

STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM OCONEE COUNTY  
Hon. Alexander S. Macaulay, Circuit Court Judge

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Opinion No. 5226 (S.C. Ct. App. Filed April 23, 2014)

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Appellate Case No. 2013-000515

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THE STATE, .....APPELLANT,

v.

CODY ROY GORDON, .....RESPONDENT.

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**RETURN TO MOTION**

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**PROCEDURAL HISTORY**

**RECEIVED**  
MAY 16 2014  
**SC Court of Appeals**

On October 29, 2011, Mr. Gordon was arrested and charged with Driving Under the Influence, 1<sup>st</sup> Offense. Mr. Gordon had a jury trial and was convicted of the offense on September 12, 2012 before Magistrate M. Todd Simmons. Mr. Gordon filed a timely appeal to the Oconee County Court of Common Pleas on September 21, 2012. The appeal was heard before the Hon. Alexander S. Macaulay on January 22, 2013. On appeal, Judge Macaulay found that application of S.C. Code Ann. Sec. 56-5-2953(A) applies to recording of the accused's head during the administration of the Horizontal Gaze Nystagmus test. Based on Magistrate Simmons' application of the *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2007), Judge Macaulay found that its application incorrectly compared with S.C. Code Ann. Sec. 2953(A) and reversed Mr. Gordon's conviction and dismissed the charge for the State's failure to

adhere to the incident site recording statute. The State filed a timely appeal to this Court and this matter was heard on March 6, 2014. On April 23, 2014, this Court affirmed in part, vacated in part, and remanded the circuit court's reversal of Magistrate Simmons' conviction for the charge of Driving Under the Influence, 1<sup>st</sup> Offense. The State has subsequently filed a motion for rehearing pursuant to Rule 221(a), SCACR asserting that this Court did not apprehend the case and overlooked the State's arguments. The State has asserted that Mr. Gordon's conviction must be upheld. This return is filed opposing a rehearing in this matter.

### **ARGUMENTS**

This Court did not misapprehend the law nor did it overlook the State's application of the law. Based on the transcript of hearing before the Circuit Court, no evidence was admitted to the Court for review. Although referenced and brought before the Court without any objection by the State, the Circuit Court reviewed whether the law was applied correctly as was its role sitting in an appellate capacity. Mr. Gordon's objection to the application of the S.C. Code Ann. Sec 56-5-2953(a) was preserved for appeal and was appropriate for the Court to review. In its review, the Circuit Court properly applied S.C. Code Ann. Sec. 2953(a) wherein the incident site recording is to "include any field sobriety tests administered." S.C. Code Ann. Sec. 56-5-2953(A)(1)(a)(ii).

At the Circuit Court appeal, the Court questioned as to whether the arresting officer administered the HGN test. (R. p. 11, lines 3 – 15). The State agreed that the administration of the HGN was not visible and subsequently argued that administration was not required pursuant to *Murphy*. (R. p. 11, lines 19 – 25; R. p. 20, lines 1 – 25; R. p. 13, lines 1 – 4). The Court's finding was that "'includes' means that it must be reliable to the sense that it does have the representation; in other words, you can discern what is going on." (R. p. 16, lines 5 – 8). In

essence, the Circuit Court applied S.C. Code Ann. Sec. 56-5-2953 to mean that its purpose was to create direct evidence of a DUI arrest as in *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283(2011). See *State v. Elwell*, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011) (“[56-5-2953] protects both the State *and the defendant* from sometimes unreliable memories of those testifying during trial.”); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (failure to provide a valid exception for incident site recording violations supports dismissal).

The State argues that introduction of the black and white still photos was improper admission of evidence to the Circuit Court sitting in its appellate capacity. It is not contested that the photos were provided; however, the photos were never admitted into evidence, were never referenced in the Circuit Court’s order, and the record is unclear as to what was actually viewed by the Circuit Court and his law clerk. Even if it is assumed to be procedurally inappropriate, the State failed to timely object or file for reconsideration; therefore, this issue was not preserved for this Court’s review. If the State, having been present in the courtroom with the Circuit Court at the time of the hearing, believed the Circuit Court was improperly basing its decision, the proper remedy was to file a timely motion for reconsideration and allow the Circuit Court to address the issue. This Court is limited to review issues that are properly preserved for appellate review when the issue has been raised and ruled on by the lower court. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 396 S.C. 479, 482, 722 S.E.2d 213, 214 (2011).

In contrast, it is undisputed in the Record that the State admitted that Mr. Gordon was not visible during the entire performance of the HGN and that the State relied on the officer’s testimony of the officer’s administration and results of the HGN in prosecuting Mr. Gordon. Pursuant to the laws of this State, “[a] person who violates Section 56-5-2930 . . . must have his

conduct at the incident site and breath test site video recorded . . . [t]he video recording at the incident site must . . . include any field sobriety tests administered.” S.C. Code Ann. Sec. 56-5-2953(A)(1)(a)(ii) (emphasis added). The Legislative intent was to minimize reliance on one person’s memory of the incident and create direct evidence of the DUI arrest. *See State v. Elwell*, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011) (“[56-5-2953] protects both the State *and the defendant* from sometimes unreliable memories of those testifying during trial.”); *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (“protracted failure to equip its patrol vehicles with video cameras . . . defeats the intent of the Legislature and violates the statutorily-created obligation to videotape DUI arrests.”).

#### CONCLUSION

Wherefore, the Respondent requests that this Court deny the Appellant’s motion for rehearing because this Court properly held that the Circuit Court properly applied the law in finding that the magistrate erred in finding the incident site recording was only required to show the conduct of the defendant. This Court’s subsequent vacating of Mr. Gordon’s conviction dismissal and remanding the case back to the magistrate for a finding relating to the visibility of Mr. Gordon’s head on the incident recording is consistent with the laws of this State.

Respectfully submitted,  
KEITH G. DENNY, P.A.

BY: 

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May 15, 2014

Mrs. Jenny Abbott Kitchings  
Court of Appeals Clerk of Court  
1015 Sumter Street  
Columbia, South Carolina 29201

RE: Opinion No. 5226; State of South Carolina vs. Cody R. Gordon; 2013-000515; Return To Motion

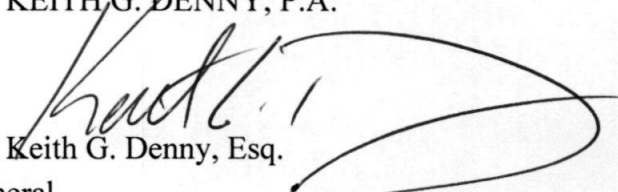
Dear Ms. Kitchings,

Please find the original and six (6) copies of the Respondents Return To Motion and the original and two (2) copies of the Proof of Service.

Please feel free to contact me if you have any questions.

Very truly yours,

KEITH G. DENNY, P.A.

  
Keith G. Denny, Esq.

cc: Mr. Benjamin Aplin, Office of Attorney General  
KGD/

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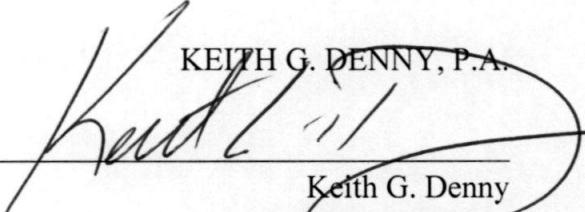
v.

CODY ROY GORDON .....RESPONDENT.

**PROOF OF SERVICE**

I, Keith G. Denny, hereby certify that I have served the within Return To Motion, dated May 15, 2014, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Mr. J. Benjamin Aplin  
Office of Attorney General  
P.O. Box 11549  
Columbia, South Carolina 29211-1549

  
\_\_\_\_\_  
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