

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2013CP4601010

Christopher D Gessner

Rock Hill City Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Sl John C Hayes

Circuit Court Judge

2049

Judge Code

04/03/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on April 4, 2014, and a copy mailed first class or placed in the appropriate attorney's box on April 4, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Michael Langford Brown Jr. PO Box 1025 Rock Hill, SC
29731

Paula Knox Brown 201 E. Main Street Third Floor Rock
Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Christopher D. Gessner,)
)
Appellant,)
)
)
-V-)
)
City of Rock Hill,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

ORDER

Civil Action No.: 2013-CP-46-01010

FILED-RECEIVED
2014 APR -15 AM 10:05
DAVID HAMILTON
C.C.P.E.G.S.
YORK COUNTY, SC

This matter was heard before the undersigned in the York County Court of Common Pleas on March 12, 2014. Appearing for the Appellant was Michael L. Brown, Esquire. Paula Knox Brown, Esquire, appeared for the City of Rock Hill. The basis of this appeal arises from Appellant's conviction of Driving Under the Influence First Offense.

Facts

Appellant was arrested and charged with DUI First Offense on August 2, 2012. Appellant then filed a Motion to Dismiss and such motion was denied in Magistrate Court. The case then proceeded to a bench trial by which the Honorable Judge Peter Lenzi found the Defendant guilty of DUI First Offense. Appellant now appeals this conviction on the following ground: "The lower court erred in failing to dismiss the charge against the appellant; the error being that the Incident Site video fails to record all of the field sobriety testing in violation of Section 56-5-2953, SC Code of Laws, 1976, as amended" (Def. Notice of Appeal).

Joe Hill
1

At trial, both the Appellant and the Respondent acknowledged that the only issue concerning the administration and/or video taping of the Defendant was that his first step and last step of the nine-step walk and turn test were not visible in the videotaped recording of the incident site. The Appellant contends that the Respondent failed to comply with the statutory requirements of § 56-5-2953 by failing to record each and every step of the walk and turn test, and additionally that such failure requires a dismissal of his conviction.

Commentary

Now may be a good time to take a look at the statutory language which must be strictly construed that requires for the videotaping of one's "conduct" at the incident site and the Footnote that is the genesis of this issue. In Footnote¹ 4 of Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), the Court of Appeals noted a statutory change in § 56-5-2953 which the Court stated "bolsters" the Court's holding in Murphy. It is the undersigned's opinion that the footnote is simply a comment and nothing else. An observation, or as the footnote states, a "note" absolutely unnecessary to the holding in Murphy. (The footnoted change not being applicable to the Court's holding.) It appears to be a gratuitous comment, unnecessary to the holding. It is noted to support and buoy up the opinion, or to hearten the court regarding their holding.² The footnote comment, in the undersigned's opinion, does not constitute *obiter dictum*, although even if it did it would only be persuasive and not precedential.³ Even if the footnote's value rises above mere comment and even if it is considered *obiter dictum* the

¹ With awareness of the irony, The American Heritage College Dic*tion*ar*y, for the purpose here defines footnote as "a note at the bottom of a page . . . that comments on a designated part of the text." (Page 540).

² See definition of "bolster", The American Heritage College Dic*tion*ar*y, Page 362

³ Black's Law Dictionary, 7th Edition, Page 1106

footnote, in the undersigned's opinion, does not support the argument that every nuance of every test must be observable on the videotape. The footnote simply states the amended statute requires the recording of "all tests." Admittedly, the term "all tests" arguably could encompass all of all of the tests, but such a reading in the undersigned's opinion reaches a tortuous result, a result, while not absolutely unobtainable, one which places the officer administering the test in a situation that is practically difficult.

Black's Law 7th Ed. Dictionary defines "conduct" as "personal behavior, whether by action or inaction; the manner in which a person behaves." (Page 292). The American Heritage College Dic*tion*ary, 4th Ed., defines "conduct" as used in the statute, "the way a person acts." (Page 297).

The Word "conduct" has unleashed a plethora of challenges to DUI incident site videos (and to a lesser degree breath site videos) using the word "conduct" to attack videotaping in which every nuance of a test is not recorded (a step or two out of sight, eye reaction in HGN test not videotaped). The undersigned does not believe the legislature intended the requirement of videotaping to require that every movement, however slight, be recorded for there to be compliance with the statute. A reasonable real world interpretation of the language of the statute is that the subjects "conduct," under a totality analysis, be videotaped without scrutiny of every step, eye twitch, or bobble, whether favorable to a subject or unfavorable.

In the real world one's conduct is a blend of actions and not a simple action or inaction. The undersigned believes that a video of the way a subject conducts themselves during the walk and turn test, not each and every action, reaction, or inaction, is reasonably what the statute envisions. Like the requirement at trial of "substantial circumstantial evidence," a reasonable

interpretation of the videotaping requirement is that a video show substantially a subject's conduct during the administration of the field sobriety tests.

In addition, the footnote can in no way, even by way of dictum, be argued to address the current version of the oft changed statute, as the amended version was not at issue before the Court. Appellate courts' opinions impact only the justiciable issue (or issues) the opinion addresses. The plethora of cases is a case of the defense bar, and in an instance or two this Court, following a trial further than it goes.

Holding

The Court disagrees with the Appellant's contention and finds that the requirements of § 56-5-2953 were substantially complied with. It does not logically follow that the videotaping of the field sobriety tests must capture one hundred percent of each and every test administered. Rather, logic calls for a common sense analysis of the plain and ordinary meaning of the statutory language as set forth above. The Court finds that substantial compliance is sufficient to meet the statutory requirements under § 56-5-5923. The Court realizes that "substantial" is an indefinite measure and will require a subjective assessment by the trial judge on a case by case basis. The Court hesitates to set a rigid bright line percentage of performance as to what actually constitutes "substantial compliance." Just like the assessment of what constitutes "substantial circumstantial evidence" at the directed verdict stage of a criminal case, a trial judge in a DUI setting is likewise capable of making an assessment of whether or not there has been substantial compliance with the video recording statute.

Here, only two steps, the first and last steps, of the nine step walk and turn test were not completely visible on camera. Thus, seven out of the nine steps from the test were visible on videotape and the Court finds that this is sufficient to establish substantial compliance with the

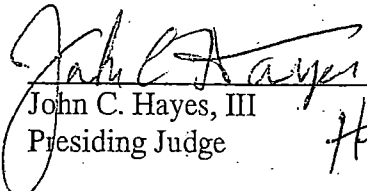
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video recording statute. This case can be distinguished from State v. Larusso, 2013-CP-46-1390, where the video recording device was positioned in such a manner that the Defendant's performance of the heel to toe field sobriety test was not visible. In Larusso, the Court was unable to gauge the defendant's performance of the heel to toe field sobriety test by watching the video due to the position of the video recording device. Here, the Respondent's performance on the nine-step walk and turn test was adequately videotaped in that seven of the nine steps were visible within the view of the video recording device.

Conclusion

This Court agrees with the Magistrate Judge's finding that such an insignificant deficiency in the recording of a field sobriety test does not violate the Statute, and additionally provides no basis for dismissal of the Appellant's DUI conviction. The Court finds the requirements of § 56-5-2953 were substantially complied with and that the sole issue raised on appeal is without merit and does not justify the dismissal of the Defendant's conviction. The Appellant's appeal is hereby DENIED and his trial court conviction of DUI First Offense is upheld.

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge *HS*

April 3rd, 2014
York, South Carolina