STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-002523

THE STATE,

Respondent,

v.

CATHY KENNINGTON ROCKETT,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion to dismiss the charge of driving under the influence because police complied with the video recording requirements of S.C. Code § 56-5-2953.

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant for driving under the influence (DUI) and habitual traffic offender. (R.* Indictments.) On November 18-20, 2013, Appellant proceeded to trial before a jury. James W. Boyd, Esquire, represented Appellant, and Assistant Solicitor Chris Jones represented the State. The jury found Appellant guilty on both charges. (Tr. 235.) The Honorable John C. Hayes, III, sentenced her to five years' imprisonment on each charge, to be served concurrently. (Tr. 240.)

On November 25, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On May 13, 2012, patrol officers Michelle Del Castillo and Kristine Proulx of the Rock Hill Police Department were dispatched to a residence in response to a 911 call concerning a disturbance. (Tr. 53, lines 2-13; Tr. 86, line 22-Tr. 87, line 12; Tr. 90, lines 1-6.) On the way to the scene, Officer Del Castillo was informed by dispatch that an intoxicated driver had left the residence in a beige vehicle and pulled into a nearby Exxon station. (Tr. 53, lines 15-21.) She and Officer Proulx went to the Exxon and observed Appellant driving the car in reverse. (Tr. 53, line 22-Tr. 55, line 10; Tr. 88, lines 13-24.) After conducting several field sobriety tests on Appellant, the officers arrested her for driving under the influence (DUI) and took her to the Rock Hill Police Department. (Tr. 68, line 17-Tr. 69, line 4.) Appellant was indicted for DUI and habitual traffic offender and proceeded to trial. (R* Indictments.)

Pretrial, Appellant moved to dismiss the DUI charge for failure to videotape in compliance with section 56-5-2953 of the South Carolina Code. (Tr. 5, lines 20-21; Tr. 6, lines 6-8.) Appellant argued that a violation of the statute occurred when her behavior, action, and demeanor were not recorded for the first eighteen minutes of the video. (Tr. 7, lines 9-11.) Additionally, Appellant argued the video did not show the entire "walk and turn" test due to the hood of the patrol car blocking the view of her feet during a portion of the test. (Tr. 8, lines 2-12.) The State argued the officers were in compliance with section 56-5-2953(A) because the video showed Appellant's conduct and showed that the field sobriety tests were administered. (Tr. 19, lines 9-11.) Specifically, the State pointed out "[t]he statute does not say the video must be unobstructed and a person must continuously . . . be within the view of the camera from start to finish." (Tr. 11, lines 5-7.) The State further explained that the reason Appellant was not seen in the video for the

first eighteen minutes was because officers originally responded to a disturbance, not a DUI, and they spent the first eighteen minutes trying to ascertain what happened and get Appellant's story. (Tr. 12, lines 4-23.) The following exchange took place:

> [The State]: Well how would it be different from a traffic stop where you can't see the person when they're sitting in the car and it normally takes two to three minutes for an officer to talk to the person, have your license and registration, where you've been, have you had anything to drink? You don't actually see the person just on the – I guess that would be more typical DUI case. In this particular instance there had to be a little more investigation as to what was going on because they thought they were responding to a domestic disturbance. That should be the reason for the I guess the eighteen minutes of the defendant not being on the camera.
>
> . . .
>
> The Court: Part of the problem is – I follow your logic about getting somebody out of the car. But once somebody is out of the car how much leeway can an officer have before they decide to start filming the alleged violator?
>
> [The State]: Once she got out of the car she was on the video. I don't know if I'm confusing the court.
>
> The Court: She was in the car for eighteen minutes and they talked to her in a car for eighteen minutes.
>
> [The State]: Yes, Your Honor.
>
> The Court: Oh. Okay. I'm sorry, I got the impression she was outside the car out of the camera. Go ahead.

(Tr. 13, line 7-Tr. 14, line 9.)

As for the field sobriety test, the State again noted the accused need not remain in full view in order to capture her conduct and compared the "walk and turn" test to the horizontal gaze nystagmus (HGN) test, arguing:

> I think if we take that logic to other steps of the field sobriety test then when officers do the HGN are we gonna [sic] have to have an officer actually stand there with a video camera where you can actually see the eyes go back and forth and see what they're talking about? I think that's putting more of a burden on the state than the statute does.

(Tr. 15, lines 19-25.)

After considering both parties' arguments and watching the video, the trial judge noted that although the statute requires the video recording include any field sobriety tests administered, it did not go further to require the driver's performance thereon, and he pointed out the Legislature could have written the statute that way if it that was its intent. (Tr. 23, lines 3-9.) The trial court found the video recording complied with section 56-5-2953 and denied Appellant's motion to dismiss based on failure to comply with the statute. (Tr. 23, lines 16-23.)

Officer Michelle Del Castillo testified she was dispatched to a residence in response to a 911 call concerning a disturbance. (Tr. 53, lines 2-13; Tr. 86, line 22-Tr. 87, line 12; Tr. 90, lines 1-6.) Officer Del Castillo testified she was informed by dispatch while on the way to the scene that an intoxicated driver had left the residence in a beige vehicle and pulled into a nearby Exxon station. (Tr. 53, lines 15-21.) She went to the Exxon and observed Appellant driving the car in reverse. (Tr. 53, line 22-Tr. 55, line 10.) Officer Del Castillo testified the video recording began automatically upon activation of Officer Proulx's patrol vehicle's blue lights. (Tr. 57, lines 5-15.) She stated that after speaking to Appellant for a while trying to figure out what the disturbance was, she determined she needed to administer field sobriety tests to see if she was impaired. (Tr. 59, lines 5-11; Tr. 60, lines 10-15.) Del Castillo conducted several field sobriety tests on Appellant. (Tr. 61, line 14-Tr. 68, line 1.) Appellant failed the HGN test when Del

Castillo saw all six of the clues the officers are taught to look for. (Tr. 63, line 10-Tr. 64, line 17.) Next, Del Castillo administered the one-leg stand test. (Tr. 64, lines 18-20.) She observed Appellant raise her arms up to balance herself, put down her foot and stop during the test, and count incorrectly. (Tr. 66, line 22-Tr. 67, line 3.) Finally, Del Castillo administered the "walk and turn" test. (Tr. 67, lines 4-6.) She explained Appellant did not touch heel and toe when she walked back after turning and was not even in a line. (Tr. 68, lines 3-16.)

Officer Kristine Proulx testified that when she and Officer Del Castillo arrived at the Exxon station, she spoke to Appellant while Del Castillo spoke to the complainant who had called 911 about the disturbance. (Tr. 87, lines 21-22.) She found it difficult to understand Appellant and noticed that Appellant smelled of alcohol and had bloodshot, glazed eyes. (Tr. 87, line 22-Tr. 88, line 4.) Officer Proulx explained this case was different from a typical DUI because the officers were originally dispatched for another reason. (Tr. 89, line 21-Tr. 90, line 6.) She testified she may have turned off the video after it automatically came on with the blue lights and then turned it back on when she began speaking to Appellant at the car. (Tr. 100, lines 4-16.)

Appellant testified that her sister dropped her off at a bar called the Sledge Hammer. (Tr. 162, line 21-Tr. 163, line 3.) There she saw her friend Robert Harris, and Harris drove Appellant to his home from the bar. (Tr. 163, lines 18-22; Tr. 165, line 3-Tr. 166, line 1.) When they arrived at Harris's home, his girlfriend began yelling and called the police. (Tr. 166, lines 4-21.) Appellant testified they left and Harris drove her a few houses down to an Exxon station. (Tr. 166, line 22-Tr. 167, line 5.) She explained that Harris jumped out of the car but it continued moving, so she jumped over into the driver's seat to stop it. (Tr. 167, lines 7-21; Tr. 175, line 14-Tr. 176, line 9.)

Ultimately, the jury found Appellant guilty on both charges, and the trial judge sentenced her to five years' imprisonment on each charge, to be served concurrently. (Tr. 240.)

ARGUMENT

The trial court properly denied Appellant's motion to dismiss the charge of driving under the influence because police complied with the video recording requirements of S.C. Code § 56-5-2953.

Appellant argues the trial court erred in denying her motion to dismiss her DUI charge because police failed to follow the video recording requirements of S.C. Code § 56-5-2953. To the contrary, the trial court did not abuse its discretion in denying the motion because police did comply with the requirements of the statute. Thus, this Court should affirm the trial court's ruling and Appellant's conviction and sentence.

Standard of Review

A trial court's decision on whether to grant a motion to dismiss should not be reversed absent an abuse of discretion. See State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007).

Law / Analysis

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (emphasis added). The court should look to the plain language of the statute. Binney v. State, 384 S.C. 539, 544, 683

S.E.2d 478, 480 (2009). If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). In interpreting a statute, the court will give words their plain and ordinary meaning and will not resort to forced construction that would limit or expand the statute. State v. Johnson, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011).

The applicable section of the South Carolina Code provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2012).

Appellant made a pretrial motion to dismiss on grounds that the State failed to adhere to the requirements of South Carolina Code section 56-5-2953.[1] Specifically, she argued that because she was not in view of the video recording for the first eighteen minutes and because her feet were hidden by the patrol car's hood for a portion of the "walk and turn" test, the officers were not in compliance with the statute. Notably, when

[1] The State submits dismissal is not the only available remedy under the statute but was the one chosen in this case. Alternatively, the trial court could have simply suppressed the video if it found a violation of the statute, in which case the officers' testimony regarding the arrest would have still been admissible as evidence.

the trial court watched the video, it skipped the first eighteen minutes and began with the field sobriety test portion of the video. The trial court's decision follows the clear language of the statute and demonstrates that only the field sobriety tests, the arrest, and the Miranda warnings are the "conduct" the statute requires to be recorded. Furthermore, the trial court was correctly unconcerned about the eighteen minutes once it realized Appellant was not out of the car at that time, as indicated in the following exchange:

> The Court: Part of the problem is – I follow your logic about getting somebody out of the car. But once somebody is out of the car how much leeway can an officer have before they decide to start filming the alleged violator?
>
> [The State]: Once she got out of the car she was on the video. I don't know if I'm confusing the court.
>
> The Court: She was in the car for eighteen minutes and they talked to her in a car for eighteen minutes.
>
> [The State]: Yes, Your Honor.
>
> The Court: Oh. Okay. I'm sorry, I got the impression she was outside the car out of the camera. Go ahead.

(Tr. 13, line 22-Tr. 14, line 9.) In its ruling not to dismiss the charge, the trial court did not even address or specifically rule on Appellant's argument that there was a failure to record conduct for eighteen minutes and instead focused solely on the recording of the field sobriety tests.[2] (Tr. 21, line 20-Tr. 24, line 1.)

[2] It was incumbent upon Appellant to seek a ruling from the trial judge on the specific argument regarding the failure to record the first eighteen minutes, and because she did not, arguably this portion of the argument is not preserved. However, to the extent it is preserved, the State submits the conduct was recorded during the first eighteen minutes even though Appellant was not in view of the camera and the trial court indicated it did not consider this a failure to record once it determined Appellant was inside the vehicle for the entire eighteen minutes.

According to testimony by Officer Del Castillo, the video recording began automatically upon activation of the patrol vehicle's blue lights. (Tr. 57, lines 5-15.) According to Officer Proulx, whose patrol vehicle contained the video recording equipment that captured this arrest, she may have turned off the video after it automatically came on with the blue lights and then turned it back on when she began speaking to Appellant at the car.[3] (Tr. 100, lines 4-16.) For the first eighteen minutes of the video, the watcher can see the car and hear the conversation between Appellant and the officers in which the officers are attempting to ascertain what happened regarding the 911 call. Regardless of whether the video recording stayed on constantly from the time it was automatically activated with the blue lights, the recording included the three things required by the statute: (1) the field sobriety tests, (2) the arrest, and (3) the Miranda rights. Thus, the requirements of the statute were met and the trial court properly denied Appellant's motion to dismiss.

The State further submits that, if the video does not adequately conform to the requirements of §56-5-2953(A)(1)(a)(i) the noncompliance is excused (1) because it is accompanied by a sworn affidavit indicating the officer saw Appellant driving a motor vehicle when she got to the gas station and blocked Appellant's vehicle in with her police car so that she could investigate the domestic disturbance call and (2) under the totality of the circumstances. As summarized in State v. Manning, 400 S.C. 257, 264-65, 734 S.E.2d 314, 317-18 (Ct. App. 2012):

> Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the

[3] Despite this testimony, the State's review of the video recording from the incident does not appear to show the recording stopped at any point. See State's Exhibit #1 (Incident Site Video).

> video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances.

S.C. Code §56-5-2953(B) also specifically provides:

> In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section.

Here, Officer Del Castillo submitted an affidavit explaining why there was a delay in placing Appellant in front of the in-car camera. She attested to the fact that she had initially responded to a call about a disturbance at a residence but was rerouted to the Exxon station. She indicated in her affidavit that she and Officer Proulx spoke with both Appellant and the complainant to determine what had occurred in regard to the disturbance. Only after speaking to Appellant did it become apparent she was under the influence. At that time, Officer Del Castillo explained:

> As soon as practicable I walked [Appellant] in front of Officer Proulx's police car in view of her in-car camera to administer field sobriety tests.
>
> Pursuant to South Carolina Code of Law Ann. § 56-5-2953 (B) (2009 as amended), I hereby certify that [Appellant] was placed in front of the video camera as soon as was practicable under the totality of the circumstances in this case.

(R* Affidavit, Court's Exhibit 2.) Only after speaking to both Appellant and the complainant who called 911 did Del Castillo and Officer Proulx determine that Appellant was impaired and they needed to conduct field sobriety tests. Therefore, due to the officers spending the first eighteen minutes of the video recording ascertaining the situation in light of the 911 call, the fact that Appellant's conduct is only recorded insomuch as audio can be heard is excusable pursuant to S.C. Code §56-5-2953(B).

Any shortcoming in the video of Appellant's conduct is also excusable under the totality of the circumstances. The present case is somewhat unique in that the officers did not pull over the vehicle for a suspected DUI. The officers were not certain they were dealing with a DUI until they spoke with Appellant, observed her disorientation, and smelled alcohol. Appellant's voice appears in audio during the early part of the tape; therefore, her conduct is not completely undocumented. Further, once Appellant was moved into view, the video shows the entirety of Appellant's conduct during the field sobriety tests except the few steps of the "walk and turn" test that were blocked by the hood of the patrol car. S.C. Code §56-5-2953's requirement for video cameras installed in law enforcement vehicles clearly subjects the videotaping requirements to what is possible to capture from such equipment, in this case on a camera mounted in a patrol car, under the totality of the circumstances. Here, the trial court found the "walk and turn" test was sufficiently recorded to demonstrate Appellant's ability to perform in accordance with the officer's directions despite a portion of Appellant's performance being blocked momentarily by the hood of the patrol car. The trial court properly found §56-5-2953 did not require dismissal of Appellant's charges, even though the trial judge here did not get to a consideration of subsection (B) in light of deciding not to dismiss the case under subsection (A).

Finally, to dismiss the instant case due to Appellant's first eighteen minutes of conduct not being *physically visible* immediately upon the officers' arrival yields an absurd result. That the video taken on scene only provides audio of Appellant's conduct during the initial encounter is much like the situation when an automobile is initially stopped. A typical dashboard video following a traffic stop would at first only record the operation of the vehicle and the verbal exchange between the officer and driver. A driver should not be able to argue that because his body was not visible, the case should be dismissed because his "conduct" did not appear on the videotape. For example, a potential defendant could argue that he was not visible to the camera when he is pulled over until asked to step out of his vehicle. Alternatively, to apply the standard suggested by Appellant, a defendant could merely step away from the front of an officer's car in order to assure that his conduct prior to sobriety tests and Miranda warnings was not recorded, thereby eluding DUI conviction. Appellant essentially argues that a video must at all times, even before sobriety tests or warnings are administered, perfectly capture the defendant's physical presence in the video frame. Undoubtedly, this was not the desired result of the statute.

In Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), this Court addressed a circuit court's decision to deny suppression of an incident site videotape; however, the issue was raised under an earlier version of section 56-5-2953 before the statute was amended to add a specific requirement for the recording of "any field sobriety tests administered." Nevertheless, Murphy is still instructive. Murphy claimed the videotape of the incident site at her arrest did not comply with the statute because it failed to "record most of the field sobriety tests." Specifically, she argued the statute required that she remain in full view for all field sobriety tests. This Court disagreed and found

that because the predecessor statute merely provided a person "must have his conduct at the incident site and breath test site videotaped," an accused need not remain in full view of the camera at all times in order for the recording to capture that conduct. Murphy, 329 S.C. at 631, 709 S.E.2d at 688. Specifically, this Court found, "[T]he plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture *all* field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused's conduct." Murphy, 329 S.C. at 632, 709 S.E.2d at 688.

Here, the plain language of the amended statute says the video recording must "include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2012). As in Murphy, the plain language of the statute still does NOT require that the recording capture "a continuous full view of the accused." It also does not require a recording of a particular quality, or a recording in the best possible lighting conditions, or any other such limitation. As long as the recording includes "any field sobriety tests administered," it is in compliance with the plain, unambiguous language of the statute, and the circuit court correctly found the arresting officers acted in compliance with the plain terms of section 56-5-2953.

To the extent this Court disagrees and finds section 56-5-2953(A)(1)(a) is ambiguous, the State nevertheless submits the circuit court properly interpreted the statute. If a statute is ambiguous, courts must construe the terms of the statute. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); Johnson, 396 S.C. at 189, 720 S.E.2d at 520. A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Sloan v. S.C. Bd. Of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-

07 (2006); Johnson, 396 at 189, 720 S.E.2d at 520. The language of the statute must be read in such a way that harmonizes its subject matter and accords with the statute's general purpose. Roberts, 393 S.C. at 342, 713 S.E.2d at 283; Johnson, 396 S.C. at 189, 720 S.E.2d at 520. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Id. However, courts will reject a statutory interpretation that would lead to an absurd result not intended by the Legislature or that would defeat plain legislative intention. Id.

The overarching purpose of subsection 56-5-2953(A) is clear: to ensure that the driver's "conduct" at the incident site and breath test site is recorded for evidence. The South Carolina Supreme Court has explained: "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Roberts, 393 S.C. at 347, 713 S.E.2d at 285. The purpose is not to provide a video such that a jury will see exactly what the arresting officer sees. The video is to document the arrest and provide a recording of all required items, including the field sobriety tests administered and the defendant's conduct during the tests. Nothing in the statute requires the watcher of the video to see exactly what the officer saw. Requiring otherwise rewrites the statute and imposes requirements not imposed by the Legislature.

Here, the recording clearly includes Appellant's conduct. The viewer can hear her interactions with the officers from the beginning and see her conduct during the field sobriety tests, including several missteps during the "walk and turn" test. The video shows that Appellant is not able to keep her heel and toe together even while simply standing before she actually begins the test. In the parts of the video in which the watcher can clearly see Appellant's feet, there are several times in which the heel and toe are clearly not making contact as she steps one foot far to the side. (Incident Site Video).

While the viewer admittedly cannot see every single heel-to-toe touch or non-touch, this is not a requirement of the statute. The officers completely complied with the recording statute by recording the field sobriety tests administered, using videotaping equipment in a law enforcement vehicle, and by recording Appellant's conduct as that term is generally defined.

Any issue regarding the quality of what is shown or the successful or unsuccessful completion of the test is for the jury to consider as part of the weight it assigns to the video and does not go to the admissibility of the video. The State must produce a video that records the person's conduct and includes any field sobriety tests administered. This was unquestionably done in this case.

Indeed, capturing the driver's overall conduct was the precise purpose described in Murphy, supra. The subparts of 56-5-2953(A)(1) simply identify particular aspects of that conduct which must also be included in the video recording. These consist of: (1) "the arrest of a person . . . or a probable cause determination . . . and show the person being advised of his Miranda rights," S.C. Code Ann. § 56-5-2953(A)(1)(a)(iii) (Supp. 2012); and (2) "any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2012). Pursuant to Murphy and its analysis of the predecessor statute, an officer could have complied by video recording some, but not all, of the field sobriety tests administered. The amendment simply eliminated this possibility by requiring that any and all field sobriety tests be video recorded. It requires a video recording of the officer's administration of the field sobriety tests, not a recording that captures every detail or the actual results of the tests. Indeed, it would be absurd to require every single step of the "walk and turn" test to be in full view, just as it would be absurd to require the video recording to show the "involuntary jerking of the eyeball" in

an HGN test.[4] The State submits that as long as a juror can tell the arresting officer is administering the test, there is compliance. Here, the video recording leaves no doubt the arresting officer conducted a "walk and turn" test along with two other field sobriety tests, and all three tests were included in the video recording. Any other interpretation is not practical, reasonable, or consonant with the purpose, design, and policy of the lawmakers. Certainly the Legislature did not intend dismissal of an otherwise valid DUI charge simply because a portion of one test includes Appellant's feet being blocked by the hood of the patrol vehicle for approximately ten seconds. Accordingly, the trial court properly interpreted section 56-5-2953(A) and found the video recording at issue was in compliance.

In State v. Gordon, Op. No. 5226 (S.C. Ct. App. filed Apr. 23, 2014) (Shearouse Adv. Sh. No. 16 at 71) (reh'g pending), this Court determined that "[b]ecause of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless." In Gordon, this Court affirmed the circuit court's finding (on appeal from a magistrate court's finding that the recording was only required to show the conduct of the defendant) that the head must be shown during the HGN test. Id. at 76. However, because the circuit court, sitting as an appellate court, should not have engaged in fact finding, and the magistrate court did not make any findings as to whether the entire test was on camera, this Court remanded the case to the magistrate court to make those findings. Id. at 76-77.

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[4] It is interesting to note that the HGN test on the video is conducted such that the officer is almost facing the camera, while Appellant is turned nearly sideways to the camera, making it impossible for a person watching the video to see Appellant's eyes. However, one can easily see the officer administering the test, which is the only thing required by the statute. (Incident Site Video).

Here, the circuit court was in the same position as the magistrate court was in Gordon—acting as the trial court. In this case, the trial court **did** make findings regarding the video, stating, "I think this particular video passes muster under 56-5-2952. It shows the defendant's conduct and shows the field sobriety test quote administered end quote." Therefore, the situation in the instant case is quite different from the one in Gordon, and Gordon offers little insight here.

More recently, our Supreme Court decided State v. Sawyer, Op. No. 27393 (S.C. Sup. Ct. filed June 4, 2014) (Shearouse Adv. Sh. No. 22 at 24). In Sawyer, the Court addressed the issue of a videotape from the breath test site that lacked audio, and determined it did not satisfy the requirements of § 56-5-2953. Id. The Supreme Court distinguished Murphy from Sawyer, stating, "Here, however, we are concerned not with the defendant's conduct but with the content of the statutorily required warnings." Id. at 28. Specifically, the Court found that because the State did not produce audio recording of the Miranda warnings or the person being informed he was being videotaped, the recording failed to meet the statutory requirements. Sawyer has no bearing on the instant case because, like Murphy, this case deals with Appellant's conduct rather than statutorily required verbal warnings. Indeed, the Miranda warnings were clearly captured on the videotape, with audio.

These two recent cases do not affect the case at hand. Here, the trial court used its discretion in denying Appellant's motion to dismiss the DUI charge. See State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. The trial judge did not

abuse his discretion as his decision was not based on an error of law and his factual findings are supported by the evidence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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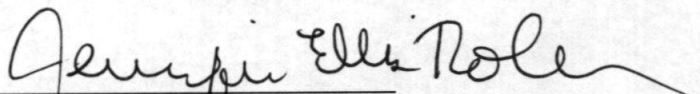
BY: 
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June 11, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-002523

THE STATE,

Respondent,

v.

CATHY KENNINGTON ROCKETT,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Trial transcript pages 55-69; 86-90; 100; 149-51; 162-67; 175-76; 235; 240.
(2) Court's Exhibit 2-Affidavit of Michelle Del Castillo-Reiten.

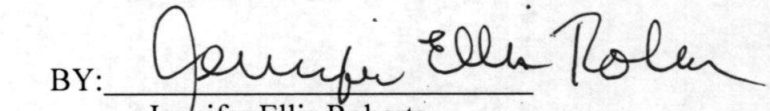
To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 

Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 11, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-002523

THE STATE,

Respondent,

v.

CATHY KENNINGTON ROCKETT,

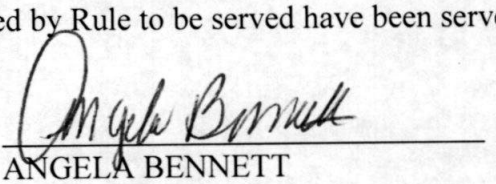
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 11th day of June, 2014.



ANGELA BENNETT
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

June 11, 2014

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Cathy Kennington Rockett
Appellate Case No. 2013-002523

Dear Mr. Pachak:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services