STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. Roger L. Couch, Circuit Court Judge
Appellate Case Tracking No. 2011-201206

The State, Petitioner,

v.

Phillip Wesley Sawyer, Respondent.

PETITION FOR REHEARING

On June 4, 2014, the majority of this Court affirmed the circuit court's decision suppressing evidence related to the breath test and video at the breath test site in Respondent's DUI case. The majority of this Court misapprehended or overlooked relevant case law, the proper statutory construction of section 56-5-2953 of the South Carolina Code (Supp. 2007), and relevant facts and circumstances which dictate a different result. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing; find the State properly complied with the provisions of the statute, or in the alternative, find no suppression was required; and reverse the decision of the circuit court, thereby allowing the breath test results and video be used at Respondent's trial for DUI.

First, the majority opinion of this Court addresses preservation as it relates to the State's argument that the circuit court erred in suppressing the video and other evidence

because an exception applies under the totality of the circumstances in section 56-5-2953(B). The majority indicates the issue was never ruled on by the circuit court in either its original order or its order amending (but not superseding) its original order. The majority overlooks the ruling of the trial court in its original order as it relates to the Subsection (B) totality of the circumstances exception.

In its original Order the circuit court expressly considered the Subsection (B) totality of the circumstances argument of the State. The Order even directly quoted the language of the totality of the circumstances exception. The Order found the exception was sufficient to warrant allowing other evidence in at trial, but did not find it excused any possible defect in the videotape. This ruling, on an issue clearly raised by the State, certainly is sufficient to preserve the issue for review on appeal. The State raised the issue during argument on whether to suppress the videotape and other evidence of the breath test site, obtained a ruling contrary to the State's position in the circuit court's original order, and appealed from that issue[1]. See State v. Langford, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (S.C.,2012) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must have been raised to and ruled upon to be preserved for review)); Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed.2002) (stating that to be preserved for appellate review, an issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity"); see also, State v. Kromah, 401 S.C. 340, 354 n.3, 737 S.E.2d 490, 497 n.3 (2013).

[1] The Court of Appeals addressed the issue in its opinion; the issue was raised in the State's Petition for Rehearing to the Court of Appeals; and the issue was again raised in the State's Petition for Writ of Certiorari to this Court.

As a result, the State asks the majority, at a minimum, to amend its opinion to provide that the State properly preserved the issue regarding the totality of the circumstances exception for review on appeal and the only reason the issue was not before the Court was because the Court declined to grant certiorari as to the issue. Further, the State asks the Court, based on this misunderstanding of the Record, to reconsider its denial of the State's Petition for Writ of Certiorari as to the issue of the totality of the circumstances exception under section 56-5-2953(B), grant the State's Petition as to Question II as defined in the majority's opinion, and allow the State to address the issue which was clearly preserved for the Court's consideration.[2]

Next, the State never asserted on appeal it was error for the trial court to consider the affidavit provided by the officer. The extent of the State's argument related to the affidavit included: "Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required" thereby arguing resort to the affidavit was unnecessary, not that the trial court erred in any way in its analysis of the affidavit itself. The State believes the circuit court erred in finding it needed to resort to Subsection (B) and the affidavit because the State submits it produced a videotape in compliance with section 56-5-2953(A).[3] The majority's opinion, especially footnote 2, seems to assert the State ascribed error to the trial court. The State asks the Court to remove footnote 2, as the State never asserted error on the part of the trial court.

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[2] In the alternative, the State asks the Court to reconsider its ruling denying the State's Petition for Writ of Certiorari as to Question II, grant the petition as to this Question, dispense with further briefing, and address the issue of whether the trial court erred in failing to find the totality of the circumstances allowed the admission of the videotape of the breath test site, the breath test results, and all other evidence related to the breath test which was suppressed.

[3] To the extent any error or failure to comply with section 56-5-2953(A) occurred in this case, the State submits proper resort is to the Subsection (B) totality of the circumstances exception as discussed above, but does not ascribe any error to the trial court for reviewing the affidavit provided.

Additionally, the majority opinion implies the State did not challenge the suppression of the evidence suppressed except the videotape. As the dissent notes, while the State did not specifically challenge each and every piece suppressed separately, the State specifically challenged the suppression of 1) the video recording of the breath test site, 2) testimony or other evidence a breath test was offered or administered, and 3) the results of Respondent's breath test as the State articulated in its Issue before the Court. The Issue presented is certainly stated in such a way that the Court could and should consider whether it was proper for the circuit court to suppress all of the items listed, which clearly goes beyond merely the suppression of the videotape.

In its analysis, the majority of the Court misapprehends the State's position, misapplies applicable law, and incorrectly construes a statute which is clear on its face. Initially, the majority indicates the State argues only the individual must be videotaped because the section 56-5-2953(A) only references his conduct needing to be recorded. The State submits the videotape at the breath test site must **document** the reading of Miranda warnings, as well as the person being informed that he is being videotaped and he has the right to refuse the breath test. The State has not argued only the individual must be videotaped.

The State relied in part on Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), to indicate the primary purpose of section 56-5-2953(A) is to record the persons conduct at the incident and breath test sites. Additionally, Murphy provided a definition of conduct as it related to the statute. This Court has indicated the holding in Murphy related to conduct has been superseded by an amendment to the statute. The State submits the amendment does not supersede the holding of Murphy and that its

holding is still entirely accurate.[4] Recording the conduct of the individual is still the primary purpose of section 56-5-2953 as it is the overarching command of the statute. The statute has been amended to alter only the specific events which must be documented. This does not impact the statutes' primary goal of recording and documenting the individual's conduct at the incident site and breath test site, nor does it alter the definition or application of the definition of conduct at either location.

However, the majority of this Court has written language into the statute which is not there. The majority's opinion requires the content of the Miranda warnings and other information be recorded. Specifically, the majority's opinion states: "Here, however, we are concerned not with the defendant's conduct but with the content of the statutorily required warnings." Nothing in the statute requires the actual content of the statutorily required warnings be heard on the recording. The statute merely requires a documentation that Miranda warnings and the other information was provided to the person as it relates to its overall purpose of recording the person's conduct at the breath test site.

Requiring the videotape to document the actions being taken satisfies this Court's explanation of the legislative intent. This Court has stated "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). By recording the actions taken by the party in a videotape from which it is clear the officer is providing the person his Miranda

[4] Even if this Court disagrees with the State, this Court relies on State v. Gordon, 2014 WL 1614854 (S.C. Ct. App. filed Apr. 23, 2014), to indicate the holding of Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), has been superseded by statute. The Gordon Opinion cited by this Court has been withdrawn and superseded by an Opinion refiled June 11, 2014. The State asks the Court to remove any citation to Gordon as the State is currently preparing a Petition for Writ of Certiorari in the case and a new Opinion has been issued.

warnings and other information, from which you can clearly see his acceptance of the warnings and other information, and from which there is no challenge to the substance of the warnings or other information, the State has created the necessary direct evidence of the DUI arrest as it relates to the breath test site. To require the content of the warnings be recorded writes a requirement into the statute that is not otherwise present. See Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language"); see also, State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) (recognizing that where a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning).

The majority also asserts all the videotape shows is the officer's lips moving, this is factually inaccurate. You can see the officer take a card and begin reading from the card, which he states is him reading the Miranda warnings. (R. 22-23). You see Respondent acknowledge the warnings with a clear affirmative nod of his head. Then you see the officer read from a form, which he explains is the implied consent rights form. Respondent is then seen signing the form. At the hearing, the implied consent form with Respondent's signature is provided to the officer to identify. (R.21-22).

The majority also states: "Further, respondent has not conceded the adequacy of the officer's statements, as reflected in his briefs which refer to the 'alleged warnings.'" However, Respondent did concede the adequacy of the statements. At the pretrial hearing, counsel for Respondent specifically stated in regards to the implied consent form: "We'll stipulate he read it. We won't stipulate it was recorded on the videotape."

(R.25). Further, appellate counsel for Respondent conceded at oral argument before the Court of Appeals that there was no challenge to the sufficiency of the Miranda warnings or the other information provided. The State indicated this concession in its brief and the concession was never challenged by Respondent. As a result, the majority's contention that the adequacy has not been conceded is against the facts of this case.

Further, the majority's reading of the statute is against its plain language. The primary focus of the statute is the recording of the person's conduct. Section 56-5-2953(A) of the South Carolina Code (Supp. 2006) requires: "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 videotaped." The statute then specifies the required events at the breath test site which must be documented on the videotape:

> 2) The videotaping at the breath site:
>
> (a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;
>
> (b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;
>
> (c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;
>
> (d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test,

> the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2006). The section clearly requires an individual's "conduct" be captured by the videotaping and then specifies certain events at the breath test site during which the "conduct" must be recorded. The recording does not need to detail the accuracy of the Miranda warnings or other information given, but must document that the various functions were performed by the officer at the breath test site and record the person's conduct during these various functions. In this case, this was completed because the recording clearly shows the officer reading from his Miranda card, reading the implied consent form, and obtaining Respondent's acknowledgement of both. The event required to be documented was documented on the videotaping.

If this Court finds defects or assumes defects in the videotape because it does not have sound, then the majority's opinion incorrectly finds those defects render the videotape and other evidence inadmissible and require exclusion or dismissal without consideration of prejudice or any other analysis. This case does **not** involve the failure to produce the breath test site video recording. Respondent received a copy of the video recording and was able to review the contents of the recording. The videotape began when it was intended to begin and documents every event required by the statute to be documented. The videotape clearly shows the reading of Respondent's Miranda warnings, the officer informing Respondent of the videotape and his right to refuse the breath test, Respondent's acknowledgement of these rights, as well as all the breath test procedures. (T.34-40; R.21-27; Ct. Exhibit 1, DVD).

Any issues regarding the quality of the content of the video should go to its weight and the weight to be assigned the video by the trier of fact. See State v. Cope, 405

S.C. 317, 342 n.6, 748 S.E.2d 194, 207 n.6 (2013) ("factual discrepancies . . . go to the weight of the evidence"); State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility); Weaver v. Lentz, 348 S.C. 672, 680, 561 S.E.2d 360, 364-365 (Ct. App. 2002) ("Questions as to the accuracy of conclusions drawn go solely to the weight of the testimony, rather than its admissibility."); see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

To find otherwise, requires a perfect video when all the statute requires is documentation that certain events took place or the officer performed certain functions. It is an absurd result to require a perfect video when there are so many factors beyond the control of the officer. For instance, in this case the officer had no way to know the videotape failed to record the sound. He could not immediately review the tape to determine if it included sound. Once he completed the process with Respondent, if there is any issue with the tape, he could not go back and redo any of the procedures or testing to try and comply with the requirements this Court is setting forth. The Court is setting an unreachable standard for the videotaping requirements under the statute. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (finding courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the

legislature); State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) ("The statute must be interpreted with realistic circumstances and rationales in mind.").

Further, the majority errs in reading City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), to require strict compliance prior to admissibility of the evidence. Section 56-5-2953 specifically states: "The videotapes of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action." Additionally, in section 56-5-2953(B), the legislature used the language "Failure by the arresting officer to produce the videotapes required by this section **is not alone a ground for dismissal** of any charge. . . ." Had the legislature intended dismissal as the only remedy without any consideration of prejudice or the remaining evidence, the legislature would have simply indicated failure to comply with this statute shall or must result in dismissal of the case. Instead, they provided dismissal as a remedy, but did not make it the exclusive remedy. In addition, the legislature specifically allowed the trial court to consider other facts and circumstances in determining the appropriate remedy when it indicated: "Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances." S.C. Code Ann. §56-5-2953(B).

This Court interpreted those provisions, especially the dismissal language, in Suchenski. The Court stated:

> The statute provides, "Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if [exceptions apply] ..." (emphasis added). Conversely, failure to produce

> videotapes **would be a ground for dismissal** if no exceptions apply.

Suchenski, 374 S.C. at 16, 646 S.E.2d at 881. Nothing in the above language used by this Court mandates dismissal or requires the evidence be deemed inadmissible. By using "would be a ground for dismissal" this Court specifically provided discretion to the court to determine the remedy based on the court's analysis of the State's failure to produce.

The conclusion to Suchenski is also telling. This Court concluded by stating: "Finally, dismissal of the DUAC charge is **an** appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." This Court specifically chose language which indicates other remedies are also appropriate. This Court did not find dismissal is the only appropriate remedy. This Court specifically stated dismissal is **an** appropriate remedy. The conclusion by the Court clearly allows the trial court discretion in how to handle a failure to produce a videotape.

Also, nothing in Suchenski mandates a perfect video in order for it, or any of the evidence related to it, to be admissible. Even if Suchenski requires strict compliance with the statutory requirements of what must be recorded, it does not require that compliance be perfect in every way. The State in Suchenski failed to record entire required events. The videotape did not have quality issues or defects; instead, required events are entirely absent. In that situation, in which entire events required to be recorded are missing, this Court found dismissal was "an appropriate remedy" and did not require it, nor did it make any statement regarding the admissibility of the videotape. Suchenski says nothing about the admissibility of a videotape or other evidence in a situation where the tape includes all events required, but has mere defects or quality issues.

In this case, where all events are recorded, Suchenski is inapposite. Here, the trial court found suppression, not dismissal, was an appropriate remedy. However, it did so without considering the proper procedure for suppression, which is to determine whether Respondent was prejudiced. As the dissent correctly pointed out, there is no prejudice in this case. All events are recorded. All evidence can be presented and both parties will have the opportunity to provide argument regarding the lack of audio and the weight the jury should ascribe to the video. Any defects of the videotape go to its weight to be assigned by the jury and not its admissibility under the statute, and the court should have found the videotape and all evidence of Respondent's breath test admissible. See Section 56-5-2953(A) (videotapes of incident and breath test sites are admissible as evidence in a criminal proceeding).

This Court should conclude that where all required events are recorded and a videotape is produced, Suchenski is not applicable. This Court should then find that the defects or quality issues in the videotape are for a jury's consideration and do not require the videotape or any other evidence to be deemed inadmissible. This Court should require judges to consider the prejudice to the person resulting from the defects in light of the ability to address the defects in front of the jury. See e.g., State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedure.").

The jury should be allowed to perform its duty as the finder of facts and be allowed to weigh the evidence as it sees fit in considering the videotape and its impact on

Respondent's guilt. See State v. Cheeks; 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013) (finding "[i]t is always for the jury to determine the facts, and the inferences that are to be drawn from these facts" and further finding it is the prerogative of the jury to weigh the evidence); South v. Sherwood Chevrolet, Inc., 277 S.C. 372, 374, 287 S.E.2d 490, 492 (1982) ("The jury is the sole trier of the facts."). The majority of the Court erred in relying on Suchenski for a determination that the evidence in this case was inadmissible.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court erred in suppressing all evidence related to the breath test site, and remand for a trial in which the jury as finder of fact may consider and weigh all the relevant evidence in performing its job as the trier of fact.

Respectfully submitted,

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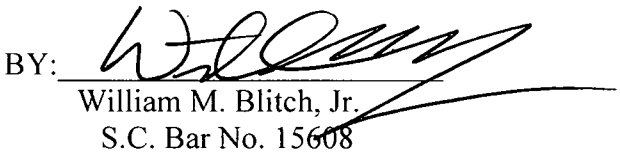
BY: 

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June 19, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. Roger L. Couch, Circuit Court Judge
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The State, Petitioner,

v.

Phillip Wesley Sawyer, Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 19th day of June, 2014.

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