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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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JUN 19 2014

Opinion No: 5226 (S.C. Ct. App. Filed April 23, 2014) **S.C. Supreme Court**

Appellate Case No: 2013-000515

THE STATE

PETITIONER,

v.

CODY ROY GORDON

RESPONDENT.

APPENDIX

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The Honorable Alexander S. Macaulay, Circuit Court Judge

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THE STATE,

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v.

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RECORD ON APPEAL

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1 State of South) In the Court of Common Pleas
 2 Carolina)
 3 County of Oconee) Case No: 2012-CP-37-00852
 4)

5 Cody Roy Gordon,)
 6)
 7 Appellant,)
 8 -vs-) Transcript of Record
 9 State of South) Appeal from Magistrate's
 10 Carolina,) Court
 11 Respondent.)

11 January 22, 2013
 12 Walhalla, South Carolina

13
 14 B E F O R E:

15 The Honorable Alexander S. Macaulay, Judge.
 16

17 A P P E A R A N C E S:

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20 Blair Stoudemire, Esq.
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25

Robin Sue Hild, FCRR, RPR
 Circuit Court Reporter

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No Witnesses were called.

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The Court's Ruling

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Certificate of Court Reporter

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Exhibits

18

No exhibits were introduced.

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1 ** Start of Requested Certified Transcript of Record **

2 January 22, 2013

3 10:26 a.m.

4 **THE COURT:** This is Cody Gordon versus the State of
5 South Carolina, 2012-CP-37-852. Mr. Denny on behalf of
6 the Appellant, Mr. Stoudemire on behalf of the
7 Respondent.

8 **MR. DENNY:** This case was before Judge Simmons last
9 September. And the issues before this Court simply
10 include the fact that the State failed to redact the
11 video in such a way that would prevent prejudicial
12 statements from being disclosed to the Jury.

13 There was an Order from the bench during that trial
14 that they must redact it. There was a time taken during
15 that trial. And when the tape was replayed, more
16 information, that not supposed to be displayed to the
17 jury, was.

18 Second, basically incident site recording
19 violations. And if you look at South Carolina
20 56-5-2953, incident site video is supposed to have, you
21 know, not starting with activation of blue lights, any
22 field sobriety tests, and the arrest, including Miranda.
23 Also, the breath site videos also are supposed to be
24 recorded, and any problems are supposed to be documented
25 in the affidavit showing why there is any noncompliance.

1 The video itself, the incident site, actually at
2 the road stop, has Mr. Gordon in the dark, you cannot
3 see him at his face or his head doing the HGN test.
4 Now, the Magistrate at that point in time said, Well, we
5 can see his body. But we couldn't see whether he was
6 actually doing the HGN test correctly, whether he was
7 tracking the stimulus.

8 In my opinion, as well as I believe the Court would
9 see if he views the video, is that it is impossible to
10 actually see his head. I do not believe that's in
11 compliance with the video. There is absolutely nothing
12 to prevent the Officer from bringing Mr. Gordon closer
13 to the Trooper's car so that he would be in full
14 visibility and actually having the HGN performed at that
15 point in time. He didn't do it. You can't see it.

16 I do have still shots of the video. I believe that
17 all the evidence was submitted up to the Court, but if
18 you would like it for reference, I will be happy to
19 provide it to the State as well as you at this point in
20 time.

21 **THE COURT:** Do you have stills?

22 **MR. DENNY:** Yes, Your Honor, I do (handing). And,
23 Your Honor, obviously this is a black-and-white
24 printout. There's nothing done to it. But I know the
25 black-and-white might be different here.

1 THE COURT: You say it's improved from what the
2 actual video looks like?

3 MR. DENNY: Right. That's a screen shot of exactly
4 what was there.

5 And again, 2953 required that the video show the
6 field sobriety test be performed. My contention at the
7 court that day was basically you could not see the HGN
8 being performed, it was impossible to see it. The State
9 had minimal effort to bring Mr. Gordon closer to the car
10 for that particular test. They didn't do it.

11 Now, that in and of itself I believe should have
12 been grounds for either exclusion of the tape or
13 dismissal.

14 When we look at the actual breath site test, the
15 breath site test actually starts out on October --

16 THE COURT: All right. What's the statute again?

17 MR. DENNY: It is 56-5-2953, and it's Section (A),
18 that (reading):

19 A person who violates 2930, '33 or '45 must have
20 this conduct at the incident site and breath test site
21 video recorded. The video recording at the incident
22 site must not begin later than the activation of blue
23 lights -- and in this case, Your Honor, this was a
24 roadblock and there was an affidavit to that effect --
25 and include any field sobriety test administered, any,

1 including the arrest of a person for violation of 2930
2 or '33, as well as showing the person first being
3 advised of their *Miranda* rights.

4 My contention with regard to this part of the
5 appeal is that you cannot see the HGN. That's the field
6 sobriety test is one of those performed. You cannot see
7 the actual conducting, you know, the Officer conducting
8 that weren't relevant, and the effort on the State was
9 minimal to bring that subject, bring the Defendant
10 closer to the car for his benefit. I mean, we've all
11 been told that basically the field sobriety tests are
12 for the benefit of not only the State but for the
13 Defendant to show that basically they are not
14 intoxicated. In this case it removed that ability of
15 that Defendant to have that argument because the State
16 intentionally in my belief kept him out of visibility of
17 the video.

18 Your Honor, I have a printout. I've got a copy.

19 **THE COURT:** Let me see it, if you would, please.

20 (The Court conferred with the law clerk off the
21 record.)

22 **THE COURT:** All right. Anything else?

23 **MR. DENNY:** Yes, Your Honor. There's several other
24 issues that were brought up at trial. There's the HGN
25 test. In addition, basically, the charging document

1 that was presented shows the arrest, and the Jury was
2 charged basically saying, showing that Mr. Gordon was
3 charged, as listed on the charging document, as driving
4 under the influence on October 30th, 2011.

5 Again, from the still photos I show you, this road
6 stop, everything that was done was on October 29th. He
7 was out of the car, he was actually handcuffed, which is
8 that bottom photo, on the 29th. The charging document
9 was wrong, the error in the instruction to the Jury
10 about it happening on the 30th was wrong.

11 THE COURT: What was the prejudice in that? Did he
12 have an alibi?

13 MR. DENNY: Well, Your Honor, I mean, we expect
14 the --

15 THE COURT: Well, I think there are cases, I
16 haven't looked at them, I'm sure Mr. Stoudemire has,
17 which say that, of course, scriveners' errors and things
18 of that nature are not fatal unless they do have a
19 prejudicial consequence.

20 MR. DENNY: Well, Your Honor, in this --

21 THE COURT: In other words, it goes to the element
22 of the crime or something of that nature.

23 MR. DENNY: Your Honor, I understand. However,
24 going back to 2953 and the recording statute, when we
25 look at everything that went across on the day of this

1 incident, the Officer on the stand then testified, Well,
2 this is daylight savings time, it was actually the 30th
3 and it wasn't a scrivener's error, it was actually
4 daylight savings time, as if to explain why his camera
5 listed it as the 29th when, in fact, it wasn't daylight
6 savings time. The Court took judicial notice that it
7 was an error all the way around.

8 So we have a Defendant who has been taken out of
9 his car at night and put through a series of tests in a
10 way that does not give him the protection because he's
11 outside the visibility of the video --

12 THE COURT: Well, that is a different argument,
13 different grounds.

14 MR. DENNY: Right. But I'm looking at the
15 compounding issues here as far as the time goes. The
16 scrivener's error might be he wrote the wrong date.

17 THE COURT: Well, no. A scrivener's error is
18 usually before we had all of our technology and we had
19 scriveners --

20 MR. DENNY: Yes, sir.

21 THE COURT: -- making the record. And now we have
22 machines making the record. And, but I think that the
23 analogy or the rule is the same, that if it's something
24 that doesn't go to the element of the crime or to some
25 defense such as alibi that adds, that harms there.

1 MR. DENNY: I understand, Your Honor.

2 THE COURT: Let's go on to something else.

3 I want to hear Mr. Stoudemire on your first
4 argument, though, because I've looked at the statute
5 that you have given us, and I don't know how there's an
6 exception in that. And the (B) part, too.

7 MR. DENNY: And, in addition, going back to the
8 recording statute, again, there's testimony that it was
9 daylight savings time, that his camera had not been
10 adjusted for daylight savings time, that it was actually
11 supposed to be the next day.

12 2953 as well as I'm gonna look at 2954 which talks
13 about -- 2953 talks about if there was an exception or
14 if there was a problem with any of the equipment.

15 THE COURT: But you have to have an affidavit.

16 MR. DENNY: There's an affidavit, correct. But the
17 only thing the State supplied was an affidavit, and it
18 was part of State's Exhibit Number 2. (Reading):

19 The only valid reason for failing to produce a
20 videotape based upon the totality of the circumstance,
21 the arrest came from the traffic safety check point or
22 video recording began as soon as possible.

23 That was the only explanation -- I believe it was
24 part of the record -- however, I do have a copy if the
25 Court would like it.

1 So nothing that was presented explained why the
2 dates were wrong on the video. I believe they do not
3 comply with 2953 under the recording statute, and those
4 are two examples of it.

5 I do have some other issues if you want to have the
6 State address that one point.

7 **THE COURT:** All right, Mr. Stoudemire?

8 **MR. STOUDEMIRE:** Which point do want to go with
9 first?

10 **THE COURT:** The one that I'm concerned about is
11 apparently section 56-5-2953 (A) speaks in absolutes
12 almost that -- I say almost -- but does speak in
13 absolutes. They include the entire breath test
14 procedure, they include the person taking or refusing a
15 breath test.

16 **MR. STOUDEMIRE:** Yes, sir.

17 **THE COURT:** So, I mean -- and again, the fact that
18 they're out of range in the sense that light doesn't
19 penetrate the darkness, it's one of those things that
20 perhaps would interfere with recording the field
21 sobriety test. Go ahead.

22 **MR. STOUDEMIRE:** Yes, sir. Judge, I think what the
23 Courts seemed to have focused on over time with regard
24 to the incident site recording, and of course that would
25 be with regard to the HGN and other field sobriety

1 tests, seems to be that it must capture the conduct of
2 the accused.

3 THE COURT: Well, before we start down that road,
4 did they perform the HGN test?

5 MR. STOUDEMIRE: I'm going with what Mr. Denny said
6 is that it wasn't visible in the video.

7 THE COURT: Well, did they perform it? Was that
8 part of the testimony?

9 MR. DENNY: Yes, Your Honor, it was. Part of the
10 testimony was that they performed the HGN test and
11 subsequently Mr. Gordon did not pass the HGN test, as
12 well.

13 THE COURT: Well, in other words, if they performed
14 it, that meant that they were relying on it, and if they
15 were relying on it, there has to be some image of it.

16 MR. STOUDEMIRE: Correct.

17 THE COURT: Readable, viewable. I mean, in other
18 words, don't do the test if you're out of sight.

19 MR. STOUDEMIRE: I agree. And, Judge, what I would
20 rely on is *Murphy versus State*, which 392 S.C. 626,
21 which is a 2011 case, and in that particular case they
22 dealt with the issue of failure to record a full view of
23 all field sobriety tests. And just reading from the
24 case it says here, the statute provides that (reading):

25 A person must have his conduct at the incident site

1 and breath test site videotaped. The videotaping at the
2 incident site must, A, begin not later than the
3 activation of blue lights and conclude after the arrest
4 and, B, include the person being advised of Miranda
5 before field sobriety tests are administered, or after.

6 And it goes on to say that (reading):

7 The plain language of the statute is not violated
8 as long as the recording captures, one, the accused
9 conduct, and, two, *Miranda* warning provided prior to the
10 field sobriety test if such test occurred.

11 It further goes on to say that Murphy -- the
12 Defendant in that case -- does not allege the video
13 fails to capture her being advised of Miranda but only
14 that this statute requires that she remain in full view
15 and record all field sobriety tests.

16 However, nothing in the plain language of the
17 statute indicates that an accused remain in full view of
18 the camera for the duration of the encounter; rather,
19 the statute only requires that her conduct be recorded.

20 So it seems that -- and it goes on to define
21 conduct, according to the *Oxford Dictionary*, is
22 generally defined as one's behavior, action, or
23 demeanor.

24 My argument would be that that's only her action
25 and demeanor are on there. For instance, if this were a

1 walk and turn, just because you don't see the bottom of
2 their legs doing the walk and turn, it doesn't mean that
3 that conduct wasn't recorded, and then specifically
4 that's what Murphy is dealing with.

5 THE COURT: Well, I can attest to legs not
6 performing like they used to. And it's not the bottom
7 that gives you the problem, it's when the legs at the
8 bottom give out or for some reason or another,
9 intoxication or just old age. Your top starts becoming
10 unstable.

11 MR. STOUDEMIRE: Yes, sir.

12 THE COURT: So, I mean, that's a little bit of a
13 difference because the nystagmus test, if I remember,
14 has to do with such things as eye movement, which is a
15 very, you know, precise type of thing. In other words,
16 I don't know if you can show the finger without showing
17 the eyes and how, the complete test.

18 MR. STOUDEMIRE: And that's true, Your Honor, and I
19 agree with that. But I would also say I have yet to see
20 any incident site recording where, regardless of how
21 close to the camera they are, that the viewer is able to
22 see the accused's eye movements during an HGN test.
23 Sometimes you'll be able to see head movements, but
24 generally you see a finger moving back and forth --

25 THE COURT: That's why it's not gonna be, they use

1 other tests or something, not something that wouldn't be
2 of benefit.

3 MR. STOUDEMIRE: Yes, sir.

4 THE COURT: If you can't see it, you can't see any
5 part of it, or you can't even see the head moving, like
6 you say, as I say, I know about stability when your
7 limbs kind of give out on you.

8 MR. STOUDEMIRE: Yes, sir. And, Judge, looking
9 through here, and I may be missing it in here. But I
10 don't see what, if any, other tests were performed at
11 the incident site other than HGN. There may have been
12 others.

13 THE COURT: I think unfortunately that's probably
14 gonna be the critical part because if you didn't have
15 any other tests, that's the only test.

16 MR. STOUDEMIRE: Yes, sir, I agree.

17 THE COURT: And if that test is not complete, is
18 not of benefit, because obviously there's nothing on
19 the -- and the video is supposed to give you an image of
20 the test used, the sobriety test used.

21 MR. STOUDEMIRE: Yes, sir.

22 THE COURT: All right. Anything else, Mr. Denny?

23 MR. DENNY: Your Honor, also in this appeal we
24 address the fact that under 2954 there is an error at
25 the breath site. The actual DataMaster at the video had

1 the wrong time stamp on it as well. Again, under the
2 next section, 2954, they are supposed to provide records
3 of maintenance, malfunctions or errors, and they didn't
4 do that.

5 The actual clock, you watch it on the video, starts
6 on Saturday, October 29th, 2011, at 2:19 a.m., and then
7 in the middle of the video it jumps to Sunday, October
8 30th, 2011, at 1:12 in the morning. And again I realize
9 that there's the image of what's going on, but all of
10 this consistently needs to be --

11 THE COURT: Again, that comes down to, as I say,
12 harmless error. Because I sometimes write checks, you
13 know, in the new year using the old year date, and the
14 bank has been very good to negotiate it. I wish they
15 wouldn't sometimes. As long as I put the sufficient
16 funds.

17 But I mean, in other words, I think life tells us
18 that there are certain things that have consequences.
19 And that's coming back to what I said on the video of
20 the arrest.

21 All right. Anything else?

22 MR. DENNY: Nothing further, Your Honor.

23 The Court's Ruling:

24 THE COURT: All right. Your motion is granted.

25 Draw the Order.

1 MR. DENNY: Thank you, Your Honor.

2 THE COURT: But let's concentrate on the 56-5-2953,
3 must include any field sobriety test administered.

4 MR. DENNY: Yes, Your Honor.

5 THE COURT: And "includes" means that it must be
6 reliable in the sense that it does have the
7 representation; in other words, you can discern what is
8 going on.

9 MR. DENNY: Yes, Your Honor. Thank you.

10 THE COURT: In other words, but also, if they're
11 gonna use that, that means that you do bring it a little
12 bit closer, but if it's out at the edge of the lighted
13 area, perhaps use some other test.

14 MR. STOUDEMIRE: Yes, sir.

15 MR. DENNY: Thank you, Your Honor.

16 THE COURT: All right.

17 (Whereupon, the Magistrate's Court Appeal was
18 concluded at approximately 10:50 a.m.)

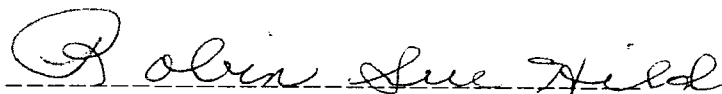
19 ** End of Requested Certified Transcript of Record **
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Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, FCRR, RPR, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Oconee County, South Carolina, on the 22nd day of January, 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 16, 2013

A handwritten signature in cursive script, reading "Robin Sue Hild", written over a horizontal line.

Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

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September 21, 2012 2012 SEP 21 P 2: 16

DELIVERED VIA HAND DELIVERY

Magistrate M. Todd Simmons
Oconee County Summary Court
207 A E.N. First Street
Seneca, South Carolina 29678

RECEIVED

RE: State of South Carolina v. Cody Roy Gordon; TKT F346464; Notice of Appeal

Dear Judge Simmons,

Please find the attached Notice of Appeal which has been filed regarding the above referenced case.

If you have any questions, please feel free to contact me.

Very truly yours,

KEITH G. DENNY, P.A.



Keith G. Denny
Attorney at Law

cc: Cody Roy Gordon

THE STATE OF SOUTH CAROLINA
In the Circuit Court
Tenth Judicial Circuit

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2012 SEP 21 P 2:00

APPEAL FROM OCONEE COUNTY
Oconee County Magistrate Court

Hon. M. Todd Simmons, Magistrate Judge

2012-CP-37-852

TKT F346464

State of South Carolina

Respondent.

v.

Cody Gordon,

Appellant.

NOTICE OF APPEAL

Mr. Cody Gordon (the "Defendant") appeals the Order of the Magistrate M. Todd Simmons for the conviction of Driving Under the Influence, 1st Offense.

ARGUMENTS

Prior Bad Acts Disclosed To Jury

Failure To Adhere to Court's Order and Redact Prejudicial Statements

The State sought to move into evidence the DataMaster video from the breath testing site over the Defendant's objection. The Court ruled that the State must redact the video to prevent any statements regarding prior bad acts of the Defendant because of the prejudicial nature of the comments. The State was given time to identify appropriate video stopping points and portions of the video were published to the jury. The State failed to timely stop the video and specific statements regarding the Defendant's prior arrests and familiarity with law enforcement was

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N.J.
COMPUTER

published to the jury. The Defendant's motion for a mistrial was denied. Rather, the Court issued a curative charging instruction whereby the jury was told to disregard what it heard. At the close of the trial, the Court charged the jury with its instructions. However, the subsequent restatement of the charge regarding the prior bad act was not consistent with the initial charge to the jury. In response to the Defendant's objection to the Court's error, the Court reissued the same original curative charge instruction.

Failure to declare a mistrial was reversible error that the Court compounded with the subsequent inconsistent charge and attempted re-correction. The State's failure to comply with the prior ruling and redact the tape was grounds for mistrial; however, the subsequent inconsistent charges further prejudiced the Defendant beyond the initial impact of the disclosure.

Incident Site Recording Violations

Defendant Avoidably Obscured During Field Sobriety Test

Pursuant to S.C. Code Ann. Sec. 56-5-2953(A)(1)(ii), the incident site video must include any field sobriety tests administered. In this case, the arresting officer positioned Mr. Gordon sufficiently far away from the front of his patrol car that it is not possible to see any substantive feature of Mr. Gordon during the administration of the horizontal gaze nystagmus (HGN) test. The State provided testimony that it could not adequately position Mr. Gordon closer to the patrol car because the trooper was afraid that doing so would possibly obscure the Defendant's feet. However, this is contradictory because the focus of the HGN test was the Defendant's upper body and moving the Defendant closer to the car to allow the video to accurately capture the Defendant's responses would have been beneficial to the defense. The arresting officer's intentional failure to move the Defendant closer in view of the dashcam video recorder

prejudiced the Defendant and failed to meet the requirement pursuant to S.C. Code Ann. Sec. 56-5-2953.

Breath Site Reporting and Recording Violations

Failure To Record Breath Testing Procedure at Seneca Police Department

Pursuant to S.C. Code Ann. Sec. 56-5-2953(A)(2)(a), the breath test site video must include the entire breath test procedure. In this case, the State admitted that Mr. Gordon was taken to the DataMaster room at the Seneca Police Department for a breath test. The State alleged that the DataMaster was not operational Mr. Gordon was then taken to the Oconee County Law Enforcement Center for a breath test. However, no records were provided as to any current malfunction for the Seneca DataMaster. A solution change was noted that it was performed several hours after Mr. Gordon had been taken to the Seneca DataMaster room; however, no record exists for any prior malfunction or reason for the inability to perform.

Pursuant to S.C. Code Ann. Sec. 56-5-2954, the State is required to maintain detailed records of malfunctions, repairs, complaints or other problems regarding breath testing devices at each site. In this case, the State provided testimony that the Seneca DataMaster was inoperable but could not provide any record as required by S.C. Code Ann. Sec. 56-5-2954. Therefore, the Court made a reversible error by ruling that the video from the Seneca DataMaster room could be excluded by the State without showing of a malfunction. Otherwise, S.C. Code Ann. Sec. 56-5-2953(A) mandates that the video be available which the State failed to produce.

Failure to Provide Maintenance Records for DataMaster Recording at Oconee Law Enforcement Center

The DataMaster video from the Oconee Law Enforcement Center clearly shows a date and start time of October 29, 2011 at 2:19 A.M with the Defendant on the video. Then, the video jumps and the date/time changes to sometime after midnight on October 30, 2011. When realizing this inconsistency on cross-examination, the arresting officer stated that he was not responsible for the equipment in the DataMaster room and that the video was wrong. However, he had previously authenticated and stated for the record that the video was accurate. The Court subsequently denied the Defendant's motion to exclude the tape based on the admission of its inaccuracy witness who had previously vouched for its accuracy. Furthermore, when pressed for records for any alleged malfunction pursuant to S.C. Code Ann. Sec. 56-5-2954, the State failed to produce any and alleged that the video was not encompassed as a "breath testing devices" as provided by statute. However, it is clear that S.C. Code Ann. Sec. 56-5-2953 clearly requires that video recording be part of the breath testing procedure; therefore, malfunctions with the video equipment must be addressed in the same manner. Without adherence to S.C. Code Ann. Sec. 56-5-2954 for all equipment used in the breath test procedure, the use of breath test video for the Defendant's use at trial is nullified. Relying on *State v. Elwell*, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011), S.C. Code Ann. Sec. 56-5-2953(A) requires that the breath test site be videotaped to protect both the State *and the Defendant* from unreliable memories of those testifying at trial. *Id.* fn6. Here, the Court chose to allow the State's witness to select those parts of the tape it wanted to say were accurate and which parts were inaccurate. The Court's reasoning to allow this is incomprehensible and defies logic.

Therefore, the Court's failure to dismiss the Defendant's charge based on the State's failure to comply with S.C. Code Ann. Sec. 56-5-2953 and S.C. Code Ann. Sec. 56-5-2954 was reversible error. The statute, case law and contradicting statements by the State's own witness negate any reliance on the DataMaster video.

Failure To Grant Directed Verdict for State's Failure To Provide Any Evidence That The Incident Occurred on October 30, 2011

The Defendant was charged with the offense of Driving Under the Influence, 1st offense having occurred on October 30, 2011. The Uniform Traffic Ticket, charging document, listed the arrest time as "00:51" (i.e. 12:51 A.M.). From all the evidence presented by the State, the Defendant was stopped and out of his vehicle as of 23:45 (i.e. 11:45 P.M. on October 29, 2011). When the State realized its error, the trooper attempted to allege that the night of the arrest was the night of Daylight Savings Time and the time on the dashcam video recording equipment had not been changed. This was an outright falsehood. The Court took judicial notice of the fact that the time change for Daylight Savings in 2011 ended on November 6, 2011 and not October 29, 2011. Moreover, the State failed to provide ANY affidavit regarding any purported malfunction of the dashcam video equipment; therefore, the State's claim that the dashcam recorder was malfunctioning was baseless.

The Magistrate's failure to grant a directed verdict was an error because the State provided no evidence that Mr. Gordon committed the offense as charged by the charging document and subsequently charged by the Court. There was no evidence that the crime, as charged against the Defendant, occurred on October 30, 2011 and the State's video of the Defendant's arrest clearly indicates an arrest on October 29, 2011. Again, the Court was clearly

aware of the arresting officer's baseless statement by taking judicial notice that Daylight Savings Time ended later in November rather than in October. The State's introduction of the actual roadblock video whereby the State's witness authenticated that the video was accurate which clearly indicated that arrest occurred on October 29, 2011 negated any allegation of when the alleged act occurred. Therefore, the Court's failure to a verdict in light of the overwhelming evidence that no act occurred, as charged on October 30, 2011, is reversible error.

CONCLUSION

The reasons set forth above, the charge against the Defendant must be dismissed with prejudice.

September 21, 2012

Walhalla, S.C.


Keith G. Denny, Esq.
Post Office Box 101
30 Short Street
Walhalla, S.C. 29691
Phone: 864-638-2930
Fax: 864-638-2922

Other Counsel:
Attorney Bethany Blundy
Solicitor's Office, Tenth Judicial Circuit
205 W. Main Street
Walhalla, S.C. 29691

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-37-00852

Cody Roy Gordon

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Keith G. Denny

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ 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.
- ☐ **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
N/A	N/A	\$N/A
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.

s/Alexander S. Macaulay

2063

02/15/2013

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (12/2011)

Page 1

For Clerk of Court Office Use Only

This judgment was entered on the 15th day of February, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 15th day of February, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Keith G. Denny

ATTORNEY(S) FOR THE PLAINTIFF(S)

Blair L. Stoudemire

ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. Whitfield
CLERK OF COURT

Court Reporter: Robin S. Hild

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

CODY ROY GORDON,

Appellant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT

ORDER

2012-CP-37-852

2013 FEB 15 PM 4 21

FILED
BEVERLY N. WHITEFIELD
CLERK OF COURT

Judge: Hon. Alexander S. Macaulay
Date of Hearing: January 22, 2013
Attorney for Appellant: Keith G. Denny, Esq.
Attorney for Respondent: Blair Stoudemire, Esq.
Court Reporter: Robin Hild

PROCEDURAL HISTORY

The Appellant was charged with Driving Under the Influence, 1st offense on October 30, 2011. This matter was brought to trial before Magistrate M. Todd Simmons in the Oconee County Summary Court. At trial, Appellant's counsel moved for dismissal of the case because the State failed to adhere to incident site recording requirements as provide in S.C. Code Ann. Sec. 56-5-2953. Specifically, Appellant's counsel argued that the arresting officer's placement of the Appellant too far away from the trooper's car caused the Appellant's head to not be sufficiently visible during the administration of the Horizontal Gaze Nystagmus standardized field sobriety test. The trial court determined that the fact that he was on the video was sufficient even if the Appellant's head could not be adequately seen. Furthermore, Appellant's counsel raised objections and moved for dismissal for the State's failure to provide records for alleged malfunctions of the trooper's video equipment, apparent malfunctions of the breath site recording system based on invalid date/timestamps on the video and the State's failure to appropriately redact the incident site and breath test site videos. The Appellant's counsel's objections were denied. This appeal followed.

FINDINGS

After a review of the record and arguments by counsel for the State and Appellant, I find the following:

1. I find that this Court has subject matter jurisdiction of the appeal issues and the parties before the Court.
2. I find that venue is proper.
3. I find that the Appellant's objections were properly preserved for appeal.
4. I find that the State's argument pursuant to *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2007), that "the plain language of the statute does not require that the recording capture a continuous 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" is not applicable here as the "conduct" sought to be recorded during the Horizontal Gaze Nystagmus standardized field sobriety test was not, in fact, captured on the recording.
5. I find that as a matter of law, S.C. Code Ann. Sec. 56-5-2953(A) requires that the Defendant's head must be visible – unless an exception as provided for in S.C. Code Ann. Sec. 56-5-2953(B) applies – during the administration of the Horizontal Gaze Nystagmus field sobriety test. In this case, the Appellant was moved so far out of view in front of the arresting officer's patrol car for the administration of the test and into the dark which prevented the Appellant's head from being sufficiently visible through the entire administration of the Horizontal Gaze Nystagmus test.
6. Furthermore, at the roadblock incident site, nothing prevented the officer from moving the Appellant closer to the camera for administration of this Horizontal Gaze Nystagmus test.

7. I find that Magistrate Simmons' failure to dismiss the case for failure to comply with the incident site recording requirements was an error of law and the only remedy is the dismissal of the charge against the Appellant. The dismissal is with prejudice.
8. I find that the additional issues raised by defense counsel did not necessarily prejudice the Appellant as the Appellant had adequate notice of the charge and that scrivener errors were not fatal to the State's case. However, because charge is dismissed for failure to adhere to S.C. Code Ann. Sec. 2953(A), it is not necessary to evaluate defense counsel's additional objections further.

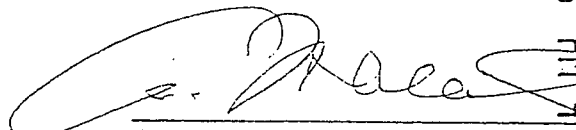
CONCLUSION

Therefore, it is the conclusion of this Court:

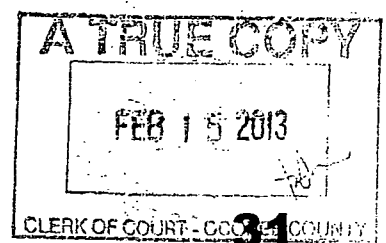
1. Magistrate Simmons' denial of the Appellant's motion to dismiss because the Appellant's head was not sufficiently visible during the entire administration of the Horizontal Gaze Nystagmus test was an error of law.
2. Because the arresting officer did not comply with S.C. Code Ann. Sec. 56-5-2953, the conviction in the Oconee County Summary Court for the Driving Under the Influence, 1st Offense (TKT F346464) is reversed the charge of Driving Under the Influence, 1st Offense (TKT F346464) is dismissed with prejudice.

AND IT IS SO ORDERED!

February 15, 2013
Walhalla, South Carolina


ALEXANDER S. MACAULAY, Judge

FILED OCONEE CO
BEVERLY H. WHITEHEAD
CLERK OF COURT
2013 FEB 15 PM 4:21



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

FILED OCONEE, SC TENTH JUDICIAL CIRCUIT
BEVERLY H. WHITFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA,)

2012 OCT 16 PM 4 54

V.)

RETURN OF THE CRIMINAL APPEAL

Cody Roy Gordon)
510 N. Depot Street)
Seneca, SC 29678,)

CASE NO.: 2012-CP-37-852

UNIFORM TRAFFIC TICKET NO.: F 346464

DEFENDANT.)
_____)

This matter is on appeal from the Court of M. Todd Simmons, Oconee County Summary Court, Seneca, South Carolina, M. Todd Simmons, Presiding Judge.

The Defendant, Cody Roy Gordon was charged with violating S.C. Code §56-5-2930, which is commonly referred to as Driving Under the Influence. This offense is alleged to have occurred on October 30, 2011.

This matter was heard in a jury trial on September 12, 2012 and the Notice of Appeal was filed on September 21, 2012. The Defendant was represented by Attorney Keith G. Denny. The State was represented by Assistant Solicitor Beth Blundy. The proceedings were recorded electronically. The jury list was prepared pursuant to S.C. Code §22-2-90. (Selection of jury list for a scheduled term of jury trials). The Defendant and the State were given an opportunity to exercise peremptory challenges on September 10, 2012 at 10 a.m.

The Defendant made the following pre-trial motions:

1. Motion to dismiss for failure to adhere to S.C. Code §56-5-2953 and 56-5-2954. This motion is recorded on Part 1 of the DVD beginning at 5:38 minutes and ends at 24:10 minutes. More discussion occurs at 28:22 minutes and ends at 31:15 minutes. The Court's ruling is recorded at 31:17 minutes. The Court reviewed S.C. Code §56-5-2953, §56-5-2954, State v. Elwell, 396 S.C. 330 (Ct. App. 2011), and Murphy v. State, 392 S.C. 626 (Ct. App. 2011). The Court ruled that the State properly

captured on the roadside video the Defendant's conduct as required by S.C. Code §56-5-2953 and as interpreted by Murphy. Additionally, the Court ruled that the breath test site was in Walhalla and the State complied with the videotaping statute. The Court also ruled that there were records of the solution change on the breath machine in Seneca. The Defendant's Motion to dismiss was denied.

2. Motion to redact portions of videotapes pertaining to Defendant's statements regarding prior interactions with law enforcement or prior arrests. This motion is recorded on Part 1 of the DVD beginning at 24:18 minutes and ends at 27:54 minutes. This motion was granted and the State was ordered to redact any portions of the videotapes wherein the Defendant made any statements regarding his previous interactions with law enforcement and any statements regarding prior arrests.
3. Motion to sequester witnesses. This motion is recorded on Part 1 of the DVD beginning at 33:07 minutes and ends at 34:30 minutes. The Court denied this motion.

The State made the following pre-trial motions:

1. Motion to redact portions of videotapes pertaining to Defendant's statements regarding potential penalties if convicted of DUI. This motion is recorded on Part 1 of the DVD beginning at 27:54 minutes and ends at 28:22 minutes. This Motion was granted by the Court.

The State called the following Witnesses:

1. Cpl. Mayfield of the S.C. Highway Patrol
2. Lnc. Cpl. Greer of the S.C. Highway Patrol

See attached digital recording of the trial proceedings on DVD for the testimony from these witnesses. (Mayfield testimony begins at 17:21 minutes on Part 2 of DVD and ends at 42:25 minutes.) (Greer testimony begins at 43:28 minutes on Part 2 of DVD and ends at 37:20 minutes on Part 5 of DVD.)

The Defendant called the following witnesses:

1. NONE

The State made the following Motions:

1. NONE

The Defendant made the following Motions:

1. Motion for mistrial based upon State's inadvertent disclosure of a certain redacted portion of the Datamaster room videotape (Exhibit #6). The Defendant made the statement on the videotape "the other cops let me" while speaking to Trooper Greer in the Datamaster about smoking. (This is recorded at 46:00 minutes on part 3 of the trial DVD). Both parties agree that the disclosure was accidental and in violation of the Court's prior Order to redact the statement. The State argued that a curative instruction would remedy the matter. Upon review of State vs. Howard, 296 SC 481 (1988), the Court determined that the proper remedy under the circumstances was to issue a curative instruction to the jury. The Defendant's motion for mistrial was denied and a curative instruction was given to the jury. (Curative instruction is recorded at 7:41 minutes on part 4 of the trial DVD). Defendant renewed his motion for a mistrial at 11:40 minutes on part 4 of the DVD. Defendant's motion is based upon the fact that statements on the Datamaster video were published to the jury wherein he explained "you can ask anybody in the jail about me". This statement was not specifically ruled upon by the Court as it was not raised by the Defendant during the previous discussions with the parties. Defendant's motion was denied as it was not a prior crime, wrong, or act as he merely explained he knew people working at the jail.
2. Motion to dismiss based upon violation of S.C. Code §56-5-2954. Alternatively, motion to exclude videos from evidence. This motion is recorded on Part 5 of the DVD beginning at 15:16 minutes and ends at 34:16 minutes. Defendant did not object to the introduction of the roadside video (Exhibit #3) or Datamaster video (Exhibit #6), except for the portions which were redacted pursuant to the Defendant's pre-trial motion. The Defendant's position is that time stamps on the videos are inaccurate, and, therefore the videos are not in compliance with the video recording statutes and related case law. The Defendant argues that since

the video time stamps are not correct, the appropriate remedy is for the Court to dismiss the case. There is no dispute that both videotapes capture the Defendant on camera. The dispute is whether or not the State is required to keep the time stamps on each video accurate and to what degree of accuracy are the time stamps supposed to be maintained. At this point in the trial, the videos had already been introduced into evidence, and the Defendant did not raise any objection other than the redaction issue discussed in the Defendant's pretrial motion. Since the videos were already in evidence, to exclude them would be impossible. Additionally, a curative instruction would not be appropriate since the evidence was already admitted and published to the jury. The motion in the alternative to exclude the videos was denied. Since no objection was raised at the time the videos were admitted into evidence, since S.C. Code §56-5-2953 does not set forth any requirements of a time stamp on the videos, and since S.C. Code §56-5-2954 does not set forth any remedy for the State's failure to report time stamp discrepancies, the Court denied the Defendant's motion to dismiss.

3. Defendant made a Motion for Directed Verdict at the close of the State's evidence. This motion is recorded on Part 5 of the DVD beginning at 38:33 minutes and ends at 42:52 minutes. The Defendant asserts that there was no evidence which shows the he violated S.C. Code §56-5-2930 specifically on October 30, 2011. Upon review of the evidence, the Court determined that both of the State's witnesses testified that the alleged offense occurred on October 30, 2011. Specifically, Trooper Greer testified that he first came into contact with the Defendant at a license check point shortly after midnight on October 30, 2011. Additionally, Trooper Greer testified that he contacted dispatch at the time of the arrest and was told it was 00:51 on October 30, 2011. Trooper Greer also testified that Exhibit #5 contained the arrest time and that it was also 00:51, or 51 minutes after midnight on October 30, 2011. While there is conflicting time stamps on the videos involved in this case, there exists substantial evidence which reasonably tends to show the Defendant operated a motor vehicle upon the roads of the State on October 30,

MTS
10/21

2011. The Court denied the motion for directed verdict as there was evidence as to each element of the offense.

4. Motion to take judicial notice of the date of daylight savings time for 2011 and that October 29, 2011 was a Saturday. Judicial notice was taken and two exhibits were placed in evidence as Court Exhibit #1 and #2.
5. Motion to set aside jury verdict based upon prior motion for directed verdict. This motion was denied based upon same reasons for denial of directed verdict motion.

The State offered the following items into evidence:

1. SC Highway Patrol Driver Inspection Report (Exhibit #1)
2. Affidavit for failure to produce videotape (Exhibit #2)
3. DVD of roadside video (Exhibit # 3)
4. Advisement of Implied Consent Rights (Exhibit #4)
5. SLED breath alcohol analysis report (Exhibit #5)
6. DVD of Datamaster room video (Exhibit #6)

The Defendant raised the following objections to the items that the State sought to introduce into evidence:

1. Defendant objected to Exhibit #1 on relevance. Objection was overruled.
2. Defendant did not object to Exhibit #2.
3. Defendant objected to Exhibit #3 based upon the pre-trial motion to redact. Objection was sustained and the exhibit was admitted into evidence with the condition that the State redacts and not publish to the jury any portions of the videotape wherein the Defendant made any statements regarding his previous interactions with law enforcement and any statements regarding prior arrests. Defendant did not raise any other objections to the introduction of Exhibit #3.
4. Defendant did not object to Exhibit #4.
5. Defendant did not object to Exhibit #5.
6. Defendant objected to Exhibit #6 based upon the pre-trial motion to redact. Objection was sustained and the exhibit was admitted into evidence with the condition that the State redacts and not publish to the jury any portions of the videotape wherein the Defendant made any

statements regarding his previous interactions with law enforcement and any statements regarding prior arrests. Defendant did not raise any other objections to the introduction of Exhibit #6.

The Defendant offered the following items into evidence.

1. NONE

The State raised the following objections to the items that the Defendant sought to introduce into evidence.

1. NONE

No case was presented by the Defendant.

The following items were placed into evidence as a Court Exhibit:

1. Daylight time calendar (Court Exhibit #1)
2. Calendar for October 2011 (Court Exhibit #2)

This jury trial was held on September 12, 2012. Following a trial, closing arguments, and deliberations, the jury found the Defendant guilty of violating S.C. Code §56-5-2930 "Driving Under the Influence" (Ticket #F 346464). Following a finding of guilt, the Court sentenced the Defendant to 30 days suspended upon the completion of 48 hours of public service employment within 8 weeks and payment of \$167 court costs on a scheduled time payment agreement of 6 weeks.

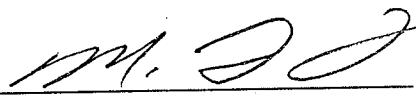
Attached are originals of the following items:

1. Uniform Traffic Ticket F 346464, public service employment time sheet, and scheduled time payment agreement.
2. Defendant's filed Notice of Appeal.
3. Jury verdict form.
4. Defendant's jury trial request.
5. Defendants Affidavit of Indigency and Application for Counsel.
6. Letter from Public Defender Office dated January 6, 2012.
7. Letter and Order determining the Defendant to be eligible for public defender representation.

8. Notice of appearance, jury trial request, and pre-trial conference request.
9. Motion for discovery, Brady materials, and Rule 6 request.
10. Certificate of Service.
11. SLED breath records.

Also, attached are the original exhibits entered into evidence by the State and Court, and also the DVD recording of the trial.

Submitted by:


Judge M. Todd Simmons
Oconee County Magistrate
207-A East North First Street
Seneca, South Carolina 29678

October 9, 2012

Daylight Time

Court
Exhibit #1

Starting in 2007, daylight time begins in the United States on the second Sunday in March and ends on the first Sunday in November. On the second Sunday in March, clocks are set ahead one hour at 2:00 a.m. local standard time, which becomes 3:00 a.m. local daylight time. On the first Sunday in November, clocks are set back one hour at 2:00 a.m. local daylight time, which becomes 1:00 a.m. local standard time. These dates were established by Congress in the Energy Policy Act of 2005, Pub. L. no. 109-58, 119 Stat 594 (2005).

Not all places in the U.S. observe daylight time. In particular, Hawaii and most of Arizona do not use it. Indiana adopted its use beginning in 2006.

Year	Begin	End
2006	April 2	October 29
2007 *	March 11	November 4
2008	March 9	November 2
2009	March 8	November 1
2010	March 14	November 7
2011	March 13	November 6
2012	March 11	November 4
2013	March 10	November 3
2014	March 9	November 2
2015	March 8	November 1

* New law went into effect.

Many countries observe some form of "summer time" and the dates when the changes are made are various and not determined by any international agreements.

Daylight time and time zones in the U.S. are defined in the U.S. Code, Title 15, Chapter 6, Subchapter IX - Standard Time.

History of Daylight Time in the U.S.

Although standard time in time zones was instituted in the U.S. and Canada by the railroads in 1883, it was not established in U.S. law until the Act of March 19, 1918, sometimes called the Standard Time Act. The act also established daylight saving time, a contentious idea then. Daylight saving time was repealed in 1919, but standard time in time zones remained in law. Daylight time became a local matter. It was re-established nationally early in World War II, and was continuously observed from 9 February 1942 to 30 September 1945. After the war its use varied among states and localities. The Uniform Time Act of 1966 provided standardization in the dates of beginning and end of daylight time in the U.S. but allowed for local exemptions from its observance. The act provided that daylight time begin on the last Sunday in April and end on the last Sunday in October, with the changeover to occur at 2 a.m. local time.

During the "energy crisis" years, Congress enacted earlier starting dates for daylight time. In 1974,

daylight time began on 6 January and in 1975 it began on 23 February. After those two years the starting date reverted back to the last Sunday in April. In 1986, a law was passed that shifted the starting date of daylight time to the first Sunday in April, beginning in 1987. The ending date of daylight time was not subject to such changes, and remained the last Sunday in October. The Energy Policy Act of 2005 changed both the starting and ending dates. Beginning in 2007, daylight time starts on the second Sunday in March and ends on the first Sunday in November.

For a very readable account of the history of standard and daylight time in the U.S., see

- Ian R. Bartky and Elizabeth Harrison: "Standard and Daylight-saving Time", *Scientific American*, May 1979 (Vol. 240, No. 5), pp. 46-53.

Calendar for October 2011 (United States)

October						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Phases of the moon: 3: ☾ 11: ☽ 19: ☾ 26: ●

Holidays and Observances: 10: Columbus Day (Most regions); 31: Halloween

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME
Corey
MIDDLE NAME
Ray
LAST NAME
Gooden
CITY
Greenville
STATE
SC
ZIP CODE
29606

STATE LICENSED DRIVER'S LICENSE NO.
SC 11699545
CDL
SC
YES ☐ NO ☐ DRI. LIC. CLASS
B

VEH. LIC. NO.
11699545
STATE
SC
MAKE OF VEH.
1995
YEAR
1995
COMB. VEH. ☐ TO
16PSR VEH.
HAZ. MT. ☐ MTRCYCL. ☐ OTHER ☐

NAME OF TRIAL COURT
TRICASS CT
STREET AND NO.
207 A E N 1st St
CITY
Greenville
STATE
SC
ZIP CODE
29606

DATE OF TRIAL
11/16/2011
TIME OF TRIAL
10:00

VIOLATION - COURT APPEARANCE REQUIRED YES ☒ NO ☐
VIOLATION SECTION NO.
56-S-2530

OWNER OF VEHICLE
SUE
DATE OF ARREST
10/30/2011

ADDRESS OF OWNER
Scottdale
DATE OF VIOLATION
10/30/2011

BAIL DEPOSITED
Scottdale
NAME OF ARRESTING OFFICER
SC 10130

RACE
WM
SEX
M
DATE BAIL REC'D.
11/16/2011
BY
1215 B

DESCRIPTION OF ACCUSED
SC 10130
COUNTY
Greenville
BADGE
704

CASE BEFORE
CIRCUIT COURT ☐ MAGISTRATE ☐ MUN. COURT ☐
FAMILY COURT ☐ FEDERAL COURT ☐

NAME OF TRIAL COURT
IF DIFFERENT FROM ABOVE
DEFENDANT: DID NOT APPEAR ☐ APPEARED ☐

NOLLE PROSSER ☐ DISPOSITION
FORFEITED BOND ☐ GUILTY
PLED: NOLLO CONTENDERE ☐

TRIAL BY: TRIAL JUDGE ☐ JURY ☐

VERDICT OF
GUILTY ☐ DATE OF TRIAL IF ANY
NOT GUILTY ☐

JAIL SUSPEND FINE AMT. COLLECTED AMT. SUSPENDED

COMMITTED TO: Vehicle Searched ☒ Arrest as Result of Collision ☐

CERTIFIED CORRECT

DATE

DATE

DATE

DATE

DATE

DATE

DATE

DATE

DATE

DATE

DATE

DATE

**CERTIFIED TRUE COPY
JUDGE M. TODD SIMMONS**

F 346464

TRIAL COURT COPY

State of South Carolina

)

In the Oconee County Summary Court

County of Oconee

)

Offense: Driving Under the Influence F346464

The State

)

JURY VERDICT

Vs.

)

Cody Roy Gordon

)

Defendant

)

We the Jury find the Defendant:

 Not Guilty

 ✓ Guilty

DATE: 9/12/2012

FOREPERSON:

Ashley Shick

Cory R. Davis

Debra Oates Chambers

Lonnie W. Sparks

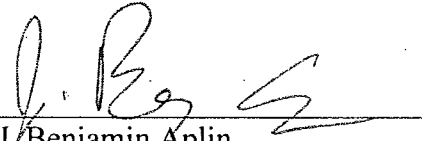
[Signature]

Henry D. A. Lyle

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 7, 2013


J. Benjamin Aplin
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Attorney for Appellant

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2013-000515

THE STATE, ...APPELLANT

v.

CODY ROY GORDON, ...RESPONDENT.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR APPELLANT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in reversing Respondent's magistrate court conviction for driving under the influence where, in compliance with section 56-5-2953 of the South Carolina Code, Respondent's conduct at the incident site was video recorded and the video recording included the field sobriety tests administered by the arresting officer?

STATEMENT OF THE CASE

On October 30, 2011, Respondent was charged with driving under the influence for violating section 56-5-2930 of the South Carolina Code. (R. p.40). On September 12, 2012, Respondent's case was called for trial before the Honorable M. Todd Simmons, Oconee County magistrate judge, and a jury. Respondent was present and was represented by Keith G. Denny, Esquire, of Walhalla. Appellant (the State) was represented by Assistant Solicitor Bethany Ann Blundy of the Tenth Circuit Solicitor's Office. (R. p.30).

Respondent made several pretrial motions, including a motion to dismiss on grounds that the State failed to adhere to the requirements of S.C. Code section 56-5-2953, which required that the officer video record Respondent's conduct at the incident site, including the field sobriety tests administered. The trial judge heard arguments, reviewed the relevant statute, and reviewed recent caselaw from this Court before ruling "the State properly captured on the roadside video [Respondent's] conduct as required by S.C. Code § 56-5-2953 and as interpreted by Murphy"¹ and denying the motion. (R. p.30).

At trial, the State presented testimony from two witnesses: Corporal Mayfied and Lance Corporal Greer of the South Carolina Highway Patrol. The State also introduced several exhibits, including a DVD recording of the roadside video of Respondent's arrest. Following a trial, closing arguments, and deliberations, the jury found Respondent guilty of violating S.C. Code § 56-5-2930 "driving under the influence" (R. p.40). (R. p.41). Respondent was sentenced to thirty (30) days imprisonment suspended upon completion

¹ Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2007).

of 48 hours of public service employment within eight weeks and payment of \$167 in court costs on a scheduled time payment agreement of six weeks. (R. p.30).

Respondent timely appealed his conviction to the Oconee County Court of Common Pleas (Case No. 2012-CP-37-852) and attached a written statement setting forth his grounds for appeal. (R. p.18; p.24). On January 22, 2013, a hearing was convened at the Oconee County Courthouse before the Honorable Alexander S. Macaulay.

Respondent was again represented by Keith G. Denny, Esquire, and the State was represented by Assistant Solicitor Blair Stoudemire of the Tenth Circuit Solicitor's Office. (R. p.1; R. p.27). As grounds for appeal, Respondent argued he should have been granted dismissal of the charge because of "incident site recording violations." He argued that although his body physically appeared in the video recording during the field sobriety tests, he was "in the dark" and that "you cannot see him at his face or his head doing the HGN² test." (R. p.4, lines 1-3). Respondent went on to argue:

In my opinion, as well as I believe the Court would see if he views the video, is that it is impossible to actually see his head. I do not believe that's in compliance with the video. There is absolutely nothing to prevent the Officer from bringing [Respondent] closer to the Trooper's car so that he would be in full visibility and actually having the HGN performed at that point in time. He didn't do it. You can't see it.

(R. p.4, line 8-16). He then provided the judge with two black and white "still shots" or "screen shots" from the video recording in support of his argument and suggested the

² HGN or "horizontal gaze nystagmus" is a standard field sobriety test often administered along with other tests during an investigation of suspected driving under the influence. See State v. Sullivan, 310 S.C. 311, 313, 426 S.E.2d 766, 768 (1993). "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system. The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." Sullivan, 310 S.C. at 315 n.2, 426 S.E.2d at 769 n.2 (internal citations omitted).

trooper may have intentionally “kept him out of visibility of the video.”³ (R. p.4, line 16-p.6, line 22). Without watching the actual video recording of the incident, Judge Macaulay appears to operate under the assumption that the HGN test was in fact “out of sight” during the video recording. Based on this misapprehension, the circuit court granted Respondent’s motion to reverse his conviction and dismissed the charge. (R.p.10, line 10-p.15, line 25).

On February 15, 2013, Judge Macaulay issued a written order finding the magistrate committed an error of law in denying Respondent’s motion to dismiss. He found the “conduct” sought to be recorded during the HGN test was not, in fact, captured on the recording because, “as a matter of law, S.C. Code Ann. [s]ec. 56-5-2953(A) requires that the Defendant’s head must be visible . . . during the administration of the HGN field sobriety test.” Judge Macaulay reversed the conviction for driving under the influence and dismissed the charge with prejudice. (R. p.18). The State timely filed a notice of intent to appeal the circuit court’s order. This Brief of Appellant follows.

³ These “screen shots” were not part of the record before the trial court and appear to have been handed to the circuit court judge by Respondent’s counsel in lieu of the actual video recording introduced at trial as State’s Exhibit #3. The State submits that to the extent the circuit court relied upon these “screen shots” that reliance was in error.

STATEMENT OF FACTS

On October 30, 2011, Respondent was charged with driving under the influence for violating Section 56-5-2930 of the South Carolina Code. (R. p.40). Prior to placing Respondent under arrest, the officer conducted a series of field sobriety tests including: (1) an HGN test; (2) a “walk and turn” test; and (3) a “one leg stand” test.⁴ Respondent’s conduct at the incident site was video recorded by the dashboard camera in the arresting officer’s patrol car. The video recording is a continuous recording and includes all three of the field sobriety tests administered by the officer prior to Respondent’s arrest. Although the lighting is not perfect, Respondent can be seen and heard during the entire six minute and ten seconds recorded prior to his arrest. Respondent’s head is visible during the approximately two-minute long HGN test, and it is clearly visible during a majority of that HGN test because the officer’s flashlight is pointed directly at Respondent. (State’s Exhibit #3: DVD of roadside video). After completing the tests Respondent was placed under arrest. Following a trial, Respondent was convicted of driving under the influence.

⁴ In State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001), the Supreme Court discusses several common field sobriety tests including the “walk and turn” test and the “one leg stand” test in finding that an officer’s personal observations and opinions of a driver’s actions, appearance, and condition constitute direct evidence of driving under the influence.

ARGUMENT

The circuit court erred in reversing Respondent's magistrate court conviction for driving under the influence and dismissing the case with prejudice where, in compliance with section 56-5-2953 of the South Carolina Code, Respondent's conduct at the incident site was video recorded and the video recording included the field sobriety tests administered by the arresting officer.

The State submits the circuit court committed an error of law in reversing Respondent's magistrate court conviction for first offense driving under the influence and dismissing his case with prejudice. The arresting officer complied with the plain and unambiguous requirements of section 56-5-2953, and specifically, subpart 56-5-2953(A)(1)(a)(ii) of the South Carolina Code (Supp. 2012), by video recording Respondent's conduct at the incident site, including the field sobriety tests administered prior to Respondent's arrest. The circuit court erred in finding "that as a matter of law, S.C. Code Ann. [s]ec. 56-5-2953(A) requires that the Defendant's head must be visible . . . during the administration of the [HGN] field sobriety test." Not only does this requirement fail to appear in the plain language of the statute, but interpreting any perceived ambiguity in the statute by adding such a requirement would lead to an absurd result not possibly intended by the Legislature. Furthermore, even if this Court finds support for the circuit court's interpretation of the statute, the factual finding that "[Respondent's] head was not sufficiently visible during the entire administration of the [HGN] test" was nevertheless an error of law because it utterly lacked evidentiary support. For all of these reasons, the State submits the circuit court erred in reversing Respondent's conviction and in dismissing the driving under the influence charge.

Standard of Review

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (Ct. App. 2012); State v. Johnson, 396 S.C. 182, 186, 720 S.E.2d 516, 518 (Ct. App. 2011). 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 circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70 (Supp. 2012). 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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 186, 720 S.E.2d at 518.

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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. 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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. 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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. 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. Johnson, 396 S.C. at 188, 720 S.E.2d at 520.

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) (emphasis added).

Respondent 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. The trial court denied the motion. (R. p.30). On appeal to the circuit court, Respondent argued he should have been granted dismissal because of "incident site recording violations." He claimed that although his body physically appeared in the video recording during the

field sobriety tests, he was “in the dark” and that “you cannot see his face or his head doing the HGN test.” (R.p.4, lines 1-3). Respondent went on to argue:

In my opinion, as well as I believe the Court would see if he views the video, is that it is impossible to actually see his head. I do not believe that’s in compliance with the video. There is absolutely nothing to prevent the Officer from bringing [Respondent] closer to the Trooper’s car so that he would be in full visibility and actually having the HGN performed at that point in time. He didn’t do it. You can’t see it.

(R.p.4, line 8-16) (emphasis added). The circuit court agreed and on February 15, 2013, issued a written order finding the magistrate committed an error of law in denying Respondent’s motion to dismiss. The circuit court judge found the “conduct” sought to be recorded during the HGN test was not, in fact, captured on the recording because, “as a matter of law, S.C. Code Ann. [s]ec. 56-5-2953(A) requires that the Defendant’s head must be visible . . . during the administration of the HGN field sobriety test.” The judge reversed the conviction for driving under the influence and dismissed the charge with prejudice. (R. p.27). The State submits the circuit court’s statutory interpretation constitutes an error of law.

In Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), this Court addressed a similar claim; however, it 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 that 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 since 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, contrary to the findings of the circuit court, the plain language of the amended statute does not require “that the Defendant’s head must be visible . . . during the administration of the [HGN] field sobriety test.” It merely 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 erred in finding otherwise. Here, the arresting officer 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 committed an error of law by interpreting the statute in a way that would lead to an absurd result not possibly intended by the Legislature. 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. This allows a jury to weigh whether the conduct supports the allegation of driving under the influence. 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 comply 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 video recording of the “involuntary jerking of the eyeball,” which is the only relevant observation in an HGN test. Sullivan, supra. 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 an HGN 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. Indeed, the State submits the circuit court judge’s expansive view of the allegedly ambiguous language fails to resolve the issue in favor of a just, equitable, and beneficial operation of the law. To the contrary, it leads to an absurd result not possibly intended by the Legislature. Certainly the Legislature did not intend dismissal of an otherwise valid driving under the influence charge simply because the quality of the video recording does not meet the appellate court’s arbitrary standards. Accordingly, the circuit court judge erred in interpreting section 56-5-2953(A) to require that a defendant’s head be visible during the administration of an HGN test.

Assuming the circuit court judge had not been wrong in interpreting the relevant statute, the circuit court judge’s finding that Respondent’s head was not visible during the HGN test was clearly erroneous and contrary to the evidence presented to him on appeal. Prior to placing Respondent under arrest, the officer conducted a series of field sobriety tests including: (1) an HGN test; (2) a “walk and turn” test; and (3) a “one leg stand” test. Respondent’s conduct at the incident site was video recorded by the dashboard camera in the arresting officer’s patrol car. The video recording is a continuous recording and includes all three of the field sobriety tests administered by the officer prior to

Respondent's arrest. Although the lighting is not perfect, Respondent can be seen and heard during the entire six minute and ten seconds recorded prior to his arrest.

Respondent's head is visible during the approximately two minute long HGN test, and it is clearly visible during a majority of that HGN test because the officer's flashlight is pointed directly at Respondent. (State's Exhibit #3: DVD of roadside video). Thus, the factual finding that "[Respondent's] head was not sufficiently visible during the entire administration of the [HGN] test" was wholly without evidentiary support, and was an error of law.

Conclusion

The circuit court judge's findings regarding the requirements of section 56-5-2953(A) were controlled by an error of law both because they constituted an incorrect interpretation of the statute and because they were unsupported by the evidence.

Therefore, the circuit court judge erred in reversing Respondent's conviction based on those findings. The circuit court's ruling dismissing the driving under the influence charge should be reversed and Respondent's case should be remanded for trial.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court reverse the decision of the circuit court and reinstate Respondent's conviction and sentence for driving under the influence.

Respectfully submitted,

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August 7, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2013-000515

THE STATE, ...APPELLANT

v.

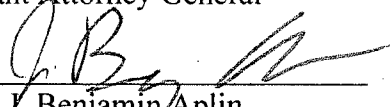
CODY ROY GORDON, ...RESPONDENT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(including social security numbers, names of minor children, financial account numbers, and home addresses).

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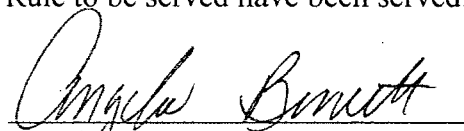
CODY ROY GORDON, ...RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Appellant*, dated August 7, 2013, on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 7th, day of August, 2013.


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STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

Appellate Case No. 2013-000515

THE STATE, APPELLANT,

CODY ROY GORDON, RESPONDENT.

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ISSUE ON APPEAL

- I. WHETHER THE INCIDENT SITE RECORDING STATUTE IN S.C. CODE ANN. SEC. 56-5-2953 IS INEXCUSEABLY VIOLATED WHEN LAW ENFORCEMENT PLACES A DEFENDANT SUSPECTED OF DRIVING UNDER THE INFLUENCE IN THE DARK THEREBY OBSCURING THE DEFENDANT AND THE ADMINISTRATION OF THE HORIZONTAL-GAZE NYSTAGMUS TEST FROM THE INCIDENT SITE RECORDING.

STATEMENT OF THE CASE

On October 29, 2011, Mr. Gordon was stopped at a license and registration checkpoint and was detained on the suspicion of driving under the influence. The checkpoint was administered by the South Carolina Highway Patrol and manned by three (3) officers – although testimony at Mr. Gordon's trial and the South Carolina Highway Patrol Driver/Vehicle Inspection Report introduced at trial indicated on only two (2) officers were present at the checkpoint. Under cross-examination of the supervising officer, Cpl. B.W. Mayfield, it was admitted that another law enforcement officer was present and not reflected on the inspection report. (R. pp. 30-36)

Mr. Gordon was initially detained by L/Cpl. Greer who did not tape the first part of Mr. Gordon's investigative detention. The incident site video starts mid-sentence when L/Cpl. Greer directs Mr. Gordon to walk into the distance where L/Cpl. Greer begins administration the Horizontal-Gaze Nystagmus test. From the video, it is clear that the road was sufficiently blocked and L/Cpl. Greer's patrol car was out of the path of any oncoming traffic which could have presented an exigent circumstance relevant to the incident site recording of the field sobriety tests. In addition, the State did not submit an affidavit asserting the existence of any exigent circumstance which would have caused L/Cpl. Greer to move Mr. Gordon to a distant point in the night's darkness to administer the test. (R. pp. 30-36)

During L/Cpl. Greer's administration of the HGN test, Mr. Gordon's was obscured by the dark and his silhouette was partially visible. Moreover, L/Cpl. Greer's administration of the stimulus in front of Mr. Gordon is indiscernible and Mr. Gordon's upper body is not visible for significant portions of L/Cpl. Greer's administration of test. (R. p. 16, lines 10-13, R. pp. 30-36) Specifically, the incident site video was indiscernible as to the number of passes performed with

the stimulus, the duration of any prescribed hold time for determination of the onset of nystagmus, or the extent to which the stimulus was moved to either side of Mr. Gordon's head. (R. p. 4, lines 1-7) Subsequent to L/Cpl. Greer's HGN test, Mr. Gordon was given the Walk And Turn (WAT) test and the One-Legged Stand (OLS) test. Based on the dashcam video, Mr. Gordon was arrested at 23:55 on October 29, 2011 and read his *Miranda* rights. Mr. Gordon's Uniform Traffic Ticket (F-346464) erroneously listed the date of his violation as October 30, 2011 and the time of violation as 00:31. (R. pp. 30-36)

L/Cpl. Greer kept the patrol car dashcam focused on Mr. Gordon during the drive from the incident site to the Seneca Municipal Police Department for administration of the Datamaster breath analysis test. The dashcam camera skips forward three and a half minutes and then Mr. Gordon is seen back in the patrol car. At trial on cross-examination, L/Cpl. Greer was forced to admit that he took Mr. Gordon first to the Seneca DataMaster and then to the Oconee Law Enforce Center DataMaster. (R. pp. 30-31) When asked for the Seneca DataMaster breath site video, L/Cpl. Greer indicated the Seneca DataMaster machine was inoperable. (R. p. 31) However, no records were presented for any malfunction of the Seneca DataMaster and the video from Mr. Gordon's time at the Seneca DataMaster was not provided by the State. (R. pp. 30-36)

While Mr. Gordon was being transported to the Seneca DataMaster test site and subsequently to the Oconee County Law Enforcement Center DataMaster site ("Oconee DataMaster"), L/Cpl. Greer engaged Mr. Gordon in conversation regarding Mr. Gordon's past arrests while L/Cpl. Greer's dashcam video continued to record the conversation. At the Oconee DataMaster site, Mr. Gordon refused submit to the breath test and was charged with Driving

Under the Influence, 1st Offense and his license was suspended. Mr. Gordon was booked into the Oconee County Detention Center. (R. pp. 30-36)

At trial before the Magistrate M. Todd Simmons, Mr. Gordon's counsel moved to dismiss the charge against Mr. Gordon on several grounds. These grounds included the State's failure to provide a video of Mr. Gordon at the Seneca DataMaster site, the State's failure to record the conduct and administration of the HGN test at the incident site, the State's failure to redact prejudicial statements against Mr. Gordon from the incident site video and Oconee DataMaster breath site video after the Court specifically ordered the State to do so, and the State's failure to provide maintenance records for the Oconee DataMaster equipment pursuant to S.C. Code Ann. Sec. 56-5-2954 because of obvious timing malfunctions with the Oconee DataMaster breath site recording equipment. The magistrate denied defense counsel's motions and Mr. Gordon was subsequently found guilty and sentenced. (R. pp. 30-36).

Mr. Gordon's appeal was timely filed and the above-referenced issues were preserved for appeal. The Honorable Judge Alexander S. Macaulay heard the appeal after receipt of the Return of the Criminal Appeal from Magistrate M. Todd Simmons of the Oconee County Summary Court. (R. p. 1) During arguments, Mr. Gordon's counsel referred to still photos and made them available to the Court and the State. The State reviewed the photos and did not raise any objection to the Circuit Court's consideration of the still photos. (R. p. 6, line 18). Although the record is not fully developed, the record does reflect that Judge Macaulay took a break and conferred with his law clerk wherein Judge Macaulay appeared to review the incident site video at the bench's laptop with the aid of his law clerk. (R. p.6, lines 19 -21).

After returning from his review with his law clerk, Judge Macaulay heard a summary of Mr. Gordon's additional issues on appeal such as the inaccuracies of the dashcam video

recording equipment and the malfunctioning timestamps of the video recording equipment at the Datamaster breath analysis site. (R. pp. 6-10) Judge Macaulay requested the State to specifically address the incident site video issue raised by Mr. Gordon's counsel. (R. p. 10, line 7) Judge Macaulay surmised that if the State performed the HGN test, then the State was relying on the test. Furthermore, if the State was relying on the test then it needed to be [r]eadable, viewable." (R. p.11, line 17).

In response and relying on *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), the State argued that as long as the defendant was partially visible on the video then the incident site recording statute requirements were satisfied. (R. p.12, lines 16 – 19). Other than arguing that partial conduct was sufficient, the State failed to argue or raise for the Court's consideration any other field sobriety tests which were performed. (R. p.14, lines 8 – 12). The Court inquired of the State of any additional sobriety tests that were performed to supplement the HGN test and the State did not identify any additional test or present argument for any other test to supplement the Court's consideration of the validity of the HGN test administration. (R. p.14, lines 17 – 20).

In granting Mr. Gordon's motion to dismiss, Judge Macaulay stated that the incident site video must include any field sobriety test administered. Moreover, by "includes" it must be reliable in the sense that it does have the representation that "can be discerned what is going on." (R. p.16, lines 5 – 8). In addition, if law enforcement is going to use the HGN test then they can bring the defendant closer to the vehicle rather than in the outer edge of the lighted area. (R. p.16, lines 10 – 13). The State timely filed a Notice of Appeal and this appeal follows.

STATEMENT OF FACTS

On October 29, 2011, Mr. Cody Roy Gordon was stopped at a license and registration checkpoint administered by the South Carolina Highway Patrol. At the incident site, L/Cpl. Greer administered field sobriety tests. There were no exigent circumstances that required deviation from the statutory obligation for incident site video recording. At the incident site, L/Cpl. Greer placed Mr. Gordon in the distance beyond the discernible view of the patrol car's dash cam resulting in an obscured video. Not only is Mr. Gordon's conduct obscured but L/Cpl. Greer's administration of the HGN test is not discernible. (R. pp. 30-31) Mr. Gordon was arrested for Driving Under the Influence, 1st Offense and was taken into custody prior to midnight on October 29, 2011. (R. p. 30) After arrest, Mr. Gordon was transported to the Seneca Municipal DataMaster site for a breath analysis and subsequently transported to the Oconee County Law Enforcement Center for a breath analysis. (R. p. 31) The patrol car dashcam video continued to record Mr. Gordon's entire transport sequence and included a break in the video recording indicating the stop of the Seneca Municipal DataMaster site. (R. pp. 30-31).

The incident site video recording and the only DataMaster breath analysis site video provided by the State both included multiple instances of prejudicial statements made by Mr. Gordon. Magistrate Simmons ordered the State to redact both videos; however, the State failed to redact them and the Defendant's prejudicial statements were presented by the State to the jury over defense counsel's objections. At trial, Mr. Gordon's counsel objected and moved for dismissal based on the above-referenced issues and multiple instances of equipment malfunctions resulting in inaccuracies. (R. pp. 30 - 36).

Mr. Gordon was convicted of Driving Under the Influence, 1st Offense and sentenced by Magistrate M. Todd Simmons. Mr. Gordon timely filed a Notice of Appeal to the Court of

Common Pleas for the Tenth Judicial Circuit. (R. pp. 30-36). On appeal, the Honorable Alexander S. Macaulay heard the issues preserved for appeal from the trial court. After hearing arguments and reviewing the matter, Judge Macaulay dismissed with prejudice Mr. Gordon's conviction. (R. pp. 27 – 29) The Circuit Court's finding was that if the State was going to rely on a field sobriety test then the test must include the representation of the test being administered and that the conduct and administration must be discernible. (R. p.16, lines 5 – 8) This appeal follows.

ARGUMENT

- I. INTENTIONALLY PLACING A DRIVER SUSPECTED OF DRIVING UNDER THE INFLUENCE IN THE DARK, WITHOUT EXIGENT CIRCUMSTANCES, TO CONDUCT THE HORIZONTAL GAZE NYSTAGMUS VIOLATES THE SOUTH CAROLINA INCIDENT SITE RECORDING STATUTE WHEN THE VIDEO IS NOT DISCERNIBLE AS TO THE DEFENDANT'S CONDUCT OR THE TEST ADMINISTRATION; THEREFORE, THE CIRCUIT COURT DID NOT ERR BY DISMISSING WITH PREJUDICE THE RESPONDENT'S CONVICTION.

The circuit court reviews appeals from the magistrate court pursuant to S.C. Code Ann. Sec. 18-3-10 (Supp. 2004). The circuit court, acting as the appellate court, reviews the matters raised in the notice of appeal. S.C. Code Ann. Sec. 18-3-70 (Supp. 2004). *State v. Bailey*, 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006). In criminal appeals, the circuit court does not conduct a de novo review; rather, it reviews the case for preserved errors raised to it by an appropriate exception. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011) (citing *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011)). The Court of Appeal's review is limited to correcting the circuit court's order for errors of law. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). Moreover, the Court of Appeals 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).

South Carolina law provides that a driver suspected of driving under the influence who is given field sobriety tests must have his conduct videotaped at the incident site unless a statutory exception exists and the exception documented with a sworn affidavit. S.C. Code Ann. Sec. 56-5-2953(A) – (B). The issues of what conduct must be actually present on the incident site video as well as the implicit acts of law enforcement have been reviewed by this Court and the South Carolina Supreme Court. In *Town of Mount Pleasant v. Roberts*, the South Carolina Supreme

Court evaluated the effect of the local municipality willfully avoiding compliance with the State statute mandating incident site video recording. Although acknowledging that statutory exceptions exists for noncompliance with S.C. Code Ann. Sec. 56-5-2953, the Court found that the municipality's "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." *Id.* at 347, 713 S.E.2d at 285.

In *Murphy v. State*, 392 S.C. 626, 632, 709 S.E.2d 685, 688 (Ct. App. 2011), this Court evaluated whether the incident site video must contain a continuous full view of the accused and capture all field sobriety tests. This Court held that "provided all other requirements are met, the video need only record the accused's conduct." *Id.* This Court determined that the 'conduct' required to be captured on the incident site video was the accused's "behavior, action or demeanor." *Id.* at 631, 709 S.E.2d at 688.

In *State v. Elwell*, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011), *aff'd* 052913 SCSC, 27259, this Court evaluated whether the statutory twenty-minute pre-test observation period was required when there is a refusal to take the breathalyzer test. In determining that the observation period was not required, this Court made a clear determination that the legislative intent for the S.C. Code Ann. Sec. 56-5-2953 was to "reduce the number of DUI trials heard as swearing contests" between the State and the defendant. *Elwell* at 336, 721 S.E.2d at 454. This Court further clarifies this point by adding footnote 6 wherein the Court states: "The statute protects both the State *and the defendant* from sometimes unreliable memories of those testifying at trial." *Elwell* at 337, 721 S.E.2d at 455, n6.

Here, this case presents a novel question: Should the State be allowed to position the defendant in a manner that *obscures* the defendant's performance during a field sobriety test and

makes the test administration indiscernible and *then allow the State to use its sole impression* of the test administration against the defendant at trial? It is inconceivable to believe that the South Carolina Legislature would have intended to implement an incident site recoding statute crafted with such precise language if all law enforcement had to do was 1) turn on the incident site video camera, and then 2) move the defendant so far away from the camera that the defendant's responses and test administration are barely visible and, at times, completely obscured by no fault of the defendant and where suitable lighting alternatives exist. Indeed, the plain language of S.C. Code Ann. Sec. 56-5-2953 expressly provides for exceptions and the method to document the exceptions. Where no exceptions exist, the proper remedy is dismissal. *Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). To allow law enforcement such an abuse would strip away the defendant's constitutional freedom from being forced to testify at trial about the defendant's recollection of events in contrast to law enforcement's recollection. In essence, this is the precise situation that this Court believed that the Legislature intended to avoid as enunciated in *Elwell*.

Analysis

- A. The Circuit Court's dismissal was not an error because L/Cpl. Greer moved Mr. Gordon out of the lighted view of the incident site video recorder to administer the Horizontal Gaze Nystagmus (HGN) resulting in defendant's conduct to be obscured and the HGN test administration indiscernible.

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 South Carolina Supreme Court established that dismissal is an appropriate remedy for violations of S.C. Code Ann. Sec. 56-5-2953(A) where

the violation is not mitigated by an exception outlined in S.C. Code Ann. Sec. 56-5-2953(B). *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007).

In developing the incident site recording statute, the Legislature used unambiguous terms that require the alleged violator's *conduct* to be recorded during the *administration of any* field sobriety tests. 'Conduct' is defined as: "personal behavior, whether by action or inaction; the manner in which a person behaves." Black's Law Dictionary 315 (8th ed. 2004). With regards to the HGN field sobriety test, the investigating officer is trained to order the driver to conform to specific conduct in order for the HGN test to be administered. The driver's conduct during the HGN test administration and the investigating officer's perception of the tests results are used routinely used by the State at trial.

Specifically, the investigating officer is trained to provide the following instructions: "I am going to check your eyes. Keep your head still and follow this stimulus with your eyes only. Keep following the stimulus with your eyes until I tell you to stop." Moreover, the investigating officer is trained to have the driver 1) place their feet together, 2) keep their hands at their sides and 3) look straight ahead and keep their head still. DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing Student Manual VIII-6 (2006). When the investigating officer actually conducts the HGN test, the officer is required to perform a minimum number of passes of a stimulus in front of the driver's eyes with each pass to be performed within a recommended time for holding the driver's eyes in a given position. According to the National Highway Traffic Safety Administration, interpretation of the results are valid only when 1) the tests are administered in the prescribed manner, 2) the standardized clues are used to assess the driver's performance, and 3) the standardized criteria are employed to interpret the performance. DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing Student

Manual VIII-19 (2006). Simply stated, if the HGN test is not administered correctly, then the results are not reliable.

In *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 345, 713 S.E.2d 278, 284 (2011), the Town of Mount Pleasant sought to avoid compliance with S.C. Code Ann. Sec. 56-5-2953 because the Town was not obligated by statute to purchase cameras for its patrol cars nor was the Town obligated to request additional videotape equipment from the Department of Public Safety. In that case, the South Carolina Supreme Court made it clear that the legislative purpose behind the videotape requirement was “to create direct evidence of a DUI arrest.” *Id.* at 347, 713 S.E.2d 278, 285 (2011). The Court reviewed whether the intentional avoidance by the Town to not equip their patrol cars with video recording equipment was a sufficient exception to the incident site recording statute. The Court held that the municipality’s willful failure to equip their cars violated the Legislature’s intention of a statutory-obligation to have a video of a DUI arrest. *Id.* at 347-48, 713 S.E.2d 278, 285-86 (2011). The Court found the town’s explanations to be disingenuous because the reasons seemed to imply that law enforcement could circumvent the incident site recording statute by purposefully not requesting cameras. *Id.*

In this case, the State takes a similarly disingenuous approach. By all outward appearances, the statutory aspects of S.C. Code Ann. Sec. 56-5-2953(A) appear to have been met. However, L/Cpl. required Mr. Gordon to stand so far in the dark that any discernible review of L/Cpl. Greer’s administration of the HGN test and Mr. Gordon’s conduct during the test has been negated resulting in a useless video for Mr. Gordon’s defense. (R. p. 14, lines 17-20) *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.”). The Circuit Court posited to the State during the appeal, if the State is going to

administer the test, then the State is intending to rely on the test. And if the State is going to rely on the test, the test needs to be visible. (R .p.11, lines 11 – 15. Allowing law enforcement to force a defendant to stand outside the discernible viewing area of the incident site recorder during administration of a field sobriety test, without a valid exception, is a disingenuous method to circumvent the recording statute.

Therefore, the Circuit Court's dismissal with prejudice of Mr. Gordon's conviction was not an error because a valid exception did not exist to support the State's failure to adequately provide the incident site video showing Mr. Gordon's conduct and HGN test in a discernible manner.

- B. An issue that has not been raised and ruled on by the lower court may not be presented for consideration for the first time on appeal; therefore, the State's objection to the Circuit Court's consideration of still photographs and the culmination of additional field sobriety tests are not reviewable issues by this Court.

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) (citing *Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007) (citing *Williams v. Williams*, 329 S.C. 569, 579, 496 S.E.2d 23, 29 (Ct.App.1998) , *rev'd* on other grounds, 335 S.C. 386, 517 S.E.2d 689 (1999) ("The circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party."); *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992) (circuit court sitting on appeal did not address

an issue and Wal-Mart made no motion pursuant to Rule 59(e), SCRCP , to have the court rule on the issue; thus the allegation was not preserved for further review by the Court of Appeals).

The State now argues for the first time on appeal that the Circuit Court considered the still photographs as the only basis for supporting the decision to reverse and dismiss Mr. Gordon's conviction. The record is absent of any objection preserving the Circuit Court's review of this issue to this Court. (R. p. 6, lines 18-22) In addition, there were no motions for reconsideration pursuant to SCRCP Rule 59(e) that would have preserved this issue for the Court of Appeals. Failure of the State to timely raise an objection requires that this Court to now review an issue that was not presented to the lower court for a ruling. Because that issue was not properly preserved, it cannot be raised for the first time on appeal to this Court. *Id.*

Next, the State contends that the Circuit Court's lacked any evidentiary support to find that Mr. Gordon's head was not sufficiently visible during the administration of the HGN test. In addition to not properly raising this issue for consideration, the State, in its Initial Brief of the Appellant, admits that during some part of the HGN test Mr. Gordon's head is not visible. Moreover, the Circuit Court clearly states that in its finding that the video must "include" which "means that is it must be reliable in the sense that it does have the representation . . . you can discern what is going on." (R. p.16, lines 5 - 8). Although the Circuit Court provided its justification and identified that the trooper could have brought Mr. Gordon closer to the car, the State for the first time in this appeal is challenging the basis of the Circuit Court's decision. Again, the State never raised the issue to the lower court for a determination and ruling. The record is absent of any objection or clarification by the State to the basis of the Circuit Court's decision. Therefore, this issue is not properly preserved for appeal. *Id.*

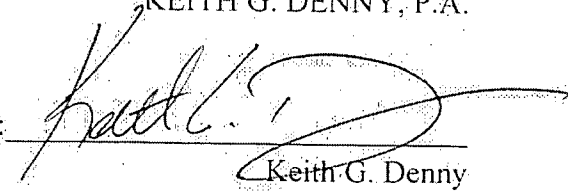
Finally, the record reflects that the State failed to make any argument regarding consideration of any other field sobriety test. However, the State, in its brief, relies upon the additional tests for reversal of the Circuit Court. The Circuit Court had the complete Return from the trial court for its review. (R. pp. 30-36). Moreover, the record reflects that Judge Macaulay took a break to perform a review when Mr. Gordon's counsel addressed the deficiencies in the lighting present in the incident site video. (R. p. 6, lines 19-21). While the record is not clear the specific intent of the Circuit Court's review with his law clerk of the Return, the State never addressed this issue to the lower court. Therefore, this issue of whether the Circuit Court had a sufficient evidentiary basis to render its decision is not properly preserved for this Court.

CONCLUSION

For the reasons set forth above, Mr. Gordon respectfully requests this Court to deny the State's appeal and affirm the Circuit Court's dismissal with prejudice of his conviction of Driving Under the Influence, 1st Offense.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

Walhalla, South Carolina
August 21, 2013

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Appellant,

v.

Cody Roy Gordon, Respondent.

Appellate Case No. 2013-000515

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5226
Heard March 6, 2014 – Filed April 23, 2014
Withdrawn, Substituted, and Refiled June 11, 2014

**AFFIRMED IN PART, VACATED IN PART, AND
REMANDED**

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia, for Appellant.

Keith G. Denny, of Keith G. Denny, P.A., of Walhalla,
for Respondent.

KONDUROS, J.: The State appeals the circuit court's reversal of the magistrate court's conviction of Cody Roy Gordon for driving under the influence (DUI). It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A) of the South Carolina Code (Supp. 2013) because Gordon's head was

not visible on the required recording during one of the field sobriety tests administered. We affirm in part, vacate in part, and remand.

FACTS

On October 29, 2011, the South Carolina Highway Patrol stopped Gordon at a license and registration checkpoint. Officers administered three tests to determine if Gordon was under the influence: the Horizontal-Gaze Nystagmus (HGN) test¹, the walk and turn test, and the one-leg stand test. Following the tests, the officers charged Gordon with DUI. The dashboard camera in the arresting officer's car recorded the events leading to the arrest.

Prior to a trial before the magistrate court, Gordon moved to dismiss the charge on several grounds, including the State's failure to sufficiently record the HGN test because Gordon's head was not visible on the recording during the test. The magistrate denied the motion to dismiss, finding the State properly captured Gordon's conduct on the recording as required by section 56-5-2953 of the South Carolina Code (Supp. 2013) and *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Following a trial, a jury convicted Gordon of DUI.

Gordon appealed his conviction to the circuit court. At the hearing before the circuit court, Gordon argued the HGN test could not be seen on the recording. Gordon provided black and white photographs ("stills") of the recording to the circuit court without objection by the State. Following the conclusion of arguments, the circuit court granted Gordon's motion to dismiss. The court found section 56-5-2953(A) requires the defendant's head be visible during the administration of the HGN test, unless an exception in section 56-5-2953(B) applies. The court noted Gordon was "so far out of view in front of the arresting officer's patrol car for the administration of the test and into the dark[,] which

¹ "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system." *State v. Sullivan*, 310 S.C. 311, 315 n.2, 426 S.E.2d 766, 769 n.2 (1993). "The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." *Id.*

prevented [Gordon's] head from being sufficiently visible through the entire administration of the [HGN] test." This appeal followed.

STANDARD OF REVIEW

"In criminal appeals from magistrate . . . court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70 (2014) ("The appeal [from the magistrate court in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). This court will review the decision of the circuit court for errors of law only. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); *Henderson*, 347 S.C. at 457, 556 S.E.2d at 692. "[Q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013) (internal quotation marks omitted). The circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. *Id.*

LAW/ANALYSIS

The State argues the circuit court erred in reversing the magistrate court's conviction of Gordon for DUI. It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A)(1)(a)(ii) of the South Carolina Code (Supp. 2013) because Gordon's head was not visible during the HGN test.² It

² The State also contends the circuit court did not review the recording. However, the record does not indicate whether the circuit court reviewed the recording or not. Gordon indicated at the hearing that all of the evidence had been submitted to the circuit court. The record provides the circuit court conferred with its law clerk off the record after receiving the stills. Gordon asserts that at this time, the circuit court appeared to review the recording on its laptop on the bench with the assistance of its law clerk. The transcript of the hearing states no exhibits were introduced. The State did not put on the record the fact that the circuit court allegedly did not view the recording or raise any objection to the court allegedly

asserts the statute requires the recording include the field sobriety tests but not that the defendant's head must be visible. It further maintains that even if it is a requirement of the statute, the circuit court's factual finding that Gordon's head was not sufficiently visible during the HGN test lacked evidentiary support.

Section 56-5-2953(A) provides:

A person who [commits the offense of DUI] must have his conduct at the incident site . . . video recorded.

(1)(a) The video recording at the incident site must . . .

(ii) include any field sobriety tests administered

"As amended in 2009, the current version of section 56-5-2953 expressly requires the recording of field sobriety tests." *Murphy v. State*, 392 S.C. 626, 632 n.4, 709 S.E.2d 685, 688 n.4 (Ct. App. 2011) (citing S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2010) ("The video recording at the incident site must: . . . include any field sobriety tests administered." (alteration by court))).

In *Murphy*, the defendant contended "the videotape of the incident [s]ite d[id] not comply with the statute because it fail[ed] to 'record most of the field sobriety tests.'" *Id.* at 631, 709 S.E.2d at 688. The court applied the prior version of section 56-5-2953, which was in effect at the time of the defendant's arrest, and found "the 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." *Id.* at 632, 709 S.E.2d at 688. The version of the statute applied in *Murphy* did not include the explicit requirement that it "include any field sobriety tests administered" as the current version does. § 56-5-2953(A)(1)(a)(ii).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text

not reviewing the recording. The appellant has the burden of providing a sufficient record. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). Generally, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. Accordingly, we cannot consider the State's assertion the circuit court did not review the recording.

of a statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the state." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, 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). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 342-43, 713 S.E.2d at 283.

The purpose of section 56-5-2953 is to create direct evidence of a DUI arrest. *Town of Mt. Pleasant*, 393 S.C. at 347, 713 S.E.2d at 285. Dismissal of a DUI charge is an appropriate remedy provided by section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Town of Mt. Pleasant*, 393 S.C. at 348, 713 S.E.2d at 286. "By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance." *Id.* at 349, 713 S.E.2d at 286.

The circuit court properly found the magistrate erred in finding the recording was only required to show the conduct of the defendant. The magistrate relied on *Murphy* in making that determination. Although *Murphy* holds that only the conduct of the defendant must be recorded, *Murphy* was based on a prior version of the statute, which did not include the specific language regarding the tests being recorded. The current version of the statute states: "The video recording at the incident site must . . . include any field sobriety tests administered" § 56-5-2953(A)(1)(a)(ii). Because 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. Accordingly, the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding.

However, because the magistrate court found the recording only needed to capture the conduct, it did not make any findings as to whether the entire test, including the head, was on camera. The circuit court found Gordon's head was not "sufficiently visible through the entire administration of the [HGN] test." But "the circuit court, sitting in its appellate capacity, may not engage in fact finding." *City of Greer v. Humble*, 402 S.C. 609, 618, 742 S.E.2d 15, 20 (Ct. App. 2013) (quoting *Rogers v. State*, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004)). Because the circuit court engaged in fact finding and the magistrate never made such findings due to its misconstruction of the statute, we vacate the circuit court's finding Gordon's head was not visible and remand the case to the magistrate court.³ The magistrate court is to make factual findings in light of the circuit court and our determination that the test must be recorded on camera; specifically for the HGN test, the head has to be visible on the recording.⁴

³ The dashcam recording that was available to the circuit court and the magistrate court was part of the record on appeal. This court viewed the recording, but our standard of review, just like the circuit court's standard of review in this matter, does not allow us to make findings of fact. That duty is left solely to the magistrate court. Accordingly, we will not make findings as to what the recording shows.

⁴ Because we find the circuit court erred in making findings of fact, we need not address the State's argument the circuit court erred in reviewing the stills. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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

Appellate Case No. 2013-000515

THE STATE, ...APPELLANT,

v.

CODY ROY GORDON, ...RESPONDENT.

PETITION FOR REHEARING

On April 23, 2014, this Court issued a published opinion which affirmed in part, vacated in part, and remanded the circuit court's reversal of the magistrate court's conviction of Respondent Cody Roy Gordon for driving under the influence (DUI). State v. Gordon, Op. No. 5226 (S.C. Ct. App. filed April 23, 2014) (Shearouse Adv. Sh. No. 16 at 71). Appellant (the State) respectfully petitions the Court for rehearing pursuant to Rule 221(a), SCACR. The State hereby seeks rehearing on the grounds that the Court may have misapprehended or overlooked: (1) the absolute impropriety of the intermediate appellate court admitting evidence not contained in the record and then

basing its decision on that evidence, regardless of whether the State raised an objection to these improper actions during the appellate proceeding; and (2) the clear and unambiguous language of the statute, which is devoid of any requirement that “the head must be visible on the recording” of an HGN field sobriety test. For these reasons, the State respectfully asks this Court to grant this petition for rehearing and issue an opinion reversing the decision of the circuit court and reinstating Gordon’s magistrate court conviction for DUI.

Statement of the Case & Statement of Facts

The procedural history and the statement of facts recited in the Final Brief of Appellant are hereby incorporated by reference.

Argument

First, the State submits this Court may have misapprehended or overlooked the impropriety, while acting in an appellate capacity, of the circuit court admitting evidence not contained in the record and then basing its decision on that evidence. See State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (Ct. App. 2012) (“In a criminal appeal from the magistrate court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception.”); Rogers v. State, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004) (“[T]he circuit court, sitting in its appellate capacity, may not engage in fact finding.”); State v. Brown, 358 S.C. 382, 387-88, 596 S.E.2d 39, 41 (2004) (finding error when an appellate court considered facts not included in the magistrate’s return); Id. at 388, 596 S.E.2d at 41 (stating the “magistrate’s return is the official record of trial proceedings” (citing State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984))). There is no dispute the two black and

white “stills” or “screen shots” from the video recording were not part of the magistrate’s return and therefore are not part of the official record of the trial proceedings. They were offered by Gordon for the first time during the appellate proceeding and were considered by the circuit court before rendering its decision. This was improper, and provided sufficient grounds to reverse the circuit court’s decision and reinstate Gordon’s conviction.

This Court found the issue was “unpreserved for our review because the State did not object to the circuit court’s consideration of the photographs at the hearing”; however, it relied exclusively on rules regarding the preservation of trial court errors for consideration on appeal. Here, the case was already on appeal when the intermediate appellate court improperly considered the photographs submitted by Gordon. Thus, it was not a situation where the State failed to object to a trial court error. Indeed, the State never had the opportunity to raise an objection to the trial court because the photographs were not introduced at trial. Consequently, standard error preservation rules do not apply. The State submits that under appellate court rules this Court could have affirmed the underlying conviction because, regardless of any objection, the circuit court’s appellate error appears in the Record on Appeal. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); see also Upchurch v. New York Times Co., 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) (“We may affirm the trial judge for any reason appearing in the record.”).

Second, the State submits this Court may have misapprehended or overlooked the clear and unambiguous language of the statute, which does not include any requirement

that “the head must be visible on the recording” of an HGN field sobriety test. Both the circuit court and this Court erred in concluding otherwise and, as a result, misapplied the standard of review. Not only does this requirement fail to appear in the plain language of the statute, but interpreting any perceived ambiguity in the statute by adding such a requirement would lead to an absurd result not possibly intended by the Legislature. Thus, the circuit court erred in reversing Gordon’s conviction and in dismissing the DUI charge.

In a criminal appeal from the magistrate’s court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (Ct. App. 2012); State v. Johnson, 396 S.C. 182, 186, 720 S.E.2d 516, 518 (Ct. App. 2011). 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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 186, 720 S.E.2d at 518. 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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. 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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. 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); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519.

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 . . . (ii) include any field sobriety tests administered.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2012) (emphasis added). The statute merely requires that the “conduct at the incident site” be recorded and goes on to specify that such conduct must “include any field sobriety tests administered.” Here, Gordon argued to the trial court that his head was not visible during the video recording of the HGN field sobriety test and that this violated the terms of the statute. The trial court reviewed the video recording and found it sufficiently captured Gordon’s conduct. No more detailed finding was required. The trial court’s reference to Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), which itself notes the statutory language had been amended, shows the trial court was aware of the specific requirement that the video recording include the field sobriety tests and still found the video was sufficient. This Court criticizes the trial court’s failure to make any findings “as to whether the entire test, including the head, was on camera.” However, no such finding was required by the statute, and if the statutory language implies the requirement, then the trial court’s finding regarding Gordon’s conduct encompasses that finding. If the circuit court applied the proper standard of review on appeal, it should have affirmed the trial court because its finding was supported by evidence in the record.

Contrary to the findings of the circuit court and this Court, the plain language of the amended statute does not require that the Defendant's "head must be visible" . . . during the administration of the HGN field sobriety test. It merely 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 statute 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 erred in finding otherwise. Here, the arresting officer acted in compliance with the plain terms of section 56-5-2953.

Even if this Court finds the statute is somehow ambiguous, the State nevertheless submits it may have misapprehended the statute in a way that would lead to an absurd result not possibly intended by the Legislature. 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. This allows a jury to weigh whether the conduct supports the allegation of driving under the influence. 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. Pursuant to Murphy and its analysis of the predecessor statute, an officer could comply 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 video recording of the "involuntary jerking of the eyeball," which is the only relevant observation in an HGN test. Sullivan, supra. 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 an HGN 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. Indeed, the State submits this Court's expansive view of the allegedly ambiguous language would fail to resolve the issue in favor of a just, equitable, and beneficial operation of the law. To the contrary, it

leads to an absurd result not possibly intended by the Legislature. Certainly the Legislature did not intend dismissal of an otherwise valid DUI charge simply because the quality of the video recording does not meet the intermediate appellate court's arbitrary standards.

As noted by this Court, "the purpose of section 56-5-2953 is to create direct evidence of a DUI arrest." As implicitly found by the trial court, that purpose was fulfilled. The video recording of the three field sobriety tests provided the State, the defendant, and the jury with direct evidence of Gordon's arrest, as well as his conduct at the incident site. This Court logically concludes that: "if the actual tests cannot be seen on the recording, the requirement is pointless"; however, it then makes the unreasonable leap of concluding that "the head has to be visible" during the HGN test. The State submits that under this Court's analytical process, showing the head would also be "pointless" because an HGN test concerns movement of the eyeballs, not the head. Certainly the Legislature did not intend that the arresting officer videotape a defendant's eyeballs during an HGN test. If it did it would have said so explicitly in the statute. The State submits that superimposing any specific or detailed requirement onto the video recording statute beyond what is actually required, which is simply a recording of all field sobriety tests administered, would be absurd.

This Court also notes that "the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." But here, there is NO mandatory provision that the head must be visible. Instead, the mandate is only that "conduct at the incident site" be recorded, including "any field

sobriety tests administered.” As found by the trial court, that mandate was met. If any evidence supports that finding, the circuit court was required to affirm.

For all of these reasons, the State submits the circuit court judge erred in interpreting section 56-5-2953(A) to require that a defendant’s head be visible during an HGN test. By video recording Gordon’s conduct at the incident site, including the field sobriety tests administered prior to Gordon’s arrest, the arresting officer complied with the plain and unambiguous requirements of section 56-5-2953 of the South Carolina Code.

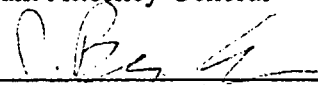
WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Appellant, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order reversing the decision of the circuit court and reinstating Gordon’s conviction and sentence for driving under the influence.

Respectfully submitted,

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Attorney General

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BY:


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ATTORNEYS FOR APPELLANT

Columbia, South Carolina
May 6, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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

Appellate Case No. 2013-000515

THE STATE, ...APPELLANT,

v.

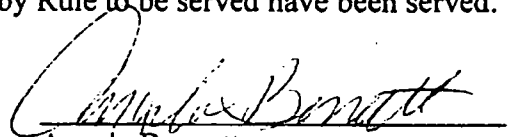
CODY ROY GORDON, ...RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Petition for Rehearing*, dated May 6, 2014, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Keith G. Denny, Esquire
Keith G. Denny, P.A.
Post Office Box 101
Walhalla, SC 29691

I further certified that all parties required by Rule to be served have been served.
This 6th, day of May, 2014


Angela Bennett
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STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

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

Appellate Case No. 2013-000515

THE STATE, ...APPELLANT,

v.

CODY ROY GORDON, ...RESPONDENT.

RETURN TO MOTION

PROCEDURAL HISTORY

On October 29, 2011, Mr. Gordon was arrested and charged with Driving Under the Influence, 1st 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, 1st 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).

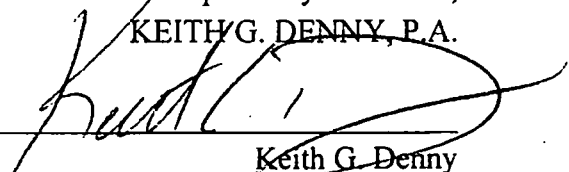
In contrast, it is undisputed in the Record that the State admitted that Mr. Gordon was not visible during the entire performance of the HGN and that the State relied on the officer’s testimony of the officer’s administration and results of the HGN in prosecuting Mr. Gordon. Pursuant to the laws of this 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,
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ATTORNEY FOR RESPONDENT

Walhalla, South Carolina
May 15, 2014

STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

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

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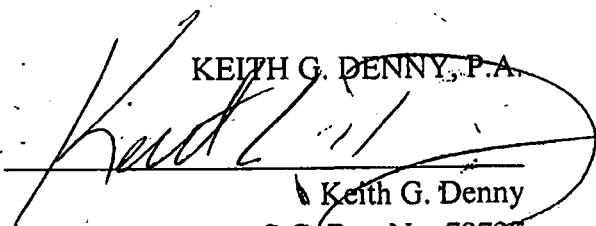
CODY ROY GORDON RESPONDENT.

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

KEITH G. DENNY, P.A.



Keith G. Denny
S.C. Bar No. 79727

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ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State, Appellant,

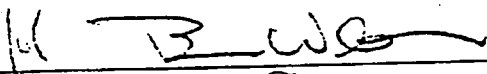
v.

Cody Roy Gordon, Respondent.

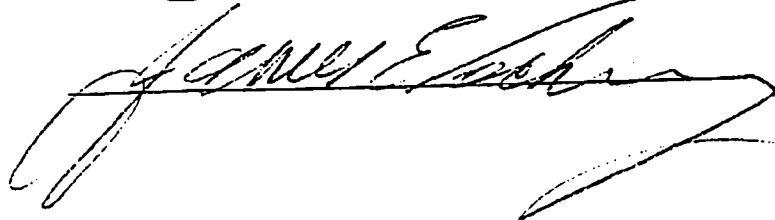
Appellate Case No. 2013-000515.

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied, but the attached opinion is substituted for the previous opinion, which is withdrawn.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Keith G Denny, Esquire

John Benjamin Aplin, Esquire

FILED

Dec 11, 2014