

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal From Greenville County  
Edward W. Miller, Circuit Court Judge

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THE STATE,

Respondent,

vs.

WILMOND VINCENT MATHIS,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUE ON APPEAL**

Magistrate's Court did not err in denying the motion to dismiss based on the failure of the arresting officer's body microphone to activate since an audio recording by a body microphone is not required by statute; Appellant failed to provide a sufficient record for review; and the Magistrate's ruling was not final and therefore, the issue should not be reviewed.

## **STATEMENT OF THE CASE**

Appellant Mathis was charged with driving under the influence pursuant to S.C. Code § 56-5-2930. Mathis proceeded to jury trial before the Honorable Darrell Fisher, Magistrate for Greenville County. The instant appeal concerns a pre-trial motion denied by Magistrate Fisher. The jury found Mathis guilty as charged.

Mathis appealed to the Court of Common Pleas and the conviction and sentence was upheld by the Honorable Edward W. Miller. Mathis appealed to this Court. The State's brief follows.

## **STATEMENT OF FACTS**

Because a trial record was not submitted in the record for review by the circuit court, no facts are contained in the record.

## ARGUMENT

**Magistrate’s Court did not err in denying the motion to dismiss based on the failure of the arresting officer’s body microphone to activate since an audio recording by a body microphone is not required by statute; Appellant failed to provide a sufficient record for review; and the Magistrate’s ruling was not final and therefore, the issue should not be reviewed.**

Mathis argues the Magistrate erred in denying his pre-trial motion to dismiss the DUI charge because the law enforcement officer’s body microphone was not operating while sobriety tests and Miranda warnings were given. Mathis argued the lack of an audio recording violates the requirements of S.C. Code §56-5-2953. A video recording was produced at trial showing Mathis’ performance during the sobriety tests and also showing the officer administering the Miranda warnings. No part of §56-5-2953 requires a law enforcement **officer** to be equipped with a sound recording device. Further, Mathis has failed to provide a sufficient record to determine if under the totality of circumstances, the lack of audio is justified. Finally, the pre-trial ruling was only a preliminary ruling and since the record does not indicate a final ruling, the issue is not preserved for this Court’s review.

Under the plain language of the statute, law enforcement complied with §56-5-2953. “The legislature’s intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute’s operation.” State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

Section 56-5-2953(A) requires:

A person who violates Section 56-5-2930 . . . 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 . . . **and show** the person being advised of his Miranda rights.

(Emphasis added).

Section 56-5-2953(B) requires the officer to produce the video recording or submit an affidavit explaining the failure to produce the videotape. Section (B) also provides exceptions to these requirements, including an exception where the trial court finds the failure to produce a video reasonable under the totality of the circumstances.

Since the Appellant's brief was submitted, the Supreme Court has rendered its decision in State v. Phillip Wesley Sawyer, Op. No. 27393 (S.C. Sup. Ct., filed June 4, 2014). In Sawyer, a video recording at the breath site showed Sawyer's conduct and the reading of warnings, but the audio recording failed. The Court analyzed and implicitly provided its approbation to this Court's opinion in Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). The Supreme Court found that although audio recordings are unnecessary to record a defendant's conduct at the breath site, it is required for the purpose of a defendant being read his Miranda rights and informed consent rights at the breath site. A silent video would not meet these statutory requirements. Id. However, the Supreme Court

noted a silent tape of a defendant's conduct during the twenty-minute waiting period "would be acceptable under Murphy." Saywer, supra.

A review of the entirety of Section 56-5-2953 makes clear that only the patrol car, **not the officer**, must be equipped, and that the legislature contemplated visual and not audio recordings at the incident site.

Under section 56-5-2953(D):

The Department of Public Safety is responsible for purchasing, maintaining, and supplying all videotaping equipment **for use in all law enforcement vehicles** used for traffic enforcement. The Department of Public Safety also is responsible for monitoring all law enforcement vehicles used for traffic enforcement to ensure proper maintenance of video recording equipment.

(Emphasis added).

Under section 56-5-2953(G), the statute becomes effective "for each law enforcement **vehicle** used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device." (Emphasis added).

In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).<sup>1</sup> Reading the statute as a whole, it is

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<sup>1</sup> Mathis mistakenly claims that the statute is a penal statute and that it should be construed against the State. However, it is not a penal statute as it does not proscribe conduct or set a penalty. See State v. Goad, 754 So.2d 95 (Fla. Dist. Ct. App. 2000) (noting "a law is not punitive merely because it can be applied in

evident that there is no statutory requirement for a body microphone on the police officer as no provisions were made for the implementation of such devices as there were for the audio equipment in the patrol vehicles. This indicates the lack of a statutory requirement for an audio recording during the field sobriety tests, which is necessarily done outside the patrol vehicle.

In addition, the present version of section 56-5-2953(A)(1)(a)(iii) only requires the video recording “**show** the person being advised of his Miranda rights.” (Emphasis added). Prior to amendment in 2008,<sup>2</sup> section 56-5-2953, in relevant part read as follows: “(1) The videotaping at the incident site must . . . (b) include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered.” Also, Miranda warnings at the breath site were required: “(2) The videotaping at the breath site: . . . (b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test; . . .” S.C. Code §56-5-2953 (Supp. 2008).

Our courts “have long acknowledged the presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law.” Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2006). “Because the amendment materially changed the terminology of the statute, a departure from existing law clearly was intended, rather than a clarification of original intent.” Id., 373 S.C. at 61, 644 S.E.2d at 678. Note the legislature has considered, but not passed, an amendment that would

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the context of a criminal case); but see State v. Hercheck, 403 S.C. 597, 603, 743 S.E.2d 798, 801 (2013).  
2 2008 Act No. 201, § 11.

explicitly require audio recordings at the incident site.<sup>3</sup> Clearly, the legislature interprets the present statute to not carry this requirement.

The American Heritage Dictionary (2d college ed. 1985) defines “show” as: “1. a. To cause or allow to be seen or viewed; to make visible.” The plain language of the statute clearly indicates the legislature intended only a visual recording of the Miranda warnings was required.

An affidavit from the arresting officer was not required since law enforcement produced a video recording in compliance with the statute. Accordingly, admission of the video recording was proper and the Magistrate did not err in denying the motion to dismiss the charge.

Further, Mathis, as appellant, failed to provide a sufficient record for review to the circuit court. This objection was made by the State during oral argument to the circuit court judge. Transcript of oral arguments, dated April 8, 2013 (Tr.) p. 4. Without a transcript or recording of the trial, the circuit court lacked the ability to review the record to determine prejudice from the failure of a sound recording and further, testimony that might have related the reasons for the failure of a sound recording. Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court’s actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Without further information, the circuit court and this Court will be unable to determine if the video should have been admitted based on the totality of circumstances. State v. Brannon, 341 S.C. 271, 276, 533 S.E.2d 345, 347 (Ct. App. 2000) (finding without

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<sup>3</sup> See H. 4476, 120th Leg. (S.C. 2013-14).

further information on the record, the reviewing court is unable to decide if trial court's decision was prejudicial). Additionally, the circuit court and this Court are unable to determine if, under subsection (B), the totality of circumstances justifies admission of the video recording. In the instant case, the lack of a trial record precludes consideration of this issue on appeal.

Finally, the record indicates Magistrate Fisher's ruling was only a preliminary finding and the record fails to indicate that a final ruling on the issue was secured. Magistrate Fisher's ruling is as follows:

After hearing presentation of the motion and response from the state, **at this time I'm going to rule in favor of the state** and let's move forward with the trial. I understand, Mr. Angell, the question and concern of the video. Video is provided. Granted, there is no audio. I'm going to leave it to you guys to cross examine whatever you may choose to do in this situation and I'm going to leave it up to the jury. **And at this time**, we'll forward [sic] with the trial.

R. p. at \_\_\_\_ (Emphasis added). "Merely raising an argument in limine does not preserve the issue for appellate review." State v. Stokes, 339 S.C. 154, 528 S.E.2d 430 (Ct. App. 2000). A final ruling must be procured for an issue to be reviewed on appeal. State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012).

Regardless of the finality of the Magistrate's ruling, the Magistrate did not err in denying the motion and there is an insufficient record to determine if under the totality of circumstances of subsection (B), the video should be admissible, even if it is not in accord with statutory requirements of subsection (A).

**CONCLUSION**

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

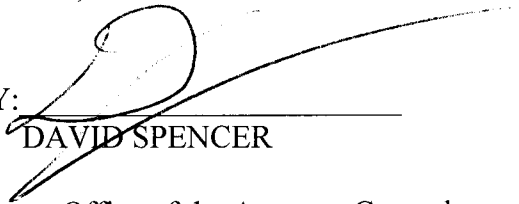
Respectfully submitted,

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July 1, 2014

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal From Greenville County  
Edward W. Miller, Circuit Court Judge

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THE STATE,

Respondent,

vs.

WILMOND VINCENT MATHIS,

Appellant.

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**DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL**

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Respondent does not propose any additional matter be included on the record on appeal. Respondent would note the in car video is not in the possession of the clerk of court.

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

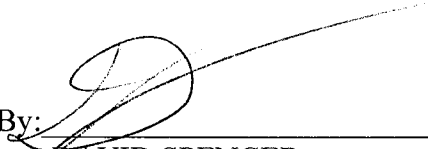
The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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July 1, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal From Greenville County  
Edward W. Miller, Circuit Court Judge

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THE STATE,

Respondent

v.

WILMOND VINCENT MATHIS,

Appellant.

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**PROOF OF SERVICE**

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I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Aaron J. Angell, Esquire, 398 College Ave., Clemson, SC 29631.

I further certify that all parties required by Rule to be served have been served.

This 1<sup>st</sup> day of July, 2014.

  
Norma Bigbee  
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July 1, 2014

**VIA HAND DELIVERY**

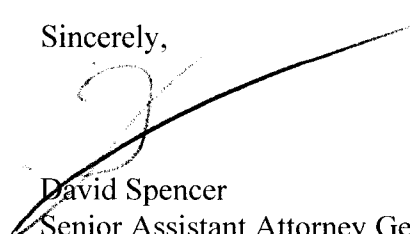
The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
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Re: **The State v. Wilmond Vincent Mathis**  
**Appellate Case No: 2013-001020**

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

  
David Spencer  
Senior Assistant Attorney General  
Bar No: 68571

DS/nb  
Enclosures

cc: Aaron J. Angell, Esquire (2 copies enclosed)  
Trisha Allen, Victim Services (1 copy enclosed)

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