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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-002406

The State, Appellant,

vs.

Shelby Jean Lorusso, Respondent.

RETURN TO MOTION TO STRIKE
AND REQUEST FOR EXPEDITED CONSIDERATION

Appellant would respectfully show unto this Court as follows:

The State filed its Initial Brief of Appellant on April 1, 2014. After receiving three extensions, on July 14, 2014, Respondent served his Motion to Strike asking this Court to strike several statements from the State's Statement of Facts and one statement within the State's Argument related to Issue I.

Respondent first objects to the State's introductory statement: "Respondent was stopped by Deputy Palmer on suspicion of driving under the influence." (Initial Brief of Appellant[1] p.3). This statement is clearly supported by review of the video which will be transported to the Court at a later date. In summary, Deputy Palmer initiates the traffic stop; relays the driver's erratic driving to dispatch; pulls her over; and, immediately after

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[1] The State's Initial Brief of Appellant is on file with the Court of Appeals, and the State craves reference to the copy on file as opposed to filing a separate copy as an exhibit with this motion.

asking for her license and registration, asks how many drinks she has had prior to driving. Further, the inference is a very reasonable one in light of the officer's actions in asking about the drinking and then having her conduct field sobriety tests. The State submits the inference contained in the statement is clearly supported by the video recording, the officer's actions, and the entirety of the record at trial before the magistrate and on appeal to the circuit court. In its final brief, the State will be happy to add citation to the video if the Court believes it necessary.

Respondent's second complaint is in regards to the State's description of the video indicating: "He [Deputy Palmer] first performed the HGN test, which can be seen on the video recording." (Initial Brief of Appellant p.3). The State properly cites the video recording as its basis for this statement. The HGN test is clearly performed on the video recording. Respondent argues the trial transcript belies this point. The trial transcript indicates the HGN test can be seen on the video being performed. Counsel for Respondent argued you cannot see the person's eyes and Deputy Palmer agreed because it is not possible to conduct the test in a way that the person's eyes can be recorded using the technology provided under the law. The State's comment that the HGN test can be seen on the video recording, however, is an accurate statement of the video and is not challenged in the motion or by the record.

Respondent next contends the State made the following statement without support in the record: "He [Deputy Palmer] is standing away from the patrol vehicle to avoid its lights, including the flashing blue lights, from interfering in the test results." (Initial Brief of Appellant p.3). The State specifically cites to the pages of the transcript in which a discussion of the effect of the lights on the HGN test is discussed and in which Deputy

Palmer is specifically asked whether he considered the lights and their effect when he positioned Respondent for the test. (See Transcript pages attached as Exhibit A).

All three of the above statements objected to by Respondent are found in the State's Statement of the Facts, and Respondent is not bound to any of the statements. The State did not copy and paste the exact wording from the transcript or repeat verbatim statements made on the video in setting forth the Statement of the Facts, nor does the State believe that is necessary or required. See Rule 208(b)(1)(D), SCACR ("A party may also include a separate statement of the facts relevant to the issues presented for review, with reference to the record on appeal, which **may include contested matters and summarize the party's contentions**.") The State has fully complied with the requirements of Rule 208, by setting forth its contentions and its view of the underlying video and facts presented, and asks the Court not to strike any statements from its Statement of the Facts.

Respondent's final argument is the State improperly included the following statement: "First, the trial court erred in finding section 56-5-2953 ambiguous." (Initial Brief of Appellant p.7). He contends the court did not make this finding. The magistrate court based its opinion entirely on an unpublished ruling by a circuit court judge who set forth requirements of the video not required by the statute. (See Magistrate's Return attached as Exhibit B). In order to alter the language of the statute to meet what the court found to be the legislative intent, it would be required to find the statute ambiguous. Otherwise, it committed a clear error of law in not solely relying on the clear wording of the statute.

The circuit court issued its opinion in this case and stated: "Arguably, one could say that the statutory language is ambiguous, because the statute does not specifically state or define what is required in the recording of field sobriety tests. To the extent there is any ambiguity in the statute, this Court looks to any evidence of the legislature's intent in enacting the statute." (See Circuit Court Order attached as Exhibit C). The circuit court then proceeded to read into the statute requirements not expressed in the clear language of the statute, thereby indicating he found it ambiguous and in need of clarification based on the legislative intent which he discussed at length. The State's prefatory language that the court erred in finding the statute ambiguous is clearly supported by the court's ruling.

Further, to the extent Respondent is conceding there is no ambiguity in the statute, the State believes the orders of the magistrate and circuit courts are in clear error as each relied on legislative intent to define what is required by the statute an did not rely solely on the language of the statute in make the rulings. See e.g., State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 864 (2012) ("Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect."); Edwards v. State Law Enforcement Div., 395 S.C. 571, 575, 720 S.E.2d 462, 465 (2011) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). The State believes it articulated a proper argument based on the findings of the explicit findings of the magistrate and circuit courts.

WHEREFORE, Appellant asks this Court to deny Respondent's Motion to Strike. The State fully complied with Rule 208(b)(1)(D), SCACR, in completing its Statement of Facts. Finally, the order of the circuit court and the analysis by both the magistrate and circuit court indicate the judges found the statute ambiguous since they both interpreted the statute to add requirements not in the clear language of the statute. As a result, the State believes there is absolutely no basis to strike any statement from its brief. The State asks this Court to rule on this patently frivolous Motion in an expedited manner and to set Respondent's Initial Brief due within a limited time from this Court's ruling.[2]

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

By: _____
WILLIAM M. BLITCH, JR.
Assistant Attorney General

S.C. Bar No. 15608
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

July 22, 2014

[2] In the alternative, because the motion appears to have been filed in lieu of Respondent's fourth extension to which the State would have consented, the State asks that the Motion be construed as a fourth extension and handled accordingly.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-002406

The State, Appellant,

vs.

Shelby Jean Lorusso, Respondent.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Motion to Dismiss as Moot on Respondent by depositing a copy in the United States mail, postage prepaid, addressed to:

Christopher A. Wellborn, Esquire
142 Oakland Avenue, Suite C
Rock Hill, South Carolina 29730

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

This 22nd day of July, 2014.

Sally B. Ellison

SALLY B. ELLISON
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

EXHIBIT A

A Yes, I could.
Q Okay. And were you able to see whether she turned incorrectly or not?
A Yes, I could.
Q I mean, were you in a position where you could determine that?
A Yes.
Q Deputy Palmer, when you eventually made your -- Well, did you arrest this Defendant for DUI?
A Yes, I did.
Q And what was the basis of your determination to arrest her for DUI that night?
A It's based off the driving and field sobriety; so totality of circumstances. It was based off her driving, field sobriety and the characteristics or things that I observed with her. So, it was totality of the circumstances.
Q So was it totality of the circumstances decision, incorporating everything that you observed before you made that arrest.
A Correct.
Q Okay. How many -- Are there -- Is there more than one indicator on the walk-and-turn that you're looking for?
A Yes, there's eight.

Q Okay. And what do you think of the statement that the walk-and-turn all boils down to whether her heel met her toe?
A Can you rephrase that or --
Q Sure. Do you think it is a true statement that walk-and-turn basically boils down to whether she was touching heel-to-toe?
A I mean, that is one of the objectives, yes, is touch heel-to-toe. I'm still not following your question.
Q That's okay. Is -- Would your decision only be -- Is that the only thing that you look for, when you're looking at walk-and-turn, whether she --
A Oh, no, ma'am.
Q -- touched heel --
A No.
Q -- heel-to-toe?
A No.
Q Okay. When you're considering how you place the defendant in relation to your car, what do you take into account?
A Amount of space, actual -- my safety and their safety; and also, if we're on a road, parking lot, how busy the road is, things of that nature.
Q Were you taught that your lights --

MR. WELLBORN: Your Honor, I'm going to object as to what she -- her saying, "Were you taught that." That's about as leading as it gets. She can ask what he's taught, but not, "Were you taught," blank, and then have him respond "yes" or "no."
MS. VALENZUELA: Well, Your Honor, if I said, "Were you taught?"
MR. WELLBORN: Well, it's -- "Were you taught?" is fine. When you add, "Were you taught," and then bring into what he was taught, that's when it becomes leading. And that's my objection. That's a leading question.
MS. VALENZUELA: Your Honor, I have to give context to "Were you taught?" I can't just say, --
MR. WELLBORN: Well, by giving context, --
MS. VALENZUELA: -- "Were you" -- "Deputy Palmer, were you taught?"
MR. WELLBORN: -- you can -- The simple way to address this is simply say, "What were you taught about" blank.
THE COURT: Ma'am, put it that way.
BY MS. VALENZUELA: (Continuing Redirect)

Q Okay. Deputy Palmer, what were you taught about blue lights and HGN?
A To turn off your front blues whenever you conduct HGN.
Q Why is that?
A They could give you a -- I guess you'd consider it a false reading or something. You could see something that you're not supposed to see. Because, it could -- It could mess up the other person's eyes.
Q So the blue lights could affect how you --
MR. WELLBORN: Your Honor, again, "what could the blue lights affect."
MS. VALENZUELA: No, I'm restating what he just said. That's not leading.
THE COURT: That's right. Go ahead.
BY MS. VALENZUELA: (Continuing Redirect)
Q So -- I keep getting thrown off here. But -- So the blue lights could affect your determination of the HGN?
A Correct.
Q Okay. Do you take that into account when you determine the position that you're putting the defendant in relation to your car?
A Yes.

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE MAGISTRATE'S COURT

RETURN TO NOTICE OF APPEAL

CASE NUMBER: 2013-CP-46-1390

FILED-RECEIVED
2013 MAY 17 PM 2:02
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

STATE,

VS.

DEFENDANT,

Shelby Lorusso
Ticket: 62685GB
Charge: Driving Under the Influence, 1st offense

The above action came before the Court on April 23, 2013 at 2:00 P.M. in a PreTrial Motion Hearing before the jury trial started. Assistant Solicitor Johanna Valenzuela was the prosecutor for the State and Deputy Matthew Palmer was a witness for the State. The defendant was represented by Attorney Christopher Wellborn and Sam Ludlam was called as an Expert Witness for the defense.

Testimony was taken from the arresting officer, Deputy Palmer, with the York County Sheriff's Office. The videotape of the Defendant's arrest and her performance of the field sobriety tests was played and reviewed by the court. The issue in this case is whether the arresting officer complied with the requirements of section 56-05-2953(A)(1)(a)(ii) of the South Carolina Code of Laws for 1876, as amended in the video recording of the sobriety test. The Defendant asserts that the arresting officer failed to comply with the statute. The State argues that the arresting officer substantially complied with the statue and that he acted in good faith in his efforts to comply. This court granted the Defendant' s

motion to dismiss based on the unpublished ruling by Judge Alford in the State of South Carolina vs. John Douglas Pittman case on July 26, 2012.

In the State vs. Pittman case, a person watching the recording could view the test performed by the driver suspect so that an assessment could be made as to how well the driver suspect performed the test. In the video, the Defendant is instructed to walk heel to toe directly toward the camera and directly back. In the State vs. Lorusso case, a person can only see the toe of each foot when the Defendant is walking towards the camera and the heel of each foot when the Defendant turns to walk back. At no time can a person watching the video observe any heel to toe touching or not touching. Based on these facts, testimony, and video this court felt compelled to grant the Defendant's motion for dismissal.

Please find enclosed documents, the tape, and a copy of Judge Alford's ruling.

If I can be of any further assistance, please do not hesitate to call.

Amber Hayd
DUI Clerk

CLAYBURN BARNETTE, JR.
MAGISTRATE
YORK COUNTY CENTRALIZED DUI COURT

May 13, 2013

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO: 2013-CP-46-1390
COUNTY OF YORK	)	
	)	
State of South Carolina,	)	
	)	
Appellant,	)	ORDER DISMISSING APPEAL
	)	
vs.	)	
	)	
Shelby Lorusso,	)	
Respondent.	)	
	)	

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C.C.C.P. & GS
YORK COUNTY, SC

Appearance for Appellant: Johanna C. Valenzuela
Appearance for Respondent: Christopher A. Wellborn
Trail Judge: Honorable Clayburn Barnette, Jr., Magistrate

This matter came before this Court pursuant to an appeal taken by the State from a dismissal of the charge against the Respondent, Shelby Lorusso. This dismissal was entered by the trial judge, the Honorable Clayburn Barnette, Jr. on April 24, 2013. The State filed its appeal on May 3, 2013. The appeal was heard by this Court on August 27, 2013. After review of the State's appeal, the Return of Magistrate Barnette, the transcript of record from the proceedings below and argument of counsel I find the following:

FACTS

On December 15, 2012, the Respondent was stopped by Deputy Matthew Palmer of the York County Sheriff's Department. Deputy Palmer ultimately arrested the Respondent and charged her with driving under the influence of alcohol. This case was called for trial on April 23, 2013 before the Magistrate. At the time of the trial, the Respondent moved to have her charge dismissed, asserting that the arresting officer failed to comply with the mandatary video taping requirements of Section 56-5-2953(A)(1)(a)(ii) of the S.C. Code of Laws, as amended. After review of the video

tape of the field sobriety tests and testimony from Deputy Palmer, the Magistrate sustained the Respondent's motion. This appeal followed.

During the hearing for this motion, Deputy Palmer testified that after stopping the Respondent, he directed her to step out of her car and submit to field sobriety tests, including, inter alia, the walk and turn test. Deputy Palmer testified that he asked the Respondent to take nine heel to toe steps in a straight line and that her heels should touch her toes on each step. He further testified that she was to turn back the opposite direction and take nine heel to toe steps on the same line with her heel again touching her toe with each step. Deputy Palmer testified that the Respondent "missed the majority of her steps" when she attempted to walk the first nine steps. He acknowledged the video tape did not show whether her heels actually touched her toes or not. After completing the turn, Deputy Palmer said she "missed the majority of her steps" when she walked back along the line. He also said that this was not visible on the video camera because of the way he had positioned the Respondent relative to the camera. Deputy Palmer stated that he choose which direction to have the Respondent walk and therefore what her position would be relative to the camera.

The Magistrate also reviewed the video tape of the field sobriety tests and found that, as Deputy Palmer testified, whether or not the Respondent's heels touched her toes was not visible on the video tape.

LEGAL ANALYSIS

1. The provisions of S.C. Code Section 56-5-2953(A), as amended in 2009 states in pertinent part that a person charged with driving under the influence must have their conduct video recorded at the incident site as follows:

(A) A person who violated Section 56-5-930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and 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 test administered; and

(iii) include the arrest of a person for a violation of Section 56-5-2930 or 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.

HISTORY: 1998 Act. No. 434, Section 9, eff. June 29, 1998; 200 Act. No. 390, Section 23-2003 Act. No. 61, Section 8, eff. August 19, 2003; 2008 Act. No. 201, Section 11, eff. February 10, 2009.

Since the 2009 Amendment to Section 56-5-2953(A), there has been no published, or unpublished, opinion by the South Carolina Supreme Court or Court of Appeals interpreting or applying the requirement that there be a video recording of "any field sobriety test administered." However, the Court of Appeals recently addressed this statute in the context of the mandatory recording requirement for Miranda warnings, see *State v. Henkel*, 746 S.E. 2d, 347 (2013).

In construing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011). A Court should not attempt to divine the intent of the legislature when the statutory language of the state is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. Spp 2011). Thus, in interpreting a statute, a Court should give words their plain and ordinary meaning, and not resort to forced construction that would limit or expand

the statute in question. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E. 2d 278, 282 (2011). *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 520 (Ct. App. 2011). Lastly, where, as here, the provisions of a statute are penal in nature, the statute must be strictly construed against the State and in favor of the Defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011).

Arguably, one could say that the statutory language is ambiguous, because the statute does not specifically state or define what is required in the recording of field sobriety test. To the extent there is any ambiguity in the statute, this Court looks to any evidence of the legislature's intent in enacting the statute. Prior to the 2009 Amendment, all that was required by Section 56-5-2953(A)(1), (with respect to the recording of any field sobriety testing), was that the "conduct" of the suspect-driver be recorded at the incident site. Thus, in *Murphy v. State*, 392 S.C. 628, 709 S.E. 2d 685 (2011), under the former provisions of Section 56-5-2953 (A)(1), the video recording at the incident site in that case only showed the suspect-driver doing the "walk and turn test" from the knees or waistline upwards. Although the feet of the suspect-driver could not be seen during the test, which is an important part of the test, the Court of Appeals held that under the *former* statute the video recording requirements of Section 56-5-2953(A)(1)(a) had been complied with:

> While certainly an individual's performance on such tests would be part and parcel of his or her "conduct" at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct Therefore, the recording need not display all field sobriety tests provided it captures the accused's conduct.[4].

However, footnote number 4 provides as follows:

> As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. Section 56-5-2953(A)(1)(a)(ii) (supp. 2010) ("The video recording at the incident site must...include any field sobriety test

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administered."). We note that the legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior versions, in effect at the time of this action, did not require recording of all tests.

The obvious import of the above quote from *Murphy v. State* is that if the complete recording of a person *performance* if any field sobriety test was not required under the former statute, it is now required under the amended statute. The 2009 Amendment specifically provides for the recording of any field sobriety test, which goes beyond the former requirement of merely recording a person's conduct. Had the General Assembly only intended that there be a recording of a person doing a field sobriety test, without there being any way to determine the person's performance on the test, as in *Murphy v. State*, there would have been no need to amend the statute. It must be presumed that the General Assembly did not intent a futile or meaningless act by enacting the 2009 Amendment. *State v. Long*, 363 S.C. 360, 610 S.E. 2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E. 2d 645 (Ct. App 2008). To put it plainly, there is no sense in conducting field sobriety tests if the finder of fact can not see the results of such test.

2. That the video recording provisions of S.C. Code Ann. Section 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). When a proceeding agency fails to comply with the mandatory video recording provisions of S.C. Code Ann. Section 56-5-2953(A), the appropriate remedy is the dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516 (Ct. App 2001). In *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 SE. 2d 278 (2011), the South Carolina Supreme Court return to the *City of Rock*

JC 7445

Hill v. Suchenski, decision and reiterated that the un-excused noncompliance with the S.C. Code Ann. Section 56-5-2953 mandates the dismissal of a DUI/DUAC charge:

> As evidenced by this Court's decision is Suchenski, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* Section 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930....if (certain exceptions are met).). The term "dismissal" is significant as it explicitly designated a sanction for an agency's failure to adhere to the requirements of Section 56-5-2953.
>
> Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.
>
> Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*.

Likewise, the decisions of the South Carolina Court of Appeals have been consistent with City of Rock Hill v. Suchenski.[1]

3. In the present case the State failed to comply with the videotaping requirements in regard to the "walk and turn test". The Respondent was asked to take several steps by lining up the heel of the front foot against the toe of the trailing foot. The Respondent was then required to turn around and walk in the opposite direction in the same manner. Although the video camera was

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[1] *See State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516 (Ct. App. 2011) (officer violated Section 56-5-2953(A)(2),, when he failed to capture the administration of the breath test to the Defendant on videotape, when the first breath test machine was not working, and the officer moved the Defendant to another machine in the same room but failed to activate the videotape for that second machine in the same room but failed to activate the videotape for that second machine; although the officer could be seen on the video made from the first machine which was left on the entire time, and the Defendant could be heard, the Defendant himself could not be seen; case should have been dismissed); *Murphy v. State*, 392 S.C. 626, 709 S.E. 2d 685 (2011) (the remedy for noncompliance with Section 56-5-2953 is dismissal of the case, not mere suppression of the evidence).

recording during the Respondent's performance of this test, it was positioned in such a manner that the Respondent's heels were not visible as they touched or did not touch her toes. Therefore, the Respondent's performance, an important part of the test, was not video taped.

The State has argued that compliance with the statute should be excused in this case because the actions of the arresting officer in failing to record the field sobriety test was not intentional or in bad faith. Whether an officer acts in good faith, or if any omission in recordings is unintentional, does not excuse noncompliance under S.C. Code Ann. Section 56-5-2953. The General Assembly has provided for exceptions for noncompliance under Section 56-5-2953(B), but none have been invoked by the State in this case. See, *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007) (charge of DUAC was dismissed where arresting officer was unaware that his recording tape had run out, and failure to record as neither intentional or done in bad faith).

In the present case the arresting officer did not properly video tape the Respondent being given the walk and turn field sobriety as required by Section 56-5-2953(A)(1)(a)(ii). The recording requirements of Section 56-5-2953 are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011), *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007). The only remedy for noncompliance with the video recording requirements of Section 56-5-2953 is dismissal of a case. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011), *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007). Admittedly, the sanction of dismissal is severe, but as the South Carolina Supreme Court observed in *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011), the Legislature has clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction of dismissal for noncompliance.

IT IS THEREFORE ORDERED, that based upon above stated findings of fact and conclusions of law, the Court hereby dismisses the appeal of the State in South Carolina v. Shelby Lorusso, 2013-GS-46-1390.

AND IT IS SO ORDERED.

John C. Hayes, III
Chief Administrative Judge #8
Sixteenth Judicial Circuit

York, South Carolina
September 17, 2013

ALAN WILSON
ATTORNEY GENERAL

July 22, 2014

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: State v. Shelby Lorusso
Appellate Case Tracking No. 2013-002406

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of a Return to Motion to Strike, with proof of service, in the above referenced appeal.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General

Enclosures

cc: Christopher A. Wellborn, Esquire (enclosure)

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JUL 22 2014
SC Court of Appeals