STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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, ...PETITIONER,

v.

CODY ROY GORDON .....RESPONDENT.

AMENDED
RETURN TO PETITION FOR WRIT OF CERTIORARI

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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. (App. pp. 32-43).

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. (App. pp. 32-43).

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. 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. 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. (App. pp. 32-43).

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. When asked for the Seneca DataMaster breath site video, L/Cpl. Greer indicated the Seneca DataMaster machine was inoperable. 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. (App. pp. 32-43).

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. (App. pp. 32-43).

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. (App. pp. 32-43).

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. (App. p. 3) 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. (App. p. 8, 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. (App. p. 8, 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. Judge Macaulay requested the State to specifically address the incident site video issue. 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." (App. p. 13, lines 17-18).

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 statue requirements were satisfied. (App. p. 14, 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. (App. p. 16, 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. (App. p. 16, 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." (App. p. 18, 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. (App. p. 18, lines 10 – 13).

The State timely filed a Notice of Appeal. The appeal was heard and an published opinioned was issued by the Court of Appeals affirming the finding of the Circuit Court remanding the matter back to the Magistrate for a specific finding consistent with the law as applied by the Circuit Court. (App. pp. 83-89). The State filed for reconsideration and was denied. (App. pp. 90-98; 105). The State's petition for writ of certiorari followed.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE CIRCUIT COURT'S REVERSAL OF THE MAGISTRATE COURT'S CONVICTION BECAUSE THE MAGISTRATE'S INTERPRETATION AND RELIANCE ON *MURPHY v. STATE* WAS INCONSISTENT WITH THE LATER REVISED INCIDENT RECORDING STATUTE, S.C. CODE ANN. SEC. 56-5-2953.

The State has submitted that "special and important" reasons exist for this Court to review this matter and grant certiorari. However, the State raises no new reasons that have not previously been heard before the Court of Appeals or this Court and only provides spirited rhetoric that the appellate courts are legislating from the bench because the State disapproves of the Court of Appeals' opinion in this matter. The State's main support for its petition appears to be that the Court of Appeals opinion in this matter is being relied upon throughout the State and cases are being dismissed. An application of S.C. Code Ann. Sec. 56-5-2953 that is consistent with its legislative intent does not create "special and important" reasons for this Court to grant certiorari.

A. The incident site recording statute includes "*any* field sobriety tests administered" to allow applicability to a range of possible tests that may be administered.

The South Carolina statute does not define a finite list of field sobriety tests that can only be administered by law enforcement for the detection of whether a driver is materially and appreciably impaired while operating a motor vehicle. *See South Carolina Department of Motor Vehicles v. Brown*, 406 S.C. 626, 753 S.E.2d 524 (2014) (accused driver ordered to perform *four* field sobriety tests); *Town of Mount Pleasant v. Jones*, 335 S.C. 295, 516 S.E.2d 468 (Ct. App. 1999) (administration of *several* field sobriety tests); *State v. Clute*, 324 S.C. 584, 480 S.E.2d 85 (Ct. App.) (field sobriety test includes reciting alphabet); *State v. Salisbury*, 330 S.C. 250, 498 S.E.2d 655 (Ct. App. 1998) (driver evaluated with reciting alphabet and walk-and-turn test);

Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) (*three* field sobriety tests administered). However, the State is attempting to contort this current case into an unnecessarily complex analysis alleging that our laws can only have specific requirements if already expressly stated verbatim in the statute. (App. p. 56). The State appealed that S.C. Code Ann. Sec 56-5-2953 does not include specific language that the accused's head must be visible during the HGN test administration; therefore, the Circuit Court erred. *Id.* Yet, the Legislature's specific language states "include any field sobriety tests administered" to further clarify the prior version's language of "conduct." While the Legislature's collective knowledge may be vast, it is reasonable that the Legislature knew that field sobriety tests change over time. Inclusion of the word '*any*' provides for general applicability based on the plain and unambiguous language of the statute. Moreover, if a 'test administered' is to be included, it is only reasonable that the video recording of the administration is to be relied upon at some later date. Without question, law enforcement relies upon the incident site video at trial for the State's benefit. But, the State ignores this rational interpretation of the plain language of the statute. The Court of Appeals and this Court have held that the *intent* is to allow both parties – the State and the accused – to rely upon the incident site recording. The Court of Appeals succinctly clarified this point by adding footnote 6 wherein the Court of Appeals provides: "The statute protects both the State *and the defendant* from sometimes unreliable memories of those testifying at trial." *State v. Elwell*, 396 S.C. 330, 337, 721 S.E.2d 451, 455, n6 (Ct. App. 2011), *aff'd State v. Elwell,* 743 S.E.2d 802 (2013).

Therefore, a rudimentary application of the statute supports that the relevant aspect of an administered field sobriety test should be captured on the incident site video. It is basic logic that if a field sobriety test is focused on an accused's part of the body, that that part of the body

should be visibly discernible. This is basic logic and not a "special and important" reason for granting certiorari.

B. When the Horizontal Gaze Nystagmus (HGN) test is administered, the plain and unambiguous language of the incident site recording statute reasonably requires that the video provide a discernible view of the accused's head.

In this case, law enforcement chose to administer the Horizontal Gaze Nystagmus (HGN) test to Mr. Gordon although no requirement existed for the HGN test to be administered. Law enforcement had complete control of the environment and the arresting officer and Mr. Gordon are clearly visible on the incident site recording *until* the arresting officer intentionally moves Mr. Gordon a significant distance from the discernible view of the dashcam recorder. Although there is significant disagreement of the degree to which Mr. Gordon was not visible at all and the degree to which Mr. Gordon's silhouette was only visible, the State even conceded in its brief that Mr. Gordon's head was not visible during the entire HGN test administration. (App. p. 60) ("majority" of the time visible). Yet, the State repeatedly tries to convince itself and the appellate courts that the Legislature didn't intend for a video recorded test to be visible or discernible as long as there's something on video to support that a test was administered.

Assuming the State's argument has merit, to take the State's argument to its logical full application would mean that law enforcement could direct the incident site camera at the shoes of the accused while administering the HGN test and still be compliant. Moreover, the State tries to argue that the only reason for the test is for law enforcement to identify the "jerking of the eyeballs." However, law enforcement relies on "clues" in its trial testimony that are specific to the accused's head position, ability to follow instructions, ability to keep the accused's head still and focused forward. 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.

Therefore, if the tests administered – including the officer's actions *and* the accused's actions – are not visibly discernible, the only alternative is for the accused to give up his constitutional protection of not being forced to testify. That is the essence of the State's position in this matter. Specifically, if an accused wants to challenge the test administration because the incident site video is not visibly discernible to allow an adequate defense of the administered test, then the accused must take the stand and testify on how he performed during the test. It is absurd to believe that our Legislature intended to create a situation whereby an accused is required to give up a fundamental right. Regardless, this issue has already been addressed; the purpose of the video recording is to reduce the number of swearing contests at trial and reduce reliance on unreliable memories. *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 345, 713

S.E.2d 278, 284 (2011) (purpose is to create *direct evidence* of the arrest); *Elwell*, 396 S.C. 330, 337, 721 S.E.2d 451, 455, n6 (Ct. App. 2011) (benefit of both the State and the accused; reduce reliance on memories). With that being the purpose, that purpose is rendered unachievable if the test administered is 1) not visible and 2) not discernible of the test being administered. Why record something if it is not visible and why have a video of some act if one cannot determine what is actually being performed?

Because the Magistrate's Return did not include a finding in response to the Mr. Gordon's motion wherein it was asserted that he head was not visible during the HGN and violated the incident recording statute, the Court of Appeals reversed the Circuit Court's dismissal of the conviction and remanded the matter back to the magistrate for a finding consistent with the current state of the law as applied by the Circuit Court. This is the appropriate application of the incident site recording statute and analysis of the Magistrate's error in applying S.C. Code Ann. Sec. 56-5-2953 to this case's facts and does not represent a "special and important" issue for certiorari.

C. 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 is not reviewable on appeal.

The appellate court in this matter 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 argued for the first time on appeal to the Court of Appeals that the Circuit Court considered the still photographs as the only basis for supporting the decision to reverse and dismiss Mr. Gordon's conviction. There record is clear that no evidence was admitted and it is unclear the extent to which the Circuit Court considered the still photographs or even the incident site recording that was part of the Magistrate's Return. Regardless, the record is clearly absent of any objection preserving this issue to the Court of Appeals. In addition, there were no motions for reconsideration pursuant to SCRCP Rule 59(e) that would have preserved this issue after a response by the Circuit Court. Because that issue was not properly preserved, it cannot be raised for the first time on appeal to the Court of Appeals. *Id.*

Further, the State contends that the Circuit Court 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 brief admitted that during some part of the HGN test Mr. Gordon's head is not visible. (App. p. 60) (refers to *majority* of the time but not all of the time). 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." (App. p. 18). Although the

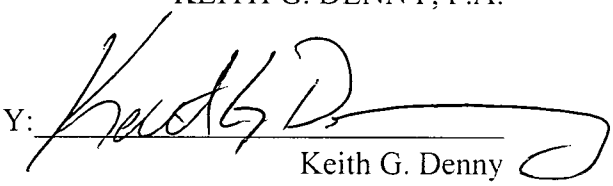
Circuit Court provided its justification and identified that the trooper could have brought Mr. Gordon closer to the car, the State for the first time in its appeal challenged the basis of the Circuit Court's decision. Again, the State never raised the issue to the lower court for a determination and 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.*

CONCLUSION

For the reasons set forth above, Mr. Gordon respectfully requests this Court to deny the State's petition for certiorari as there is no "special and important" issue to be decided by this Court that has not already been decided. If the Court does grant the State's petition, Mr. Gordon respectfully requests the right to fully brief this matter and oral arguments to be heard.

Respectfully submitted,

KEITH G. DENNY, P.A.

BY: 

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AMENDED PROOF OF SERVICE

I, Keith G. Denny, hereby certify that I have served the within Return To Petition For Writ Of Certiorari, dated July 20, 2014, on Petitioner by depositing a copy of the same on July 21, 2014 in the United States mail, postage prepaid, addressed to:

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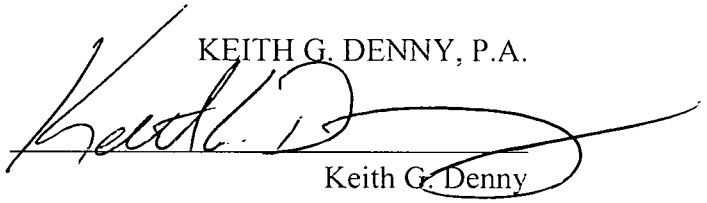

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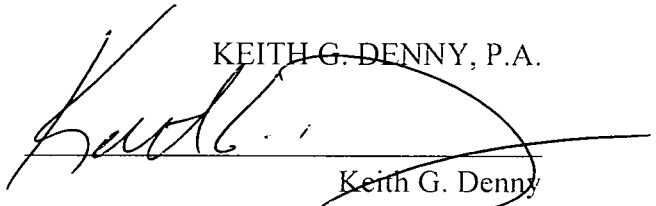

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