STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

PETITIONER,

V.

PHILLIP WESLEY SAWYER,

RESPONDENT

APPELLATE CASE NO. 2011-201206

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals correctly affirmed the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Sawyer's breath test.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case as presented in the state's Brief of Petitioner filed February 6, 2013.

ARGUMENT

The Court of Appeals correctly affirmed the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Sawyer's breath test.

The Court of Appeals correctly affirmed the circuit court's decision to suppress Phillip Sawyers' videotape, evidence and breath test results produced at the breath test site following Sawyers' arrest for driving under the influence. The suppression was required in order to protect the rights of Sawyer and to insure that he received fair treatment pursuant to S.C. Code Ann. Section 56-5-2953 (A) (2006) because the State did not comply with the statute.

Phillip Sawyer was arrested and charged with driving under the influence (DUI) on September 13, 2007 in Spartanburg County. ROA. 90, ll. 23 – 25; ROA. 91, ll. 1 – 10. Deputy David Evett testified that he responded to Lt. Woodward's traffic stop for transportation and a Data Master. Deputy Evett said he was certified by SLED as a Data Master operator. ROA. 17, ll. 6 – 25; ROA. 18, ll. 1 – 23.

Deputy Evett took Sawyer to jail and placed him in the room used for video recording which was next to the room where the Data Master machine was kept. He allegedly activated the video and audio recording device in the room with the Data Master. He stated he then returned to the room where Sawyer was held and he allegedly read the *Miranda*[1] rights to Sawyer as well as the implied consent form. He believed the recording device was operating correctly. ROA. 19, ll. 1 – 25; ROA. 20, ll. 1 – 13. Deputy Evett said

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

he believed Sawyer understood his rights as he nodded his head up and down. ROA. 24, ll. 1 – 25; ROA. 25, ll. 1 – 25.

Deputy Evett admitted on cross examination that he was not the arresting officer. ROA. 27, ll. 10 – 17. He said that the recording device did not work properly and no sound was recorded as no one could hear him read the rights or anything else to Sawyer. He said there was supposed to be audio. He admitted that he did not check the microphones and did not know how. ROA. 27, ll. 18 – 25; ROA. 28, ll. 1 – 25.

Agent Brett Baker of SLED, who administered the program on the breath alcohol testing devices, testified that he did not know what the problem was with the device. ROA. 36, ll. 16 – 25. He admitted that SLED was responsible for regulating the breath alcohol tests and that they were required by statute to inspect the breath testing devices every twelve weeks. He said they tried to check the video recoding device then also. ROA. 34, ll. 7 – 25; ROA. 35, ll. 1 – 15.

Agent Baker said from his research, that the device had not been working properly for four months. ROA. 42, ll. 16 – 25; ROA. 43, ll. 1 – 10.

Defense counsel made a motion pretrial for the court to dismiss the charges against Sawyer, or in the alternative, to suppress the results of the Data Master test. ROA. 8, ll. 16 – 25. Counsel explained that according to South Carolina Code Section 56-5-2953, the state has to meet certain requirements in a DUI case. One of the requirements is that there be videotaping at the breathalyzer site of the reading of the *Miranda* rights, the breath test procedure, the person being informed that he is being videotaped and can refuse the test. Counsel said no sound was recorded as the audio was not working. Because of that, counsel

argued that the state had not complied with the statute 56-5-2953. ROA. 9, ll. 1 – 25; ROA. 10, ll. 1 – 25; ROA. 11, ll. 1 - 9.

Counsel also argued that the affidavit the state submitted did not meet any of the exceptions in the statute. ROA. 11, ll. 5 – 9.

The state agreed that the audio malfunctioned but said that the video was working and it was possible to see the officer reading *Miranda* rights and the implied consent form. ROA. 11, ll. 12 – 25; ROA. 12, ll. 1 – 25; ROA. 13, ll. 1 – 25.

The state argued that the statute provided that if there were a problem where the videotapes could not be produced, then the arresting officer could submit a sworn affidavit certifying that the equipment was inoperable at the time and no other operable breath test facility was available; or it was impossible due to needed emergency medical treatment; or exigent circumstances. ROA. 15, ll. 9 – 25; ROA. 16, ll. 1 – 4.

The solicitor then provided the court with an affidavit that Deputy Evett signed stating there was a problem with the audio recording due to exigent circumstances which were outside his control. The state argued that Deputy Evett was the breath test operator so he was the one who signed the affidavit. ROA. 16, ll. 5 – 25; ROA. 64, ll. 14 – 19.

The state told the court that the exigent circumstances were that Deputy Evett did not know the audio was not working so the circumstance was beyond his control. ROA. 63, ll. 17 – 25; ROA. 64, ll.1 – 19.

Defense counsel argued that the affidavit was not sworn to by the arresting officer as required by the statute and that the state did not check the box that the system was not operating as the reason for the problem on the affidavit. The state chose the exigent

circumstances exception that the machine did not work. ROA. 67, ll. 13 – 25; ROA. 68, ll. 1 – 25.

Counsel defined the word "exigent" from Webster's Dictionary as meaning emergency, pressing, and demanding. He told the court that this was not an exigent circumstance. ROA. 69, ll. 1 – 24.

The court ruled that the affidavit was insufficient because the state checked exigent circumstances as the exception and the exigent circumstances did not exist because the problem had been there but was not discovered until recently. The court also ruled that there was no showing of sufficient maintenance for the system, and there was not a sufficient reviewing of the tapes. He dismissed the case. ROA. 82, ll. 1 – 25; ROA. 83, ll. 1 – 14.

On June 16, 2008, the judge issued an order suppressing the video but stating that the state could go forward on any other evidence. On September 18, 2008, a hearing was held on defense counsel's motion for clarification or reconsideration of the June 16th ruling. Defense counsel said he needed clarification from the judge's written order on June 16, 2008 where the judge suppressed the video. Counsel said it was not clear whether the state could still admit the results of the breath test through the testimony of the Data Master operator. September 18, 2008 Transcript, ROA. 86, ll. 2 – 25; ROA. 87, ll. 1 – 18.

The judge ruled on September 18, 2008 that the Data Master test and its results were suppressed but that the state could go forward with the prosecution using other evidence such as the field sobriety test, observations of driving, and things of that nature. ROA. 91, ll. 1 – 5.

South Carolina Code Section 56-5-2953 provides: "A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped." The statute identifies the requirements to be recorded:

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

S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2006).

The state argued on page eight of their Initial Brief that the state complied with the statute because they produced a video even though no sound was included. Judge Couch stated at the June hearing that it was important to hear what was going on because he recently had a case where the officer gave the *Miranda* rights differently from what was on the card. He left out an important right. ROA. 74, ll. 3 – 25; ROA. 75, ll. 1 – 15.

The Legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). In interpreting a statute, the determination of legislative intent is a matter of law. Id.

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. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E. 2d 278 (2011) citing State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010).

The Legislature clearly intended for the videotape to include the sound portion since they required the reading of *Miranda,* as well as the person being informed of other rights and the implied consent form. Otherwise, the statute would have simply stated that the video portion was sufficient.

South Carolina Code Section 56-5-2953(A)(1)(a)(iii) provides that the video recording at the incident site must include the arrest of the person "and **show** the person being advised of his Miranda rights." Section 56-5-2953(A)(2) which describes what the video recording at the breath test site must include does not include the word "show." Therefore, if the Legislature meant that only the video portion at the breath test site was acceptable, they would have included the word "show" again. The spirit of the law, the "totality of the circumstances," require a logical reading of the statute.

The Court of Appeals correctly relied on the Supreme Court's decision in City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007), where the Supreme Court ruled that dismissal of the charge of DUAC (arrest was for DUI), for the arresting officer's failure to provide a complete videotape from the incident site was the

appropriate remedy. In that case, the officer began the tape and taped two field sobriety tests but ran out of tape before the third field sobriety test was administered. The officer said it had never happened before and he did not know the tape had run out. The municipal court denied the motion to dismiss on the grounds of exigent circumstances. On appeal, the circuit court reversed and dismissed the charge based on the violation of Section 56-5-2953(A).because a complete tape was not produced. The Supreme Court did not address the issue of exigent circumstances because the circuit court did not address it.

In State v. Landis, *supra,* the Court of Appeals held that when a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court will not look for or impose another meaning.

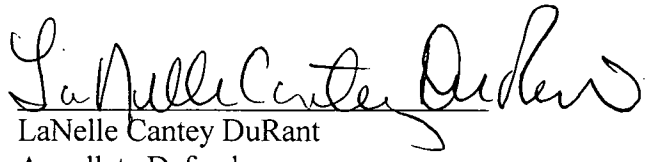
In reading Section 56-5-2953 as a whole, the language is clear that the video recording at the breath test site is meant to include the sound as well as the video portion.[2]

[2] The Supreme Court issued opinions on May 29, 2013 in the cases of State v. Hercheck, Op. No. 27258 (Filed May 29, 2013) and State v. Elwell, Op. No. 27259 (Filed May 29, 2013) which held that a twenty minute pre-test video recording is not required where an arrestee has refused the breath test under S.C. Section 56-5-2953. These cases are inapposite. Sawyer agreed to the breath test; and in Sawyer's case, the video/audio concerned the reading of Sawyer's rights to him pursuant to *Miranda.*

CONCLUSION

Based on the above, the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 30th day of May, 2013.

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Respondent in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of May, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 30th day of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.