

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP4601548

South Carolina State Of

Richard Wells

RECEIVED

OCT 14 2014

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 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. See Page 2 for additional information.
- 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 appeal in Circuit Court
 does not end the case.

Additional Information for the Clerk: **ORDER DENYING APPEAL**

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)

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/ John C. Hayes, III.

Circuit Court Judge

2049

Judge Code

9/11/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on **September 12, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **September 12, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Stephanie Ann Wood 1070 Heckle Blvd., Ste. 207 Rock Hill, SC 29732

Paul L. Reeves PO Box 11126 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
State of South Carolina,)
)
Respondent,)
)
v.)
)
Richard Alan Wells,)
)
Appellant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-46-1548

ORDER DENYING APPEAL

RECEIVED
OCT 14 2014
SC Court of Appeals

2014 SEP 12 AM 9:16
CLERK OF COURT
YORK COUNTY, SC

Appearance for Appellant: Paul L. Reeves
Appearance for Respondent: Stephany Ann Wood
Trial Judge: Honorable Mandrile H. Young, Magistrate

This matter came before this Court pursuant to an appeal by the Richard Alan Wells ("Appellant") from his conviction of Driving Under the Influence First Offense less than .10 ("DUI 1st"). The trial judge, the Honorable Mandrile H. Young, convicted and sentenced the Appellant on April 30, 2014, in the Rock Hill Municipal Court. This Court heard this appeal on September 3, 2014. After review of the Appellant's appeal and the arguments of counsel I find the following:

FACTS

On October 5, 2013, Deputy J. Osborne of the York County Sheriff's Department arrested for the Appellant for DUI and open container. The video recording from the arresting officer's video camera was working properly at all times relevant. The video recording showed the officer activate his blue lights to initiate the traffic stop. The Appellant pulled from the traveled portion of the highway into a parking lot. The officer also pulled into the parking lot. The video continued to show the arresting officer approach the Appellant's vehicle. After this contact with the Appellant, the officer moved his vehicle to the traveled portion of the highway. The officer's



videotape did not record the Appellant for approximately four (4) minutes and thirty (30) seconds. During a portion of this time, the officer and the Appellant were in their respective vehicles. After several minutes, per the audio portion of the video, the officer approaches and orders the Appellant from the vehicle. They walk together to the traveled portion of the highway where video again records the Appellant. The video does not capture the Appellant exiting his vehicle and walking with the officer. The Honorable Mandrile H. Young found that "conduct" only applied to the field sobriety test, *Miranda* rights, and the arrest.

At trial, the Appellant attempted to demonstrate that the training of law enforcement officers in the detection of impairment, as shown by the South Carolina Justice Academy taken by the National Highway Traffic Safety Administration, showed the Appellant exiting the vehicle was critical conduct as defined by *State v. Murphy*, 392 S.C. 626, 709 S.E. 2d 685 (Ct. App. 2011). The State made a hearsay objection to this evidence, and the trial judge granted the State's objection. The trial court tried and convicted the Appellant April 30, 2014.

LEGAL ANALYSIS

1. The provisions of South Carolina Code Ann. § 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 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 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 Section 56-5-2930 or

56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and to show the person being advised of his *Miranda*¹ rights.

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. *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). A Court should not attempt to derive the intent of the Legislature when the statutory language is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (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, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001).

It is arguable that the statutory language is ambiguous because the statute does not specifically state or define what is required in the recording of the field sobriety test. To the extent there is any ambiguity in the statute, the Court looks to any evidence of the Legislature's intent in enacting the statute. Prior to the 2009 amendments, Section 56-5-2953(A)(1), with respect to the recording of any field sobriety testing, only required that the "conduct" of the suspect-driver be recorded at the incident site. Under the former provisions of Section 56-5-2953(A)(1), the Court of Appeals held, in *Murphy v. State*, 392 S.C.628, 709 S.E. 2d 685 (Ct. App. 2011), that although a suspect-driver's feet could not be seen during the "walk and turn" test, the video recording requirements complied with 56-5-2953. In *Murphy*, the video recording

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

at the incident site only showed the suspect-driver doing the "walk and turn" test from the knees or waistline upwards. *Id.* The Court explained:

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 conduct.⁴

However, footnote 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. §56-5-2953(A)(1)(a)(ii) (sup. 2010). (The video recording at the incident site must...include any field sobriety test 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 importance of the above quote from *Murphy* is that if the complete recording of a person's *performance* of 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 Legislature 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*, there would have been no need to amend the statute. The Legislature enacted the 2009 amendments, and it must be presumed that the Legislature did not intend for the amendments to be futile or meaningless. *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). The South Carolina Court of Appeals explains that "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." *State v. Gordon*, 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014).

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2. The video recording of South Carolina Code Ann. § 56-5-2953(a) 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); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). When a prosecuting agency fails to comply with video recording provisions of S.C. Code Ann. § 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, 519 (Ct. App 2001). In *Town of Mt. Pleasant*, the South Carolina Supreme Court returned to the *Suchenski* decision and reiterated that the un-excused noncompliance with the South Carolina Code Ann. § 56-5-2953 mandates the dismissal of DUI charge. In *Town of Mt. Pleasant* the Court states:

As evidenced by this Court's decision in *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 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 grounds for dismissal of any charge made pursuant to Section 56-5-2953...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*.

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Likewise, the decisions of the South Carolina Court of Appeals have been consistent with *Suchenski*.²

3. In the present case, the State complied with the videotaping requirements of Section 56-5-2953. The statute is very specific as to when the driver-suspect's conduct must be performed, that is "not begin later than the activation of the officer's blue lights; include any field sobriety test administered; and include the arrest of a person for a violation Section 56-5-2930 or 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and to show the person being advised of his Miranda rights."

In this case, the Appellant's conduct was recorded at all times required by Section 56-5-2953. The Appellant was not recorded while he was in his vehicle and as he exited his vehicle to walk to the field sobriety test site. This case can be distinguished from cases involving the officer's failure to record part of a sobriety test, or administering the breath test. Here, the Appellant's performance in the sobriety test was recorded, and recording this conduct satisfies the recording requirements of Section 56-5-2953.

4. In this case, the video recording was produced and therefore Section 56-5-2953(B) it is not implicated.

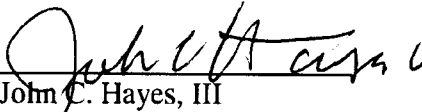
5. The trial court properly granting the State's hearsay objection regarding the admissibility of training manual. Hearsay is an out of court statement proving the matter

² See *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001) (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 a second machine in the same room; 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); *Murray 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 evidence).

asserted. The training manual by the South Carolina Justice Academy taken by the National Highway Traffic Safety Administration was produced by a third party. Thus, it was an out of court statement which attempted to prove the matter asserted, that is that the Appellant exiting the vehicle is "critical conduct." Therefore, the trial judge properly granted the State's hearsay objection. Additionally, a training manual cannot trump a statute. The statute at issue clearly sets forth what is required to be videotaped.

IT IS THEREFORE ORDERED, that based upon the above the Court DENIES the Appellant's appeal and his trial court conviction of DUI 1st is upheld.

AND IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge #7

September 11th, 2014
York, South Carolina