

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP4601988

Lenora Marie White	Rock Hill City Of
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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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 does not end the case.

Additional Information for the Clerk: _____

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.**

RECEIVED

s/John C. Hayes, III
 Circuit Court Judge

2049

Judge Code

9/25/2014

Date

NOV 03 2014

For Clerk of Court Office Use Only

SC Court of Appeals

This judgment was entered on **September 29, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **September 29, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

James W. Boyd 1544 Ebenezer Rd. PO Box 36425 Rock Hill,
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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)
)
 The City of Rock Hill,)
)
 Plaintiff/Respondent,)
)
 v.)
)
 Lenora M. White,)
)
 Defendant/Appellant.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2014-CP-46-01988

ORDER

FILED-RECEIVED
 2014 SEP 29 AM 11:16
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

The City of Rock Hill (the City) requests relief relative to this Court’s Order of September 11, 2014, pursuant to Rule 59(e) SCRPC.

The City argues no error in the Order of September 11, 2014, but rather requests specific rulings in two regards.

The City asks the Court to rule specifically why a totality of the circumstances analysis pursuant to Section 56-5-2953(B) is not appropriate in this case. The city relies on State v. Manning, 400 S.C 257 (Ct. App. 2012), State v. Johnson, 408 S.C. 544 (Ct. App. 2014) and State v. Sawyer, 2014 WL 42144291 (S. Ct. 2014).

State v. Manning, *supra*, offers no support for the proposition that a tape which fails to comply with Section 56-5-2953(A)¹ may nonetheless, under any circumstance, survive dismissal under the Section 56-5-2952 (B) “totality of the circumstances” exception. In the instant case, the appealed from Order is not based on Section 56-5-2953(B), but is rather based on the interpretation of the word “conduct.”

¹ On page 4 of the September 11, 2014 Order, at No. 3, language from Section 56-5-2953(A)(2) is incorrectly referenced as Section 56-5-2953(B).

State v. Johnson, *supra*, is inapplicable as it is a case in which no video tape was produced under circumstances implicating Sections 56-5-2953(B) and (G).

In State v. Sawyer, *supra*, the circuit court did not address the totality of circumstances issue, thus it was not preserved for appeal. Sawyer is, addressed further below. Of importance here is its application of the requirement of Section 56-5-2953(A).²

Even though Judge Lenzi's order³ was not based on Section 56-5-2953(B), this is a good opportunity for the undersigned to address how I understand the Section 56-5-2953(B) totality of circumstances exception comes into play. The argument of the City, and by all prosecutors, seems to be that regardless of the failure of the arresting officer to comply with Section 56-5-2953(A) in a driving under the influence case, the prosecutor may proceed on a defective tape⁴ if the Court finds the totality of the circumstances warrant.

The undersigned may be misreading Section 56-5-2953(B). Section 56-5-2953(B) sets forth a set of four exceptions when "production" of the video tape is excused (not grounds for dismissal). Black's Law Dictionary defines the word "produce," in the definition applicable here as "to bring into existence, to create." (7th Ed., 1969, p. 1225). The American Heritage College dictionary defined the word "produce," for purposes I believe applicable to the statute, as "to create by physical . . . effort, to manufacture; to cause to occur or exist." (4th Ed., 2002, p. 1111).

The above definitions have lead the undersigned to apply the word "produce" as used in Section 56-5-2953(B) as meaning the creation of video tape. Further, the undersigned finds that the 56-5-2953(B) exception does not apply when the arresting officer or breathalyzer officer

² While Sawyer, *supra*, is decided under Section 56-5-2953 as it existed in 2007, its dispositive holding is applicable to the statute as of Ms. White's arrest dated, November 22, 2013.

³ Apologies to Judge Lenzi for leading him down the wrong trail.

⁴ The word defective seems to be as good as any to signify an existing tape which fails to comply with Section 56-5-2953(A).

produces a tape, but the tape fails to comply with Section 56-5-2953(A) (i.e the tape is defective). If the undersigned's interpretation is incorrect then Section 56-5-2953(A) is neutered.

As observed in the Court's Order of September 11, 2014, Judge Lenzi relied on this Court's Order in Rock Hill v. Gessner, 2013-CP-46-1010. In Gessner, the undersigned found that logic called for a "substantial compliance" application of Section 56-5-2953(A). Gessner did not address the totality of circumstances language of Section 56-5-2953(B), but rather opined that the conduct captured on a video tape should be subject to a real world totality analysis.

Judge Lenzi's Order, here, was a "conduct" analysis. That is, his Order did not address the totality of the Section 56-5-2953(B) circumstances argument.

The City's Motion to Reconsider requests a remand for a factual finding it contends is lacking from the lower court. I find this argument is factually in error. Judge Lenzi stated in his Order "the mere fact that the suspect's head was blocked by police officer's head does not warrant dismissal of the charges." (emphasis added).

Recapping, the City's motion set forth as Number 1, is incorrect. Judge Lenzi did not apply a Section 56-5-2953(B) totality analysis as his Order addresses the totality of the facts as they related to a video which was produced and allowed into evidence. Judge Lenzi did not engage in a Section 56-5-2953(B) analysis based on the arresting officer's failure to "produce" a tape. In essence, Judge Lenzi's analysis ruling is the antithesis of a Section 56-5-2953(B) totality of the circumstances analysis.⁵ He ruled that the video complied with Section 56-5-2953(A).

⁵ Judge Lenzi does use the words "totality analysis." The issue before him, as reflected by his Order, was compliance with Section 56-5-2953 not an exception to Section 56-5-2953(A).

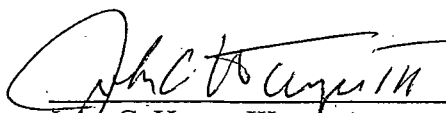
As to the City's argument Numbered 2, Judge Lenzi did make a specific finding of fact as to the fact crucial here, i.e., the administered officer positioned himself such that Ms. White's head was blocked from view when she blew into the Datamaster machine.

As noted to a degree in the Court's Order of September 11, 2014, State v. Sawyer, 2011-201206, 2014 WL 4214429 (S.C. August 27, 2014), appears to contradict the undersigned's finding in Gessner that a "substantial compliance" test should be applied in Section 56-5-2953 cases. In Sawyer, the Court observed that it had interpreted the statute to require "strict compliance" absent a Section 56-5-2953(B) exception. (emphasis added). In footnote 5, the Court appears to indicate (while not actually ruling) that a prejudice analysis is not appropriate as to evidence which does not fully comply with the statutory requirements.

Pursuant to the language of the statute, the undersigned finds that Section 56-5-2953(B) applies only when a videotape is not produced (i.e., made, created) and does not apply in cases where a video tape is produced and the tape fails to comply with Section 56-5-2953(A) and is therefore defective.

Wherefore, the City of Rock Hill's Motion to Alter or Amend the Court's September 11, 2014 Order is denied.⁶

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge

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September 25th, 2014
York, South Carolina

⁶ As reflected in the September 11, 2014 Order, the Court opines that this result in this case is absurd.