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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

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S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5226 (S.C. Ct. App. filed June 11, 2014)

Appellate Case No. 2014-001337

THE STATE, ... PETITIONER,

v.

CODY ROY GORDON, ... RESPONDENT.

BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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Did the Court of Appeals err in affirming the circuit court's reversal of Respondent's magistrate court conviction for driving under the influence where, in compliance with section 56-5-2953 of the South Carolina Code, Respondent's conduct at the incident site was video recorded and the video recording included the field sobriety tests administered by the arresting officer?

STATEMENT OF THE CASE

On October 30, 2011, Respondent was charged with driving under the influence for violating section 56-5-2930 of the South Carolina Code. (App.p.42). On September 12, 2012, Respondent's case was called for trial before the Honorable M. Todd Simmons, Oconee County magistrate judge, and a jury. Respondent was present and was represented by Keith G. Denny, Esquire, of Walhalla. Petitioner (the State) was represented by Assistant Solicitor Bethany Ann Blundy of the Tenth Circuit Solicitor's Office. (App.p.32).

Respondent made several pretrial motions, including a motion to dismiss on grounds that the State failed to adhere to the requirements of S.C. Code section 56-5-2953, which required that the officer video record Respondent's conduct at the incident site, including the field sobriety tests administered. The trial judge heard arguments, reviewed the relevant statute, and reviewed recent case law before ruling "the State properly captured on the roadside video [Respondent's] conduct as required by S.C. Code § 56-5-2953 and as interpreted by Murphy"[1] and denying the motion. (App.p.32-p.33).

At trial, the State presented testimony from two witnesses: Corporal Mayfied and Lance Corporal Greer of the South Carolina Highway Patrol. The State also introduced several exhibits, including a DVD recording of the roadside video of Respondent's arrest. Following a trial, closing arguments, and deliberations, the jury found Respondent guilty of violating S.C. Code § 56-5-2930 "driving under the influence" (App.p.32-p.43). Respondent was sentenced to thirty (30) days imprisonment suspended upon completion of 48 hours of public service employment within eight weeks and payment of $167 in court costs on a scheduled time payment agreement of six weeks. (App.p.37).

[1] Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2007).

Respondent timely appealed his conviction to the Oconee County Court of Common Pleas (Case No. 2012-CP-37-852) and attached a written statement setting forth his grounds for appeal. (App.p.20-p.26). On January 22, 2013, a hearing was convened at the Oconee County Courthouse before the Honorable Alexander S. Macaulay. Respondent was again represented by Keith G. Denny, Esquire, and the State was represented by Assistant Solicitor Blair Stoudemire of the Tenth Circuit Solicitor's Office. (App.p.3; p.29). As grounds for appeal, Respondent argued he should have been granted dismissal of the charge because of "incident site recording violations." He argued that although his body physically appeared in the video recording during the field sobriety tests, he was "in the dark" and that "you cannot see him at his face or his head doing the HGN[2] test." (App.p.6, lines 1-3). Respondent went on to argue:

> In my opinion, as well as I believe the Court would see if he views the video, is that it is impossible to actually see his head. I do not believe that's in compliance with the video. There is absolutely nothing to prevent the Officer from bringing [Respondent] closer to the Trooper's car so that he would be in full visibility and actually having the HGN performed at that point in time. He didn't do it. You can't see it.

(App.p.6, line 8-16) (emphasis added). He then provided the judge with two black and white "still shots" or "screen shots" from the video recording in support of his argument and suggested the trooper may have intentionally "kept him out of visibility of the

[2] HGN or "horizontal gaze nystagmus" is a standard field sobriety test often administered along with other tests during an investigation of suspected driving under the influence. See State v. Sullivan, 310 S.C. 311, 313, 426 S.E.2d 766, 768 (1993). "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system. The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." Sullivan, 310 S.C. at 315 n.2, 426 S.E.2d at 769 n.2 (internal citations omitted) (emphasis added).

video."[3] (App.p.6, line 16-p.8, line 22). Although the video recording was viewed by the magistrate and was attached to the Return submitted to the circuit court, the record does not indicate the circuit court actually reviewed that recording. Thus, Judge Macaulay appears to operate under the assumption that the HGN test was in fact "out of sight" during the video recording. Based in part on this misapprehension, the circuit court granted Respondent's motion to reverse his conviction and dismissed the charge. (App.p.12, line 10-p.17, line 25).

On February 15, 2013, Judge Macaulay issued a written order finding the magistrate committed an error of law in denying Respondent's motion to dismiss. He found the "conduct" sought to be recorded during the HGN test was not, in fact, captured on the recording because, "as a matter of law, S.C. Code Ann. [s]ec. 56-5-2953(A) requires that the Defendant's head must be visible . . . during the administration of the HGN field sobriety test." Judge Macaulay reversed the conviction for driving under the influence and dismissed the charge with prejudice. (App.p.27-p.31). The State timely filed a notice of intent to appeal the circuit court's order and submitted a brief to the Court of Appeals challenging the circuit court's ruling. (App.p.45-p.63). On April 23, 2014, the Court of Appeals issued a published opinion which affirmed in part, vacated in part, and remanded the case to the magistrate court. State v. Gordon, Op. No. 5226 (S.C. Ct. App. filed April 23, 2014) (Shearouse Adv. Sh. No. 16 at 71). The State submitted a petition for rehearing on May 6, 2014, and Respondent filed a return on May 15, 2014. (App.p.90-p.104). By order filed June 11, 2014, the petition for rehearing was denied. (App.p.105). In conjunction with denying rehearing, the Court of Appeals withdrew the

[3] These "screen shots" were not part of the record before the trial court and appear to have been handed to the circuit court judge by Respondent's counsel in lieu of the actual video recording introduced at trial as State's Exhibit #3.

previous opinion and substituted a new published opinion. State v. Gordon, Op. No. 5226 (S.C. Ct. App. filed June 11, 2014) (Shearouse Adv. Sh. No. 23 at 43). (App.p.83-p.89). On June 19, 2014, the State submitted a Petition for a Writ of Certiorari to the Court of Appeals. On July 22, 2014, Respondent submitted an Amended Return to Petition for Writ of Certiorari, and by Order dated November 19, 2014, this Court granted the petition and directed the parties to serve and file the appendix and briefs as provided by Rule 242(i), SCACR. This Brief of Petitioner now follows.

STATEMENT OF FACTS

On October 30, 2011, Respondent was charged with driving under the influence for violating Section 56-5-2930 of the South Carolina Code. (R. p.40). Prior to placing Respondent under arrest, the officer conducted a series of field sobriety tests including: (1) an HGN test; (2) a "walk and turn" test; and (3) a "one leg stand" test.[4] Respondent's conduct at the incident site was video recorded by the dashboard camera in the arresting officer's patrol car. The video recording is a continuous recording and includes all three of the field sobriety tests administered by the officer prior to Respondent's arrest. Although the lighting is not perfect, Respondent can be seen and heard during the entire six minutes and ten seconds recorded prior to his arrest. Respondent's head is visible during the approximately two-minute long HGN test, and it is clearly visible during a majority of that HGN test because the officer's flashlight is pointed directly at Respondent. (State's Exhibit #3: DVD of roadside video). After completing the tests Respondent was placed under arrest. Following a trial, Respondent was convicted of driving under the influence.

[4] In State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001), this Court discussed several common field sobriety tests including the "walk and turn" test and the "one leg stand" test in finding that an officer's personal observations and opinions of a driver's actions, appearance, and condition constitute direct evidence of driving under the influence.

ARGUMENT

The Court of Appeals erred in affirming the circuit court's reversal of Respondent's magistrate court conviction for driving under the influence where, in compliance with section 56-5-2953 of the South Carolina Code, Respondent's conduct at the incident site was video recorded and the video recording included the field sobriety tests administered by the arresting officer.

In affirming the reversal of Respondent's conviction, the Court of Appeals recognized that in an appeal from magistrate's court the circuit court does not review the case de novo, and that the circuit court is bound by the magistrate court's findings if any evidence in the record reasonably supports them. However, the Court of Appeals then misapplied the standard of review based in part on a misapprehension of the magistrate court's factual findings. The Court of Appeals mistakenly construed the decision of the magistrate as lacking sufficient findings of fact, but it did so only after manufacturing a statutory requirement that simply does not exist.

The State submits the Court of Appeals misapprehended or overlooked the clear and unambiguous language of the statute, which does not include any requirement that "the head must be visible on the recording" of an HGN field sobriety test. Both the circuit court and the Court of Appeals erred in concluding otherwise and, as a result, misapplied the standard of review. Not only does this requirement fail to appear in the plain language of the statute, but interpreting any perceived ambiguity in the statute by adding such a requirement would lead to an absurd result not possibly intended by the Legislature. Thus, the circuit court erred in reversing Respondent's conviction and in dismissing the DUI charge, and the Court of Appeals erred in affirming in part and remanding to the magistrate for additional factual findings.

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (Ct. App. 2012); State v. Johnson, 396 S.C. 182, 186, 720 S.E.2d 516, 518 (Ct. App. 2011). The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 186, 720 S.E.2d at 518. 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. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. The court should look to the plain language of the statute. Binney v. State, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519.

The South Carolina Code provides:

> (A) 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 video recorded.
>
> (1)(a) The video recording at the incident site must . . . (ii) include any field sobriety tests administered.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2012) (emphasis added). The statute requires that the "conduct at the incident site" be recorded and goes on to specify that "the video recording [of that conduct] at the incident site must include any field sobriety tests administered." Here, Respondent argued to the trial court that his head was not visible during the video recording of the HGN field sobriety test and that this violated the terms of the statute. The trial court reviewed the video recording and found it sufficiently captured Respondent's conduct. No more detailed finding was required. The trial court's reference to Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), which itself notes the statutory language had been amended after Murphy's arrest, shows the magistrate was aware of the specific requirement that the video recording include the field sobriety tests, and still found the video was sufficient. The Court of Appeals criticized the trial court's failure to make any findings "as to whether the entire test, including the head, was on camera." However, no such finding was required by the statute, and if the statutory language somehow implies the requirement, then the trial court's finding regarding Respondent's conduct necessarily encompasses that finding. If the circuit court applied the proper standard of review on appeal, it should have affirmed the trial court because its finding was supported by evidence in the record.

Contrary to the findings of the circuit court and the Court of Appeals, the plain language of the amended statute does not require that the defendant's "head must be visible" . . . during the administration of the HGN field sobriety test. It merely says the video recording must "include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2012). As in Murphy, the statute does NOT require that the recording capture "a continuous full view of the accused." It also does NOT require a

recording of a particular quality, or a recording in the best possible lighting conditions, or any other such limitation. As long as the recording includes "any field sobriety tests administered," it is in compliance with the plain, unambiguous language of the statute, and the circuit court erred in finding otherwise. Here, the arresting officer acted in good faith compliance with the plain terms of section 56-5-2953, and his compliance should not be thwarted by an invented statutory requirement that does not exist.

In State v. Sawyer, this Court addressed the video recording requirements at the breath test site, which are set forth in subsection (A)(2) of section 56-5-2953, rather than the video recording requirements at the incident site, which are at issue here, and which are set forth in subsection (A)(1). State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014). In Sawyer, the Court found it was concerned not only with the defendant's "conduct" but also with the "content of the statutorily required warnings," specifically "the reading of his Miranda rights" and "the person being informed that he is being videotaped, and that he has the right to refuse the test." Id. at 480, 763 S.E.2d at 185-86. This Court held that a silent video "simply cannot meet these statutory requirements." Id. The State contends Sawyer is not dispositive. While "the reading of Miranda rights" and "the person being informed" of certain rights can be construed as having solely verbal or audible components above and beyond the "conduct" which must be captured in the video, the same construction does not flow from a requirement that the video "include any field sobriety tests administered." Indeed, the trial court, the circuit court, and the Court of Appeals all seemed to agree the requirement regarding field sobriety tests simply involved recording particular aspects of Respondent's "conduct." Furthermore, the audio portion of the videotape from the incident site of Respondent's arrest was not challenged.

For these reasons, Sawyer is inapplicable, and the Court of Appeals erred in affirming the circuit court's construction of subsection (A)(1) of the statute.

Even if this Court agrees with the Court of Appeals and finds the statute is somehow ambiguous, the State nevertheless submits the Court of Appeals misapprehended the statute in a way that would lead to an absurd result not possibly intended by the Legislature. If a statute is ambiguous, courts must construe the terms of the statute. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); Johnson, 396 S.C. at 189, 720 S.E.2d at 520. A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006); Johnson, 396 at 189, 720 S.E.2d at 520. The language of the statute must be read in such a way that harmonizes its subject matter and accords with the statute's general purpose. Roberts, 393 S.C. at 342, 713 S.E.2d at 283; Johnson, 396 S.C. at 189, 720 S.E.2d at 520. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Johnson, 396 S.C. at 189, 720 S.E.2d at 520. However, courts will reject a statutory interpretation that would lead to an absurd result not intended by the Legislature or that would defeat plain legislative intention. Id.

The overarching purpose of subsection 56-5-2953(A) is clear: to ensure that the driver's "conduct" at the incident site and breath test site is recorded. This allows a jury to weigh whether the conduct supports the allegation of driving under the influence. Indeed, capturing the driver's overall conduct was the precise purpose described in Murphy, supra. The subparts of 56-5-2953(A)(1) simply identify particular aspects of

that conduct which must also be included in the video recording. Pursuant to Murphy and its analysis of the predecessor statute, an officer could comply by video recording some, but not all, of the field sobriety tests administered. The amendment simply eliminated this possibility by requiring that any and all field sobriety tests be video recorded. It requires a video recording of the officer's administration of the field sobriety tests, not a recording that captures every detail or the actual results of the tests. Indeed, it would be absurd to require video recording of the "involuntary jerking of the eyeball," which is the only relevant observation in an HGN test. Sullivan, supra. The State submits that as long as a juror can tell the arresting officer is administering the test, there is compliance with the statute and any challenge to the quality of the test should go solely to the weight of the evidence. Here, the video recording leaves no doubt the arresting officer conducted an HGN test along with two other field sobriety tests, and all three tests were included in the video recording. Any other interpretation is not practical, reasonable or consonant with the purpose, design, and policy of the lawmakers. Indeed, the State submits the Court of Appeals' expansive view of the allegedly ambiguous language would fail to resolve the issue in favor of a just, equitable, and beneficial operation of the law. To the contrary, it leads to an absurd result not possibly intended by the Legislature. Certainly the Legislature did not intend dismissal of an otherwise valid DUI charge simply because the quality of the video recording does not meet the intermediate appellate court's arbitrary standards.

As noted by the Court of Appeals, "the purpose of section 56-5-2953 is to create direct evidence of a DUI arrest." As implicitly found by the trial court, that purpose was fulfilled. The video recording of the three field sobriety tests provided the State, the

defendant, and the jury with direct evidence of Respondent's arrest, as well as his "conduct at the incident site." The Court of Appeals logically concludes that: "if the actual tests cannot be seen on the recording, the requirement is pointless"; however, it then makes the unreasonable leap of concluding that "the head has to be visible" during the HGN test. The State submits that under the Court of Appeals' analytical process, showing the head would also be "pointless" because an HGN test concerns movement of the eyeballs, not the head. Certainly the Legislature did not intend that the arresting officer videotape a defendant's eyeballs during an HGN test. If it did it would have said so explicitly in the statute. The State submits that superimposing any specific or detailed requirement onto the video recording statute beyond what is actually required, which is simply a recording of "all field sobriety tests administered," would be absurd.

Quoting this Court's language from Roberts, the Court of Appeals also concludes that "the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953."[5] As explained below, the State disputes this conclusion; however, even if it is correct, Respondent's case is distinguishable. Here, there is NO mandatory provision in the statute that the defendant's head must be visible. Instead, the mandate is only that "conduct at the incident site" be recorded, including "any field sobriety tests

[5] This conclusion and the quoted language stem from this Court's earlier decision in Suchenski, wherein the Court held that "failure to produce videotapes would be a ground for dismissal if no exceptions apply." Suchenski, 374 S.C. at 16, 646 S.E.2d at 881. Yet, nothing in the above language mandates dismissal or requires the evidence be deemed inadmissible. By using "would be a ground for dismissal" the Court specifically provided discretion to the court to determine the remedy based on the court's analysis of the State's failure to produce. The conclusion to Suchenski is also telling. This Court stated: "Finally, dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." Id. at 17, 646 S.E.2d at 881. The Court specifically chose language which indicates other remedies are also appropriate. The Court did not find dismissal is the only appropriate remedy. The Court specifically stated dismissal is an appropriate remedy. The conclusion by the Court clearly allows the trial court discretion in how to handle a failure to produce a videotape.

administered." As found by the trial court, that mandate was met. If any evidence supports that finding, the circuit court was required to affirm, and the Court of Appeals was required to reverse the circuit court when that court failed to do so.

For all of these reasons, the State submits the circuit court judge erred in interpreting section 56-5-2953(A) to require that a defendant's head be visible during an HGN test. By video recording Respondent's conduct at the incident site, including the field sobriety tests administered prior to Respondent's arrest, the arresting officer complied with the plain and unambiguous requirements of section 56-5-2953 of the South Carolina Code. The Court of Appeals should have reversed the decision of the circuit court and reinstated Respondent's conviction for driving under the influence. Instead, the Court of Appeals affirmed the circuit court's invention of a statutory requirement that does not exist in the plain language of the statute and has remanded the case to the magistrate court to make findings of fact regarding the newly invented requirement. The evidence in Respondent's case leaves little doubt the magistrate would reach the same conclusion on remand–that the video fully complies with all statutory requirements, including the newly minted requirement that: "for the HGN test, the head has to be visible on the recording." Nevertheless, the State submits reversal is warranted because the ramifications of the ruling go far beyond Respondent's case. To the extent the Court of Appeals is incorrect, as contended by the State, this Court should take this opportunity to reinforce which incident site videotaping requirements are specifically identified in the statute and end the unwarranted addition of implied requirements. To the extent the Court of Appeals is correct, this Court should take this opportunity to clarify for the

bench and bar what other specific incident site videotaping requirements the appellate courts wish to legislate from the bench.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court issue an order reversing the decision of the Court of Appeals, reversing the circuit court, and affirming Respondent's conviction and sentence.

Respectfully submitted,

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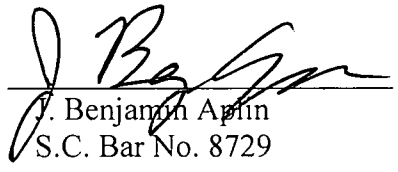
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Brief of Petitioner* dated December 18, 2014, on Respondent by depositing two copies of the brief in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 18th, day of December, 2014.

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