STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2014-000280

William Russell Patterson, Respondent,

v.

The State of South Carolina, Appellant.

INITIAL BRIEF OF RESPONDENT

CHRISTOPHER A. WELLBORN
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ATTORNEY FOR RESPONDENT

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II. The circuit court correctly found section 56-5-2953(B) was not applicable to this case.

STATEMENT OF THE CASE

On July 6, 2013, Trooper Hassen of the S.C. Highway Patrol stopped the Respondent for allegedly crossing the center line of traffic. Trooper Hassen ultimately charged and arrested the Respondent for driving under the influence. (Ticket No: G 37897; R.__). Pre-trial Motions were heard on November 6, 2013 at which time the Respondent sought a dismissal of his charge pursuant to section 56-5-2953(A) of the S.C. Code (11/6T.3-5; R. ___). The Motion was based on the State's failure to properly record two of the three field sobriety tests administered by Trooper Hassen, specifically the horizontal gaze nystagmous (HGN) test and the walk and turn test. (11/6T.5; R.___). The trial court denied the motion as to the walk and turn test but specifically chose not to address the HGN test, finding it was "not an issue before the court". (11/6T.37-38; R.___). A trial was held on November 14, 2013 at which time Trooper Hassen testified extensively about both his administration of the HGN test and the results of this test. (11/14 T.29-32; R.___); 11/14 T.85/99; R.___).

At trial the jury convicted the Respondent of driving under the influence. The Respondent filed an appeal to the circuit court. (Notice of Appeal to Circuit Court; R.__). The magistrate filed a Return dated November 27, 2013. (Magistrate's Return to Notice of Appeal; R.__). The Appeal was heard before the Honorable John C. Hayes, III, on January 13, 2014. (1/13T.1; R.__). Judge Hayes issued an Order of Dismissal which was filed on January 23, 2014. (Order of Dismissal; R.__). The State filed a Motion to Alter/Amend Judge's Hayes ruling on January 28, 2014. (Motion to Alter/Amend; R__). The motion was denied by an Order filed January 31, 2014. (Order Denying Motion to Alter/Amend; R.__).

The State has now appealed the circuit court's orders.

ARGUMENT

I. The circuit court correctly dismissed the State's case where the State did not comply with the mandatory recording provisions of section 56-5-2953 of the South Carolina Code.

In this case, the State did not produce a video that complied with the mandatory recording provisions of section 56-5-2953 of the S.C. Code. The provisions of this section state in pertinent part that:

> (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:
>
> > (I) not begin later than the activation of the officer's blue lights;
> > (ii) include any field sobriety tests administered;
> > and
> > (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probably cause determination in that the person violated Section 56-5-45, and show the person being advised of his Miranda rights.

The cardinal rule of statutory construction is that a court must ascertain and give effect to the intent of the legislature. State v. Elwell, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013). "What a legislature says in the text of the statute is considered the best evidence of the legislative intent or will" .Id. "Therefore, if a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning". Id.; see also State v. Pittman, 373 S.C. 527, 561,

647 S.E.2d 144, 161 (2007). "All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used". "However, penal statutes will be strictly construed against the State." Elwell, 403 S.C. 612, 743 S.E.2d 806.

The State's position seems to be that although the plain language of the statute requires the recording of the HGN test, it does not require that one be able to view the test or the results of this test. Presumably simply recording the fact that the test took place would, in the State's view, suffice.[1] It would then be up to the finder of fact to accept the officer's testimony regarding a person's performance on these tests. This court has rejected this position stating: "because of the purpose of the video taping to create direct evidence of the arrest, if the actual tests can not be seen on the recording, the requirement is pointless." State v. Gordon, 408 S.C. 536, 541, 759 S.E.2d 755, 758 (Ct. App. 2014). In Gordon, like this case, this court addressed the HGN test and though, like in this case, presumably the HGN test was administered, it could not be seen on the video recording. In the instant case, during both the motion to dismiss and the trial, Trooper Hassen testified extensively about the HGN test he gave the Respondent and the results he observed. (11/6 T.12-23; R.__), 11/14 T.29-32; R.___), 11/14 T.88-99; R.__). Prior to the HGN test, Trooper Hassen examined the Respondent's eyes for equal pupil size, and to make sure that his eyes tracked equally. Then, if the pupils were equal and the eyes tracked equally, he would administer the HGN test. (11/14 T.30; R.__). The Respondent told Trooper Hassen that he had eye

[1] An analogy might be where perspective bar applicants took the Bar Examination but no one recorded their scores, only that they were administered the examination.

problems and that his eyes did not track equally (11/14 T.89; R.__). Trooper Hassen further testified that the Respondent lacked smooth pursuit in both eyes. (11/14 T.92; R.__). Trooper Hassen then tested for nystagmous at maximum deviation twice in each eye, (11/14 T.92-93; R.__), and the onset of nystagmous prior to 45 degrees. (11/14 T.93; R.__). Although Trooper Hassen claimed to observe both nystagmous at maximum and onset of nystagmous prior to 45 degrees in each eye, he admitted that none of the results were able to be seen or observed by watching the video recording of the incident site. (11/6 T.14-23; R.__), (11/14 T.92-94; R.__). Trooper Hassen further admitted that there were portions of the video where his hand disappeared as he administered the HGN test. (11/6 T.16-22; R.__), (11/14 T.93; R.__).

In sum, none of the results that Trooper Hassen allegedly observed and testified about, were recorded. Various portions of the administration of the tests were not recorded as well. The actual HGN test could not be seen on the video and the circuit court correctly found the appropriate remedy was a dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007), Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (Ct. App. 2002) ; State v. Gordon, 408 S.C. 542, 759 S.E.2d 758 (Ct. App. 2014)..

ARGUMENT

II. The circuit court correctly found that Section 56-5-2953(B) was not applicable to this case.

Section 56-5-2953(B) of the South Carolina Code states that:

> nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer **to produce** the video recording required by this section is not alone ground for dismissal of any charge made pursuant to section 56-5-2930, 56-5-2933, or 56-5-2945 **if the arresting officer submits a sworn affidavit** certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was **in an inoperable condition**, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, **submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed**. The circumstances including, but not limited to road blocks, traffic accident investigations, and citizen's arrests, where an arrest has been made and the video recording equipment has not been activated by the blue lights, the failure by the arresting officer to produce the video recording required by this section is not alone grounds for dismissal. However, as soon as the video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other **valid reason** for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

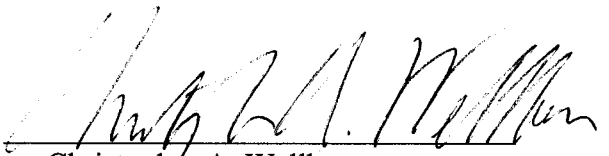
The record is clear in this case that the arresting officer did not submit any affidavit, sworn or unsworn, which suggests that his video recording equipment was in an inoperable condition, or that it was physically impossible to produce a video recording for the reasons enumerated within the statute. Nor did the State argue that sub-section (B) was applicable at all. The State's argument was that Section 56-5-2953(A) was complied with. No more and no less. (11/6 T.36; R.__).

It is well settled that an issue not raised below and ruled upon is not preserved for review. State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991), State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998), Ex-Parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995).

CONCLUSION

For all the forgoing reasons, the decision of the circuit court should be affirmed.

Respectfully submitted:

By: 

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December 11, 2014

STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, Christopher A. Wellborn, certify that I have served the within Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to its attorneys of record as follows:

Alan McCrory Wilson
Attorney General

William M. Blitch, Jr.
Assistant Attorney General

Post Office Box 11549
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ATTORNEYS FOR APPELLANT

I further certify that all parties required by Rule to be served have been served.
This 11th day of December, 2014

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December 11, 2014

The Honorable Jenny Abbott Kichings
S.C. Clerk of Court of Appeals
Post Office Box 11629
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Re: William Russell Patterson, Respondent v. State of South Carolina, Appellant
Appellate Case No: 2014-000280

Dear Ms. Kichings:

Enclosed please find for filing the original and one copy of Respondent's Initial Brief, along with Certificate of Service, regarding the above referenced case. By copy of this letter, I am herewith serving copies of same on other counsel of record.

With kindest regards, I remain

Sincerely,

Christopher A. Wellborn
Attorney for Respondent
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CAW/aww

cc: Alan McCrory Wilson
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