

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Presiding Judge

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SC Court of Appeals

Trial Court Case No. 2014CP4601548
Appellate Court Case No.: 2014-002312

State of South Carolina ,

Respondent,

v.

Richard Alan Wells,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Magistrate Judge and the Circuit Court err in failing to dismiss the driving under the influence charge where the arresting officer failed to video record the Defendant Driver's conduct at the incident site as required by S.C. Code §56-5-2953?

A Did the Magistrate and Circuit Court err in finding that Section 56-5-2953 only requires the arresting officer to video record the driver's conduct during the field sobriety tests and the arrest and Miranda warnings?

B. Did the Magistrate err in failing to consider that the conduct omitted from the video recording included the Driver exiting his car and walking to the roadway?

II. Did the Magistrate and Circuit Court err in failing to properly consider the arresting officer's undisputed testimony regarding his training which included that he is trained to look for important "cues" in the driver's conduct during while exiting his vehicle as evidence of sobriety?

III. Did the Magistrate Judge and Circuit Court err in failing to dismiss the driving under the influence charge, as a matter of due process, where potentially exculpatory evidence of the Driver's conduct was not video recorded because the arresting officer consciously moved his patrol vehicle?

STATEMENT OF THE CASE

Appellant Richard Wells was charged with driving under the influence (first) in violation of §56-5-2933, on October 5, 2013 by York County Sheriff's Deputy Jonathan Deputy. [R.p. ___; Ticket.]¹ Wells timely requested a jury trial, which was conducted by the York County Magistrate on April 4, 2014.

Prior to the beginning of the trial, Wells moved to dismiss the charge on the ground that the arresting officer failed to fully comply with the video recording requirements in S.C. Code Ann. §56-5-2953. [R.p. ___; Motion.] The motion to dismiss was based upon the State's failure to record relevant, material conduct of Wells' sobriety at the incident site. The Court heard argument, outside the presence of the jury, from Wells and the State, reviewed Wells' written motion and the applicable case law. The Court denied Wells motion and ordered the matter to proceed before the jury.

During the Motions hearing, the arresting officer testified that his training required him to assess sobriety from the very first contact with a suspect by viewing him face to face and observing the suspect exit from the vehicle, stand up and then walk. The arresting officer admitted that these cues of sobriety were conduct and this conduct was not recorded. After the arresting officer had testified, at the end of the State's case, Wells' renewed his motion as a motion for a directed verdict on the ground that the State did not comply with §56-5-2953, as there were no exigent circumstances and the video camera was working at the time of the arrest. The Court denied the motion again. The jury convicted Wells of driving under the influence. [R.p. ___]

¹ He was also charged with open container violation, which he did not contest.

Wells timely appealed the conviction to the Circuit Court. [R.p. ____; Notice of Appeal, filed May 9, 2014.] The Magistrate filed a Return, and the appeal to the circuit court was heard by the Honorable John Hayes on September 3, 2014. [R.p. ____; Return, filed July 24, 2014.] The grounds for Wells' appeal to the circuit court were set forth in the written memorandum submitted to the Circuit Court. [R.p. ____; Memorandum, dated May 8, 2014.] The Circuit Court affirmed the magistrate's decision by Order, dated September 12, 2014 [R.p. ____.] This appeal followed when Wells served and filed his Notice of Appeal on October 9, 2014. [R.p. ____.]

STATEMENT OF FACTS

Richard Wells was arrested by York County Sheriff's Deputy Jonathan Osborne on October 5, 2013 in York County, South Carolina. The Deputy testified that he was a seasoned deputy trained and certified as an instructor in DUI detection, standardized field sobriety and certified by NHTSA. [R.p. ____; Tr. p.62:1-15.] The Deputy testified that his patrol vehicle was equipped with a video recorder that was in proper working order at the time of Wells' arrest and the video "fairly and accurately" reflected Wells condition at the time of his arrest. [R p ____, ____; Tr.p.64:1-14, Tr. p. 65 1-5.]

The Deputy testified that he stopped Wells by initiating his blue lights based upon his observations that Wells failed to maintain his lane of travel. [R.p. ____; Tr. p 63:20-22.]. The video shows that when the Deputy initiated his blue lights, Wells pulled off the roadway into a parking lot. The Deputy positioned his car where you could see Wells' vehicle. The Deputy approached Wells' car initially, gets ID information, license, insurance, talks to him for just a minute, does a cursory inspection of his truck bed and then goes back to his patrol car. At that point, the Deputy consciously and purposefully

chose to move his patrol car up into the travel portion of the highway and park it there, leaving Wells off camera for four and a half minutes, although the audio portion continued to record. During part of those 4.5 minutes that was not visually recorded, Wells was sitting in his car while the Deputy was sitting in his patrol car running the driver's license and tag information. The Deputy got out of his patrol car and approached Wells and directed him to get out of the car. Wells exited his car and walked to the traveled portion of the road as directed by the Deputy. At that point, they are in the range of the video recording when the Deputy performed the field sobriety tests. [See R.p. ___ - ___, ___; 9/3/14 Hearing Tr. p. 4-6, 12; Incident scene video.].

The video does not record the critical sequence of Wells exiting the vehicle, standing upon exiting the vehicle, and walking about thirty feet to the traveled portion of the highway to a point in front of the patrol vehicle, where the video began recording Wells for the first time in almost five minutes. Once they were in the visual video range of the patrol vehicle's camera, the Deputy began to administer certain field sobriety tests: the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. The Deputy testified he saw signs of impairment during his observations of Wells conduct during these tests, and placed him under arrest for driving under the influence.

The Deputy testified that he is trained, from the onset of contact with a suspect's vehicle, to look for "cues" from the driver that demonstrate sobriety or the lack thereof. [R.p. ___ - ___; Tr. p. 25:22-p.26:1). The Deputy testified that based upon his training, the first phase of investigation is his observations of the driving conduct. [R.p. ___; Tr. p.25:7-12.] He is looking for cues of impairment to decide whether to stop the driver. The second phase of his initial investigation is to observe the conduct of and interview

the driver face-to-face to determine sobriety. The Deputy admitted that during the second stage, his training requires him to “observe the driver’s exit and walk from the vehicle...” in order to assess sobriety. [R.p. ___; Tr. p.25:18-21.] At that point, he then must decide whether to have the driver submit to further investigation by administering field sobriety tests, which is the third stage of his investigation. [R.p. ___; Tr. p.25:13-17.]

The Deputy testified that that all these cues of sobriety are important aspects of the driver’s conduct which he is to consider as he goes through the three phases of investigation and assessment of whether the driver is under the influence. [R p. ___, Tr. p. 26:2-6.] The Deputy admitted that he did not record the important, relevant cues of sobriety of Wells as he exited his vehicle:

Q. Would you agree with me that cues where there’s an indication of sobriety or a lack thereof are missing from the videotape?

A: I’m not sure. Can you rephrase that question?

Q: I will. I will. You agreed with me a while ago that the officer should come face to face, observe him exiting the vehicle and walking from the vehicle, do you agree with that?

A: Yes, sir,

Q: Those are important cues in the determination of sobriety?

A: Could be, yes sir.

Q: All right. Would you agree that those important cues in the determination of sobriety regarding the actions and demeanor of Mr. Wells were not recorded?

A: I agree with that.

[R.p. ___; Tr. p.28:7-p.28:4.]

The Deputy testified that the basis for Wells arrest was not just the field sobriety tests, but the totality of Wells’ conduct during the stop.

Q. Okay, and were the field sobriety tests the sole basis for why you arrested Mr. Wells that night?

A: No, sir. The reason Mr. Wells was arrested was the totality of everything from the driving that I has seen prior to stopping him. Upon the approach in my—the *appearance* of Mr. Wells during—while talking to him. The fact that he had a strong order of alcoholic beverage coming from the vehicle at the time of talking with him, he admitted that he had been drinking that night.

[R.p. ___ - ___; Tr. p. 75:20-p.76:8 emphasis added.]

The Deputy's admission that his arrest of Wells was based on "the totality of everything" and upon his approach and observation of Wells further supports the argument that the failure to record Wells exiting his vehicle and walking to the paved portion of the highway is in violation of §56-5-2953.

Summary of Argument

S.C. Code Ann. §56-5-2953 requires that in DUI cases, the arresting officer must video record the driver's conduct at the incident site and mandates that the recording begin no later than the activation of the officer's blue lights, and it must include any field sobriety tests administered; and the arrest and Mirandizing. The charge is subject to dismissal if there is a violation of this statutory requirement, unless the lack of video falls into one of the enumerated exceptions.

None of the exceptions apply. The recording equipment was working properly and there was no medical emergency or any other exigent circumstances to excuse the failure to visually record the Driver's conduct during the entire stop. It was the conscious, purposeful conduct of the Deputy – without any legitimate reason -- to move his patrol vehicle and thus fail to record 4.5 minutes of an important part of the second

phase of the Deputy's investigatory stop – 45 minutes of potentially exculpatory evidence.

Despite the undisputed evidence that the Deputy consciously/purposefully failed to video record all of Wells' conduct during the stop and arrest, the Magistrate refused to grant a dismissal based on the reasoning that the statute only requires recording of the driver's conduct while performing the field sobriety tests and while being arrested and advised of his Miranda rights. Wells maintains that the Magistrate's interpretation of §56-5-2953(A) was in error, particularly in view of the clear language of the statute, the legislative purpose and the testimony of the arresting officer.

The statute mandates that a person charged with DUI "must have his conduct at the incident site ... video recorded." The legislative purpose of this statute is to create direct evidence of a DUI arrest, not just evidence of intoxication, but also any exculpatory evidence of sobriety. The arresting officer testified that he is trained to consider the driver's conduct in three stages, including the second stage that includes the face-to-face communication when the officer first approaches the driver at the vehicle and the driver's conduct while exiting the vehicle. There are important cues of sobriety he trained to consider. Yet, the Deputy consciously moved his patrol vehicle and thereby failed to record an important, necessary part of the Driver's conduct – conduct that was potentially exculpatory. Given the undisputed, inexcusable failure to video record Wells' conduct during this second stage of the DUI investigatory stop, the DUI charge should be dismissed.

ARGUMENT

Standard of Review

The scope of review on appeal is limited to correcting errors of law:

In criminal appeals from municipal court, the circuit court does not conduct a de novo review. S.C.Code Ann. § 14-25-105 (Supp.2006); *State v Landis*, 362 S.C. 97, 606 S E 2d 503 (Ct.App.2004). In criminal cases, the appellate court reviews errors of law only. *State v Cutter*, 261 S.C. 140, 199 S.E.2d 61 (1973). Therefore, our scope of review is limited to correcting the circuit court's order for errors of law.”

City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). *See also* State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70. The circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. City of Greer v. Humble, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct App. 2013).

In this case, the facts are largely undisputed, and the core question is one of law. The single factual issue concerns the lack of any substantial evidence to support the Magistrate’s apparent factual finding that the only thing not captured on the video recording was the Driver sitting in his car, when the Deputy testified that during the 4.5 minutes, he directed Wells to exit his truck and walk to the roadway in front of the patrol vehicle where he then conducted and recorded the field sobriety tests.

The circuit court affirmed the magistrate judge's decision to deny defendant's motion to dismiss the charge based upon the state's failure to comply with Section 56-5-2953. The circuit court's determination was based upon the same reasoning of the magistrate judge. The circuit court found that “[T]he statute is very specific as to when the driver-suspect's conduct must be performed, that is "not began 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." (P. 6, Order of the Circuit Court, September 11, 2014.) The circuit court held that "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." The circuit court found that Wells' case was distinguishable from previous cases involving the officer's failure to record part of a sobriety test or administering the breath test. (Page 6, Order of the Circuit Court, September 11, 2014.) The circuit court erred when it determined that the only conduct to be recorded as required by Section 56-5-2953 was the sobriety test, the arrest and the advice of the Miranda warnings. This is a clear error.

The ultimate legal issue is whether the charge should be dismissed because the Deputy did not visually record the Driver's conduct for those 4.5 minutes. The related questions of law are whether the statute can be interpreted as only requiring the video recording of field sobriety tests, the arrest, and the administration of Miranda rights. And, more specifically in this case, whether the statute requires the recording of the driver's conduct during one of the three phases of the investigation which the arresting officer testified he is required by his training to observe and consider. A separate but related issue is whether dismissal is warranted based on the Deputy conscious actions in moving his patrol vehicle so that those 4.5 minutes – of potentially exculpatory evidence – were not recorded.

Based on the clear mandatory language of the statute, the Legislative intent, and the Deputy's testimony that the basis of the arrest was the totality of all the Driver's

conduct, and the purposeful conduct of the Deputy in moving his patrol vehicle, the failure to video record Wells' conduct in those 4.5 minutes warrants dismissal.

I. THE MAGISTRATE JUDGE AND THE CIRCUIT COURT ERRED IN FAILING TO DISMISS THE DRIVING UNDER THE INFLUENCE CHARGE WHERE THE ARRESTING OFFICER FAILED TO VIDEO RECORD THE DEFENDANT DRIVER'S CONDUCT AT THE INCIDENT SITE AS REQUIRED BY S.C. CODE §56-5-2953.

S.C. Code Ann. §56-5-2953 requires that in DUI cases, the arresting officer must video record the driver's conduct at the incident site:

(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 probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

The charges may be dismissed if there is a violation of this statutory requirement, unless the lack of video falls into one of the enumerated exceptions:

Failure by the arresting officer to produce the video recording required by this section is not alone a 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.

S.C. Code Ann. § 56-5-2953(B); *See also City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of DUI charge is an appropriate remedy if the officer fails to produce a satisfactory video recording unless an exception applies).

A. The Magistrate erred in finding that Section 56-5-2953 only requires the recording of the driver’s conduct during the field sobriety tests, the arrest and Miranda warnings.

1. *Statutory Construction -- The legislative purpose is to create direct evidence of a DUI arrest.*

The well-settled rules on statutory construction are set forth in the Supreme Court’s decision in *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011):

“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Bryant v State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. *State v Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, “[a]ll 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 light of the intended purpose of the statute.” *State v Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citation omitted).

In ascertaining legislative intent, “a court should not focus on any single section or provision but should consider the language of the statute as a whole.” *Mid-State Auto Auction of Lexington, Inc v Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Where the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning *Gay v Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

If the statute is ambiguous, however, courts must construe the terms of the statute. *Lester v SC Workers’ Comp Comm’n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). “A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers” *Sloan v SC Bd of Physical Therapy*

Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006). In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys Corp v Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

“Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.” *Bennett v Sullivan's Island Bd of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins Co v Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

In that case, the Supreme Court found that the legislative purpose of Section 56–5–2953 is to create direct evidence of a DUI arrest. The Court also found that the Legislature clearly intended strict compliance with the provisions of the statute. “By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56–5–2953 and, in turn, promulgated a severe sanction for noncompliance.” 713 S.E.2d at 286; *see also State v Gordon*, 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014), *cert granted* (Nov. 19, 2014).

This means that the arresting officer must video record all the relevant evidence of a DUI arrest, not only evidence of the Driver’s alleged intoxication and incapacity, to prove guilt, but also any exculpatory evidence of his sobriety that might prove innocence. *See State v Jackson*, 302 S.C. 313, 396 S.E.2d 101 (1990)(due process requires of preserving and providing exculpatory evidence) As will be discussed below, the critical importance of recording all of the driver’s conduct is strikingly evidenced by the testimony of the arresting officer that he is trained to consider the driver’s conduct in his face-to-face investigation and his observation of the driver exiting the vehicle. These are important pieces of evidence - “cues” - of sobriety as well as intoxication.

2. ***The Mandatory Statutory Language - “Conduct” at the incident site MUST be video recorded.***

One of the rules stated above, is that “a court should not focus on any single section or provision but should consider the language of the statute as a whole.” Section 56-5- 2953(A) clearly states in mandatory language that a person charged with DUI “must have his conduct at the incident site ... video recorded.” The Magistrate held that the statute only requires the recording of the field sobriety tests and the arrest. [R.p. ____; Return to Appeal.] The Circuit Court agreed. [R.p. ____; p6. Order of the Circuit Court]

First, such interpretation is inconsistent with the specific requirement that the recording must begin not begin later than the activation of the officer's blue lights. This requirement would be meaningless if the only conduct that must be recorded are the field sobriety tests and the arrest/Mirandizing.

Further, the syntax of the subsection (1)(a) which specifies that the recording must “include” the field sobriety tests and the arrest does not limit or alter the mandatory requirement that one must have his conduct at the incident site and the breath test site video recorded. Use of “include” does not limit the statutory requirement only those specified types of “conduct.” It does not mean “only” include; rather, in context with the mandate to begin the video when the deputy first turns on the blue lights, the only reasonable interpretation is that it means including – but not limited to.

The Appellate Court have addressed questions of the meaning and application of §56-5-2953 in several previous cases. Under prior provisions of this statute, before it was last amended in 20092, the Court held in Murphy v. State, 392 S.C. 626, 631, 709 S.E.2d

2 The amendment added the specification that the video recording include the field sobriety tests. 2008 Act No. 201, § 11, eff. February 10, 2009.

685, 688 (Ct. App. 2011), that “nothing in the plain language of the statute indicates that an accused remain in full view of the camera for the duration of the encounter. Rather, the statute only requires her “conduct” be recorded. Conduct is generally defined as one's behavior, action, or demeanor.” In Town of Mt. Pleasant v. Roberts, the Supreme Court found that the DUI charge should be dismissed because the Town had persistently, failed to equip its patrol vehicles with video cameras. In City of Rock Hill v. Suchenski, the Supreme Court held that dismissal of a DUAC charge was the appropriate remedy where the arresting officer, ran out of tape and stopped recording before the officer administered a third field sobriety test and before respondent was arrested. *See also* State v. Henkel, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013) (charge dismissed where the videotape did not include *Miranda* warnings); State v. Gordon, *supra* (the head must be shown during the HGN test in order for that sobriety test to be recorded).

Most recently, the Court of Appeals considered the question of what must be record on the incident scene video in State v. Taylor, ___ S.C. ___, ___ S E.2d ___, Appellate Case No.2012-213018, 2014 WL 7273644 (S C. Ct. App., filed December 23, 2014). In Taylor, the defendant was off camera for several seconds as the officer repositioned his vehicle. The defendant moved to dismiss because the video failed to capture the entire contact between her and the arresting officer. The magistrate judge granted the motion and the ruling was affirmed by the circuit court. The Court of Appeals held that the statute did not require a dismissal when only a few seconds of the suspect are omitted and the gap in the recording did not occur during any “of those events that either create direct evidence of a DUI or serve to protect the important rights of the defendant.” Taylor at ___.

Here, the conduct of Wells exiting his car and walking to the roadway omitted from the video recording created direct evidence of the DUI and could have served his important due process right to exculpatory evidence of his sobriety. Accordingly, the DUI charges should have been dismissed for failure to comply with the mandatory requirement of § 56-5-2953.

B. The Magistrate erred in failing to consider that the conduct omitted from the video recording included Wells exiting his car and walking to the roadway.

In his Return, the Magistrate noted that “the defendant’s act of sitting in his vehicle unseen while the video recording captured the scene doesn’t violate the section.” [R.p. ___; Return, p. 2.] The missing 4.5 minutes during which the video recording was running, but did not record the Wells’ conduct included more than him sitting in his vehicle. It is undisputed, and the State conceded at the Circuit Court hearing, that while part of that time, the Deputy was running the license and tag checks, the video did not capture Wells’ conduct in exiting his vehicle and walking 30 feet to the roadway. [R.p. ___ - ___; Hearing Tr. pp. 11-12. See also R.p ___; Order denying Appeal §3, p. 6.]

As discussed above, under Taylor, that conduct of Wells exiting his car and walking to the roadway created direct evidence of the DUI and could have served his important due process right to exculpatory evidence of his sobriety. And, the dismissal is, particularly, warranted in this case in view of the fact that, as a matter of law enforcement protocol, the Deputy was trained to consider the driver’s demeanor and actions in exiting the vehicle as part of the conduct evidencing sobriety.

II. THE MAGISTRATE ERRED IN FAILING TO CONSIDER THE ARRESTING OFFICER'S UNDISPUTED TESTIMONY THAT HE IS TRAINED TO LOOK FOR CUES IN THE DRIVER'S CONDUCT WHILE EXITING HIS VEHICLE.

Section 56-5-2953 required the Deputy to record the driver's "conduct" from the time of the activation of the blue lights. In finding that there was no violation, the Magistrate failed to even consider the Deputy's testimony, in accordance with his training, that conduct as related to a DUI investigation is "one's behavior, action or demeanor," and the Deputy's acknowledgement that he failed to record important cues in Wells' conduct that were part of his determination of sobriety.

The Deputy testified that he was trained to look for indications – "cues" – in his initial contact with a suspect which are important in determining sobriety or lack thereof. At the trial in Magistrate's court, when the Defendant first began his argument about the Deputy's training to look for "cues," the State objected to the Defendant introducing the actual NHTSA training manual used by the S.C. Criminal Justice Academy, and the Magistrate excluded the manual and any direct reference to the manual. [R.p. ___; Tr. pp. 6-7.] However, the Deputy did testify extensively, without objection, as to his training.

According to the Deputy's testimony, as set forth in detail above in the Statement of the Facts, he is trained, from the onset of contact with a suspect's vehicle, to look for "cues" from the driver that demonstrate sobriety or the lack thereof. After the first phase of activating this blue lights and pulling the driver over, he is trained to observe the conduct of and interview the driver face-to-face to determine sobriety in the second phase of his initial investigation. The Deputy admitted that during the second stage, his training

requires him to “observe the driver’s exit and walk from the vehicle...” in order to assess sobriety. [R.p. ____; Tr. p.25:18-21.]

Ultimately, the Deputy agreed that Wells’ conduct of exiting the vehicle was evidence that ought to be preserved because it is important in the determination of sobriety:

Q: Would you agree with me that cues where there’s an indication of sobriety or a lack thereof are missing from the videotape?

A: I’m not sure. Can you rephrase that question?

Q: I will I will. You agreed with me a while ago that the officer should come face to face, observe him exiting the vehicle and walking from the vehicle, do you agree with that?

A: Yes, sir,

Q: Those are important cues in the determination of sobriety?

A: Could be, yes sir.

Q: All right. Would you agree that those important cues in the determination of sobriety regarding the actions and demeanor of Mr. Wells were not recorded?

A: I agree with that.

[R.p. ____, Tr p.28:7-p.28:4.]

However, despite his training and his knowledge of the statutory requirements, the Deputy did not record Wells’ conduct as his exited his vehicle. Moreover, not only was there no legitimate statutory excuse, the Deputy did not have any good explanation for why he chose to move his patrol vehicle at that time which prevented the video camera from visually recording Wells’ conduct as he exited the vehicle.

In *Taylor*, the Court held that a brief omission of the suspect from the video did not require dismissal. This case is materially different During the 4.5 minutes that

Wells is off camera, the video fails to capture his conduct is exiting his vehicle which – by the Deputy’s own acknowledgement – was important and directly related to the issue of Wells’ sobriety. Under Taylor, if the conduct omitted from the video was important to the arresting officer in his investigation, then these same events create direct evidence related to the charge of DUI. The video did not record the conduct that was evidence of DUI; therefore, the State failed to capture Wells’ conduct as required by §56-5-2953. Because direct evidence of Wells conduct was omitted from the video, the Magistrate Judge and the Circuit Court erred in denying Wells motion to dismiss, as required by Suchenski

III. THE MAGISTRATE JUDGE AND CIRCUIT COURT ERRED IN FAILING TO DISMISS THE DRIVING UNDER THE INFLUENCE CHARGE, AS A MATTER OF DUE PROCESS, WHERE POTENTIALLY EXCULPATORY EVIDENCE OF THE DRIVER’S CONDUCT WAS NOT VIDEO RECORDED BECAUSE THE ARRESTING OFFICER PURPOSEFULLY MOVED HIS PATROL VEHICLE.

In State v. Jackson, . prior to the enactment of §56-5-2953, the Court addressed certain constitutional due process requirements as they related to a videotape of field sobriety tests and the defendant’s right to access to evidence as a necessary part of the due process right to a meaningful opportunity to present a complete defense:

His argument is based upon the principle that defendants are to be given a meaningful opportunity to present a complete defense. To protect this right, the United States Supreme Court has developed “what might loosely be called the area of constitutionally guaranteed access to evidence” **102 *United States v Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S Ct. 3440, 3446, 73 L Ed.2d 1193, 1203 (1982).

In this regard, defendants have the right to request and obtain from the prosecution evidence that is material to the guilt of the defendant or relevant to the punishment to be imposed. *Brady v Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Even absent a request,

prosecutors have a constitutional duty to give the defendant exculpatory evidence which would raise a reasonable doubt about his guilt. *United States v Agurs*, 427 U S 97, 96 S.Ct. 2392, 49 L Ed.2d 342 (1976).

396 S.E 2d at 101-102.

In Jackson, the Court stated: “In the case at bar, the videotape was clearly ‘material’. The exculpatory value was apparent before its destruction because one assistant solicitor was willing to drop the charges because of it. In addition, Jackson had no other evidence and could not obtain evidence of comparable value. Although the destruction of the tape was explained to the jury, the value of the tape could not be replaced.” *Id* at 316

The *Jackson* Court found that there was a due process violation that required the DUI conviction be reversed because videotape of the field sobriety tests had been erased after the Solicitor’s office decided to dismiss the charges. Even though the tape was erased as a matter of normal practice, the Court focused on the conscious decision made by the Solicitor's office to dismiss the charges which resulted in the tape being erased.

In this case, the Deputy did not destroy the video; however, he made a conscience decision to not record Wells exiting from his vehicle. The video camera was working. The Deputy, because of his extensive training about the cues of sobriety provided by a person accused of DUI, knew of the critical importance of the conduct of the suspect when he exited the vehicle and positioned himself standing outside of his vehicle. While having such knowledge, the Deputy failed to preserve the evidence by videotaping the exit. Video evidence of Wells’ exiting his vehicle, standing up once he exited, and then walking for thirty feet would have been the best exculpatory evidence for Wells. The video did not record Wells sobriety as he performed these actions, although the means to

do so was within the ability of the arresting officer to do so. The absence of the video leaves no objective, exculpatory evidence of this important sequence. The *Jackson* Court found that “the value of the tape could not be replaced.” This Court should find the same, and dismiss the charge.

CONCLUSION

Under the clear, mandatory language of § 56-5-2953, the Deputy was required to record Wells’ conduct beginning with the activation of the blue lights and through the arrest and Mirandizing. By the Deputy’s own testimony of his training, that conduct in exiting the vehicle is important evidence of sobriety; and as such, it was potentially exculpatory. Yet, the Deputy made a conscious decision to move his patrol vehicle and thereby failed to record the conduct of Wells’ exiting his vehicle and walking 30 feet to the roadway.

WHEREFORE, based on the language of the statute, the Legislative intent, and the Deputy’s testimony, as discussed before, the DUI charge should be dismissed for failure to comply with the mandate of §56-5-2953, and his constitutionally guaranteed access to direct, relevant evidence of his sobriety at the incident site.



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