

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APR 27 2015

**SC Court of Appeals**

Appeal from York County  
Honorable Mandrile H. Young, Magistrate Court Judge  
Honorable John C. Hayes, III, Circuit Court Judge  
Appellate Case Tracking No. 2014-002312

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The State,

Respondent,

vs.

Richard Wells,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. The magistrate did not err in refusing to dismiss the case because the video recording provided by the State complied with the requirements of section 56-5-2953(A) of the South Carolina Code and admission was proper under the totality of the circumstances. (Appellant's Issues I and II).
  
- II. The magistrate did not err in failing to dismiss the case because there was no violation of Appellant's due process rights and, further, this issue is not properly preserved for review on appeal to this Court.

**STATEMENT OF THE CASE**

The State agrees with Appellant's procedural Statement of the Case.

## STATEMENT OF FACTS

Deputy Osborne witnessed Appellant cross the center line several times while driving in York County. Appellant's driving was recorded by Deputy Osborne's in-car camera. (See Video of Incident Site) After receiving information regarding Appellant's vehicle, Deputy Osborne turned on his blue lights and proceeded to stop Appellant. Appellant pulled into a gravel, uneven parking lot. (4/14T.13; 65-66; R.\_\_\_\_) (Video of Incident Site). Deputy Osborne exited his vehicle, approached Appellant's vehicle, and spoke with Appellant.

Deputy Osborne determined he needed to perform field sobriety tests to further an investigation into whether Appellant was driving under the influence. (4/14T.13; R.\_\_\_\_). He indicated he moved his vehicle to the road so he had a flat level surface in order to perform the tests, including balancing and walking tests. (4/14T.14; 65-66; R.\_\_\_\_). When he moved his vehicle, Appellant necessarily had to be off camera. (Video of Incident Site). Deputy Osborne indicated his camera is permanently mounted in his vehicle and it would be impossible to "try to maneuver it around as a camera crew." (4/14T.14; R.\_\_\_\_).

Deputy Osborne then went and had Appellant get out of his vehicle and walk to the road to perform field sobriety tests. Deputy Osborne testified he noted no specific signs of impairment when Appellant got out of his vehicle and noted nothing of significance. (4/14T.16; R.\_\_\_\_). Specifically, Deputy Osborne indicated: "Undoubtedly, he did not appear to have any indications of impairment between his truck and walking in front of my camera because it was not noted in the report." (4/14T.18; R.\_\_\_\_). Deputy Osborne conducted three field sobriety tests, the HGN, walk and turn or heel to toe test,

and the one leg balancing test. (Video of Incident Site). After administering the tests, Appellant was read his Miranda rights and placed under arrest for DUI. (Video of Incident Site).

After placing Appellant under arrest, Deputy Osborne went to Appellant's vehicle and located an open bottle of vodka in the passenger compartment. (4/14T.78-79; R. \_\_\_) (Video of Incident Site). Deputy Osborne also found several liquor glasses and other cups inside the vehicle. (4/14T.79; R. \_\_\_).

At trial, Appellant moved to dismiss the charges, alleging the State failed to produce a video recording in compliance with section 56-5-2953(A) of the South Carolina Code. The magistrate found the video in compliance and denied the motion to dismiss. (4/14T.47; R. \_\_\_).

## ARGUMENT

- I. **The magistrate did not err in refusing to dismiss the case because the video recording provided by the State complied with the requirements of section 56-5-2953(A) of the South Carolina Code and admission was proper under the totality of the circumstances. (Appellant's Issues I and II).**

Appellant contends the trial court erred in failing to dismiss this case because the State failed to record Appellant exiting his vehicle after a traffic stop where the officer suspected Appellant to be driving under the influence. The video recorded all required and necessary conduct pursuant to section 56-5-2953(A) of the South Carolina Code and any portion not recorded is merely incidental to the traffic stop, especially in light of the officer's testimony. Further, and as an additional sustaining ground, the magistrate properly admitted the video recording under the totality of the circumstances in this case pursuant to section 56-5-2953(B) of the South Carolina Code.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161. However, the statute must also be read as a whole and in harmony

with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Accordingly, “[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Section 56-5-2953 requires:

- (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.

S.C. Code Ann. § 56-5-2953 (A) (Supp. 2010).

The statute requires a video recording of the incident site, and in doing so, specifically provides what must be videotaped. It indicates the individuals conduct at the incident site must be recorded and then provides the requirements for meeting this requirement. Specifically the recording must: 1) not begin later than the activation of the officer’s blue lights; 2) include any field sobriety tests administered; and 3) 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 clear language of the statute does not require the individual to be on camera the entire time.

This case is nearly identical to the recent case decided by this Court in State v. Taylor, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014). In Taylor, the officer had to

reposition his vehicle to be able to best administer the field sobriety tests. As he moved the vehicle, as in this case, Taylor was not on camera. The magistrate court dismissed the charges finding the video failed to comply with the statute. The Court of Appeals, however, found the plain language of the statute did not require the defendant to remain on the camera at all times. The Court discussed the impact of several recent cases, including: City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007); State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014); and Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Specifically, the Court held: “Suchenski, Murphy, and Gordon demonstrate the plain language of the statute does not require the video to encompass every action of the defendant, but requires video of each event listed in the statute.” Taylor, 411 S.C. at 305, 768 S.E.2d at 77. Ultimately, the Court concluded:

The plain language of the statute demonstrates the legislature intended video recording of the majority of an officer's encounter with a potential DUI suspect. Nonetheless, interpreting the statute to require dismissal of the charges when the defendant is off camera for a short period of time and the gap does not occur during any of those events that either create direct evidence of a DUI or serve important rights of the defendant would result in an absurdity that could not possibly have been intended by the legislature. Indeed, interpreting the statute in that way would require dismissal of a DUI charge when a suspect stumbles out of view of the camera or when the officer is placing a suspect into his vehicle. Accordingly, section 56-5-2953 does not require dismissal of a DUI charge when the video recording of the incident briefly omits the suspect but that omission does not occur during any of those events that either create direct evidence of a DUI or serve important rights of the defendant.

Id. at 306, 768 S.E.2d at 77.

As in Taylor, nothing required to be captured on video in the current case occurred during the time Appellant was off camera. All field sobriety tests are performed

on camera, as was the reading of his Miranda rights and his arrest. Requiring video of him getting out of the car and walking to the flat level ground in this case would be tantamount to requiring the video to follow his every move; a finding clearly not required under the statute and not required by the Court in Taylor.

Further, to the extent Appellant claims evidence could be created during the time he is getting out of the car, the same argument would apply to when the person is able to stand still waiting on the officer to reposition his vehicle as in Taylor or when the person wandered off camera during the middle of a field sobriety test. Requiring the video recording to follow the person's every move is physically and technologically impossible and, as found in Taylor, leads to an absurd result.

The facts of the instant case are also similar to those in Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). In Murphy, the defendant asserted a DUI case should have been dismissed by the magistrate because the video recording failed to capture a full view of Murphy at all times during the field sobriety tests. Id. at 631, 709 S.E.2d at 688. This Court found:

[N]othing 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. Failure of the video to maintain a full view of the accused for the duration of a field sobriety test in which she is made to walk a line, for instance, does not fail to display her behavior, demeanor, and general state. Thus, an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct.

....

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's conduct.

Id. at 631-632, 709 S.E.2d at 688 (emphasis added and citations omitted).

As in Murphy, an unbroken recording is not necessary to show Appellant's conduct. The video recording in the instant case turns on prior to the officer's activation of his blue lights and clearly shows the officer stopping Appellant. It is only when the officer is preparing to administer the field sobriety test and moves his vehicle to better display the test that Appellant is removed from the camera's field of view. The camera records from blue light activation until after arrest and Appellant's conduct is recorded throughout even if he is not within the field of view at all times; however, he is entirely within the field of view during those time specifically enumerated in section 56-5-2953(A) to be recorded.

This case is distinguishable from the cases of City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) or State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). In both of those cases, a significant and specifically required portion of the videotape was not produced and an affidavit was not provided. In Suchenski, the officer failed to record all of the field sobriety tests administered and the arrest of the individual as specifically required under section 56-5-2953(A). Suchenski, 374 S.C. at 18, 646 S.E.2d at 881-882. In Johnson, the officer failed to record the administration of the breath test as specifically required. Johnson, 396 S.C. at 190-191, 720 S.E.2d at 520-521.

In the instant case, however, all the specifically required portions of the incident site were recorded. The recording began before the officer activated his blue lights, and

ended after Appellant was arrested. As a result, the State produced a videotape meeting the requirements of section 56-5-2953(A).

Also, any defects in the videotape go to its weight rather than admissibility. See State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility); see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of Breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

Additionally, “[t]he legislature is presumed to intend that its statutes accomplish something.” State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005). Here, the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence. State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011). “The statute must be interpreted with realistic circumstances and rationales in mind.” Elwell, 396 S.C. at 336, 721 S.E.2d at 454; State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) (“A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.”). Courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331

S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (“However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. . . .”).

In the instant case, Appellant’s interpretation of the statutory requirements leads to an absurd result. Clearly, the legislature did not intend for someone to avoid responsibility for driving under the influence of alcohol because they are not within the field of view of the officer’s camera at all times. This case is no different than if the suspected drunk driver were to wander out of the field of view while he is performing the heel to toe step test or some other test. The legislature’s intent cannot be a drunk driver gets a pass because the Officer made certain to have his car in a position to best record the incident site field sobriety tests (an event specifically enumerated by the statute as required to be recorded) and in doing so the Appellant is out of the field of view for a short period of time.

The video recording complied with section 56-5-2953(A) by recording all the events of the incident site as required, and there is no requirement Appellant had to remain within the full view of the camera in order to have his conduct recorded. Accordingly, the magistrate court and circuit court correctly refused to dismiss the case and found the video met the requirements of section 56-5-2953(A).

As an additional sustaining ground, the court properly declined to dismiss the charges based on the totality of the circumstances. In the event this Court finds a proper video was not produced, then the State submits the totality of the circumstances clearly favor not dismissing the case.

Section 56-5-2953(B) reads in pertinent part as follows:

Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 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 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. . . . 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 . . . .

S.C. Code Ann. § 56-5-2953(B) (Supp. 2013) (emphasis added).

In the instant case, the officer's testimony clearly established the reason for moving his vehicle and having Appellant off camera for a short period of time. The officer was in a "catch-22" situation of either moving his vehicle to allow Appellant to properly perform the field sobriety tests or attempt to administer them on a gravel uneven lot to the distinct disadvantage of the defendant. All portions of the video required by statute are recorded and were provided and the officer never testified there was any sign of impairment during the time Appellant exited his vehicle and walked to the roadway to perform the field sobriety tests. As a result, the totality of the circumstances clearly support the magistrate court's decision to deny the motion to dismiss.

**II. The magistrate did not err in failing to dismiss the case because there was no violation of Appellant's due process rights and, further, this issue is not properly preserved for review on appeal to this Court.**

Appellant maintains the magistrate court erred in failing to dismiss the case because the failure to record the time Appellant exited his vehicle violated his due process rights. The State has not violated Appellant's due process rights and certainly has not acted in bad faith. Further, the issue is not properly preserved for review on appeal to this Court because the issue was not ruled on by the circuit court on appeal.

**Preservation**

Appellant contends the trial court erred in failing to find the State's failure to record his exit from his vehicle violates his due process rights. This issue was never ruled on by the circuit court judge sitting in appeal from the magistrate's court ruling. (Order of Circuit Court dated Sept 11, 2014). Appellant failed to file a motion to reconsider or to alter or amend the Order, and, as a result, the issue is not properly before this Court. As the South Carolina Supreme Court has stated:

“[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.” An argument that is not raised to an intermediate appellate court is not preserved for review by this Court.

State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011)(internal citations omitted); see also, Graniteville Mfg. Co. v. Renew, 113 S.C. 171, 176, 102 S.E. 18, 19 (1920) (holding an issue not raised before the circuit court on appeal from a magistrate is not properly before the appellate court); City of Columbia v. Ervin, 330 S.C. 516, 519–20, 500 S.E. 2d 483, 485 (1998) (holding an issue not raised in an intermediate appeal cannot be considered in a subsequent appeal to the court of appeals or supreme court); Kleckley

v. Nw. Nat'l Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (noting an issue must be raised to and ruled upon by both the trial court and an intermediate appellate court to be properly preserved for review).

### **Merits**

On the merits of Appellant's claim, there is no due process violation in the instant case. Deputy Osborne did not act in bad faith in failing to record Appellant's exit from the vehicle. Nor is this case similar to State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990), cited by Appellant.<sup>1</sup> As a result, the magistrate court properly denied the motion to dismiss because there was no due process violation.

In Jackson, a solicitor dismissed the charges against the defendant after viewing the video recording of his field sobriety test. The video recording was then destroyed pursuant to policy. The Solicitor's Office then notified defendant his charges would be reinstated and the charges prosecuted. The trial proceeded without the video evidence, though an explanation for the destruction was presented. Id. at 314, 396 S.E.2d at 101.

After discussing relevant case law, including Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the South Carolina Supreme Court found a due process violation occurred. The Court found the video recording to be material and exculpatory because a solicitor was willing to dismiss the charges after viewing the recording. Further, the Court decided Jackson could not obtain comparable evidence to the video. Id. at 316, 396 S.E.2d at 102. The Court concluded: "It is our opinion, however, that the peculiar facts of this case require a reversal of the conviction. Here, a conscious decision was made by the Solicitor's office to dismiss the charges. This

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<sup>1</sup> It is important to note Appellant does not accuse the State of destroying evidence as was the case in Jackson or Youngblood; instead, he alleges the State committed a due process violation by failing to create the evidence.

decision was discussed with the defendant. It was because of this decision that the tape was ordered to be erased.” Id. (emphasis added).

No such peculiar facts apply in the instant case. The officer began his recording as required by section 56-5-2953(A), recorded all necessary and required events, and continued recording through the arrest of Appellant. The fact he had to maneuver his vehicle, in order to provide a fair and proper location for Appellant to perform the required field sobriety tests, resulting in Appellant being off camera for a short period of time does not create a due process violation of the nature of the one in Jackson.

Further, pursuant to Arizona v. Youngblood, referenced by the Jackson Court, dismissal for a due process violation would require bad faith on the part of the officer. Clearly, there is not bad faith in this case as it would be impossible for him to both record Appellant getting out of his vehicle and moving to the roadway while at the same time moving his vehicle to allow Appellant a legitimate opportunity to perform the field sobriety tests. Accordingly, even if the issue is preserved, Appellant has failed to prove his due process rights have been violated.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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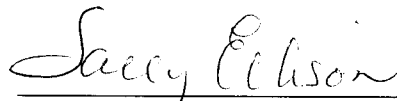
Appellant.

**PROOF OF SERVICE**

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Paul L. Reeves, Esquire  
Reeves Law Firm, LLC  
Post Office Box 11126  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.  
This 27<sup>th</sup> day of April, 2015.



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ALAN WILSON  
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RE: State v. Richard Alan Wells  
Appellate Case Tracking No. 2014-002312

Dear Mr. Reeves:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William M. Blich, Jr.  
Assistant Attorney General  
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)  
Victim Services