

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2000255

State of South Carolina

Kathryn Hart D

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MAY 18 2015

PLAINTIFF(S)

SC Court of Appeals
DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER DENYING APPEAL

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

4/17/2015

Date

For Clerk of Court Office Use Only

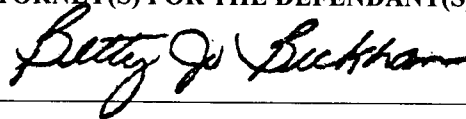
This judgment was entered on **April 17, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **April 17, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

Marcus Keith Gore Office Of General Counsel PO Box 1993
Blythewood, SC 29016

Robert Cleland FitzSimons 1001 Beltline Blvd. Columbia,
SC 29205

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Betty Jo Beckham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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SCDPS
Office of General Counsel

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)

State of South Carolina,

Appellant,

v.

Kathryn Hart Dew,

Respondent

2015 APR 17) AM 11 09
FAIRFIELD COUNTY)
CLERK OF COURT)
BETTY J. BUCHANAN)
ORDER DENYING APPEAL

This matter is before the Court pursuant to an appeal by the State from the dismissal of the charge against the Respondent, Kathryn Hart Dew. Present at the hearing on this matter was Marcus K. Gore, counsel for the Appellant, and Robert C. FitzSimons, counsel for the Respondent. The dismissal was entered by Judge M. Paul Swearingen, Fairfield County Magistrate, on June 12, 2014. The appeal was heard on December 1, 2014. After review of the State's appeal, the return of the Magistrate, the transcript of record from the proceedings below, and argument of counsel, the appeal is denied.

FACTS

On the night of December 8, 2013, Trooper Ford of the SC Highway Patrol encountered Respondent in the median of Interstate 77 in Fairfield County; Respondent's truck was apparently stuck in the mud. Trooper Ford administered field sobriety tests to Respondent, including the walk and turn test and ultimately arrested Respondent, charging her with driving with an unlawful alcohol concentration. The dash camera in the patrol car recorded the events leading up to the arrest.

Prior to the jury being sworn, Respondent moved to have the charge dismissed based on the State's failure to comply with the mandatory video recording requirements of § 56-5-2953 (A)(1)(a)(ii) of the South Carolina Code of Laws, as amended. After reviewing the videotape of the field sobriety tests and hearing testimony from Trooper Ford, the Magistrate found that Respondent's feet were not clearly visible during her performance of the walk and turn test for several reasons. He found that the dark color of Respondent's shoes and clothing made it hard to see her feet in the night-time lighting conditions, especially against the grainy background of the recording; that in performing the test Respondent walked away from the camera, rather than

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across the video frame; and that the line of recording data, automatically placed across the bottom of the screen by the camera, obscured the view of Respondent's feet. Based upon these findings, the Magistrate granted Respondent's motion. This appeal followed.

LEGAL ANALYSIS

The provisions of S. C. Code Ann. § 56-5-2953(A) state that a person charged with driving under the influence or driving with an unlawful alcohol concentration must have their conduct at the incident site video recorded. The video recording at the site must include any field sobriety tests administered. § 56-5-2953(A)(1)(a)(ii).

The videotape in this case was not viewed by this Court. The description of the contents of the videotape is based on the return of the Magistrate. The Magistrate's findings of fact are not subject to review, only his ruling of law. While the State has argued that the quality of the videotape was "not so bad", the videotape itself was not offered as evidence before me and review of the Magistrate's order of dismissal is based solely on the facts as found by him.

The Magistrate relied on the recent Court of Appeals decision in *State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) in which the Court of Appeals held that § 56-5-2953 required a motorist's head to be visible on a recording of the Horizontal-Gaze Nystagmus test, noting that because the purpose of the recording is to create direct evidence of the arrest, if the actual test cannot be seen on the recording, the requirement is pointless. *Id.* at 543.

In the present case the state failed to properly videotape the walk and turn test. As noted above, the recording of the test failed to clearly display Respondent's feet during her performance of the test.


The legislative intent behind the creation of § 56-5-2953 was to create direct evidence of a DUI or DUAC arrest. *Id.* at 542. Therefore, dismissal of a DUAC charge is the appropriate remedy provided by the statute when subsection (A) is violated and the violation is not mitigated by the exceptions enumerated in subsection (B). *Id.* In the event that the arrest does not comply with the statutory scheme, the Legislature clearly intended *per se* dismissal of the charge. *Id.* at 542-43.

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The State advances a “good faith” exception with regard to the videotaping requirement, suggesting that circumstances of the individual arrest should excuse any defects in the videotape. The Legislature has provided exceptions for noncompliance under § 56-5-2953(B) including a sworn affidavit citing non-functioning equipment, need for emergency medical treatment, and exigent circumstances. Counsel for the State suggests that any defects in the videotape should not be fatal. This suggestion is directly contradicted by both statutory and case law. The State has not provided any exception, as enumerated by the statute, for noncompliance; therefore the only remedy is dismissal of the charge.

Based on the foregoing, the appeal is dismissed.

AND IT IS SO ORDERED.



Clifton Newman
Circuit Court Judge

April 9, 2015
Columbia, South Carolina