

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2014-CP-46-2349

The State,

Respondent,

v.

Neal A. Nessmiller,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in affirming the trial court's denial of Appellant's motion to dismiss for failure of the State to comply with the recording requirements of §56-5-2953, in that the incident site video did not record all of the field sobriety test, to include Appellant's head?

II. Did the Circuit Court err in affirming the trial court's denial of Appellant's motion to dismiss for failure of the State to comply with the recording requirements of §56-5-2953, in that the incident site video did not record the person being advised of his Miranda rights?

III. Did the Circuit Court err in affirming the trial court's denial of Appellant's motion to dismiss for failure of the State to comply with the recording requirements of §56-5-2953, in that the breath test site video did not record all of the actions of the test operator?

STATEMENT OF THE CASE

On March 12, 2013 Appellant Neal Nessmiller was arrested and charged with Driving Under the Influence, First Offense. Appellant moved to dismiss the charge on the grounds that the arresting officer did not comply with videotaping requirements of S.C. Code of Laws §56-5-2953 (1976). Appellant's motion was denied in an Order entered on June 24, 2014. At the bench trial held on July 10, 2014, the Appellant renewed his motions to dismiss on the same grounds and they were denied. Appellant was found guilty and sentenced to thirty days suspended upon the payment of \$ 997.00.

Appellant filed a timely notice of appeal to the Circuit Court and the appeal was heard by the Honorable Lee S. Alford on December 2, 2014 who affirmed the lower court decision in an Order entered on December 11, 2014. Appellant received written notice of the order on December 15, 2014 and filed this appeal on January 13, 2015.

STATEMENT OF FACTS

On March 12, 2013, Officer Sizemore of the Rock Hill Police Department was dispatched to an automobile accident scene within the Rock Hill city limits (R __). Appellant, Neal Nessmiller, was the driver of one of the two cars involved in the accident, his car having rear-ended the other driver's car(R __). Upon questioning, Appellant admitted to officer Sizemore that he was coming from a local bar where he had consumed 3 drinks(R __). Appellant also stated that he was on multiple prescription painkillers(R __). Because Appellant's left leg was amputated below the knee in 2012, Officer Sizemore offered only one standard field sobriety test, the Horizontal Gaze Nystagmus (HGN) (R __). Officer Sizemore placed the Appellant some distance from his patrol car, in front of the in-car camera, and administered the test(R __). In the video recording the view of defendant's head is relatively small and partially obscured at some points in the video by some obstruction in front of the camera lens(R __). The head is not completely visible, and for the duration of the test only the right side of Appellant's head is visible(R __). Also, due to Officer Sizemore's positioning, only his left side is visible for the duration of the test(R __).

Officer Sizemore placed the Appellant under arrest, handcuffed Appellant, and moved Appellant to the front of his patrol vehicle(R __). Officer Sizemore then commenced to read Appellant his Miranda rights(R __). For the duration of the advisement of rights, Appellant is partially in view on the video, with his back to the camera and half of his upper torso and part of the rear of his head visible on the video(R __). On a few occasions, Appellant's entire head disappears from the video(R __). The

audio of the Miranda warnings can be plainly heard with the exception of a second or so when the sound cuts out(R __).

Appellant was transported to the Rock Hill Law Center where Officer Sizemore began administering a Datamaster breath test on Appellant(R __). On the breath test site video recording, the subject is visible but portions of the operator's actions, such as typing and data entry, are obscured due to the angle of the camera(R __). The sound on the test site video is clearly audible(R __). Appellant refused to provide a sample for Officer Sizemore and Officer Sizemore concluded the test(R __).

ARGUMENT

I. HGN Test

A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and breath test site video recorded. S.C. Code Ann. §56-5-2953(A) The purpose of §56-5-2953 is to create direct evidence of a DUI arrest. State v. Gordon, 408 S.C. 536, 542, 759 S.E.2d 755, 758 (Ct. App. 2014) The video recording at the incident site must include “any field sobriety tests administered” S.C. Code Ann. §56-5-2953(A)(1)(a)(ii), and specifically for the HGN test, the head has to be visible on the recording. Gordon at 544.

During the incident site video, as Officer Sizemore is conducting the HGN test, Appellant’s head is not completely visible and the Officer Sizemore’s hand is not completely visible. The Appellant and arresting officer are positioned in such a way that it is unclear, from the video, if the test is being performed to standard or if Appellant’s eyes are open. If the purpose of the Statute under Gordon is to create direct evidence of a DUI arrest and the Appellant’s arrest is at least partially conditioned on the arresting officer’s observations during the HGN test, then the only remedy for failing to capture the entire test is dismissal because the Appellant’s conduct during the HGN test, specifically portions of the Appellant’s head, were not captured on video. The remedy for the City’s failure to videotape the HGN test is dismissal: “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. Town of Mt. Pleasant v. Roberts, 393 S.C.

332, 348, 713 S.E.2d 278, 286 (2011). Therefore it was error for the Circuit Court to uphold the Rock Hill Municipal Court decision dismissing the Appellant's motions at trial.

II. Miranda advisement

The statute requires that the video recording at the incident site must "show the person being advised of his Miranda rights." S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) The video submitted by the City of Rock Hill at trial shows, during the Miranda advisement, half of the back of the Appellant's upper torso and a portion of the rear of the Appellant's head. The advisement is captured, but the 'person' is not shown. Only a portion of the person is shown. The video, during the advisement of Miranda rights, also fails to fully show the Appellant's 'conduct' as required under the Statute and defined by the Court of Appeals as "one's behavior, action, or demeanor". State v. Sawyer, 409 S.C. 475, 480, 763 S.E.2d 183, 185 (2014)

What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. State v. Elwell, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013). 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. When a statute is penal in nature, it must be strictly construed against the State in favor of the defendant. Roberts at 342. The word "person" is not defined in the Statute (Title 56, Article 3). "Person" is defined by Black's Law Dictionary as

1. A human being.
2. An entity such as a corporation that is recognized by law as having the rights and duties of a human being.
3. The living body of a human being. Black's Law Dictionary 932 (Abridged 7th ed. 2000)

In the video tape submitted only portions of a human being or a living body of a human being were recorded. One cannot see the entire person. Also, from the view provided by the video, it is difficult to determine the Appellant's conduct, meaning his behavior or demeanor. One cannot see his eyes, if he is paying attention to his advisement of rights, if he is concentrating on the officer or the process, or any other conduct that might be determined if Appellant had been placed properly in front of the camera by Officer Sizemore. The remedy for the failure to show the person in the video, under Roberts, is dismissal. The Circuit Court erred in upholding the trial court's ruling denying the Appellant's motion to dismiss at trial for failure to videotape the person during the Miranda warnings.

III. Test Site Recording

The video recording at the breath test site must include "the actions of the breath test operator while conducting the test". S.C. Code Ann. §56-5-2953(A)(2)(b) What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. State v. Elwell, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013). 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. When a statute is penal in nature, it must be strictly construed against the State in favor of the defendant. Roberts at 342. In this case, all of the actions of the breath test operator are not captured on video as some typing and data entry are obscured from the camera by the testing operator's body. The Statute does not modify the word 'actions', therefore all of the operator's actions must be captured on video in

order to comply with the statutory requirements. The purpose of the recording is to collect evidence of a DUI arrest, and in preparation of the breath test machine for operation, the operator must undertake certain tasks and perform certain actions. One cannot determine if the actions of the test operator are appropriate from the video provided. Therefore, possible exculpatory evidence may not be captured. The State clearly did not comply with the Statute because the all of the test operator's actions are not captured. The remedy for this must be dismissal under Roberts. Therefore, the Circuit Court erred in upholding trial court's dismissal of Appellant's motion to dismiss for failure to comply with the Statute.

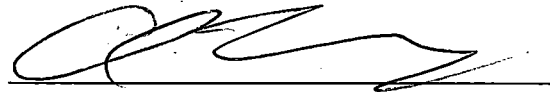
CONCLUSION

The statutory requirement that incident site video recordings capture the Appellant's conduct and specifically any field sobriety tests administered was not met where the video does not show the Appellant's head and portions of the video recording are obscured. The statutory requirement that the person being advised of his Miranda rights at the incident site be recorded was not met where the person is not view of the camera and his behavior and demeanor cannot be determined by viewing the video. The statutory requirement that the test operator's actions must be recorded at the breath test site was not met where the operator's actions are obscured from the camera by his own body. The remedy for these errors is dismissal and the circuit court erred in upholding the trial court's denial of Appellant's motions to dismiss and his subsequent conviction.

For all of the foregoing reasons, the Appellant respectfully submits that the decision of the circuit court upholding Appellant's conviction and denial of the Appellant's motions to dismiss should be reversed.

Respectfully submitted,

May 21, 2015



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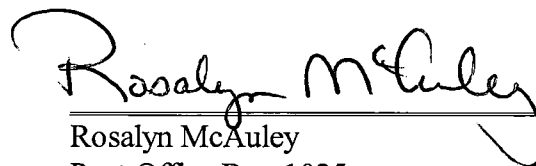
Neal A. Nessmiller,

Appellant.

PROOF OF SERVICE

I certify that I have served the INITIAL BRIEF OF APPELLANT on Paula Knox-Brown by depositing a copy of it in the United States Mail, postage prepaid, on May 21, 2015, addressed to her at 201 E. Main St., 3rd Floor, Rock Hill, SC 29730.

May 21, 2015



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