STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-002704

THE STATE, ...RESPONDENT

v.

MICHAEL WAYNE SHERRILL, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's magistrate court conviction for driving under the influence should be affirmed where neither the circuit court nor this court has appellate jurisdiction over his appeal and where in any event, in compliance with section 56-5-2953 of the South Carolina Code, Appellant's conduct at the incident site was video recorded and the video recording included all field sobriety tests administered by the arresting officer.

STATEMENT OF THE CASE

On November 20, 2011, Michael Wayne Sherrill (Appellant) was stopped for a traffic violation by Trooper Albert Walters of the South Carolina Highway Patrol and was charged with driving under the influence (Ticket Number F258842). On April 11, 2012, Appellant's case was called for trial before the Honorable Frederick A. Thomas, Lancaster County magistrate judge, and a jury. Appellant was present and was represented by Francis L. Bell, Jr. Esquire. The State was represented by Assistant Solicitor Spiro Poulos of the Sixth Circuit Solicitor's Office. Appellant made several motions including a motion to suppress the video recording on grounds that the State failed to adhere to S.C. Code section 56-5-2953, which requires that the officer video record Appellant's conduct at the incident site, including the field sobriety tests administered. The trial judge heard arguments, reviewed the video recording (Circuit Court's Exhibit #1 – Incident Site Video), and denied the motion.[1] At the conclusion of trial, the jury found Appellant guilty as charged and Appellant made an oral motion for arrest of judgment or a new trial.[2]

On April 13, 2012, Appellant submitted a written "Motion for Arrest of Judgment or New Trial" asking for a new trial on four grounds including:

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[1] At the subsequent appeal before the circuit court, Appellant explained he was not able to locate a copy of the video recording in the magistrate's file and said it was not "introduced as part of the trial." Nevertheless, because the magistrate viewed the video recording before denying Appellant's motion, the parties agreed to make it a part of the record before the circuit court to consider in ruling on the appeal. (Tr.p.4, lines 6-18; p.9, line 13-p.10, line 8).

[2] The statement of the case and statement of facts are both derived from various documents that were before the circuit court including: (1) an April 13, 2012, "Motion for Arrest of Judgment or New Trial," (2) a June 8, 2012, "Denial of Motion for Arrest of Judgment or New Trial," and (3) a June 26, 2012, "Notice of Appeal," as well as the circuit court's November 20, 2014, "Order Denying Appeal." It appears the magistrate did not prepare a "return" to the criminal appeal and that these documents were the only papers filed with the clerk of court pursuant to section 18-3-40 of the Code.

> That His Honor erred in not granting during the trial Defense Motion to Suppress and Dismiss the charge when the evidence on the roadside video clearly did not show Defendants conduct during the walk and turn standardized field sobriety test, such test was not properly captured by the video as required by Section 56-5-2953, Code of Laws for SC 1976, as amended.

(April 13, 2012, Motion for Arrest of Judgment or New Trial). On June 8, 2012, the trial court issued an Order denying Appellant's post-trial motion after finding in part that: "The defendant's conduct during the walk and turn portion of the test was sufficient."

On June 26, 2012, Appellant filed a notice of appeal seeking to appeal his conviction to the Lancaster County Court of Common Pleas on the same grounds as argued in the post-trial motion. (Case No. 2012-CP-29-865). The solicitor and the magistrate each accepted service of the Notice of Appeal on June 27, 2012.

On November 10, 2014, a hearing was convened at the Lancaster County Courthouse before the Honorable Michael G. Nettles. Appellant was again represented by Mr. Bell and the State was represented by Assistant Solicitor Luke I. Knight of the Sixth Circuit Solicitor's Office. Appellant raised several grounds in his written notice of appeal; however, at the hearing he narrowed it to a single ground: that under section 56-5-2953(A) the video recording did not sufficiently include the field sobriety tests administered because it did not capture all of the walk and turn test. He argued that although his body physically appeared in the video recording during all three field sobriety tests, the video was not in full compliance because his feet were not visible during a portion of the walk and turn test. (Tr.p.5, line 10-p.9, line 6). The solicitor agreed that Appellant's feet were not visible during several steps of the walk and turn test but argued the video recording was nevertheless sufficient to capture Appellant's conduct and to record the administration of the field sobriety tests for purposes of the statute.

(Tr.p.11, lines 6-14). After hearing arguments from both parties, the circuit court ruled that, as a matter of law, the video recording does not have to capture each and every aspect of every field sobriety test because they vary from case to case. The court noted that if the video was so dark you could not discern anything at all, it would be a different case. However where, as here, you can see and hear the test being administered, the fact that Appellant's feet are temporarily out of view of the camera does not mandate dismissal. (Tr.p.23, line 13-p.26, line 21). In a written order dated November 20, 2014, and filed November 24, 2014, the circuit court denied Appellant's appeal upon finding as follows:

> In the present case, the Court finds that the State did comply with the requirements of Section 56-5-2953 as outlined above. Specifically, the video recording produced did sufficiently capture the Defendant's walk and turn test.
>
> The Defense had argued that the recordings are not sufficient, in that several steps on the Walk and Turn test are obstructed. This Court finds that the mandates of Section 56-5-2953 are met under the circumstances of this case.

(November 20, 2014, Order Denying Appeal).

Appellant filed a notice of intent to appeal the circuit court's order and has now submitted a Brief of Appellant to this Court challenging both the circuit court's ruling and the magistrate's denial of his motions to suppress the video recording and/or dismiss the case. On June 5, 2015, the State filed a motion to dismiss the appeal for lack of appellate jurisdiction on grounds that Appellant failed to timely file and serve his notice of appeal; however, by letter dated June 9, 2015, that motion was withdrawn. This Brief of Respondent now follows.

STATEMENT OF FACTS

On November 20, 2011, Appellant was stopped for a traffic violation by Trooper Albert Walters of the South Carolina Highway Patrol and was charged with driving under the influence (Ticket Number F258842). Prior to placing Appellant under arrest, Walters conducted a series of field sobriety tests including: (1) a horizontal gaze nystagmus (HGN)[3] test; (2) a "walk and turn" test; and (3) a "one leg stand" test.[4] Walters conducted the tests on the side of the road in front of his patrol vehicle and video recorded the encounter with the camera installed in the dashboard area of the his car. The video recording is a continuous recording and captures Appellant's conduct at the incident site including all three of the field sobriety tests administered by the officer prior to Appellant's arrest. Although Appellant's feet are briefly obscured during the walk and turn test, Appellant can be seen and heard during the portion of the video recorded prior to his arrest. (Circuit Court's Exhibit #1 – CD (Incident Site Video)). After completing the administration of the tests, Appellant was placed under arrest. Following a trial, Appellant was convicted of driving under the influence.

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[3] HGN is a standard field sobriety test often administered along with other tests during an investigation of suspected driving under the influence. See State v. Sullivan, 310 S.C. 311, 313, 426 S.E.2d 766, 768 (1993). "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system. The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." Sullivan, 310 S.C. at 315 n.2, 426 S.E.2d at 769 n.2 (internal citations omitted).

[4] In State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001), the Supreme Court discusses several common field sobriety tests including the "walk and turn" test and the "one leg stand" test in finding that an officer's personal observations and opinions of a driver's actions, appearance, and condition constitute direct evidence of driving under the influence.

ARGUMENT

I.

Appellant's magistrate court conviction for driving under the influence should be affirmed where neither the circuit court nor this court has appellate jurisdiction over his appeal and where in any event, in compliance with section 56-5-2953 of the South Carolina Code, Appellant's conduct at the incident site was video recorded and the video recording included all field sobriety tests administered by the arresting officer.

Appellant argues the lower courts erred by finding the incident site video sufficiently captured the field sobriety tests and by not finding the incident site video violated section 56-5-2953 of the South Carolina Code. He contends the legislative intent behind the video recording statute can only reasonably be that the results of the test being performed by the driver must be recorded. The State disagrees and submits Appellant's argument should be dismissed for several reasons.

Lack of Appellate Jurisdiction

Initially, the State submits Appellant's appeal should be dismissed because this Court currently lacks appellate jurisdiction over the appeal. The South Carolina Code provides: "The appellant, within ten days after sentence, shall file notice of appeal with the clerk of circuit court and shall serve notice of appeal upon the magistrate who tried the case and upon the designated agent for the prosecuting agency or attorney who prosecuted the charge, stating the grounds upon which the appeal is founded." S.C. Code Ann. § 18-3-30 (2014) (emphasis added). Thus, the standard statutory time for appeal from a criminal conviction in magistrate's court is within ten days after sentence.

On the date of the offense, the Code also provided however that: "No motion for a new trial may be heard unless made within five days from the rendering of the judgment.

The right of appeal from the judgment exists for thirty days after the rendering of the judgment." S.C. Code Ann. § 22-3-1000 (2007) (emphasis added). Under the plain and unambiguous terms of this statute, a motion for a new trial must be made within five days from the "rendering of the judgment," but even if made, the right of appeal only "exists for thirty days after" the same "rendering of the judgment" regardless of when the magistrate rules on the motion for a new trial. Beyond the clear meaning conveyed by the repetition of the phrase "rendering of the judgment," this meaning is further evinced when compared to the previous version of the statute, prior to the 1999 amendment. Section 22-3-1000 formerly provided that: "No motion for a new trial may be heard unless made within five days of the rendering of the judgment. The right of appeal from the judgment exists for twenty-five days after the refusal of a motion for a new trial." S.C. Code Ann. § 22-3-1000 (Supp. 1998). In State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993), our supreme court held the ten day statutory time for appeal from a conviction had been enlarged by this language because it "specifically provides that the right of appeal from the judgment exists for twenty-five days after refusal of motion for a new trial." Id. In 1999, the Legislature removed the relevant language tying the time frame to the "refusal of motion for a new trial" and replaced it with the language which now repeats the phrase "rendering of the judgment" which was already being used in the statute to set the time for filing a motion for a new trial specifically to the date of sentencing. In other words, instead of being concerned with the "refusal of a motion for a new trial," section 22-3-1000 now merely enlarges the statutory time for appeal from a magistrate court conviction from "within ten days after sentence" to "thirty days after" the sentence.

Although Appellant made a motion for a new trial within five days of the sentence, he failed to file and serve his notice of appeal within thirty days of the sentence. Indeed, the notice of appeal was not filed or served until June 26, 2012, more than sixty days after the April 11, 2012, sentence. Because Appellant's appeal was untimely, the circuit court lacked appellate jurisdiction over the appeal. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has not authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); Town of Hilton Head Island v. Godwin, 370 S.C. 221, 224, 634 S.E.2d 59, 61 (Ct. App. 2006) ("A party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction."). Similarly, this Court lacks appellate jurisdiction over the current appeal from the circuit court and the appeal should be dismissed. In any event, even if appellate jurisdiction was properly conferred, the State submits Appellant's argument is without merit and that the circuit court's affirmance of his conviction should be affirmed.

Argument is Without Merit

The circuit court properly affirmed Appellant's magistrate court conviction for first offense driving under the influence. The arresting officer complied with the plain and unambiguous requirements of section 56-5-2953, and specifically, subpart 56-5-2953(A)(1)(a)(ii) of the South Carolina Code (Supp. 2012), by video recording Appellant's conduct at the incident site, including the field sobriety tests administered prior to Appellant's arrest. A requirement that a defendant's feet be visible during every

single step of the walk and turn test fails to appear in the plain language of the statute, and interpreting any perceived ambiguity in the statute by adding such a requirement would lead to an absurd result not possibly intended by the Legislature. Additionally, the circuit court properly affirmed the magistrate's ruling because Appellant failed to demonstrate prejudice from the alleged defects with the video. For all of these reasons, the State submits the trial court properly denied Appellant's motion to dismiss and the circuit court properly affirmed his conviction.

Standard of Review

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (Ct. App. 2012); State v. Johnson, 396 S.C. 182, 186, 720 S.E.2d 516, 518 (Ct. App. 2011). A trial court's decision on whether to grant a motion to dismiss should not be reversed absent an abuse of discretion. See State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70 (Supp. 2012). The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 186, 720 S.E.2d at 518.

Law / Analysis

All 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 the light of the intended purpose of the statute. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. The court should look to the plain language of the statute. Binney v. State, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. In interpreting a statute, the court will give words their plain and ordinary meaning and will not resort to forced construction that would limit or expand the statute. Johnson, 396 S.C. at 188, 720 S.E.2d at 520.

The applicable section of the South Carolina Code provides:

> (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. 2012) (emphasis added).

On appeal to the circuit court, Appellant argued the trial court erred in failing to dismiss the case because the statute requires that a defendant's feet be visible at every step of the walk and turn field sobriety test. The State disagrees and submits both the trial court and the circuit court properly concluded the incident site video recording of Appellant's conduct in this case was sufficient to comply with the requirements of section 56-5-2953. In Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), this Court addressed a similar claim; however, it was raised under an earlier version of section 56-5-2953, before the statute was amended to add a specific requirement for the recording of "any field sobriety tests administered." Nevertheless, Murphy is still instructive.

Murphy claimed that the videotape of the incident site at her arrest did not comply with the statute because it failed to "record most of the field sobriety tests." Specifically, she argued the statute required that she remain in full view for all field sobriety tests. This Court disagreed and found that since the predecessor statute merely provided a person "must have his conduct at the incident site and breath test site videotaped," an accused need not remain in full view of the camera at all times in order for the recording to capture that conduct. Murphy, 329 S.C. at 631, 709 S.E.2d at 688. Specifically, this Court found:

> [T]he plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture *all* field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused's conduct.

Murphy, 329 S.C. at 632, 709 S.E.2d at 688.

Here, as found by the trial court, the plain language of the amended statute does not require that the video capture the defendant's feet during the entire administration of the walk and turn field sobriety test. It merely says the video recording must "include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2012). As in Murphy, the plain language of the statute still does NOT require that the recording capture "a continuous full view of the accused." It also does not require a recording of a particular quality, or a recording in the best possible lighting conditions, or a recording the captures every detail of the tests. As long as the recording includes "any field sobriety tests administered," it is in compliance with the plain, unambiguous language of the statute, and the circuit court erred in finding otherwise. Here, the arresting officer acted in compliance with the plain terms of section 56-5-2953 and Appellant's conviction was properly affirmed.

To the extent this Court disagrees and finds section 56-5-2953(A)(1)(a) is ambiguous, the State nevertheless submits the lower courts correctly interpreted the statute in a way that would not lead to an absurd result not possibly intended by the Legislature. If a statute is ambiguous, courts must construe the terms of the statute. Town of Mt. Pleasant v. Roberts , 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); Johnson, 396 S.C. at 189, 720 S.E.2d at 520. A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006); Johnson, 396 at 189, 720 S.E.2d at 520. The language of the statute must be read in such a way that harmonizes its subject matter and accords with the statute's general purpose. Roberts, 393 S.C. at 342, 713 S.E.2d at 283; Johnson, 396 S.C.

at 189, 720 S.E.2d at 520. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Id. However, courts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention. Id.

The overarching purpose of subsection 56-5-2953(A) is clear: to ensure that the driver's "conduct" at the incident site and breath test site is recorded. Indeed, capturing the driver's overall conduct was the precise purpose described in Murphy, supra. The subparts of 56-5-2953(A)(1) simply identify particular aspects of that conduct which must also be included in the video recording. Pursuant to Murphy and its analysis of the predecessor statute, an officer could have complied by video recording some, but not all, of the field sobriety tests administered. The amendment simply eliminated this possibility by requiring that any and all field sobriety tests be video recorded. It requires a video recording of the officer's administration of the field sobriety tests, not a recording that captures every detail or the actual results of the tests. It would be absurd to require every single step of the "walk and turn" test to be in full view, just as it would be absurd to require the video recording to show the "involuntary jerking of the eyeball" in an HGN test. The State submits that as long as a juror can tell the arresting officer is administering the test, there is compliance.

This interpretation allows a jury to weigh whether the conduct supports the allegation of driving under the influence. The South Carolina Supreme Court has explained: "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Roberts, 393 S.C. at 347, 713 S.E.2d at 285. The purpose is not to provide a video such that a jury will see exactly what the arresting officer sees. The video is instead

intended to document the arrest and provide a recording of all required portions of the defendant's conduct, including the field sobriety tests administered. Nothing in the statute requires the watcher of the video to see exactly what the officer saw. Requiring this would otherwise effectively rewrite the statute and impose requirements not imposed by the Legislature.

Here, the recording clearly includes Appellant's conduct. The viewer can hear his interactions with the officer from the beginning and see his conduct during the three field sobriety tests, including his missteps during the walk and turn test. In the parts of the video in which the viewer can clearly see Appellant's feet, there are several times in which the heel and toe do not make contact as he steps one foot far to the side. (Circuit Court's Exhibit #1 – CD (Incident Site Video)). While the viewer admittedly cannot see every single heel-to-toe touch or non-touch, this simply is not a requirement of the statute. The officer fully complied with the statute by recording the field sobriety tests administered, using videotaping equipment in a law enforcement vehicle, and by recording Appellant's "conduct" as that term is generally defined. The video recording leaves no doubt the arresting officer conducted a walk and turn test along with two other field sobriety tests, and the administration of all three tests were included in the video recording.

Any other interpretation is not practical, reasonable or consonant with the purpose, design, and policy of the lawmakers. Indeed, the State submits the expansive view of the statutory language which is being advanced by Appellant fails to resolve the issue in favor of a just, equitable, and beneficial operation of the law. To the contrary, it would lead to an absurd result not possibly intended by the Legislature. Certainly the

Legislature did not intend dismissal of an otherwise valid driving under the influence charge simply because the quality of the video recording does not meet the appellate court's arbitrary standards. Accordingly, the lower courts properly interpreted section 56-5-2953(A) as not requiring that a defendant's feet be visible at every single step during the administration of a walk and turn test.

Instead, any issue regarding the quality of what is shown or the successful or unsuccessful completion of the test is for the jury to consider as part of the weight it assigns to the video and does not go to admissibility or support dismissal. See State v. Cope, 405 S.C. 317, 342 n.6, 748 S.E.2d 194, 207 n.6 (2013) ("factual discrepancies . . . go to the weight of the evidence"); 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); Weaver v. Lentz, 348 S.C. 672, 680, 561 S.E.2d 360, 364-365 (Ct. App. 2002) ("Questions as to the accuracy of conclusions drawn go solely to the weight of the testimony, rather than 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)). Under section 56-5-2953(A)(1) the State must produce a video that records the person's conduct and in recording that conduct the video must include any field sobriety tests administered. This was unquestionably done in Appellant's case.

In State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) (certiorari granted), this Court determined that "[b]ecause of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless." This Court affirmed the circuit court's finding (on appeal from a magistrate court's finding that the recording sufficiently showed the conduct of the defendant) that the head must be visible during the HGN test. Id. at 543, 759 S.E.2d at 758. However, because the circuit court, sitting as an appellate court, should not have engaged in fact finding, and the magistrate court did not make any findings as to whether the head was visible on camera, this Court remanded the case to the magistrate court to make those findings. Id. at 7543-44, 759 S.E.2d at 758. This Court's opinion indicated dismissal is appropriate where the actual HGN test cannot be seen, but did not specifically add a requirement, as advocated by Appellant in this case, that the results of the test, the performance of the defendant on the test, or every detail of the test must also be seen.[5]

More recently, our supreme court decided State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014). In Sawyer, the Supreme Court addressed the issue of a videotape from the breath test site that lacked audio, and determined it did not satisfy the requirements of § 56-5-2953. Id. at 480, 763 S.E.2d at 185-86. The Supreme Court distinguished Murphy from Sawyer, stating, "Here, however, we are concerned not with the defendant's conduct but with the content of the statutorily required warnings." Id. at 480, 763 S.E.2d at 185. Specifically, the Court found that because the State did not produce audio recording of the Miranda warnings or the person being informed he was being videotaped, the recording failed to meet the statutory requirements. Id. at 480, 763

[5] To the extent necessary, the State will move to argue against the precedent of Gordon.

S.E.2d at 185-86. Sawyer has no bearing on the instant case because, like Murphy, this case deals with Appellant's conduct rather than statutorily required verbal warnings. Indeed, the Miranda warnings were clearly captured on the videotape, with audio.

These two recent cases do not affect the case at hand. Here, the trial court appropriately exercised its discretion in denying Appellant's motion to dismiss the DUI charge. See State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. As explained above, the trial judge did not abuse his discretion because his decision was not based on an error of law and his factual findings are supported by the evidence. Although Appellant's feet are not visible for brief portion of the walk and turn test, he can be seen and heard during the entire video recording prior to his arrest. (Circuit Court's Exhibit #1-CD (Incident Site Video)). Thus, the trial court properly denied Appellant's motion to dismiss and the circuit court properly affirmed.[6]

The trial court's decision is also supported by the fact that Appellant did not suffer any prejudice from the alleged defects in the video recording. The magistrate found the video recording of the walk and turn test was sufficient. This finding was akin to a determination that Appellant failed to prove any prejudice from the fact his feet were not visible during a portion of the walk and turn test. Appellant was not able to demonstrate how he was prejudiced by the video recording of the administration of the test. As has

[6] Under Appellant's argument, officers would be better off not performing any field sobriety tests than performing the tests and risking a dismissal because the video recording is not perfect, especially when done in less than ideal circumstances of darkness. The more reasonable approach would allow the jury to perform its duty of weighing the evidence.

previously been found, violations of a statutory requirement should not result in exclusion or other remedy without the presence of prejudice. It is well established that "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedure." State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976); see also, State v. Huntley, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002) (finding the trial court erred in automatically suppressing a breath test's results when no prejudice to the defendant was shown as a result of the implied consent statute's violation). With no showing of prejudice, dismissal was not warranted.

For all of these reasons, the circuit court should be affirmed. The State submitted a properly recorded video which showed the administration of all field sobriety tests and included Appellant's arrest. Any possible "defects" because of the video failed to capture all the steps during the walk and turn test inured only to the weight to be given by the jury and properly did not result in dismissal of the case. Further, Appellant's position leads to an absurd result. Finally, the trial court's denial constituted a finding that Appellant failed to demonstrate prejudice, and as a result, the circuit court properly affirmed the magistrate's decision. Consistent with the trial court and the circuit court, this Court should find the video produced by the State complied with the statutory requirements of section 56-5-2953 and that dismissal was not required.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the circuit court's decision and Appellant's conviction be affirmed.

Respectfully submitted,

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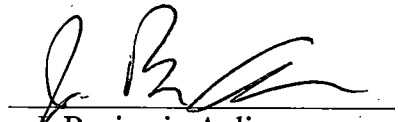
RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 12, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-002704

THE STATE, ...RESPONDENT

v.

MICHAEL WAYNE SHERRILL, ...APPELLANT.

PROOF OF SERVICE

I, Norma Bigbee, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated June 12, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Francis L. Bell, Jr., Esquire
P.O. Box 867
Lancaster, South Carolina 29721

I further certified that all parties required by Rule to be served have been served. This 12th day of June, 2015.

Norma Bigbee
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 12 2015
SC Court of Appeals

June 12, 2015

Francis L. Bell, Jr., Esquire
P.O. Box 867
Lancaster, South Carolina 29721

Re: The State v. Michael Wayne Sherrill
Appellate Case No. 2014-002704

Dear Mr. Bell:

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

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

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