

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
APPEAL FROM YORK COUNTY  
Court of Common Pleas  
Case No. 2014-CP-46-2349

LEE S. ALFORD, Circuit Court Judge

\_\_\_\_\_  
Appellate Case No. 2015-000130

City of Rock Hill,

Respondent,

v.

Neal A. Nessmiller

Appellant.

\_\_\_\_\_  
**INITIAL BRIEF OF RESPONDENT**  
\_\_\_\_\_

Paula Knox Brown  
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SC Bar #69564

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ATTORNEY FOR APPELLANT

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JUL 23 2015

SC Court of Appeals

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## STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Circuit Court err in affirming the trial court's finding that the City of Rock Hill complied with the requirements of §56-5-2953 in its recording of the HGN test in this case and that, having complied with the statute, dismissal of the DUI charge was unwarranted?
- II. Did the Circuit Court err in affirming the trial court's finding that the City of Rock Hill complied with the requirements of §56-5-2953 in its recording of the Miranda warnings in this case and that, having complied with the statute, dismissal of the DUI charge was unwarranted?
- III. Did the Circuit Court err in affirming the trial court's finding that the City of Rock Hill complied with the requirements of §56-5-2953 in its recording of the breath test site in this case and that, having complied with the statute, dismissal of the DUI charge was unwarranted?

## STATEMENT OF THE CASE

Neal Nessmiller, the Appellant in this case, was arrested for Driving Under the Influence, 1<sup>st</sup> offense, on March 12, 2013. His motion to dismiss the charge for violations of §56-5-2953 was heard on June 10, 2014. The trial court denied the motion by Order dated June 24, 2014. The parties stipulated to information contained in the incident report; the interactions between the Officer and defendant at the incident site and in the Datamaster room, as depicted on the roadside and Datamaster room videos; the Implied Consent form, the Breath Alcohol Analysis Test Report, and the Notice of Suspension. The trial court received those items in evidence and rendered a verdict of guilty on July 10, 2014. The Appellant was sentenced to thirty (30) days suspended upon the payment of Nine Hundred Ninety-Seven and 00/100 Dollars (\$997.00). (R., \_\_\_\_\_)

Appellant appealed to the Circuit Court. The matter was heard by the Honorable Lee S. Alford on December 2, 2014. The Circuit Court affirmed the trial court in an Order entered on December 11, 2014. This appeal was filed on January 13, 2015. (R., \_\_\_\_\_)

## STATEMENT OF THE FACTS

The defendant was involved in a two-car collision on March 12, 2013, having struck another vehicle stopped at an intersection for a traffic light. (R., \_\_\_\_\_) Officer Eric Sizemore arrived to investigate and found indications of a possible driver impaired by drugs and/or alcohol. (R., \_\_\_\_\_) Mr. Nessmiller advised Officer Sizemore that he had had

three Vodka drinks. (R., \_\_) Per his training, the Officer provided the Appellant, Neal Nessmiller, with an opportunity to perform several field sobriety tests. (R., \_\_) Mr. Nessmiller informed Officer Sizemore that he had recently injured his right knee. His left leg had clearly been amputated, and he wore a prosthetic limb. He was, therefore, unable to perform two of the standardized field sobriety tests. (R., \_\_) Because of Mr. Nessmiller's physical limitations, Officer Sizemore administered only the HGN prior to reading Miranda and arresting Mr. Nessmiller for DUI. (R., \_\_)

Officer Sizemore walked the suspect back to the patrol car for recording of the Miranda warnings. The defendant can clearly be seen. A part of the defendant's side is off camera during filming of the Miranda recitation to the defendant by Officer Sizemore. Defendant was subsequently placed in the patrol car, before being driven to Rock Hill Police Department where an opportunity to provide a breath sample was provided. (R., \_\_\_\_\_)

## ARGUMENT

- I. **Did the Circuit Court err in affirming the trial court's finding that the City of Rock Hill complied with the requirements of §56-5-2953 in its recording of the HGN test and Miranda warnings in this case and that, having complied with the statute, dismissal of the DUI charge was unwarranted?**

During the HGN, the Appellant is visible on camera; however, half of Defendant's head cannot be seen during the test. (R., \_\_\_\_\_) The entire continuous movement of the investigating officer's finger during the HGN can be seen on tape. The captured portion of Mr. Nessmiller's head was visible on camera during the entire administration of the HGN test, from instruction phase through the conclusion of the test, as is required under §56-5-2953 of the South Carolina Code of Laws, Annotated, and State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App 2014). The Appellant's head remained visible on camera, and the defendant did not need to be reminded to keep his head still during the HGN test. Appropriate evidence of Appellant's conduct during his HGN testing is captured on this videotape, consistent with the wording of §56-5-2953 and with State v. Murphy, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Granted, the defendant's eyes were not visible on camera, but that inability to depict or see the eye movement is not inconsistent with the norm for videotaped HGN testing, given the limitations of videotaping equipment, and is neither a Gordon requirement nor a requirement of any other statute or case in South Carolina law for that reason.

Mr. Nessmiller's position afterwards was the result of his behavior, not any wrongdoing by the Officer. The Officer's complete testing procedure on HGN was

depicted on video. The defendant's head movement during the entire test was properly captured. No violation of §56-5-2953 occurred; and no violation of Gordon occurred. City of Rock Hill complied with both §56-5-2953 and Gordon. The Circuit Court was correct in affirming the Trial Court. Dismissal on this ground was unwarranted.

**II. Did the Circuit Court err in affirming the trial court's finding that the City of Rock Hill complied with the requirements of §56-5-2953 in its recording of the Miranda warnings in this case and that, having complied with the statute, dismissal of the DUI charge was unwarranted?**

Likewise, Officer Sizemore escorted Mr. Nessmiller to a position at the front of the patrol car for the recitation of Miranda warnings, which was performed with the Appellant's person visible on camera. The camera caught a view of Appellant's back, given the way Appellant was standing. The front of his body was not visible. As the Circuit Court noted, "A couple of times, the Appellant's left shoulder and part of his head swayed out of the filmed scene due to Appellant's voluntary movement while the officer was reading." The officer did not engage in blocking exercises consistent with those performed in movie and stage productions. Nothing in South Carolina law requires him to do so. His purpose was not to create a Hollywood-caliber, award winning video but to capture the interactions between himself and the defendant during a DUI investigation as evidence, as required by §56-5-2953, Murphy, and Gordon, and the legislative intent, where he and the Appellant may well be the only people testifying in a subsequent trial. Granted, one side of the Appellant may have been captured on camera, while the other side remained off camera, but the undivided living person depicted on camera listening to Miranda was Neal Nessmiller. No violation of §56-5-2953, Murphy, or Gordon occurred. The officer's Miranda recitation to the Appellant was properly captured on film, satisfying §56-5-2953, Murphy, and Gordon. The Circuit Court was correct in its ruling. Dismissal on this ground was unwarranted.

**III. Did the Circuit Court err in affirming the trial court's finding that the City of Rock Hill complied with the requirements of §56-5-2953 in its recording of the breath test site in this case and that, having complied with the statute, dismissal of the DUI charge was unwarranted?**

Officer Sizemore administered the Datamaster test in a room at Rock Hill Police Department where the camera was mounted roughly ten feet above and at an angle to the area where Officer Sizemore and Mr. Nessmiller were positioned on opposite sides of the Datamaster equipment. The Appellant, Officer Sizemore, and the Datamaster machine were all clearly depicted. As the Circuit Court noted, the

Officer's back is shown on the camera but his movements with respect to his paperwork and any interaction with or manipulation of the Datamaster machine were visible during the entire breath test effort. However, because Mr. Nessmiller refused to submit to the Datamaster test when offered after his twenty minute waiting period, even if there had been a flaw in the Officer's behavior during the testing itself, it would not have warranted dismissal of this case. State v. Elwell, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011). The Circuit Court noted, "the video recording was in compliance with Section 586-5-2953(A)(2) of the S.C. Code, as Amended." The Circuit Court was correct in its ruling. Dismissal on this ground was unwarranted.

### CONCLUSION

Circuit Court correctly interpreted and applied the law in this State when it affirmed the Trial Court's legal rulings and guilty verdict in this case. The City of Rock Hill complied with §56-5-2953 in the videotaping of the HGN test, the recitation of Miranda warnings, and depiction of the interaction of Officer Sizemore and Mr. Nessmiller in the Datamaster room. The Trial Court correctly denied Appellant's motions for dismissal for alleged violations of videotaping statutes. The Circuit Court did not err in affirming those lower court rulings. This appeal should be denied and the Circuit Court affirmed.



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July 2, 2015  
Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY  
Court of Common Pleas  
Case No. 2014-CP-46-2349

LEE S. ALFORD, Circuit Court Judge

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City of Rock Hill,

Respondent,

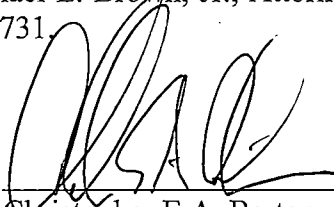
v.

Neal A. Nessmiller,

Appellant.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the Initial Brief of Respondent and Designation of Matter has been served upon opposing counsel by mailing a copy via regular U.S. Mail to him on the 21<sup>st</sup> day of July, 2015, to Michael L. Brown, Jr., Attorney for Respondent, Post Office Box 1025, Rock Hill, South Carolina 29731.

  
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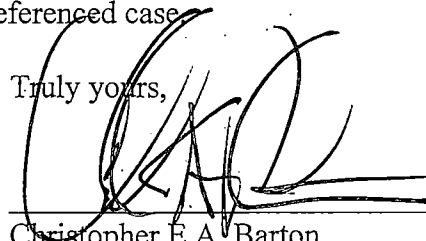
The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

RE: Neal A. Nessmiller, Appellant v. City of Rock Hill, Respondent

Dear Ms. Kitchings;

Enclosed for filing please find the original and 2 copies of our Initial Brief of Respondent and Designation of Matter in regards to the above referenced case.

Truly yours,



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SC Court of Appeals

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