The Supreme Court of South Carolina

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August 5, 2015

The Honorable Paul B. Wickensimer

Courthouse
305 E North St
Greenville SC 29601-2121

REMITTITUR

Re: The State v. Gregg Henkel
Lower Court Case No. 2009GS2302593
Appellate Case No. 2013-001989

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

Brenda F. Shealy

CHIEF DEPUTY CLERK

cc: C. Rauch Wise, Esquire
William M. Blitch, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Gregg Gerald Henkel, Respondent.

Appellate Case No. 2013-001989

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 27541
Heard April 22, 2015 – Filed July 1, 2015

REVERSED

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Petitioner.

C. Rauch Wise, of Greenwood, for Respondent.

JUSTICE PLEICONES: We granted the State's petition for a writ of certiorari to review the Court of Appeals' opinion that found the trial court should have dismissed respondent's DUI charge because the videotape did not comply with the statutory requirements for videotaping respondent's conduct at the scene of his DUI

arrest. *State v. Henkel*, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013); S.C. Code Ann. § 56–5–2953 (2006). We reverse.

FACTS

A witness observed a vehicle being driven erratically on I-385 and ultimately wrecking. Sergeant Hiott responded to the wreck and organized a search after learning from a witness that the driver had fled the scene. Officers were unable to locate the driver and cleared the scene.

Several hours later, Sergeant Hiott responded to a call indicating an individual had been found walking down I-385. When Sergeant Hiott arrived, he found respondent receiving medical care in an ambulance. Sergeant Hiott read respondent his *Miranda*[1] rights and conducted a horizontal gaze nystagmus (HGN) test while respondent was in the ambulance. Sergeant Hiott initiated his audio recording device by a switch on his belt during the HGN test.[2] After the HGN test, Sergeant Hiott learned respondent was not going to the hospital, so he led respondent from the ambulance to the side of his vehicle and asked him to recite the alphabet. Respondent failed both the HGN and ABC tests.[3] The ABC test and Sergeant Hiott's admonitions while administering the HGN test were captured by audio recording. Neither test was captured by video recording. Sergeant Hiott arrested respondent for DUI, placed respondent in his patrol vehicle, faced the in-car camera towards respondent, and read respondent his *Miranda* rights again.

Respondent sought dismissal of the charge alleging the videotape of his conduct at the scene failed to comply with the statutory videotaping requirements. Subsection 56–5–2953 (A) requires that an individual have his conduct recorded at the incident site, and that the recording must include that individual being advised of his *Miranda* rights prior to the administration of field sobriety tests.[4] Subsection

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] This switch also activated patrol car's video recording camera. This forward facing camera only recorded the highway in front of Sergeant Hiott's vehicle. When Sergeant Hiott arrived at the scene, he pulled his patrol vehicle past all of the other emergency vehicles.

[3] No balancing tests were administered because respondent indicated he had an injured leg.

[4] Subsection (A) states:

> (A) A person who violates Section 56–5–2930, 56–5–2933, or 56–5–2945

(B) provides several exceptions to this videotaping requirement:

> [I]n circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section.

S.C. Code Ann. § 56–5–2953(B) (2006).

The trial court denied respondent's motion to dismiss. The trial court recognized this incident was not a typical DUI stop because Sergeant Hiott's investigation began hours after respondent's wreck. Accordingly, the trial court applied subsection (B), and found Sergeant Hiott activated the video and audio recording as soon as practicable.[5] The trial court found the videotape complied with the requirements of subsection (A) because it captured audio of the HGN and ABC tests.

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must have his conduct at the incident site and the breath test site videotaped.

> (1) The videotaping at the incident site must:
>
> > (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56–5–2930, 56–5–2933, or a probable cause determination that the person violated Section 56–5–2945; and
> >
> > (b) include the person being advised of his *Miranda* rights before any field sobriety tests are administered, if the tests are administered.

We note that § 56–5–2953 was amended effective February 10, 2009. *See* Act No. 201, 2008 S.C. Acts 1682-85. While subsection (A) was amended, the language of subsection (B) was essentially unchanged. Respondent's arrest occurred on January 19, 2008, so the amended statute is not applicable.

[5] The trial court's factual finding that videotaping began as soon as practicable is not challenged on appeal.

The Court of Appeals reversed. The majority first looked to subsection (B) because the videotaping equipment was not activated by Sergeant Hiott's blue lights and Sergeant Hiott was conducting a traffic accident investigation. The majority applied the language of subsection (B) which provides two qualifying provisions: "[h]owever, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section." S.C. Code Ann. § 56–5–2953(B). The majority found the language which requires "videotaping must begin and conform with the provisions of this section," necessitates compliance with subsection (A). That is, the majority held that once videotaping begins, it must include **all** the requirements of subsection (A). Subsection (A)(1)(b) requires the videotaping "include the person being advised of his *Miranda* rights before any field sobriety tests are administered." Here, the first *Miranda* warning was not captured by audio or video. Accordingly, the majority found dismissal of the charge was required because the videotape did not capture respondent being advised of his *Miranda* rights before the audio recording of the HGN and ABC tests.[6]

Judge Geathers dissented and reasoned that to require strict compliance with subsection (A)(1)(b) would effectively eviscerate the exception in subsection (B). Judge Geathers observed an officer is required to begin recording as soon as practicable, and the "begin and conform" provision in subsection (B) was intended to require compliance with subsection (A), *from that point forward.* Judge Geathers stated "the initiation of the videotaping and conformance must each begin as soon as is practicable," and here, it was not practicable to capture video evidence of respondent receiving his initial *Miranda* warnings or performing the HGN and ABC tests. Accordingly, Judge Geathers would have affirmed respondent's conviction and sentence.

ISSUE

Did the videotape of respondent's conduct made at the scene of his traffic accident investigation comply with the videotaping requirements of S.C. Code Ann. § 56–5–2953, as it existed in January 2008?

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[6] This same issue will not arise under the amended version of the statute because while it requires both the field sobriety tests and the *Miranda* rights be recorded, it does not require *Miranda* rights be given **before** the field sobriety tests.

ANALYSIS

The State contends the Court of Appeals misapplied the exception in subsection (B) because the phrase "as soon as videotaping is practicable" applies to both when the videotaping must "begin" and what it must show in order to "conform" to the requirements of subsection (A). The State argues the effect of the Court of Appeals' opinion requires, in situations such as this, the arresting officer to perform *Miranda* warnings and field sobriety tests anew, in order to capture them on videotape, if they were first performed prior to the moment where videotaping became practicable. We find the language of the exception in subsection (B) ambiguous, and construe the exception to require compliance with subsection (A) need only begin at the time videotaping becomes practicable, and continue until the arrest is complete.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). However, "[a]ll 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 light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

If the statute is ambiguous, courts must construe the terms of the statute. *Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "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). We have strictly construed § 56–5–2953. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011).

We find the language of the exception in subsection (B) ambiguous and construe the exception to require compliance with subsection (A) when it becomes practicable to begin videotaping. Accordingly, we find Court of Appeals' majority erred, for two reasons, in finding once videotaping begins pursuant to an exception in subsection (B), that full compliance with subsection (A) is necessary. First, the majority opinion violates the legislative intent of the statute. Subsection (A) was intended to capture the interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop where there are no other witnesses. *Roberts*, 393 S.C. at 347, 713 S.E.2d at 285 (finding the purpose of § 56–5–2953 is

to create direct evidence of a DUI arrest). During a traffic stop, the subject, his vehicle, and his interaction with the officer can be videotaped by the car-mounted camera that is initiated by the officer's blue lights. Requiring an officer to repeat *Miranda* and field sobriety tests on camera in a situation contemplated in subsection (B) is not consistent with the legislative intent of the DUI recording statute.

Here, the legislative concerns with videotaping one-on-one traffic stops to capture the interactions between an officer and the subject are not present. *See Sweat,* 386 S.C. at 350, 688 S.E.2d at 575 (holding "language must be construed in light of the intended purpose of the statute."). Numerous officers and emergency personnel observed respondent's conduct at the scene. Officer Hamilton testified he was the first responder that located respondent walking down I-385. Officer Hamilton testified respondent was unsteady on his feet, he was confused, and he was talking with a slurred voice. Officer Terry testified he also responded to the call reporting that respondent was walking down I-385 and he believed respondent was definitely intoxicated. He explained respondent was slurring his speech, his posture was slumped over, and he smelled like alcohol.

Second, the majority opinion fails to consider the statute as a whole. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole."). In effect, the majority opinion would render the exceptions for road blocks, traffic accident investigations, and citizens' arrests meaningless, if during an encounter it becomes practicable to begin videotaping. The majority requires an arresting officer to repeat *Miranda* warnings and field sobriety tests if it becomes practicable to begin videotaping; especially when, as occurred here, *Miranda* and a portion of a field sobriety test were conducted prior to the moment when videotaping became practicable. We hold the phrase "as soon as videotaping is practicable in these circumstances," applies to both when videotaping must "begin" and when videotaping must "conform to the provisions of this section."

Accordingly, we hold when an individual's conduct is videotaped during a situation provided for in subsection (B), compliance with subsection (A) must begin at the time videotaping becomes practicable and continue until the arrest is complete. Subsection (A) of the statute as it existed at the time of respondent's arrest only required respondent's conduct be videotaped and *Miranda* warnings be given prior to field sobriety tests. We find the audio recording of respondent's field sobriety

tests adequately captured his conduct at the scene of the traffic accident investigation. Additionally, because respondent was given *Miranda* warnings prior to the time videotaping became practicable, we hold the videotape complies with subsection (A) because the videotape need only begin complying with subsection (A) from the time videotaping became practicable. *See* footnote 5, *supra*.

We reverse the Court of Appeals and reinstate respondent's conviction because the videotape satisfied the requirements of § 56–5–2953 once videotaping became practicable.[7]

CONCLUSION

For the reasons given above, the opinion of the Court of Appeals is

REVERSED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

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[7] Because we find the videotape complied with § 56–5–2953, we need not address whether the totality of the circumstances exception in subsection (B) applies.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gregg Gerald Henkel, Appellant.

Appellate Case No. 2011-184986

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5159
Heard March 6, 2013 – Filed July 10, 2013

REVERSED

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

LOCKEMY, J.: Gregg Henkel argues the trial court erred in denying his motion to dismiss his indictment for driving under the influence (DUI). Henkel contends the South Carolina Highway Patrol (SCHP) failed to comply with section 56-5-2953 of the South Carolina Code (2006), which requires the arresting officer to provide videotaping of the defendant's conduct at the incident site. We reverse.

FACTS/PROCEDURAL BACKGROUND

Around 1:00 a.m. on January 19, 2008, Lillie Chastain called 911 and reported a motorist driving a truck erratically on I-385 in Greenville County. Chastain followed the truck until it hit a bridge and overturned into a ditch. She observed the driver get out of the truck and jump over a fence. Sergeant Wesley Hiott of the SCHP arrived on the scene and organized a search for the driver. Officers were unable to locate the driver, and the scene was cleared.

Around 4:00 or 5:00 a.m., Sergeant Hiott responded to a call indicating the possible driver of the truck had been located on I-385. When he arrived on the scene, Sergeant Hiott pulled his patrol car to the front of the line of emergency vehicles on the side of the interstate. Thereafter, Sergeant Hiott found Henkel being examined by EMS in an ambulance behind his patrol car. Sergeant Hiott got into the ambulance with Henkel and could smell alcohol. Sergeant Hiott read Henkel his *Miranda* rights and performed a horizontal gaze nystagmus (HGN) test inside the ambulance. After performing the HGN test, Sergeant Hiott concluded Henkel was under the influence and moved him from inside the ambulance to the side of his patrol car. There, Sergeant Hiott had Henkel recite his ABCs.[1] Henkel failed the ABC test and admitted to Sergeant Hiott he was the driver of the wrecked truck. Henkel was arrested and placed in Sergeant Hiott's patrol car. Once inside the patrol car, Sergeant Hiott turned the dashboard video camera to face Henkel and read him his *Miranda* rights again.

Henkel was indicted for DUI and a trial was held in February 2011. Prior to trial, Henkel moved to dismiss the indictment on the ground that neither the field sobriety tests nor the initial *Miranda* warning were videotaped as required by section 56-5-2953 of the South Carolina Code. The trial court reserved ruling on the motion until all of the testimony was presented.

Sergeant Hiott testified he activated the patrol car's video camera and his microphone by the remote control on his belt. The record indicates this occurred after Sergeant Hiott read Henkel his *Miranda* rights in the ambulance but before he administered the HGN test. Sergeant Hiott testified he activated the camera as soon as it was practicable. Two versions of the videotape from the incident site were admitted into evidence. In the defense's version (Court's Exhibit 1), the videotape includes audio of the HGN and ABC tests but does not include video

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[1] Sergeant Hiott did not have Henkel perform any walking or balancing tests because Henkel indicated his leg was injured.

because these tests were not administered in front of Sergeant Hiott's patrol car where the video camera was aimed. The State's version (State's Exhibit 2) of the videotape is nearly identical to Court's Exhibit 1 but does not begin until after the HGN test. Thus, the videotapes in evidence do not include any video or audio of the initial *Miranda* warning, or any video of the HGN or ABC tests.

At the conclusion of the testimony, Henkel renewed his motion to dismiss. The trial court denied Henkel's motion based on "the totality . . . [of] the evidence." The trial court noted Sergeant Hiott testified he activated the video camera as soon as practicable. The trial court further found the HGN and ABC tests "don't cry out for video representation . . . [t]hey cry out for audio representation on the ABCs." Based on the tests given, the trial court determined the videotape "met the requirements of the law."

The jury found Henkel guilty of DUI, and he was sentenced to three years in prison suspended upon the service of three months and thirty months of probation. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

Henkel argues the trial court erred in denying his motion to dismiss his DUI indictment because the State failed to produce a videotape that complied with section 56-5-2953 of the South Carolina Code. The State contends Sergeant Hiott activated the video camera as soon as practicable, and the videotape, while capturing only audio of the field sobriety tests, was sufficient to show Henkel's conduct at the incident site. We reverse the trial court's decision.

I. Applicable Law

Subsection 56-5-2953(A) 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 videotaped.

(1) The videotaping at the incident site must:

(a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and

(b) include the person being advised of his *Miranda* rights before any field sobriety tests are administered, if the tests are administered.

S.C. Code Ann. § 56-5-2953(A) (2006).[2] Subsection (B) of section 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Pursuant to subsection 56-5-2953(B),

> [f]ailure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal . . . if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating 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 videotape because the person needed emergency medical treatment, or exigent circumstances existed. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations,

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[2] Section 56-5-2953 was amended effective February 10, 2009. *See* Act No. 201, 2008 S.C. Acts 1682-85. The amended statute is not applicable to Henkel's January 19, 2008 arrest.

> and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape.

S.C. Code Ann. § 56-5-2953(B).

"Our appellate courts have strictly construed section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011) (citing *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding that "dismissal of the DUAC charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions"); *Murphy v. State*, 392 S.C. 626, 630, 709 S.E.2d 685, 687 (Ct. App. 2011) (recognizing the State's noncompliance with section 56-5-2953, which is not mitigated by a statutory exception, warrants dismissal)). "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Id.* at 348, 713 S.E.2d at 286.

II. Analysis

Subsection 56-5-2953(A)(1) requires that a person who drives under the influence must have his conduct at the incident site videotaped. Under subsection 56-5-2953(A)(1)(a), the videotaping must "begin not later than the activation of the officer's blue lights." Sergeant Hiott testified his patrol car was equipped with front and rear blue lights, which could be activated independently of each other, but the car's video camera turns on only when the front blue lights are activated. When he arrived at the scene, Sergeant Hiott activated only his rear blue lights. Because the event that subsection 56-5-2953(A)(1)(a) sets as the latest point in

time when videotaping must begin—activation of the front blue lights that turn on the camera—never occurred, the failure to videotape the *Miranda* warnings did not violate subsection 56-5-2953(A)(1).

Subsection 56-5-2953(B) (2006) provides that "in circumstances including, but not limited to . . . traffic accident investigations, . . . where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal." The next sentence of subsection (B) qualifies that provision with two requirements: "However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section."

This is a case in which the videotaping equipment was not activated by blue lights. The trial court made a factual finding that Sergeant Hiott activated his patrol car's video as soon as practicable. There is evidence to support this finding, and under our standard of review, we are bound by it. However, the requirement in subsection 56-5-2953(B) that the videotaping "conform with the provisions of this section" refers back to subsection (A). Subsection 56-5-2953(A)(1)(b) requires that the videotaping at the incident site "include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered." Sergeant Hiott performed field sobriety tests after he started videotaping. Because the videotape did not include him giving Henkel *Miranda* warnings, it did not conform to the provisions of section 56-5-2953. Therefore, the trial court was required to dismiss the charge,[3] and it erred by not doing so.

REVERSED.

FEW, C.J., concurs.

GEATHERS, J., dissenting: For the following reasons, I would affirm Appellant's conviction for DUI.

I agree with the majority's analysis that a key determination in this case is whether the officer activated his patrol car's video recording equipment as soon as was practicable, such that the officer's delay in initiating the recording (non-compliance

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[3] Because the omission of the *Miranda* warnings requires dismissal, it is not necessary for us to consider the significance of the alleged failure to videotape Henkel's conduct.

with subsection 56-5-2953(A)) was excused pursuant to an exception within subsection 56-5-2953(B). However, I disagree with the majority's conclusion that when this exception is invoked that an officer must still strictly comply with subsection (A). To so construe the exception would effectively eviscerate it. *See State v. Hercheck*, Op. No. 27258 (S.C. Sup. Ct. filed May 29, 2013) (Shearouse Adv. Sh. No. 24 at 46) ("[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction" (citation omitted)). Further, the majority's interpretation disregards the plain meaning of subsection (B). In my view of the terms of this provision, when the exception is properly invoked an officer must, *from that point forward*, comply with all applicable recording requirements. *See* § 56-5-2953(B) ("[*A*]*s soon as is practicable* in these circumstances, *videotaping must* begin and *conform* with the provisions of this section." (emphases added)). Accordingly, the initiation of the videotaping and conformance must each begin as soon as is practicable. *Id.* In the instant matter, it was not practicable for the officer to capture video evidence of Appellant receiving his initial *Miranda* warning or performing the HGN or ABC tests while Appellant was inside the ambulance.

Additionally, I believe that a complete recording of events "at the incident site," as required by subsection (A), was excused due to the "totality of the circumstances" exception within subsection (B). *See* § 56-5-2953(A) (requiring "videotaping *at* the incident site"); § 56-5-2953(B) (providing that "[n]othing in this section prohibits the court from considering *any other valid reason* for the failure to produce the videotape based upon the *totality of the circumstances*." (emphases added)). Notably, this case did not involve a typical DUI investigation and subsequent arrest at or near the site of a traffic stop. Instead, this case involved a report of an erratic driver, the erratic driver's collision with a bridge and overturning of his vehicle, and his subsequent fleeing on foot and jumping a fence. Thus, when the officer first encountered the suspect *four hours after the accident, inside of an ambulance*, and after the suspect had *wandered down the middle of the highway back toward* the site of the wreck that was cleared hours earlier, the totality of these circumstances did not require video recording, at least not as contemplated by subsection (A) for a typical DUI stop and investigation.

Accordingly, the totality of the circumstances did not require a video recording in strict compliance with subsection (A). Here, the produced video recording still began as soon as was practicable and included audio of the HGN and ABC tests. Thus, in light of subsection (B) and the totality of the circumstances, the produced recording was sufficient.

For these reasons, I respectfully dissent.