THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2014-CP-20-0255

The State.....Appellant,

v.

Kathryn H. Dew.....Respondent.

INITIAL BRIEF OF APPELLANT

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DID THE MAGISTRATE ERR IN GRANTING THE RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF S.C. CODE § 56-5-2953?

STATEMENT OF THE CASE

On December 8, 2013, Senior Trooper C. B. Ford of the South Carolina Highway Patrol cited Respondent for Driving With an Unlawful Alcohol Concentration (DUAC) in violation of S.C. Code Ann. § 56-5-2933. (Uniform Traffic Ticket # G633064.) This matter came before the Honorable Michael P. Swearingen, Magistrate Judge for Fairfield County, on June 12, 2014 for a pre-trial hearing. (Ticket # G633064; Magistrate's Return filed August 15, 2014; Audio of Hearing on June 12, 2014 before Judge Swearingen.)

At the pre-trial hearing, Respondent moved to suppress the incident site video and to dismiss the charge for failure to comply with S.C. Code Ann. § 56-5-2953. (Magistrate's Return; Audio of Hearing.) Specifically, Respondent argued that the video failed to adequately display the walk and turn field sobriety test. After hearing arguments from Respondent and Appellant, Judge Swearingen found that the portion of the officer's video depicting the walk and turn test failed to comply with the requirements of § 56-5-2953 and he dismissed the charge. (Magistrate's Return; Audio of Hearing.)

The State then filed an appeal of the magistrate's dismissal with the Fairfield County Circuit Court. (Notice of Appeal and Appeal filed on July 10, 2014 in Fairfield County bearing C.A. No. 2014-CP-20-0255.) The appeal was called for oral argument on December 1, 2014 before the Honorable Clifton Newman. (Transcript of December 1, 2014 hearing held before Judge Newman.) On April 17, 2015, Judge Newman issued an order denying the appeal. (Order of Judge Newman.) The State received notice of said

Order on April 21, 2015 and subsequently filed a Notice of Appeal with the South Carolina Court of Appeals on May 18, 2015.

STATEMENT OF FACTS

Trooper Ford was on routine patrol in the early morning hours of December 8, 2013. (Video of Roadside Stop dated December 8, 2013.) A light drizzle was falling. (Video of Roadside Stop.) Shortly after midnight, he noticed a vehicle parked in the median of I-77 near mile marker 33. (Video of Roadside Stop; Audio of Hearing; Ticket # G633064.) Noting that the vehicle had not been there as he passed the area earlier, he decided to investigate its presence. As he approached the vehicle, he activated his in-car video camera and found Respondent standing beside her vehicle. (Video of Roadside Stop.) As Trooper Ford spoke with Respondent, her behavior raised a suspicion that she may have been operating her vehicle while impaired. (Video of Roadside Stop.) In order to investigate his suspicion, Trooper Ford administered the standard battery of field sobriety tests: horizontal gaze nystagmus (HGN), walk and turn, and one-legged stand. (Video of Roadside Stop.) At the conclusion of the tests, Trooper Ford placed Respondent under arrest for DUAC. (Video of Roadside Stop; Ticket # G633064.) His in-car camera recorded his entire interaction with Respondent up until his arrival at the detention center with her, where she was booked on a charge of DUAC. (Video of Roadside Stop.)

ARGUMENT

The magistrate erred as a matter of law in dismissing the case for failure to video record the incident site pursuant to § 56-5-2953. The relevant portion of the statute reads as follows:

> (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)(1) (Supp. 2010). The magistrate viewed the video and dismissed the case, finding that dismissal was dictated by this court's opinion in State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) (hereinafter "Gordon I"), aff'd as modified by Op. No. 27554 (S.C.Sup.Ct. filed August 5, 2015) (Magistrate's Return, Audio of Hearing.) This was error.

A. The Supreme Court's Recent Opinion in Gordon Mandates Suppression as the Appropriate Remedy for a Violation of the Video Recording Requirements of § 56-5-2953.

On August 5, 2015, the Supreme Court issued its opinion in State v. Gordon, Op. No. 27554 (S.C.Sup.Ct. filed August 5, 2015) (hereinafter "Gordon II"). While the Supreme Court affirmed the court of appeals' "conclusion that [§ 56-5-2953] requires that the motorist's head be recorded on video," the opinion made clear that a violation of the video recording requirements of § 56-5-2953 does not require dismissal of a charge associated with impaired driving: "Even if we assume that the video of a field sobriety test is of such poor quality that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge." Id. at *3 (emphasis added). The Supreme Court observed that instead the "remedy would be to redact the field sobriety test from the video and exclude testimony about the test." Id. Thus, even assuming that

there was some flaw in the recording of the walk and turn test, the appropriate remedy was suppression of the test, not dismissal.

B. Neither Gordon I nor Gordon II Requires Performance of Field Sobriety Tests to Be on Video.

In finding he was required to dismiss the case under the rationale articulated in Gordon I, the magistrate stated that although Respondent's conduct during the walk and turn test was visible on the video, he could not make out Respondent's entire "performance" on the test. (Magistrate's Return, Audio of Hearing.) In so concluding, he opined that Gordon I stands for the proposition that compliance with the video recording statute now requires a complete showing of a defendant's "actual performance" on field sobriety tests. (Magistrate's Return, Audio of Hearing.) This interpretation goes far beyond the holding in either Gordon decision and effectively establishes a subjective requirement that a video demonstrate a defendant's "performance" on field sobriety tests when no such language is present in either Gordon decision or § 56-5-2953.[1]

Admittedly, the opinions in Gordon I and Gordon II shifted the focus from the statutory requirement that a defendant's conduct at the incident site be recorded to the requirement that the video recording must "include any field sobriety tests administered." Gordon II at *3; Gordon I, 408 S.C. at 543, 759 S.E.2d at 758. Nothing in either opinion or the statute, however, demands a recording that depicts a defendant's performance on the field sobriety tests. In Gordon II, the level of the defendant's performance on the HGN test depicted on the video was not even addressed by the court, as the magistrate there had made no factual findings as to whether the specific body part involved—the

[1] Judge Newman committed a similar error in finding that the video was defective because "the recording of the [walk and turn] test failed to clearly display Respondent's feet during her *performance* of the test." (Order of Judge Newman) (emphasis added).

head—was actually visible on camera. Instead, the Supreme Court's description of the video requirement for field sobriety tests focused solely on the *administration* of the test rather than the *performance*.[2]

> Here, the officer's administration of the HGN test is visible on the video recording. It is undisputed that Gordon's face is depicted in the video; it is axiomatic that the face is a part of the head. The officer's flashlight and arm are visible as he administers the test. Also, the officer's instructions were audible. Thus, the requirement that the head be visible on the video is met and the statutory requirement that the administration of the HGN field sobriety test be video recorded is satisfied.

Gordon II at *3 (emphasis added).

Given Gordon II's clear mandate that *administration* rather than *performance* is the benchmark, the magistrate's stated concern that "the jury would not be able to determine from the video if [Respondent] was in fact performing the walk and turn test as instructed because her feet were not clearly visible throughout the entirety of the test" was misplaced. (Magistrate's Return.) Rather, both Gordon courts recognized that to meet the statute's requirement that the video "include" the field sobriety tests, you must be able to at least see the body part in question on the video. Gordon II at *3; Gordon I, 408 S.C. at 543, 759 S.E.2d at 758. Here, Respondent's feet are visible throughout the walk and turn test. Therefore, the video "includes" this field sobriety test.

South Carolina's Supreme Court has stated that the legislature intended "strict compliance" with the videotaping requirements of § 56-5-2953. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 349, 713 S.E.2d 279, 286 (2011). Such strictness, however, should not be viewed as an inflexible command to override common sense. See, e.g., Kordel v.

[2] In fact, the court of appeals recognized this distinction as well. The Gordon I court remanded the case for a determination of whether you could see the body part in question on the video. Gordon I, 408 S.C. at 543-44, 759 S.E.2d at 759. Notably, the case was not remanded for any consideration of whether there was nystagmus (i.e., performance) present in the defendant's eyes.

United States, 335 U.S. 345, 349 (1948) ("[T]here is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it."); United States v. Cook, 384 U.S. 257 (1966) (same). To the contrary, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). A court, therefore, should reject any interpretation leading to a result "so plainly absurd that it could not have been intended by the Legislature . . . ." Town of Mt. Pleasant, 393 S.C. at 342-43, 713 S.E.2d at 283.

Section 56-5-2953 clearly states, and both Gordon opinions confirm, that what is required is that the incident site video recording "include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2010); Gordon II at *3; Gordon I, 408 S.C. at 543, 759 S.E.2d at 758. No more and no less is commanded. Here, the video recording depicts each of the three field sobriety tests taken by Respondent on December 8, 2013 in its entirety. Although the magistrate initially concluded the State met the statutory requirements, later he appeared to read an additional condition into the statute that would require the video recording to capture Respondent's "performance" on each test. (Magistrate's Return, Audio of Hearing.) To this end, the magistrate undertook a review of the video recording in an effort to determine whether a jury could ascertain the Respondent's level of impairment based on the video. (Magistrate's Return, Audio of Hearing.) However, such is not the judicial gatekeeper role envisioned by the statute and subsequent case law. Whether the acts depicted on video convince a jury of impairment

is, instead, a wholly different question from whether the video meets the statutory mandate of "includ[ing] any field sobriety tests."

Ultimately, the magistrate found that although he could "distinguish [the Respondent's] conduct" during the walk and turn test, he could not determine whether she was "actually doing the heel-to-toe [test] correctly." (Audio of Hearing; Magistrate's Return.) Nonetheless, nowhere in § 56-5-2953 or the Gordon decisions is this level of subjective scrutiny required, and the reason is obvious. Field sobriety tests are typically conducted on the side of the road in a wide range of weather and geographical conditions, not in controlled environments or under static circumstances. Here Trooper Ford filmed the field sobriety tests in less than ideal conditions – the narrow median of a darkened interstate accompanied by falling rain. (Video of Roadside Stop.)

Respondent argued that "due to the grainy nature of the background in the video, the fact that the incident occurred at night, and the color of the [Respondent's] clothing, as well as the placement of the [Respondent] by the Trooper which had her walking away from the camera during the test, her feet were not clearly visible as she performed the [walk and turn] test." (Magistrate's Return.) In addition, Respondent noted that "the data at the bottom of the video helped to obscure the [Respondent's] feet." (Magistrate's Return.) With the exception of the placement of Respondent by Trooper Ford for the field sobriety tests, each of the remaining defects was entirely out of the officer's control. An officer investigating a disabled vehicle on a darkened interstate lacks the ability to adjust his video recording protocol to compensate for weather or a driver's clothing. Additionally, the argument that the State should be prejudiced by a time stamp appearing on the video is absurd insofar as the officer has no control over this feature of his camera.

The magistrate's decision also ignores the fact that an officer has a limited ability to know what is being recorded. When Officer Ford arrived at the scene, he activated his video camera. Once he made a decision to perform field sobriety tests, he was obligated to use the space available to him. This required him to make on-the-scene decisions regarding the best location to record the events that were about to transpire. He was not in a position, as Respondent argued, to simply adjust his camera or move to a better location. Additionally, the in-car camera is not equipped with any type of monitor which would show him what is being recorded. Trooper Ford therefore had no information available to him regarding the quality of the recording until he played it back. By then, it was too late to attempt to improve the quality of the video.

Upon arriving on scene, Trooper Ford positioned his vehicle based on his determination as to the safest location. (Audio of Hearing.) He was unaware of what he might find other than a vehicle in the median. After determining that he might be dealing with an intoxicated driver, Trooper Ford proceeded to position himself and Respondent in a location that would best document the tests in the safest manner possible. (Audio of Hearing; Magistrate's Return.)

Under the magistrate's erroneous view of Gordon I, it is doubtful that an incident site video recording could ever pass muster. Such an absurd result could not have been the intent of the legislature nor the scenario contemplated by either of the Gordon courts. Accordingly, for the reasons set forth above the magistrate erred in dismissing this case as a matter of law.

C. Gordon Says Nothing About the Walk and Turn Test.

At issue in Gordon was the question of whether "the head must be shown during the HGN test in order for that sobriety test to be recorded . . . ." Gordon I, 408 S.C. at 543, 759 S.E.2d at 758. The analysis in Gordon I and Gordon II was limited to the HGN test – it said nothing about other standard field sobriety tests, including the walk and turn test at issue here. Neither of the Gordon opinions therefore can be read to say anything about what constitutes an acceptable recording of a walk and turn test, and any reading that implies otherwise was error.

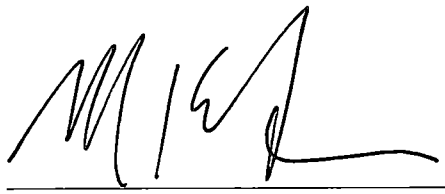
D. Non-Compliance Can Be Excused by the Totality of the Circumstances Exception.

Even if the video somehow failed to comply with the requirements of § 56-5-2953(A), the statute provides a list of exceptions which can excuse non-compliance. Included within those exceptions is the totality of the circumstances exception: "Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances . . . ." S.C. Code Ann. § 56-5-2953(B) (Supp. 2010); see also Town of Mt. Pleasant, 393 S.C. at 346, 713 S.E.2d at 285 ("Noncompliance is excusable . . . for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.") This exception is not a "good faith" exception as described by Judge Newman in his April 21, 2015 Order, but rather a statutory exception which was designed for circumstances such as these. As described in detail above, Trooper Ford encountered a vehicle on a misty night in the median of an interstate. He made a reasonable attempt to record his interaction with Respondent, and his enforcement efforts should not be undermined simply because he may not have produced a perfect video. Instead, this is exactly the type

of situation in which the totality of the circumstances should be considered by the court where an officer's best efforts arguably fell short of the statutory recording mandate.

CONCLUSION

The State, having asserted its grounds and legal authority in support thereof, hereby asks this Court to reverse the circuit court order and grant such other relief as the Court deems just and proper under the circumstances.



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August 14, 2015

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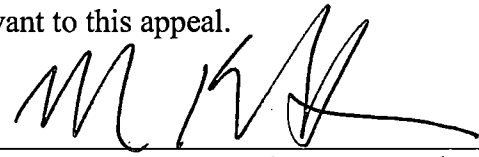
CERTIFICATE OF COUNSEL

I certify that the Appellant's Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to this appeal.



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PROOF OF SERVICE

I hereby certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter to be Included on the Record on Appeal on the Respondent, Kathryn H. Dew, addressed to her attorney of record, Robert FitzSimons, via United States Mail, postage prepaid, on this 14th day of August, 2015 addressed to 1001 Beltline Boulevard, Columbia, SC 29205.

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Dated: August 14, 2015