

STATE OF SOUTH CAROLINA
In The Supreme Court

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SEP 11 2015

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

S.C. SUPREME COURT

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

S.C. Sup. Ct. Opinion No. 27554

Heard June 3, 2015 – Filed August 5, 2015

Appellate Case No. 2014-001337

THE STATE,PETITIONER,

v.

CODY ROY GORDONRESPONDENT.

RETURN TO PETITION FOR REHEARING

Respondent respectfully submits this Return to the State’s Petition For Rehearing to address the specific issues the State has identified as “misapprehensions” by this Court. Upon review of the State’s petition, it is clear that the State believes this Court lacks the ability to objectively apply the legislative intent of S.C. Code Ann. Sec. 56-5-2953. In simplest terms, the State insists that all the courts have erred in evaluating that the Magistrate’s decision wherein the Magistrate unequivocally applied a prior version of the law to the case before him that was not

applicable at the time of Mr. Gordon's hearing. But, the State would have this Court believe that application of outdated law should prevail over the plain language, unambiguous interpretation of the Legislature requirement that the incident site video should capture any field sobriety tests administered. The State's position promotes allowing an officer to turn on the camera, point it to the floor of their patrol car, and then proceed with interrogating a person who is constitutionally presumed innocent. In essence, hide the officer's conduct so that there can be no defense at trial for the defendant. Our Legislature specifically did not want this type of "grey area" for officers at the incident site who would be investigating persons suspected of driving under the influence. The Legislature, separated in authority from law enforcement and designed to keep a balance for all of this State's constituents, specifically modified the language in the statute to include *any field sobriety tests administered*. But, Petitioner would have this Court believe those words should be shed of any useful meaning. After all, what value to law enforcement would S.C. Code Ann. Sec. 56-5-2953(a) be if *it actually protected the rights of the driver*? What difference would it make if an accurate incident site video reduces swearing contests and unreliable memories? Petitioner views these very aspects of a reliable incident site recording as 'random noise' in its zealous pursuit to prosecute without recognizing the balance the Legislature has mandated. Accurate videos of arrests and law enforcement encounters are critical – our Legislature knew that very fact and modified our statute. Our country, and our very own South Carolina, at this very moment struggle with the realization that "law enforcement – citizen" encounters do not always occur as recollected by law enforcement. This year alone, we have seen the power of accurate videos by bystanders that have been used to protect the rights of our citizens who would have otherwise been without recourse. Unfortunately, Petitioner appears to beg this Court to authorize taking drivers into the

dark and away from the video recording devices to generate a one-side approach. The Legislature mandated transparency; Petitioner wants to obfuscate.

Regarding the Standard of Review

Petitioner's attempt to skew the Magistrate's misapplication of the law at trial as being appropriate is simply incorrect and warranted the appellate courts' reversal and remand. The Magistrate by his own admission relied upon the find that the defendant's conduct was sufficiently captured as previously required. That application of the law was not correct when the Magistrate applied it in forming his opinion and there can be no argument now that should remain. The Legislature specifically modified the statute to include verbiage that *any field sobriety* must be video recorded. All courts involved in this review have come to the same conclusion that video recording of a field sobriety test should include the relevant part of the body that is at question for the test administration.

The Legislature focused on the term *administration* of any field sobriety test for a reason – not by random chance. The Legislature did not use the term 'results.' That part is critical to this Court's review. At the Circuit Court, Judge Macaulay stated that the incident site video must include any field sobriety test administered. Moreover, by "includes" it must be reliable in the sense that it does have the representation that "can be discerned what is going on." (App. p. 18, lines 5 – 8). In addition, if law enforcement is going to use the HGN test then they can bring the defendant closer to the vehicle rather than in the outer edge of the lighted area. (App. p. 18, lines 10 – 13). Simply stated, this is the meaning of the Legislature. If the test is administered, it must be in such a way that allows it to be discernible. The Court of Appeals and this Court have held that the *intent* is to allow both parties – the State and the accused – to rely upon the incident site recording. The Court of Appeals succinctly clarified this point by adding footnote 6 wherein the

Court of Appeals provides: “The statute protects both the State *and the defendant* from sometimes unreliable memories of those testifying at trial.” *State v. Elwell*, 396 S.C. 330, 337, 721 S.E.2d 451, 455, n6 (Ct. App. 2011), *aff’d State v. Elwell*, 743 S.E.2d 802 (2013).

The Magistrate erred with the standard of review; therefore, the Court of Appeals held that the case should be remanded for a specific finding with the correct standard. This Court felt a remand was not applicable but took the opportunity to clarify the underlying common sense proposition that has escaped the State and seems to elude law enforcement officers. It is part and parcel that if the HGN test is being administered, the video capturing the administration must show the defendant’s head. It is plainly clear from all the appellate courts in this matter that applying a basic ‘conduct’ standard is inappropriate and more detailed review is required. Therefore, this Court’s determination appropriately resolves this matter.

Regarding the Alleged Conflict With Henkel

Petitioner attempts to make a self-explanatory issue complicated. This Court’s opinion compliments *State v. Henkel*, Op. No. 27541 (Sup. Ct. filed July 1, 2015) (Shearouse Adv. Sh. No. 25). This Respondent has never argued before any appellate court in this matter that the issue was viewing of the driver’s eyes. The issue at point is the *administration* as mandated by our Legislature. It is impossible to determine if the *administration* of any field sobriety test is done correctly if the area subject to the test is not visible. A rudimentary application of the statute supports that the relevant aspect of an administered field sobriety test should be captured on the incident site video. It is basic logic that if a field sobriety test is focused on an accused’s part of the body, that that part of the body should be visibly discernible. That was the proper holding of this Court in its opinion.

This application compliments *Henkel* by providing usable aspects for trial courts when determining whether the “interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop” are recorded appropriately.

Therefore, Respondent respectfully submits that this Court has provided ample information and guidance that allows *Gordon* and *Henkel* to be viewed as consistent and complimentary.

With Regards to the Bench and Bar

Petitioner has contorted this current case into an unnecessarily complex analysis alleging that our laws can only have specific requirements if already expressly stated verbatim in the statute. (App. p. 56). For the reasons set forth above, it is the Respondent’s position that both *Gordon* and *Henkel* provide sufficient guidance without clarification or rehearing.

CONCLUSION

For the reasons set forth above, Mr. Gordon respectfully requests this Court to deny the State’s petition for rehearing as the Court’s opinion in this case addresses all relevant issues. If the Court does grant the State’s petition, Mr. Gordon respectfully requests the right to fully brief this matter and oral arguments to be heard.

Respectfully submitted,

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Walhalla, South Carolina
September 10, 2015

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PROOF OF SERVICE

I, Keith G. Denny, hereby certify that I have served the within *Return To Petition For Rehearing*, dated September 10, 2015, on Petitioner by depositing a copy of the same on September 10, 2015 in the United States mail, postage prepaid, addressed to:

Mr. J. Benjamin Aplin
Office of Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Respectfully submitted,

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Walhalla, South Carolina
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