



The Supreme Court of South Carolina

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COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

October 22, 2015

The Honorable Beverly H. Whitfield
PO Box 678
Walhalla SC 29691-0678

REMITTITUR

Re: The State v. Cody Roy Gordon
Lower Court Case No. 2012CP3700852
Appellate Case No. 2014-001337

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,

CLERK

cc: Keith G Denny, Esquire
John Benjamin Aplin, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner,

v.

Cody Roy Gordon, Respondent.

Appellate Case No. 2014-001337

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Oconee County
The Honorable Alexander S. Macaulay, Circuit Court Judge

Opinion No. 27554
Heard June 3, 2015 – Filed August 5, 2015

AFFIRMED AS MODIFIED

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia, for Petitioner.

Keith G. Denny, of Keith G. Denny, P.A., of Walhalla,
for Respondent.

JUSTICE BEATTY: The State appeals the Court of Appeals' affirmation of the circuit court's interpretation of section 56-5-2953 of the South Carolina Code. The Court of Appeals found that section 56-5-2953 requires officers to

record the head of the motorist when administering the Horizontal Gaze Nystagmus (HGN) field sobriety test and that Cody Gordon's head was not sufficiently visible. The State posits that a plain reading of the statute makes no mention of the motorist's "head." We affirm the Court of Appeals' conclusion that the statute requires that the motorist's head be recorded in the video; however, we vacate the mandate to remand to the magistrate court for further consideration. We reinstate Gordon's conviction as we find that the officer complied with the statute in recording Gordon's HGN test.

I. Factual/Procedural History

On October 29, 2011, Gordon was stopped at a license and registration checkpoint by a South Carolina Highway Patrol Officer. The officer administered several field sobriety tests. The test at issue in this case is the HGN test. The dashboard camera on the officer's patrol car recorded the entire incident, including all field sobriety tests, with continuous recording. The stop occurred at night, so the lighting was not perfect, but the officer had Gordon stand in the light of his patrol car's headlights and further illuminated Gordon by shining a flashlight directly on his face.

Following the tests, Gordon was placed under arrest. Gordon was charged with driving under the influence (DUI) for violating section 56-5-2930. The case was presented to a magistrate judge and a jury. The jury found Gordon guilty as charged. Gordon timely appealed his conviction.

Using still-shot photos of the video, Gordon argued that the video violated section 56-5-2953(A) because he was out of sight and in the dark during the HGN test. The circuit court concluded that section 56-5-2953(A) requires the motorist's head to be visible during the administration of the HGN field sobriety test. Section 56-5-2953(A) reads in pertinent part:

(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 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 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. 2011) (emphasis added). The circuit court found Gordon's head was not "sufficiently visible through the entire administration of the [HGN] test." The circuit court reversed his conviction and dismissed the DUI charge. The State timely appealed to the Court of Appeals.

The Court of Appeals affirmed in part, vacated in part, and remanded the case to the magistrate court. *State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014). The court concluded that "the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding." *Gordon*, 408 S.C. at 543, 759 S.E.2d at 758. The Court of Appeals remanded the case to the magistrate court with the instruction to "make factual findings in light of the circuit court and our determination that the test must be recorded on the camera; specifically for the HGN test, the head has to be visible on the recording." *Gordon*, 408 S.C. at 543-44, 759 S.E.2d at 759.

The Court of Appeals denied the State's petition for a rehearing.¹ This Court granted the State's petition for a writ of certiorari to review the Court of Appeals' decision.

II. 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). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459.

¹ Additionally, the Court of Appeals withdrew its original opinion and substituted a new published one. *Gordon*, 408 S.C. at 536, 759 S.E.2d at 755.

III. Discussion

Whether the Court of Appeals erred in affirming the circuit court's decision to reverse Gordon's magistrate court conviction for driving under the influence?

A. Argument

The State argues the Court of Appeals misconstrued the decision of the magistrate as lacking sufficient findings of fact. Specifically, the State contends that the Court of Appeals "misapprehended or overlooked the clear and unambiguous language of the statute, which does not include any requirement that 'the head must be visible on the recording' of an HGN field sobriety test."

B. Analysis

The State would have us review this case using the analytical framework of *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). The court in *Murphy* held that section 56-5-2953 only requires that the conduct of the motorist be recorded. *Murphy*, 392 S.C. at 631, 709 S.E.2d at 688. The Court of Appeals and the circuit court correctly distinguished *Murphy* from Gordon's case. In *Murphy*, the prior version of the statute at issue in this case was in effect. The prior version of the statute did not include the explicit requirement that the videotape include "any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii)(Supp. 2011). The current version of the statute, which applies to Gordon, specifically requires that the officer record "any field sobriety tests administered." Based on this distinction, the magistrate erred as a matter of law in finding that the officer's recording was only required to show Gordon's conduct generally.

The statute at issue in this case is clear and unambiguous and, therefore, this Court must give its words their ordinary meaning. The statute states that the video recording "must include any field sobriety test administered," which necessarily includes the HGN test. Considering the fact that the HGN test focuses on eye movement, common sense dictates that the head must be visible on the video. Accordingly, the circuit court's finding that the head must be visible does not amount to a hyper-technicality, but merely states the obvious. The Court of Appeals did not err in affirming this requirement.

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. Therefore, the per se dismissal of the charge as discussed in *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), and *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) is not appropriate.

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. Instead, the remedy would be to redact the field sobriety test from the video and exclude testimony about the test.² If that remedy is applied here, there is still sufficient evidence to present this case to a jury for resolution. The evidence included the breath alcohol analysis report, video of other field sobriety tests, and Gordon's statement that he had consumed four beers.

Neither Gordon nor the State would have been prejudiced by the exclusion of the HGN test video or testimony because of the alleged poor quality of the video. Since the focus of the HGN test is the movement of the eyes, the jury would not have been able to determine if Gordon passed or failed by simply looking at this video. Moreover, the viewing of a video of an HGN field sobriety test has very little probative value to a jury because the eyes of the motorist are rarely, if ever, seen.³

The remaining issues raised by Gordon concerning discrepancies with the breath test site video's date and time stamp are without merit.

IV. Conclusion

The Court of Appeals' decision is affirmed as to the requirements for video recording the HGN field sobriety test. The mandate to remand to the magistrate court for further consideration is vacated. Gordon's conviction is reinstated.

**TOAL, C.J., HEARN, J., and Acting Justice Allison Renee Lee, concur.
PLEICONES, J., concurring in result only.**

² It appears the solicitor unintentionally led the circuit court to believe that the HGN test was the only evidence against Gordon.

³ Of course, this would not be the case if actual eye movement is recorded.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Cody Roy Gordon, Respondent.

Appellate Case No. 2013-000515

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5226
Heard March 6, 2014 – Filed April 23, 2014
Withdrawn, Substituted, and Refiled June 11, 2014

**AFFIRMED IN PART, VACATED IN PART, AND
REMANDED**

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia, for Appellant.

Keith G. Denny, of Keith G. Denny, P.A., of Walhalla,
for Respondent.

KONDUROS, J.: The State appeals the circuit court's reversal of the magistrate court's conviction of Cody Roy Gordon for driving under the influence (DUI). It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A) of the South Carolina Code (Supp. 2013) because Gordon's head was not visible on the required recording during one of the field sobriety tests administered. We affirm in part, vacate in part, and remand.

FACTS

On October 29, 2011, the South Carolina Highway Patrol stopped Gordon at a license and registration checkpoint. Officers administered three tests to determine if Gordon was under the influence: the Horizontal-Gaze Nystagmus (HGN) test¹, the walk and turn test, and the one-leg stand test. Following the tests, the officers charged Gordon with DUI. The dashboard camera in the arresting officer's car recorded the events leading to the arrest.

Prior to a trial before the magistrate court, Gordon moved to dismiss the charge on several grounds, including the State's failure to sufficiently record the HGN test because Gordon's head was not visible on the recording during the test. The magistrate denied the motion to dismiss, finding the State properly captured Gordon's conduct on the recording as required by section 56-5-2953 of the South Carolina Code (Supp. 2013) and *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Following a trial, a jury convicted Gordon of DUI.

Gordon appealed his conviction to the circuit court. At the hearing before the circuit court, Gordon argued the HGN test could not be seen on the recording. Gordon provided black and white photographs ("stills") of the recording to the circuit court without objection by the State. Following the conclusion of arguments, the circuit court granted Gordon's motion to dismiss. The court found section 56-5-2953(A) requires the defendant's head be visible during the administration of the HGN test, unless an exception in section 56-5-2953(B) applies. The court noted Gordon was "so far out of view in front of the arresting officer's patrol car for the administration of the test and into the dark[,] which prevented [Gordon's] head from being sufficiently visible through the entire administration of the [HGN] test." This appeal followed.

STANDARD OF REVIEW

¹ "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." *State v. Sullivan*, 310 S.C. 311, 315 n.2, 426 S.E.2d 766, 769 n.2 (1993). "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." *Id.*

"In criminal appeals from magistrate . . . court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70 (2014) ("The appeal [from the magistrate court in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). This court will review the decision of the circuit court for errors of law only. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); *Henderson*, 347 S.C. at 457, 556 S.E.2d at 692. "[Q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013) (internal quotation marks omitted). The circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. *Id.*

LAW/ANALYSIS

The State argues the circuit court erred in reversing the magistrate court's conviction of Gordon for DUI. It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A)(1)(a)(ii) of the South Carolina Code (Supp. 2013) because Gordon's head was not visible during the HGN test.² It

² The State also contends the circuit court did not review the recording. However, the record does not indicate whether the circuit court reviewed the recording or not. Gordon indicated at the hearing that all of the evidence had been submitted to the circuit court. The record provides the circuit court conferred with its law clerk off the record after receiving the stills. Gordon asserts that at this time, the circuit court appeared to review the recording on its laptop on the bench with the assistance of its law clerk. The transcript of the hearing states no exhibits were introduced. The State did not put on the record the fact that the circuit court allegedly did not view the recording or raise any objection to the court allegedly not reviewing the recording. The appellant has the burden of providing a sufficient record. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). Generally, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. Accordingly,

asserts the statute requires the recording include the field sobriety tests but not that the defendant's head must be visible. It further maintains that even if it is a requirement of the statute, the circuit court's factual finding that Gordon's head was not sufficiently visible during the HGN test lacked evidentiary support.

Section 56-5-2953(A) provides:

A person who [commits the offense of DUI] must have his conduct at the incident site . . . video recorded.

(1)(a) The video recording at the incident site must . . .

(ii) include any field sobriety tests administered

"As amended in 2009, the current version of section 56-5-2953 expressly requires the recording of field sobriety tests." *Murphy v. State*, 392 S.C. 626, 632 n.4, 709 S.E.2d 685, 688 n.4 (Ct. App. 2011) (citing S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2010) ("The video recording at the incident site must: . . . include any field sobriety tests administered." (alteration by court))).

In *Murphy*, the defendant contended "the videotape of the incident [s]ite d[id] not comply with the statute because it fail[ed] to 'record most of the field sobriety tests.'" *Id.* at 631, 709 S.E.2d at 688. The court applied the prior version of section 56-5-2953, which was in effect at the time of the defendant's arrest, and found "the 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." *Id.* at 632, 709 S.E.2d at 688. The version of the statute applied in *Murphy* did not include the explicit requirement that it "include any field sobriety tests administered" as the current version does. § 56-5-2953(A)(1)(a)(ii).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); *see also State v. Pittman*,

we cannot consider the State's assertion the circuit court did not review the recording.

373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the state." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, 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). "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). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 342-43, 713 S.E.2d at 283.

The purpose of section 56-5-2953 is to create direct evidence of a DUI arrest. *Town of Mt. Pleasant*, 393 S.C. at 347, 713 S.E.2d at 285. Dismissal of a DUI charge is an appropriate remedy provided by section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). "[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." *Town of Mt. Pleasant*, 393 S.C. at 348, 713 S.E.2d at 286. "By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance." *Id.* at 349, 713 S.E.2d at 286.

The circuit court properly found the magistrate erred in finding the recording was only required to show the conduct of the defendant. The magistrate relied on *Murphy* in making that determination. Although *Murphy* holds that only the conduct of the defendant must be recorded, *Murphy* was based on a prior version of the statute, which did not include the specific language regarding the tests being recorded. The current version of the statute states: "The video recording at the incident site must . . . include any field sobriety tests administered" § 56-5-2953(A)(1)(a)(ii). Because 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. Accordingly, the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding.

However, because the magistrate court found the recording only needed to capture the conduct, it did not make any findings as to whether the entire test, including the head, was on camera. The circuit court found Gordon's head was not "sufficiently visible through the entire administration of the [HGN] test." But "the circuit court, sitting in its appellate capacity, may not engage in fact finding." *City of Greer v. Humble*, 402 S.C. 609, 618, 742 S.E.2d 15, 20 (Ct. App. 2013) (quoting *Rogers v. State*, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004)). Because the circuit court engaged in fact finding and the magistrate never made such findings due to its misconstruction of the statute, we vacate the circuit court's finding Gordon's head was not visible and remand the case to the magistrate court.³ The magistrate court is to make factual findings in light of the circuit court and our determination that the test must be recorded on camera; specifically for the HGN test, the head has to be visible on the recording.⁴

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

³ The dashcam recording that was available to the circuit court and the magistrate court was part of the record on appeal. This court viewed the recording, but our standard of review, just like the circuit court's standard of review in this matter, does not allow us to make findings of fact. That duty is left solely to the magistrate court. Accordingly, we will not make findings as to what the recording shows.

⁴ Because we find the circuit court erred in making findings of fact, we need not address the State's argument the circuit court erred in reviewing the stills. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

WILLIAMS and LOCKEMY, JJ., concur.