THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-001871

City of North Charleston, ...Respondent,

v.

John Barra, ...Appellant,

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND COURT RULES

STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN DENYING THIS APPEAL WHERE THE VIDEO CAMERA WAS INEXPLICABLY OUT OF FOCUS DURING ONE OF THE FIELD SOBRIETY TESTS ADMINISTERED TO APPELLANT IN VIOLATION OF S.C. CODE ANN. § 56-5-2953 AND WHERE THE ARRESTING OFFICER DID NOT SUBMIT AN AFFIDAVIT PROVING AN EXCEPTION?

II. DID THE LOWER COURT ERR IN DENYING THIS APPEAL WHERE IT DID NOT REVIEW THE FIELD SOBRIETY TESTING PROCEDURE DEFICIENCIES RAISED BY APPELLANT BEFORE DECIDING THAT THE ISSUE IS ONE FOR A JURY?

STATEMENT OF THE CASE

This appeal arises from a Municipal Court criminal conviction for driving under the influence, 1st offense. The North Charleston Municipal Court, the Honorable Thaddeus James Doughty presiding, held trial as follows: jury selection on August 20, 2013; motions on August 21, 2013; and trial on August 22, 2013. On or about August 22, 2013, a jury convicted Appellant of the criminal offense of driving under the influence.

On August 28, 2013, Appellant timely filed a notice of appeal to the circuit court. The municipal judge filed his return on September 17, 2013. On July 15, 2014, the Honorable J.C. Nicholson, Jr. heard the appeal. On July 21, 2014, Judge Nicholson issued an order denying the appeal. On August 18, 2014, Judge Nicholson denied Appellant's motion to reconsider without hearing. This appeal followed.

STATEMENT OF THE FACTS

On February 1, 2013, a North Charleston police officer initiated a traffic stop on Appellant and commenced an investigation to determine whether Appellant was driving under the influence. During the investigation, the officer purported to administer field sobriety tests and subsequently arrested Appellant. [R. p. 80]

At trial, before the court heard any testimony, Appellant made a pre-trial motion to suppress the FST's because the arresting officer did not comply with his training and the standards set forth by the National Highway Traffic Safety Administration ("NHTSA") in the administration of these tests. [R. p. 29] Appellant also made a pre-trial motion to dismiss based upon defects in the video recording because the video equipment's focus malfunctioned during one of the FST's. [R. p. 29] The trial judge denied both of these motions but allowed

Appellant's counsel to cross-examine the arresting officer using the officer's field sobriety training manual regarding the administration and results of the field sobriety test. [R. p. 3]

ARGUMENTS

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.* "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 (Supp. 2013) ("The appeal [from a magistrate 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.").

In criminal appeals from the magistrate court, the circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. *See City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013). "Moreover, [q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which [an appellate court is] free to decide without any deference to the court below." *Id.*

I. THE LOWER COURT ERRED IN DENYING THIS APPEAL BECAUSE THE VIDEO CAMERA WAS INEXPLICABLY OUT OF FOCUS DURING ONE OF THE FIELD SOBRIETY TESTS ADMINISTERED TO APPELLANT IN VIOLATION OF S.C. CODE ANN. § 56-5-2953 AND BECAUSE THE ARRESTING OFFICER DID NOT SUBMIT AN AFFIDAVIT PROVING AN EXCEPTION EXISTS.

(A) Summary.

DUI arrests must be video recorded. S.C. Code Ann. § 56-5-2953(A) provides: "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." "The video recording at the incident site must . . . include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii).

If a video violates the provisions of S.C. Code Ann. § 56-5-2953, then it is not automatically fatal to the prosecution's case if the officer submits the affidavit required by the statute. Specifically:

> Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which 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 video recording because the person needed emergency medical treatment, or exigent circumstances existed.

S.C. Code Ann. § 56-5-2953(B) (emphasis added).

Here, the video violated S.C. Code Ann. § 56-5-2953 because it becomes blurry during the administration of the FST's from the 44:27 mark until the 46:30 mark, a total of approximately 2 minutes and 3 seconds. The entire recording of the one-leg stand test is distorted, and it is impossible to evaluate Appellant's balance during this test. Had the arresting

officer simply submitted an affidavit stating that it was physically impossible to submit a compliant video due to a malfunction of the equipment and stating which reasonable efforts have been made to maintain the equipment in an operable condition, Appellant would likely not be raising this issue.

However, the officer did not submit such an affidavit. The failure to submit this affidavit did not allow Appellant's counsel to evaluate the propriety of the malfunction or determine whether the violation of § 56-5-2953 was excusable. The failure to submit this affidavit is fatal to the prosecution's case.

(B) Importance of Viewing the Balance Component of the One Leg Stand.

The One Leg Stand ("OLS") is a test of balance. When administering this test, the arresting officer follows the procedures proscribed by the National Highway Traffic Safety Administration ("NHTSA"). In making his pre-trial motion to the municipal judge, and in cross-examining the arresting officer, the arguments and questions revolved around the officer's training manual. [R. pp. 29, 58]

According to the NHTSA manual, the officer looks for four clues:

1. Whether the suspect sways while balancing.
2. Whether the suspect uses arms for balance by raising them more than 6 inches from his or her sides.
3. Whether the suspect hops to maintain balance.
4. Whether the suspect puts his or her foot down one or more times during the 30-second test.

[R. p. 72, ¶ 3A – D] The officer then "grades" a suspect on performance by determining whether the suspect "shows two or more clues or fails to complete the One-Leg Stand." [R. p. 72 ¶ 3] If

a video of a suspect performing the OLS does not allow for meaningful review of these four "clues," then the video does not "include" this FST and violates § 56-5-2953.

In *State v. Gordon*, Opinion 5226 (Ct. App. 2014), *cert. granted* November 19, 2014, this Court reversed a municipal court conviction for DUI and remanded the case to the municipal court for a factual finding of whether the video adequately showed the head during the horizontal gaze nystagmus ("HGN") test. For a police officer to evaluate the performance of the HGN test, the officer "watches the driver's eyeballs to detect involuntary jerking." *Gordon*, fn. 1. According to the NHTSA training manual, of which the trial judge reviewed and allowed cross examination of the officer, the officer "should look for three clues of nystagmus in **each** eye: (1) the eye cannot follow a moving object smoothly; (2) Nystagmus is distinct and sustained when the eye is held at maximum deviation for a minimum of four seconds; (3) The angle of onset of nystagmus is prior to 45 degrees." [R. pp. 64 – 65] (emphasis added). The officer then determines whether the suspect exhibited 4 of the 6 clues. [R. p. 67]

During the One Leg Stand ("OLS"), which is the relevant test to this issue, according to the NHTSA manual, the officer looks for the following clues:

A. The suspect sways while balancing. This refers to side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.

B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.

C. Hopping. Suspect is able to keep one foot off the ground but resorts to hopping in order to maintain balance.

D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.

[R. p. 72]

In other words, the OLS test is a **balance test**. During the incident site video, the blur that last approximately two minutes distorts the video recording and makes it impossible to

evaluate Appellant's balance during the test and impossible to evaluate whether Appellant swayed while balancing or used his arms for balance. If the head needs to be seen during the HGN test, then certainly the video needs to be of sufficient quality to evaluate a suspect's balancing during the OLS.

(C) Video in Case at Hand.

The officer is required to "produce the video recording required by [Section 2953]." S.C. Code Ann. § 56-5-2953(B) (emphasis added). The video recording "required by Section 2953" must include "any field sobriety tests administered." If the video recording does not allow for review of the defendant's balance during the OLS, it violates Section 2953.

The municipal judge stated in his return that the "picture was a little out of focus for a minute, but not to the extent you could not see the administration of the tests." [R. p. 3] The municipal judge then stated: "§ 56-5-2953 requires an affidavit if an officer fails to produce a video, which is not the situation in this case. You could still see the administration of the tests at all times." [R. p. 3] Here, the municipal judge clearly ignored the plain language of Section 2953, which requires not just any video, but a video that "includes any field sobriety tests administered." The municipal judge also focused on whether it showed the administration of the tests, not whether the test properly allowed one to review whether Appellant swayed, hopped, or used arms for balance.

The circuit court on appeal found that "even though it's blurry, you can still see the subject raising his legs on the leg raise." [R. p. 56, lines 12 – 20] However, the circuit court did not address whether the video allowed one to determine (1) whether Appellant swayed while balancing, (2) whether Appellant used arms for balance, (3) whether Appellant hopped to maintain balance, or (4) whether Appellant put his foot down during the test. Appellant raised

this issue in his motion to reconsider, which the circuit court denied without hearing. [R. pp. 2, 14]

A viewing of the two-minute portion of the video (44:27 mark until the 46:30 mark) will clearly allow this Court to evaluate whether the video allows meaningful review of whether Appellant swayed or used arms for balance, which should be required for the video to comply with Section 2953. [R. DVD affixed to back cover]

(D) Law Regarding Compliance with § 56-5-2953.

"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). In other words, an inexcusable violation of § 56-5-2953 results in dismissal. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007).

(E) Exceptions.

If an arresting officer is unable to submit a video that complies with § 56-5-2953, the arresting officer needs only to submit an affidavit stating that an exception applies. If the court finds the reason in this affidavit to be acceptable, the court is not required to dismiss the charge on the basis of the 2953 violation. The exceptions can come in two primary forms:

1. The officer may say that the video recording equipment at the arrest site was inoperable and state which reasonable efforts have been made to maintain the equipment in an operable condition.
2. The officer may say that it was physically impossible to produce the video because of emergency medical treatment or other exigent circumstances.

S.C. Code Ann § 56-5-2953(B).

The requirements imposed on law enforcement by § 56-5-2953 are of minimal burden, if any. In *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013), this Court reviewed the sufficiency of an affidavit submitted in a case where no video was provided. In *Humble*, the arresting officer submitted an affidavit that stated "[a]t the time of the defendant's arrest, or probable cause determination, the video equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition." Testimony from the officer at trial suggested that the police did not adequately respond to complaints concerning the equipment. The municipal judge in *Humble* dismissed the case, finding that the police department's "efforts" were not enough. After the circuit court reversed, this Court reinstated the municipal judge's decision:

> Contrary to the circuit court's reasoning, dismissal of Humble's DUI charge does not set precedent that only routine maintenance and preventative measures constitute reasonable efforts. Rather, the determination of whether reasonable efforts were made to maintain the video equipment in an operable condition is a determination to be made on a case-by-case basis. To borrow a quote from Michel de Montaigne, we find that in its most basic sense, the municipal court merely found "saying is one thing and doing is another." Quite simply, the statute requires reasonable efforts. The municipal court essentially found as a fact that saying something is broken while refusing to pay for a repair visit is not enough. The "reasonable efforts" language of the statute requires some "doing," and refusing to pay for repair visits evades the intent of the statute and is not "doing" enough to constitute reasonable efforts to maintain the video equipment in an operable condition. We find the limited record before us supports the decision of the municipal court and, thus, the circuit court erred in reversing the municipal court.

Humble, 402 S.C. at 620, 472 S.E.2d at 21.

Here, despite this Court clearly placing the burden on the prosecution to show what *reasonable* efforts were made to maintain the equipment, the State offered no affidavit, testimony, or other evidence regarding the condition of the video recording equipment, whether this issue has occurred in the past, or attesting to whether any reasonable efforts have been made to maintain the equipment.

Appellant is not requesting a precedent be set that any time a video is deficient, the case should result in a dismissal. Appellant is requesting that the State be held to its burden of proving the existence of an exception. The issue of whether efforts were reasonable is not reached here because there is no evidence of any efforts. Had the officer simply provided an affidavit stating that his camera had not exhibited problems in the past and stated the frequency and nature of any inspections, the trial court could have made a determination whether reasonable efforts were made to maintain the equipment.

This case is distinguishable from *Murphy v. State*, 709 S.E.2d 685, 392 S.C. 626 (Ct. App. 2011). In *Murphy*, during the traffic stop Murphy was made to walk a straight line. However, during this sobriety test, the videotape only recorded her from essentially the knees up, and in portions only displayed half her body as she walked to the limit of the camera's field of view. In addition, HGN was conducted. However, the officer conducted this test in the spot where Murphy stood after completing the straight-line test, with her back to the car, on the fringe of the dashboard camera's field of view. The Court of Appeals upheld the conviction but made clear that *Murphy* was decided under the old (pre-2009) DUI law. *Id.*, fn 4. Specifically, the 2009 amendment added the requirement that "[t]he video recording at the incident site must . . . include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(ii).

This Court recently reviewed a case similar to *Murphy* except that the case was subject to the current (post-2009) law, like the case at hand. In *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), the defendant was off-camera for a period of time while the officer repositioned his vehicle. This Court reversed the dismissal, but distinguished *Taylor* from the case at hand. Notably, this Court stated in *Taylor*:

> Although the video omitted Taylor from its view during the repositioning of Tolley's patrol vehicle, none of the field sobriety tests administered and none of the other statutory requirements occurred while she was out of the camera's view.

Taylor, 411 S.C. at 306, 768 S.E.2d at 78 (emphasis added).

Here, unlike *Taylor*, the defective portion of the video occurs during a field sobriety test. There are no exigent circumstances giving rise to an exception, and the arresting officer did not submit an affidavit even acknowledging the defect in the video resulting from the equipment's condition or stating what reasonable efforts were made to maintain it.

Accordingly, because the State did not prove any exception applies regarding the violation of § 2953, this Court should reverse the trial judge's ruling and dismiss the charge against Appellant or remand the charge for its dismissal. To the extent this Court believes that a factual finding was made by the municipal judge or the circuit judge, this Court should disregard those findings because they ignored the importance of the "balance" evaluation of the OLS and because they are clearly erroneous. Under no interpretation of the viewing of the 2-minute portion of the video can one claim that he or she can evaluate Appellant's balance or whether Appellant hopped, swayed, or used arms for balance during the test.

(F) Remedy.

Because the arresting officer did not produce a video that complies with 2953 and did not provide an affidavit giving any basis for an exception, the remedy is dismissal of the charge.

In various contexts, this Court and the South Carolina Supreme Court have dismissed driving under the influence cases due to violations of Section 2953. *See State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755, 2014 S.C. App. LEXIS 89, 2014 WL 1614854 (S.C. Ct. App. filed Apr. 23, 2014) (reversing a magistrate's court conviction for DUI when the video tape did not appear to show the defendant's head during the administration of the HGN); *State v. Henkel*, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013) (dismissing a charge of DUI because the video did not

include the first Miranda warning or either field sobriety test); *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013) (upholding a municipal judge's grant of a motion to dismiss where the police department did not use reasonable efforts to maintain its video recording equipment); *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011) (reversing a magistrate's decision to suppress evidence due to the failure to provide a video tape of the breath test procedure and holding that dismissal was the proper remedy); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011) (affirming a circuit judge's decision to dismiss a DUI case due to a prolonged failure of a police department to equip its patrol cars with video cameras); *City of Rock Hill v. Suchenski*, 646 S.E.2d 879, 374 S.C. 12 (2007) (upholding a dismissal of a DUI charge where the video did not include the third field sobriety test administered).

Each of these cases, including *Roberts* and *Suchenski* issued by our Supreme Court, make it clear that a dismissal should occur when the statute is inexcusably violated and when no exception applies. Indeed, when the DUI statute was amended in 2009, it took no exception to the *Suchenski* holding of 2007. The General Assembly is presumed to be aware of an appellate court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the legislature's inaction is evidence that the Court's interpretation is correct. E.g. *McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012).

However, a recent case might be misconstrued as to the proper remedy for a violation of 2953. Specifically, *State v. Sawyer*, 409 S.C. 475, 763 S.E.2d 183 (2014) had lengthy discussion by both the majority and the dissent regarding the remedy for a Section 2953 violation. This discussion should carry little weight because the defendant in *Sawyer* did not request a dismissal of the case, only a suppression of evidence. Suppression of evidence may fall under a different

standard, including applying a prejudice analysis, but the fact that the defendant in *Sawyer* did not pursue all available remedies under the statute does not change the law. Here, Appellant clearly requested a dismissal of his charge. Nevertheless, the *Sawyer* court granted the relief requested by the defendant and found that the evidence should have been suppressed due to the breath site video containing no audio.

Even in cases where our Supreme Court did not rule in the defendant's favor, it has consistently expressed the importance of Section 2953. In *State v. Hercheck*, 743 S.E.2d 798, 801 (2013), the South Carolina Supreme Court stated: "[W]e agree with the court of appeals' analysis concerning the legislative purpose behind the videotape requirements. In *Roberts*, this Court stated that 'the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest.'" Here, evidence has been lost due to the camera's inexplicable blurring during the entire one-leg stand test.

II. THE LOWER COURT ERRED IN DENYING THIS APPEAL BECAUSE IT DID NOT REVIEW THE FIELD SOBRIETY TESTING PROCEDURE DEFICIENCIES RAISED BY APPELLANT BEFORE DECIDING THAT THE ISSUE IS ONE FOR A JURY.

(A) Strict or Substantial Compliance with Field Sobriety Testing Procedures.

Regarding this issue, the municipal judge's return states:

> The defendant first contends that the trial judge erred in admitting evidence of field sobriety tests administered to appellant where the arresting officer substantially deviated from his training while administering the field sobriety tests. The appellant goes through each test and how he asserts the officer in the case deviated from the test.
>
> The appellant's argument fails because the appellant's attorney was allowed to question the officer who testified in this case on his administration of each test using the training manual. Furthermore, whether or not the officer conducted the test properly and whether this compromised the results of the tests were factual questions for the jury. The training manual is not a statute or law.

[R. p. 3]

This ruling implies that the admission of field sobriety testing should *always* go to the jury. Similarly, the circuit judge hearing the appeal seemed to rule that field sobriety tests are automatically admissible regardless of whether the arresting officer deviates from the proscribed testing manner. [R. p. 46, line 16 – p. 48, line 5] In other words, without hearing about the alleged deficiencies in this case, the circuit judge decided that the officer's compliance is for the jury to decide.

Both the municipal judge and the circuit judge overlooked the court's role as the gatekeeper of evidence and did not consider the prejudicial nature of an incorrectly administered test. Rule 403, SCRE. Appellant asks this Court to remand this case so that the municipal judge will review the field sobriety tests prior to their admission into evidence with an eye towards whether the arresting officer strictly or substantially complied with the standardized testing procedures and to conduct a 403 prejudice analysis. Specifically, Appellant requests this Court to remand the case and direct the municipal judge to make a finding regarding whether the arresting officer strictly or substantially complied with standardized testing procedures.

South Carolina has never issued an opinion regarding the admission of field sobriety tests when the arresting officer is accused of administering them incorrectly. Probably the closest case to lend guidance is *State v. Sullivan*, 310 S.C. 311, 316, 426 S.E.2d 766 (1993). In *Sullivan*, the South Carolina Supreme Court held "that testimony relating to the HGN test was admissible in the present case because the HGN test was used in conjunction with other field sobriety tests to establish evidence of DUI." (emphasis added). There is logic to this requirement. The NHTSA manual provides:

- HGN, by itself, was 77% accurate
- WAT, by itself, was 68% accurate
- OLS, by itself, was 65% accurate
- By combining HGN and WAT an 80% accuracy can be achieved.

[R. p. 60]

While Appellant does not concede the accuracy of these percentages, they indicate that the entity that created the "standardized field sobriety tests" finds greater utility in the tests when they are administered as a test battery and not in isolation. Our Supreme Court in *Sullivan* agreed. The next logical step is to not just require the entire test battery to be performed together, but to require the tests to be administered correctly. Ohio has taken that step.

In *State v. Homan*, 732 N.E.2d 952, 89 Ohio St.3d 421, 2000-Ohio-212 (Ohio 2000), the Ohio Supreme Court discussed the importance of requiring that a police officer strictly comply with NHTSA standards when administering a field sobriety test. In *Homan*, the Court began its discussion by stating: "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.* at 424. The Court later noted: "The small margins of error that characterize field sobriety tests make strict compliance critical." *Id.* at 425. Although the Ohio Supreme Court only required substantial compliance (1) in cases regarding an administrative regulation that required urine specimens to be refrigerated when not in transit or under examination and (2) in cases regarding Department of Health regulations in regard to breathalyzer testing being admissible at trial, the Court distinguished field sobriety testing from these scenarios and required strict compliance of the administration of an FST. *Id.* at 425. (emphasis added).

The *Homan* Court further reasoned:

> When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable. In an extensive study, the National Highway Traffic Safety Administration[1]

[1] "The NHTSA has been a leader in the study and development of field sobriety testing policy and procedure. The NHTSA's standardized test manuals form the basis for manuals used by state law enforcement agencies across the country. Taylor, Drunk Driving Defense (5 Ed. 2000), Section 4.3.2." *Homan*, fn 4.

("NHTSA") evaluated field sobriety tests in terms of their utility in determining whether a subject's blood-alcohol concentration is below or above the legal limit. The NHTSA concluded that field sobriety tests are an effective means of detecting legal intoxication "only when: the tests are administered in the prescribed, standardized manner[,] * * * the standardized clues are used to assess the suspect's performance[, and] * * * the standardized criteria are employed to interpret that performance." National Highway Traffic Safety Adm., U.S. Dept. of Transp., HS 178 R2/00, DWI Detection and Standardized Field Sobriety Testing, Student Manual (2000), at VIII-3. According to the NHTSA, "[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised." *Id.* Experts in the areas of drunk driving apprehension, prosecution, and defense all appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures. See *e.g.*, 1 Erwin, Defense of Drunk Driving Cases (3 Ed. 1997), Section 10.06[4]; Cohen Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.01.

The *Homan* Court went on to discuss how a small mistake by the arresting officer can affect reliability of a test:

> The small margins of error that characterize field sobriety tests make strict compliance critical. Here, for example, Trooper Worcester's failure to use the full four seconds when checking for the onset of nystagmus, while seemingly trivial, rendered the results of this test unreliable. When a police officer moves the stimulus too quickly, he or she runs the risk of going past the point of onset or missing it altogether. NHTSA Student Manual, at VIII-8.

Notably, as a result of the Supreme Court of Ohio adopting the rule requiring "strict compliance" when administering field sobriety tests, the Ohio legislature subsequently amended the statute to require only "substantial compliance" before tests may be admitted into evidence. Ohio Rev. Code 4511.194(C)(1). Here, Appellant requests this Court impose a "strict compliance" standard upon remand, or in the alternative, a "substantial compliance" standard and to require a trial judge to perform a Rule 403 prejudice analysis before allowing the evidence to be seen or heard by the jury.

This Court should not be concerned with the fact that any given case could become more

difficult to prosecute because an officer did not correctly administer the test. This Court should be concerned with the importance of a police officer following protocol before he or she can use a test to criminally convict a defendant. These tests are difficult for the average human, regardless of alcohol consumption.

(B) The FST's in the Case at Hand.

Although Appellant is not requesting this Court to review the field sobriety tests as a whole and make a ruling regarding their admissibility, Appellant finds it important to describe how the arresting officer deviated from testing procedures in this case. At trial, the State stipulated that the 2007 National Highway Traffic Safety Administration (NHTSA) standards were those under which the officer in this case was trained to administer the field sobriety tests. [R. pp. 3, 58 – 79]

The NHTSA standards for this arresting officer expressly provide (bold and caps in original):

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

o THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER
o THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE
o THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

[R. p. 78].

Further, these tests are not perfect. According to the manual, if the officer observes 4 out of 6 clues on the Horizontal Gaze Nystagmus, the officer will only be "able to classify about 77% of [his or her] suspects accurately." [R. p. 67] If the officer observes 2 or more out of the 8

possible clues on the Walk-and-Turn, he or she will only "be able to accurately classify 68% of [his or her] suspects." [R. p. 70, ¶ 5] If the officer observes 2 or more of the 4 clues on the One Leg Stand, the officer will only "accurately classify 65% of the people [he or she tests] . . ." [R. p. 72]

The three tests administered in this case (Horizontal Gaze Nystagmus, Walk and Turn, and One-Leg Stand) were improperly administered as discussed below:

Horizontal Gaze Nystagmus ("HGN").

The HGN test was not administered in compliance with NHTSA standards in the following particulars:

1. The Horizontal Gaze Nystagmus ("HGN") test first requires the officer to check for smooth pursuit in each eye ("smooth pursuit"). The NHTSA standards require the officer to move the stimulus to the suspect's left eye until the eye goes as far as it can go, then back across the suspect's face to check the right eye. [R. p. 65 – 66] The officer should then repeat the procedure. Each pass from left to right to returning should take 8 seconds (2 seconds out, 2 seconds back, 2 seconds to the other side, and 2 seconds back again), so the initial pass and the repeat should total at least 16 seconds. Here, the officer completed the smooth pursuit portion of the test in 13 seconds, which includes any pauses. (R. DVD affixed to back cover, 40:37 – 40:50). It is clear that the officer rushed this portion of the test.
2. Next, the officer attempted to administer the onset of nystagmus portion of the test. For this test, the officer should move the stimulus across the subject's face at a slower pace so that moving from center to the side should take approximately 4 seconds, and then the officer should repeat the procedure for the other eye ("onset of nystagmus"). [R. p. 66]

The initial pass should take at least 16 seconds (4 seconds out, 4 seconds back in, 4 seconds to the other side, and 4 seconds back in). After repeating the procedure, this test should take 32 seconds. The officer moved the stimulus at a much greater speed than is prescribed by NHTSA standards for a total of 17 seconds or approximately twice as fast as directed (40:53 – 41:10). Notably, the NHTSA manual states: "It is important to use the full four seconds when checking for the onset of nystagmus. If you move the stimulus too fast, you may go past the point of onset or miss it altogether." [R. p. 66].

3. During the maximum deviation portion of the test, the officer started the test, the officer quickly yanked the stimulus back, then started again, and the officer did not hold the stimulus for four seconds. [R. R. DVD affixed to back cover 41:11 – 41:40] This portion of the HGN requires the officer to move the stimulus to the suspect's left side until the eye has gone as far to the side as possible, and the officer should hold the stimulus in position for a minimum of four seconds ("maximum deviation"). Notably, the NHTSA manual states that "[p]eople exhibit slight jerking of the eye at maximum deviation, even when unimpaired, but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable." [R. p. 64, ¶ 2]
4. NHTSA requires the checking of vertical nystagmus to hold the stimulus in place for approximately four seconds. Here the officer did not reach the four-second mark on either attempt. [R. p. 67]
5. The officer performed the maximum deviation portion and the onset of nystagmus portion out of order. The standards provide a specific order for the tests to be performed as noted by the language "after" and "next." [R. p. 66]

Walk and Turn.

The Walk-and-Turn test was not administered in compliance with NHTSA standards. The officer stated in his incident report that he observed 3 clues that he is trained to look for: (1) the Appellant separated his feet during the instructions, (2) Appellant took 10 steps, and (3) Appellant made an improper turn. [R. p. 80 – 81] Of these clues, there is no evidence on the video of the first. Also, as shown below, deficiencies in the administration of this test could have led to Appellant exhibiting any of these "clues" as claimed by the officer. Also, each of these "clues" were marked because of a failure to follow instructions, and the officer should be required to follow the instructions given to him in the administration of the tests. As will be shown below, the officer failed to follow the instructions of his training throughout the administration of this test:

1. The officer is required to tell the Appellant: "Maintain this position until I have completed the instructions." [R. p. 68, ¶ 1] The officer did not make this instruction to the Appellant. Accordingly, this "clue" as observed by the officer should be invalidated. Notably, despite this portion of the test being one of the most difficult portions of the FST battery, Appellant maintained balance throughout. Additionally, the officer paraphrased the portion of the instructions "with heel of right foot 'against toe of left foot'" by simply stating: "touch it heel to toe." [R. p. 68, ¶ 1; DVD affixed to back cover 42:15] <u>The officer should not be able mark this clue against Appellant when the officer did not advise Appellant to maintain the position until the officer completed instructions</u>.
2. After the previous instruction, the officer is required to ask the Appellant if he understands the instructions thus far. The officer failed to do so. [R. p. 68, ¶ 1; R. DVD affixed to back cover 42:25]

3. The officer completely omitted the instruction: "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud." [R. p. 68, ¶ 2; R. DVD affixed to back cover 42:09 – 43:05]
4. The officer completely omitted the instruction: "Once you start walking, don't stop until you have completed the test." [R. p. 68, ¶ 2; R. DVD affixed to back cover 42:09 – 43:05]
5. The officer omitted the instruction "Begin, and count your first step from the heel-to-toe position as 'One'" and simply said to "begin." [R. p. 68, ¶ 2; R. DVD affixed to back cover 42:09 – 43:05] There was no reason to omit these reminders as to both the "heel-to-toe" requirement and the counting requirement.
6. NHTSA standards require the officer to "limit [his] movement which may distract the suspect during the test." [R. P. 70] Here, especially during the first 9 steps, the officer walked alongside of the Appellant in the periphery of Appellant's vision. [R. DVD affixed to back cover 43:10 – 43:22] The officer should not be able to "split hairs" on the counting of the number of steps when the officer violated testing protocol by engaging in a noted "distraction."
7. NHTSA standards indicate that individuals with back problems have difficulty performing this test. [R. p. 70, ¶ 4] The Appellant advised the officer that he has back problems [R. DVD affixed to back cover 39:32 – 39:51], but the officer only investigated by asking if the back problems "stopped him from walking or turning or standing or anything like that." [R. DVD affixed to back cover 39:32 – 39:51]
8. The officer demonstrated 5 steps instead of 3. [R. p. 68, ¶ 2; DVD affixed to back cover 42:40].

9. Regarding the turn, the officer is required to advise the suspect: "When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this (Demonstrate)." [R. p. 68, ¶ 2] Instead, the officer advised the Appellant that on the ninth step, the Appellant should "keep his front foot planted and take a series of small steps and go back." [R. DVD affixed to back cover 42:44 – 42:53] The officer omitted the word "turn" from this portion of the instructions, despite NHTSA standards requiring the same and despite the "turning" aspect being the most important aspect of this instruction. The officer also omitted the words "with the other foot." Notably, one of the 3 "clues" indicated by the officer was for an "improper turn." [R. p. 81] If law enforcement wishes to split hairs in the grading of these tests, then law enforcement needs to be precise in the administration of these tests.

One-Leg Stand.

The One-Leg Stand test was not administered in compliance with NHTSA standards [R. pp. 71 – 73], shown as follows:

1. The officer failed to advise Appellant to keep his feet together. [R. p. 71, ¶ 1; DVD affixed to back cover 43:44 – 44:50]
2. The officer advised how to count by going to "one thousand five" instead of stopping at "one thousand three." [R. p. 71, ¶ 2; DVD affixed to back cover 44:03 – 44:17]
3. The officer advised Appellant that if Appellant "put[s] [his] foot down, that's okay." [R. DVD affixed to back cover 44:17 – 22] <u>This instruction should invalidate the test without any further discussion</u>. The four clues the officer looks for are (1) swaying, (2) using arms for balance, (3) hopping, and (4) putting the foot down. In other words, it was <u>not</u> okay for Appellant to put his foot down.

4. The officer advised the Appellant prior to commencing the test that if he puts his foot down, he could continue where he left off. [R. DVD affixed to back cover 44:17 – 44:28] This instruction is only to be given if the suspect puts his foot down during the test. [R. p. 71, ¶ 2] This instruction should also invalidate the test without any further discussion.

(C) The Admissibility of Tests.

The circuit judge erred in not considering the prejudicial nature of the field sobriety tests against any probative value. *See State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013) (finding the reversible error when the lower court failed to conduct a 403 balancing test on the record when considering the admissibility of evidence of prior bad acts of the defendant). Here, it is clear from the municipal judge's return that he did not perform any such balancing test before allowing the evidence to be heard by the jury. Further, when Appellant's counsel attempted to argue this issue to the circuit judge, he was immediately instructed to move on to the next argument. [R. p. 9, lines 1 – 7]

These tests are not observations of the officer that a jury can equally appreciate, such as whether the subject was unsteady on his or her feet, was boisterous, understood questions, drove erratically, had bloodshot eyes, or slurred words. These are objective tests that have objective results based on the observation of certain clues.

Our Supreme Court has discussed the importance of proper testing procedures in other contexts. In *State v. Parker*, 271 S.C. 159, 245 S.E.2d 904 (1978), the Court reviewed the propriety of the admission of a breathalyzer test and stated:

> The requirement of laying a foundation for the introduction of the results of chemical tests is universally recognized.
>
> 'The party offering the results of any of these chemical tests [for drunkenness] must first lay a foundation by producing expert witnesses who will explain the way in which the test is conducted, identify it as approved under the statute, and

> vouch for its correct administration in the particular case.' Cleary, McCormick on Evidence ((2d) ed., 1972), § 209 at p. 513. See, also, 29 Am. Jur. (2d), Evidence § 830.

Parker, 271 S.C. at 162. (emphasis added) Here, there is clear evidence that the officer did not correctly administer the tests, and the circuit judge did not consider the testing deficiencies.

The prejudicial nature of these tests is clear. The results generally come before a jury through the testimony of the arresting officer where the officer will describe in detail all of his or her training and experience, and the officer will then discuss the "clues" he observed pursuant to this training. Finally, the officer will grade a defendant as either "passing" or "failing." The probative nature arguably comes from the experimentation over time conducted by NHTSA in an attempt to classify subjects as intoxicated. To automatically allow field sobriety tests to go to the jury ignores the required 403 analysis and can allow overly prejudicial evidence to be before the jury.

(D) Relief.

Because (1) the NHTSA manual provides: **IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED**, (2) the officer did not strictly or substantially comply with his training, (3) the officer attempted to "fail" Appellant because Appellant did not follow the officer's instructions even though the officer did not follow the instructions in the training manual, (4) *Homan* provides sound reasoning and guidance regarding the test for admitting field sobriety tests at a DUI trial, (5) the field sobriety testing is a primary component of probable cause and jury consideration, and (6) any probative value of the field sobriety tests was compromised, this Court should remand this case for a new trial and instruct the municipal judge to assess for strict compliance with testing procedures by the arresting officer before admitting

the tests into evidence. In the alternative, this Court should impose a "substantial compliance" standard. In the second alternative, the Court should instruct the municipal judge to conduct a Rule 403 prejudice analysis and consider any deficiencies of the arresting officer during the testing procedure.

CONCLUSION

This Court should dismiss the charge of driving under the influence against Appellant because the video recording of the incident site does not properly capture the One Leg Stand field sobriety test in that one cannot evaluate Appellant's balance due to the defective recording of this test. Specifically, it cannot be determined whether Appellant swayed or used arms for balance during this test, and potentially exculpatory evidence was lost. Additionally, the arresting officer did not submit any affidavit stating that the camera did not work properly at the time and that reasonable efforts have been made to keep it in good working order.

If this Court does not dismiss the charge of driving under the influence, it should remand for a new trial because the municipal judge admitted the field sobriety tests into evidence without considering the degree of compliance by the arresting officer with the testing protocol. As shown throughout this brief, the office deviated from the proper administration protocol on numerous occasions and marked "failing" clues against Appellant for things for which the officer omitted instructions. Upon such remand, this Court should direct the municipal judge to consider whether the officer strictly complied with the procedures, or in the alternative, substantially complied. At a minimum, the municipal judge should be required to conduct a thorough 403 prejudice analysis while considering the deficiencies in the officer's administration of the tests.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-001871

City of North Charleston, ...Respondent,

v.

John Barra, ...Appellant,

PROOF OF SERVICE OF FINAL BRIEF OF APPELLANT, REPLY BRIEF OF APPELLANT, AND RULE 211 CERTIFICATE

I hereby certify that I have served (1) Final Brief of Appellant, (2) Reply Brief of Appellant, and (3) Rule 211 Certification on the following by United States Mail, postage prepaid, on November 4, 2015, addressed as follows:

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RULE 211 CERTIFICATE

The undersigned hereby certifies that Appellant's final brief and final reply brief both comply with Rule 211(b), SCACR.

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