THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

COURT RULE

ARGUMENT

A. Appellant Seeks Review of a Mixed Question of Law and Fact.

Appellant does not dispute that Judge Newman's review of the magistrate's decision was limited to matters of law. However, "[i]n reviewing mixed questions of law, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). There has never been any factual dispute regarding what is shown on the video recording. Instead, Appellant contends that the magistrate erred by misapplying S.C. Code § 56-5-2953 to the facts before him.

B. In a Situation Similar to Gordon, Redaction, not Dismissal, is the Appropriate Remedy.

Respondent argues that Gordon II does not mandate suppression of a video which incompletely depicts a field sobriety test. Her position overlooks the clear language of Gordon II and instead attempts to rely on the remedy articulated in City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). Importantly, Respondent's argument ignores the factual distinction between the two cases that compelled different results.

In Suchenski, the "videotaping began upon activation of the officer's blue lights and recorded two field sobriety tests and the Miranda warnings, but the tape stopped before the officer administered a third field sobriety test and before respondent was arrested." Suchenski, 374 S.C. at 14, 646 S.E.2d at 879. The officer therefore failed to record any portion of one of the three tests he administered. In contrast, the officer in Gordon, as here, had video footage of all three field sobriety tests administered. State v. Gordon, Op. No. 27554 at *1 (S.C.Sup.Ct. filed August 5, 2015) ("The dashboard camera on the officer's patrol car recorded the entire incident, including all field sobriety tests,

with continuous recording."). Insofar as the officer in Gordon complied with the statute by recording the administration of all field sobriety tests administered, Gordon II held that dismissal would not be an appropriate remedy. Id. at *3 ("[T]he per se dismissal of the charge as discussed . . . is not appropriate.").

Instead, redaction of the flawed video in Gordon was the only necessary sanction because the officer had complied with the statute. Trooper Ford, like the officer in Gordon, successfully recorded all three tests. Even if, as Respondent suggests, the redaction requirement of Gordon II is a "narrow exception" that "reaffirms the legislative intent that the subject's performance is required to be shown, when possible, and that the failure to do so subjects the State to sanctions," the sanction articulated by Gordon II is redaction, not dismissal. (Init. Br. of Resp. at p. 7.)

C. Section 56-5-2953 Does Not Require a Video to Depict a Defendant's Performance on Field Sobriety Tests.

Respondent's position that the specific videotaping requirements of § 56-5-2953 remain unclear is contradicted by the Supreme Court's holding in Gordon II that § 56-5-2953 is "clear and unambiguous." Gordon II at *3. In Gordon II, the court specifically articulated what § 56-5-2953 requires of a recording by describing how the video in question met the statutory requirements:

> 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). This is consistent with § 56-5-2953's requirement that the incident site video recording "include any field sobriety tests administered." Thus, §

56-5-2953's plain language, bolstered by the Gordon II opinion, makes clear that administration of the field sobriety tests is all that must be depicted on the video. To require a depiction of performance on the field sobriety tests would read an additional requirement into the statute that has never been identified by any court. See, e.g., State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation.").

Respondent argues that Trooper Ford's failure to record a portion of the walk and turn test somehow deprives the jury of an opportunity to evaluate her conduct. This might be the case if the walk and turn test was the only evidence on which Trooper Ford relied in making the arrest. Instead, much like the officer in Gordon, Trooper Ford relied on a variety of evidence in making the arrest, particularly the other two field sobriety tests of which Respondent has never raised an objection.[1]

D. Gordon II Says Nothing About the Failure to Record a Walk and Turn Test.

Appellant argued in its initial brief that both Gordon opinions were limited to questions surrounding the HGN test, and therefore they could not be read to say anything about what constitutes an acceptable recording of a walk and turn test. Respondent contends that the "legal principles expounded in Gordon are analogous and apply to the walk and turn test as well as any of the other standard FST's." (Init. Br. of Resp. at p. 11.) Respondent, however, significantly undercuts this argument by simultaneously contending that the horizontal gaze nystagmus test is "fundamentally different" from the

[1] The Gordon II court specifically noted that even after the redaction remedy was applied, "there [was] still sufficient evidence to present this case to a jury for resolution . . . includ[ing] the breath alcohol analysis report, video of other field sobriety tests, and Gordon's statement that he had consumed four beers." Gordon II at *3.

walk and turn test. (Id. at p. 6.) If the HGN test and walk and turn test are as distinctive as Respondent maintains, then it would be unreasonable to rely on Gordon II regarding the consequences of a failure to record a walk and turn test.

E. The Officer Did Not Have the Level of Control Over the Video that Respondent Suggests.

Respondent asserts that the police officer is in "total control of the location of his patrol car when making the traffic stop . . . ." (Init. Br. of Resp. at p. 8.) This assertion may be true in a typical traffic stop, but Respondent's arrest took place following an investigation of a vehicle parked in the median of I-77 and not during a traffic stop. Trooper Ford did not know that he would encounter someone he would later arrest for impaired driving and therefore did not position his vehicle accordingly.[2] Respondent asserts that she knows of "no law which prevents the officer from moving the motorist to a parking lot or other safe place to perform the FST's if the officer deems the incident location too unsafe to correctly perform the FST's on camera and comply with the video recording statute." (Init. Br. of Resp. at p. 8.) In actuality, the Fourth Amendment and its restrictions on unlawful seizures would prevent the officer from taking such action. Until Trooper Ford performed field sobriety tests, he had no probable cause to arrest and therefore could not compel Respondent to move to a safer location. To do so would have restrained Respondent's liberty in violation of the Fourth Amendment. See, e.g., State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001).

[2] Respondent, without any authority, erroneously notes that Trooper Ford has made "numerous, if not hundreds of arrests involving impaired drivers." (Init. Br. of Resp. at p. 9.) In fact, Trooper Ford has been employed by the Highway Patrol since March 18, 2011. At the time of Respondent's arrest (December 8, 2013), he had been employed for less than two years.

F. The Totality of Circumstances Exception is Applicable when a Video is Partially Out of Compliance with § 56-5-2953.

The totality of circumstances provision contained in § 56-5-2953(B) is not limited, as Respondent argues, to situations where no video is produced at all. (Init. Br. of Resp. at pp. 11-12.) Instead, the provision permits the court to consider any valid reason based upon the totality of the circumstances for the failure to produce the video recording. This provision applies with equal force when a video is missing some required component and when no video is produced at all. In both scenarios, the officer has failed to produce the video recording required by § 56-5-2953(A).[3]

G. Respondent Has Improperly Sought Consideration of a Document Which Did Not Appear in the Record.

Respondent designated a single item to be included in the Record on Appeal, the National Highway Traffic Safety Administration DWI Detection and Standardized Field Sobriety Testing (SFST) Participant Guide, 2013 Edition ("Participant Guide"). The court should not consider the Participant Guide or any arguments related thereto because the document was not properly designated. The inclusion of matter in the Record on Appeal is governed by South Carolina Appellate Court Rules 209 and 210. Specifically, Rule 210(C) states that the Record on Appeal "shall not . . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. A review of the magistrate's return indicates that Respondent did not introduce as an exhibit or discuss the Participant Guide at the pre-trial hearing.[4]

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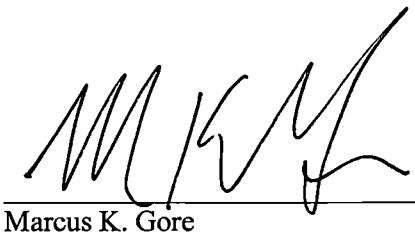
[3] This argument does not amount to an admission of a violation of § 56-5-2953(A), but rather is an alternative argument to consider in the event that the court finds that a violation of § 56-5-2953(A) did occur.

[4] Appellant has concurrently with the filing of its Reply Brief filed an Objection to Respondent's Designation of Matter in an effort to exclude the Participant Guide from the Record on Appeal.

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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November 4, 2015

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PROOF OF SERVICE

I hereby certify that I have served (1) the Reply Brief of Appellant and (2) Appellant's Objection to Respondent's Designation of Matter to be Included in 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 4th day of November, 2015 addressed to 1001 Beltline Boulevard, Columbia, SC 29205.

Monishia L. Davis
Paralegal

Dated: November 4, 2015