

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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NOV 09 2015

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2014-CP-20-0255

The State of South Carolina.....Appellant,

v.

Kathryn H. Dew.....Respondent.

APPELLANT'S OBJECTION TO RESPONDENT'S
DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL

COMES NOW, Appellant, the State of South Carolina, who for its Objection to Respondent's Designation of Matter to be Included in the Record on Appeal, does respectfully state as follows:

1. Respondent's Designation of Matter includes a single item: National Highway Traffic Safety Administration DWI Detection and Standardized Field Sobriety Testing (SFST) Participant Guide, 2013 Edition ("Participant Guide").

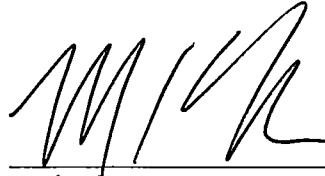
2. That pursuant to Rule 210(c) of the S. C. Appellate Court Rules, the Record on Appeal shall not include matter which was not presented to the lower court or tribunal.

3. That Respondent did not present the Participant Guide to the magistrate as shown by the Magistrate's Return (attached hereto as Exhibit A) which indicates that Respondent offered no items into evidence at the pre-trial hearing giving rise to this appeal.

4. That Respondent has designated matter in her Designation of Matter which was not presented to the lower court or tribunal, and therefore Appellant objects to Respondent's designation.

5. That Appellant requests an Order of this Honorable Court ordering Respondent to omit the Participant Guide from the Record on Appeal.

WHEREFORE, Appellant prays for an Order of this Honorable Court ordering Respondent to omit the Participant Guide from the Record on Appeal and for such further relief as the Court deems just and proper under the circumstances.



Catherine Fant
Assistant General Counsel
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S. C. Department of Public Safety
P. O. Box 1993
Blythewood, South Carolina 29016
Telephone: (803) 896-7965
Attorneys for Appellant

Date: 4 November 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

NOV 09 2015

SC Court of Appeals

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2014-CP-20-0255

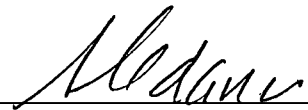
The State.....Appellant,

v.

Kathryn H. Dew.....Respondent.

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

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

STATE

VS

KATHRYN HART DEW

DEFENDANT'S)

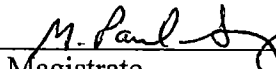
2014 AUG 15 PM 1:53
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

IN THE COURT OF COMMON PLEAS
MAGISTRATE'S RETURN
OF
CRIMINAL APPEAL

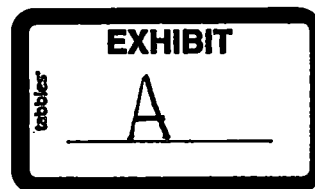
The Attached Papers Comprise the Court Record Which Is Transmitted to the Circuit Court Pursuant to Section 18-3-40 Sc Code. Attached are copies of the items which are checked.

1. Warrant / Or Ticket. Number: G633064
2. Pretrial Motions and Responses:
 A) Rule 5 / Brady
 B) Motion to Exclude Evidence And/or Testimony
 C) Other Motions.
3. Jury List and Jury Selection Record of Strikes, Cause and /or Peremptory.
4. Voir Dire of Jury.
5. Trial Transcript: Judge's Trial Notes Typed, or Transcript of Recording Prepared by Appellant and Certified Correct by Magistrate.
6. List of witnesses and summary of their testimony.
7. List of motions, a summary of parties' positions, and court ruling.
8. List of items offered into evidence, a summary of objections and the court's ruling.
9. List of Exhibits Admitted and Copies.
10. Jury Verdict.
12. New Trial Motion Received (Date _____ Time _____).
13. Notice of Hearing on Motion.
14. Notice of Denial of Motion.
11. Notice of Intent to Appeal.
12. Other _____

Respectfully Submitted,


Magistrate

CITY Winnsboro STATE SC
August 14, 2014



STATE OF SOUTH CAROLINA)
COUNTY OF SOUTH CAROLINA)

IN THE CIRCUIT COURT

STATE)

VS)

MAGISTRATE'S RETURN
OF
CRIMINAL APPEAL

KATHRYN HART DEW)

DEFENDANT'S)
(ADDRESS))

This matter is on appeal from the Magistrate Court of Fairfield County,
South Carolina, the Honorable, M. Paul Swearingen, Presiding Judge

The defendant, Kathryn Hart Dew was charged with violating
S. C. Code Ann. § 56-5-2933 which is commonly referred to as
Driving with an Unlawful Alcohol Concentration, on December 8, 2013.

This matter was heard in a Jury trial on June 12, 2014 and the
Notice of Appeal was filed on July 10, 2014. The proceedings were
(check appropriate box) recorded electronically. recorded by a court reporter.
 recorded in writing by the judge.

The jury list was prepared pursuant to S. C. Code Ann. (Check appropriate Box)
 § 22-2-80. Selection of jury list for a single trial, § 22-2-90. Selection of jury list for
scheduled terms of jury trials, and the Defendant and the State was given an opportunity to
exercise peremptory challenges on February 25, 2014.

The State called the following witnesses:

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

A summary of their testimony is attached.

The Defendant called the following witnesses:

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

A summary of their testimony is attached.

The State made the following Motions:

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

A summary of the State's and Defendant's position on each motion and the Court's ruling is attached.

The Defendant made the following Motions:

- | | |
|----------------------|-----------|
| 1. Motion to Dismiss | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

A summary of the Defendant's and State's position on each motion and the Court's ruling is attached.

The State offered the following items into evidence:

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

The Defendant raised the following objections to the items that the State sought to introduce into evidence:

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

A summary of the Defendant's and State's position and the Court's ruling on the objection is attached.

The Defendant offered the following items into evidence:

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

The State raised the following objections to the items that the Defendant sought to introduce into evidence:

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

A summary of the State's and Defendant's position and the Court's ruling on the objection is attached.

The Defendant was found guilty of violating S. C. Code Ann. § _____,
commonly known as _____ and the Court imposed
the following sentence: _____

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD)

SIXTH JUDICIAL CIRCUIT

State of South Carolina,)

Case No. 2014-CP-20-255

Appellant,)

Vs.)

MAGISTRATE'S RETURN

Kathryn Hart Dew,)

Respondent.)

A jury trial was scheduled on the above captioned matter for July 12, 2014. Present that day in the courtroom were Trooper Christopher B. Ford of the South Carolina Highway Patrol representing the State, the Defendant, Kathryn Hart Dew, and her attorney Robert FitzSimons of the Fairfield County Bar.

Prior to bringing in the jury, and prior to the jury being sworn, the Defendant's attorney made a motion to dismiss the case based on the State's failure to comply with the video recording statute, S.C. Code Ann. §56-5-2953. The Defense argued that the video was incomplete due to the failure of the video to show the Defendant's feet as she took the walk and turn field sobriety test. He argued that the jurors would not be able to determine how well the Defendant performed the walk and turn test if her feet could not be clearly seen as she performed the test.

During arguments presented by the State and the Defense on the motion to dismiss, I viewed the incident site video. The Defense argued that due to the grainy nature of the background in the video, the fact that the incident occurred at night, and the color of the Defendant's clothing and shoes, as well as the placement of the Defendant by the Trooper which

had her walking away from the camera during the test, her feet were not clearly visible as she performed the test. Also, the data at the bottom of the video helped to obscure the Defendant's feet. The Defense also argued that the Trooper could have placed the Defendant in a position ~~where she was walking left to right in front of the camera, as the Trooper did himself when he demonstrated the test for the Defendant, rather than walking away from the camera, so that her feet could clearly be seen.~~ The State argued that the Defendant was placed in a position to be walking away from the camera for her safety. After viewing the video, I found that the conditions on the video and the placement of the Defendant relative to the camera did in fact prevent her feet from being seen so that the jury would be unable to determine if she was walking heel-to-toe as instructed by the Trooper.

In determining whether the defects in the video while the walk and turn test was being administered constituted an incomplete video for purposes of the videotaping statute, I relied heavily on the recent case of State v. Gordon, Op. No. 5226 (S.C. Ct. App. Filed April 23, 2014; opinion withdrawn, substituted and refiled June 11, 2014) (Shcarouse Adv. Sh. No. 23). I took the Court's holding in Gordon as standing for the proposition that the Legislature's revision of the videotaping statute has shifted the focus from the Defendant's conduct while performing the field sobriety tests to the Defendant's actual performance of the field sobriety tests. Therefore, in order to determine if the Defendant is performing the sobriety test as instructed by the officer, you must be able to clearly see the portion of the Defendant's body that is performing the test. In applying this standard to the case at hand, I found that the jury would not be able to determine from the video if the Defendant was in fact performing the walk and turn test as instructed because her feet were not clearly visible throughout the entirety of the test.

Based upon my viewing of the video, and my interpretation of the case of State v. Gordon, I found the State's video to be incomplete and therefore not in compliance with the videotaping statute. Following the line of South Carolina appeals court cases that direct that the ~~only remedy for the State's failure to comply with the videotaping statute is dismissal of the~~ case, I granted the Defendant's motion and thereby dismissed the case.



M. Paul Swearingen
Magistrate for Fairfield County

August 14, 2014
Winnsboro, SC



South Carolina Department of Public Safety

OFFICE OF GENERAL COUNSEL

P.O. Box 1993 • Blythewood, S.C. 29016

Tel: (803) 896-7965 • Fax: (803) 896-7967

RECEIVED

November 4, 2015

NOV 09 2015

SC Court of Appeals

Ms. Jenny Abbott Kitchings
Clerk of Court
S. C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State vs. Kathryn H. Dew
Appeal from Fairfield County
The Honorable Clifton Newman
C/A 2014-CP-20-0255
Appellate Case No. 2015-001093

Dear Ms. Kitchings:

Enclosed please find the following to be filed in the above matter:

1. Initial Reply Brief of Appellant
2. Appellant's Objection to Respondent's Designation of Matter to be included in the Record on Appeal
3. Proof of Service

Also enclosed is an additional copy of each document above. Please clock-in the copies enclosed and return them to me in the envelope provided herein.

Thank you for your attention to this matter.

Yours very truly,

Marcus K. Gore
Assistant General Counsel

MKG/mld

Enclosures

cc: Robert C. FitzSimons, Esq.