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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-002406

RECEIVED

JAN 05 2016
Appellant,
SC Court of Appeals

The State,

vs.

Shelby Jean Lorusso,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The circuit court erred in affirming the magistrate court's dismissal of this DUI case when the officer complied with the requirements of section 56-5-2953(A) of the South Carolina Code and the court's interpretation of the requirements of section 56-5-2953 is an error of law.
- II. The circuit court and magistrate's court erred in failing to consider the totality of the circumstances as provided in section 56-5-2953(B) of the South Carolina Code in determining whether dismissal of the case was appropriate.

STATEMENT OF THE CASE

Respondent was arrested for driving under the influence in York County. Prior to trial, the magistrate heard several motions, including Respondent's motion to dismiss the case based on the State's failure to comply with section 56-5-2953(A) of the South Carolina Code. The magistrate, on April 24, 2013, ordered dismissal of the case.

The State filed a timely Notice of Appeal from the magistrate's ruling on May 3, 2013. The appeal was heard by the Honorable John C. Hayes, III, on August 27, 2013. By order dated September 17, 2013 and filed September 20, 2013, Judge Hayes affirmed the ruling of the magistrate's court and dismissed the State's appeal. The State filed a motion to alter or amend, which was denied by Judge Hayes by Order dated October 7, 2013.

The State filed a timely Notice of Appeal from the ruling of the circuit court. This appeal follows.

STATEMENT OF FACTS

Respondent was stopped by Deputy Palmer on suspicion of driving under the influence. Deputy Palmer's camera was activated prior to his activation of his blue lights and remained recording at all times during the stop of Respondent. Deputy Palmer talked with Respondent, including asking how many drinks she had that night. After positioning his vehicle behind hers along the side of a roadway at night, he asked her to step out of her vehicle to perform several field sobriety tests.

He first performed the HGN test, which can be seen on the video recording. (Video of Incident Site). He is standing away from the patrol vehicle to avoid its lights, including the flashing blue lights, from interfering in the test results. (4/23T.147-148; R. 47-48). He explained how he conducted the test and what he checked for in Respondent's eye movement. (4/23T.135-138; R.44-45). He testified his camera is affixed to his windshield and he could not move his camera around to position it so that the eyes could be seen. (4/23T.139-140; R.45).

Additionally, Deputy Palmer conducted the heel to toe walking test. He asked Respondent to assume the starting position with one foot in front of the other. She was unable to remain in that position at the beginning of the test. He then had her perform the test walking toward the camera because the vehicles were along the side of the road. (Video of Incident Site). He testified regarding his observations of her performance and why he believed she did not pass the test. (4/23T.143-146; R. 46-47).

Finally, he has Respondent perform the one leg stand test. She clearly cannot maintain her balance during this test. (Video of Incident Site). Deputy Palmer reads Respondent her Miranda rights and places her under arrest for DUI.

At trial, counsel for Respondent argued because the viewer of the video cannot verify Respondent's performance of the HGN and heel to toe tests on the video, the State failed to comply with section 56-5-2953. He asserted the case should be dismissed. Respondent's counsel provided the magistrate with several unpublished circuit court orders and argued the magistrate should follow their holdings in regard to what is required in the video.

The State maintained the video complied with the statute so the case should not be dismissed, and if it did not, under the totality of the circumstances the video should be admitted and the case not dismissed. The State asserted the orders of the circuit court were not binding.

The magistrate ultimately dismissed the case based on the heel to toe walk and turn test. He stated:

At this time, based on what has been - - the orders that have been put in front of me I'm going to go ahead and dismiss this charge against the defendant. I'm dismissing the charge based on what came down from higher up. This is a Sixteenth Circuit opinion. I'm making no - - Nothing is based on anything to do with the HGN. I'm basing it strictly off the walk-and-turn. The order, even though it's an unpublished opinion, does come down from above me. That being said, it needs to me - - At least these issues have been addressed, and I'm dismissing it.

(4/24T.3; R. 65). The State again maintained the orders were not binding and that the State complied with the statute. (4/24T.4-5; R.65-66). She further maintained the interpretation of the statute by the magistrate and the orders he relied upon was incorrect. (4/24T.6-10; R. 66-67). Additionally, she asserted the case should not be dismissed based on a totality of the circumstances under section 56-5-2953(B), the statute should not be interpreted as requiring all aspects of the field sobriety test to be perfectly visible.

to a viewer of the video, and the case was not required to be dismissed. (4/24T.11-28; R. 67-71).

The State filed an appeal to the circuit court alleging error by the magistrate. The magistrate issued a return relying on the unpublished circuit court opinion of Judge Alford for his dismissal of the case. (Return of Magistrate; R. 1-2).

The circuit court issued an order affirming the magistrate's dismissal of the case, and subsequently denied the State's motion to reconsider, alter or amend. This appeal follows.

ARGUMENT

- I. **The circuit court erred in affirming the magistrate court's dismissal of this DUI case when the officer complied with the requirements of section 56-5-2953(A) of the South Carolina Code and the court's interpretation of the requirements of section 56-5-2953 is an error of law.**

The court erred in affirming the magistrate court's dismissal of this case. The State produced a videotape in complete compliance with section 56-5-2953 of the South Carolina code. The magistrate court and circuit court's interpretation of the section adds requirements not specified in section 56-5-2953(A) in order to find the State failed to produce a videotape that contained all content required.

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)).

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. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v.

Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

Section 56-5-2953 provides:

(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 the 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 a 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. 2012).

First, the trial court erred in finding section 56-5-2953 ambiguous. The statute uses very clear terms and sets forth clear requirements for what must occur. The conduct of the person must be recorded. The recording must begin no later than the activation of the blue lights, include any field sobriety tests administered, include the arrest of the person and show the person being advised of their Miranda rights. These are very specific, unambiguous requirements, all of which were met in this case with the video recording provided by the State. The video clearly demonstrates Respondent's conduct throughout the time at the incident site, began actually before the blue lights were activated, recorded and provided a full recording of all field sobriety tests with nothing occurring off camera, showed Respondent being placed under arrest, and showed her being read her Miranda rights. The video recording completely complied with the

unambiguous requirements of section 56-5-2953(A), and as a result, the courts erred in dismissing the case.

To the extent the language could be construed as ambiguous, the State submits the magistrate and circuit court clearly erred in the determination of the legislative intent and in finding the video produced in this case failed to meet the legislative intent of the statute. The South Carolina Supreme Court has explained: “the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest.” Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). The purpose is not to provide a video such that a jury will see exactly what is seen by the officer. The purpose is not to provide the jury with the ability to assess a person’s attempt to complete a field sobriety test. The video is to document the arrest, providing a recording of all required items, including the field sobriety tests administered and the defendant’s conduct during the tests.

First, the magistrate’s ruling impermissibly relied on an unpublished decision out of the circuit court for its holding. Unpublished opinions have no precedential value and are not binding on any court. See Rule 268(d)(2), SCACR (“Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.”); Ford v. Beaufort County Assessor, 398 S.C. 508, 515 n.3, 730 S.E.2d 335, 339 n.3 (Ct. App. 2012) (finding neither ALC order nor unpublished Court of Appeals opinion are binding on ALC or Court of Appeals); Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000) (finding “it should be noted unpublished opinions have no precedential value”); 21 C.J.S. Courts § 212 (2006) (“Trial or inferior

court decisions are not precedents binding other courts, including appellate courts or other judges of the same trial court.”).

On the record in making his decision, the magistrate specifically stated it was based on the opinions out of the Sixteenth Circuit Court of Common Pleas. (4/24T.3; R. 65). The magistrate held the video failed to comply and dismissed the case “**based on the unpublished ruling by Judge Alford** in the State of South Carolina vs. John Douglas Pittman case on July 26, 2012.” (Return of Magistrate dated May 13; R. 1-2) (emphasis added). The Magistrate continues to explain that the statute requires “a person watching the recording could view the test performed by the driver suspect so that an assessment could be made as to how well the driver suspect performed the test.” (Return of Magistrate May 13; R. 1-2). Relying on the analysis taken from the unpublished opinion, he concluded: “At no time can a person watching the video [in the instant case] observe any heel to toe touching or not touching. Based on these facts, testimony, and video this court felt compelled to grant the Defendant’s motion for dismissal.” (Return of Magistrate May 13; R. 1-2).

The magistrate’s ruling, in addition to impermissibly relying on an unpublished circuit court case, fails to properly analyze the requirements of the statute. Nothing in the statute requires the watcher of the video to see exactly what the officer saw or to see the test be performed in such a way that the watcher can make an assessment of the defendant’s performance. Any issue regarding the quality of what is shown or the successful or unsuccessful completion of the test is for the jury to consider as part of the weight it assigns to the video and not to the admissibility of the video. The State must

produce a video which records the person's conduct and which includes any field sobriety tests offered. This was unquestionably done in this case.

The circuit court also misconstrued the legislative intent behind the statute and added requirements not written into the statute by the legislature. The circuit court references Murphy v. State, 392 S.C. 268, 709 S.E.2d 685 (Ct. App. 2011), to determine what must be recorded. In Murphy, this Court noted the statute prior to amendment required the person's "conduct" be recorded. This Court defined conduct as: "one's behavior, action, or demeanor." Id. at 631, 709 S.E.2d at 688 (citing The Oxford Dictionary 158 (2d ed. 2001)). The Court then analyzed a video in which a person is not fully visible—her feet and legs are generally not shown on the video—during a walking test or the HGN test. The Court found the recording of the complete person throughout the field sobriety test was not necessary because the statute required capturing their conduct. Further, the Court found it was not necessary to record *all* field sobriety tests because the statute did not mandate it. Id. at 631-632, 709 S.E.2d at 688. The Court noted its ruling was under the old statute and the new version, at issue in the instant case, requires the recording of any field sobriety tests administered. The Court found this amendment bolstered its holding that *all* field sobriety tests did not have to be recorded under the old statute. It did not alter the Court's holding regarding the recording of an individual's conduct or the definition it applied to the term "conduct."

The circuit court interprets the change in the statute and the Court of Appeals' footnote in Murphy to indicate the statute now requires the "complete recording of a person[']s *performance*." (Order of Circuit Court dated September 17, 2013; R. 3-10) (emphasis in original). However, nothing in the statute or the Court of Appeals opinion

indicates the video must record all aspects of the individual's performance in such a way that the viewer can make a determination of the successful or unsuccessful completion of the test as the circuit court's order requires. Further, the amendment to the statute just clarified the events during which the defendant's conduct must be recorded, and re-wrote the statute to eliminate the need to provide Miranda warnings prior to the officer administering field sobriety tests. The amendment did not add the requirement the content must be recorded in such a way that all performance on the tests can be determined.

The circuit court's ruling: "To put it plainly, there is no sense in conducting field sobriety tests if the finder of fact can not see the results of such test" adds a requirement to the statute—requiring the video to show the result of the test to the jury—which does not appear within the language itself. (Order of Circuit Court dated September 17, 2013; R. 3-10) (emphasis added). The language requires the conduct of the individual be recorded throughout the incident site, requires the video to begin at the initiation of the officer's blue lights, include any field sobriety tests administered, and include the arrest with Miranda warnings. Nothing in the statute requires the jury to be able to assess the performance of the defendant on the video. The conduct of the individual, even during the field sobriety tests, can be recorded without having the camera record in such a manner that the fact finder can make the same determination as the officer regarding the results of the test. Requiring otherwise rewrites the statute and imposes requirements not imposed by the Legislature.

The circuit court, in applying its incorrect interpretation of section 56-5-2953, found because one could not see on the video whether Respondent's heel touched her toe

the officer failed to comply with the recording requirements of section 56-5-2953. This ruling is error based on the error in the court's interpretation as discussed above. The recording clearly includes Respondent's conduct. The viewer can see her walking, the viewer can hear her interactions with the officer, the viewer can see several missteps along her walk. While the viewer admittedly cannot see every single heel to toe touch or non-touch, this is not the requirement of the statute. The officer completely complied with the recording statutes by recording the field sobriety test administered and by recording Respondent's conduct as that term is generally defined.

Further, the circuit court acknowledged the officer produced a video, but the issue related to the "content" and "not the absence of a videotape." (Order of Circuit Court dated October 7, 2013; R. 11-12). Any issues regarding the quality of the content of the video should go to its weight and the weight to be assigned the video by the trier of fact. See State v. Cope, 405 S.C. 317, 342 n.6, 748 S.E.2d 194, 207 n.6 (2013) ("factual discrepancies . . . go to the weight of the evidence"); State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility); Weaver v. Lentz, 348 S.C. 672, 680, 561 S.E.2d 360, 364-365 (Ct. App. 2002) ("Questions as to the accuracy of conclusions drawn go solely to the weight of the testimony, rather than its admissibility."); see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence

or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

The State has complied with section 56-5-2953 by producing a videotape with all required events documented. Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required, and the court erred in affirming the magistrate's dismissal of the case.

The trial court's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), is misplaced. In Suchenski, the arresting officer's vehicle recorder ran out of tape before the defendant was arrested, and as a result, there was **no** recording of the last field sobriety test or the arrest, both events required to be recorded under the statute. Thus, under the statute, the officer could not produce a videotape of all of the required events. The officer testified a tape had never ended during an arrest before, and he did not know the tape was about to run out, but assumed the videotape was running as usual. The magistrate denied the defendant's motion to dismiss, finding exigent circumstances excused full compliance with the statute. The circuit court reversed on appeal. The South Carolina Supreme Court affirmed, finding the City's claim of exigent circumstances was not preserved for review, and in the absence of an exception, section 56-5-2953(B) required dismissal of the charge. Id.

In this case, unlike Suchenski, the State produced a videotape of the entire incident site and all events required to be documented under the statute. While the video recording does not document all instances of the defendant's heel touching or not touching her toes, the video recording clearly documented Respondent's conduct as required by the statute. Any defects of the videotape go to its weight to be assigned by

the jury and not its admissibility under the statute, and the court should have found the video recording admissible and allowed the case to proceed to trial. See Section 56-5-2953(A)(3) (video recordings of incident and breath test sites are admissible as evidence in a criminal proceeding).

Finally, the interpretation of the statute by the magistrate and circuit courts would lead to an absurd result. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (finding courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature); State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) (“The statute must be interpreted with realistic circumstances and rationales in mind.”). A person could avoid prosecution for DUI by placing himself during part of a test just off camera. Additionally, tests such as the HGN, which involve movement of the eyes, could never be recorded in such a manner as to allow the fact finder to see what the officer saw or to know whether the individual successfully or unsuccessfully completed the test. The defendant’s own witness admitted that even if you placed the person so the camera could record their eyes, the eyes would be blocked part of the time because of the officer moving his hand, arm, or an object in front of the camera. (T.116-120; R. 39-40). Significantly, the only way to satisfy the judge’s requirements and interpretation on the heel to toe test would be to have the person walk perpendicular to the camera, meaning they would be walking directly toward a lane of traffic anytime the vehicle is stopped on a roadway. It is clearly not the intention of the Legislature to require the officer to put the person in danger by having a possibly unsteady individual walk toward a lane of traffic while performing field sobriety tests.

The trial court erred in interpreting the statute in such a way as to write into the statute the requirement the fact finder is able to assess the performance of the person stopped for DUI on the field sobriety tests. The clear language of the statute requires the person's conduct—their behavior, actions, or demeanor— be recorded along with the administration of the field sobriety tests, the reading of Miranda warnings, and the arrest of the individual. Here, the State complied fully with the statute and the trial court erred in dismissing the case.

II. The circuit court and magistrate's court erred in failing to consider the totality of the circumstances as provided in section 56-5-2953(B) of the South Carolina Code in determining whether dismissal of the case was appropriate.

The trial court erred in finding: "This is not a § 56-5-2953(B) totality of the circumstances issue." The State submits to the extent the court considered section 56-5-2953(B) and found dismissal still necessary, the ruling is in error. Further, to the extent the court is ruling the subsection B exceptions to the dismissal of the case do not apply at all in this case, the court committed an error of law which should be reversed.

The totality of the circumstances in this case clearly supports allowing the case to continue. First, the officer testified he considered the location, Respondent's safety, and his own safety in determining how to position Respondent for the field sobriety tests. (4/23T.146; R. 47). The video clearly begins prior to his activation of the blue lights while following Respondent and lasts, completely uninterrupted, through Respondent's arrest and transport. (Incident Site Video). Further, the video includes Respondent's conduct throughout the time at the incident site as required by the video. The officer, in order to not make Respondent walk into a lane of traffic, positioned her between the two automobiles and had her walk toward the camera. During her heel to toe field sobriety test, she has trouble at the beginning placing and keeping one foot in front of the other. The video shows several times in which the heel and toe are clearly not making contact as one foot is turned to the side. (Incident Site Video). Based on the totality of the circumstances, including the fact the video included everything required by the statute, this Court should find the trial court erred in dismissing this case.

To the extent the trial court found the exceptions to dismissal do not apply in the instant case, the court committed error. The court could only dismiss the case based on a finding the State failed to produce a video recording in compliance with section 56-5-2953. Section 56-5-2953(B) specifically allows the trial court to consider the totality of the circumstances in analyzing the failure to produce a video recording. Accordingly, to the extent the trial court ruled the issue could not be analyzed under subsection B, the ruling is an error of law and this court should find dismissal was inappropriate based on a totality of the circumstances.

Dismissal, whether under Suchenski or the statute, is premised on the State's failure to produce a video recording in compliance with section 56-5-2953(A).¹ Specifically, the statute provides: "Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge." S.C. Code Ann. § 56-5-2953(B) (Supp. 2012) (emphasis added). The statute then lays out exceptions including submitting an affidavit explaining the failure to produce the video. Finally, the statute includes: "Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances." Id. Clearly, if the court dismisses a case based on the failure to produce a video recording in compliance with subsection A, then subsection B allows the court to consider the totality of the circumstances in determining whether the failure to produce requires dismissal.

In this case, the trial court's ruling that "This is not a § 56-5-2953(B) totality of the circumstances issue" is an error of law to the extent he is saying the subsection does

¹ The State submits dismissal is not the only available remedy under the statute, but was the one chosen in this case.

not apply to this case. The only basis for dismissal is the failure to produce a video which meets the requirements of subsection A. Subsection B and its totality of the circumstances provision apply when the case would otherwise be dismissed based on a failure to produce a video. Accordingly, it is an error of law to say subsection B does not apply. This court should find the totality of the circumstances can be considered and based on the totality of the circumstances appearing in the record on appeal reverse the trial court's dismissal of this case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court affirming the magistrate's dismissal of the case should be reversed and this case remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant, complies with Rule 211(b), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Rulings."

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Christopher A. Wellborn, Esquire
142 Oakland Avenue, Suite C
Rock Hill, South Carolina 29730

I further certify that all parties required by Rule to be served have been served.
This 5th day of January 2016.



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