

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

Honorable Robin B. Stilwell, Circuit Judge

RECEIVED

JAN 11 2016

SC Court of Appeals

Appellate Case Number: 2014-002317

Maria Moyao,

Appellant,

v.

The State,

Respondent.

AMENDED INITIAL BRIEF OF APPELLANT

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ISSUES ON APPEAL

- I. **THE CIRCUIT COURT ERRED BY FAILING TO REVERSE APPELLANT'S CONVICTION FOR DUAC AS THE STATE FAILED TO COMPLY WITH MANDATORY VIDEO REQUIREMENTS OF SC CODE § 56-5-2953 WHERE PORTIONS OF THE APPELLANT COULD NOT BE SEEN ON THE VIDEO WHILE PERFORMING FIELD SOBRIETY TESTS.**

- II. **THE CIRCUIT COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHERE THE STATE PROVIDED INVALID NOTICE BEFORE PROCEEDING UNDER DUAC.**

STATEMENT OF THE CASE

On September 4, 2011, Maria Lozano Moyao [hereinafter *Appellant*], was charged with Driving Under the Influence (1st Offense) [hereinafter *DUI*]. (R. ___ Ticket No. 53541FV). Appellant was asked to perform three standardized field sobriety tests at the scene, those being the Horizontal-Gaze Nystagmus, Walk-and-Turn, and One-Leg Stand. After performing the tests, Master Deputy J. Jackson [hereinafter *Deputy Jackson*] arrested Appellant for DUI. Appellant was taken to the Greenville County Detention Center where Deputy Jackson administered a breath-alcohol test to Appellant. Appellant recorded a .10 on the breath test and was then placed in detention.

Appellant retained Daniel J. Farnsworth, Jr. to defend her on the DUI charge. On February 6, 2012, the State, via a preprinted form, provided appellant a written offer to plead guilty to an alternative charge of Driving with an Unlawful Alcohol Concentration [hereinafter *DUAC*], with a deadline of March 6, 2012 to accept the State's offer. (R. ___ Notice to Defendant). Appellant declined this plea offer. Included on the lower portion of this preprinted plea offer form was a section entitled DUAC notice. The plea offer

stated near the top of the form, in underlined, bold-type, that if appellant did not accept the State's offer before it expired, that "**the case will tried as charged, and NO recommendations will be made.**" (R. ___) However, contradicting this conspicuous plea offer language, the notice form also contained language in the lower portion of the notice, indicating the State intended to try the case as a DUAC, and that the case would appear on an upcoming trial docket no sooner than 30 days from the date of this notice. (R. ___ Notice to Defendant)

Thereafter, on or about March 1, 2013, nearly thirteen months after Appellant declined the State's plea offer, counsel for appellant was notified that the State had scheduled a jury trial for Appellant's for the week of March 11, 2013, for the charge of DUI. (R. Trial Docket) Appellant's case remained listed as DUI charge and not a DUAC, and Appellant prepared for trial accordingly.

The following day, Tuesday, March 12, 2013, jury selection was held for Appellant's case, with the Court announcing the charge as a DUI. There was no mention from the State that it intended to proceed alternatively on a DUAC charge. A jury trial was set for 9:00 a.m. on the next day, Wednesday, March 13, 2013, before the Honorable Charles R. Garrett.

On March 13, 2013, Judge Garrett seated the jury and called the case, again introducing the charge as DUI. (R. ___ See Trial Transcript at 2-6). Prior to opening statements, the Judge asked if there were any pre-trial matters, and counsel for Appellant notified the Court that it had a motion concerning the video evidence and its compliance with S.C. Code § 56-5-2953(A)(1)(a)(ii). (R. ___ See Transcript, at 2-6).

The basis of Appellant's motion concerning the video recording was that during her field sobriety tests Appellant's feet, and at times her legs from her knees down, were obscured and not visible on the video recording. Due to how the deputy positioned his patrol vehicle, the in-dash video recorder failed to capture the entirety of Appellant's performance on the sobriety tests. Specifically, a portion of the patrol car, along with the digital recording numbers and data at the bottom portion of the video camera screen, blocked significant portions of Appellant's legs and feet while performing two of the three standardized sobriety tests required by the officer. Appellant's feet, and her legs from the knees down, were off the visible portion of the video recording during a significant portion of the Walk and Turn test. And during almost the entirety of the One Leg Stand test, her feet and legs from the knees down are off the visible portions of the video recording.

Outside the presence of the jury, the Court viewed the in-car video and subsequently denied the motion. (R. ___ See Transcript, at 9). In denying the motion, the court found that Appellant's feet were indeed obscured by the counter numbers, but that the deficiency in the video affected its weight, not its admissibility, and that a "reasonable juror could weigh this evidence and decide whether Defendant failed or successfully completed the tests" she was given. (R. ___ Summary Court Return)

Following the completion of pretrial motions, Judge Garrett again addressed the jury, again informing them that Appellant had been charged with DUI. (R. ___ See Trial Transcript, at 10). As the Court introduced the parties and counsel before beginning opening statements, the Assistant Solicitor informed the court, stating, "just for purposes of clarification, this is going to be a DUAC case." *Id.* at 10. Counsel for Appellant

immediately objected to this change in the charge. The Court overruled appellant's objection and allowed the trial to proceed as DUAC, based on the thirteen-month-old notice form provided to defendant. (R. ___ Summary Court Return)

The trial proceeded and the jury found Appellant guilty of DUAC. An appeal to the Circuit Court followed. (R. Circuit Transcript). The Circuit Court found no error in the Summary Court's finding that the incident site video was in substantial compliance with Section 56-5-2953. (R. Circuit Order). Further, the Circuit Court found that Appellant received appropriate notice of the State's intent to proceed on DUAC charges, and that no prejudice was visited upon the Defendant as a consequence of that notice. *Id.* This appeal followed.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY FAILING TO REVERSE APPELLANT'S CONVICTION FOR DUAC AS THE STATE FAILED TO COMPLY WITH MANDATORY VIDEO REQUIREMENTS OF SC CODE § 56-5-2953 WHERE PORTIONS OF THE APPELLANT COULD NOT BE SEEN ON THE VIDEO WHILE PERFORMING FIELD SOBRIETY TESTS.

Appellant's conviction should be overturned and her underlying DUI charge dismissed because the State failed to comply with S.C. Code § 56-5-2953. In February of 2009, the South Carolina Legislature amended S.C. Code § 56-5-2953, to include the requirement that "[t]he video recording at the incident site must . . . include any field sobriety test administered." S.C. CODE ANN. § 56-5-2953(A)(1)(a)(ii). In this case, the Appellant's feet and portions of her legs from the knees down are not visible on the video during the majority of both the Walk and Turn test and the One Leg Stand test.

“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (S.C. 2011) (quoting *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (S.C. 2009). The Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. *Id* at 348. Additionally, statutes that are penal in nature “must be strictly construed against the State and in favor of the defendant.” *Id* at 342. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-4-2953 and, in turn, promulgated a severe sanction for noncompliance. *Id* at 349, 713, S.E.2d at 286.

Since the DUI video statute’s amendment in 2009, S.C. Code § 56-5-2953(A)(1)(a)(ii) has been interpreted by this Court. In *State v. Gordon*, it was held that when the actual field sobriety tests cannot be seen on the officer’s video recording, the proper remedy is dismissal of the underlying DUI charge. *See State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (S.C., App. 2014). In order for the sobriety tests to be recorded properly, and to create direct evidence of the arrest, the tests showing the appellant’s actual performance must be visible on the video recording.

In addressing the significance of the amendment of Section 56-5-2953 in *Gordon*, this Court found that when a DUI field video did not show the defendant’s head during the administration of the HGN field sobriety test, the video violated the statute and dismissal was required. (*Id* at 758). This Court noted that the purpose of the videotaping requirement was to create direct evidence of the arrest. *Id* at 758. Direct evidence is evidence that a subsequent viewer or finder of fact could see and determine for itself the

accuracy of what the officer describes during his or her observation of the defendant performing field sobriety tests. Such direct evidence requires that the actual tests be seen on the recording; otherwise, as this Court concluded, the video requirement would be pointless. *Id.*

In the present case, the Summary Court Judge acknowledged that Appellant's feet were obscured by a portion of what appeared to be the front of the patrol car and the numbers on the bottom of the video screen. (R. Summary Court's Return). The State suggested that the law requires only substantial compliance, while conceding "[t]here is [*sic*] some steps toward the end of the walk and turn when she's walking into the screen portion where the numbers are." (R. Trial Transcript at 7). Although the Assistant Solicitor failed to acknowledge that the Appellant's legs from the knees down were obstructed from view during the majority of the third field sobriety test, the One Leg Stand, the State goes on to argue that while Appellant's entire body is not visible during these tests, a juror could "substantially view the conduct . . ." of Appellant. (R. Trial transcript at 9). The State suggested that any obstruction of the view of Appellant should go to the weight of the evidence and not its admissibility. *Id.*

The presence of direct evidence as required by the mandatory video recording statute is not an issue for the jury to weigh, nor a substantial compliance standard of admissibility. Substantial compliance is not the same thing as strict compliance. As this Court suggests in *State v. Taylor*, even a brief omission of the suspect from the video recording may violate the statute, if that omission occurs during any of those events that create direct evidence of a DUI or serve important rights of the defendant. *See State v. Taylor*, No. 20112-213018 (S.C. Ct. App. December 23, 2014). A sufficiency standard

would require the viewer to assume certain actions on the part of the test subject, and the officer, rather than meeting the requirement of direct evidence by showing these actions in their entirety. It is well established that strict compliance with the mandatory DUI video recording statute is required and that the only remedy for noncompliance is dismissal by the Court. *See City of Rock Hill v. Suchenski*, 374 S.C. 12, 16–17, 646 S.E.2d 879, 881 (S.C. 2007) (requiring dismissal when a field video fails to comport with Section A of S.C. Code Ann. § 56-5-2953).

For the video statute to require including “any field sobriety tests administered”, it would demand at the very least, that those body parts with which the suspect is performing sobriety tests are clearly visible. When the video recording shows the suspect doing those tests being obscured or missing from view, there becomes a lack of direct evidence, which defeats the purpose of the mandatory video recording requirement.

In this case, the deputy had complete control over operation of the camera and positioning of his patrol car to ensure the Appellant’s performance on field sobriety tests were fully captured as intended. Appellant’s feet, and legs from the knees down, are blocked and obscured during the majority of the officer’s encounter with the Appellant. During two of the three field sobriety tests offered by the arresting officer, those requiring the Appellant to use her feet and legs to accomplish the tests, they are not visible on the video recording. What is captured on the appellant’s field video does not strictly comply with the statute as the legislature intended. As such, as the Court has been clear, the dismissal of a DUI charge is the appropriate remedy when the actual field sobriety tests cannot be seen on the video recording. Appellant’s conviction for DUAC should be reversed, and her charge of DUI be dismissed.

II. THE CIRCUIT COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHERE THE STATE PROVIDED INVALID NOTICE BEFORE PROCEEDING UNDER DUAC.

Appellant's conviction for DUAC should be overturned, as there was invalid notice that the Solicitor would be trying the case as a DUAC instead of as a DUI. Pursuant to S.C. Code § 56-5-2933(J)(4), a person who is going to be tried "under the provisions of this section [must have notice] at least thirty calendar days before his trial date." The notice provided in the present case, however, was invalid and ineffective, as while timely notice was arguably given, such notice was ambiguous and contradicted by the actions of the State leading up to trial and seemingly treated as optional by the State. The actions of the State and how it purportedly intended to proceed with the trial of appellant's case were inconsistent with the notice provided.

The State essentially included a blanket notice on a pre-printed DUI plea offer form that it may intend to proceed as a DUAC, and then continued to treat the charge as originally made. Apparently, the State believed it had the option sometime prior to trial to decide to proceed as it said it might. Such notice is not notice at all, but a warning of what course it may decide to take. This is not what the DUAC notice statute requires.

A. The State's notice of DUAC was ineffective to Appellant as until the beginning of trial, the case was docketed, noticed, conferenced and announced as one to be tried as a DUI.

Appellant's notice of DUAC was ineffective because her case was consistently treated from the outset, and up until the start of the trial, as a DUI. From the time

Appellant was notified of her trial being scheduled, through pretrial negotiations and jury selection, the State continued to treat the charge as DUI. Despite the notice form provided to Appellant, defense counsel was led to believe the case would be tried as a DUI, as originally charged, up to and until the beginning of the actual trial of the case.

Well before the trial date, Appellant received the week's trial docket, referring to the case as a DUI, as it had on pre-trial conference dockets a year earlier. (R. ___ See Jury Trial Docket). Then as Appellant's trial date drew closer, during pre-trial conferences the week of trial, the State continued to treat the case as a DUI, extending again its earlier plea offer to a reduced charge of DUAC and a recommendation of time served. Additionally, through jury selection the next day, the State continued to treat the case as a DUI, as it was announced during the selection of the jury. Then, on the morning of trial, up through pre-trial motions, the State continued to treat the charge as a DUI, failing to note its decision to proceed under the DUAC alternative even after the Judge had addressed the jury twice referring to the charge as DUI. It was only after a pretrial evidentiary motion by the Defense had been heard and was denied, that the State announced to the Court that the case was going to proceed under DUAC. (See Transcript at 2-11).

The State must do more than indicate they "might" proceed under the alternative charge. The DUAC notice provisions require the State to affirmatively declare they intend to proceed under the alternative charge, and one would infer, to proceed accordingly. The State's treatment of the charge as DUI for months leading up to the very start of the trial was inconsistent with an intention to try the original DUI charge as a DUAC. When providing the statutorily required notice to proceed under DUAC, the

State cannot be allowed to say one thing, and do another. Nor is the State granted an “option” to decide after providing prior notice that it “might” choose to proceed under an alternative DUAC charge. Under the notice provisions of the DUAC statute, the State is not allowed to change its treatment of the case leading up to trial and choose at the last minute to notify the Court and the Appellant that it had decided to proceed with trial on the alternative DUAC charge.

The notice requirement is intended for a reason, as there are significant defense issues in defending a DUAC as opposed to a DUI charge. The preparation for a case tried as a DUAC is significantly different from that of DUI, which is why South Carolina law requires definitive, effective, notice to individuals at least thirty (30) days prior to trial, when the State decides to proceed under DUAC instead of an original charge of DUI. Clearly, following the plain language of the statute, and considering its 2009 amendment increasing such notice time from fourteen (14) days to thirty (30) days, lack of notice of the change of the charge to DUAC for trial is a significant prejudice to the DUI defendant. Otherwise, there would be no need for prior notice of the amended charge, or any reason for the Legislature to have amended the statute to provide even more pretrial notice to a defendant. Preparing for a trial of a DUAC charge often involves considering the use of expert witnesses, and obtaining additional, specific data and records concerning the breath test machine itself, as the accuracy of that instrument becomes the crux of the case, instead of the primary issue being whether the defendant appeared materially and appreciably impaired.

The Legislature intended to require clear, affirmative notice by the State when deciding to proceed under the DUAC provisions of Section 56-5-2933. A discretionary

option exercised on the part of the State to amend the charge to DUAC at the very last moment, was unfair, misleading and prejudicial to Appellant. This is precisely what the notice requirement is aimed at preventing.

Appellant's conviction for DUAC should be reversed and a new trial granted, due to the state failing to provide fair and effective notice that the case would be tried as a DUAC instead of a DUI. The State pointed to its plea offer notice form provided thirteen (13) months earlier, with the idea that the State could later, at its option, choose to amend the DUI charge, and proceed with the alternative DUAC charge, even up to the start of the DUI trial. State had not honored its earlier notice, as the case had been treated as a DUI the entire time. Up until the beginning of trial, the case had been scheduled as and referred to as a DUI, and had been treated as such at every stage leading up to the beginning of trial. The State's exercising a last minute option to change the trial charge to DUAC is in direct violation of the DUAC notice statute, which requires an affirmative choice at least 30 days prior to trial, in order to proceed alternatively under a charge of DUAC.

B. The form that supposedly provided notice to Appellant was ambiguous as it did not designate if the terms would continue if Appellant did not accept the offer included on its face.

Additionally, the content of the State's notice form was ambiguous, as it was contradictory on its face. At the top of the pre-printed form the State designates that the Appellant is currently charged with DUI, and includes an offer to plead to the alternative charge of DUAC with a recommendation of leniency, and includes an expiration date for the plea offer. The language at the top portion of the notice warns the defendant, in bold and underlined text, that if the plea offer noted on the document is not accepted before

the listed expiration date, that the Defendant “will be tried as charged, and NO recommendation will be made.” (R. ___ Notice to Defendant).

However, below, at the bottom of the form, language is included indicating that the State intends to try the case as a violation of DUAC, and that the charge will appear on an upcoming trial docket. *Id.* The ambiguity and contradictory nature of the two statements do not provide clear and effective notice required to allow the State to proceed alternatively under DUAC, particularly when the State is showing all signs of proceeding on the original DUI charge.

Apparently, the State believed that it could provide a sort of conditional notice of its intention to proceed later on an alternative DUAC charge, and decide along the way whether to do so or not, even up to the start of trial. This violates the intention of the notice requirement and should be found invalid. The form that the State alleges provided notice to Appellant was ambiguous; therefore, its notice was ineffective under S.C. Code § 56-5-2933(J)(4).

Notifying the Appellant that the trial would be “tried as charged,” and then in the same pre-printed form indicate that the State intends to proceed on a separate DUAC charge, cannot be read together as giving notice of intent to prosecute under the DUAC provisions of Section 56-5-2933(J)(4). A basic maxim of contract law is that all ambiguities are construed against the drafter. The solicitor’s office drafted the plea offer notice; therefore, the ambiguity created in that notice, and furthered by the continued treatment of the charge as a DUI by the State leading up to trial, must be construed against the State and a new trial ordered for the Appellant.

C. Appellant was never officially charged with DUAC, therefore any notice given was not effective under the statute.

South Carolina Code § 56-5-2933(J)(4) provides that “A person **charged** with a violation of **this section** (DUAC) must be given notice . . . at least thirty calendar days before his trial date.” Appellant was not charged under any charging document or ticket with DUAC prior to commencing trial under this section. Appellant, on the only ticket she received, was originally charged with Driving Under the Influence, a violation of S.C. Code § 56-5-2930. Pursuant to the statute, Appellant is entitled to proper notice of what she is being tried for, however she was never re-charged under “this section” as required by the DUAC statute, as all charging documents provided to her indicated that she was charged with DUI, not DUAC. The State allowed Appellant’s trial to start as a DUI, and proceeded through pre-trial motions without notifying the Appellant or the Court about the option it would exercise in announcing it would proceed under the DUAC section. The State’s failure to re-charge Appellant with a new ticket for DUAC, prior to proceeding on the alternative charge, is fatal to the notice requirements of the DUAC statute and the arrest warrant requirements under South Carolina law.

CONCLUSION

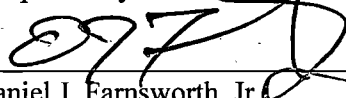
Appellant’s conviction for DUAC should be reversed, and the underlying DUI charge dismissed, as the field video did not comply with S.C. Code § 56-5-2953. The law in South Carolina is clear that DUI field videos must strictly comply with the statute and show any field sobriety tests being administered. Consequently, the deficiency in the

video presented in Appellant's case requires that her conviction be overturned and her underlying DUI charge be dismissed.

Further, and in the alternative, the notice provided to Appellant regarding the State's decision to try Appellant's case as a DUAC, instead of DUI, was ineffective. The Appellant was prejudiced by the ambiguous nature of the State's notice concerning DUAC, along with the State's contradictory treatment of the docketed case leading up to the beginning of Appellant's trial, and the failure to provide proper notice to Appellant of what she was being tried for by formally re-charging Appellant with a ticket for DUAC before proceeding to trial. The remedy for such ineffective notice is a reversal of the DUAC conviction and the granting of a new trial

WHEREFORE, for the reasons set out above Appellant respectfully requests that her conviction for DUAC be overturned and the case dismissed, or if the Court finds the field video to comply with the mandatory recording statute, in the alternative, grant Appellant a new trial.

Respectfully submitted,



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PROOF OF SERVICE

I, Brad Tollison, certify that I served the within Amended Initial Brief and Amended Designation of Matter to be included on the Record on Appeal on the Respondent and one (1) copy of same via United States Postal Service delivery to the following addresses:

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Re: The State v. Maria Moyao
Appellate Case Number: 2014-002317
Amended Designation of Matter
Amended Initial Brief

To The Honorable Jenny A. Kitchings,

Please find enclosed our Amended Designation of Matter and Amended Initial Brief for the above referenced matter.

Thank you.

With kind regards, I remain,

Sincerely,

Brad Tollison

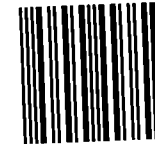
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Enclosures

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