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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

SC Court of Appeals

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-002704

The State, Respondent,

v.

Michael Wayne Sherrill, Appellant.

RECORD ON APPEAL

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OF COURT)

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER 2014 NOV 24 AM 10:31)
State of South Carolina,)
Plaintiff,)
Vs.)
Michael Wayne Sherill, Jr.,)
Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

ORDER DENYING APPEAL

This matter came before the Court on November 10, 2014, on the Defendant's appeal from Lancaster County Magistrates Court. By its appeal, the Defendant appealed his conviction of driving under the influence, after the ruling of Magistrate Court, denying Appellant's motion for Arrest of Judgment or New Trial dated June 8, 2012. Parties stipulated that the sole issue before the court was whether the prosecuting agency's failure to comply with mandatory video requirements of SC Code Ann. §56-5-2953, as amended, at the incident site in regards to the Walk and Turn test performed by the Defendant. Present at the appeal hearing were Assistant Solicitor Luke I. Knight and Francis L. Bell, Jr. representing the Defendant.

By agreement of the parties, the relevant portion of the video that was produced at trial depicts 3 field sobriety tests offered to the Defendant at the time of his arrest. The Court reviewed this portion of the video that was introduced by the state during the Defendant's Trial, and the Court heard from each party as to the matter raised by the Defendant's appeal, and for the reasons set forth below in this Order, the ruling of the Magistrate Court is affirmed.

Findings of Fact

The facts of this case are agreed upon by the parties, and are set forth below.

The Defendant was stopped for a traffic violation on November 20, 2011, by Trooper Albert Walters of the South Carolina Highway Patrol. Pursuant to his investigation, Trooper Walters requested that the Defendant perform three field sobriety

tests- the Horizontal Gaze Nystagmus, the Walk and Turn, and the One Leg Stand. Trooper Walters conducted the tests on the side of the road in front of his patrol vehicle.

During the beginning of the administration of the Walk and Turn Test, both Trooper Walters and the Defendant were positioned in front of Trooper Walter's patrol vehicle in view of the camera. During the first part of the test, Trooper Walters instructs the Defendant to take nine steps in a straight line towards his patrol vehicle, and then to turn around and take nine steps away from his patrol vehicle. As the Defendant takes nine steps towards the patrol vehicle he is completely visible for steps 1 through 5. On the sixth through the ninth step the Defendant's feet are obstructed from the camera by the hood of the patrol vehicle. As the Defendant turns around and takes nine steps away from the patrol vehicle, the turn, and steps 1 through 5, of the Defendant's feet are obstructed from the camera, again by the hood of Walters' patrol vehicle. During the entire test Defendant was on camera from his knees up.

The Magistrate concluded that Defendant's conduct during the Walk and Turn Test was sufficient.

CONCLUSIONS OF LAW

This Court has personal jurisdiction and subject matter jurisdiction of the matter before it; and that venue is proper in Lancaster County, South Carolina.

Pursuant to the provisions of S.C. Code Ann. Section 56-5-2953(A), as amended, a person charged with Driving Under the Influence must have their conduct video recorded at the incident site as follows:

(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 breath test site video recorded.

(1)(a) The video recording at the incident site must:

- (i) not being later than the activation of the officer's blue lights;
- (ii) include any field sobriety test administered; and

- (ii) include the arrest of a person for a violation of Section 56-5-2930 or 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.

At issue in this case is whether the State has complied with the provisions of Section 56-5-2953(A)(1)(a)(ii), which states that " The video recording at the incident site must include any field sobriety test administered".

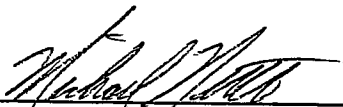
APPLICATION OF LAW

In the present case, the Court finds that the State did comply with the requirements of Section 56-5-2953 as outlined above. Specifically, the video recording produced did sufficiently capture the Defendant's walk and turn test.

The Defense had argued that the recordings are not sufficient, in that several steps on the Walk and Turn test are obstructed. This Court finds that the mandates of Section 56-5-2953 are met under the circumstances of this case.

NOW THEREFORE,

AND IT IS SO ORDERED.



Resident or Presiding Judge
Sixth Judicial Circuit

Lancaster, South Carolina

11-20, 2014


CERTIFICATE OF MAILING

2012-CP-29-865

The undersigned hereby certifies that he is the attorney for the Plaintiff in the within matter, and that the within **Order** was served upon the attorney for the Defendant by depositing a copy of same in the United States Mail, with sufficient postage annexed thereto, addressed as follows:

Francis L. Bell, Jr.
Francis Bell Law Firm, LLC
P.O. Box 867
Lancaster, SC 29721

This 24th day of November, 2014.



Luke Knight
Assistant Solicitor



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LANCASTER, SC

STATE OF SOUTH CAROLINA,)

IN THE CENTRAL MAGISTRATE COURT

COUNTY OF LANCASTER)

STATE OF SOUTH CAROLINA)

DENIAL OF MOTION FOR ARREST OF

VS.)

JUDGEMENT OR NEW TRIAL

MICHAEL WAYNE SHERRILL, JR.)

DUI – Ticket Number: F258842

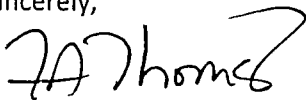
DEFENDANT)

To Francis L. Bell, Jr., Esquire and attorney for defendant Michael Wayne Sherrill and to Spiro Poulos, Assistant Solicitor, Sixth Judicial Circuit.

YOU WILL PLEASE TAKE NOTICE that the undersigned, having given thoughtful consideration to the Motion for Arrest of Judgment or A New Trial, after a finding of Guilty of the offense of DUI 1st, now in writing, Denies the Motion, on the following grounds for an Arrest of Judgment or a New Trial:

1. The defendant’s retinae were indeed not visible during the HGN standardized field sobriety test; but NEVER are.
2. The defendant’s conduct during the walk and turn portion of the test was sufficient.
3. The defendant’s wife’s conduct occurred. She simply tried to help her husband. The jury was allowed to see that which occurred.
4. Again, the defendant’s wife’s conduct occurred. She simply tried to help her husband. The jury was allowed to see that which occurred.

Sincerely,



The Honorable Fredrick A. Thomas

Lancaster County Magistrate

June 8, 2012

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STATE OF SOUTH CAROLINA

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STATE OF SOUTH CAROLINA,

Plaintiff,

Case No.

-against-

2012CP2900865

MICHAEL WAYNE SHERRILL,

Defendant.

-----x

November 10 , 2014

Lancaster, S.C.

B E F O R E :

HONORABLE MICHAEL NETTLES, Judge.

A P P E A R A N C E S :

WILLIAM NIGHT, Esquire

Attorney for the Respondent

FRANCIS BELL, Esquire

Attorney for the Appellant

Aileen Butler

Official Court Reporter

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
Court's 1	CD		22

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THE COURT: The next case is State of South Carolina versus Michael Wayne Sherrill.

MR. BELL: Your Honor, for the record Francis Bell for the appellant.

MR. NIGHT: William Night for the State, Your Honor.

THE COURT: All right. Mr. Bell, be glad to hear from you.

MR. BELL: As usual, Your Honor, I don't have a real good return in this case in that you will notice this is a rather old case and it is partly my fault because it didn't get caught up because I didn't yell at the Clerk of Court. But we had a trial back in 12 and I did a motion for reconsideration.

THE COURT: Back in 12?

MR. BELL: Sorry, yes, in 12. We had the trial in 12.

THE COURT: 2012?

MR. BELL: 2012, I'm sorry Your Honor and I filed a motion to give me extra 25 days and Magistrate ruled against me in June of 2012 and that's when I then filed my Notice of Appeal which is identical to what I asked the judge to reconsider.

The Magistrate -- and I'm pretty sure it's in the

1 file -- in August of this year filed something that
 2 really wasn't in response to my motion because he
 3 filed a different Order denying my motion, and he
 4 filed that in August of this year which Solicitor
 5 Night and I have agreed is good enough for us to use
 6 as a return, but the only thing we are lacking and the
 7 solicitor is going to consent to this, as far as I
 8 know -- the only thing we are lacking is that he
 9 didn't filed the road tape with you or the incident
 10 site tape with the Court. He didn't even have one.
 11 He came to my office. We produced a copy. I've got
 12 extra copies. I even got the Magistrate's original
 13 file up here now that I went and got and has shown to
 14 Mr. Night that the tape -- excuse me -- the road disc
 15 wasn't introduced as part of the trial. So I don't
 16 think the State is going to disagree with me at this
 17 point making this part of the record for you to
 18 consider today which is the road tape itself.

19 THE COURT: Explain to me he again why this matter
 20 it is just appearing before me at this late date
 21 again.

22 MR. BELL: Your Honor, I can not answer why it
 23 didn't come up. I can only say that I didn't do
 24 anything to push it. That's the only answer I can
 25 give.

1 THE COURT: All right.

2 MR. BELL: I didn't do anything to not have it come
3 up, it just didn't come up.

4 THE COURT: How about -- I assume this is a DUI
5 prosecution, is that correct?

6 MR. BELL: That's correct, Your Honor.

7 THE COURT: And I assume that his license had been
8 suspended and probably gotten back -- has already
9 received all that of that back.

10 MR. BELL: That's exactly right, Your Honor,
11 therefore -- I was going to get to that. But I will
12 be glad to resolve -- I will tell you that after
13 discussing with my client the only two issues I would
14 bring up would be my first appeal and second appeal by
15 paragraph which is HGN problem and the walk-and-turn
16 problem. Number three and number four, about other
17 evidence that they let in that should not have been in
18 would only give me a new trial, which I don't want. I
19 don't need a new trial because I may lose again.
20 Number one and number two, and particularly number
21 two, which is the walk-and-turn matter on the road
22 video if His Honor agrees that it should not come in
23 to evidence therefore that brings up it should have
24 been suppressed and that then brings up the dismissal
25 of the charge according to Suchenski out of Rock Hill.

1 And this is an old '11 case, 2011 case which means
2 it's coming under the 2009 law. There are two cases I
3 am prepared to hand up. Again, I don't know how many
4 trials you actually had in DUI Court. We don't do a
5 lot up here other than Magistrate Court.

6 THE COURT: Right. They don't try very many of
7 them in General Sections and I've actually only tried
8 one in the ten years I have been here and I tried
9 probably more than one thousand as a lawyer, so I am
10 familiar with it.

11 MR. BELL: Yes, sir. Well, and I understand the
12 2009 law, Your Honor, changed radically, 56-5-2953 the
13 first paragraph is the same. It says that the video
14 tape must capture the conduct of the defendant. The
15 main thing that changed that was down in the body it
16 said including field sobriety tests and that was the
17 big difference and that changed law as it preexisted
18 before 2009. That brought about the Murphy case which
19 I am prepared to hand up which was decided on the old
20 law that said you did not have to capture everything
21 on the video tape.

22 THE COURT: Did that evolve out of an issue of
23 them not being able to see his foot?

24 MR. BELL: Yes. That's correct, yes. And the
25 Court of Appeals issued that opinion saying that was

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good enough under old law, but they put in footnote number four that the new law changed all that, but it didn't change their decision. So we lawyers have been using that to show that there is a difference.

Then in April of this year -- excuse me -- in June of this year a brand new case came out called the State versus Gordon, which I am prepared to hand up to His Honor since you haven't had time to read all this. It clearly sets out on the new law, that the statute means what it means. Meaning, you got to capture its conduct and as that comes to field sobriety tests that's everything that is shown that had been done and it has got to all be captured.

We are fighting -- and I am not going to put his Honor in a position to having to decide -- nobody can see anybody eyes anywhere in this state, and I'm fighting that every time I go to court that that's not proper not to capture his eyes. This case came close, but it remanded back because of some question about whether or not there was enough in the record as to whether or not he actually saw the defendant's head or not. But in my case, that I am arguing with you, the second field sobriety test was the walk-and-turn.

The walk-and-turn requires standing there, listening to the cop tell you go out nine, turn around

1 and come back and that was on the tape. The cop gave
2 him instructions. Well, he started out but the
3 trouble is he is walking towards the car and the
4 problem is the closer he gets to the hood it cuts him
5 off for about six, seven, eight, nine, you can't see
6 the turn and therefore you can't see the other steps
7 going back until he is far enough away. So I have
8 been raising that and raising it in 2012 and it's
9 clearly on the tape.

10 I don't think the State is going to disagree that
11 you can't see the whole 18 steps. I don't think they
12 are going to disagree with what the evidence is. And
13 the Magistrate just back then we didn't have any of
14 these cases yet because I can assure you that they are
15 ruling accordingly now. But back then he simply said
16 if you read his little return, that you can't see the
17 retina. That is true, but I'm going to kind of
18 abandon that, Your Honor. I will let it fall on the
19 second field sobriety test.

20 You will notice that he said as a finding of fact
21 that what he saw was sufficient, but therefore as a
22 matter of law I think you would be able to overturn if
23 you agree that that's not the complete walk-and-turn
24 that you will see on that tape -- the disc I
25 introduced -- then he made an error as matter of law

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and therefore that gives you the right to --

THE COURT: Essentially what you are saying and you are maintaining that case says it too, if they can't see ever specific detail of the field sobriety tests then it has to be dismissed.

MR. BELL: Yes, sir. Yes, sir.

In a lot of ways technically what I do Your Honor, I make a motion to dismiss the evidence or suppress the evidence and let the Magistrate make that decision and if he suppresses it then that brings up Suchenski which would be the dismissal. So I do make a double-type motion.

THE COURT: But apparently you are saying that the solicitor, who is here today, agrees that you can't see all of it. Is that correct?

MR. NIGHT: That is correct on the field sobriety test I was able to watch the walk-and-turn portion of the video and as the defendant was walking towards the car there are a few steps that are off camera that cut off.

THE COURT: So we can stipulate to that. Either of you see the necessity of my reviewing the film to make take finding or can you all stipulate to it,

MR. BELL: We can stipulate to that, Your Honor. I still want to get it in evidence because again I

1 have no idea no idea what you are going to rule --

2 THE COURT: Right.

3 MR. BELL: And therefore we kind of need it in
4 evidence.

5 THE COURT: If we can stipulate to that and make
6 the entire video part of the record.

7 MR. NIGHT: The State consents to stipulate to
8 that.

9 THE COURT: Okay. All right. Now, what do you
10 think -- I will read this case, but what do you think
11 the law says with regard to whether or not some of it
12 being cut off amounts to a dismissal.

13 MR. NIGHT: Well, I think the courts in the last
14 few years with Murphy, Suchenski, and the newest case,
15 Gordon, basically state that the video according to
16 the statute must capture the conduct and the field
17 sobriety tests.

18 I think Gordon kind of stops going as far as saying
19 -- and Gordon is a 2014 case -- it doesn't get into
20 the specifics of how you need to have to see the eyes
21 or, you know, the details in which you need to see on
22 the video, but it does say that you have to capture
23 the conduct and you have to capture the field sobriety
24 test.

25 THE COURT: Now, is the fact that you only miss

1 three steps is the conduct -- you know, if you walk
2 down the line, then you turn around and then when they
3 get too close to the car the camera cuts it off, do
4 you think that's sufficient to comply with the statute
5 that says that you have to record the conduct?

6 MR. NIGHT: I would argue that it would be
7 sufficient to capture the conduct and the field
8 sobriety test. About ninety percent of that test is
9 on camera. It is just a couple of steps. You can see
10 the defendant during the test, you just can't see the
11 feet at the bottom where the hood kind of cuts the
12 view off. So I would argue that the conduct and the
13 field sobriety test are both captured in the video
14 that we stipulated too.

15 THE COURT: What do you have to say about that?

16 MR. BELL: Well, Your Honor, we have stipulated
17 that you do not see the complete field sobriety test
18 on the walk-and-turn. The tape shows that and I keep
19 using the word tape -- and I keep using the word
20 "tape" Your Honor. I'm old. I still think of VHS.
21 The disc shows that.

22 THE COURT: All right.

23 MR. BELL: Now, we don't worry about percentage or
24 anything. As far as the evidence in this case the
25 officer gives the instructions of what he wants you to

1 do on field sobriety test on each three of them, but
2 I'm only down to one. And based on the evidence the
3 instructions are that you are to stand left foot,
4 right foot, and I have to hold on, Your Honor, because
5 you don't give this to anybody over 65 and I am little
6 bit older than that. And you listen to the
7 instructions and the instruction then you are to start
8 over with the left foot, heel-to-toe, go out nine and
9 then when you come to the nine, this foot is leading
10 and you go one, two, three, and then you go nine back.
11 What is not captured is more than just three steps,
12 Your Honor. It is cutting out about step number six,
13 seven, eight, nine and then one, two, three going back
14 and the turn so it's cutting out if you want to do
15 percentages almost half the test.

16 THE COURT: I imagine you talked to the jury about
17 that too, didn't you?

18 MR. BELL: Yes, sir, I did. Well -- yes, but I
19 had other problems with the case more than the field
20 sobriety test problem.

21 THE COURT: Right.

22 MR. BELL: The defendant -- I'm sorry. The law
23 then -- of course my case was in 2012. This case came
24 out in 2011, but the Murphy case which I did use in
25 Court, but it only talks about the footnote four,

1 which kind of put everybody on notice that the Court
2 of Appeals at least acknowledged that the '09 law
3 changed what is required to be considered conduct.
4 And if you give somebody the field sobriety test on
5 the road then that conduct must be captured.
6 Therefore the Court's position is all of it. There is
7 no other way around it, because that's where the
8 Gordon case comes in. Like I said this came out in
9 June of this year in that case and it was in front of
10 June Gibbons and it was in Oconee County, but in that
11 case -- and I have not seen the video, so I can't tell
12 you exactly about the facts. But in that case there
13 was some question about whether or not you could
14 actually see the guy's head or had something to do
15 with illumination or something like that. And Judge
16 Gibbons said that at least as part of the HGN test --
17 because no judge has yet to get on to the eye part --
18 but at least as part of the HGN test you got to see
19 his head, and evidently he formed an opinion that you
20 couldn't see the head. Now some technical questions
21 came up in here about the judge may be coming up with
22 some facts that was not really discussed by the
23 Magistrate and that's why I am avoiding all that
24 stuff, but that's why my Notice of Appeal says what it
25 says, and also what we are using as a return which was

1 filed in August of this year.

2 Number two, the defendant's conduct during the
3 walk-and-turn portion of the test was sufficient so
4 that shows it was in evidence and it shows that he
5 made a finding of fact that was sufficient. So as a
6 matter of law I am asking you to make a finding that
7 it wasn't sufficient because of what is required. So
8 again, in Gordon it talks about the statute and it
9 says that the best language is on the next to the last
10 page because of the purpose of the videotaping to
11 create direct evidence of the arrest, if the actual
12 test can not be seen on the recording the requirement
13 is pointless and that's the point I'm making, Your
14 Honor.

15 THE COURT: Well, that might be a little bit
16 different then the previous example you gave because
17 you couldn't even see the man's head because it was so
18 dark. But in this instance you have three quarters of
19 the heel-to-toe where you could watch.

20 MR. BELL: Well, part of it, yes. That's correct.

21 THE COURT: There might be an argument that what
22 was cut out was inculpatory. The chances are the turn
23 would have been the most difficult.

24 MR. BELL: Well, it probably would, Your Honor, but
25 see it's not a matter of having to weigh the evidence.

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It's a matter of the evidence having to be presented.

THE COURT: Right.

MR. BELL: And the evidence wasn't presented because of the technical problem that he wasn't far enough away from the car.

THE COURT: Right.

MR. BELL: And that requirement is on the State to do. You know, they don't have to give field sobriety test. There is no law saying they got to give them and unfortunately they do and they use the three tests that was developed by NHTSA that they called the standardized field sobriety test. Well, once the State on the road, the trooper or whichever the officer is, makes the decision to give that field sobriety test then he has got to capture again, all of it.

I can hand up -- these are not precedential, but I can hand up copies of orders from other circuits, like Judge and so forth that have seen this many times and of course they have ruled not yet on the eye thing. That's why I am kind of avoiding that. I am letting my case rise and fall on that one issue about the feet; about the walk-and-turn, but I can hand some Orders up, a couple of Orders up from Judge Hayes that have this issue, and he has ruled you got to have the

1 whole test. I mean, you got to see everything. So
2 that's the point I'm trying to make, Your Honor, is
3 what is the law of this State. They said according to
4 the circuit court found the head must be shown when
5 they issue the test and also the sobriety test be
6 recorded and we affirm that finding. However, the
7 Magistrate Court found the recording only needs to
8 capture the conduct. It did not make any finding that
9 it had to record the entire test including the head
10 was on the camera and that's why they remanded it
11 back.

12 My return shows that the entire test was not there.
13 What the Magistrate saw he said was sufficient and
14 that's why the video is important and made a record of
15 the case, but the State has agreed by stipulation that
16 what the Magistrate saw, what you would see if you had
17 to review that thing, what the jurors saw -- but it
18 doesn't matter, it's a matter of law -- wasn't the
19 whole field sobriety test. So, you know, I think the
20 whole field sobriety test has got to be shown and has
21 got to be captured. That's is his conduct, the
22 complete test. There's no such thing as a half a
23 test. You either do it all or you don't do it.

24 THE COURT: Yes, sir. Be glad to hear from you.

25 MR. NIGHT: Yes, sir. The State's position in

1 this case the video shows what it shows. The
2 defendant in this case did walk a few steps off during
3 the field sobriety test. The walk-and-turn portion we
4 would argue that that was sufficient to capture his
5 conduct and the field sobriety test. It wasn't -- you
6 can't see his feet for a few seconds in the video, but
7 we would as matter of public policy and as a matter --
8 based on case law really that it did capture the field
9 sobriety test, the walk-and-turn portion sufficiently
10 to meet the requirements under statute, under case law
11 to capture the defendant's conduct.

12 THE COURT: What you are saying is that it was
13 indeed recorded. It was videotaped that was preserved
14 and given to the defendant and was shown to the jury
15 and that it's distinguished from the case where if you
16 have a gaze nystagmus test you need to be able to see
17 the jerking of the eyes in the gaze nystagmus test.
18 But in that case it was clear from looking at it that
19 the video was not sufficient because it was not
20 illuminated enough; is that correct?

21 MR. NIGHT: Yes, Your Honor. I think that this
22 case is a little bit different because you can see
23 most of the walk-and-turn test. You can see him
24 walking. You could see the defendant's body on the
25 camera, you just can't see every step because of the

1 hood of the car. I think too as a matter of public
2 policy there is a lot of situations including this
3 situation where the trooper is on the side of the road
4 and the way the car's camera work it could be next to
5 impossible to capture every single step, especially if
6 they are pulled over in certain areas on the road or
7 certain situations and I think this situation -- I
8 know the law states that the conduct, field sobriety
9 test must be captured, but I think it is in this case
10 it was sufficiently captured because it did show him,
11 you know, three forth's.

12 THE COURT: How do you think the change of the
13 statutory law might effect that in that it is a
14 little bit different ball game when it says you have
15 to capture the conduct.

16 MR. NIGHT: Right. Yes, Your Honor. The old law
17 prior to 2009 stated that the conduct must be
18 captured. It was amended in 2009 to basically state
19 the conduct in the field sobriety test were to be
20 captured. I think that was probably in response to
21 letting the jury or the judge see the full range of
22 the test and to adequately insure that the highway
23 patrolman would also perform the test the right way
24 and that basically to show all the evidence that the
25 State had of the accused to present at trial. I think

1 that is probably why it was changed to have the
2 conduct recorded as well as the entire field sobriety
3 test.

4 As far as the State is concerned we would say yes,
5 you can't see his feet for a couple of seconds in the
6 video but, under the statute, the case law, we think
7 that would sufficiently show the defendant's conduct
8 and show the field sobriety test being administered.

9 MR. BELL: Well, the old law read as follows, Your
10 Honor, videotaping at the incident site must begin not
11 later than activation of the light and it said
12 including the person being advised of Miranda rights
13 and they took that out. Before any field sobriety
14 tests are administer. If the tests are administered.
15 That was the old law.

16 Murphy said, that law to interpret the conduct to
17 the purpose of the general assembly was that you had
18 to show something, but it wasn't strike with the way
19 they read it was written. The new law that came in
20 effect in '09 -- of course this isn't part of the
21 record I was there in '07 and '08 and participated in
22 it. Not as a legislator, but participated in it. The
23 main thing they wanted to do is get rid of Miranda.
24 It use to be that you had to give Miranda at the
25 incident site before you could do anything. So that

1 was given up. But re-worded the statute, part A of
2 the statute is read the same old law/new law. The new
3 law said the video reporting at the incident site must
4 include any field sobriety test administered. That's
5 what brought about the Murphy case.

6 The facts on the Murphy was old law and they said
7 under old law the videotape in that case was
8 sufficient, but under new law they went out of their
9 way to give footnote four concerning what they viewed
10 under old law and they didn't say that this wouldn't
11 pass muster under new law, Your Honor. They didn't
12 say that, but that's where footnote four came about
13 which read -- which read - "as amended in '09 -- and I
14 will paraphrase -- as amended in '09 the current
15 version of 2953 expressly requires the recording of
16 field sobriety test and I agree. It expressly
17 requires the recording of field sobriety test. Not
18 part of the field sobriety tests. See code as amended
19 blah, blah blah. We note the legislature's amendment
20 of the plain language of the statute to require the
21 recording of field sobriety tests further bolsters our
22 position that the plain language of the prior version,
23 in effect at the time of this action, did not require
24 recording of all tests. That's what Murphy was about.

25 There has been a lot of Circuit Court cases. I can

1 I hand up some of those. They are not binding on the
2 Court. I understand that, but the 16th is very active
3 over -- when Gordon came out and again, Your Honor, I
4 don't mean to belittle the point but, either you
5 capture the field sobriety tests in its entirety or
6 you don't. It's just that simple. I think what the
7 law requires.

8 Now, why it happened or why it didn't happen, you
9 know, that Your Honor, the State loves to talk about
10 the statute the General Assembly passed. It took
11 Suchenski to come out to say ain't no prejudice
12 involved. If you don't do it you lose the case.
13 Period.

14 Now, there are exceptions that the statute allows
15 and if you can't do something all you do is fill out
16 an affidavit and file it with the Court and hope the
17 Court says that affidavit excuses what you didn't do.
18 But we don't have that in this case. They relied
19 purely on what they have, and again, it's agreed as to
20 the walk-and-turn that -- His Honor would actually
21 have to look at the tape. I can't give you a
22 percentage. It's around fifty/fifty.

23 THE COURT: I believe I am going to look at it.

24 MR. BELL: Yes, sir. It's around fifty/fifty of
25 what they can't see and I don't remember the exact

1 count as to where the camera quits recording his feet,
2 but if you watch the tape, a Trooper Walters explains
3 what the test consist of the and then the test
4 consists of; this, this, (demonstrating) and then go
5 out nine times heel-to-toe. Don't do this stuff and
6 turn around and come back and it doesn't matter --

7 THE COURT: Well, lets look at the video. All
8 right.

9 MR. BELL: I don't know if we can play it up here
10 because the system is down, but I brought my computer.

11 THE COURT: All right, if you'll fire it up I will
12 look at it.

13 MR. BELL: Your Honor, this is my son, Wes Bell,
14 who just got admitted in May of this year

15 THE COURT: You getting any work out of him?

16 MR. BELL: Yes, in things like this. Especially in
17 the electronics.

18 THE COURT: I want it to be a part of the record.

19 (Court Exhibit 1, CD, marked as an exhibit as of
20 this date.)

21 THE COURT: Really the part I want to watch is the
22 field sobriety test. I don't need to watch the
23 trooper drive to the jailhouse.

24 (Whereupon, the video was played)

25 THE COURT: All right. Anything further from

1 anybody?

2 MR. BELL: Well, if His Honor would like to review
3 Murphy and Gordon I was going to hand them up.

4 THE COURT: I'm familiar with them. I've read
5 them before

6 MR. BELL: And again, these are two circuit
7 orders. They're both out of the 16th Circuit. One by
8 Judge Hayes and one by Judge Kelly. If Your Honor
9 would to see them. I understand they are not
10 precedent.

11 It's undisputed it didn't capture all his conduct
12 and it is what the law requires Your Honor.

13 THE COURT: All right. Well, I think we all agree
14 that really, the only issue on appeal is whether or
15 not they capture the heel-to-toe walk and the
16 turnaround. There is no question that they did not
17 and this is a very well defined point of law as
18 whether or not they have to capture each and every
19 instance, each and every action on the video.

20 I specifically find -- I am going to ask counsel
21 for the State to prepare an Order and I want to say
22 number one, the field sobriety test was thin. It is
23 not as though they didn't are alleging that the video
24 camera was defective or they didn't have one in the
25 car. The parole officer did indeed do that and I

1 think when you look at the video as a whole you can
2 see his behavior. Actually the heel-to-toe test which
3 is what we are talking about here today, you can
4 indeed gather a lot of information from that. First
5 of all when he was walking he fell off the line
6 several times and I think that the fact that you
7 couldn't see him turning around would problem be
8 exculpatory, but the overall fact is that it did
9 indeed record his behavior. And I am going to
10 specifically rule that as matter of law that the video
11 doesn't have to capture each and every aspect of it.
12 I think that it varies from case to case. If it's so
13 dark that you can't see anything, that the video is
14 too dark that you can't discern anything then I think
15 that would be a different case all together. In this
16 case you can hear what was being said and you can see
17 his behavior. One of the things that I think was
18 exculpatory was when he was doing the gaze nystagmus
19 test. Quite often people who are under the influence
20 kind of sway like a pine tree in the wind. But he was
21 straight as six o'clock. It was only when he got on
22 the line and started to do the heel-to-toe that it was
23 clear he had some difficulties with that. And then
24 when you -- I think that when you look at the test in
25 its entirety it did exactly what the statute required

1 that you do, is to look at his behavior. When he
2 asked him to do the one leg stand he did fairly well
3 for a period of time and then it looked like he was
4 hopping around like a jumping jacks for a while. It
5 was really kind of comical actually, but clearly he
6 had some difficulty with that.

7 On the other hand in fairness to him I don't think
8 he ever put his foot down but he was hoping a good
9 bit. But all those things -- I think the purpose of
10 the statute is that number one you can't elect not to
11 do it, and number two, you have to be able to capture
12 his behavior.

13 I'm finding as a matter of law that this particular
14 video did indeed capture his behavior. I don't think
15 if I had been able to see his feet in that very
16 limited portion of it would have added anything to it
17 or taken away from it. And I think the fact that the
18 that portion was not many able to be seen does not
19 take away from the fact that you can still see whether
20 or not he is swaying, whether or not he is walking.
21 You can't not see his feet, but really the essence is
22 his balance. In the heel-to-toe test has to do with
23 whether or not he is able to stay on the line;
24 heel-to-toe and whether or not able they are maintain
25 his balance.

1 It is clear from looking at the test as a whole he
2 had some difficulty with that. He didn't get it all
3 wrong and he didn't fall down, but I think that the
4 fact that those portions were not able to be seen
5 really goes more to the weight as opposed to the
6 admissibility. I think it is admissible. And I think
7 -- and I'm ruling that as matter of law that it was
8 sufficient to capture his conduct. And I might be
9 wrong and it very well might be that when you all get
10 on the road to Columbia they might have a different
11 idea. The record on appeal we have agreed that is the
12 issue, is whether or not they missed that certain
13 portion of the heel-to-toe test dictates a dismissal
14 of the case, and I don't thing it does. I might be
15 wrong, and I have been corrected before and I will
16 invite defense counsel to do that and we will see.
17 Get a definition on the law. There seems to be some
18 confusion in that regard, but I'm just saying what I
19 think the law should be, but that certainly I'm not
20 the ultimate authority in that regard.

21 I am going to ask that you prepare the Order.

22 MR. NIGHT: Yes, Your Honor.

23 THE COURT: And provide a copy of that to him and
24 if he has any issue I will ask that you all resolve
25 it. If you all can't resolve it then I will resolve

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those conflicts for you. All right, thank you all.

MR. BELL: Thank you, Your Honor.

Mr. Night: Thank you, Your Honor.

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for Lancaster County, South Carolina, on the 10th day of November, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 25, 2014

Aileen Butler

STATE OF SOUTH CAROLINA,)
)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS

State of South Carolina,)
)
PLAINTIFF,)
)
VS.)
)
Michael Wayne Sherrill, Jr.,)
)
DEFENDANT.)

NOTICE OF APPEAL
2012-CP-29- 865

FILED
OFFICE OF CLERK
OF COURT
2012 JUN 26 AM 11:52
CLERK OF COURT
LANCASTER, SC

TO: The Honorable Fredrick A. Thomas, Magistrate Lancaster County, South Carolina and Spiro Poulos, Assistant Solicitor.

YOU WILL PLEASE TAKE NOTICE that the undersigned as attorney for the above named Defendant does hereby appeal to the Court of Common Pleas for Lancaster County from a Guilty verdict on a charge of DUI 1st occurring on Wednesday, April 11, 2012 and subsequent denial of written Motion for Arrest of Judgement or New Trial dated June 8, 2012, on the following grounds to wit:

1. That His Honor erred not granting during the trial, Defense Motion to Suppress and Dismiss the charge when the evidence on the roadside video clearly did not show Defendants conduct during the HGN standardized field sobriety test; such test was not captured by the video as required by Section 56-6-2953 Code of Laws for SC 1976, as amended.

2. That His Honor erred not granting during the trial, Defense Motion to Suppress and Dismiss the charged when the evidence on the roadside video did not show the Defendants conduct during the walk and turn standardized field sobriety test, such test was not properly captured by the video as required by Section 56-5-2953, Code of Laws for SC 1976, as amended.

3. That His Honor erred not granting during the trial, Defense Motion to Suppress all roadside video evidence of Defendants wife, as such, denying Defendant to see, hear, confront, and cross-examine such evidence, violation of the United States and State Constitution as the right of confrontation and further, such evidence was not relevant to the charges against the Defendant.

4. That His Honor erred not granting during the trial, Defense Motion, in particular to suppress the conversation between Sgt. Walters and Defendants wife as to her about to be arrested, such evidence was extremely prejudicial to the Defendant and such evidence was not relevant to the charges against the Defendant.

June 26, 2012
Lancaster, South Carolina

FRANCIS BELL LAW FIRM, LLC

BY: 

Francis L. Bell, Jr.
Attorney for Defendant
P. O. Box 867
Lancaster, SC 29721
(803) 283-8476

STATE OF SOUTH CAROLINA,)
)
COUNTY OF LANCASTER)

IN THE CENTRAL MAGISTRATE COURT

Clocked in at Central Court

Date: 4-13-2012

STATE OF SOUTH CAROLINA)
)
VS.)
)
MICHAEL WAYNE SHERRILL, JR.)
)
DEFENDANT.)

MOTION FOR ARREST OF JUDGMENT
OR NEW TRIAL

DUI – Ticket No. F258842

To the Honorable Fredrick A. Thomas, Magistrate Central Court for Lancaster County Spiro Poulos, Assistant Solicitor, Sixth Judicial Circuit.

YOU WILL PLEASE TAKE NOTICE that the undersigned having orally made Motion for Arrest of Judgment or A New Trial on Wednesday, April 11, 2012, after a finding of Guilty of the offense of DUI 1st. on the same date, now in writing, again moves for an Arrest of Judgment or New Trial on the following grounds:

1. That His Honor erred not granting during the trial Defense Motion to Suppress and Dismiss the charge when the evidence on the roadside video clearly did not show Defendants conduct during the HGN standardized field sobriety test, such test was not captured by the video as required by Section 56-5-2953 Code of Laws for SC 1976, as amended.
2. That His Honor erred not granting during the trial Defense Motion to Suppress and Dismiss the charge when the evidence on the roadside video did not show Defendants conduct during the walk and turn standardized field sobriety test, such test was not properly captured by the video as required by Section 56-5-2953, Code of Laws for SC 1976, as amended.
3. That His Honor erred not granting during the trial Defense Motion to Suppress all roadside video evidence of Defendants wife, as such, denying Defendant to see, hear, confront and cross-examine such evidence, violation of the United States and State Constitution as the right of confrontation and further, such evidence was not relevant to the charges against the Defendant.
4. That His Honor erred not granting during the trial, Defense Motion, in particular to suppress the conversation between Sgt. Walters and Defendants wife as to her about to be arrested,

such evidence was extremely prejudicial to the Defendant and such evidence was not relevant to the charges against the Defendant.

That further, pursuant to Section 22-3-990 Code of Laws for SC 1976, as amended; the court does have the right to grant new trials.

April 13, 2012

Lancaster, South Carolina

Respectfully submitted,

FRANCIS BELL LAW FIRM, LLC

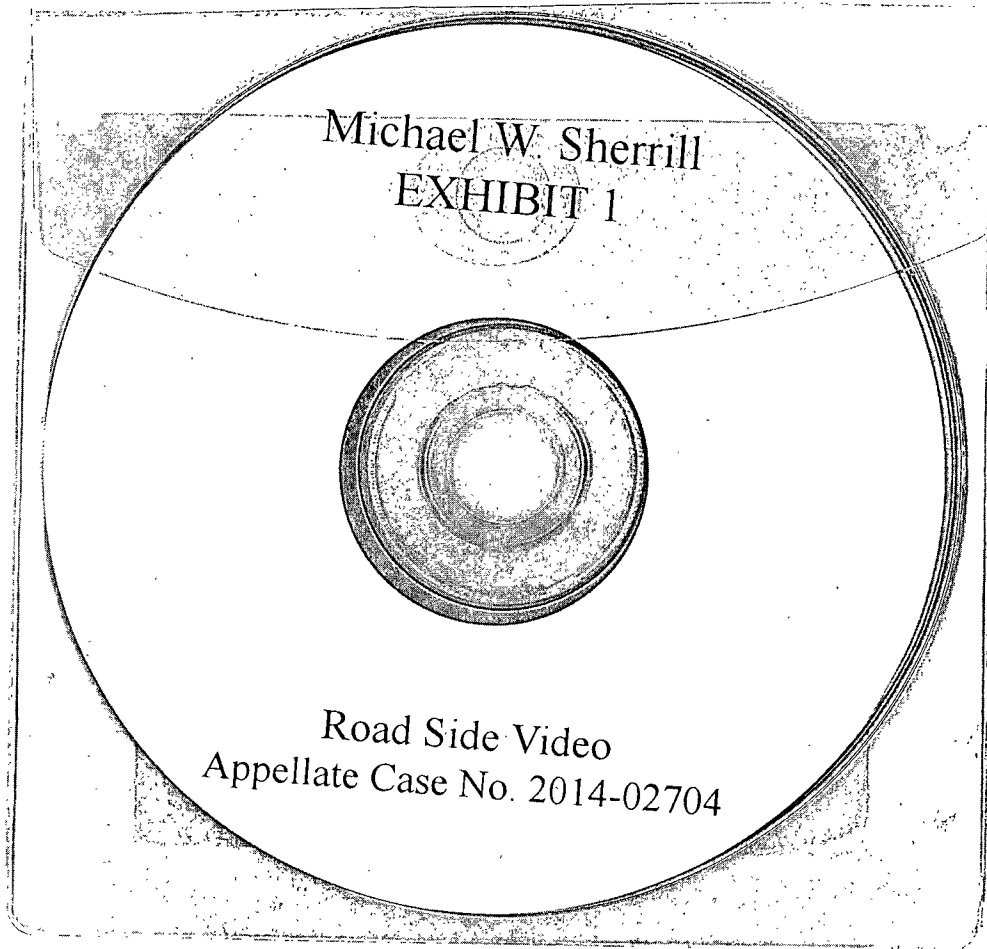
BY: 

Francis L. Bell, Jr.
Attorney for Defendant
P.O. Box 867
Lancaster, SC 29721
(803)283-8476

EXHIBIT 1

Michael W. Sherrill
Road Side Video

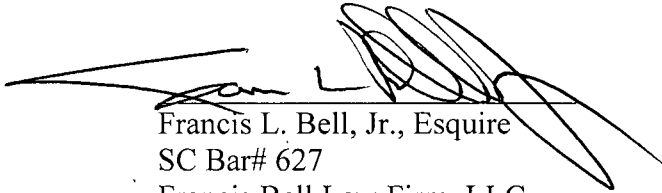
Appellate Case No. 2014-02704



Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 14, 2015



Francis L. Bell, Jr., Esquire
SC Bar# 627

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Attorney for Appellant

RECEIVED
JUL 20 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

APPEAL FROM LANCASTER COUNTY

JUL 20 2015

Court of Common Pleas

SC Court of Appeals

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-002704

The State, Respondent,

v.

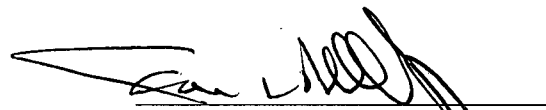
Michael Wayne Sherrill, Appellant.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to attorney of record:

J. Benjamin Aplin, Esquire
Assistant Attorney General
Office of Attorney General
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served, this 17th day of July, 2015.



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