

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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AUG 04 2015

APPEAL FROM LANCASTER COUNTY

SC Court of Appeals

Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-002704

The State, Respondent,

v.

Michael Wayne Sherrill, Appellant.

FINAL BRIEF OF APPELLANT

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ISSUE ON APPEAL

1. WHETHER THE INCIDENT SITE RECORDING STATUTE S.C. CODE ANN § 56-5-2953 WAS VIOLATED WHEN LAW ENFORCEMENT PLACED DEFENDANT SUSPECTED OF DRIVING UNDER THE INFLUENCE IN A POSITION THAT THE PATROL CAR HOOD OBSTRUCTS THE VIEW OF THE COMPLETE WALK AND TURN TEST FROM THE RECORDING.

STATEMENT OF THE CASE

Appellant had a jury trial on a charge of DUI 1st on April 11, 2012 in the Lancaster County Magistrate Court presided over by the Magistrate Fredrick A. Thomas. During trial, Appellant moved to suppress introduction of incident site video because of the hood blocking the Appellant's conduct during the Walk and Turn Test. The court viewed the video and motion was denied. Appellant received a guilty verdict on April 11, 2012. Appellant filed a Motion for Arrest of Judgment or New Trial on April 13, 2012 and was denied that motion on June 8, 2012. The appeal was filed on June 26, 2012 in the Court of Common Pleas for Lancaster County. Argument was heard in the Court of Common Pleas for Lancaster County by the Honorable Michael Nettles on November 10, 2014 on the issue that the prosecuting agency failed to comply with mandatory video requirements of SC Code Ann. §56-5-2953 in regards to the Walk and Turn test performed by Appellant, and appeal was denied by written order dated November 20, 2014. Appellant served his Notice of Appeal on December 16, 2014.

FACTS

Appellant Michael Wayne Sherrill 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 the three standardized NHTSA 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 initial administration of the walk and turn test, both Trooper Walters and the Appellant were positioned in front of Troopers Walters' patrol vehicle in view of the camera. Trooper Walters instructs the Appellant to

take nine steps in a straight line towards his vehicle, to turn and then take nine steps away from his patrol vehicle. After the Appellant begins the test, his sixth through ninth step towards the vehicle, the turn, and his steps one through five on the return are obstructed by the hood of Trooper Walters' patrol vehicle. Appellant was subsequently arrested and charged with Driving Under the Influence.

STANDARD OF REVIEW

The circuit court reviews appeals from the magistrate court pursuant to S.C. Code Ann. § 18-3-10. The circuit court, acting as the appellate court, reviews the matters raised in the notice of appeal. S.C. Code Ann. § 18-3-70. *State v. Bailey*, 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006). In criminal appeals, the circuit court does not conduct a de novo review; rather, it reviews the case for preserved errors raised to it by an appropriate exception. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011) (citing *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011)). The Court of Appeal's review is limited to correcting the circuit court's order for errors of law. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). Moreover, the Court of Appeals is limited to review issues that are properly preserved for appellate review when the issue has been raised and ruled on by the lower court. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 396 S.C. 479, 482, 722 S.E.2d 213, 214 (2011).

ARGUMENT

THE LOWER COURTS ERRED BY FINDING THAT THE INCIDENT SITE VIDEO DID SUFFICIENTLY CAPTURE THE FIELD SOBRIETY TESTS AND BY NOT FINDING THE INCIDENT SITE VIDEO VIOLATED S.C. CODE ANN. § 56-5-2953.

The South Carolina incident site video recording statute S.C. Code Ann. § 56-5-2953 (A)(1)(a)(ii) states that “The video recording at the incident site must...include any field sobriety test administered.” The video requirement of “any field sobriety test administered” was added in 2008 when the General Assembly amended the statute and came in effect in February 2009. Under the previous statute, the “conduct” of the driver was to be video recorded at the incident site. In *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (2011), which was decided under the previous version of S.C. Code Ann. §56-5-2953 (A)(1), the video of the driver doing the Walk and Turn Test was only recorded from her knees or waistline up and her feet were not visible on the video recording during the test. The Court of Appeals held that under the former statute the video requirements had been complied with. The Court of Appeals added Footnote 4 which read

“[4] As amended in 2009, the current version of section 56-5-2953 expressly requires the recording of field sobriety tests. *See* S.C.Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp.2010) (“The video recording at the incident site must: ... include any field sobriety tests administered.”). We note that the legislature's amendment of the plain language of the statute to require the recording of field sobriety tests

further bolsters our position that the plain language of the prior version, in effect at the time of this action, did not require recording of all tests.”

Id. At 392 S.C.626, 633, 709 S.E.2d 685, 690

The addition of the footnote adds emphasis that the complete recording of any field sobriety tests was not required under the former statute, but it is required under the 2008 statutory amendment. The amendment went beyond the previous term of conduct, and now formally requires recording of the field sobriety tests.

The Court of Appeals has addressed 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. “Because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless.” *State v. Gordon*, Appellate Case No. 2013-000515, Pg. 6 (SC Ct. App. 2014). In the *Gordon* case, the defendant’s head was not shown at all times during the HGN test. The Court of Appeals affirmed that the head must be shown during the HGN test in order for that sobriety test to be recorded. *Id.* The recording requirements of 56-5-2953 are mandatory. *Town of Mount Pleasant, City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879. Dismissal of a DUI charge is an appropriate remedy provided by section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions. *Gordon Pg. 5, quoting Suchenski 374 SC at 17, 646 S.E.2d at 881 (2007).*

The primary rule of statutory construction is that a statute should be construed to give effect to the intent of the legislature. Also, the Court should give their plain and

ordinary meaning, and not resort to forced construction that would limit expand the statute in question. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 282 (2011); *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516, 520. Lastly, whereas here the provision of the statute are penal in nature, the statute must be strictly construed against the State and in favor of the Defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283; *State v. Johnson*, 396 S.C. 182, 187, 720 S.E.2d 516, 519.

In the present case, the arresting officer did not properly videotape the Defendant being given the Walk and Turn Test as required by §56-5-2953 (A)(1)(a)(ii). The video recording that was produced and entered into evidence over Appellant's objection during jury trial failed to capture the Appellant's feet and lower legs on steps 6 through 9 walking towards the patrol vehicle, the turn, and steps 1 through 5 on the walk away from the patrol vehicle. The steps and the turn were obstructed by the patrol vehicle's hood. The magistrate, after viewing the video at trial, ruled the defendant's conduct during the Walk and Turn Test was sufficient. The Common Pleas Appellate judge confirmed the magistrate's ruling. The magistrate and presiding Common Pleas judge incorrectly found that the Appellant's conduct during Walk and Turn test was sufficient. S.C. Ann §56-5-2953 states that the video recording at the incident site must include any field sobriety test administered. This change in the law is highlighted in footnote 4 of *Murphy*, which has similar facts to this present case in that the lower half of the driver is not visible during the administration of some of the field sobriety tests. The Court of Appeals noted that when the driver in *Murphy* was stopped, the law at the time did not require the recording of all tests, and the 2008 amendment changed that requirement. In the present

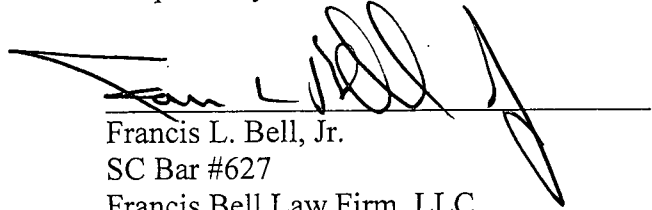
case, the field sobriety tests are required to be video recorded. Construing the terms of S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) which requires “any field sobriety test administered” must be recorded, the legislative intent can only reasonably be that the results of the test being performed by the driver are recorded. The requirement that the tests be recorded would necessarily mean that a viewer of the recording could see the test being administered completely. If the intent would have been just to capture the conduct during the tests as in *Murphy*, the General Assembly would have no need to amend the statute as they did in 2008. The *Gordon* case interprets the law further specifically towards the HGN test, which targets the eyes, that the head of the driver must be visible during the entire administration of the test. The Appellant’s feet and lower legs not being visible during the entire test and partial compliance is insufficient to meet the requirements of the statute. There is another new Court of Appeals case *State v. Taylor*, Appellate Case No. 2012-213018 (SC Ct. App. 2014). *Taylor* reaffirms the ideas in *Gordon* but the current case does not fit the facts of *Taylor*. *Taylor* was off video during the repositioning of the patrol car and the video was deemed sufficient and in the current case, the Appellant’s conduct was not fully captured during the Walk and Turn Test which by statute has to be recorded and is not sufficient for S.C. Code Ann. §56-5-2953. Since the incident site video does not comply with S.C. Ann §56-5-2953, the only remedy is dismissal of the case. *Town of Mt. Pleasant*, 393 S.C. 332, 713 S.E.2d 278 (2011), *Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2011).

CONCLUSION

The Appellant Michael Sherrill's conduct was not sufficiently captured per S.C. Code Ann. 56-5-2953 while being administered the Walk and Turn field sobriety test which is required by the statute to be recorded. For the reasons set forth above, Appellant respectfully requests the Court to Reverse the Circuit Court's discussion that the incident site video in this case was sufficient under S.C. Code Ann. 56-5-2953.

July 30, 2015

Respectfully submitted,



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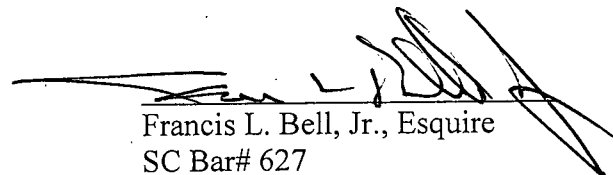
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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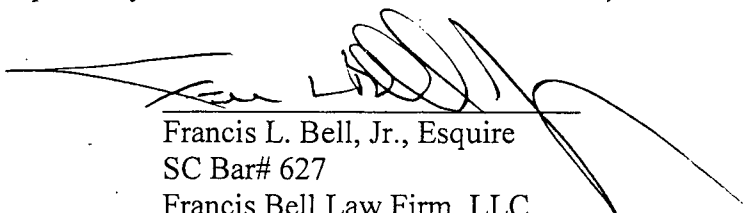
Michael Wayne Sherrill, Appellant.

PROOF OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served, this 31st day of July, 2015.


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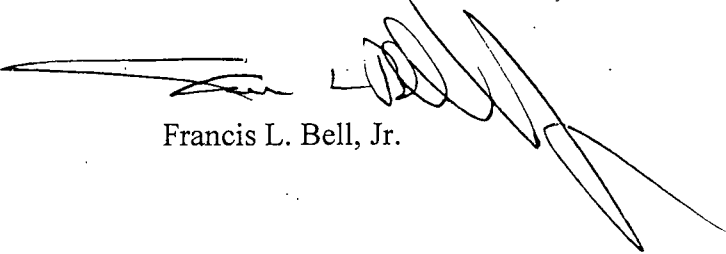
**Re: The State vs. Michael Wayne Sherrill
Appellate Case No.: 2014-002704**

Dear Mr. Aplin:

I have enclosed one (1) copy of the Final Brief in regards to the above referenced along with a copy of the Proof of Service.

Very truly yours,

FRANCIS BELL LAW FIRM, LLC


Francis L. Bell, Jr.

FLBjr/jbg
Enclosures

cc: Honorable Jenny A. Kitchings