

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2014-002556

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SC Court of Appeals

The State,

Appellant,

vs.

Tiffanie Nicole Turner,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The circuit court erred in dismissing this case after incorrectly finding the State failed to comply with section 56-5-2953(A) of the South Carolina Code when the video recording required by the statute was produced.
- II. The circuit court erred in dismissing this case and finding no mitigating factors provided in section 56-5-2953(B) of the South Carolina Code are present.

STATEMENT OF THE CASE

Respondent was stopped for speeding, and ultimately ticketed and arrested for driving under the influence (DUI) on July 25, 2013. (T.4; Uniform Traffic Ticket; R. 21). She was subsequently indicted for DUI 2nd offense. (Indictment; R. 22-23). The Honorable Doyet A. Early, III, conducted a pretrial hearing in which Respondent moved to dismiss the charge based on an alleged violation of the video recording statute, section 56-5-2953(A) of the South Carolina Code.

After hearing argument, Judge Early issued an Order on November 17, 2014, dismissing the case, finding the State failed to properly provide a video recording pursuant to section 56-5-2953(A). He also found Subsection (B) of the statute did not apply. (Order dated November 17; R. 1-2). The State timely filed a Notice of Appeal and this brief follows.

ARGUMENT

- I. **The circuit court erred in dismissing this case after incorrectly finding the State failed to comply with section 56-5-2953(A) of the South Carolina Code when the video recording required by the statute was produced.**

The court erred in dismissing the case because the State fully complied with the requirements of section 56-5-2953(A) of the South Carolina Code (Supp. 2013) and the circuit court's interpretation read into the statute new requirements. The State produced a proper video recording in full compliance with section 56-5-2953(A). Further, any possible defect in the video recording regarding the inability to fully see Respondent's head and eyes during the HGN test went to the video's weight to be considered by the jury and should not result in dismissal. Finally, the trial court's interpretation leads to an absurd result and is physically impossible given the technology available.

"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. 2013).

It is clear from the statute the overarching requirement of the video recording is to record the defendant’s conduct at the incident site and the breath test site. The statute then details the events which must be included to provide documentation the events occurred and to record the defendant’s conduct during those events. Indeed, capturing the driver’s overall conduct was the precise purpose described in Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). The subparts of 56-5-2953 (A)(1) simply identify particular aspects of that conduct which must also be included in the video recording.

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 no later than when the blue lights were activated, recorded and provided a full recording of all field sobriety tests with nothing occurring off camera and no portion of a test failing to record, showed Respondent being placed under arrest, and showed her being read her Miranda rights. (Video Recording of Incident Site). The video recording completely complied with the unambiguous requirements of section 56-5-2953(A), and as a result, the circuit court erred in dismissing the case.

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 video requirement is to document the arrest, document any field sobriety tests administered, and document the defendant's conduct during the tests. The purpose of the video is not to allow a jury to see exactly what is seen by the officer during the field sobriety tests or any other time. 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 a documentary of the actions performed by the officer and the defendant's conduct after being stopped.

Contrary to the findings of the circuit court, the plain language of the statute does not require Respondent's eyes to be visible during the administration of the HGN field

sobriety test, nor does it require the video to provide the viewer with the ability to assess the defendant's success or failure on the video. It merely says the video recording must "include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953 (A)(1)(a)(ii) (Supp. 2012). As the Court of Appeals correctly found in Murphy, the statute does not require that the recording capture "a continuous full view of the accused." Nothing in the amended statute has changed this requirement. The plain language of the statute, even after amendment, requires nothing more than the defendant's conduct be captured during the administration of the field sobriety tests. Conduct would not include a close up of her eyes or even a perfectly visible head to determine how she performed on the HGN test, but instead would only require her overall demeanor, behavior, or actions be captured on the video recording. Any other requirement placed on the video is based on the court writing into the statute provisions not placed there by the Legislature.

The statute does not require 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. It requires the conduct of the defendant be recorded. It requires the video show the field sobriety test being performed in order to prove they occurred and to have documentary evidence the test was given. Any issue regarding the quality of what is shown, or regarding 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 a recording of any field sobriety tests offered. This was unquestionably done in this case.

Section 56-5-2953(A) also does not require a recording of a particular quality, or a recording in the best possible lighting conditions, or any other such limitation. The ruling by the circuit court forces an absurd decision to be made by officers attempting to protect the public from drunk drivers. Under the circuit court's ruling, Officers are better off not performing any field sobriety tests than performing the tests and risk a dismissal because the video recording is not perfect, especially when done in less than ideal circumstances of darkness or with technology which is not even capable of providing a view of the defendant's eyes as required by the circuit court in this case. This Court's ruling will have the effect of either 1) encouraging officers to perform no field sobriety tests and turn the subsequent DUI trial into a battle of credibility with little supporting video evidence—a result which clearly defeats the legislative purpose of creating evidence of the DUI through the video; 2) requiring a professional videographer and lighting assistant travel with him so as to produce a movie perfect video recording capturing all details, including movement of eyeballs, even in the dark of night during which a significant number of DUIs occur; or 3) allowing the jury to perform its duty in properly considering any “defects” in the video recording, especially when the defendant is unable to articulate any prejudice resulting from the “defects.” See e.g., State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) (“exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedure.”): The State submits the video in this case clearly complied with the clear, unambiguous statutory requirements of section 56-5-2953, and the third

option above, allowing the jury to perform its duty of weighing the evidence, should be the option selected by this Court.

As long as the recording includes “any field sobriety tests administered,” it is in compliance with the plain, unambiguous language of the statute, and the circuit court erred in finding otherwise. The circuit court found “no finder of fact could independently determine the results of the horizontal gaze nystagmus test.” (Order page 2; R. 2). Nothing in section 56-5-2953(A) requires the State to produce a video in which the jury could “independently determine the results;” it only requires the video recording include any field sobriety test administered.” The court went on to find: “In order to avoid a pointless statutory requirement, it is at least required that the officer’s camera record the Defendant’s eyes which would amount to direct evidence of impairment if nystagmus were present.” (Order page 2; R..2).

The circuit court’s requirement means the officer has to position himself and the suspect in front of a camera mounted inside the officer’s vehicle in such a way that the defendant’s eyes are visible on camera at all times and the jury could see small jerking movements in the eyes during the test. At the same time the defendant’s eyes are shown close enough to see small jerking movements, the officer’s movements and conduct during the test must be shown otherwise there will be an argument the administration of the test is not shown on the video recording. The Legislature certainly did not intend such a physically impossible requirement. Requiring a field sobriety test be completely or substantially recorded, such that 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 adds requirements to the statute not found in the clear,

unambiguous language, and it places an absurd burden on those attempting to enforce the laws of the state and protect the citizens from the dangers of drunk drivers. See Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (“When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature’s language”); see also, State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) (recognizing that where a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning).

The State submits as long as a juror can tell the arresting officer is administering the test, there is compliance with section 56-5-2953(A). Here, the video recording leaves no doubt the officer conducted the HGN test. The video is recorded under less than perfect conditions and using less than perfect equipment, both beyond the control of the officer. There is no question Respondent’s eyes are not seen in the video recording, and it is highly unlikely any driver-suspect’s eyes have ever been seen on a DUI video clearly enough to judge the jerking motion evidence in the HGN test. However, Respondent is clearly visible and it is entirely evident what test is being performed and the Respondent’s conduct during that test. Certainly the legislature did not intend to craft a video recording statute which will result in the dismissal of any DUI where the HGN test is performed.

In State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) (Certiorari granted), this Court determined: “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.” In Gordon, this Court affirmed the circuit court’s finding (on

appeal from a magistrate court's finding that the recording was only required to show the conduct of the defendant) that the head must be shown during the HGN test. Id. at 76. This Court's opinion indicates the actual test could not be seen, but does not add the requirement added in this case that the results of the test, and especially the eyes jerking, must also be seen.

Further, it appears the circuit court acknowledges the State produced a video, but believes the issue related quality of the content of the video required dismissal. 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)). Further, as this Court has found, dismissal is not always warranted when the video recording is not perfect. See State v.

Taylor, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014) (finding error in dismissing a case in which a recording did not continuously show the driver-suspect).

Additionally, the circuit court's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), to dismiss the case 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 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 show Respondent's eyes during the HGN test, the video recording clearly documented Respondent's conduct during this test and all tests performed 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.

Also, nothing in Suchenski mandates a perfect video in order for it, or any of the evidence related to it, to be admissible. Even if Suchenski requires strict compliance with

the statutory requirements of what events must be recorded, it does not require that compliance be perfect in every way, nor does it require the finder of fact be able to judge a person's performance from the video. In Suchenski, the video failed to record entire required events. There is no final field sobriety test on the video. The videotape did not have quality issues or "defects;" instead, required events are entirely absent. In that situation, in which entire events required to be recorded are missing, the Court found dismissal was "an appropriate remedy" and did not require it, nor did it make any statement regarding the admissibility of the videotape. Suchenski says nothing about the admissibility of a videotape or other evidence in a situation where the tape includes all events required, but has mere defects or quality issues.

The HGN merely determines the presence of alcohol in a person's system. See State v. Sullivan, 310 S.C. 311, 315 n.2, 426 S.E.2d 766, 769 n.2 (1993). The test cannot be used to determine the level of impairment or the blood alcohol content of the person. See Id. at 315-316; 426 S.E.2d at 769 (citing State v. Garrett, 119 Idaho 878, 811 P.2d 488 (1991)). Respondent admitted consuming one beer prior to performing any field sobriety tests, three beers during the tests, and ultimately admitted she was drunk and consumed "a lot" of alcohol. (Video of Incident Site).

As has previously been found, violations of a statutory requirement should not result in exclusion or other remedy without the presence of prejudice. It is well established that "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedure." State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976); see also, State v. Hunley, 349

S.C. 1, 6, 562 S.E.2d 472, 474 (2002) (finding the trial court erred in automatically suppressing a breath test's results when no prejudice to the defendant was shown as a result of the implied consent statute's violation).

Finally, the interpretation of section 56-5-2953(A) by the circuit court would lead to an absurd result, namely the dismissal of every DUI case in which an HGN field sobriety test is performed.¹ 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.”). Tests such as the HGN, which involve noticing the movement and jerking of the eyes, could never be recorded in such a manner as to allow the fact finder to see what the officer saw or “independently determine the results” of the test.

The State submitted a properly recorded video which began when the officer activated his blue lights, showed **all** field sobriety tests being performed, included Respondent's arrest, and showed the reading of Miranda warnings. The circuit court's interpretation, requiring a video sufficient to assess the performance of the field sobriety tests, leads to an absurd result. Finally, there can be no prejudice to Respondent after she has admitted being drunk and consuming “a lot” of alcohol. This Court should find the video produced by the State complied with the statutory requirements of section 56-5-2953(A) and dismissal was not warranted.

¹ The circuit court even seems to acknowledge the absurd result, but indicates he has no choice but to dismiss in this particular case. (T.13-14; R. 16-17).

II. The circuit court erred in dismissing this case and finding no mitigating factors provided in section 56-5-2953(B) of the South Carolina Code are present.

The circuit court erred in finding section 56-5-2953(B) of the South Carolina Code (Supp. 2013) was not applicable to this case. The State submits dismissal was not proper because a video was produced.² In the event this Court finds a proper video was not produced, then the State submits the totality of the circumstances clearly favor not dismissing the case.

Subsection (B) reads in pertinent part as follows:

Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. . . . **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**

S.C. Code Ann. § 56-5-2953(B) (Supp. 2013) (emphasis added).

The circuit court failed to consider the totality of the circumstances, especially in light of the argument by the State there exists no means for an officer to comply with the

² As discussed above, the State also submits the video clearly complied with the requirements of section 56-5-2953(A) and so dismissal was clearly inappropriate.

requirements being advocated by Respondent's counsel. (T.11; 13; R. 14; 16). Further, the video itself belies the need for dismissal. Respondent specifically admits being drunk as she indicates she knows she will not be able to perform the field sobriety tests. She admits drinking "a lot" of alcohol including an unknown number of beers and shots of liquor. (Video of Incident Site).

Based on the totality of the circumstances, including the facts: 1) the video recording included from before the blue lights were activated until after Respondent's arrest; 2) the conditions at the time of the stop included it being dark so it would be nearly impossible for the vehicle's camera to properly capture movement in the driver-suspect's eyes even if in the field of view; 3) the video equipment is not capable of recording Respondent's or any other person's eyes during the HGN test; and 4) at trial the officer would be able to testify to all the procedures he undertook and be cross-examined about the field sobriety tests he performed; the circuit court should have found the video admissible and should not have dismissed the case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court finding the State failed to provide a proper video under section 56-5-2953(A) or failed to show the video should be admitted under the totality of the circumstances pursuant to section 56-5-2953(B) 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 Filings."

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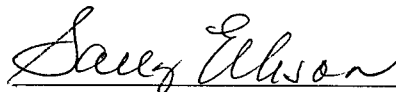
Respondent.

PROOF OF SERVICE

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

S. Jahue Moore, Jr., Esquire
Margaret A. Hazel, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 21st day of July, 2015.



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