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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Doyet A. Early, III

Appellate Case No. 2014-002556

The State, Appellant,

vs.

Tiffanie Nicole Turner Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent received a ticket and was indicted for a DUI 2nd offense. (Traffic Ticket, R. p. 21; Indictment, R. pp. 22-23). The Honorable Doyet A. Early, III, conducted a hearing on October 21, 2014 and issued a subsequent Order dismissing the charged based on the violation of S.C. Code Ann. Section 56-5-2953(A). He also held that subsection (B) of the statute did not apply. (Order, R. pp. 1-3).

ARGUMENT

In criminal appeals from municipal court, the circuit court does not conduct a de novo review. S.C.Code Ann. § 14-25-105 (Supp. 2006); *State v. Landis,* 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). In criminal cases, the appellate court reviews errors of law only. *State v. Cutter,* 261 S.C. 140, 199 S.E.2d 61 (1973).

I. THE CIRCUIT COURT CORRECTLY DISMISSED THIS CASE AFTER FINDING THE STATE FAILED TO COMPLY WITH S.C. CODE ANN. § 56-5-2953(A).

A. The court properly construed the statute.

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell,* 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a

statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); *see also State v. Pittman,* 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("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."). "However, penal statutes will be strictly construed against the state." *Elwell,* 403 S.C. at 612, 743 S.E.2d at 806.

The statute reads:

> (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 (2014). (emphasis added).

This Court has already construed the statute at issue. In *City of Rock Hill v. Suchenski,* 374 S.C. 12, 646 S.E.2d 879 (2007), a municipal court convicted the defendant for driving with an unlawful alcohol concentration (DUAC). *Id.* at 14, 646 S.E.2d at 879. The circuit court reversed the conviction based on the City of Rock Hill's failure to videotape the defendant's entire arrest because the arresting officer's camera "ran out of tape." *Id.* This court found the plain language of the statute provided that the

"failure to produce videotapes would be a ground for dismissal if no exceptions apply." *Id.*

This court held in *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 345-49, 713 S.E.2d 278, 284-86 (2011) that the "decision in *Suchenski* indisputably established that the videotaping provisions of section 56–5–2953 are mandatory and not optional."

In *State v. Gordon,* 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014), *cert. granted,* the court of appeals affirmed the circuit court's determination that the statute required the Horizontal Gaze Nystagmus Test (HGN test) to be on video and, specifically for the HGN test, the defendant's head must be on video.

Suchenski, Robert, and *Gordon* all show that the court's have interpreted the plain language of the statute requires video evidence of each listed event in the statute. There are no qualifiers in the statute – the video must include a recording of all tests, not just portions of tests, administered on site. The only exceptions to this requirement are listed in subsection (B) of the statute.

The State has cited *Murphy v. State,* 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) as controlling precedent. In *Murphy*, this court affirmed the defendant's DUI conviction under the prior version of the statute. The defendant was recorded with her back to the camera during the horizontal gaze nystagmus (HGN) test and the video only recorded the defendant from the knees up as she performed the walk and turn test. 392 S.C. 626, 628–29, 709 S.E.2d 685, 686–87 (Ct. App. 2011). However, in that case the court found "the plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture *all* field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused's conduct." *Id.* at

632, 709 S.E.2d at 688. In addition, "an unbroken recording of the tests is not necessary to capture conduct." *Id.* However, *Murphy* was superseded by statute, as described in *State v. Taylor,* 411 S.C. 294, 768 S.E.2d 71, 75-76 (Ct. App. 2014). The statute applicable in *Murphy* did not include the explicit requirement that it "include any field sobriety tests administered." § 56–5–2953(A)(1)(a)(ii).

In *Taylor*, the court stated: "[Unlike] the amended statute applicable in *Gordon* and in the present case, [the statute in *Murphy*] was based on the prior statute, which did not specifically require video of the field sobriety tests. *Taylor,* 411 S.C. at 303, 768 S.E.2d at 76, *citing* § 56–5–2953(A)(1)(a)(ii) (Supp. 2013); § 56–5–2953(A)(1)(b) (2006).

The statute applicable in this case is the current amended statute, which specifically requires video of the field sobriety tests. Thus, the holding in *Murphy* does not apply.

The Appellant also asserts that the trial court's interpretation leads to an absurd result, and compliance with the statute physically impossible. The Town of Mt. Pleasant presented the same argument in *Town of Mt. Pleasant,* 393 S.C. at 345-49, 713 S.E.2d at 284-86. In that case, the Town argued that because it had not yet obtained video recorders for all patrol cars, it had a "valid reason" for noncompliance with the statute. This court did not agree, stating:

> By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56–5–2953 and, in turn, promulgated a severe sanction for noncompliance.
> Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski.*

Id. "The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the legislature's inaction is evidence that our interpretation is correct." *State v. Sawyer,* 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014), reh'g denied (Aug. 27, 2014) (internal citation omitted). The General Assembly has amended § 56–5–2953 since this Court's decision in *Suchenski.* However, the amendment did not change the Court's interpretation that "failure to comply with the statute's terms renders the evidence inadmissible." *Sawyer,* 409 S.C. at 482, 763 S.E.2d at 186. Therefore, the court properly construed the statute to find that a video recording of all tests was required.

B. The State failed to comply with the statute, thus dismissal was proper.

The purpose of the video requirement in the statute "is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant,* 393 S.C. at 347, 713 S.E.2d at 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." *Gordon,* 408 S.C. at 543-44, 759 S.E.2d at 758-59.

The statute requires that the video recording begin no later than the activation of the blue lights, include any field sobriety tests administered, and include video of arrest and Miranda advisement. S.C. Code Ann. § 56-5-2953. These are very specific, unambiguous requirements, which were not met in this case. "[F]ailure to produce videotapes would be a ground for dismissal if no exceptions apply." *Suchenski,* 374 S.C. at 16, 646 S.E.2d at 881.

The recording of the Respondent did not provide a full recording of all field sobriety tests. The HGN test, which requires an examination of the eyes, occurred entirely off-camera. (R. pp. 7-8). The Appellant's assert that the "plain language of the statute...requires nothing more than the defendant's conduct be captured during the administration of the field sobriety tests." (Appellant's Initial Brief, p. 6). This is incorrect. The statute stated plainly that the **"video recording at the incident site must... include any field sobriety tests administered."** S.C. Code Ann. § 56-5-2953 (emphasis added). The statute requires more than simply capturing the defendant's conduct. The tests themselves must be seen on the recording. The HGN test includes viewing the eyes of the tested. This was not shown on the recording.

This court has already considered this statute and its requirements in *State v. Sawyer,* 409 S.C. at 480, 763 S.E.2d at 185-86. In that case, the court cited to *Murphy v. State:*

> The State argues that the statute only required that the individual's "conduct" be recorded, and that conduct under the statute has been defined by the Court of Appeals as "one's behavior, action or demeanor." Thus, the State contends that only video of the individual is necessary to satisfy the statute. We disagree. In *Murphy,* the incident site video did not capture a full length image of the individual as she attempted field sobriety tests. *Murphy* held that the video adequately reflected the individual's behavior. Here, however, we are concerned not with the defendant's conduct but with the content of the statutorily required warnings.

Sawyer, 409 S.C. at 480, 763 S.E.2d at 185. The court held that those requirements had not been met in *Sawyer*, in which the State sought to introduce a video with no audio recording:

> [T]he statute required a videotape not merely of the individual's conduct while being read his *Miranda* and

> informed consent rights, but also that it "must include" "the reading of *Miranda* rights" and "the person being informed that he is being videotaped, and that he has the right to refuse the test." § 56–5–2953(A)(2)(b). A silent video simply cannot meet these statutory requirements.

Sawyer, 409 S.C. at 480, 763 S.E.2d at 185-86.

Just as in *Sawyer*, the statute requires the recording of **all** field sobriety tests. If a test includes observation of walking in a line, the recording must show the tested attempting to walk in a line. If a test includes oral recitation of the alphabet, the recording must have a recording of this recitation. And if a test includes observation of the eye movements of a tested, the recording must show the tested's eye movements.

The video recording of the Respondent does not show the eyes of the Respondent. It shows no eye movements in the HGN test. It shows only the back of Respondent's head. (R. pp. 7-12). In order to avoid a pointless statutory requirement, a fact finder must be able to observe the results of the test. "As evidenced by this Court's decision in *Suchenski,* 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." *Town of Mt. Pleasant,* 393 S.C. at 345-49, 713 S.E.2d at 284-86. Therefore, since the recording does not show the administration of this sobriety test, and dismissal was proper.

II. THE CIRCUIT COURT CORRECTLY DISMISSED THIS CASE AFTER FINDING THAT THE EXCEPTIONS IN S.C. CODE ANN. § 56-5-2953(B) DID NOT APPLY.

Subsection (B) of section 56–5–2953 gives several statutory exceptions that excuse noncompliance with the mandatory recording requirements. Noncompliance is excusable: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer

submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

South Carolina courts have found that if there is noncompliance with subsection A, and no mitigation under subsection B, dismissal is the appropriate remedy. *Suchenski*; 374 S.C. at 17, 646 S.E.2d at 881.

None of the exceptions apply in this case. There was no sworn affidavit submitted stating that the equipment was inoperable. There was no sworn affidavit submitted stating that it was impossible to produce the recording. There was no valid reason for the failure to produce the recording. The trial judge, acting as the factfinder, examined the totality of the circumstances and concluded that subsection B did not apply.

CONCLUSION

For the reasons cited above, this Court should affirm the order of the trial court.

Respectfully submitted,

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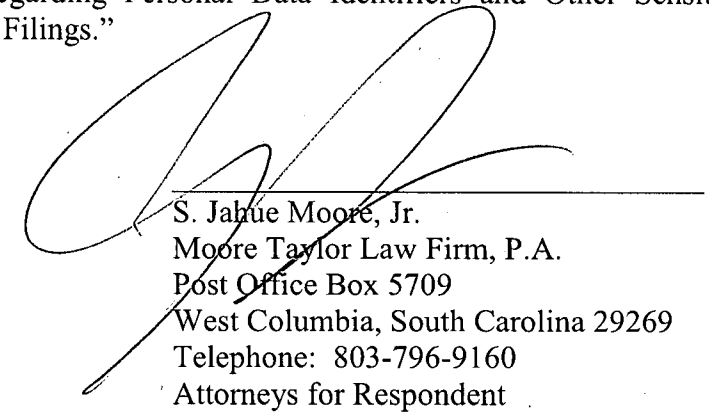
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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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PROOF OF SERVICE

I certify that I served the Final Brief of Respondent upon Appellant, by depositing a copy in the United States mail, postage prepaid, addressed to Alan Wilson and William M. Blitcher, Jr., at P. O. Box 11549, Columbia, South Carolina 29211 and Donald V. Myers, at 212 South Lake Drive, Lexington, South Carolina 29072, on August 11, 2015.

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