

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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SC Court of Appeals

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Case No. 2014-001871

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John Barra.....Appellant,  
v.  
City of North Charleston.....Respondent.

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**BRIEF OF RESPONDENT**

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**STATEMENT OF ISSUES ON APPEAL**

**I. DID THE LOWER COURT ERR IN DENYING THIS APPEAL WHERE THE VIDEO CAMERA WAS OUT OF FOCUS DURING ONE OF THE FIELD SOBRIETY TESTS ADMINISTERED TO APPELLANT?**

**II. DID THE LOWER COURT ERR IN DENYING THIS APPEAL WHERE IT DID NOT REVIEW THE FIELD SOBRIETY TESTING PROCEDURE DEFICIENCIES RAISED BY APPELLANT BEFORE DECIDING THAT THE ISSUE IS ONE FOR A JURY?**

## STATEMENT OF THE FACTS

On or about February 1, 2013 Officer Thomas Bennett of the North Charleston Police Department initiated a traffic stop on Appellant and during the course of the traffic stop determined Appellant was driving under the influence. Officer Bennett arrested Appellant for Driving Under the Influence, first offense.

Prior to any testimony, Appellant made two pre-trial motions to suppress the standardized field sobriety tests ("FSTS"). (R. p. 3). The first motion was based on grounds the officer failed to perform the FSTS in compliance with the guidelines as provided by the National Highway Traffic Safety Administration ("NHTSA"). (R. p. 3). The second motion was based on a short portion of the videotape during which the camera goes slightly out of focus; however, the presiding judge found that Appellant was in full view of the camera during the administration of the FSTS. (R. p. 3). The presiding judge denied both of these motions but allowed Appellant to cross-examine Officer Bennett using the officer's field sobriety training manual regarding the administration and results of the FSTS. (R. p. 3).

Appellant was convicted of Driving Under the Influence, first offense in the North Charleston Municipal Court on or about August 22, 2013. The Honorable J.C. Nicholson Jr. heard Appellant's appeal on July 15, 2014 and subsequently denied Appellant's appeal on July 21, 2014.

## Arguments

### Standard of Review

“In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous.” *State v. Banda*, 371 S.C. 245, 351, 639 S.E.2d 36, 39 (2006). “In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception.” *Rogers v. State*, 358 S.C. 266, 269, 594 S.E.2d 278, 279 (Ct. App. 2004).

#### I. **THE LOWER COURT DID NOT ERR IN DENYING THIS APPEAL WHERE THE VIDEO CAMERA WAS OUT OF FOCUS DURING ONE OF THE FIELD SOBRIETY TESTS ADMINISTERED TO APPELLANT**

Section 56-5-2953(A) of the South Carolina Code states that “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. The video recording at the incident site must ... include any field sobriety tests administered.” S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii). The government’s inability to provide the required videotape in compliance with the requirements of section 56-5-2953 is usually “fatal to the prosecution of a DUI case.” *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E. 2d 278, 285 (2011). However, failure to comply with the videotaping requirements of section 56-5-2953 is not always fatal to the government’s prosecution if the arresting officer provides an affidavit. See S.C. Code Ann. § 56-5-2953(B). Affidavits are not, of course, required if the tape exists and is sufficient.

A. RESPONDENT PROVIDED APPELLANT WITH A VIDEOTAPE IN COMPLIANCE WITH SECTION 56-5-2953

In order to prosecute a DUI case, the government must provide a videotape of the incident site or provide an affidavit executed by the arresting officer why a videotape was not provided. *See Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E. 2d 278, 285 (2011).

South Carolina courts have held numerous videotapes to be insufficient when measured to the requirements of section 56-5-2953. In *State v. Gordon*, 408 S.C. 536, 759 S.E. 2d 755 (Ct. App. 2014), this Court reversed a magistrate court's conviction for DUI when the videotape did not show the defendant's head during the administration of the horizontal gaze nystagmus test. The State Supreme Court affirmed a lower court's decision to dismiss a DUI following a protracted absence of video cameras in a police department's cruisers. *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E. 2d 278, 285 (2011). In *City of Rock Hill v. Suchenski*, 347 S.C. 12, 646 S.E.2d 879 (2007), the Supreme Court upheld a dismissal of a DUI because the government failed to record one of the FSTS administered to the defendant.

1. ALL FIELD SOBRIETY TESTS WERE RECORDED ON THE INCIDENT SITE VIDEO.

Here, Respondent complied fully with the requirements of section 56-5-2953 because all the field sobriety tests were captured on video. Respondent provided Appellant with an incident site videotape. (R. p. 3). Prior to the trial, the presiding judge reviewed the videotape and found that Appellant was in view of the camera during the administration during all of the FSTS although "[t]he picture was a little out of focus for a minute." (R. p.

3). Specifically, a viewer was able to “see the administration of the tests at all times.” (R. p. 3).

The videotape in the present case is significantly different from the videotapes in *Gordon*, *Roberts* and *Suchenski*. The videotapes in those cases excluded whole FSTS or in *Gordon* a significant portion of the defendant’s body during the administration of the FSTS. In this case, Appellant takes issue with the quality of the recording of the FSTS. See Appellant’s Initial Brief at 3 (“The entire recording of the one-leg stand test is distorted”). However, section 56-5-2953 and South Carolina case law impose no duty as to the quality of a videotape only that the defendant’s conduct at the incident site be recorded. See S. C. Code Ann. § 56-5-2953. Further, the tape quality of even the parts Appellant complains of here is reasonable and sufficient for a jury to view the defendant’s performance on all the field sobriety tests.

In criminal appeals, appellate courts “review errors of law only.” *State v. Muquit*, 381 S.C. 114, 118, 671 S.E.2d 643, 645 (Ct. App. 2009). The appellate court is “bound by the trial court’s factual findings unless they are clearly erroneous.” *Id.* Here, there is no indication in the record that the presiding judge’s finding that administration of the FSTS was not able to be viewed on the videotape provided by Respondent.

Because the videotape provided by Respondent complied with section 56-5-2953 and the factual finding by the presiding judge the ruling of the lower court should be affirmed.

2. NO AFFIDAVIT AS PROVIDED FOR IN SC CODE § 56-5-2953(B) WAS  
REQUIRED

Appellant contends that Respondent should have provided an affidavit as provided for section 56-5-2953(B). Appellant's Initial Brief at 4. However, no affidavit was required because Respondent complied with the videotaping requirements of section 56-5-2953.

The presiding judge in the instant case found that the administration of all the FSTS was captured on video. (R. p. 3). This is a clear finding of fact that cannot be overturned unless it is clearly erroneous. *State v. Muquit*, 381 S.C. 114, 118, 671 S.E.2d 643, 645 (Ct. App. 2009). Nothing in the record indicates that the presiding judge's finding of fact was clearly erroneous. As a matter of law, the trial judge then found that no affidavit was required since a tape existed. (R. p. 3). The trial judge's ruling is correct. Appellant has been unable to find any reported South Carolina case that required an affidavit where an adequate video tape existed under SC Code § 56-5-2953.

Because of the presiding judge's finding of fact that all the FSTS were captured on the videotape, no affidavit as provided for in section 56-5-2953(B) was required to be provided by Respondent in this case.

**II. THE LOWER COURT DID NOT ERR IN DENYING THIS APPEAL WHERE IT DID NOT REVIEW THE FIELD SOBRIETY TESTING PROCEDURE DEFICIENCIES RAISED BY APPELLANT BEFORE DECIDING THAT THE ISSUE IS ONE FOR A JURY.**

South Carolina Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Appellate courts give great deference to trial judges' admission of evidence under SCRE 403. *Lee v. Bunch*, (S.C. 2007) 373 S.C. 654, 647 S.E.2d 197. Only "in exceptional circumstances" should an appellate court reverse "[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence." *State v. Stephens* 398 S.C. 314, 319, 728 S.E.2d 68, 71 (Ct. App. 2012). The presiding judge controls the admissibility of evidence and the admissibility of evidence is within the sound discretion of the trial judge. *State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). However, once evidence is admitted, the jury is "the ultimate fact finder." *State v. Webb*, 389 S.C. 174, 182 697 S.E.2d 662, 666 (Ct. App. 2010).

Appellant is unable to find any reported South Carolina case that requires exact compliance with National Highway Transportation Safety Administration guidelines as a foundational requirement for the introduction of FSTS as evidence in prosecution under SC Code Ann. § 56-5-2930. Appellant only cites *State v. Homan*, 732 N.E.2d 952, 89 Ohio St.3d 421, 2000-Ohi-212 (Ohio 2000) which Respondent believes is Ohio law made by Ohio lawyers best left in Ohio.

**A. APPELLANT WAS GIVEN AN OPPORTUNITY TO CROSS-EXAMINE THE OFFICER; THUS CURING ANY ISSUES ON HOW THE OFFICER CONDUCTED THE FSTS**

Here, Appellant was offered the opportunity to cross-examine the officer regarding the officer's training with the NHTSA FSTS training manual and how the officer conducted the FSTS with Appellant. (R. p. 3). Allowing the jury to hear testimony regarding FSTS while allowing Appellant the opportunity to cross-examine the officer regarding his training regarding FSTS could not possibly meet the abuse of discretion standard because the record presents no

“exceptional circumstances” that would permit this Court to substitute its judgement for that of the trial judge. *State v. Stephens*, 398 S.C. 314, 319, 728 S.E.2d 68, 71 (Ct. App. 2012).

#### B. THE JURY IS THE PROPER FINDER OF FACT

Whether or not the FSTS were performed in accordance with NHSTSA guidelines is a factual question. The jury is “the ultimate fact finder.” *State v. Webb*, 389 S.C. 174, 182 697 S.E.2d 662, 666 (Ct. App. 2010). As such, it is appropriate for the trial judge to allow the jury to hear testimony regarding the FSTS and for Appellant to cross-examine the officer regarding the FSTS. Allowing the evidence concerning the FSTS in under the appropriate Rule 403 analysis, the trial judge properly allowed the fact finder to determine if the FSTS were performed in accordance with NHTSA guidelines

#### CONCLUSION

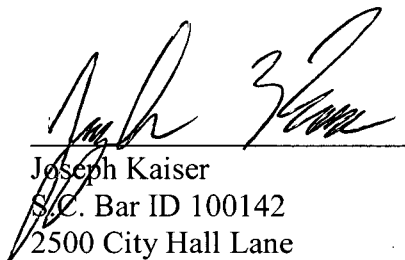
This Court should affirm the ruling of the circuit court judge which upheld Appellant’s conviction of DUI after a jury trial in North Charleston Municipal Court. Based on the trial judge’s finding of fact Respondent provided a videotape that complied with the requirements of section 56-5-2953. Additionally, Appellant takes issue with the quality of video Respondent provided; however, no South Carolina law or controlling case requires any quality of video only that a video be provided.

Appellant’s second argument regarding the how the FSTS were conducted by the officer fails because Appellant cannot meet the burden to overcome the abuse of discretion standard required to overturn the trial judge’s decision to let the FSTS into evidence under SCRE 403. Additionally, the jury was the proper fact finder as whether or not the FSTS were properly

conducted. For the foregoing reasons, this Court should affirm the Circuit Court and uphold the jury's verdict in this case.

Respectfully submitted,

October 27, 2015



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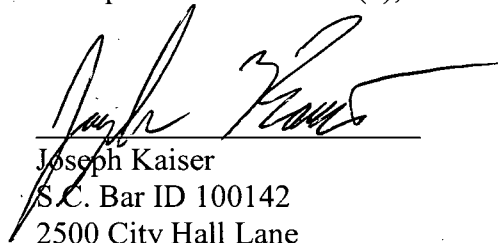
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John Barra.....Appellant,  
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City of North Charleston.....Respondent.

**CERTIFICATE OF COUNSEL**

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

October 29, 2015

  
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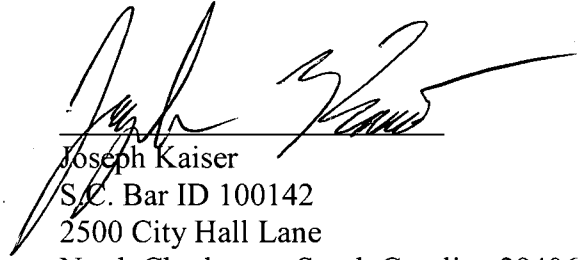
I hereby certify that I have served *Respondent's Brief* on the following by United States

Mail, postage prepaid, on October 29, 2015, addressed as follows:

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Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Joseph Kaiser', is written over a horizontal line. The signature is stylized and cursive.

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