

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

JAN 27 2016

Appeal From York County
Honorable John C. Hayes, III, Circuit Court Judge SC Court of Appeals
Appellate Case No. 2013-002406

The State,

Appellant,

vs.

Shelby Jean Lorusso,

Respondent.

FINAL BRIEF OF RESPONDENT

CHRISTOPHER A. WELLBORN
S. C. Bar No. 11914

Post Office Box 10191
Rock Hill, South Carolina 29731
(803) 366-1065

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 5

 I. The circuit court correctly affirmed the magistrate court’s dismissal
 of this charge where the magistrate found, and the arresting officer
 acknowledged, that he did not comply with the mandatory recording
 provisions of section 56-5-2953(A) of the South Carolina Code. 4

 II. The circuit court correctly found that the State’s non-compliance
 with the mandatory recording provisions of section 56-5-2953(A)
 were not excusable under subsection (B). 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

<u>City of Greer v. Humble</u> , 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2014)	6
<u>City of Rock Hill v. Suchenski</u> , 373 S.C. 12, 646 S.E.2d 879 (2007)	7
<u>Murphy v. State</u> , 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011)	5
<u>State v. Elwell</u> , 403 S.C. 606, 743 S.E.2d 802 (2013)	5
<u>State v. Cody Roy Gordon</u> , 414 S.C. 94, 777 S.E.2d 376, 755 (2015)	5
<u>State v. Johnson</u> , 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011)	6
<u>State v. Pittman</u> , 373 S.C. 527, 561, 647 S.E.2d 144 (2007)	6
<u>Town of Mt. Pleasant v. Roberts</u> , 393 S.C. 342, 713 S.E.2d 278 (2011)	6, 7

Statutes

S.C. Code Ann. § 56-7-2930 (Supp. 2012)	4, 6
S.C. Code Ann. § 56-7-2933 (Supp. 2012)	4
S.C. Code Ann. § 56-7-2945 (Supp. 2012)	4
S.C. Code Ann. § 56-7-2953 (Supp. 2012)	4, 5, 6, 7

STATEMENT OF ISSUES ON APPEAL

- I. The circuit court correctly affirmed the magistrate court's dismissal of a DUI charge where the magistrate found the State did not comply with the mandatory recording provisions of section 56-5-2953(A) of the South Carolina Code.
- II. The circuit court correctly found that the State's non-compliance with the mandatory recording provisions of section 56-5-2953(A) were not excusable under subsection (B) of that statute.

STATEMENT OF THE CASE

The Respondent was stopped on December 15, 2012 and arrested for driving under the influence 1st offense. Pre-trial Motions were heard on April 23-24, 2013, the result of which was the dismissal of the charge against the Respondent, pursuant to the State's failure to comply with the mandatory video recording provisions of section 56-5-2953(A). The State appealed this dismissal and that appeal was heard by the Honorable John C. Hayes, III, on August 27, 2013. Judge Hayes affirmed the Magistrate, dismissing the State's appeal on September 17, 2013. This appeal has followed.

STATEMENT OF FACTS

On December 15, 2012, Deputy Palmer of the York County Sheriff's Department noticed the Respondent make a "wide" left turn from S.C. 160 onto Gold Hill Road in Fort Mill area of York County. Moments later he activated his in-car video camera. He ultimately stopped the Respondent on a side street in a residential neighborhood within a few feet of the Respondent's driveway. After asking the Respondent whether she had had anything to drink, Deputy Palmer directed her to perform three standardized field sobriety tests to investigate the possibility that she might be driving under the influence. The Respondent was directed to perform the horizontal gaze nystagmus test (HGN), the walk-and-turn test (WAT) and the one leg stand test. She was ultimately arrested and charged with driving under the influence 1st offense.

Pre-trial motions were held on April 23/24, 2013 in the York County Centralized D.U.I. Court, before the Honorable Clayburn Barnette, Magistrate. At that time, the Respondent moved to dismiss her charge, asserting that the State had failed to comply with the mandatory video recording provisions of section 56-5-2953(A) of the South Carolina Code. (Pretrial T. p. 60, line 9- p. 62 line 27; R. p. 25). The Respondent sought to have her charge dismissed asserting that neither the HGN or WAT test were recorded within the meaning of section 56-5-2953(A). The Magistrate chose to not make a finding regarding the HGN test. Deputy Palmer testified extensively regarding the WAT test. He testified that he directed the Respondent to walk nine steps towards his patrol car with the heel of her lead foot touching the toes of her trailing foot with each step. She was then directed to turn

counter-clockwise and walk nine steps back with her heel of her lead foot touching the toes of her trailing foot. Deputy Palmer testified that she did not touch heel-to-toe in the majority of her steps. (Pretrial T. p. 144, line 5; R. p. 46). Deputy Palmer admitted that he chose which direction to have the Respondent walk relative to the video camera and because of this the video tape did not show whether her heels touch her toes or not. (Pretrial T. p. 154, line 18-p.156, line 1; R. p. 49). The Magistrate, after watching the video tape and listening to the sworn testimony of Deputy Palmer, found, as admitted by Deputy Palmer, the walk-and-turn test was not visible within the meaning of section 56-5-2953(A) of the South Carolina Code and thereupon dismissed the charge against the Respondent.

ARGUMENT

I. The Circuit Court correctly affirmed the Magistrate Court’s dismissal of this charge where the Magistrate found, and the State acknowledged that the State did not comply with the mandatory recording provision of section 56-5-2953(A) of the South Carolina Code.

Section 56-5-2953(A) provides in pertinent part that:

(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 at breath test site video recorded.

(1)(a) The video recording of the 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 of 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.

This statute was most recently addressed by our Court in State v. Gordon, 414 S.C. 94, 777 S.E.2d 376, 755 (2015). In Gordon, our Court stated that “as amended in 2009 the current version of section 56-5-2953 expressly requires the recording of field sobriety tests”. Id. 414 S.C. at 99, 777 S.E.2d at 378, Murphy v. State, 392 S.C. 626, 632n, 709 S.E.2d 685, 688 (Ct. App. 2011). The version of the statute applied in Murphy did not include the explicit requirement that it “include any field sobriety tests administered” as the current version does. Gordon, 408 S.C. at 99, 777 S.E.2d at 378.

The cardinal rule of statutory construction is that 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); 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, 188, 720 S.E.2d 516, 519 (Ct. App. 2011). Where 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. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). However, the provisions of a penal statute must be strictly construed against the state and in favor of the defendant. Town of Mt. Pleasant v. Roberts, 393 S.C. at 342, 713 S.E.2d at 283.

The current version of this statute is clear and unambiguous. The purpose of the video taping provisions of section 56-5-2953(A) is to create direct evidence of a DUI arrest. Town of Mt. Pleasant v. Roberts, 393 S.C. at 347, 713 S.E.2d at 285. Because the clear purpose of the statute is to require video taping of the field sobriety tests, if the actual tests cannot be seen the requirement is pointless. As the circuit court in this case surmised, "to put it plainly, there is no sense in conducting field sobriety tests if the finder of fact cannot see the results of such test". (Order Dismissal Appeal, p. 5, R. p. 7).

In this case, the Magistrate specifically found that "at no time can a person watching the video observe any heel to toe touching, or not touching." (Magistrate's Return to Notice of Appeal of May 13, 2013, R. p. 2). In criminal appeals, the circuit court does not conduct a *de novo* review of the facts but is bound by the Magistrate's finding if any evidence in the record reasonably supports them. City of Greer v. Humble, 402 S.C. 609, 613, 742, S.E.2d 15, 17 (Ct. App. 2013).

Dismissal of a DUI charge is the remedy provided by section 56-5-2953 when a violation of subsection (A) is not mitigated by a subsection (B) exception. “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 v. Roberts, 393 S.C. at 346, 713 S.E.2d at 285; City of Rock Hill v. Suchenski, 374 S.C. 646, 16, 646 S.E.2d 879, 881 (2007).

II. The Circuit Court correctly found that the State’s non-compliance with the mandatory recording provisions of section 56-5-2953 were not excusable under subsection (B).

Section 56-5-2953(B) states in pertinent part that:

....Failure by the arresting officer to produce the video recording required by this section is not alone grounds for dismissal of any charge pursuant to section 56-5-2930, ... if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause for termination, was in inoperable condition, stating which reasonable efforts have been made to maintain the equipment in operable condition.... 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.

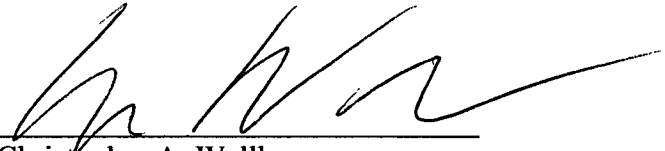
In this case, the State never claimed that they failed to produce a video recording, nor did they submit an affidavit excusing such a failure. The video tape was produced, reviewed by the Magistrate and was the subject of the Magistrate’s factual findings. Furthermore, on appeal the State argued that “even if the defendant’s toes and heels not being visible (sic) on video during the field sobriety test was held to violate section 56-5-2953(A)(1)(a)(ii) under the totality of the circumstances analysis pursuant to section 56-5-2953(B) the failure to

record is excused". (State's Notice of Appeal, R. p. 13). Thus the State has taken the illogical position of arguing it is excused from producing a video under subsection (B) when in fact it produced a video which was reviewed by the Magistrate. It is worth noting that on appeal the State did not argue that they failed to produce a video recording, but that the officer's non-compliance with the statute was unintentional or not done in bad faith. (Order Dismissing Appeal p. 7, R. p. 9). Neither of these are contemplated by subsection (B) as an excuse for violating the mandatory recording provision of subsection (A).

CONCLUSION

For the forgoing reasons the Circuit Court's ruling should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Wellborn', written over a horizontal line.

Christopher A. Wellborn
S.C. Bar No. 11914

Post Office Box 10191
Rock Hill, South Carolina 29731
(803) 366-1065

ATTORNEY FOR RESPONDENT

January 26, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

JAN 27 2016

Appeal From York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2013-002406

SC Court of Appeals

The State,

Appellant,

vs.

Shelby Jean Lorusso,

Respondent.

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 Rulings."

By: _____


Christopher A. Wellborn

Post Office Box 10191
Rock Hill, South Carolina 29731
(803) 366-1065

ATTORNEY FOR RESPONDENT

January 26, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2013-002406

RECEIVED

JAN 27 2016

SC Court of Appeals

The State,

Appellant,

vs.

Shelby Jean Lorusso,

Respondent.


PROOF OF SERVICE

I, Anne W. Weeks, certify that I have served the within Final Brief of Respondent by depositing one copy each of the same in the United States mail, postage prepaid, addressed to:

Alan Wilson
Attorney General
Post Office Box 11549
Columbia, SC 29211

William M. Blich, Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 26th day of January 2016.



ANNE W. WEEKS

Legal Assistant

Christopher A. Wellborn, P.A.
Post Office Box 10191
Rock Hill, South Carolina 29731
(803) 366-1065