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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2014-002770

The State, Appellant,

vs.

Steven Hoss Walters, Jr., Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. The circuit court erred in dismissing the State's case against Respondent when the video recording produced by the State fully complied with section 56-5-2953(A) of the South Carolina Code.

II. The circuit court erred in finding section 56-5-2953(B) had no application in this case and in not finding, based on a totality of the circumstances, the State produced a proper video recording and the underlying case should not have been dismissed.

STATEMENT OF THE CASE

Respondent was stopped by Trooper McAdams travelling along Interstate 77. Trooper McAdams arrested Respondent for driving under the influence (DUI) second offense and issued a uniform traffic ticket. (Uniform Traffic Ticket; R. 39). The York County Grand Jury subsequently indicted Respondent for DUI on November 6, 2014. (Indictment; R. 40-41). On December 16, 2014, Respondent proceeded to trial before the Honorable Lee S. Alford.

Prior to trial, Respondent moved to dismiss the case based on an alleged violation of section 56-5-2953(A) of the South Carolina Code (Supp. 2014). The trial court dismissed the case and found no exceptions under section 56-5-2953(B) of the South Carolina Code (Supp. 2014) applied to the case. The State timely filed its Notice of Appeal on December 23, 2014. This brief follows.

ARGUMENT

I. The circuit court erred in dismissing the State's case against Respondent when the video recording produced by the State fully complied with section 56-5-2953(A) of the South Carolina Code.

The court erred in finding the State failed to produce a video recording in compliance with section 56-5-2953(A) of the South Carolina Code (Supp. 2014). The State produced a video recording which began no later than the Trooper's activation of his blue lights, recorded and showed all field sobriety tests being performed, and included the Trooper reading Respondent his Miranda rights prior to his arrest. As a result, the trial court erred in finding the video failed to comply with the requirements of section 56-5-2953(A) and erred in dismissing the case.

In the instant case, Trooper McAdams activated his blue lights which activated his in-car camera. He pulled Respondent over and, after speaking with him, proceeded to administer field sobriety tests as part of a DUI investigation. The tests were conducted on the side of the interstate, at night, in a poorly lit area. As a result, Trooper McAdams left his lights on, including his flashing lights, for both safety and illumination. (T.8-10; R. 8-10). During the HGN test, Trooper McAdams positioned Respondent facing away from the flashing lights because he had been taught the flashing lights could cause false positives in the HGN test. (T.9-10; R. 9-10). The trial court found because Trooper McAdams chose to position the defendant in this manner, resulting in the Trooper's hand not being visible at all times during the test, the State failed to comply with the requirements of Section 56-5-2953(A). (T.22-25; 34-38; R.22-25; 34-38).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the 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." Pittman, 373 S.C. at 561, 647 S.E.2d at 161. However, the statute must also be read as a whole and in harmony with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Accordingly, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Section 56-5-2953 requires:

> (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. 2014).

The statute requires a video recording of the incident site, and in doing so, specifically provides what must be videotaped. Section 56-5-2953(A) indicates the individuals conduct at the incident site must be recorded and then provides the requirements for meeting this requirement. Specifically the recording must: 1) not begin later than the activation of the officer's blue lights; 2) include any field sobriety tests administered; and 3) 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. The clear language of the statute does not require every aspect of the HGN test to be seen so that the jury or any viewer can judge the person's performance or the Trooper's administration of the test.

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 is to **document** the arrest, document any field sobriety tests the Trooper administered, and **document** the defendant's conduct during the tests. As explained, the video began before Trooper McAdams stopped Respondent's vehicle and continued uninterrupted during the administration of the field sobriety tests, the reading of Miranda, and Respondent's arrest. (Video of Incident Site). 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 the Trooper's hand to be visible at all times 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 or the officer's conduct during the test. 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. 2014). The positioning of the defendant during the test should be at the discretion of the officer and can be considered by the jury in the weight that they give the test. As long as the test is documented by the video the officer has fully complied with the video recording requirements.

As the Court of Appeals correctly found in Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), 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. The plain language requires the person's overall demeanor, behavior, or actions be captured on the video recording, which they were in this case.

Further, and even more important in light of the trial court's ruling dismissal was required because you could not see the Trooper's hand during the test, the statute says nothing about the officer's conduct being recorded. Section 56-5-2953(A) does not indicate in any way the jury or viewer of the video should be able to assess the conduct or performance of the officer. It requires the conduct of the person be recorded and then requires documentary evidence the field sobriety tests were performed.

The statute 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 with the Trooper's lights flashing. This Court's ruling will have the effect of 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 even in the dark of night, which of course is when 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, is the common sense, appropriate result.

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. Requiring a field sobriety test to be recorded in a manner which allows a person watching the recording to make an assessment as to how well the driver-suspect performed the test or how well the officer administered the test adds requirements to the statute not found in the clear, unambiguous language. Further, the requirement 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 that 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 Trooper McAdams 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 Trooper. He positioned Respondent in a manner he believed best allowed him to assess Respondent's performance to determine whether to make an arrest for DUI. As a result, while it is clear Trooper McAdams conducted the HGN test—it can be seen and heard on the video—the recording is not perfect. This, however, is not and should not be the requirement under the statute. Certainly the legislature did

not intend to craft a video recording statute which will result in the dismissal of many night time DUIs because the video is not perfect.

In State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) (Certiorari granted)[1], 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. This Court's opinion indicates the actual test must be seen on the video, but does not add the requirement added in this case that the jury be able to assess the officer's administration of the test including seeing his hand move back and forth at all times and be able to judge the distance from the person's eyes at which the officer begins the test.[2]

Further, it appears the circuit court acknowledges the Trooper produced a video, but believes the issue related to the content or quality of the content of the video. 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

[1] To the extent necessary, the State will move to argue against the precedent of Gordon.

[2] Counsel for Respondent's argument indicated you could not tell if Trooper McAdams hands were 12-15 inches from Respondent and his hand was blocked from the camera behind Respondent's head for approximately six seconds. (T.15; R.15). The Court accepted these arguments finding the Trooper's hands needed to be visible the whole time. (T.23; 36; R. 23; 36).

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)).

This case is distinguishable from the cases of City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) or State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). In both of those cases, a significant and specifically required portion of the videotape was not produced and an affidavit was not provided. In Suchenski, the officer failed to record all of the field sobriety tests administered and the arrest of the individual as specifically required under section 56-5-2953(A). Suchenski, 374 S.C. at 18, 646 S.E.2d at 881-882. In Johnson, the officer failed to record the administration of the breath test as specifically required. Johnson, 396 S.C. at 190-191, 720 S.E.2d at 520-521.

The State has complied with section 56-5-2953 by producing a videotape with all required events documented. Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required, and the circuit court erred in dismissing the case.

Finally, the interpretation of the statute by the circuit court would lead to an absurd result.[3] 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

[3] This absurdity is demonstrated in part based on the circuit court's finding a side view would be "plenty" even though he acknowledged it would also cause problems seeing the full test being administered, and "the argument can be presented any way." (T.22; 25; R. 22; 25).

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."). A Trooper would be forced to possibly compromise a field sobriety test, compromise his or the person's safety, or forgo a possibly valuable test because it is impossible to comply with the circuit court's requirement that the test be visible in such a way that the jury can see all aspects of the person's and the officer's conduct during the test. The legislature clearly intended documented evidence showing the test was performed, not a cinematic version from all angles which allows the jury or viewer to assess all participants performance during the administration of the test.

The State produced a video in compliance with Section 56-5-2953(A) because it began with the activation of the blue lights, recorded and documented all field sobriety tests performed, and included the reading of Respondent's Miranda rights prior to his arrest. The circuit court erred in writing new requirements into the statute and in dismissing Respondent's case.

II. The circuit court erred in finding section 56-5-2953(B) had no application in this case and in not finding, based on a totality of the circumstances, the State produced a proper video recording and the underlying case should not have been dismissed.

The trial court erred in finding section 56-5-2953(B) of the South Carolina Code could not apply to allow the case to proceed without dismissal. Section 56-5-2953(B) clearly allows the trial court to consider the totality of the circumstances in determining whether to allow a case to proceed, and the trial court committed legal error in finding he could not consider the totality of the circumstances. If the circuit court had properly considered the totality of the circumstances, the underlying case would not have been dismissed.

The State submits either the circuit court erred in finding it had the power to dismiss the case based on the language of section 56-5-2953(B) and City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), or the circuit court erred in finding the totality of the circumstances exception of the same subsection had no application in this case. Section 56-5-2953 is divided into two applicable subsections[4]. Subsection (A) sets forth the requirements for video recording at both the incident site and the breath test site. Nothing in the first section provides for dismissal, or any other remedy, for failing to produce a video or failing to produce a video of a certain quality as is at issue in the instant 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

[4] The statute has subsections (A) through (G). However, as it relates to the current appeal, only subsections (A) and (B) are applicable.

> 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 only provision allowing for the dismissal of the case—Subsection (B)—also allows the court to consider "any other valid reason for the failure to produce the video recording based upon the totality of the circumstances." Id.

As a result, the circuit court's determination subsection (B) does not apply must be an error of law. (T.31; R. 31). Either the circuit court improperly dismissed the case because the State produced a video and no other provision outside of subsection (B) even allows for dismissal of the case, or the court should have considered the totality of the circumstances exception found in subsection (B) as requested by the State in making its determination of whether to dismiss the case.

The State submits dismissal was not proper because a video was produced.[5] In the event this Court finds dismissal was an appropriate remedy, then the State submits the totality of the circumstances clearly favor not dismissing the case.

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

Trooper McAdams testified he stopped Respondent along a poorly lit stretch of Interstate 77. (T.10; R.10). He indicated he left his vehicle's lights on for safety reasons, to alert traffic to his presence, and to illuminate the area. (T.8; 10; 14; R. 8; 10, 14). Trooper McAdams testified he oriented Respondent with his back to the camera so the flashing lights would not affect the administration of the test by creating their own nystagmus or exacerbating the finding of nystagmus in Respondent.[6] (T.9-10; R. 9-10). Further, he testified he did not want him facing the lights because it would likely cause Respondent to squint, making a determination of the presence of nystagmus more difficult. (T.14; R.14). The video of the incident scene clearly shows the HGN test being performed; a viewer can hear instructions and see the full test being administered. You cannot see the exact position of the officer's hand, but based on the totality of the circumstances, this should not be enough to require dismissal of the case.

[6] Optokinetic nystagmus can be caused by the strobe effects of lights or movement of other objects across the field of vision of the person. Officers are trained not to position the person so as to possibly cause Optokinetic nystagmus. See http://www.nhtsa.gov/people/injury/enforce/nystagmus/hgntxt.html.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court dismissing this case for a violation of section 56-5-2953(A) and refusing to consider the totality of the circumstances under 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 14, 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, 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:

James W. Boyd, Esquire
1544 Ebenezer Road
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I further certify that all parties required by Rule to be served have been served.
This 17th day of July, 2015.

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July 17, 2015

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RE: State v. Steven H. Walters, Jr.
Appellate Case Tracking No. 2014-002770

Dear Mr. Boyd:

I am enclosing two (2) copies of the Final Brief of Appellant in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and 9 copies enclosed)
Victim Services