

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-002770

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SC Court of Appeals

The State, Appellant,

v.

Steven Hoss Walters, Jr.,Respondent.

FINAL BRIEF OF RESPONDENT

James W. Boyd
Post Office Box 36425
1544 Ebenezer Road
Rock Hill, SC 29732
(803) 328-2600
Attorney for Respondent

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN DISMISSING THE STATE'S CASE AGAINST THE RESPONDENT BECAUSE THE VIDEO RECORDING PRODUCED BY THE STATE FAILED TO COMPLY WITH §56-5-2953 OF THE SOUTH CAROLINA CODE?
2. DID THE CIRCUIT COURT ERR IN FINDING THAT §56-5-2953(B) HAD NO APPLICATION TO THIS CASE?

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE STATE'S CASE AGAINST THE RESPONDENT BECAUSE THE VIDEO RECORDING PRODUCED BY THE STATE FAILED TO COMPLY WITH § 56-5-2953 OF THE SOUTH CAROLINA CODE.

The issue in this case is whether the State complied with the video requirements of §56-5-2953(a) of the South Carolina Code when the video failed to include a full recording of one of the field sobriety tests. During the Horizontal Gaze Nystagmus Test (HGN) several important parts of the test were missing. It could not be determined when the Trooper started the test or how far his finger was from the head.¹ There were several periods during the test that the Trooper's finger disappeared in front of the Trooper's head.²

South Carolina Code Annotated §56-5-2953(b)(1)(ii) provides that the video recording at the incident site must, "include any field sobriety test administered". A primary rule of statutory construction is that a statute should be construed to 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. 323, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E.2d 516, 519 (Ct. App. 2001) The Court should not attempt to derive the intent of the Legislature when the statutory language is clear and unambiguous, *Town of Mt. Pleasant v. Roberts, supra*. In

¹ R. pg. 15, lines 12-13

² R. pg. 15, line 15- pg. 16, line 1

interpreting a statute a Court should give words their plain and ordinary meaning and must not resort to a forced construction that would limit or expand the statute in question. *Town of Mt. Pleasant v. Roberts*, *supra*. *State v. Johnson*, *supra*. Section §56-5-2953(a) does not set forth what is required in the recording of Field Sobriety Tests (FST). The Court must look to evidence of the Legislatures intent in enacting the statute. Prior to the 2009 Amendments, §56-5-2953(a)(1) only required that the conduct of the Defendant be recorded at the incident site. The Court of Appeals held in *Murphy v. State*, 392 S.C. 628, 709 S.E.2d 685 (Ct. App. 2011) that the video recording requirements of §56-5-2953 were met although the Defendant's feet could not be seen in the Walk and Turn Test. In *Murphy* the video recording at the incident site showed the Defendant from the waist upwards. The Court in *Murphy* held, "while certainly an individual's performance on such test would be part and parcel of his or her 'conduct' at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct. Therefore the recording need not display all field sobriety tests provided it captures the accused's conduct." The Court provided a footnote to that statement in the opinion, "As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) (Supp.2010) ("The video recording at the incident site must: ... include any field sobriety tests administered."). We note that the legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior version, in effect at the time of this action, did not require recording of all tests". The quote from *Murphy* shows that if a complete recording of an individual's performance on any FST test as not required under the former statute it now required under the amended statute. The 2009 amendment specifically provides for the recording of any FST. This goes beyond the former requirement of merely

recording a person's conduct. Had the Legislature only intended that there be a recording of a person doing a FST, without there being any way to determine the person's performance on the test as in *Murphy*, there would have been no need to amend the statute. It is presumed that the Legislature does not intend for amendments to be futile or meaningless. *State v. Long*, 363 S.C. 360, 610 S.E.2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008). In *State v. Gordon* 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) the Court held, "because of the purpose of the video taping is to create a direct evidence of the arrest, if the actual test cannot be seen on the recording the requirement is pointless".

In the present case the State failed to comply with the videotaping requirements of the Horizontal Gaze Nystagmus Test (HGN). The Respondent argues that the video tape recorded the Field Sobriety Test (FST) being given. Although the video camera was recording during Appellant's performance of this test, the Appellant and the Trooper were positioned in such a manner that it could not be determined whether the test was being properly administered. In the present case the trial Court made a factual finding that the HGN test was not properly videotaped so that one could see if it was properly done.³ The Court stated, "I can't see the Officer's hand a good bit of the time, a finger. I don't know what's going on there; I can't see".⁴ The Appellant argues that the interpretation of the statute by the Circuit Court would lead to an absurd result because the Trooper would be forced to possibly compromise a FST or compromise a person's safety if he did as the Court suggested. Referring to conducting the test from a side view the Court stated, "there is no reason why he couldn't have done it at least this way".⁵ This is a factual finding by the lower Court. In reviewing criminal cases the Appellate Court may review only errors of law. *State v. Henderson*, 347 S.C. 455, 556 S.E.2d 691 (2001).

³ R. Pg. 38, lines 7-8

⁴ R. Pg. 37, lines 11-13

⁵ R. Pg. 25, lines 13-14

The video recording provisions of South Carolina Code Annotated 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 323, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E.2d 516 (Ct. App. 2001). When a prosecuting agency fails to comply with the video recording provisions of §56-5-2953(a) the appropriate remedy is dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski*, supra, *State v. Johnson*, supra. In the *Town of Mt. Pleasant v. Roberts*, supra the South Carolina Supreme Court stated that the unexcused compliance with South Carolina Code Annotated 56-5-2953 mandates the dismissal of a DUI charge. In the case *Town of Mt. Pleasant v. Roberts*, supra, the Court stated, “furthermore it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of the videotaping oral confessions, the Legislature, has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest the Legislature clearly intended strict compliance with the provision of §56-5-2953 and, and in turn, promulgated a severe sanction for non-compliance.

Thus, we hold that dismissal is an appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*”.

In *Murphy v State*, 392 S.C. 628, 709 S.E.2d 685 (Ct. App. 2011) the Court held that remedy for non-compliance was §56-5-2953 is dismissal of the case, not mere suppression of the evidence.

The Circuit Court properly held that the HGN was not properly videotaped.

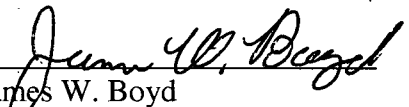
II. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT §56-5-2953(B) HAD NO APPLICATION TO THIS CASE.

Section 56-5-2953(B) provides in part, “nothing in this section prohibits the Court from considering any other valid reason for failure to produce the video recording based on the totality of the circumstance”. In the present case the Court correctly ruled that Section 56-5-2953(B) did not apply because that there was not a missing video in this case. Section (B) applies when a video tape is missing or a portion is missing. The issue in the present case is the quality of the video that was produced not the failure to produce a tape. Even if the Court holds that the Court should have conducted a totality of the circumstance analysis, the Court in essence did so by making a factual finding that the Officer could have positioned the Defendant differently and properly recorded the test being conducted.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision of the Circuit Court should be affirmed.

Respectfully submitted,


James W. Boyd
Attorney at Law
1544 Ebenezer Road
Post Office Box 36425
Rock Hill, SC 29732
(803) 328-2600
ATTORNEY FOR RESPONDENT

July ____, 2015

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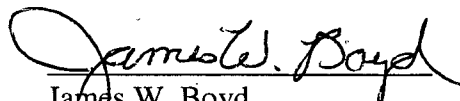
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Steven Hoss Walters, Jr.,Respondent.

PROOF OF SERVICE

I, James W. Boyd, certify that I served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to the William M. Blicht, Jr., South Carolina Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

I further certify that all parties required by Rule 211(a) to be served have been served. This 9 day of July, 2015.



James W. Boyd
1544 Ebenezer Road
Post Office Box 36425
Rock Hill, SC 29732
(803) 328-2600
Attorney for Respondent