STATE OF SOUTH CAROLINA	) **IN THE COURT OF GENERAL SESSIONS**
COUNTY OF NEWBERRY	) **FOR THE EIGHTH JUDICIAL CIRCUIT**

State of South Carolina,

Ticket No.(s): H390372 & H390373
Indictment No.: 2016-GS-36-0107

v.

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SC Court of Appeals

FILED
NEWBERRY COUNTY
2016 AUG 4 PM 4 21
JACKIE S. BOWERS
CLERK OF COURT

Tony Latrell Kinard,
Defendant.

ORDER

Date of Hearing:	June 7, 2016
Judge:	The Honorable Donald B. Hocker
Attorney for State:	Taylor Daniel and Dale Scott
Attorney for Defendant:	Michael Laubshire

This matter came before the Court on June 7, 2016, on the Defendant's motion to dismiss the charge of Driving Under the Influence, based upon the State's failure to comply with the mandatory videotaping requirement of S.C. Code Ann. §56-5-2953(A)(1)(a) iii) at the incident site. Present at the hearing was the Defendant and his attorney, Michael Laubshire, Taylor Danial, Assistant Solicitor for the Eighth Judicial Circuit and Dale Scott, Deputy Solicitor the Eighth Judicial Circuit, Trooper Burnett, South Carolina Highway Patrol and Deputy Snellgrove, Newberry County Sheriff's Office. As part of the hearing, the Defendant called witnesses, Trooper Burnett and Deputy Snellgrove and introduced into evidence the videotape from the incident site.

FINDING OF FACT

On or about November 3, 2015, at approximately 6:30pm, Trooper Barnett responded to a wreck on the I-26 west bound exit ramp at exit 74. Prior to his arrival on scene Trooper

Barnett activated his in-car video camera. Newberry County Deputy Snellgrove was already on scene and had detained the Defendant by placing him in handcuffs and in the rear of his patrol vehicle. The Defendant never physically appears on Trooper Burnett's at-scene video because he is handcuffed and in the rear of Trooper Snellgrove's car. Deputy Snellgrove does not have any recording of this incident because his vehicle was not equipped with a video camera. Deputy Snellgroves blue lights are flashing during the entire video making it difficult to see what is happening on the video. No field sobriety tests are conducted at the scene. The Defendant is never taken out of Deputy Snellgrove's vehicle, therefore, the arrest of the Defendant is not on the video and the Defendant is not shown being advised of his Miranda Rights.

CONCLUSIONS OF LAW

Pursuant to the provisions of S.C. Code Ann. §56-5-2953, as amended, a person charged with driving under the influence must have their conduct recorded as follows:

> S.C. Code Ann §56-5-2953: Incident site and breath test site video recording
> (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.**
> (b) A refusal to take a field sobriety test does not constitute disobeying a police command.
> (2) The video recording at the breath test site must:
> (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;
> (b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and

(c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.
(3) The video recordings of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.
(B) 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 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. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. 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; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.
HISTORY: 1998 Act No. 434, Section 9; 2000 Act No. 390, Section 23; 2003 Act No. 61, Section 8; 2008 Act No. 201, Section 11, eff February 10, 2009.

The Statutory construction of this section has been litigated extensively throughout South Carolina. In constructing the terms of a statue, the primary rule of statutory construction is that a statute should be construed to give the effect to the intent of the legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E. 2d 278 (2011); City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007); and State v. Johnson, 393 S.C. 182, 720 S.E.2d 516 (Ct. App.

2011). A court should not attempt to divine the intent of the legislature when the statutory language of the statute is clear and unambiguous. Id. Thus, in interpreting a statute, a court should give words their plain and ordinary meaning, and not resort to forced construction that would limit or expand the statute in question. Id. Lastly, the provision of a statute are penal in nature, the statute must be strictly construed against the State in favor of the Defendant. Id.

In construing the terms of 56-5-2953(A)(1)(a)(iii) which requires "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[1] rights," I find and conclude that the plain and ordinary meaning of the statute is that the videotape must include the arrest of the Defendant and also show the Defendant being advised of his Miranda rights.

In the case at bar, the arresting officer failed to comply with the requirements set forth in S.C. Code Ann. §56-5-2953, specifically the arresting officer did not videotape the arrest of the Defendant nor did he show the Defendant being advised of his Miranda warnings. The remedy for failure to comply with the above videotaping statute is a dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (S.C. 2011): The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (S.C. 2012).

The word show means "something that one views or at what one looks and at the same time hears." Black's Law Dictionary sixth edition p1379. The legislation is clear, the at-scene video must include the arrest of the defendant and show the defendant being given his Miranda warnings. After viewing the pertinent portions of the video and hearing the testimony of the officers I find that the arrest of the Defendant was not included on the video and the video did

[1] Miranda v Arizona, 384 U.S. 436 (1966)

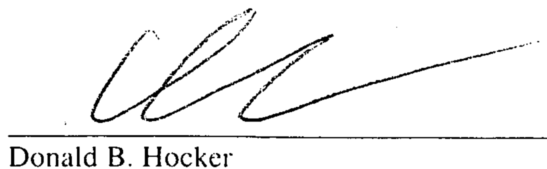
not include the arrest of the defendant nor did it show the Defendant being advised of his Miranda rights. There is nothing in the record to suggest that S.C. Code Ann. §56-5-2953 subsection (B) applies since a video tape from the arresting officer was produced and began recording prior to his arrival on scene. The Defendant was in the back seat of Deputy Snellgrove's patrol car when Trooper Burnett places him under arrest and advises him of his Miranda rights. The rights can be heard but the Defendant is not visible and because of the flashing blue lights on Deputy Snellgrove's patrol car the trooper is barely visible. Trooper Burnett testified he was standing in the apex of the door when he read the Defendant his rights.

Since there is no evidence of a S.C. Code Ann. §56-5-2953 subsection (B) exception, the appropriate remedy for the violation of section (A) of this statute is dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (S.C. 2011); The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (S.C. 2012).

IT IS THEREFORE ORDERED that:

That based upon the above stated findings of fact and conclusions of law, the Court hereby dismisses this matter.

IT IS SO ORDERED!



7-25, 2016

Laurens, South Carolina

Donald B. Hocker

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