STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-46-03747

The State.....Appellant,

v.

Sean Robert Kelly.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent was arrested for Driving Under the Influence, First Offense, in York County by a York County Deputy Sheriff on September 11, 2013. On September 17, 2015, the case was called for a bench trial before the Honorable Clayburn Barnette, Jr. in the York County Magistrate's Court. Following the presentation of the State's case, counsel for Respondent moved for a directed verdict. The magistrate took the matter under advisement and recessed until November 25, 2015. When the parties reconvened, Judge Barnette granted Respondent's motion (Magistrate's Return, p.1).

Appellant filed an appeal in the York County Court of Common Pleas on or about December 1, 2015 (State's Notice of Appeal to the Circuit Court). The parties appeared before the Honorable John C. Hayes, III on March 23, 2016 in order to address the State's appeal. By Order filed March 29, 2016, Judge Hayes affirmed the magistrate's decision (Order of the Honorable John C. Hayes, III filed March 29, 2016). On or about March 31, 2016, the State filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP (State's Memorandum in Support of 59(e) Motion). By Order filed April 13, 2016, the State's Motion to Reconsider was denied (Order of the Honorable John C. Hayes, III filed April 13,

2016). This appeal followed.

FACTS

On September 11, 2013, Investigator Kevin Tolson responded to radio traffic concerning a possible impaired driver. Investigator Tolson is a York County Deputy Sheriff assigned to the Sixteenth Circuit Solicitor's Office. Investigator Tolson located Respondent and witnessed Respondent travel onto Interstate 77. He observed Respondent being unable to maintain his lane of travel and travelling at a slow rate of speed. Investigator Tolson then initiated a traffic stop. Deputy Stagner of the York County Sheriff's Department subsequently arrived on the scene and arrested Respondent for Driving Under the Influence, First Offense.

At the bench trial, Investigator Tolson testified that upon approaching Respondent, he noticed the odor of alcohol. He indicated that Respondent seemed incoherent and "out of it." He further testified that Respondent had slurred speech, slow movements and did not seem to understand Investigator Tolson's instructions. It is undisputed that Investigator Tolson's patrol car was not equipped with video recording equipment. Therefore, he did not video or audio record the stop of Respondent or any of the initial contact with Respondent (Audio of Magistrate Court Trial, 04:36 – 17:08).

At the conclusion of the State's case, counsel for Respondent moved for a directed verdict based upon Investigator Tolson's failure to video record Respondent at the incident site. The magistrate granted the motion finding that the State failed to produce a video recording in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Gordon*, 414 S.C. 94, 99, 777 S.E.2d 376, 378 (2015).

ARGUMENT

I. THE DECISIONS OF THE LOWER COURTS ARE NOT APPEALABLE TO THIS COURT.

The State's appeal in this matter is not appealable to this Court and should be dismissed. It is well settled that the State has no right of appeal from a directed verdict of not guilty.[1] *State v. McWaters*, 246 S.C. 534, 144 S.E.2d 718 (1965); *State v. Ludlam*, 189 S.C. 69, 200 S.E. 361 (1938); *State v. Ivey*, 73, S.C. 282, 53 S.E. 428 (1906); *State v. Gathers*, 15 S.C. 370 (1881). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147 (1978). "This state of jeopardy attaches when a jury is empanelled and sworn, or, in a bench trial, when the judge begins to receive evidence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353 (1977).

"That the State has no right of appeal from judgment upon verdict of acquittal in a criminal case seems to have been recognized and accepted as the law of this jurisdiction from the beginning of our judicial history." *State v. Lynn*, 120 S.C. 258, 260, 113 S.E. 74, 75

[1] Based upon *I'On v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court may consider issues not ruled upon by the lower court as additional sustaining grounds as long as the reason appears in the record below.

(1922). The State has a limited right of appeal in criminal cases and generally has no right of appeal from an acquittal except in circumstances where the acquittal was procured by the accused's fraud or collusion. This principle applies even in cases where there has been legal error. *State v. Holliday*, 255 S.C. 142, 144-45, 177 S.E.2d 541, 542-543 (1970).

In *Horry County v. Parbel*, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008), this Court addressed the issue of a double jeopardy violation following the dismissal of a defendants charge. In *Parbel*, several female dancers and the manager of an adult entertainment establishment were cited for alleged criminal violations of Horry County zoning ordinances. All individuals charged requested a jury trial and a criminal trial was held before an Horry County magistrate. After Horry County rested its case, counsel for the defendants moved for a dismissal of all charges. The magistrate granted the motion to dismiss.

Horry County appealed the magistrate's ruling to the circuit court. The circuit court held that the magistrate's interpretation of the zoning ordinance was incorrect but also held that double jeopardy prevented the defendants from being tried a second time. Based upon double jeopardy principles, this Court held that the circuit court did not have the authority to review possible legal errors following an acquittal.

In addition to decisions cited above, the *Parbel* court based its holding on our Supreme Court's decision in *State v. Tillinghast*, 375 S.C.201, 652 S.E.2d 400 (2007). In *Tillinghast*, the defendant was charged with possession of alcohol by a minor. Following the State's case, the magistrate found that the statute under which the defendant was charged to be unconstitutional and directed a verdict of acquittal. The State appealed the magistrate's decision to the circuit court but indicated that it was not seeking to reinstate the charge

against the defendant.

The circuit court held that it had jurisdiction to hear the appeal and that the magistrate erred in finding the statute unconstitutional. The Supreme Court reversed stating:

> The *Holliday* court noted that "no writ of error, appeal, or other proceeding lies on behalf of the state to review or to set aside a verdict or a judgment of acquittal in a criminal case, although there may have been error committed by the court, or a perverse finding by the jury."

Id., 375 S.C. at 203, 652 S.E.2d at 401. The court further noted that the denial of the right of the State to appeal is ". . . premised upon the basic double jeopardy principle that a defendant in a criminal prosecution is in legal jeopardy when he has been place on trial. . . ." *Id.*

The facts in *Parbel* and *Tillinghast* are similar to the present case. The case was called for a bench trial. The State's first witness, Investigator Kevin Tolson, was sworn in and jeopardy attached (Audio of Magistrate Court Trial at 4:36). Investigator Toslon testified with regard to his initial stop of Respondent and the fact that his car had no video recording equipment. The State then called Deputy Stagner of the York County Sheriff's Department who testified at length with regard to the arrest of Respondent. The State rested its case. Counsel for Respondent moved for a directed verdict (Magistrate's Return, p. 1). The motion was taken under advisement and after a lengthy recess, the magistrate dismissed the case based upon the State's failure to produce a video in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013).

As noted above, jeopardy attaches in a bench trial when the court begins to receive evidence. *Martin Linen Supply Co.*, 430 U.S. at 569, 97 S.Ct. at 1353. In the present case, witnesses were sworn and the State presented its entire case-in-chief. Jeopardy

unquestionably attached. Assuming *arguendo* that the State is correct that the magistrate erred as a matter of law in dismissing the case, this appeal still must be dismissed. Although the magistrate did not specifically rule on the evidence presented by the State and whether the State proved the *corpus delicti* of driving under the influence, Respondent cannot be subjected to another trial for this offense. As the *Tillinghast* court noted: "**Whether or not the magistrate erred in his ruling of law**, appellant was acquitted and is now out of court." *Tillinghast*, 375 S.C. at 203, 652 S.E.2d at 401 (emphasis added). Consequently, this Court should dismiss the present appeal.

II. THE LOWER COURT CORRECTLY AFFIRMED THE MAGISTRATE'S DISMISSAL OF RESPONDENT'S DRIVING UNDER THE INFLUENCE CHARGE WHEN THE STATE FAILED TO PRODUCE A VIDEO RECORDING IN COMPLIANCE WITH S.C. CODE ANN. § 56-5-2953 (SUPP. 2013).

S.C. Code Ann. § 56-5-2953 (A) (Supp. 2013) requires that a person who has violated S.C. Code Ann. § 56-5-2930 (Supp. 2013) have his or her conduct at the incident site video recorded. Specifically, S.C. Code Ann. § 56-5-2953 (A)(1)(a)(i) (Supp. 2013) requires that the video recording must ". . . not begin later than the activation of the officer's blue lights." As frequently recited by our appellate courts in reviewing S.C. Code Ann. § 56-5-2953 (Supp. 2013), statutes must be interpreted with realistic circumstance and rationales in mind. *State v. Elwell*, 403 S.C.606, 743 S.E.2d 802 (2013). Additionally, penal statutes will be strictly construed against the state and in favor of the defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

Our Supreme Court has strictly interpreted the requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2011) and has noted that it ". . . provides for dismissal of charges when the

statute is inexcusably violated." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 881 (2007). Further, our Supreme Court has held:

> As evidenced by this Court's decision in *Suchenski,* 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. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* § 56–5–2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56–5–2930. . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of section 56–5–2953. . . . By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn promulgated a severe sanction for noncompliance.

Roberts, 393 S.C. at 348 – 349, 713 S.E.2d at 286.

The facts in the present case are not in dispute. Investigator Kevin Tolson is a York County Deputy Sheriff assigned to the Sixteenth Circuit Solicitor's Office. Investigator Tolson initiated the traffic stop that is the genesis of this case. He detained Respondent until Deputy Stagner arrived. Upon his arrival, Deputy Stagner conducted a driving under the influence investigation and subsequently arrested Respondent. Investigator Tolson's patrol car was not equipped with video recording equipment (Order of the Honorable John C. Hayes, III, filed March 29, 2016, p. 1). Accordingly, the initial stop of Respondent was not captured on video pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2013).

The purpose of the video requirement in the statute "is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant,* 393 S.C. at 347, 713 S.E.2d at 285. In *State v. Taylor,* 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014), our Court of Appeals stated:

> The plain language of the statute demonstrates the legislature intended video

> recording of the majority of an officer's encounter with a potential DUI suspect. Nonetheless, interpreting the statute to require dismissal of the charges when the defendant is off camera for a short period of time and **the gap does not occur during any of those events that either create direct evidence of a DUI** or serve important rights of the defendant would result in an absurdity that could not possibly have been intended by the legislature.

(emphasis added).

It is clear that this Court has interpreted S.C. Code Ann. § 56-5-2953 (Supp. 2013) in a manner that requires all direct evidence tending to prove the *corpus delicti* of driving under the influence to be captured on video. The State elicited the following testimony from Investigator Tolson which is direct evidence tending to prove Respondent was materially and appreciably impaired: (1) Respondent was incoherent; (2) Respondent was "out of it"; (3) Respondent had slurred speech; (4) Respondent had slow movements; and (5) Respondent did not seem to understand Investigator Tolson's instructions. These observations were not video and audio recorded in such a manner that would enable the trier of fact to verify this testimony which defeats the purpose and intent of S.C. Code Ann. § 56-5-2953 (Supp. 2013) as interpreted by this Court and our Supreme Court. Had the State elected not to utilize the "direct evidence of DUI" gathered by Investigator Tolson, then a different result may have been warranted. However, the State clearly used this evidence in its effort to convict Respondent.

Based thereon, the lower court correctly held that Investigator Tolson is the "officer" contemplated in S.C. Code Ann. § 56-5-2953 (A) (Supp. 2013). The court further noted that provisions of S.C. Code Ann. § 56-5-2953 (A)(1)(a) (Supp. 2013) apply even if the officer making the stop is not the arresting officer. The State asserts that Investigator Tolson's

patrol car was exempt from the video recording requirements pursuant to S.C. Code Ann. § 56-5-2953 (G) (Supp. 2013). The State asserts that the video recording requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2013) take effect for each law enforcement vehicle used for traffic enforcement once the vehicle is equipped essentially does not apply because Investigator Tolson's patrol car was not used for traffic enforcement. The State's position would arguably be correct but for the fact that Investigator Tolson's patrol car was being used for traffic enforcement on September 11, 2013.

As noted above, this Court is bound by the factual finding of the lower court's decision unless they are clearly erroneous. The lower court found that even though Investigator Tolson testified that law enforcement was not his primary job, he was acting as a law enforcement officer when he initiated a traffic stop of Respondent. The court further found that the vehicle Investigator Tolson used to stop was being used as a law enforcement vehicle (Order of the Honorable John C. Hayes, III, filed March 29, 2016, p. 2). Further, as his testimony indicates, it is not as if Investigator Tolson "happened" upon Respondent. Quite the opposite, Investigator Tolson actively engaged in pursuing Respondent. Based thereon, Investigator Tolson's patrol car was being used for traffic enforcement on September 11, 2013 and is not exempt from the provisions of S.C. Code Ann. § 56-5-2953 (Supp. 2013).

Finally, the State cites *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) in support of it position that Deputy Stagner satisfied the requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2013) because he was the arresting officer and produced a video. The lower court held that Investigator Tolson is the "officer" contemplated in S.C. Code Ann. §

56-5-2953 (A) (Supp. 2013) and was therefore required to produce a video presumably in addition to the video produced by the arresting officer. *Landis* is distinguishable in that both officers in *Landis* witnessed the reason for the original stop and both officers were immediately on the scene. In the present case, Investigator Tolson gathered a significant amount of evidence prior to the arrival of Deputy Stagner and the State used the unrecorded evidence at trial. Therefore, the lower court correctly ruled that the case was appropriately dismissed pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2013) because the State did not produce a video from the officer who initiated the stop.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court dismiss this appeal and affirm the decision of the magistrate or in the alternative, affirm the decision of the circuit court.

Respectfully submitted,

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