

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM YORK COUNTY  
John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2016-000875

RECEIVED  
OCT 10 2016  
SC Court of Appeals

THE STATE

APPELLANT,

v.

SEAN ROBERT KELLY

RESPONDENT.

RECORD ON APPEAL

HEATH P. TAYLOR  
Taylor Law Firm, LLC  
3618 Sunset Blvd., Suite D  
West Columbia, SC 29169  
(803) 926-2205

ATTORNEY FOR RESPONDENT

ALAN WILSON  
Attorney General

RANEE SAUNDERS  
Assistant Attorney General

Office of the Attorney General  
P.O. Box 11549  
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KEVIN S. BRACKETT  
Solicitor, Sixteenth Judicial Circuit

1675-1A York Highway  
York, South Carolina 29745  
(803) 628-3020

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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STATE OF SOUTH CAROLINA  
UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF YORK VERSUS  
FIRST NAME Sean MIDDLE NAME R LAST NAME Kelly  
STREET AND NO. CITY STATE ZIP CODE

847 Haymarket PL Font Mill  
STATE LICENSED DRIVER'S LICENSE NO. CDL DRI. LIC. CLASS  
SC 100415442  YES  NO D  
VEH. LIC. NO. STATE MAKE OF VEH YEAR COMM. VEH. AUTO 16 PSGR. VEH. COMB.  
CY1386 SC merc 02 HAZ. MT. MOPED MTRCYCL. OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT  
NAME OF TRIAL COURT STREET AND NO. CITY STATE ZIP CODE  
Wood Branch Hwy 529 Scharf  
118 2014 0800 Rock Hill SC 29732

VIOLATION - COURT APPEARANCE REQUIRED (YES/NO) VIOLATION SECTION NO.  
DUI 1st 56.5-2930  
OWNER OF VEHICLE DATE OF ARREST  
9 11 2013

ADDRESS OF OWNER DATE OF VIOLATION  
9 11 2013

BAIL DEPOSITED NAME OF ARRESTING OFFICER RANK  
Jail Stagner Det

RACE SEX DESCRIPTION OF ACCUSED COUNTY NUMBER  
W M 17 19 6018121202 YORK 76  
DATE BAIL REC'D. BY  
20

CASE BEFORE MAGISTRATE  MUN. COURT   
CIRCUIT COURT  FAMILY COURT  FEDERAL COURT

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE. TIME OF VIOLATION WEATHER  
1400 A.M.-1 CIA

DEFENDANT: DID NOT APPEAR  APPEARED  DISTANCE IN FEET FROM INTERSECTION OF  
W160  
I77 N

NOLLE PROSSED  DISPOSITION GUILTY   
FORFEITED BOND  PLED: NOLO CONTENDERE  MILES 1 N E S W  
1 2 3 4

TRIAL BY: TRIAL JUDGE  JURY  HWY NO. CITY  
1 Fm

VERDICT OF TRIAL IF ANY GUILTY  DATE OF TRIAL IF ANY  
NOT GUILTY  Lat 0

JAIL SUSPEND FINE AMT. COLLECTED AMT. SUSPENDED Long 0  
COMMITTED TO: Vehicle Searched Arrest as Result of Collision OFFENSE CODE B.A. LEVEL  
N 99 Refused

CERTIFIED CORRECT DATE 20  
68360 GM

DRIVER'S RECORD COPY

STATE OF SOUTH CAROLINA  
UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF YORK VERSUS  
FIRST NAME Sean MIDDLE NAME R LAST NAME Kelly  
STREET AND NO. 847 Haymarket PL CITY Fort Mill STATE SC ZIP CODE 29715

STATE LICENSED SC DRIVER'S LICENSE NO. 100415442 CDL  YES  NO  
VEH. LIC. NO. CY1386 STATE SC MAKE OF VEH Merced YEAR 2012 COMM. VEH.  AUTO  BUS  TRUCK  
HAZ. MT.  MOPED  MTRCYCL.  OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT Wood STREET AND NO. 114 Springs St

DATE OF TRIAL 10/29/13 TIME OF TRIAL 1400 CITY Fort Mill STATE SC ZIP CODE 29715

VIOLATION - COURT APPEARANCE REQUIRED YES NO VIOLATION SECTION NO. 61-6-4020

OWNER OF VEHICLE Same DATE OF ARREST 9/11/2013

ADDRESS OF OWNER Same DATE OF VIOLATION 9/11/2013

BAIL DEPOSITED Jail NAME OF ARRESTING OFFICER Stasme RANK Dep

RACE W SEX M BIRTH DATE 11/7/69 HT. 601 HAIR Black WT. 170 EYES Brn COUNTY York NUMBER 46  
DATE BAIL RECD. 10/29/13 BY 59910 TROOP 4

CASE BEFORE: MAGISTRATE  MUN. COURT.   
CIRCUIT COURT.  FAMILY COURT.  FEDERAL COURT.

NAME OF TRIAL COURT Wood TIME OF VIOLATION 1405 WEATHER Clear

DEFENDANT: DID NOT APPEAR  APPEARED  AND 160

NOBLE PROSSED  DISPOSITION: GUILTY  MILES 1.77 N 0 E 0 S 0 W 0  
FORFEITED BOND  PLED: NOLO CONTENDERE

TRIAL BY: TRIAL JUDGE  JURY  HWY NO. 1 CITY Fm

VERDICT OF TRIAL IF ANY: GUILTY  NOT GUILTY  DATE OF TRIAL IF ANY 10/29/13

JAIL  SUSPEND  FINE  AMT. COLLECTED  AMT. SUSPENDED

COMMITTED TO: Vehicle Searched  Arrest as Result of Collision  OFFENSE CODE 94 B.A. LEVEL 1

CERTIFIED CORRECT DATE 10/29/13 68361 GM

DRIVER'S RECORD COPY

STATE OF SOUTH CAROLINA

IN THE MAGISTRATE'S COURT

COUNTY OF YORK

RETURN TO NOTICE OF APPEAL

CASE NUMBER: 2015-CP-46-03747

STATE,

VS.

DEFENDANT,

Sean Kelly

Ticket: 68360GM

Charge: Driving Under the Influence, 1<sup>st</sup> offense

FILED-RECEIVED  
2016 JAN 21 PM 3:53  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

The above action came before the Court on September 17, 2015 at 10:00am as a bench trial. Assistant Solicitor Bill Mckinnon was the prosecutor for the State and Kevin Tolsen and Deputy Stagner were witnesses for the State. The defendant was represented by Attorney Michael Brown.

On September 11, 2013, the defendant was stopped on I-77 by Investigator Tolsen with the 16<sup>th</sup> Solicitor's office. The initial stop was accomplished by the use of emergency blue lights. Following the initial traffic stop, Deputy Stagner arrived on the scene. Tolsen's car had no video recording equipment. Stagner initiated a DUI investigation and subsequently arrested the defendant for DUI and transported him to the Moss Justice Center in York, SC. After all testimony and evidence had been presented and after the State rested, the defendant made a motion for a directed verdict of not guilty. After some discussion, it was agreed by all parties to delay a ruling to a later date. The next date for all parties was on November 25, 2015 in my office at which time motion to dismiss was granted.

In this case, the important statutory provision is 56-05-2953 (A). "The video recording at the incident site must: (i) not begin later than the activation of the officer's blue lights." This case involves a

traffic stop accomplished with the activation of blue lights, however, we have no incident site video that complies with this mandatory provision.

The State has argued that the non-compliance should be excused under the exceptions found in 56-5-2953(B). However, this court finds that argument is without merit, where none of the exceptions apply to the facts of this case.

The video provided by Deputy Stagner does not satisfy 56-5-2953(A), where the video begins recording only after the traffic stop has been entirely completed. The statute unambiguously establishes a point in time when the video recording must begin, stating "The video recording at the incident site must: (i) not begin later than the activation of the officer's blue lights." 56-5-2953 (A)(1)(a)(i).

Here, the officer's blue lights, refers to Tolsen, the officer whose blue lights were activated in effecting the traffic stop. The only video produced by the state, fails to begin recording at the statutorily required time, violating the clear mandate provided by 56-5-2953 (A).

Moreover, none of the exceptions from 56-5-2953 (B) apply in this case. There are no facts indicating: 1) the video equipment was inoperable, or 2) that it was impossible to produce the videotape because the defendant either needed emergency medical treatment or exigent circumstances existed. 56-5-2953(B) further states, "In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrest, where an arrest has been made and the video recording equipment has not been activated by blue lights."

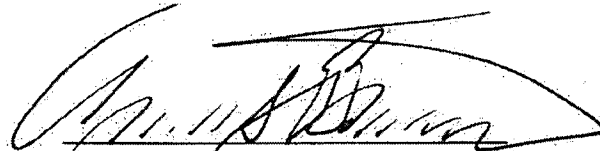
At first glance it may seem the Stagner video implicates this section, "where an arrest has been made and the video recording equipment has not been activated by blue lights," This argument would defeat the clear legislative intent found in the other mandatory provisions of the statute. "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." State v. Henkel (S.C., 2015).

Rather, this exception concerns situations that do not involve the normal traffic stop, which is accomplished by blue lights. This exception recognizes, there are certain times, where it is not practical for the video to begin upon activation of blue lights. Unlike the subsection (B) scenarios, this case clearly involves a blue light traffic stop, and accordingly must comply with mandatory requirement of 56-5-2953(A)(1)(a)(i). Any attempt to excuse their noncompliance through would defeat the overall intent of the statute, and subsection (A) would be rendered meaningless.

Here, the state has failed to produce a video in compliance with Section 56-5-2953 (A), and none of the exceptions of Section 56-5-2953(B) apply. Strictly construing the requirements of this statute and applying the clear case law of this state, the court must dismiss this prosecution for an alleged violation of Section 56-5-2930.

Please find enclosed all evidence, including the audio of the trial.

If I can be of any further assistance, please do not hesitate to call.



CLAYBURN BARNETTE, JR.  
MAGISTRATE

YORK COUNTY CENTRALIZED DUI COURT

December 7, 2015

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STATE OF SOUTH CAROLINA

Appellant **Plaintiff(s)**

vs.

SEAN KELLY

Respondent **Defendant(s)**

Submitted By: Aaron J. Hayes and William A. McKinnon  
Address: 1070 Heckle Boulevard, Suite 207  
Rock Hill, SC 29732

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 -CP- 46 -

SC Bar #: Hayes: 100114 McKinnon: 69463  
Telephone #: (803) 909 7582  
Fax #: (803) 909 7577  
Other:  
E-mail: aaron.hayes@yorkcountysc.gov

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

**DOCKETING INFORMATION** (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.  NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

**NATURE OF ACTION** (Check One Box Below)

- |   |  |   |   |
|---|--|---|---|
| <p><b>Contracts</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Constructions (100)</li> <li><input type="checkbox"/> Debt Collection (110)</li> <li><input type="checkbox"/> General (130)</li> <li><input type="checkbox"/> Breach of Contract (140)</li> <li><input type="checkbox"/> Fraud/Bad Faith (150)</li> <li><input type="checkbox"/> Failure to Deliver/Warranty (160)</li> <li><input type="checkbox"/> Employment Discrim (170)</li> <li><input type="checkbox"/> Employment (180)</li> <li><input type="checkbox"/> Other (199)</li> </ul> | <p><b>Torts - Professional Malpractice</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Dental Malpractice (200)</li> <li><input type="checkbox"/> Legal Malpractice (210)</li> <li><input type="checkbox"/> Medical Malpractice (220)</li> <li>Previous Notice of Intent Case # <u>20 -NI-</u></li> <li><input type="checkbox"/> Notice/ File Med Mal (230)</li> <li><input type="checkbox"/> Other (299)</li> </ul>   | <p><b>Torts - Personal Injury</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Conversion (310)</li> <li><input type="checkbox"/> Motor Vehicle Accident (320)</li> <li><input type="checkbox"/> Premises Liability (330)</li> <li><input type="checkbox"/> Products Liability (340)</li> <li><input type="checkbox"/> Personal Injury (350)</li> <li><input type="checkbox"/> Wrongful Death (360)</li> <li><input type="checkbox"/> Assault/Battery (370)</li> <li><input type="checkbox"/> Slander/Label (380)</li> <li><input type="checkbox"/> Other (399)</li> </ul>   | <p><b>Real Property</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Claim &amp; Delivery (400)</li> <li><input type="checkbox"/> Condemnation (410)</li> <li><input type="checkbox"/> Foreclosure (420)</li> <li><input type="checkbox"/> Mechanic's Lien (430)</li> <li><input type="checkbox"/> Partition (440)</li> <li><input type="checkbox"/> Possession (450)</li> <li><input type="checkbox"/> Building Code Violation (460)</li> <li><input type="checkbox"/> Other (499)</li> </ul>   |
| <p><b>Inmate Petitions</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> PCR (500)</li> <li><input type="checkbox"/> Mandamus (520)</li> <li><input type="checkbox"/> Habeas Corpus (530)</li> <li><input type="checkbox"/> Other (599)</li> </ul>  | <p><b>Administrative Law/Relief</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Reinstate Drv. License (800)</li> <li><input type="checkbox"/> Judicial Review (810)</li> <li><input type="checkbox"/> Relief (820)</li> <li><input type="checkbox"/> Permanent Injunction (830)</li> <li><input type="checkbox"/> Forfeiture-Petition (840)</li> <li><input type="checkbox"/> Forfeiture-Consent Order (850)</li> <li><input type="checkbox"/> Other (899)</li> </ul> | <p><b>Judgments/Settlements</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Death Settlement (700)</li> <li><input type="checkbox"/> Foreign Judgment (710)</li> <li><input type="checkbox"/> Magistrate's Judgment (720)</li> <li><input type="checkbox"/> Minor Settlement (730)</li> <li><input type="checkbox"/> Transcript Judgment (740)</li> <li><input type="checkbox"/> Lis Pendens (750)</li> <li><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)</li> <li><input type="checkbox"/> Confession of Judgment (770)</li> <li><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)</li> <li><input type="checkbox"/> Other (799)</li> </ul> | <p><b>Appeals</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Arbitration (900)</li> <li><input type="checkbox"/> Magistrate-Civil (910)</li> <li><input checked="" type="checkbox"/> Magistrate-Criminal (920)</li> <li><input type="checkbox"/> Municipal (930)</li> <li><input type="checkbox"/> Probate Court (940)</li> <li><input type="checkbox"/> SCDOT (950)</li> <li><input type="checkbox"/> Worker's Comp (960)</li> <li><input type="checkbox"/> Zoning Board (970)</li> <li><input type="checkbox"/> Public Service Comm. (990)</li> <li><input type="checkbox"/> Employment Security Comm (991)</li> <li><input type="checkbox"/> Other (999)</li> </ul> |
| <p><b>Special/Complex /Other</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Environmental (600)</li> <li><input type="checkbox"/> Automobile Arb. (610)</li> <li><input type="checkbox"/> Medical (620)</li> <li><input type="checkbox"/> Other (699)</li> <li><input type="checkbox"/> Sexual Predator (510)</li> </ul>   |  | <ul style="list-style-type: none"> <li><input type="checkbox"/> Pharmaceuticals (630)</li> <li><input type="checkbox"/> Unfair Trade Practices (640)</li> <li><input type="checkbox"/> Out-of State Depositions (650)</li> <li><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)</li> <li><input type="checkbox"/> Pre-Suit Discovery (670)</li> </ul>   |   |

Submitting Party Signature: [Signature]

Date: 12/1/15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

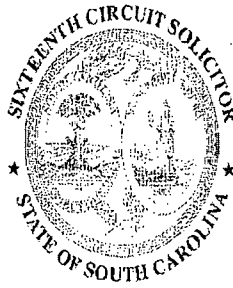
Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post-Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**



KEVIN S. BRACKETT  
SOLICITOR

December 1, 2015

**VIA INTER-DEPARTMENTAL DELIVERY**

Hon. David Hamilton, Clerk of Court  
York County Court of Common Pleas  
300 W. Liberty Street  
York, South Carolina 29745

**VIA INTER-DEPARTMENTAL DELIVERY**

Hon. Clayburn S. Barnette, Jr., Magistrate  
York County Centralized DUI Court  
529 S. Cherry Road  
Rock Hill, South Carolina 29730

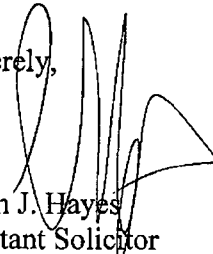
Re: *State v. Sean Kelly*, Case No. 2015-CP-46-\_\_\_\_\_, Former Ticket No. 68360GM

Dear Mr. Hamilton and Judge Barnette:

Please find enclosed an original and one copy of the Notice of Appeal and Proof of Service in the above-referenced matter. Please file these items in accordance with your normal procedures, and return a clocked copy to me in the enclosed self-addressed inter-departmental delivery envelope.

Since this Appeal is being pursued by the State of South Carolina, I am informed that no filing fee is necessary. As always, please do not hesitate to contact me at (803) 909-7582, should you have any questions or concerns.

Sincerely,

  
Aaron J. Hayes  
Assistant Solicitor

enclosures as stated

cc: Michael L. Brown, Jr., Esquire (*via US Mail*)

STATE OF SOUTH CAROLINA )

COUNTY OF YORK )

State of South Carolina, )

Appellant, )

v. )

Sean Kelly, )

Respondent. )

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-46-\_\_\_\_\_

Former Ticket No. 68360GM

**NOTICE OF APPEAL**

**TO: THE HONORABLE CLAYBURN S. BARNETTE, JR., YORK COUNTY MAGISTRATE, and MICHAEL LANGFORD BROWN, JR., ESQUIRE, ATTORNEY FOR THE RESPONDENT, and TO THE RESPONDENT ABOVE-NAMED:**

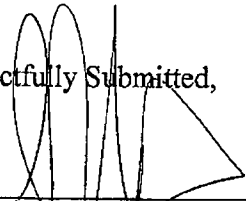
THE STATE OF SOUTH CAROLINA in the Sixteenth Judicial Circuit, by and through Assistant Solicitor William A. McKinnon, hereby appeals, to the Court of Common Pleas for York County, the ruling of York County Centralized DUI Court Magistrate Clayburn Barnette dismissing the Driving Under the Influence charge (Ticket No. 68360GM) against Sean Kelly ("Respondent"). Respondent is represented by Michael L. Brown, Jr., Esquire. The ruling was made by Judge Barnette on November 25, 2015.

This appeal is made on the following grounds:

1. The Magistrate erred in dismissing the above-referenced charge for an alleged violation of S.C. CODE ANN. § 56-5-2953. Pursuant to State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004), only the arresting officer, Deputy John Stagner, was required to produce a video in compliance with S.C. CODE ANN. § 56-5-2953. Further, Investigator Tolson was not required to produce such a video, nor was he required to have a video camera in his car at the time he initiated a traffic stop on Respondent. See S.C. CODE ANN. § 56-5-2953(B), (G). Therefore the Magistrate's order of dismissal should be reversed and this case remanded for further proceedings.

*Signature Block on Following Page.*

Respectfully Submitted,



---

William A. McKinnon  
Aaron J. Hayes  
Assistant Solicitors, Sixteenth Judicial Circuit  
1070 Heckle Boulevard, Ste. 207  
Rock Hill, SC 29732  
(803) 909-7566

Rock Hill, South Carolina

December 1, 2015

STATE OF SOUTH CAROLINA )

COUNTY OF YORK )

State of South Carolina, )

Appellant, )

v. )

Sean Kelly, )

Respondent. )

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-46-\_\_\_\_\_

Former Ticket No. 68360GM

**CERTIFICATE OF SERVICE**

I hereby certify that I have served upon the Magistrate and the Respondent's Counsel of Record a copy of the foregoing Notice of Appeal to their addresses of record:

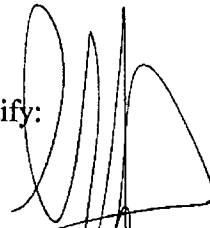
**VIA INTER-DEPARTMENTAL DELIVERY:**

Hon. Clayburn S. Barnette, Jr.  
529 S. Cherry Road  
Rock Hill, SC 29730  
(803) 909-7605  
*York County Magistrate*

**VIA US MAIL:**

Michael L. Brown, Jr., Esquire  
P.O. Box 1025  
Rock Hill, SC 29731  
(803) 328-8822  
*Attorney for Respondent*

I so certify:



\_\_\_\_\_  
Aaron J. Hayes  
Assistant Solicitor

Date: \_\_\_\_\_

12-1-15

**STATE OF SOUTH CAROLINA**

**COUNTY OF YORK**

State of South Carolina,

Appellant,

v.

Sean Kelly,

Respondent.

**IN THE COURT OF COMMON PLEAS**

**SIXTEENTH JUDICIAL CIRCUIT**

Case No. 2015-CP-46-03747

Former Ticket No. 68360GM

**MEMORANDUM IN SUPPORT  
OF APPEAL**

COMES NOW THE STATE OF SOUTH CAROLINA, by and through the undersigned Assistant Solicitor, who respectfully requests that the Court grant the appeal, reverse the decision below dismissing this charge of Driving Under the Influence, and remand the matter for trial.

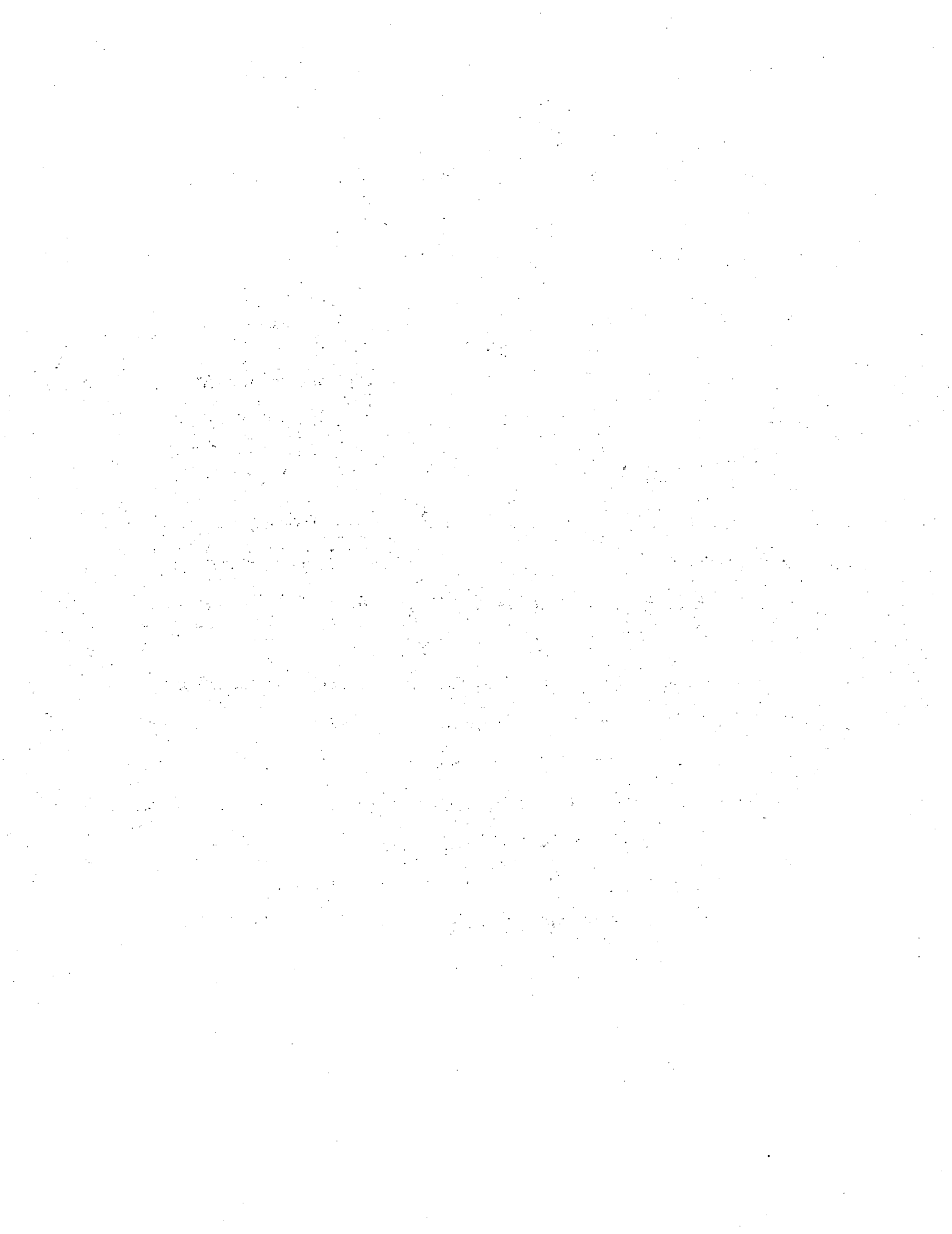
**PROCEDURAL HISTORY**

This case originates from the York County Magistrate’s Centralized DUI Court, via former Ticket No. 68360GM alleging Driving Under the Influence, First Offense (“DUI”). During a bench trial held on September 17, 2015 and December 10, 2015, Respondent (as the Defendant below) moved to dismiss the charge. The motion to dismiss was granted on the grounds the state “failed to produce a video in compliance with Section 56-5-2953(A),”<sup>1</sup> because the officer who performed the initial traffic stop was not driving a vehicle equipped with a camera.

**FACTS BEARING UPON THE APPEAL**

The initial traffic stop on Defendant-Respondent Kelly on September 11, 2013, was performed by Kevin Tolson, a sworn law enforcement officer who was employed as an investigator with the Sixteenth Circuit Solicitor’s Office at the time the events in this matter

<sup>1</sup> Return to Notice of Appeal at 3.



occurred. Investigator Tolson testified that he received a radio report of a probable impaired driver on I-77. Realizing he was very close to the reported location, Investigator Tolson testified that he located the vehicle and observed it crossing the fog line and driving in a manner which was unsafe. He therefore initiated a traffic stop using in his unmarked vehicle, a vehicle which is not equipped with a dashboard camera.

Investigator Tolson testified that shortly after the traffic stop, and while he was still waiting at the car window for Mr. Kelly, Deputy Stagner arrived on the scene in his marked patrol car which was equipped with an operating camera.<sup>2</sup> Deputy Stagner then testified that Mr. Kelly admitted to Deputy Stagner that he had consumed "a lot" of alcohol, had bloodshot eyes, and slurred speech. Deputy Stagner further testified that Mr. Kelly was so intoxicated he could not stand without assistance. Deputy Stagner attempted field sobriety tests, but Mr. Kelly was too intoxicated to perform them and began refusing to try. He was arrested by Deputy Stagner for DUI, First Offense, and transported by Deputy Stagner to the Fort Mill Police Department in Deputy Stagner's vehicle. A search of Mr. Kelly's vehicle revealed an open bottle of Canadian Mist liquor and a cup with a dark liquid which smelled of alcohol. Mr. Kelly refused to blow into the Datamaster BAC machine.

Particularly relevant to this appeal, Investigator Tolson testified he was not a traffic enforcement officer, was never assigned to traffic enforcement duties, and that his unmarked Solicitor's Office Vehicle was therefore not "used for traffic enforcement."

At trial, Appellant moved to dismiss based the lack of a video recording of the entire traffic stop. The Trial Court granted the motion, finding S.C. Code § 56-5-2953(A) was violated because Deputy Stagner's video began "later than the activation of the officer's blue lights." In other

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<sup>2</sup> Deputy Stagner's dashboard camera video recording of this incident, as well as a disc of the audio record of the trial, should have been including in the Magistrate's Return to this Appeal. Should the Court request, the State is able to provide additional copies of the dashboard camera video.

words, the charge was dismissed because the incident video began when Deputy Stager arrived at the scene, rather than when Investigator Tolson performed the traffic stop. This appeal followed.

### STANDARD OF REVIEW

“In criminal appeals from the magistrate court, the circuit court is bound by the magistrate court’s findings of fact if any evidence in the record reasonably supports them . . . but [q]uestions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below.” *State v. Taylor*, 411 S.C. 294, 300, 768 S.E.2d 71, 74 (Ct. App. 2014) (internal citations and quotations omitted). As this appeal concerns the proper interpretation of S.C. Code Ann. § 56-5-2953, the appeal is *de novo*.

### APPLICABLE LAW

The DUI video recording statute, § 56-5-2953 of the SOUTH CAROLINA CODE OF LAWS, provides, in pertinent parts:

(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) *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...*

...

*(G) The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device.*

### **APPLICATION**

Two different provisions of S.C. Code Ann. § 56-5-2953 require reversal of the Magistrate Judge in this matter. First, Investigator Tolson was not the arresting officer, and therefore he was not required to produce a dashcam video. Second, even if Investigator Tolson was considered the arresting officer (which he was not), his vehicle was not “used for traffic enforcement” and therefore the statutory exception applies.

### **THERE IS NO VIOLATION OF § 56-5-2953 IN THIS CASE BECAUSE DEPUTY STAGNER, NOT INVESTIGATOR TOLSON, WAS THE ARRESTING OFFICER**

The plain language of S.C. Code Ann. § 56-5-2953 provides that its provisions only apply to “arresting officer[s].” “Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation . . . 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 . . . . S.C. Code Ann. § 56-5-2953(B) (emphasis added). The Court of Appeals has held that this language means exactly what it says: only the arresting officer must comply with the DUI video statute. “Trooper Davis conducted the field sobriety test, determined Landis was impaired, and placed him under arrest for DUI. Trooper Davis was the arresting officer responsible for meeting the statutory videotaping requirements of section 56-5-2953(A).” *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004).

Both Investigator Tolson and Deputy Stagner testified that it was Deputy Stagner who arrested Mr. Kelly. Just as in the *Landis* case, here Deputy Stagner was the officer who “conducted

the field sobriety test, determined [Kelly] was impaired, and placed him under arrest for DUI." It is not necessary for other officers, like Investigator Tolson, to provide videos.

Because Investigator Tolson testified he was not the arresting officer, it was error for the Trial Court to require him to produce a video, and this matter should be remanded for trial.

**BECAUSE INVESTIGATOR TOLSON'S VEHICLE IS NOT "USED FOR TRAFFIC ENFORCEMENT," THE STATUARY EXEPTION IN § 56-5-2953(G) APPLIES**

Even if, contrary to the clear holding of *Landis*, Investigator Tolson is found to be the "arresting officer," reversal is still appropriate because of the exception in S.C. Code Ann. § 56-5-2953(G).

By its plain language, the entire video recording statutory scheme only applies to police vehicles "used for traffic enforcement," not all police vehicles. "The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device." S.C. Code Ann. § 56-5-2953(G) (emphasis added).

Investigator Tolson testified that all of his duties were investigating crimes for the Solicitor's Office, and that he was never assigned to traffic enforcement duty, and that his vehicle was not "used for traffic enforcement." Opposing counsel argued that on the day of the arrest, Investigator Tolson must have been performing traffic enforcement duty because he performed a traffic stop. This interpretation is absurd, and robs § 56-5-2953(G) of any meaning. It is important to note that S.C. Code Ann. § 56-5-2953 applies only to DUI, DUAC, and Felony DUI arrests. Therefore every case under § 56-5-2953 will be a "traffic stop" since the offense is operating a vehicle under the influence and thus every single law enforcement vehicle must have a camera. That is an absurd result, and this interpretation must be rejected. "We will reject a statutory


interpretation that leads to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” *New York Times Co. v. Spartanburg Cty. Sch. Dist. No. 7*, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007). More specifically, “we should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless.” *Hinton v. S. Carolina Dep’t of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). For the § 56-5-2953(G) exception to actually mean something, it must mean traffic stops performed in a vehicle not normally or not routinely used in traffic enforcement are excused from the video requirement.

Investigator Tolson was not a traffic enforcement officer, and his vehicle was not a traffic enforcement vehicle. He is therefore exempt from the video requirement under S.C. Code Ann. § 56-5-2953(G).

#### CONCLUSION

Investigator Tolson was not required to produce a video of the traffic stop because he was not the arresting officer, pursuant to *State v. Landis*, and because his vehicle was not “used for traffic enforcement.” For the foregoing reasons, the State respectfully requests that the Court grant instant appeal and remand for trial.

Respectfully Submitted,



---

William A. McKinnon  
Assistant Solicitor  
16<sup>th</sup> Judicial Circuit  
1070 Heckle Boulevard, Ste. 207  
Rock Hill, SC 29732  
(803) 909-7566

Rock Hill, South Carolina

March 18, 2016

State of South Carolina., )  
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 )  
County of York., )

In the Court of Common  
Pleas for York  
Case No.: 2015-CP-46-03747

State of South Carolina., )  
 )  
Appellant., )  
 )  
-vs- )  
 )  
Sean Robert Kelly., )  
 )  
Respondent. )  
\_\_\_\_\_ )

Transcript of Record.

March 23, 2016  
York, South Carolina

B E F O R E:

The Honorable John C. Hayes, III., Judge.

A P P E A R A N C E S:

Ms. William McKinnon  
Assistant Solicitor  
Sixteenth Judicial Circuit  
1070 Heckle Boulevard, Ste., 207  
Rock Hill, South Carolina 29732  
For the Appellant

**ORIGINAL**

Ms. Michael L. Brown, Junior, Esquire  
P.O. Box 1025  
Rock Hill, South Carolina 29730  
For the Respondent

Wanda S. Nelson, CVR-M  
Official Court Reporter  
Sixteenth Circuit, York and Union  
To the Honorable John C. Hayes, III

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WITNESS

BY:

PAGE NO.

No witnesses were called.

I N D E X - C O N T I N U E D

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NO.                      DESCRIPTION                      ID.                      EVD.

No Exhibits were received into the record.

1 (COURT IN SESSION/ON THE RECORD IN THE MATTER OF STATE  
2 OF SOUTH CAROLINA VERSUS SEAN ROBERT KELLY, WEDNESDAY,  
3 MARCH 23, 2016 AT 10:20 AM.)

4 THE COURT: All right. The next one is not set until  
5 ten thirty I believe ten thirty and that's South Carolina  
6 versus Kelly. Mr. McKinnon is present and then Michael  
7 Brown is on the other side. So we'll be at ease until ten  
8 thirty.

9 (COURT AT EASE AT 10:22 AM.)

10 (COURT BACK IN SESSION AT 10:25 AM.)

11 THE COURT: Take your seats. Thank you.

12 The next matter is the State of South Carolina versus  
13 Sean Kelly; a DUI appeal from Magistrate Clayburn Barnette.

14 MR. MCKINNON: Thank you, your Honor, good morning.

15 THE COURT: Good morning.

16 MR. MCKINNON: Bill McKinnon on behalf of the State,  
17 your Honor. Your Honor, this is a case involving a traffic  
18 stop by Kevin Tolson who at the time was an investigator  
19 with the York County Sheriff's - with the York County  
20 Solicitor's Office.

21 On September 11th, 2013 Mr. Tolson had a radio report  
22 of an intox - probable intoxicated driver on I-77 and he  
23 realized he was very very close to the reported location;  
24 he located the car, it was swerving and it was driving in a  
25 dangerous manner and he initiated a traffic stop.

1 MR. BROWN: Your Honor, I'm gonna object to his  
2 rendition of the facts. The video speaks for itself and  
3 the transcript speaks for itself. He's taking liberty with  
4 the facts ---

5 MR. MCKINNON: You know I'm ---

6 MR. BROWN: --- here. It's outside the context of the  
7 --

8 MR. MCKINNON: Mr. Brown, I'm not taking any liberties  
9 at all and you know that.

10 MR. BROWN: I disagree, your Honor.

11 MR. MCKINNON: In fact --

12 MR. BROWN: I totally disagree, your Honor.

13 THE COURT: Whoa, whoa, whoa. We're lawyers, we'll do  
14 this civilly. I'm hearing this without a jury, of course,  
15 this is an appeal.

16 MR. MCKINNON: Your Honor, --

17 THE COURT: I'll listen to his rendition and if  
18 there's anything you can add that I do not find in there  
19 I'll weed it out ---

20 MR. BROWN: Yes, sir.

21 MR. MCKINNON: I'll do my best.

22 THE COURT: --- I'll listen to your response so you  
23 may proceed.

24 MR. MCKINNON: Thank you, your Honor, I'll do my best  
25 to summarize the facts and if I speak to anything wrong I'm

1       sure Mr. Brown will correct me.

2               But Mr. Tolson initiated a traffic stop, your Honor.

3       His vehicle --

4               (DISTRACTION FROM CONSTRUCTION WORK ON COURTHOUSE  
5       ROOF.)

6               THE COURT: They're working on the roof so hopefully  
7       they'll stay up there. I can't promise.

8               MR. MCKINNON: Mr. Tolson's investigative vehicle,  
9       your Honor, is not equipped with a camera. Deputy Stagner  
10       from York County Sheriff's Office arrived very shortly  
11       after the stop. At the time Deputy Stagner arrived Mr.  
12       Tolson is still standing at the driver's window waiting for  
13       the license. Deputy Stagner testified that Mr. Kelly had  
14       blood-shot eyes. He consumed - Said he consumed a lot of  
15       alcohol. He had a slurred speech and then he was so  
16       intoxicated that they did not feel like field sobriety test  
17       were safe. He was placed under arrest by Deputy Stagner  
18       for DUI; transported to the Fort Mill Police Department for  
19       field sobriety - for a DATA Master test which he refused.

20               Your Honor, the basic issue in the appeal is, does the  
21       fact that the traffic stop performed by Investigator  
22       Tolson, without a camera on the vehicle, does that mean  
23       this case had to be thrown out? It was dismissed by Judge  
24       Barnett on that basis, your Honor. And I believe there are  
25       two statutory basis why Judge Barnett should be reversed.

1           The first one, your Honor, is *State v. Landis*, it's a  
2 Court of Appeals case which says very clearly that only the  
3 arresting officer must produce a video of --

4           MADAM COURT REPORTER: I'm sorry, I'm sorry. I'm  
5 sorry, could you repeat that please? Reversed on appeal.

6           MR. MCKINNON: Yes, ma'am.

7           Your Honor, Court of Appeals case *State versus Landis*.  
8 Your Honor, in *State versus Landis* holds that only the  
9 arresting officer must produce a video under 2953. In this  
10 case Deputy Stagner who had the video was the arresting  
11 officer, your Honor. His video covers everything that  
12 happened in the case except for the very initial traffic  
13 stop by Investigator Tolson.

14           That's one independent basis for reversal, your Honor,  
15 is that Investigator Tolson does not have to produce a  
16 video under the statute.

17           The second basis, your Honor, is 2953(G) which is an  
18 exception to the DUI recording statute. That provides that  
19 law enforcement vehicles which are not used for traffic  
20 enforcement do not have to have video so that means it does  
21 not even apply to traffic stops by law enforcement vehicles  
22 that are not used for traffic enforcement. And that is,  
23 Investigator Tolson is the perfect example of that sort of  
24 case, your Honor.

25           He testified at the trial he does not do traffic

1 enforcement; he has never assigned to traffic enforcement;  
2 his vehicle is never used for traffic enforcement. He  
3 performed this stop because it was an unsafe driver and,  
4 your Honor, it fits squarely in the 2953(G) exception.

5 Investigator Tolson is not a patrol officer, his  
6 vehicle does not have to be equipped with a camera because  
7 he does not perform traffic enforcement duties; his vehicle  
8 is not used for traffic enforcement, your Honor.

9 So for both of those reasons, your Honor, the State  
10 earned it's reversal.

11 THE COURT: All right. Mr. Brown.

12 MR. BROWN: Your Honor, I submit the facts are  
13 uncontradicted in this case and the record will reveal  
14 this. Officer Tolson executed a stop with a blue light on  
15 this defendant. Approximately five minutes later Deputy  
16 Stagner shows up. Pursuant to 56-5-2953(A) "A person who  
17 violates Section 56-5-2930; 2933 or 2945 must have his  
18 conduct at the incident site" . . . "and breath test site  
19 video recorded. The video recording of the incident site  
20 must: not begin later than the activation of blue lights."  
21 That clearly was not done in this case; that's  
22 uncontradicted.

23 So the question becomes under Subsection B of the  
24 statute do exceptions apply. I want to emphasize to this  
25 Court the State produced no affidavit listing any of the

1 exceptions of Officer Tolson's vehicle which they could  
2 have done. And I'm sure the Court's well familiar with the  
3 State's form that says my vehicle has not been equipped  
4 with a video camera yet. This was not done in this case.  
5 The State has not complied with Subsection B in this  
6 statute so, therefore, they're standing on the merits of  
7 this fact that he does not have a camera in his vehicle.

8 The State's reliance on *State v. Landis* is misplaced,  
9 your Honor. A quick review of that case will show that in  
10 that particular matter Officer Davis of the South Carolina  
11 Highway Patrol in Spartanburg County, and a state  
12 transportation officer, stopped a vehicle at the same time.  
13 Both cars arrived; the Officer Davis the arresting officer  
14 in this case also saw the person driving, saw the bad  
15 driving, and stopped him in *Landis*. He also did not  
16 produce a video tape but it's a complete different set of  
17 facts.

18 In that case the Supreme Court of Appeals correctly  
19 found in my opinion that his video camera was inoperable at  
20 that time and reasonable efforts have been made to maintain  
21 it in operable condition so *Landis* is not applicable here,  
22 your Honor.

23 The question becomes they've not complied with the  
24 statute. What's the remedy? And I would like to hand this  
25 up.

1 I gave you a copy didn't I? Do you need another copy?

2 MR. MCKINNON: Do you mean at trial?

3 MR. BROWN: No. *Town of Mount Pleasant versus*  
4 *Roberts.*

5 MR. MCKINNON: No, I don't need a copy.

6 (DOCUMENTS RECEIVED UP BY THE COURT.)

7 MR. BROWN: I beg the Court's indulgence one second.

8 On page 7, and I think the Court's familiar with *Town*  
9 *of Mount Pleasant v. Roberts - Town of Mount Pleasant* just  
10 decided they weren't going to equip video cameras in their  
11 cars at all because they weren't gonna pay for them despite  
12 the legislatures mandate that these cars be equipped with  
13 video cameras.

14 On page 7, paragraph 3, "Up until this point our  
15 appellate courts have affirmly answered the question when a  
16 law enforcement agency inexcusably failed to video tape the  
17 DUI arrest with an existing video camera. In the incident  
18 case the town failed to create a video tape of Robert's DUI  
19 arrest because the patrol vehicle had never been equipped  
20 with a video camera."

21 On page 8 of that opinion the court goes on to say,  
22 "Our courts however have not analyzed whether these  
23 exceptions apply with a law enforcement vehicle that's  
24 never been equipped with a video camera in the incident  
25 case. Taking into consideration the purposes of Sections

1 56-5-2953 which is to create direct evidence of a DUI  
2 arrest we find the town's protracted failure to equip it's  
3 patrol vehicles with video cameras despite it's priority  
4 ranking defeats the intent of the legislature and violates  
5 the statutory created obligation to video tape DUI arrest.

6 Accordingly we do not believe the town should be able  
7 to continually evade it's duty to allow in Subsection G  
8 thus we hold the town's failure to equip it's patrol  
9 vehicles does not negate the application of a statutory  
10 exception of Subsection B."

11 And to emphasize the point on Page 9 of that opinion  
12 the court goes on to state, "Further more it is instructive  
13 that the legislature has not mandated video taping in any  
14 other criminal context. Despite the potential significance  
15 of video taping of oral confessions the legislature is not  
16 required the state to do so. By requiring the law  
17 enforcement agency to video tape a DUI arrest the  
18 legislature clearly intended strict compliance with the  
19 provisions of Section 46-5-2953 and in turn promptly gave  
20 us the severe act sanction for non-compliance."

21 They haven't complied, your Honor. They have not  
22 submitted an affidavit which the statute requires pursuant  
23 to Subsection B. The State would like you to buy an  
24 argument that this is only applicable for what they deem to  
25 be a vehicle that's used for traffic enforcement.

1 My counter argument is, your Honor, --

2 THE COURT: Well doesn't -- I hate to kind of  
3 interrupt, but doesn't the *Roberts* case talk about quote  
4 patrol vehicle? Patrol vehicles on the page 8 that you  
5 pointed to. I mean it specifically talks about patrol  
6 vehicles and the town's failure to equip patrol vehicles.

7 MR. BROWN: That's correct, your Honor.

8 THE COURT: So is that the distinction between law  
9 enforcement officers and not patrol officers?

10 MR. BROWN: No, sir, your Honor. I take the position  
11 the statute's clear and unambiguous on this point. Any  
12 vehicle and the plain words in reading the statute take  
13 effect for each law enforcement vehicle used for traffic  
14 law enforcement. When they turn the blue light on to stop  
15 somebody they chose to use that vehicle for traffic law  
16 enforcement. By the State's own admission they were  
17 looking for suspected DUI. They knew it was gonna be a DUI  
18 case. You can imply that the State knew the statutory  
19 requirements of 56-5-2953 and chose not to do it.

20 I really believe the non-compliance comes in. They  
21 didn't even submit an affidavit saying it hadn't been  
22 equipped. If they had fulfilled the exceptions to  
23 Subsection B I think my argument would a lot weaker but the  
24 State chose not to do that; therefore, no exceptions are  
25 listed therefore the statutory schemes have been violated

1 and under the *City of Rock Hill versus Suchenski* the remedy  
2 is dismissal.

3 I also would like to add, your Honor, the State did  
4 not appeal the additional sustaining ground to this matter;  
5 that there is no affidavit; there's no audio at the start  
6 of Deputy Stagner's video either. And the only field  
7 sobriety test given is one test. So, HGN test and that's  
8 blocked by the officer's head. You can't even see the  
9 defendant's face. And I would raise those additional  
10 sustaining grounds to uphold Judge Barnett's ruling.

11 THE COURT: Did you file a document indicating you  
12 were raising those as additional sustaining grounds?

13 MR. BROWN: I didn't file the appeal, your Honor.

14 THE COURT: I know but did you file any - Okay. I  
15 hear your argument but it just wasn't ruled on so ---

16 MR. BROWN: Yes, sir.

17 THE COURT: -- it's really not before me.

18 MR. BROWN: I'm just throwing it to the court for  
19 additional sustaining grounds for what it's worth.

20 THE COURT: Okay.

21 MR. MCKINNON: Your Honor, very briefly. No affidavit  
22 is required, your Honor. Section B provides for an  
23 affidavit of exigent circumstances like the camera is  
24 broken or there is a medical emergency or something like  
25 that. That's not what we're arguing, your Honor. We're

1 arguing Subsection G. And as your Honor pointed out that  
2 this *Town of Mount Pleasant* does not apply. Provision G --  
3 every traffic - every incident under the statute, your  
4 Honor, is a traffic stop so the exception in G must mean  
5 what the legislature intended for there to be a class of  
6 police vehicles that did not have to comply with the  
7 statute.

8 THE COURT: That's those not used for traffic  
9 enforcement?

10 MR. MCKINNON: Exactly, your Honor. And Investigator  
11 Tolson testified --

12 THE COURT: Why would somebody have a blue light if  
13 they weren't intending to stop people on the highway?

14 MR. MCKINNON: In case of exigent circumstances or  
15 emergencies like this, your Honor. Or, when he's pulling  
16 up and there is someone in front of someone's house, your  
17 Honor, if he's chasing someone in pursuit, but obviously  
18 every stop under this statute is gonna be a traffic stop.  
19 It's a DUI statute. So the legislature could have said if  
20 you're gonna stop people for DUI you must have a camera.  
21 They didn't say that. They said in the DUI statute, where  
22 every incident will be a traffic stop, they said there is a  
23 class of vehicles which don't have to have cameras. And  
24 that's vehicles that are not used for traffic enforcement  
25 and that's Investigator Tolson, your Honor.

1 THE COURT: Did Investigator Tolson testify?

2 MR. MCKINNON: He did, your Honor. He testified he's  
3 never assigned to traffic enforcement duties. He does not  
4 perform traffic enforcement; his vehicle is not used for  
5 traffic enforcement. His sole duties are investigating  
6 cases for the Solicitor's office.

7 THE COURT: Did you ask why he had a blue light if  
8 that was the case?

9 MR. MCKINNON: Not that I recall, your Honor.

10 And again, your Honor, there's an additional  
11 sustaining ground, you know, additional grounds for  
12 reversal under *Landis*. *Landis* said only the arresting  
13 officer must produce a video. Deputy Stagner was the  
14 arresting officer; his video covers everything, there's  
15 everything the statute requires except it wasn't activated  
16 upon Officer Tolson's blue lights. And *Landis* says that  
17 only Stagner must produce the video.

18 And Subsection B says in circumstances where the  
19 officer arrives after the incident it's okay. That's  
20 Stagner; he's got to produce the video, he arrives. It  
21 says in circumstances including but not limited to road  
22 blocks, traffic accidents, citizen's arrest. Those are  
23 situations where the incident's already started, your  
24 Honor. Just like here Deputy Stagner arrives; as soon as  
25 he arrives his camera is activated. The fact that it

1 wasn't activated upon his blue light - I mean activated by  
2 Investigator Tolson does not matter because Tolson's not  
3 the arresting officer, your Honor.

4 Every element, that attempted the field sobriety test,  
5 the *Miranda*, everything the statute requires is on camera,  
6 your Honor. Thank you.

7 MR. BROWN: Just very briefly. By their own argument  
8 that makes me correct. They claim exigent circumstances  
9 but submitted no affidavit. The statute - Its not  
10 complicated. If they want to claim exigent circumstances  
11 in Subsection B submit the affidavit. Hey, we've got  
12 somebody here driving bad possible DUI I'm gonna stop 'em.  
13 These are exigent circumstances. They chose not to do that  
14 in the prosecution of Mr. Kelly. The statutory scheme  
15 fails.

16 THE COURT: All right. Well I'll take a look at it.

17 MR. MCKINNON: Thank you, your Honor.

18 THE COURT: Thank you both.

19 - END OF TRANSCRIPT OF RECORD. -  
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STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )  
State of South Carolina, )  
Appellant, )  
vs. )  
Sean Kelly, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-46-03747

ORDER

This is an appeal by the State from the Magistrate Court’s dismissal of a Driving Under the Influence charge <sup>1</sup>(DUI) against Respondent Sean Kelly. The Court heard this matter in open court March 23, 2016. The Appellant was represented by William A. McKinnon, Esq., the Respondent by Michael L. Brown, Jr., Esq.

On September 11, 2013, Respondent was stopped on I-77 by Investigator Kevin Tolson (Tolson), a Sheriff’s officer assigned to the 16<sup>th</sup> Solicitor’s office. The initial stop was accomplished by the use of Officer Tolson’s blue lights. Following the initial traffic stop, a Deputy Stagner arrived on the scene. Tolson’s car had no video recording equipment. Stagner initiated a DUI investigation and subsequently arrested the Respondent for DUI and transported him to the Moss Justice Center in York, South Carolina. Respondent was subsequently tried in a bench trial and the charge dismissed, upon motion of Respondent.

The Magistrate Judge indicated in the Return that the dismissal of Respondent’s DUI charge was based on the State’s failure to produce a video from the incident site in compliance with Section 56-5-2953(A), S.C. Code of Laws, 1976, as amended.<sup>2</sup>

<sup>1</sup> Violation of Section 56-5-2930, S.C. Code of Laws, 1976, as amended.

<sup>2</sup> All references to statutory provisions herein are from S.C. Code of Laws, 1976, as amended.

Section 56-5-2953 provides in pertinent part:

(A) A person who violates Section 56-5-2930, or 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.

The Cardinal rule of statutory interpretation is to ascertain and effectuate the intentions of the legislature. State v. Gordon, 408 SC 536; 759 S.E.2d (755).

Section 29-5-2953 uses three terms when referencing the person responsible for certain conduct under the statute Section 29-5-2953(A)(1)(a) uses the word "officer"; Section 56-5-2953(B), two times, refers to the "arresting officer" and once to "the arresting law enforcement officer."

Here, the facts establish that Officer Tolson was the officer who effected the traffic stop of Respondent. At Respondent's trial, Officer Tolson testified he was not the arresting officer and the Uniform Traffic Ticket issued to Respondent confirms this.

Section 56-5-2953(G) applies to vehicles "used for Traffic enforcement" and provides for delayed implementation of 56-5-2953(A) under a certain circumstance, installation of video devices in Traffic enforcement vehicles. Officer Tolson testified that law enforcement was not his primary job. Therefore, he implicitly, if not explicitly, confirmed he is a law enforcement officer to some degree. The fact that he drove a vehicle equipped with blue lights further bolsters this finding.

Officer Tolson, when stopping Respondent, was acting as a law enforcement officer. Therefore, the vehicle he used to effect the stop was being used as a law enforcement vehicle.

Based on the above, I find that under Section 56-5-2953(A) Tolson is the "officer" referred to therein. There is no question Respondent's stop was occasioned by Officer Tolson's activation of the blue lights in his law enforcement vehicle.

Based on the above, I find that under Section 56-5-2953(A)(1)(a) Officer Tolson is the officer referred to therein. Therefore, the initial stop by Officer Tolson implicates Section 56-5-2953 (A)(1)(a). I find the intention of the legislation is that when an officer stops a vehicle whose driver is suspected of driving under the influence, that the subsequent conduct of the driver must be video recorded. I find this is true even if the officer making the stop is not the arresting officer.

Since Officer Tolson was not the arresting officer, he could not have, nor did he, submit a Section 56-5-2953(B) affidavit under the clear and unambiguous language of Section (B).

I find that Section 56-5-2953(G) here does not excuse Officer Tolson's failure to comply with Section 56-5-2953. The State has presented no reason why Officer Tolson's law enforcement vehicle was not equipped with a video recording device other than law enforcement was not Officer Tolson's primary job. There is nothing in the record, other than the fact just noted, that justifies the failing to equip Officer Tolson's vehicle with a video recording device seventeen years after the enactment of Section 56-5-2953. In so finding, the Court applies its own rule of reason<sup>3</sup> as an overlay to the intention of the legislature.

It is not reasonable that law enforcement can leave law enforcement vehicles, which may be used in DUI stops, unequipped with video recorders and take the position the State does here. That is, the simple fact that law enforcement has chosen not to install video recorders in certain law enforcement vehicles which clearly fall under the designation of a law enforcement vehicle cannot reasonably justify the State's reliance on Section 56-5-2953(G) in making this choice. To

<sup>3</sup> The Rule of Reason is antitrust doctrine.



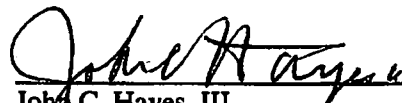
allow law enforcement to opt to not equip its law enforcement vehicles with video recorders and then get the benefit of the provision of Section 56-5-2953(G) would be to allow law enforcement to neuter Section 56-5-2953.

The Court in the above is to a degree following the logic of The Supreme Court in The Town of Mount Pleasant v. Roberts, 393 S.C. 332; 713 S.E.2d 278 (S. Ct. 2011). In Roberts, the Court found;

... the town's prolonged failure to equip its patrol vehicle with video cameras defeats the intent of the legislature.  
(393 SC at 349)

Therefore, the State's appeal is denied and dismissed. The ruling of the Magistrate Judge herein below is AFFIRMED.

IT IS SO ORDERED.

  
\_\_\_\_\_  
John C. Hayes, III  
Presiding Judge

#4

March <sup>28<sup>th</sup></sup>, 2016  
York, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 State of South Carolina, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 Sean Kelly, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-46-03747

**RULE 59(e) MOTION TO  
 RECONSIDER/ALTER JUDGMENT AND  
 MEMORANDUM IN SUPPORT**

COMES NOW THE STATE OF SOUTH CAROLINA, by and through the undersigned Assistant Solicitor, who respectfully moves pursuant to Rule 59(e), SCRPC for this this Court to reconsider and alter its judgment of March 28, 2016 and reverse the Magistrate Court. This motion is timely because the State received notice of this judgment on March 29, 2016.

**GROUND FOR RECONSIDERATION/ALTERATION**

The March 29, 2016 judgment in this matter should be reconsidered and altered for two reasons: 1) it is contrary to *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) and 2) it renders the “traffic enforcement” language of § 56-5-2953 meaningless, contrary to *Matter of Decker*, 322 S.C. 15, 471 S.E.2d 462 (1995).

**ARGUMENT**

**I. THE JUDGMENT IS CONTRARY TO STATE v. LANDIS**

Pursuant to *State v. Landis*, the only person upon which § 56-5-2953(A) places any obligations is the arresting officer (here, Deputy Stagner). “Therefore, we hold that the State Transport Officer merely assisted in facilitating the traffic stop. Trooper Davis was the arresting officer responsible

for meeting the statutory videotaping requirements of section 56-5-2953(A)." *State v. Landis*, 362 S.C. 97, 105, 606 S.E.2d 503, 506-507 (Ct. App. 2004) (emphasis added). *Landis* concerns the exact fact pattern present in the instant case: a traffic stop was performed by one officer, and a second officer, equipped with a video camera, arrived later and made the arrest. *Landis* held the only officer to which § 56-5-2953(A) applied was the second, arresting officer. The language in § 56-5-2953 concerning the "officer's blue lights" does not apply to Investigator Tolson because it is part of § 56-5-2953(A), which *Landis* directly held only applies to the arresting officer. The facts of the instant case are even stronger than *Landis*, because the second officer in *Landis* arrived after the driver had already been removed from his vehicle. In this case, Mr. Kelly was still in his vehicle when Deputy Stagner arrived.

Under *Landis*, since Investigator Tolson was not the arresting officer, it does not matter whether he had a working video camera. It does not matter if he had ten video cameras or none, or a broken camera, or whether he was in a car or a motorcycle or performed the traffic stop on foot. He was not the arresting officer and therefore neither his actions at the scene, nor what kind of vehicle he was driving, nor whether or not he had a camera matter in the least for § 56-5-2953(A) under *Landis*.

The only remaining question, then, is whether Deputy Stagner's video, standing alone and without any reference to Investigator Tolson, satisfies § 56-5-2953. It plainly does. Section 56-5-2953(B) provides, in relevant part:

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.

Deputy Stagner's video began as soon as "practicable." In fact, it began even before he arrived at the scene. His video shows him arrive while Investigator Tolson is still standing at Defendant Kelly's door, and before Mr. Kelly has stepped out of his vehicle. It shows everything that occurred with the exception of Investigator Tolson using his blue lights to pull over Mr. Kelly. This is a situation squarely falling into § 56-5-2953(B) – where the traffic stop had already occurred – and the video beginning before Deputy Stagner arrived on scene is surely as soon as "practicable."

Because Investigator Tolson's lack of video is utterly irrelevant pursuant to *Landis*, and because Deputy Stagner's video squarely falls within -2953(B), the judgment should be altered and the Magistrate reversed.

**II. THE JUDGMENT RENDERS PORTIONS OF -2953(G) MEANINGLESS. AND IS THEREFORE CONTRARY TO *MATTER OF DECKER***

The March 29, 2016 Order holds that every law enforcement vehicle that makes a DUI stop must have a video recorder, and therefore the -2953(G) exception does not apply. "It is not reasonable that law enforcement can leave law enforcement vehicles, which may be used in DUI stops, unequipped with video recorders...." Order of March 28, 2016. This holding is contrary to the plain language of § 56-5-2953(G) and must be altered.

Section 56-5-2953(G) provides: "The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device" (emphasis added). The Order in this case contradicts the plain language of the statute, which states not that every law enforcement vehicle must be equipped with cameras, but only those vehicles "used for traffic enforcement." Our courts have held repeatedly that the plain language of the statute controls. *See, e.g., Peake v. S.*

*Carolina Dep't of Motor Vehicles*, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007) (“The legislature's intent should be derived primarily from the plain language of the statute”). It is very easy to write a hypothetical statute which reads “All law enforcement vehicles must have cameras.” But this is not what the legislature drafted – the actual statute is limited to those “used for traffic enforcement,” and this language must mean something.

The Order attempts to reconcile these precepts by pointing out that on the date of this stop, Investigator Tolson’s vehicle was used for traffic (i.e., DUI) enforcement. That is, although every law enforcement vehicle does not need a camera, every vehicle that is ever, even once, used for traffic enforcement must have one. This interpretation is logically tortured and renders the “used for traffic enforcement” language a nullity. The entire statutory scheme of § 56-5-2953 only applies to DUI stops – it is not a generic video recording statute. Every DUI stop is “traffic enforcement” on its face – the offense is driving a vehicle under the influence.

In *Matter of Decker*, our Supreme Court held that Courts must give effect to every word in a statute. 322 S.C. 15, 471 S.E.2d 462 (1995) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous”) (internal citation omitted). Since every DUI is “traffic enforcement,” § 56-5-2953(G) must mean there is a subset of law enforcement vehicles, used for occasional DUI stops, that do not have to have cameras because they are not “traffic enforcement.” Otherwise, the -2953(G) exemption has no meaning at all. This conclusion is further strengthened by *Town of Mt. Pleasant v. Roberts*, where the Supreme Court repeatedly described its holding requiring video cameras as applying to “patrol vehicles,” not all vehicles. See, e.g., 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011), “[W]e find the Town's protracted failure to equip its patrol vehicles with video cameras . . . defeats the intent of the

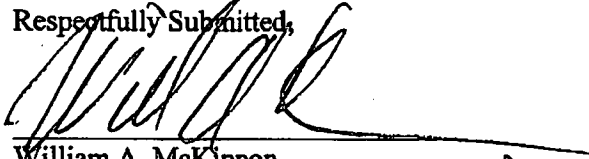
Legislature and violates the statutorily-created obligation to videotape DUI arrests"). "Patrol vehicles" is just another way of phrasing vehicles "used for traffic enforcement."

The interpretation offered by the March 29, 2016 Order means that there is no situation where lack of video on a DUI stop can be excused because the vehicle is not a "traffic enforcement" video. That holding eviscerates the -2953(G) exception and must be altered and the Magistrate reversed.

### CONCLUSION

Both because Deputy Stagner's video satisfies -2953(B), and Investigator Tolson's video is irrelevant under *Landis*; and because -2953(G) excuses the lack of video in any case, the State respectfully submits the March 29<sup>th</sup>, Order must be reconsidered and altered, the Magistrate reversed, and this matter remanded for retrial.

Respectfully Submitted,



William A. McKinnon  
Assistant Solicitor  
16<sup>th</sup> Judicial Circuit  
1070 Heckle Boulevard, Ste. 207  
Rock Hill, SC 29732  
(803) 909-7566

Rock Hill, South Carolina

March 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF YORK

State of South Carolina,

Appellant,

v.

Sean Kelly,

Respondent.

IN THE COURT OF COMMON PLEAS

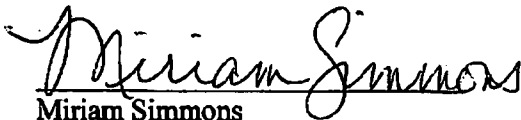
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-46-03747

CERTIFICATE OF SERVICE

I, Miriam Simmons, employee of the Sixteenth Circuit Solicitor's Office, certify that I have served State's Rule 59(e) Motion to Reconsider/Alter the Judgment by depositing the same in the US Mail, First-Class postage prepaid, on March 31, 2016 upon:

Michael L. Brown, Esq.  
Law Offices of Michael Brown  
P.O. Box 1025  
Rock Hill, SC 29730



Miriam Simmons  
Paralegal  
Solicitor's Office, 16<sup>th</sup> Judicial Circuit  
1070 Heckle Boulevard, Ste. 207  
Rock Hill, SC 29732  
(803) 909-7581

Rock Hill, South Carolina

March 31, 2016

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )  
STATE OF SOUTH CAROLINA )  
Plaintiff, )  
v. )  
SEAN KELLY )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-0374

ORDER

FILED-RECEIVED  
2016 APR 13 PM 3:47  
DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

The Assistant Solicitor timely moves for the Court to reconsider its judgment of March 28, 2016 pursuant to Rule 59(e), SCRPC.

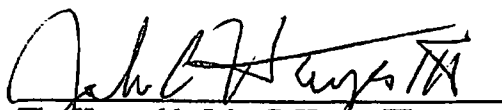
The Court has reviewed the two reasons set forth in the solicitor's Motion to Reconsider Judgment.

The State's reliance on *State v. Landis*, 362 S.C. 97, 606 SE.2d 503 (Ct. App 2004) is unpersuasive, and in the undersigned's opinion, is not the "exact fact pattern" (see State's Rule 59(e) Motion). As to Section 56-5-2953(G), the undersigned does not believe the March 29, 2016 Order is incorrect in its analysis of said section.

Upon review, the Court finds no cause to alter its prior judgment. Therefore, the Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

April 12<sup>th</sup>, 2016.

  
The Honorable John C. Hayes, III  
Presiding Circuit Court Judge

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-46-03747

THE STATE OF SOUTH CAROLINA, Appellant,

v.

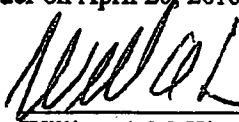
Sean Robert Kelly, Respondent.

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DAVID HAMILTON  
C.C.P. CLERK  
YORK COUNTY, SC

NOTICE OF APPEAL

The State of South Carolina hereby appeals to the Court of Appeals the Order of the Honorable John C. Hayes, III, dated March 28, 2016. Appellant received written notice of entry of this Order on March 29, 2016. This Order is enclosed herewith as Exhibit A. Appellant filed a timely Rule 59(e) Motion, which was denied on April 13, 2016. That order is enclosed as Exhibit B. Appellant received written notice of that order on April 20, 2016.

April 22, 2016

  
William A McKinnon, Assistant Solicitor  
16<sup>th</sup> Judicial Circuit Solicitor's Office  
1070 Heckle Boulevard, Suite 207  
Rock Hill, South Carolina 29732  
*Attorney for Appellant*

Other Counsel of Record:

Michael L. Brown, Jr., Esquire  
P.O. Box 1025  
Rock Hill, South Carolina 29730  
*Attorney for Respondent*

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

Case No. 2015-CP-46-03747

THE STATE OF SOUTH CAROLINA, Appellant,

v.

Sean Robert Kelly,

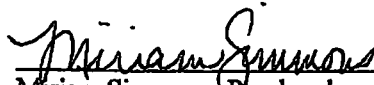
Respondent.

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DAVID J. HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

PROOF OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal in the above-referenced matter upon Michael L. Brown, Esquire, by depositing a copy of same in the United States Mail, addressed to his mailing address at P.O. Box 1025, Rock Hill, South Carolina 29730, in accordance with the provisions of Rule 262(b) of the South Carolina Appellate Court Rules.

Served this day,  
April 22, 2016

  
Miriam Simmons, Paralegal  
16<sup>th</sup> Judicial Circuit Solicitor's Office  
1070 Heckle Boulevard, Suite 207  
Rock Hill, South Carolina 29732  
*Attorney for Appellant*

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

BY: *Ranee Saunders*  
Ranee Saunders  
S.C. Bar No: 100073

Office of the Attorney General  
P.O. Box 11549  
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(803) 734-3727

October 10, 2016

**RECEIVED**  
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SC Court of Appeals