

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

APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-002770

RECEIVED
OCT 12 2016
SC Court of Appeals

The State, Appellant,

v.

Steven Hoss Walters, Jr.,Petitioner.

PETITION FOR RE-HEARING

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Attorney for Petitioner

The Petitioner petitions the Court on the following grounds:

The Court based its decision in the present case on *State v. Gordon*, 414 S.C. 94, 777 S.E. 2nd 376 (2015). In *Gordon* the Supreme Court held that §56-5-2953(a) is clear and unambiguous in that the provision that video recordings must include any field sobriety tests administered necessarily includes the HGN test. The Court further held that the head must be visible to comply with the recording requirements during the HGN test. In *Gordon* the Court noted that Gordon's face is depicted on the video. The Court further noted that the Officer's instructions were audible and that the Officer's flash light and arm are visible as he administered the test. Based on those findings the Court ruled that a per se dismissal of the charge was not appropriate.

In the present case, the Court held that the requirements for §56-5-2953(a) were satisfied because the Petitioner's head is visible during the entire recording of the HGN test, the Trooper's arm is visible as he administers the test and his instructions are audible. Unlike *Gordon*, the Appellant's face is not visible at all during the recording of the HGN test, only the back of the Appellant's head is visible. The Trooper's finger is unable to be seen during portions of the test. The Court notes that the Trooper's arm is visible as he administers the test but in fact the Trooper's arm disappears in front of the Appellant at various time during the test so the Trooper's arm is not visible at all times.

The Court notes that, "the statute does not require video recordings of the HGN to include views of all angles of the test". The Petitioner does not contend that all angles of the test be included, however the statute does require that the test be recorded. If portions of the test are not recorded then the requirements of the statute have not been met. The Trooper made the decision to place the Petitioner in such a position that a portion of test was not recorded. The Trooper could have easily had the Petitioner stand with his side toward the camera and the full test would have been recorded. The trial Court noted concerning the HGN test, "but most of the

ones I've seen, the officers and the – stations the Defendant face to face with proper distance with a properly positioning of the Defendant and they do it side-to-side. They're looking at each other in the face and this from the side, so the camera's looking at them, the Defendant is here and the Officer is here, and the camera is here, and he's looking this way and you can see every movement that the Officer is administering the field sobriety test makes. So you can see if he's doing properly.”¹ Referring to the present case, the trial Court noted, “That's the concern I have, and I've had people come in where experts testify that the officers didn't hold it out here long enough, that he was supposed to make more passes than he made and he didn't hold it out here long enough and to be able to get a correct reading and that sort of thing, but if you can't see the officer's hand – okay – the whole time, I don't know how you can critic that. You have to guess what he did when he was in front of his face, and it's not – of course, the Officer can testify as to what he did, but you can't really – nobody can cross examine him and say, well, it looks like here you didn't hold it long enough. You can't see that. Now, so that's the concern I have got in this case.”²

The full test was not recorded because of the position in which the Trooper place the Petitioner. The legislature intended strict compliance with §56-5-2953 and promulgated a severe sanction for non-compliance. A per se dismissal is appropriate because the test was not fully recorded.

As the Court noted in its decision, in 2009 the legislature amended the statute expressly requiring the recording of field sobriety tests. The importance of this explicit requirement is unquestionably to allow a jury to evaluate the test process. Field sobriety exercises are used by law enforcement as a standard and "objective" method of evaluating a person's physical and

¹ Trans. Of Record p. 20, lines 12-21

² Trans. Of Record p. 21, line 13 thru p. 22 , line 2

mental ability on the roadside as part of the arrest decision. The Court in *State v. Sullivan*, 426 S.E.2d 766, 310 S.C. 311 (1992), recognized the tests only have evidentiary value if demonstrated and conducted by the officer in a way consistent with the training standards for the conduct of the exercises and the officer evaluation. The conduct of the tests by the officer is as important an evidentiary consideration as is the performance of the tests by the suspect. The Courts have consistently used a "reasonableness" standard or "reasonable man" standard in criminal law and torts, phrases or concepts that suggest the use of a hypothetical person or standard of average skill, judgement or effort to serve as a measuring stick.

Though these field sobriety exercises are often referred to as objective tests, they are unquestionably subject to an observer's interpretation or bias. Officers most often do not score the tests as their training recommends to be done in writing, along with the taking of field notes(see NHTSA Training Manual), but rather the officers simply offer their own opinion on a pass and fail basis. This degree of subjective scoring of objectively designed "tests" was not what was intended by NHTSA in the recommended use of these field tests. The video offers evidence not simply subject to the officer's rendition and interpretation of the performance of the suspect, but video offers a real time and accurate record of events which provide the jury with a complete and unambiguous view of what occurred which affords fairness to both the State and suspect.

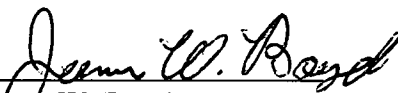
The legislative intent in requiring video of the field exercise process offers an opportunity to provide a critical tool to a jury that this court should recognize (and require) that every reasonable degree of recordation is a requirement implicit and obvious in that legislative intent. As the Court states in *Gordon*, "A statute must require a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers." The announced purpose of 56-5-2953 from *Gordon* "is to create direct evidence of a DUI arrest"- and inherently to record the probable cause for the arrest. Direct evidence can only be of value to a jury and

important to the end result if it is a complete record preserved on video which affords the jury the opportunity and ability to reasonably scrutinize and evaluate the events by reasonable recordation, thereby minimizing the jury's reliance on the officer's opinions and eliminating speculation to every degree possible.

While recognizing that not every aspect of a field exercise process may reasonably be captured on video (such as the eyes twitching in nystagmus as discussed in Gordon), this court must require that the recording permit an objective evaluation by requiring the State to take the special care to produce a reasonably complete video of the field test process as is feasible by proper positioning of the process in the camera view, including both the officer's instruction and demonstration as required by NHTSA and the suspect's performance. The officer on the roadside is uniquely in control of the suspect and camera angle in the orchestration of events and as the "director of the video. To require less than a reasonably complete record showing the officer's conduct and instructions, defeats and defies the legislative purposes which gave life to the statutory video requirement.

Conclusion

All of the above reasons the Petitioner requests that the Court grant this Petition for Re-Hearing.


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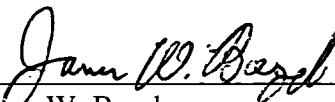
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PROOF OF SERVICE

I, James W. Boyd, certify that I served the within Petition for Re-hearing of Petitioner on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to William M. Blich, Jr., South Carolina Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 and to Kevin Brackett, York County Solicitor's Office, 1675-1A York Highway York, SC 29745.

I further certify that all parties required by Rule 211(a) to be served have been served. This 12 day of October, 2016.


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