STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE A. MAHON,

APPELLANT

APPELLATE CASE NO. 2015-001599

FINAL BRIEF OF APPELLANT

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II.

The trial court erred reversibly by refusing to suppress the results of Appellant's blood test where Trooper Klemm admitted that he did not offer Appellant the opportunity to provide a breath sample before seeking a blood draw and the State did not allege that Appellant was physically unable to provide a breath sample.

[1] *Miranda v. Arizona*, 384 U.S. 426 (1966).

STATEMENT OF THE CASE

On November 10, 2014, the Greenville County Grand Jury indicted Appellant Shane A. Mahon for driving under the influence, third offense, with a blood alcohol concentration between .10% and .15%. R. 164.

On July 15-16, 2015, Appellant proceeded to a bench trial before the Honorable C. Victor Pyle, Jr. R. 22, ll. 16-24. Alex Kornfield represented Appellant. Assistant Solicitor Justin Halloway represented the State.

Judge Pyle found Appellant guilty as charged and sentenced Appellant to three years imprisonment suspended on the service of one year imprisonment, the payment of a $3,500.00 fine, the completion five years of probation, and the successful completion of a drug diversion program. R. 146, l. 20 - 147, l. 19; R. 154, ll. 9-23.

STATEMENT OF THE FACTS

Early Morning Single Car Accident

At 4:47 a.m. on May 4, 2014, State Trooper Erik Klemm arrived on the scene of a single car accident south of Greer in a rural part of Greenville County. R. 32, l., 12 - 35, l. 25. Appellant had driven his white Jeep Cherokee off of the road, struck a telephone pole, and rolled over several times. There were no passengers. Appellant's accident was Klemm's first DUI investigation. R. 29, ll. 1-11.

By the time Klemm arrived, firefighters had already cut off the roof of Appellant's badly damaged jeep in order to extract him from the vehicle. *Id.* Appellant was seriously injured during the crash. R. 33, ll. 1-13; R. 51, ll. 14-20. He was taken by ambulance to Greenville Memorial Hospital.

Klemm would claim at trial that he spoke briefly to Appellant while Appellant was in the ambulance and that he noticed a "very strong odor of alcoholic beverage about his person." R. 33, ll. 10-13. Klemm's in-car dash camera began recording when he activated his blue lights while driving to the accident location. R. 45, l. 7 - 46, l. 15.

Because Appellant had to be taken to the hospital, no field sobriety tests were conducted at the accident location. Klemm turned off his camera at 5:05 a.m. R. 49, ll. 6-21.

HGN Test and Blood Draw at Hospital

When Appellant arrived at Greenville Memorial Hospital at around 5:30 a.m. He was immediately admitted into the trauma ward. R. 49, l. 22 - 51, l. 23. Appellant's father, Ronald Mahon, arrived at the hospital at around 6:00 a.m. R. 118, ll. 1-23. Ronald recalled that Appellant was "awake, but he was kinda in and out . . . mumbling words" during the first couple of hours he was in the hospital. *Id.*

At trial, Klemm originally testified that he arrived at the hospital shortly after Appellant did. R. 50, ll. 2-19. He stated that Appellant still smelled of alcohol when he arrived. R. 35, l. 23 - 37, l. 23. Klemm was certain that he left Appellant around 6:00 a.m. *Id.*

Ronald Mahon, whom Klemm remembered was with Appellant in the hospital, also recalled that Klemm left Appellant's room by 6:10 a.m. R. 117, l. 19 - 119, l. 7; R. 124, l. 13 - 125, l. 14. Hospital records indicated that Appellant was "unable to answer" questions about his condition when admitted to the hospital around 5:30 a.m. R. 15, l. 4 - 16, l. 24; R. 164.

Based on the hospital records, if Klemm had left Appellant's room by 6:00 a.m. - as he and Ronald Mahon believed he had - it was almost impossible for Appellant to have been awake, alert, and to have agreed to do horizontal gaze nastagmus (HGN) test from his hospital bed and then to have consented to a blood draw. R. 51, l. 25 - 53, l. 23.

However, after prompting from the solicitor on re-direct, Klemm clarified that his earlier testimony was incorrect. R. 56, l. 3 - 57, l. 12. With the solicitor's assistance, he remembered that, in fact, he did not arrive at the hospital until around 6:30 a.m. *Id.* Thus, the State argued that hospital records indicating that Appellant was "unable to answer" questions at 5:30 a.m. now no longer meant that Appellant was unconscious at the same time that Klemm alleged Appellant failed the HGN test.

Regardless of if and when the HGN test was allegedly conducted, Trooper Klemm averred that Appellant failed it. R. 36, l. 1 - 37, l. 23. *Id.* There were no witnesses or video footage of the test. Klemm arrested Appellant as a result of the failed HGN test. R. 37, l. 24 - 38, l. 3. **Klemm did not provide a sworn affidavit explaining why there was no video** of the field sobriety test and arrest.

At trial, Klemm reluctantly admitted that Appellant was the first person he had ever given an HGN test to. R. 52, ll. 3-14. Ronald Mahon did not recall Appellant undertaking any field sobriety tests while in the trauma ward. R. 118, l. 18 - 119, l. 16.

After arresting Appellant, Klemm alleged that he read Appellant his implied consent rights and that Appellant - alert and awake - consented to a blood draw. *Id.* R. 38, l. 2 - 39, l. 19. **The State produced an implied consent form dated May 4, 2014, signed only by Klemm. Appellant's signature was not on the form, instead Klemm wrote "unable to sign" in its place.** *Id.*; R. 157. Ronald Mahon did not remember his son ever being given an implied consent form and stated that Appellant would not have been able to sign it if one had been presented to him. R. 119, ll. 2-11.

When asked by the solicitor why Appellant did not sign the implied consent form, Klemm had no cogent explanation, positing only that, "[t]he subject was inside the trauma bay. He just wasn't able to sign it at the time." R. 38, ll. 20-25. More troublingly, Klemm later contradicted himself during cross-examination and conceded that he did not recall if he ever asked Appellant to sign the implied consent form. R. 54, ll. 6-21. **Critically, Klemm admitted that he did not offer Appellant the chance to take a breathalyzer test before ordering a blood draw.** *Id.*

Klemm denied that Appellant was unconscious at any point during the HGN test or blood draw. R. 52, l. 12 - 54, l. 21. Klemm never testified that Appellant had an injury to his mouth that would have rendered him physically unable to provide a breath sample

Nurse Becky Howe conducted the blood draw at 7:10 a.m. R. 59, ll. 6-21; R. 61, ll. 5-22. At trial, she testified she was not involved in Appellant's medical treatment and had only conducted the blood draw at Klemm's behest. R. 63, l. 5 - 68, l. 2. She did not remember Klemm handing Appellant an implied consent form. *Id.*

She did not remember whether Appellant's hands rendered him unable to sign his name. *Id.* She did not remember if Appellant was unconscious during the blood draw. She never testified that Appellant was physically unable to provide a breath sample. The results of the blood draw revealed that Appellant had a blood alcohol concentration of 0.159. R. 100, ll. 3-23.

Pre-Trial Motions and Bench Trial

Appellant moved pre-trial to dismiss his indictment arguing the State failed to comply with the video recording requirements of S.C. Code Ann. § 56-5-2953(A) and (B). R. 1, l. 20 - 4, l. 24. The defense argued that Trooper Klemm did not record Appellant's "conduct" as required by the statute. *Id.*

Specifically, there was no video of the HGN test, Appellant's *Miranda* advisement, or Appellant's arrest. *Id.* Moreover, Klemm did not submit an affidavit "certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed." *Id.*; *see also* R. 13, ll. 10-19; S.C. Code Ann. § 56-5-2953(B).

The State countered that under a separate exception in § 56-5-2953(B), "once you have a traffic investigation" neither a video recording nor a sworn affidavit from the arresting officer is necessary. R. 5, ll. 5-22. The State also contended that the video recording was unnecessary as there were no field sobriety tests at the "incident site". The State advanced that the "incident site" in § 56-5-2953(A)(1)(a) was defined as the accident location. R. 6, l. 7 - 29, l. 24.

The defense also motioned to suppress the results of the blood draw as the hospital documents and implied consent form indicated that Appellant was "unable to answer" questions and "unable to sign" at the time that the blood draw was taken, thus he could not have consented to the draw. R. 15, l. 4 - 16, l. 24. The State responded that Trooper Klemm and Nurse Howe "will be

able to testify as to what sort of condition [Appellant] was in while he was in the hospital. R. 17, l. 1 - 20, l. 4.

The trial court summarily denied the defense's motions. After the denial of motions, Appellant elected to proceed with a bench trial. Klemm and Howe testified for the State. Ronald Mahon testified for the defense.

Appellant's Post-Trial Renewal of Motions

After the State rested and again at the close of evidence, Appellant renewed his motion to dismiss the case for the failure to provide a video recording or affidavit. R. 105, l. 6 - 117, l. 14; R. 132, l. 1 - 135, l. 15. The defense noted that the exception excusing the failure to record and the failure to produce an affidavit when dealing with traffic accidents was inapplicable as Klemm's dash-camera was activated when he turned on his blue lights. R. 105, l. 7 - 107, l. 44; R.132, l. 1 - 134, l. 8.

Defense counsel also noted that Klemm had both a camera and a phone capable of recording video that he could have used in the hospital. *Id.* The trial court denied Appellant's renewed motion without elaboration. R. 113, ll. 2-3; R. 135, ll. 14-15.

Appellant also renewed his motion to suppress the results of the blood draw due to Klemm's failure to comply with S.C. Code Ann. § 56-5-2950(A)(1)(a). R. 113, l. 8 - 115, l. 18, l. 44; R.134, ll. 9- 16. Specifically, Klemm admitted in his trial testimony that he did not first offer Appellant the opportunity to provide a breath sample before seeking the blood draw. *Id.*

Moreover, none of the statutory exceptions permitting Klemm to dispense with the offer of a breath test were present. *Id.* Again, the trial summarily denied Appellant's motion. R. 115, l. 19-20; R. 135, ll. 14-15.

ARGUMENTS

I.

The trial court erred by refusing to dismiss Appellant's DUI indictment where the State failed to produce a video of Appellant's field sobriety tests, of Appellant's arrest or the determination of probable cause to arrest, and of Appellant's being advised of his *Miranda* rights, as required by S.C. Code Ann. § 56-5-2953(A)(1)(a), or an affidavit from the arresting officer, State Trooper Erik Klemm, certifying that it was physically impossible to produce the video recording because Appellant needed emergency medical treatment, as required by S.C. Code Ann. 56-5-2953(B).

Relevant Facts

The State did not produce a video of Appellant's conduct at the incident site as required under S.C. Code Ann. 56-5-2953(A)(1)(a). The State also failed to produce an affidavit from Trooper Klemm certifying that it was impossible to record Appellant's conduct because Appellant needed emergency care as required by S.C. 56-5-2953(B) so as to excuse the failure to produce a video of Appellant's conduct at the incident site.

The State argued, and the trial court agreed, that the failure to produce a video or an affidavit was excused because only conduct at the "incident site" must be recorded. R. 6, l. 7 - 7, l. 24. The State defined "incident site" as the accident location; irrespective of where Appellant conducted field sobriety tests, was given *Miranda* warnings, or was arrested. R. 10, l. 6 - 12, l. 16. The State also claimed that no affidavit or video was required because Klemm was investigating a traffic accident pursuant to S.C. Code Ann. § 56-5-2953(B). R. 14, ll. 7-23.

The trial court should have dismissed Appellant's indictment as the failure to produce a video or a sworn affidavit mandated dismissal. Our case law and the rules of statutory construction make evident that the "incident site" is the location where the field sobriety tests occur, where the probable cause determination or arrest takes place, and where the defendant is advised of his *Miranda* rights. *State v. Henkel*, 413 S.C. 9, 774 S.E.2d, 458 (2015) (holding that the failure to

record defendant's conduct at an incident site located several miles from accident location was excused under the facts of the case).

The failure to record Appellant's "conduct" could have been excused if Klemm had drafted a sworn affidavit certifying that video recording was impossible because Appellant required emergency medical treatment. *See* S.C. Code Ann. § 56-5-2953(B). For unknown reasons, Trooper Klemm simply failed to draft an affidavit in thirteen months between Appellant's arrest and trial.

Appellant's indictment should have been dismissed by the trial court due to the State's failure to comply with the statutory requirements. *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) (recognizing the State's noncompliance with § 56-5-2953, which is not mitigated by a statutory exception, warranted dismissal).

The "Incident Site" for the purposes of the video recording requirement of S.C. Code Ann. § 56-5-2953(A)(1)(a) is the location where the field sobriety tests occur, where the probable cause determination or arrest occurs, and where the *Miranda* advisement occurs.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206.

Courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). Particular terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577.

Finally, penal statutes must be strictly construed against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper

construction should be resolved in favor of the citizen against the state. *State v. Cutler*, 374 S.C. 376, 264 S.E.2d 420 (1980); *see also Yates v. United States*, 574 U.S. ___, 135 S.Ct. 1074 (2015) (holding that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

South Carolina law requires that a person who violated § 56-5-2930 "must have his conduct at the **incident site** and breath site videotaped." S.C. Code Ann. § 56-5-2953(A). The purpose of the videotaping requirement "is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011).

"[T]he videotaping provisions of section 56-5-2953 are mandatory and not optional." *Id.* at 346, 713 S.E.2d at 285. "A law enforcement agency's failure to comply with [section 56-5-2953] is fatal to the prosecution of a DUI case." *Id.* The video recording statute provides that:

> A person . . . must have his conduct at the incident site and the breath test site video recorded.
>
> **The video recording at the incident site must not begin later than the activation of the officer's blue lights; include any field sobriety tests administered; and include the arrest of a person . . . or a probable cause determination** in that the person violated Section 56-5-2945, and **show the person being advised of his *Miranda* rights.**

S.C. Code Ann. § 56-5-2953(A)(1)(a)(*emphasis added*).

Further, an exception to the video recording requirement requires the arresting officer to submit a sworn affidavit explaining the failure to have video footage of the "**time of arrest or probable cause determination**" § 56-5-2953(B). Another exception also excuses the failure to record Appellant's conduct where "an arrest has already been made" provided that the video recording begins as soon as is practicable and otherwise conforms to the statutory requirements. *Id.*

Section 56-5-2953(A)(1)(a) clearly mandates recording specific conduct of a suspected drunk driver. Therefore the "incident site" is the location or locations where this specific conduct- the field sobriety tests, the arrest or the determination of probable cause to arrest, and the advisement of *Miranda* rights - occurred.

Our Supreme Court's opinion in *State v. Henkel*, 413 S.C. 9, 774 S.E.2d, 458, used exactly this definition of "incident site" when deciding whether the failure to record *Miranda* warnings required dismissal. In *Henkel*, a motorist called 911 to report an individual driving a truck erratically had just hit a bridge and overturned into a ditch. *Id.* at 10, 774 S.E.2d at 459.

The truck's driver ran from the scene. Three to four hours later, the arresting officer responded to a call that the driver may have been located several miles from the accident scene. *Id.* The driver was being examined by EMS. The arresting officer could smell alcohol on the driver when he arrived at the ambulance. EMS then informed the officer that the driver did not need medical treatment. *Id.*, 774 S.E.2d at 460.

The arresting officer initiated audio recording during the HGN test inside the ambulance and read the driver his *Miranda* rights. *Id.* The officer concluded the driver was under the influence and placed him beside his patrol car. The driver then failed to recite the alphabet correctly while beside the car. The officer then placed the driver inside his patrol car, turned on his camera and read the driver his rights again. None of the field sobriety tests were videotaped.[2]

The Court excused the failure to record because the arresting officer had not activated his blue lights and videotaping began as soon as was practicable and continued until the driver's arrest. *Id.* at 15-16, 774 S.E.2d at 462. In so ruling, the Court held that the "incident site" for the purposes

[2] At the time of the driver's arrest § 56-5-2953(A) required only that a person's conduct and advisement of rights be recorded. It did not specifically require recording field sobriety tests as the current statute does. *Henkel*, 413 S.C. 9, 13, 774 S.E.2d 458, 460-461.

of the video recording requirement was where the field sobriety tests, the *Miranda* advisement, and the driver's arrest (and the determination of probable cause to arrest) occurred as opposed to where the driver's truck wrecked. *Id.*

In Appellant's case the "incident site" would have been the intensive care ward of Greenville Memorial Hospital where Trooper Klemm administered an HGN test, provided *Miranda* warnings, and, ultimately, arrested Appellant. Given this incident site's location, it is not surprising that Klemm failed to videotape Appellant's conduct. However, the law is clear, "a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case" unless one of the exceptions found in § 56-5-2953(B) applies. *Roberts*, 393 S.C. 332, 713 S.E.2d 278.

The State's failure to comply with the applicable exception found in S.C. Code Ann. § 56-5-2953(B), by not producing a sworn affidavit from Trooper Klemm stating that it was physically impossible to videotape Appellant's conduct because Appellant required emergency medical treatment, mandates dismissal of Appellant's indictment.

Section 56-5-2953(B) excuses the failure to produce the required videos under four circumstances. If no exceptions apply, a violation of the videotaping requirement of § 56-5-2953(A) will result in the dismissal of the charges. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) (holding that "dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions").

The first exception allows the arresting officer to submit a sworn affidavit that the video recording equipment was inoperable despite efforts to maintain it. *See* § 56-5-2953(B). The second exception allows an arresting officer to submit "**a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment,** or exigent circumstances existed." *Id.* (*emphasis added*).

The third exception is very specific. In certain circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; "**where an arrest has been made and the video recording equipment has not been activated by blue lights**" the failure to produce the required video may be excused if "as soon as video recording is practicable in these circumstances, video recording [begins and conforms] with [§ 56-6-2953(A)(1)(a)]." *Id.* (*emphasis added*).

The fourth and final exception is a "catchall" when none of the other exceptions apply. Failure to comply with the video recording requirements may be excused where the State has "**any other valid reason** for the failure to produce the video recording based on the totality of the circumstances." *Id.* (*emphasis added*)

The circumstances of Appellant's case fit squarely § 56-5-2953(B)'s second exception to the video recording requirement. Appellant was seriously injured and taken to the intensive care ward of Greenville Memorial Hospital for emergency medical treatment. Therefore, the State needed Trooper Klemm to certify in a sworn affidavit that he could not record Appellant's conduct because Appellant "needed emergency medical treatment." § 56-5-2953(B). Inexplicably, Trooper Klemm never drafted such an affidavit.

The State erroneously advanced that the third exception applied as there was a traffic accident investigation. Thus, no affidavit was required. R. 14, ll. 7-23. This argument is unavailing. The third exception plainly requires that **the arresting officer's camera not begin recording with the activation of his car's blue lights**. § 56-5-2953(B). Here, Trooper Klemm's dash-camera began recording as soon as Klemm activated his blue lights. R. 45, l. 21 - 46, l. 15.

Accordingly, the State failed to satisfy any of the statutory exceptions listed in S.C. Code Ann. § 56-5-2953(B). Trooper Klemm's unexcused failure to record Appellant's conduct at the

incident site or submit a sworn affidavit certifying that recording was physically impossible warrants dismissal of Appellant's DUI indictment. *See Roberts*, 393 S.C. at 344-50; 713 S.E.2d at 284-87 (finding the Legislature imposed a statutory obligation on the State to create evidence and provided dismissal as a sanction for inexcusable noncompliance).

II.

The trial court erred reversibly by refusing to suppress the results of Appellant's blood test where Trooper Klemm admitted that he did not offer Appellant the opportunity to provide a breath sample before seeking a blood draw and the State did not allege that Appellant was physically unable to provide a breath sample.

Relevant Facts

Accepting Trooper Klemm's testimony as true, Appellant was alert and conscious when Klemm interrogated him in the trauma ward of Greenville Memorial Hospital. R. 52, l. 18 - 53, l. 23. Klemm claimed that, after Appellant supposedly failed an HGN test from his hospital bed, Klemm read the standard implied consent form to Appellant and requested consent for a blood draw. R. 52, l. 3 - 54, l. 16.

According to Klemm, Appellant consented to the blood draw, but was either unable to sign the implied consent form because, "[h]e just wasn't able to sign it at the time" or was never presented with the form for his signature. R. 38, ll. 20-24; R. 54, ll. 6-21. However, Klemm did remember that **he never offered Appellant the opportunity to take a breath test before seeking a blood draw**. *Id.*

Nurse Howe did not remember anything about the blood draw or Appellant's admission to the hospital. R. 63, l. 1 - 68, l. 2. She was never asked whether she believed Appellant would have been physically able to provide an acceptable breath sample. At trial, nobody testified that Appellant had any injuries to his mouth that rendered him physically unable to provide an acceptable breath sample.

Appellant's father, whom Trooper Klemm agreed was present during the blood draw, testified that Appellant was heavily sedated with pain killers and "in and out" of consciousness. R. 118, l. 11 - 121, l. 6. Appellant's father did not remember Klemm ever presenting the implied

consent form to Appellant, but did recall that Klemm had Nurse Howe conduct a blood draw. *Id.* The blood draw revealed that Appellant had a blood alcohol concentration of 0.159. R. 100, ll. 3-23.

At end of trial, Appellant renewed his motion to suppress the results of the blood draw due to the State's failure to follow the requirements of § 56-5-2950(A). R. 112, l. 10 - 115, l. 20. Appellant further argued that Klemm's failure to offer Appellant a breath test prior to the blood draw mandated the test results be suppressed. *Id.* The trial court summarily denied Appellant's motion. *Id.*

Statutory Protections for Suspected Drunk Drivers.

Our legislature has provided specific protections and due process safeguards to citizens suspected of driving under the influence. *See Taylor v. S.C. Dep't of Motor Vehicles,* 368 S.C. 33, 37, 627 S.E.2d 751, 753 (Ct. App. 2006) ("The implied consent laws of this State attempt to balance the interest of the State in maintaining safe highways with the interest of the individual in maintaining personal autonomy free from arbitrary or overbearing State action."); *see also State v. Henkel*, 413 S.C. at 14, 774 S.E.2d at 461 (holding that the video recording requirements were intended to memorialize interactions between arresting officer and suspect driver, particularly where there are no other witnesses).[3]

Central among these legislatively enacted protections is the implied consent testing procedure found in § 56-5-2950(A), which require that a driver suspected of DUI must first be

[3] By way of further example, the General Assembly has limited the evidence that the State may present against repeat DUI offenders, "[i]f the defendant stipulates that the charge constitutes a second or subsequent offense, the indictment shall not contain allegations of prior offenses and evidence of such prior offenses must not be introduced." S.C. Code Ann. § 56-5-2980. By contrast, citizens standing trial for first degree burglary with a prior record of two or more convictions for either burglary and/or house breaking cannot force the State to stipulate to their prior convictions. *State v. Simmons*, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002).

offered the opportunity to provide a breath sample before the arresting officer may seek a more invasive blood draw:

> A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. **At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel**, the arresting officer may request a blood sample to be taken.

The prescribed penalty for non-compliance is the "exclusion from evidence of any test results" when the failure to comply with the statute materially affects the reliability, accuracy, or fairness of the testing procedure. S.C. Code Ann. § 56-5-2950(J).

The failure to first offer Appellant the opportunity to submit a breath sample violated § 56-5-2950(A) and materially affected the fairness of the testing procedures.

The failure to first offer a breath test before conducting a blood draw materially affects fairness of the testing procedure. *See State v. Baker*, 310 S.C. 510, 427 S.E.2d 670 (1993) (holding the results of a blood test taken without first offering a breath test were properly suppressed, but the State was not precluded from prosecuting the case with other competent evidence).

Trooper Klemm candidly admitted that he did not offer Appellant the chance to provide a breath sample before submitting to a blood draw. R. 54, ll. 14-16. Therefore, in order to comply with the testing statute, one of the four exceptions must apply.

A review of the trial record shows that no exception applies. The State presented no evidence that Appellant had an injured mouth physically preventing him from submitting a breath sample. *State v. Kimbrell*, 326 S.C. 344, 481 S.E.2d 456 (1997) (holding that trooper's observation

that defendant had some blood on her teeth was insufficient to support reasonable belief that defendant was physically unable to provide acceptable breath sample).

Klemm was adamant that Appellant was conscious at the time of the blood draw. R. 52, ll. 3-24. Appellant was obviously not dead. Nurse Howe, the licensed medical professional who conducted the blood draw, never testified that she believed Appellant was physically unable to provide a breath sample. *Cf. State v. Stacy*, 315 S.C. 105, 107, 431 S.E.2d 640, 641 (1993) (holding that licensed nurse who conducted blood draw testified that it would have been impossible to take defendant to law enforcement center for breathalyzer).

The remedy for law enforcement's failure to comply with S.C. Code Ann. § 56-5-2950(A) is suppression of blood draw test results.

Trooper Klemm failed to comply with the requirements of § 56-5-2950(A) as he did not offer Appellant the opportunity to take a breath test prior to seeking a blood draw. R. 54, ll. 14-16. None of the statutory exceptions that excuse the failure to first offer a breath test apply.

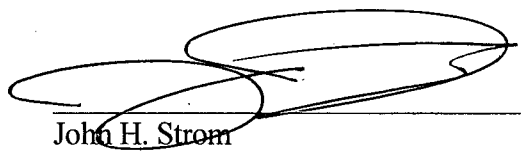
Not offering Appellant the opportunity to take the breath test before seeking a blood draw materially affected the fairness of the testing procedure. *Baker*, 310 S.C. 510, 427 S.E.2d 670; *Cf. City of Florence v. Jordan*, 362 S.C. 227, 607 S.E.2d 86 (Ct. App. 2004) (holding that where record established defendant was first offered to chance to submit a breath sample, the failure to circle word "breath" on driving under the influence (DUI) implied consent form did not violate implied consent statute).

The remedy for non-compliance with the provisions of § 56-5-2950(A) is the "exclusion from evidence of any test results." *See* S.C. Code Ann. § 56-5-2950(J). Therefore, the trial court erred by not suppressing the results of the blood draw blood draw because Appellant was not offered the opportunity to submit a breath sample before Klemm sought a blood draw. *Id.*

CONCLUSION

Based on the foregoing arguments, Appellant Shane A. Mahon respectfully requests that this Court reverse his conviction and dismiss his indictment for DUI, third offense (Issue I), or in the alternative, reverse his conviction and remand this case to the Greenville County Court of General Sessions (Issue II).

Respectfully submitted,



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Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of February, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 3, 2017

John Harrison Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

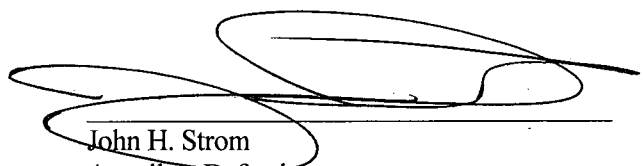
V.

SHANE A. MAHON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of February, 2017.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of February, 2017.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.