

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
Case No. 2014-CP-46-00239

JOHN C. HAYES, III, Circuit Court Judge

Appellate Case No. 2014-002340

City Of Rock Hill.....Appellant

v.

Brenda Stroupe.....Respondent

APPELLANT'S FINAL BRIEF

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v.

Brenda Stroupe,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. The circuit court erred in finding that the incident site video recording did not comply with the requirements of section 56-5-2953 of the South Carolina Code of Laws.

- II. The circuit court erred in finding that section 56-5-2953(B) of the South Carolina Code of Laws did not apply where the arresting officer submitted an affidavit documenting the circumstances encountered at the time the incident site video was recorded.
 - a. The circuit court erred in not conducting a Totality of the Circumstances Analysis as Required by S.C. Code of Laws Section 56-5-2953.

- III. The circuit court erred in dismissing the charge after the production of the incident site video recording. When an incident site video recording is produced the admission of the recording is controlled by the South Carolina Rules of Evidence.

STATEMENT OF THE CASE

Respondent was arrested for driving under the influence in the City of Rock Hill, South Carolina. Prior to trial the Respondent moved to dismiss the charge on the ground that the Appellant failed to comply with the recording provisions of Section 56-5-2953 of the South Carolina Code of Laws. The Appellant filed a response to the motion to dismiss on October 21, 2013. A hearing on the motion to dismiss was held on October 26, 2013, and the municipal court issued an order denying the motion to dismiss on October 28, 2013. Following the denial of the motion to dismiss, the case proceeded to a jury trial on January 23, 2014. The result was the jury found the Respondent guilty of driving under the influence and then determined that her blood alcohol content was a .16% or greater in separate second verdict form.

On January 24, 2014, the Respondent filed a timely Notice of Appeal from her conviction. The appeal was heard by the Honorable John C. Hayes, III, on September 3, 2014. By order dated September 15, 2014, and filed September 19, 2014, Judge Hayes reversed the ruling of the trial court, dismissed the charge and granted Respondent's appeal. Appellant subsequently filed a timely Rule 59 Motion to Alter or Amend Judgment on October 1, 2014, which was denied by the circuit court in an order dated October 7, 2014.

The City of Rock Hill filed a timely Notice of Appeal from the rulings of the circuit court. This appeal follows.

STATEMENT OF FACTS

On April 13, 2013, Brenda M. Stroupe (Respondent) was charged with Driving Under the Influence (S.C. Code § 56-5-2930) following a call from Adam Rainey, a concerned citizen, that led Rock Hill officers to her location. Mr. Rainey reported that a maroon Mitsubishi Eclipse was driving recklessly in the area of Red River Road in Rock Hill and at times, driving on the wrong side of the road. Mr. Rainey's information and vehicle description were relayed by a Rock Hill Police Department dispatcher to Officer Justin Lewis who responded to the location where Red River Road becomes Cel-River Road. (R. pp.19-20)

Officer Lewis came in contact with the vehicle near the intersection of Cel-River Road and Cherry Road at approximately 7:37 pm. Officer Lewis fell in behind the vehicle and followed the vehicle to the intersection of Cel-River Road and Cherry Road. The driver of the vehicle was the first vehicle stopped at the red light and then began to proceed through the intersection on Cherry Road heading west while the traffic light was still red. Officer Lewis then activated his blue lights to initiate a traffic stop. (R. p. 20)

Following Officer Lewis activating his blue lights, the driver of the vehicle proceeded down Cherry Road heading towards I-77. The vehicle was eventually stopped a short distance from the intersection of Cherry Road and Cel-River Road near I-77 within the city limits of Rock Hill. Officer Lewis made contact with the Respondent who was the driver and sole occupant of the vehicle. Upon speaking with the Respondent, Officer Lewis believed that she may be impaired and contacted Officer Justin Cook with the Rock Hill Police Department Traffic Unit to assist. (R. p. 20)

Officer Cook arrived on scene at approximately 7:46 p.m. and spoke with Officer Lewis to review the matter and then spoke with the Respondent. Upon speaking with the Respondent,

Officer Cook detected a strong smell of alcoholic beverage coming from her as she was leaning on the back of a patrol vehicle. Officer Cook noted that the Respondent's eyes were bloodshot and glassy and that her speech was slurred. Officer Cook asked the Respondent how much she had been drinking and she replied that she had one mixed drink earlier at her mother's house. Officer Cook then proceeded to offer the Respondent some field sobriety tests which the Respondent agreed to do. (R. p. 20)

Officer Cook offered the Horizontal Gaze Nystagmus test and noted that all six clues were present. (R. p. 240, line 6) Due to the Respondent's stated physical impairments, Officer Cook offered the Respondent the Finger Dexterity test in lieu of the Walk and Turn and One Leg Stand tests. (R. p. 241, lines 15-16) Lastly, Officer Cook requested the Respondent to recite the alphabet from D to X after confirming that the Respondent knew the alphabet. (R. p. 243, lines 16-22)

Based on the observations related to Officer Cook and his direct observations, he placed the Respondent under arrest for DUI and read a Miranda warning to her. The entire interaction at the incident site between the Rock Hill Police officers and Respondent was video recorded. (R. p. 21)

Following her arrest, the Respondent was transported to the Rock Hill Law Center and offered a breath test. The Respondent registered a 0.23% blood alcohol content and was served with a notice of suspension of her driving privileges due to her blood alcohol content. She was issued Uniform Traffic Ticket number 48264 GH charging her with Driving Under the Influence. (R. p. 21)

The Respondent proceeded to a two day jury trial and following the submission of the case to the jury, the jury deliberated for approximately five (5) minutes before returning with a

finding of guilt. Subsequently, the jury was charged to determine the Defendant's blood alcohol contact and the jury found the blood alcohol content (BAC) to be in excess of 0.16%. (R. p. 22)

The Respondent filed a timely appeal of her conviction and the circuit court issued an order reversing the conviction, dismissing the case and subsequently denied Appellant's Rule 59 motion to alter or amend judgment. This appeal follows.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE INCIDENT SITE VIDEO RECORDING DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 56-5-2953(A) OF THE SOUTH CAROLINA CODE OF LAWS.

All the City of Rock Hill police officers involved with this case digitally video recorded every moment required by S.C. Code of Laws Section 56-5-2953. The video from Officer Lewis, Officer Langley and Officer Cook provided a comprehensive video recording of the interactions between the City of Rock Hill police officers and the Defendant at the incident site. S.C. Code of Laws Section 56-5-2953 requires that the “conduct” of the individual at the incident site must be video recorded. In State v. Murphy, 392 S.C. 626, 709 S.E.2d 685 (S.C. Ct. App. 2011), this Court affirmed the driving under the influence conviction finding that “an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct.” Id. at 688. Conduct as stated in S.C. Code of Laws Section 56-5-2953 “is generally defined as one’s behavior, action or demeanor.” Id. “[T]he plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture all field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused’s conduct.” Id.

In February 2009, the South Carolina Legislature amended S.C. Code of Laws Section 56-5-2953 to include in subsection (A)(1)(a)(ii) the requirement to video record any field sobriety tests administered. S.C. Code of Laws Section 56-5-2953(A) establishes that an individual’s conduct at the incident site must be video recorded and that the incident site recording must begin with the activation of the officer’s blue lights, include any field sobriety tests administered and the arrest or probable cause determination along with showing the person

being advised of their Miranda rights. The Legislature did not and has not chosen to further define what is considered conduct pursuant to Section 56-5-2953. Thus the Murphy definition of conduct still controls the determination of whether a video recording complies with Section 56-5-2953(A), even though the type of conduct that is required to be recorded has changed.

In South Carolina, one of the fundamental rules of statutory construction is that “there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.” State v. Corey D., 339 S.C. 107, 112, 529 S.E.2d 20, 23, (S.C. 2000). Had the South Carolina Legislature wished to change the definition of conduct subsequent to the Gordon decision they could have; however, they have chosen not to do so.

This Court subsequently re-examined and applied the Murphy decision in State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) and State v. Taylor, 411 S.C. 294; 768 S.E.2d 71 (Ct. App. 2014). Gordon and Taylor interpret section 56-5-2953 to require the events listed in 56-5-2953 to be video recorded. In this case, the events that were recorded included the incident site field sobriety tests and the advisement of Miranda warnings upon arrest. Neither Gordon nor Taylor require the watcher of the video to see the actual nystagmus exhibited as was the case in Gordon or all the physical movements of the defendant as was the case in Taylor. Any issue regarding the quality of what is shown or the successful or unsuccessful completion of any given field sobriety test is for the finder of the fact to consider as part of the weight it assigns to the video and not to the admissibility of the video. The City in this case was required to produce a video which records the person’s conduct and that includes the administration of any field sobriety tests offered. The trial court found that the City produced video recordings that complied with 56-5-2953.

In Gordon, the issue was whether the Defendant's head must be visible on the video recording of the Horizontal Gaze Nystagmus (HGN) test. The Gordon court found that the current version of S.C. Code of Laws Section 56-5-2953(A) requires the recording of field sobriety tests and that "the head must be shown during the HGN test in order for that sobriety test to be recorded." Id. at 543. The case was subsequently remanded back to the magistrate court to make appropriate findings of fact as to what specifically was visible on the video recording. What is important is that the definition of conduct did not change. The statute changed the type of conduct required to be recorded (field sobriety tests). However, in order to record the event of the HGN field sobriety test in compliance with section 56-5-2953, the video recording need only show the head on the individual. Equally important is what was not required to be shown by the recording. The video does not require the recording of the actual nystagmus exhibited by the individual at the incident site nor does the video recording need to mirror the Officer's observations of the individual and only requires the individual to be visible while the field sobriety test is administered.

State v. Taylor, 411 S.C. 294; 768 S.E.2d 71 (Ct. App. 2014) held that "Suchenski, Murphy and Gordon demonstrate the plain language of the statute does not require the video to encompass every action of the defendant, but requires video of each event listed in the statute." Id. at 77. All the field sobriety tests administered to the Respondent in this case are video recorded along with the advisement of Miranda warnings immediately following her arrest. The video recording technology as mandated by Section 56-5-2953 does not need to record every single action of the person performing the field sobriety test. Requiring the video recording to display all the actions of the person taking the test is simply impossible given the fact that the statute requires the camera to be mounted inside as part of the vehicle, the technological

limitations of digital video recording and the dimensional limitations of video recording in a three-dimensional world.

The circuit court has improperly expanded on the video recording requirements set out in S.C. Code of Laws Section 56-5-2953. The circuit court, in addition to the requirements contained in section 56-5-2953, required the viewer of the video to see exactly what the officer administering the test saw. The circuit court sitting in an appellate capacity found that “in this case, the video shows only the administering of the Horizontal Gaze Nystagmus, test, Vertical Gaze Nystagmus test, and the finger dexterity test.” (R, 89) The only issue the circuit court held that supported dismissal was failure of the video to show the Defendant’s performance on the finger dexterity test. (R, 89). This analysis ignores that portion of the statute that provides that the admissibility of the video recordings are controlled by the South Caroline Rules of Evidence and ignores the language of State v. Murphy, 392 S.C. 626, 709 S.E.2d 685 (S.C. Ct. App. 2011), State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) and State v. Taylor, 411 S.C. 294; 768 S.E.2d 71 (Ct. App. 2014) regarding the event being video recorded. Both the trial court and the circuit court found that the event of administering the field sobriety tests were recorded; however, the circuit court adds the additional requirement that the video must show the Defendant’s performance as witnessed by the officer administering the test, which is not part of section 56-5-2953.

The circuit court committed error when it substituted its view of the evidence on appeal, absent a holding that the trial court abused its discretion and a finding that there is no evidence to support the original ruling by the trial court. The Defendant’s conduct as defined in Murphy and subsequently refined by Gordon and Taylor at the incident site was video recorded in compliance with S.C. Code of Laws Section 56-5-2953. Clever lawyering has made sophisticated that which

the law should be able to treat plainly, namely that the actions of the Respondent were video recorded.

II. THE CIRCUIT COURT ERRED IN FINDING THAT SECTION 56-5-2953(B) OF THE SOUTH CAROLINA CODE OF LAWS DID NOT APPLY WHERE THE ARRESTING OFFICER SUBMITTED AN AFFIDAVIT DOCUMENTING THE CIRCUMSTANCES ENCOUNTERED AT THE TIME THE INCIDENT SITE VIDEO WAS RECORDED.

The DUI investigation in this case took place in the evening hours as the sun was setting. The Respondent and the DUI investigation were video recorded by three patrol vehicles all facing with their cameras pointed west towards the Respondent and the sun setting behind her. After the videos were reviewed, all three cameras video recordings were similarly affected by the lighting conditions caused by the setting sun. Due to the lighting conditions that existed at the time of the traffic stop that none of the officers were aware of, Officer Justin Cook (arresting officer) later completed an affidavit as required by S.C. Code of Laws Section 56-5-2953(B) which allows for the consideration of any other relevant evidence at the trial and sets out exceptions to the video recording requirements contained in Subsection A of 56-5-2953. (R. pp. 38, 40-41)

Officer Cook noted in his affidavit that the evening lighting conditions affected his cameras ability to record the incident site and the video submitted from Officer's Langley and Lewis shows the same effect. (R. p. 40) Officer Cook testified that he was unaware of the issue caused by the setting sun at the time the video recording was made and that this was the first case where he had ever encountered this issue. (R. p. 144, line 25) The City also submitted a copy of the time chart showing the sunrise and sunset for April 13, 2013, along with the periods of dawn and dusk for Rock Hill, South Carolina. (R. p 38).

“Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A’s mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen’s arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances.” State v. Manning, 400 S.C. 257, 264-265, 734 S.E.2d 314, 317-318 (Ct. App. 2012).

The affidavit provided by the Officer Cook falls within two of the exceptions: (1) exigent circumstances existed based on the evening lighting which affected all of the officers’ cameras and (2) any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. Officer Cook also testified that he and the other officers were not aware of the lighting effect at the time the video was initially recorded and this was the first time he had dealt with this situation.

Even where no affidavit was provided in State v. Manning this Court affirmed the conviction finding that “nothing in this section [56-5-2933(B)] prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances.” Id. At 318-319.

The affidavit submitted by Officer Cook provided valid reasons for the exigent circumstances encountered by Officer Cook and the other officers due to the evening lighting

conditions and provided a valid reason, based on the totality of the circumstances, for any defects in the quality of video recording.

The South Carolina Legislature provided for the video recording of DUI arrests in 1998 and has periodically updated and amended section 56-5-2953 over the years since. “[T]he primary intention behind section 56-5-2933 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence.” State v. Elwell, 396 S.C. 330; 336, 721 S.E.2d 451, 454 (Ct. App. 2011).

The South Carolina Legislature adopted the video recording of DUI arrests with a common sense view towards the fact that video cameras would be mounted in patrol vehicles and that weather, lighting and other factors could and would play a role in the video collection of evidence at the roadside. “The statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind.” *Id.* at 454. The circuit court erred where it conceptually will not consider and apply section 56-5-2953(B) where “the video recording was produced.” This analysis fails to account for the language contained in 56-5-2953(B) and the interplay between 56-5-2953(A) and 56-5-2953(B). The circuit court found that the video failed to record the field sobriety tests as required by 56-5-2953(A) while at the same time finding that a video recording was produced. Either the video recording shows the event of the field sobriety testing or it does not. If the video does not show the field sobriety testing then how can the circuit court find both that a video does exist and not exist at the same time within the context of applying 56-5-2953? This analysis makes meaningless the language contained in 56-5-2953(B) that allows a court to consider “any other valid reason for the failure to produce the video recording based on the totality of the circumstances.” S.C. Code Ann. § 56-5-2953 (Supp.2014)

State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) found that a video is produced when it is brought into existence or created at the time of the event (in this case field sobriety testing). Either a video was created by Officer Cook that complied with section 56-5-2953(A) or not. If the video created does not comply with 56-5-2953(A), then “an officer may submit a sworn affidavit certifying it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed. The use of the phrase “was physically impossible” instead of “is physically impossible” suggests a focal point at the time of the event. Thus, utilizing that time framework as our perspective, the meaning we ascribe to the word “produce” best fits within the statutory context . . .” Id. at 232.

Appellant believes the proper analytical model for a court to utilize is as follows:

(1) If a video has been produced that meets the requirements of Section 56-5-2953(A), then dismissal is not appropriate and admission of the video is controlled by the South Carolina Rules of Evidence.

(2) If no video is produced or you have a video that is created that fails to meet the requirements of Section 56-5-2953(A) then the Court must determine whether that failure of production (whether the production failure be a problem with the audio, video or combination of audio/video) is excused by one of the exceptions contained in Section 56-5-2953(B). If an exception contained in 56-5-2953(B) applies excusing an audio and/or video production failure, then dismissal is not appropriate and admission of the video is controlled by the South Carolina Rules of Evidence.

(3) If either no video is produced or the video created fails to meet the requirements of Section 56-5-2953(A) and the failure of production is not excused by an exception contained in Section 56-5-2953(B), then and only then is dismissal appropriate.

An analysis based on factors permitted under 56-5-2953(B); the exigent circumstances faced at the time of this incident (report of reckless driver at busy city intersection near I-77) along with the totality of the circumstances faced (defendant had setting sun behind her which affected all three patrol vehicle video cameras) in this case supports a finding that dismissal of the charge was not appropriate.

The circuit court erred in finding that the issue of whether the section 56-5-2953(B) applies was not ruled on by the trial court and was not preserved for appeal. The City was initially the respondent in this case and the circuit court was acting in an appellate capacity hearing the appeal filed by the Defendant from her conviction in municipal court. "A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been presented to or ruled on by the lower court. The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal" S.C. DOL v. Chastain, 392 S.C. 259, 262, 708 S.E.2d 818, 820 (S.C. Ct. App. 2011) (internal citations omitted).

A. A Totality of the Circumstances Analysis is Required by S.C. Code of Laws Section 56-5-2953.

State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012), affirmed the felony DUI conviction even though the South Carolina Highway Patrol officer who investigated the case and arrested the defendant failed to record any video of the defendant at the incident site and failed to provide an affidavit certifying that it was physically impossible to provide a video recording. The Manning Court held that even in the absence of a video affidavit being submitted

in compliance with S.C. Code of Laws Section 56-5-2953(B), that “section 56-5-2933 allows a circuit court to look at the totality of the circumstances and make a determination of whether the charges should be dismissed.” Id. at 318. Manning held that the circuit court properly refused to dismiss the DUI charges under subsection B despite the fact that no video affidavit was submitted.

The Manning Court went on to hold that “even if the traffic accident investigation exception was inapplicable, the circuit court properly concluded the video recording was not required due to the totality of the circumstances.” Id. The totality of the circumstances analysis was appropriate to determine if a statutory exception to the video recording requirement existed. Even when no affidavit is submitted, it was appropriate to determine if one of the so-called escape valves in section 56-5-2953 is present as “[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances.” Id. at 318-319.

In reviewing the instant case under a totality of the circumstances analysis, the following factors support a finding of compliance with a statutory exception under 56-5-2953:

(1) A 911 call from a concerned citizen that he had observed significant erratic driving by the Respondent. (R. pp. 20 & 37)

(2) Video from Officer Lewis shows the Respondent driving into the intersection of Cherry Road and Cel-River Road against a solid red light. (R. p. 21)

(3) Video from all the officers documents the significant impairment exhibited by the Respondent at the incident site, including her slurred speech, (R. p. 204, line 22) inability to walk in a normal fashion (R. p. 304, lines 19-20), confused thought processes (R. p. 259, lines 12-24),

having to lean against the patrol vehicle to maintain her balance (R. p. 235, lines 20-21) , in addition to her performance on the field sobriety tests.

(4) A blood alcohol content of 0.23% that is almost three (3) times the legal inference level for impairment. (R. p. 21)

(5) Breath test site video which displays significant impairment in the Respondent's behavior, action and demeanor in the breath testing room. (R. p. 260, line 10)

All of this must be weighed versus visual clarity of the video recording of the fifteen (15) seconds while the Respondent attempts to perform the finger dexterity test. The video recording properly records the Respondent's conduct as defined in Murphy during the finger dexterity test where you can see the Respondent's hands and her fingers moving but cannot see clearly the tips of her fingers. Remembering that the "statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind." State v. Elwell, 396 S.C. 330, 337, 721 S.E.2d 451, 454 (Ct. App. 2011).

There is overwhelming evidence of the Respondent's guilt and any realistic and rational interpretation of the fifteen seconds of video does not negate, in any fashion, the Respondent's guilt. On appeal, the South Carolina Supreme Court affirmed the decision of the Court of Appeals in Elwell, finding that "because no statutory violation occurred in this case, we need not rely on Suchenski for a remedy here." State v. Elwell, 403 S.C. 606, 614, 743 S.E.2d 801, 807 (2013).

Viewed with the perspective of the decisions in Murphy, Gordon and Taylor as they relate to what conduct needs to be video recorded and Elwell as it relates to interpreting 56-5-2953 with realistic circumstances and rationales, the Respondent's argument that the inability of

the video recording to display fifteen seconds of her fingers with cinema graphic clarity merits dismissal of the DUI charge is absurd and unrealistic.

III. THE CIRCUIT COURT ERRED IN DISMISSING THE CHARGE AFTER THE PRODUCTION OF THE INCIDENT SITE VIDEO RECORDING. WHERE AN INCIDENT SITE VIDEO RECORDING IS PRODUCED THE ADMISSION OF THE RECORDING IS CONTROLLED BY THE SOUTH CAROLINA RULES OF EVIDENCE.

“The video recordings of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action” S.C. Code Ann. § 56-5-2953(A)(3) (Supp. 2014). In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) the South Carolina Supreme Court found that dismissal of the charge was an appropriate remedy to the failure to produce a video recording in compliance with S.C. Code of Laws Section 56-5-2953 where the violation of section 56-5-2953(A) was not mitigated by an exception from subsection (B). The trial court in Suchenski had found that exigent circumstances existed under subsection (B); however, the South Carolina Supreme Court refused to consider the City’s argument on appeal finding that issue had not been properly preserved.

The City of Rock Hill supplied video recordings from all three officers involved in this case. The video from Officer Cook recorded all required conduct of the Respondent at the incident site. Any issue with the clarity or resolution of the video goes to the weight to be assigned the evidence by the trier of the fact, not the issue of Section 56-5-2953(A) compliance.

“Subsection 56-5-2953(B) outlines four exceptions that excuse noncompliance with subsection (A)'s mandatory video recording requirements: Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying

the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances.” State v. Johnson, 408 S.C. 544, 549-550, 758 S.E.2d 911, 914 (Ct. App. 2014). Assuming that section 56-5-2953(A) was not been complied with, the affidavit from the arresting officer (Officer Cook) provided subsection (B) mitigation and any noncompliance is properly excused given the exigent circumstances faced by Officer Cook and the other officers at the time of their encounter with the Respondent. The affidavit also supports a finding that considering the totality of the circumstances, the video recording as a whole mitigates against dismissal when considered against the fifteen seconds of video that the Respondent bases her argument on.

In South Carolina, where the video recording complies with Section 56-5-2953(A) or an exception to the recording requirement exists under Section 56-5-2953(B), dismissal of the charge is not warranted. In State v. Elwell, 403 S.C. 606, 743 S.E.2d 801 (2013), the South Carolina Supreme Court found that no violation of Section 56-5-2953 occurred and dismissal of the charge was not appropriate. State v. Hercheck, 403 S.C. 597; 743 S.E.2d 798 (2013) excused the video recording of the twenty minute pre-test waiting period where the defendant refused to submit the breath test.

In State v. Huntley, 562 S.E.2d 472 (2001), the South Carolina Supreme Court found that even though a statutory violation had occurred with regards to the level of alcohol required to be in the simulator solution of the breath testing instrument, that this violation did not support either

dismissal of the charge or even suppression of the results of the breath testing instrument as the results were reliable. The Huntley Court restated the long held principal that the “exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures. Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntely’s breathalyzer results.” Id. at 474.

With neither a Constitutional or statutory violation present in this case, neither dismissal nor even suppression of the evidence is appropriate. Any issue regarding the clarity of the video recording goes to the weight to be assigned to the video recording evidence, not its admissibility.

CONCLUSION

For all the foregoing reasons, the Appellant respectfully submits that the decision of the circuit court reversing Respondent’s conviction and dismissing the charge should be reversed and the conviction reinstated.

Respectfully submitted,



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