

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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Appellate Case No. 2016-000875

THE STATE, .....APPELLANT,

v.

SEAN ROBERT KELLY, .....RESPONDENT.

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**FINAL BRIEF OF APPELLANT**

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## **APPELLANT'S STATEMENT OF ISSUE ON APPEAL**

The circuit court erred in affirming the magistrate's finding that the State failed to produce a proper video recording pursuant to Section 56-5-2953 of the South Carolina Code (Supp. 2015) and dismissing the case on that ground because the statute does not require Investigator Tolson to equip his vehicle with a camera. Moreover, the arresting officer produced a video that satisfied the provisions of the statute.

## STATEMENT OF THE CASE

On September 11, 2013, Respondent was arrested for driving under the influence (DUI) pursuant to Section 56-5-2930 of the South Carolina Code. A bench trial was held in magistrate's court before the Honorable Clayborn Barnette, Jr., on September 12, 2015. After the State rested, Respondent moved for a directed verdict, and the magistrate ultimately dismissed the case. The State filed a notice of appeal in circuit court on December 1, 2015.

The Honorable John C. Hayes, III, heard the appeal from the magistrate's decision. By Order dated March 25, 2016, Judge Hayes affirmed the decision of the magistrate. The State served and filed a timely Notice of Appeal on April 22, 2016. This appeal follows.

## STATEMENT OF FACTS

Robert Sean Kelly (Respondent) was arrested on September 11, 2013, for DUI. His case proceeded to a bench trial in York County Magistrate's Centralized DUI Court before the Honorable Clayborn Barnette, Jr.

At trial, the State called Investigator Kevin Tolson. Investigator Tolson worked as an investigator for the Sixteenth Circuit Solicitor's Office. He explained his primary duties were to assist his assigned prosecutors in trial preparation with any additional investigation. Investigator Tolson clarified that traffic enforcement was not one of his primary duties, and he was never required to perform traffic enforcement duties for the solicitor's office. Investigator Tolson testified he was issued a county vehicle equipped with blue lights and sirens, but not video equipment.

Investigator Tolson testified on the day of the incident, he responded to a call on his police radio reporting a possible intoxicated driver improperly operating a vehicle. Discerning he was closer to the vehicle than Deputy Stagner, Investigator Tolson proceeded to the I-77 on-ramp where he observed a sports utility vehicle (SUV) situated behind Respondent's car. He had a brief conversation with the driver of the SUV during which Respondent left the area and drove onto I-77. Investigator Tolson then began following Respondent's vehicle, which crossed the left and right traffic lines and never exceeded forty-five miles per hour. Based on the call and the driving he observed, Investigator Tolson chose to perform a traffic stop for the safety of other drivers on the interstate.

Investigator Tolson testified that after Respondent pulled off the road, he approached the vehicle and immediately smelled alcohol; he also observed that Respondent was incoherent and "kind of out of it." Aware that Deputy Stagner would arrive shortly, Investigator Tolson simply informed Respondent he pulled him over based on concerns about Respondent's driving, and

requested his license, registration, and proof of insurance. He noted Respondent's speech was slurred, his movements were slow, and he did not seem to understand what was being asked of him. Investigator Tolson clarified he was not the arresting officer and he allowed Deputy Stagner to take the lead once he arrived. On cross-examination, Investigator Tolson explained he was a Class 1 officer and had the right to arrest like Deputy Stagner. He could not recall having made any custodial arrests since he began working for the solicitor's office. Investigator Tolson stated he has not requested a camera be installed in his car because it is not necessary for the primary functions of his job. He explained that there would be no real reason for investigators to have cameras. (Audio of Magistrate Ct. Trial, 4:50–17:10.)

Next, the State called the arresting officer, Deputy Stagner, from the York County Sheriff's Office. Deputy Stagner testified that after hearing the call on the radio reporting an unsafe driver, he proceeded toward the scene and arrived shortly after Investigator Tolson pulled over Respondent. Once he was there, he received nonverbal communication from Investigator Tolson that Respondent seemed intoxicated. When Deputy Stagner asked him how much alcohol he had consumed that day, Respondent replied "a lot."

Deputy Stagner then began a horizontal gaze nystagmus (HGN) test, which Respondent initially attempted but eventually became frustrated and refused to complete the test. Subsequently, Deputy Stagner read Respondent his *Miranda*<sup>1</sup> rights and placed him under arrest. Once Respondent was in the patrol car, Deputy Stagner proceeded to search the vehicle. He discovered an almost empty liquor bottle and a styrofoam cup filled with whiskey and soda, which smelled very strong. (Audio of Magistrate Ct. Trial, 17:00 to 29:00; DVD of Roadside

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Video.) The State then played the video recording from the traffic stop and the breathalyzer room. (Audio of Magistrate Ct. Trial, 29:00 to 55:00; DVD of roadside video.)

The State rested and requested the magistrate to issue a verdict before ruling on any motions in order for the State to keep its right to appeal, arguing otherwise double jeopardy issues would arise. (Audio of Magistrate Ct. Trial at 1:06:24.) Respondent disagreed, arguing he did not believe ruling on any motion prior to the verdict would preclude the State from appealing. After a brief recess, the magistrate allowed the defense to continue with its motion for directed verdict since the State had already rested its case. (Audio to Magistrate Ct. Trial 1:19:19.) Respondent then moved to have the case dismissed, arguing Investigator Tolson failed to provide adequate video footage of the incident under section 56-5-2953 because there was no recording of the stop by Investigator Tolson and none of the exceptions applied.<sup>2</sup> Relying on *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011), Respondent argued any vehicle equipped with blue lights could potentially be used in a traffic stop and therefore are all “vehicles used for traffic enforcement” and subject to the statute.

The magistrate ultimately granted the motion to dismiss. Specifically, the magistrate concluded the video Deputy Stagner produced begins only after the traffic stop is entirely completed and the statute requires the recording to begin after Investigator Tolson’s lights were activated. (ROA, p. 4–5.) Accordingly, the magistrate dismissed the case on the grounds that the State failed to produce a video in compliance with the statutory provision. (ROA, p.3.)

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<sup>2</sup> Although Respondent waited until the close of the State’s case to make this motion and repeatedly referred to moving for directed verdict, he argued his case should be dismissed pursuant *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007).

The State appealed to the circuit court, arguing Deputy Stagner's video satisfies the statutory requirement because he was the arresting officer and because Investigator Tolson was not required to have his car equipped with a camera so his noncompliance was excused under subsection (G). The circuit court affirmed the magistrate, finding Investigator Tolson is a law enforcement officer of some degree even though it may not be his primary duty; therefore, when he stopped Respondent his vehicle became a law enforcement vehicle because he used it as such. (ROA, p. 37-38.) Additionally, the court concluded the video should have started when Investigator Tolson activated his blue lights, not Deputy Stagner. (ROA, p. 38.) Because the circuit court concluded there was no excuse for noncompliance, it affirmed the dismissal of the case. (ROA, p. 39.) This appeal follows.

## ARGUMENT

**The magistrate and the circuit court erred in finding the State failed to produce a proper video recording pursuant to section 56-5-2953 of the South Carolina Code (Supp. 2015) and dismissing the case on that ground because the statute did not require Investigator Tolson to equip his vehicle with a camera and moreover the arresting officer produced a video that satisfied the provisions of the statute.**

“In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception.” *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001). Similarly, in criminal cases the appellate court confines its review to errors of law. *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). However, when the question is one of statutory construction, the appellate court’s review is *de novo*; thus, the appellate court is free to decide without any deference to the court below. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012). “Where the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283.

Pursuant to section 56-5-2953, a person arrested for driving under the influence must have his conduct recorded at the incident site. S.C. Code Ann. § 56-5-2953(A). Specifically, “[t]he 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 . . . , and show the person being advised of his Miranda rights.” *Id.* The provisions elucidated in subsection (A) 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).

Both the magistrate and circuit court concluded the statute required Investigator Tolson to have produced a video recording and dismissed the case for noncompliance. Specifically, the circuit court determined that because Investigator Tolson was engaged in law enforcement, he was not excluded from the statutory requirement.<sup>3</sup> This reading is unfaithful to the language employed by the legislature. Section 56-5-2953(G) specifies that the provisions requiring videotaping “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). Thus, the only vehicles falling under the video-taping requirement are those “vehicles used for traffic enforcement.” Although the circuit court reasoned in its order that because Investigator Tolson is engaged in law enforcement he cannot escape the statutory requirement, it overlooked the qualifying language of the statute and mistook the import of Investigator Tolson’s testimony. Investigator Tolson did not suggest he was not involved in law enforcement, but rather clarified his vehicle is not used for *traffic enforcement*. Interpreting the statute as mandating *all* police vehicles be equipped with video cameras fails to give meaning to the language expressly limiting the provisions to those vehicles used in traffic enforcement. That reading is therefore directly contrary to the basic tenet of statutory construction that the court must give meaning to every

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<sup>3</sup> At the hearing, the circuit court questioned why Investigator Tolson would have blue lights if they were not intended for traffic enforcement. However, equipping police vehicles with blue lights is not a practice isolated to cars used for traffic enforcement. *See* S.C. Code Ann. § 56-5-4700(C) (2005) (“All police vehicles when used as authorized emergency vehicles must be equipped with oscillating, rotating, or flashing blue lights.”). Furthermore, the use of blue lights is not limited to traffic stops—they may also be used simply to allow an officer to bypass traffic en route to an emergency situation. *See* S.C. Code Ann. § 56-5-2360 (2005) (“Upon the immediate approach of . . . a police vehicle properly and lawfully making use of an audible signal or visual signal, the driver of every other vehicle traveling along a two-lane roadway shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible; to the right hand edge or curb of the roadway clear of any intersection and shall stop and remain in that position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.”).

word of a statute. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))). Instead, the legislature’s wording distinctly recognizes there may be some law enforcement vehicles that are *not* used in traffic enforcement and thus not subject to this statute.<sup>4</sup>

Although the circuit court relies on *Town of Mount Pleasant*, the facts of that case are inapposite. There, Mount Pleasant attempted to disclaim any responsibility for equipping its patrol vehicles—despite its priority as the municipality ranking first in DUI arrests—by contending the Department of Public Safety (DPS) failed to provide it with sufficient cameras and under subsection (G) an officer was not required to comply until the vehicle was equipped. *Id.* at 347–38, 713 S.E.2d at 286. Here, the applicability of subsection (G) is not based on a claim that inertia can perpetually allow a patrol officer to avoid the video recording requirement. Instead, Investigator Tolson’s lack of video recording equipment follows the express language of the statute, which logically excludes him from the statutory requirement.

Further, the strained reading of the circuit court invites two equally untenable results. On the one hand, in this situation, an officer closest to an impaired driver—in this case Investigator Tolson—would decline to pull over the offender and instead wait for a patrol officer to initiate the stop thereby prolonging the amount of time a dangerous driver threatens the roadways. The

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<sup>4</sup> DPS’s regulations similarly refer to equipping only those law enforcement vehicles used for traffic enforcement. 2 S.C. Code Ann. Regs. 38-901(B) (2011) (“Videotaping equipment . . . will be installed in law enforcement vehicles used for traffic enforcement in a manner determined solely by [DPS].”). Presumptively, DPS, which is charged with providing the video recording devices, has, consistent with the statute and regulations, confined its distribution to those vehicles used in traffic enforcement. Therefore, to the extent the Court reads the statute to require every law enforcement vehicle to maintain video equipment, the failure to request a camera is not likely unique to Investigator Tolson, but is a systemic deficiency.

danger posed by an inebriated driver on the roadways cannot be exaggerated. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (“Media reports of alcohol-related death and mutilation on the Nation’s roads are legion. . . . Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.” (internal quotation omitted)). It is therefore inconceivable that an officer apprised of such a threat should not be able to respond and neutralize the exigency. *See generally Virginia v. Harris*, 558 U.S. 978 (2009) (Roberts, C.J., dissenting from denial of cert.) (“It will be difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check.”); *State v. Boyea*, 765 A.2d 862, 867 (Vt. 2000) (noting, in the context of a Fourth Amendment challenge, the “urgency for prompt action” when there is a report of a drunk driver, who “is not at all unlike a ‘bomb,’ and a mobile one at that”).

Alternatively, DPS and counties statewide would be compelled to equip *each and every* law enforcement vehicle on the road with cameras, even if those cars are not used for highway patrol. This statute, which is addressed solely to the crime of DUI, is the only one of its kind in requiring the production of a video as a prerequisite to prosecution. It would be nonsensical to assume the legislature would require the expenditure of state funds to equip vehicles for officers that are not involved in traffic enforcement and may never perform a traffic stop.<sup>5</sup> Although the statute must be strictly construed against the State, this precept should not be used to sanction an

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<sup>5</sup> Further, to the extent the Court would find that every vehicle that has the capability of initiating a traffic stop must be equipped with a camera, the priority to equip an investigator with the solicitor’s office would be appreciably low. *See* 2 S.C. Code Ann. Regs. 38-901(B) (“[DPS] will prioritize distribution of videotaping equipment based on a county’s DUI activity, and must distribute the equipment in a manner designed to ensure that the equipment goes first to those law enforcement agencies that have the highest volume of DUI enforcement activity.”).

illogical construction of the law. *See State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (noting both that penal statutes are construed in favor of a defendant and that statutory language “must be given [its] plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation”).

Furthermore, there can be no argument Investigator Tolson was attempting to subvert the statute—his effort to allow Deputy Stagner to comply with the video requirement is patent.<sup>6</sup> The arresting officer, Deputy Stagner, initiated a video concurrent with the activation of his blue lights. This recording spans his discussion with Respondent (who was still in his own vehicle when Deputy Stagner arrived), the attempt to perform a sobriety test along with Respondent’s subsequent refusal to be tested, and Respondent’s arrest and advisement of his *Miranda* rights.

Although the circuit court concluded that the statute requires the video produced to have been recorded by the officer initiating the stop, this construction ignores the statutory language, which merely requires the video commence with the activation of the officer’s blue lights and include the listed events. There is no specification that the referenced officer be the one who initiated the stop if all the other requirements are met. Notably, the statute does not expressly require the video to include any portion of the defendant’s actual driving or his being pulled over. It references “conduct at the incident site,” but specifies only the sobriety tests, the arrest, and Mirandizing the perpetrator. The circuit court’s construction effectively reads into the

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<sup>6</sup> To the extent it could be argued this argument would allow law enforcement to circumvent the statute by always claiming to not be involved in traffic enforcement, such concern can be ameliorated by the fact that any magistrate would quickly discern that intent. The facts of this case belie any assertion of nefarious or underhanded behavior. Investigator Tolson acted in the interest of the drivers on the roadway in pulling over Respondent; there is no evidence he is in the habit of stepping out of his investigatory role with the solicitor’s office into highway patrol. Instead, after pulling Respondent over, Investigator Tolson waited for Deputy Stagner to arrive and allowed him to effectuate the arrest and videotape the entire encounter. The desire to comply with the statute to the best of their abilities is incontrovertible.

statute requirements that are noticeably absent and therefore contrary to the legislature's intent. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning."). Even assuming Investigator Tolson was not exempt from the statutory requirement, because the arresting officer produced a video satisfying each prong of the statute, the magistrate erred in dismissing the case against Respondent. *See State v. Landis*, 362 S.C. 97, 104, 606 S.E.2d 503, 506-07 (Ct. App. 2004) (concluding the officer who "'restrained [Landis] of his liberty' and brought him 'within the custody and control of the law' . . . 'was the arresting officer responsible for meeting the statutory videotaping requirements of section 56-5-2953(A)'). Accordingly, the circuit court erred in affirming the magistrate's dismissal of Respondent's case and this Court should remand the case for trial.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests the case be remanded for trial.

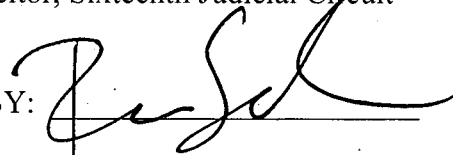
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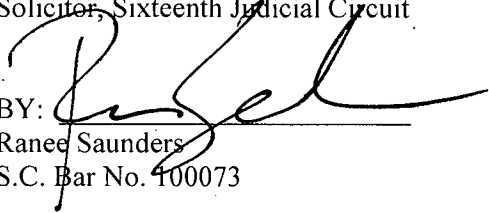
**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies the Final Brief of Appellant an Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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