STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

C. Victor Pyle, Jr., Circuit Court Judge

Appellate Case No. 2015-001599

THE STATE,

Respondent,

v.

SHANE A. MAHON,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II.

Appellant's argument that the trial court erred in refusing to suppress the blood test because the State did not allege that he was physically unable to provide a breath sample is not preserved for appellate review. However, even if preserved, the trial court properly denied Appellant's motion to suppress the blood test because he gave consent.

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant for driving under the influence (DUI), third offense, with a blood alcohol concentration (BAC) between .10 and .15%. (R. 164-165) On July 15–16, 2015, Appellant proceeded to a bench trial before the Honorable C. Victor Pyle, Jr. Alex Kornfeld, Esquire, represented Appellant, and Assistant Solicitor Justin Halloway, Esquire, represented the State. Judge Pyle found Appellant guilty and sentenced him to three years' imprisonment and a $3,500 fine, provided upon service of one year and payment of the fine, he would be on probation for five years with the special condition that he successfully complete a drug diversion program. (R. 154, lines 9–18).

Appellant filed a timely notice of intent to appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

At 4:28 a.m. on May 4, 2014, Trooper Erik Klemm of the South Carolina Highway Patrol was dispatched to investigate a crash where a vehicle had run off the road and rolled over. (R. 26, lines 8–17; R. 28, line 10–R. 29, line 9). He arrived on the scene, turned on his blue lights and video camera, and proceeded to investigate. (R. 29, lines 18–21; R. 45, line 21–R. 46, line 1). Emergency crews had already arrived, and Trooper Klemm verified Appellant was the driver of the vehicle and observed him being extracted from the vehicle and placed in an ambulance, where Klemm was only able to speak to him briefly before he was taken to the hospital. (R. 32, line 12–R. 33, line 9). Trooper Klemm noted a very strong odor of alcohol about Appellant's person. (R. 33, lines 10–13). He observed several Bud Light® beer cans on the ground near the vehicle. (R. 34, lines 4–7). After taking pictures of the scene and waiting for the vehicle to be towed, he went to the hospital and spoke to Appellant in the trauma bay. (R. 35, lines 7–19). Trooper Klemm testified he still smelled alcohol on Appellant's breath and Appellant admitted to consuming alcoholic beverages. (R. 35, lines 20–25). He conducted a horizontal gaze nystagmus (HGN) test on Appellant as part of his investigation, and Appellant displayed six indications of impairment. (R. 36, line 1–R. 37, line 17). Because the results of the HGN test, the strong smell of alcohol, the beer cans, and the crash itself suggested Appellant had driven his vehicle while impaired, Trooper Klemm arrested him for DUI. (R. 37, line 18–R. 38, line 1).

Pretrial, defense counsel moved to dismiss the charge under section 56-5-2953 based on *State v. Henkel*.[1] (R. 1, lines 1–7). He argued Trooper Klemm violated the statute by not videotaping the field sobriety test and not providing an affidavit explaining why he did not. (R. 3, lines 6–22). The solicitor argued the situation fell under the caveat regarding traffic accident investigations, in which the statute allows the video to be started as soon as practicable. (R. 5,

[1] 413 S.C. 9, 774 S.E.2d 458 (2015).

line 1–R. 6, line 10). He further argued that because Appellant was immediately rushed to the hospital, no field sobriety tests were actually conducted at "the incident site." (R. 6, lines 7–15). Defense counsel argued field sobriety tests and the giving of *Miranda* rights were supposed to be videotaped, regardless of whether they occurred at the incident site, or the officer was required to submit an affidavit. (R. 13, lines 1–19). The State again argued that because this situation met the circumstances outlined in the statute for traffic accident investigations, an affidavit was not required. The trial judge agreed and denied Appellant's motion to dismiss. (R. 14, line 1–R. 15, line 1).

Defense counsel next moved to suppress the results of Appellant's blood test. He argued that if Appellant did not consent to it, it would have been taken in violation of his Fourth Amendment rights. (R. 16, lines 9–12). He argued that because the implied consent rights form was marked "Unable to sign" and Appellant's father said Appellant was in and out of consciousness when he arrived at the hospital, it led him to believe Appellant did not consent and, thus, the evidence should be suppressed. (R. 16, lines 14–24). The solicitor informed the trial judge he would be willing to proffer testimony from Trooper Klemm and the nurse who drew the blood if the court deemed it necessary, but he also argued Appellant's consent was sufficient. (R. 17, lines 1–6; R. 19, line 21–R. 20, line 4). Defense counsel argued against Appellant's having consented, saying that the evidence he had been provided, including the medical records, showed Appellant did not consent. (R. 20, lines 8–15). The solicitor then reiterated that Trooper Klemm read Appellant his implied consent rights and wrote down that he was unable to sign and emphasized that Trooper Klemm would testify to such on the stand; however, he also expressed a lack of understanding of what defense counsel was arguing without any testimony having been presented yet. The trial judge denied the motion, stating that he did not need any testimony. (R. 21, lines 1–19).

At trial, Trooper Klemm testified he read Appellant his implied consent rights and that Appellant was unable to sign the form, so he wrote, "Unable to sign" in the subject's signature line. (R. 38, lines 2–24). He testified Appellant consented to the blood sample Trooper Klemm requested from him after the trooper read aloud each right on the implied consent rights form. (R. 39, line 12–R. 40, line 1). On cross-examination, Trooper Klemm acknowledged Appellant was in pretty bad condition when he saw him in the trauma bay of the hospital, and he believed Appellant had IVs in, but he offered no testimony casting doubt on whether Appellant's consent had been knowingly, freely, and voluntarily given. (R. 51, lines 18–20).

The State also presented testimony from nurse Becky Howe, who took Appellant's blood. (R. 57, lines 18–20; R. 58, line 14–R. 60, line 16). She read from Appellant's medical report that he had possible loss of consciousness, deformities to his left leg and right arm, and C-spine precautions. (R. 68, lines 14–24). Wesley Hiott, Rodney Frick, and Carmen Tucker provided testimony about the chain of custody of the blood evidence, which showed a BAC of 0.159. (R. 70, line 1–R. 71, line 21; R. 72, line 10–R. 78, line 6; R. 79–104).

After the State rested, defense counsel renewed his prior motions, claiming that because Trooper Klemm testified he had video recording capability, he could have video recorded the implied consent. (R. 112, lines 10–20). He continued his argument that with no video, the trooper should have filed an affidavit and, thus, violated the statute. (R. 112, lines 10–25). The trial judge denied his motion for a dismissal on those grounds. (R. 113, lines 2–3). He also renewed his motion to dismiss "the memoranda of implied consent," which the trial judge immediately denied. (R. 113, lines 4–6). He then argued there was no testimony about whether a breath test was offered or whether Appellant had an injured mouth, was unconscious, or was dead, noting "the only exception that would apply would be that it would be under the direction of the licensed medical personnel . . . ." (R. 113, lines 8–22).

The State responded that Appellant had himself consented to the blood draw and that testimony on the record supported that. (R. 113, line 24–R. 114, line 1). Furthermore, the solicitor argued that because Appellant was being treated for a very, very serious accident and was not going to be able to leave the hospital, the blood draw was the only means to get an accurate BAC reading and reiterated that Appellant was read his implied consent rights, knew he had the right to refuse, and still consented. (R. 114, line 15–R. 115, line 7). When the trial judge inquired, "Well, how could they give him a breathalyzer test in the hospital when he was in a bed?" defense counsel replied, "I don't know, Your Honor. I assume that is just what the statute says, that you've got to offer one." (R. 115, lines 13–18). The judge then denied the motion.[2] (R. 115, lines 19–20).

Appellant then presented his case, calling his father, Ronald Mahon, to the stand. (R. 117, lines 19–25). He testified he never saw the officer come back to his son's room and never saw any forms. (R. 118, line 18–R. 119, line 6). He stated his son was not very coherent but could have a conversation. (R. 119, lines 17–21). At the end of Ronald Mahon's testimony, the State recalled Trooper Klemm as a rebuttal witness. (R. 121, line 11–R. 122, line 2). The solicitor asked Trooper Klemm about his procedure for reading someone his implied consent rights and then asked him specifically whether he gave Appellant a copy of the implied consent form in this case, to which he replied that he did. (R. 122, line 14–R. 124, line 1).

Defense counsel then renewed all his motions, including his motion to dismiss on the basis of the State's not presenting a video or an affidavit. (R. 132, line 25–R. 133, line 10). He also argued the State did not prove Appellant was physically unable to take a breath test and, thus, he should have been at least offered a breath test prior to his blood test. (R. 134, lines 9–

[2] It is unclear what exactly the judge denied because Appellant did not make clear what the motion was, or what relief he was asking for.

16). The trial judge again denied all the motions. (R. 135, lines 14–15). Following closing arguments, the trial judge found Appellant guilty and sentenced him to three years' imprisonment and a $3,500 fine, provided upon service of one year and payment of the fine, he would be on probation for five years. (R. 154, lines 9–18).

ARGUMENT

I.

The trial court properly denied Appellant's motion to dismiss his DUI indictment because the State acted in full compliance with the statute as no field sobriety tests were conducted at the incident site, but even if not fully compliant, the State was excused under both the totality of the circumstances and the "traffic accident investigations" exceptions of section 56-5-2953(B).

Appellant argues the trial court erred by refusing to dismiss his DUI indictment, claiming the State failed to produce either a video of his conduct at the incident site or an affidavit from the arresting officer, as required by S.C. Code Ann. § 56-5-2953(B). However, the State acted in full compliance with the statute because the trooper recorded all of Appellant's conduct at the incident site. That recording began with the activation of Trooper Klemm's blue lights, included "any field sobriety tests administered" (of which there were none at the incident site) and could not include the arrest or *Miranda* because he was not arrested at the incident site. The trial court correctly denied Appellant's motion to dismiss for failure to comply with section 56-5-2953. Furthermore, to the extent this Court finds the video recording was not fully compliant, it was excused both (1) under the totality of the circumstances and (2) because Klemm was responding as a traffic accident investigator.

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 **must have his conduct at the incident site** and the breath test site video recorded.
>
> (1)(a) The video recording **at the incident site** must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable

cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

. . .

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits 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. In circumstances including, but not limited to, road blocks, **traffic accident investigations**, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. **Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances**; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953 (2006 & Supp. 2015) (emphasis added).

Appellant argues that in *State v. Henkel*, 413 S.C. 9, 774 S.E.2d 458 (2015), the Supreme Court "held that the 'incident site' for the purposes of the video recording requirement was where the field sobriety tests, the *Miranda* advisement, and the driver's arrest . . . occurred as opposed to where the driver's truck wrecked." (App.Br.14–15). However, the *Henkel* Court made no such holding. Indeed, the Court in *Henkel* made clear the conduct referred to in the statute is conduct "at the scene." *Id.* at 15, 774 S.E.2d at 462. It refers to a "typical DUI traffic stop" and states that the videotaping is done "by the car-mounted camera that is initiated by the officer's blue lights." *Id.* at 14, 774 S.E.2d at 461. This clearly means the Court envisions the place where the officer makes a standard DUI traffic stop, or where the officer arrives in his car following the accident, as the "incident site." This could be either the accident site itself or the place where the driver is found. Either way, though, the incident site is the place where the officer drives up in his vehicle for the first time, whether to make a traffic stop (the typical DUI situation) or to investigate an accident that has already occurred. In *Henkel*, the situation was atypical because the accident had happened elsewhere and Henkel had fled the scene and was found several hours later walking on the interstate where he was picked up by an ambulance. The officer first conducted field sobriety tests on Henkel in the ambulance, which is the place the officer found him. Henkel was not severely injured as he did not require a trip to the hospital. Indeed, the officer completed the field sobriety tests by the side of his vehicle after Henkel was released by the ambulance.

The Court noted that in the situation in *Henkel*, "the legislative concerns with **videotaping one-on-one traffic stops** to capture the interactions between an officer and the subject are not present." *Id.* at 15, 774 S.E.2d at 462 (emphasis added). It noted that "[n]umerous officers and emergency personnel observed respondent's conduct **at the scene**." *Id.* (emphasis added). The Court stated, "We find the audio recording of respondent's field sobriety

tests adequately captured **his conduct at the scene of the traffic accident investigation.**" *Id.* (emphasis added). Again, it is apparent the Court regarded "the scene" or "the incident site" as where the subject was found. It even stated the reason the Legislature required videotaping in the statute was to capture officer-subject interactions during a one-on-one traffic stop. Comparing that to the case at hand, the "incident site" would be the scene where the collision occurred and Appellant was found, not the hospital trauma bay. Thus, there was no typical conduct to record at the incident site because by the time the officer arrived, Appellant was being loaded into an ambulance and taken to the hospital for his severe injuries.

In *State v. Manning*, this Court addressed a traffic accident situation where there were injuries. 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012). This Court found "there was no conduct to record under subsection A of section 56-5-2953 because the police arrived after Manning left the scene to seek medical treatment." *Id.* at 265, 734 S.E.2d at 318. Furthermore, this Court looked at the portion of the statute that "allows the circuit court to look at the totality of the circumstances and make a determination of whether the charges should be dismissed." *Id.* It is very clear from this Court's analysis that it considered "the incident site" the place where the accident occurred, not the hospital. Otherwise, this statement from the opinion would make no sense: "Although the officers did not arrive to **the incident site** before Manning was sent to the **hospital**, the first sentence of subsection A plainly states that '[a] person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site . . . video recorded.'" *Id.* (emphasis added). Plainly the incident site and the hospital are two different things. Appellant's argument that the hospital could become the incident site if that was where the officer conducted field sobriety tests fails. Even though Appellant was still at the scene when Trooper Klemm arrived, unlike Manning, the fact remains that he was severely injured and was

already in the ambulance about to leave for the hospital. Thus, just as in *Manning*, there was no conduct to record and there was compliance with the statute.

Because no "conduct" occurred at the "incident site," Trooper Klemm was not required to provide a video recording at all. Consequently, he was not required to produce an affidavit explaining the absence of a video recording of anything that happened at the hospital. Additionally, even if this Court concludes the hospital should be encompassed in the "incident site," evidence supports the trial court's excusing the absence of a video recording for two reasons. First, under the totality of the circumstances, it would be absurd to require Trooper Klemm to drive his car into the hospital so his dash camera could record Appellant's conduct in the trauma bay. Second, the circumstances fell under the exception for "traffic accident investigations." Thus, for all three of these reasons, the trial court properly denied Appellant's request to dismiss the charge, and this Court should affirm its ruling.

II.

Appellant's argument that the trial court erred in refusing to suppress the blood test because the State did not allege that he was physically unable to provide a breath sample is not preserved for appellate review. However, even if preserved, the trial court properly denied Appellant's motion to suppress the blood test because he gave consent.

Appellant argues the trial court erred by refusing to suppress the results of his blood test, claiming that Trooper Klemm did not offer him a breath test first and the State did not allege he was physically unable to provide a breath sample. Regardless, Trooper Klemm read Appellant his implied consent rights, to which he gave his consent even though he was unable to sign the form. Thus, the trial court correctly denied the motion to suppress. This Court should affirm.

Appellant filed a written pretrial Motion to Dismiss, claiming Appellant did not consent to give a blood sample. Neither in the written motion, nor during his pretrial argument, did Appellant argue that the State did not allege that he was physically unable to provide a breath sample. Now, for the first time in his Appellant's brief, he has introduced the claim that without consent the State violated section 56-5-2950 because the nurse failed to provide testimony that he was physically unable to provide a breath sample. Even at the end of the State's case, when Appellant mentioned the nurse's testimony, he stated:

> The other Motion that I would make would be is that the nurse did not testify—I inquired about the statute that specifically states—she did prove that blood was taken at the direction of the nurse. She testified that she had come in and made the legal blood draw at his request. Also there was no testimony about whether it was requested—whether a breath test was offered, whether he had an injured mouth, whether he was unconscious or dead. So the only exception that would apply would be that it would be under the direction of the licensed medical personnel, not the other way around, Your Honor.

(R. 113, lines 8–22). It is unclear exactly what motion Appellant was actually making, and he did not specify what relief he was asking for. Defense counsel seemed to focus on whether Appellant consented and when Trooper Klemm had arrived at the hospital, rather than what the nurse's testimony was. (R. 114–116). Thus, this portion of the issue is not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

However, even if this Court finds the issue is preserved, evidence in the record supports the conclusion that Appellant consented to have his blood drawn and tested. Trooper Klemm testified that he read Appellant each part of the implied consent rights form exactly as listed and he wrote "unable to sign" where Appellant would have signed. (R. 38, line 2–R. 39, line 16). The record shows Appellant was able to hold a conversation, according to both his father's testimony and that of the officer when he testified Appellant admitted to drinking alcohol. (R. 35, lines 18–25; R. 118, lines 17–20). On cross-examination, Trooper Klemm testified he also wrote "subject conscious" on the form. (R. 54, lines 6–11). Although Appellant argues in his brief that Trooper "Klemm had no cogent explanation" for why Appellant did not sign the implied consent form, Klemm's testimony (even pointed out by Appellant in his brief) was that "[t]he subject was inside the trauma bay. He just wasn't able to sign it at the time." (App.Br.8). As to Appellant's statement in his brief that Klemm "conceded that he did not recall if he ever asked Appellant to sign the implied consent form," the State would hardly consider this a meaningful concession. There is no requirement that Klemm had to ask Appellant to sign the form and no requirement for a signature in the first place. The statute simply states that the person must be verbally informed and be given a written copy, not that he must consent in writing. Trooper Klemm could likely have seen that Appellant was unable to sign based on his

medical condition, which even Appellant describes as "seriously injured." He was not required to ask first to find out if Appellant could sign.

> (A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. 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.** If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing. A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest.
>
> (B) No tests may be administered or samples obtained **unless**, upon activation of the video recording equipment and prior to the commencement of the testing procedure, **the person has been given a written copy of and verbally informed that**:
>
> (1) the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court;

> (2) the person's privilege to drive must be suspended for at least one month with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
> (3) the person has the right to have a qualified person of the person's own choosing conduct additional independent tests at the person's expense;
> (4) the person has the right to request a contested case hearing within thirty days of the issuance of the notice of suspension; and
> (5) if the person does not request a contested case hearing or if the person's suspension is upheld at the contested case hearing, the person shall enroll in an Alcohol and Drug Safety Action Program.

S.C. Code Ann. § 56-5-2950 (Supp. 2015) (emphasis added).

Because Trooper Klemm read the implied consent rights form to Appellant, Appellant consented to the blood draw and test, and his signature was not required on the form, the trial court properly denied his motion to suppress the results. Accordingly, this Court should affirm the trial court's ruling.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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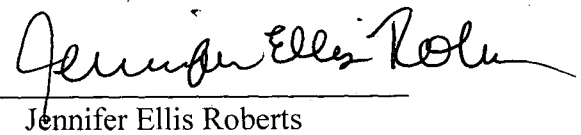
BY: 
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Appellant.

CERTIFICATE OF COUNSEL

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

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