

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County  
Honorable G. Edward Welmaker, Circuit Court Judge  
Appellate Case Tracking No. 2011-184986

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The State,

Respondent,

vs.

Gregg Gerard Henkel,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly denied the motion to dismiss because the officer complied with section 56-5-2953 to the extent possible during the traffic accident investigation.

## STATEMENT OF THE CASE

In the early morning hours of January 19, 2008, Appellant was involved in a single car automobile accident. Appellant was indicted in 2009 on charges of driving under the influence by the Greenville County Grand Jury. He proceeded to trial February 3 and 4, 2011, before the Honorable G. Edward Welmaker and a jury. The jury found him guilty as indicted and Judge Welmaker sentenced him to three years in prison, suspended on service of three months and thirty months probation. He was ordered to perform 180 hours of public service and undergo substance abuse counseling as needed.

## ARGUMENT

**I. The trial court properly denied the motion to dismiss because the officer complied with section 56-5-2953 to the extent possible during the traffic accident investigation.**

Appellant contends the trial court erred in failing to dismiss this case because the State failed to comply with section 56-5-2953 of the South Carolina Code (Supp. 2008). This case involves the investigation of an automobile accident and not a traffic stop for driving under the influence. As a result, the videotape offered complied with the requirements of section 56-5-2953 and specifically 56-5-2953(B).

In the instant case, the State presented an eye witness to the Appellant's accident. She testified he was swerving and "driving kind of crazy." (T.54; R. 40). The eyewitness testified she dialed 911 to report the driver and that she stayed on the phone with 911 while watching the driver of the vehicle swerve and nearly hit other vehicles. (T.54-55; R. 40-41). She testified Appellant hit a bridge, and flipped. She testified the car went into the ditch. Afterwards, she testified the driver climbed out and ran across to the other side of the road and jumped a fence. (T.55; R. 41). The eyewitness relayed what she saw to 911, returned to the accident scene, and provided the information to the police when they arrived. (T.55; 57-58; R. 41; 43-44).

Sergeant Hiott with the South Carolina Highway Patrol arrived on scene of the overturned pickup truck. (T.75; R. 61). He testified he talked to the eyewitness and she relayed the events to him. He proceeded to organize a group to search the area for Appellant and after about 20 minutes could not locate him. (T.76; 78; R. 62; 64). The accident occurred a little after 1:00am.

Sergeant Hiott later responded to a dispatch call indicating the possible driver of the overturned truck was located wandering the roadway on Interstate 385. Sergeant Hiott arrived and Appellant was in the back of the ambulance talking to the emergency medical personnel. (T.79; R. 65). Sergeant Hiott got into the ambulance to talk with Appellant and the EMS. He testified when he got into the ambulance, he could smell the alcohol. (T.80; R. 66). He indicated he read Appellant his Miranda rights in the back of the ambulance before performing any tests. He then performed a horizontal gaze nystagmus test (HGN). (T.79-80; R. 65-66). During this time, he remotely activated his camera from a switch on his belt. After performing the HGN, he moved Appellant to the side of his car and had Appellant recite his ABCs which is very clearly recorded on the video. (T.81; Court's Exhibit 1 on file with the Court; R. 67). Sergeant Hiott did not offer Appellant any walking or balancing tests because Appellant indicated his leg hurt. (T.80-81; R. 66-67). Appellant was placed in Sergeant Hiott's car and the camera was turned to record Appellant. Prior to turning the camera, it was aimed out the front of the vehicle which showed the interstate ahead because Sergeant Hiott had to pull to the front of the line of emergency vehicles in order to stop. (T.97; R. 83).

The trial court questioned Sergeant Hiott regarding his activating the camera. Sergeant Hiott indicated he only turned on his back blue lights, which does not activate the camera automatically. (T.95; R. 81). He indicated there were several Simpsonville police cars as well as the EMS and possible the fire department on scene. (T.95; R.81). Sergeant Hiott indicated the EMS vehicle may have been right behind him in the line of vehicles. (T.95-96; R. 81-82). Sergeant Hiott testified he activated the camera by his belt remote as soon as practicable. (T.101; R. 87).

The trial court considered whether the State presented a video pursuant to section 56-5-2953. The court found Sergeant Hiott initiated the recording as soon as practicable as required by the statute. Further, he found even though the videotape did not record a view of Appellant performing the HGN test and the ABC test, the video needs to contain Appellant's conduct and the video had the audio which was the relevant and important aspect of both tests. (T.166-168; R. 152-154).

Section 56-5-2953 provides in relevant part:

(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 videotaped.

(1) The videotaping at the incident site must:

(a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and

(b) include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered.

S.C. Code Ann. § 56-5-2953 (2006).<sup>1</sup>

Subsection B of the statute provides:

Further, in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason

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<sup>1</sup> This section was amended effective February 10, 2009. Act No. 201, 2008 S.C. Acts 1682-85. Accordingly, the 2006 Code is cited because Appellant's offense occurred in 2008 and Appellant has conceded the amended statute is not applicable to the instant case.

for the failure to produce the videotape based upon the totality of the circumstances. . . .

S.C. Code Ann. § 56-5-2953(B) (2006). As a result of subsection B, the officer does not have to produce a videotape containing all aspects of the incident site and the defendant's conduct at the incident site, but must only produce one beginning as soon as practicable. Further, the trial court is specifically allowed to consider any other valid reason for the failure to produce a videotape in full compliance with subsection A based on a totality of the circumstances.

This court analyzed the requirement under subsection A that the videotape contain the defendant's conduct in Murphy v. State, 392 S.C. 626, 631, 709 S.E.2d 685, 688 (Ct. App. 2011). In Murphy, the defendant was given the HGN and a walk the line test. The defendant was videotaped from essentially the knees up, and in portions only displayed half her body as she walked to the limit of the camera's field of view. Further the HGN was conducted at the location she completed the walking test "on the fringe of the dashboard camera's field of view" and with her back to the camera. The court found:

[N]othing in the plain language of the statute indicates that an accused remain in full view of the camera for the duration of the encounter. Rather, the statute only requires her "conduct" be recorded. Conduct is generally defined as one's behavior, action, or demeanor. The Oxford Dictionary 158 (2d ed. 2001). Failure of the video to maintain a full view of the accused for the duration of a field sobriety test in which she is made to walk a line, for instance, does not fail to display her behavior, demeanor, and general state. Thus, an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct.

Id.

Sergeant Hiott clearly initiated the camera as soon as practicable. He arrived at a scene with multiple vehicles already there, including an ambulance. He pulled in front out of concern for being hit because he was only a semi-marked car and wanted to be in front of the other vehicles which had full lights. Further, he had to verify Appellant's condition as well as make a determination of whether he believed Appellant was intoxicated, thus triggering consideration of the DUI statute. Sergeant Hiott entered the ambulance, made the determination Appellant was intoxicated and was refusing medical treatment, triggered his camera, conducted the tests he believed were appropriate, and produced a videotape of Appellant's conduct which complied with section 56-5-2953.

In this particular accident investigation, the officer used two tests, the HGN, and a recitation of the ABC's test. Appellant's appearance on camera was not necessary to a recording of his conduct during either of these tests. As the trial court indicated, the tests "cry out for audio." The relevant conduct is the officer having to repeatedly instruct Appellant to open his eyes and how to perform the HGN test and then Appellant's inability to repeat his ABC's. Appellant's conduct at the incident site is documented by the videotape and is sufficient, especially as the trial court found, in light of the totality of the circumstances of this case. As a result, the trial court properly refused to suppress the videotape and properly refused to dismiss the case.

CONCLUSION

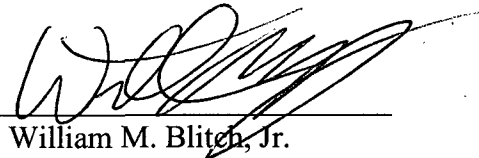
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 9, 2012

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**CERTIFICATE OF COUNSEL**

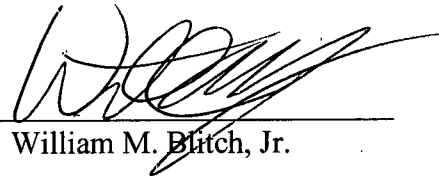
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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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**PROOF OF SERVICE**

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I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire  
305 Main Street  
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served.  
This 9<sup>th</sup> day of November, 2012.



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