

THE STATE OF SOUTH CAROLINA  
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appeal Case No. 2016-000544

RECEIVED

AUG 23 2017

SC Court of Appeals

The City of Rock Hill, ..... Respondent,

v.

Theotis E. Dunham, ..... Appellant.

RECORD ON APPEAL

James W. Boyd #824  
Post Office Box 36425  
1544 Ebenezer Road  
Rock Hill, SC 29732  
(803) 328-2600  
Attorney for Appellant

Christopher Barton  
201 E. Main Street  
3<sup>rd</sup> Floor  
Rock Hill, SC 29730  
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Attorney for Respondent

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FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF YORK  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2015CP4603059

Theotis E Dunham	Rock Hill City Of
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm; vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: **ORDER (CONVICTION IS AFFIRMED)**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ John C. Hayes, III.	2049	2/18/2016
John C. Hayes, III.	Judge Code	Date
Circuit Court Judge		

**For Clerk of Court Office Use Only**

This judgment was entered on **February 19, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **February 19, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

**James W. Boyd** 1544 Ebenezer Rd. PO Box 36425 Rock Hill,  
SC 29732

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**Christopher Edward Barton** 201 East Main Street 3Rd Floor  
Rock Hill, SC 29730

**ATTORNEY(S) FOR THE DEFENDANT(S)**

David Hamilton

**Court Reporter**

**David Hamilton - Clerk of Court**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Theotis E. Dunham )  
 )  
Appellant, )  
 )  
v. )  
 )  
City of Rock Hill, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-03059

ORDER

FILED-RECEIVED  
2016 FEB 19 AM 9:10  
DAVID H. HILLTON  
C.C.P. & GS  
YORK COUNTY, SC

This matter came before this Court pursuant to an appeal by Theotis E. Dunham (“Appellant”) from his conviction of Driving Under the Influence (“DUI”) and Driving Under Suspension Fourth Offense (“DUS 4<sup>th</sup>”). The trial judge, the Honorable Jane Pittman Modla, convicted the Appellant on September 30, 2015. This Court heard this appeal on February 16, 2016. Appellant was represented by James W. Boyd, Esq. and the City of Rock Hill was represented by Jason Weil. After review of the Appellant’s appeal and the argument of counsel, I find the following:

FACTS

On September 18, 2015, the Appellant was arrested for DUI and DUS 4th. The Appellant filed a Motion to Dismiss on several grounds: 1) the legality of the checkpoint; 2) video of the incident site did not comply with South Carolina Code of Laws Section 56-5-2953 by not including all aspects of field sobriety tests; and 3) Appellant was not offered a breath test pursuant to South Carolina Code of Laws Section 56-5-2950. The Appellant’s Motion to Dismiss was heard pre-trial on June 16, 2015 and was denied. The case was called for a bench trial the

*J. Hill*

same day. Appellant now alleges the Court erred in upholding the legality of the checkpoint at which Appellant was stopped, and also in failing to dismiss the DUI on the grounds Appellant was not offered a breath test.

### LEGAL ANALYSIS

“In criminal cases, the appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court’s factual findings unless they are clearly erroneous. Id.

#### I. Legality of Checkpoint

The South Carolina Supreme Court dictated in State v. Brockman that court rulings in Fourth Amendment search and seizure cases will be upheld unless the court’s factual findings are clearly erroneous. 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). “[S]topping a vehicle at a checkpoint constitutes a seizure of a person within the meaning of the Fourth Amendment.” United States v. Brugal, 209 F.3d 353, 356 (4th Cir. 2000) (citing Michigan Department of State Police v. Sitz, 496 U.S. 444, 450 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976)). In determining whether a checkpoint seizure is constitutional, the court must look to whether the initial stop at the checkpoint was reasonable. Id. (citing Sitz, 496 U.S. at 450). Reasonableness of a checkpoint is “determined by balancing the gravity of the public interest sought to be advanced and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped.” Id. (citing Sitz, 496 U.S. at 449-55). The Supreme Court has “upheld the constitutionality of government checkpoints set up to detect drunken drivers.” Id.

Appellant argues the Court erred in upholding the legality of the checkpoint for the following reasons:

2/4/12

1. The time of the checkpoint was not approved and extended into an unapproved date.

Appellant claims the checkpoint was invalid because the checkpoint plan approved by Major S. Parker did not include a specific time range, and the actual checkpoint extended into the early morning hours of the day following the approved date. This argument is one against the procedures used by the agency in their checkpoint plan of operation and briefing. The Supreme Court has held that "violations of procedure go to the weight, rather than the admissibility of evidence" as long as the defendant is not prejudiced. State v. Odom, 382 S.C. 144, 152, 676 S.E.2d 124, 128 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

The date approved in the checkpoint plan was September 18, 2014. There was no time listed on the plan, but the time listed during the briefing of the plan was 1500 hours to 0100 hours. Even though this time technically expands into the unapproved date of September 19, Appellant was issued traffic tickets for DUI refusal and DUS 4<sup>th</sup> at 2130 hours. This means Appellant was stopped on September 18 during the day specifically approved by the checkpoint plan, and during the hours approved within the briefing material. Further, the briefing outlines traffic safety checkpoints specifically occurring from 2100-2300 hours. Appellant's checkpoint seizure falls directly within this timeframe. As a result, Appellant cannot demonstrate any prejudice resulting from a violation of the internal procedures. Therefore, exclusion or dismissal would not be a proper remedy as found by the municipal court.

2. The checkpoint occurred outside the area approved for the checkpoint.

The question in this case is whether or not setting up a checkpoint in a specific area is reasonable in order to advance a specific public interest. The public interest here, as determined by City's Exhibit #1-D, is to deter and enforce safety within traffic and accident hot spots.

"Case law does require some basis for the location of the checkpoint." Vickery, 399 S.C.

Jell #3

at 520, 732 S.E.2d at 224. However, this does not require pinpoint accuracy for where the checkpoint is placed. City's Exhibit #1-D is a map of traffic and accident hot spots over a five year period in a .25 mile area. During this time, there were 120 accidents. This area includes the US21/E. main Street at Cowan Farmroad (Cowan Road) location listed on the checkpoint plan and the other areas listed during the briefing. In addition, it contains the location of the checkpoint Appellant was stopped at, which Lt. Breeden testified was the ½ mile area from White Street/Belleview intersection to Cowan Road. Even though the checkpoint was not in the exact intersection approved by the plan or briefing, it was within the traffic and accident hot spot on the same track as Cowan Road.

Further, Lt. Breeden testified the officers set up the roadblock within ½ mile of the intersection to Cowan Road, and additionally testified the entire area the road block was located within what is commonly known as Cowan Road. It is conceivable the basis for this particular checkpoint was to enforce safety within the traffic and accident hot spots shown in City's Exhibit #1-D, and that it was chosen also by the common understanding of the entire area being called Cowan Road. Therefore, there is no error of law, but rather a factual basis to support the finding of the municipal court.

3. The City did not present empirical data to support that the seizure serves the public interest as required by State v. Vickery, 399 S.C. 507, 752 S.E.2d 218.

The degree to which the seizure serves the public interest is determined by the "effectiveness" of the stop, and requires that the State produce empirical data to support the effectiveness of its road block. Vickery, 399 S.C. at 517, 732 S.E.2d at 223 (citing Sitz, 496 U.S. at 454). However, case law "do[es] not require the State to present pre-existing empirical data to justify setting up the checkpoint." Id. Appellant argues the City of Rock Hill did not provide this empirical data to support the effectiveness of the checkpoint.

*John H. 7*

In Vickery, the empirical data presented showed a total number of traffic violations and arrests for all checkpoint stops, but not a number specific to the checkpoint where the defendant was seized. The Court said the State met its burden in proving the effectiveness of the stop absent data specific to the particular traffic stop. Here, just as in Vickery, there is a summary report, that provides there were a total of 227 cases made during the total checkpoint operation. City's Exhibit #1-C. Of those cases, there were 17 alcohol and drug related violations (including DUI and DUS charges), 36 speeding violations, and 28 seat belt violations. There is no information specific to the checkpoint location Appellant was stopped at, similar still to Vickery.

The public interest here is to prevent traffic offenses and accidents that can cause injury to others. Given the number of violations involving alcohol/drugs and speeding, it is certainly conceivable that these checkpoints deterred several traffic offenses or stopped potential accidents from occurring. As the Court deemed the information provided in Vickery to be sufficient, this Court must also find the information in the present case to be sufficient. Therefore, the City met its burden in providing empirical data to support that the seizure was effective and served the public interest.

This Court finds the municipal court did not err in ruling the checkpoint valid.

## II. Failure to Dismiss the DUI

South Carolina requires that "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." S.C. Code Ann. § 56-5-2950. However, the arrestee can refuse, and refusal can be implied by behavior. Though the Courts have not defined "refusal," SLED's Policies and Procedures 8.12.5(F)(4)<sup>1</sup> outlines several

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<sup>1</sup> The legislature has authorized SLED to promulgate policies and procedures for administering breath tests. § 56-5-2950(A), (E), & (J).

gc  
#5

ways in which a refusal can occur, including if the subject refuses to cooperate or interferes with the administration of the test, is unruly, or delays procedure. The policies provide the Officer with discretion to determine whether the subject's failure to blow an acceptable breath sample was a refusal. Chisolm v. S. Carolina Dep't of Motor Vehicles, 402 S.C. 593, 607-08, 741 S.E.2d 42, 50 (Ct. App. 2013).

In this particular instance, 8.12.5(F)(4)(b)-(d) all apply based on the testimony of Officer McNeely and Officer Lambert. Though Officer McNeely stated he never offered Appellant a breath test, and a breath test was never verbally refused, Officer McNeely also testified Appellant's "demeanor changed radically after his arrest," and that he was "irate, cursing, pulling away, [and] out of control." Return to Appeal, p. 3. Further, Appellant refused to take off his handcuffs, which ultimately hindered the administration of the breath test because the subject cannot be kept in handcuffs in the BA room. Id. Officer McNeely stated he would have offered the breath test but for Appellant's behavior.

Officer Lambert then testified Appellant became physically combative and was taken to the ground in order to get his personal property. Id. He stated Appellant would not go where asked and officers had to place him in a restraint chair. Further, Officer Lambert explained Appellant was "very violent" and was "shouting, interrupting, and did not want to hear [the law]." Id.

In consideration of the SLED guidelines as to what amounts to refusal, the evidence supports that the officers properly discerned the Appellant was violent, unruly, and interfering with proper breath test administration procedure such that it amounted to a refusal.

This Court finds the municipal court did not err in dismissing the case because Appellant was not offered a breath test, as his combative refusal amounted to a constructive refusal.

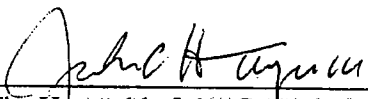
*J. W. H. G.*

Conclusion

This Court finds no error in the municipal court's finding that the checkpoint was constitutional because even if it was found there was a violation of the internal procedure, Appellant was not prejudiced. Further, there was no error in not dismissing the case based on Appellant not being offered the breath test because his behavior amounted to a constructive refusal. Accordingly, this Court cannot find the trial judge erred by denying Appellant's Motions to Dismiss.

IT IS THEREFORE ORDERED, that based upon the above, the Defendant's conviction is AFFIRMED.

IT IS SO ORDERED!

  
\_\_\_\_\_  
The Honorable John C. Hayes, III # 7  
Sixteenth Judicial Circuit

February 18<sup>th</sup>, 2015  
York, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )  
City of Rock Hill, )  
) )  
Plaintiff, )  
) )  
-vs- )  
) )  
Theotis E. Dunham, )  
) )  
Defendant. )

IN THE MUNICIPAL COURT  
CITY OF ROCK HILL

Ticket No.: 025259GR & 025260GR

MOTION TO DISMISS

FILED-RECEIVED  
CLERK'S OFFICE  
MAY -8 PH 3:44  
ROCK HILL MUNICIPAL COURT  
ROCK HILL, SOUTH CAROLINA

The above named Defendant, through his undersigned attorney, moves the Court to dismiss the above-entitled charges. The grounds for this Motion are as follows:

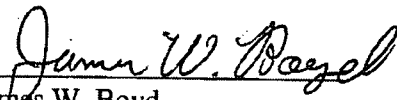
1. The Defendant was stopped at a driver's license checkpoint. The Defendant request that the Court to inquire into this matter and to determine the legality of the checkpoint under the case law set forth in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), *Brown v. Texas*, 443 U.S. 47 (1979), *State v. Vickery*, 399 S.C. 507, 732 SE2d 218 (S.C. App, 2012). The Defendant request the Court inquire into the matter to determine if the stop and seizure was in violation of the 4th Amendment of the United States Constitution and Article One, Section Ten of the South Carolina State Constitution.

2. The Defendant was given several field sobriety tests. One of the tests that were given to the Defendant was the Horizontal Gaze Nystagmus Test (HGN). During the HGN the Defendant's head is not visible during the test and the complete passes made by the Officer in conducting the HGN are not visible. Therefore the State did not comply with South Carolina Code Annotated Section 56-5-2953(A)(1)(a)(ii). *State v Gordon*, 408 S.C. 536, 759 SE2d 755 (S.C. App. 2014)

3. One of the field sobriety test given to the Defendant was the Walk and Turn Test. The Defendant was to take nine heel to toe steps turn and walk back nine heel to toe steps. The recording of video the test was conducted in such a way that the Defendant walked toward the camera and then turn and walked back from the camera. The video was unable to capture whether or not the Defendant was able or not to touch heel to toe. Section 56-5-2953(A)(1)(a)(ii) of the South Carolina Code of Laws requires the incident site video to include, "include any field sobriety test administrated". The Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. In the present case the State failed to comply with the video taping requirements with regard to the walk and turn test. Although the video camera was recording during the Defendant's performance on this test, it was positioned in such manner that the Defendant's heels were not visible as they touched or did not touch his toes. Therefore the Defendant's performance, an important part of the test was not videotaped.

4. The Defendant was not offered a breath test to determine his alcohol concentration as required by South Carolina Code 56-5-2550.

FOR ALL THE ABOVE REASONS the Defendant prays that the Court to dismiss the above-entitled matter.

  
James W. Boyd  
Attorney at Law  
1544 Ebenezer Road  
Post Office Box 36425  
Rock Hill, SC 29732  
(803) 328-2600  
ATTORNEY FOR DEFENDANT

Rock Hill, South Carolina  
May 6, 2015



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	
	)	
THEOTIS E. DUNHAM	)	RETURN TO APPEAL
	)	
V.	)	2015-CP-46-03059
	)	
CITY OF ROCK HILL,	)	
	)	
Defendant.	)	
_____	)	

This matter is on Appeal from a Bench Trial in the Rock Hill Municipal Court, Rock Hill, S.C., Jane Pittman Modla, presiding Judge.

**APPEARANCES:** For the Defense:  
Jim Boyd, Defense Attorney  
Theotis Dunham, Defendant

For the City:  
Chris Barton, Solicitor  
Tony Breeden, Rock Hill Police Department  
Officer Brian Lambert, Rock Hill Police Department  
Officer Spencer McNeely, Rock Hill Police Department

**CHARGES:** DUI 1<sup>st</sup> and DUS 4<sup>th</sup>  
Tickets: 25259GR and 25260GR  
Date of Incident: September 18, 2014  
Officer: Tony Breeden

**PRE-TRIAL MOTIONS:**

The defendant filed a Motion to Dismiss on 4 grounds.

1. The first issue was the legality of the checkpoint. The Solicitor submitted 4 documents into evidence without objection marked as City's Exhibit #1, A-D. Lt. Tony Breeden of the Rock Hill Police Department testified that the York County Multijurisdictional Traffic Unit conducted a check-point on September 18, 2014 pursuant to the approval by Major Parker's Check Point Plan for East Main at Cowan Farm. (City's Exhibit #1A). He said all cars were to be checked for DL, registration, proof of insurance and impairment. City's Exhibit #1B outlines the briefing and the hours of operation from 1500 hours - 100 hours. City's Exhibit #1C is the DDACTS Enforcement Report outlining a summary of all events and cases made that day. City's Exhibit

#1D is the crime analyst's report outlining "HOTSPOTS" for traffic violations and accidents in the area based on accident and incident reports over a 5 year period. Lt. Breeden testified that the officers set up the road block in all 4 lanes at the spot chosen by him in a ½ mile area from White St/Belleview intersection to Cowan Road.

On cross, Lt. Breeden agreed that the date September 18, 2014 was approved, but not the time. He agreed that his time 3:00 p.m. - 1:00 a.m. extended the event to an unapproved date the 19<sup>th</sup>. The defense argued the briefing concerned E. White St./Belleview intersection and not Cowan Road. Also that Cowan Road was not located within any of the circles on Exhibit #1D. The officer testified that the entire area is know as Cowan Road, that Cowan Road is visible from the roadblock and is 1/4 - 1/2 mile away, in the area, within eyesight. The defense also argued that Exhibit #1C reports a summary of all activity from the day, not just from the checkpoint, so the city did not comply with State v. Vickery.

The City argued that State. V. Groom requires a 3 part test and that the checkpoint was reasonable under the guidelines.

The Court agrees with the City that the checkpoint was reasonable and the motion to dismiss on these grounds is denied.

2. The second argument is that defendant's head was not visible during the HGN field sobriety test and this did not comply with SC Code section 56-5-2953 and per State v. Gordon, 759 S.E. 2<sup>nd</sup> 755 (S.C. App. 2014), the charge must be dismissed. The Court denies the motion and finds that pursuant to the S.C. Supreme Court version of Gordon (Opinion No. 27554, August 2015) the HGN test is in compliance with the Statute. When the officer moves the defendant to the white line for the administration of the Field Sobriety Test, defendant's entire body is visible though his head appears as a gray mass because of the darkness and the lighting. During the HGN test, the defendant's feet, left leg, left trunk, left shoulder are visible. His head appears as a gray mass until the officer shines the flashlight on him. Then it appears as a white mass. The facial features are never visible. The officer's arm and flashlight are visible on video. The officer's instructions are audible. And the defendant talks to the officer. Thus the requirement that the head be visible and that the HGN Field Sobriety Test be video-recorded is satisfied and dismissal of the charge is not appropriate.

Furthermore, the officer testified that there were no results from the test because the defendant could not keep his head still. So even if the head were not visible on video, redaction of the test would be the appropriate remedy per the Supreme Court if the prejudicial effect outweighed the probative and not dismissal of the charge. As there are no results, there is no harm, no prejudicial effect.

3. The third argument is that the charge should be dismissed because the video does not capture whether or not the defendant was able to touch heel to toe during the Walk and Turn Field Sobriety Test. The Court agrees that the video does not capture whether or not the defendant's heels and toes touched. This is either because of the direction the defendant is walking, the darkness, the light, the distance between the camera and the defendant or all of the

above. Nevertheless, the Court finds his conduct is video-recorded during this test as required by the statute and denies the motion to dismiss on this ground. Defendant's entire body is visible on the video including his legs and feet. He's seen walking the white line and turning. He is heard counting his steps. The officer is also seen and heard demonstrating the test. In Gordon, the Supreme Court indicated that the "eyes" do not have to be seen on video during the HGN to have a valid test. So, in the same vane it makes sense that the touching of the heel to toe does not have to be seen on video to have defendant's conduct video-recorded during the test.

4. The fourth argument is that the case should be dismissed because the defendant was not offered a breath test pursuant to S. C. Code 56-5-2550. Officer McNeely testified that the defendant's demeanor changed radically after his arrest and in the patrol car. At the Law Center he was "irate, cursing, pulling away, out of control" so much so that he was put into a restraint chair. For officer safety he did not offer defendant a breath test and defendant never verbally refused it. "He refused to take off his handcuffs and he can't be kept handcuffed in the BA room. Several officers couldn't take him out of handcuffs. It's rare for someone to be put in the restraint chair but his behavior was beyond reasonable. But for his behavior I would have offered him a breath test".

Officer Lambert testified that the officers could not physically get the defendant into the BA room. "He became physically combative. He was taken to the ground, on his somtach in the hallway by 2 officers to get his personal property. He would not go where they asked him to go - not in the BA room, not the jail cell". They had to put him in the restraint chair. He said it is very very rare to use and in 12 years he has only assisted in one case before. He said "I think I explained the law but he was shouting, interrupting, did not want to hear it. The encounter was very violent". They treated defendant's behavior as refusing the BA test.

The Court finds that the officer did not take defendant to the BA room to offer a breath test, that the defendant did not verbally refuse the breath test and that the officers did not videotape the refusal. The Court also finds that the defendant constructively refused the test by his own combative behavior. (See Chisholm v. SCDMV, 741 SE 2<sup>nd</sup> 42, S.C. App. 2013). Thus, the motion to dismiss on this ground is denied.

### PROCEEDINGS:

The Pre-Trial motion being denied the defendant proceeded with a Bench Trial on the charges of DUI and DUS 4<sup>th</sup>.

Officer McNeely testified that on September 18, 2014 he was working a check point in the city limits at 2130 hours when defendant approached with his headlights off. Defendant had no DL so he was asked to step outside of the vehicle. The officer smelled alcohol so he began Field Sobriety Tests. Defendant told him he was under suspension and that he'd had over 24 ozs of beer. Defendant was offered the HGN test but the officer got no results because he couldn't get him to keep his head still. He took the Walk and Turn test, walked the line, counted out loud but used his arms for balance, did not touch heel to toe and made improper turns. On the One Leg Stand test defendant used his arms for balance and put his foot down. He decided to arrest him

for DUI. His behavior in the jail confirmed his belief "absolutely". He was out of control and he testified as outlined in the Pre-Trial Motion.

The officer also testified to the DUS 4<sup>th</sup>. Defendant's 10 year Certified Driving Record showed defendant was under suspension, that he has had 3 prior convictions in 5 years on 10/28/13, 11/30/11 and 6/16/10. So, this charge from 9/18/14 was his 4<sup>th</sup> offense. The Certificate of Notice and Proof of Mailing were also offered into evidence without objection. (City's Exhibit #3).

Officer Lambert testified that he was the Field Training Officer for NcNeely and he oversaw and observed everything. He said defendant couldn't mentally follow directions, he was moving his head, using arms for balance, he had red, blood-shot glassy eyes. The rest of his testimony was outlined in the Pre-Trial Motions.

On cross, Lambert was asked if part of the defendant's irate phase came when he asked defendant if there were drugs in his car? (There were not). Or did defendant become irate when Lambert let it be known he was going to confiscate defendant's car by forfeiture?

**FINDINGS:**

The Court found defendant guilty of DUI and sentenced the defendant to a fine of \$997 or 30 days. The Court also found the defendant guilty of DUS 4<sup>th</sup> offense and sentenced defendant to 90 days plus \$2,105.00.

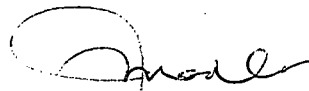
On October 8, 2015 Defendant filed his appeal.

**ATTACHMENTS:**

1. Copy of Appeal
2. Order by Judge Jane Pittman Modla to Dismiss and Bench Trial signed 9/30/15. Also see documents for Order.

Respectfully submitted,

January 12<sup>th</sup>, 2016



Jane Pittman Modla,  
Rock Hill Municipal Court Judge

Attachment 1

STATE OF SOUTH CAROLINA )

COUNTY OF YORK )

Theotis E. Dunham, )

Appellant(s) )

vs. )

City of Rock Hill, )

Respondent(s) )

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 46-0303

2015 OCT 18 PM 12:24  
WINN-ANDERSON  
CLERK OF COURT  
ROCK HILL, SC

Submitted By: James W. Boyd  
Address: PO BOX 36425, Rock Hill, SC 29732

SC Bar #: 824  
Telephone #: 803-328-2600  
Fax #: 803-328-5747  
Other:  
E-mail: jamesboyd@comporium.ent

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20-NI-, Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Administrative Law/Relief: Reinstate Drv. License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Other (799)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Comm. (990), Employment Security Comm (991), Other (999)
Special/Complex/Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature: James W. Boyd

Date: October 5, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.



The officer testified that the entire area is know as Cowan Road, that Cowan Road is visible from the roadblock and is 1/4 - 1/2 mile away, in the area, within eyesight. The defense also argued that Exhibit #1C reports a summary of all activity from the day, not just from the checkpoint, so the city did not comply with State v. Vickery.

The City argued that State. V. Groom requires a 3 part test and that the checkpoint was reasonable under the guidelines.

The Court agrees with the City that the checkpoint was reasonable and the motion to dismiss on these grounds is denied.

2. The second argument is that defendant's head was not visible during the HGN field sobriety test and this did not comply with SC Code section 56-5-2953 and per State v. Gordon, 759 S.E. 2<sup>nd</sup> 755 (S.C. App. 2014), the charge must be dismissed. The Court denies the motion and finds that pursuant to the S.C. Supreme Court version of Gordon (Opinion No. 27554, August 2015) the HGN test is in compliance with the Statute. When the officer moves the defendant to the white line for the administration of the Field Sobriety Test, defendant's entire body is visible though his head appears as a gray mass because of the darkness and the lighting. During the HGN test, the defendant's feet, left leg, left trunk, left shoulder are visible. His head appears as a gray mass until the officer shines the flashlight on him. Then it appears as a white mass. The facial features are never visible. The officer's arm and flashlight are visible on video. The officer's instructions are audible. And the defendant talks to the officer. Thus the requirement that the head be visible and that the HGN Field Sobriety Test be video-recorded is satisfied and dismissal of the charge is not appropriate.

Furthermore, the officer testified that there were no results from the test because the defendant could not keep his head still. So even if the head were not visible on video, redaction of the test would be the appropriate remedy per the Supreme Court if the prejudicial effect outweighed the probative and not dismissal of the charge. As there are no results, there is no harm, no prejudicial effect.

3. The third argument is that the charge should be dismissed because the video does not capture whether or not the defendant was able to touch heel to toe during the Walk and Turn Field Sobriety Test. The Court agrees that the video does not capture whether or not the defendant's heels and toes touched. This is either because of the direction the defendant is walking, the darkness, the light, the distance between the camera and the defendant or all of the above. Nevertheless, the Court finds his conduct is video-recorded during this test as required by the statute and denies the motion to dismiss on this ground. Defendant's entire body is visible on the video including his legs and feet. He's seen walking the white line and turning. He is heard counting his steps. The officer is also seen and heard demonstrating the test. In Gordon, the Supreme Court indicated that the "eyes" do not have to be seen on video during the HGN to have a valid test. So, in the same vane it makes sense that the touching of the heel to toe does not have to be seen on video to have defendant's conduct video-recorded during the test.

4. The fourth argument is that the case should be dismissed because the defendant was

not offered a breath test pursuant to S. C. Code 56-5-2550. Officer McNeely testified that the defendant's demeanor changed radically after his arrest and in the patrol car. At the Law Center he was "irate, cursing, pulling away, out of control" so much so that he was put into a restraint chair. For officer safety he did not offer defendant a breath test and defendant never verbally refused it. "He refused to take off his handcuffs and he can't be kept handcuffed in the BA room. Several officers couldn't take him out of handcuffs. It's rare for someone to be put in the restraint chair but his behavior was beyond reasonable. But for his behavior I would have offered him a breath test".

Officer Lambert testified that the officers could not physically get the defendant into the BA room. "He became physically combative. He was taken to the ground, on his stomach in the hallway by 2 officers to get his personal property. He would not go where they asked him to go - not in the BA room, not the jail cell". They had to put him in the restraint chair. He said it is very rare to use and in 12 years he has only assisted in one case before. He said "I think I explained the law but he was shouting, interrupting, did not want to hear it. The encounter was very violent". They treated defendant's behavior as refusing the BA test.

The Court finds that the officer did not take defendant to the BA room to offer a breath test, that the defendant did not verbally refuse the breath test and that the officers did not videotape the refusal. The Court also finds that the defendant constructively refused the test by his own combative behavior. (See Chisholm v. SCDMV, 741 SE 2<sup>nd</sup> 42, S.C. App. 2013). Thus, the motion to dismiss on this ground is denied.

#### PROCEEDINGS:

The Pre-Trial motion being denied the defendant proceeded with a Bench Trial on the charges of DUI and DUS 4<sup>th</sup>.

Officer McNeely testified that on September 18, 2014 he was working a check point in the city limits at 2130 hours when defendant approached with his headlights off. Defendant had no DL so he was asked to step outside of the vehicle. The officer smelled alcohol so he began Field Sobriety Tests. Defendant told him he was under suspension and that he'd had over 24 ozs of beer. Defendant was offered the HGN test but the officer got no results because he couldn't get him to keep his head still. He took the Walk and Turn test, walked the line, counted out loud but used his arms for balance, did not touch heel to toe and made improper turns. On the One Leg Stand test defendant used his arms for balance and put his foot down. He decided to arrest him for DUI. His behavior in the jail confirmed his belief "absolutely". He was out of control and he testified as outlined in the Pre-Trial Motion.

The officer also testified to the DUS 4<sup>th</sup>. Defendant's 10 year Certified Driving Record showed defendant was under suspension, that he has had 3 prior convictions in 5 years on 10/28/13, 11/30/11 and 6/16/10. So, this charge from 9/18/14 was his 4<sup>th</sup> offense. The Certificate of Notice and Proof of Mailing were also offered into evidence without objection. (City's Exhibit #3).

Officer Lambert testified that he was the Field Training Officer for NcNeely and he oversaw and observed everything. He said defendant couldn't mentally follow directions, he was moving his head, using arms for balance, he had red, blood-shot glassy eyes. The rest of his testimony was outlined in the Pre-Trial Motions.

On cross, Lambert was asked if part of the defendant's irate phase came when he asked defendant if there were drugs in his car? (There were not). Or did defendant become irate when Lambert let it be known he was going to confiscate defendant's car by forfeiture?


FINDINGS:

The Court finds defendant guilty of DUI and sentences the defendant to a fine of \$997 or 30 days. The Court also finds the defendant guilty of DUS 4<sup>th</sup> offense and sentences defendant to 90 days plus \$2,105.00.

ATTACHMENTS:

1. Copy of Ticket 25259GR
2. Copy of Ticket 25260GR
3. Defendant's Motion to Dismiss
4. City's Exhibit #1 (A-D)
5. City's Exhibit #2 - Video
6. City's Exhibit #3 - Certified Driving History
7. State v. Vickey
8. State v. Gordon
9. Chisolm v. SCDMV

Dated this 30<sup>th</sup> day of September, 2015

  
\_\_\_\_\_  
Jane Pittman Modla, Judge  
Rock Hill Municipal Court

# ATTACHMENT 1

Form S-438.5  
Rev. 9/10

STATE OF SOUTH CAROLINA

## UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF <u>Rock Hill</u>		VERSUS															
FIRST NAME <u>Theotis</u>		LAST NAME <u>Dunham</u>															
MIDDLE NAME <u>Emanuel</u>																	
STREET AND NO. <u>1444 Friendship Pr.</u>		CITY <u>Edgemore</u> STATE <u>SC</u> ZIP CODE <u>29712</u>															
STATE LICENSED <u>SC</u>	DRIVER'S LICENSE NO. <u>004131363</u>	CDL <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	DRI. LIC. CLASS <u>I0</u>														
VEH. LIC. NO. <u>KBN 801</u>	STATE <u>SC</u>	MAKE OF VEH <u>Dodge</u> YEAR <u>07</u>	COMM. VEH. <input checked="" type="checkbox"/> AUTO <input type="checkbox"/> 16 PSGR. VEH. <input type="checkbox"/> COMB. <input type="checkbox"/>														
HAZ. MT. <input type="checkbox"/>		MOPED <input type="checkbox"/>	MTRCYCL. <input type="checkbox"/> OTHER <input type="checkbox"/>														
<b>YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT</b>																	
NAME OF TRIAL COURT <u>Municipal</u>		STREET AND NO. <u>120 E Black St.</u>															
DATE OF TRIAL <u>09/23/14</u>	TIME OF TRIAL <u>09:00am</u>	CITY <u>Rock Hill</u>	STATE <u>SC</u> ZIP CODE <u>29730</u>														
VIOLATION - COURT APPEARANCE REQUIRED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		VIOLATION SECTION NO. <u>56-5-2930</u>															
OWNER OF VEHICLE <u>Same</u>		DATE OF ARREST <u>09/18/14</u>															
ADDRESS OF OWNER <u>Same</u>		DATE OF VIOLATION <u>09/18/14</u>															
BAIL DEPOSITED <u>None</u>	NAME OF ARRESTING OFFICER <u>B. Lambert / S. McDeely</u>		RANK <u>MPD</u>														
DESCRIPTION OF ACCUSED		COUNTY <u>Yrk</u>	NUMBER <u>46</u>														
RACE <u>B</u> SEX <u>M</u> BIRTH DATE <u>06/11/65</u>	HT. <u>508</u> HAIR <u>BRN</u> WT. <u>175</u> EYES <u>BRN</u>	BADGE <u>4315/826</u>	TROOP <u>7</u>														
DATE BAIL REC'D. <u>20</u>	BY <u></u>	<table border="1" style="width: 100%; text-align: center;"> <tr> <td>D</td><td>S</td><td>M</td><td>T</td><td>W</td><td>F</td><td>S</td> </tr> <tr> <td>1</td><td>2</td><td>3</td><td>4</td><td>5</td><td>6</td><td>7</td> </tr> </table>		D	S	M	T	W	F	S	1	2	3	4	5	6	7
D	S			M	T	W	F	S									
1	2	3	4	5	6	7											
CASE BEFORE		TIME OF VIOLATION <u>2:30</u> WEATHER <u>AM-1 PM-2 CIR</u>															
CIRCUIT COURT <input type="checkbox"/>	MAGISTRATE <input type="checkbox"/>	DISTANCE IN FEET FROM INTERSECTION OF <u>E. Main St. AND Albright Rd.</u>															
FAMILY COURT <input type="checkbox"/>	MUN. COURT <input checked="" type="checkbox"/>	DEFENDANT: DID NOT APPEAR <input type="checkbox"/> APPEARED <input checked="" type="checkbox"/>															
FEDERAL COURT <input type="checkbox"/>		DISPOSITION															
NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE		NOLLE PROSSED <input type="checkbox"/> GUILTY <input type="checkbox"/>															
DEFENDANT: DID NOT APPEAR <input type="checkbox"/> APPEARED <input checked="" type="checkbox"/>		FORFEITED BOND <input type="checkbox"/> PLED: NOLO CONTENDERE <input type="checkbox"/>															
TRIAL BY: TRIAL JUDGE <input checked="" type="checkbox"/> JURY <input type="checkbox"/>		MILES <u>5</u> CITY <u>RH</u>															
VERDICT OF TRIAL IF ANY		DATE OF TRIAL IF ANY															
GUILTY <input checked="" type="checkbox"/> NOT GUILTY <input type="checkbox"/>		Lat <u>---</u>															
JAIL <u>30</u>	SUSPEND <u></u>	FINES <u>997</u>	AMT. COLLECTED <u>100.00</u>														
AMT. SUSPENDED <u></u>		Long <u>---</u>															
COMMITTED TO: <u></u>		Vehicle Searched <input checked="" type="checkbox"/>	Arrest as Result of Collision <input checked="" type="checkbox"/>														
OFFENSE CODE <u>99</u>		B.A. LEVEL <u>Refusal</u>															
CERTIFIED CORRECT <u>Modle</u>		DATE <u>8/18/15</u>															
		<b>25259 GR</b>															

*NO* DRIVER'S RECORD COPY Bond \$997.00  
1409180782

# ATTACHMENT 2

Form S-438 Rev. 9/10		STATE OF SOUTH CAROLINA <b>UNIFORM TRAFFIC TICKET</b>											
CITY OR COUNTY OF <u>Rock Hill</u>										VERSUS			
FIRST NAME <u>Theotis</u>					MIDDLE NAME <u>Emanuel</u>					LAST NAME <u>Dunham</u>			
STREET AND NO. <u>1444 Friendship Dr.</u>										CITY <u>Edgewater</u>		STATE <u>SC</u>	ZIP CODE <u>29712</u>
STATE LICENSED <u>SC</u>		DRIVER'S LICENSE NO. <u>004131203</u>			CDL <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		DRI. LIC. CLASS <u>TD</u>						
VEH. LIC. NO. <u>KBN 501</u>		STATE <u>SC</u>	MAKE OF VEH. <u>Dodge</u>	YEAR <u>07</u>	COMM. VEH. <input checked="" type="checkbox"/> AUTO	PSGR. VEH. <input type="checkbox"/>	COMB. <input type="checkbox"/>	HAZ. MT. <input type="checkbox"/>	MOPED <input type="checkbox"/>	MTRCYCL. <input type="checkbox"/>	OTHER <input type="checkbox"/>		
<b>YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT.</b>													
NAME OF TRIAL COURT <u>Municipal</u>					STREET AND NO. <u>120 E Black St.</u>								
DATE OF TRIAL <u>10-23-2014</u>		TIME OF TRIAL <u>09:00am</u>		CITY <u>Rock Hill</u>			STATE <u>SC</u>		ZIP CODE <u>29730</u>				
VIOLATION - COURT APPEARANCE REQUIRED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO <u>DUIS 4th</u>						VIOLATION SECTION NO. <u>56-1-460</u>							
OWNER OF VEHICLE <u>Same</u>						DATE OF ARREST <u>09/18/2014</u>							
ADDRESS OF OWNER <u>Same</u>						DATE OF VIOLATION <u>09/18/2014</u>							
BAIL DEPOSITED <u>None</u>			NAME OF ARRESTING OFFICER <u>B. Lambert</u>			RANK <u>S. McNeely</u>			MDDOT				
RACE <u>B</u>		SEX <u>M</u>	BIRTH DATE <u>06/11/1965</u>		HT. <u>506</u>	HAIR <u>BRN</u>	WT. <u>175</u>	EYES <u>BRN</u>	COUNTY <u>York</u>		NUMBER <u>46</u>		
DATE BAIL REC'D. <u>20</u>		BY <u>4</u>	BADGE <u>4315/5826</u>		TROOP <u>4</u>	D <u>1</u>	S <u>2</u>	M <u>3</u>	T <u>4</u>	W <u>5</u>	F <u>6</u>		
CASE BEFORE MAGISTRATE <input type="checkbox"/> MUN. COURT <input checked="" type="checkbox"/>			CIRCUIT COURT <input type="checkbox"/> FAMILY COURT <input type="checkbox"/> FEDERAL COURT <input type="checkbox"/>			TIME OF VIOLATION <u>2:30</u>			WEATHER <u>CIR</u>				
NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE						DISTANCE IN FEET FROM INTERSECTION OF <u>F. Main St.</u> AND <u>Albright Rd.</u>							
DEFENDANT: DID NOT APPEAR <input type="checkbox"/> APPEARED <input checked="" type="checkbox"/>						MILES <u>1</u> N <u>2</u> E <u>3</u> W <u>4</u>							
NOLLE PROSSED <input type="checkbox"/> GUILTY <input type="checkbox"/>						FORFEITED BOND <input type="checkbox"/> PLED: NOLO CONTENDERE <input type="checkbox"/>							
TRIAL BY: TRIAL JUDGE <input checked="" type="checkbox"/> JURY <input type="checkbox"/>			VERDICT OF GUILTY <input checked="" type="checkbox"/> NOT GUILTY <input type="checkbox"/>			DATE OF TRIAL IF ANY <u>20</u>			HWY NO. <u>5</u>			CITY <u>RH</u>	
JAIL <u>90</u>		SUSPEND <u>2105</u>	FINE <u>200.</u>	AMT. COLLECTED <u>200.</u>	AMT. SUSPENDED	Lat <u>---</u>		Long <u>---</u>		OFFENSE CODE <u>96</u>			
COMMITTED TO: <u>consecutive</u>		Vehicle Searched <u>Y</u>	Arrest as Result of Collision <u>N</u>	B.A. LEVEL <u>N/A</u>		DATE <u>8/18/15</u>		25260 GR					
CERTIFIED CORRECT <u>Moeller</u>													

DRIVER'S RECORD COPY

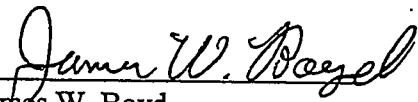
Bond  
\$2,100  
1469180782



3. One of the field sobriety test given to the Defendant was the Walk and Turn Test. The Defendant was to take nine heel to toe steps turn and walk back nine heel to toe steps. The recording of video the test was conducted in such a way that the Defendant walked toward the camera and then turn and walked back from the camera. The video was unable to capture whether or not the Defendant was able or not to touch heel to toe. Section 56-5-2953(A)(1)(a)(ii) of the South Carolina Code of Laws requires the incident site video to include, "include any field sobriety test administrated". The Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. In the present case the State failed to comply with the video taping requirements with regard to the walk and turn test. Although the video camera was recording during the Defendant's performance on this test, it was positioned in such manner that the Defendant's heels were not visible as they touched or did not touch his toes. Therefore the Defendant's performance, an important part of the test was not videotaped.

4. The Defendant was not offered a breath test to determine his alcohol concentration as required by South Carolina Code 56-5-2550.

FOR ALL THE ABOVE REASONS the Defendant prays that the Court to dismiss the above-entitled matter.

  
James W. Boyd  
Attorney at Law  
1544 Ebenezer Road  
Post Office Box 36425  
Rock Hill, SC 29732  
(803) 328-2600  
ATTORNEY FOR DEFENDANT

Rock Hill, South Carolina  
May 6, 2015



ATTACHMENT 4  
CHECK POINT PLAN

Date to be held: 09-18-2014  
Location: US21/ E. Main Street at Cown Farm Road  
Type of Checkpoint: Traffic Safety

Cowan

Att Ex 1 A

**SYSTEMATIC PLAN FOR CHECKING VEHICLES**

All vehicles will be checked and every driver will be checked under normal circumstances. If the Supervisor deems it necessary to deviate from this plan, He/She will inform all officers at the checkpoint. Officers are to check vehicles traveling in all directions. This area was chosen because of traffic volume and violations occurring in this area. This area also provides a safe sight distance and adequate space to stage patrol vehicles and violator vehicles.

***NO INDIVIDUAL OFFICER HAS THE DISCRETION TO DEVIATE FROM THE PLAN UNLESS DIRECTED TO SO BY THE SUPERVISOR IN CHARGE.***

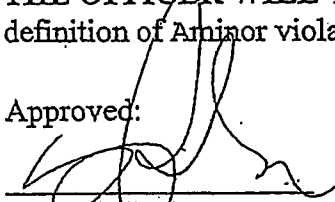
**THIS AREA WILL BE MARKED TO ADVISE THE PUBLIC THAT AN AUTHORIZED CHECKPOINT IS BEING CONDUCTED.**

**PLAN OF OPERATION:**

Officers are to check every vehicle and every driver unless the plan is altered by the supervisor. In the event an officer has reason to believe a driver may be impaired, immediately instruct the driver to place the vehicle in park and exit the vehicle. Another officer or non-drinking licensed occupant of the vehicle will move the vehicle into a safe zone. If an officer is to conduct sobriety tests and does not have a video camera, utilize the equipment of an officer that has in-car video equipment. Only Field Sobriety Tests approved by the SCCJA and the Rock Hill police department will be conducted. All tests will be given in manner as to provide safety for the officer and individual taking the test. Any violator vehicle and its contents will be the responsibility of the arresting officer. In the event a wrecker is necessary, the officer making the charge will be responsible for contacting dispatch to make arrangements. **NO OFFICER WILL LEAVE THE SCENE WITH A PRISONER WITHOUT MAKING ARRANGEMENTS FOR THE SUBJECT VEHICLE.**

Anytime traffic becomes a hazard, the supervisor may release traffic until the situation becomes safe again. All Officers should familiarize themselves with department policy in reference to pursuits. **WE WILL NOT PURSUE VEHICLES FOR MINOR VIOLATIONS.** If there is an attempt to stop a vehicle for a minor violation and that vehicle does not yield, **THE OFFICER WILL TERMINATE IMMEDIATELY** (see General Order on pursuits for definition of minor violations).

Approved:

  
Major S. Parker

City's #1 B

# 16<sup>th</sup> Circuit Law Enforcement Network/DDACTS Multi-Jurisdictional Event

September 18, 2014

1500 Hours – 0100 Hours

- Briefing: 1500-1530 Hours, Training Room, Rock Hill Police Dept.
- 1545-1800, Group Lidar/Seat Belt Enforcement, E. Main St, (E. White St, Bellview intersection area).
- 1800-1900 Break
- 1900-2100 Saturation (RHPD Street Crimes Unit enforcement in designated areas as needed)
- 2100-2300 Traffic Safety Checkpoints, Elizabeth St/Flint St and E. White St/Wood St
- 2300-0100 Individual DUI Enforcement Saturation

## Municipal Court – 120 E. Black Street Rock Hill, SC 29730

- October 2, 2014 – 9:00 AM or 1:00 PM
- October 23, 2014 – 9:00 AM or 1:00 PM

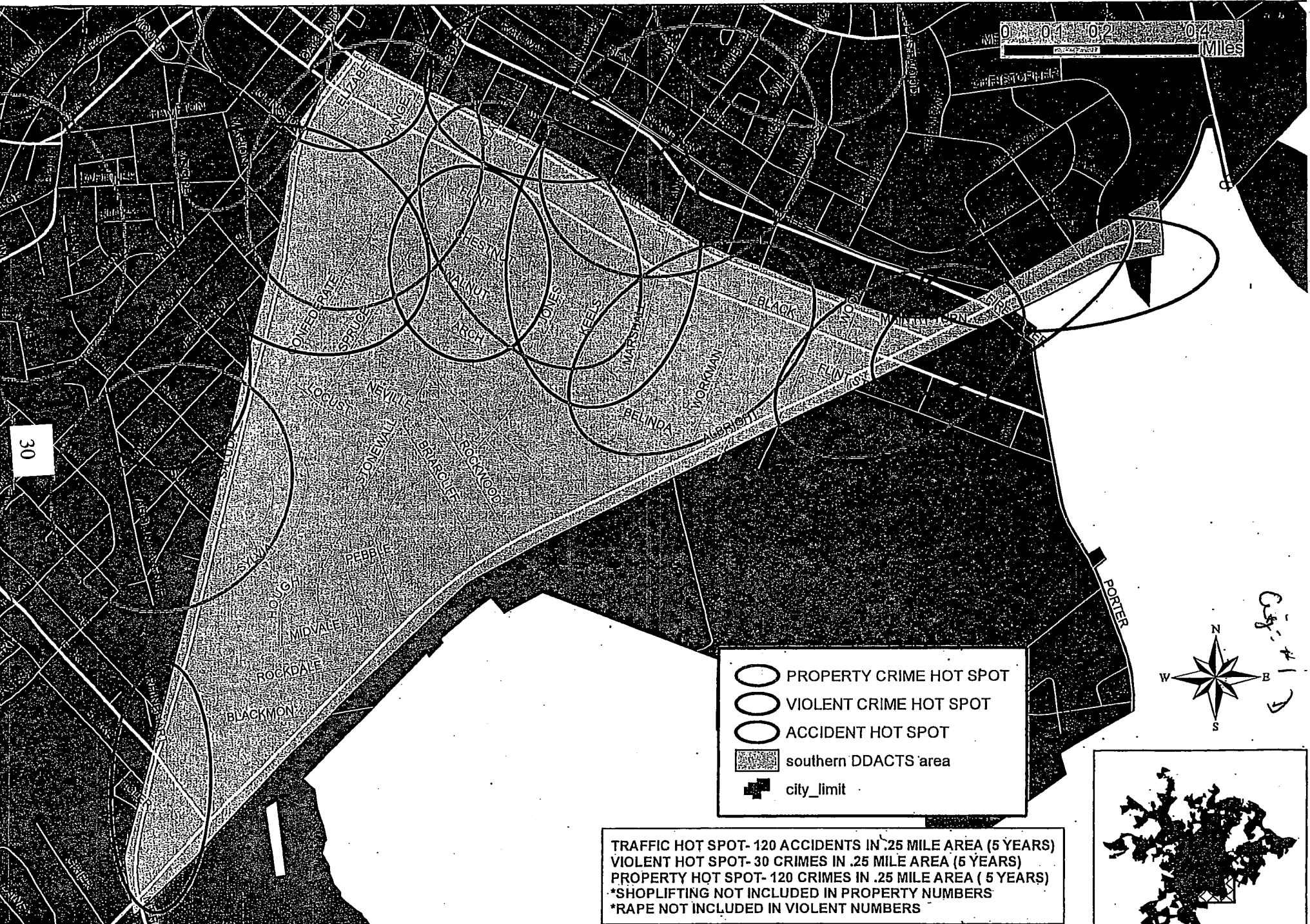
## Contacts

- Lt. Harmon 803-417-0593
- Sgt. Breeden 803-417-4794
- Sgt. Cribb 803-412-0206
- Lambert 803-412-0595
- Cook 803-448-2512
- Rowe 803-412-2445
- Allen 803-448-5173
- Maury 803-448-2589

City #1 C

Rock Hill Police Department					
DDACTS Enforcement Report					
<b>Assignment:</b>	DDACTS South				
<b>DDACTS Commander</b>	Breedon				
<b>Weather:</b>	<b>Date</b>	9/18/2014	<b>Time</b>	1500-0100	
<b>Area of focus</b>			<b>Types of Vehicles Used</b>		
<b>Violations</b>	<b>Cases Made</b>				
Driving Under Influence	2				
Driving Under Suspension	12				
SeatBelt Violations	28				
Gun Violations					
Other Weapons					
Drug Arrest	2	Type	Marijuana	Amount	Municipal
No driver License Violations	2				
Wanted Persons	2				
Warrants	5				
Warnings Issued	118				
Alcohol Violations	1				
Fail to Stop (Blue Lights/Siren)					
Vehicle License Violations	7				
Speeding Violations	36				
Other Violations	12				
<b>Total Cases</b>	<b>227</b>				

# SOUTHERN DDACTS AREA - HOT SPOTS-VIOLENT/PROPERTY CRIME AND ACCIDENTS 5 YEAR PERIOD, 7/1/09 TO 6/30/14



	PROPERTY CRIME HOT SPOT
	VIOLENT CRIME HOT SPOT
	ACCIDENT HOT SPOT
	southern DDACTS area
	city_limit

TRAFFIC HOT SPOT- 120 ACCIDENTS IN .25 MILE AREA (5 YEARS)  
 VIOLENT HOT SPOT- 30 CRIMES IN .25 MILE AREA (5 YEARS)  
 PROPERTY HOT SPOT- 120 CRIMES IN .25 MILE AREA (5 YEARS)  
 \*SHOPLIFTING NOT INCLUDED IN PROPERTY NUMBERS  
 \*RAPE NOT INCLUDED IN VIOLENT NUMBERS



ATTACHMENT 6

*City & 3*



Certified to be a true and correct copy of the original document on file with the South Carolina Department of Motor Vehicles.

*A. L. Phelps*

Procedures & Compliance, Director

Certification for Court

Customer No: 23090855 Driver License No: 4131363  
 Name: DUNHAM, THEOTIS EMANUEL  
 Address: 1444 FRIENDSHIP DR  
 City: EDGEMOOR State: SC Zip: 29712  
 County: CHESTER  
 DOB: 6/11/1965 Height: 5'08 Weight: 140 Sex: M Race: BLACK Driver Training: N  
 Status - DL: SUSPENDED CDL: DISQUALIFIED

License Information

Type	Class	Function	Issued	Expires	First Issued	Rest.	Endor.
Current							
ID		Renewal	07/24/2014	07/24/2019		N	N
Prior							
ID		Renewal	02/28/2014	02/28/2019		N	N
ID		Renewal	02/18/2009	02/18/2014		N	N
ID		Renewal	05/31/2006	05/31/2011		N	N
ID		Renewal	05/18/2001	05/18/2006		N	N
BP	F	Returned	06/26/1990	12/26/1990	06/26/1990	N	N
DL	D	Returned	07/10/1989	06/11/1993	07/13/1995	N	N
DL	D	Convrnsn	07/10/1989	06/11/1993	07/13/1995	N	N

Address Change - Date Changed: 05/16/2001  
 Address: 451 PORTER RD  
 City: ROCK HILL State: SC Zip: 297300000

Address Change - Date Changed: 05/31/2006  
 Address: 273 CARROLL ST  
 City: ROCK HILL State: SC Zip: 297305142

Address Change - Date Changed: 02/18/2009  
 Address: 1454 MOUNT GALLANT RD  
 City: ROCK HILL State: SC Zip: 297322277

Address Change - Date Changed: 02/18/2011  
 Address: 1605 MEMORIAL DR  
 City: ROCK HILL State: SC Zip: 297304933

Address Change - Date Changed: 02/28/2014  
 Address: 4414 FRIENDSHIP DR  
 City: EDGEMOOR State: SC Zip: 297127756

Address Change - Date Changed: 03/10/2014  
 Address: 1049 SOUTHLAND DR  
 City: ROCK HILL State: SC Zip: 297308585

Address Change - Date Changed: 03/27/2014  
 Address: 4414 FRIENDSHIP DR  
 City: EDGEMOOR State: SC Zip: 297127756

# Certification for Court

Customer No: 23090855  
Name: DUNHAM, THEOTIS EMANUEL

Driver License No: 4131363

Address Change -  
Address: 1049 SOUTHLAND DR  
City: ROCK HILL

State: SC Zip: 297308585

Date Changed: 07/24/2014

## Point Summary

Total Current Points: 0  
Driver Credit: -0  
Adjusted Current Points: 0

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copy of the original document on file  
with the South Carolina Department of  
Motor Vehicles.



Procedures & Compliance, Director

## Suspension Summary

Driving Under the Influence:  
Driving Under Suspension:  
Unlawful Alcohol Concentration:  
Failure To Make Payment For Gasoline:  
Uninsured Motorist:

Total 0 DUI Suspensions  
Total 3 DUS Suspensions  
Total 0 Per-Se Suspensions  
Total 0 Gasoline Suspensions  
Total 0 UM Violations

**VIOL:** 496 - Driving Under Suspension  
Violation: 03/19/2013 Conviction: 10/28/2013  
ACD: B26 Conviction Loc Ref:  
Conviction State: SC  
Violation No: 14  
Status: ACTIVE

Ticket#: 19931FT  
Recd: 11/08/2013 Post: 11/14/2013  
Conviction Reference:  
Court Type: MUNICIPAL COURT

Last Change: 11/14/2013

**SUSP:** 013 - Driving Under Suspension  
Special Driving Privilege: NONE  
Suspension Beg: 10/28/2013  
Causal: 03/19/2013  
Reinstatement Requirements Met: INDEFINITE  
ACD: B26 Withdrawal Loc Ref:  
Suspension No: 16 Violation No: 14  
Status: ACTIVE Reason:

Ticket#: 19931FT  
Suspension End: 10/28/2014  
Post: 11/14/2013  
Reinstatement Fee Paid: N  
Withdrawal Reason Ref:

Last Change: 11/14/2013

**SUSP:** 018 - Failure to Stop for Blue Light  
Special Driving Privilege: NONE  
Suspension Beg: 04/05/2012  
Causal: 10/18/2011  
Reinstatement Requirements Met: 03/11/2014  
ACD: U01 Withdrawal Loc Ref:  
Suspension No: 15 Violation No: 13  
Status: ACTIVE Reason:

Ticket#: 12GS4600481  
Suspension End: 04/05/2013  
Post: 04/13/2012  
Reinstatement Fee Paid: Y  
Withdrawal Reason Ref:

Last Change: 03/11/2014

**VIOL:** 418 - Failure to Stop for Blue Light  
Violation: 10/18/2011 Conviction: 04/05/2012  
ACD: U01 Conviction Loc Ref:  
Conviction State: SC  
Violation No: 13  
Status: ACTIVE

Ticket#: 12GS4600481  
Recd: 04/11/2012 Post: 04/13/2012  
Conviction Reference:  
Court Type: MAGISTRATE COURT

Last Change: 04/13/2012

**SUSP:** 013 - Driving Under Suspension  
Special Driving Privilege: NONE  
Suspension Beg: 11/30/2011  
Causal: 10/18/2011  
Reinstatement Requirements Met: 03/11/2014  
ACD: B26 Withdrawal Loc Ref:  
Suspension No: 14 Violation No: 12  
Status: ACTIVE Reason:

Ticket#: 12629FT  
Suspension End: 02/28/2012  
Post: 12/12/2011  
Reinstatement Fee Paid: Y  
Withdrawal Reason Ref:

Last Change: 03/11/2014

# Certification for Court

Customer No: 23090855

Driver License No: 4131363

Name: DUNHAM, THEOTIS EMANUEL

**VIOL:** 496 - Driving Under Suspension  
Violation: 10/18/2011 Conviction: 11/30/2011  
**ACD:** B26 Conviction Loc Ref:  
Conviction State: SC  
Violation No: 12  
Status: ACTIVE

Ticket#: 12629FT  
Recd: 12/07/2011 Post: 12/12/2011  
Conviction Reference:  
Court Type: MUNICIPAL COURT  
Last Change: 12/12/2011

**SUSP:** 013 - Driving Under Suspension  
Special Driving Privilege: NONE  
Suspension Beg: 06/16/2010  
Causal: 04/13/2010  
Reinstatement Requirements Met: 02/23/2011  
**ACD:** B26 Withdrawal Loc Ref:  
Suspension No: 12 Violation No: 11  
Status: ACTIVE Reason:

Ticket#: 49477EU  
Suspension End: 09/16/2010  
Post: 07/07/2010  
Reinstatement Fee Paid: Y  
Withdrawal Reason Ref:  
Last Change: 02/23/2011

**VIOL:** 496 - Driving Under Suspension  
Violation: 04/13/2010 Conviction: 06/16/2010  
**ACD:** B26 Conviction Loc Ref:  
Conviction State: SC  
Violation No: 11  
Status: ACTIVE

Ticket#: 49477EU  
Recd: 06/28/2010 Post: 07/07/2010  
Conviction Reference:  
Court Type: MAGISTRATE COURT  
Last Change: 07/07/2010

**SUSP:** 022 - Habitual Offender  
Special Driving Privilege: NONE  
Suspension Beg: 08/01/2004  
Causal: 12/30/2003  
Reinstatement Requirements Met: 02/23/2011  
**ACD:** W01 Withdrawal Loc Ref:  
Suspension No: 11  
Status: ACTIVE Reason:

Suspension End: 08/01/2009  
Post: 07/02/2004  
Reinstatement Fee Paid: Y  
Withdrawal Reason Ref:  
Last Change: 02/23/2011

**SC Driver License Surrendered**  
License Type: DL Class: D Function: Convrsn  
Date Surrendered: 07/17/2002  
Reason for Return: DL AFFIDAVIT FROM COURT

Posted: 09/26/2002  
Issued: 07/10/1989  
Returning State: SC

**SC Driver License Surrendered**  
License Type: BP Class: F Function: Returned  
Date Surrendered: 01/23/1991  
Reason for Return: SUSPENDED LICENSE

Posted: 07/27/2002  
Issued: 06/26/1990  
Returning State: SC

**SUSP:** 001 - Driving Under the Influence  
Special Driving Privilege: NONE  
Suspension Beg: 01/17/1991  
Causal: 12/30/1990  
Reinstatement Requirements Met: INDEFINITE  
**ACD:** A20 Withdrawal Loc Ref:  
Suspension No: 2 Violation No: 1  
Status: ACTIVE Reason:

Ticket#: Q526164  
Suspension End: 07/17/1991  
Post: 02/06/1991  
Reinstatement Fee Paid: Y  
Withdrawal Reason Ref:  
Last Change: 03/24/2011

**End of Report**

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copy of the original document on file  
with the South Carolina Department of  
Motor Vehicles.

*A. L. Shelton*  
Procedures & Compliance, Director

South Carolina  
Department of Motor Vehicles



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with the South Carolina Department of  
Motor Vehicles.

*A. L. Phelps*

Procedures & Compliance, Director

11/14/2013

DUNHAM, THEOTIS EMANUEL  
4414 FRIENDSHIP DR  
EDGEMOOR, SC 29712-7756

CUSTOMER NO: 23090855  
FILE NO: 16464677  
DL NO: 4131363

OFFICIAL NOTICE

You may not drive commercial or non-commercial motor vehicles.

REASON: You have been convicted of the offense listed below.

SECTION OF LAW: 56-1-460

VIOL DATE	CONV DATE	TICKET#	VIOLATION DESCRIPTION
03/19/2013	10/28/2013	19931FT	Driving Under Suspension

BEGINNING DATE: 12:01 AM 10/28/2013 ENDING DATE: MIDNIGHT 10/28/2014

SPECIAL DRIVING PRIVILEGES:

If your violation date is on or after 1/1/11, the following may apply. You may be eligible for a route restricted license if you are a licensed driver, a US Citizen, have a job, attend ADSAP, attend a court-ordered drug program or are enrolled in a college or university. This license allows you to drive non-commercial motor vehicles on a specific route at a certain time during this suspension period. Complete the enclosed application and return it to the DMV Customer Service Office at 1630 Shop Road, Columbia, SC or mail it to Driver Records, PO Box 1498, Blythewood, SC 29016-0028. There is a \$100.00 fee for this license. Incomplete applications will be returned. If you do not receive special driving privileges, the suspension will become effective on the date indicated above and you must surrender your driver's license to your local DMV Office. If you are holding a valid license from another state, you may make application for a route restricted license without surrendering your out-of-state license to the SCDMV. If approved, this credential must be kept in your possession with the out-of-state license during the suspension period.

FINANCIAL RESPONSIBILITY:

You must do one of the following for 3 years from the ending date listed above:

1. have your insurance agent file a Certificate of Insurance (SR-22), or
2. deposit \$40,000 per motor vehicle with SC State Treasurer's Office, or
3. have a surety company issue a bond for you.

REINSTATEMENT FEE:

You must pay a \$100.00 reinstatement fee. This fee can be paid at any DMV Office, mailed to Driver Records, PO Box 1498, Blythewood, SC 29016-0028 or paid by credit card at [www.scdmvonline.com](http://www.scdmvonline.com). Make checks and money orders payable to SCDMV. Do not send cash through the mail.

Tests:

You must successfully complete the vision test.

THIS LETTER CONCERNS ONLY THE ACTION LISTED ABOVE AND DOES NOT CHANGE ANY OTHER NOTICES WE HAVE SENT TO YOU.

Driver Records Manager

Certified to be a true and correct copy of the original document on file with the South Carolina Department of Motor Vehicles.

*D. L. Phelps*

Procedures & Compliance, Director

PATENT NO. 5, 183, 203

FERRARELLI, INC.

DISCARD THIS PORTION  
TEAR OFF AND

35

TEAR FROM BOTTOM UP



1. Article Addressed to:

DUNHAM, THEOTIS EMANUEL  
4414 FRIENDSHIP DR  
EDGEWOOD, SC 29712-7756

23090855

REF247

2. Article Number  
(Transfer from service label)

7196 9002 0770 1304 1227

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

Agent  
 Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1?  
If YES, enter delivery address below:

Yes  
 No

RECEIVED

DEC 02 2013

3. Service Type

Certified Mail

DRIVER RECORDS

4. Restricted Delivery? (Extra Fee)

Yes

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

FOLD BACK THEN TEAR OUT

Certified to be a true and correct  
copy of the original document on file  
with the South Carolina Department of  
Motor Vehicles.

*D. L. Phelps*

Procedures & Compliance, Director

**CERTIFIED MAIL**

S.C. DEPARTMENT OF MOTOR VEHICLES  
POST OFFICE BOX 1498  
BLYTHEWOOD, SOUTH CAROLINA 29016-0028



FIRST CLASS



UNITED STATES POSTAGE  
EAGLE  
FIRST CLASS  
02 1M \$ 06.11<sup>0</sup>  
0004278852 NOV 15 2013  
MAILED FROM ZIP CODE 29016

7196 9002 0770 1304 1227

# RETURN RECEIPT REQUESTED

SHOWING TO WHOM, DATE AND ADDRESS WHERE DELIVERED

*UTF*

DUNHAM, THEOTIS EMANUEL.  
4414 FRIENDSHIP DR  
EDGEMOOR, SC 29712-7756

1st NOTICE \_\_\_\_\_  
2nd NOTICE \_\_\_\_\_  
RETURNED \_\_\_\_\_

NIXIE 282 DE 1 8411/23/13

RETURN TO SENDER  
NOT DELIVERABLE AS ADDRESSED  
UNABLE TO FORWARD

BC: 29016149898 \*0348-07764-19-21

29016@1498





*State of South Carolina*  
*Department of Motor Vehicles*

CERTIFICATE OF CERTIFIED MAILING

This notice of suspension is a true and correct copy of the original notice of Suspension which was computer generated on 11-14-13, Processed in the normal course of business and placed in the United States mail, return receipt requested, with **certified** postage prepaid addressed to the driver at the address contained in the DMV records and electronically stored on file with the South Carolina Department of Motor Vehicles.

November 6, 2014  
Date

Bertha Phillips  
Driver Services

Certified to be a true and correct  
copy of the original document on file  
with the South Carolina Department of  
Motor Vehicles.

A. L. Phelps  
Procedures & Compliance, Director



RECEIVED  
FEB 5 1991

**SOUTH CAROLINA  
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION**

**DIVISION OF MOTOR VEHICLES**

**DRIVER RECORDS**

**P.O. BOX 1498  
COLUMBIA, SOUTH CAROLINA 29216-0028  
TELEPHONE NUMBER 803-251-3000**

**W.M. DIFONZO  
DIVISION DIRECTOR**

**JOE G. ROEGUTTE  
EXECUTIVE DIRECTOR**

PLEASE ADDRESS ALL CORRESPONDENCE TO THE UNDERSIGNED.

February 5, 1991

Dunham-Theotis Emmanuel  
329 State St.  
Rock Hill, S. C. 29730

Driver License # 004131363  
Ref. # 001 M 6/11/1965 VJT

**OFFICIAL ORDER OF SUSPENSION**

YOU ARE HEREBY NOTIFIED THAT YOUR PRIVILEGE TO OPERATE A MOTOR VEHICLE IN THIS STATE IS SUSPENDED FOR VIOLATION OF SECTION 56-5-2990, CODE OF SOUTH CAROLINA LAWS, 1976, AS AMENDED - DRIVING UNDER THE INFLUENCE OF INTOXICANTS.

PERIOD OF SUSPENSION 6 BEGINNING 1/17/1991 ENDING 7/17/1991  
Mos. 12.01 AM 12.00 MIDNIGHT

VIOLATION	VIO-DATE	CONVICTION	TICKET
DRIVING UNDER THE INFLUENCE	12/30/1990	1/17/1991	0526164

**MANAGER  
DRIVER RECORDS**

**IMPORTANT  
YOUR DRIVER LICENSE MUST BE RETURNED TO THIS DEPARTMENT**

UNDER NO CIRCUMSTANCES CAN THE SUSPENSION BE WITHDRAWN UNTIL THE EXPIRATION OF THE SUSPENSION PERIOD AND NOT THEN UNTIL THE DRIVER RECORDS OFFICE, POST OFFICE BOX 1498, COLUMBIA, S.C. 29216-0028 HAS RECEIVED THE FOLLOWING: (1) NOTIFICATION OF EVALUATION AND SUCCESSFUL COMPLETION OF AN ADGAP PROGRAM; (2) THE REQUIRED REINSTATEMENT FEE OF \$30.00 FOR EACH SUSPENSION; (3) PROOF OF FINANCIAL RESPONSIBILITY FOR THE FUTURE. IF THIS PROOF, WHICH MUST BE MAINTAINED FOR A PERIOD OF NOT LESS THAN THREE YEARS FROM THE ENDING DATE OF THE SUSPENSION PERIOD, IS IN THE FORM OF LIABILITY INSURANCE, A CERTIFICATE OF INSURANCE, FORM SR-22, MUST BE FILED IN YOUR BEHALF BY AN INSURANCE COMPANY.

AFTER THE SUSPENSION PERIOD HAS ELAPSED AND YOU HAVE COMPLIED WITH THE REQUIREMENTS LISTED ABOVE, A LETTER OF AUTHORIZATION TO MAKE APPLICATION FOR A SOUTH CAROLINA DRIVER'S LICENSE WILL BE FORWARDED TO YOU.

Nikki R. Haley  
Governor



Kevin A. Shwedo  
Director

*State of South Carolina*  
*Department of Motor Vehicles*

CERTIFICATE OF MAILING

This notice of suspension is a true and correct copy of the original notice of Suspension which was computer generated on 02-05-91, Processed in the normal course of business and deposited in the United States mail with postage prepaid addressed to the driver at the address contained in the DMV records and electronically stored on file with the South Carolina Department of Motor Vehicles.

November 7, 2014  
Date

Bertie Phillips  
Driver Services

Certified to be a true and correct  
copy of the original document on file  
with the South Carolina Department of  
Motor Vehicles.

A. L. Phelps  
Procedures & Compliance, Director

# ATTACHMENT 7

State v. Vickery (S.C. App., 2012)

The State, Appellant,  
v.  
Randy Vickery, Respondent.  
Opinion No. 5025  
STATE OF SOUTH CAROLINA In The Court of Appeals  
Heard March 20, 2012  
August 22, 2012

Byrd

Appeal From Greenwood County Eugene Griffith, Circuit Court Judge  
**REVERSED AND REMANDED**

Assistant Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blich, Jr., of Columbia, for Appellant.

Chief Appellate Defender Robert M. Dudek, of Columbia, for Respondent.

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**KONDUROS, J.:** In this criminal case, the State appeals the trial court's suppression of evidence arising out of a driver's license checkpoint because it alleges the checkpoint was constitutional. We reverse and remand.

## FACTS/PROCEDURAL HISTORY

Sometime between 9 p.m. April 25, 2009, and 3 a.m. April 26, 2009, officers with the Greenwood Police Department conducted a license checkpoint at the intersection of New Market Street and Milwee Avenue in Greenwood, South Carolina. During that checkpoint, while detaining Randy Jason Vickery for suspicion of driving under the influence, officers spotted methamphetamines and drug paraphernalia in his vehicle and arrested him. That same night, the Greenwood Police Department conducted three other checkpoints in the same vicinity from 9 p.m. until 3 a.m. The four checkpoints produced a total of fifty-six violations, including forty-eight traffic cases and eight criminal cases.

Vickery was indicted for possession of methamphetamine with intent to distribute and possession of methamphetamine with intent to distribute within proximity of a school. At trial, Vickery made a motion to suppress the evidence discovered as a result of the stop, challenging the stop's constitutionality, arguing it violated the Fourth Amendment. The State presented the testimony of Officer Robbie Byrd. Officer Byrd testified he was employed by the Greenwood Police Department in the traffic unit. He stated that on the night of April 25, 2009, through the morning of April 26, he conducted traffic safety checkpoints. He testified that checkpoint locations were determined based on "traffic flow, speeding complaints, loud music complaints, anything such as that nature, primarily just involving traffic." He indicated that the checkpoint locations were selected by Lieutenant Jennifer Bass, who was over the traffic unit, and Major James Marshall. He stated that they had contact with the citizens who were complaining about speeding and loud music coming from cars. Officer Byrd stated the primary purpose of the checkpoints was to check for traffic safety, such as child restraints, seatbelts, driver's licenses, vehicle tags, and the proper credentials. He testified the officers would stop each car that came through the checkpoint and check each driver's license. He further testified the four checkpoints that

Page 3

night resulted in forty-eight traffic cases and two drug cases. He testified the stops that produced no violations lasted no longer than a minute.

Following Officer Byrd's testimony, Vickery argued the State had not laid the proper foundation to establish the checkpoint's constitutionality under Brown v. Texas, 443 U.S. 47 (1979), and Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990). He argued State v. Groome, 378 S.C. 615, 664 S.E.2d 460 (2008), was "adamant" the State must present empirical data gathered prior to the checkpoint to justify setting up the checkpoint. He maintained the State only provided empirical data on the "back side, what the results were, but they have produced nothing to indicate why the Greenwood Police Department wanted to set up a checkpoint here." He asserted the State needed to provide information as to how many tickets were written and people had been arrested on the road in the month or year prior to the checkpoint. He stated those who established the checkpoints needed to testify and supply the empirical data.

The State responded and agreed Sitz, while critical of the searching examination of effectiveness by trial courts, "retains the requirement that the State produce empirical data to support the roadblock." It argued the report marked Court Exhibit Number 1 established how the checkpoint was effective and what the results were. Vickery argued that report "would probably be very good empirical data for the next checkpoint that they want to have at this location." He asserted that the State was arguing that if it set up a checkpoint and arrested forty-eight people, then it was a good checkpoint. Vickery argued, "It's data on the front side [that case law requires], not on the back side."

Before adjourning for lunch, the trial court stated it was going to take the matter under advisement and would leave the record open if the State wished to see if the file contained any additional empirical data. Following the break, the State called Major Urban Mitchell to testify. He stated he was in charge of the administration division of the Greenwood Police Department. He stated that the position involved records, training, evidence, and crime scenes and included gathering statistics. The State introduced, for the purposes of the hearing, several traffic enforcement activity reports that included the intersection of New Market and Milwee or an intersection

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located two blocks away. Major Mitchell testified that the police department had determined that conducting traffic safety checkpoints was an effective way to manage traffic problems. On cross-examination, Major Mitchell could not say how many of the fifty-six violations on April 26 occurred at the intersection of New Market and Milwee but admitted fifty-six tickets at the police headquarters could be obtained to show which of the incidents occurred at that intersection.

The trial court found the State presented

insufficient empirical data justifying the authorization and implementation of the roadblock in question . . . . Except for the traffic testimony offered by Major Mitchell, no testimony was offered by the State about the number of tickets, wrecks, and/or citizen complaints related to traffic concerns at the intersection of New Market Street and Milwee Avenue prior to the roadblock in question. Testimony by the State's witnesses indicates that the Greenwood Police Department relied on general knowledge of the neighborhood to justify the roadblock in question.

The trial court further found:

[T]he Traffic Enforcement Activity Reports contain some empirical data regarding the intersection of New Market Street and Milwee Avenue, but the data presented is insufficient to constitutionally justify the roadblock on April 25, 2009, at which [Vickery] was stopped and arrested. The record is absent of any specific evidence for the Court to determine the number of cases which resulted from the roadblock in question. Furthermore, the evidence in the record is insufficient for the Court to determine the effectiveness of the roadblock in question. No

Page 5

testimony was presented about how many vehicles passed through the roadblock in question.

The court determined the roadblock "did not violate [Vickery's] Fourth Amendment rights because its primary purpose was traffic safety enforcement." However, the court found the roadblock did violate his Fourth Amendment rights because

the State provided insufficient empirical data to support the effectiveness of the roadblock in question. Without sufficient empirical data to justify the implementation of the roadblock and without sufficient data derived from conducting this roadblock, the Court is unable to do the necessary comparison analysis to determine the effectiveness of this roadblock as required under Brown v. Texas, 443 U.S. 47 (1979).

Accordingly, the trial court granted Vickery's motion to suppress and suppressed all drugs and drug paraphernalia located in Vickery's vehicle and on his person, as well as all statements made, observations of his behavior, and recordings. This appeal followed.

#### STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The South Carolina Supreme Court has articulated the standard of review to apply to Fourth Amendment search and seizure cases. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The court has specifically rejected the de novo standard the United States Supreme Court set forth in Ornelas v. United States, 517 U.S. 690 (1996), for reviewing determinations of reasonable suspicion and probable cause in the context of warrantless searches and seizures. State v. Williams, 351 S.C. 591, 597, 571 S.E.2d 703, 706 (Ct. App. 2002). The Brockman court determined the trial court's ruling would be reviewed like any other factual

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finding: reversed if there is clear error and affirmed if any evidence supports the ruling. 339 S.C. at 66, 528 S.E.2d at 666.

On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error. However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.

State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citation omitted). Under the clear error standard, "an appellate court will not reverse a trial court's finding of fact simply because it would have

decided the case differently." State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Rather, the appellate court must determine whether, based on the evidence, it is left with the definite and firm conviction the trial court committed a mistake. Id. Accordingly, we will apply an any evidence standard to the trial court's ruling. Williams, 351 S.C. at 597, 571 S.E.2d at 707.

## LAW/ANALYSIS

The State contends the trial court erred in suppressing the stop by finding the State failed to produce sufficient empirical data to justify the effectiveness of the checkpoint. We agree.

The Fourth Amendment guarantees a person the right to be secure from unreasonable searches and seizures. U.S. Const. amend IV; State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000). "[T]he Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Mendenhall, 446 U.S. 544 (1980)). "[S]topping a vehicle at a checkpoint constitutes a seizure of a person within the meaning of the Fourth Amendment." United States v. Brugal, 209 F.3d 353, 356 (4th Cir. 2000) (citing Mich.

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Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976)).

Constitutional challenges to checkpoint seizures turn on whether the initial stop at the checkpoint was reasonable. . . . Whether particular checkpoint seizures are reasonable is determined by balancing the gravity of the public interest sought to be advanced and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped.

Id. (citing Sitz, 496 U.S. at 449-55).

The United States Supreme Court has applied this balancing analysis and "upheld the constitutionality of government checkpoints set up to detect drunken drivers, see [Sitz, 496 U.S. at 454], and illegal immigrants, see Martinez-Fuerte, 428 U.S. at 556-67 . . . , so long as they involve no more than an 'initial stop . . . and the associated preliminary questioning and observation by checkpoint officers.'" Id. at 356-57 (quoting Sitz, 496 U.S. at 450-51) (second ellipses added by court). "The seizure at the sobriety checkpoint upheld in Sitz lasted approximately twenty-five seconds, and the seizures at the immigration checkpoint upheld in Martinez-Fuerte lasted three to five minutes." Id. at 357 (citations omitted).

"The [United States] Supreme Court has also recognized that a state has a substantial interest in enforcing licensing and registration laws, though that interest is not substantial enough to justify roving patrol stops as an enforcement mechanism." Id. (citing Prouse, 440 U.S. at 658-59). However, the Court suggested in Prouse, "checkpoints to check driver's licenses would be permissible even in the absence of articulable and reasonable suspicion that a driver was unlicensed." Id. (citing Prouse, 440 U.S. at 663; Texas v. Brown, 460 U.S. 730, 743 (1983) (plurality opinion) (noting that the circumstances surrounding stop at driver's license roadblock gave "no suggestion that the roadblock was a pretext whereby evidence of a narcotics

Page 8

the limited purpose of verifying a driver's license, vehicle registration, and proof of insurance is a reasonable intrusion into the lives of motorists and their passengers even in the absence of reasonable suspicion that a motorist or passenger is engaged in illegal activity.

*Id.* (citing United States v. Galindo-Gonzales, 142 F.3d 1217, 1221 (10th Cir. 1998) (finding brief detention of motorist to inspect driver's license, vehicle registration, and insurance information at an established license checkpoint comports with the Fourth Amendment); United States v. McFayden, 865 F.2d 1306, 1310-13 (D.C. Cir. 1989) (finding a roadblock to inspect drivers' licenses and vehicle registrations met the Fourth Amendment standard of reasonableness)).

[T]he Court has determined that the gravity of the public interests that such stops seek to advance and the general efficacy of checkpoint stops in advancing those interests outweigh the minimal intrusions on protected Fourth Amendment liberty interests that are caused by the brief stops required for such limited questioning and observation. But, the Court has also cautioned that "[d]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard."

Norwood v. Bain, 143 F.3d 843, 848 (4th Cir. 1998) (ellipsis and last set of brackets by court) (quoting Sitz, 496 U.S. at 451), vacated, aff'd this ground on reh'g en banc, 166 F.3d 243, 245 (4th Cir. 1999). "[A] claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." Martinez-Fuerte, 428 U.S. at 559.

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In State v. Groome, 378 S.C. 615, 619, 664 S.E.2d 460, 462 (2008), the trial court found a roadblock violated the Fourth Amendment under Brown v. Texas, 443 U.S. 47 (1979). The Groome court noted "Brown established a three part balancing test for determining the constitutionality of a traffic checkpoint: 1) the gravity of the public interest served by the seizure; 2) the degree to which the seizure serves the public interest; and, 3) the severity of the interference with individual liberty." *Id.* at 619, 664 S.E.2d at 462. The trial court held the first and third factors easily weighed in the State's favor but found the State presented no evidence on the second factor. *Id.*

On appeal, the State argued the trial court abused its discretion in finding the State failed to meet the second Brown factor, the "effectiveness" requirement. *Id.*

The State argues that it need not introduce evidence about the specific effectiveness of this roadblock because, by its very nature, every license check roadblock determines whether the driver is legally licensed. The State's position that license check roadblocks are ipso facto constitutional, thereby eliminating the requirement of effectiveness from the Brown formula relies upon Sitz. While Sitz does criticize "searching examination of effectiveness" by trial courts, it retains the requirement that the State produce empirical data to support the effectiveness of its roadblock. Sitz, [496 U.S.] at 454 ("unlike Prouse, this case [does not involve] a complete absence of empirical data. . ."). The record supports the trial court's finding that the State failed to produce any evidence satisfying the second prong of the Brown test.

Groome, 378 S.C. at 619-20, 664 S.E.2d at 462 (ellipsis and last set of brackets added by court).

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In Sitz, 496 U.S. at 453, the Michigan Court of Appeals "consider[ed] as part of the balancing analysis the 'effectiveness' of the proposed checkpoint program." The United States Supreme Court found the court of appeals erred in concluding the checkpoint program failed the effectiveness part of the test and the failure materially discounted the State's strong interest in implementing the program. Id. The court noted, "The actual language from Brown v. Texas, upon which the Michigan courts based their evaluation of 'effectiveness,' describes the balancing factor as 'the degree to which the seizure advances the public interest.'" Id. (quoting Brown, 443 U.S. at 51). "This passage from Brown was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." Id. "But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." Id. at 453-54. "Brown's rather general reference to 'the degree to which the seizure advances the public interest' was derived, as the opinion makes clear, from the line of cases culminating in Martinez-Fuerte, . . . . Neither Martinez-Fuerte nor [Prouse], however, the two cases cited by the Court of Appeals as providing the basis for its 'effectiveness' review, . . . supports the searching examination of 'effectiveness' undertaken by the Michigan court." Id. at 454.

The Sitz court further noted:

In Delaware v. Prouse, we disapproved random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles. We observed that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety and said that "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed."

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Id. (quoting Prouse, 440 U.S. at 659-60) (alteration by court). The court "observed that the random stops involved the 'kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.'" Id. (quoting Prouse, 440 U.S. at 661) (alteration by court).

The Sitz court found that "[u]nlike Prouse, this case involves neither a complete absence of empirical data nor a challenge to random highway stops." Id.

During the operation of the Saginaw County checkpoint, the detention of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped. By way of comparison, the record from one of the consolidated cases in Martinez-Fuerte showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint. The ratio of illegal aliens detected to vehicles stopped (considering that on occasion two or more illegal aliens were found in a single vehicle) was approximately 0.5 percent. We concluded that this "record . . . provides a

rather complete picture of the effectiveness of the San Clemente checkpoint," and we sustained its constitutionality. We see no justification for a different conclusion here.

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Id. at 454-55 (alteration by court) (citations omitted). The court determined "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program" and found it consistent with the Fourth Amendment. Id. at 455.

In State v. Larson, 485 N.W.2d 571, 573 (Minn. Ct. App. 1992), the Minnesota Court of Appeals found "the state failed to present any evidence of the effectiveness of the checkpoint." (citing Brown, 443 U.S. at 51 (holding the court must balance "the degree to which the seizure advances the public interest"); Prouse, 440 U.S. at 659-60 (finding the State presented no empirical evidence that random driver's license checks were effective)). It noted, "Here, there was no testimony on how many driver's license or equipment violations were uncovered or other empirical data on the effectiveness of the checkpoint in advancing the public interest." Id. (emphasis added) (citing Chock v. Comm'r of Pub. Safety, 458 N.W.2d 692, 694 (Minn. Ct. App. 1990) (approving legality of sobriety checkpoint on which empirical data of effectiveness was presented)).

Vickery argued and the trial court found the State presented no evidence of empirical evidence that led to the determination of the location of the checkpoint.<sup>1</sup> However, the cases on point do not require the State to present pre-existing empirical data to justify setting up the checkpoint. The case law does require some basis for the location of the checkpoint. Here, Officer Byrd testified the checkpoint was placed in that location due to citizen complaints about speeding and loud music. Major Mitchell also testified he had personal knowledge of the problems at the intersection before the checkpoint was set up from seeing incident reports, traffic tickets, and statistics. Additionally, the Traffic Enforcement Activity Reports for dates prior to April 26 show that license checkpoints in the same area resulted in thirty to sixty traffic and criminal offenses on each occasion. Therefore, the

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trial court committed an error of law in requiring the State to present empirical data to justify the authorization and implementation of the checkpoint.

The trial court also suppressed the search because the State's empirical data regarding the effectiveness of the checkpoint was insufficient. The trial court acknowledged the State presented some empirical data regarding the intersection, but that it was insufficient to justify the roadblock. Prouse, Groome, and Sitz all require some empirical data that supports the second prong of Brown, that the seizure serves the public interest. However, none of these cases state how much evidence is considered enough. The United States Supreme Court, as well as our own supreme court, has stressed that no evidence is not enough. Here, we do have some evidence, lying somewhere between Prouse and Sitz. The two facts that seem to be lacking to paint the entire picture are how many vehicles came through this stop or all of the stops and how many of the tickets were specific to this stop location. According to Groome, the question before us is whether the record supports the trial court's finding that the State's empirical data was insufficient to satisfy the second prong of Brown. By showing the stops resulted in a total of forty-eight traffic violations and eight criminal cases including two drug arrests, the State met its burden under the second prong of Brown and the trial court erred in determining the State had to put up more evidence to show the checkpoint's effectiveness.

The purpose of the empirical data on the effectiveness is to be able to balance the effectiveness of the checkpoint with the other two prongs set forth in Brown, (1) the gravity of the public interest served by the seizure and (3) the severity of the interference with individual liberty. Here, the point of the checkpoint was to prevent traffic offenses and people driving without a license. This serves the public interest in that traffic violations and people driving without a license can cause injury to others. The severity with individual liberty was low in that the stops were marked so drivers could anticipate it and each stop lasted under a minute, if there was no violation. Weighing those two factors with the data provided as to the second factor, effectiveness, the license checkpoint did not violate the Fourth Amendment. Accordingly, the trial court's decision is

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**REVERSED AND REMANDED.**

**PIEPER and GEATHERS, JJ., concur.**

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Notes:

<sup>1</sup> The State also had the burden of showing the purpose of the stop and that it served the public interest. The checkpoint was not established by the officers conducting it but rather by their supervisors. Also, this was not a roving stop. None of these factors are at issue in this case.

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**ATTACHMENT 8**

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

The State, Petitioner,

v.

Cody Roy Gordon, Respondent.

Appellate Case No. 2014-001337

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Oconee County  
The Honorable Alexander S. Macaulay, Circuit Court Judge

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Opinion No. 27554  
Heard June 3, 2015 – Filed August 5, 2015

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**AFFIRMED AS MODIFIED**

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Attorney General Alan McCrory Wilson and Assistant  
Attorney General John Benjamin Aplin, both of  
Columbia, for Petitioner.

Keith G. Denny, of Keith G. Denny, P.A., of Walhalla,  
for Respondent.

**JUSTICE BEATTY:** The State appeals the Court of Appeals' affirmation of the circuit court's interpretation of section 56-5-2953 of the South Carolina Code. The Court of Appeals found that section 56-5-2953 requires officers to record the head of the motorist when administering the Horizontal Gaze Nystagmus (HGN) field sobriety test and that Cody Gordon's head was not sufficiently visible. The State posits that a plain reading of the statute makes no mention of the motorist's "head." We affirm the Court of Appeals' conclusion that the statute requires that the motorist's head be recorded in the video; however, we vacate the mandate to remand to the magistrate court for further consideration. We reinstate Gordon's conviction as we find that the officer complied with the statute in recording Gordon's HGN test.

### I. Factual/Procedural History

On October 29, 2011, Gordon was stopped at a license and registration checkpoint by a South Carolina Highway Patrol Officer. The officer administered several field sobriety tests. The test at issue in this case is the HGN test. The dashboard camera on the officer's patrol car recorded the entire incident, including all field sobriety tests, with continuous recording. The stop occurred at night, so the lighting was not perfect, but the officer had Gordon stand in the light of his patrol car's headlights and further illuminated Gordon by shining a flashlight directly on his face.

Following the tests, Gordon was placed under arrest. Gordon was charged with driving under the influence (DUI) for violating section 56-5-2930. The case was presented to a magistrate judge and a jury. The jury found Gordon guilty as charged. Gordon timely appealed his conviction.

Using still-shot photos of the video, Gordon argued that the video violated section 56-5-2953(A) because he was out of sight and in the dark during the HGN test. The circuit court concluded that section 56-5-2953(A) requires the motorist's head to be visible during the administration of the HGN field sobriety test. Section 56-5-2953(A) reads in pertinent 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 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 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.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2011) (emphasis added). The circuit court found Gordon's head was not "sufficiently visible through the entire administration of the [HGN] test." The circuit court reversed his conviction and dismissed the DUI charge. The State timely appealed to the Court of Appeals.

The Court of Appeals affirmed in part, vacated in part, and remanded the case to the magistrate court. *State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014). The court concluded that "the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding." *Gordon*, 408 S.C. at 543, 759 S.E.2d at 758. The Court of Appeals remanded the case to the magistrate court with the instruction to "make factual findings in light of the circuit court and our determination that the test must be recorded on the camera; specifically for the HGN test, the head has to be visible on the recording." *Gordon*, 408 S.C. at 543-44, 759 S.E.2d at 759.

The Court of Appeals denied the State's petition for a rehearing.<sup>1</sup> This Court granted the State's petition for a writ of certiorari to review the Court of Appeals' decision.

## II. Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there

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<sup>1</sup> Additionally, the Court of Appeals withdrew its original opinion and substituted a new published one. *Gordon*, 408 S.C. at 536, 759 S.E.2d at 755.

is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459.

### III. Discussion

**Whether the Court of Appeals erred in affirming the circuit court's decision to reverse Gordon's magistrate court conviction for driving under the influence?**

#### A. Argument

The State argues the Court of Appeals misconstrued the decision of the magistrate as lacking sufficient findings of fact. Specifically, the State contends that the Court of Appeals "misapprehended or overlooked the clear and unambiguous language of the statute, which does not include any requirement that 'the head must be visible on the recording' of an HGN field sobriety test."

#### B. Analysis

The State would have us review this case using the analytical framework of *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). The court in *Murphy* held that section 56-5-2953 only requires that the conduct of the motorist be recorded. *Murphy*, 392 S.C. at 631, 709 S.E.2d at 688. The Court of Appeals and the circuit court correctly distinguished *Murphy* from Gordon's case. In *Murphy*, the prior version of the statute at issue in this case was in effect. The prior version of the statute did not include the explicit requirement that the videotape include "any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii)(Supp. 2011). The current version of the statute, which applies to Gordon, specifically requires that the officer record "any field sobriety tests administered." Based on this distinction, the magistrate erred as a matter of law in finding that the officer's recording was only required to show Gordon's conduct generally.

The statute at issue in this case is clear and unambiguous and, therefore, this Court must give its words their ordinary meaning. The statute states that the video recording "must include any field sobriety test administered," which necessarily

includes the HGN test. Considering the fact that the HGN test focuses on eye movement, common sense dictates that the head must be visible on the video. Accordingly, the circuit court's finding that the head must be visible does not amount to a hyper-technicality, but merely states the obvious. The Court of Appeals did not err in affirming this requirement.

Here, the officer's administration of the HGN test is visible on the video recording. It is undisputed that Gordon's face is depicted in the video; it is axiomatic that the face is a part of the head. The officer's flashlight and arm are visible as he administers the test. Also, the officer's instructions were audible. Thus, the requirement that the head be visible on the video is met and the statutory requirement that the administration of the HGN field sobriety test be video recorded is satisfied. Therefore, the per se dismissal of the charge as discussed in *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), and *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) is not appropriate.

Even if we assume that the video of a field sobriety test is of such poor quality that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge. Instead, the remedy would be to redact the field sobriety test from the video and exclude testimony about the test.<sup>2</sup> If that remedy is applied here, there is still sufficient evidence to present this case to a jury for resolution. The evidence included the breath alcohol analysis report, video of other field sobriety tests, and Gordon's statement that he had consumed four beers.

Neither Gordon nor the State would have been prejudiced by the exclusion of the HGN test video or testimony because of the alleged poor quality of the video. Since the focus of the HGN test is the movement of the eyes, the jury would not have been able to determine if Gordon passed or failed by simply looking at this video. Moreover, the viewing of a video of an HGN field sobriety test has very little probative value to a jury because the eyes of the motorist are rarely, if ever, seen.<sup>3</sup>

The remaining issues raised by Gordon concerning discrepancies with the breath test site video's date and time stamp are without merit.

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<sup>2</sup> It appears the solicitor unintentionally led the circuit court to believe that the HGN test was the only evidence against Gordon.

<sup>3</sup> Of course, this would not be the case if actual eye movement is recorded.

#### IV. Conclusion

The Court of Appeals' decision is affirmed as to the requirements for video recording the HGN field sobriety test. The mandate to remand to the magistrate court for further consideration is vacated. Gordon's conviction is reinstated.

**TOAL, C.J., HEARN, J., and Acting Justice Allison Renee Lee, concur.**  
**PLEICONES, J., concurring in result only.**

402 S.C. 593, \*; 741 S.E.2d 42, \*\*;  
2013 S.C. App. LEXIS 79, \*\*\*

Not a  
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1 of 51 DOCUMENTS

Krystal Chisolm, Appellant, v. South Carolina Department of Motor  
Vehicles, Respondent.

Published Opinion No. 5107

COURT OF APPEALS OF SOUTH CAROLINA

402 S.C. 593; 741 S.E.2d 42; 2013 S.C. App. LEXIS 79

November 13, 2012, Heard

March 27, 2013, Filed

**PRIOR HISTORY:** [\*\*\*1]

Appellate Case No. 2011-196890. Appeal From The Administrative Law Court. Deborah Brooks Durden, Administrative Law Judge.

**DISPOSITION:** REVERSED.

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit*

[HN1] See S.C. Law Enf. Div. Pol. and Proc. §8.12.5(F)(4)(i).

*Administrative Law > Agency Adjudication > Hearings > General Overview*

*Administrative Law > Agency Adjudication > Review of Initial Decisions*

*Transportation Law > Private Vehicles > General Overview*

[HN2] The South Carolina Office of Motor Vehicle Hearings (OMVH) is authorized to hear contested cases from the South Carolina Department of Motor Vehicles. As a result, the OMVH is an agency pursuant to South Carolina's Administrative Procedures Act. Appeals from the OMVH are taken by the South Carolina Administrative Law Court.

*Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges*

*Administrative Law > Judicial Review > Standards of Review > General Overview*

[HN3] See S.C. Code Ann. § 1-23-610(B) (Supp. 2012).

***Administrative Law > Judicial Review > Standards of Review > Substantial Evidence***

[HN4] In the context of judicial review of agency action, substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency.

***Governments > Legislation > Interpretation***

[HN5] Where a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. The court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.

***Governments > State & Territorial Governments > Police Power******Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension***

[HN6] Being licensed to operate a motor vehicle on the public highways of South Carolina is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. The privilege may be revoked or suspended for any cause relating to public safety, but it cannot be revoked arbitrarily or capriciously.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > General Overview******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit******Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension***

[HN7] A person who drives a motor vehicle in South Carolina is considered to have given consent to chemical tests of his breath. *S.C. Code Ann. § 56-5-2950(A)* (Supp. 2012). The South Carolina Department of Motor Vehicles must suspend the driver's license, permit, or nonresident operating privilege of or deny the issuance of a license or permit to a person who drives a motor vehicle and refuses to submit to a breath test. *§ 56-5-2951(A)*. The requirements for suspension for refusal to consent are: (1) a person (2) operating a motor vehicle (3) in South Carolina (4) be arrested for an offense arising out of acts alleged to have been committed while the person was driving under the influence of alcohol, drugs, or both; and (5) refuse to submit to alcohol and drug testing.

***Administrative Law > Separation of Powers > Legislative Controls > Explicit Delegation of Authority******Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > General Overview******Evidence > Scientific Evidence > Sobriety Tests***

[HN8] The legislature has given the South Carolina State Law Enforcement Division (SLED) authority to make policies, procedures, and regulations to administer the provisions of the implied consent statute. *S.C. Code Ann. § 56-5-2950(E)* and *(J)* (Supp. 2012). Specifically, *§ 56-5-2950(A)* states that a breath test must be administered pursuant to SLED policies.

402 S.C. 593, \*; 741 S.E.2d 42, \*\*;  
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*Administrative Law > Agency Adjudication > Hearings > Evidence > General Overview*  
*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit Evidence > Procedural Considerations > Burdens of Proof > Allocation*

[HN9] In a license revocation proceeding, the burden is on the South Carolina Department of Motor Vehicles to prove that a driver refused a breath test.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit Evidence > Scientific Evidence > Sobriety Tests*

[HN10] With respect to breath tests, the South Carolina Code does not define "refusal." However, the South Carolina State Law Enforcement Division's (SLED's) policies and procedures provide several examples of when a refusal can occur. For example, a refusal can occur if the subject refuses to cooperate, delays the administration of the test, ingests prohibited substances during the observation, or intentionally causes the instrument to have an error. S.C. Law Enf. Div. Pol. and Proc. § 8.12.5(F)(4)(b), (d), (f), and (j). Section 8.12.5(F)(4)(i) defines "refusal" as occurring when a person does not blow an adequate sample, as determined by the instrument. Thus, for the breath test to be administered pursuant to SLED policies, as required by *S.C. Code Ann. § 56-5-2950(A)* (Supp. 2012), a subject who blows an inadequate sample as determined by the instrument can be deemed by the officer administering the test to have refused the breath test.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension*  
[HN11] See *S.C. Code Ann. § 56-5-2951(A)* (Supp. 2012).

*Administrative Law > Agency Rulemaking > General Overview*  
*Administrative Law > Separation of Powers > Legislative Controls > Explicit Delegation of Authority*  
*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures Evidence > Scientific Evidence > Sobriety Tests*

[HN12] The legislature has authorized the South Carolina State Law Enforcement Division to promulgate policies and procedures for administering breath tests. *S.C. Code Ann. § 56-5-2950(A), (E), and (J)* (Supp. 2012).

*Administrative Law > Agency Rulemaking > General Overview*  
*Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority Governments > State & Territorial Governments > Legislatures*

402 S.C. 593, \*, 741 S.E.2d 42, \*\*;  
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[HN13] The South Carolina Legislature has the right to vest administrative officers and bodies discretion to promulgate rules and regulations; however, an agency may not make rules and regulations that conflict with or change the statute that confers such authority.

*Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion*  
*Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review*

[HN14] An appellate court may reverse the decision of the South Carolina Administrative Law Court if it is affected by an error of law or is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

*Administrative Law > Agency Adjudication > General Overview*  
*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit*

*Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension*  
[HN15] With respect to the refusal to submit to testing for alcohol concentration levels, because a license-suspension hearing constitutes a final adjudication of an important interest, the legislature has promulgated *S.C. Code Ann. § 56-5-2951* (Supp. 2012) in such a way that guards against an automatic or rote elimination of this interest.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit*  
*Evidence > Scientific Evidence > Sobriety Tests*

[HN16] With respect to breath tests, the South Carolina State Law Enforcement Division's policies and procedures provide that "INVALID SAMPLE DETECTED," "DETECTOR OVERFLOW DETECTED," or "INTERFERENCE DETECTED" readings by the instrument are not alone a refusal situation. *S.C. Law Enf. Div. Pol. and Proc. § 8.12.5(L)(2)(f)(iv)-(vi)*.

*Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Refusals to Submit*  
*Evidence > Scientific Evidence > Sobriety Tests*

*Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension*  
[HN17] The South Carolina State Law Enforcement Division's policies and procedures are designed for the officer to determine whether a breath test subject's inability to register a sample was based on the fault of the subject or any attempt to thwart the test. Moreover, *S.C. Law Enf. Div. Pol. and Proc. § 8.12.5(L)(2)(f)(vii)* specifically provides that a "NO" can be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own. Thus, the instrument's failure to register a test report in and of itself, absent other facts, does not end the inquiry in determining whether the subject refused the breath test.

COUNSEL: C. Rauch Wise, of Greenwood, for Appellant.

402 S.C. 593, \*; 741 S.E.2d 42, \*\*;  
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Frank L. Valenta Jr., Linda Annette Grice, and Philip S. Porter, all of the South Carolina Department of Motor Vehicles, of Blythewood, for Respondent.

JUDGES: PIEPER, J. FEW, C.J., and WILLIAMS, J., concur.

OPINION BY: PIEPER

## OPINION

[\*594] [\*\*43] PIEPER, J.: Krystal Chisolm appeals the administrative suspension of her driver's license. On appeal, Chisolm argues the Administrative Law Court (ALC) erred by (1) interpreting the term "refusal" in *section 56-5-2951 of the South Carolina Code* (Supp. 2012) in accordance with the State Law Enforcement Division's (SLED) policies and procedures, and (2) finding she refused the breath test. We reverse.

## FACTS

On May 19, 2010, Officer Dyar Archibald arrested Chisolm for driving under the influence. Officer Archibald pulled Chisolm over because he had received a call that Chisolm's cousin, a passenger in her vehicle, was "banging on cars." While speaking with Chisolm's cousin, Officer Archibald noticed [\*595] that Chisolm seemed to be impaired. Chisolm took three field sobriety tests: the one-legged stand, the walk and turn, [\*\*\*2] and the horizontal gaze nystagmus test. Officer Archibald testified that Chisolm failed the one-legged stand, but that he did not consider the walk and turn a failure. Chisolm also failed the horizontal gaze nystagmus test which, according to Officer Archibald, indicated that Chisolm had alcohol in her system. However, this test did not measure the amount of alcohol in Chisolm's system.

Once Officer Archibald transported Chisolm to the police station, he administered a breath test. Chisolm blew into the DataMaster, the breath test instrument, for approximately [\*\*44] one minute and fifty-three seconds. Officer Archibald testified that there was a steady tone while Chisolm blew, meaning air was going into the instrument. However, Officer Archibald also testified that the instrument "just didn't read it." No evidence was presented that the DataMaster's failure to register Chisolm's breath sample resulted from her own fault by faking or thwarting the test, being uncooperative, acting unruly, delaying the administration of the test, ingesting prohibited substances during the observation period, failing to cooperate with the officer's instructions, or behaving in any manner that would amount to [\*\*\*3] a constructive refusal. Even though Officer Archibald testified that Chisolm blew into the instrument and gave a steady tone, he also testified that Chisolm did not give an "accurate sample," which he considered to be a refusal. As a result, Officer Archibald reported that Chisolm refused to submit to a breath test. Officer Archibald asked Chisolm to take the test again and Chisolm agreed. However, according to Officer Archibald, the DataMaster would not let Chisolm take the test again because it registered an inadequate sample after the first blow. Because the records indicated Chisolm refused the breath test, the South Carolina Department of Motor Vehicles (the Department) suspended her driver's license.

Subsequently, Chisolm requested an administrative hearing before the South Carolina Office of Motor Vehicle Hearings (OMVH) to challenge her license suspension. Chisolm argued her suspension was unjustified because (1) there was no probable cause to arrest, and (2) she never refused to give the sample required by law and provided an adequate test sample.<sup>1</sup> [\*596] The hearing of-

ficer sustained Chisolm's license suspension, finding that Chisolm refused the breath test because Chisolm's breath [\*\*\*4] test results did not provide a registerable sample.

1 Chisolm does not raise any issues regarding probable cause to this court on appeal.

Chisolm appealed her license suspension to the ALC. The ALC affirmed, solely relying on SLED Policy 8.12.5(F)(4)(i) that provides, [HN1] "[a] refusal to submit to a breath test can occur in any of the following ways: . . . i. The subject . . . does not blow an adequate sample, as determined by the instrument." This appeal followed.

### STANDARD OF REVIEW

[HN2] "The [OMVH] is authorized to hear contested cases from the Department." *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011). As a result, the OMVH is an agency pursuant to the Administrative Procedures Act (APA). *Id.* Appeals from the OMVH are taken by the ALC. *Id.* When reviewing a decision of the ALC, *section 1-23-610(B) of the South Carolina Code* (Supp. 2012), governs this court's standard of review, providing:

[HN3] The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision [\*\*\*5] or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[HN4] "Substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow [\*597] reasonable minds to reach the same conclusion as the agency." *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

### LAW/ANALYSIS

Chisolm argues the ALC erred in determining a refusal takes place pursuant to [\*\*45] *section 56-5-2951* when the breath test instrument "determines" a provided sample is inadequate. According to Chisolm, a refusal only takes place when the test subject actually refuses the conscious act of blowing into the instrument, [\*\*\*6] and the ALC erred in interpreting the SLED policies and procedures in a manner that is contrary to *section 56-5-2951*. Chisolm contends she never "refused"

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within the meaning of *section 56-5-2951*; thus, the suspension of her license was unjustified. We reverse.

[HN5] "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quotation marks omitted). This court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks omitted).

[HN6] "Being licensed to operate a motor vehicle on the public highways of this state is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare." *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 595, 654 S.E.2d 284, 288 (Ct. App. 2007). "The privilege may be revoked or suspended for any cause relating to [\*\*\*7] public safety, but it cannot be revoked arbitrarily or capriciously." *Id.*

[HN7] "A person who drives a motor vehicle in [South Carolina] is considered to have given consent to chemical tests of his breath . . ." *S.C. Code Ann. § 56-5-2950(A)* (Supp. 2012). "The Department of Motor Vehicles must suspend the driver's license, permit, or nonresident operating privilege of or deny the issuance of a license or permit to a person who drives a motor vehicle and refuses to submit to [a breath] test . . ." *§ 56-5-2951(A)*.

[\*598] The requirements for suspension for refusal to consent are: (1) a person (2) operating a motor vehicle (3) in South Carolina (4) be arrested for an offense arising out of acts alleged to have been committed while the person was driving under the influence of alcohol, drugs, or both, and (5) refuse to submit to alcohol and drug testing.

*S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 523, 613 S.E.2d 544, 549 (Ct. App. 2005).

[HN8] The legislature gave SLED authority to make policies, procedures, and regulations to administer the provisions of the implied consent statute. *See S.C. Code Ann. § 56-5-2950(E) & (J)* (Supp. 2012). Specifically, subsection *56-5-2950(A)* states that a "breath [\*\*\*8] test must be administered . . . pursuant to SLED policies." *§ 56-5-2950(A)*. [HN9] The burden is on the Department to prove that Chisolm refused the breath test. *See McCarson*, 391 S.C. at 149, 705 S.E.2d at 431 (noting in a license revocation proceeding, the burden of proving that the driver was lawfully arrested or detained for DUI was on the Department).

Prior to determining the meaning of the word "refusal," we note the procedures in conducting a breath test. Pursuant to SLED policies, after the required twenty minute observation period, the officer will prepare the DataMaster instrument for the breath test. SLED Policies & Procedures § 8.12.5(J) & (K) (2009).<sup>2</sup> Thereafter, the officer starts the instrument, and:

The instrument will display, "PLEASE BLOW", at the time for the subject to blow. The test operator will ensure a new mouthpiece is placed on the breath tube, unless a refusal has already occurred. The subject may use the same mouthpiece in the event the test is aborted and must be started again. The subject is given approximately two minutes to provide an acceptable breath sample. . . . The subject will provide a continuous breath sample, acceptable to the instrument, containing [\*\*\*9] a minimum of approximately one and one half liters. "PLEASE BLOW" will display until an adequate sample is obtained or time expires.

SLED Policies & Procedures § 8.12.5(L)(2)(f)(i).

[\*\*46] If an acceptable breath sample is not provided in two minutes, the instrument will display "Did the subject refuse?" [\*599] When question is prompted, press the touchscreen icon, "Yes" or "No". If "Yes" is answered, the instrument will print "REFUSED" by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. . . . If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An "INCOMPLETE SUBJECT TEST" reading, by itself, is not a refusal situation. (A "NO" should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.). In the event of an "INCOMPLETE SUBJECT TEST", the breath test sequence may be repeated, except the advisement process is not required to be repeated.

SLED Policies & Procedures § 8.12.5(L)(2)(f)(vii) (emphasis added).

2 SLED's policies and procedures are available at:

<http://www.sled.sc.gov/documents/IMPLIEDCONSENT/polproc/8125/200902108125.pdf> [\*\*\*10]  
(last visited March 15, 2013).

[HN10] The South Carolina Code does not define "refusal." However, SLED's policies and procedures provide several examples of when a refusal can occur. For example, a refusal can occur if the subject refuses to cooperate, delays the administration of the test, ingests prohibited substances during the observation, or intentionally causes the instrument to have an error. SLED Policies & Procedures § 8.12.5(F)(4)(b), (d), (f), & (j). At issue in this case is the SLED policy that defines "refusal" as occurring when a person "does not blow an adequate sample, as determined by the instrument." SLED Policies & Procedures § 8.12.5(F)(4)(i). Thus, for the breath test to be administered "pursuant to SLED policies," as required by *section 56-5-2950(A)*, a subject who blows an inadequate sample "as determined by the instrument" can be deemed by the officer administering the test to have refused the breath test. *See id.*

Here, the ALC affirmed the suspension of Chisolm's license, finding the record contains evidence that "the machine determined that the breath sample of [Chisolm] was not measurable, and thus inadequate." The ALC further found the "facts of this case conform [\*\*\*11] to the criteria for determining a refusal pursuant to SLED policy 8.12.5, and the Hearing Officer properly found that [Chisolm] refused to submit to a breath test."

[\*600] A plain reading of the statute at issue, as opposed to the SLED policies and procedures, provides that the Department may suspend a driver's license when a person refuses to submit to a breath test. *See § 56-5-2951(A)* ([HN11] "The Department of Motor Vehicles must suspend the driver's license, permit, or nonresident operating privilege of or deny the issuance of a license or permit to a person who drives a motor vehicle and refuses to submit to [a breath] test . . . ." (emphases added)). We also recognize that [HN12] the legislature authorized SLED to promulgate policies and procedures for administering breath tests. *See § 56-5-2950(A), (E), & (J)*. *See Ahrens v. State*, 392 S.C. 340, 348-49, 709 S.E.2d 54, 58 (2011) (noting [HN13] the legislature has the right to vest administrative officers and bodies discretion to promulgate rules and regulations; however, an agency may not make rules and regulations that conflict with or change the statute that confers such authority).

[HN14] An appellate court may reverse the decision of the ALC if it is affected [\*\*\*12] by an error of law or is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *S.C. Dep't of Motor Vehicles v. Blackwell*, 389 S.C. 293, 295, 698 S.E.2d 770, 771 (2010) (quoting *S.C. Code Ann. § 1-23-610(B)* (Supp. 2008)). [HN15] "Because a license-suspension hearing constitutes a final adjudication of an important interest, we believe the Legislature promulgated *section 56-5-2951* in such a way that guards against an automatic or rote elimination of this interest." *McCarson*, 391 S.C. at 148, 705 S.E.2d at 431 (emphasis added).

As cited above, SLED policies and procedures include a specific protocol for when the instrument does not register the breath sample. See SLED Policies & Procedures § 8.12.5 (L)(2)(f)(vii). The DataMaster will display "PLEASE BLOW" until an adequate sample is obtained or time expires. SLED Policies & Procedures § 8.12.5 (L)(2)(f). If time expires, the DataMaster will ask the officer whether the subject refused, in which event the officer must answer "Yes" or "No." [\*\*47] SLED Policies & Procedures § 8.12.5 (L)(2)(f)(vii). A "Yes" will print as a refusal, while a "No" will print "INCOMPLETE SUBJECT TEST." *Id.* The policies [\*\*\*13] and procedures provide that a "No" should be entered only if the subject failed to provide an acceptable breath sample through no fault of his or her own. *Id.* Thus, the failure of a driver to supply a [\*601] registerable breath sample does not automatically result in a refusal, as the officer has discretion to determine whether there was a refusal and has the option to conduct a second breath test. Our courts have not been presented with the question of whether a driver's inability to provide a registerable breath sample may result in a "refusal" pursuant to *section 56-5-2951*; therefore, we look to other jurisdictions for guidance.

We start with the proposition that when the breath test instrument emits a steady tone, the steady tone is an indication that the instrument is receiving a breath sample. See *Kurosak v. Comm'r of Pub. Safety*, 402 N.W.2d 826, 828 (Minn. Ct. App. 1987) ("A tone sounds when an adequate sample is blown into the machine."); *Quick v. Com., Dep't of Transp.; Bureau of Driver Licensing*, 915 A.2d 1268, 1270 (Pa. Commw. Ct. 2007) ("The breath testing instrument emits a steady tone during a continuous breath, but beeps during intermittent breathing."). Other jurisdictions [\*\*\*14] have upheld the suspension of a driver's license based on the subject's refusal to submit to a breath test when, unlike the present case, the driver failed to produce a steady tone into the breath instrument. In *Walker v. State*, the officer administering the breath test testified that an air sample flowing into the instrument will generate a steady tone, but that the subject did not blow into the machine as he was instructed, was puffing his cheeks to act like he was blowing, and never made a steady tone. 262 Ga. App. 872, 586 S.E.2d 757, 759 (Ga. Ct. App. 2003).<sup>3</sup> The officer testified that he did hear a brief "ping" tone, but he never heard a [\*602] "long constant tone." *Id.* at 759-60. The officer determined that the subject was deliberately failing to provide adequate air for the machine to evaluate, and thus, he registered the subject's failure to properly blow into the machine as a refusal. *Id.* at 760. On appeal, the court affirmed the trial court's determination that the defendant refused a breath test for the failure to properly blow into the breath test instrument, noting that the officer has the discretion to determine whether a subject is faking it. *Id.* at 762.

3 In regards to breath samples, Georgia's [\*\*\*15] implied consent statute requires:

No more than two sequential series of a total of two adequate breath samples each shall be requested by the state; provided, however, that after an initial test in which the instrument indicates an adequate breath sample was given for analysis,

any subsequent refusal to give additional breath samples shall not be construed as a refusal for purposes of suspension of a driver's license under Code Sections 40-5-55 and 40-5-67.1. Notwithstanding the above, a refusal to give an adequate sample or samples on any subsequent breath, blood, urine, or other bodily substance test shall not affect the admissibility of the results of any prior samples. An adequate breath sample shall mean a breath sample sufficient to cause the breath-testing instrument to produce a printed alcohol concentration analysis.

*Ga. Code Ann. § 40-6-392* (West 2012).

Likewise, in *State v. Householder*, the Ohio Court of Appeals affirmed the trial court's determination that the invalid breath sample was based on the driver's failure to sufficiently blow into the instrument. *181 Ohio App. 3d 269, 2009 Ohio 826, 908 N.E.2d 987, 992 (Ohio Ct. App. 2009)*.<sup>4</sup> The court relied on the officer's testimony [\*603] that if the DataMaster starts [\*\*\*16] beeping, then the driver is not blowing into the machine correctly and not giving an adequate sample. *Id. at 988-89*. The officer also explained that [\*\*48] the instrument "went from a steady tone, to a beep, back to a steady tone," indicating that the reason for the invalid sample was a "discontinued blowing pattern." *Id. at 989*.

4 The Ohio statute on refusing a breath sample provides:

(5)(a) If a law enforcement officer arrests a person for a violation of [the Ohio DUI statutes], the law enforcement officer shall request the person to submit, and the person shall submit, to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine for the purpose of determining the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine. A law enforcement officer who makes a request pursuant to this division that a person submit to a chemical test or tests is not required to advise the person of the consequences of submitting to, or refusing to submit to, the test or tests and is not required to give the person the form described in *division (B) of section 4511.192* [\*\*\*17] of the Revised Code, but the officer shall advise the person at the time of the arrest that if the person refuses to take a chemical test the officer may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. The officer shall also advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. *Divisions (A)(3) and (4)* of this section apply to the administration of a chemical test or tests pursuant to this division.

(b) If a person refuses to submit to a chemical test upon a request made pursuant to *division (A)(5)(a)* of this section, the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. A law enforcement officer who acts pursuant to this division to ensure that a person submits to a chemical test of the person's whole blood or blood serum or plasma is immune from criminal and civil liability based upon a claim for

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assault and battery or any other claim for the acts, [\*\*\*18] unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

*Ohio Rev. Code Ann. § 4511.191* (West 2012).

Similarly, the Oregon Court of Appeals reinstated the revocation of a license based on a refusal, where the hearing officer determined that the subject feigned an inability to take the test. *Gilliam v. Oregon Dep't of Transp.*, 178 Ore. App. 267, 36 P.3d 509, 510 (Or. Ct. App. 2001). Specifically, the officer testified that he told the subject to blow into the Intoxilyzer machine and generate a steady tone. *Id.* at 509. However, the subject did not generate a steady tone; rather, he would blow and then stop for a second after the tone started. *Id.* Based on this conduct, the officer determined that the subject "did not appear to be trying to blow hard" and that he thought the subject was toying with the machine. *Id.* at 510. Accordingly, the court affirmed the officer's decision to press the button to indicate that the subject refused the test. *Id.* at 510.

In addition, the Missouri Supreme Court undertook an analysis to define "refusal," explaining:

There is no mysterious meaning to the word "refusal". In the context of the implied consent law, it simply means that [\*\*\*19] an arrestee, after having been requested to take the breathalyzer test, declines to do so of his own volition. Whether the declination is accomplished by verbally saying, "I refuse", or by remaining silent and just not breathing or blowing into the machine, or by vocalizing some sort of qualified or conditional consent or refusal, does not make any difference. The volitional failure to do what is necessary in order that the test can be performed is a refusal.

*Spradling v. Deimeke*, 528 S.W.2d 759, 766 (Mo. 1975).<sup>5</sup> A Connecticut court has held that the determination of a refusal is required to be supported by substantial evidence, finding:

[\*604] [W]here it is undisputed that the motorist submitted to the chemical alcohol test, the fact that he failed to provide an adequate breath sample does not automatically constitute refusal within the meaning of [the statute]. Such refusal must be supported by substantial evidence. A conclusory statement by the arresting officer that the driver has failed to provide an adequate breath sample and has, therefore, refused, does not constitute such evidence.

*Bialowas v. Comm'r of Motor Vehicles*, 44 Conn. App. 702, 692 A.2d 834, 841 (Conn. App. Ct. 1997).<sup>6</sup>

5 The Missouri implied [\*\*\*20] consent statute provides that if: "a person under arrest, or who has been stopped pursuant to *subdivision (2) or (3) of subsection 1 of section 577.020*, refuses upon the request of the officer to submit to any test allowed pursuant to *section 577.020*, then evidence of the refusal shall be admissible." *Mo. Ann. Stat. § 577.041* (West 2012).

6 The Connecticut statute governing a refusal to submit a breath test provides:

(b) If any such person, having been placed under arrest for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both, and thereafter, after being apprised of such person's constitutional rights, having been requested to submit to a blood, breath or urine test at the option of the police of-

ficer, having been afforded a reasonable opportunity to telephone an attorney prior to the performance of such test and having been informed that such person's license or nonresident operating privilege may be suspended in accordance with the provisions of this section if such person refuses to submit to such test . . . .

*Conn. Gen. Stat. Ann. § 14-227b(b)* (West 2012).

Furthermore, a Pennsylvania court was faced with a set of facts similar to the case [\*\*\*21] at bar. The court was asked to determine if the subject refused the breath test after she attempted to blow into the machine and the machine did not register a sample; she also [\*\*49] wanted to take the test again. See *Bomba v. Com., Dep't of Transp., Bureau of Driver Licensing*, 28 A.3d 946, 948 (Pa. Commw. Ct. 2011).<sup>7</sup> In *Bomba*, the officer administering the breath test, Officer Lawniczak, testified that the subject, Heather Bomba, "attempted to give one breath sample" that "was insufficient." *Id.* According to Officer Lawniczak, the breathalyzer machine "allows a two-minute window to provide an adequate breath sample; if an [\*605] adequate breath sample is not provided within the two-minute timeframe, the machine prompts the operator to report whether a refusal has occurred." *Id.* (emphasis added). Officer Lawniczak testified he instructed Bomba to "blow with one steady breath until . . . told to stop." *Id.* However, Officer Lawniczak explained Bomba gave "a series of short breaths, not one continuous breath." *Id.* After two minutes had elapsed, the breathalyzer instrument prompted the officer to report whether there had been a refusal, and Officer Lawniczak pressed the "yes" button. *Id.* Officer [\*\*\*22] Lawniczak admitted that Bomba "may have asked to retake the breath test," but the officer stated that she is only required to give one test. *Id.* As a result, Bomba's license was suspended. *Id.* 947. Bomba appealed and the trial court reversed her license revocation, finding Bomba's "initial, unequivocal and unqualified consent to the breath test, her subsequent inability to perform it properly, despite attempting to do so and her immediate request to re-take the breath test, do not amount to a refusal under these circumstances." *Id.* at 949.

<sup>7</sup> The Pennsylvania statute governing refusal of a breath test provides, "[i]f any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person." 75 Pa. Cons. Stat. Ann. § 1547 (b.1) (1) (West 2012).

On appeal, the appellate court affirmed the determination that Bomba did not refuse the breath test and reinstated her license. *Id.* at 951. The court reasoned that Bomba "made one attempt to provide a breath sample. When it was not successful, she immediately [\*\*\*23] asked to try again. PennDOT offered no evidence that [Bomba] was attempting to delay the testing process or was intentionally producing an inadequate sample." *Id.* at 950. Furthermore, in upholding the trial court's determination that Bomba did not refuse the breath test, the court explained:

Refusal cases are highly fact-sensitive. The crucial, determinative factor we glean from the cases is whether PennDOT's evidence shows that the licensee deliberately tried to delay or undermine the testing process. Such evidence was simply not present in this case. Rather, the evidence showed, and the trial court found, that [Bomba] made a good faith, but unsuccessful, attempt to provide a breath sample and immediately requested to attempt the test a second time.

[\*606] *Id.* at 951.<sup>8</sup>

8 We also note that other jurisdictions have determined that a physical inability or medical condition that inhibits a driver's ability to perform a breath test does not constitute a "refusal." See *Call v. Kansas Dep't of Revenue*, 17 Kan. App. 2d 79, 831 P.2d 970, 972 (Kan. Ct. App. 1992) (stating that the Kansas implied consent statute provides that the "[f]ailure of a person to provide an adequate breath sample or samples as directed shall constitute [\*\*\*24] a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs"); *Vill. of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 366 N.W.2d 506, 509 (Wis. Ct. App. 1985) ("A person is deemed not to have refused the test if it is shown that the refusal was due to a physical inability to submit to the test as a result of physical disability or disease unrelated to the use of alcohol or controlled substances.").

A review of the record and video recording reveals that Chisolm wanted to take the breath test, blew into the DataMaster, and the instrument produced a steady tone for an extended period of time that indicated sufficient air was going into the instrument. Officer Archibald testified that he is trained to listen for a steady tone when administering a breath test. Unlike the officers' testimonies in *Walker*, *Householder*, and *Gilliam*, here, according to Officer Archibald, Chisolm's breath test produced a steady tone, indicating that Chisolm was doing what she was supposed to do and that air was going into the instrument. Even though the machine ultimately did not register Chisolm's breath sample, at no time did the [\*\*\*25] machine indicate [\*\*50] that she was not blowing an adequate sample, as evidenced by the steady tone. Additionally, like *Bomba*, Chisolm consented to the breath test, attempted the test, and asked to take a second test. No evidence was presented by the Department, which carries the burden of proof, that Chisolm's failure to register a breath sample resulted from her own fault by faking or thwarting the test, being uncooperative, acting unruly, delaying the administration of the test, ingesting prohibited substances during the observation period, failing to cooperate with the officer's instructions, or behaving in any manner that would amount to a constructive refusal. Furthermore, we find it significant that when Officer Archibald offered Chisolm the opportunity to take the test for a second time, and she agreed to do so, the instrument would not allow for another test. This evidence also suggests Chisolm was not attempting to thwart the test.

[\*607] Officer Archibald testified that he had "no clue" why the instrument would not register her sample, that the DataMaster "just didn't read it," and the instrument "didn't come up with any errors." Despite the officer's testimony that he did not know why [\*\*\*26] her breath sample would not register, Officer Archibald pressed "yes" when prompted by the DataMaster to answer whether Chisolm refused the breath test. Thus, Officer Archibald decided that Chisolm refused even though he did not know why the instrument would not register her breath sample.<sup>9</sup> Under these circumstances, Officer Archibald's decision to press "yes," notwithstanding his own testimony, caused the instrument to print a refusal, and the decision was an arbitrary and capricious act and a manifest abuse of his discretion resulting in Chisolm's license being revoked arbitrarily. See *Peake*, 375 S.C. at 595, 654 S.E.2d at 288 (noting that while the license to operate a motor vehicle is a mere privilege that is always subject to revocation or suspension for any cause related to public safety, it cannot be revoked arbitrarily or capriciously).

9 We find problematic Officer Archibald's statement that he had "no clue" why the DataMaster would not register a test result in light of his observations of Chisolm's continued and

steady blow into the machine. If the prosecution does not know why the machine did not register the breath sample, we question how a citizen would know, especially [\*\*\*27] in light of the difficulty in obtaining the software underlying the DataMaster based on its proprietary nature. *See S.C. Code Ann. 56-5-2934* (Supp. 2012) (stating SLED is required to "produce all breath testing software in a manner that complies with any and all licensing agreements").

Here, we have a situation where the ALC relied on, as its sole basis to affirm the hearing officer's determination of refusal, the component of SLED policies and procedures that state an inadequate sample is furnished "as determined by the instrument." We recognize that the policies and procedures state that a refusal can occur when the instrument determines there is not an adequate sample. However, the policies do not mandate a refusal in all circumstances where an adequate sample is not registered, particularly in instances, like here, where the determination of a refusal would be arbitrary and capricious.

The policies provide the officer with discretion to determine whether the subject's failure to blow an acceptable breath [\*608] sample was a refusal. We also note that [HN16] SLED's policies and procedures provide that "INVALID SAMPLE DETECTED," "DETECTOR OVERFLOW DETECTED," or "INTERFERENCE DETECTED" readings by [\*\*\*28] the instrument are not alone a refusal situation. *See SLED Policies & Procedures § 8.12.5(L)(2)(f)(iv)-(vi)*.

Similarly, if an acceptable breath sample is not provided in the two-minute period, the DataMaster prompts the officer to make a determination about whether the subject refused the test. [HN17] SLED's policies and procedures are designed for the officer to determine whether a test subject's inability to register a sample was based on the fault of the subject or any attempt to thwart the test. Moreover, the policy specifically provides that a "NO" can be entered "if the subject failed to provide an acceptable breath sample through no fault of his/her own." *SLED Policies & Procedures § 8.12.5(L)(2)(f)(vii)*. Thus, the instrument's failure to register a test report in and of itself, absent other facts, does not end the inquiry in determining whether the subject refused the breath test.

The record indicates Chisolm did not refuse to take the test and the Department did not produce any evidence indicating that she [\*\*\*51] was trying to fake or thwart the test, be uncooperative, act unruly, delay the administration of the test, ingest prohibited substances during the observation period, fail to cooperate [\*\*\*29] with the officer's instructions, or behave in any manner that would amount to a constructive refusal. We find it fundamentally unfair under the facts herein to label as a refusal a situation where Chisolm blew for such an extended length of time with a steady tone by the instrument, absent any allegations of fault by Chisolm or any attempt to fake or thwart the test. [\*609] Based on the facts and circumstances of this case, Officer Archibald's decision to enter a refusal, in light of his own testimony, was arbitrary and capricious, and the State failed to meet its burden of producing evidence to support Officer Archibald's determination of refusal.

Based on the foregoing, the ALC's decision to sustain the hearing officer's determination of a "refusal" is arbitrary and capricious. Accordingly, the order of the ALC is hereby

**REVERSED.**

**FEW, C.J., and WILLIAMS, J., concur.**



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Theotis E. Dunham, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
City of Rock Hill, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS

Case No.: 2015-CP-46- 3090

NOTICE OF CRIMINAL APPEAL

The defendant, Theotis E. Dunham hereby gives notice of appeal from the judgment of the Municipal Court in the action on ticket no.: 25259GR, DUI1st and 25260GR, DUS 4th, to the Circuit Court of Common Pleas, in the County of York.

This notice of appeal is made subsequent to the sentence and Order dated September 30, 2015, Appellant received notice of the Order on October 1, 2015.

The grounds for the appeal are as follows:

1. The Court erred in upholding the legality of the checkpoint at which Appellant was stopped. The errors being as follows:
  - a. The time of the checkpoint was not approved and extended into an unapproved date.
  - b. The checkpoint occurred outside the area approved for the checkpoint.
  - c. The City did not present empirical data to support that the seizure serves the public's interest as required by State v. Vickery, 752 S.E. 2d 218, 399 S.C. 507.
2. The Court erred in failing to dismiss the DUI on the grounds that the Appellant was not offered a breath test.

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DAVID HAMILTON  
C.C.C.P. & G.S.  
YORK COUNTY, SC  
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October 5, 2015

STATE OF SOUTH CAROLINA )  
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COUNTY OF YORK )  
 )  
Theotis E. Dunham, )  
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Appellant, )  
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vs. )  
 )  
City of Rock Hill, )  
 )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS


Case No.: 2015-CP-46-\_\_\_\_\_

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2015, I served, by placing in the United States Mail, postage prepaid, upon the person named below, at the address below, a Notice of Appeal, pertaining to the above-referenced matter.

Rock Hill Municipal Court  
120 East Black Street  
Rock Hill, SC 29730

Rock Hill City Solicitor  
201 E. Main Street  
3rd Floor  
Rock Hill, SC 29730

  
Kathy L. Carpenter  
Paralegal to James W. Boyd

Rock Hill, South Carolina  
October 6, 2015

State of South Carolina.,)  
                                  )  
                                  )  
County of York.                  )

In the Common Pleas  
Court of York

Case No.: 2015-CP-46-03059

Theotis E. Dunham.,)  
                                  )  
Plaintiff.,                  )  
                                  )  
-vs-                          )  
                                  )  
City of Rock Hill.,)  
                                  )  
Defendant.                  )  
\_\_\_\_\_)

Transcript of Record

February 16, 2016  
York, South Carolina

B E F O R E:

The Honorable John C. Hayes, III, Judge.

A P P E A R A N C E S:

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**ORIGINAL**

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P.O. Box 11706  
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803-329-8783  
For the Defendant

Wanda Nelson, CVR-M  
Official Court Reporter  
To the Honorable John C. Hayes, III

I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.

No witnesses were called.

Court Reporters' Certificate Page . . . . . P.12

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD.</u>
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No Exhibits were received into the record.

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1 (COURT IN SESSION TUESDAY, FEBRUARY 16 2016 AT 12:07  
2 PM.)

3 THE COURT: All right. The next matter is Dunham  
4 versus the city of Rock Hill.

5 Mr. Boyd, you represent Mr. Dunham?

6 MR. BOYD: I do, your Honor.

7 THE COURT: This is a Notice of Appeal by you and the  
8 issue appears to be a DUI case based on a checkpoint and  
9 you question whether or not the checkpoint was properly  
10 approved or extended into an unapproved - on an unapproved  
11 date, so I'll be glad to hear from you.

12 MR. BOYD: Yes, your Honor. Your Honor, it's a DUS  
13 and DUI case and there is one ground for appeal just  
14 particular to the DUI but the check point issue was - goes  
15 to both issues.

16 Your Honor, just to give a little background, I don't  
17 think at this point extending it to an unapproved date is  
18 important because my client was stopped during perhaps  
19 arguably an approved time but just to give some background  
20 of it.

21 Your Honor, the city of Rock Hill Police Department  
22 decided to conduct a checkpoint on September 18th, 2014.  
23 The checkpoint plan was approved by Major Parker with the  
24 police department for September 18th. That approval was  
25 attached. I think it is -- But on the return - Yes, it

1 was attached on Number 4, and I think a person attached 4,  
2 the location approved was US 21, East Main Street and it  
3 says Calvin Farm Road and it's struck through and it says  
4 Cowan Road. I think based on the testimony they meant  
5 Calvin Road so I don't think Cowan Road versus Calvin Farm  
6 Road is really important to the issues we have here. So in  
7 arguments I'll just state that Calvin Road location.

8 But a checkpoint was approved for Calvin Road for  
9 September 18th, 2014. No time however was listed for the  
10 checkpoint; that was left blank. Thereafter -- Well, in  
11 going back a little bit, they base the location on certain  
12 hot spots that were dealt and that's an attachment Four  
13 also. It's C at Exhibit 1(d). The Calvin Road location  
14 was not actually in any of the hot spots. But then  
15 thereafter the city they had a - call it a training session  
16 -- and the information about the checkpoints was put into  
17 that which is Attachment of 4 set at Exhibit 1(b), and they  
18 listed at that point the locations for the checkpoint as  
19 Elizabeth Flint Street and East White Street Wood Street;  
20 not the location that had been approved by Major Parker at  
21 the Calvin Road location.

22 So we have another document talking about checkpoints  
23 and approving areas for checkpoints of two other locations  
24 that is not the location that was originally approved by  
25 Major Parker. But then on the day in question my client

1 was stopped at a checkpoint at the location of Main Street  
2 and Albright Road. And you can see that, that was the  
3 location listed on the ticket and he was stopped at  
4 approximately 9:30 pm.; I think I said in my brief am by  
5 mistake but it was pm., and that location is not a location  
6 that was approved by Major Parker. It's not the Calvin  
7 Road location; neither is it a checkpoint that was in what  
8 I call the train briefing which was East White Street or  
9 Elizabeth Flint Street. So he's stopped outside of all the  
10 locations that conceivably been approved.

11 He - The testimony of Lieutenant Breeden was that  
12 Calvin Road is visible from that road block and it's about  
13 - between a fourth of a mile and a half of a mile away.  
14 And I don't think being visible from the location - the  
15 location that's approved being visible from the actual  
16 check point is - makes any difference. I mean I would  
17 assume probably if it's a clear night the moon is also  
18 visible and you can - so something being visible doesn't  
19 mean - doesn't approve that area for the road block.

20 They have - Of course the court's have set up  
21 guidelines concerning the constitutionality of road blocks.  
22 They have been approved; basically the court's have  
23 required generally a prior approval; supervisory personnel  
24 present, the use of a empirical data. And as State versus  
25 Victory said it does require some basis for the location

1 of the checkpoint. In this particular case the location  
2 chosen for the checkpoint - the actual checkpoint of which  
3 my client stopped is not the location that had been  
4 approved earlier. I think arguably the location that was  
5 originally approved there was no basis for it in the  
6 empirical data. But even - I don't think we even have to  
7 go to that extent because where he stopped it's not even a  
8 location that's been approved at all.

9 In addition to that, your Honor, the city did not  
10 present I believe adequate and empirical data to support  
11 procedures required by *State versus Victory*. The State  
12 presented in attachment Four Exhibit 1(c), a summary of the  
13 events and cases made that day between eleven o'clock and  
14 one am the following -- between three o'clock and one am  
15 the next morning.

16 None of that was in the - Well, that's the collection  
17 of all the stops that were made in this time. There was a  
18 saturation done at that time; had nothing -- not part of  
19 the checkpoints. It was a whole basically an enforcement  
20 day to do - make traffic stops. And that's all included in  
21 the summary. We don't have any data about this particular  
22 checkpoint or other checkpoints that they done or an  
23 ability to separate the two to know what came through  
24 where.

25 So, your Honor, and in just summary my position on the

1 checkpoint, the checkpoint location wasn't approved. The  
2 officers just for some reason decided to put it at the  
3 place my client was stopped and that's not sufficient and  
4 there is no emperical data to this; no empirical data to  
5 back up the effectiveness of this checkpoint as required by  
6 *State versus Victory*.

7 Your Honor, on the other issue on this appeal, and  
8 this just goes to the DUI, my client was not offered a  
9 breath test. The reasons he was not offered a breath test  
10 is that according to the record -- and we'll take the  
11 record as it is -- that he had -- his behavior was such  
12 that they put him in a restraint chair and didn't think  
13 they could give him a breath test. However, 56-5-2950  
14 requires -- I'm quoting "a breath test must be administered  
15 at the direction of a law enforcement officer who has  
16 arrested the person for driving a motor vehicle in the  
17 state while under the influence of alcohol, drugs, or a  
18 combination of alcohol or drugs."

19 I believe this statute makes it mandatory that a  
20 breath test be offered. And I think its important to know  
21 the breath test - the requirement to offer a breath test is  
22 not just for the benefit for the State to collect evidence,  
23 it's also an opportunity for the defendant to potentially  
24 prove his innocence by taking a breath test and that's why  
25 it's required that they be offered it. And it's undisputed

1 here that he was never offered the test.

2 Now Section 56-5-2950 list reasons a defendant may not  
3 be given a breath test; that it being physically unable,  
4 and they say it's an injured mouth, being unconscious,  
5 dead, or reasons considered acceptable by a licensed  
6 medical personnel. None of the exceptions are listed or  
7 the defendant's behavior. So I would submit that the  
8 defendant was denied the right to take a breath test and  
9 the DUI should be dismissed for that reason.

10 ~~However I don't think the Court -- it's necessary for~~  
11 the Court to reach the breath test issue because I think  
12 the road block issue -- the road block in this case is  
13 defective and the road block issue is dispositive of this  
14 appeal. Thank you.

15 THE COURT: All right.

16 MR. WEIL: Good afternoon, your Honor. Just a couple  
17 of points I want to make. I assumed they're gonna argue  
18 there was a three part test to this and obviously I  
19 disagree as to that if we met it or not. In particular it  
20 seems like the second issue is the one we're arguing over  
21 as to if this serves the public interest and perhaps it was  
22 adequate data to support it.

23 I will say that the officer who testified regarding  
24 the location of it did also include in his testimony some  
25 verbiage that in fact that the entire area was known as the

1 Calvin Road area and so Calvin Road appears in that initial  
2 document as the area where the checkpoint is taking place;  
3 that his testimony I think confirms that a general  
4 sentiment that this needs to - that this region is referred  
5 to as the Calvin Road area and it wasn't the intent to have  
6 it specifically take place on Calvin Road.

7 I do think though that -- I agree the data that was  
8 provided in the second exhibit that Mr. Boyd referred to  
9 was generic for that time period of the day. We also did  
10 offer testimony as I understand it that supported it that  
11 there was some efface to the actual stops that were taking  
12 place that day as well at those checkpoints.

13 Specifically as to the - as to the second issue that  
14 was raised in regards to his not being offered a breath  
15 test, certainly agree that that's the language of 56. It  
16 doesn't specifically say whether a refusal is however we do  
17 look to SLED's policies and procedures that they do offer  
18 some guidance on that. And they do say that when a subject  
19 refuses to cooperate or delays in the administration of the  
20 test that they have to be an example of a refusal. In this  
21 particular case the fact that he was so combatant --

22 THE COURT: That sounds like they talking about after  
23 he's been offered it.

24 MR. WEIL: But one could argue that it is impossible  
25 to argue - it's impossible to offer a test to someone when

1 they're being so combative. They weren't even able to get  
2 him into the room as I understand it. You have to take off  
3 the handcuffs in order to go into the BA room and they were  
4 unable to get the handcuffs off. Multiple officers  
5 attempted as was testified to. He was believed he had  
6 gotten himself onto the floor and refused to go anywhere.  
7 They couldn't actually even get him into the room to offer  
8 him so that he could refuse the test.

9 So, you know, at some point I would argue that there's  
10 a constructive refusal by virtue of the fact that he  
11 wouldn't be able to attend. One of the officers who  
12 testified that day said that in his twelve years of  
13 experience in that capacity he's only had to help secure  
14 one other person to a restraint chair in his time. So  
15 we're certainly talking about a novel situation here. This  
16 isn't something that has to happen very often with  
17 defendants.

18 THE COURT: All right. Anything?

19 MR. BOYD: Just briefly, your Honor. Concerning the  
20 whole area being the Calvin Road area, the location if you  
21 look through this is US 21 East Main Street and Calvin  
22 Road, so it's talking about a particular intersection  
23 location; not an entire an entire area for a checkpoint. I  
24 just point that out.

25 THE COURT: Well we'll take this under advisement.



THE STATE OF SOUTH CAROLINA  
In the South Carolina Court of Appeals

---

**APPEAL FROM YORK COUNTY**  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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Appeal Case No. 2016-000544

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The City of Rock Hill, ..... Respondent,

v.

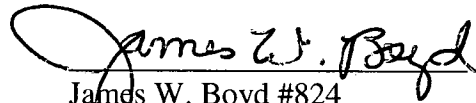
Theotis E. Dunham, ..... Appellant.

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CERTIFICATE OF COUNSEL

---

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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(803) 328-2600  
Attorney for Appellant

July 31, 2017.

**RECEIVED**

AUG 23 2017

SC Court of Appeals