STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 10 2018
S.C. SUPREME COURT

APPEAL FROM YORK COUNTY

John C. Hayes, III, Circuit Judge

Unpublished Opinion No. 2017-UP-391 (S.C. Ct. App. filed Oct. 18, 2017)

The State.....Respondent,

v.

Sean Robert Kelly..... Petitioner.

AMENDED APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Sean Robert Kelly, Respondent.

Appellate Case No. 2016-000875

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2017-UP-391
Submitted September 1, 2017 – Filed October 18, 2017

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General Susan Ranee Saunders, both of Columbia; and Solicitor Kevin Scott Brackett, of York, all for Appellant.

Heath Preston Taylor, of Taylor Law Firm, LLC, of West Columbia, for Respondent.

PER CURIAM: The State appeals an order of the circuit court affirming the magistrate's dismissal of Sean Robert Kelly's charge for driving under the influence (DUI), first offense. On appeal, the State argues the circuit court erred

by finding the State failed to comply with the mandatory video recording requirements of section 56-5-2953 of the South Carolina Code (Supp. 2016). We reverse and remand.[1]

We hold the circuit court erred by requiring the officer who stopped Kelly but did not arrest him to produce the video recording of the incident site. *See City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) ("[O]ur scope of review is limited to correcting the circuit court's order for errors of law."). Instead, we find the arresting officer was required to produce the video recording. *See State v. Landis*, 362 S.C. 97, 103-04, 606 S.E.2d 503, 506-07 (Ct. App. 2004) (holding the "arresting officer" is "responsible for meeting the statutory videotaping requirements of section 56-5-2953(A)"). We also find the arresting officer produced a video recording that fully complied with the statute because the recording began upon the activation of his blue lights and recorded the field sobriety tests, Kelly's arrest, and the *Miranda* warnings. *See* S.C. Code Ann. § 56-5-2953(A)(1)(a) (Supp. 2016). Accordingly, we reverse the circuit court and remand the case to the magistrate for a new trial.

REVERSED AND REMANDED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

John C. Hayes, Circuit Court Judge

Case No. 2015-CP-46-03747

Appellate Case No. 2016-000875

The State..... **Appellant,**

v.

Sean Robert Kelley..... **Respondent.**

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Respondent hereby respectfully petitions the Court for a rehearing of its opinion in this matter filed October 18, 2017. The Court reversed the decision of the lower court holding that the lower court erred by finding that the State failed to comply with the mandatory video requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2016).

In the opinion, the Court failed to address or acknowledge Respondent's argument concerning double jeopardy and whether the decisions of the lower courts were appealable. (Respondent's Final Brief, pp. 3 – 6). While reasonable minds may disagree as to the application S.C. Code Ann. § 56-5-2953 (Supp. 2016), there is no dispute that Respondent's case was called for

a bench trial, witnesses were sworn and a judgment of acquittal was rendered. Respondent respectfully requests that the Court address Argument I of his brief in light of well settled South Carolina jurisprudence holding that the State has no right of appeal from a directed verdict of not guilty. *State v. McWaters*, 246 S.C. 534, 144 S.E.2d 718 (1965); *State v. Ludlam*, 189 S.C. 69, 200 S.E. 361 (1938); *State v. Ivey*, 73, S.C. 282, 53 S.E. 428 (1906); *State v. Gathers*, 15 S.C. 370 (1881).

For the forgoing reasons, Respondent urges this Court to grant Respondent's Petition for Rehearing and reconsider the opinion issued in this case.

Respectfully Submitted,

TAYLOR LAW FIRM LLC

October 30, 2017

HEATH P. TAYLOR
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-46-03747

The State..... Appellant,

v.

Sean Robert Kelly..... Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by causing it to be mailed to its attorneys of record, Alan M. Wilson, Esquire and Ranee Saunders, Esquire, at their office, P.O. Box 11549 Columbia, SC 29211-1549 and Kevin S. Brackett, Esquire, 16th Circuit Solicitor's Office, 1675-IA York Highway, York, South Carolina 29745 on October 30, 2017.

October 30, 2017

Heath P. Taylor
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Attorney for Respondent

The South Carolina Court of Appeals

The State, Appellant,

v.

Sean Robert Kelly, Respondent.

Appellate Case No. 2016-000875

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Ranee Saunders, Esquire
Heath Preston Taylor, Esquire
Kevin Scott Brackett, Esquire

FILED
December 11, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No: 2016-000875

THE STATE

APPELLANT,

v.

SEAN ROBERT KELLY

RESPONDENT.

RECORD ON APPEAL

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Form S-439
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STATE OF SOUTH CAROLINA

UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF: York — VERSUS

FIRST NAME: Sean — MIDDLE NAME: R — LAST NAME: Kelly

STREET AND NO. — CITY — DOB

STATE LICENSED	DRIVER'S LICENSE NO.	CDL	DRI. LIC. CLASS
SC	442	☐ YES ☒ NO	D

VEH. LIC. NO.	STATE	MAKE OF VEH	YEAR	COMM VEL	AUTO	PSGR. VH.	COMB.
CYJ385	SC	Merc	02	HAZ. MT.	MOPED	MTRCYCL	OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT	STREET AND NO.	CITY	STATE	ZIP CODE
Judge B. Bennett	529 S Cherry	Rock Hill	SC	29732

DATE OF TRIAL	TIME OF TRIAL
11/8/2014	0900

VIOLATION - COURT APPEARANCE REQUIRED (YES) NO: DUI 1st

VIOLATION SECTION NO.: 56-5-2930

OWNER OF VEHICLE

ADDRESS OF OWNER

DATE OF ARREST: 9/11/2013

DATE OF VIOLATION: 9/11/2013

BAIL DEPOSITED: Jail

NAME OF ARRESTING OFFICER: Stayner — RANK: Dep

DESCRIPTION OF ACCUSED

RACE	SEX	BIRTH DATE	HT.	HAIR	WT.	EYES
W	M	11/7/19	601	Brn	228	Grn

COUNTY: York — NUMBER: 46

DATE BAIL REC'D. — BY

BADGE: 5990 — TROOP: 4

DOCKET NO.

DAY	S	M	T	W	T	F	S
	1	2	3	4	5	6	7

CASE BEFORE: MAGISTRATE ☒ MUNI COURT ☐ CIRCUIT COURT ☐ FAMILY COURT ☐ FEDERAL COURT ☐

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE

TIME OF VIOLATION: 1400 A.M.-1 P.M.-2 — WEATHER: Clr

DISTANCE IN FEET FROM INTERSECTION OF: W160 AND I77 N

DEFENDANT: DID NOT APPEAR ☐ APPEARED ☐

DISPOSITION

NOLLE PROSSED ☐ GUILTY ☐

FORFEITED BOND ☐ PLEO: NOLO CONTENDERE ☐

MILES — N 1 E 2 S 3 W 4

HWY NO. — CITY: Fm

TRIAL BY: TRIAL JUDGE ☐ JURY ☐

VERDICT OF TRIAL IF ANY: GUILTY ☐ NOT GUILTY ☐ — DATE OF TRIAL IF ANY

Lat ° ' "

Long ° ' "

JAIL	SUSPEND	FINE	AMT. COLLECTED	AMT. SUSPENDED

COMMITTED TO:

Vehicle Searched

Arrest as Result of Collision: N

OFFENSE CODE: 99 — B.A. LEVEL: Refused

CERTIFIED CORRECT — DATE

68360 GM

DRIVER'S RECORD COPY

1

Form S-430
Rev. 9/10

STATE OF SOUTH CAROLINA

UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF York — VERSUS

FIRST NAME: Sean — MIDDLE NAME: R — LAST NAME: Kelly

STREET AND NO. — ZIP CODE

STATE LICENSED: SC — DRIVER'S LICENSE NO.: 16 — CDL: ☐ YES ☒ NO — DRI. LIC. CLASS.

VEH. LIC. NO.: CY1386 — STATE: SC — MAKE OF VEH: Merc — YEAR: 02 — COMM. VEH. — AUTO — PASSR. VEH. — COMB. — HAZ. MT. — MOPED — MTRCYCL. — OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT: Wood — STREET AND NO.: 114 Springs St

DATE OF TRIAL: 12/29/2013 — TIME OF TRIAL: 1400 — CITY: Fort Mill — STATE: SC — ZIP CODE: 29715

VIOLATION - COURT APPEARANCE REQUIRED: YES NO

VIOLATION: Violation ABC Law — VIOLATION SECTION NO.: 61-6-4020

OWNER OF VEHICLE: Same — DATE OF ARREST: 9/11/2013

ADDRESS OF OWNER: Same — DATE OF VIOLATION: 9/11/2013

BAIL DEPOSITED: Jail — NAME OF ARRESTING OFFICER: Stasko — RANK: Dep

DESCRIPTION OF ACCUSED: RACE: W — SEX: M — BIRTH DATE: 6/4/19 — HT.: 601 — HAIR: Red — WT.: 170 — EYES: Brn

COUNTY: York — NUMBER: 46

DATE BAIL RECD. — BY — BADGE: 595 — TROOP: 4

DAY: S 1 | M 2 | T 3 | W 4 | T 5 | F 6 | S 7 — DOCKET NO.

CASE BEFORE: MAGISTRATE ☒ MUN. COURT ☐ CIRCUIT COURT ☐ FAMILY COURT ☐ FEDERAL COURT ☐

TIME OF VIOLATION: 1605 — A.M.-1 P.M.-2 — WEATHER: Cl

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE

DISTANCE IN FEET FROM INTERSECTION OF: W 160 AND I 77 N

DEFENDANT: DID NOT APPEAR ☐ APPEARED ☐

DISPOSITION: NOLLE PROSSED ☐ FORFEITED BOND ☐ GUILTY ☐ PLED: NOLO CONTENDERE ☐

MILES: 1 — N 1 | E 2 | S 3 | W 4

HWY NO.: 1 — CITY: Fm

TRIAL BY: TRIAL JUDGE ☐ JURY ☐

VERDICT OF TRIAL IF ANY: GUILTY ☐ NOT GUILTY ☐ — DATE OF TRIAL IF ANY

Lat: ° ′ ″

Long: ° ′ ″

JAIL	SUSPEND	FINE	AMT. COLLECTED	AMT. SUSPENDED

COMMITTED TO: — Vehicle Searched — Arrest as Result of Collision: N

OFFENSE CODE: 94 — B.A. LEVEL: /

CERTIFIED CORRECT — DATE

68361 GM

DRIVER'S RECORD COPY

2

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE MAGISTRATE'S COURT

RETURN TO NOTICE OF APPEAL

CASE NUMBER: 2015-CP-46-03747

STATE,

VS.

DEFENDANT,

Sean Kelly
Ticket: 68360GM
Charge: Driving Under the Influence, 1st offense

The above action came before the Court on September 17, 2015 at 10:00am as a bench trial. Assistant Solicitor Bill Mckinnon was the prosecutor for the State and Kevin Tolsen and Deputy Stagner were witnesses for the State. The defendant was represented by Attorney Michael Brown.

On September 11, 2013, the defendant was stopped on I-77 by Investigator Tolsen with the 16th Solicitor's office. The initial stop was accomplished by the use of emergency blue lights. Following the initial traffic stop, Deputy Stagner arrived on the scene. Tolsen's car had no video recording equipment. Stagner initiated a DUI investigation and subsequently arrested the defendant for DUI and transported him to the Moss Justice Center in York, SC. After all testimony and evidence had been presented and after the State rested, the defendant made a motion for a directed verdict of not guilty. After some discussion, it was agreed by all parties to delay a ruling to a later date. The next date for all parties was on November 25, 2015 in my office at which time motion to dismiss was granted.

In this case, the important statutory provision is 56-05-2953 (A). "The video recording at the incident site must: (i) not begin later than the activation of the officer's blue lights." This case involves a

traffic stop accomplished with the activation of blue lights, however, we have no incident site video that complies with this mandatory provision.

The State has argued that the non-compliance should be excused under the exceptions found in 56-5-2953(B). However, this court finds that argument is without merit, where none of the exceptions apply to the facts of this case.

The video provided by Deputy Stagner does not satisfy 56-5-2953(A), where the video begins recording only after the traffic stop has been entirely completed. The statute unambiguously establishes a point in time when the video recording must begin, stating "The video recording at the incident site must: (i) not begin later than the activation of the officer's blue lights." 56-5-2953 (A)(1)(a)(i).

Here, the officer's blue lights, refers to Tolsen, the officer whose blue lights were activated in effecting the traffic stop. The only video produced by the state, fails to begin recording at the statutorily required time, violating the clear mandate provided by 56-5-2953 (A).

Moreover, none of the exceptions from 56-5-2953 (B) apply in this case. There are no facts indicating: 1) the video equipment was inoperable, or 2) that it was impossible to produce the videotape because the defendant either needed emergency medical treatment or exigent circumstances existed. 56-5-2953(B) further states, "In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrest, where an arrest has been made and the video recording equipment has not been activated by blue lights."

At first glance it may seem the Stagner video implicates this section, "where an arrest has been made and the video recording equipment has not been activated by blue lights," This argument would defeat the clear legislative intent found in the other mandatory provisions of the statue. "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." State v. Henkel (S.C., 2015).

Rather, this exception concerns situations that do not involve the normal traffic stop, which is accomplished by blue lights. This exception recognizes, there are certain times, where it is not practical for the video to begin upon activation of blue lights. Unlike the subsection (B) scenarios, this case clearly involves a blue light traffic stop, and accordingly must comply with mandatory requirement of 56-5-2953(A)(1)(a)(i). Any attempt to excuse their noncompliance through would defeat the overall intent of the statue , and subsection (A) would be rendered meaningless.

Here, the state has failed to produce a video in compliance with Section 56-5-2953 (A), and none of the exceptions of Section 56-5-2953(B) apply. Strictly construing the requirements of this statue and applying the clear case law of this state, the court must dismiss this prosecution for an alleged violation of Section 56-5-2930.

Please find enclosed all evidence, including the audio of the trial.

If I can be of any further assistance, please do not hesitate to call.

CLAYBURN BARNETTE, JR.
MAGISTRATE
YORK COUNTY CENTRALIZED DUI COURT

December 7, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
STATE OF SOUTH CAROLINA)
Appellant ~~Plaintiff(s)~~)
vs.)
SEAN KELLY)
Respondent ~~Defendant(s)~~)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 -CP- 46 -

Submitted By: Aaron J. Hayes and William A. McKinnon SC Bar #: Hayes: 100114 McKinnon: 69463
Address: 1070 Heckle Boulevard, Suite 207 Telephone #: (803) 909 7582
Rock Hill, SC 29732 Fax #: (803) 909 7577
Other:
E-mail: aaron.hayes@yorkcountygov.com

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)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ 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
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
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- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
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- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
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- ☐ Judicial Review (810)
- ☐ Relief (820)
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- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
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- ☐ Confession of Judgment (770)
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- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
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- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** 12/1/15

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

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. ~~Post-Conviction~~ relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

KEVIN S. BRACKETT
SOLICITOR

December 1, 2015

VIA INTER-DEPARTMENTAL DELIVERY
Hon. David Hamilton, Clerk of Court
York County Court of Common Pleas
300 W. Liberty Street
York, South Carolina 29745

VIA INTER-DEPARTMENTAL DELIVERY
Hon. Clayburn S. Barnette, Jr., Magistrate
York County Centralized DUI Court
529 S. Cherry Road
Rock Hill, South Carolina 29730

Re: *State v. Sean Kelly*, Case No. 2015-CP-46-_____, Former Ticket No. 68360GM

Dear Mr. Hamilton and Judge Barnette:

Please find enclosed an original and one copy of the Notice of Appeal and Proof of Service in the above-referenced matter. Please file these items in accordance with your normal procedures, and return a clocked copy to me in the enclosed self-addressed inter-departmental delivery envelope.

Since this Appeal is being pursued by the State of South Carolina, I am informed that no filing fee is necessary. As always, please do not hesitate to contact me at (803) 909-7582, should you have any questions or concerns.

Sincerely,

Aaron J. Hayes
Assistant Solicitor

enclosures as stated

cc: Michael L. Brown, Jr., Esquire *(via US Mail)*

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK	)	**SIXTEENTH JUDICIAL CIRCUIT**
State of South Carolina,	)	Case No. 2015-CP-46-_____
Appellant,	)	Former Ticket No. 68360GM
v.	)	
Sean Kelly,	)	**NOTICE OF APPEAL**
Respondent.	)	

TO: THE HONORABLE CLAYBURN S. BARNETTE, JR., YORK COUNTY MAGISTRATE, and MICHAEL LANGFORD BROWN, JR., ESQUIRE, ATTORNEY FOR THE RESPONDENT, and TO THE RESPONDENT ABOVE-NAMED:

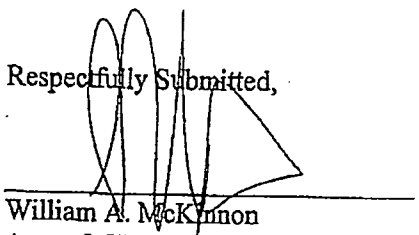
THE STATE OF SOUTH CAROLINA in the Sixteenth Judicial Circuit, by and through Assistant Solicitor William A. McKinnon, hereby appeals, to the Court of Common Pleas for York County, the ruling of York County Centralized DUI Court Magistrate Clayburn Barnette dismissing the Driving Under the Influence charge (Ticket No. 68360GM) against Sean Kelly ("Respondent"). Respondent is represented by Michael L. Brown, Jr., Esquire. The ruling was made by Judge Barnette on November 25, 2015.

This appeal is made on the following grounds:

1. The Magistrate erred in dismissing the above-referenced charge for an alleged violation of S.C. CODE ANN. § 56-5-2953. Pursuant to State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004), only the arresting officer, Deputy John Stagner, was required to produce a video in compliance with S.C. CODE ANN. § 56-5-2953. Further, Investigator Tolson was not required to produce such a video, nor was he required to have a video camera in his car at the time he initiated a traffic stop on Respondent. See S.C. CODE ANN. § 56-5-2953(B), (G). Therefore the Magistrate's order of dismissal should be reversed and this case remanded for further proceedings.

Signature Block on Following Page.

Respectfully Submitted,



William A. McKinnon
Aaron J. Hayes
Assistant Solicitors, Sixteenth Judicial Circuit
1070 Heckle Boulevard, Ste. 207
Rock Hill, SC 29732
(803) 909-7566

Rock Hill, South Carolina

December 1, 2015

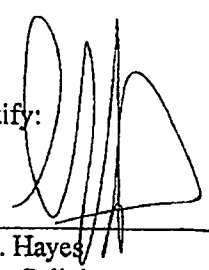
STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK	)	**SIXTEENTH JUDICIAL CIRCUIT**
State of South Carolina,	)	Case No. 2015-CP-46-_____
Appellant,	)	Former Ticket No. 68360GM
v.	)	
Sean Kelly,	)	**CERTIFICATE OF SERVICE**
Respondent.	)	

I hereby certify that I have served upon the Magistrate and the Respondent's Counsel of Record a copy of the foregoing Notice of Appeal to their addresses of record:

VIA INTER-DEPARTMENTAL DELIVERY:
Hon. Clayburn S. Barnette, Jr.
529 S. Cherry Road
Rock Hill, SC 29730
(803) 909-7605
York County Magistrate

VIA US MAIL:
Michael L. Brown, Jr., Esquire
P.O. Box 1025
Rock Hill, SC 29731
(803) 328-8822
Attorney for Respondent

I so certify:



Aaron J. Hayes
Assistant Solicitor

Date: 12-1-15

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
State of South Carolina,	)	Case No. 2015-CP-46-03747
Appellant,	)	Former Ticket No. 68360GM
v.	)	MEMORANDUM IN SUPPORT OF APPEAL
Sean Kelly,	)	
Respondent.	)	

COMES NOW THE STATE OF SOUTH CAROLINA, by and through the undersigned Assistant Solicitor, who respectfully requests that the Court grant the appeal, reverse the decision below dismissing this charge of Driving Under the Influence, and remand the matter for trial.

PROCEDRUAL HISTORY

This case originates from the York County Magistrate's Centralized DUI Court, via former Ticket No. 68360GM alleging Driving Under the Influence, First Offense ("DUI"). During a bench trial held on September 17, 2015 and December 10, 2015, Respondent (as the Defendant below) moved to dismiss the charge. The motion to dismiss was granted on the grounds the state "failed to produce a video in compliance with Section 56-5-2953(A),"[1] because the officer who performed the initial traffic stop was not driving a vehicle equipped with a camera.

FACTS BEARING UPON THE APPEAL

The initial traffic stop on Defendant-Respondent Kelly on September 11, 2013, was performed by Kevin Tolson, a sworn law enforcement officer who was employed as an investigator with the Sixteenth Circuit Solicitor's Office at the time the events in this matter

[1] Return to Notice of Appeal at 3.

occurred. Investigator Tolson testified that he received a radio report of a probable impaired driver on I-77. Realizing he was very close to the reported location, Investigator Tolson testified that he located the vehicle and observed it crossing the fog line and driving in a manner which was unsafe. He therefore initiated a traffic stop using in his unmarked vehicle, a vehicle which is not equipped with a dashboard camera.

Investigator Tolson testified that shortly after the traffic stop, and while he was still waiting at the car window for Mr. Kelly, Deputy Stagner arrived on the scene in his marked patrol car which was equipped with an operating camera.[2] Deputy Stagner then testified that Mr. Kelly admitted to Deputy Stagner that he had consumed "a lot" of alcohol, had bloodshot eyes, and slurred speech. Deputy Stagner further testified that Mr. Kelly was so intoxicated he could not stand without assistance. Deputy Stagner attempted field sobriety tests, but Mr. Kelly was too intoxicated to perform them and began refusing to try. He was arrested by Deputy Stagner for DUI, First Offense, and transported by Deputy Stagner to the Fort Mill Police Department in Deputy Stagner's vehicle. A search of Mr. Kelly's vehicle revealed an open bottle of Canadian Mist liquor and a cup with a dark liquid which smelled of alcohol. Mr. Kelly refused to blow into the Datamaster BAC machine.

Particularly relevant to this appeal, Investigator Tolson testified he was not a traffic enforcement officer, was never assigned to traffic enforcement duties, and that his unmarked Solicitor's Office Vehicle was therefore not "used for traffic enforcement."

At trial, Appellant moved to dismiss based the lack of a video recording of the entire traffic stop. The Trial Court granted the motion, finding S.C. Code § 56-5-2953(A) was violated because Deputy Stagner's video began "later than the activation of the officer's blue lights." In other

[2] Deputy Stagner's dashboard camera video recording of this incident, as well as a disc of the audio record of the trial, should have been including in the Magistrate's Return to this Appeal. Should the Court request, the State is able to provide additional copies of the dashboard camera video.

words, the charge was dismissed because the incident video began when Deputy Stager arrived at the scene, rather than when Investigator Tolson performed the traffic stop. This appeal followed.

STANDARD OF REVIEW

"In criminal appeals from the magistrate court, the circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them . . . but [q]uestions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below." *State v. Taylor*, 411 S.C. 294, 300, 768 S.E.2d 71, 74 (Ct. App. 2014) (internal citations and quotations omitted). As this appeal concerns the proper interpretation of S.C. Code Ann. § 56-5-2953, the appeal is *de novo*.

APPLICABLE LAW

The DUI video recording statute, § 56-5-2953 of the SOUTH CAROLINA CODE OF LAWS, provides, in pertinent parts:

> *(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.*
>
> *(1)(a) The video recording at the incident site must:*
>
> *(i) not begin later than the activation of the officer's blue lights;*
> *(ii) include any field sobriety tests administered; and*
> *(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.*
>
> ...
>
> *(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945...*
>
> ...

(G) The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device.

APPLICATION

Two different provisions of S.C. Code Ann. § 56-5-2953 require reversal of the Magistrate Judge in this matter. First, Investigator Tolson was not the arresting officer, and therefore he was not required to produce a dashcam video. Second, even if Investigator Tolson was considered the arresting officer (which he was not), his vehicle was not "used for traffic enforcement" and therefore the statutory exception applies.

THERE IS NO VIOLATION OF § 56-5-2953 IN THIS CASE BECAUSE DEPUTY STAGNER, NOT INVESTIGATOR TOLSON, WAS THE ARRESTING OFFICER

The plain language of S.C. Code Ann. § 56-5-2953 provides that its provisions only apply to "arresting officer[s]." "Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation . . . Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made . . . . S.C. Code Ann. § 56-5-2953(B) (emphasis added). The Court of Appeals has held that this language means exactly what it says: only the arresting officer must comply with the DUI video statute. "Trooper Davis conducted the field sobriety test, determined Landis was impaired, and placed him under arrest for DUI. Trooper Davis was the arresting officer responsible for meeting the statutory videotaping requirements of section 56–5–2953(A)." *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004).

Both Investigator Tolson and Deputy Stagner testified that it was Deputy Stagner who arrested Mr. Kelly. Just as in the *Landis* case, here Deputy Stagner was the officer who "conducted

the field sobriety test, determined [Kelly] was impaired, and placed him under arrest for DUI." It is not necessary for other officers, like Investigator Tolson, to provide videos.

Because Investigator Tolson testified he was not the arresting officer, it was error for the Trial Court to require him to produce a video, and this matter should be remanded for trial.

BECAUSE INVESTIGATOR TOLSON'S VEHICLE IS NOT "USED FOR TRAFFIC ENFORCEMENT," THE STATUORY EXEPTION IN § 56-5-2953(G) APPLIES

Even if, contrary to the clear holding of *Landis*, Investigator Tolson is found to be the "arresting officer," reversal is still appropriate because of the exception in S.C. Code Ann. § 56-5-2953(G).

By its plain language, the entire video recording statutory scheme only applies to police vehicles "used for traffic enforcement," not all police vehicles. "The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device." S.C. Code Ann. § 56-5-2953(G) (emphasis added).

Investigator Tolson testified that all of his duties were investigating crimes for the Solicitor's Office, and that he was never assigned to traffic enforcement duty, and that his vehicle was not "used for traffic enforcement." Opposing counsel argued that on the day of the arrest, Investigator Tolson must have been performing traffic enforcement duty because he performed a traffic stop. This interpretation is absurd, and robs § 56-5-2953(G) of any meaning. It is important to note that S.C. Code Ann. § 56-5-2953 applies only to DUI, DUAC, and Felony DUI arrests. Therefore every case under § 56-5-2953 will be a "traffic stop" since the offense is operating a vehicle under the influence and thus every single law enforcement vehicle must have a camera. That is an absurd result, and this interpretation must be rejected. "We will reject a statutory

interpretation that leads to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *New York Times Co. v. Spartanburg Cty. Sch. Dist. No. 7*, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007). More specifically, "we should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." *Hinton v. S. Carolina Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). For the § 56-5-2953(G) exception to actually mean something, it must mean traffic stops performed in a vehicle not normally or not routinely used in traffic enforcement are excused from the video requirement.

Investigator Tolson was not a traffic enforcement officer, and his vehicle was not a traffic enforcement vehicle. He is therefore exempt from the video requirement under S.C. Code Ann. § 56-5-2953(G).

CONCLUSION

Investigator Tolson was not required to produce a video of the traffic stop because he was not the arresting officer, pursuant to State v. Landis, and because his vehicle was not "used for traffic enforcement." For the foregoing reasons, the State respectfully requests that the Court grant instant appeal and remand for trial.

Respectfully Submitted,

William A. McKinnon
Assistant Solicitor
16th Judicial Circuit
1070 Heckle Boulevard, Ste. 207
Rock Hill, SC 29732
(803) 909-7566

Rock Hill, South Carolina

March 18, 2016

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

In the Court of Common Pleas for York

Case No.: 2015-CP-46-03747

State of South Carolina.,
Appellant.,
-vs-
Sean Robert Kelly.,
Respondent.

Transcript of Record

March 23, 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:

Ms. William McKinnon
Assistant Solicitor
Sixteenth Judicial Circuit
1070 Heckle Boulevard, Ste., 207
Rock Hill, South Carolina 29732
For the Appellant

ORIGINAL

Ms. Michael L. Brown, Junior, Esquire
P.O. Box 1025
Rock Hill, South Carolina 29730
For the Respondent

Wanda S. Nelson, CVR-M
Official Court Reporter
Sixteenth Circuit, York and Union
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.

I N D E X - CONTINUED

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.

No Exhibits were received into the record.

(COURT IN SESSION/ON THE RECORD IN THE MATTER OF STATE OF SOUTH CAROLINA VERSUS SEAN ROBERT KELLY, WEDNESDAY, MARCH 23, 2016 AT 10:20 AM.)

THE COURT: All right. The next one is not set until ten thirty I believe ten thirty and that's South Carolina versus Kelly. Mr. McKinnon is present and then Michael Brown is on the other side. So we'll be at ease until ten thirty.

(COURT AT EASE AT 10:22 AM.)

(COURT BACK IN SESSION AT 10:25 AM.)

THE COURT: Take your seats. Thank you.

The next matter is the State of South Carolina versus Sean Kelly; a DUI appeal from Magistrate Clayburn Barnette.

MR. MCKINNON: Thank you, your Honor, good morning.

THE COURT: Good morning.

MR. MCKINNON: Bill McKinnon on behalf of the State, your Honor. Your Honor, this is a case involving a traffic stop by Kevin Tolson who at the time was an investigator with the York County Sheriff's - with the York County Solicitor's Office.

On September 11th, 2013 Mr. Tolson had a radio report of an intox - probable intoxicated driver on I-77 and he realized he was very very close to the reported location; he located the car, it was swerving and it was driving in a dangerous manner and he initiated a traffic stop.

MR. BROWN: Your Honor, I'm gonna object to his rendition of the facts. The video speaks for itself and the transcript speaks for itself. He's taking liberty with the facts ---

MR. MCKINNON: You know I'm ---

MR. BROWN: --- here. It's outside the context of the --

MR. MCKINNON: Mr. Brown, I'm not taking any liberties at all and you know that.

MR. BROWN: I disagree, your Honor.

MR. MCKINNON: In fact --

MR. BROWN: I totally disagree, your Honor.

THE COURT: Whoa, whoa, whoa. We're lawyers, we'll do this civilly. I'm hearing this without a jury, of course, this is an appeal.

MR. MCKINNON: Your Honor, --

THE COURT: I'll listen to his rendition and if there's anything you can add that I do not find in there I'll weed it out ---

MR. BROWN: Yes, sir.

MR. MCKINNON: I'll do my best.

THE COURT: --- I'll listen to your response so you may proceed.

MR. MCKINNON: Thank you, your Honor, I'll do my best to summarize the facts and if I speak to anything wrong I'm

sure Mr. Brown will correct me.

But Mr. Tolson initiated a traffic stop, your Honor. His vehicle --

(DISTRACTION FROM CONSTRUCTION WORK ON COURTHOUSE ROOF.)

THE COURT: They're working on the roof so hopefully they'll stay up there. I can't promise.

MR. MCKINNON: Mr. Tolson's investigative vehicle, your Honor, is not equipped with a camera. Deputy Stagner from York County Sheriff's Office arrived very shortly after the stop. At the time Deputy Stagner arrived Mr. Tolson is still standing at the driver's window waiting for the license. Deputy Stagner testified that Mr. Kelly had blood-shot eyes. He consumed - Said he consumed a lot of alcohol. He had a slurred speech and then he was so intoxicated that they did not feel like field sobriety test were safe. He was placed under arrest by Deputy Stagner for DUI; transported to the Fort Mill Police Department for field sobriety - for a DATA Master test which he refused.

Your Honor, the basic issue in the appeal is, does the fact that the traffic stop performed by Investigator Tolson, without a camera on the vehicle, does that mean this case had to be thrown out? It was dismissed by Judge Barnett on that basis, your Honor. And I believe there are two statutory basis why Judge Barnett should be reversed.

The first one, your Honor, is *State v. Landis*, it's a Court of Appeals case which says very clearly that only the arresting officer must produce a video of --

MADAM COURT REPORTER: I'm sorry, I'm sorry. I'm sorry, could you repeat that please? Reversed on appeal.

MR. MCKINNON: Yes, ma'am.

Your Honor, Court of Appeals case *State versus Landis*. Your Honor, in *State versus Landis* holds that only the arresting officer must produce a video under 2953. In this case Deputy Stagner who had the video was the arresting officer, your Honor. His video covers everything that happened in the case except for the very initial traffic stop by Investigator Tolson.

That's one independent basis for reversal, your Honor, is that Investigator Tolson does not have to produce a video under the statute.

The second basis, your Honor, is 2953(G) which is an exception to the DUI recording statute. That provides that law enforcement vehicles which are not used for traffic enforcement do not have to have video so that means it does not even apply to traffic stops by law enforcement vehicles that are not used for traffic enforcement. And that is, Investigator Tolson is the perfect example of that sort of case, your Honor.

He testified at the trial he does not do traffic

enforcement; he has never assigned to traffic enforcement; his vehicle is never used for traffic enforcement. He performed this stop because it was an unsafe driver and, your Honor, it fits squarely in the 2953(G) exception.

Investigator Tolson is not a patrol officer, his vehicle does not have to be equipped with a camera because he does not perform traffic enforcement duties; his vehicle is not used for traffic enforcement, your Honor.

So for both of those reasons, your Honor, the State earned it's reversal.

THE COURT: All right. Mr. Brown.

MR. BROWN: Your Honor, I submit the facts are uncontradicted in this case and the record will reveal this. Officer Tolson executed a stop with a blue light on this defendant. Approximately five minutes later Deputy Stagner shows up. Pursuant to 56-5-2953(A) "A person who violates Section 56-5-2930; 2933 or 2945 must have his conduct at the incident site" . . . "and breath test site video recorded. The video recording of the incident site must: not begin later than the activation of blue lights." That clearly was not done in this case; that's uncontradicted.

So the question becomes under Subsection B of the statute do exceptions apply. I want to emphasize to this Court the State produced no affidavit listing any of the

exceptions of Officer Tolson's vehicle which they could have done. And I'm sure the Court's well familiar with the State's form that says my vehicle has not been equipped with a video camera yet. This was not done in this case. The State has not complied with Subsection B in this statute so, therefore, they're standing on the merits of this fact that he does not have a camera in his vehicle.

The State's reliance on *State v. Landis* is misplaced, your Honor. A quick review of that case will show that in that particular matter Officer Davis of the South Carolina Highway Patrol in Spartanburg County, and a state transportation officer, stopped a vehicle at the same time. Both cars arrived; the Officer Davis the arresting officer in this case also saw the person driving, saw the bad driving, and stopped him in *Landis*. He also did not produce a video tape but it's a complete different set of facts.

In that case the Supreme Court of Appeals correctly found in my opinion that his video camera was inoperable at that time and reasonable efforts have been made to maintain it in operable condition so *Landis* is not applicable here, your Honor.

The question becomes they've not complied with the statute. What's the remedy? And I would like to hand this up.

I gave you a copy didn't I? Do you need another copy?

MR. MCKINNON: Do you mean at trial?

MR. BROWN: No. *Town of Mount Pleasant versus Roberts.*

MR. MCKINNON: No, I don't need a copy.

(DOCUMENTS RECEIVED UP BY THE COURT.)

MR. BROWN: I beg the Court's indulgence one second.

On page 7, and I think the Court's familiar with *Town of Mount Pleasant v. Roberts - Town of Mount Pleasant* just decided they weren't going to equip video cameras in their cars at all because they weren't gonna pay for them despite the legislatures mandate that these cars be equipped with video cameras.

On page 7, paragraph 3, "Up until this point our appellate courts have affirmly answered the question when a law enforcement agency inexcusably failed to video tape the DUI arrest with an existing video camera. In the incident case the town failed to create a video tape of Robert's DUI arrest because the patrol vehicle had never been equipped with a video camera."

On page 8 of that opinion the court goes on to say, "Our courts however have not analyzed whether these exceptions apply with a law enforcement vehicle that's never been equipped with a video camera in the incident case. Taking into consideration the purposes of Sections

56-5-2953 which is to create direct evidence of a DUI arrest we find the town's protracted failure to equip it's patrol vehicles with video cameras despite it's priority ranking defeats the intent of the legislature and violates the statutory created obligation to video tape DUI arrest.

Accordingly we do not believe the town should be able to continually evade it's duty to allow in Subsection G thus we hold the town's failure to equip it's patrol vehicles does not negate the application of a statutory exception of Subsection B."

And to emphasize the point on Page 9 of that opinion the court goes on to state, "Further more it is instructive that the legislature has not mandated video taping in any other criminal context. Despite the potential significance of video taping of oral confessions the legislature is not required the state to do so. By requiring the law enforcement agency to video tape a DUI arrest the legislature clearly intended strict compliance with the provisions of Section 46-5-2953 and in turn promptly gave us the severe act sanction for non-compliance."

They haven't complied, your Honor. They have not submitted an affidavit which the statute requires pursuant to Subsection B. The State would like you to buy an argument that this is only applicable for what they deem to be a vehicle that's used for traffic enforcement.

My counter argument is, your Honor, --

THE COURT: Well doesn't -- I hate to kind of interrupt, but doesn't the *Roberts* case talk about quote patrol vehicle? Patrol vehicles on the page 8 that you pointed to. I mean it specifically talks about patrol vehicles and the town's failure to equip patrol vehicles.

MR. BROWN: That's correct, your Honor.

THE COURT: So is that the distinction between law enforcement officers and not patrol officers?

MR. BROWN: No, sir, your Honor. I take the position the statute's clear and unambiguous on this point. Any vehicle and the plain words in reading the statute take effect for each law enforcement vehicle used for traffic law enforcement. When they turn the blue light on to stop somebody they chose to use that vehicle for traffic law enforcement. By the State's own admission they were looking for suspected DUI. They knew it was gonna be a DUI case. You can imply that the State knew the statutory requirements of 56-5-2953 and chose not to do it.

I really believe the non-compliance comes in. They didn't even submit an affidavit saying it hadn't been equipped. If they had fulfilled the exceptions to Subsection B I think my argument would a lot weaker but the State chose not to do that; therefore, no exceptions are listed therefore the statutory schemes have been violated

and under the *City of Rock Hill versus Suchenski* the remedy is dismissal.

I also would like to add, your Honor, the State did not appeal the additional sustaining ground to this matter; that there is no affidavit; there's no audio at the start of Deputy Stagner's video either. And the only field sobriety test given is one test. So, HGN test and that's blocked by the officer's head. You can't even see the defendant's face. And I would raise those additional sustaining grounds to uphold Judge Barnett's ruling.

THE COURT: Did you file a document indicating you were raising those as additional sustaining grounds?

MR. BROWN: I didn't file the appeal, your Honor.

THE COURT: I know but did you file any - Okay. I hear your argument but it just wasn't ruled on so ---

MR. BROWN: Yes, sir.

THE COURT: -- it's really not before me.

MR. BROWN: I'm just throwing it to the court for additional sustaining grounds for what it's worth.

THE COURT: Okay.

MR. MCKINNON: Your Honor, very briefly. No affidavit is required, your Honor. Section B provides for an affidavit of exigent circumstances like the camera is broken or there is a medical emergency or something like that. That's not what we're arguing, your Honor. We're

arguing Subsection G. And as your Honor pointed out that this *Town of Mount Pleasant* does not apply. Provision G -- every traffic - every incident under the statute, your Honor, is a traffic stop so the exception in G must mean what the legislature intended for there to be a class of police vehicles that did not have to comply with the statute.

THE COURT: That's those not used for traffic enforcement?

MR. MCKINNON: Exactly, your Honor. And Investigator Tolson testified --

THE COURT: Why would somebody have a blue light if they weren't intending to stop people on the highway?

MR. MCKINNON: In case of exigent circumstances or emergencies like this, your Honor. Or, when he's pulling up and there is someone in front of someone's house, your Honor, if he's chasing someone in pursuit, but obviously every stop under this statute is gonna be a traffic stop. It's a DUI statute. So the legislature could have said if you're gonna stop people for DUI you must have a camera. They didn't say that. They said in the DUI statute, where every incident will be a traffic stop, they said there is a class of vehicles which don't have to have cameras. And that's vehicles that are not used for traffic enforcement and that's Investigator Tolson, your Honor.

THE COURT: Did Investigator Tolson testify?

MR. MCKINNON: He did, your Honor. He testified he's never assigned to traffic enforcement duties. He does not perform traffic enforcement; his vehicle is not used for traffic enforcement. His sole duties are investigating cases for the Solicitor's office.

THE COURT: Did you ask why he had a blue light if that was the case?

MR. MCKINNON: Not that I recall, your Honor.

And again, your Honor, there's an additional sustaining ground, you know, additional grounds for reversal under *Landis*. *Landis* said only the arresting officer must produce a video. Deputy Stagner was the arresting officer; his video covers everything, there's everything the statute requires except it wasn't activated upon Officer Tolson's blue lights. And Landis says that only Stagner must produce the video.

And Subsection B says in circumstances where the officer arrives after the incident it's okay. That's Stagner; he's got to produce the video, he arrives. It says in circumstances including but not limited to road blocks, traffic accidents, citizen's arrest. Those are situations where the incident's already started, your Honor. Just like here Deputy Stagner arrives; as soon as he arrives his camera is activated. The fact that it

wasn't activated upon his blue light - I mean activated by Investigator Tolson does not matter because Tolson's not the arresting officer, your Honor.

Every element, that attempted the field sobriety test, the *Miranda*, everything the statute requires is on camera, your Honor. Thank you.

MR. BROWN: Just very briefly. By their own argument that makes me correct. They claim exigent circumstances but submitted no affidavit. The statute - Its not complicated. If they want to claim exigent circumstances in Subsection B submit the affidavit. Hey, we've got somebody here driving bad possible DUI I'm gonna stop 'em. These are exigent circumstances. They chose not to do that in the prosecution of Mr. Kelly. The statutory scheme fails.

THE COURT: All right. Well I'll take a look at it.

MR. MCKINNON: Thank you, your Honor.

THE COURT: Thank you both.

- END OF TRANSCRIPT OF RECORD. -

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 23rd day of March, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson

Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: May 23 / 2016

STATE OF SOUTH CAROLINA COUNTY OF YORK State of South Carolina, Appellant, vs. Sean Kelly, Respondent.	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT C.A. No.: 2015-CP-46-03747 ORDER

This is an appeal by the State from the Magistrate Court's dismissal of a Driving Under the Influence charge [1](DUI) against Respondent Sean Kelly. The Court heard this matter in open court March 23, 2016. The Appellant was represented by William A. McKinnon, Esq., the Respondent by Michael L. Brown, Jr., Esq.

On September 11, 2013, Respondent was stopped on I-77 by Investigator Kevin Tolson (Tolson), a Sheriff's officer assigned to the 16th Solicitor's office. The initial stop was accomplished by the use of Officer Tolson's blue lights. Following the initial traffic stop, a Deputy Stagner arrived on the scene. Tolson's car had no video recording equipment. Stagner initiated a DUI investigation and subsequently arrested the Respondent for DUI and transported him to the Moss Justice Center in York, South Carolina. Respondent was subsequently tried in a bench trial and the charge dismissed, upon motion of Respondent.

The Magistrate Judge indicated in the Return that the dismissal of Respondent's DUI charge was based on the State's failure to produce a video from the incident site in compliance with Section 56-5-2953(A), S.C. Code of Laws, 1976, as amended.[2]

[1] Violation of Section 56-5-2930, S.C. Code of Laws, 1976, as amended.
[2] All references to statutory provisions herein are from S.C. Code of Laws, 1976, as amended.

Section 56-5-2953 provides in pertinent part:

> (A) A person who violates Section 56-5-2930, or 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
> (i) not begin later that the activation of the officer's blue lights.

The Cardinal rule of statutory interpretation is to ascertain and effectuate the intentions of the legislature. State v. Gordon, 408 SC 536; 759 S.E.2d (755).

Section 29-5-2953 uses three terms when referencing the person responsible for certain conduct under the statute Section 29-5-2953(A(1)(a) uses the word "officer"; Section 56-5-2953(B), two times, refers to the "arresting officer" and once to "the arresting law enforcement officer."

Here, the facts establish that Officer Tolson was the officer who effected the traffic stop of Respondent. At Respondent's trial, Officer Tolson testified he was not the arresting officer and the Uniform Traffic Ticket issued to Respondent confirms this.

Section 56-5-2953(G) applies to vehicles "used for Traffic enforcement" and provides for delayed implementation of 56-5-2953(A) under a certain circumstance, installation of video devices in Traffic enforcement vehicles. Officer Tolson testified that law enforcement was not his primary job. Therefore, he implicitly, if not explicitly, confirmed he is a law enforcement officer to some degree. The fact that he drove a vehicle equipped with blue lights further bolsters this finding.

Officer Tolson, when stopping Respondent, was acting as a law enforcement officer. Therefore, the vehicle he used to effect the stop was being used as a law enforcement vehicle.

Based on the above, I find that under Section 56-5-2953(A) Tolson is the "officer" referred to therein. There is no question Respondent's stop was occasioned by Officer Tolson's activation of the blue lights in his law enforcement vehicle.

Based on the above, I find that under Section 56-5-2953(A)(1)(a) Officer Tolson is the officer referred to therein. Therefore, the initial stop by Officer Tolson implicates Section 56-5-2953 (A)(1)(a). I find the intention of the legislation is that when an officer stops a vehicle whose driver is suspected of driving under the influence, that the subsequent conduct of the driver must be video recorded. I find this is true even if the officer making the stop is not the arresting officer.

Since Officer Tolson was not the arresting officer, he could not have, nor did he, submit a Section 56-5-2953(B) affidavit under the clear and unambiguous language of Section (B).

I find that Section 56-5-2953(G) here does not excuse Officer Tolson's failure to comply with Section 56-5-2953. The State has presented no reason why Officer Tolson's law enforcement vehicle was not equipped with a video recording device other than law enforcement was not Officer Tolson's primary job. There is nothing in the record, other than the fact just noted, that justifies the failing to equip Officer Tolson's vehicle with a video recording device seventeen years after the enactment of Section 56-5-2953. In so finding, the Court applies its own rule of reason[3] as an overlay to the intention of the legislature.

It is not reasonable that law enforcement can leave law enforcement vehicles, which may be used in DUI stops, unequipped with video recorders and take the position the State does here. That is, the simple fact that law enforcement has chosen not to install video recorders in certain law enforcement vehicles which clearly fall under the designation of a law enforcement vehicle cannot reasonably justify the State's reliance on Section 56-5-2953(G) in making this choice. To

[3] The Rule of Reason is antitrust doctrine.

allow law enforcement to opt to not equip its law enforcement vehicles with video recorders and then get the benefit of the provision of Section 56-5-2953(G) would be to allow law enforcement to neuter Section 56-5-2953.

The Court in the above is to a degree following the logic of The Supreme Court in The Town of Mount Pleasant v. Roberts, 393 S.C. 332; 713 S.E.2d 278 (S. Ct. 2011). In Roberts, the Court found;

> . . . the town's prolonged failure to equip its patrol vehicle with video cameras defeats the intent of the legislature. (393 SC at 349)

Therefore, the State's appeal is denied and dismissed. The ruling of the Magistrate Judge herein below is AFFIRMED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

#4

March 28th, 2016
York, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
State of South Carolina,	)	Case No. 2015-CP-46-03747
Appellant,	)	
v.	)	RULE 59(e) MOTION TO RECONSIDER/ALTER JUDGMENT AND MEMORANDUM IN SUPPORT
Sean Kelly,	)	
Respondent.	)	

COMES NOW THE STATE OF SOUTH CAROLINA, by and through the undersigned Assistant Solicitor, who respectfully moves pursuant to Rule 59(e), SCRCP for this this Court to reconsider and alter its judgment of March 28, 2016 and reverse the Magistrate Court. This motion is timely because the State received notice of this judgment on March 29, 2016.

GROUNDS FOR RECONSIDERATION/ALTERATION

The March 29, 2016 judgment in this matter should be reconsidered and altered for two reasons: 1) it is contrary to *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) and 2) it renders the "traffic enforcement" language of § 56-5-2953 meaningless, contrary to *Matter of Decker*, 322 S.C. 15, 471 S.E.2d 462 (1995).

ARGUMENT

I. THE JUDGMENT IS CONTRARY TO STATE v. LANDIS

Pursuant to *State v. Landis*, the only person upon which § 56-5-2953(A) places any obligations is the arresting officer (here, Deputy Stagner). "Therefore, we hold that the State Transport Officer merely assisted in facilitating the traffic stop. Trooper Davis was the arresting officer responsible

for meeting the statutory videotaping requirements of section 56-5-2953(A)." *State v. Landis*, 362 S.C. 97, 105, 606 S.E.2d 503, 506-507 (Ct. App. 2004) (emphasis added). *Landis* concerns the exact fact pattern present in the instant case: a traffic stop was performed by one officer, and a second officer, equipped with a video camera, arrived later and made the arrest. *Landis* held the only officer to which § 56-5-2953(A) applied was the second, arresting officer. The language in § 56-5-2953 concerning the "officer's blue lights" does not apply to Investigator Tolson because it is part of § 56-5-2953(A), which *Landis* directly held only applies to the arresting officer. The facts of the instant case are even stronger than *Landis*, because the second officer in *Landis* arrived after the driver had already been removed from his vehicle. In this case, Mr. Kelly was still in his vehicle when Deputy Stagner arrived.

Under *Landis*, since Investigator Tolson was not the arresting officer, it does not matter whether he had a working video camera. It does not matter if he had ten video cameras or none, or a broken camera, or whether he was in a car or a motorcycle or performed the traffic stop on foot. He was not the arresting officer and therefore neither his actions at the scene, nor what kind of vehicle he was driving, nor whether or not he had a camera matter in the least for § 56-5-2953(A) under *Landis*.

The only remaining question, then, is whether Deputy Stagner's video, standing alone and without any reference to Investigator Tolson, satisfies § 56-5-2953. It plainly does. Section 56-5-2953(B) provides, in relevant part:

> In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section.

Deputy Stagner's video began as soon as "practicable." In fact, it began even before he arrived at the scene. His video shows him arrive while Investigator Tolson is still standing at Defendant Kelly's door, and before Mr. Kelly has stepped out of his vehicle. It shows everything that occurred with the exception of Investigator Tolson using his blue lights to pull over Mr. Kelly. This is a situation squarely falling into § 56-5-2953(B) – where the traffic stop had already occurred – and the video beginning before Deputy Stagner arrived on scene is surely as soon as "practicable."

Because Investigator Tolson's lack of video is utterly irrelevant pursuant to *Landis*, and because Deputy Stagner's video squarely falls within -2953(B), the judgment should be altered and the Magistrate reversed.

II. THE JUDGMENT RENDERS PORTIONS OF -2953(G) MEANINGLESS. AND IS THEREFORE CONTRARY TO *MATTER OF DECKER*

The March 29, 2016 Order holds that every law enforcement vehicle that makes a DUI stop must have a video recorder, and therefore the -2953(G) exception does not apply. "It is not reasonable that law enforcement can leave law enforcement vehicles, which may be used in DUI stops, unequipped with video recorders...." Order of March 28, 2016. This holding is contrary to the plain language of § 56-5-2953(G) and must be altered.

Section 56-5-2953(G) provides: "The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device" (emphasis added). The Order in this case contradicts the plain language of the statute, which states not that every law enforcement vehicle must be equipped with cameras, but only those vehicles "used for traffic enforcement." Our courts have held repeatedly that the plain language of the statute controls. *See, e.g., Peake v. S.*

Carolina Dep't of Motor Vehicles, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007) ("The legislature's intent should be derived primarily from the plain language of the statute"). It is very easy to write a hypothetical statute which reads "All law enforcement vehicles must have cameras." But this is not what the legislature drafted – the actual statute is limited to those "used for traffic enforcement," and this language must mean something.

The Order attempts to reconcile these precepts by pointing out that on the date of this stop, Investigator Tolson's vehicle was used for traffic (i.e., DUI) enforcement. That is, although every law enforcement vehicle does not need a camera, every vehicle that is ever, even once, used for traffic enforcement must have one. This interpretation is logically tortured and renders the "used for traffic enforcement" language a nullity. The entire statutory scheme of § 56-5-2953 only applies to DUI stops – it is not a generic video recording statute. Every DUI stop is "traffic enforcement" on its face – the offense is driving a vehicle under the influence.

In *Matter of Decker*, our Supreme Court held that Courts must give effect to every word in a statute. 322 S.C. 15, 471 S.E.2d 462 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous") (internal citation omitted). Since every DUI is "traffic enforcement," § 56-5-2953(G) must mean there is a subset of law enforcement vehicles, used for occasional DUI stops, that do not have to have cameras because they are not "traffic enforcement." Otherwise, the -2953(G) exemption has no meaning at all. This conclusion is further strengthened by *Town of Mt. Pleasant v. Roberts*, where the Supreme Court repeatedly described its holding requiring video cameras as applying to "patrol vehicles," not all vehicles. *See, e.g.*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011) ,"[W]e find the Town's protracted failure to equip its patrol vehicles with video cameras . . . defeats the intent of the

Legislature and violates the statutorily-created obligation to videotape DUI arrests"). "Patrol vehicles" is just another way of phrasing vehicles "used for traffic enforcement."

The interpretation offered by the March 29, 2016 Order means that there is no situation where lack of video on a DUI stop can be excused because the vehicle is not a "traffic enforcement" video. That holding eviscerates the -2953(G) exception and must be altered and the Magistrate reversed.

CONCLUSION

Both because Deputy Stagner's video satisfies -2953(B), and Investigator Tolson's video is irrelevant under *Landis*; and because -2953(G) excuses the lack of video in any case, the State respectfully submits the March 29th, Order must be reconsidered and altered, the Magistrate reversed, and this matter remanded for retrial.

Respectfully Submitted,

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Rock Hill, South Carolina

March 31, 2016

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK	)	**SIXTEENTH JUDICIAL CIRCUIT**
State of South Carolina,	)	Case No. 2015-CP-46-03747
Appellant,	)	
v.	)	**CERTIFICATE OF SERVICE**
Sean Kelly,	)	
Respondent.	)	

I, Miriam Simmons, employee of the Sixteenth Circuit Solicitor's Office, certify that I have served **State's Rule 59(e) Motion to Reconsider/Alter the Judgment** by depositing the same in the US Mail, First-Class postage prepaid, on March 31, 2016 upon:

Michael L. Brown, Esq.
Law Offices of Michael Brown
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Rock Hill, SC 29730

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Rock Hill, South Carolina

March 31, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

STATE OF SOUTH CAROLINA)

Plaintiff,)

v.)

SEAN KELLY)

Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-0374

ORDER

The Assistant Solicitor timely moves for the Court to reconsider its judgment of March 28, 2016 pursuant to Rule 59(e), SCRCP.

The Court has reviewed the two reasons set forth in the solicitor's Motion to Reconsider Judgment.

The State's reliance on *State v. Landis*, 362 S.C. 97, 606 SE.2d 503 (Ct. App 2004) is unpersuasive, and in the undersigned's opinion, is not the "exact fact pattern" (*see* State's Rule 59(e) Motion). As to Section 56-5-2953(G), the undersigned does not believe the March 29, 2016 Order is incorrect in its analysis of said section.

Upon review, the Court finds no cause to alter its prior judgment. Therefore, the Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

April 12th, 2016.

The Honorable John C. Hayes, III
Presiding Circuit Court Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-46-03747

THE STATE OF SOUTH CAROLINA, Appellant,

v.

Sean Robert Kelly, Respondent.

NOTICE OF APPEAL

The State of South Carolina hereby appeals to the Court of Appeals the Order of the Honorable John C. Hayes, III, dated March 28, 2016. Appellant received written notice of entry of this Order on March 29, 2016. This Order is enclosed herewith as Exhibit A. Appellant filed a timely Rule 59(e) Motion, which was denied on April 13, 2016. That order is enclosed as Exhibit B. Appellant received written notice of that order on April 20, 2016.

April 22, 2016

William A McKinnon, Assistant Solicitor
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Other Counsel of Record:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

Case No. 2015-CP-46-03747

THE STATE OF SOUTH CAROLINA, Appellant,

v.

Sean Robert Kelly, Respondent.

PROOF OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal in the above-referenced matter upon Michael L. Brown, Esquire, by depositing a copy of same in the United States Mail, addressed to his mailing address at P.O. Box 1025, Rock Hill, South Carolina 29730, in accordance with the provisions of Rule 262(b) of the South Carolina Appellate Court Rules.

Served this day,
April 22, 2016

Miriam Simmons, Paralegal
16th Judicial Circuit Solicitor's Office
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Rock Hill, South Carolina 29732
Attorney for Appellant

CERTIFICATE OF COUNSEL

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

BY: Jennifer Ellis Roberson for

Ranee Saunders
S.C. Bar No: 100073

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October 10, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2016-000875

THE STATE, ...APPELLANT,

v.

SEAN ROBERT KELLY, ...RESPONDENT.

FINAL BRIEF OF APPELLANT

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The circuit court erred in affirming the magistrate's finding that the State failed to produce a proper video recording pursuant to section 56-5-2953 of the South Carolina Code (Supp. 2015) and dismissing the case on that ground because the statute does not require Investigator Tolson to equip his vehicle with a camera. Moreover, the arresting officer produced a video that satisfied the provisions of the statute.... 7

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

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

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

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

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

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

ARGUMENT

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

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

Pursuant to section 56-5-2953, a person arrested for driving under the influence must have his conduct recorded at the incident site. S.C. Code Ann. § 56-5-2953(A). Specifically, "[t]he video recording at the incident site must: (i) not begin later than the activation of the officer's blue lights; (ii) include any field sobriety tests administered; and (iii) include the arrest of a person . . . , and show the person being advised of his Miranda rights." *Id.* The provisions elucidated in subsection (A) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device. S.C. Code Ann. § 56-5-2953(G).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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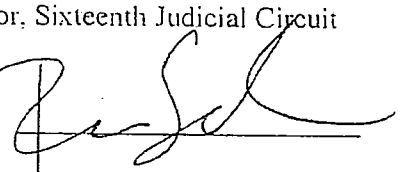
BY: 

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October 25, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2016-000875

THE STATE,..... APPELLANT,

v.

SEAN ROBERT KELLY,..... RESPONDENT.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Appellant* dated October 25, 2016, on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-46-03747

The State.....Appellant,

v.

Sean Robert Kelly.....Respondent.

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STATEMENT OF ISSUES ON APPEAL

I. ARE THE DECISIONS OF THE LOWER COURTs APPEALABLE TO THIS COURT?

II. DID THE LOWER COURT CORRECTLY AFFIRM THE MAGISTRATE'S DISMISSAL OF RESPONDENT'S DRIVING UNDER THE INFLUENCE CHARGE WHEN THE STATE FAILED TO PRODUCE A VIDEO RECORDING IN COMPLIANCE WITH S.C. CODE ANN. § 56-5-2953 (SUPP. 2013)?

STATEMENT OF THE CASE

Respondent was arrested for Driving Under the Influence, First Offense, in York County by a York County Deputy Sheriff on September 11, 2013. On September 17, 2015, the case was called for a bench trial before the Honorable Clayburn Barnette, Jr. in the York County Magistrate's Court. Following the presentation of the State's case, counsel for Respondent moved for a directed verdict. The magistrate took the matter under advisement and recessed until November 25, 2015. When the parties reconvened, Judge Barnette granted Respondent's motion (R. p. 3).

Appellant filed an appeal in the York County Court of Common Pleas on or about December 1, 2015 (R. pp. 6 - 11). The parties appeared before the Honorable John C. Hayes, III on March 23, 2016 in order to address the State's appeal. By Order filed March 29, 2016, Judge Hayes affirmed the magistrate's decision (R. pp. 36 – 39). On or about March 31, 2016, the State filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP (R. pp. 40 - 45). By Order filed April 13, 2016, the State's Motion to Reconsider was denied (R. p. 46). This appeal followed.

FACTS

On September 11, 2013, Investigator Kevin Tolson responded to radio traffic concerning a possible impaired driver. Investigator Tolson is a York County Deputy Sheriff assigned to the Sixteenth Circuit Solicitor's Office. Investigator Tolson located Respondent and witnessed Respondent travel onto Interstate 77. He observed Respondent being unable to maintain his lane of travel and travelling at a slow rate of speed. Investigator Tolson then initiated a traffic stop. Deputy Stagner of the York County Sheriff's Department subsequently arrived on the scene and arrested Respondent for Driving Under the Influence, First Offense.

At the bench trial, Investigator Tolson testified that upon approaching Respondent, he noticed the odor of alcohol. He indicated that Respondent seemed incoherent and "out of it." He further testified that Respondent had slurred speech, slow movements and did not seem to understand Investigator Tolson's instructions. It is undisputed that Investigator Tolson's patrol car was not equipped with video recording equipment. Therefore, he did not video or audio record the stop of Respondent or any of the initial contact with Respondent (Audio of Magistrate Court Trial, 04:36 – 17:08).

At the conclusion of the State's case, counsel for Respondent moved for a directed verdict based upon Investigator Tolson's failure to video record Respondent at the incident site. The magistrate granted the motion finding that the State failed to produce a video recording in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013).

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." *State v. Gordon*, 414 S.C. 94, 99, 777 S.E.2d 376, 378 (2015).

ARGUMENT

I. THE DECISIONS OF THE LOWER COURTS ARE NOT APPEALABLE TO THIS COURT.

The State's appeal in this matter is not appealable to this Court and should be dismissed. It is well settled that the State has no right of appeal from a directed verdict of not guilty.[1] *State v. McWaters*, 246 S.C. 534, 144 S.E.2d 718 (1965); *State v. Ludlam*, 189 S.C. 69, 200 S.E. 361 (1938); *State v. Ivey*, 73, S.C. 282, 53 S.E. 428 (1906); *State v. Gathers*, 15 S.C. 370 (1881). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147 (1978). "This state of jeopardy attaches when a jury is empanelled and sworn, or, in a bench trial, when the judge begins to receive evidence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353 (1977).

"That the State has no right of appeal from judgment upon verdict of acquittal in a criminal case seems to have been recognized and accepted as the law of this jurisdiction from the beginning of our judicial history." *State v. Lynn*, 120 S.C. 258, 260, 113 S.E. 74, 75 (1922). The State has a limited right of appeal in criminal cases and generally has no right of

[1] Based upon *I'On v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court may consider issues not ruled upon by the lower court as additional sustaining grounds aslong as the reason appears in the record below.

appeal from an acquittal except in circumstances where the acquittal was procured by the accused's fraud or collusion. This principle applies even in cases where there has been legal error. *State v. Holliday*, 255 S.C. 142, 144-45, 177 S.E.2d 541, 542-543 (1970).

In *Horry County v. Parbel*, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008), this Court addressed the issue of a double jeopardy violation following the dismissal of a defendants charge. In *Parbel*, several female dancers and the manager of an adult entertainment establishment were cited for alleged criminal violations of Horry County zoning ordinances. All individuals charged requested a jury trial and a criminal trial was held before an Horry County magistrate. After Horry County rested its case, counsel for the defendants moved for a dismissal of all charges. The magistrate granted the motion to dismiss.

Horry County appealed the magistrate's ruling to the circuit court. The circuit court held that the magistrate's interpretation of the zoning ordinance was incorrect but also held that double jeopardy prevented the defendants from being tried a second time. Based upon double jeopardy principles, this Court held that the circuit court did not have the authority to review possible legal errors following an acquittal.

In addition to decisions cited above, the *Parbel* court based its holding on our Supreme Court's decision in *State v. Tillinghast*, 375 S.C.201, 652 S.E.2d 400 (2007). In *Tillinghast*, the defendant was charged with possession of alcohol by a minor. Following the State's case, the magistrate found that the statute under which the defendant was charged to be unconstitutional and directed a verdict of acquittal. The State appealed the magistrate's decision to the circuit court but indicated that it was not seeking to reinstate the charge against the defendant.

The circuit court held that it had jurisdiction to hear the appeal and that the magistrate erred in finding the statute unconstitutional. The Supreme Court reversed stating:

> The *Holliday* court noted that "no writ of error, appeal, or other proceeding lies on behalf of the state to review or to set aside a verdict or a judgment of acquittal in a criminal case, although there may have been error committed by the court, or a perverse finding by the jury."

Id., 375 S.C. at 203, 652 S.E.2d at 401. The court further noted that the denial of the right of the State to appeal is ". . . premised upon the basic double jeopardy principle that a defendant in a criminal prosecution is in legal jeopardy when he has been place on trial. . . ." *Id.*

The facts in *Parbel* and *Tillinghast* are similar to the present case. The case was called for a bench trial. The State's first witness, Investigator Kevin Tolson, was sworn in and jeopardy attached (Audio of Magistrate Court Trial at 4:36). Investigator Toslon testified with regard to his initial stop of Respondent and the fact that his car had no video recording equipment. The State then called Deputy Stagner of the York County Sheriff's Department who testified at length with regard to the arrest of Respondent. The State rested its case. Counsel for Respondent moved for a directed verdict (R. p. 3). The motion was taken under advisement and after a lengthy recess, the magistrate dismissed the case based upon the State's failure to produce a video in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013).

As noted above, jeopardy attaches in a bench trial when the court begins to receive evidence. *Martin Linen Supply Co.*, 430 U.S. at 569, 97 S.Ct. at 1353. In the present case, witnesses were sworn and the State presented its entire case-in-chief. Jeopardy unquestionably attached. Assuming *arguendo* that the State is correct that the magistrate

erred as a matter of law in dismissing the case, this appeal still must be dismissed. Although the magistrate did not specifically rule on the evidence presented by the State and whether the State proved the *corpus delicti* of driving under the influence, Respondent cannot be subjected to another trial for this offense. As the *Tillinghast* court noted: "**Whether or not the magistrate erred in his ruling of law**, appellant was acquitted and is now out of court." *Tillinghast*, 375 S.C. at 203, 652 S.E.2d at 401 (emphasis added). Consequently, this Court should dismiss the present appeal.

II. THE LOWER COURT CORRECTLY AFFIRMED THE MAGISTRATE'S DISMISSAL OF RESPONDENT'S DRIVING UNDER THE INFLUENCE CHARGE WHEN THE STATE FAILED TO PRODUCE A VIDEO RECORDING IN COMPLIANCE WITH S.C. CODE ANN. § 56-5-2953 (SUPP. 2013).

S.C. Code Ann. § 56-5-2953 (A) (Supp. 2013) requires that a person who has violated S.C. Code Ann. § 56-5-2930 (Supp. 2013) have his or her conduct at the incident site video recorded. Specifically, S.C. Code Ann. § 56-5-2953 (A)(1)(a)(i) (Supp. 2013) requires that the video recording must ". . . not begin later than the activation of the officer's blue lights." As frequently recited by our appellate courts in reviewing S.C. Code Ann. § 56-5-2953 (Supp. 2013), statutes must be interpreted with realistic circumstance and rationales in mind. *State v. Elwell*, 403 S.C.606, 743 S.E.2d 802 (2013). Additionally, penal statutes will be strictly construed against the state and in favor of the defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

Our Supreme Court has strictly interpreted the requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2011) and has noted that it ". . . provides for dismissal of charges when the statute is inexcusably violated." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d

879, 881 (2007). Further, our Supreme Court has held:

> As evidenced by this Court's decision in *Suchenski,* the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56–5–2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* § 56–5–2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56–5–2930. . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of section 56–5–2953. . . . By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn promulgated a severe sanction for noncompliance.

Roberts, 393 S.C. at 348 – 349, 713 S.E.2d at 286.

The facts in the present case are not in dispute. Investigator Kevin Tolson is a York County Deputy Sheriff assigned to the Sixteenth Circuit Solicitor's Office. Investigator Tolson initiated the traffic stop that is the genesis of this case. He detained Respondent until Deputy Stagner arrived. Upon his arrival, Deputy Stagner conducted a driving under the influence investigation and subsequently arrested Respondent. Investigator Tolson's patrol car was not equipped with video recording equipment (R. p. 36). Accordingly, the initial stop of Respondent was not captured on video pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2013).

The purpose of the video requirement in the statute "is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant,* 393 S.C. at 347, 713 S.E.2d at 285. In *State v. Taylor,* 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014), our Court of Appeals stated:

> The plain language of the statute demonstrates the legislature intended video recording of the majority of an officer's encounter with a potential DUI suspect. Nonetheless, interpreting the statute to require dismissal of the

> charges when the defendant is off camera for a short period of time and **the gap does not occur during any of those events that either create direct evidence of a DUI** or serve important rights of the defendant would result in an absurdity that could not possibly have been intended by the legislature.

(emphasis added).

It is clear that this Court has interpreted S.C. Code Ann. § 56-5-2953 (Supp. 2013) in a manner that requires all direct evidence tending to prove the *corpus delicti* of driving under the influence to be captured on video. The State elicited the following testimony from Investigator Tolson which is direct evidence tending to prove Respondent was materially and appreciably impaired: (1) Respondent was incoherent; (2) Respondent was "out of it"; (3) Respondent had slurred speech; (4) Respondent had slow movements; and (5) Respondent did not seem to understand Investigator Tolson's instructions. These observations were not video and audio recorded in such a manner that would enable the trier of fact to verify this testimony which defeats the purpose and intent of S.C. Code Ann. § 56-5-2953 (Supp. 2013) as interpreted by this Court and our Supreme Court. Had the State elected not to utilize the "direct evidence of DUI" gathered by Investigator Tolson, then a different result may have been warranted. However, the State clearly used this evidence in its effort to convict Respondent.

Based thereon, the lower court correctly held that Investigator Tolson is the "officer" contemplated in S.C. Code Ann. § 56-5-2953 (A) (Supp. 2013). The court further noted that provisions of S.C. Code Ann. § 56-5-2953 (A)(1)(a) (Supp. 2013) apply even if the officer making the stop is not the arresting officer. The State asserts that Investigator Tolson's patrol car was exempt from the video recording requirements pursuant to S.C. Code Ann. §

56-5-2953 (G) (Supp. 2013). The State asserts that the video recording requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2013) take effect for each law enforcement vehicle used for traffic enforcement once the vehicle is equipped essentially does not apply because Investigator Tolson's patrol car was not used for traffic enforcement. The State's position would arguably be correct but for the fact that Investigator Tolson's patrol car was being used for traffic enforcement on September 11, 2013.

As noted above, this Court is bound by the factual finding of the lower court's decision unless they are clearly erroneous. The lower court found that even though Investigator Tolson testified that law enforcement was not his primary job, he was acting as a law enforcement officer when he initiated a traffic stop of Respondent. The court further found that the vehicle Investigator Tolson used to stop was being used as a law enforcement vehicle (R. p. 37). Further, as his testimony indicates, it is not as if Investigator Tolson "happened" upon Respondent. Quite the opposite, Investigator Tolson actively engaged in pursuing Respondent. Based thereon, Investigator Tolson's patrol car was being used for traffic enforcement on September 11, 2013 and is not exempt from the provisions of S.C. Code Ann. § 56-5-2953 (Supp. 2013).

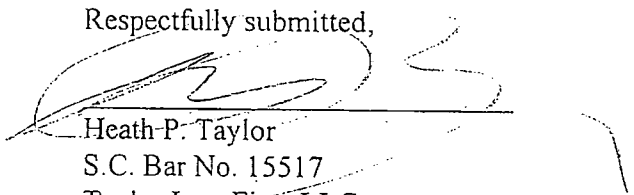
Finally, the State cites *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) in support of it position that Deputy Stagner satisfied the requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2013) because he was the arresting officer and produced a video. The lower court held that Investigator Tolson is the "officer" contemplated in S.C. Code Ann. § 56-5-2953 (A) (Supp. 2013) and was therefore required to produce a video presumably in addition to the video produced by the arresting officer. *Landis* is distinguishable in that both

officers in *Landis* witnessed the reason for the original stop and both officers were immediately on the scene. In the present case, Investigator Tolson gathered a significant amount of evidence prior to the arrival of Deputy Stagner and the State used the unrecorded evidence at trial. Therefore, the lower court correctly ruled that the case was appropriately dismissed pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2013) because the State did not produce a video from the officer who initiated the stop.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court dismiss this appeal and affirm the decision of the magistrate or in the alternative, affirm the decision of the circuit court.

Respectfully submitted,



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ARGUMENT

I.

The current case is appealable and not violative of the Double Jeopardy Clause.

Respondent contends the order of the magistrate is unappealable because the State may not appeal from a directed verdict of not guilty. Initially, Respondent declined to raise this issue on appeal to the circuit court and it is therefore unpreserved. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("An argument that is not raised to an intermediate appellate court is not preserved for review by this Court."); *see also State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) (noting constitutional arguments are not excepted from preservation rules). Although Respondent is correct that *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), acknowledges an appellate court may consider additional sustaining grounds which were not argued below, it is clear this discretion should not promote the erosion of well-settled tenets of preservation. Instead, our Supreme Court indicated that it "likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal," and thus would decline the invitation to entertain an issue that should properly have been raised to the previous tribunal. *Id.* at 421, 526 S.E.2d at 724; *see id.* ("Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it."). Accordingly, the Court should decline to address this issue because it is not preserved.

Regardless of preservation, Respondent's argument fails on the merits. "The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth, provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life

or limb.'" *Brown v. Ohio*, 432 U.S. 161, 164 (1977). Accordingly, it bars the State from prosecuting a defendant for the same offense after acquittal or conviction. *State v. Easler*, 327 S.C. 121, 129, 489 S.E.2d 617, 622 (1997). "In a nonjury trial, jeopardy attaches when the court begins to hear evidence." *Serfass v. United States*, 420 U.S. 377, 388 (1975). However, "[t]he conclusion that jeopardy has attached . . . begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Martinez v. Illinois*, 134 S. Ct. 2070, 2075 (2014) (internal quotations marks omitted) (citations omitted). "The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried." *Id.* There is no doubt the State may not appeal from a directed verdict of not guilty. *State v. McKnight*, 353 S.C. 238, 239, 577 S.E.2d 456, 457 (2003) ("[W]e have long recognized that the State has no right of appeal from a judgment of acquittal in a criminal case . . . ." (emphasis removed) (internal citation omitted)). This is true even where a magistrate committed a legal error in granting the acquittal. *See State v. Tillinghast*, 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007) ("Whether or not the magistrate erred in his ruling of law, appellant was acquitted and is now out of court. The circuit court erred by finding the State may appeal the magistrate's ruling.").

Where Respondent fails in his argument is in his misguided assumption that he was acquitted. The United States Supreme Court has clarified that an acquittal "encompass[es] any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 133 S. Ct. 1069, 1074–75 (2013). This definition would include "a ruling by the court that the evidence is insufficient to convict, a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability, and any other rulin[g] which relate[s] to the ultimate question of guilt or innocence." *Id.* at 1075 (alterations in original) (internal quotation marks omitted). However, these factual rulings are differentiated from mere

procedural endings to a case, such as "rulings on questions that are unrelated to factual guilt or innocence, but which serve other purposes, including a legal judgment that a defendant, although criminally culpable, may not be punished because of some problem like an error with the indictment." *Id.* (internal quotation marks omitted) (citation omitted).

In this instance, the magistrate dismissed the case under a purely procedural rationale. As the magistrate's order makes plain, he found "the state failed to produce a video in compliance with Section 56-5-2953(A), and none of the exceptions of Section 56-5-2953(B) apply." (ROA p.3.) He thus concluded that based on that deficiency, "the court must dismiss this prosecution." (ROA p. 3.) Respondent even admits, as he must, that "the magistrate did not specifically rule on the evidence presented by the State and whether the State proved the *corpus delicti* of driving under the influence." (Resp't's Br.6.) It is unclear how a decision that indisputably fails to comment on the sufficiency of the evidence can be characterized as an acquittal. Accordingly, his case is distinguishable from *Tillinghast* and *Horry Cnty. v. Parbel*, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008) *overruled on other grounds by State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011), which he cites in his brief, as both address situations expressly involving an *acquittal*, not dismissals.[1] In both cases, the magistrate's rulings involved substantive holdings that reflected the court's consideration of the quantum of evidence presented. *See Tillinghast*, 375 S.C. at 202, 652 S.E.2d at 401 (holding Double Jeopardy Clause barred an appeal where "the magistrate granted appellant's motion for a directed verdict on the ground [that the statute under which he was indicted] was unconstitutional as applied . . . ."); *Parbel*, 378 S.C. at 258, 662 S.E.2d at 469 (finding the Double Jeopardy Clause prohibited appellate review where "[t]he magistrate granted Appellant's motion for dismissal" based on its finding that "the County has

[1] Moreover, those cases assumed the defendant was acquitted and the issue discussed focused on whether the State may appeal from an erroneous legal holding that resulted in the acquittal.

II.

Investigator Tolson was not required to equip his vehicle with a camera and therefore Section 56-5-2953 of the South Carolina Code is inapplicable to bar the State's prosecution.

Respondent offers little by way of cogent argument as to why Investigator Tolson's vehicle should be equipped with video equipment, instead reciting case law about what the video should include if the statute was actually implicated. However, he does conclude without discussion that it is enough that Investigator Tolson conducted a traffic stop in this one instance to transform his vehicle into a "law enforcement vehicle used for traffic enforcement." (Resp't's Br.9.) This assertion is illogical and unpersuasive. Nothing about the legislature's use of this term indicates it should be construed as something to be created by happenstance. A law enforcement vehicle is either used for traffic enforcement, or it is not.[2] Application of the attendant statutes and regulations employing this term would be impracticable if it was construed as a moving target. Investigator Tolson was an investigator for the Sixteenth Circuit Solicitor's Office and did not engage in traffic enforcement as part of his professional duties. Here, he only responded to the 911 call because he was the closest officer to a dangerous driver threatening the roadway. The requirements of the video recording statute are thus inapplicable.

[2] Respondent confuses the issue by assigning significance to the circuit court's conclusion that Investigator Tolson was engaged in law enforcement. Of course he was. The relevant consideration is whether his vehicle was a law enforcement vehicle *used for traffic enforcement.* Additionally, for clarification, Respondent incorrectly asserts the circuit court's findings in this case are reviewed under a clear error standard. However, the circuit court heard this case sitting in an appellate capacity and was therefore not the fact-finder; this Court is not required to give deference to its decision.

CONCLUSION

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

Respectfully submitted,

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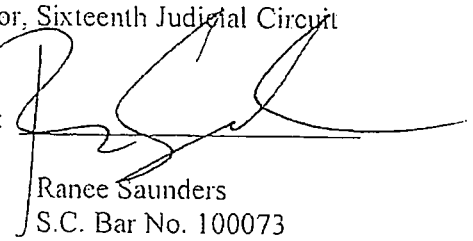
BY: 

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October 25, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2016-000875

THE STATE,.....APPELLANT,

v.

SEAN ROBERT KELLY,.....RESPONDENT.

CERTIFICATE OF COUNSEL

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

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Columbia, South Carolina
October 25, 2016

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In The Court of Appeals

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

Appellate Case No. 2016-000875

THE STATE, ...APPELLANT

v.

SEAN ROBERT KELLY, ...RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Reply Brief of Appellant*, dated October 25, 2016, on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 25th day of October, 2016.

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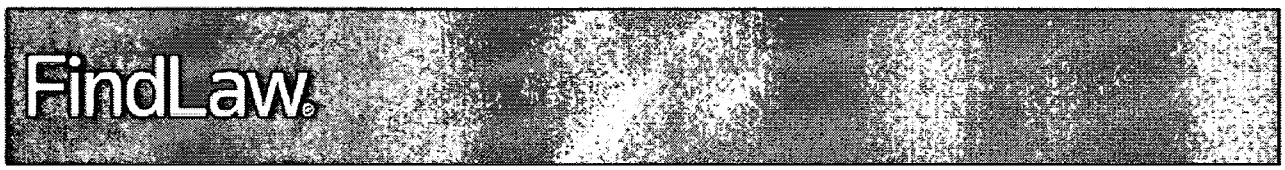

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