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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2013-000515

THE STATE, ...APPELLANT

v.

CODY ROY GORDON,..RESPONDENT.

FINAL BRIEF OF APPELLANT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in reversing Respondent's magistrate court conviction for driving under the influence where, in compliance with section 56-5-2953 of the South Carolina Code, Respondent's conduct at the incident site was video recorded and the video recording included the field sobriety tests administered by the arresting officer?

STATEMENT OF THE CASE

On October 30, 2011, Respondent was charged with driving under the influence for violating section 56-5-2930 of the South Carolina Code. (R. p.40). On September 12, 2012, Respondent's case was called for trial before the Honorable M. Todd Simmons, Oconee County magistrate judge, and a jury. Respondent was present and was represented by Keith G. Denny, Esquire, of Walhalla. Appellant (the State) was represented by Assistant Solicitor Bethany Ann Blundy of the Tenth Circuit Solicitor's Office. (R. p.30).

Respondent made several pretrial motions, including a motion to dismiss on grounds that the State failed to adhere to the requirements of S.C. Code section 56-5-2953, which required that the officer video record Respondent's conduct at the incident site, including the field sobriety tests administered. The trial judge heard arguments, reviewed the relevant statute, and reviewed recent caselaw from this Court before ruling "the State properly captured on the roadside video [Respondent's] conduct as required by S.C. Code § 56-5-2953 and as interpreted by Murphy"[1] and denying the motion. (R. p.30).

At trial, the State presented testimony from two witnesses: Corporal Mayfied and Lance Corporal Greer of the South Carolina Highway Patrol. The State also introduced several exhibits, including a DVD recording of the roadside video of Respondent's arrest. Following a trial, closing arguments, and deliberations, the jury found Respondent guilty of violating S.C. Code § 56-5-2930 "driving under the influence" (R. p.40). (R. p.41). Respondent was sentenced to thirty (30) days imprisonment suspended upon completion

[1] Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2007).

of 48 hours of public service employment within eight weeks and payment of $167 in court costs on a scheduled time payment agreement of six weeks. (R. p.30).

Respondent timely appealed his conviction to the Oconee County Court of Common Pleas (Case No. 2012-CP-37-852) and attached a written statement setting forth his grounds for appeal. (R. p.18; p.24). On January 22, 2013, a hearing was convened at the Oconee County Courthouse before the Honorable Alexander S. Macaulay. Respondent was again represented by Keith G. Denny, Esquire, and the State was represented by Assistant Solicitor Blair Stoudemire of the Tenth Circuit Solicitor's Office. (R. p.1; R. p.27). As grounds for appeal, Respondent argued he should have been granted dismissal of the charge because of "incident site recording violations." He argued that although his body physically appeared in the video recording during the field sobriety tests, he was "in the dark" and that "you cannot see him at his face or his head doing the HGN[2] test." (R. p.4, lines 1-3). Respondent went on to argue:

> In my opinion, as well as I believe the Court would see if he views the video, is that it is impossible to actually see his head. I do not believe that's in compliance with the video. There is absolutely nothing to prevent the Officer from bringing [Respondent] closer to the Trooper's car so that he would be in full visibility and actually having the HGN performed at that point in time. He didn't do it. You can't see it.

(R. p.4, line 8-16). He then provided the judge with two black and white "still shots" or "screen shots" from the video recording in support of his argument and suggested the

[2] HGN or "horizontal gaze nystagmus" is a standard field sobriety test often administered along with other tests during an investigation of suspected driving under the influence. See State v. Sullivan, 310 S.C. 311, 313, 426 S.E.2d 766, 768 (1993). "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system. The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." Sullivan, 310 S.C. at 315 n.2, 426 S.E.2d at 769 n.2 (internal citations omitted).

trooper may have intentionally "kept him out of visibility of the video."[3] (R. p.4, line 16-p.6, line 22). Without watching the actual video recording of the incident, Judge Macaulay appears to operate under the assumption that the HGN test was in fact "out of sight" during the video recording. Based on this misapprehension, the circuit court granted Respondent's motion to reverse his conviction and dismissed the charge. (R.p.10, line 10-p.15, line 25).

On February 15, 2013, Judge Macaulay issued a written order finding the magistrate committed an error of law in denying Respondent's motion to dismiss. He found the "conduct" sought to be recorded during the HGN test was not, in fact, captured on the recording because, "as a matter of law, S.C. Code Ann. [s]ec. 56-5-2953(A) requires that the Defendant's head must be visible . . . during the administration of the HGN field sobriety test." Judge Macaulay reversed the conviction for driving under the influence and dismissed the charge with prejudice. (R. p.18). The State timely filed a notice of intent to appeal the circuit court's order. This Brief of Appellant follows.

---

[3] These "screen shots" were not part of the record before the trial court and appear to have been handed to the circuit court judge by Respondent's counsel in lieu of the actual video recording introduced at trial as State's Exhibit #3. The State submits that to the extent the circuit court relied upon these "screen shots" that reliance was in error.

STATEMENT OF FACTS

On October 30, 2011, Respondent was charged with driving under the influence for violating Section 56-5-2930 of the South Carolina Code. (R. p.40). Prior to placing Respondent under arrest, the officer conducted a series of field sobriety tests including: (1) an HGN test; (2) a "walk and turn" test; and (3) a "one leg stand" test.[4] Respondent's conduct at the incident site was video recorded by the dashboard camera in the arresting officer's patrol car. The video recording is a continuous recording and includes all three of the field sobriety tests administered by the officer prior to Respondent's arrest. Although the lighting is not perfect, Respondent can be seen and heard during the entire six minute and ten seconds recorded prior to his arrest. Respondent's head is visible during the approximately two-minute long HGN test, and it is clearly visible during a majority of that HGN test because the officer's flashlight is pointed directly at Respondent. (State's Exhibit #3: DVD of roadside video). After completing the tests Respondent was placed under arrest. Following a trial, Respondent was convicted of driving under the influence.

[4] In State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001), the Supreme Court discusses several common field sobriety tests including the "walk and turn" test and the "one leg stand" test in finding that an officer's personal observations and opinions of a driver's actions, appearance, and condition constitute direct evidence of driving under the influence.

ARGUMENT

The circuit court erred in reversing Respondent's magistrate court conviction for driving under the influence and dismissing the case with prejudice where, in compliance with section 56-5-2953 of the South Carolina Code, Respondent's conduct at the incident site was video recorded and the video recording included the field sobriety tests administered by the arresting officer.

The State submits the circuit court committed an error of law in reversing Respondent's magistrate court conviction for first offense driving under the influence and dismissing his case with prejudice. The arresting officer complied with the plain and unambiguous requirements of section 56-5-2953, and specifically, subpart 56-5-2953(A)(1)(a)(ii) of the South Carolina Code (Supp. 2012), by video recording Respondent's conduct at the incident site, including the field sobriety tests administered prior to Respondent's arrest. The circuit court erred in finding "that as a matter of law, S.C. Code Ann. [s]ec. 56-5-2953(A) requires that the Defendant's head must be visible . . . during the administration of the [HGN] field sobriety test." Not only does this requirement fail to appear in the plain language of the statute, but interpreting any perceived ambiguity in the statute by adding such a requirement would lead to an absurd result not possibly intended by the Legislature. Furthermore, even if this Court finds support for the circuit court's interpretation of the statute, the factual finding that "[Respondent's] head was not sufficiently visible during the entire administration of the [HGN] test" was nevertheless an error of law because it utterly lacked evidentiary support. For all of these reasons, the State submits the circuit court erred in reversing Respondent's conviction and in dismissing the driving under the influence charge.

Standard of Review

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (Ct. App. 2012); State v. Johnson, 396 S.C. 182, 186, 720 S.E.2d 516, 518 (Ct. App. 2011). A trial court's decision on whether to grant a motion to dismiss should not be reversed absent an abuse of discretion. See State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70 (Supp. 2012). The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 186, 720 S.E.2d at 518.

Law / Analysis

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. The court should look to the plain language of the statute. Binney v. State, 384 S.C. 539, 544, 683 S.E.2d 478, 480

(2009); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008); Hoyle, 397 S.C. at 625, 725 S.E.2d at 722; Johnson, 396 S.C. at 188, 720 S.E.2d at 519. In interpreting a statute, the court will give words their plain and ordinary meaning and will not resort to forced construction that would limit or expand the statute. Johnson, 396 S.C. at 188, 720 S.E.2d at 520.

The applicable section of the South Carolina Code provides:

> (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.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2012) (emphasis added).

Respondent made a pretrial motion to dismiss on grounds that the State failed to adhere to the requirements of South Carolina Code section 56-5-2953. The trial court denied the motion. (R. p.30). On appeal to the circuit court, Respondent argued he should have been granted dismissal because of "incident site recording violations." He claimed that although his body physically appeared in the video recording during the

field sobriety tests, he was "in the dark" and that "you cannot see his face or his head doing the HGN test." (R.p.4, lines 1-3). Respondent went on to argue:

> In my opinion, as well as I believe the Court would see if he views the video, is that it is impossible to actually see his head. I do not believe that's in compliance with the video. There is absolutely nothing to prevent the Officer from bringing [Respondent] closer to the Trooper's car so that he would be in full visibility and actually having the HGN performed at that point in time. He didn't do it. You can't see it.

(R.p.4, line 8-16) (emphasis added). The circuit court agreed and on February 15, 2013, issued a written order finding the magistrate committed an error of law in denying Respondent's motion to dismiss. The circuit court judge found the "conduct" sought to be recorded during the HGN test was not, in fact, captured on the recording because, "as a matter of law, S.C. Code Ann. [s]ec. 56-5-2953(A) requires that the Defendant's head must be visible . . . during the administration of the HGN field sobriety test." The judge reversed the conviction for driving under the influence and dismissed the charge with prejudice. (R. p.27). The State submits the circuit court's statutory interpretation constitutes an error of law.

In Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), this Court addressed a similar claim; however, it was raised under an earlier version of section 56-5-2953, before the statute was amended to add a specific requirement for the recording of "any field sobriety tests administered." Nevertheless, Murphy is still instructive. Murphy claimed that the videotape of the incident site at her arrest did not comply with the statute because it failed to "record most of the field sobriety tests." Specifically, she argued the statute required that she remain in full view for all field sobriety tests. This Court disagreed and found that since the predecessor statute merely provided a person "must have his conduct at the incident site and breath test site videotaped," an accused

need not remain in full view of the camera at all times in order for the recording to capture that conduct. Murphy, 329 S.C. at 631, 709 S.E.2d at 688. Specifically, this Court found:

> [T]he plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture *all* field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused's conduct.

Murphy, 329 S.C. at 632, 709 S.E.2d at 688.

Here, contrary to the findings of the circuit court, the plain language of the amended statute does not require "that the Defendant's head must be visible . . . during the administration of the [HGN] field sobriety test." It merely says the video recording must "include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2012). As in Murphy, the plain language of the statute still does NOT require that the recording capture "a continuous full view of the accused." It also does not require a recording of a particular quality, or a recording in the best possible lighting conditions, or any other such limitation. As long as the recording includes "any field sobriety tests administered," it is in compliance with the plain, unambiguous language of the statute, and the circuit court erred in finding otherwise. Here, the arresting officer acted in compliance with the plain terms of section 56-5-2953.

To the extent this Court disagrees and finds section 56-5-2953(A)(1)(a) is ambiguous, the State nevertheless submits the circuit court committed an error of law by interpreting the statute in a way that would lead to an absurd result not possibly intended by the Legislature. If a statute is ambiguous, courts must construe the terms of the statute. Town of Mt. Pleasant v. Roberts , 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); Johnson, 396 S.C. at 189, 720 S.E.2d at 520. A statute as a whole must receive practical,

reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006); Johnson, 396 at 189, 720 S.E.2d at 520. The language of the statute must be read in such a way that harmonizes its subject matter and accords with the statute's general purpose. Roberts, 393 S.C. at 342, 713 S.E.2d at 283; Johnson, 396 S.C. at 189, 720 S.E.2d at 520. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Id. However, courts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention. Id.

The overarching purpose of subsection 56-5-2953(A) is clear: to ensure that the driver's "conduct" at the incident site and breath test site is recorded. This allows a jury to weigh whether the conduct supports the allegation of driving under the influence. Indeed, capturing the driver's overall conduct was the precise purpose described in Murphy, supra. The subparts of 56-5-2953(A)(1) simply identify particular aspects of that conduct which must also be included in the video recording. These consist of: (1) "the arrest of a person . . . or a probable cause determination . . . and show the person being advised of his Miranda rights," S.C. Code Ann. § 56-5-2953(A)(1)(a)(iii) (Supp. 2012); and (2) "any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2012). Pursuant to Murphy and its analysis of the predecessor statute, an officer could comply by video recording some, but not all, of the field sobriety tests administered. The amendment simply eliminated this possibility by requiring that any and all field sobriety tests be video recorded. It requires a video recording of the officer's administration of the field sobriety tests, not a recording that captures every

detail or the actual results of the tests. Indeed, it would be absurd to require video recording of the "involuntary jerking of the eyeball," which is the only relevant observation in an HGN test. Sullivan, supra. The State submits that as long as a juror can tell the arresting officer is administering the test, there is compliance. Here, the video recording leaves no doubt the arresting officer conducted an HGN test along with two other field sobriety tests, and all three tests were included in the video recording. Any other interpretation is not practical, reasonable or consonant with the purpose, design, and policy of the lawmakers. Indeed, the State submits the circuit court judge's expansive view of the allegedly ambiguous language fails to resolve the issue in favor of a just, equitable, and beneficial operation of the law. To the contrary, it leads to an absurd result not possibly intended by the Legislature. Certainly the Legislature did not intend dismissal of an otherwise valid driving under the influence charge simply because the quality of the video recording does not meet the appellate court's arbitrary standards. Accordingly, the circuit court judge erred in interpreting section 56-5-2953(A) to require that a defendant's head be visible during the administration of an HGN test.

Assuming the circuit court judge had not been wrong in interpreting the relevant statute, the circuit court judge's finding that Respondent's head was not visible during the HGN test was clearly erroneous and contrary to the evidence presented to him on appeal. Prior to placing Respondent under arrest, the officer conducted a series of field sobriety tests including: (1) an HGN test; (2) a "walk and turn" test; and (3) a "one leg stand" test. Respondent's conduct at the incident site was video recorded by the dashboard camera in the arresting officer's patrol car. The video recording is a continuous recording and includes all three of the field sobriety tests administered by the officer prior to

Respondent's arrest. Although the lighting is not perfect, Respondent can be seen and heard during the entire six minute and ten seconds recorded prior to his arrest. Respondent's head is visible during the approximately two minute long HGN test, and it is clearly visible during a majority of that HGN test because the officer's flashlight is pointed directly at Respondent. (State's Exhibit #3: DVD of roadside video). Thus, the factual finding that "[Respondent's] head was not sufficiently visible during the entire administration of the [HGN] test" was wholly without evidentiary support, and was an error of law.

Conclusion

The circuit court judge's findings regarding the requirements of section 56-5-2953(A) were controlled by an error of law both because they constituted an incorrect interpretation of the statute and because they were unsupported by the evidence. Therefore, the circuit court judge erred in reversing Respondent's conviction based on those findings. The circuit court's ruling dismissing the driving under the influence charge should be reversed and Respondent's case should be remanded for trial.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court reverse the decision of the circuit court and reinstate Respondent's conviction and sentence for driving under the influence.

Respectfully submitted,

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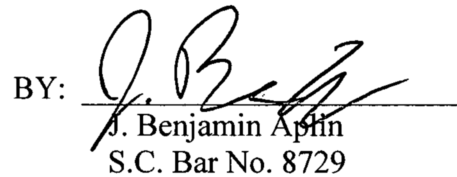
Assistant Attorney General

BY: 
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CODY ROY GORDON,...RESPONDENT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(including social security numbers, names of minor children, financial account numbers, and home addresses).

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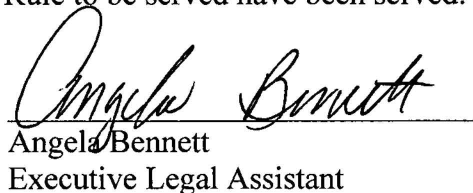
CODY ROY GORDON, ... RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Appellant*, dated August 7, 2013, on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Keith G. Denny, Esquire
P.O. Box 101
Walhalla, South Carolina 29691

I further certified that all parties required by Rule to be served have been served. This 7th, day of August, 2013.



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August 7, 2013

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The State v. Cody Roy Gordon
Appellate Case No. 2013-000515

Dear Mr. Denny:

I am enclosing two (2) copies of the Final Brief of Appellant in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 14 enclosed)
Victim Services