

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Oconee County  
Honorable Alexander S. Macaulay, Circuit Court Judge  
Appellate Case Tracking No. 2012-213018

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The State,

Appellant,

vs.

Bailey Taylor,

Respondent.

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**FINAL BRIEF OF APPELLANT**

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SC Court of Appeals

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## STATEMENT OF ISSUES ON APPEAL

The magistrate and circuit court erred in finding the State failed to produce a proper video recording under section 56-5-2953 of the South Carolina Code and in dismissing the case.

- A) The magistrate and circuit court erred in finding the defendant had to remain in full view of the camera for the duration of the recording.
- B) The magistrate and circuit court erred in finding the officer had to provide an affidavit explaining why the defendant left the field of view of the camera.

## **STATEMENT OF THE CASE**

On July 22, 2011, Respondent was arrested for driving with an unlawful alcohol concentration under section 56-5-2933 of the South Carolina Code and issued a uniform traffic ticket. The matter was set for trial in magistrate's court on March 13, 2012; however, the case was dismissed on pre-trial motion by Respondent. The State appealed to the circuit court by Notice of Appeal served and filed March 20, 2012.

The Honorable Alexander S. Macaulay heard the appeal from the magistrate's court decision. By Order dated September 6, 2012, Judge Macaulay affirmed the decision of the magistrate. The State served and filed a timely Notice of Appeal on September 14, 2012. This appeal follows.

## ARGUMENT

**The magistrate and circuit court erred in finding the State failed to produce a proper video recording under section 56-5-2953 of the South Carolina Code and in dismissing the case. The magistrate and circuit court erred in finding the defendant had to remain in full view of the camera for the duration of the recording or the officer had to provide an affidavit explaining why the defendant left the field of view of the camera.**

The circuit court erred in affirming the magistrate's decision to dismiss this case for failure to comply with section 56-5-2953(A) of the South Carolina Code and for failing to file an affidavit pursuant to section 56-5-2953(B). The State produced a video recording of the incident site in this case, and has not failed to produce one such that an affidavit is required. While Respondent is out of the view of the camera for several seconds, her conduct and all relevant interactions are recorded and on the video recording produced by the State. Further, the intent and purpose of the statute would be severely frustrated if an officer must produce an affidavit any time the defendant leaves the view of the camera for any period of time.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory

interpretation are not needed and the court has no right to impose another meaning.” Pittman, 373 S.C. at 561, 647 S.E.2d at 161. However, the statute must also be read as a whole and in harmony with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Accordingly, “[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

**A) Remaining in Full View**

Section 56-5-2953 requires:

- (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. 2010).

The statute requires a video recording of the incident site, and in doing so, specifically provides what must be videotaped. It indicates the individuals conduct at the incident site must be recorded and then provides the requirements for meeting this requirement. Specifically the recording must: 1) not begin later than the activation of the officer’s blue lights; 2) include any field sobriety tests administered; and 3) 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. The clear language of the statute does not require the individual to be on camera the entire time.

The facts of the instant case are similar to those in Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). In Murphy, the defendant asserted a DUI case should have been dismissed by the magistrate because the video recording failed to capture a full view of Murphy at all times during the field sobriety tests. Id. at 631, 709 S.E.2d at 688.

This Court found:

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

.....

While certainly an individual’s performance on such tests would be part and parcel of his or her “conduct” at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct. Therefore, the recording need not display all field sobriety tests provided it captures the accused’s conduct.

Id. at 631-632, 709 S.E.2d at 688 (emphasis added and citations omitted).

As in Murphy, an unbroken recording is not necessary to show Respondent’s conduct. As discussed at the hearing, the videotape clearly shows the officer stopping Respondent. It is only when the officer is preparing to administer the field sobriety test and moves his vehicle to better display the test that Respondent is removed from the camera’s field of view. The camera records from blue light activation until after arrest

and Respondent's conduct is recorded throughout even if she is not within the field of view at all times; however, she is entirely within the field of view during those time specifically enumerated in the statute to be recorded.

This case is distinguishable from the cases of City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) or State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). In both of those cases, a significant and specifically required portion of the videotape was not produced and an affidavit was not provided. In Suchenski, the officer failed to record all of the field sobriety tests and the arrest of the individual as specifically required under section 56-5-2953(A). Suchenski, 374 S.C. at 18, 646 S.E.2d at 881-882. In Johnson, the officer failed to record the administration of the breath test as specifically required. Johnson, 396 S.C. at 190-191, 720 S.E.2d at 520-521.

In the instant case, however, all the specifically required portions of the incident site were recorded. The recording began when Trooper Tolley activated his blue lights, and ended after Respondent was arrested. As a result, the State produced a videotape meeting the requirements of section 56-5-2953(A).

Also, any defects in the videotape go to its weight rather than admissibility. See State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility); see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of Breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence

or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

Additionally, “[t]he legislature is presumed to intend that its statutes accomplish something.” State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005). Here, the primary intention behind section 56–5–2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence. State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011). “The statute must be interpreted with realistic circumstances and rationales in mind.” Elwell, 396 S.C. at 336, 721 S.E.2d at 454; State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) (“A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.”). Courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (“However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. . . .”).

In the instant case, the magistrate and circuit court’s decisions lead to an absurd result. Clearly, the legislature did not intend for someone to avoid responsibility for driving under the influence of alcohol because they are not within the field of view of the Trooper’s camera at all times. This case is no different than if the suspected drunk driver were to wander out of the field of view while he is performing the heel to toe step test or

some other test. The legislature's intent cannot be a drunk driver gets a pass because the Trooper made certain to have his car in a position to best record the incident site tests and in doing so the Respondent is out of the field of view for several seconds. It is important to note Respondent has never alleged anything significant took place in those several seconds, only that she was off camera and, therefore, should not have to face trial for DUAC.

The video recording complied with section 56-5-2953 by recording all the events of the incident site as required, and there is no requirement Respondent had to remain within the full view of the camera in order to have her conduct recorded. Accordingly, the magistrate court and circuit court committed an error of law in determining the video recording failed to satisfy the requirements of section 56-5-2953(A).

#### **B) Affidavit Requirement**

Section 56-5-2953(B) of the South Carolina Code (Supp. 2010) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. Specifically, it provides:

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, . . . was in an inoperable condition, . . . or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording

based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2010).

In State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011), this Court discussed subsection B and the requirement the State must produce a video recording.<sup>1</sup>

Within the statutory framework at issue, we find the definition of the word “produce” intended by the General Assembly to be consistent with the following definitions: to bring into existence; to create; to manufacture; or to cause to have existence or to bring forth by mental or physical effort. . . . Quite simply, we find the legislature intended that a video of the breath test site be created.

Id. at 232, 708 S.E.2d at 810.

This case does not involve the failure to produce the incident site video recording. It is uncontested the camera in Trooper Tolley's vehicle activated when he activated his blue lights and continued recording until after Respondent's arrest. Further, the videotape displays the field sobriety tests given to Respondent, as well as the arrest and advice of rights. There is only a several second period of time when Trooper Tolley is trying to reposition his automobile so he can comply with the specific recording requirements of the statute that Respondent is out of the view of the camera. (T.4-5; R.7-8). Trooper Tolley created or produced the video recording when required, and as discussed above, the recording included all elements required under subsection A of the statute.

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<sup>1</sup> Branham involved the production of the breath test site video as opposed to the incident site video as in this case. However, the distinction makes no difference in a determination of what is required of the State in producing a video recording according to the statute.

Even if, as this Court discussed in Branham, the definition means to turn over a copy to opposing counsel, this was done in this case. Respondent received a copy of the video recording and was able to review the contents of the recording. No matter which definition of produced is used, the State produced a video recording of the incident site.

The State has complied with section 56-5-2953 by producing a videotape with all required events documented. Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required, and the videotape and all evidence related to Respondent's arrest should have been admitted into evidence.

Further, the affidavit referred to in subsection B is necessary only when a videotape is not produced. The section provides: "Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit . . . ." S.C. Code Ann. § 56-5-2953(B) (emphasis added). Nothing in the plain language of the statute requires an affidavit be submitted when the videotape is produced but contains a defect or an individual is not within the camera's field of view.

According to subsection B, the affidavit must indicate whether the failure to produce a videotape was excused because of the inoperability of the equipment, a medical emergency, or exigent circumstances. Clearly the provisions of the affidavit requirement do not apply in a situation such as in this case because the reason for the person leaving the field of view was not 1) the inoperability of the equipment; 2) a medical emergency; or 3) exigent circumstances. It was merely a need to reposition the

vehicle to best meet the requirements of the statute. If the section is read to require an affidavit any time an individual goes off the screen, then nearly every incident site video recording will have to be accompanied by an affidavit because the person is inevitably off the screen when he or she is being placed in the patrol car. The legislature could not have intended to require an affidavit any time an individual is off the screen for a short period of time. The statute, and the legislative intent, clearly only require an affidavit when a video recording that includes the relevant events discussed above cannot be produced. The magistrate and circuit court committed an error of law in determining Trooper Tolley was required to submit an affidavit explaining the time Respondent was out of the view of the camera.

Accordingly, Respondent was not required to remain within the field of view for the entire recording in order for the State to produce a proper video recording. Further, the affidavit requirement only applies when a video recording cannot be produced and not when the individual leaves the field of view for a short time during recording. Finally, the case should be remanded for a trial in which the State will be entitled to admit the video recording of the incident site.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the magistrate and circuit court dismissing this case for failure to produce a video recording or present an affidavit of explanation pursuant to section 56-5-2953 of the South Carolina Code should be reversed and this case remanded for trial.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**


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

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**PROOF OF SERVICE**

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I, Sally Ellison, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.  
This 13 day of January, 2014.



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