STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-213281

The State, Appellant,

vs.

Colin Duane Fitzgerald, Respondent.

**MOTION TO HOLD APPEAL IN ABEYANCE**

Appellant, through its undersigned counsel, would respectfully show unto this Court as follows:

The appeal arises out of a conviction for Driving with an unlawful alcohol concentration (DUAC). The video of the incident site produced by the State pursuant to Section 56-5-2953(A) of the South Carolina Code (Supp. 2010) does not contain audio of the field sobriety tests, or Miranda warnings being given. The magistrate admitted the incident site video and allowed the case to proceed to the jury after denying Respondent's motions to dismiss. Respondent was convicted of DUAC by a jury.

Respondent appealed his conviction to the circuit court. After hearing argument, the circuit court issued an Order filed September 28, 2012, reversing the conviction and dismissing the case. The court found the lack of audio on the video recording, and the arresting officer's failure to provide an affidavit pursuant to Section 56-5-2953(B) of the

South Carolina Code (Supp. 2010) to explain the lack of audio, necessitated dismissal of the charges. (See Order of the Circuit Court Attached as Exhibit A).

The State timely filed its Notice of Appeal from the circuit court's determination. (See Notice of Appeal Attached as Exhibit B). The Initial Brief of Appellant and Designation of Matter are due to be served and filed on February 6, 2013.[1]

The undersigned is also counsel of record for the State in the case of State v. Phillip Wesley Sawyer, Op. No. 2011-UP-263 (S.C. Ct. App. filed June 7, 2011). The Sawyer case involves the issue of whether the lack of audio at the breath test site without explanatory affidavit necessitated dismissal of the charges. This Court found the circuit court properly suppressed the breath test video and other evidence due to the audio not being recorded.

The State has filed a Petition for Writ of Certiorari seeking review of this Court's Opinion in Sawyer on the issue of whether the lack of audio renders the videotape invalid under Section 56-5-2953. (See Petition for Writ of Certiorari Attached as Exhibit C). The Supreme Court, on January 9, 2013, granted the State's Petition for Writ of Certiorari and briefing has been requested on the issue of whether the lack of audio invalidates the video from the breath test site. (See Order Granting Certiorari Attached as Exhibit D).

III.

The State believes the issue presented in Sawyer, and the eventual ruling by the Supreme Court, will be determinative of the issue on appeal in the instant appeal. If the Supreme Court upholds this Court's ruling that the audio is required in order to comply with Section 56-5-2953 briefing will likely not be necessary. If the Supreme Court

[1] The undersigned asks this deadline be held in abeyance pending a ruling on this motion.

reverses this Court's ruling and finds audio is not required and the videotape may still be admitted without the audio portion of the recording, the State believes the Sawyer opinion will be controlling and would mandate reversal of the circuit court's order.

Accordingly, the State asks this Court to hold this appeal in abeyance pending a final opinion by the South Carolina Supreme Court. The State does not believe this would prejudice Respondent, whose conviction has been reversed by the circuit court. Further, the State believes this is the judicially efficient means of handling the underlying appeal which will likely turn entirely on the outcome of the appeal in State v. Phillip Sawyer.

WHEREFORE, Appellant prays that the Court hold this matter in abeyance until the South Carolina Supreme Court issues an opinion in State v. Phillip Wesley Sawyer; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
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WILLIAM M. BLITCH, JR.
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ATTORNEYS FOR APPELLANT

January 29, 2013

# EXHIBIT A

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE SIXTEENTH JUDICIAL CIRCUIT |
| COUNTY OF YORK | ) | |
| City of Fort Mill, | ) | |
| Respondent, | ) | C. A. No. 2012-CP-46-02640 |
| vs. | ) | |
| Colin Duane Fitzgerald, | ) | **ORDER** |
| Appellant. | ) | |



This matter is before the Court on Appeal from the City of Fort Mill Municipal Court. Colin Duane Fitzgerald, Defendant (Appellant), was represented by J. Tyler Burns of the law firm of Reeves, Aiken and Hightower, LLP. The City of Fort Mill was represented by Jenny Desch of the Sixteenth Circuit Solicitor's Office.

Factually and procedurally, this is an unusual case. Fitzgerald was stopped in the City of Fort Mill by a York County Sheriff's Deputy. The deputy was transporting someone in his vehicle at the time, and he called in a Fort Mill policeman to investigate the matter. The police vehicle driven by the city officer did not have a working video recorder. The county deputy remained on scene with his video recorder on. However, the microphone was attached to his person, and when he got into his vehicle, there was no audio recording of the field sobriety test or Miranda warnings being given by the arresting officer.

Fitzgerald was charged with DUI and went to trial on a DUAC charge. Defense counsel made pretrial motions for dismissal on the grounds that the State failed to comply with the requirements of Section 56-5-2953. The motions were denied.

The case was tried before a judge and jury on April 24, 2012. The jury found Fitzgerald guilty of DUAC. The jury was dismissed. Before sentencing, it was brought to the attention of the trial judge that the required verdict form in which the jury was required to make a finding as to alcohol content was not submitted to the jury and no finding was made by the jury. The trial judge realized the oversight and ordered a mistrial, sua sponte, and placed the case back on the jury trial docket.

Fitzgerald appealed to the Circuit Court on June 27, 2012. Judge John C. Hayes, III, ordered the mistrial to be set aside as improvidently granted and remanded back to the trial court for sentencing according to the jury verdict. Fitzgerald was subsequently sentenced by the trial judge.

Issues on Appeal

1. The Court erred in not dismissing the case for failure by the arresting officer to comply with S. C. Code Ann. § 56-5-2953 (B) to provide a sworn affidavit to explain why no video of the incident site could be provided.

2. The Court erred in not dismissing the case for failure of the non-arresting officer to comply with S. C. Code Ann. § 56-5-2953 (B) to provide a sworn affidavit to explain why no audio was included in his video of the incident site.

3. The Court erred in not dismissing the case for violation of S. C. Code Ann. § 56-5-2953 in that the video at the incident site does not show the Appellant being advised of his Miranda warnings.

Section 56-5-2953 provides in pertinent part as follows:

(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)(e) The video recording at the incident site **must**:
(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 shows the person being advised of his Miranda rights. [Emphasis added]

(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 submitted a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable 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. 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. 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.

Section 56-5-2953 was amended in 2008 and rewrote subsection (A) and substituted "video recording" for "videotape," "videotapes" and "videotaping," throughout.

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## Discussion

The visual part of the video recording of the administration of the field sobriety tests is included in the video recording at the incident site. However, the audio part of the video recording of the field sobriety tests, Miranda warnings, and verbal communication by Fitzgerald is not included. Therefore, the wording of any Miranda warnings, instructions by the officer administering the field sobriety tests, and verbal responses by Fitzgerald are not included.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. All rules of statutory construction are subservient to the one that 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. The determination of legislative intent is a matter of law. State v. Landis, 362 S.C. 97; 606 S.E. 2d 503 (Ct. App. 2004).

The 2008 amendment to Section 56-5-2953 by the legislature must have been made for a reason and purpose. The only logical and rational basis for the amendment is a legislative intent to require the video at the incident site and the breath test site to include audio of those procedures in the videos.

The arresting officer did not provide an affidavit to the trial court which provides information creating an exception to the video recording required by Section 56-5-2953 (B). Failure to install operative video recording equipment does not meet the requirements of that section. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (S.C. 2011). In fact, no sworn affidavit by the arresting officer was offered to the Court.



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The remedy for failure to provide a video recording or an affidavit of the arresting officer which meets the requirements of Section 56-5-2953 is a dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (S.C. 2007).

Conclusion

The State has failed to provide a video recording or an affidavit of the arresting officer creating an exception, as set forth in Section 56-5-2953. The conviction in the Fort Mill City Municipal Court of Colin Duane Fitzgerald on a charge of DUAC is reversed and the charge is dismissed.

**IT IS SO ORDERED.**

Lee S. Alford
Presiding Judge
of the Sixteenth Judicial Circuit

York, South Carolina

September 30, 2012

# EXHIBIT B

**NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A CONVICTION IN FORT MILL MUNICIPAL COURT**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

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Case No. 2012-CP-46-02640

RE: Ticket # 46773FT

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The State of South Carolina, Appellant,

v.

Colin Duane Fitzgerald, Respondent.

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NOTICE OF APPEAL

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The State of South Carolina, by and through Assistant Solicitor Jenny Desch, appeals the Order of the Honorable Lee S. Alford dated September 28, 2012, which reversed the conviction of Respondent Colin Duane Fitzgerald in Fort Mill Municipal Court and dismissed the charge. Appellant received notice of the Order on or about October 2, 2012. Appellant hereby appeals the ruling in that Order.

October 2, 2012

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Attorney for Respondent

**PROOF OF SERVICE OF A NOTICE OF APPEAL**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge



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Case No. 2012-CP-46-02640

RE: Ticket # 46773FT

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The State of South Carolina, Appellant,

v.

Colin Duane Fitzgerald, Respondent.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 3, 2012, addressed to his attorney of record, J. Tyler Burns, Reeves, Aiken and Hightower, LLC, Post Office Box 1297, Fort Mill, South Carolina 29716.

October 3, 2012

Dawn Carter, Paralegal
Sixteenth Judicial Circuit Office of Solicitor
1675-1A York Hwy
York, South Carolina 29745
(803) 818-5958

# EXHIBIT C

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

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THE STATE, Petitioner,

vs.

PHILLIP WESLEY SAWYER, Respondent.

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Opinion No. 2011-UP-263 (S.C. Ct. App. filed June 7, 2011)

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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ATTORNEYS FOR PETITIONER

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## CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on June 20, 2011. The Petition for Rehearing was denied by Order filed September 20, 2011.

## STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals erred in affirming the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.

II. The Court of Appeals erred in refusing to reverse the trial court's decision based on the totality of the circumstances pursuant to Section 56-5-2953(B) of the South Carolina Code.

## STATEMENT OF THE CASE

### Procedural History

Phillip Wesley Sawyer, Respondent, was charged with one count of driving under the influence, second offense pursuant to section 56-5-2930 of the South Carolina Code. The case was called for trial on April 15, 2008, before the Honorable Roger L. Couch. Prior to the jury being sworn, Respondent moved to dismiss the case or in the alternative suppress the breath test site evidence pursuant to section 56-5-2953 of the South Carolina Code (Supp. 2006). Both parties submitted briefs on the issues, and the State asked the court to reconsider its oral ruling and not suppress the videotape. On June 16, 2008, Judge Couch issued an order suppressing the video recording.

Respondent moved to reconsider or clarify the order of the Court. The parties submitted briefs and the Court held a hearing on the motion on September 18, 2008. On October 6, 2008, Judge Couch filed an Order on Motion for Post-Judgment Ruling to amend his prior ruling.

Pursuant to the standard found in State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), the State timely served and filed a Notice of Appeal on October 15, 2008. The Court of Appeals affirmed the decision in State v. Sawyer, Op. No. 2011-UP-263 (S.C. Ct. App. filed June 7, 2011). The State's timely Petition for Rehearing en banc was denied. This Petition follows.

### Factual Background

After Respondent was arrested for DUI, he was taken to the Spartanburg County Detention Facility in order for a breathalyser test to be administered. Deputy Evett placed

Respondent in the subject test area and then went into an adjoining room to activate the video recorder equipment. (T.31-33; R.18-20). He returned and proceeded to read Respondent his Miranda[1] rights as well as the informed consent form. (T.32; R.19; Ct. Exhibit 1, DVD). Respondent signed the form and was given a copy. (T.34; 36-39; R.21; 23-26; Ct. Exhibit 1, DVD). Deputy Evett then checked Respondent's mouth and began the twenty-minute waiting period prior to administering the breath test. (T.39; R. 26; Ct. Exhibit 1, DVD). Deputy Evett then administered the test to Respondent.

At a pretrial hearing, Respondent moved to dismiss the case or in the alternative suppress the video recording of the breath site, any testimony or evidence related to the administration of the breath test, and the results of the Datamaster breath test because he claimed the State failed to comply with section 56-5-2953 of the South Carolina Code (Supp. 2006). (T.21; R. 8). The State produced a copy of the video recording of the breath site, which was played for the judge. (T.27; R.14; Ct. Exhibit 1, DVD). The audio, however, from the room in which Respondent was kept was not recorded. (T.24-25; R.11-12; Ct. Exhibit 1, DVD).

At the hearing, Deputy Evett testified he had no way of knowing the audio was malfunctioning and not recording. He testified when he turned on the video recorder, it displayed what it was recording on a monitor, but there was no way to verify the audio portion was being recorded properly. (T.33-34; R. 20-21). Further, he testified he was not aware of the malfunction and no one at the jail had indicated there was a malfunction in that room's microphone. (T.42; 45-46; R.29; 32-33).

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[1]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Deputy Evett testified he informed Respondent he was being videotaped and then read Respondent his Miranda rights. Respondent indicated he understood the rights and accompanied the acknowledgment with a visible nod of his head. (T.36-37; R. 23-24; Ct. Exhibit 1, DVD). Deputy Evett stated he then read through the notification of informed consent. had Respondent initial each page and sign where appropriate. A copy of the form was given to Respondent. Deputy Evett indicated on the video recording that Respondent acknowledges his understanding of the informed consent notification with a visible nod of his head. (T.38-39; R.25-26; Ct. Exhibit 1, DVD). The video recording also showed Deputy Evett checking Respondent's mouth, Respondent waiting twenty minutes, and the breath test being administered. (T.39-40; R.26-27; Ct. Exhibit 1, DVD).

After learning the recording did not include audio, Deputy Evett provided an affidavit indicating he had no knowledge at the time of the breath test that the audio was not recording as intended. He indicated exigent circumstances existed regarding the failure of the audio because it was unknown and beyond his control. (T.29; 77; 81; State's Exhibit 1; R. 16, ).

Agent Baker with SLED testified at the hearing that SLED performs the maintenance and checks on the Datamaster systems. He testified when asked by the State to review the system at the Spartanburg County Detention Facility he found a four month period in which the audio would sometimes be recorded and other times would not be recorded by the recorder used by Deputy Evett to record Respondent's breath test site . (T.49-50; 59-60; R.36-37; 46-47). Further, he testified the system appeared to fix on its own because it was currently working and no one had done anything to fix the system. (T.55-56; R.42-43).

Finally, he testified there was no means for Deputy Evett to verify the audio was properly recording before beginning the test. (T.51-54; 61-62; R.38-41).

After hearing argument from counsel and receiving briefs from both parties, the trial court suppressed the video recording and evidence of the administration of a breath test, including the results of the breath test. The Court found the State failed to comply with section 56-5-2953 because the audio was not recorded. (Ct. Order dated June 16, 2008; R. 1). After a motion to reconsider or clarify filed by Respondent, the circuit court amended its order to suppress not only the videotape, but also all evidence or testimony related to the offering of a breath test as well as the result of the breath test. (Ct. Order filed October 6, 2008; R. 2).

## ARGUMENT

**I. The Court of Appeals erred in affirming the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.**

The Court of Appeals erred in affirming the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test. While the video recording does not include audio of the total time Respondent is at the breath test site, the State produced the video recording as required by section 56-5-2953 of the South Carolina Code (Supp. 2006), and any deficiency in the video recording should go to its weight and not its admissibility. Under the plain language of the statute, the State complied with the requirements of the statute and suppression of the evidence was not proper.

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).

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

Id. (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v.

Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted). Further, it is a "well-settled rule of statutory construction, that a court is bound, if possible, to give some place and effect to every word found in a statute." Burns v. Gower, 34 S.C. 160, 13 S.E. 331, 332 (1891) (emphasis added); see also, Breeden v. TCW, Inc./Tennesse Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (finding every "word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction").

Section 56-5-2953(A) of the South Carolina Code (Supp. 2006) requires: "A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped." The statute specifies the required events of the breath test site that must be recorded:

> 2) The videotaping at the breath site:
>
> (a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;
>
> (b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test; (c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;
>
> (d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's

> conduct during the twenty-minute pre-test waiting period must be videotaped.

S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2006). Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape.

Deputy Evatt complied with section 56-5-2953(A)(2) when he activated the camera system at the breath test site. He verified the camera was operational and verified video recording had begun. He had no means of verifying whether audio recording began with the camera, but could only verify a videotape was being created. All required events which must be recorded pursuant to section 56-5-2953(A)(2) were recorded, and all the events are clearly visible on the videotape created by the recording system and produced by the State. No portion of the required recordings was missing or unrecorded.

Further, the State produced a copy of this videotape as required by section 56-5-2953(B). This case does **not** involve the failure to produce the breath test site video recording. Respondent received a copy of the video recording and was able to review the contents of the recording. The videotape clearly shows the reading of Respondent's Miranda warnings, the officer informing Respondent of the videotape and his right to refuse the breath test, as well as all the breath test procedures. (T.34-40; R.21-27; Ct. Exhibit 1, DVD).

It is significant to note Respondent has **never** challenged the validity of the Miranda warning he was given, whether he was properly informed of the videotape and his right to refuse the breath test, nor the actual test procedures utilized by Deputy Evett. Additionally, counsel for Respondent conceded at oral argument before the Court of Appeals the substance

of what took place was not at issue, and there was no challenge to the Miranda warnings or other instructions required to be given under the statute.

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 the breath test should have been admitted into evidence.

The trial court's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), is misplaced. In Suchenski, the arresting officer's vehicle recorder ran out of tape before the defendant was arrested, and as a result, there was **no** recording of the last field sobriety test or the arrest, both events required to be recorded under the statute. Thus, under the statute, the officer could not produce a videotape of all of the required events. The officer testified a tape had never ended during an arrest before, and he did not know the tape was about to run out, but assumed the videotape was running as usual. The magistrate denied the defendant's motion to dismiss, finding exigent circumstances excused full compliance with the statute. The circuit court reversed on appeal. The South Carolina Supreme Court affirmed, finding the City's claim of exigent circumstances was not preserved for review, and in the absence of an exception, section 56-5-2953(B) required dismissal of the charge. Id.

In this case, unlike Suchenski, the State produced a videotape of the **entire** breath test site and all events required to be documented under the statute. See Section 56-5-2953(A)(2). While the audio is missing, the videotape was produced as required by the statute and the

court should have found it admissible as evidence. See Section 56-5-2953(A) (videotapes of incident and breath test sites are admissible as evidence in a criminal proceeding).

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), *cert. granted* April 17, 2008; 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, Op. No. 26624 (S.C. Sup. Ct. filed March 30, 2009) (Shearouse Adv. Sh. No. 15 at 11) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

Further, while not binding precedent, it is important to note the Court of Appeals found in State v. Craig, Op. No. 2009-UP-603 (S.C. Ct. App. filed December 22, 2009), that a videotape with similar defects resulting from a tracking error was admissible. The Court found any defects in the videotape went merely to its weight and not its admissibility and that a videotape was produced by the State. See Id. (citing S.C. Code Ann. § 56-5-2953(B) (2006) (stating that failure by the arresting officer "to produce" a videotape is not a ground alone for dismissal of a DUI charge if the arresting officer submits a sworn affidavit certifying that the video equipment was in an inoperable condition and that reasonable efforts have been made to maintain the equipment in an operable condition); State v. Dicapua, 373 S.C. 452, 457, 646 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring) ("The flaws in

the videotape go to the weight of the evidence and not to its admissibility.")). This case is no different and does not demand a different result from that in Craig. As a result, this Court should grant the Petition for Writ of Certiorari in order to establish a consistent result.

The statutory language required the production of the videotape. The State produced a videotape which included all the requisite events from the breath test site in this case, and, as a result, the State met the clear language of the statute. The legislative intent was to require the State to document the steps taken at the breath test to ensure a fair procedure was used, and the intoxicated individual's rights were not violated. The videotape in this case meets that legislative intent because it shows Respondent being read his Miranda rights, being informed of the videotape and the right to refuse the breath test, the procedure used by Deputy Evett in conducting the breath test, and Respondent's acknowledgment and compliance with each step. Respondent never challenged the accuracy, adequacy, or appropriateness of any of the steps demonstrated by the videotape.

At trial, Respondent would have the opportunity to challenge any deficiency in the procedures, and Deputy Evett would have the opportunity to explain the procedures used. It should then be up to the jury to determine the weight to assign to the evidence and testimony before them and then render their verdict. Therefore, the circuit court erred in suppressing the videotape of the breath test site, testimony or evidence of the fact a breath test was conducted, and the results of the breath test, and the Court of Appeals erred in affirming the result. The State complied with the statute requiring that a videotape be produced showing the required events at the breath test site. Any defect in the produced videotape affects its weight as will be determined by the jury and not its admissibility into

evidence. As a result, this Court should grant the Petition for Writ of Certiorari and find, as the Court of Appeals did in a conflicting opinion in Craig, the State properly produced a videotape in compliance with the statute and any defect goes to the weight of the evidence and not its admissibility.

## II. The Court of Appeals erred in refusing to reverse the trial court's decision based on the totality of the circumstances pursuant to Section 56-5-2953(B) of the South Carolina Code.

The Court of Appeals also erred in not reversing the decision of the magistrate based on the totality of the circumstances under section 56-5-2953(B) of the South Carolina Code (Supp. 2007). Even if this court finds the videotape violates section 56-5-2953(A), mitigating circumstances under 56-5-2953(B) exist, and the trial court should not have suppressed the videotape, any evidence related to the offer of a breath test, or the results of the breath test. Given the totality of the circumstances in this case, especially considering the failure of the audio was completely beyond the control of the officer, the court should not have suppressed the evidence.

Section 56-5-2953(B) contains a failsafe for the court to consider extenuating circumstances:

> (B) Nothing in this section may be construed as prohibiting the introduction of other 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 videotapes 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 videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape 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

> videotape 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 videotape.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2007) (emphasis added).

The solicitor asked the court to view the failure of the audio in light of the circumstances of the instant case and to consider the fact the failure was beyond the control of Deputy Evett and had even escaped routine maintenance because it was a malfunction that was not a chronically occurring problem. (T.72-73; 76-78; R. 59-60; 63-65 ). There was no failure on the part of Deputy Evett to perform his duty under the statute. He started the videotape when he was required to do so and verified to the best of his ability that it was recording. As Agent Baker explained, the only means to verify the videotape was functioning properly was to view what it was recording on a monitor. The main problem was at the time of this incident, there was no means to verify the audio was functioning properly. It is logical for Deputy Evett to assume because the video portion recorded and displayed properly on the monitor that the audio also worked.

This is not a situation in which the officer intentionally tried to manipulate the video, disguise his actions, or violate Respondent's rights. Deputy Evett did everything within his power to preserve on video the breath test site as required by section 56-5-2953. Given the totality of the circumstances, including the fact Deputy Evett followed proper procedure, he had no means prior to performing the test of verifying the functioning of the audio portion of the recording, and the fact Respondent has not challenged the actual procedures used by

Deputy Evett, the circuit court erred in not finding the videotape and other breath test related evidence admissible.

Further, the statute allows the officer to file an affidavit indicating some exception to the requirements, including exigent circumstances, existed which resulted in the failure to comply with the statute. In this case, Deputy Evett provided an affidavit indicating exigent circumstances existed because he had no means of knowing the audio malfunctioned and its malfunction was beyond his control. (T.29-30; 77; 81; State's Exhibit 1; R. 16-17; 64; 68; 94 ). Deputy Evatt was the appropriate officer to file the affidavit because he was the only officer with personal knowledge of the breath test site. The intent of the statute, while indicating the arresting officer should produce an affidavit is clearly to require the officer with personal knowledge of the videotape in question to produce the affidavit. The circuit court should have found his affidavit sufficient given the circumstances of this case. See City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007) (Burnett, J., dissenting opinion) (arguing exigent circumstances existed when the officer started tape, but it ran out prior to completion of the events required to be videotaped at the incident site).

This Court should grant the Petition for Writ of Certiorari and find, even if the videotape requires a recording of the twenty-minute pre-test waiting period when no test is to be given, the refusal was admissible based on the totality of the circumstances and the case should not have been dismissed.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

November 18, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



Certiorari to the Court of Appeals
Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

THE STATE, Petitioner,

vs.

PHILLIP WESLEY SAWYER, Respondent.

Opinion No. 2011-UP-263 (S.C. Ct. App. filed June 7, 2011)

**PROOF OF SERVICE**

I, ELLEN DuBOIS, certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals and Appendix by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, S. C. 29211

I further certify that all parties required by Rule to be served have been served. This 18th day of November, 2011.

Ellen DuBois

ELLEN DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

# EXHIBIT D

# The Supreme Court of South Carolina

The State, Petitioner,

v.

Phillip Wesley Sawyer, Respondent.

Appellate Case No. 2011-201206



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ORDER

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The State has filed a petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Sawyer*, Op. No. 2011-UP-263 (S.C. Ct. App. filed June 7, 2011). We grant the petition as to Question I and deny the petition as to Question II. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C.J.

J.

J.

We would deny the petition for a writ of certiorari.

J.

J.

Columbia, South Carolina

January 9, 2013

cc:
The Honorable Jenny Abbott Kitchings
William M. Blitch, Jr.
Barry Joe Barnette
LaNelle Cantey DuRant
The Honorable M. Hope Blackley
The Honorable Roger L. Couch

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JAN 29 2013
SC Court of Appeals

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Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-213281

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The State, Appellant,

vs.

Colin Duane Fitzgerald, Respondent.

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**PROOF OF SERVICE**

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I, Ellen R. DuBois, certify that I have served the Motion Out of Time For Second Extension Of Time Within Which To Serve And File Initial Brief Of Appellant and Designation Of Matter on Respondent by depositing a copy of same in the United States mail, postage prepaid, addressed to:

J. Tyler Burns, Esquire
1012 Market Street Suite 205
Fort Mill, South Carolina 29708

I further certify that all parties required by Rule to be served have been served.

This 29th day of January, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

January 29, 2013

**VIA HAND DELIVERY**
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Colin Fitzgerald
Appellate Case Tracking No. 2012-213281

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Motion to Hold Appeal in Abeyance along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General



Enclosures
cc: J. Tyler Burns, Esquire
Victim Services