

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2014-002340

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SC Court of Appeals

The City of Rock Hill,

Appellant,

v.

Brenda Stroupe,

Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court correctly dismissed the City's case where the City did not comply with the mandatory recording provisions of section 56-5-2953(A) of the South Carolina Code.
- II. The Circuit Court correctly found that section 56-5-2953(B) of the South Carolina Code was not applicable to this case.

STATEMENT OF THE CASE

Brenda Stroupe was arrested and charged with driving under the influence on April 13, 2013 by Officer Justin Cook of the Rock Hill Police Department. On September 11, 2013, she moved to dismiss this charge on the grounds that the City of Rock Hill had not complied with the mandatory recording provisions of 56-5-2953(A) of the South Carolina Code. That Motion was heard on September 26, 2013 by the Honorable Peter Lenzi, Associate Judge for the Rock Hill Municipal Court. The City replied to the Motion approximately one month after the hearing (October 21, 2013). Judge Lenzi issued an Order on October 28, 2013 denying the Motion. A trial was held in the case on January 23, 2014 in which Mrs. Stroupe was found guilty. Mrs. Stroupe appealed her conviction to the Circuit Court. The Circuit Court reversed the conviction on September 15, 2014. The City appealed the Circuit Court order of the Honorable John C. Hayes III, finding that the ruling of the trial court on the Motion to Dismiss was erroneous. The City moved the Circuit Court to alter or amend this Order which the circuit court denied by way of its order on October 7, 2014. This appeal followed.

STATEMENT OF THE FACTS

Brenda Stroupe, the Respondent, was stopped by Officer Justin Cook of the Rock Hill Police Department on or about 7:30 p.m. April 13, 2013 in the City of Rock Hill. Following the stop, she was removed from her vehicle and directed to step behind the vehicle where Officer Cook administered four (4) field sobriety tests to her, specifically, the horizontal gaze nystagmus test (HGN), (PT Transcript p. 29; R. p. 158), (T. Transcript p. 43, line 17; R. p. 234). The vertical gaze nystagmus test (VGN) (PT Transcript p. 33, line 22, R. p. 162), (T. Transcript p. 90, line 2; R. p. 281); “the finger dexterity test” (PT Transcript p. 35, line 7; R. p. 164), (T. Transcript p. 50, line 15; R. p. 241) and an alphabet (ABC) test.

Officer Cook, who provided a video recording which presumably showed him administering these tests, and testified to the results of the tests, acknowledged that her face was not visible on the recording because her whole face was a blur. (T. Transcript p. 80, line 23; R. p. 271). He stated that she “showed all six clues” on the HGN (T. Transcript p. 49, line 6; R. p. 240) and “typically, the more clues that are observed, the more likely that the person is impaired or under the influence of alcohol (T. Transcript p. 49, line 10; R. p. 240). However, it was impossible for the finder of fact to determine as to whether the clues actually existed because her face was a complete blur. (T. Transcript p. 84, line 22; R. p. 275).

Officer Cook admitted that the jury would not be able to assess whether his testimony giving the VGN was true or not because her face was a blur. (T. Transcript p. 90, lines 12-18; R. p. 281).

Officer Cook admitted that the recording of the finger touch test was so blurred that it was impossible to determine whether she passed this test or not. He agreed that her hand was not able to be seen clearly let alone the finger and thumb. (T. Transcript p. 93; lines 8-16; R. p. 284). In sum, Officer Cook admitted that for “three out of the four tests administered to Mrs. Stroupe, and results of which were introduced against her at trial, it could not be determined on the video tape whether she passed them or not. (T. Transcript p. 95, lines 11-15; R, p. 286).

Prior to the trial in this case, the Respondent moved for a dismissal of her charge citing the Appellant’s failure to comply with the mandatory recording provisions of section 56-5-2953(A) of the South Carolina Code. The trial court made no factual finding regarding the HGN or VGN tests but did find, as a matter of fact, that the finger dexterity test the Respondent could be heard but not seen attempting to perform the finger dexterity test. (Order of the Trial Court; R. p. 13). The trial court did not specifically rule whether the recording of the tests complied with the statute, only that the statute had been complied with.

ARGUMENT

I. The Circuit Court correctly dismissed the City's case where the City did not comply with the mandatory recording provisions of section 56-5-2953 of the South Carolina Code.

The Appellant argues that because the video tape provided in this case shows that field sobriety tests took place the statute is satisfied, regardless of whether the video shows if the Respondent passed or failed such tests or whether the officer gave the tests properly. Put in different terms, the Appellant's position is that a person's conduct relating to the tests does not have to be recorded. Only the fact that the person was at a location and at time where an officer was present to observe such conduct. Such a position is at odds with the unambiguous language of section 56-5-2953(A) states that pertinent part:

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and 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 56-5-45, and show the person being advised of his Miranda rights.

It is clear from the language above that to comply with the mandatory recording provisions of §56-5-2953(A) more than general conduct must be recorded. There must be a

recording which shows the person's conduct as they perform the field sobriety tests. In other words, the results of the field sobriety tests. In the instant case, there were four field sobriety tests that were administered by the officer to the Respondent. For three of these field sobriety tests, it is not possible to determine, from the video tape, whether the Respondent passed them or not. (T. Transcript p. 95, lines 11-15; R.p. 286).

The first field sobriety test administered was the HGN. Officer Cook testified that nystagmous is the involuntary jerking of the eyes (T. Transcript p. 47, line 14; R. p. 238), and the "when your eyes move from side to side, a person that's not under the influence, they're smooth. Side to side they're smooth. There's no jerking. As a person becomes under the influence of alcohol there becomes a jerking of the eyes which is involuntary." (T. Transcript p. 47, line 19; R. p. 238). Officer Cook acknowledged that before the HGN can be administered that he is trained to make sure that there is no resting nystagmous, that a person's pupils are equal in size and that both eyes track equally. At the time of the HGN, he saw no resting nystagmous, the Respondent's pupils were equal in size and her eyes tracked equally, but because on the video the Respondent's entire face is a blur, there was no way for the jury to determine if his testimony was truthful or not. (T. Transcript pp. 80-82; R. pp. 271-273). Officer Cook testified that he then administered the HGN test, checking each eye twice for the following clues: lack of smooth pursuit, distinct and sustained nystagmous at maximum deviation and onset of nystagmous prior to forty-five (45) degrees. Although he testified that he observed all six clues in the Respondent's eyes, and that "the more clues that are observed, the more likely that a person is impaired or under the influence of alcohol", (T. Transcript p. 49, line 10; R. p. 240); he acknowledged that none of these

alleged clues were visible on the video tape because her face is a complete blur. (T. Transcript pp. 84-89; R. pp. 275-280).

Officer Cook testified that after administering the HGN test he gave the Respondent the VGN test. He agreed the results of this test were not visible on the video tape as well because the Respondent's face is a blur. (T. Transcript p. 90, lines 9-18; R. p. 281).

The third test given to the Respondent was a finger touch test. Officer Cook demonstrated to the Respondent how he wanted her to perform this test by using his own fingers. The video recording did not show either the officer's finger or thumbs as he demonstrated the test nor did it show whether or not the Respondent's fingers touched her thumb in the sequence demonstrated by the officer. (T. Transcript pp. 91-94, lines 23-25; R. p. 285). Although he told the jury she "did poorly" and touched her finger tips out of order (T. Transcript p. 51, lines 14-16; R. p. 242), Officer Cook admitted, for three out of the four tests it could not be determined from the video whether she passed them or not. (T. Transcript p. 95, lines 11-15; R. p. 286).

As the Circuit Court reasoned, it would be a hollow requirement for just the administration be shown without the results of the tests being shown. Two of three tests at issue involve the eyes. Not only were the Respondent's eyes not visible, but neither was her face. The third test involved the thumb and fingers of her right hand. (T. Transcript p. 93, lines 4-6; R. p. 284). Yet neither the fingers or the thumb of this hand can be seen. The trial court found that "we can hear the Defendant clearly but cannot see her clearly attempting to perform the finger dexterity test". (Order of Trial Court; R. p. 13). In sum, the Respondent's conduct while attempting to comply with three field sobriety tests administered was not

recorded and the Circuit Court ruled correctly that the statute was not complied with. The Respondent is aware of the Court's ruling in State v. Gordon, 414 S.C. 94, 777 S.E.2d 376, (2015). However, in that case, our Court found that it "was undisputed that Gordon's face is depicted in the video" Gordon, 777 S.E.2d at 379. In the instant case, it is undisputed that the Respondent's face and hand are not depicted on the video. The statute at issue in this case is clear and unambiguous and, therefore this Court must give its words their ordinary meaning. The statute states that the video recording "must record any field sobriety test administered", which necessarily includes the HGN test, VGN test and finger dexterity test. In the instant case, the video recording did not.

A video tape that shows that an individual has a head is not the same as one that shows how that head reacted or the person's conduct using their head during a field sobriety test. A video tape that allows one to surmise that a person has a thumb and fingers on their right hand is not the same as one which shows whether or not such thumb and fingers touched as instructed during a field sobriety test. Yet all this alleged conduct was presented by the City against the Respondent in great detail. The probative value of a video recording which showed the Respondent's thumb and fingers would have been two fold. First, it would have demonstrated that the officer was incorrect regarding his observation of the Respondent's conduct during the three field sobriety tests and second, that the Respondent was not in fact under the influence at the time of the field sobriety tests. The testimony of the arresting officer, coupled with the lack of a video recording of the Respondent's conduct, put the Respondent in an untenable position of losing the only evidence that could challenge the officer's testimony.

ARGUMENT

II. The Circuit Court correctly found that section 56-5-2953(B) of the South Carolina Code was not applicable to this case.

Section 56-5-2953(B) states in pertinent part that:

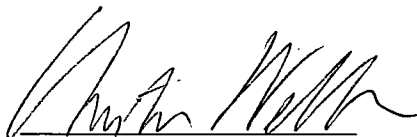
Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of sections 56-5-2930, 56-5-2933 or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to sections 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 arrest or probable cause was in an inoperable condition...

As the Circuit Court found, the City produced a video recording, albeit one that did not comply with the mandatory recording provisions of section 56-5-2953(A). The Appellant argued at the trial level that it produced a video recording in compliance with this section. The trial court ruled that such a recording was produced. The trial court never ruled, nor did the Appellant seek a ruling from the trial court regarding subsection (B) "exceptions". The Circuit Court found that as the trial court had not ruled on this issue it was not preserved and therefore not properly before the Circuit Court or before this Court. An issue not preserved cannot be raised on appeal. State v. Hoffman, 312 S.C. 386, 391, 440 S.E.2d 869, 873 (1994); State v. Johnson, 324 S.C. 38, 39, 476 S.E.2d 682, 684 (1996).

CONCLUSION

The Order of the Circuit Court dismissing the conviction of Brenda Stroupe should be affirmed.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Christopher A. Wellborn", written over a horizontal line.

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