

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAY 19 2016

APPEAL FROM YORK COUNTY
Court of Common Pleas
Case No. 2014-CP-46-00239

SC Court of Appeals

JOHN C. HAYES, III, Circuit Court Judge

Appellate Case No. 2014-002340

City Of Rock Hill.....Appellant

v.

Brenda Stroupe.....Respondent

RECORD ON APPEAL

Jason M. Weil
201 E Main Street, 3rd Floor
Rock Hill, South Carolina 29730
(803) 329-8783
Attorney for Appellant

Christopher A. Wellborn
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Rock Hill, South Carolina 29731
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STATE OF SOUTH CAROLINA

COUNTY OF YORK

The City of Rock Hill,

Plaintiff,

-VS-

Brenda Stroupe,

Defendant.

IN THE MUNICIPAL COURT
FOR THE CITY OF ROCK HILL

**MOTION TO DISMISS FOR
FAILURE TO COMPLY WITH
S.C. CODE ANN. §56-5-2953**

Case No: 048264GH

TO: Chris Barton, Solicitor, the City of Rock Hill, SC.

The Defendant hereby moves that the above charge be dismissed for the City's failure to comply with the mandatory recording provisions of §56-5-2953 of the S.C. Code and pursuant to City of Rock Hill v. Suchenski, 646 SE2 879 (2011) and Henkel v. State, Op. No. 2011-184986 (S.C. App. July 10, 2013).

Respectfully submitted:

September 11, 2013

Christopher A. Wellborn
142 Oakland Avenue, Ste. C
Rock Hill, SC 29730
(803) 366-1065

Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE MUNICIPAL COURT
	)	OF THE CITY OF ROCK HILL
COUNTY OF YORK	)	
	)	Reply to Defendant's
The City of Rock Hill	)	Motion to Dismiss
	)	
v.	)	
	)	
Brenda M. Stroupe, Defendant	)	

This matter comes before the Court on motion of the Defendant seeking dismissal of the charge of Driving Under the Influence (citation 48262 GH).

FACTS

On April 13, 2013, Brenda M. Stroupe (Defendant) was charged with Driving Under the Influence (S.C. Code § 56-5-2930) following a call from Adam Rainey a concerned citizen, that led Rock Hill officers to her location. Mr. Rainey reported that a maroon Mitsubishi Eclipse was driving recklessly in the area of Red River Road in Rock Hill and at times, driving on the wrong side of the road. Mr. Rainey's information and vehicle description was relayed by a Rock Hill Police Department dispatcher to Officer Justin Lewis who responded to the location.

Officer Lewis came in contact with the vehicle near the intersection of Cel River Road and Cherry Road at approximately 7:37 pm. Officer Lewis fell in behind the vehicle and followed the vehicle to the intersection of Cel River Road and Cherry Road. The driver of the vehicle was the first vehicle stopped at the red light and then began to proceed through the intersection on Cherry Road heading west while the traffic light was still red. Officer Lewis then activated his blue lights to initiate a traffic stop.

Following Officer Lewis activating his blue lights, the driver of the vehicle proceeded down Cherry Road heading towards I-77. The vehicle was eventually stopped a short distance from intersection of Cherry Road and Cel River Road within the city limits of Rock Hill. Officer Lewis made contact with the Defendant who was the driver and sole occupant of the vehicle. Upon speaking with the Defendant, Officer

Lewis believed that she may be impaired and contacted Officer Justin Cook with the Rock Hill Police Department Traffic Unit to assist.

Officer Cook arrived on scene at approximately 7:46 pm and spoke with Officer Lewis to review the matter and then spoke with the Defendant. Upon speaking with the Defendant, Officer Cook detected a strong smell of alcoholic beverage coming from her as she was leaning on the back of a patrol vehicle. Officer Cook noted that the Defendant's eyes were bloodshot and glassy and that her speech was slurred. Officer Cook asked the Defendant how much she had been drinking and she replied that she had one mixed drink earlier at her mother's house. Officer Cook then proceeded to offer the Defendant some field sobriety tests which the Defendant agreed to do.

Officer Cook offered the Horizontal Gaze Nystagmus test and noted that all six clues were present. Due to the Defendant's stated physical impairments, Officer Cook offered the Defendant the Finger Dexterity test in lieu of the Walk and Turn and One Leg Stand tests. Lastly, Officer Cook requested the Defendant to recite the alphabet from D to X after confirming that the Defendant knew the alphabet.

Based on the observations related to Officer Cook and his direct observations, he placed the Defendant under arrest for DUI and read a Miranda warning to her. All of the facts as outlined above were recorded on digital video and a copy was provided to the Defendant. Video supplied to the Defendant included copies from all three officer's (Cook, Lewis and Langley) vehicles. The entire interaction at the incident site between the Rock Hill Police officers and Defendant was video recorded.

Following her arrest, the Defendant was transported to the Rock Hill Law Center and offered a breath test. The Defendant registered a 0.23% blood alcohol content and was served with a notice of suspension of her driving privileges due to her blood alcohol content and she was issued Uniform Traffic Ticket number 48264 GH charging her with Driving Under the Influence.

ANALYSIS

A. The City of Rock Hill Video Recorded the Entire Roadside Encounter with the Defendant and Complied with S.C. Code of Laws Section 56-5-2953.

All the City of Rock Hill police officers involved with this case digitally recorded every moment required by S.C. Code of Laws Section 56-5-2953. The video from Officer Lewis, Officer Langley and Officer Cook provides a comprehensive video recording of the interactions between the City of Rock Hill police officers and the Defendant at the incident site.

S.C. Code of Laws Section 56-5-2953 requires that the "conduct" of the individual at the incident site must be video recorded. In State v. Murphy, 709 S.E.2d 684 (Ct. App. 2011), the South Carolina Court of Appeals affirmed the driving under the influence conviction finding that "an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id. at 688. Conduct as stated in S.C. Code of Laws Section 56-5-2953 "is generally defined as one's behavior, action or demeanor." Id. "[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." Id.

Subsequent to the Court of Appeals decision in Murphy, the South Carolina Legislature amended S.C. Code of Laws Section 56-5-2953 to include in subsection (A)(1)(a)(ii) requiring the video recording of any field sobriety tests administered. However, it is important to note the subsection simply lists the required conduct to be recorded and does not alter the definition of conduct as provided for in Murphy.

In South Carolina, one of the fundamental rules of statutory construction is that "there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." State v. Corey D., 529 S.E.2d 20, 23 (2000). Had the South Carolina Legislature wished to change the definition of conduct they could have chosen to do so and the subsequent amendment of S.C. Code of Laws Section 56-5-2953 was done with knowledge of the Murphy definition of conduct and the Legislature is presumed to have chosen not to alter that definition.

The Defendant's conduct as defined in Murphy at the incident site was recorded in compliance with S.C. Code of Laws Section 56-5-2953.

B. The City of Rock Hill Provided an Affidavit as Required by S.C. Code of Laws Section 56-5-2953(B) Due to the Lighting Conditions Caused by the Sunset.

Out of an abundance of caution due to the lighting conditions that existed at the time of the traffic stop of the Defendant, Officer Justin Cook (arresting officer) later completed an affidavit as required by S.C. Code of Laws Section 56-5-2953(B) which allows for the consideration of any other relevant evidence at the trial and sets out exceptions to the video recording requirements contained in Subsection A of 56-5-2953.

Officer Cook noted in his affidavit that the evening lighting conditions affected his cameras ability to record the incident site and the video submitted from Officer's Langley and Lewis shows the same effect. The City also submitted a copy of the time chart showing the sunrise and sunset for April 13, 2013 along with the periods of dawn and dusk for Rock Hill, South Carolina.

"Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances." State v. Manning, 734 S.E.2d 314, 317-318 (Ct. App. 2012).

The affidavit provided by the Officer Cook falls within two of the exceptions: (1) exigent circumstances existed based on the evening lighting which affected all of the officers' cameras and (2) any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. Officer Cook also testified that

he and the other officers were not aware of the lighting effect at the time the video was initially recorded and this was the first time he had dealt with this situation.

Even where no affidavit was provided the South Carolina Court of Appeals in State v. Manning affirmed the conviction finding that "nothing in this section [56-5-2933(B)] prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances." Id. At 318-319.

The affidavit submitted by Officer Cook provides valid reasons for the exigent circumstances encountered by Officer Cook and the other officers due to the evening lighting conditions and provides a valid reason based on the totality of the circumstances for any defects in the video recording.

The South Carolina Legislature provided for the video recording of DUI arrests in 1998 and has periodically updated and amended section 56-5-2953 over the years since. "[T]he primary intention behind section 56-5-2933 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, 721 S.E.2d 451, 454 (Ct. App. 2011).

The South Carolina Legislature adopted the video recording of DUI arrests with a common sense view towards the fact that video cameras would be mounted in patrol vehicles and that weather, lighting and other factors could and would play a role in the video collection of evidence at the roadside. "The statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind." Id. at 454. What has not changed is what is required to be recorded is "conduct" which was defined in State v. Murphy, 709 S.E.2d 684 (Ct. App. 2011). "[A]n accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id. at 688.

C. A Totality of the Circumstances Analysis is Required by S.C. Code of Laws Section 56-5-2953.

In State v. Manning, 734 S.E.2d 314 (Ct. App. 2012), the South Carolina Court of Appeals affirmed the felony DUI conviction even though the South Carolina Highway Patrol officer who investigated the case and arrested the defendant failed to record any video of the defendant at the incident site and failed to provide an affidavit certifying that

it was physically impossible to provide a video recording. The Manning Court held that even in the absence of a video affidavit being submitted in compliance with S.C. Code of Laws Section 56-5-2953(B), that "section 56-5-2933 allows a circuit court to look at the totality of the circumstances and make a determination of whether the charges should be dismissed." Id. at 318. The Court of Appeals in Manning held that the circuit court properly refused to dismiss the DUI charges under subsection B despite the fact that no video affidavit was submitted.

The Manning Court went on to hold that "even if the traffic accident investigation exception was inapplicable, the circuit court properly concluded the video recording was not required due to the totality of the circumstances." Id. The Court of Appeals found that a totality of the circumstances analysis was appropriate to determine if a statutory exception to the video recording requirement existed. Even though no affidavit was submitted, the Court of Appeals found that it was appropriate to determine if one of the so-called escape valves in section 56-5-2953 was present as "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances." Id. at 318-319.

In reviewing the instant case under a totality of the circumstances analysis, the following factors support a finding of compliance with a statutory exception under 56-5-2953:

(1) A 911 call from a concerned citizen documenting significant bad driving by the Defendant and the caller appeared to testify; however, the Court did not allow his testimony at the motion hearing.

(2) Video from Officer Lewis shows the Defendant driving into the intersection of Cherry Road and Cel River Road against a solid red light.

(3) Video from all the officers documents the significant impairment exhibited by the Defendant at the incident site, including her slurred speech, inability to walk in a normal fashion, confused thought processes, having to lean against the patrol vehicle to maintain her balance, in addition to her performance on the field sobriety tests.

(4) A blood alcohol content of 0.23% almost three (3) times the legal inference level for impairment.

(5) Breath test site video which displays significant impairment in the Defendant's behavior, action and demeanor in the breath testing room.

All of this must be weighed versus the approximately fifteen (15) seconds of video recording at issue. The video recording properly records the Defendant's conduct as defined in Murphy during the finger dexterity test where you can see the Defendant's hands and her fingers moving but cannot see clearly the tips of her fingers.

Remembering that the "statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind." State v. Elwell, 721 S.E.2d 451, 454 (Ct. App. 2011).

There is overwhelming evidence of the Defendant's guilt and any realistic and rational interpretation of the fifteen seconds of video does not negate, in any fashion, the Defendant's guilt. On appeal, the South Carolina Supreme Court affirmed the decision of the Court of Appeals in Elwell, finding that "because no statutory violation occurred in this case, we need not rely on Suchenski for a remedy here." State v. Elwell, 743 S.E.2d 801, 807 (2013). In Elwell, the South Carolina Supreme Court reiterated that 56-5-2953 "must be interpreted with realistic circumstances and rationales in mind." Id. at 805.

Viewed with the perspective of the decisions in Murphy as it relates to the definition of what conduct needs to be video recorded and Elwell in light of interpreting 56-5-2953 with realistic circumstances and rationales, the Defendant's argument that the inability of the video recording to display fifteen seconds of her fingers with cinematic clarity merits dismissal of the DUI charge is absurd, unrealistic and irrational.

D. Dismissal or Suppression of the Evidence is Limited to Constitutional Violations and Not to Statutory Violations. Neither Constitutional nor Statutory Violations are Present in this Case.

In City of Rock Hill v. Suchenski, 646 S.E.2d 879 (2007) the South Carolina Supreme Court found that dismissal of the charge was an appropriate remedy to the failure to produce a video recording in compliance with S.C. Code of Laws Section 56-5-2953 where the violation of section 56-5-2953(A) was not mitigated by an exception from subsection (B). The trial court in Suchenski had found that exigent circumstances

existed under subsection (B), however, the South Carolina Supreme Court refused to consider the City's argument on appeal finding that issue had not been properly preserved.

The City of Rock Hill has supplied video recordings from all three officers involved in this case. The video from Officer Cook records all required conduct of the Defendant. Any issue with the clarity or resolution of the video goes to the weight to be assigned the evidence by the trier of the fact, not the issue of whether Section 56-5-2953(A) has been complied with.

Assuming that this Court finds that Section 56-5-2953(A) has not been complied with, the affidavit supplied by Officer Cook supplies the necessary subsection (B) mitigation and any noncompliance is properly excused given the exigent circumstances faced by Officer Cook and the other officers. The affidavit also supports a finding that considering the totality of the circumstances, the video recording as a whole mitigates against dismissal based on the fifteen seconds of video that the Defendant bases her motion on.

In South Carolina where the video recording complies with Section 56-5-2953(A), or an exception to the recording requirement exists under Section 56-5-2953(B) dismissal of the charge is not warranted. In State v. Elwell, 743 S.E.2d 801 (2013), the South Carolina Supreme Court found that no violation of Section 56-5-2953 occurred and dismissal of the charge was not appropriate.

In State v. Huntley, 562 S.E.2d 472 (2001), the South Carolina Supreme Court found that even though a statutory violation had occurred with regards to the level of alcohol required to be in the simulator solution of the breath testing instrument, that this violation did not support either dismissal of the charge or even suppression of the results of the breath testing instrument as the results were reliable. The Huntley Court restated the long held principal that the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures. Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results." Id. at 474.

With neither a Constitutional or statutory violation present in this case, neither dismissal nor even suppression of the evidence is appropriate. Any issue regarding the clarity of the video recording goes to the weight to be assigned to the video recording evidence, not its admissibility.

E. Consideration of Memorandum Opinions and Unpublished Orders is Not Appropriate.

Rule 268 (d)(2) of the South Carolina Appellate Court Rules provides that "memorandum opinions and unpublished orders have no precedential value and should not be cited except in the proceedings in which they are directly involved." Rule 286(d)(2), SCACR. The Defendant has cited and provided this Court with copies of multiple opinions that have no precedential value and the City formally objects to this Court considering the content of any of these memorandum opinions or unpublished orders.

CONCLUSION

The South Carolina Supreme Court and Court of Appeals have stated repeatedly that the video recording statute for DUI cases should be applied based on the realistic circumstances faced by law enforcement officers utilizing video cameras mounted in their patrol vehicles. The video recording statute as a whole "must receive a practical, reasonable, and fair interpretation consonant with the purposes, design and policy of the lawmakers." State v. Elwell, 743 S.E.2d 801, 805 (2013). "The primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State to videotape important events in the process of collecting DUI evidence." Id.

The City has supplied video recordings of the incident site based on the realistic circumstances faced by the officers that evening. The video recordings provide a complete recording of the interactions between the Defendant and the officers thereby avoiding the swearing contest issue which is the primary intention of the video recording statute. The South Carolina Legislature has not elected to mandate multiple cameras

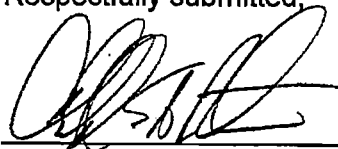
for video recording or sending officers to cinematography school to ensure that Hollywood sound stage production values are in every recording. The South Carolina Legislature understood at the time it initially adopted the video recording requirement and understands today based on the Murphy opinion definition of conduct that capturing every single detail is neither practical nor even possible given the realistic variations of circumstances under which officers encounter impaired drivers.

The City has supplied an affidavit documenting the environmental conditions faced by the officers following the traffic stop and subsequent investigation of the Defendant. Section 56-5-2953(B) provides that this Court must consider the affidavit and the testimony of Officer Cook and all the other evidence which demonstrates that the officers faced an unknown exigent circumstance caused by the angle of the evening sun and the direction their patrol vehicles/cameras faced. Officer Cook and the other officers were unaware of the illumination issue at the time. The totality of the circumstances overwhelmingly supports mitigation of any alleged shortcomings in the video recording at the incident site.

A realistic and rational review of the incident video recording consonant with the purposes of the video recording statute does not support dismissal of the charge. The overwhelming weight of the evidence demonstrates that the Defendant was operating a vehicle on the roadway in the City of Rock Hill while her ability to drive was severely and irrefutably impaired.

The City respectfully requests that the Defendant's Motion to Dismiss be denied.

Respectfully submitted,



Christopher E. Barton
Senior City Solicitor
City of Rock Hill Solicitor's Office

This 21st day of October, 2013,
Rock Hill, South Carolina

STATE OF SOUTH CAROLINA)

IN THE ROCK HILL
MUNICIPAL COURT

COUNTY OF YORK)

ORDER

CITY OF ROCK HILL)

Ticket No. 48264GH

Plaintiff,)

VS.)

BRENDA STROUPE,)

Defendant.)
_____)**APPEARANCES:**Christopher E. Barton, Solicitor – City of Rock Hill
Christopher A. Wellborn, Attorney for Defendant

THIS MATTER is before the Court on the Defendant's Motion to Dismiss. The relevant facts are for the most part uncontroverted. The Defendant was arrested on the 13th day of April, 2013 in the vicinity of Celanese Road and Interstate 77 in the City of Rock Hill. She was charged by Officer J. Cook with DUI on the Citation referenced above.

Prior to her arrest Rock Hill Police Department had been alerted by Adam Rainey concerning what he described as a Mitsubishi Eclipse which was driving recklessly in the area of Red River Road. According to Dispatch the erratic driving included, but was not limited to, the vehicle being driven on the wrong side of the road. Officer Justin Lewis located the suspected vehicle and began to follow the vehicle, eventually activating his blue lights to initiate a traffic stop.

After requesting the usual documentation from the Defendant Brenda M. Stroupe, Officer Lewis contacted Officer Justin Cook, a member of the Rock Hill Police Department Traffic Unit, who responded to the scene. Based upon various observations concerning the Defendant's appearance including, but not limited to, the Defendant's slurred speech and the strong smell of alcoholic beverage coming from her person, Officer Cook offered the Defendant three tests; the Horizontal Gaze Nystagmus Test, the Finger Dexterity Test and the Alphabet Test. Based upon the Defendant's performance on these tests she was placed under arrest, Mirandized and transported to the Rock Hill Police Department where she was offered a Data Master which registered a .23 blood alcohol concentration.

The defense contends that although a Video was produced (as a matter of fact two or perhaps three videos were produced by Officers who responded to the scene) that because the

video cameras were facing the setting sun that the videos do not provide a clear view of the Defendant while these various roadside tests were being administered. Those tests were once again the HGN, Finger Dexterity and the recitation of the alphabet.

The City submitted an Affidavit from Officer Cook (number 2 in evidence) which simply advances that the reason for the poor quality of the video is that it was recorded at sunset with the camera facing the setting sun. The City also produced a "sunrise sunset calendar" for April of 2013 (City's exhibit 3 in evidence) which tends to support the City's allegation as to when the sun was setting at the time of the Defendant's arrest on April 13, 2013.

There appears to be a dearth of authority on a case with facts similar to this one. That fact notwithstanding, it is clear to Courts and practitioners alike that the South Carolina Legislature requires the video taping of suspects at the scene of Field Sobriety Tests, at the time of their arrests and Miranda warnings, as well as their conduct in the Data Master room. In our case, we have a video and the only complaint raised by the defense as previously noted is the quality of that video. The undersigned is certainly aware of instances where it was determined by Appellate Courts that DUI charges had to be dismissed where feet could not be seen on each of a Nine Step Walk and Turn or when police officers failed to capture Miranda warnings on video tape as specifically required by the statute. This case presents a different factual scenario. We can hear the Defendant clearly but cannot see her clearly attempting to perform the Finger Dexterity Test. This Court's role in matters such as the pending Motion to Dismiss is to discern "legislative intent." 56-5-2953 S. C. Code of Laws has in recent times been amended. The provision of the Statute which has been consistent is sub-section (A) "a person who violates 56-5-2930, 56-5-2933 or 56-5-2945 must have his conduct at the incident site and breath test site video recorded." As noted by the Solicitor a fundamental rule of statutory construction provides "... there is a basic presumption that the legislature has knowledge of previous legislation as well as judicial decisions construing that legislation when later statutes are enacted concerning related subjects." State v. Corey, D 59 S.E.2nd 20, 23(2000); accord South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 669 S.E.2nd 899(S.C. App. 2008).

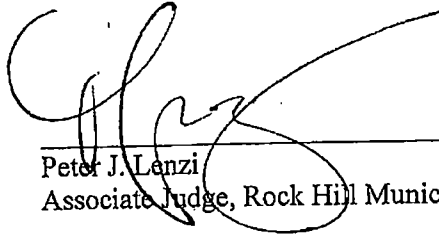
Compelling to this Court is the discussion by the Court of Appeals in State v. Murphy, 709 S.E.2nd 684(Court of Appeals 2011). The Court of Appeals in affirming a DUI conviction opined that "an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id at 688. The Court continued its discussion and concluded that Conduct "is generally defined as one's behavior, action or demeanor." "... the statute does not require that the recording capture a continuous full view of the accused, or capture all field sobriety test. Rather, provided all other requirements are met the video need only record the accused's conduct."

Subsequent to the Court of Appeals decision in Murphy the South Carolina Legislature amended 56-5-2953 sub section (A)(1)(a)(ii). Given the Murphy Court's definition of "conduct" the Legislature could have provided a different definition if they choose to do so; they did not.

The Court finds that the Defendant's conduct was captured on one or more videos at the time of her performing the HGN, Finger Dexterity and Alphabet Test. Any issues with the clarity of the videos goes to their weight and not to their admissibility.

The Defendant's Motion to Dismiss is therefore **DENIED**.

DONE AND ORDERED this 28th day of October, 2013.



Peter J. Lenzi
Associate Judge, Rock Hill Municipal Court

Copy: Christopher E. Barton, Solicitor – City of Rock Hill
Christopher A. Wellborn, Attorney for Defendant.

CHRISTOPHER A. WELLBORN, P.A.

ATTORNEY AT LAW

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LOCATION:

142 OAKLAND AVE. STE. C
ROCK HILL, S. C. 29730
FAX: (803)980-0952

January 24, 2014

The Honorable David Hamilton
York County Clerk of Court
Post Office Box 649
York, South Carolina 29745

Re: The City of Rock Hill v. Brenda Stroupe
Appeal from Rock Hill Municipal Court
Ticket No. 48264GH
Case No: 14-CP-46-

Dear David:

Enclosed please find for filing the original and 2 copies of the Appellant's Notice of Intent to Appeal, along with proof of service, in the above referenced matter. By copy of this letter, I am herewith serving a copy of same on Peter J. Lenzi, Rock Hill Municipal Court Judge, and Chris Barton, Solicitor for the City of Rock Hill.

Please return a filed copy in the enclosed envelope.

With kindest regards, I remain

Sincerely,



Christopher A. Wellborn

CAW/aww

Enclosures: As Noted

cc: Judge Peter J. Lenzi (w/enc.)
Chris Barton, Solicitor (w/enc.)

IN THE STATE OF SOUTH CAROLINA
In The Court Common Pleas

APPEAL FROM ROCK HILL MUNICIPAL COURT

Peter J. Lenzi, Judge

Ticket No: 48264GH

The City of Rock Hill

Respondent

v.

Brenda Stroupe

Appellant.

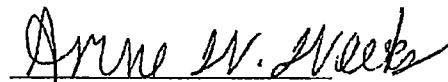
CERTIFICATE OF SERVICE BY MAIL

I, Anne W. Weeks, certify that I have served the within Notice of Intent to Appeal on Peter J. Lenzi, Rock Hill Municipal Court Judge and Chris Barton, Solicitor for the City of Rock Hill, by depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

PETER J. LENZI
ROCK HILL CITY JUDGE
120 EAST BLACK STREET
ROCK HILL, SC 29730

CHRISTOPHER E. BARTON
SOLICITOR-CITY OF ROCK HILL
201 EAST MAIN STREET, 3RD FLOOR
ROCK HILL, SC 29730

This 24 day of January, 2014



ANNE W. WEEKS
Legal Assistant

Christopher A. Wellborn
Post Office Box 10191
Rock Hill, South Carolina 29731
(803)366-1065

STATE OF SOUTH CAROLINA

) IN THE COUNTY OF YORK

THE CITY OF ROCK HILL

) CASE NO.

☐ Respondent

) 2014--CP--46-

v.

) MOTION AND ORDER INFORMATION

Brenda Stroupe

)

☐ Appellant.

)

Plaintiff's Christopher E. Barton , Bar No. Address: 201 E. Main St., 3rd Fl Rock Hill, SC 29730 phone: fax: e-mail: other:	Appellant's Attorney: Christopher A. Wellborn, Bar No. 011914 Address: PO Box 10191 Rock Hill, SC 29731 phone: 803-366-1065 fax: 803-980-0952 e-mail: cawlaw@comporium.net other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

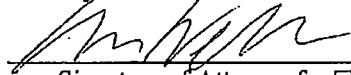
SECTION I: Hearing Information

Nature of Motion: Appeal

Estimated Time Needed 30 minutes Court Reporter Needed: X YES / ☐ NO**SECTION II: Motion/Order Type**

- ☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☐ Defendant
 January 24 2014
 Date submitted
SECTION III: Motion Fee

- ☐ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
 (check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

☐ MOTION FEE COLLECTED: _____☐ CONTESTED - AMOUNT DUE: _____

IN THE STATE OF SOUTH CAROLINA
In The Court Common Pleas

APPEAL FROM ROCK HILL MUNICIPAL COURT

Peter J. Lenzi, Judge

Ticket No: 48264GH

The City of Rock Hill

Respondent

v.

Brenda Stroupe

Appellant.

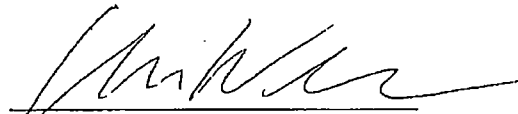
NOTICE OF INTENT TO APPEAL

Please take notice that the Appellant, Brenda Stroupe, hereby appeals her conviction on the charge of driving under the influence, such conviction occurring on January 24, 2014. This appeal is taken upon the following grounds:

- I. The trial court's denial of the Appellant's Motion to Dismiss pursuant to Section 56-52953(A)(1)(a)(ii) of the South Carolina Code of Laws, as amended.
- II. The trial court's refusal to grant a Motion for Directed Verdict where the City of Rock Hill failed to establish a jurisdictional basis for the prosecution of the charge.

Respectfully submitted:

January 24, 2014



Christopher A. Wellborn
Post Office Box 10191
Rock Hill, SC 29731
(803)366-1065
Attorney for Appellant

Other Counsel of Record:

Christopher E. Barton
Solicitor for the City of Rock Hill

Exhibit of hearing
on file with COA.
27.



February 26, 2014

Mr. David Hamilton
Clerk of Court
Post Office Box 649
York, South Carolina 29745

Re: City of Rock Hill v. Brenda Stroupe

Dear Mr. Hamilton,

Enclosed please find the original Return to Appeal with attachments pertaining to the above referenced case. Please file the Return to Appeal along with the copy. Please return the clocked copy to me.

By copy of this letter, I am serving a copy of the Return to Appeal and attachments to Chris Barton, City Solicitor and Chris Wellborn, Attorney for the Defendant.

Sincerely,

Shantay Greer
Municipal Court Clerk

cc: Chris Barton, City Solicitor
Chris Wellborn, Attorney for the Defendant.

Attachments

CITY OF ROCK HILL MUNICIPAL COURT
120 EAST BLACK STREET
ROCK HILL, SC 29730, 803/329-5691

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
CITY OF ROCK HILL)
)
Plaintiff,)
)
VS.)
)
BRENDA STROUPE,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

RETURN

TICKET: 48264GH

APPEARANCES:

Christopher E. Barton, Solicitor, City of Rock Hill
Christopher A. Wellborn, Attorney for Defendant

PRE-TRIAL MOTION:

After making his appearance on behalf of the Defendant, Mr. Wellborn filed a Motion to Dismiss on September 11, 2013 in which he alleged as a basis "the City's failure to comply with the mandatory recording provisions of 56-5-2953 of S.C. Code ..." The City responded to that Motion on October 21, 2013. A Hearing was conducted on the Motion to Dismiss on October 26, 2013 and an Order issued from this Court on October 28, 2013 denying the Motion.

TRIAL PROCEEDINGS:

The case was called to Jury Trial on January 23, 2014, a Jury was selected with one alternate and after general Jury Instructions by the Court, opening statements by both the prosecution and the defense, the City called its first witness, Mr. Rainey. Mr. Rainey testified that he is a South Pointe High School Administrator and that on April 13, 2013 his attention was drawn to a red in color vehicle which he was following. He testified that the vehicle was speeding up and slowing down, sometimes going as slow as 15 miles per hour in an area of Red River Road that has a posted speed limit of 45 miles per hour. He testified that he was directly behind the red vehicle which he said drifted into the oncoming traffic traveling in the opposite direction on several occasions requiring to take evasive action to avoid colliding with the red colored vehicle. He called Rock Hill Dispatch and reported his observations.

The next witness was Officer Justin Lewis who advised that he received a dispatch to proceed to the area where Mr. Rainey had reported the dangerous driving. Officer Lewis testified that when he located what he suspected to be the red vehicle, that he was at the intersection of Cell River and Cherry Road. He testified that both he and the red vehicle were stopped at a red light and that while the light was still red, the Defendant started rolling into the intersection. He testified that he activated his blue lights and the Defendant pulled over into the median just to the east of Interstate 77. After requesting the driver's license, insurance and registration information from the driver, Officer Lewis asked her to step out of the vehicle at which time he noticed glassy eyes, the smell of alcohol which heightened his suspicions. Officer Lewis then called for Officer Cook who was, at that time, assigned to the Traffic Enforcement Unit.

The next witness was Officer Brian Langley who testified that based upon the call from dispatch that he was on the lookout for the red vehicle in the vicinity of Red River Road, Cell River heading in the direction of Cherry Road. He passed what he believed was the Defendant's vehicle heading toward Cherry Road and advised Officer Lewis of that fact. He advised that Officer Lewis was the contact officer and that he was acting as back up. He testified on cross examination that he was around the Defendant for approximately forty minutes at which time the Defendant advised that she has some "back issues and problems with her legs." He also testified that he did not recall smelling the odor of alcohol emanating from the Defendant.

The next witness was Officer Justin Cook who testified he had been with the Traffic Enforcement Unit for some three and one half years. That he had no doubts that the Defendant was impaired and should not have been driving. That she had glassy, blood shot eyes, odor of alcoholic beverages coming from her person and that she had done very poorly on the Field Sobriety Tests that had been administered.

Officer Cook advised that he placed the Defendant under arrest, Mirandized her and took her to the Rock Hill Police Department where she was offered a Data Master Test. The Defendant submitted a breath sample which registered a .23. Officer Cook identified the roadside video as well as the BA video, the Advisement of Implied Consent and the BA test results.

On cross examination the witness conceded the importance of accuracy in any Incident Report and conceded that his times were off by one hour. He also conceded that the only "standardized" Field Sobriety Test given was the Horizontal Gaze Nystagmus. He also conceded that he did not inquire of the Defendant if she had any problems with her eyes and that he did not note Resting Nystagmus. He testified however that the eyes lacked smooth pursuit and that there was on set of Nystagmus prior to 45 degrees in both eyes. When questioned about whether or not you could see the Finger and Thumb Dexterity Test, the Officer conceded that it was blurred, both during his demonstration of the test and the Defendant's attempt to perform the test. The Officer also acknowledged that by shooting the video in a westerly direction as the sun was setting, that the quality of the video suffered.

The final witness for the City was Randy T. Brown, Agent for South Carolina Department of Law Enforcement who is assigned to the Implied Consent Division. Agent

Brown was tendered as an expert in the area of the Data Master machine and a specialist in Alcohol Breath Testing and Video Recording. The Defense did not object to his being designated as an expert in those fields. Agent Brown reviewed the SLED protocols for inspecting and maintaining the Data Master machines in use in York County in general and in Rock Hill in particular. He also advised that he had reviewed the Breath Alcohol Analysis Test Report for the Defendant as well as the BA room video of the Defendant. His opinion was that the Data Master was functioning properly and that the mouth check performed by Officer Cook was done in a satisfactory method. On cross examination counsel for the defense was successful in getting Agent Brown to admit that since the installation of the Data Master utilized to test the Defendant that no test had been run to check the machine's accuracy over .15; however, Agent Brown opined that the lack of such testing did not undermine the accuracy of the BA test given to the Defendant.

The City rested its case and the Defendant, outside of the Jury's presence, renewed its Motion to Dismiss on the grounds that the road side video failed to satisfy the statutory requirements of 56-5-2953. In addition to the renewed Motion to Dismiss, the defense contended that they are entitled to a Directed Verdict based upon the failure of the City to establish through City's witnesses that the material violations of law occurred within the City Limits of Rock Hill. Both of these Motions were denied regarding the "2953" violations on the same grounds as previously ruled upon by the Court, and on the jurisdictional issue, the Court's recollection was that either or both witnesses Lewis and/or Langley testified that the area where the Defendant's driving was witnessed is in the area of Red River Road and Cell River Road in the immediate proximity of Interstate 77 which is in the City Limits of Rock Hill.

The defense called Brenda M. Stroupe, the Defendant, as a witness and she testified that she had been at her mother's 10 or 15 minutes before her arrest. She testified that she had picked up plates of food at the VFW and had two drinks. She testified that her eyes are always red and watery and that any of her problems with driving were as a result of her being distracted by her small dog that was running around inside the passenger compartment of her vehicle. On cross examination she admitted to having two Solo cup sized drinks of vodka and Sprite Zero. She denied the Officer's assertion that she had "rolled" into the intersection while she was next to Officer Lewis. The Defendant testified that by the time that she had provided a breath sample that she had had nothing to drink for approximately two hours.

The defense rested and renewed their Motion to Dismiss on the same grounds. That Motion was denied.

The Court reviewed Jury Instructions and requested proposed Jury Instructions. Counsel for the defense and the prosecution made their Closing Arguments, the Jury was instructed without objection by either the prosecution or the defense to the Jury Instruction delivered by the Court. The Jury was successful in reaching a verdict and found the Defendant guilty of DUI. The Jury was then provided with a second verdict form and they determined the Defendant's blood alcohol content was .16 or greater.

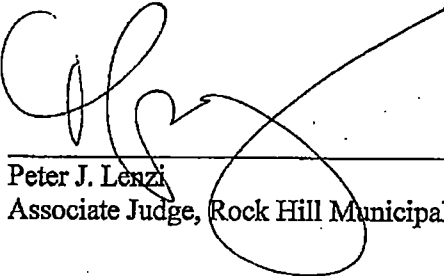
ATTACHMENTS:

1. Copy of Ticket
2. Motion to Dismiss
3. Reply to Defendant's Motion to Dismiss
4. Order
5. BA and Roadside Videos
6. Affidavit for Failure to Produce to Videotape
7. Implied Consent
8. BA Test Report
9. Jury Verdict (1)
10. Jury Verdict (2)

Respectfully Submitted By:

Date: _____

2-19-14



Peter J. Lenzi
Associate Judge, Rock Hill Municipal Court

Copy: Christopher E. Barton, Solicitor – City of Rock Hill
Christopher A. Wellborn, Attorney for Defendant.

ATTACHMENT 1

Form S-438
Rev. 6/90

STATE OF SOUTH CAROLINA
UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF Rock Hill VERSUS
FIRST NAME Brenda M. MIDDLE NAME Stroupe LAST NAME
STREET AND NO. _____ CITY _____ STATE _____ ZIP CODE _____

STATE LICENSED SC DRIVING LICENSE NO. _____ CDL ☐ YES ☒ NO DRI. LIC. CLASS D

VEH. LIC. NO. _____ STATE SC MAKE OF VEH. Mits YEAR 07 COMB. VEH. ☐ YES ☒ NO 18 PSGR. VEH. _____ COMB. _____
HAZ. MT. _____ MOPED _____ MTRCYCL. _____ OTHER _____

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT Municipal Court STREET AND NO. 120 E. Black St.
DATE OF TRIAL 5/1/13 TIME OF TRIAL 0900 CITY Rock Hill STATE SC ZIP CODE 29730

VIOLATION - COURT APPEARANCE REQUIRED (YES/NO) YES VIOLATION SECTION NO. 56-5-2030
DUI - 10/13A 1st off

OWNER OF VEHICLE SAME - DATE OF ARREST 4/13/13
ADDRESS OF OWNER _____ DATE OF VIOLATION 4/13/13

BAIL DEPOSITED _____ NAME OF ARRESTING OFFICER J. Cook RANK POT
DESCRIPTION OF ACCUSED _____ COUNTY York NUMBER 46
DATE BAIL REC'D. BY _____ BADGE 5593 TROOP 4

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

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE _____ TIME OF VIOLATION 7:50 AM WEATHER CL
DISTANCE IN FEET FROM INTERSECTION 0 OF Celanese AND I-77

DEFENDANT: DID NOT APPEAR ☐ APPEARED ☒

NOLLE PROSSED ☐ DISPOSITION GUilty MILES _____ N E S W
FORFEITED BOND ☐ PLED; NOLO CONTENDERE ☐ 1 2 3 4

TRIAL BY: TRIAL JUDGE ☐ JURY ☐ HWY NO. SC161 CITY RM

VERDICT OF TRIAL IF ANY GUilty DATE OF TRIAL IF ANY 1/24/14 Lat _____ Long _____

JAIL _____ SUSPEND _____ FINE 2267 AMT. COLLECTED _____ AMT. SUSPENDED _____

COMMITTED TO: _____ Vehicle Searched Y Arrest as Result of Collision N OFFENSE CODE 99 B.A. LEVEL 23

CERTIFIED CORRECT _____ DATE 1/24/14 **48264 GHY**

TRIAL COURT COPY

\$2267

DOCKET NO. 1304130608

STATE OF SOUTH CAROLINA ATTACHMENT 2 MUNICIPAL COURT

COUNTY OF YORK

The City of Rock Hill,

Plaintiff,

-vs-

Brenda Stroupe,

Defendant.

FOR THE CITY OF ROCK HILL

MOTION TO DISMISS FOR
FAILURE TO COMPLY WITH
S.C. CODE ANN. §56-5-2953

Case No: 048264GH

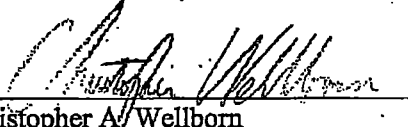
RECEIVED
CLERK'S OFFICE
SEP 15 2013 6:44
MUNICIPAL COURT
SOUTH CAROLINA

TO: Chris Barton, Solicitor, the City of Rock Hill, SC.

The Defendant hereby moves that the above charge be dismissed for the City's failure to comply with the mandatory recording provisions of §56-5-2953 of the S.C. Code and pursuant to City of Rock Hill v. Suchenski, 646 SE2 879 (2011) and Henkel v. State, Op. No. 2011-184986 (S.C. App. July 10, 2013).

Respectfully submitted:

September 11, 2013


Christopher A. Wellborn
142 Oakland Avenue, Ste. C
Rock Hill, SC 29730
(803) 366-1065

Attorney for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF YORK

The City of Rock Hill,

Plaintiff,

vs.

William Reeves, Margaret Gasper, Barrett
Martin, Spring Christl, and Brenda Stroupe,

Defendants.

IN MUNICIPAL COURT FOR
THE CITY OF ROCK HILL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is the secretary for Christopher A. Wellborn, attorney for Defendant in the with in named cases, and that a copy of each *Defendant's Motion to Dismiss for Failure to Comply with S. C. Code Ann §56-5-2953* were served upon Tammy Ford, Paralegal for Rock Hill Solicitor's Office, and Shantay Greer, Clerk of Court's Office, by having copies of same mailed to her at the following address:

Ms. TAMMY FORD
PARALEGAL SOL. OFF.
201 E. MAIN STREET, 3RD FLOOR
ROCK HILL, S C 29730

Ms. SHANTAY GREER
CLERK OF COURT'S OFFICE
120 EAST BLACK STREET
ROCK HILL, S C 29730

MAILED: 9/11, 2013

CHRISTOPHER A. WELLBORN, P.A.

Anne W. Weeks
Anne W. Weeks, Legal Assistant
142-C Oakland Avenue
Post Office Box 10191
Rock Hill, South Carolina 29731
(803)366-1065

ATTACHMENT 3

STATE OF SOUTH CAROLINA	)	IN THE MUNICIPAL COURT
	)	OF THE CITY OF ROCK HILL
COUNTY OF YORK	)	
	)	Reply to Defendant's
The City of Rock Hill	)	Motion to Dismiss
	)	
v.	)	
	)	
Brenda M. Stroupe, Defendant	)	

This matter comes before the Court on motion of the Defendant seeking dismissal of the charge of Driving Under the Influence (citation 48262 GH):

FACTS

On April 13, 2013, Brenda M. Stroupe (Defendant) was charged with Driving Under the Influence (S.C. Code § 56-5-2930) following a call from Adam Rainey a concerned citizen, that led Rock Hill officers to her location. Mr. Rainey reported that a maroon Mitsubishi Eclipse was driving recklessly in the area of Red River Road in Rock Hill and at times, driving on the wrong side of the road. Mr. Rainey's information and vehicle description was relayed by a Rock Hill Police Department dispatcher to Officer Justin Lewis who responded to the location.

Officer Lewis came in contact with the vehicle near the intersection of Cel River Road and Cherry Road at approximately 7:37 pm. Officer Lewis fell in behind the vehicle and followed the vehicle to the intersection of Cel River Road and Cherry Road. The driver of the vehicle was the first vehicle stopped at the red light and then began to proceed through the intersection on Cherry Road heading west while the traffic light was still red. Officer Lewis then activated his blue lights to initiate a traffic stop.

Following Officer Lewis activating his blue lights, the driver of the vehicle proceeded down Cherry Road heading towards I-77. The vehicle was eventually stopped a short distance from intersection of Cherry Road and Cel River Road within the city limits of Rock Hill. Officer Lewis made contact with the Defendant who was the driver and sole occupant of the vehicle. Upon speaking with the Defendant, Officer

Lewis believed that she may be impaired and contacted Officer Justin Cook with the Rock Hill Police Department Traffic Unit to assist.

Officer Cook arrived on scene at approximately 7:46 pm and spoke with Officer Lewis to review the matter and then spoke with the Defendant. Upon speaking with the Defendant, Officer Cook detected a strong smell of alcoholic beverage coming from her as she was leaning on the back of a patrol vehicle. Officer Cook noted that the Defendant's eyes were bloodshot and glassy and that her speech was slurred. Officer Cook asked the Defendant how much she had been drinking and she replied that she had one mixed drink earlier at her mother's house. Officer Cook then proceeded to offer the Defendant some field sobriety tests which the Defendant agreed to do.

Officer Cook offered the Horizontal Gaze Nystagmus test and noted that all six clues were present. Due to the Defendant's stated physical impairments, Officer Cook offered the Defendant the Finger Dexterity test in lieu of the Walk and Turn and One Leg Stand tests. Lastly, Officer Cook requested the Defendant to recite the alphabet from D to X after confirming that the Defendant knew the alphabet.

Based on the observations related to Officer Cook and his direct observations, he placed the Defendant under arrest for DUI and read a Miranda warning to her. All of the facts as outlined above were recorded on digital video and a copy was provided to the Defendant. Video supplied to the Defendant included copies from all three officer's (Cook, Lewis and Langley) vehicles. The entire interaction at the incident site between the Rock Hill Police officers and Defendant was video recorded.

Following her arrest, the Defendant was transported to the Rock Hill Law Center and offered a breath test. The Defendant registered a 0.23% blood alcohol content and was served with a notice of suspension of her driving privileges due to her blood alcohol content and she was issued Uniform Traffic Ticket number 48264 GH charging her with Driving Under the Influence.

ANALYSIS

A. The City of Rock Hill Video Recorded the Entire Roadside Encounter with the Defendant and Complied with S.C. Code of Laws Section 56-5-2953.

All the City of Rock Hill police officers involved with this case digitally recorded every moment required by S.C. Code of Laws Section 56-5-2953. The video from Officer Lewis, Officer Langley and Officer Cook provides a comprehensive video recording of the interactions between the City of Rock Hill police officers and the Defendant at the incident site.

S.C. Code of Laws Section 56-5-2953 requires that the "conduct" of the individual at the incident site must be video recorded. In State v. Murphy, 709 S.E.2d 684 (Ct. App. 2011), the South Carolina Court of Appeals affirmed the driving under the influence conviction finding that "an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id. at 688. Conduct as stated in S.C. Code of Laws Section 56-5-2953 "is generally defined as one's behavior, action or demeanor." Id. "[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." Id.

Subsequent to the Court of Appeals decision in Murphy, the South Carolina Legislature amended S.C. Code of Laws Section 56-5-2953 to include in subsection (A)(1)(a)(ii) requiring the video recording of any field sobriety tests administered. However, it is important to note the subsection simply lists the required conduct to be recorded and does not alter the definition of conduct as provided for in Murphy.

In South Carolina, one of the fundamental rules of statutory construction is that "there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." State v. Corey D., 529 S.E.2d 20, 23 (2000). Had the South Carolina Legislature wished to change the definition of conduct they could have chosen to do so and the subsequent amendment of S.C. Code of Laws Section 56-5-2953 was done with knowledge of the Murphy definition of conduct and the Legislature is presumed to have chosen not to alter that definition.

Cell 9 S.E.2d 899
(SC App 2008) SC Coastal
Circuit v. Lequer
SC Dept of Health
and Human Services

The Defendant's conduct as defined in Murphy at the incident site was recorded in compliance with S.C. Code of Laws Section 56-5-2953.

B. The City of Rock Hill Provided an Affidavit as Required by S.C. Code of Laws Section 56-5-2953(B) Due to the Lighting Conditions Caused by the Sunset.

Out of an abundance of caution due to the lighting conditions that existed at the time of the traffic stop of the Defendant, Officer Justin Cook (arresting officer) later completed an affidavit as required by S.C. Code of Laws Section 56-5-2953(B) which allows for the consideration of any other relevant evidence at the trial and sets out exceptions to the video recording requirements contained in Subsection A of 56-5-2953.

Officer Cook noted in his affidavit that the evening lighting conditions affected his cameras ability to record the incident site and the video submitted from Officer's Langley and Lewis shows the same effect. The City also submitted a copy of the time chart showing the sunrise and sunset for April 13, 2013 along with the periods of dawn and dusk for Rock Hill, South Carolina.

"Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances." State v. Manning, 734 S.E.2d 314, 317-318 (Ct. App. 2012).

The affidavit provided by the Officer Cook falls within two of the exceptions: (1) exigent circumstances existed based on the evening lighting which affected all of the officers' cameras and (2) any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. Officer Cook also testified that

he and the other officers were not aware of the lighting effect at the time the video was initially recorded and this was the first time he had dealt with this situation.

Even where no affidavit was provided the South Carolina Court of Appeals in State v. Manning affirmed the conviction finding that "nothing in this section [56-5-2933(B)] prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances." Id. At 318-319.

The affidavit submitted by Officer Cook provides valid reasons for the exigent circumstances encountered by Officer Cook and the other officers due to the evening lighting conditions and provides a valid reason based on the totality of the circumstances for any defects in the video recording.

The South Carolina Legislature provided for the video recording of DUI arrests in 1998 and has periodically updated and amended section 56-5-2953 over the years since. "[T]he primary intention behind section 56-5-2933 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, 721 S.E.2d 451, 454 (Ct. App. 2011).

The South Carolina Legislature adopted the video recording of DUI arrests with a common sense view towards the fact that video cameras would be mounted in patrol vehicles and that weather, lighting and other factors could and would play a role in the video collection of evidence at the roadside. "The statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind." Id. at 454. What has not changed is what is required to be recorded is "conduct" which was defined in State v. Murphy, 709 S.E.2d 684 (Ct. App. 2011). "[A]n accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id. at 688.

C. A Totality of the Circumstances Analysis is Required by S.C. Code of Laws Section 56-5-2953.

In State v. Manning, 734 S.E.2d 314 (Ct. App. 2012), the South Carolina Court of Appeals affirmed the felony DUI conviction even though the South Carolina Highway Patrol officer who investigated the case and arrested the defendant failed to record any video of the defendant at the incident site and failed to provide an affidavit certifying that

it was physically impossible to provide a video recording. The Manning Court held that even in the absence of a video affidavit being submitted in compliance with S.C. Code of Laws Section 56-5-2953(B), that "section 56-5-2933 allows a circuit court to look at the totality of the circumstances and make a determination of whether the charges should be dismissed." Id. at 318. The Court of Appeals in Manning held that the circuit court properly refused to dismiss the DUI charges under subsection B despite the fact that no video affidavit was submitted.

The Manning Court went on to hold that "even if the traffic accident investigation exception was inapplicable, the circuit court properly concluded the video recording was not required due to the totality of the circumstances." Id. The Court of Appeals found that a totality of the circumstances analysis was appropriate to determine if a statutory exception to the video recording requirement existed. Even though no affidavit was submitted, the Court of Appeals found that it was appropriate to determine if one of the so-called escape valves in section 56-5-2953 was present as "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances." Id. at 318-319.

In reviewing the instant case under a totality of the circumstances analysis, the following factors support a finding of compliance with a statutory exception under 56-5-2953:

(1) A 911 call from a concerned citizen documenting significant bad driving by the Defendant and the caller appeared to testify; however, the Court did not allow his testimony at the motion hearing.

(2) Video from Officer Lewis shows the Defendant driving into the intersection of Cherry Road and Cel River Road against a solid red light.

(3) Video from all the officers documents the significant impairment exhibited by the Defendant at the incident site, including her slurred speech, inability to walk in a normal fashion, confused thought processes, having to lean against the patrol vehicle to maintain her balance, in addition to her performance on the field sobriety tests.

(4) A blood alcohol content of 0.23% almost three (3) times the legal inference level for impairment.

(5) Breath test site video which displays significant impairment in the Defendant's behavior, action and demeanor in the breath testing room.

All of this must be weighed versus the approximately fifteen (15) seconds of video recording at issue. The video recording properly records the Defendant's conduct as defined in Murphy during the finger dexterity test where you can see the Defendant's hands and her fingers moving but cannot see clearly the tips of her fingers.

Remembering that the "statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind." State v. Elwell, 721 S.E.2d 451, 454 (Ct. App. 2011).

There is overwhelming evidence of the Defendant's guilt and any realistic and rational interpretation of the fifteen seconds of video does not negate, in any fashion, the Defendant's guilt. On appeal, the South Carolina Supreme Court affirmed the decision of the Court of Appeals in Elwell, finding that "because no statutory violation occurred in this case, we need not rely on Suchenski for a remedy here." State v. Elwell, 743 S.E.2d 801, 807 (2013). In Elwell, the South Carolina Supreme Court reiterated that 56-5-2953 "must be interpreted with realistic circumstances and rationales in mind." Id. at 805.

Viewed with the perspective of the decisions in Murphy as it relates to the definition of what conduct needs to be video recorded and Elwell in light of interpreting 56-5-2953 with realistic circumstances and rationales, the Defendant's argument that the inability of the video recording to display fifteen seconds of her fingers with cinematic clarity merits dismissal of the DUI charge is absurd, unrealistic and irrational.

D. Dismissal or Suppression of the Evidence is Limited to Constitutional Violations and Not to Statutory Violations. Neither Constitutional nor Statutory Violations are Present in this Case.

In City of Rock Hill v. Suchenski, 646 S.E.2d 879 (2007) the South Carolina Supreme Court found that dismissal of the charge was an appropriate remedy to the failure to produce a video recording in compliance with S.C. Code of Laws Section 56-5-2953 where the violation of section 56-5-2953(A) was not mitigated by an exception from subsection (B). The trial court in Suchenski had found that exigent circumstances

existed under subsection (B), however, the South Carolina Supreme Court refused to consider the City's argument on appeal finding that issue had not been properly preserved.

The City of Rock Hill has supplied video recordings from all three officers involved in this case. The video from Officer Cook records all required conduct of the Defendant. Any issue with the clarity or resolution of the video goes to the weight to be assigned the evidence by the trier of the fact, not the issue of whether Section 56-5-2953(A) has been complied with.

Assuming that this Court finds that Section 56-5-2953(A) has not been complied with, the affidavit supplied by Officer Cook supplies the necessary subsection (B) mitigation and any noncompliance is properly excused given the exigent circumstances faced by Officer Cook and the other officers. The affidavit also supports a finding that considering the totality of the circumstances, the video recording as a whole mitigates against dismissal based on the fifteen seconds of video that the Defendant bases her motion on.

In South Carolina where the video recording complies with Section 56-5-2953(A), or an exception to the recording requirement exists under Section 56-5-2953(B) dismissal of the charge is not warranted. In State v. Elwell, 743 S.E.2d 801 (2013), the South Carolina Supreme Court found that no violation of Section 56-5-2953 occurred and dismissal of the charge was not appropriate.

In State v. Huntley, 562 S.E.2d 472 (2001), the South Carolina Supreme Court found that even though a statutory violation had occurred with regards to the level of alcohol required to be in the simulator solution of the breath testing instrument, that this violation did not support either dismissal of the charge or even suppression of the results of the breath testing instrument as the results were reliable. The Huntley Court restated the long held principal that the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures. Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results." Id. at 474.

With neither a Constitutional or statutory violation present in this case, neither dismissal nor even suppression of the evidence is appropriate. Any issue regarding the clarity of the video recording goes to the weight to be assigned to the video recording evidence, not its admissibility.

E. Consideration of Memorandum Opinions and Unpublished Orders is Not Appropriate.

Rule 268 (d)(2) of the South Carolina Appellate Court Rules provides that "memorandum opinions and unpublished orders have no precedential value and should not be cited except in the proceedings in which they are directly involved." Rule 286(d)(2), SCACR. The Defendant has cited and provided this Court with copies of multiple opinions that have no precedential value and the City formally objects to this Court considering the content of any of these memorandum opinions or unpublished orders.

CONCLUSION

The South Carolina Supreme Court and Court of Appeals have stated repeatedly that the video recording statute for DUI cases should be applied based on the realistic circumstances faced by law enforcement officers utilizing video cameras mounted in their patrol vehicles. The video recording statute as a whole "must receive a practical, reasonable, and fair interpretation consonant with the purposes, design and policy of the lawmakers." State v. Elwell, 743 S.E.2d 801, 805 (2013). "The primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State to videotape important events in the process of collecting DUI evidence." Id.

The City has supplied video recordings of the incident site based on the realistic circumstances faced by the officers that evening. The video recordings provide a complete recording of the interactions between the Defendant and the officers thereby avoiding the swearing contest issue which is the primary intention of the video recording statute. The South Carolina Legislature has not elected to mandate multiple cameras

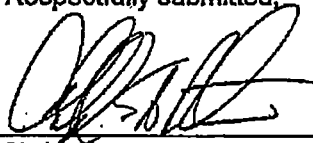
for video recording or sending officers to cinematography school to ensure that Hollywood sound stage production values are in every recording. The South Carolina Legislature understood at the time it initially adopted the video recording requirement and understands today based on the Murphy opinion definition of conduct that capturing every single detail is neither practical nor even possible given the realistic variations of circumstances under which officers encounter impaired drivers.

The City has supplied an affidavit documenting the environmental conditions faced by the officers following the traffic stop and subsequent investigation of the Defendant. Section 56-5-2953(B) provides that this Court must consider the affidavit and the testimony of Officer Cook and all the other evidence which demonstrates that the officers faced an unknown exigent circumstance caused by the angle of the evening sun and the direction their patrol vehicles/cameras faced. Officer Cook and the other officers were unaware of the illumination issue at the time. The totality of the circumstances overwhelmingly supports mitigation of any alleged shortcomings in the video recording at the incident site.

A realistic and rational review of the incident video recording consonant with the purposes of the video recording statute does not support dismissal of the charge. The overwhelming weight of the evidence demonstrates that the Defendant was operating a vehicle on the roadway in the City of Rock Hill while her ability to drive was severely and irrefutably impaired.

The City respectfully requests that the Defendant's Motion to Dismiss be denied.

Respectfully submitted,



Christopher E. Barton
Senior City Solicitor
City of Rock Hill Solicitor's Office

This 21st day of October, 2013.
Rock Hill, South Carolina

ATTACHMENT 4

STATE OF SOUTH CAROLINA)
 COUNTY OF YORK)

IN THE ROCK HILL
 MUNICIPAL COURT

CITY OF ROCK HILL)

ORDER

Plaintiff,)

Ticket No. 48264GH

VS.)

BRENDA STROUPE,)

Defendant.)

APPEARANCES:

Christopher E. Barton, Solicitor – City of Rock Hill
 Christopher A. Wellborn, Attorney for Defendant

THIS MATTER is before the Court on the Defendant's Motion to Dismiss. The relevant facts are for the most part uncontroverted. The Defendant was arrested on the 13th day of April, 2013 in the vicinity of Celanese Road and Interstate 77 in the City of Rock Hill. She was charged by Officer J. Cook with DUI on the Citation referenced above.

Prior to her arrest Rock Hill Police Department had been alerted by Adam Rainey concerning what he described as a Mitsubishi Eclipse which was driving recklessly in the area of Red River Road. According to Dispatch the erratic driving included, but was not limited to, the vehicle being driven on the wrong side of the road. Officer Justin Lewis located the suspected vehicle and began to follow the vehicle, eventually activating his blue lights to initiate a traffic stop.

After requesting the usual documentation from the Defendant Brenda M. Stroupe, Officer Lewis contacted Officer Justin Cook, a member of the Rock Hill Police Department Traffic Unit, who responded to the scene. Based upon various observations concerning the Defendant's appearance including, but not limited to, the Defendant's slurred speech and the strong smell of alcoholic beverage coming from her person, Officer Cook offered the Defendant three tests; the Horizontal Gaze Nystagmus Test, the Finger Dexterity Test and the Alphabet Test. Based upon the Defendant's performance on these tests she was placed under arrest, Mirandized and transported to the Rock Hill Police Department where she was offered a Data Master which registered a .23 blood alcohol concentration.

The defense contends that although a Video was produced (as a matter of fact two or perhaps three videos were produced by Officers who responded to the scene) that because the

video cameras were facing the setting sun that the videos do not provide a clear view of the Defendant while these various roadside tests were being administered. Those tests were once again the HGN, Finger Dexterity and the recitation of the alphabet.

The City submitted an Affidavit from Officer Cook (number 2 in evidence) which simply advances that the reason for the poor quality of the video is that it was recorded at sunset with the camera facing the setting sun. The City also produced a "sunrise sunset calendar" for April of 2013 (City's exhibit 3 in evidence) which tends to support the City's allegation as to when the sun was setting at the time of the Defendant's arrest on April 13, 2013.

There appears to be a dearth of authority on a case with facts similar to this one. That fact notwithstanding, it is clear to Courts and practitioners alike that the South Carolina Legislature requires the video taping of suspects at the scene of Field Sobriety Tests, at the time of their arrests and Miranda warnings, as well as their conduct in the Data Master room. In our case, we have a video and the only complaint raised by the defense as previously noted is the quality of that video. The undersigned is certainly aware of instances where it was determined by Appellate Courts that DUI charges had to be dismissed where feet could not be seen on each of a Nine Step Walk and Turn or when police officers failed to capture Miranda warnings on video tape as specifically required by the statute. This case presents a different factual scenario. We can hear the Defendant clearly but cannot see her clearly attempting to perform the Finger Dexterity Test. This Court's role in matters such as the pending Motion to Dismiss is to discern "legislative intent." 56-5-2953 S. C. Code of Laws has in recent times been amended. The provision of the Statute which has been consistent is sub-section (A) "a person who violates 56-5-2930, 56-5-2933 or 56-5-2945 must have his conduct at the incident site and breath test site video recorded." As noted by the Solicitor a fundamental rule of statutory construction provides "... there is a basic presumption that the legislature has knowledge of previous legislation as well as judicial decisions construing that legislation when later statutes are enacted concerning related subjects." State v. Corey, D 59 S.E.2nd 20, 23(2000); accord South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 669 S.E.2nd 899(S.C. App. 2008).

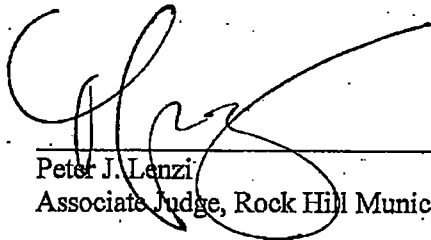
Compelling to this Court is the discussion by the Court of Appeals in State v. Murphy, 709 S.E.2nd 684(Court of Appeals 2011). The Court of Appeals in affirming a DUI conviction opined that "an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id at 688. The Court continued its discussion and concluded that Conduct "is generally defined as one's behavior, action or demeanor." "... the statute does not require that the recording capture a continuous full view of the accused, or capture all field sobriety test. Rather, provided all other requirements are met the video need only record the accused's conduct."

Subsequent to the Court of Appeals decision in Murphy the South Carolina Legislature amended 56-5-2953 sub section (A)(1)(a)(ii). Given the Murphy Court's definition of "conduct" the Legislature could have provided a different definition if they choose to do so; they did not.

The Court finds that the Defendant's conduct was captured on one or more videos at the time of her performing the HGN, Finger Dexterity and Alphabet Test. Any issues with the clarity of the videos goes to their weight and not to their admissibility.

The Defendant's Motion to Dismiss is therefore **DENIED**.

DONE AND ORDERED this 28th day of October, 2013.



Peter J. Lenzi
Associate Judge, Rock Hill Municipal Court

Copy: Christopher E. Barton, Solicitor – City of Rock Hill
Christopher A. Wellborn, Attorney for Defendant.

ATTACHMENT 6

AFFIDAVIT FOR FAILURE TO PRODUCE TO VIDEOTAPE

I hereby affirm that I cannot produce a videotape:

1. ☒ From the vehicle I was operating because:

A. ☐ At the time of the defendant's arrest the vehicle I was operating was not equipped with a videotaping device.

B. ☐ At the time of the defendant's arrest or probable cause determination, the video equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in operable condition.

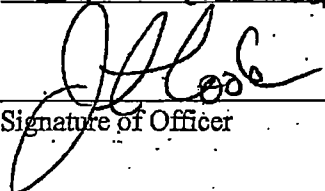
C. ☐ It was physically impossible to produce a videotape of the Defendant from the vehicle I was operating at the time of arrest or probable cause determination because:

☐ The Defendant needed emergency medical treatment, or

☐ Exigent circumstances existed which are outlined below:

D. ☒ Other valid reason(s) existed for failing to produce the videotape based on the totality of the circumstances which are outlined below:

The quality of the video submitted in this case, is poor due to it being recorded at sunset, and facing the sunset. This is the case for all three videos submitted from each car at the scene of the arrest.


Signature of Officer

7-29-13

Date

State of South Carolina
County of York

Sworn to and subscribed before me this 29th day of July, 2013

Shantay Drew Notary Public for the State of South Carolina

My commission expires: 9-1-2016

ADVISEMENT OF IMPLIED CONSENT RIGHTS

Brenda M. Straupe

ATTACHMENT 7

Subject's Name (Print)

Date of Birth

Sr. Carolina

Driver's License Number

State Licensed



DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here → - Inform subject of video recording.
If answer is No, start here → - Inform subject of type samples requested (i.e. breath, blood, urine).
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month.
 - You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, must provide you affirmative assistance.
 - You have the right to request an administrative hearing within thirty (30) days of the issuance of the notice of suspension.
 - If you do not request an administrative hearing or if your suspension is upheld at the administrative hearing, you must enroll in an Alcohol and Drug Safety Action Program.
- If applicable, perform the following procedures:
- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.)
- (D) Enter biographical data into DataMaster DMT. (Required for all tests, including refusals.)
- (E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.)

ADVERTENCIA PORMANEJAR BAJOS LOS EFECTOS DE ALCOHOL O DROGAS(DUI)

- (A) ¿Se grabará en video el análisis? Si la respuesta es Si, empieza aquí → - Informe al sujeto que va a ser grabado en video.
Si la respuesta es No, empieza aquí → - Informe al sujeto de lo que se requiere (ejemplo: soplar, sangre, urina.)
- (B) De al sujeto una copia escrita de la siguiente advertencia y lea la advertencia al sujeto:
- Usted queda detenido por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código de Leyes de Carolina del Sur de 1976, según su enmienda.
 - El agente que efectuó la detención dispuso que se sacaran muestras de alcohol y/o drogas para ser analizada(s).
 - Se obtendrán y se analizarán las muestras según la Sección 56-5-2950 y las normas de SLED.
 - Usted no está obligado a hacerse los análisis ni a sacarse las muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar el derecho de manejar en Carolina del Sur por lo menos durante seis (6) meses y el hecho de que usted se niega, podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o se saca las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0,08%) o más, entonces se lo podría acusar de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2933.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0,15%) o más, se le deberá suspender el derecho de manejar en Carolina del Sur por lo menos durante un (1) mes.
 - Usted tiene el derecho de que una persona que usted elija y que esté capacitada para hacerlo, realice sus propios análisis adicionales, los cuales usted mismo tiene que pagar y en ese caso, el agente debe brindarle ayuda si usted lo solicita.
 - Usted tiene el derecho de solicitar una audiencia administrativa dentro de los treinta (30) días de la fecha en que se emitió la notificación de la suspensión.
 - Si usted no solicita una audiencia administrativa o si se le confirma la suspensión en la audiencia administrativa, usted tiene que matricularse en un Programa de Medidas Contra el Abuso del Consumo del Alcohol y las Drogas.
- Si aplica, efectúe los siguientes procedimientos:
- (C) Inspeccione la boca del sujeto y quite material extraño de la boca. (Ignora si se niega el sujeto.)
- (D) Añade datos biográficos en el DataMaster DMT. (Esto es requerido para todos los exámenes aunque se niega el sujeto.)
- (E) Observe al sujeto un mínimo de (20) minutos antes de obtener un ejemplar de su respiro. (Ignora si se niega.)

Subject's Signature

Firma del Sujeto (Recibió una copia)

Officer's Signature

Firma del Agente

date/time

fecha/hora

SLED Forensics Form # ICS 010, February 2009

ATTACHMENT 8



SOUTH CAROLINA LAW ENFORCEMENT DIVISION BREATH ALCOHOL ANALYSIS TEST REPORT DRIVING UNDER THE INFLUENCE



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: BRENDA M/STROUPE
RACE: WHITE
SEX: F
DOB: [REDACTED]

DL NUMBER: [REDACTED]
DRIVER'S LICENSE: SC
SUBJECT ADDRESS: [REDACTED]

ARREST INFORMATION

OFFICER NAME: JUSTIN M/COOK
TICKET NUMBER: 48264GH
ARREST DATE: 04/13/2013

AGENCY ORI: SC0460300
COUNTY OF ARREST: 46 - YORK
ARREST TIME: 19:50

OPERATOR INFORMATION

TEST OPERATOR: JUSTIN M/COOK
CERTIFICATION #: DMT005993
SOLUTION LOT #: 11803
BREATH TEST VIDEO RECORDED? YES
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED? YES
SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

AGENCY ORI: SC0460300
EXPIRATION DATE: 07/05/2013
BOTTLE: 1398
SUBJECT INFORMED OF VIDEO RECORDING? YES
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES? YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATAMASTER DMT SERIAL #106907

TEST DATE:		04/13/2013
OBSERVATION START TIME:		20:27:59
BLANK TEST	0.00	20:48:58
INTERNAL STANDARD	VERIFIED	20:49:05
0.08% SIMULATOR TEMPERATURE	34.00°C	20:49:23
0.08% SIMULATOR VERIFICATION	0.079	20:49:23
BLANK TEST	0.00	20:50:13
SUBJECT SAMPLE	0.021	20:50:13
BLANK TEST	0.00	20:51:46
INTERNAL STANDARD	VERIFIED	20:51:53

Brenda M. Stroupe 4-13-2013 2100

Subject's Signature

(Received Copy) Date/Time

Arresting Officer's Signature

Test Operator's Signature

VISIT WWW.SLED.SC.GOV AND CLICK ON IMPLIED CONSENT. THEN CLICK ON BREATH SITE VIDEO RECORDINGS. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST:

SUBJECT ID: 01CDC802EB
SUBJECT PASSWORD: 912E9

IMPORTANT NOTICE

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

ATTACHMENT 9

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Municipality of Rock Hill

The State, South Carolina

Vs.

Defendant

Brenda M. Stroape

In The Court of

City of Rock Hill

Ticket:

48264 GA

Jury Verdict

We the Jury find the Defendant:

 Not Guilty

✓

Guilty of Driving Under the Influence (DUI)

1/24/2014

Date

Sarah Timberlake

Name of Foreperson

ATTACHMENT 10

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Municipality of Roar Hill

The State, South Carolina

Vs.

Defendant

Brenda M. Straupe

In The Court of City of Roar Hill

Ticket: 48264 GA

Jury Verdict

We the Jury find the Defendant:

 Guilty of DUI at least eight one-hundredths (^{.06}~~.08~~) of one percent but less than ten one-hundredths (.10) of one percent.

 Guilty of DUI at least ten one hundredths (.10) of one percent but less than sixteen one-hundredths (.16) of one percent.

 ✓ Guilty of DUI sixteen one hundredths (.16) of one percent or more.

1/24/2014

Date

Sarah Turberville

Name of Foreperson

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

Appeal From Rock Hill Municipal Court
Honorable Peter J. Lenzi, Rock Hill Municipal Court Judge
Case No: 2014-CP-46-239

The City of Rock Hill

Respondent,

vs.

Brenda Stroupe,

Appellant.

BRIEF OF APPELLANT

CHRISTOPHER A. WELLBORN

142-C Oakland Avenue
Rock Hill, South Carolina 29730
(803) 366-1065

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court abused its discretion by applying the outdated and superceded law in its interpretation of §56-5-2953(A) of the South Carolina Code as Amended in 2009.**
- II. Whether the trial court erred in its failure to dismiss the charge against the Appellant when the un-controverted record reflects that the Respondent failed to comply with the mandatory recording provisions of §56-5-2953(A) of the South Carolina Code as Amended in 2009.**

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 (Ticket No: 48264GH). On September 11, 2013, she filed a Motion to Dismiss her charge pursuant to §56-5-2953(A) of the South Carolina Code of Laws as amended in 2009. That Motion was heard on September 26, 2013 (Pre-Trial Transcript Exh. A) before the Honorable Peter J. Lenzi, Associate Judge for the Rock Hill Municipal Court. The City replied to the Motion on October 21, 2013. (Exh. B). Judge Lenzi issued an Order on October 28, 2013 (Exh. C) denying this Motion. This matter was called to trial on January 23, 2014. At that time, the Motion to Dismiss was renewed (see Trial Transcript Exh. D) both at the both at the close of the City's case and renewed at the close of the Defense's case. (Return of Municipal Judge Exh. E).

The Court denied the Motion and Ms. Stroupe was ultimately convicted of driving under the influence 1st offense. This appeal followed.

STATEMENT OF FACTS

Brenda Stroupe 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 of her vehicle, she was removed from her vehicle and directed to step behind her vehicle where she met Officers Justin Cook and Ryan Langley. Officer Cook administered four (4) field sobriety tests to her, specifically (1) the horizontal gaze nystagmus test (HGN), (PT Transcript p. 29), (City's Reply Exh. E p. 2), (Trial Transcript p. 43 L. 17), (Return of Municipal Judge p. 2); (2) the vertical gaze nystagmus test (VGN) (PT Transcript p. 33 L. 22), (Trial Transcript p. 90, L. 18), (3) the "Finger Dexterity Test" (PT Transcript p. 36 L. 6), (Reply to Motion To Dismiss p. 2), (Return of Municipal Court Oct. 28, 2013 p. 2), (Trial Transcript p. 50 L. 19) (Return of Municipal Court p. 2) and (4) an alphabet (ABC) test.

Officer Cook, who administered all four (4) tests, testified that a video recording was made which showed him presumably administering these tests but that "her eyes are not visible on the video recording whatsoever", (PT Transcript p.30 L. 5-7), that her whole face is a blur (Trial Transcript p. 80 l. 23) and no portion of the HGN or VGN can her eyes be seen. (PT Transcript p. 33)

Officer Cook also testified that the recording of the finger dexterity test is of such poor quality that it is hard to distinguish one finger from another or fingers from thumb (PT Transcript p. 36), Trial Transcript p. 93 L. 6 - P. 94 L. 23). The trial court also found that "we can hear the Defendant clearly but cannot see her clearly attempting to perform the finger dexterity test (Order of Municipal Court October 28, 2013 p. 2).

In sum, the uncontradicted testimony elicited was that for three (3) out of the four (4) field sobriety tests given to Ms. Stroupe, it could not be determined from the video tape "whether she passed them or not". (Trial Transcript p. 95 L. 11-15).

STANDARD OF REVIEW

The Circuit Court is bound by a Magistrate's factual findings if any evidence in the record reasonably supports them. However, the court is not barred from conducting its own review of the record to determine if the trial court Judge's decision is not supported by the evidence. Robinson v. State, 754 S.E.2d 862 (2014), State v. Tindall, 698 S.E.2d 203 (2010).

ARGUMENT

I.

The trial court applied the wrong statute in denying Ms. Stroupe's Motion to Dismiss.

The trial court in its Order of October 28, 2013, citing (State v. Murphy) (Murphy v. State, 709 S.E.2d 685 (2011)) said that:

"subsequent to the Court of Appeals' Opinion in Murphy, the South Carolina Legislature amended section 56-5-2953(A)(1)(a)(ii). Given the Murphy Court definition of "conduct" the Legislature could have provided a different definition if they chose to do so; they did not."

The trial court failed to recognize that the Murphy Court addressed the 2009 Amendment in its opinion but did not apply it because Mr. Murphy was charged under the former statute which, unlike the current one, did not require recordings of field sobriety tests.

"As amended in 2009, the current version of §56-5-2953 expressly requires the recording of field sobriety tests. (See S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) Supp. 2010) ("the video recording at the incident site must:

... include any field sobriety tests administered"). (Murphy v. State, 709 S.E.2d 685, 688 n. 4 (Ct. App. 2011)).

This Legislative history and chronology was most recent addressed in State v. Cody Roy Gordon, Op. No: 5226 (S.C. App. April 23, 2014), in which our Court of Appeals stated:

"Although *Murphy* holds that only the conduct of the defendant must be recorded, *Murphy* was based on a prior version of the statute, which did not include the specific language regarding the tests being recorded. The current version of the statute states: "the video recording at the incident site must . . . include any field sobriety test administered . . ." §56-5-2953(A)(1)(a)(ii) Supp. 2010). Because of the purpose of the video taping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless." Gordon, Id.

ARGUMENT

II.

The trial court incorrectly ruled that issues with the clarity of the video tapes went to their evidentiary weight and not admissibility.

The Legislature clearly intended for a per se dismissal in the event that a law enforcement agency violates the mandatory provisions of §56-5-2953, State v. Gordon, Id., citing Town of Mt. Pleasant v. Roberts, 713 S.E.2d 278 (2011), City of Rock Hill v. Suchenski, 646 S.E. 2d 203 (2010).

ARGUMENT

III.

The trial court made no factual ruling regarding whether the field sobriety tests were recorded within the meaning of §56-5-2953(A).

The trial court misapplied the pre-2009 statute, stating that “the defendant’s conduct was captured”. The trial court, although acknowledging that “Stroupe could be heard but not seen attempting to perform the finger dexterity test” made no further factual findings. The trial court, despite the request from Ms. Stroupe, made no factual findings regarding the HGN or VGN tests.

ARGUMENT

IV.

The field sobriety tests were not recorded pursuant to the requirements of §56-5-2953(A) as amended.

A. The HGN Test:

Officer Cook testified extensively both at the trial and in pre-trial motions about the procedure he used to test Ms. Stroupe and the results of her individual tests. (See PT T P. 29-33, TT, TT P. 80-89). He testified that he followed a strict procedure before giving her the HGN test in that he checked to see if she had resting nystagmus and that her pupil sizes were equal for each eye. He also tested to make sure her eyes tracked equally together when following his finger. All of these would be required before he could give an HGN test

according to his training. (TT P. 80-82). He tested each eye twice for the following clues: (1) lack of smooth pursuit, (2) nystagmus at maximum deviation, and (3) onset of nystagmus prior to forty-five degrees from the center of her face. He testified that he observed all of the above, in each eye, twice. The testimony is undisputed, both in the pre-trial hearing and at the trial that neither the pretest screening or the results of the HGN are visible or discernable from the recording made by Officer Cook on April 13, 2013.

B. The VGN Test:

On direct examination, Officer Cook testified that the VGN is caused by extremely high doses of alcohol for that person [emphasis added]. This suggested to the jury that Ms. Stroupe was used to drinking a lot of alcohol. (PT P. 50 L. 2). In cross examination, Officer Cook indicated whether VGN was present or not could not be determined by the video because "you cannot see the eyes on the video". (TT P. 90, L. 14).

C. The Finger Dexterity Test:

Officer Cook testified he asked Ms. Stroupe to use a particular sequence, starting with her "pinky and thumb" and then four times successfully count touching each finger in order "one, two, three, four, four, three, two, one". (TT P. 50, L. 18-25). He further testified she did poorly by touching her finger tips out of order. (TT P. 51, L. 14). Ms. Stroupe used her right hand doing this test and the video did not clearly show her right hand nor clearly distinguish between her fingers touched and thumb or whether or not her fingers touched her thumb in sequence or not as he testified. (TT P. 94, L. 23-25).

In short, Officer Cook admitted that three of the four field sobriety tests that were given to Ms. Stroupe, were not recorded in a manner by which one could see if Ms. Stroupe

passed them or not. (TT P. 95, L. 11-14). Because of the purpose of the video taping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless. Gordon, Id.

ARGUMENT

V.

The City of Rock Hill has never argued that the field sobriety tests were recorded and thereby is foreclosed from arguing such on appeal.

The City argued below that "the defendant's conduct as defined in Murphy at the incident site was recorded in compliance with S.C. Code of Laws §56-5-2953". (see City of Rock Hill's Reply to Motion to Dismiss). (Exh. B). The City did not address at any time the recording of the field sobriety tests themselves, which of course is what is required by the current law. It is well settled that positions not argued below cannot be asserted for the first time on appeal.

ARGUMENT

VI.

Section 56-5-2953(B) is not applicable in this case.

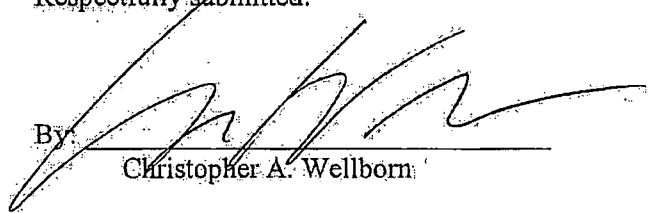
The City argued below that its failure to comply with the mandatory recording provisions of §56-5-2953(A) was excusable because, to wit, the position of the setting sun created a glare which completely obscured the face of Ms. Stroupe during the HGN, VGN

and her right hand during the finger dexterity tests. The fatal flaw in this reasoning is that in §56-5-2953(B) addresses circumstances involving a failure of the arresting officer to produce the video recording and the specific circumstances that create exceptions to the dismissal requirements of sub-section (A). Significantly, the pre-trial transcript, the trial transcript, the City's own Reply to the Motion to Dismiss (City's Reply P.8), the Return of the City Judge (see Exh. E, attachment page) and the Order of the Municipal Court of October 28, 2013 all establish that "a video was produced, as a matter of fact two or three videos were produced by officers who responded to the scene". (see Exh. C, P.1). The City is therefore put in the position of arguing that they should be excused for not producing evidence which in fact they produced and introduced at trial.

CONCLUSION

The trial court abused its discretion by misapplying inapplicable law and misinterpreting applicable law as well as refusing to make a factual or legal findings on two motions to dismiss. The trial court further erred in refusing to dismiss the charge against Brenda Stroupe pursuant to §56-5-2953(A) as amended.

Respectfully submitted:

By: 

Christopher A. Wellborn

Post Office Box 10191
Rock Hill, SC 29731
(803) 366-1065

ATTORNEY FOR APPELLANT

June 4th, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Appeal From Rock Hill Municipal Court

Honorable Peter J. Lenzi, Rock Hill Municipal Court Judge

Ticket No. 48264 GH

The City of Rock Hill

Respondent,

VS.

Brenda Stroupe,

Appellant.

DESIGNATION OF MATTER

TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal:

- 1., Pretrial Transcript of September 26, 2013.

2. City's Reply to Motion to Dismiss of October 21, 2013.

3. Order of the Municipal Court of October 28, 2013.

4. Trail Transcript of January 23-24, 2014.

5. Return of Municipal Judge of February 19, 2014.

6. Three (3) "Roadside Videos" relating to ticket no: 48264 GH.

The undersigned hereby certifies this Designation contains no matter which is

irrelevant to this appeal.

Griffin

Christopher A. Wellborn

Post Office Box 10191

Rock Hill, SC 29731

(803) 366-1065

June 4th, 2014

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Appeal From Rock Hill Municipal Court
Honorable Peter J. Lenzi, Rock Hill Municipal Court Judge

The City of Rock Hill,

Respondent:

vs.

Brenda Stroupe,

Appellant.

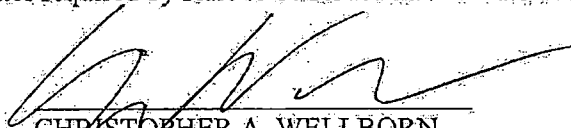
PROOF OF SERVICE

I, Christopher A. Wellborn, certify that I have served the within Brief of Appellant and Designation of Matter on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Christopher Barton
Solicitor for the City of Rock Hill
201 E. Main Street, 3rd Floor
Rock Hill, South Carolina 29730

ATTORNEY FOR RESPONDENT

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


CHRISTOPHER A. WELLBORN
Post Office Box 10191
Rock Hill, South Carolina 29731
(803) 366-1065

This 4th day of June, 2014

ATTORNEY FOR APPELLANT

EXHIBITS

- A. Pretrial Transcript of September 26, 2013.
- B. City's Reply to Motion to Dismiss of October 21, 2013.
- C. Order of the Municipal Court of October 28, 2013.
- D. Trial Transcript of January 23-24, 2014.
- E. Return of Municipal Judge of February 19, 2014.
- F. Three (3) "Roadside Videos" relating to ticket no: 48264 GH.

APPENDIX

Field sobriety tests:

"There's a battery of three tests which are used to help determine someone's level of impairment from alcohol and/or drugs"
(TT P.35 L. 17-20).

HGN:

"When your eyes move side to side, on a person that's not under the influence they're smooth. There is no jerking".
(TT P. 47 L. 19-21).

Supposed to look for resting nystagmus. Officer Cook did not observe resting nystagmus. "There is no way to determine what's going on with either of her eyes by looking at that video because you simply can't see her eyes at all, can you?"

"Not on that video, no sir."
(TT P. 80 L. 11-15).

Her face is a blur on the video.
(TT P. 81 L. 3-11)

Checked for resting nystagmus, equal pupil size and that her eyes tracked equally.

Her eyes tracked equally but we can't see this on the video because her face is a blur.
(TT P.81 L. 15- P. 82 L. 20)

Checked each eye twice for smooth pursuit, her eyes lacked smooth pursuit.
(TT P. 84 L. 14-16).

But we can't see it on the video because "we can't see her eyes on the video at all." ... "Because her face is a complete blur. . .".
(TT P. 84 L. 14-23).

Tested for distinct and sustained nystagmus at maximum deviation.
(TT P. 85 L. 2-8).

No way of knowing if when he actually did test whether she was at maximum deviation "other than, of course, your testimony".
(TT P.85 L.10-P.86 L.18)

Sustained nystagmus means visible for "at least four seconds".
(TT P.86 L.22-25).

He was able to see sustained nystagmus in each eye twice.
(TT P.87 L. 1-3).

This is not visible on the video because her face is a blur.
(TT P.87 L.4-7).

"There's no way that we in the courtroom can see whether that nystagmus was sustained or not".
(TT P.88 L.10-13).

Officer Cook tested for nystagmus prior to 45 degrees. He noticed such in her but could not recall at what point.
(TT P.89 L.7-10).

"We cannot determine whether or not there was nystagmus prior to forty-five degrees.
(TT P.89 L.16-22)

VGN:

Officer Cook did not see any VGN but because of the video "we wouldn't be able to determine whether there was vertical gaze nystagmus or not in this case."

"Not by watching the video."
(TT P.90 L.7-18).

Finger Touch Test:

Officer Cook asked her to do this test "in a very specific way"
(TT P. 91 L.14-21).

She used her right hand to do the test but on the video, her right hand is not clear and "we cannot see her right hand clearly".

(TT P. 93 L.1-9).

"You can't see whether her fingers touch her thumb in sequence"

(TT P.94 L.23-25).

That is the sequence he was testing for.

(TT P.95 L. 11-13).

For three out of four tests, "we can't see whether she passes them or not, based on the videotape..."

(TT P. 95 L.11-15).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	C.A. No.: 2014-CP-46-000239
The City of Rock Hill	)	
	)	
Plaintiff/Respondent	)	BRIEF OF THE RESPONDENT
	)	
v.	)	
	)	
Brenda M. Stroupe,	)	
	)	
Defendant/Appellant	)	

This matter involves the Defendant's appeal from her conviction for Driving Under the Influence in Rock Hill Municipal Court following her trial on January 24, 2014.

FACTS

On April 13, 2013, Brenda M. Stroupe (Defendant) was charged with Driving Under the Influence (S.C. Code § 56-5-2930) following a call from Adam Rainey a concerned citizen, that led Rock Hill officers to her location. Mr. Rainey reported that a maroon Mitsubishi Eclipse was driving recklessly in the area of Red River Road in Rock Hill and at times, driving on the wrong side of the road. Mr. Rainey's information and vehicle description was relayed by a Rock Hill Police Department dispatcher to Officer Justin Lewis who responded to the location.

Officer Lewis came in contact with the vehicle near the intersection of Cel River Road and Cherry Road at approximately 7:37 pm. Officer Lewis fell in behind the vehicle and followed the vehicle to the intersection of Cel River Road and Cherry Road. The driver of the vehicle was the first vehicle stopped at the red light and then began to

proceed through the intersection on Cherry Road heading west while the traffic light was still red. Officer Lewis then activated his blue lights to initiate a traffic stop.

Following Officer Lewis activating his blue lights, the driver of the vehicle proceeded down Cherry Road heading towards I-77. The vehicle was eventually stopped a short distance from intersection of Cherry Road and Cel River Road within the city limits of Rock Hill. Officer Lewis made contact with the Defendant who was the driver and sole occupant of the vehicle. Upon speaking with the Defendant, Officer Lewis believed that she may be impaired and contacted Officer Justin Cook with the Rock Hill Police Department Traffic Unit to assist.

Officer Cook arrived on scene at approximately 7:46 pm and spoke with Officer Lewis to review the matter and then spoke with the Defendant. Upon speaking with the Defendant, Officer Cook detected a strong smell of alcoholic beverage coming from her as she was leaning on the back of a patrol vehicle. Officer Cook noted that the Defendant's eyes were bloodshot and glassy and that her speech was slurred. Officer Cook asked the Defendant how much she had been drinking and she replied that she had one mixed drink earlier at her mother's house. Officer Cook then proceeded to offer the Defendant some field sobriety tests which the Defendant agreed to do.

Officer Cook offered the Horizontal Gaze Nystagmus test and noted that all six clues were present. Due to the Defendant's stated physical impairments, Officer Cook offered the Defendant the Finger Dexterity test in lieu of the Walk and Turn and One Leg Stand tests. Lastly, Officer Cook requested the Defendant to recite the alphabet from D to X after confirming that the Defendant knew the alphabet.

Based on the observations related to Officer Cook and his direct observations, he placed the Defendant under arrest for DUI and read a Miranda warning to her. All of the facts as outlined above were recorded on digital video and a copy was provided to the Defendant. Video supplied to the Defendant included copies from all three officer's (Cook, Lewis and Langley) vehicles. The entire interaction at the incident site between the Rock Hill Police officers and Defendant was video recorded.

Following her arrest, the Defendant was transported to the Rock Hill Law Center and offered a breath test. The Defendant registered a 0.23% blood alcohol content and was served with a notice of suspension of her driving privileges due to her blood alcohol content and she was issued Uniform Traffic Ticket number 48264 GH charging her with Driving Under the Influence.

The Defendant proceeded to a two day jury trial and following the submission of the case to the jury, the jury deliberated for approximately five (5) minutes before returning with a finding of guilt. Subsequently, the jury was charged to determine the Defendant's blood alcohol content and the jury found the blood alcohol content (BAC) to be in excess of 0.16%.

ANALYSIS

A. The City of Rock Hill Video Recorded the Entire Roadside Encounter with the Defendant and Complied with S.C. Code of Laws Section 56-5-2953.

All the City of Rock Hill police officers involved with this case digitally recorded every moment required by S.C. Code of Laws Section 56-5-2953. The video from Officer Lewis, Officer Langley and Officer Cook provides a comprehensive video recording of the interactions between the City of Rock Hill police officers and the Defendant at the incident site.

S.C. Code of Laws Section 56-5-2953 requires that the "conduct" of the individual at the incident site must be video recorded. In State v. Murphy, 709 S.E.2d 684 (Ct. App. 2011), the South Carolina Court of Appeals affirmed the driving under the influence conviction finding that "an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id. at 688. Conduct as stated in S.C. Code of Laws Section 56-5-2953 "is generally defined as one's behavior, action or demeanor." Id. "[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." Id.

In February 2009 the South Carolina Legislature amended S.C. Code of Laws Section 56-5-2953 to include in subsection (A)(1)(a)(ii) the video recording of any field sobriety tests administered. S.C. Code of Laws Section 56-5-2953(A) establishes that an individual's conduct at the incident site must be video recorded and that the incident site recording must begin with the activation of the officer's blue lights, include any field

sobriety tests administered and the arrest or probable cause determination along with showing the person being advised of their Miranda rights. The Legislature did not and has not chosen to further define what is considered conduct pursuant to Section 56-5-2953. Thus the Murphy definition of conduct still controls the determination of whether a video recording complies with Section 56-5-2953(A).

In South Carolina, one of the fundamental rules of statutory construction is that "there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." State v. Corey D., 529 S.E.2d 20, 23 (2000). Had the South Carolina Legislature wished to change the definition of conduct they could have chosen to do so.

The South Carolina Court of Appeals re-examined the Murphy decision in State v. Gordon, Op.No. 5226 (S.C.Ct.App. Order refiled June 11, 2014) (Shearouse Adv. Sh. No. 23 at 43.). In Gordon the issue was whether the Defendant's head must be visible on the video recording of the Horizontal Gaze Nystagmus (HGN) test. The Court of Appeals found that the current version of S.C. Code of Laws Section 56-5-2953(A) requires the recording of field sobriety tests and that "the head must be shown during the HGN test in order for that sobriety test to be recorded." Id. at 48. The case was subsequently remanded back to the Magistrate Court to make appropriate findings of fact as to what specifically was visible on the video recording. What is important is that the definition of conduct did not change and the recording of the HGN field sobriety test required only the head to be shown. Equally important is what was not required to be shown by the recording. The video recording does not need to mirror the Officer's

observations of the individual and only requires the individual to be visible while the field sobriety test is administered.

The Defendant's conduct as defined in Murphy at the incident site was video recorded in compliance with S.C. Code of Laws Section 56-5-2953. The video recording included the administration of all field sobriety tests as required by S.C. Code of Laws Section 56-5-2953(A) and Gordon.

B. The City of Rock Hill Provided an Affidavit as Required by S.C. Code of Laws Section 56-5-2953(B) Due to the Lighting Conditions Caused by the Sunset.

Out of an abundance of caution due to the lighting conditions that existed at the time of the traffic stop of the Defendant, Officer Justin Cook (arresting officer) later completed an affidavit as required by S.C. Code of Laws Section 56-5-2953(B) which allows for the consideration of any other relevant evidence at the trial and sets out exceptions to the video recording requirements contained in Subsection A of 56-5-2953.

Officer Cook noted in his affidavit that the evening lighting conditions affected his cameras ability to record the incident site and the video submitted from Officer's Langley and Lewis shows the same effect. The City also submitted a copy of the time chart showing the sunrise and sunset for April 13, 2013 along with the periods of dawn and dusk for Rock Hill, South Carolina.

"Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2).

if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances." State v. Manning, 734 S.E.2d 314, 317-318 (Ct. App. 2012).

The affidavit provided by the Officer Cook falls within two of the exceptions: (1) exigent circumstances existed based on the evening lighting which affected all of the officers' cameras and (2) any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. Officer Cook also testified that he and the other officers were not aware of the lighting effect at the time the video was initially recorded and this was the first time he had dealt with this situation.

Even where **no affidavit was provided** the South Carolina Court of Appeals in State v. Manning affirmed the conviction finding that "nothing in this section [56-5-2933(B)] prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances." Id. At 318-319.

The affidavit submitted by Officer Cook provides valid reasons for the exigent circumstances encountered by Officer Cook and the other officers due to the evening lighting conditions and provides a valid reason based on the totality of the circumstances for any defects in the video recording.

The South Carolina Legislature provided for the video recording of DUI arrests in 1998 and has periodically updated and amended section 56-5-2953 over the years since. "[T]he primary intention behind section 56-5-2933 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, 721 S.E.2d 451, 454 (Ct. App. 2011).

The South Carolina Legislature adopted the video recording of DUI arrests with a common sense view towards the fact that video cameras would be mounted in patrol vehicles and that weather, lighting and other factors could and would play a role in the video collection of evidence at the roadside. "The statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind." Id. at 454. What has not changed is what is required to be recorded is "conduct" which was defined in State v. Murphy, 709 S.E.2d 684 (Ct. App. 2011). "[A]n accused need not remain in full view of the camera at all times in order for the recording to capture her conduct." Id. at 688. Gordon requires the individual to be visible while the field sobriety test is administered, however, it does not require the video recording to mirror the arresting officers observations of a defendant while the field sobriety test is administered.

C. A Totality of the Circumstances Analysis is Required by S.C. Code of Laws Section 56-5-2953.

In State v. Manning, 734 S.E.2d 314 (Ct. App. 2012), the South Carolina Court of Appeals affirmed the felony DUI conviction even though the South Carolina Highway Patrol officer who investigated the case and arrested the defendant failed to record any video of the defendant at the incident site and failed to provide an affidavit certifying that it was physically impossible to provide a video recording. The Manning Court held that even in the absence of a video affidavit being submitted in compliance with S.C. Code of Laws Section 56-5-2953(B), that "section 56-5-2933 allows a circuit court to look at

the totality of the circumstances and make a determination of whether the charges should be dismissed." *Id.* at 318. The Court of Appeals in Manning held that the circuit court properly refused to dismiss the DUI charges under subsection B despite the fact that no video affidavit was submitted.

The Manning Court went on to hold that "even if the traffic accident investigation exception was inapplicable, the circuit court properly concluded the video recording was not required due to the totality of the circumstances." *Id.* The Court of Appeals found that a totality of the circumstances analysis was appropriate to determine if a statutory exception to the video recording requirement existed. Even though no affidavit was submitted, the Court of Appeals found that it was appropriate to determine if one of the so-called escape valves in section 56-5-2953 was present as "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances." *Id.* at 318-319.

In reviewing the instant case under a totality of the circumstances analysis, the following factors support a finding of compliance with a statutory exception under 56-5-2953:

(1) A 911 call from a concerned citizen documenting significant bad driving by the Defendant and the caller appeared to testify; however, the Court did not allow his testimony at the motion hearing.

(2) Video from Officer Lewis shows the Defendant driving into the intersection of Cherry Road and Cel River Road against a solid red light.

(3) Video from all the officers documents the significant impairment exhibited by the Defendant at the incident site, including her slurred speech, inability to walk in a

normal fashion, confused thought processes, having to lean against the patrol vehicle to maintain her balance, in addition to her performance on the field sobriety tests.

(4) A blood alcohol content of 0.23% almost three (3) times the legal inference level for impairment.

(5) Breath test site video which displays significant impairment in the Defendant's behavior, action and demeanor in the breath testing room.

All of this must be weighed versus the approximately fifteen (15) seconds of video recording at issue. The video recording properly records the Defendant's conduct as defined in Murphy during the finger dexterity test where you can see the Defendant's hands and her fingers moving but cannot see clearly the tips of her fingers.

Remembering that the "statute [56-5-2933] must be interpreted with realistic circumstances and rationales in mind." State v. Elwell, 721 S.E.2d 451, 454 (Ct. App. 2011).

There is overwhelming evidence of the Defendant's guilt and any realistic and rational interpretation of the fifteen seconds of video does not negate, in any fashion, the Defendant's guilt. On appeal, the South Carolina Supreme Court affirmed the decision of the Court of Appeals in Elwell, finding that "because no statutory violation occurred in this case, we need not rely on Suchenski for a remedy here." State v. Elwell, 743 S.E.2d 801, 807 (2013). In Elwell, the South Carolina Supreme Court reiterated that 56-5-2953 "must be interpreted with realistic circumstances and rationales in mind." Id. at 805.

Viewed with the perspective of the decisions in Murphy as it relates to the definition of what conduct needs to be video recorded and Elwell in light of interpreting

56-5-2953 with realistic circumstances and rationales, the Defendant's argument that the inability of the video recording to display fifteen seconds of her fingers with cinematic clarity merits dismissal of the DUI charge is absurd, unrealistic and irrational.

D. Dismissal or Suppression of the Evidence is Limited to Constitutional Violations and Not to Statutory Violations. Neither Constitutional nor Statutory Violations are Present in this Case.

In City of Rock Hill v. Suchenski, 646 S.E.2d 879 (2007) the South Carolina Supreme Court found that dismissal of the charge was an appropriate remedy to the failure to produce a video recording in compliance with S.C. Code of Laws Section 56-5-2953 where the violation of section 56-5-2953(A) was not mitigated by an exception from subsection (B). The trial court in Suchenski had found that exigent circumstances existed under subsection (B), however, the South Carolina Supreme Court refused to consider the City's argument on appeal finding that issue had not been properly preserved.

The City of Rock Hill has supplied video recordings from all three officers involved in this case. The video from Officer Cook records all required conduct of the Defendant. Any issue with the clarity or resolution of the video goes to the weight to be assigned the evidence by the trier of the fact, not the issue of whether Section 56-5-2953(A) has been complied with.

Assuming that this Court finds that Section 56-5-2953(A) has not been complied with, the affidavit supplied by Officer Cook supplies the necessary subsection (B) mitigation and any noncompliance is properly excused given the exigent circumstances faced by Officer Cook and the other officers. The affidavit also supports a finding that

considering the totality of the circumstances, the video recording as a whole mitigates against dismissal based on the fifteen seconds of video that the Defendant bases her motion on.

In South Carolina where the video recording complies with Section 56-5-2953(A), or an exception to the recording requirement exists under Section 56-5-2953(B) dismissal of the charge is not warranted. In State v. Elwell, 743 S.E.2d 801 (2013), the South Carolina Supreme Court found that no violation of Section 56-5-2953 occurred and dismissal of the charge was not appropriate.

In State v. Huntley, 562 S.E.2d 472 (2001), the South Carolina Supreme Court found that even though a statutory violation had occurred with regards to the level of alcohol required to be in the simulator solution of the breath testing instrument, that this violation did not support either dismissal of the charge or even suppression of the results of the breath testing instrument as the results were reliable. The Huntley Court restated the long held principal that the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures. Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntely's breathalyzer results." Id. at 474.

With neither a Constitutional or statutory violation present in this case, neither dismissal nor even suppression of the evidence is appropriate. Any issue regarding the clarity of the video recording goes to the weight to be assigned to the video recording evidence, not its admissibility.

CONCLUSION

The South Carolina Supreme Court and Court of Appeals have stated repeatedly that the video recording statute for DUI cases should be applied based on the realistic circumstances faced by law enforcement officers utilizing video cameras mounted in their patrol vehicles. The video recording statute as a whole "must receive a practical, reasonable, and fair interpretation consonant with the purposes, design and policy of the lawmakers." State v. Elwell, 743 S.E.2d 801, 805 (2013). "The primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State to videotape important events in the process of collecting DUI evidence." Id. In Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011) the South Carolina Supreme Court found that the purpose of the video recording required Section 56-5-2953 "is to create direct evidence of a DUI arrest." Id. at 347. The video recording is accomplished by way of a video camera mounted in the law enforcement vehicle and "the Department of Public Safety is responsible for purchasing, maintaining, and supplying all videotaping [video recording] equipment for use in all law enforcement vehicles used for traffic enforcement." S.C. Code of Laws Ann. § 56-5-2953(D) (Supp. 2013).

The City has supplied video recordings of the incident site based on the realistic circumstances faced by the officers that evening. The video recordings provide a complete recording of the interactions between the Defendant and the officers thereby avoiding the swearing contest issue which is the primary intention of the video recording statute. The South Carolina Legislature has not elected to mandate multiple cameras for video recording or sending officers to cinematography school to ensure that

Hollywood sound stage production values are in every recording. The South Carolina Legislature understood at the time it initially adopted the video recording requirement. The South Carolina Court of Appeals in the Murphy opinion holds that definition of conduct that capturing every single detail is neither practical nor even possible given the realistic variations of circumstances under which officers encounter impaired drivers. Likewise in Gordon, the South Carolina Court of Appeals does not require the bat of every eyelash in determining whether the HGN test is properly recorded, merely they require that the head of the individual be visible.

The City has supplied an affidavit documenting the environmental conditions faced by the officers following the traffic stop and subsequent investigation of the Defendant. Section 56-5-2953(B) provides that this Court must consider the affidavit and the testimony of Officer Cook and all the other evidence which demonstrates that the officers faced an unknown exigent circumstance caused by the angle of the evening sun and the direction their patrol vehicles/cameras faced. Officer Cook and the other officers were unaware of the illumination issue at the time. The totality of the circumstances overwhelmingly supports mitigation of any alleged shortcomings in the video recording at the incident site.

In this case, the City of Rock Hill Municipal Court made a determination that the video created complied with the requirements of S.C. Code of Laws Section 56-5-2953(A) and this determination is afforded great deference. "In criminal cases, the appellate court sits to review errors of law only. This court is bound by the trial court's factual findings unless they are clearly erroneous. The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether

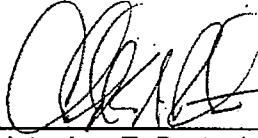
the trial judge's ruling is supported by any evidence. The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Lyles, 379 S.C. 328, 333, 665 S.E.2d 201, 204 (Ct.App.2008) (Internal citations omitted). The City of Rock Hill Municipal Court's determination of the admissibility of the video recording is supported by the factual findings regarding the direct evidence the video recording created in this case and no error of law exists.

Assuming that the City of Rock Hill Municipal Court committed error in admitting the incident site video recording, any such error is cured by the submission of the affidavit by the arresting officer as required by S.C. Code of Laws Section 56-5-2953(B) describing the environmental issues encountered at the time of the initial traffic stop and subsequent DUI investigation. A totality of the circumstances analysis is required by S.C. Code of Laws Section 56-5-2953 where the issue of whether an exception to the mandatory video recording is raised. This issue was clearly raised and argued extensively by the City and was properly before the Municipal Court. Examining all the circumstances in this case supports the finding that dismissal of the DUI charge is not appropriate.

The City of Rock Hill Municipal Court did not commit an error of law in admitting the video recording of the Defendant at the DUI incident site. Assuming such error did occur, it is cured by the affidavit submitted by the arresting officer and an examination of the exigent circumstances and the totality of the circumstances does not support dismissal of the charge. Overwhelming evidence exists to support the finding of the trier

of fact that the Defendant is guilty of Driving Under the Influence and her conviction should be affirmed.

Respectfully submitted,



Christopher E. Barton
Senior City Solicitor
City of Rock Hill Solicitor's Office

This 3rd day of September, 2014..
Rock Hill, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS
Rock Hill City Of

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP4600239

Brenda Stroupe

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER GRANTING RELIEF

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

SI John C. Hayes 777

Circuit Court Judge

2049

Judge Code

09/15/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on **September 19, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **September 19, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Christopher Edward Barton 201 East Main Street 3Rd Floor
Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

Christopher A. Wellborn 142 Oakland Avenue Rock Hill,
SC 29730

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
City of Rock Hill,)
Respondent,)
v.)
Brenda M. Stroupe,)
Appellant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-46-00239

ORDER GRANTING RELIEF

FILED-RECEIVED
2014 SEP 19 AM 11:12
DAVID HAMILTON
C.C. R. 85
YORK COUNTY, SC

Appearance for Respondent: Christopher E. Barton
Appearance for Appellant: Christopher A. Wellborn
Trial Judge: Honorable Peter J. Lenzi, Magistrate

This matter came before this Court pursuant to an appeal by Brenda M. Stroupe ("Appellant") from his conviction of Driving Under the Influence First Offense ("DUI 1st "). The trial judge, the Honorable Peter J. Lenzi, convicted the Appellant on January 24, 2014. This Court heard this appeal on September 3, 2014. After review of the Appellant's appeal, the Respondent's brief, and the argument of counsel I find the following:

FACTS

On April 13, 2013, Officer Justin Cook of the Rock Hill Police Department arrested and charged the Appellant with "DUI" 1st. On September 11, 2013, the Appellant filed a Motion to Dismiss her charge pursuant to Section 56-5-2953(A) of the South Carolina Code of Laws as amended in 2009. That Motion was heard on September 26, 2013 before the Honorable Peter J. Lenzi associate Judge for the Rock Hill Municipal Court. The City replied to the Motion on October 21, 2013. Judge Lenzi issued an order on October 28, 2013 denying this Motion. This matter was called to trial on January 23, 2014. At that time, the Motion to Dismiss was

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renewed both at the close of the City's case and renewed at the close of the Defense's case. The Court denied the Motion and the Appellant was convicted of DUI 1st.

LEGAL ANALYSIS

1. The provisions of South Carolina Code Ann. § 56-5-2953(A), as amended in 2009, states in pertinent part that a person charged with driving under the influence must have their conduct recorded at the incident site as follows:

(A) A person who violated Section 56-5-930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and breath test site 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 test administered; and
- (iii) include the arrest of a person for a violation Section 56-5-2930 or 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and to show the person being advised of his *Miranda*¹ rights.

In construing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give effect to the intent of the Legislature. *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). A Court should not attempt to derive the intent of the Legislature when the statutory language is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011). Thus, in interpreting a statute, a Court should give words their plain and ordinary meaning, and

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

not resort to forced construction that would limit or expand the statute in question. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001).

It is arguable that the statutory language is ambiguous because the statute does not specifically state or define what is required in the recording of the field sobriety test. To the extent there is any ambiguity in the statute, the Court looks to any evidence of the Legislature's intent in enacting the statute. Prior to the 2009 amendments, Section 56-5-2953(A)(1), with respect to the recording of any field sobriety testing, only required that the "conduct" of the suspect-driver be recorded at the incident site. Under the former provisions of Section 56-5-2953(A)(1), the Court of Appeals held, in *Murphy v. State*, 392 S.C. 628, 709 S.E. 2d 685 (Ct. App. 2011), that although a suspect-driver's feet could not be seen during the "walk and turn" test, the video recording requirements complied with 56-5-2953. In *Murphy*, the video recording at the incident site only showed the suspect-driver doing the "walk and turn" test from the knees or waistline upwards. *Id.* The Court explained:

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 conduct.

However, footnote 4 provides as follows:

As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) (sup. 2010). (The video recording at the incident site must...include any field sobriety test administered."). We note that the Legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior versions, in effect at the time of this action, did not require recording of all tests.

The obvious importance of the above quote from *Murphy* is that if the complete recording of a person's *performance* of any field sobriety test was not required under the former statute, it is now required under the amended statute. The Respondent argued that, pursuant to *Murphy*, entire roadside encounter did not have to be recorded to comply with Section 56-5-2953(A). However, the 2009 amendment specifically provides for the recording of any field sobriety test, which goes beyond the former requirement of merely recording a person's conduct. Had the Legislature only intended that there be a recording of a person doing a field sobriety test, without there being any way to determine the person's performance on the test, as in *Murphy*, there would have been no need to amend the statute. The Legislature enacted the 2009 amendments, and it must be presumed that the Legislature did not intend for the amendments to be futile or meaningless. *State v. Long*, 363 S.C. 360, 610 S.E. 2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E. 2d 645 (Ct. App 2008). The South Carolina Court of Appeals explains that "because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless." *State v. Gordon*, 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014).

2. The video recording of South Carolina Code Ann. § 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). When a prosecuting agency fails to comply with video recording provisions of S.C. Code Ann. § 56-5-2953(A), the appropriate remedy is the dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski* 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson* 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). In *Town of Mt. Pleasant*, the South Carolina Supreme Court returned to the *Suchenski* decision and reiterated that the un-excused

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noncompliance with the South Carolina Code Ann. § 56-5-2953 mandates the dismissal of DUI charge. In *Town of Mt. Pleasant* the Court states:

As evidenced by this Court's decision in *Suchenski*, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. Notably, the Legislature specifically provided for dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* Section 56-5-2953(B): ("Failure by the arresting officer to produce the videotapes required by this section is not alone grounds for dismissal of any charge made pursuant to Section 56-5-2953...if (certain exceptions are met). The term "dismissal" is significant as it explicitly designated a sanction for an agency's failure to adhere to the requirements of Section 56-5-2953.

Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.

Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*.

Likewise, the decisions of the South Carolina Court of Appeals have been consistent with *Suchenski*.²

3. In this case, the City failed to comply with the videotaping requirements of Section 56-5-2953. The video failed to record the Appellant's performance in three of the four sobriety tests administered at the incident site. Although the video camera was recording during

² See *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Cl. App 2001) (officer violated Section 56-5-2953(A)(2), when he failed to capture the administration of the breath test to the Defendant on videotape, when the first breath test machine was not working, and the officer moved the Defendant to another machine in the same room but failed to activate the videotape for a second machine in the same room; although the officer could be seen on the video made from the first machine which was left on the entire time, and the Defendant could be heard, the Defendant himself could not be seen; case should have been dismissed); *Murray v. State*, 392 S.C. 626, 709 S.E. 2d 685 (2011) (the remedy for noncompliance with Section 56-5-2953 is dismissal of the case, not mere suppression of evidence).

the administration of the sobriety tests, it was positioned in such a manner that the Appellant's performance was not visible. Therefore, the Appellant's performance, an important part of the test, was not recorded.

The arresting officer did not properly record the Appellant performing the sobriety tests at the incident site as required by Section 56-5-2953(A)(1)(a)(ii). The recording requirements of Section 56-5-2953 are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). The only remedy for noncompliance with the video recording requirements of Section 56-5-2953 is dismissal of the case. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). Admittedly, the sanction of dismissal is severe, but as the South Carolina Supreme Court observed in *Town of Mt. Pleasant v. Roberts*, the Legislature has clearly intended strict compliance with the provisions of Section 56-5-2953 and, in turn, promulgated a severe sanction for dismissal for noncompliance.

In this case, the video shows only the administering of the Horizontal Gaze Nystagmus test, Vertical Gaze Nystagmus test, and the finger dexterity test. However, the video fails to show the Appellant's performance on either of the nystagmus tests or the finger dexterity test.³ It would be a hollow requirement for just the administration to be shown without the results of the tests being shown. For example, there is no value in administering the SAT without the performance being score. That is, the taking the test would be of no value.

The undersigned realizes that in the past the undersigned has leaned toward a substantial compliance test. See *State v. Gessner* (2013-CP-46-01010). However, in *State v. Sawyer*, 2011-

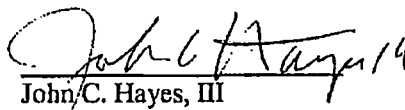
³ The undersigned is not ready to go so far as to find that the suspect-driver's eyes must be shown during the Horizontal Gaze Nystagmus or Vertical Gaze Nystagmus tests.

201206, 2014 WL 4214429 (S.C. Aug. 27, 2014), the South Carolina Supreme Court explained that the statute requires strict compliance. Therefore, the recording here failed to record the performance of the Appellant. Accordingly, the City did not strictly comply with Section 56-5-2953.

4. In this case, the video recording was produced and therefore Section 56-5-2953(B) it is not implicated.

IT IS THEREFORE ORDERED, that based upon the above the Court GRANTS the Appellant's appeal and her trial court conviction of DUI 1st is dismissed.

AND IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

September 15, 2014
York, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-46-0239

CITY OF ROCK HILL)
vs.) TRANSCRIPT OF RECORD
BRENDA STROUPE)

SEPTEMBER 3, 2014
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE JOHN C. HAYES, III

APPEARANCES:

CHRISTOPHER BARTON, ASSISTANT SOLICITOR
ROCK HILL, SOUTH CAROLINA

ATTORNEY FOR THE PLAINTIFF

CHRISTOPHER WELLBORN, ESQUIRE
ROCK HILL, SOUTH CAROLINA

ATTORNEY FOR THE DEFENDANT

SHIRLEY BROOM
16TH Circuit Court Reporter

I-N-D-E-X

WITNESSES:

(NO WITNESSES)

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-1	Brief of Respondent		15

1 THE COURT.- All right, the Stroupe -- Mr.
2 Wellborn represents Stroupe; Mr. Barton, again, on behalf
3 of the City.

4 MR. WELLBORN - Thank you, Your Honor. Beg the
5 Court's indulgence one second. I'm going to hand up copies
6 of the transcripts that I'll be referring to. I don't know
7 you have those already.

8 THE COURT - I've got some sort of transcript. I
9 wouldn't mind a second copy to work off of.

10 MR. WELLBORN - I'll be referring to these as
11 well. It's my understanding Mr. Barton ordered his own
12 copy of the transcript so -- if not I'll certainly be glad
13 to share as I refer to them.

14 (WHEREUPON, DISCUSSION IS HELD BETWEEN MR.
15 WELLBORN AND MR. BARTON WHICH WAS NOT REPORTED.)

16 MR. WELLBORN - Your Honor, this is also an appeal
17 brought from the Rock Hill Municipal Court. The grounds
18 were that motions were made both pre-trial and during a
19 trial stage. They were renewed for a dismissal of the
20 charges against my client pursuant to 56-5-2953(A)
21 basically the same issue that Mr. Boyd was addressing in
22 his matter. The fact -- and I've got in my Brief -- I
23 don't know if Your Honor's had a chance to read it. I
24 tried to file it timely enough that somebody would have a
25 chance to read it, but it's -- has a statement of the case

1 and statement of facts. I don't think that -- and the
2 facts and the statement of facts I reference specific pages
3 in the transcript so that Your Honor can compare the
4 testimony to what's in the statement of facts.
5 Effectively, what happened in this case is that Ms. Stroupe
6 was stopped by officers from the City of Rock Hill. After
7 being asked to step out of her vehicle, she was given four
8 field sobriety tests. Specifically, she was given a
9 horizontal gaze nystagmus test. She was given a vertical
10 gaze nystagmus test. She was given a finger dexterity
11 test, and she was also given an ABC test, parenthetically
12 she passed the ABC test. The officer who administered all
13 four of these tests testified both in pre-trial motions and
14 in trial that this video recording that was made, that her
15 eyes were not visible on the video recording whatsoever,
16 that her entire face was a blur, so unlike Gordon, you can
17 actually see that there is a head, but you can't really
18 determine whose head it is, what kind of head it is,
19 whether it's a head that contains the normal features that
20 you would expect a human being to have, and no portion of
21 the horizontal gaze nystagmus test or the vertical gaze
22 nystagmus test can her eyes be seen, and I'll come back to
23 why that's important. Officer -- the officer also
24 testified during the recording of the finger dexterity
25 test, it was of such poor quality that we could not

1 distinguish one finger from another or her fingers from her
2 thumb, and then the Trial Court found in -- after the
3 motions were made pre-trial, "we can hear the defendant
4 clearly, but cannot see her clearly attempting to perform
5 the finger dexterity test" and that's in the -- you should
6 have a copy of the Order of the Municipal Court from
7 October 28th, and that's on page 2 of the Court's Order. So
8 that's where we have the factual background. Now, the
9 Trial Court started out and said, okay, even though we
10 can't see these tests being performed, even though that the
11 Trial Court made this ruling -- Trial Court by the way
12 never made a specific finding regarding the horizontal gaze
13 nystagmus or the vertical gaze nystagmus test, simply
14 didn't rule one way or the other regarding those, but it
15 did rule regarding finger dexterity test. What the Trial
16 Court did, is it applied the wrong statute. In its Order,
17 the Trial Court citing State v. Murphy -- and I think what
18 the Trial Court truly meant was Murphy v. State -- said,
19 subsequent to the Court of Appeals Opinion in Murphy, the
20 South Carolina legislature amended the statute; given the
21 Murphy definition of conduct, the legislature could've
22 provided a definition if they chose to do that. The Trial
23 Court completely failed to recognize that, in fact, Murphy
24 addresses in the body of its Opinion in footnote 4 that the
25 legislature, in fact, had changed the statute and that now

1 the recording of field sobriety tests is required and has
2 been required since 2009. The Trial Court also ruled that
3 any issues regarding the video went to their evidentiary
4 weight and not admissibility, which, of course, fails to
5 recognize the authority of City of Rock Hill v. Suchenski
6 and Town of Mt. Pleasant v. Roberts and the fact that the
7 only -- the appropriate remedy is dismissal. It's not a
8 weight of evidence issue. It's strictly a dismissal or not
9 dismissal issue. So applying Gordon -- and this is -- and
10 I'll come back to this, too, -- Gordon said -- and this was
11 something that was not raised earlier, but I think it's
12 important. The Court in Gordon said, "because the purpose
13 of the video-taping to create direct evidence of the arrest
14 -- is to create direct evidence of the arrest -- if the
15 actual tests cannot be seen on the recording, the
16 requirement is pointless." Now, I personally found that
17 very interesting language, because it is language that
18 post-dates Your Honor's language in your Lorusso Order
19 where you basically said exactly the same things changing a
20 few of the words, but the same concept. Obviously, if
21 we're going to record these statutes supposed to mean
22 something and if you can't see them, how do you -- you
23 know, what does the statute mean? The Trial Court made no
24 factual ruling regarding whether the field sobriety tests
25 were recorded within the meaning of 56-5-2953(A), although

1 the Trial Court did, as I've referenced earlier, make a
2 factual finding that we couldn't see the finger dexterity
3 test with any clarity. So getting to the tests themselves,
4 it's our position they were not recorded within the meaning
5 of the statute, specifically the horizontal gaze nystagmus
6 test. Officer Cook testified extensively, both in trial
7 and pre-trial motions about the procedure that he used; he
8 testified that he checked Ms. Stroupe's pupils to make sure
9 they were equal in size, which is a prerequisite to giving
10 the test. We can't see her eyes at all, so can't see
11 whether her pupils were equal in size or not. He testified
12 that they were. He testified that her eyes tracked
13 equally, which is a requirement before giving horizontal
14 gaze nystagmus test, testified that her eyes did track
15 equally. We don't know. There's no way for us to confront
16 that or even if we disregard the confrontation, that she -
17 there's no way for her to present evidence and be fully
18 heard in her defense that, hey, I passed this test, because
19 all we have on the video-tape is a -- literally a blur
20 where a head should be. Granted, we can assume there's a
21 head there, but that's all we have is a blur. And we have
22 to ask ourselves, in Gordon, when they said, okay, yeah, we
23 agree you have to see the head, why is it important to see
24 the head in a horizontal gaze nystagmus test? Why would it
25 matter? Well, it would matter, because you can't see what

1 the test is if you can't even see the head. In this case
2 we can't see what's going on with the test either. Officer
3 Cook testified he tested each eye for lack of smooth
4 pursuit, nystagmus at maximum deviation, onset of nystagmus
5 prior 45, and he observed all of the above twice in each
6 eye. Actually, four times in each eye. The testimony is
7 undisputed, both pre-trial and trial, that none of these
8 things that the officer testified that he saw are visible
9 or discernable on the horizontal gaze nystagmus test. He
10 also testified that he gave Ms. Stroupe a vertical gaze
11 nystagmus test and that vertical gaze is caused by
12 extremely high doses of alcohol for that person, which, of
13 course, suggested that Ms. Stroupe had been used to
14 drinking a lot of alcohol or was drinking a lot of alcohol,
15 and I've got the pre-trial transcript and the cross
16 examination part that's referenced, so you can go to that
17 part of the transcript. He indicated that whether the
18 vertical gaze nystagmus test was present or not could not
19 be determined by the video, because you can't see her eyes
20 on the video. We then go to the finger dexterity test. He
21 testified that he asked Ms. Stroupe to use a particular
22 sequence starting with her pinky and thumb then four times
23 successfully count touching each finger in order, one, two,
24 three, four, four, three, two, one. That's referenced in
25 the trial transcript. He further testified that she

1 touched her fingers out of order, which, of course, is the
2 test that he's giving her. He testified that she used her
3 right hand in doing this test, but that the video does not
4 show her right hand clearly, nor clearly distinguished
5 between the fingers touched and the thumb or whether or not
6 her fingers touched her thumb in sequence or not as he
7 testified. Bear in mind, the officer got to choose which
8 field sobriety tests he offered. He could've walked her
9 directly up to the front of his car and had her face his
10 car, and we would've seen them. He chose not to. So we
11 have four field sobriety tests that the officer gave, three
12 of which the officer admitted under oath are not visible or
13 recorded on this video-tape, but my client had to confront
14 that. The City of Rock Hill below never argued that the
15 field sobriety tests were recorded, which puts us in an
16 interesting appellate posture, because presumably they're
17 arguing now that these tests were recorded within the
18 meaning of the statute, but they never argued that position
19 below. All they said was we don't have to show the field
20 sobriety tests, we just have to show the conduct,
21 misapplying the Murphy decision. So from an appellate
22 standpoint, it would be arguably inappropriate at this
23 juncture for the City of Rock Hill to make that argument.
24 I think the law is clear that if you do not argue or
25 preserve a position below, you can't argue it for the first

1 time on appeal. Finally, the City argued subsection B
2 applies, that, "its failure to comply with mandatory
3 recording provisions was excusable because of the position
4 of the setting sun created a glare which obstructed Ms.
5 Stroupe's face during the horizontal gaze nystagmus test,
6 the vertical gaze nystagmus test and obstructed her right
7 hand during the finger dexterity test." The problem with
8 that argument, and I know this has been raised before, is,
9 in fact, the City did produce a video-tape as the Return of
10 the City Judge -- well, actually, as the pre-trial
11 transcript, the trial transcript, the City's own Reply to
12 the Motion to Dismiss, page 8, the Return of the City Judge
13 and the Order of the Municipal Court relating to the pre-
14 trial Motion to Dismiss all establish that the video was
15 produced. In fact, two or three videos were produced by
16 officers. The City is now, I guess, arguing that they
17 should be excused for not producing evidence which, in
18 fact, they did produce and introduced at trial. I have,
19 aside from the transcripts that I've provided for the
20 Court, I have also provided an appendix at the end of my
21 Brief, and I would ask, Your Honor, if you don't mind, just
22 turning to that briefly, because it references how
23 egregious this testimony became, and you'll find that after
24 the exhibit page -- it should be attached to the Brief, and
25 if you don't have it I'll be glad -- it should be attached,

1 but if not, I'll be glad to provide by copy which should
2 show the appendix.

3 THE COURT - I saw it earlier. Let's see -- here
4 it is.

5 MR. WELLBORN - So the officer testified -- and
6 this is in front of the jury, and I've referenced either TT
7 for trial transcript or PT for pre-trial transcript, but
8 there's a battery of three tests to use to determine
9 someone, "level of impairment". So that's what was
10 presented to the jury. Regarding the horizontal gaze
11 nystagmus test, when your eyes move side-to-side on a
12 person, and they're smooth, that's, "not under the
13 influence" was the officer's testimony. The officer then
14 testifies about the resting nystagmus and then agreed that
15 he couldn't -- you couldn't see that on the video, that her
16 face was a blur on the video, that he checked for resting
17 nystagmus, equal pupil size, her eyes tracked equally, her
18 eyes tracking -- but we can't see this on the video because
19 her face is a blur. He checked twice in each eye for
20 smooth pursuit, her eyes lacked smooth pursuit, but we
21 can't see it on the video, because her face is a complete
22 blur. He test for distinct and sustained nystagmus at
23 maximum deviation, referring to page 2 of the appendix, --
24 by the pause -- he says that, there's no way of knowing if
25 he -- if he actually did test to see if she was at maximum

1 deviation, other than, of course, his testimony, which
2 clearly is not what the statute envisioned. Mr. Barton
3 spoke earlier about a swearing contest. Well, that's what
4 we're left with in this case is a swearing contest.
5 Sustained nystagmus means visible for at least four
6 seconds. He was able to see sustained nystagmus in each
7 eye. This is not visible on the video, because her face is
8 a blur. There was no way that we in the courtroom can see
9 whether the nystagmus was sustained or not. He tested for
10 nystagmus prior to 45 degrees; he noticed such in her, but
11 could not recall at what point, and we can't determine
12 whether or not there was nystagmus at 45 degrees. That's
13 the first test, the vertical gaze nystagmus test. He says
14 that he did not see any vertical gaze nystagmus test
15 because of the video, we wouldn't be able to determine
16 there was vertical gaze or not in this case, not by
17 watching the video. Then the finger touch test. He talks
18 about how he asked her to do it in a very specific way; she
19 used her right hand to do the test, but on the video her
20 right hand is not clear; we can't see her right hand
21 clearly; we can't see whether her fingers touch her thumb
22 in sequence, which was the whole gravamen of the test that
23 he testified she did not do. But that is the sequence he
24 was testing for, and ultimately he acknowledged that for
25 three out of four tests we can't see whether she passed

1 them or not based on the video-tape. So that in sum is our
2 argument why this charge should have been dismissed. And
3 even though the Magistrate chose to not make a finding
4 regarding the horizontal gaze nystagmus test, not make the
5 finding regarding the vertical gaze nystagmus test, the
6 Magistrate did at least make a finding regarding the finger
7 dexterity test, which is one of the field sobriety tests
8 required. Once again, referring Gordon, -- and I would
9 also argue that the City's -- the City's argument below in
10 pre-trial was, okay, we've got these video-tape -- these
11 video-tapes and we have an affidavit; the affidavit is part
12 of the record; it's referenced in the Judge's Return and
13 the Court -- and the affidavit uses subsection B excuse for
14 the failure to produce the video-tapes, which of course,
15 they produced, and the affidavit says the quality of the
16 video submitted in this case is poor due to its being
17 recorded at sunset facing the sunset; this is the case for
18 all three videos from the scene of arrest.
19 Parenthetically, the affidavit was signed multiple months
20 after the video-tape was actually made. That said, the
21 Magistrate did make a finding or the Municipal Judge did
22 make a finding at least regarding the finger dexterity
23 test, and so I would argue that that in and of itself is
24 grounds to grant the appeal, that in and of itself. Of
25 course, the Magistrate made no finding regarding the other

1 tests which might mitigate -- I mean as an officer of the
2 Court I may have to say would mitigate towards remand for a
3 finding under the current law of Gordon, but the Magistrate
4 did make a finding regarding the finger dexterity test. He
5 just applied the wrong standard, and said, okay, yeah, I
6 agree we can't see what's going on with this, they're a
7 blur, we can't see what's going on with her fingers, but I
8 don't have to worry about that, because all I have to worry
9 about is conduct. Again, not -- I guess -- misapplying
10 Murphy v. State and the language of Murphy v. State. In
11 fact, Murphy itself references that the new statute
12 requires more. So for all those reasons, I would argue
13 that this charge -- that this conviction should be
14 reversed.

15 THE COURT - Mr. Barton?

16 MR. BARTON - Judge, I'm just going to have this
17 marked. This is also a Brief for the City in this matter.
18 I sent both Mr. Boyd and Mr. Wellborn by e-mail last night
19 a copy of this and gave them a hard copy today.

20 (DOCUMENT MARKED AS COURT'S EXHIBIT NUMBER 1.)

21 THE COURT - All right?

22 MR. BARTON - Your Honor, if it please the Court.
23 Is it all right if I go from here versus ---

24 THE COURT - You may. Sure.

1 MR. BARTON - Chris Barton on behalf of the City
2 of Rock Hill. Your Honor, just a couple of things I wanted
3 to address that was raised in Mr. Wellborn's Brief. One,
4 it talks about the Trial Court made a no factual finding
5 regarding whether -- which version of -- I guess 56-5-59 --
6 2953 was applied. To the extent that that is the case or
7 the Court were to find that I think remand would be the
8 appropriate remedy for him, he also talks about that the
9 City never argued that the field sobriety tests were
10 recorded and therefore, foreclosed in that argument on
11 appeal. Your Honor, I think included in the Return is the
12 City's Reply to the Defendant's Motion to Dismiss. Your
13 Honor, within that Reply is an extensive argument as to
14 both that the 56-5-2953 was either complied with or in the
15 alternative that an affidavit was submitted and a 56-5-
16 2953(B) analysis would be appropriate, so -- in this case
17 the City was faced with a situation where a individual
18 called law enforcement after seeing an individual drive
19 recklessly coming from the Galleria Mall area headed
20 towards Cherry Road on -- the Celriver Road, essentially
21 the back way to Cherry Road from the Galleria Mall.
22 Officers made contact with that individual. The video
23 clearly shows her actually running a red light at the
24 intersection of Celriver and Cherry heading towards the I-
25 77 onramp. She doesn't quite make it there before she's

1 stopped by the officers. Officer Cook, along with two
2 other officers -- all three did video in this case, and all
3 their videos suffered from the same set of circumstances
4 and that I made part of the record was the sunrise/sunset
5 calendar for the City of Rock Hill for that time period and
6 I don't think it's in dispute here, that the sun was
7 setting at that point in time such as the camera that's
8 mounted on all the patrol vehicles was facing that sunset
9 and it affected the ability of those cameras to record this
10 incident. I don't think, again, that's in dispute, because
11 all three cameras were affected in a like manner. And out
12 of the abundance of caution the City argued both below and
13 it's argued in our Brief here that we created the affidavit
14 after having viewed that video and realized that there were
15 issues with the videos, no doubt about that. Wasn't
16 perfect cinematic quality that you'd want from a Hollywood
17 sound stage, doesn't exist. Quite honestly, from the City,
18 we've never seen that exist from a camera that's mounted on
19 an officer's patrol vehicle, but that being said, the issue
20 really is going to, again, looking at the time this case
21 was decided, the only case out there that interpreted and
22 defined what conduct was and what was mandated under the
23 recording statute was the Murphy case. Sawyer wasn't
24 decided until June of this year, and so Judge Lenzi at that
25 time applied the only case law that he had from the Court

1 of Appeals that talked about what is required to be
2 recorded. Secondly, I think if you look at the transcript
3 and look at the totality, both Mr. Wellborn and the City
4 argue that you either have one of two choices in this
5 matter. Either we have produced a recording, which
6 complies with the subsection (A) of 56-5-2953 that
7 accurately records the conduct of the accused, including
8 the inscription field sobriety tests or based upon the
9 quality of the video, because of the environmental affects
10 faced by the officers at that point in time the video was
11 of poor quality, and we have potentially a subsection (B)
12 analysis. In this case, the Court never got to the
13 subsection (B) analysis, because the Court made a finding
14 that 56-5-2953(A) had been met based upon the recording as
15 viewed by the Court. So ---

16 THE COURT - But as I understand it, only made
17 that finding as to one of the four tests.

18 MR. BARTON - Well, and I think that's the --
19 that's the -- that's the contention of Mr. Wellborn. I
20 think if you look at the transcript as a whole, it's pretty
21 clear that the Court makes the finding that the video
22 complies with the recording statute of 56-5-2953 and I
23 think it's clear that, again, from both the City's
24 argument, as well as Mr. Wellborn's argument, the Court was
25 ruling on that -- that whether that video complied with the

1 statute as it was currently drafted -- because even the
2 City acknowledged in its initial argument to the Court that
3 subsequent to Murphy -- actually prior to Murphy the
4 statute had been amended in I think June of 2009 to mandate
5 that it did not include field sobriety tests as part of the
6 conduct that has to be recorded. Your Honor, the -- again,
7 the issue in this case is whether the recording itself
8 complies with Murphy, and then as Murphy's further
9 explained in the Gordon case, and again, I think, looking
10 at the standard to be applied if it's an abuse of
11 discretion standards and error of law standard unless there
12 is no evidence that supports that finding, then if there's
13 some evidence that supports that finding then the appeal is
14 not appropriate. Secondly, assuming the Court were to find
15 that the recording that was produced essentially doesn't
16 qualify under 56-5-2953(A), then I think the Court is
17 mandated to do a 56-5-2953(B) analysis. The reason I say
18 that it's mandated is because of the case of State v.
19 Elwell and State v. Manning talks about the fact that if
20 the arresting officer submits an affidavit that it was
21 impossible to produce the video recording and it talks
22 about the reasons why, then the Court at that point in time
23 must look at whether a subsection (B) analysis applies.
24 I'd also note that in -- it's cited too in our Brief --
25 that the subsection (B) analysis is mandated even in the

1 absence of an affidavit, that the Court of Appeals has
2 talked about that -- and again, it's cited too in our Brief
3 -- that you have to look at -- if subsection (A) doesn't
4 apply, is there a subsection (B) exception -- if there's
5 subsection (A) hasn't been applied, the video recording
6 fails for whatsoever reason. And the question -- next
7 question is, from the analysis standpoint, is there a
8 subsection (B) exception. If there is, then the case would
9 still go forward. If there isn't ---

10 THE COURT - What case says -- what case says
11 that? I know every time we have these, we -- I get the
12 totality of circumstances argument and I just haven't ---

13 MR. BARTON - Judge, it's State v. ---

14 THE COURT - --- I haven't been able to connect
15 those two up.

16 MR. BARTON - State v. Elwell and ---

17 THE COURT - Do you cite that in your Brief?

18 MR. BARTON - Yes, sir, it's cited too in the
19 Brief; it's 721 Southeast 2d. 451 from the Court of Appeals
20 from 2011, as well as the Manning decision, which is the
21 State v. Manning, Court of Appeals decision from 734
22 Southeast 2d. 314. Your Honor, in Manning, the South
23 Carolina Court of Appeals affirmed the felony DUI
24 conviction in that case for the officer who investigated
25 the case and arrested the defendant failed to record any of

1 the video of the defendant at the incident site and failed
2 to even provide an affidavit certifying that it was somehow
3 impossible to provide the video recording. It says the
4 Manning, the Court held that even in the absence of a video
5 affidavit being submitted in compliance with South Carolina
6 Code of Laws, section 56-5-2953(B), that section 56-5-2933
7 allows a Circuit Court to look at the totality of the
8 circumstances to make a determination of whether charges
9 should be dismissed, and the Court of Appeals in Manning
10 held that Circuit Court properly refused to dismiss the DUI
11 charges under subsection (B) despite the fact that no video
12 affidavit was submitted, and then again in Elwell, it talks
13 about this totality of the circumstances analysis that's
14 supposed to be inducted if the Court finds that 56-5-
15 2953(A) has not been complied with. Judge, I think it's
16 important to note in this case that after a two-day trial
17 and extensive litigation by Mr. Wellborn, that when it was
18 all said and done, the jury took about five minutes to
19 convict his client. I think there was overwhelming
20 evidence in this case that his client was under the
21 influence. There's also -- looking at the totality of the
22 circumstances, assuming the Court were to find we've not
23 complied with subsection (A), I think that subsection (B)
24 and the affidavit that was submitted by the officer meets

1 that burden to provide the Court dismissal is not the
2 appropriate sanction, and the case moving forward to trial.

3 THE COURT - Do you have any cases that indicate
4 that the jury verdict likes claim any erroneous ruling by a
5 Judge prior to the verdict?

6 MR. BARTON - No, clearly not, Your Honor.

7 THE COURT - Thank you.

8 MR. WELLBORN - Just briefly in response, if I
9 may. Mr. Barton indicated that his Brief below in seeking
10 or in response to the pre-trial motions reference the City
11 arguing that they had complied with 56-5-2953 in recording
12 the field sobriety tests. Page 3 of the City's Brief below
13 is the City's argument. The City's argument was as follows:
14 Officer Langley and Officer Cook -- the video from Officer
15 Lewis, Langley and Cook provides a comprehensive recording
16 of interactions between the City of Rock Hill police
17 officers and the defendant at the incident site, and then
18 later references, the plain language of the statute does
19 not require -- is the City's argument -- record a capture
20 of continual full view of the accused or capture all field
21 sobriety tests. That was their argument below. They never
22 argued below that these field sobriety tests were captured
23 within meaning of the statute. What they argued was, we
24 don't have to. And that's within -- and you've got a copy
25 of it. That was the City's argument below; that was in the

1 Brief or the Reply to the Defendant's Motion to Dismiss,
2 page 3, which was filed and signed by Mr. Barton on the 21st
3 of October, 2013 in response to our pre-trial Motion to
4 Dismiss. The -- and I'll be glad to show Mr. Barton a copy
5 of that, but that's what's in it. Furthermore, the Judge
6 in his Order, which was addressing the pre-trial motions,
7 found, "that this case presents a different factual
8 scenario. We can hear the defendant clearly but cannot see
9 her clearly attempting to perform the finger dexterity
10 testing." He did make that one finding, and that is a
11 field sobriety test which was given to my client; the Court
12 made a factual finding below, we can't see it. So that
13 coupled with the testimony that came from the officer, both
14 trial and pre-trial, I think -- and that's why I have that
15 appendix, and that's why I submitted the transcripts,
16 because it's clear, it was not on the video-tape and
17 fortunately, the Judge did, at least, make one factual
18 finding regarding one out of four field sobriety tests, but
19 what the Court said was, that didn't matter, because the
20 Court said, subsequent to the Court of Appeals decision in
21 Murphy, South Carolina legislature changed the statute and
22 given the Murphy Court's definition of conduct, the
23 legislature could've provided a different definition if
24 they chose to, but they did not. What the Court again
25 failed to recognize was, first of all, the legislature

1 never changed the statute after Murphy; it was before
2 Murphy, which is why Murphy referenced the change in the
3 statute in footnote 4 and that they did, in fact, change
4 the definition or at least expand the definition of conduct
5 because they now require the recording for the first time
6 of field sobriety tests. So these issues that Mr. Barton
7 says were addressed by the Court below, the only thing that
8 was addressed by the Court below is the factual matter of,
9 we couldn't see her fingers on the finger dexterity test.
10 Nothing else was addressed, because it was the Court's
11 position and Mr. Barton's position by way of oral argument,
12 and more importantly, by way of his Motion in Opposition,
13 which you a copy of, that the Court wasn't required or the
14 City wasn't required to record the field sobriety tests.
15 They were simply required to record the conduct, whatever
16 that meant. So, again, I would simply point that out,
17 because that was raised during Mr. Barton's representation
18 and reply, and procedurally the record suggests something
19 else.

20 THE COURT - All right, Mr. Barton, did you make
21 the section (B) totality of circumstances argument to the
22 Judge below?

23 MR. BARTON - I did, Your Honor. That's included
24 in the City's Reply and that's included as part of the
25 Return.

1 THE COURT - Did the Judge make a ruling on it?

2 MR. BARTON - The Judge did not make a ruling on
3 that, because essentially what the Judge found was that ---

4 THE COURT - He didn't reach it, didn't need to.

5 MR. BARTON - He --- the Judge didn't need to reach
6 it, because he felt that the video was appropriately
7 recorded under subsection (A), so we didn't need to get to
8 the subsection (B) analysis. Your Honor, just a brief
9 reply, and again, you have it as part of the record, the
10 very first argument that the City makes is, (A) The City of
11 Rock Hill video recorded the entire roadside encounter with
12 the defendant and complied with 56 -- South Carolina Code
13 of Laws, section 56-5-2953. We go on to cite State v.
14 Murphy; we go on to include a paragraph that subsequent to
15 the Court of Appeals decision which should've been prior to
16 the Court of Appeals decision, that South Carolina
17 legislature amended the South Carolina Code of Laws to
18 include subsection (A) requiring the video recording of
19 field sobriety tests administered. However, it's important
20 to note that the subsection simply lists the required
21 conduct to be recorded and doesn't alter the definition of
22 conduct by Murphy. Murphy's definition of conduct still
23 hasn't been altered by the legislature. That definition of
24 conduct is still there. It's still good law at this point
25 in time. Sawyer may disband upon that in that the Sawyer -

1 - I'm sorry the Gordon decision was decided after the
2 legislature had made that amendment, but the Court of
3 Appeal's decision in State vs. Murphy has not been
4 overturned. It's still good law. In Murphy, the
5 definition of conduct still controls at this point.

6 THE COURT - All right, I'm going to take this
7 under advisement.

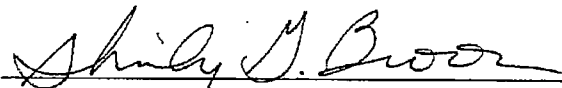
8 (END OF TRANSCRIPT)

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C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 27 pages is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the proceedings of City of Rock Hill vs. Brenda Stroupe, taken by me in the Court of Common Pleas for the Sixteenth Judicial Circuit on the 3rd day September, 2014, and provided by me this the 25th day of Nov., 2014.

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



Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

CITY OF ROCK HILL

Plaintiff,

vs.

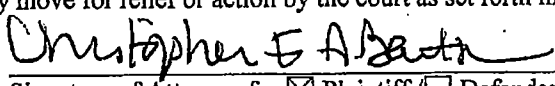
BRENDA STROUPE

Defendant.

IN THE COURT OF COMMON PLEAS
16th JUDICIAL CIRCUIT

CASE NO.: 2014-CP-46-00239

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Christopher E. A. Barton, Bar No. _____ Address: 201 E Main St., 3rd Floor, Rock Hill, SC 29730 Phone: (803) 329-5692 Fax (803) 326-3865 E-mail: _____ Other: _____		Defendant's Attorney: Christopher A. Wellborn, Bar No. _____ Address: PO Box 10191, Rock Hill, SC 29731 Phone: (803) 366-1065 Fax (803) 980-0952 E-mail: _____ Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Alter/Amend Judgment Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES/ ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		10/1/2014 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: \$ _____ ☒ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☒ Other: Criminal Appeal			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

 FILED - RECEIVED
 2014 OCT 2 AM 11:20
 DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF YORK

The City of Rock Hill

Plaintiff/ Respondent

v.

Brenda Stroupe,

Defendant/ Appellant

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2014-CP-46-04988

MOTION TO ALTER
OR AMEND JUDGMENT

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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter involves the Defendant's appeal from her conviction for Driving Under the Influence in the City of Rock Hill Municipal Court on January 24, 2014 and this Court's subsequent order reversing the conviction. The City is requesting that this Court issue a more definitive ruling specifically addressing the issues outlined below pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The hearing before this Court was held on September 3, 2014 and the order from this Court was signed on September 15, 2014, sent via U.S. Mail on September 19, 2014, and subsequently received by the City of Rock Hill Solicitor's Office on September 22, 2014.

I. The City Argued Two Exceptions (1) Exigent Circumstances and (2) a Totality of the Circumstances Based on S.C. Code of Laws Section 56-5-2953 (B)

The City argued both to the trial court and to this Court on appeal that production of the video that complies with the requirements of South Carolina Code of Laws Section 56-52953(A) was excused by the exigent circumstances created by the lighting which affected all three Rock Hill Police patrol vehicles involved at the roadside with the

Defendant per the South Carolina Code of Laws section 56-5-2953 (B). The City also argued to both the trial court and to this Court that a totality of the circumstances analysis supported a finding of a valid reason for the failure to produce a video that complied with the requirements of South Carolina Code of Laws Section 56-5-2953(A).

The order of the Court in this case finds that "the video recording was produced and therefore Section 56-5-1953(B) it is not implicated". (See, page 7, Order Granting Relief).

The City believes this is error. Section 56-5-2953(A) of the South Carolina Code of Laws requires production of a video recording that meets certain statutory requirements outlined in that section, the failure to produce such a recording will result in dismissal of the charge as provided by Section 56-5-2953(B) of the South Carolina Code of Laws. You cannot have a dismissal of the charge for violation of Section 56-5-2953(A) without reliance on Section 56-5-2953(B).

The City believes the proper analytical model for a court to utilize is as follows:

- (1) If a video has been produced that meets the requirements of Section 56-5-2953(A), then dismissal is clearly not available as an option.
- (2) If no video is produced or you have a video that is produced that fails to meet the requirements of Section 56-5-2953(A) then the Court must determine whether that failure of production (whether the production failure be a problem with the audio, video or combination of either) is excused by one of the exceptions contained in Section 56-5-2953(B). If an exception applies then dismissal is not appropriate.

(3) If either no video is produced or the video produced fails to meet the requirements of Section 56-5-2953(A) and the failure of production is not excused by an exception contained in Section 56-5-2953(B), then and only then is dismissal appropriate.

Section 56-5-2953(B) clearly applies when the City produced a video that this Court found did not comply with the requirements of subsection (A) of 56-5-2953. The South Carolina Supreme Court in State v. Sawyer, Op. No. 27393 (S.C. Sup. Ct. refiled August 27, 2014) noted in a footnote that: "The only arguable error of law was the circuit court's failure to dismiss the charges once it determined that the State did not produce a videotape meeting the requirements of (A) and that it did not meet any of the exception in (B)." Id. Sawyer provides that before dismissal is appropriate a court must look to see if an exception provided in subsection (B) applies.

II. The Order of this Court Fails to Address the Argument that Dismissal of the Evidence is Limited to Constitutional Violations and Not to Statutory Violations. Neither Constitutional nor Statutory Violations are Present in this Case.

The City argued to both the trial court and to this Court that neither a Constitutional or statutory violation is present in this case and therefore neither dismissal nor even suppression of the evidence is appropriate. Any issue regarding the clarity of the video recording goes to the weight to be assigned to the video recording evidence, not its admissibility. The Order of this Court fails to address this argument.

III. The Trial Court Never Made a Specific Factual Finding in the Record and Remand of the Case is Appropriate

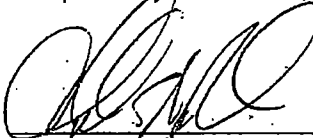
Judge Lenzi's Order does not make a specific finding of fact that the video produced fails to comply with South Carolina Code of Laws Section 56-52953(A). This Court on appeal is not permitted to examine the emanations and penumbra's of the trial courts return to an appeal in order to make or supply an explicit finding of fact where none occurred. Neither Judge Lenzi's return to the appeal nor his order denying the Defendant's motion to suppress reflect any finding of fact by the trial court regarding the Defendant's claimed defects in the video recording. Remand this matter for finding of fact by the trial court is the appropriate remedy, rather than this Court filling in the blanks and making its own findings of fact.

The City requests this Court to cite to appropriate findings of fact made by the trial court that the Defendant's conduct was not recorded as required.

Conclusion

The City of Rock Hill requests that the conviction of the Defendant be affirmed or in the alternative, that the matter be remanded back to the trial court for additional findings of fact.

Respectfully submitted,

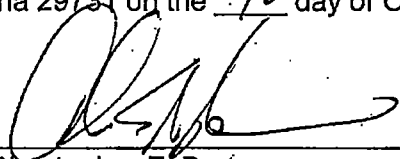


Christopher E. Barton
Senior City Solicitor
City of Rock Hill Solicitor's Office

This 15th day of October, 2014.
Rock Hill, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the City of Rock Hill's Motion to Alter or Amend Judgment was served on the Defendant/Appellant by placing a copy in the regular U.S. Mail to Christopher A. Wellborn, Attorney for Defendant/Appellant Post Office Box 10191, Rock Hill, South Carolina 29731 on the 12 day of October, 2014.



Christopher E. Barton
Senior City Solicitor
201 E. Main Street, Suite 300
Rock Hill, South Carolina 29730
(803) 329-5619
Attorney for Plaintiff/Respondent

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2014 OCT 12 AM 11:22
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS
Rock Hill City Of

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP4600239

Brenda Stroupe	
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:
ORDER INFORMATION.

ORDER

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/John C. Hayes, III
Circuit Court Judge

2049
Judge Code

10/7/2014
Date

For Clerk of Court Office Use Only

This judgment was entered on October 8, 2014, and a copy mailed first class or placed in the appropriate attorney's box on October 8, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Christopher Edward Barton 201 East Main Street 3Rd Floor
Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

Christopher A. Wellborn 142 Oakland Avenue Rock Hill,
SC 29730

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
City of Rock Hill,)
)
Plaintiff/Respondent,)
)
v.)
)
Brenda M. Stroupe,)
)
Defendant/Appellant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-46-00239

ORDER

FILED-RECEIVED
2014 OCT -8 PM 4:19
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

The City of Rock Hill (the City) requests relief relative to this Court's Order of September 11, 2014, pursuant to Rule 59(e) SCRCP.

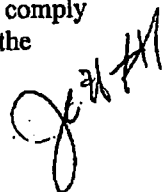
The City timely filed a Motion to Alter or Amend and raised three exceptions therein. This Court will address the exceptions *seriatim*.

First, the City asks the Court to rule specifically why an exigent circumstances and a totality of the circumstances analysis pursuant to Section 56-5-2953(B) is not appropriate in this case.¹ The argument of the City, and by all prosecutors, seems to be that regardless of the failure of the arresting officer to comply with Section 56-5-2953(A) in a driving under the influence case, the prosecutor may proceed on a defective tape² if the Court finds the totality of the circumstances warrant.

The undersigned may be misreading Section 56-5-2953(B). Section 56-5-2953(B) sets forth a set of four exceptions when "production" of the video tape is excused (not grounds for

¹ For reasons more fully set forth at footnote 4, the issue is not preserved for Circuit Court consideration. However, since this is an issue in perpetuity the Court will gratuitously address the issue.

² The word defective seems to be as good as any to signify an existing tape which fails to comply with Section 56-5-2953(A). In Sawyer, *infra*, the Supreme Court speaks of a "defect" in the videotape there at issue and refers to the tape as a "flawed tape."



dismissal). Black's Law Dictionary defines the word "produce," in the definition applicable here as "to bring into existence, to create." (7th Ed., 1969, p. 1225). The American Heritage College dictionary defined the word "produce," for purposes I believe applicable to the statute, as "to create by physical . . . effort, to manufacture; to cause to occur or exist." (4th Ed., 2002, p. 1111).

The above definitions have lead the undersigned to apply the word "produce" as used in Section 56-5-2953(B) as meaning the creation of video tape. Further, the undersigned finds that the 56-5-2953(B) exception does not apply when the arresting officer or breathalyzer officer produces a tape, but the tape fails to comply with Section 56-5-2953(A) (i.e the tape is defective/flawed). If the undersigned's interpretation is incorrect then Section 56-5-2953(A) is neutered.

Pursuant to the language of the statute, the undersigned finds that Section 56-5-2953(B) applies only when a videotape is not produced (i.e., made, created) and does not apply in cases where a video tape is produced and the tape fails to comply with Section 56-5-2953(A) and is therefore defective/flawed.

The City contends that State v. Sawyer³, 2014 WL 42144291 (S. Ct. 2014) "provide that before dismissal is appropriate a court must look to see if an exception provided subsection (B) applies." Sawyer affirmatively does not address the "totality of circumstances" provision of §56-5-2953. This issue was not before the Court. The issue before the court, as stated under the heading "Issue" is, a Section 56-5-2953(A) issue and the majority opinion's last paragraph makes it clear the Court is declining consideration of any 56-5-2953(B) "totality of the circumstances exception."

³ It is interesting to note that in Sawyer the State argued that a videotape was "produced" and that "only video of the individual is necessary to satisfy this statute."

The City presented an affidavit before the lower court in an effort to rely on the exigent circumstances provisions of 5-56-2953(B). However, the lower court did not rule on Section 56-5-2953(B) exception and therefore this issue is not preserved.⁴

Second, the City contends that neither Constitutional or statutory violations are present in this case. However, this Court found that the videotape that was produced did not comply with §56-5-2953(A). Therefore, this case does present a statutory violation. Accordingly, as stated in *City of Rock Hill v. Suchenski* 374 S.C. 12, 646 S.E. 2d 879 (2007), the only remedy for a Section 56-5-2953 violation is dismissal.⁵

Third, the City alleges that the trial court never made a specific factual finding in the record; and thus, the case should be remanded. However, Judge Lenzi's Order did find that "we can hear the Defendant clearly but cannot see her clearly attempting to perform the Finger Dexterity Test." This finding of fact by the trial judge is a finding of lack of compliance with Section 56-5-2953(A). This is a finding that the videotape was defective/flawed. The trial judge found that despite the lack of compliance Ms. Stroupe's "conduct" during the administration of the three sobriety test was "captured" by one or more video cameras at the scene.

⁴ If the City wished a ruling from the Lower Court on a Section 56-5-2953(B) exception, it could have moved the lower court for reconsideration but it did not.

⁵ Candidly, the Court has been unable to digest this argument although the City raises it regularly.

Wherefore, the City of Rock Hill's Motion to Alter or Amend the Court's September 11, 2014 Order is denied. As observed in Sawyer, supra, the Supreme Court has held that absent a Section 56-5-2953(B) exception strict compliance with Section 56-5-2953(A) is required. [See also City of Rock Hill v. Suchenski, 646 S.E. 2d 879 (Sup. Ct. 2007)]

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

October 9th
September, 2014
York, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF YORK

ROCK HILL MUNICIPAL COURT

CITY OF ROCK HILL,
PLAINTIFF,
-VS-
BRENDA STROUPE,
DEFENDANT.

TRANSCRIPT OF PROCEEDINGS

ROCK HILL, SOUTH CAROLINA

SEPTEMBER 26, 2013

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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Appearances:

For the Plaintiff -

Chris Barton, Esquire
Solicitor
City of Rock Hill

For the Defendant -

Christopher Wellborn, Esquire
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P R O C E E D I N G S

BEFORE: THE HONORABLE PETER LENZI

9:11 A.M.

* * * * *

The Court - Brenda Stroupe? Is Ms. Stroupe here. It was continued last time for her to be here.

Mr. Wellborn - For purposes of motions, I can go forward without her. I can check outside and see if she's here. I didn't see her when I first walked in.

The Court - Sure.

(Brief Recess)

The Court - Are Suchenski Henkel issues related in this case to the FTS as well?

Mr. Wellborn - Yes.

The Court - What I'd like is a brief -- Your motion, Mr. Wellborn, I'd like a brief outline of what you think entitles you to the relief you're seeking?

Mr. Wellborn - Should we perhaps wait on Mr. Barton?

The Court - I'm sorry. There he comes. Mr. Barton, I asked Mr. Wellborn to provide the court with some specifics as to the nature of

Stroupe Motions Hearing

1 the deficiencies that he alleges relative to the
2 videotaping of the field sobriety test. When
3 he's concluded, I'd like you to respond to his
4 representations. Mr. Wellborn?

5 Mr. Wellborn - I'm assuming you want to
6 look at the actual video. In Ms. Stroupe's case,
7 there were, from what I can glean, three sobriety
8 tests given to my client.

9 The videotape was working so there is a
10 recording. I bring that up because there was an
11 affidavit that was signed on July 29th of this
12 year indicating why it was that the city failed to
13 produce a videotape. In fact, the videotape
14 was produced.

15 I will bring this to the court's attention.
16 This is my only copy which you will note that under
17 the affidavit, it says Affidavit For Failure to
18 Produce Videotape. Under Section D which is
19 checked, it says other reason for failing to
20 produce a videotape. The videotape was produced
21 but, as you will see, and I think the City kind of
22 outlined it in the -- or somebody outlined, I
23 assume the officer, in this affidavit. You can't
24 really see what's going on in the videotape. You
25 can hear some sounds.

1 Three field sobriety tests were given to my
2 client. The first one was the horizontal gaze
3 nystagmus test. The second one was a finger
4 touch test, and the third one was a modified
5 alphabet test.

6 You can hear what my client is saying to
7 some extent on the alphabet test, but you can't
8 see what's going on on the horizontal gaze
9 nystagmus test nor on the finger touch test.
10 That's the issue in particular. Of course, there
11 is a video, and you will be able to look at the
12 video yourself and see whether it's visible or not.
13 Obviously, the video, I assume if it becomes an
14 issue will be made part of the record.

15 The Court - Yes, sir.

16 Mr. Wellborn - The first issue that I would
17 address is, of course, the affidavit effectively
18 doesn't add anything because the affidavit would
19 be for failure to produce a videotape which, in
20 fact, was produced.

21 The fact that the quality of the videotape is
22 poor doesn't excuse the failure to record. In
23 fact, that's the issue in every one of these cases
24 because the quality is poor either because they
25 didn't record what they were suppose to record at

1 all because of the camera angle, or because it was
2 blurry or because an officer was standing in the
3 way. For whatever reason, the quality was poor.
4 That doesn't excuse the failure to record under the
5 statute. That's basically what this case is about
6 factually as we enter the motions.

7 The Court - Okay. Mr. Barton?

8 Mr. Barton - If it please the Court, with
9 respect to the issue, Mr. Wellborn talks about
10 this failure to record. I'm looking at Section
11 56-5-2953 which talks about incident site and
12 breath test video recording. I don't see anything
13 in here that talks about a failure to record. It
14 talks about a failure to produce a video. There's
15 no mention about failure to record in there. So,
16 I'm not sure that that's a basis for ---

17 Mr. Wellborn - Well, ---

18 The Court - Wait. One at a time please. All
19 I want you to do -- I don't want your argument. I
20 want the factual position. I think I'm gleaning
21 it from what you're telling me.

22 Mr. Barton - I will hand this to the Court.
23 I shared this with Mr. Wellborn earlier. This
24 is a copy of the sunrise and sunset calendar for
25 South Carolina. You can look specifically for

1 Rock Hill. This incident occurred on August
2 13th. I think the Court can simply take judicial
3 notice of when the sun rises and the sun sets
4 pursuant to ---

5 The Court - what's relevant about that?

6 Mr. Barton - I think it's relevant because in
7 this case, Your Honor, what you're going to find
8 is the officers came in contact with Ms. Stroupe
9 in the early evening hours such that from an
10 illumination standpoint it was fairly well
11 illuminated. From the standpoint of the cameras
12 sensing the degree of illumination and the way
13 the sun was in the cameras, the camera records
14 the entire proceeding. The recording itself is
15 dim. It's the officer's camera, but it was the
16 other officers who responded to the scene also,
17 it had the same effect on all their camera
18 systems.

19 The Court - well, of course. If you shoot
20 a video into a certain type of back lit
21 illumination source, I guess there's a possibility
22 that you aren't getting good quality video. I
23 guess I'm going to have to look at the video and
24 see.

25 Mr. Barton - If we can just stipulate that

1 these are the videos in connection with the case.

2 Mr. Wellborn - Well, I -

3 Mr. Barton - They're the same ones I gave
4 you copies of. You can look at them again if
5 you want. If you want me to, I can put the
6 officer ---

7 The Court - It's quicker.

8 Mr. Wellborn - Yes. If we just play the
9 portion so the judge can see ---

10 The Court - Until it's identified.

11 Mr. Wellborn - As far as I know, I have a
12 copy of what Mr. Barton has. I've not seen what
13 he's about to put in. I've seen my own copies,
14 and my own copies are in line with the affidavit.
15 The video quality is poor, and you can't see
16 two out of the three sobriety tests.

17 The Court - I've got to make that call.

18 Mr. Barton, have him identify it.

19 Mr. Barton - Officer, can you just identify
20 that please, sir?

21 Officer Cook - Yes, sir. That's the videotape
22 I made from the August -- I'm sorry, April 13th
23 from Ms. Stroupe's arrest.

24 Mr. Barton - At some point in time, it was
25 requested that you burn a copy of that off the

1 server, and that is what is represented here on
2 this DVD?

3 Officer Cook - That's correct.

4 Mr. Wellborn - Judge, just for sake of
5 procedure, if the officer is going to testify,
6 we may want to have him sworn.

7 The Court - Absolutely.

8 Mr. Barton - If I was in the military and
9 I was trial counsel, I used to be the prosecutor
10 to swear the witness. I don't think that I'm that
11 individual ---

12 The Court - You're not. Officer, raise
13 you right hand.

14 Whereupon - Officer Cook first being duly
15 sworn, testified as follows:

16 Examination: (By Mr. Barton)

17 Q officer Cook, you were the arresting officer in
18 the City -vs- Brenda Stroupe case; is that
19 correct?

20 A Yes, sir.

21 Q I'm going to show you what's been marked as
22 city's -- Well, not marked but ---

23 The Court - It's going to marked as 1.

24 Q City's 1 in this case. It's got a label 1, with
25 a circle around it, on that document, on the DVD

1 right there. Do you recognize that?

2 A Yes, sir, that's my video from the time of the
3 arrest.

4 Q Can you tell the court how that was created?

5 A It goes to a hard drive on my car, from my camera,
6 onto a hard drive, which is located inside of
7 my car, which wirelessly uploads to the city
8 server once I get to the law center. At that
9 point, it's held on a big server for a particular
10 period of time. I'm able to make DVDs from that
11 server.

12 Q And this represents essentially a duplicate copy
13 of what was recorded out there that evening?

14 A That's right.

15 The Court - Any objection to this being
16 introduced, Mr. Wellborn?

17 Mr. Wellborn - No objection.

18 The Court - Without objection, that will
19 be City's Number 1. Can I put this on there at
20 some place where it's not going to interfere?
21 I can't put it across the middle.

22 Whereupon - DVD marked as City's Exhibit 1.

23 Mr. Wellborn - Perhaps we can put in one of
24 those sleeves with Exhibit 1.

25 The Court - That would be a good idea. I'll

1 find a sleeve.

2 (Videotape is played)

3 (The witness - Resuming)

4 A We received a call from dispatch, a citizen called
5 in a reckless driver. Stated -- I'm not sure
6 exactly what he informed dispatch. It led us to
7 believe that she was possibly impaired.

8 Officer Langley and Officer Lewis ended up
9 initiating a traffic stop. At this point where
10 they stopped her, we were near the intersection
11 of Celanese and that's I-77 going over Celanese.

12 They arrived there prior to me and felt she
13 was possibly impaired. I'm on the traffic unit.
14 They called me to further investigate.

15 Mr. Barton - One of these is Officer
16 Langley's and the other one is ---

17 Officer Cook - Officer Lewis.

18 Mr. Barton - Officer Lewis' vehicle.

19 Officer Cook - That's correct. Officer
20 Langley's is the closest to us. Officer Lewis'
21 is ---

22 (Videotape continues)

23 The Court - For purposes of the motion, he
24 would stipulate that Ms. Stroupe was read her
25 Miranda rights.

1 (Videotape stopped)

2 Mr. Wellborn - Judge, I don't know if the
3 City wanted to play any other video tapes for
4 purposes of the motion or not.

5 Mr. Barton - Judge, I would like to do that
6 simply just to show, again, that the other
7 officers' cameras were affected similarly as to
8 officer Cook's cameras. Even though they don't
9 show the field sobriety tests, they simply do
10 show how the were affected in essentially the
11 same exact manner or we can just simply agree that
12 they were affected ---

13 Mr. Wellborn - We'll stipulate that the other
14 cameras were pointing west and the sun was setting.

15 Mr. Barton - And the effect was similar in
16 terms of the illumination level from the camera.

17 Mr. Wellborn - Arguably, it wouldn't be
18 relevant anyway since those cameras don't capture
19 any of the field sobriety tests. So, I would
20 suggest that what their cameras show or don't
21 show wouldn't be relevant for the purposes of
22 this motion. I'll certainly stipulate that the
23 other officers' cameras were pointed west. They
24 would have the same potential lighting effect,
25 and that the sun was setting at the time.

1 I would like the opportunity to cross examine
2 the officer.

3 The Court - Okay. In just a second.

4 Mr. Barton - Judge, I still have some more
5 things. I'm waiting for the Court. You tell me
6 when you're ready.

7 The Court - I will. Mr. Barton?

8 (Mr. Barton - Resuming)

9 Mr. Barton - I'd like to have this marked
10 as Number 2.

11 The Court - Is this being admitted into
12 evidence without objection?

13 Mr. Wellborn - Without objection.

14 Whereupon - Document marked City's Exhibit
15 2.

16 Q (Mr. Barton) Officer Cook, I'm going to show you
17 what's been marked as City's Exhibit 2. It's
18 in evidence at this point in time. It's
19 Affidavit For Failure To Produce Videotape.
20 Did you, in fact, make that affidavit?

21 A Yes, sir.

22 Q And that was done at my request; is that correct?

23 A That's correct.

24 Q That was after we spoke about the issues about
25 regards to not only the video as it was recorded

1 by your camera, but the video as it was recorded
2 by Officer Langley and -- I keep the forgetting
3 the other officer's name. Office Lewis, I believe,
4 right?

5 A Yes, sir, that's right.

6 Q And all three of your videos were similarly
7 affected those evening hours at the time you came
8 in contact with Ms. Stroupe?

9 A That's correct.

10 Q Were you aware of the fact that the video was being
11 affected in that way by the lighting conditions?

12 A No, not until afterwards.

13 Q Had you been aware of it, I guess, what potential
14 steps could you have taken to remediate that?

15 A The cars could have been adjusted if I was aware.

16 Q With regards to your experience, how long have
17 you been with the Rock Hill Police Department?

18 A I've been with the Rock Hill Police Department
19 for over three years now. I have a total of
20 almost nine years in law enforcement.

21 Q During those nine yeas of law enforcement, how
22 often did you have some form of video recording
23 equipment within your vehicle, whether it was
24 with Rock Hill PD or in your earlier law
25 enforcement career?

- 1 A I've never had video in my vehicle until I came
2 to Rock Hill PD. Rock Hill Police Department is
3 the first agency I've worked for that has had
4 video.
- 5 Q With regard to your time with Rock Hill PD, the
6 majority of that three years you've had video?
- 7 A Yes, sir, that's right, the entire time.
- 8 Q Have you ever had a video situation such as this
9 before within that three year time period whether
10 it was sunrise or sunset but for some reason the
11 illumination -- the sunrise or sunset was affecting
12 the illumination of your camera?
- 13 A I believe I probably have.
- 14 Q Has it been brought to your attention? In
15 other words, is this the first time you've had
16 a situation where you've had to produce a
17 recording and realized, wow, that really ---
- 18 A That's right.
- 19 Q Prior to that, you've not had an issue that
20 you were at least aware of either sunrise or
21 sunset ---
- 22 A No, sir.
- 23 Q -- somehow affecting the camera's ability to
24 record appropriately?
- 25 A I've never had an issue prior to this.

1 Q With respect to Ms. Stroupe, again, there was a
2 911 call that came out. Mr. Rainey is here. He
3 can testify to that in just a little bit. You
4 responded to the scene. What kind of shape was
5 Ms. Stroupe out there at the roadside?

6 A She was -- It was my determination she was
7 definitely impaired, too impaired to be operating
8 a motor vehicle.

9 Q What type of signs or symptoms was she displaying
10 to you that led you to that determination?

11 The Court - what's the relevancy of any this
12 to the motion to dismiss?

13 Mr. Barton - To the motion to dismiss, it
14 talks about the Court -- This is a copy of
15 29-5-2953 which is the relevant statute.

16 The Court - The only thing is I understand
17 is that Mr. Wellborn is challenging or
18 contesting is that that video, as it's been
19 produced, does not satisfy the statutory
20 requirements imposed upon the city to produce
21 a video.

22 Mr. Wellborn - Specifically, Subsection
23 A-2 which would be the field sobriety
24 tests administered. That's the only issue
25 that I'm challenging.

1 Mr. Barton - Judge, again, looking at
2 29-5-2953, when that is challenged, there
3 are essentially two options for the court to
4 find.

5 One, either the video is satisfactory
6 and; therefore, the motion is not appropriate
7 or the court can find that the video is
8 unsatisfactory, but then we can rely on,
9 through the affidavit, the totality of the
10 circumstances, language that says -- Again, in
11 Section B, at the bottom, it says, the failure
12 of the arresting officer to produce the video,
13 is not alone a ground for dismissal of any
14 charge, if the officer submits a sworn
15 affidavit certifying, in this case, that
16 exigent circumstances existed. B, it was the
17 sunrise and sunset that was affecting his
18 camera. He was not aware of it. It affected
19 all the other officers' cameras in a similar
20 fashion.

21 Had he been aware of it, he could have
22 remedial --- He was not aware of it. It was
23 the first time he's ever experienced that
24 situation.

25 Therefore, we get to the issue of nothing

1 in this section prohibits the court from
2 considering any other valid reason for the
3 failure to produce the video tape based upon
4 the totality of the circumstances.

5 When we get to that totality of the
6 circumstances language, Your Honor, it's the
7 City's position that the Court gets to look at
8 the big picture in that point in time, which
9 in this case is the fact that there is
10 overwhelming evidence that Ms. Stroupe was
11 driving under the influence. The overwhelming
12 evidence being Mr. Rainey saw her, very
13 concerned about her driving, calls 911. He
14 can testify to significant impaired driving
15 that he observed.

16 The Court - That's - I didn't mean to
17 interrupt. Go ahead. Finish.

18 Mr. Barton - Officer Cook, coming to the
19 scene, coming in contact with Ms. Stroupe,
20 making a determination that she's
21 significantly impaired, arresting her for DUI,
22 bringing her down to the law center where she
23 registered .23 on the Datamaster.

24 From the standpoint of the City, and the
25 other officers obviously can testify too, to

1 their interaction with Ms. Stroupe, the video
2 from -- I believe the first officer who gets
3 behind her where Ms. Stroupe is at an
4 intersection and begins to edge out halfway
5 into the intersection under a red light.

6 The Court - But my understanding - I'm here
7 to be educated along with everybody else.
8 Nothing in this section prohibits the Court
9 from considering any other valid reason for
10 failure to produce the video, not for
11 arresting her, not for using the big picture
12 to say, well, when we got there she was
13 obviously intoxicated, obviously
14 impaired. Is that right? Am I misreading
15 this statute?

16 Mr. Barton - Judge, my understanding, again,
17 and the way the courts have treated Suchenski
18 and the way the courts have treated the
19 statute is, it's essentially a foundational
20 requirement to go forward with a DUI to either
21 have a video or if you don't have a video fall
22 under a Subsection B exception.

23 So, either we have the video and produce
24 the video that meets the quality - which I
25 think we have in this case. Even assuming we

1 have it, then affidavit allows the court to
2 look at -- Assuming the court were to say, you
3 know what, that video is just so bad it's as
4 if no video existed whatsoever.

5 Therefore, the next question is, can I
6 fall under a Subsection B exception. And if I
7 can, I still get to go forward with my case.
8 If I have a video or a Subsection B exception,
9 the foundation requirements, I don't get to go
10 forward and even go forward with my case at
11 that point in time. That's what Suchenski has
12 held.

13 The Court - I've never had this argument
14 before. Subsection B is an excuse for not
15 producing a video.

16 Mr. Wellborn - Correct.

17 The Court - We have a video here. It's just
18 not the best quality. It has nothing to do
19 with whether she was intoxicated or not. I
20 agree with you. If they made a mistake and
21 stopped her by mistake, but when they stopped
22 her by mistake they noticed that she is
23 obviously impaired, can you go on with a DUI
24 investigation. I believe they can. I believe
25 as long as they had probable cause, even if it

1 was wrong, even if they made an error, I
2 believe they can continue on with their
3 investigation of a crime that was discovered
4 as a result of that stop.

5 This has nothing to do with that as far
6 as I'm concerned. This has to do with whether
7 or not we have a video and whether or not we
8 don't have a video, whether it is an exception
9 to that video being produced. I think that's
10 what Suchenski says. I think that's what
11 Henkel says, all these cases.

12 I don't want to cut you short, but I'm
13 not interested - I'm interested - It's Mr.
14 Wellborn's motion. His motion is that two of
15 the tests, and only those two, by his
16 stipulation a few minutes ago ---
17 Mr. Wellborn - Actually, I think it's now
18 three because we saw the vertical gaze
19 nystagmus test, too. It's actually going to
20 be three out of four tests.

21 The Court - Horizontal gaze nystagmus ---
22 Mr. Wellborn - Vertical gaze nystagmus and
23 the finger touch.

24 The Court - And the finger touch. He's saying
25 that the video of that is not sufficient to

1 pass muster under the statute. That's what I
2 want to hear arguments from, from the City.
3 Mr. Barton - Judge, I think the video is.
4 Is it the best video ever? No.
5 The Court - Then that's your position.
6 Mr. Barton - It's an either or proposition.
7 It's not an either or. It's either you have a
8 video that falls under the first subsection
9 that meets those criteria. A Suchenski motion
10 is saying you don't have that video.
11 The Court - Or you have a video that is not --
12 that's legally -- nothing satisfied the
13 statutory requirements.
14 Mr. Barton - Correct, but then I get to go
15 to Subsection B. If you go to Subsection B,
16 again, the failure to produce the video as
17 required by the subsection. In other words,
18 by subsection A. The failure to produce that
19 video isn't alone grounds for dismissal. If
20 we submit an affidavit ---
21 The Court - which you have.
22 Mr. Barton - If we outline in that affidavit
23 that an exigent circumstance existed, which
24 I think we have, at that point in time ---
25 The Court - But you've covered that. You've

1 covered the sun. That's the exigent
2 circumstance, the location of the camera.
3 Mr. Barton - Again, what I think though, it
4 says nothing -- It's part of that same
5 paragraph of Subsection B. Our position is
6 simply this.

7 If we get to a Subsection B analysis, it
8 becomes a totality of the circumstances
9 analysis of looking at the big picture. I get
10 that from the plain language of the statute
11 which says nothing in this section prohibits
12 the Court from considering any other valid
13 reason for the failure to produce a video
14 recording based on the totality of the
15 circumstances. The totality of the
16 circumstances in this case is Mr. Rainey
17 calling 911 because of concern for a driver --

18 -
19 The Court - I understand all that.

20 Mr. Barton - The officers responding to that
21 and seeing a woman who is severely intoxicated

22 ----
23 The Court - Chris, I agree with that. What
24 does that have to do with the motion that's
25 before the Court.

1 Mr. Barton - If the Court finds that the
2 video is valid, that ends the discussion.
3 In other words, it qualifies under Subsection
4 A and meets the requirements. That ends the
5 discussion. If the Court doesn't find that
6 but finds that Subsection B applies, then the
7 Court can make a determination, you know what,
8 yeah, could this video have been better. But
9 looking at the big picture of Mr. Rainey, of
10 three officers who would testify that Ms.
11 Stroupe was intoxicated ---

12 The Court - It has nothing to do with the
13 video. It has nothing to do with the video.
14 Mr. Barton - But, it goes to the totality
15 of the circumstances.

16 The Court - No. There's a phrase in front
17 of that, Chris. Nothing in this section
18 prohibits the Court from considering any other
19 valid reason for the failure to produce a
20 video, based upon totality of circumstances.

21 There was an Iranian attack going on, and
22 the officer thought it was more important to
23 go to that than to stay where he was.
24 Lightening struck his vehicle. Somebody threw
25 a fire bomb in his vehicle. There were

1 extenuating circumstances as to why we either
2 don't have a video, it's not a good video or
3 it's an incomplete video. Whether or not she
4 was intoxicated, whether or not somebody
5 called and said there's a dangerous person
6 operating on the streets of this city has
7 nothing to do with this section.

8 Mr. Barton - I understand the Court may take
9 that view. I just want to, again, outline our
10 argument. First of all, our argument is one,
11 the video while albeit of poor quality is of
12 sufficient quality to meet Subsection A.

13 Assuming it doesn't meet Subsection A, I
14 think we've outlined through Officer Cook and
15 through the affidavit that the situation
16 existed that he was not aware. It was the
17 first time he had been aware of it. That
18 because of the illumination -- Again, I've
19 handed up to the Court the sunrise and the
20 sunset table for the City of Rock Hill. I'm
21 not sure if that was objected to or not or if
22 I need to put that into evidence.

23 Mr. Wellborn - I'll be happy to stipulated
24 to it. Judge, I would point out one thing and
25 that is that nothing in Subsection B excuses a

1 poor quality video.

2 Subsection B entirely addresses the issue
3 of whether a video was produced. We know a
4 video was produced in this case. We've seen
5 it. That's now part of the record. That's
6 Exhibit 1.

7 Subsection B says, quote, that the only
8 way you can exclude or you can say Subsection
9 B applies and that there is an excuse for a
10 failure to produce a video, which again was
11 produced in this case. So we have no failure
12 to produce a video. Therefore, Subsection B
13 doesn't apply at all. Factually, Number 1,
14 the affidavit showing the video equipment
15 wasn't working at the time. Well, that
16 doesn't apply here. That it was physically
17 impossible to produce the video recording
18 because the person needed emergency
19 medical treatment. That doesn't apply here.
20 Or, exigent circumstances existed, including
21 roadblocks, traffic accidents, citizens
22 arrest.

23 As you continue reading, it says, where
24 arrest has been made and the video recording
25 has not been activated by the blue lights.

1 well, it was in this case. The failure by the
2 officer to produce the video, which does not
3 apply in this case, is not alone grounds for
4 dismissal. The problem is we do have a
5 videotape. Subsection B doesn't apply at all.

6 However, as soon as the video recording
7 is practical, the video recording must begin.
8 well, we have the video recording in total in
9 this case. The last line of it says, nor do
10 the provisions of this section prohibit the
11 person from offering evidence relating to the
12 arresting officer's failure to produce the
13 video recording.

14 We don't have a failure to produce a
15 video recording in this case. That's the only
16 way that Subsection B applies is if there's a
17 failure to produce, not if the quality of it
18 is poor.

19 If you look through every single one of
20 those orders from Circuit Court and Judge
21 Modla's return from this court, every single
22 one of them talks about videos of poor
23 quality. They're videos of poor quality
24 because something wasn't shown at all or the
25 video camera cut off part of the person's ---

1 The Court - I'm going to let you get to
2 that in wrapping up your case.

3 Mr. Wellborn - I'm pointing out that as we're
4 arguing this totality of the circumstances,
5 that it simply does not apply here because
6 subsection B does not apply at all as a matter
7 of law and fact.

8 Mr. Barton - Judge, then that means you're
9 arguing against Suchenski. You want to have
10 Suchenski overturned because that's what you
11 just -- that's the argument you made.

12 Mr. Wellborn - No. I'm arguing Suchenski
13 does apply; that under subsection A, because
14 of the quality of the video we can't see my
15 client's horizontal gaze nystagmus test. We
16 can't see the vertical gaze nystagmus test,
17 and we can't see how she does on the finger
18 test. Therefore, Suchenski does apply and 56-
19 5-2953 A, subsection 2 applies
20 and; therefore, the court is mandated to
21 dismiss the case. That's what I'm applying,
22 arguing.

23 what I'm also suggesting is your counter
24 argument under subsection B fails as a matter
25 and law and fact because we do have a

1 videotape that was produced.

2 The Court - Okay. Do you have anymore
3 questions of this witness?

4 Mr. Barton - Of Officer Cook?

5 The Court - Of Officer Cook?

6 Mr. Barton - No, Your Honor.

7 The Court - Mr. Wellborn, cross-examination.

8 The Court - Thank you.

9 Examination: (By Mr. Wellborn)

10 Q Officer Cook, the first test you gave Ms. Stroupe
11 was the horizontal gaze nystagmus test, correct?

12 A Yes, sir.

13 Q Looking over your incident report, it looks like
14 the first thing you did is you observed lack of
15 smooth pursuit in both eyes, correct?

16 A I believe so. I'd have to review the report.
17 If that's what it says, that's ---

18 Q Would you like to review your report?

19 A Yes, please.

20 Q Do you see where it says lack of smooth pursuit
21 in both eyes? Right there.

22 A Yes, sir.

23 Q So, you would agree that that's what you noticed?

24 A Yes, sir.

25 Q So, you saw lack of smooth pursuit in her left eye,

1 correct?

2 A Yes, sir.

3 Q And lack of smooth pursuit in her right eye?

4 A Yes, sir.

5 Q You would agree that her eyes are not visible on
6 the video recording whatsoever?

7 A That's correct.

8 Q You would also agree that when you look at the
9 videotape as you moved your pen -- By the way,
10 did you use a pen or a finger?

11 A I used my finger.

12 Q As you moved your finger to your right side, her
13 left, in fact, your arm on the camera blocks
14 basically a whole section of her face where her
15 eyes are, correct?

16 A I'd have to look at the video. I can't recall
17 that.

18 Mr. Wellborn - Can we stipulate to that?

19 Mr. Barton - If I may, Your Honor, the
20 video speaks for itself. If you want to
21 go through this laundry list of breaking
22 out each single field sobriety test into -
23 The Court - I'm going to take judicial
24 notice of the fact that the officer's hand was
25 in front of the defendant's face,

1 administering the HGN, and his camera was
2 behind him so there were portions of time
3 when, obviously, his hand would have been in
4 front of her eyes.

5 Mr. Wellborn - Well, specifically, his
6 entire arm blocks all of her eyes and
7 everything except for her jaw area as he
8 moves to the right. If the Court wants to
9 take judicial notice great. I just need to
10 get that on the record. We can do that by
11 the officer admitting it or we can play
12 that section and get him to admit it either
13 way.

14 Mr. Barton - The video is in evidence.
15 It speaks for itself.

16 The Court - The officer is saying he
17 doesn't recall. He doesn't remember.

18 Mr. Wellborn - The officer is saying
19 he doesn't recall. The record doesn't speak
20 for itself. So, we need to do it. Let's
21 go ahead and tee it up.

22 The Court - Mr. Wellborn, before we
23 tee it up. What does this have to do with
24 your two motions?

25 Mr. Wellborn - Because, obviously, if the

1 eyes are completely covered by the officer's
2 arm, you can't see her eyes in a test where
3 you're suppose to be able to see what's going
4 on with the eyes.

5 Mr. Barton - Judge, I'm just going to
6 say for all practical purposes, on a
7 horizontal or vertical gaze nystagmus test,
8 other than watching the officer administer
9 the test, unless we have an absolute ---

10 The Court - Chris, sit down. We all
11 know that in this room. Mr. Wellborn wants
12 to put it on the record so we're going to
13 put it on the record.

14 Mr. Wellborn - Thank you.

15 (Videotape played)

16 Mr. Wellborn - Okay. Right there do
17 you see how your arms are blocking? You can
18 stop it or pause it. We're good.

19 (Mr. Wellborn - Resuming)

20 Q officer, would you agree that every time you move
21 your arms to the right hand side, your right, her
22 left, that your arm completely obscures her eyes?

23 A As shown on the video, yes, sir.

24 Q Thank you. Since it completely obscures her eyes,
25 we can't see her eyes, correct, as we look at the

1 video?

2 A We can't see her eyes, that's correct.

3 Q Because we can't look through your arm, right?

4 A Well, we can't see eyes on an HGN test on any
5 video ---

6 Q Especially when we can't look through your arm
7 because the camera is obscured by your body, right,
8 or part of your body?

9 A We can't see HGN -- eyes on HGN on any video,
10 counsel.

11 Q Once again, not to belabor the point, but
12 especially when you move your arm to the right,
13 and her eyes are blocked by your arm. Would you
14 agree that that is occurring on the video every
15 time you move your arms to the right?

16 A Yes, sir.

17 Q Thank you. So, you noticed, I believe, looking
18 into her eyes -- By the way, at no portion during
19 the horizontal gaze test can we see her eyes at
20 all, can we?

21 A I don't believe so.

22 Q And at no portion during the vertical gaze
23 nystagmus test can we see her eyes at all, can
24 we?

25 A Not that I'm aware of. I'd have to review the

1 video, but I would say probably not.

2 Q Okay. You indicated that she failed the horizontal
3 gaze nystagmus test because you noticed sustained
4 nystagmus in her eyes at maximum deviation,
5 correct?

6 A I don't believe I used the word failed. I just
7 observed.

8 Q An onset of nystagmus prior to 45 degrees?

9 A Yes, sir.

10 Q You also indicated you observed lack of smooth
11 pursuit in her eyes, correct?

12 A Yes, sir.

13 Q Those would be the clues that you are looking for
14 on the nystagmus test, right?

15 A That's right.

16 Q Then you gave her a vertical gaze nystagmus test,
17 correct?

18 A That's right.

19 Q You did not in your incident report indicate how
20 she did on that. How did she do on the vertical
21 gaze nystagmus test? Do we know?

22 A I don't recall. Typically, in my report, if I see
23 vertical gaze nystagmus, I will document that.

24 Q Okay.

25 A Typically, if I do not, I won't document that.

1 Q But we don't know how she did because you didn't
2 document it in your report, correct?

3 A That's right.

4 Q And we can't see her eyes on the test either,
5 can we?

6 A No.

7 Q Then you gave her a finger touch test, right?

8 A That's right.

9 Q And on the videotape when you did the finger touch
10 test, we can't see whether she's touching her
11 fingers to her thumbs or however you asked her to
12 do it or not because that's kind of a blur, right,
13 would you agree?

14 A Somewhat.

15 Q Somewhat ---

16 A It's somewhat of a blur.

17 Q As we look at the tape, can you determine whether
18 her thumbs are touching her fingers from that
19 videotape?

20 A I would need to review it again.

21 Mr. Wellborn - Let's tee it up.

22 (Videotape played)

23 (Mr. Wellborn - Resuming)

24 Q Officer, would you agree that when she does her
25 finger touch test basically you've got a blur and

1 you can't see her fingers and/or thumb where one
2 is touching the other?

3 A I would agree there's not a lot of detail.

4 Q Would you agree that you can't see her fingers when
5 she does the finger touch test on this videotape?

6 A It's hard to distinguish fingers.

7 Q You can't see the thumb either. Would you agree
8 with that?

9 A It's hard to distinguish. I would say that.

10 Q As we look at the videotape, are the fingers even
11 visible -- We know they're there presumably because
12 we've got a blur of what presumably is a hand, but
13 we can't actually see the fingers, can we?

14 A Not -- not in any detail, no, sir.

15 Q Enough detail to show that there are fingers,
16 any detail that would be important.

17 A (No response)

18 Q Let's just cut to the chase instead of trying to
19 be coy. Can you see the fingers or not?

20 A Not in any detail.

21 Mr. Wellborn - Thank you. Judge, that's
22 all I have. Just a couple of more things.

23 (Mr. Wellborn - Resuming)

24 Q No question you produced a videotape in this case,
25 correct?

1 Mr. Barton - That's a question of law. He
2 can't ---

3 Q Let's do it factually. Did you make a videotape?

4 A Yes, sir.

5 Q Did you provide that videotape to the City of Rock
6 Hill?

7 A Yes, sir.

8 Q Is that the same videotape that we've been
9 watching?

10 A That's right.

11 Q By the way, at the time you were producing or
12 making this videotape, your vehicle had a videotape
13 device, right, a camera?

14 A Yes, absolutely.

15 Q And the video camera was working, correct?

16 A Yes, sir.

17 Q So, it wasn't impossible for you to produce a
18 videotape. In fact, you did produce a videotape,
19 right?

20 A I produced a videotape.

21 Mr. Wellborn - Thank you. That's all.

22 The Court - Anything on redirect?

23 Further Examination: (By Mr. Barton)

24 Q With respect to the videotape in this case, was the
25 camera affected due to the illumination conditions

1 of the evening hours?

2 A I believe so.

3 Q To the best of your knowledge, were Officer Lewis
4 and Officer Langley's cameras similarly affected?

5 A I believe so.

6 Mr. Barton - Again ---

7 Mr. Wellborn - No objection.

8 Mr. Barton - That's the sunrise and
9 sunset table which I think he's not objected
10 to. That would be City's Exhibit 3.

11 The Court - Thank you very much. As I
12 understand it, without objection, City's
13 Number 3.

14 Whereupon - Document marked City's
15 Exhibit 3.

16 (Mr. Barton - Resuming)

17 Q The vehicle you operated has a video recording
18 system, is that correct?

19 A Yes.

20 Q What kind of video recording system is it?

21 A It's an L-3.

22 Q Is it a digital video system?

23 A It's a digital system, yes, sir. When it records,
24 it captures it on hard drive.

25 Q So when we're talking about videotaping, it

1 doesn't videotape, correct?

2 A It's not technically a videotape. It's a video
3 recording.

4 Q So in Subsection A here where it says at the time
5 of the defendant's arrest, the vehicle I was
6 operating was not equipped with a videotaping
7 device, if you had checked that, that would have
8 been incorrect because you were actually equipped
9 with a digital video recording, not videotape, is
10 that right?

11 A That's right.

12 Q The way that digital recording system works is that
13 the camera records it digitally and then you come
14 down here to the law center. What happens when you
15 come down here to the law center?

16 A When you park in the lot, it will wirelessly upload
17 to a server that's located within the law center.
18 At that point, it's stored on the server. The
19 video is stored on the server for a particular
20 amount of time. During that time, you can produce
21 DVDs if needed.

22 Q Those DVDs would essentially be duplicate copies of
23 what's stored on the server?

24 A That's right.

25 Mr. Barton - Your Honor, that's all the

1 questions I have for Officer Cook.

2 Mr. Wellborn - I'm ready to be heard
3 whenever Your Honor is ready.

4 The Court - All right. Mr. Wellborn?

5 Mr. Wellborn - Your Honor, basically
6 you've seen the video and the officer has
7 admitted under oath that on the video camera
8 or on the recording of this particular set of
9 field sobriety tests, the first test that was
10 offered was the horizontal gaze nystagmus
11 test. On that test, you can't see my client's
12 eyes whatsoever.

13 On the next test that was offered was
14 the vertical gaze nystagmus test, and in that
15 test you can't see my client's eyes
16 whatsoever. Both those tests involve the
17 officer's determination or the officer's
18 potential testimony of what my client's eyes
19 were doing. Those are field sobriety tests.

20 The third field sobriety test offered
21 was the finger touch test in which you can't
22 see my client's fingers or thumb whatsoever.
23 So the tests are simply not visible according
24 to the officer's undisputed testimony.

25 I would point out that in terms of the

1 law, and I know, Your Honor, has a chance to
2 read some and perhaps all these orders.

3 The first case that addressed this
4 issue -- Actually, the first case that's
5 directly on point is State -vs- Turner which,
6 of course, addresses a finger touch test.
7 That was, I believe, Judge Couch's order
8 affirming a dismissal or dismissing a case
9 under 56-5-2953, Subsection A-2, because the
10 finger touch test was not visible. In this
11 case, we have a finger touch test that is not
12 visible.

13 That order was signed, I believe in
14 2012 ---

15 The Court - Yes.

16 Mr. Wellborn - The next case that came
17 was State -vs- Self (phonetic) and that was
18 Judge Mark Hayes, Circuit Judge Mark Hayes'
19 order affirming a dismissal because a walk and
20 turn was not visible.

21 The third case that came out was the
22 one decided by Judge Alford on August 20, 2012,
23 and that was State -vs- Pittman case which
24 was an order dismissing a General Sessions
25 level DUI also because the walk and turn was

1 not visible.

2 All of these cases cite the same, exact
3 principles, the same exact law. All of
4 them addressed Subsection B or potential
5 arguments under Subsection B.

6 The next case that came out was August
7 6, 2013. That was Circuit Judge Keith
8 Kelly's dismissal of the General Sessions
9 level DUI case because portions of a walk and
10 turn were not visible, not the entire thing,
11 but just portions of it.

12 The next case that came out was an order
13 signed by Judge Hayes on September 3, 2013,
14 State -vs- Bailey, also a dismissal of the
15 the General Sessions level DUI case because
16 the walk and turn was partially not visible.
17 That would be page 3 of that order.

18 The next case that was decided was
19 September 17, 2013, also Judge Hayes. That
20 was a York County case. Judge Hayes affirmed
21 the dismissal of a magistrate's appeal because
22 a walk and turn was not visible. That's
23 State -vs- Lorusso.

24 What's interesting in Lorusso, which is
25 actually the latest we have from any of

1 the circuit courts, is page 5 of the opinion.
2 On page 5 of Lorusso, at the end of the first
3 full paragraph, and I'll wait to Your Honor
4 is there.

5 The Court - First paragraph on which
6 page?

7 Mr. Wellborn - Page 5.

8 The Court - I've got you.

9 Mr. Wellborn - It says, to put it
10 plainly, there is no sense in conducting
11 field sobriety tests if the finder of fact
12 cannot see the results of such tests.

13 The Court - I marked it when I read it.

14 Mr. Wellborn - What you have is you have
15 all the Circuit Court orders that address
16 this particular issue.

17 Now, I understand that they are not
18 binding on this court. They are persuasive
19 authority but not binding authority. I
20 recognize that. I would argue that the legal
21 analysis that they go through is rather
22 persuasive given the fact that we have Court
23 of Appeals opinions that address this issue
24 here.

25 One is Murphy -vs- State which talks

1 about the fact that we now have a 2009 law
2 which requires that the field sobriety tests
3 be recorded versus the conduct.

4 The other is a case that came out this
5 year, State -vs- Henkel. In Henkel, which
6 Your Honor is familiar with, the Court of
7 Appeals reversed and dismissed a DUI case,
8 Circuit Court level case, because although
9 everybody arguing in Henkel factually agreed
10 that Miranda warnings were given, they were
11 not on camera.

12 Henkel said we have to apply this
13 statute, we have to construe it strictly,
14 and the authority for the strict construction
15 of this statute was The City of Rock Hill
16 -vs- Suchenski, Town of Mount Pleasant -vs-
17 Roberts, Et Al, all of which are referenced
18 within the body of Henkel and referenced in
19 the body of this particular order.

20 The last thing, we have -- This issue has
21 come up here in this particular court, again
22 not binding on Your Honor, but certainly
23 persuasive, and that would be Judge Modla's
24 Return to Appeal in the case of City of
25 Rock Hill -vs- Steven Patrick Paliock

1 (phonetic). Of note, after this Return to
2 Appeal was filed, the City withdrew its
3 Intent to Appeal.

4 I would ask Your Honor to reference all
5 those. Factually, the officer has testified
6 as to what's visible and not visible.
7 Certainly, the tape also, I think, backs up
8 the officer's testimony that out of three of
9 four field sobriety tests, my client -- How
10 she did on the test is not visible; therefore,
11 the tests are not visible because the test
12 means more than the fact that the officer
13 gave the test. It means how my client did on
14 it, again, going to back to Judge Hayes'
15 language in State -vs- Lorusso.

16 So, for all those reasons, I would move
17 for a dismissal of the charge of driving
18 under the influence and/or driving with
19 unlawful alcohol concentration for my
20 client, Ms. Brenda Stroupe, under 56-5-2953 A
21 Subsection 2.

22 The Court - Mr. Barton?

23 Mr. Barton - Your Honor, if it please the
24 court.

25 The Court - Yes.

1 Mr. Barton - Your Honor, to go back
2 initially to what is binding on this court
3 which is Murphy -vs- The State, the Court
4 of Appeals decision which I know the court is
5 familiar with, there's just one thing I
6 want to outline, Your Honor. Mr. Wellborn
7 was arguing a little bit earlier that somehow
8 Subsection B does not apply if you can't fall
9 in Subsection A. I think Murphy will hold to
10 the contrary. Even Suchenski would hold to
11 the contrary. What Suchenski really stands
12 for is an issue preservation case, was
13 whether -- If we appropriately preserved the
14 argument for the Subsection B analysis.

15 The Court - Exactly.

16 Mr. Barton - So, in this case, Your
17 Honor, again from the City's perspective,
18 either the video meets the requirements of
19 Subsection A, which if the court rules that
20 it does then the case goes forward.

21 If the court rules that the video
22 doesn't meet the requirements of Subsection
23 A but, because of the circumstances and
24 Officer Cook's affidavit, the Subsection B
25 exception applies, then the case can still

1 go forward at that point in time. That's
2 essentially the City's argument in a nutshell.

3 I also look at -- Again, this is State
4 -vs- Branham (phonetic) here which is a 2011
5 case which talks about -- You know, in
6 City of Rock Hill -vs- Suchenski, our Supreme
7 Court found dismissing the charge was an
8 appropriate remedy for a Subsection A
9 violation that's not mitigated by an exception
10 from Subsection B.

11 Again, the Supreme Court refused to
12 consider that argument because they said it
13 was not preserved for appellate review.

14 So, again, I think in this case we
15 currently have, either -- Again, the video
16 meets the Subsection A requirements. If it
17 doesn't meet the Subsection A requirements
18 then the question is - I think the court can
19 fall back on Subsection B. We have an
20 affidavit. We've heard testimony from the
21 officer. I think it is abundantly clear that
22 the time of day affected the video recording
23 of this case, something that the officer was
24 not aware of prior to that date that he could
25 remediate.

1 The Court - I have no reason to doubt
2 any of that.

3 Mr. Barton - Therefore, again, I think
4 -- Again, the court can look at that and look
5 at the totality of the circumstances at that
6 point in time and say, based upon that, the
7 failure of the video to meet the Subsection A
8 requirement is excusable and the City can
9 still go forward with the case.

10 Again, I understand that the court takes
11 a little bit different tact with regards to
12 that, but it's the City's position -- I think
13 that the court, again, based on the Subsection
14 B language, can look at the big picture which
15 simply says, in the grand scheme of things,
16 what a finder of fact -- would a reasonable
17 finder of fact be affected by de minimis
18 quality or the de minimis amount of conduct
19 shown on the videotape versus the overwhelming
20 evidence of the fact that Ms. Stroupe was
21 under the influence and shouldn't have been
22 operating a motor vehicle at the time.

23 If I could have a quick minute to check
24 with my learned colleagues seated on either
25 side of me here.

1 The Court - You're blessed to have
2 learned colleagues. I'll take judicial
3 notice of that.

4 Mr. Barton - Judge, the only other
5 thing is -- I'm fine. Thank you. We've got
6 the video recording, the affidavit, as well
7 as the sunset and sunrise ---

8 The Court - I need the video. It's
9 still in your machine.

10 Mr. Barton - Is there anything else
11 that you need?

12 The Court - Chris, let me ask you this.
13 I want you to distinguish this case from
14 Lorusso.

15 Mr. Wellborn - You're asking me to ---

16 The Court - No. I'm sorry. I forgot
17 there were two Chrises in the room.

18 Mr. Barton - Judge, I guess I would
19 have to take a look at Lorusso. I'm not ---

20 The Court - Let me read it to you.

21 Mr. Wellborn - You should have a copy
22 over there.

23 The Court - Reading from page 5. The
24 2009 amendments specifically provides for
25 the recording of any field sobriety tests

1 which goes beyond the former requirement of
2 merely recording a person's conduct. Had
3 the General Assembly only intended that there
4 be a recording of a person doing a field
5 sobriety test, without there being any way
6 to determine the person's performance on that
7 test, as in Murphy -v- State, there would
8 have been no need to amend the statute.

9 It goes on. In the present case, the
10 State failed to comply with the videotaping
11 requirements in regards to the walk and turn.
12 The respondent was asked to take several
13 steps by lining up the heel of her front foot
14 against the toe of her trailing foot.
15 Respondent was then required to turn around
16 and walk in the opposite direction in the
17 same manner.

18 Although the video camera was recording
19 during the respondent's performance of this
20 test, it was positioned in such a manner that
21 the respondent's heels were not visible as
22 they touched or did not touch her toes.
23 Therefore, the respondent's performance,
24 an important part of the test, was not
25 videotaped.

1 The State has argued that compliance
2 with the statute should be excused in this
3 case because of the actions of the arresting
4 officer in failing to record the field
5 sobriety test was not intentional or in bad
6 faith.

7 Whether an officer acts in good faith
8 or if any omission in recording is
9 unintentional, does not excuse compliance
10 with 56-5-2930.

11 The General Assembly has provided for
12 exceptions for non-compliance but none has
13 been invoked by the State in this case.

14 In the present case, the arresting
15 officer did not properly videotape the
16 respondent being given the walk and turn
17 field sobriety test. The recording
18 requirements of 56-5-2930 are mandatory,
19 citing to Mount Pleasant and Suchenski.
20 The only remedy for non-compliance
21 with the recording section is dismissal.

22 Now, if we substitute -- We can't see --
23 It's not a big leap for me going from I
24 can't see the heel to toe to I can't see
25 the fingers and whether they are touching.

1 Distinguish that case.

2 Mr. Barton - Judge, the first thing,
3 it says the General Assembly has provided
4 for non-compliance under Subsection B,
5 which I think we have here. We have a
6 Subsection B case. This was is not a sub --
7 This was not a Subsection B case, first of
8 all. Secondly, if we want to ---

9 The Court - Subsection B exception, why
10 we don't have a video, is that right?

11 Mr. Barton - Secondly -- That's correct
12 Your Honor. Secondly, if we want to produce
13 dualing, non-binding Circuit Court rulings,
14 Judge Alford has also issued an opinion in
15 which he's held the finger tip dexterity
16 test, which was not visible, did not result
17 in the Suchenski violation. So we can Judge
18 Alford -- I will get that for the court, the
19 order.

20 Mr. Wellborn - It's not an order. It's
21 a transcript. I don't believe it's a finger
22 touch test. It's my case. It's actually
23 a horizontal gaze nystagmus test. It is
24 not actually -- There was no order that was
25 issued.

1 So, for a persuasive authority, a
2 transcript, I would suggest, is not the same
3 as an order.

4 Mr. Barton - Since we have a Circuit
5 Court judge making a finding of fact and
6 making a ruling that has basically said
7 horizontal gaze nystagmus then, even though
8 it's not visible still complies with
9 Subsection A.

10 The Court - I don't have any problem --
11 I've never seen a video presented in front
12 of me in any DUI case where the movement of
13 the eyes of the suspect could be detected.
14 I'm not making a ruling based upon any
15 problem with the videotaping of the horizontal
16 gaze nystagmus.

17 Mr. Barton - Judge, again, I'm looking
18 at -- This is the current version of 56-5-
19 2953. It talks about conduct being recorded.
20 It talks about that conduct must include -
21 must start with activation of the lights.
22 I don't think that's an issue here in this
23 case, include field sobriety tests being
24 administered. I don't think it's an issue --
25 It captures the field sobriety tests being

1 administered albeit not to Mr. Wellborn's
2 satisfaction, and we've stipulated that it
3 includes the advice of Miranda on this case.

4 Judge, looking at the Branham case and
5 looking at the other cases from both the
6 Court of Appeals and the Supreme Court, the
7 whole concept behind video recording was to
8 prevent what was perceived as happening in
9 the past where a police officer would get up
10 there and whether it was perceived as
11 being puffery or exaggeration of what was
12 going on, to avoid essentially a swearing
13 contest between a police officer saying
14 he was horrible, he was all over the place,
15 and the defendant saying, that's, in fact,
16 not the case.

17 The Court - I understand.

18 Mr. Barton - That was the impetus that
19 led to the video and that's really where the
20 videotaping statute ---

21 The Court - And, it's a worthy goal.
22 But the officer has testified here this
23 morning. I think I understood his
24 testimony that he can't tell whether the
25 fingers -- her, not his. There's a point in

1 that video, Chris, and I was looking for it.

2 Let me say this before I go any further.

3 If putting that video on a different machine
4 allows a juror to see that lady's finger to
5 thumb test, not perfectly, but to see it,
6 I can't see it at all. I can't see what she's
7 doing with her hand.

8 Because I can't see it at all, I think
9 it's analogous to these other decisions that
10 talk about not being able to see the legs,
11 not being able to see the movement.

12 Mr. Barton - I would say, if that's the
13 finding of the court, I can understand that,
14 and I can appreciate that finding. Then the
15 next question becomes, unlike those other
16 cases does the exigency of the illumination
17 conditions, as outlined in his Affidavit
18 under Subsection B, mitigate that. I think
19 the problem with all these cases that Mr.
20 Wellborn has cited is none of them is a
21 Subsection B case. They're all Subsection
22 A cases.

23 So, in Subsection B, that's where the
24 court gets to look at the totality of the
25 circumstances. It gets to take the big

1 picture, and say, in the grand scheme of
2 things, does the fact that we have a
3 situation where HGN, which we can never see,
4 is not visible. The finger tip dexterity
5 test, which we cannot see, but we can see
6 her conduct. We can see her having to lean
7 on the patrol vehicle. We can hear her
8 slurring her words. We can hear her talking
9 in a confused manner. There is overwhelming
10 evidence that Ms. Stroupe ---

11 The Court - Overwhelming evidence that
12 she was impaired. I would tend to agree
13 with that. That's not what I'm deciding
14 here today. I'm deciding whether or not the
15 statute has been complied with.

16 Mr. Barton - I agree, Your Honor, but
17 Subsection B, I think, gives you the room to
18 stand on which is, nothing in this section,
19 Subsection B, prohibits the Court from
20 considering any other valid reason for the
21 failure to produce a video recording based
22 on the totality of the circumstances, and
23 the failure of the officer to produce the
24 video is not alone a ground for dismissal,
25 if we submit a sworn affidavit certifying,

1 which we have, that exigent circumstances
2 existed.

3 He was not aware of the illumination
4 effect upon his camera at that time. We've
5 got a Subsection B case here, Judge, is what
6 I'm trying to say.

7 Now, the court can make, I guess, some
8 additional findings that -- You know,
9 considering the totality of the circumstances
10 and still find Subsection B inapplicable or
11 find Subsection B applicable, but I think --
12 But not -- That's for the court to decide.

13 I think in this case Subsection B ---

14 The Court - Forget about the lighting.
15 You're telling me -- I think you said this,
16 and I want it to be clear. If you make that
17 bigger, it doesn't help because it blurs it.

18 Mr. Barton - If you -- Judge ---

19 The Court - Because maybe if it's
20 bigger I could see something with her hands.
21 But, at this point, I can't see anything
22 with that field sobriety test. I wasn't
23 around when you guys brought it up, to look
24 and see whether the larger version would
25 assist me.

1 Mr. Barton - My argument is simply
2 this. Had the illumination been appropriate
3 to record normally, you would have been able
4 to see that under normal circumstances. The
5 problem is, because the illumination effect
6 it was preventing the camera from recording.
7 In other words, what happens is that camera
8 pixelates like any camera does. When it
9 doesn't have sufficient illumination, it
10 pixelates, and it makes -- and it affects the
11 recording.

12 That's why, again, I think you get to
13 the Subsection B analysis. Had we had
14 appropriate illumination, everything would
15 have been much clearer on that video. The
16 horizontal gaze nystagmus would have been
17 clearer, the finger tip dexterity test would
18 have been clearer. The whole image itself
19 of everyone on that videotape and all the
20 activity on that videotape would have been
21 clearer.

22 Mr. Wellborn - May I respond very
23 briefly?

24 The Court - Please.

25 Mr. Wellborn - The problem with the

1 Subsection B argument, as I mentioned earlier,
2 is that Subsection B applies and only applies
3 for a failure to produce a videotape.

4 We have the videotape in the record.
5 I think the court can take judicial notice
6 of the fact that the videotape was produced.

7 The officer has testified under oath
8 the videotape was produced. We've seen the
9 videotape so Subsection B doesn't apply
10 period.

11 Subsection B is all about a failure
12 to produce a videotape ---

13 The Court - Can you find me a case that
14 says that?

15 Mr. Wellborn - The statute says that.

16 The Court - No. I'm not being coy with
17 with you.

18 Mr. Wellborn - The statute says that.

19 The Court - Find me a case that says
20 what you're arguing, that says, we've got a
21 bad video here. The officer submitted an
22 affidavit. This isn't the first affidavit
23 case in the State of South Carolina.

24 Find me the case that says, we got a
25 video, if it exists.

1 Mr. Wellborn - There is no case that
2 I am aware of where a videotape was produced
3 where a court upheld a Subsection B exception
4 for failure to produce a videotape, probably
5 for obvious reasons, because it's a
6 nonsensical argument, with all due respect
7 to the City.

8 It's completely irrational to argue we
9 are seeking an exception of Subsection B
10 for failure to produce a videotape that we've
11 produced. That's probably why there is no
12 ---

13 The Court - Maybe they should change
14 this to producing a videotape that satisfies
15 the statutory requirements.

16 Mr. Wellborn - Maybe they should, but
17 that's not what the statute says.

18 The Court - I'm saying what the affidavit
19 says. If you change the affidavit to say,
20 we produced a video, but it's of poor
21 quality. It doesn't do what we would hope
22 it would do and; therefore ---

23 Mr. Wellborn - Here's the thing. First
24 of all, we have a criminal statute so the
25 rules have to be strictly complied with.

1 The rule of lenity requires that if there's
2 any ambiguity in the statute that it cuts in
3 favor of the defendant.

4 The Court - It's not ambiguous.

5 Mr. Wellborn - It's not ambiguous, and
6 in this particular case, the videotape was
7 produced.

8 The Court - I'm talking about the
9 affidavit that may be ambiguous. The
10 statute is certainly not ambiguous.

11 We're not going to try this case this
12 term. I'm going to give you both ten days
13 to provide me with copies of whatever you
14 want me to consider, and I will give you
15 my written order.

16 Mr. Wellborn - Thank you.

17 Mr. Barton - Thank you.

18 Whereupon - Hearing concluded at 10:30
19 a.m.

Shirley Dallas-Gerrald, CVR-CM
Notary Public/Court Reporter

(Recorded audio retained fifteen days from date of
certification unless otherwise requested)

CERTIFICATE OF REPORTER

State of South Carolina)
County of York)

I, Shirley Dallas-Gerrald, CVR-CM, a Notary Public for the State of South Carolina, do hereby certify that I reported the foregoing proceedings at the time and place herein designated and that the foregoing pages are a true, accurate and correct transcript of the aforesaid proceedings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, nor in anyway interested in the event of said cause.

In witness my hand and official seal this the 20th day of January, 2014, in the City of Rock Hill, County of York, State of South Carolina.

Shirley Dallas-Gerrald, CVR-CM
Court Reporter/Notary Public

My Commission Expires:
8-18-2021

Stroupe Motions Hearing

STATE OF SOUTH CAROLINA)
COUNTY OF YORK) IN THE ROCK HILL MUNICIPAL COURT

THE CITY OF ROCK HILL,
PLAINTIFF,
-VS-
BRENDA STROUPE,
DEFENDANT.

EXCERPTS

TRANSCRIPT OF PROCEEDINGS

ROCK HILL, SOUTH CAROLINA

JANUARY 23, 2014

JANUARY 24, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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(Reporter's Note: All exhibits retained by the Court)

1 P R O C E E D I N G S

2 BEFORE: THE HONORABLE PETER LENZI

3 * * * * *

4 (REPORTER'S NOTE: THE FOLLOWING ARE EXCERPTS FROM
5 THE TRIAL HELD ON 1-23-14 AND 1-24-14. THE
6 FULL PROCEEDINGS WERE NOT TRANSCRIBED)

7 WHEREUPON -

8 OFFICER JUSTIN LEWIS

9 WAS CALLED AS A WITNESS AND FIRST BEING DULY SWORN,

10 TESTIFIED AS FOLLOWS:

11 The Court - Mr. Barton, Your first question.

12 Direct Examination: (By Mr. Barton)

13 Q Officer Lewis, if you could introduce yourself
14 to the jury please, sir.

15 A My name is Officer Justin Lewis. I've been with
16 the Rock Hill City Police Department going on
17 three years now.

18 Q Can you tell the jury a little bit about what
19 you do with the Rock Hill PD?

20 A Answer calls for service, enforce traffic laws.

21 Q Going back to April 13th in the evening hours,
22 between seven and eight, were you working with Rock
23 Hill PD at that point in time?

24 A Yes.

25 Q Can you tell the jury a little bit about the type

1 of equipment you have and how you utilize that
2 equipment in terms of your patrol vehicle and the
3 type of patrol vehicle you had back in April?

4 A I've got a patrol vehicle, blue lights, sirens,
5 cameras, in car cameras. Whenever the lights come
6 on, the camera comes on. In car computers that
7 gives me up to date information. If we were to
8 receive a call from a citizen, the dispatchers can
9 type it into the computer, and it'll come to my
10 screen.

11 Q The shorthand for that is CAD, computer aided
12 dispatch; is that correct?

13 A Yes, sir.

14 Q In this case, you've heard the 911 call ---

15 Mr. Wellborn - Your Honor, object to
16 leading. Certainly Officer Lewis is capable
17 of testifying to what he heard without Mr.
18 Barton telling him.

19 The Court - I think the question was, you
20 heard. You heard. He heard it. I haven't
21 heard him suggest what he heard.

22 Mr. Wellborn - His question was quote,
23 you heard the 911 call. That would be leading
24 versus what did you hear. That's my
25 objection.

1 The Court - I overrule the objection.

2 Mr. Barton - Resuming

3 Q With respect to your being dispatched in this case,
4 that was a result of a 911 call?

5 A Yes, sir.

6 Mr. Wellborn - Once again, Your Honor,
7 object to leading.

8 Mr. Barton - Judge, I'm just trying to
9 put him at the scene.

10 Mr. Wellborn - I understand but there's
11 no put at the scene exception to the rules
12 evidence and that's why I'm objecting.

13 The Court - Ladies and Gentlemen, can you
14 excuse us again please.

15 (Jury leaves the courtroom)

16 Mr. Wellborn - I will be happy to
17 withdraw the objection if Mr. Barton will
18 extend me the same courtesy when I present my
19 case, not object to any leading questions I
20 have for my client or other potential
21 witnesses.

22 The Court - We're going to take a break
23 for lunch right now. Everybody else with
24 the exception of the court reporter can leave.

25 Whereupon - A lunch recess was taken.

1 The Court - You're still under oath
2 officer.

3 Mr. Barton - Resuming

4 Q Officer Lewis, when we last spoke, you talked a
5 little bit about the equipment in your vehicle
6 and the ability to receive dispatch information.

7 A Yes, sir.

8 Q Can you describe for the jury how that works?

9 A Whenever dispatch receives a call from an
10 individual, they have a computer system, they can
11 type it in and then send it to my computer screen
12 as an update of what's going on.

13 Q Does that allow for the -- When you say that
14 information comes to your computer screen, does
15 that allow for it to be updated?

16 A Yes.

17 Q As you're moving about the City?

18 A Yes, sir.

19 Q In connection with this case, did you receive a
20 dispatch?

21 A Yes, sir.

22 Q Can you tell the Court and the jury what kind of
23 information was related to you to the best of your
24 recollection in that dispatch?

25 A Yes, sir. Dispatch gave me a call about a

1 reckless driver in the area of Red River and
2 Waterford Park Drive. They gave me the tag
3 number. They also updated my computer screen
4 with it. They said the car was traveling up
5 towards Cherry Road.

6 Q For those jurors that may not be familiar with
7 the area, does Red River -- Does it stay that same
8 name or does it change names?

9 A It changes names to Celriver.

10 Q But does the road itself physically change or is
11 it simply that you stay on that same road but the
12 road name changes, but the road stays the same?

13 A Yes, sir.

14 Q Based on the information you received from the
15 dispatch, what actions did you take with respect
16 to trying to locate that vehicle?

17 A I started circulating the area. I was driving up
18 towards Cherry Road area. When I got to the
19 intersection of Celriver, Cherry Road and
20 Celanese corridor, I observed a red Mitsubishi
21 Eclipse with the tag number on it that was
22 displayed and given to us.

23 At that point in time, that's when I observed
24 the driver of the Eclipse start pulling out into
25 the intersection while the light was red.

1 Q So where were you specifically when you came in
2 contact with that red Mitsubishi Eclipse?

3 A I was sitting in the lane right beside her.

4 Q What direction were you facing at that point
5 in time?

6 A I'm going to say west.

7 Q If my memory serves me correctly, it's a situation
8 where you are at the intersection of Celriver and
9 Cherry Road then?

10 A Yes, sir.

11 Q Can you describe that intersection for the jury,
12 where that may be?

13 The Court - One second.

14 Whereupon - A brief break was taken.

15 Q Officer Lewis, can you describe that intersection
16 of Celriver and Cherry for the jury? Just tell
17 them what the landmarks are around there.

18 A Steak-N-Shake, there's an Exxon gas station, a
19 farmer's market in that area.

20 Q Is it close to the Home Depot and IHOP and some
21 other things on Cherry?

22 A Yes, sir.

23 Q You said you were in the lane next to the red
24 Mitsubishi Eclipse?

25 A Yes..

1 Q what, if anything, did you observe with regards to
2 the operation of that red Mitsubishi Eclipse at
3 that point in time, when you were near the vehicle?

4 A At that point in time, we were at a red light
5 waiting on the light to turn green. At that point
6 in time, I observed the red Mitsubishi Eclipse take
7 her foot off -- you know, take the foot off the
8 brake. Observed the red Mitsubishi Eclipse start
9 slowly rolling through the intersection. That's
10 what I observed.

11 Q What was the color of the light at that point in
12 time as the Mitsubishi Eclipse is rolling into the
13 intersection?

14 A It was still red.

15 Q Where was the vehicle with respect the roadway,
16 Cherry Road? Was it getting into the roadway or
17 physically where was that vehicle in relation to
18 the cross intersection of Celriver and Cherry
19 Road?

20 A It was almost right in the intersection.

21 Q Now, at some point in time, what does that vehicle
22 do, what direction does it travel from that
23 stop light when it turns green?

24 A It continues straight, goes under the red light on
25 Celanese towards 77.

1 Q So Celriver turns into Celanese right there and
2 then becomes 161?

3 A Yes, sir.

4 Q Just further down would be the intersection of
5 161 and I-77?

6 A Yes, sir.

7 Q At some point in time, did you activate your blue
8 lights and siren to try to conduct a traffic stop
9 on that vehicle?

10 A Yes, sir.

11 Q Can you tell the jury what occurred once you did
12 that?

13 A Once the light turned green, we proceeded through
14 the intersection. As soon as we got under the
15 red light, I activated my blue lights. We still
16 proceeded to roll farther on down the road so I hit
17 my siren and still proceeded to roll a little bit
18 farther down the road until we came to a stop right
19 at the 77 entrance and exit ramps.

20 Q With respect to when the vehicle came to stop, what
21 actions did you take when you approached the
22 vehicle?

23 A I came in contact with the driver which was Ms.
24 Stroupe. I asked her for her license,
25 registration, insurance. She fumbled around for

1 her license, trying to find her license. I had to
2 ask her numerous times if she could, you know, hand
3 me her license, registration, insurance.

4 Q Was there anyone in the vehicle besides Ms.
5 Stroupe?

6 A As a person, no, sir.

7 Q Was there anybody in the vehicle -- Was it occupied
8 otherwise by something other than a human being?

9 A A dog.

10 Q So it was Ms. Stroupe and her dog?

11 A Yes, sir.

12 Q So you asked for the standard information and at
13 some point in time was Ms. Stroupe able to give you
14 that?

15 A Yes, sir.

16 Q This encounter between you and Ms. Stroupe, was
17 that video recorded?

18 A Yes, sir.

19 Q Can you tell the jury a little bit about that
20 capability that you have and how that recording
21 took place in this case?

22 A It took place -- Like I said, as soon as the blue
23 lights and siren comes on, the camera starts
24 recording. That's when I approached Ms. Stroupe,
25 asked her for the information. Like I said, I

1 asked her two or three times for the information.
2 At that point in time, she handed me her
3 information. I made sure her license were valid
4 and then proceeded to ask Ms. Stroupe to step out
5 of the vehicle.

6 Q In your initial encounter with Ms. Stroupe, did you
7 begin to develop some kind of concerns about her
8 ability to operate a motor vehicle?

9 Mr. Wellborn - I'm going to object ---

10 The Court - Rephrase it.

11 Q At some point in time, did you develop concerns
12 about Ms. Stroupe and her ability to operate a
13 motor vehicle safely?

14 A Yes, sir, as I was speaking with Ms. Stroupe, I
15 could smell an alcoholic beverage coming from
16 inside the vehicle. Also, I located in the back
17 seat, in plain view, a six pack of Smirnoff Ice,
18 with one of them missing out of the box.

19 Q Was there anything with respect to Ms. Stroupe's
20 demeanor that caused you to have any kind of
21 concern?

22 A Slurred speech, glassy eyes.

23 Q You asked her to exit the vehicle; is that right?

24 A Yes, sir.

25 Q She exits the vehicle. Where does she go to at

1 that point in time, when she exits the vehicle?

2 A At that point in time, we have her safely stand
3 behind her vehicle out of traffic.

4 Q Was another officer with you at that point in
5 time?

6 A Yes, sir.

7 Q Who was that?

8 A Officer Langley.

9 Q Where was his vehicle in relationship to your
10 vehicle and Ms. Stroupe's vehicle when you
11 initially encountered Ms. Stroup?

12 A It was behind our vehicles.

13 Q So you all were at the same intersection together?

14 A Yes, sir.

15 Q In terms of his vehicle, once you came to a stop,
16 where did Officer's Langley's vehicle come to a
17 stop at?

18 A Right behind mine.

19 Q Was that essentially simultaneous or did he arrive
20 at a later time?

21 A No, I do believe he was at the intersection with me
22 when the stop was made.

23 Q At this point in time, you stopped Ms. Stroupe and
24 asked for her information. You asked her to exit
25 the vehicle. What's the next step in the process

1 of your initial encounter with Ms. Stroupe?

2 A With everything that I observed, the alcoholic
3 beverage coming from inside the vehicle, observing
4 the six pack of Smirnoff, that is when I asked for
5 officer Cook's assistance.

6 Q In this case, why would you call Officer Cook
7 versus just simply doing the investigation
8 yourself?

9 A Because he is one of the traffic officers and
10 that's what their specialty is.

11 Q Did you essentially just maintain Ms. Stoupe there
12 until Officer Cook could arrive?

13 A Yes, sir.

14 Q During that period of time was there some back and
15 forth, though, between you and Ms. Stroupe trying
16 to determine kind of what was happening, what was
17 going on?

18 A Yes, sir.

19 Q At some point in time after that, your initial
20 encounter with Ms. Stroupe, does Officer Cook
21 arrive?

22 A Yes, sir.

23 Q What, if anything, did you relate to Officer Cook
24 at the time you came in contact with him?

25 A What I observed, what the initial call was about

1 from the 911 call, all the way up until the time
2 of the stop, what I observed, her in the
3 intersection. That's what was relayed to Officer
4 Cook.

5 Q At some point in time, Officer Cook took over the
6 investigation as the traffic officer?

7 A Yes, sir.

8 Q Now, you've had an opportunity to review the
9 video from your in car camera prior to today,
10 right?

11 A Yes, sir.

12 Q Is that essentially a verbatim recording of the
13 interaction between you and the defendant that
14 evening?

15 A Yes, sir.

16 Mr. Barton - Your Honor, with the Court's
17 permission I would move to publish that
18 momentarily here.

19 The Court - Okay.

20 Whereupon - Video recording was played.

21 Mr. Barton - Resuming

22 Q Officer Lewis, just a couple of quick questions.
23 Can you tell the jury what you were doing?

24 A I was asking if there was a traffic unit in the
25 area where we were, Celanese and 77, and that's

1 when Officer Cook said he was in the area.

2 Q With respect, again, to that location of Celriver
3 and Celanese? Is that here in the City of Rock
4 Hill?

5 A Yes, sir.

6 Q In terms of the vehicle, the red Mitsubishi with
7 the tag, did that match the tag number that had
8 been given out by dispatch?

9 A Yes, sir.

10 Q In terms of the driver of that vehicle, that was
11 Ms. Stroupe, the defendant?

12 A Yes, sir.

13 Q At this point in time, did you all just wait for
14 Officer Cook to arrive?

15 A Yes, sir.

16 Q Was there an attempt to find out a little bit about
17 what Ms. Stroupe was doing prior to Officer Cook
18 arriving?

19 A Yes, sir.

20 whereupon - Video recording resumed.

21 Mr. Barton - Resuming

22 Q Officer Lewis, essentially at that point in time,
23 is that when Officer Cook takes over the
24 investigation?

25 A Yes, sir.

1 Q So what were you able to learn from Ms. Stroupe out
2 there at the roadside?

3 A I'm sorry.

4 Q What were you able to learn from Ms. Stroupe out
5 there at the roadside with respect to her operation
6 of a motor vehicle and consumption of alcohol?

7 A That she was not fit to be driving that day.

8 Q Now, did you have some concerns about her and her
9 driving ability, whether she should have been
10 driving?

11 A Yes, sir.

12 Q What were those concerns?

13 A With her back with her legs and then also with the
14 alcoholic beverage coming from her person after we
15 got her -- after we asked her to step out of the
16 vehicle.

17 Q Now, at one point in time, she says something to
18 the effect that, I didn't even take my pain pill
19 today. Was there any kind of further conversation
20 about that, that you could supply any additional
21 information with regards to any kind of medication
22 she may have been on?

23 A No, sir.

24 Q Once Officer Cook took over the investigation, did
25 you stay on scene until that investigation was

1 complete?

2 A I believe so. As far as I remember, I was on the
3 scene until the time of the arrest. However, I was
4 not in the video. I had no further contact other
5 than that right now.

6 Mr. Barton - I beg the Court's
7 indulgence. We're done with the video at this
8 time unless Mr. Wellborn ---

9 Mr. Barton - Resuming

10 Q Officer Lewis, with respect to your involvement and
11 interaction with Ms. Stroupe, is that pretty much
12 what's capture on video in connection with this
13 case?

14 A Yes, sir.

15 Q Had you met Ms. Stroupe or known Ms. Stroupe before
16 this incident?

17 A No, sir.

18 Mr. Barton - Please answer any questions that
19 Mr. Wellborn has.

20 The Court - Cross examination please.

21 (Reporter's Note: Cross Examination by Mr.
22 Wellborn not transcribed)

23 Redirect Examination: (By Mr. Barton)

24 Mr. Barton - Just briefly.

25 Q Ms. Stroupe was able to tell you when she had

1 the drinking, correct?

2 A On the video.

3 Q And, where she had the drinking?

4 A Correct.

5 Q And I think she even indicated what she had to
6 drink which was, I believe, a mixed drink; is that
7 right?

8 A She didn't tell me that.

9 Q Something to drink alcoholic at her mom's about
10 an hour ago?

11 A About an hour ago.

12 Mr. Barton - That's all I have.

13 The Court - Thank you. You may step down.
14 Call your next witness.

15 Mr. Barton - Your Honor, is there any
16 objection to Officer Lewis being excused?

17 The Court - Not from the Court.

18 Mr. Barton - That would be Officer Langley.

19 Whereupon -

20 Officer Ryan Langley

21 was called as a witness and first being duly sworn

22 testified as follows:

23 The Court - State your name.

24 The Witness - My name is Ryan Langley.

25 The Court - Your first question, Mr. Barton.

1 Direct Examination (By Mr. Barton)

2 Q Officer Langley, introduce yourself to the jury
3 please, sir.

4 A My name is Ryan Langley. I've been with the Rock
5 Hill Police Department for approximately four
6 years now.

7 Q Going back to August 13th, a Saturday evening,
8 between seven and eight, were you one of the
9 officers that responded to the dispatch regarding a
10 potential reckless driver in the area of Celriver/
11 Red River Road?

12 A Yes, sir.

13 Q Based on that information, what actions did you
14 take to try to locate that vehicle?

15 A I believe I was on Celanese Road when the call was
16 dispatched. I began traveling toward Red River
17 Road. I crossed over the intersection of Cherry
18 Road. As I did that, I observed the caller's pick
19 up truck they had described which was Ford pick up
20 truck. I continued up Red River Road ---

21 Q When you say caller's, that was Mr. Rainey, the
22 vehicle that he was in?

23 A That's correct.

24 Q So you saw that pick up truck?

25 A That's correct. I believe it was at the

1 intersection right there at the red light on Red
2 River.

3 Q Did you acknowledge that in some way, shape or form
4 that you had seen that vehicle?

5 A I believe I pointed at that vehicle.

6 Q So you responded -- You acknowledged Mr. Rainey's
7 vehicle. Where did you go to after that?

8 A I continued up Red River Road in an attempt to
9 locate the vehicle he had described as a red
10 Mitsubishi Eclipse. That vehicle did pass me,
11 traveling towards Cherry Road. There were several
12 vehicles behind it. At that time, I made a U turn
13 and started traveling towards Cherry Road.

14 Q What, if anything, did you notice with respect to
15 the vehicle as it was proceeding up Celriver Road
16 towards Cherry Road?

17 A I was able to identify that it was a red Mitsubishi
18 Eclipse as had been described. At that time, I
19 believe I radioed Officer Lewis and advised him
20 that it was approaching the intersection of Cherry
21 Road.

22 Q Approximately how long were you behind that
23 vehicle before it reached that intersection where
24 you first encountered it?

25 A I believe by the time I was able to make a U turn,

1 with the other traffic, it was already at the red
2 light. I was maybe -- I believe I was one vehicle
3 behind the Mitsubishi.

4 Q So you didn't travel down Celriver Road that far
5 before you came in contact with the vehicle?

6 A No, sir.

7 Q I think you described a little bit ago you did a
8 quick U turn to get in behind the vehicle?

9 A That's correct.

10 Q At some point in time, did you also utilize ---
11 Let me ask you this. Does your vehicle have
12 videotaping capability as well?

13 A Yes, it has video and audio capability.

14 Q Did you begin to utilize that at some point in
15 time during your encounter on this evening?

16 A Yes, I did.

17 Q Does that video -- You've had an opportunity to
18 review that video prior to coming to court this
19 morning -- this afternoon now?

20 A Yes, sir.

21 Q Does that video fairly and accurately portray your
22 encounter with Ms. Stroupe that afternoon?

23 A Yes, sir.

24 Q With respect to when the vehicle came up to that
25 intersection of Celriver and Cherry what, if

1 anything, did you observe with the operation of
2 that vehicle?

3 A I believe I was one vehicle behind the red car, or
4 two. We were stopped at the red light. I don't
5 believe that I was able to observe that it did
6 anything.

7 Q At some point in time, did you see Officer Lewis's
8 vehicle?

9 A His vehicle was in the left turn lane on Red River
10 Road.

11 Q And he falls in behind the vehicle. Do you then
12 fall in behind his vehicle?

13 A Yes, sir.

14 Q What, if anything, did you do once you fell in
15 behind his vehicle?

16 A Officer Lewis activated his lights. I then
17 activated my lights to stop that vehicle.

18 Q You had an opportunity to view Officer Lewis's
19 vehicle. That vehicle came to rest shortly before
20 the intersection of Celanese Road and I-77; is that
21 right?

22 A That's correct.

23 Q Did you assist Officer Lewis in making contact with
24 the vehicle?

25 A I did.

1 Q what, if anything, did you observe about the
2 vehicle when you first made contact with it?

3 A I approached on the passenger side of the vehicle.
4 I observed the female driver. There was a dog in
5 the vehicle as well. No other occupants were in
6 the vehicle.

7 Q You were present. At that point in time, Officer
8 Lewis was essentially the lead officer. You were
9 just there to kind of assist at that point in
10 time; correct?

11 A He was the contact officer. I was his back up
12 officer.

13 Q Can you describe for the jury what those roles mean
14 in terms of contact officer and back up officer?

15 A Contact officer, which was Officer Lewis, was
16 speaking with the operator of the vehicle. My job
17 is pretty much to back him up, assist him with
18 whatever he needs while he's making contact with
19 the vehicle operator.

20 Q In terms of this case, you didn't directly interact
21 with Ms. Stroupe all that much?

22 A That's correct.

23 Q You did speak with her from time to time?

24 A Yes, briefly.

25 Q Could you describe your interactions with her, and

1 her demeanor with you?

2 A I don't recall the conversations that we had with
3 one another. She was just speaking to me.

4 Q Was there any concern on your part with respect to
5 what you were observing from Ms. Stroupe in terms
6 of whether she might be suffering from some form
7 of impairment, whether it was a physical impairment
8 or mental impairment, with regards to her ability
9 to operate the vehicle that evening?

10 A She was complaining of back injuries and leg
11 injuries. I did inquire if she was able to drive
12 that vehicle with those injuries, which she said
13 she was fine to drive the vehicle.

14 Q Were you able to determine whether or not you could
15 detect any odor of alcohol coming from her?

16 A I do not recall that.

17 Q Your role in this case was essentially limited to
18 that of cover officer?

19 A That's correct.

20 Mr. Barton - With the court's permission,
21 I would like to play Officer Langley's video
22 at this point in time. It's relatively short.
23 whereupon - Video recording was played.

24 Mr. Barton - Resuming

25 Q officer Langley, at this point in time when

1 Officer Cook comes up, does he essentially take
2 over the investigation at that point in time?

3 A That's correct.

4 Q Other than continuing your role as a cover officer,
5 did you have any other further involvement with
6 this case.

7 A I was just the cover officer. I waited and
8 contacted her husband to come pick up the vehicle.

9 Q So you stayed with the vehicle so it could avoid
10 a tow?

11 A That's correct.

12 Mr. Barton - Please answer any questions
13 Mr. Wellborn has for you.

14 Reporter's Note - Cross Examination by
15 Mr. Wellborn not transcribed.

16 The Court - Mr. Barton, call your next
17 witness

18 Mr. Barton - Office Justin Cook.

19 Whereupon -

20 Officer Justin Cook

21 was called as a witness and first being duly sworn,

22 testified as follows.

23 The Court - State your name.

24 The Witness - Justin Cook.

25 Direct Examination: (By Mr. Barton)

1 Q Officer Cook, please introduce yourself to the
2 jury.

3 A Officer Justin Cook. I'm a police officer on the
4 traffic enforcement unit with the Rock Hill
5 Police Department. I've been employed at the
6 department about three and a half years, and I
7 have nine years total in law enforcement.

8 Q Back on September 13th -- I'm sorry, April 13th of
9 this past year, were you working with the Rock
10 Hill Police Department Traffic Unit?

11 A Yes, sir, that's correct.

12 Q Did you have occasion to come in contact with
13 Ms. Stroupe?

14 A I did. I was contacted by Officer Justin Lewis
15 that he was investigating a possible impaired
16 driver and ask me to come down and further
17 investigate.

18 Q And you spent probably a fair amount of time with
19 Ms. Stroupe out at the roadside as well as back
20 here at the law center, correct?

21 A That's right.

22 Q During that period of time, you were able to
23 speak with Ms. Stroupe?

24 A Yes, sir, that's right.

25 Q Ask her to try to do at least some form of what is

1 commonly called field sobriety testing?

2 A That's right. Normally, we have a standardized
3 battery of tests we do. It appeared to me as well
4 as she told me that she had some possible leg and
5 back problems so I did some different tests.

6 Q You had your encounter at the roadside. She was
7 placed under arrest, brought back here to the law
8 center where she was offered the breath test by you
9 also; is that correct?

10 A That's correct.

11 Q During that period of time, you were interacting
12 with her, again, by speaking with her and asking
13 her to do some testing and then asking her
14 ultimately do the breath test; is that right?

15 A That's right.

16 Q Based on that entirety of your encounter with Ms.
17 Stroupe -- The bottom line is what kind of shape
18 was she in that night?

19 A There was no doubt in my mind that she was too
20 impaired to be operating a motor vehicle.

21 Q What, in kind of outline form, led you to make that
22 determination?

23 A Well, when I first made contact with Officer Lewis,
24 he briefed me on his findings, told me what led to
25 the stop, what his findings were when he was

1 speaking to Ms. Stroupe. I then proceeded to speak
2 to Ms. Stroupe. While I was speaking with her, I
3 did notice she had glassy, blood shot eyes which is
4 consistent with consumption of alcohol. I also
5 noticed that she had the odor of alcoholic beverage
6 coming from her person. We were outside at this
7 time. She was outside the vehicle. I did smell
8 the odor of beverage coming from her. I do think
9 she made the statement that she had one drink at
10 her mama's house. Then I proceeded to do a field
11 sobriety tests before I made my decision to place
12 her under arrest.

13 Q Once she was placed under arrest and brought to the
14 law center, you then are certified -- essentially
15 required to offer her that breath test; is that
16 right?

17 A Yes, sir, that's right.

18 Q In terms of that breath testing, that's in a
19 relatively small area where you're at when you
20 accomplish this test; is that correct?

21 A As far as the room that we're in?

22 Q Yes.

23 A Yes. You have two breath alcohol rooms with
24 Datamaster machines in them. One has a chair for
25 the arrestee, one does not. I like to use the one

1 with the chair so Ms. Stroupe could sit down. That
2 is a relative small room. That's right.

3 Q Can you, to the best of your recollection, kind of
4 describe Ms. Stroupe's demeanor with you in the
5 Datamaster room?

6 A Very talkative. She was very talkative. That's
7 the best way, I guess, I can describe.

8 Q You said you've been with the Rock Hill PD -- Was
9 it two or three years you said?

10 A About three and a half.

11 Q Three and a half. And then prior to that, where
12 was your law enforcement experience at?

13 A I worked for two departments in Maine. One
14 municipal, one county level, and also worked for
15 the United States Border Patrol.

16 Q Let's go back with the recent experience with the
17 Rock Hill Police Department and as member of the
18 traffic unit. How often would you say you come in
19 contact with drivers who may have had something
20 alcoholic to consume and operating a motor vehicle?

21 A Very frequently. That's one of our primary duties
22 is DUI.

23 Q Now, again, you're certainly taught as part of your
24 training that just because someone has had alcohol
25 to drink that's not always going to result in an

1 arrest?

2 A Absolutely not.

3 Q What are you looking at to make that determination
4 between, hey, this person just simply had something
5 alcoholic to drink and this person really ought not
6 be driving?

7 A It's a totality of the circumstances. It doesn't
8 boil down to just field sobriety tests or just the
9 odor of alcohol on the breath. It boils down to
10 everything as a whole. Officer Lewis informed me
11 that her driving was bad. Mr. Rainey called in
12 making a report of her poor driving. She admitted
13 drinking. I did smell alcoholic beverage coming
14 from her person when we were outside. I did notice
15 that her eyes were glassy and blood shot, all which
16 is consistent of alcohol consumption and
17 impairment, and I did conduct three -- four
18 separate field sobriety tests which led me to my
19 decision to make the arrest.

20 Q Once that decision is made, then she's brought down
21 to the law center where it's essentially -- for the
22 most part mandatory that she be offered a breath
23 test absent there being some kind of medical
24 concern or physical impairment that you can give
25 an appropriate breath test.

1 A Yes, sir, that's right.

2 Q Was there anything that occurred in the Datamaster
3 room that would have caused you to change your mind
4 or dispel belief about her impairment?

5 A No. I continued to believe that right on through,
6 that she was too impaired to drive.

7 Q Let's talk some specifics now. I think the jury
8 has had an opportunity to see the video where you
9 initially arrive on scene and meet with Officer
10 Lewis and were briefed by him prior to coming in
11 contact with Ms. Stroupe; is that correct?

12 A Yes, sir.

13 Q As a traffic officer, can you tell the jury, what
14 is your training with respect to trying to make
15 that roadside determination about simply someone
16 who has had something alcoholic to drink, and
17 someone who is potentially impaired as a result of
18 that consumption of alcohol?

19 A In addition to being certified in DUI detection and
20 standard field sobriety testing, I'm also an
21 instructor. I've also attended numerous classes.
22 I've also attended numerous classes including
23 prosecuting impaired drivers and such.

24 Q You've been doing this specifically as a member of
25 the traffic unit now for about three years?

1 A I've been on the Rock Hill Police Department for
2 three and a half years. I've been on the traffic
3 unit two years next month.

4 Q Looking at the time you've spent with the Rock Hill
5 PD, whether as patrol officer or traffic unit
6 officer, how often would you say you came in
7 contact with people who either had something
8 alcoholic to drink on one hand and also have had
9 something alcoholic to drink or some other
10 substances ingested to the point where they are
11 intoxicated in some way, shape or form?

12 A I would say at least once a week.

13 Q Would it be safe to say that you've got probably
14 more than the average person's experience when it
15 comes in terms of making contact with people who
16 have consumed an intoxicant as well as people who
17 are intoxicated as a result of the consumption of
18 that intoxicant?

19 A I would say significantly so, sir.

20 Q Let's talk the specifics of April the 13th. You're
21 briefed by Officer Lewis. You first make contact
22 with Ms. Stroupe. What are you looking at try to
23 make a determination in your initial encounter with
24 Ms. Stroupe at that point in time?

25 A I wanted to get what she had to say about things.

1 I wanted to make sure she understood why she had
2 been stopped by the police. I wanted to make sure
3 -- I wanted to corroborate what Officer Lewis told
4 me as far as the odor of alcohol that she had
5 admitted to drinking, that sort of thing.

6 Q Were you able to corroborate what Officer Lewis had
7 related to you both with respect to that alcohol
8 admission as well as you were detecting alcoholic
9 beverage off of her as well?

10 A Yes, that's correct.

11 Q You mentioned that you not only have been trained
12 to do standardized field sobriety testing,
13 but you're actually an instructor in that. Let's
14 talk a little bit about standardized field sobriety
15 testing. Can you tell the jury a little bit about
16 what that is and how you utilize that?

17 A With standardized field sobriety testing, there's a
18 battery of three tests which are used to help
19 determine someone's level of impairment from
20 alcohol and/or drugs.

21 The first test is the horizontal gaze
22 nystagmus which checks for an involuntary jerking
23 of the eyes. There's several types of nystagmus.
24 The primary one is caused by the consumption of
25 alcohol. The jerking of the eyes can't be

1 controlled. There are several things we look for
2 when we check for that.

3 We also do a walk and turn test where they're
4 required to do nine steps out heel to toe in a
5 straight line, turn around in the prescribed manner
6 and take nine heel to toe steps back, as well as a
7 one leg stand where they are required to stand
8 on one leg for a period of time.

9 As Ms. Stroupe stated she had some problems
10 with her back and leg, I elected not to do the last
11 two and elected to do two different ones that would
12 be better in that situation.

13 Q Let's talk a little bit about that. Part of your
14 training on standardized field sobriety testing,
15 if someone indicates to you that they have either
16 some form of physical abnormality or physical issue
17 that would prevent them from keeping the foot off
18 the ground or walking, what does that mandate to
19 you in terms of field sobriety testing? Can you
20 use that field sobriety test or do you have to
21 find an alternative?

22 A I try to find an alternative one. It wouldn't be
23 fair -- I try to be fair to everyone on the side of
24 the road. If someone indicates to me that they're
25 injured or they're having some sort of physical

1 problems that they wouldn't be able to do the test,
2 the only fair thing to do would be find a different
3 test that they should or could be able to do.

4 Q Are there other times when standardized field
5 sobriety testing is simply inappropriate at the
6 roadside either because of a physical condition
7 that the person might have, age or other types of
8 conditions that can cause you to say, you know,
9 standardized field sobriety testing simply isn't
10 appropriate in this circumstance?

11 A The guidelines that are given is an elderly person,
12 typically 65 years or above, as far as the walk and
13 turn and the one leg stand or obese persons as
14 well.

15 Q So it's not fair to give someone who is
16 significantly overweight or who is elderly these
17 type of tests because they would not be expected to
18 be able to perform them in the same fashion as you
19 or I or someone who is relatively younger or
20 healthier?

21 A That's exactly right.

22 Q So what does that leave you with as options out
23 there at the roadside in order to make that
24 determination, hey, do I arrest this person, do I
25 let them go? What do I need to do with this

1 person?

2 A I elected to give Ms. Stroupe the horizontal gaze
3 nystagmus and vertical gaze nystagmus test, which
4 is checking her eyes. I also elected to give her
5 a finger dexterity test, where she would touch the
6 tips of her fingers with her thumb and required to
7 count in a particular manner. I also had her
8 perform an alphabet test where she was asked to
9 recite certain letters of the alphabet.

10 Q Other than that eye test, the horizontal gaze
11 nystagmus test, the finger tip dexterity test and
12 the alphabet tests, those are what are called
13 non-standardized field sobriety testing?

14 A That's right.

15 Q What's the significance between quote, unquote
16 standardized field sobriety testing and non-
17 standardized field sobriety testing?

18 A With standardized, they're done in a prescribed
19 manner. They're the same every time whether you
20 do it on Tuesday, whether you do it on Saturday.
21 Whether you do it in January, whether you do it
22 in July. Whether you do it during the day, whether
23 you do it during the night. With standardized
24 field sobriety tests, it's the exact same every
25 time. When you deviate from that or give a

1 different test, it becomes non-standardized. The
2 indicators or the clues that we're looking for have
3 not been validated, validated in the laboratory and
4 by researchers.

5 Q Just so the jury can understand, standardized
6 field sobriety testing is testing that is the same
7 year around, 24/7 no matter where ---

8 A Exactly the same every time.

9 Q In addition to that, it is also then studied in
10 some way, shape or form that there is some
11 scientific validity to the results of that
12 standardized field sobriety testings if it's done
13 properly?

14 A That's right.

15 Mr. Wellborn - I'm going to object to
16 that. It's a matter we probably need to take
17 up outside the presence of the jury.

18 The Court - Sure.

19 Whereupon - Jury is excused.

20 The Court - Mr. Wellborn?

21 Mr. Wellborn - Thank you, Your Honor. If
22 we're going to get into scientific validity
23 there's got to be some kind of an inquiry that
24 would pass the State versus Council and State
25 versus Jones standards in South Carolina,

1 which effectively track Daubert versus Merrill
2 Dow. There would have to be testimony
3 regarding peer review, margin of error, who
4 reviewed it, when it was first created, who
5 created it, what kind of studies replicated
6 it. There's a whole a pathway of stuff needs
7 to be addressed by the Court to meet the level
8 of quote, scientific reliability. I certainly
9 have no objection if the officer wants to
10 testify -- You know, he certainly can testify
11 that these are standards. I think he can go
12 as far as saying they've been certified by
13 NHTSA. I think that's perfectly appropriate.
14 But to give it the imprimatur of scientific
15 reliability is a higher evidentiary standard
16 that would require some inquiry. If we're
17 going to go there and Mr. Barton insists on
18 going there, I would like the opportunity to
19 hear the officer before that is accepted by
20 the jury or as taken as fact by the jury.

21 The Court - Mr. Barton?

22 Mr. Barton - My intent is simply to
23 distinguish between ---

24 The Court - That's your intent. What's
25 your question?

1 Mr. Barton - Well, the question is going
2 to be the non-standardized field sobriety
3 testing ---

4 The Court - Why are you getting into
5 testimony about -- I agree with Mr. Wellborn.

6 Mr. Barton - I'm just trying to note that
7 there's ---

8 The Court - I think Mr. Wellborn put it
9 very well. He can say it's a standard.
10 There's a difference between standard and non-
11 standard field sobriety tests. Now he's
12 getting into, in response to your question,
13 into how compelling from a scientific
14 perspective, the results of standardize field
15 sobriety tests.

16 Mr. Barton - Your Honor, I think it's
17 certainly within the officer's realm of
18 knowledge to say that standardized field
19 sobriety testing has been studied and
20 validated ---

21 The Court - You've already said that.

22 Mr. Barton - That's what I was trying to
23 get to is that's the difference between
24 standardized and non-standardized. It
25 specifically has not been studied or

1 validated. That's where I was trying to get
2 to with my next question.

3 The Court - I don't know why we're going
4 there. I don't understand why we're --
5 what we're getting into areas that are of no
6 consequence in this case. Once we got
7 past the reasoning for not giving the
8 standardized field sobriety test is blanket
9 sort of explanation as to the difference
10 between the two, we need to move on and not
11 have him making comments in response to your
12 questions about things that require -- or
13 impact on the rights of the defendant to have
14 hearings concerning his ability to -- offering
15 testimony concerning matters over which I
16 don't think he's qualified, beyond the fact
17 that there's two different sets of tests,
18 and one has withstood scrutiny by the
19 scientific community, or at least by the
20 government, and the other hasn't.

21 Mr. Wellborn - Just to be clear. I would
22 object to withstands scrutiny by the
23 scientific community. I have no objection to
24 saying the government, specifically the
25 National Highway Traffic Safety Administration

1 has ---

2 The Court - I mispoke, Mr. Wellborn.

3 Mr. Wellborn - I know you did, Your
4 Honor. I just want to be clear that my
5 objection is on the record.

6 The Court - That's fine.

7 Mr. Barton - I'm not looking to dwell on
8 this topic whatsoever. I'm just trying ---

9 The Court - He's entitled to object when
10 it's something that's legitimate that he's
11 entitled to object to. I don't know why
12 we're getting into it, but it's not my
13 case. Bring the jury back.

14 Whereupon - Jury returns to courtroom.

15 The Court - Mr. Barton, you may continue.

16 Mr. Barton - Resuming

17 Q Officer, with respect to -- Again, you've mentioned
18 field sobriety testing that you used, one of the
19 tests was the horizontal gaze nystagmus test, which
20 is part of that standardized field sobriety
21 battery, correct?

22 A That's right.

23 Q But you could not use the other two due to Ms.
24 Stroupe's indication of physical impairment?

25 A That's right. I elected not to.

1 Q With respect to the non-standardized field sobriety
2 tests that you use, what's the different in those,
3 to the best of your training and knowledge of
4 field sobriety testing?

5 A The non-standardized field sobriety -- Like I said,
6 I used the finger dexterity test where she's
7 required to touch the tips of her fingers to her
8 thumb in a particular pattern and the alphabet
9 test. They have not been studied by the scientific
10 community in order to determine their validity.

11 Q But they're still a common sense tool that you
12 can use out there at the roadside?

13 A Sure. Absolutely.

14 Q Let's talk a little bit about where this field
15 sobriety testing was taking place. Can you tell
16 the jury, where did you move Ms. Stroupe to to
17 initiate that testing?

18 A Initially when I arrived at the scene, I found Ms.
19 Stroupe and the other officers talking at the back
20 of her car. She was leaning on the rear of her
21 bumper. In order to use my camera and my video and
22 audio system which is standard, I had her walk back
23 towards the front of my car. As I had her lean on
24 -- I believe it was Officer Langley's, the rear of
25 his car.

1 Q So you made, at that point in time, an effort to
2 fairly and accurately record this material with
3 your in car camera and with your audio; is that
4 correct?

5 A Yes, sir, that's right.

6 Q Now, can you tell the jury a little bit about how
7 that video recording and audio recording system
8 works with your vehicle?

9 A Mine is actually standard. In fact, every officer
10 with a marked patrol car at the Rock Hill Police
11 Department is set up the same way. It's set up to
12 automatically start recording audio and video when
13 you activate the blue lights and/or siren.

14 Q Is there a way to activate it without having to
15 activate the blue lights or siren?

16 A You can activate them manually if you like.

17 Q In this case, how did you try to set your vehicle
18 up, vis-a-vis the other vehicles, to conduct this
19 video recording?

20 A I parked several car lengths behind Officer
21 Langley's patrol vehicle so we would have a little
22 bit of room to work and some space.

23 Q Was there any attempt or effort on your part to
24 cause or want this video recording not to be
25 accurate or to be distorted in some way, shape or

1 form?

2 A Of course not.

3 Q To some extent, is this video recording equipment
4 limited in some way, shape or form in terms of its
5 ability to focus in on the subject? You don't have
6 some one sitting behind the camera like ---

7 A Typically no. No.

8 Q How does that camera work in terms of, to the best
9 of your knowledge, trying to focus on the subject
10 where you're giving field sobriety testing?

11 Q Typically, what we do under normal circumstances is
12 when we have a potential DUI case that we're going
13 to make, we do our best to position our car to
14 where it's going to get the best video. Going back
15 to what I said in my previous statement about being
16 a couple of car lengths back, typically that's what
17 we'll do in case they need to walk in a straight
18 line or whatever, that there's plenty of room to do
19 that.

20 Q Now, on occasion will you have people try to assist
21 in the patrol vehicle with the video?

22 A Yes, sometimes we do if we have adequate officers
23 on the scene.

24 Q In this case, that didn't happen. You were just
25 relying on the equipment?

1 A That's right. I turned my recording on, and my
2 camera was facing straight out the front of my
3 windshield.

4 Q Did you have any reason at that point in time to
5 suspect that there was going to be any kind of
6 issues with the quality of the recording that took
7 place?

8 A I had no reason to think that.

9 Q Can you describe for the jury -- You said the first
10 thing you used was the horizontal gaze nystagmus
11 test. Will you tell the jury a little more
12 specifics about that and what you're looking for
13 and what you noticed with Ms. Stroupe?

14 A Yes, sir. With the horizontal gaze nystagmus test,
15 the word nystagmus is the involuntary jerking of
16 the eyes. There are several things that can cause
17 nystagmus, none of them being common. The most
18 common thing that would cause nystagmus is alcohol
19 consumption. When your eyes move from side to
20 side, on a person that's not under the influence,
21 they're smooth. Side to side, they're smooth.
22 There's no jerking. As a person becomes under the
23 influence of alcohol, there becomes a jerking of
24 the eyes which is involuntary. It can't be
25 controlled, and it can't be felt or noticed by the

1 person who is being tested.

2 There are six different clues we're looking
3 for during that test. One of them being the lack
4 of smooth pursuit, that the eyes do not track from
5 side to side smoothly. That would be considered
6 lack of smooth pursuit. That would constitute
7 two clues, being that a person has two eyes.

8 The second clue we're looking for is nystagmus
9 -- I'm sorry. Distinct and sustained nystagmus at
10 maximum deviation. That is when the eyes are all
11 the way looking to one side or the other, and there
12 is sustained nystagmus meaning your stimulus -- I
13 might just be my finger. I bring it all the way
14 out to where the person is looking all the way to
15 the side and hold it for at least four seconds.
16 At that point, the nystagmus would be sustained,
17 and the eyes would continue to jerk.

18 As far as distinct and sustained, nystagmus
19 and maximum deviation, we're also looking for that
20 in each eye. That's two more clues.

21 Finally, we're looking for the onset of
22 nystagmus prior to 45 degrees, which basically
23 means -- The 45 degrees from the center, we're
24 looking for the nystagmus to start, the jerking to
25 start prior to the 45 degree point, if they're

1 looking off to the side. That's each eye, too,
2 for a total of six clues.

3 Q With respect to the testing that was given to
4 Ms. Stroupe, how did she register on the
5 horizontal gaze nystagmus?

6 A I observed all six clues.

7 Q Based on your training and experience, what is the
8 significance of that horizontal gaze nystagmus test
9 at that point in time?

10 A Typically, the more clues that are observed, the
11 more likely that the person is impaired or under
12 the influence of alcohol.

13 Q At this point in time, since you weren't able to do
14 the walk and turn, one leg stand, what was the next
15 test that you used in lieu of those standardized
16 field sobriety tests?

17 A Prior to me administering the next test, I did
18 check her vertical gaze nystagmus as well.

19 Q What's that?

20 A Which is very similar to the horizontal gaze
21 nystagmus except I check for the eyes going
22 vertical and hold my finger for four seconds, my
23 finger or my stimulus, my finger in this case.
24 I did not observe vertical gaze nystagmus.

25 Q Vertical gaze nystagmus, what's the difference

1 between that and the horizontal ---

2 A The vertical gaze nystagmus is caused by extremely
3 high doses of alcohol for that particular person.
4 If that person drinks much more than their body is
5 accustomed to, you may observe vertical gaze
6 nystagmus or there are particular categories of
7 drugs that cause vertical gaze nystagmus as well,
8 and I did not observe that in Ms. Stroupe.

9 Q So she was positive for the horizontal gaze
10 nystagmus test but not for the vertical gaze
11 nystagmus test?

12 A Yes, sir, that's right.

13 Q After those two tests were given, what was the
14 next test that you administered?

15 A Based on her physical problems she was having, I
16 elected to give her a finger dexterity test.

17 Q Describe that for the jury.

18 A What I asked Ms. Stroupe to do is I asked her to
19 start with her pinky and thumb, such as I'm doing
20 right now, and go in this manner, one, two, three,
21 four; four, three, two one, like that, and do that
22 a total of four times. It would look this, one
23 two, three, four; four, three, two, one. One, two,
24 three, four; four, three, two, one. One, two,
25 three, four; four, three, two, one.

1 Q When you gave that test to Ms. Stroupe, do you
2 demonstrate for her the same way you demonstrated
3 for the jury?

4 A Yes, sir, that's right.

5 Q Did she indicate to you that she had any issues or
6 she didn't understand it?

7 A I asked her if she was left or right handed or had
8 any problems with her hands. She stated she had --
9 I believe she stated she had eczema.

10 Q Did she indicate whether the eczema would prevent
11 her from ---

12 A She did not.

13 Q How did she do with the finger dexterity test?

14 A If I recall, she did poorly. I believe she counted
15 out of order and touched her finger tips out of
16 order.

17 Q The next thing used was asking her to the alphabet;
18 is that right?

19 A Yes, sir, that's right.

20 Q Can you describe for the jury how you go about
21 testing someone to give you the alphabet or portion
22 of the alphabet?

23 A Yes, sir. I always ask their level of education to
24 determine that they would know the alphabet or if
25 not familiar with it, I don't want to ask them to

1 do something that couldn't be done. Ms. Stroupe
2 indicated that she had a high enough level of
3 education and that she did know the alphabet. I
4 asked her to recite the alphabet from A to Z
5 without singing it, which she did successfully.

6 I then asked her to recite the alphabet
7 starting with the letter D and ending with the
8 letter X. I would have to refer to my report to
9 see the results on that, but I do recall it was
10 very poor.

11 Q Why would you ask her to recite the alphabet A
12 to Z and then go D to X? What are you looking for?
13 What's the difference in terms of asking to do just
14 a normal recitation of the alphabet and then a
15 recitation of a portion of the alphabet?

16 A I want to be sure that they -- Even if they say
17 they know the alphabet, I want to make sure that
18 they do. Ms. Stroupe indicated and demonstrated
19 that she did know the alphabet. I then proceeded
20 to ask her to recite the D through the letter X.
21 Start with the letter D, end with the letter X.
22 She could not do so.

23 Q You said your report would reference how she
24 performed on that?

25 A That's correct.

1 Mr. Barton - I will show Mr. Wellborn.

2 Mr. Barton - Resuming

3 Q Officer, let me show you the portion of your
4 report that I think reflects the alphabet
5 testing.

6 A Yes, sir, that's right.

7 Q What does your report reflect with respect to how
8 Ms. Stroupe was able to do -- When you asked her to
9 do D through X?

10 A I asked Ms. Stroupe to recite the alphabet starting
11 with D and ending with X. Ms. Stroupe stated,
12 D, F, U, V, W, X, Y, Z.

13 Q Was there any other field sobriety testing done out
14 there at that time with respect to Ms. Stroupe?

15 A No, sir, that was the end of it.

16 Q At that point in time, did you have to make a
17 determination as to whether or not to arrest
18 Ms. Stroupe?

19 A I did. I did elect to place Ms. Stroupe under
20 arrest.

21 Q She was told she was under arrest for DUI at that
22 point in time?

23 A That's right.

24 Q What led to the decision making process there at
25 the roadside to make that determination that you

1 believed she was impaired as a result of some form
2 of intoxicant?

3 A Again, it doesn't just come from the field sobriety
4 testing. It's a totality of everything. Beginning
5 with the 911 call from Mr. Rainey calling in saying
6 what he saw as far as operation of her vehicle,
7 listening to what Officer Lewis told me about her
8 pulling into almost the center of intersection or
9 well into the intersection at a red light. She
10 had admitted to drinking. I did smell alcoholic
11 beverage coming from her person, as did Officer
12 Lewis. Her eyes were blood shot and glassy, which
13 I observed. In addition, there was also the
14 field sobriety tests. I determined that she was
15 impaired.

16 Q Let's talk just a moment about some of the other
17 things that were taking place with Ms. Stroupe at
18 the time she was operating her vehicle. One in
19 particular is the small dog; is that right?

20 A That's right.

21 Q With respect to the dog, at that point in time, you
22 didn't really have a whole lot of information about
23 the dog other than it was present with Ms. Stroupe
24 in the vehicle; is that right?

25 A That's right. I never saw the dog.

1 Q Did Ms. Stroupe -- At some point in time, I think,
2 indicated that the dog was presenting problems to
3 her with respect to the vehicle; is that right?

4 A If she said that to me, I don't recall, sir.
5 She may or may not have. I don't remember.

6 Q But, you don't know a whole lot about that dog
7 other than it was present in the car with her.
8 And, I think at some point in time, and I'm not
9 sure whether you're present when she says this,
10 but I think the dog's name is Precious; is that
11 right?

12 A I believe so.

13 Q In terms of the dog -- In terms of how well behaved
14 or how misbehaved it is, you have no idea?

15 A I could not testify to that. I just don't know.

16 Q And you wouldn't know, other than potentially --
17 other than statements she made, you have no way
18 of verifying that in any way, shape or form?

19 A I would not.

20 Q Once Ms. Stroupe was placed under arrest, where was
21 she placed at that point in time?

22 A I handcuffed her in front of her person, and I
23 walked her towards the front of my car where she
24 was read her Miranda rights as per protocol.

25 Q What took place at that point?

1 A I placed her in the rear seat of my patrol car.

2 Q Did you stay out there at the scene for very
3 long?

4 A Just a few minutes. We worked on making some
5 arrangements to get her car picked up. I then
6 drove her into the Rock Hill Police Department.

7 Q With respect to making arrangements to get the
8 car picked up, what are your options when someone
9 is placed under arrest or taken into custody and
10 there is no one else there to drive the vehicle?

11 A Typically what we'll do, we'll try to get someone
12 to come pick up the car, if possible, if someone is
13 close. If someone is available, we'll have them
14 come down and pick up the car, as long as they are
15 sober and a licensed driver and available to come
16 pick up the car.

17 Ms. Stroupe's husband was willing to do that.
18 He was close by. He was, I would say at the most,
19 a couple of miles away. Officer Langley waited for
20 him to pick up the car. I had left with Ms.
21 Stroupe at that point.

22 Q If someone had not been able to come, what is the
23 next option?

24 A It would have been towed.

25 Q So there would be a cost for the towing?

1 A There would be a cost associated with it.

2 Q So Ms. Stroupe was put in the back of your patrol
3 vehicle. Where was she brought to after she was
4 placed in the back of your patrol vehicle?

5 A I brought her to the Rock Hill Police Department
6 which is located at the Law Center, 120 East
7 Black Street.

8 Q Essentially between us and the library?

9 A That's right.

10 Q What's the protocol or the training required for
11 you once someone has been placed under arrest in
12 terms of the next step in this process?

13 A I will offer them a breath test at the police
14 department. We have two possible rooms to do that.
15 one inside of our jail, one located in the rear
16 hallway. The one I chose to use is the one located
17 in the rear hallway because it had a chair for
18 Ms. Stroupe to sit down. A chair is not available
19 at the other room.

20 Q With respect to the breath testing, can any officer
21 do that? Is there some training required to offer
22 a breath test?

23 A There is training that's required. You are
24 required to be certified in that training once
25 every two years.

1 Q Back on this date of April, 2013, were you
2 certified to operate the Datamaster at that point
3 in time?

4 A Yes, sir. I've been certified since I first began.
5 I've never had a lapse.

6 Q Can you tell the jury just a little bit about how
7 that Datamaster process works in terms of the
8 protocol you follow when you're administering
9 someone a breath test?

10 A Absolutely. When they're brought into the room,
11 there's a mandatory 20 minute waiting period that
12 has to be taken. I have to observe the subject for
13 20 minutes and make sure they do not drink, do not
14 eat, do not vomit, do not belch, anything like
15 that, that could affect the machine.

16 The purpose of the 20 minute waiting period
17 is also to get rid of any residual alcohol that
18 might be in their mouth. It's been determined
19 that over 20 minutes the residual alcohol will
20 dissipate, and it is appropriate to do the test
21 at that time. During the 20 minutes, obviously,
22 there's some paperwork and things like that are
23 gathered.

24 Q Ms. Stroupe is given an advisement about taking the
25 test and not taking the test and the potential

1 ramifications one way or another?

2 A That's right. Those are called implied consent
3 rights.

4 Q That was reviewed with her prior to giving a breath
5 sample?

6 A That's right.

7 Q She is given a copy of that?

8 A Yes, sir.

9 Q And a copy is maintained by the police to give
10 to the court?

11 A That's exactly right.

12 Mr. Barton - I'm not sure if it's got any
13 marks on it.

14 Mr. Wellborn - No objection.

15 The Court - Number 4.

16 Whereupon - Document marked as City's Exhibit
17 4.

18 Mr. Barton - Resuming

19 Q Officer Cook, let me show you what's been marked
20 as Exhibit 4 and just ask if you can identify that
21 document?

22 A Yes, sir. This is the copy of the Advisement of
23 Implied Consent Rights that I read and provided to
24 Ms. Stroupe.

25 Q To the best of your recollection did she have

1 any kind of specific qualms about the testing
2 itself?

3 A I don't recall that she did.

4 Q The protocol that you follow then is to go through
5 some steps prior to that testing; is that right?

6 A Yes, sir.

7 Q Can you tell the jury, what's the first thing that
8 someone is advised when they walk into the
9 Datamaster room or shortly after they walk into the
10 Datamaster room?

11 A The very first thing they're advised when they
12 walk into the room is that the entire process is
13 audio and video recorded.

14 Q At some point in time, I believe you're provided
15 with the ability to get that audio and video?

16 A Yes, the results are printed out at the end
17 regardless of whether it's a refusal or whether
18 they provided a sample. They will get a copy of
19 their results and there's a code on the bottom that
20 they can go to the SLED website and view their
21 video.

22 Q So they have the ability to at some point in time
23 later to pull that up or provide that information
24 to someone who may be assisting?

25 A That's right.

1 Q So Ms. Stroupe was told that she was being
2 audio/video recorded?

3 A Yes, sir.

4 Q What's the next step in that process?

5 A At that that point, I have to acquire pertinent
6 information and enter it into the machine, such as
7 her name, her address, her driver's license
8 number and the location of the arrest, the arrest
9 time, that sort of thing.

10 Q You physically use like a keypad to enter the
11 information?

12 A That's exactly right.

13 Q Where does the information come from? Does it
14 come from the driver's license or from Mrs.
15 Stroupe or a combination thereof?

16 A A combination thereof. Typically, we use a
17 driver's license or an ID card. I always confirm
18 that the information is still current.

19 Q Sometimes people move around from location to
20 location, so there may not be a current address on
21 the license?

22 A That's right.

23 Q You told her she was being audio/video recorded.
24 You began to put some biographical information into
25 the machine. Does the machine prompt you as you

1 go along through this process?

2 A It does. There's also a clock on the bottom
3 basically counting down from 20 minutes to zero.
4 At zero, the machine will start warming up and
5 testing itself. That takes approximately a minute
6 or a minute and half.

7 Q In Ms. Stroupe's case, you had given her the
8 audio/video recording warning, you've gotten
9 the biographical information, what's the next
10 step in the process before ---

11 A The printer will print out two copies of this,
12 which is the Implied Consent Rights. One is for
13 me; one is for the subject. I provided Ms. Stroupe
14 her copy, and I will proceed to read aloud the
15 Implied Consent Rights.

16 Q Is there a check list at the top of the Implied
17 Consent warning that you follow also?

18 A There is.

19 Q What is the first thing on top of that?

20 A The first thing on that was will the test be
21 video recorded.

22 Q And you indicated to her that it would be?

23 A That's right.

24 Q What's the next check on that?

25 A To provide the subject with a written copy of

1 the following advisement.

2 Q And that was done in this case?

3 A That was done.

4 Q What is the next check in that process?

5 A To go ahead and read the Implied Consent Rights to
6 the subject out loud.

7 Q And that was done?

8 A That was done.

9 Q What is the next step in the process?

10 A After the Implied Consent Rights are read to the
11 subject, it asks you to check the subject's mouth
12 and remove any foreign material.

13 Q Did you ask Ms. Stroupe that question?

14 A I did.

15 Q Do you recall whether she gave you a positive
16 response or not?

17 A She opened her mouth, and I didn't observe any
18 foreign material.

19 Q There were no dentures or anything like that?

20 A I don't recall there being anything like that.
21 Typically what we're looking for is dentures or
22 tongue rings or anything that's not supposed to be
23 there.

24 Q At that point in time, is that when you begin
25 waiting 20 minutes or is there another check?

1 A Then it requires a little bit more biographical
2 data.

3 Q So you enter some additional information?

4 A Then the subject is observed for the rest of the
5 20 minute waiting period.

6 Q In this case, did you follow that protocol?

7 A Yes, sir.

8 Q And it was also recorded as well?

9 A That's right.

10 Q Once that 20 minute waiting period ended, can you
11 describe to the jury the next step in the process
12 in terms of how the machine prepares itself for
13 an individual giving a sample?

14 A The machine will proceed to warm up and test
15 itself. Like I said, that takes approximately
16 one to two minutes, maybe a minute and half
17 approximately. At the end of that, it will
18 prompt for the subject to blow.

19 Q Did you instruct, at that time, Ms. Stroupe what
20 she should do and how she should supply a sample?

21 A During the waiting period, I always instruct the
22 subject, and I always instruct everybody the same
23 way. I take a brand new mouthpiece which is still
24 enclosed in a plastic wrapper. I instruct them
25 that I'm going to put it on the end of that tube

1 and when the machine starts beeping you're going to
2 blow into the tube, and I need them to put
3 sufficient air into the machine for it to produce
4 a reading.

5 Q With respect to Ms. Stroupe, did you follow that
6 protocol?

7 A Yes, sir.

8 Q Was she able to provide a sufficient sample?

9 A She did provide a sufficient sample.

10 Q Ultimately, once that is done, does the machine do
11 anything further or does it just simply give you a
12 result?

13 A It will give you a result. It will print out
14 two copies, one for myself and one for her.

15 Q Once the subject sample is given, does the machine
16 continue to go back and check itself out?

17 A No, that's the end of the test.

18 Mr. Barton - I'd like to get this marked.

19 I believe it's number 5.

20 Mr. Wellborn - Without objection.

21 Whereupon - Document marked as City's

22 Exhibit 5.

23 Q Officer Cook, I'm going to show you what's been
24 marked as City's Exhibit 5 that's in evidence
25 at this point. I'll just ask if you can identify

1 that please, sir?

2 A This is a copy of Ms. Stroupe's results from the
3 Datamaster.

4 Q What do those results reflect?

5 A The blood alcohol content.

6 Q That's measured by a breath sample; is that right?

7 A That's exactly right.

8 Q What was that blood alcohol content?

9 A Her blood alcohol content -

10 Mr. Wellborn - I'm going to object as to
11 the blood alcohol content. It's a breath
12 alcohol level. I think Mr. Barton would
13 stipulate that my client's blood was never
14 drawn.

15 The Court - I sustain your objection.
16 Rephrase your question.

17 Mr. Barton - Resuming

18 Q With respect to the blood alcohol level that's
19 measured by her breath sample, what was that?

20 A The results indicated a 0.23 percent.

21 Q Within South Carolina, are you familiar with
22 what the inference level for an individual with
23 regards to the presence of alcohol?

24 A Yes, sir. In South Carolina, the inference level
25 would be .08 percent.

1 Q Now, once that testing was complete, was Ms.
2 Stroupe given copy of the results?

3 A Yes, sir.

4 Q And that contains the information that allows her
5 to go back and watch the video later if ---

6 A That's right. There is a code and instructions on
7 how to obtain a copy of the video on the bottom
8 of this Implied Consent. I'm sorry. Not the
9 Implied Consent, on the bottom of the results.

10 Q With respect to the Datamaster instrument itself,
11 did it appear that there were any problems with
12 the functioning or operation of the Datamaster?

13 A No, sir. It appeared to be working correctly.

14 Q And you're not trained on necessarily the physical
15 operation or the engineering of the machine, are
16 you?

17 A No, sir, I'm trained on how to use it.

18 Q Based on your training, did you have any indication
19 that that machine was functioning in any other
20 manner than it was ---

21 A No, sir. Typically, if there is a problem, there
22 will be an error code that will pop up and say the
23 test could not be completed for a particular
24 reason. That did not occur on this test.

25 Mr. Barton - With the Court's permission,

1 I would like to play Officer Cook's
2 roadside video.

3 Whereupon - Video recording was played.

4 Mr. Barton - Resuming

5 Q Officer Cook, with respect to the transport of
6 Ms. Stroupe from Celanese or Celriver, you can
7 see there's a period of time where some of it is
8 audible and sometimes it's not. Can you just
9 describe for the jury what you were hearing Ms.
10 Stroupe say and kind of what her demeanor was
11 at that point in time?

12 A Kind of an excited up and down demeanor. A lot
13 of it, she appeared to be crying, and then she
14 seemed to get kind of upset saying her husband
15 was going to kill her. Then she seemed to get
16 distracted about wondering if that was the place
17 where she pays her taxes. Kind of up and down
18 throughout the transport.

19 Q There are multiple references to her dog. Do
20 you recall that?

21 A I do.

22 Q What was the gist of her situation with the dog?

23 A She was saying that her dog was jumping in her
24 lap or interfering with her driving somehow.

25 Q And you have no way of knowing whether that was

1 correct one way or another?

2 A I don't. That all occurred prior to my arrival.

3 Q The next step in this process is then where she
4 is going to be offered the breath test by you in
5 the Datamaster room; is that right?

6 A That's right.

7 Mr. Barton - With the Court's indulgence,
8 I'm going to swap out and put that disc in
9 next.

10 Whereupon - Video recording was played.

11 Whereupon - A recess was taken.

12 The Court - Ladies and Gentlemen, I'm
13 going to send you home and ask you to come
14 back here.

15 There are matters that the attorneys
16 have to review on this tape before it is
17 played for you. It may involve some
18 redactions that either they agree to or I
19 may have to rule on. It's got to be done in
20 a way that we're sure things that shouldn't
21 be seen are not seen.

22 Next question. I don't want any of you
23 to be reluctant to be honest with me about
24 my question. Can everybody be here by
25 eight thirty so we can get an early start?

1 (No response)

2 The Court - I'm going to excuse you
3 with the Court's thanks for your service
4 today. Keep your badges. Be back here
5 promptly at eight thirty. We'll try to
6 get underway as soon we can.

7 Don't go start watching reruns of
8 Law and Order or doing research on your
9 computers. It's a violation of your oath.
10 Kick back and relax and be here promptly
11 at 8:30. Thank you.

12 Whereupon - Trial was recessed at
13 4:05 P.M.

14 * * * * *

15 P R O C E E D I N G S

16 (Resuming at 8:30 a.m. on January 24, 2013)

17 The Court - Mr. Barton?

18 Mr. Barton - I think we were at the point
19 where were getting ready to play this for
20 the jury.

21 Whereupon - Video recording was played.

22 Mr. Barton - Resuming

23 Q Officer Cook, once you completed your time in the
24 Datamaster room, where was Ms. Stroup taken at
25 that point in time?

1 A Brought her back to the Rock Hill Police Department
2 Jail.

3 Q And she would have been booked in at that point?

4 A That's correct.

5 Q Once that was complete, was that essentially the
6 end of this case for you at that point?

7 A Yes.

8 Q Other than coming to court?

9 A That's right.

10 Q Overall that evening, how much time would you
11 say you spent with Ms. Stroupe?

12 A I'd probably estimate an hour.

13 Q Within that hour period of time, do you have an
14 opinion as to whether or not Ms. Stroupe was
15 under the influence of any form of intoxicant?

16 A Absolutely I believe she was.

17 Q Do you think she should have been operating a
18 motor vehicle?

19 A Absolutely not.

20 Q Ms. Stroupe initially claimed at the roadside to
21 have consumed some alcohol; is that correct?

22 A That's right. On the roadside, she stated she had
23 one drink at her mother's house.

24 Q In the Datamaster room, did that change in some
25 way, shape or form?

1 A Yes. I believe she stated at least a couple of
2 times that she had two mixed drinks at her
3 mother's house.

4 Q And you don't know what size those mixed drinks
5 may have been. You don't know how strong they
6 may have been poured. You just simply know
7 what she stated?

8 A That's right. She never indicated.

9 Mr. Barton - Your Honor, if I can review,
10 I believe all the exhibits are in evidence.
11 If they're not -- I think everything has been
12 moved into evidence.

13 The Court - My records reflect that all
14 five exhibits have been admitted without
15 objection, the 911 call, the videos of all
16 three officers, the BA video, the Implied
17 Consent and the BA test results. Those are
18 the five I have.

19 Mr. Barton - Officer Cook, please answer
20 answer any questions Mr. Wellborn may have for
21 you. Thank you.

22 The witness - Yes, sir, thank you.

23 The Court - Cross Examination.

24 Cross Examination: (By Mr. Wellborn)

25 Q Officer, I believe you wrote the incident report on

1 this case; correct?

2 A Yes, sir, I did.

3 Q Let me talk to you about incident reports. They're
4 something that you're trained to write, correct?

5 A That's right.

6 Q The purpose of an incident report is to memorialize
7 what happened, when it happened, what you saw;
8 correct?

9 A That's right.

10 Q And they're important documents because they
11 not only keep a record of what you saw, but those
12 records get used by other people; right?

13 A Sure.

14 Q Judges?

15 A Absolutely.

16 Q Prosecutors?

17 A That's right.

18 Q Jurors?

19 A Yes, sir.

20 Q And you're trained to write those through, not only
21 the Criminal Justice Academy, but also through the
22 Rock Hill Police Department; correct?

23 A That's right.

24 Q And you're trained that it's important to be
25 accurate; correct?

- 1 A Sure. Absolutely.
- 2 Q And you were in this case; correct?
- 3 A I believe I probably was. I'm as accurate as I can
4 be.
- 5 Q Sure. So your incident report one of the lines,
6 and I think it's pretty close towards the top. Do
7 you have a copy of your incident report with you?
8 You may wish to refresh your recollection as I
9 go along, and I don't want to misstate anything.
10 That's why I'm suggesting that perhaps you look
11 at it.
- 12 Now, there was a dispatch call that went out
13 on April 13, 2013, related to this incident;
14 correct?
- 15 A Yes, sir, that's right.
- 16 Q And the time that the dispatch call was made or
17 came to you was 20:23 which would be 8:23; correct?
- 18 A Yes, sir. Looking back, I believe that's incorrect
19 on my report. It believe it actually came in about
20 7:30 in the afternoon.
- 21 Q But you typed this report; correct?
- 22 A I did. I typed 20:30 hours which would be 8:30
23 which is incorrect.
- 24 Q That would be the time you arrived at the scene is
25 what ---

1 A It was typed in error. I should have typed 19:30
2 hours.

3 Q So you were an hour off on your incident report is
4 what you're saying?

5 A That's right. That's a typo on my part.

6 Q Because that would create some problems with the
7 timing later if you're an hour off on your incident
8 report, correct?

9 A It could, sure.

10 Q Well, for instance, it would be physically
11 impossible to give somebody their Implied Consent
12 Warnings at the Rock Hill Police Department at
13 8:25 if you didn't even arrive at the roadside
14 until 8:30; right?

15 A That's right.

16 Q That would be an accuracy problem. Would you
17 agree?

18 A That's right.

19 Q No big deal. Everybody makes mistakes; right?

20 A I would believe so.

21 Q Were you under any particular pressure when you
22 were typing this incident report to get it done
23 fast?

24 A No more pressure than usual, sir.

25 Q Well, I mean, how much is your usual pressure to

1 get it done?

2 A I try to get it done as promptly as possible. I
3 have other duties, of course.

4 Q Sure. Did you fill this incident report out that
5 day or the next day?

6 A I always fill it out that night.

7 Q That night. Okay.

8 A Before I go home.

9 Q So while this memory was fresh in your mind, you
10 filled out the incident report?

11 A Yes, sir.

12 Q I noticed you put down time of arrest at 8:50 p.m.
13 So that would also be inaccurate; is that correct?

14 A Yes, sir. My times were incorrect on this
15 report. I do admit to that.

16 Q We'll come back to some other portions of the
17 report perhaps. Now, when you met Brenda, after
18 speaking with her, you gave her some field sobriety
19 tests; correct?

20 A Yes, sir, that's right.

21 Q And you talked about those to great extent
22 yesterday as I recall.

23 A Yes, sir.

24 Q And those are also on the videotape?

25 A That's right.

1 Q The first tests you gave Brenda was standardized
2 field sobriety tests as you described it. That was
3 the horizontal gaze nystagmus test; correct?

4 A Yes.

5 Q I'd like, if you don't mind, to spend to time with
6 me discussing how that test is run, according to
7 the standards.

8 A Okay.

9 Q And you follow the standards; correct?

10 A I try to.

11 Q Let me ask you this. In this particular case, did
12 you follow the standards or did you not follow
13 the standards?

14 A I believe I followed the standards.

15 Q That's what I'm asking. So before you can give
16 a horizontal gaze nystagmus test, there are certain
17 things you have to do. You mentioned yesterday the
18 six clues.

19 A That's right.

20 Q Before you can start looking for those six clues,
21 there are other things that you are required to
22 look for to even see if it's appropriate to give
23 the test; correct?

24 A That's right.

25 Q Let's take a second on that. I believe the first

1 thing that you're supposed to do is ask somebody if
2 they have any problems with their eyes or any
3 potential injuries that might affect the test,
4 correct?

5 A That's right.

6 Q Did you do that with Ms. Stroupe?

7 A Well, we had -- Prior to that, we had discussed
8 problems with her back and legs. So I had already
9 made the determination at that point that I wasn't
10 going to conduct the walk and turn and the one leg
11 stand test.

12 Q My question is, did you ask any questions relating
13 to her eyes ---

14 A I did not, no.

15 Q All right. So moving along, the next thing you're
16 supposed to test for or look for is what's called
17 resting nystagmus, right?

18 A Yes.

19 Q Can you tell us what resting nystagmus means?

20 A Resting nystagmus is -- some people have it when
21 the eyes are not moving from side to side or up and
22 down. When the eyes are just looking ahead,
23 there's an involuntary jerking of the eyes. That's
24 typically caused by a head injury.

25 Q It can also be a neurological disorder ---

1 A Or a neurological disorder. That's right.

2 Q You mentioned, in fact, other kinds of nystagmus
3 yesterday that are unrelated to the consumption of
4 alcohol. Can you tell us, based on your training,
5 those other types other than what we've talked
6 about?

7 A There's numerous, numerous types of nystagmus.

8 Q Approximately -- In fact, there are greater than
9 20 types of nystagmus ---

10 A I believe there are. I believe there's well
11 in excess of that.

12 Q That are unrelated to consumption of alcohol;
13 correct?

14 A That's right.

15 Q That's why it would be important to ask to somebody
16 if they have a history of head injuries,
17 neurological issues, other things that might, in
18 fact, cause this nystagmus.

19 A That's the reason for checking for resting
20 nystagmus and equal pupil size.

21 Q And asking them questions like, do you have any
22 previous head injuries or neurological issues;
23 right?

24 A Typically, that's not done on the side of the road,
25 asking them about head injuries, unless you observe

1 that there is resting nystagmus or equal pupil
2 size.

3 Q So you look for resting nystagmus, correct?

4 A That's right.

5 Q And you were able to observe there was no resting
6 nystagmus?

7 A I did not observe any resting nystagmus.

8 Q Now, when we watched the video yesterday, and
9 you've seen this video multiple times; correct?

10 A That's right.

11 Q You would agree there's no way to determine what's
12 going on with either of her eyes by looking at that
13 video because you simply can't see her eyes at all,
14 can you?

15 A Not on that video, no, sir.

16 Q In fact, her face is just a blur, isn't it?

17 A I did what I had to do on the side of the road
18 which was lean her against the back of Officer
19 Langley's car.

20 Q Without going into why her face is a blur, her
21 face is a blur on the video; correct? You would
22 agree?

23 A I guess so.

24 Q If you don't agree, we could cue the video up so we
25 can see it again, but I believe you've testified

1 under oath about this before, correct?

2 A That's right.

3 Q Before you agreed that the face was a blur. Do you
4 disagree at this point?

5 A I don't disagree with that.

6 Q So since you don't disagree, I assume you agree
7 that her face was a blur on the video; correct?

8 A I agree.

9 Q And since you agree that her face was a blur, you
10 agree that you cannot see either of her eyes?

11 A No, sir. That's correct.

12 Q So we, in the courtroom, would have no way of
13 determining whether or not, by looking at that
14 video, whether she had resting nystagmus or not?

15 A That's right.

16 Q And we, in the courtroom, would have no way by
17 looking at the video to determine whether or not
18 her pupil size were equal or not?

19 A That's correct. That's typical of all -- almost
20 every DUI stop, since the eyes cannot be seen on
21 camera. That's the reality of the way the camera -
22 --

23 Q I understand that's your position.

24 Mr. Barton - Objection to the editorial
25 comment on the end of that.

1 The Court - Sustained. Officer, also,
2 try to listen to question and just answer
3 those.

4 The Witness - Yes, sir.

5 Mr. Wellborn - Thank you, Your Honor.

6 Mr. Wellborn - Resuming

7 Q So the next thing you would look for before you
8 give somebody a horizontal gaze nystagmus test is
9 to make sure that their eyes track equally, too,
10 correct?

11 A Yes, sir, that's right.

12 Q And you, of course, did that?

13 A Yes, sir, that's right.

14 Q And you were able to determine that her eyes did or
15 did not track equal?

16 A They tracked equal.

17 Q And we would have no way of being able to see that
18 on the video either because her face is a blur, and
19 we can't see her eyes; correct?

20 A That's right.

21 Q Now, once you've determined all those things, then,
22 based on your training, it is appropriate, if you
23 so choose, to give a horizontal gaze nystagmus
24 test; correct?

25 A That's right.

1 Q You're not required to give a horizontal gaze
2 nystagmus test; are you?

3 A It's part of the standardized battery. No, sir,
4 we're not required to.

5 Q For instance, the walk and turn and the one leg
6 stand are also part of the standardized batteries,
7 but you made a very sensible decision not to give
8 those tests in this case; correct?

9 A That's right. I felt it was prudent in this case.
10 Q Because you're not required to, right?

11 A That's right.

12 Q Now, when you gave the horizontal gaze nystagmus
13 test to Brenda, the first thing you looked for
14 was smooth pursuit or lack of smooth pursuit;
15 correct?

16 A Yes, sir, that's right.

17 Q And to do that, you make four passes. You test her
18 right eye twice and her left eye twice; correct?

19 A That's, actually, two passes, yes, sir.

20 Q But you do each eye actually twice; don't you? You
21 just don't go one, two. It's one, one, two, two.

22 A Yes, sir, that's correct.

23 Q So, it's four passes total, two passes for each eye
24 for that first clue, which is smooth pursuit;
25 correct?

1 A One pass constitutes checking each eye one time, so
2 out and back; out and back would constitute one
3 pass.

4 Q Then you do it again?

5 A Yes, sir, that's right.

6 Q Again, you're checking each eye twice.

7 A Yes, sir.

8 Q Your pen is moving four times, because you stop in
9 the middle. You don't just go straight across,
10 right?

11 A You can stop briefly or you can keep going.

12 Q Either way, you check each eye twice?

13 A Yes, sir, that's right.

14 Q And you were able to determine, looking at her
15 eyes, that her eyes lacked smooth pursuit?

16 A Yes, sir, that's right.

17 Q We would not be able to see that no matter how many
18 times we played the video because you've already
19 testified we can't see her eyes on the video at
20 all.

21 A That's right.

22 Q Because her face is a complete blur, correct?

23 A Correct.

24 Q The next thing you tested for was onset of
25 nystagmus -- actually not onset. You tested for

1 nystagmus at maximum deviation.

2 A Yes, sir, I tested for distinct and sustained
3 nystagmus at maximum deviation.

4 Q And to get to maximum deviation, you basically take
5 your finger or your pen, whatever you're using, and
6 you move it all the way out to where there's just a
7 tiny bit of the whites of the eyes in somebody
8 showing; correct?

9 A Yes, sir.

10 Q We would have no idea of knowing whether you were
11 in that position or not, since we can't see her
12 eyes at all as her face is a blur; right?

13 A You can't see her eyes in the video. That's right.

14 Q So we would have no way of knowing whether, in
15 fact, you were in that position when you were
16 testing for maximum deviation; correct?

17 A Can you repeat that?

18 Q Sure. Those of us who are watching the video
19 wouldn't be able to tell whether or not you were at
20 maximum deviation or not because her face is a blur
21 on the camera; right?

22 A Well, in the video, sir, you can't see her eyes.
23 You can see me. You can see my arm go out the
24 distance which -- pretty much my arm's length would
25 be maximum deviation for a typical person.

- 1 Q But we're talking about Brenda Stroup, right?
- 2 Do you agree?
- 3 A Yes, sir.
- 4 Q And not every person is the same. You would agree?
- 5 A That's right.
- 6 Q And what you're supposed to look for when you're
- 7 testing that is whether or not you can see the
- 8 whites of her eyes still when you're at maximum
- 9 deviation; correct?
- 10 A That's right. At maximum deviation, the whites of
- 11 the eyes on one side all but disappear.
- 12 Q We can't tell whether that's occurring or not on
- 13 this video camera since her face is blur; correct?
- 14 A That's right. You cannot see her eyes on video.
- 15 Q So we can't tell whether you were at maximum
- 16 deviation other than, of course, your testimony,
- 17 correct?
- 18 A That's right.
- 19 Q Fair enough. And you tested twice in each eye for
- 20 maximum deviation, correct?
- 21 A That's right.
- 22 Q Now, it was distinct and sustained. How long does
- 23 the nystagmus have to be visible to you to
- 24 constitute sustained according to your training?
- 25 A At least four seconds.

1 Q Were you able to see sustained nystagmus in each
2 eye twice when you tested her?

3 A Yes.

4 Q Which, of course, we wouldn't be able to see on the
5 video camera that was played in court because her
6 face is a blur; correct?

7 A Her face is a blur on the camera. Yes, sir, it is.

8 Mr. Barton - Your Honor, if I can, I
9 think it's been established that the video in
10 this case is such that you cannot accurately
11 see Ms. Stroupe's eye. Mr. Wellborn can do
12 any number of variations of that same
13 question. I think the answer is going to be
14 the same and has been the same. It's
15 repetitive at this point.

16 The Court - We've only got one left. I'm
17 going to overrule your objection and let
18 Mr. Wellborn continue.

19 Mr. Wellborn - Thank you.

20 Q Again, you would agree that at maximum deviation
21 we wouldn't be able to determine whether the
22 nystagmus was sustained four seconds because we
23 can't see the eyes at all, right?

24 A You cannot see the eyes on video, that's correct.

25 Q Which means we can't see whether the nystagmus is

1 sustained, correct?

2 A Can you rephrase that.

3 The Court - I want you to listen to his
4 question. He's asking a question that is a
5 yes or a no answer. Would you please listen
6 to his question. Mr. Wellborn, repeat the
7 question.

8 Mr. Wellborn - Resuming

9 Q Because you can't see eyes, which you've agreed to,
10 on this tape, there's no way that we in the
11 courtroom can see whether that nystagmus was
12 sustained or not, can we?

13 A Yes, sir, that's correct.

14 Q Thank you. Last section of the horizontal gaze
15 nystagmus test. That would be onset of nystagmus
16 prior to 45 degrees; correct?

17 A Yes, sir, that's right.

18 Q To do that, you have to move your finger or
19 whatever you're using from the center of her
20 body, or presumably her nose; correct?

21 A Yes, sir.

22 Q Twice in each eye; correct?

23 A Yes, sir.

24 Q To no farther than 45 degrees from the tip of her
25 nose; correct?

1 A Yes, sir, that's right.

2 Q When you find that spot, you're supposed to stop;
3 aren't you?

4 A Yes, sir, that's right.

5 Q And hold it there.

6 A Right.

7 Q Where did you first notice nystagmus in her right
8 eye?

9 A I noticed it prior to 45 degrees. I'm unable to
10 recall exactly at what ---

11 Q You would agree we would not be able to determine
12 that off the video because we can't see her eyes at
13 all; correct?

14 A You cannot see the eyes on the video. Yes, sir,
15 that's right.

16 Q Would you agree that we cannot determine whether or
17 not there was nystagmus prior to 45 degrees?

18 A I'm going to agree with you and say we cannot see
19 the eyes on the video, sir.

20 Q Just to move quickly along, you would agree that
21 would also apply to her left eye as well?

22 A Yes, sir, that's right.

23 Q Thank you. You gave two other tests in this case;
24 correct?

25 A Yes, sir, that's right.

1 Q Actually, three other field sobriety tests. The
2 next one you gave was a vertical gaze nystagmus
3 test, right?

4 A Yes.

5 Q And you moved your stimulus up and down?

6 A Yes.

7 Q And you determined that you did not see any
8 vertical gaze nystagmus?

9 A I did not see any vertical gaze nystagmus.

10 Q Again, we would not be able to determine what you
11 say you saw or didn't see is true or not because we
12 can't see her eyes at all, her face is a blur;
13 correct?

14 A You cannot see the eyes on the video.

15 Q So we wouldn't be able to determine whether there
16 was vertical gaze nystagmus or not in this case;
17 would we?

18 A Not by watching the video, no, sir.

19 Q The next test you gave was the finger touch test;
20 correct?

21 A Yes, sir.

22 Q This is not a standardized test?

23 A It is not a standardized test.

24 Q Which means effectively you could make up any
25 version you want of it and give it to her, and it

1 would all be okay because there are no standards;
2 right? It's just whatever standard you want.
3 A When I give this test, I give it the same way
4 every time. There's some form of consistency.
5 Q Sure. I understand that. What I'm getting at is
6 that you could give it a different way than Officer
7 Lewis could give it. Officer Langley could give it
8 a completely different way if they choose because
9 there are no standards for that test.
10 A There are no standards for that test.
11 Q It's whichever way you want to give it, it's an all
12 good kind of thing; right?
13 A Yes, sir.
14 Q Now, you demonstrated to Ms. Stroup how you wanted
15 her to do?
16 A Yes, sir, that's right.
17 Q And you asked her to do it in a very specific way?
18 A I did.
19 Q On camera, we can see you demonstrating how you
20 want her to do it; correct?
21 A Yes, sir, that's right.
22 Q But you would agree that on camera we cannot see
23 your fingers and thumb clearly to determine what
24 exactly you're doing in that demonstration; can we?
25 A It's hard to tell on the video.

1 Q Would you agree that your fingers and thumbs are
2 not visible to the point where we can see whether
3 or not you're doing finger to thumb, little finger
4 first, and then back.

5 A I would agree that is not clear on the video.

6 Q Would you agree it's not visible?

7 A No, sir, I would not.

8 Q Would you like to re-cue the camera so we can see
9 whether or not we can see your fingers actually
10 touching your thumbs in the order that you
11 testified to?

12 A That would be fine, sir.

13 Mr. Wellborn - Mr. Barton?

14 Mr. Barton - I think the Judge has the
15 video.

16 The Court - Which one is it, Mr. Barton?

17 Mr. Barton - It's the white one with the
18 Number 2 on it.

19 The Court - Okay.

20 Whereupon - Video is played.

21 Mr. Wellborn - Resuming

22 Q It looks like we can kind of see a thumb there.
23 Can we see any of your fingers clearly, officer?
24 Would you agree we can't see ---

25 A I would say it's not clear, sir.

1 Q Would you agree that we can't even see her hand at
2 that point?

3 A It's not clear, sir.

4 Q Would you agree you can't even see her right hand
5 as she does this test?

6 A I would agree that we cannot see her right hand
7 clearly, sir.

8 Q Thank you. Can you see any of fingers distinctly?

9 A Not clearly, sir.

10 Q Can you see her thumb?

11 A Not clearly, sir.

12 Q Can you see her thumb unclearly, meaning at all?

13 A I can't. It's hard to distinguish, sir.

14 Q Okay. This is the clear version of the video,
15 correct, as Mr. Barton said?

16 A I guess so.

17 Mr. Barton - It's less pixelated, Your Honor.

18 Q Is there a clearer version of the video if we went
19 to full size?

20 A It would only be bigger.

21 Q It would only be bigger, but we still wouldn't be
22 able to distinguish her fingers and her thumb,
23 correct?

24 A That's hard for me to answer without having watched
25 it, sir.

1 Q Let's go back and watch it. I certainly don't
2 want to put words in your mouth.

3 Whereupon - Video is played.

4 Mr. Wellborn - Resuming

5 Q Would you agree we cannot distinguish her fingers
6 from her thumb in this full version?

7 A Not clearly, sir.

8 Q Can you see any of her fingers clearly?

9 A Not clearly, sir.

10 Q Enough to distinguish that they're actually fingers
11 and not a blur?

12 A It's hard to distinguish.

13 Q Would you agree you can't see her thumb at all?

14 A I would say not clearly, sir.

15 Q Can you see her thumb unclearly? Other than the
16 fact that you know a thumb exists, can you see it?

17 A I would say not clearly, sir.

18 Q Is not clearly the same as saying no or is that
19 --- I'm just trying to find out. If you could
20 just answer the question yes or no. Can you see
21 her fingers and her thumb on that or not?

22 A Yes, sir, I believe you can.

23 Q All right. But you can't see whether her fingers
24 touch her thumb in sequence, can you, officer?

25 A That's correct.

1 Q And it's that sequence that you're testing for on
2 that, correct?

3 A Yes, sir, that's right.

4 Q So the jury can't see whether her fingers and her
5 thumb touched in the sequence that you asked on
6 that videotape, can they?

7 A Not clearly, sir, that's correct.

8 Q All right. So those were three tests out of four
9 that you gave her, correct?

10 A That's right.

11 Q And three out of four tests, you would agree, from
12 what we can see on the video camera, we can't see
13 whether she passed them or not, based on the
14 videotape, correct?

15 A Based on the videotape, that's correct.

16 Q As we discussed yesterday, you did not give her a
17 walk and turn or a one leg stand because of her
18 physical problems; correct?

19 A That's right.

20 Q We already heard testimony from Officer Lewis
21 who noticed the handicapped sticker on the front
22 of her car?

23 A Yes, sir.

24 Q And who indicated that one -- well, at least two
25 out of the major concerns that he had for her in

1 terms of driving were her back and her leg issues;
2 correct?

3 A Yes, sir.

4 Q And we heard from Officer Langley yesterday that
5 two out of the three issues that he had were
6 because of her back and her legs; correct?

7 A That's right.

8 Q So there is no question that you were dealing
9 with somebody with physical impairment?

10 A I believe that to be the case.

11 Q You did notice a strong odor of alcohol?

12 A I did notice a strong odor of alcoholic beverage.

13 Q Which presumably would contain alcohol; correct?

14 A Yes.

15 Q From that odor, you were not able to determine when
16 she had anything to drink?

17 A No. You can't tell that.

18 Q How much she had to drink?

19 A No, sir.

20 Q Whether or not this is an amount that she's
21 use to drinking, not use to drinking?

22 A You can't tell by just smelling it, sir, that's
23 correct.

24 Q Or whether she was under the influence of it,
25 correct?

1 A That's right.

2 Q You can just tell there's an odor which presumably
3 means she had something with alcohol that she
4 ingested prior to you meeting her; at some
5 undefined time; correct?

6 A That's right.

7 Q I believe on the videotape you mentioned yesterday
8 that -- On the videotape, you told her that you
9 could tell that she had a fair amount to drink
10 because, quote, I can tell by your eyes, and you
11 messed up on the videotape; correct?

12 A Are you referring to the roadside, sir?

13 Q Yes.

14 A I think I -- I believe I mentioned that prior to
15 giving her the finger dexterity test.

16 Q Well, my question is, on the videotape, my
17 recollection is you told her, I can tell by your
18 eyes and the fact that you messed up on the
19 finger test. Obviously, if you said that, you
20 would have said that after you gave her the finger
21 test, because unless you were clairvoyant, you
22 wouldn't know how she was going to do on the finger
23 test until you gave it to her; right?

24 A I don't recall saying that, but if that's what I
25 said ---

- 1 Q That would logically ---
- 2 A Logically.
- 3 Q Fair enough. I want to talk to you a moment about
- 4 effects of alcohol on a human body. You had some
- 5 training in this, when you went through your field
- 6 sobriety training, correct?
- 7 A Yes, sir.
- 8 Q And you're aware that there are typically two
- 9 categories of motor skills. First of all, you know
- 10 what a motor skill is; right?
- 11 A Yes, sir.
- 12 Q The way you use your body; correct?
- 13 A That's right.
- 14 Q And there are fine motor skills and gross motor
- 15 skills; would you agree with that?
- 16 A I would agree with that.
- 17 Q Fine motor skills being things that require more
- 18 delicate or precise manipulation of fingers, things
- 19 that require a little bit more concentration and
- 20 more control over things like finger tips and such;
- 21 correct?
- 22 A I would agree what that.
- 23 Q Gross motor skills being things such as standing,
- 24 walking, sitting, that doesn't require the same
- 25 amount of detail and control; correct?

1 A Yes, sir.

2 Q You would agree that, based on your training,
3 someone who had had too much to drink, they're more
4 likely to have their fine motor skills affected
5 before the gross motor skills. In other words, a
6 lot easier to walk than it is to, for instance,
7 dial a safe or a combination lock. Would you agree
8 with that?

9 A Yes, sir, I would.

10 Q So fine motor skills typically get affected by
11 alcohol, if someone is under the influence of
12 alcohol, before gross motor skills; would you
13 agree?

14 A I would agree with that.

15 Q Fair enough. You would agree that a signature,
16 signing a name, picking up a pen, that would be a
17 fine motor skill, not a gross motor skill?

18 A Yes, sir.

19 Q You asked Ms. Stroupe to say her ABCs. The first
20 time you just asked her to say it all the way
21 through without singing?

22 A That's right.

23 Q And that's something, to be fair, most of us just
24 don't do on a daily basis, would you agree?

25 A Not normally.

1 Q In fact, that's probably something that you've done
2 more, as an officer, arresting people, asking
3 people to give field sobriety tests, than the
4 general public at large; would you agree?

5 A Possibly.

6 Q Well, I mean, have you met very many other than
7 teachers ---

8 A Teachers, parents of young children.

9 Q Right, but on a daily basis or a weekly basis or
10 a monthly basis, most of the general public doesn't
11 walk around practicing their ABCs, right?

12 A I wouldn't imagine so.

13 Q When you asked her to say her ABCs the first time,
14 A to Z correctly, she did it?

15 A That's right.

16 Q And she did it correctly?

17 A That's right.

18 Q Then you asked her to say, okay, let's D to X.
19 Now, that's something that most people probably
20 never do in their lives; correct?

21 A Probably not.

22 Q And that's where she had trouble?

23 A Yes, sir, that's right.

24 Q By the way, when she said her ABCs, A to Z, we were
25 able to clearly hear letters on the videotape,

1 right?

2 A Yes, sir.

3 Q After giving her all these tests, you placed her
4 under arrest; correct?

5 A Yes, sir.

6 Q And you took her to the Rock Hill Police Department
7 to offer her a breath test?

8 A That's right.

9 Q I want to talk to you a moment or two about that.
10 First of all, the machine that you tested her on
11 was a breath alcohol sensor Datamaster machine,
12 otherwise known as a BAC Datamaster; correct?

13 A Yes, sir.

14 Q That's the machine that's at the Rock Hill Police
15 Department?

16 A Yes, sir.

17 Q And you're trained and certified to give someone a
18 test on that machine?

19 A Yes, sir.

20 Q And what you're trained is there is a very specific
21 procedure that you have to follow?

22 A Yes, sir.

23 Q Because if you don't follow that procedure, you're
24 not supposed to give the test at all; right?

25 A That's right.

1 Q And to the best of your recollection you followed
2 that procedure to a tee?

3 A I believe I did.

4 Q And it's important that that procedure be followed
5 because you want to make sure that you get fair
6 tests; right?

7 A Sure.

8 Q And you get an accurate test?

9 A That's right.

10 Q This breath test does not test someone's blood, it
11 tests their breath; right?

12 A Yes, sir.

13 Q Based on a test of breath, it gives an estimate of
14 what alcohol concentration is in their blood?

15 A To the best of my knowledge, I believe that's
16 correct.

17 Q So we're not talking about a blood test. We're
18 talking about an estimate of blood alcohol level
19 based on a test of breath, right?

20 A Based on my knowledge of the machine, I believe
21 that to be accurate.

22 Q So for this to be a fair and an accurate estimate,
23 the machine has to be set up in a way that's fair
24 and accurate; right?

25 A (No response)

1 Q well, let's put it this way. If the procedure in
2 setting up the test was not fair, you wouldn't get
3 a fair estimate of someone's blood alcohol level;
4 would you?

5 A That's right.

6 Q If you did not follow the procedures to make sure
7 that this was going to be a fair and accurate test,
8 you wouldn't have a fair and accurate estimate of
9 someone's blood alcohol level; would you?

10 A I would say that that's possible.

11 Q And that would be important in a case where blood
12 alcohol level is important, such as a driving under
13 the influence charge; right?

14 A Yes, sir.

15 Q So, among other procedures that you're required to
16 do, you're required to test to make sure that this
17 machine is accurate in terms of can it measure
18 someone's blood alcohol level at .08; right?

19 A I'm not responsible for testing the machine. The
20 machine tests itself.

21 Q But you want make to sure that it's coming up with
22 the right number; don't you?

23 A Yes, sir.

24 Q So it's supposed to be accurate at .08 because that
25 is the inference level by which a jury may infer

1 that someone is under influence; right?

2 A Are you referring to the solution?

3 Q Yes.

4 A Yes, sir, that's right.

5 Q So the machine tests itself and says this is the
6 solution I've got; I'm going to make sure that this
7 registers in a correct range?

8 A Yes, sir.

9 Q To be fair, it doesn't have to be exactly .08.
10 In this particular case, it think it was what,
11 .79? Let me see if I can find the ---

12 The Court - That is correct, counsel.

13 Q .79. That would be appropriate under the
14 standards; right?

15 A I believe it would be, yes, sir.

16 Q So you follow the procedure, you plugged in the
17 correct information, you told Ms. Stroupe that she
18 was being video recorded, which you are required to
19 do; right?

20 A Yes, sir.

21 Q And you observed her for at least 20 minutes which
22 you are required to do?

23 A That's right.

24 Q And the machine did not show any problems, radio
25 frequency interference or anything else which would

1 cause you concern or cause the machine not to
2 process?

3 A That's right. If there was a problem or error with
4 the machine, it would indicate that before the test
5 would even begin.

6 Q So you would agree there were no problems or error
7 with this machine on this date that gave this
8 estimate of Ms. Stroupe?

9 A Not to my knowledge.

10 Q Fair enough. One of the things you're also
11 required to do before you give somebody a test is
12 to check their mouth; right?

13 A Yes, sir.

14 Q And you did that in this case?

15 A Yes, sir.

16 Q If I recall it was at 8:27:01 to 8:27:02 is when
17 you checked her mouth. I know you didn't write
18 down the time.

19 A I didn't, but I do recall checking her mouth.

20 Q It looks like you asked her to open her mouth,
21 you looked inside her mouth, and you asked her
22 whether she had any jewelry in her mouth, like
23 a tongue ring, I guess is what that would mean;
24 right?

25 A Sure.

1 Mr. Barton - Your Honor, I'm going to
2 object. I don't think that's an accurate
3 statement of what Officer Cook actually asked
4 the witness. I think it's reflected on the
5 video, but I think foreign object.

6 Mr. Wellborn - We can play it. Should we
7 key this up?

8 The Court - Comments on evidence, folks.
9 If there's a disagreement on what was
10 presented, that's a determination for you
11 folks to make.

12 Mr. Wellborn - Resuming

13 Q Let me ask this, officer. Do you recall that you
14 asked her about jewelry or if you don't recall I'll
15 be happy to ---

16 A I don't recall exactly what I said.

17 Mr. Wellborn - Can we key up that portion
18 of the BA tape please.

19 Mr. Barton - You're more than welcome to.

20 Mr. Wellborn - Again, I don't want to
21 mess up your machine.

22 Mr. Barton - It's nothing special. It's
23 a DVD player.

24 Whereupon - Videotape was played.

25 Mr. Wellborn - Resuming

1 Q All right. So you've heard, don't have any jewelry
2 or anything in there?

3 A Anything foreign in there, yes, sir.

4 Q Any jewelry or anything foreign there. Okay. What
5 would foreign mean?

6 A Anything that's not supposed to be in there, gum,
7 candy, food, jewelry.

8 Q You're also trained, as I understand it, if someone
9 has removable dentures to take those out, too,
10 correct?

11 A I believe so.

12 Q And the purpose for doing that is because you want
13 to give a fair estimate or get a fair estimate of
14 someone's blood alcohol level based on a test of
15 their breath; right?

16 A That's the point of the entire test, yes, sir.

17 Q So that would be a purpose of taking out dentures
18 because dentures, if they were left in there, your
19 training is it might not be a fair estimate of
20 someone's breath alcohol level; correct?

21 A I believe that to be correct, yes, sir.

22 Q And, of course, you're certified to give this test,
23 so that's the training that you've gotten; right?

24 A Yes, sir.

25 Q So you asked about jewelry and foreign material?

1 A Yes, sir.

2 Q What did foreign material mean to her?

3 Mr. Barton - Objection. It asks for him
4 to try to --

5 The Court - As to what she would
6 interpret that to be. I'll sustain that
7 objection.

8 Mr. Wellborn - Resuming

9 Q In that one second approximate time period when you
10 glanced over and looked in her mouth, did you see
11 anything in her mouth at all?

12 A Not that I could tell.

13 Q Did you ask her to stick her tongue out?

14 A No, sir.

15 Q Did you ask her about retainers, dental retainer?

16 A I didn't.

17 Q Did you ask her about dentures?

18 A No, sir.

19 Q Did you ask her about any dental ware whatsoever --

20 -

21 A No, sir.

22 Q --- that might be something that you would ask
23 normally to take out?

24 A No, sir, I did not.

25 Q Again, as far as we can tell, there doesn't seem

1 to be any dispute the machine itself was working
2 correctly on that date?

3 A To the best of my knowledge it was, yes, sir.

4 Q There's no evidence that you've gotten that would
5 dispute that whatsoever?

6 A No, sir. No, not at all.

7 Q So if the procedures were followed to give a fair
8 and accurate estimate of her breath alcohol level,
9 then she should have gotten a fair and accurate
10 breath test; right?

11 A I believe that to be the case, yes, sir.

12 Mr. Wellborn - That's all the questions I
13 have. Thank you so much for your time.

14 The Court - Re-direct.

15 Redirect Examination: (By Mr. Barton)

16 Q Officer Cook, I want to talk just a moment about
17 the horizontal gaze nystagmus test. Based on your
18 training and experience, when you give that
19 horizontal gaze nystagmus test, where do you
20 normally give that at a roadside situation?

21 A Typically, I will have them stand perpendicular to
22 the roadway, directly in front of my car so I'm
23 looking at -- So the camera would be looking at the
24 side of them.

25 Q In that case, would you be trying to capture the

1 video through the camera that's inside your patrol
2 vehicle?

3 A Yes, sir, that's right.

4 Q That camera is not a camera of your own choosing,
5 that's a camera that is supplied either by Rock
6 Hill Police Department or by some other entity; is
7 that right?

8 A Yes, that's correct.

9 Q And you're limited to the quality of that camera
10 that's supplied to you? You don't have an choice
11 or an option of some other piece of equipment?

12 A That's right.

13 Q Now, in order to look and catch actual nystagmus,
14 you would simply need to pretty much have the
15 eyeball and the eyeball only in order for someone
16 to be able to see that being video recorded; is
17 that correct?

18 A Yes, sir, that's right.

19 Q So given the technology that you have at this point
20 in time, is it feasible for you to be able to do
21 that at the roadside in any kind of efficient
22 manner?

23 A Absolutely not.

24 Q Now, let's assume that you have the ability to zoom
25 in on the eye and get that video somehow at the

1 roadside. That would show just the eye only, is
2 that correct, in order for someone to actually see
3 the nystagmus?

4 A That's right.

5 Q so if they also needed to see you moving your hand
6 back and forth, you'd have to have a second camera
7 in order to capture that?

8 A I would believe that to be the case.

9 Q So there's really no way for you to have a patrol
10 vehicle camera properly record the horizontal gaze
11 nystagmus test and get both the whole eyeball, and
12 you administering the test at the same time?

13 A I believe that to be an accurate statement. I
14 don't see any way that that could be possible.

15 Q I want to talk just a moment about the alphabet
16 test. Initially, you said you asked Ms. Stroupe to
17 say the alphabet simply from A to Z, correct?

18 A Yes, sir.

19 Q At some point in time, you asked her to do it from
20 D to X, I believe; is that right?

21 A Yes.

22 Q That's what's called a divided attention test. Can
23 you explain to the jury what a divided attention
24 test is and the significance of that versus just
25 having her do it from A to Z like she did

1 initially.

2 A A divided attention test measures a person's
3 ability to divide their attention. The reason for
4 that is because driving is an activity that
5 requires you to divide your attention. You have to
6 look at the road. You have to look at your
7 rearview. You have to apply the accelerator pedal.
8 You have to apply the brake pedal. You have to
9 look around you. You have to steer the car, things
10 like that. Driving requires many different tasks
11 simultaneously. When we're on the roadside to test
12 for sobriety, we use what's called a divided
13 attention test. You have to listen to the
14 instructions, and you have to perform certain
15 tasks simultaneously in order to determine your
16 ability to divide your attention.

17 Q Now, the other field sobriety tests that you
18 weren't able to utilize in this case, given Ms.
19 Stroupe's stated medical conditions, were the walk
20 and turn and the one leg stand. Are those also
21 divided attention tests?

22 A Yes, sir, they both are.

23 Q Mr. Wellborn also talked for just a little bit
24 about fine motor skills and gross motor skills;
25 is that correct?

1 A He did.

2 Q In terms of when someone operates a motor vehicle,
3 do they need a combination of both of those skills
4 normally?

5 A I believe so.

6 Q As well as some mental skills and accurately
7 perceiving situations and then responding
8 appropriately?

9 A Yes, sir.

10 Q Given, again, your hour plus interaction with
11 Ms. Stroupe, what kind of shape were her fine
12 motor skills in, based upon your interaction with
13 her?

14 A I believe they were impaired.

15 Q What about her gross motor skills?

16 A It was hard to judge her level of impairment based
17 on -- Because I didn't get an opportunity to test
18 those, to have her walk in a straight line and
19 stand on one foot. I did observe she did have some
20 trouble walking and even standing.

21 Q And, again, that's hard to say whether that's a
22 result of what you saw or she indicated at least
23 she had some stated medical issues that could
24 have caused her to exhibit those defects as well?

25 A Yes, sir, that's right.

1 Q I want to talk a little bit about the Datamaster
2 room. In this case, she was given a Datamaster
3 examination at about 8:50 in the evening, I believe
4 is what's reflected on the Datamaster slip?

5 Hold on. I'm going to show you, again, what is in
6 evidence at this point as City's Exhibit Number 5
7 and ask when she gave her subject sample?

8 A She gave her subject sample at 8:50 p.m.

9 Q And your initial encounter with Ms. Stroupe was
10 somewhere between probably about 7:30 to 7:45
11 timeframe?

12 A I believe that's accurate, yes, sir.

13 Q So from approximately 7:30 or 7:45, and all that's
14 been reflected on the various and sundry videos
15 that the City has presented in evidence in this
16 case, was the initial encounter with Ms. Stroupe,
17 right?

18 A Yes.

19 Q Essentially, the completion of the case was when
20 she was given the Datamaster examination, and she
21 registered that result at 8:50?

22 A Yes, sir, that's right.

23 Q So for better than an hour, to the best of your
24 knowledge, did she consume any alcoholic beverages
25 or have anything alcoholic to consume within that

1 hour time period?

2 A No, sir, absolutely not.

3 Q Again, there were no open containers of alcohol
4 found in the vehicle. Is it safe to assume that
5 she probably at least wasn't drinking, physically
6 drinking, while she was actually driving the motor
7 vehicle?

8 A That's right. From the time police made contact
9 with her to the time I turned her over to
10 correction officers, there was no -- She had not
11 consumed any alcohol.

12 Q And part of the waiting period that you're given
13 and instructed on is to allow any type of residual
14 alcohol that may be contained in the mouth by
15 anything, that that will dissipate, and that's
16 the point of the twenty minute waiting period?

17 A That's correct. That's the purpose of the twenty
18 minute waiting period.

19 Q So, at this point in time, is there any reason to
20 believe that Ms. Stroupe, prior to that twenty
21 minute waiting period, but following your initial
22 encounter, had something alcoholic to consume?

23 A I don't believe that would be possible at all.

24 Q And it's not reflected by anything on the video;
25 correct?

1 A That's right.

2 Q So it's safe to say that for approximately an hour
3 and change, she had nothing alcoholic to consume?

4 A That is correct.

5 Q Mr. Wellborn had commented about the incident
6 report that you had made in this case; is that
7 correct?

8 A Yes, sir, he did.

9 Q And you were off by approximately one hour when you
10 initially prepared this incident report?

11 A I believe I was off just by about an hour, yes,
12 sir.

13 Q You just, basically -- Instead of saying 7:30, you
14 had 8:30 initially indicated?

15 A That's right.

16 Q What's reflected on the audio recordings and what's
17 reflected in the City's exhibits is the accurate
18 time?

19 A Yes, sir.

20 Q The incident report that you prepare, that's not a
21 verbatim summary of your encounter with Ms.
22 Stroupe, is it?

23 A No, it's a brief synopsis in terms of what had
24 occurred.

25 Q Would it be safe to say it's more of an outline or

1 summary than an actual verbatim recitation of the
2 encounter?

3 A That would be accurate.

4 Q I'm going to ask you to take a look at this and
5 just, if you can, review it.

6 A (Witness complies)

7 Q That would have been prepared ---

8 The Court - Would you identify what he's
9 looking at?

10 Q For purposes of the Court, can you identify for
11 the Court and the jury and Mr. Wellborn ---

12 A I'm looking at a copy of my incident report that
13 I prepared that evening.

14 Q Can you tell the jury, to the best of your
15 recollection, when you prepared that report?

16 A I completed typing it at 8:30 p.m., according to
17 this.

18 Q So that would actually probably be, since you're
19 off by an hour, 9:30?

20 A That would be accurate, yes, sir.

21 Q So, within a half hour or so after Ms. Stroupe
22 completed her test and was booked in, you then
23 had completed your incident report?

24 A Yes, sir.

25 Q In terms of the incident report, other than the

1 hour being off, is there any other thing you can
2 --- if you want to take a moment to review
3 that --- that caused you to have concern or
4 something that you think is inaccurate or a
5 mistake?

6 A As far as I can tell, sir, I don't believe there is
7 anything else that I find to be inaccurate.

8 Mr. Barton - Your Honor, if I can, I just
9 ask to allow Officer Cook to publish the
10 remainder of this writing and just read the
11 narrative portion of this incident report.

12 Mr. Wellborn - Your Honor, I would object
13 to that.

14 The Court - Will you folks excuse us.
15 It's probably time for a break anyway. Give
16 us a break, a minute, and we'll call you back
17 in. Please don't discuss the case.
18 Whereupon - The jury is excused.

19 The Court - Mr. Wellborn, your grounds
20 for that objection.

21 Mr. Wellborn - Thank you. They are two-
22 fold, Your Honor. The first is that incident
23 reports in general are not evidence and not
24 published to the jury. There might be an
25 exception if a door was opened to a portion of

1 the incident report that was cross examined
2 on.

3 That portion in my case was specifically
4 the times listed on the report, not anything
5 in the narrative. I don't recall any part of
6 my cross examination where I cross examined
7 the officer on what he actually wrote in the
8 incident report. I simply talked to him about
9 the timing of it. He was cross examined on his
10 testimony, but not on the incident report.

11 So publishing a narrative of the incident
12 report would not be germane to my cross, this
13 being redirect. Mr. Barton, I would submit to
14 the Court, should be dealing with matters
15 brought up on cross not simply anything he
16 wants to get into in the way of evidence.

17 Again, the general rule is incident
18 reports are not admissible as a matter of
19 law. There would be, again, an exception
20 if I opened the door. The door that I opened
21 is related to the times listed on the report
22 and nothing more. So for those reasons, I
23 would object.

24 Mr. Barton - Your Honor, if I may, I
25 think Officer Cook was questioned regarding

1 the accuracy of his report, and that was
2 what was the nature of the cross examination,
3 was to the accuracy of the report.

4 If the only error in the report is the
5 time, then I think the jury is entitled to
6 realize that that's the only error in the
7 report, and the rule clearly allows for
8 publishing the remainder of a writing. He
9 got into the incident report. I'm not looking
10 to have the incident report introduced as
11 evidence as an exhibit. I think I'm allowed
12 to have him read the remainder of the
13 incident report to show the accuracy of that.

14 Mr. Wellborn - Your Honor, I would
15 object to that because there is no difference
16 in terms of putting an incident report in
17 evidence if he simply reads from it verbatim
18 or if it goes back to the jury.

19 The Court - It's a peculiarity between
20 the jurisdictions I'm admitted to practice
21 in, that folks get to read things, read things
22 to the jury that are in not in evidence.
23 That's something I've never quite gotten my
24 arms around in South Carolina, but it happens
25 all the time.

1 As I think is the custom, most of the
2 time or on a fairly regular basis that I see
3 lawyers attempting to question police officers
4 about what they've put in their incident
5 report, they do spend a considerable amount of
6 time, which I understand to be probably
7 appropriate from a tactical standpoint.

8 Asking the officer over and over again
9 is it not important that this be accurate,
10 aren't you taught that, aren't you taught
11 that at the Academy, aren't you taught that
12 by your training officer when you get here to
13 Rock Hill.

14 Although your question may have been
15 limited to the time discrepancy, the question
16 you asked, the predicate you laid before
17 asking that question, dealt with the whole
18 incident not simply with the time issue. To
19 that extent, I think you've opened the door.

20 We're going to take a break. I'm not
21 going to rule on it yet.

22 Mr. Wellborn - Your Honor, I would like
23 to be heard on one issue related to your
24 last colloquy. We can do that after the
25 break if you prefer.

1 The Court - We can do it now.

2 Mr. Wellborn - Your Honor, has addressed
3 the fact that I queried the officer about
4 whether the incident report was accurate.
5 That is true. Publishing what the officer ---

6 The Court - And trained. Not just that
7 this is accurate but that he is trained to
8 do it.

9 Mr. Wellborn - Absolutely, and I did.
10 The officer answered in the affirmative. The
11 officer also answered in the affirmative with
12 me, and also with Mr. Barton, so now it's come
13 in by both the State and the Defense that to
14 his knowledge this incident report is accurate
15 absent being an hour off on the time.

16 I've accepted that. The accuracy issue
17 has now been addressed. Publishing to the
18 jury what the officer observed about my
19 client does not tend to show that the
20 incident report is accurate or not accurate
21 any more than his testimony has already done.

22 The fact that the officer, in his
23 incident report, says that a caller called in
24 a maroon Mitsubishi Eclipse which was driving
25 recklessly, does not mean that this incident

1 report is accurate. That comes through
2 testimony of somebody else. The fact that
3 the officer says that Officer Lewis activated
4 his emergency blue lights to initiate a
5 traffic stop would not mean that the officer
6 is accurate in his incident report other than
7 what the jury has already seen by way of
8 video or Officer Lewis's testimony.

9 The fact that the officer then explained
10 the horizontal gaze nystagmus test to Brenda
11 Stroupe, quote, end quote, would not show that
12 the incident report is any more accurate than
13 his testimony. He was not cross examined on
14 the accuracy of his recollection. He was
15 simply asked about the timing.

16 Publishing the incident report does not
17 address that. It goes beyond that. It's just
18 a blanket way of restating testimony that's
19 already been stated. That's my objection.

20 The Court - Is there anything in the
21 incident report that is new?

22 Mr. Wellborn - Yes.

23 The Court - Direct me to that.

24 Mr. Wellborn - For instance, the last
25 paragraph. The results of the tests concluded

1 that Brenda Stroupe's blood alcohol content.
2 That contradicts his testimony because, again,
3 this was not a blood test. That would not be
4 appropriate. The custody of Ms. Stroupe was
5 then turned over to correction officials.
6 That would not be appropriate.

7 The Court - He just testified to that.

8 Mr. Wellborn - Exactly. The point is
9 again ---

10 The Court - Things that are inaccurate
11 or that we're hearing for the first time in
12 this ---

13 Mr. Wellborn - It's really irrelevant
14 whether the officer's recollection of what
15 he saw with Ms. Stroupe or what he said to
16 Ms. Stroupe, it's irrelevant whether that was
17 accurate or not if this introduction of this
18 incident report is supposed to be responsive
19 to my cross examination, because my cross
20 examination did not touch those issues
21 regarding accuracy. That's the point.

22 The Court - Mr. Barton?

23 Mr. Barton - The dilemma I'm left with is
24 this, is that Mr. Wellborn can say he was
25 inaccurate with the incident report. I'm

1 not allowed to say, but the rest of the
2 incident report was accurate about
3 handicapped. That's the whole point for the
4 opening the door ruling, Your Honor.

5 Mr. Wellborn - This is all argument to
6 a jury at the end of the case. The jury has
7 the video. There's no way I'm going to stand
8 up and say to the jury, wow, he never gave her
9 a field sobriety test, which is in the
10 incident report, when it's clearly on the
11 video, and I spent a bunch of time cross
12 examining him on the field sobriety tests
13 that he gave.

14 The Court - The question of ultimately
15 fairness, Mr. Wellborn, is you have put his
16 training on the preparation, his experience
17 on the preparation of incident reports as
18 an issue in this case. You may think that it
19 was only on one issue. You may think it was
20 only on one issue, but what you've done by
21 developing that error, is you have brought
22 into question the accuracy -- his credibility,
23 his professionalism in preparing the
24 documents. Having brought that in, isn't the
25 function of redirect to attempt to

1 rehabilitate him?

2 Mr. Wellborn - And Mr. Barton did that.
3 Mr. Barton asked him specifically, other than
4 the timing of the incident report, was
5 everything else to your knowledge accurate,
6 and you got the response which was yes.

7 The Court - I'm going to rule when I
8 come back.

9 Whereupon - A recess was taken.

10 The Court - During the break, gentlemen,
11 this is what I'm having an issue with.

12 If Mr. Wellborn's inquiry opened the
13 door and the door is open by his inquiry.
14 It's not open a little bit; it's not open
15 a lot. If the door is open, it's open.

16 I understand Mr. Wellborn's argument
17 that he simply inquired about the discrepancy
18 in the times reflected in the incident
19 report. However, as I stated earlier, you
20 posed significance questions concerning the
21 importance of the officer's training, both
22 in his initial training at the Justice
23 Academy, his training with the City of Rock
24 Hill and the importance of accuracy in the
25 drafting of these incident reports.

1 I think by implication that brings the
2 accuracy of the incident report into question.
3 At the same time, Mr. Wellborn, Mr. Barton
4 has asked the officer -- provided him a copy
5 of the report, asked him to review it and
6 asked him whether he could determine any
7 other problems with the incident report.

8 Gentlemen, it's a close question, but
9 I'm going to sustain Mr. Wellborn's objection.
10 Mr. Barton, if you wish to expand upon that
11 line of questioning, I have no problem with
12 that. As far as reading it verbatim ---

13 Mr. Barton - Your Honor, for the Court,
14 the first line -- In the narrative portion, it
15 mentions it being 20:30 hours instead of
16 7:30 hours, so that first paragraph contains
17 that time reference.

18 What I'm looking at, the very first part
19 of the narrative report reflects that 13,
20 April, 2013 at approximately 20:30 hours and
21 then I'm just trying to see if there are any
22 other references to time other than, I think,
23 the final paragraph in the incident report.

24 The Court - With reference to time
25 but then he says court date? Is that what

1 you're referring to?

2 Mr. Barton - Correct, Your Honor. That's
3 the only time reference or date reference in
4 there.

5 The Court - There's also the reference at
6 the bottom of the page of the incident report
7 where the time has been indicated, which the
8 officer has officer has addressed.

9 Mr. Wellborn - Yes, the officer testified
10 to that.

11 The Court - In response to Mr.
12 Wellborn's questions.

13 Mr. Wellborn - Actually, he addressed it
14 in response to Mr. Barton's questions.

15 The Court - He may have also in response.
16 Like I said, if you want -- short of having
17 him read the entire incident report, I have no
18 problem.

19 Mr. Wellborn - I have no objection to
20 Mr. Barton reading the portions of the
21 incident report that relates specifically to
22 a time, which is what the officer was queried
23 on. I have no objection to that. Since that
24 was the timing or the time the report itself
25 was written, was not something that I brought

1 up during my cross. It was new matter brought
2 up in Mr. Barton's redirect. That's the
3 only thing I was opposed to recross on, that
4 one sole issue.

5 The Court - We aren't there.

6 Mr. Barton - Your Honor, I don't think
7 I have anything else. I may go into the
8 incident report with Officer Cook just
9 briefly and then comment about one of the
10 things that Mr. Wellborn raised on his
11 cross examination.

12 Mr. Wellborn - I would object to Mr.
13 Barton commenting on things I raised ---

14 Mr. Barton - I have other questions.
15 When I say comment, I'm just looking at ---

16 The Court - I understand.

17 Mr. Barton - Addressing. How about
18 that.

19 The Court - I can live with addressing.
20 Whereupon - Jury returns.

21 The Court - Mr. Barton, continue your
22 redirect.

23 Mr. Barton - Resuming

24 Q Officer Cook, Mr. Wellborn on his cross examination
25 brought up the time discrepancy in your incident

1 report; is that correct?

2 A Yes, sir, he did.

3 Q And, again, you were off by approximately one
4 hour which indicated it was 8:30 in terms of the
5 initial encounter of Ms. Stroupe by Rock Hill
6 Police Department officers when it was actually
7 approximately 7:30?

8 A Yes, that is correct.

9 Q Your first paragraph in your narrative portion of
10 the incident report reflects that that says 13,
11 April, 2013, at approximately 20:30 hours, officers
12 with Rock Hill Police Department received a call
13 from a concerned citizen in regards to a reckless
14 driver. Other than that it should have indicated
15 7:30, the remainder of that paragraph is accurate
16 to the best of your knowledge; is that right?

17 A Yes, sir, that's right.

18 Q The next paragraph you talk about ---

19 Mr. Wellborn - I'm going to object to the
20 next paragraph for the reasons previously
21 stated.

22 The Court - Let's listen to the question
23 before we consider an objection.

24 Mr. Wellborn - May we take this up
25 because if the question is read, if a comment

1 from the incident report is directly read then
2 it's already in.

3 The Court - Let's step outside.

4 Mr. Wellborn - Thank you.

5 Whereupon - A recess was taken.

6 Mr. Barton - Resuming

7 Q officer Cook, if you could just take a moment to
8 review the narrative portion of your incident
9 report please.

10 A (Witness complies)

11 Q The narrative portion of your incident report
12 essentially is a time line of this incident from
13 the initial encounter through to the booking
14 process of Ms. Stroupe; is that correct?

15 A Yes, sir.

16 Q In reviewing that narrative report, other than the
17 time discrepancy by an hour, is there any other
18 material discrepancy in the incident report?

19 A Not that I'm aware of.

20 Q Again, the narrative of the incident report,
21 being that time line, is essentially the same
22 time line we presented here to the Court and the
23 jury today?

24 A Yes, sir.

25 Q And yesterday as well?

1 A Yes, sir.

2 Q Mr. Wellborn commented about when we were doing the
3 Datamaster examination and in reality when you do
4 any type of investigation you want to try to be as
5 fair and accurate as possible; is that correct?

6 A Yes, sir.

7 Q In this case, would a fair and accurate assessment
8 indicate that Ms. Stroupe was driving that motor
9 vehicle that evening ---

10 Mr. Wellborn - I object to the leading
11 question.

12 The Court - Rephrase it.

13 Q Would a fair and accurate ---

14 Mr. Wellborn - I object to the form of
15 the question as to what would.

16 The Court - Mr. Wellborn, I'm going to
17 listen to his question then I'll rule on the
18 objection. I don't know what the question is
19 going to be.

20 Mr. Barton - Resuming

21 Q Mr. Wellborn, again, indicated on cross examination
22 you attempt to be fair and accurate.

23 A Yes, sir.

24 Q Is it a fair and accurate statement that Ms.
25 Stroupe was operating the motor vehicle?

1 A It would be.

2 Q And that she had been drinking that evening?

3 A Yes, sir, I believe she was.

4 Q Would it be fair and accurate that when she was
5 subsequently tested that she registered a .23
6 percent blood alcohol content as measured by
7 breath?

8 A Yes, sir.

9 Mr. Barton - That's all I have on
10 redirect, Your Honor.

11 Mr. Wellborn - Very briefly on recross.
12 Specifically, this is addressing new matter
13 brought up by Mr. Barton relating to the
14 incident report and the timing. That's all
15 I want to go into because it was new matter.

16 The Court - The timing on the incident
17 report was new matter? The error in the
18 timing was new matter?

19 Mr. Wellborn - Mr. Barton brought up the
20 time that the incident report was actually
21 written by the officer, which I did not do.
22 That's new matter. I just want to ask some
23 questions on that.

24 The Court - If it goes beyond that, I'm
25 going to stop you.

1 Mr. Wellborn - I certainly understand, and I
2 appreciate that.

3 Recross Examination: (By Mr. Wellborn)

4 Q Officer, you indicated that you wrote this or
5 prepared this incident report, based on what the
6 incident report says, at 8:30 p.m.; correct?

7 A Yes, sir.

8 Q On the incident report, you indicated that you
9 arrested my client at 8:50 p.m.; correct?

10 A Yes, sir.

11 Q Which would be twenty minutes after you prepared
12 the report; correct?

13 A Yes, sir, the times are not accurate.

14 Q So the times are not just inaccurate in terms of
15 being off an hour. Within the incident report
16 itself, it doesn't really make sense; does it?
17 For instance, when you were preparing this report
18 at 8:30, did you not notice that you were putting
19 down the time of arrest, twenty minutes after you
20 prepared the report?

21 A I didn't notice that at the time.

22 Q And you indicated in the report that you arrived
23 at the scene at 8:30, but you're writing the
24 report and saying that you're preparing it at
25 8:30. Did you not catch, not just being off an

1 hour, but the fact that it would be impossible
2 for you to arrive at the scene and prepare an
3 incident report at the same time; correct?

4 A No, sir, I did not catch that.

5 Q So it wasn't just that you were off an hour. The
6 timing inaccuracies within the report itself just
7 don't make sense, do they?

8 A The times in the report are not correct; that's
9 right.

10 Mr. Wellborn - That's all. Thank you.

11 The Court - You may step down, officer.

12 Thank you.

13 The Court - Is that the City's case?

14 Mr. Barton - The City is prepared to call
15 one more witness.

16 The Court - Okay.

17 Mr. Barton - That would be Randy Brown
18 with SLED.

19 The Court - Okay.

20 (Reporter's Note: Testimony of Randy
21 Brown not transcribed)

22 Mr. Barton - Your Honor, that would be
23 the City's case.

24 The Court - When the City rests it's
25 case, that's a normal time for me to take up

1 some matters with the attorneys and take up
2 some matters that you can't be privy to.

3 It is a quarter until twelve. Let's
4 be back here at 1:00 o'clock. Please don't
5 be discussing the case or do any legal
6 research. Be back here promptly at 1:00
7 o'clock.

8 Whereupon - Jury dismissed and a recess
9 was taken.

10 Mr. Wellborn - My first motion would be
11 a renewal, again, of the motion to dismiss,
12 the basis of which was Section 56-5-2953A
13 of the South Carolina of Laws.

14 Again, that motion is made on the basis
15 that of the four field sobriety tests given to
16 my client on the date of the arrest, three
17 are not recorded, specifically, the horizontal
18 gaze nystagmus test that was specific, of
19 course, the tape is in evidence but there was
20 also testimony from the officer for the second
21 time on this issue. This time he specifically
22 indicated that nobody in the courtroom would
23 be able to see whether or not my client had
24 lack of smooth pursuit, onset of nystagmus
25 prior to 45 degrees or nystagmus at maximum

1 deviation in either eye, although he testified
2 that he observed all of those things.

3 He also testified that he observed that
4 my client's pupils were equal size, that she
5 tracked equally and that she had no resting
6 nystagmus, all of which would be prerequisites
7 to giving that test. Again, none of that was
8 visible on the tape per the officer's
9 testimony. That's the only testimony in the
10 record regarding that.

11 The officer also acknowledged that he
12 could not or we could not see on the videotape
13 the results of the vertical gaze nystagmus
14 test given to my client.

15 So that would be two tests that are not
16 visible on the tape per the officer's
17 testimony, the results of which are not
18 visible.

19 Furthermore, the officer indicated that
20 on the finger touch test, he acknowledged that
21 you could not see what his fingers were
22 doing in relation to his thumb as he
23 demonstrated the finger touch test nor could
24 he see my client's fingers or thumb clearly
25 enough to determine which finger was following

1 -- or whether the thumb was following the
2 fingers in the sequence that he asked my
3 client to follow, although he testified under
4 oath, even though it was not visible on the
5 tape, that he observed that she did not
6 follow the correct sequence.

7 So for those reasons, I would ask again
8 for a dismissal of the charge pursuant to
9 56-5-2953A. For purposes of persuasive
10 authority, I've handed up a copy of an Order
11 from Judge Hayes, which I received by email
12 yesterday. It was signed on January 17th,
13 dismissing a case -- Actually reversing a
14 conviction in a case where the horizontal
15 gaze nystagmus test was not visible and
16 furthermore addressing the issue of 56-5-2953
17 and that no application since the totality of
18 the circumstances language does not apply,
19 given the fact that a video recording was
20 made.

21 So, for those reasons, again, I would
22 renew my motion to dismiss.

23 Mr. Barton - Your Honor, one of the
24 things I attempted to do on my direct
25 examination of Officer Cook was speak to the

1 issue of the HGN testing and what would be
2 required in order to capture HGN testing
3 per the Wellborn requirements of the eyeball
4 on the HGN being visible.

5 Mr. Wellborn - Your Honor, I would object
6 to the term Wellborn requirements. I think
7 that's --- I would object.

8 The Court - I'll sustain the objection.

9 Mr. Barton - At least to the level Mr.
10 Wellborn has indicated would be necessary to
11 comply with 56-5-2953A.

12 The Court - I'm a little confused. I've
13 reviewed Judge Hayes' Order. I obviously
14 don't know the facts relevant to the Patterson
15 matter. If it's here, I would like Mr.
16 Wellborn to direct the court's attention to
17 it.

18 Where Judge Hayes -- Where the deficiency
19 is discussed in some sort of detail as to the
20 HGN. Within the four corners of this, I don't
21 know whether there was no video, which you
22 have suggested. In this case, there is no
23 video of the HGN and these other tests. Is
24 that same case here where there was no video?

25 Mr. Wellborn - Your Honor, I've never

1 suggested, in fact, to the contrary. I've
2 suggested that there is video, but the video
3 does not capture the conduct ---

4 The Court - Video not made.

5 Mr. Wellborn - I said it was not
6 recorded. There certainly is, and I think,
7 Your Honor, has seen the video now on two
8 occasions. I've always stated that there was
9 a video made which is why Section B of the
10 statute does not apply.

11 The Court - Let's go back to my question.
12 Where is that addressed in Judge Hayes' order?
13 What did he find to be the deficiency? If
14 there was a video made of the HGN, what does
15 he say is the deficiency?

16 Mr. Wellborn - Page 2, the second
17 second paragraph, the gravamen of the
18 the defendant's argument, then and now, is
19 that the video fails to show the HGN and heel
20 to toe test in such a manner as would allow
21 a person watching the recording to view the
22 tests performed so that an assessment can
23 be made as to how well the defendant performed
24 each test.

25 The Court - The next, and it's a follow

1 up to that, give me some authority from the
2 appellate court to this date that that is
3 a requirement.

4 Mr. Wellborn - Again, I don't have
5 beyond Murphy versus State, and the
6 fact that footnote four mentions that the
7 statute now requires a recording of the
8 sobriety tests. I have no such appellate
9 opinion which is why I mention that Judge
10 Hayes' order, I would suggest, is persuasive
11 although not binding ---

12 The Court - I'll deny your motion on
13 that.

14 Mr. Wellborn - Thank you.

15 The Court - Do you have another motion?

16 Mr. Wellborn - Yes, I would move for a
17 directed verdict in this matter as the
18 State never established jurisdiction. Not
19 one witness from the State stated under oath
20 beyond alluding to streets. Not one of them
21 stated that that matter occurred within the
22 city of limits of Rock Hill.

23 Mr. Barton - Judge, I believe I asked
24 officer Langley as well as ---

25 The Court - I understand.

1 Mr. Wellborn - The record, of course,
2 will reflect but that would be my motion.

3 The Court - I'll give you guys a chance
4 to review that over lunch. Be back here at
5 1:00 o'clock. We'll get started at 1:00.
6 I'll reserve my ruling on that issue.

7 Whereupon - A lunch recess was taken.

8 The Court - Did counsel come to any
9 agreement on the question of jurisdiction.
10 I believe to Officer Lewis and/or Langley
11 the question was posed that the area in
12 the Red River Road, Celanese Road, Cherry
13 Road vicinity -- in the vicinity of Interstate
14 77, whether that was in the city limits.
15 That's the court's recollection.

16 Mr. Barton - For what it's worth, I
17 showed Mr. Wellborn, which I have venue,
18 Celriver, Id-ing the defendant. I had both
19 of those checked. I'm just saying normally
20 the only time I'm going to check that is if
21 I asked that question. I could have missed
22 it, but I believe I did ask that question.

23 Mr. Wellborn - Again, the record will
24 reflect whatever is there.

25 The Court - The City has rested. I've

1 ruled on the motion to dismiss and motion
2 for a directed verdict. Is the defense
3 going to put on a case?

4 Mr. Wellborn - Yes.

5 (Reporter's Note: Defense testimony not
6 transcribed.

7 Mr. Wellborn - That would be the
8 case for the defense. I do have some
9 motions.

10 Whereupon - Jury excused.

11 The Court - Mr. Wellborn?

12 Mr. Wellborn - Thank you. Once again,
13 Your Honor, I renew my motion to dismiss
14 on the specific grounds raised previously,
15 again, under 56-5-2953A, the failure to record
16 within the meaning of the statute the
17 horizontal gaze nystagmus test, the vertical
18 gaze nystagmus test and the finger touch test.

19 I would also -- I guess I should pause
20 and let you rule on that one.

21 The Court - I deny that motion.

22 Mr. Wellborn - Thank you. Just for the
23 record, are you denying it for all three
24 distinct grounds, each individual test?
25 Let's try it this way. I would move to

1 dismiss because ---

2 The Court - Which three tests so we're
3 not ---

4 Mr. Wellborn - The horizontal gaze
5 nystagmus ---

6 The Court - The vertical gaze nystagmus -
7 --

8 Mr. Wellborn - And the finger touch test.
9 The Court - And your question is?

10 Mr. Wellborn - I would move, first, to
11 dismiss because the horizontal gaze nystagmus
12 test was not recorded within the meaning of
13 the statute.

14 The Court - Denied.

15 Mr. Wellborn - I would move to dismiss
16 because the vertical gaze nystagmus test was
17 not recorded within the meaning ---

18 The Court - Denied.

19 Mr. Wellborn - I would move to dismiss
20 because the finger touch test is not recorded
21 within the meaning of statute.

22 The Court - Denied as well.

23 Mr. Wellborn - Thank you. The next
24 motion, again, would be a renewal of my
25 motion for a directed verdict because the

1 city has not established jurisdictional
2 grounds.

3 The Court - As I related to you gentlemen
4 off the record when we first came back from
5 lunch, my recollection was that it was
6 asked ---

7 Mr. Wellborn - Thank you, Your Honor.

8 The Court - And established at that
9 location, specifically near the area of
10 Celriver/Celanese Road and the intersection
11 of intersection of Interstate 77 and that
12 vicinity is within the city limits.

13 (Reporter's Note: The remainder of the
14 trial was not transcribed)

Whereupon - Trial concluded at 2:55 P.M.

Shirley Dallas-Gerrald, CVR-CM
Notary Public/Court Reporter

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CERTIFICATE OF REPORTER

State of South Carolina }
County of York }

I, Shirley Dallas-Gerrald, CVR-CM, a Notary Public for the State of South Carolina, do hereby certify that I placed under oath the aforesaid deponent; that I reported the foregoing proceedings at the time and place herein designated and that the foregoing pages are a true, accurate and correct transcript of the aforesaid proceedings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, nor in anyway interested in the event of said cause.

In witness my hand and official seal this the 19th day of February, 2014, in the City of Rock Hill, County of York, State of South Carolina.

Shirley Dallas-Gerrald, CVR-CM
Court Reporter/Notary Public

My Commission Expires:
8-18-2021

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