

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

J. Derham Cole, Circuit Court Judge

Case No. 2013-GS-46-00430
Appellate Case No. 2013-002169

RECEIVED
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SC Court of Appeals

The State. Respondent.
v.
Patrick Gillis McAllister Appellant.

RECORD ON APPEAL

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THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:

STATE’S EXHIBIT #1 (INCIDENT SITE VIDEO)

Oral Argument by Appellant (Mr. Hope)

1 Sheriff's Office arrested and charged Mr. McAllister with
2 violating 56-5-2930. The State has provided the video in
3 this case. Now, I have filed a written motion with the
4 court with an exhibit detailing all the relevant times on
5 the video. With permission to approach, I can provide
6 that to the Court.

7 THE COURT: Please. Thank you.

8 MR. HOPE: Your Honor, Deputy Osborne was contacted
9 by dispatch. A gentleman named William Branch had called
10 911 to report that a gentleman out in his driveway, gravel
11 driveway, appeared to be intoxicated. When Deputy Osborne
12 arrived, Mr. McAllister was sitting on a golf cart. I
13 presume it was owned by Mr. Branch. Mr. McAllister was
14 sitting on the rear of that golf cart, and to the right of
15 the golf cart and remaining in the driveway was
16 Mr. McAllister's truck. Deputy Osborne parked behind the
17 truck. And we see the truck for the length of the video.

18 Measuring from the time that Deputy Osborne first
19 spoke to the defendant to the time that the defendant was
20 arrested and placed and taken out of view of the patrol
21 car camera, we have approximately 33 minutes and 11
22 seconds that it passed. That's from the time that Osborne
23 first spoke to the defendant to the time the defendant was
24 taken out of view and placed into the patrol car. Within
25 that time, the defendant does not appear on video for 11

1 minutes and 11 seconds. After 12 minutes had passed into
2 the video, Deputy Osborne spoke to Mr. Branch and told
3 Mr. Branch, "If you want to get some supper, I'll just
4 move him to the back of the pickup truck. You can go on.
5 I'll take care of it." And four minutes later, at
6 approximately 16 minutes elapsed into the video, EMTs did
7 show up. Mr. McAllister had an injury, an abrasion to his
8 chin, and that was bandaged.

9 Now, we have approximately 33 percent of the video
10 that doesn't have the defendant's conduct on it, and
11 56-5-2953 requires the defendant's conduct to be on video.
12 Section A is the relevant portion of that statute that
13 requires his conduct to be on video. Section B details
14 different exceptions, ways that failure to comply with
15 Section A would not immediately result in a dismissal.

16 There's been an affidavit that's been filed in this
17 case -- I understand it to be a court exhibit -- in which
18 Deputy Osborne lays out some of the facts of this case.
19 But nowhere in the affidavit is there any language that
20 complies with Section B of 56-5-2953. Section
21 56-5-2953(b) states, "Nothing in this section may be
22 construed as prohibiting the introduction of other
23 relevant evidence in the trial of a violation of Section
24 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the
25 arresting officer to produce the video recording required

1 by this section is not alone a ground for dismissal of any
2 charge made pursuant to Section 56-5-2930, 56-5-2933, or
3 56-5-2945 if the arresting officer submits a sworn
4 affidavit certifying that the video-recording equipment at
5 the time of the arrest or probable cause determination or
6 video equipment at the breath test facility was in an
7 inoperable condition, stating which reasonable efforts had
8 been made to maintain the equipment in an operable
> 9 condition and certifying that there was no other operable
10 breath test facility available in the County, or in the
11 alternative" -- and this is the relevant portion --
12 "submits a sworn affidavit certifying that it was
13 physically impossible to produce the video recording
14 because the person needed emergency medical treatment or
15 exigent circumstances existed." This affidavit that's
16 been filed by the State does not say that it was
17 physically impossible to produce the video recording
18 because the defendant needed medical treatment.

19 Now, on video, it's clear that Mr. McAllister is not
20 on video, and he's not on the video until Deputy Osborne
21 removes him from the golf cart and places him in a sitting
22 position on the tailgate of his own truck, and this is
23 four minutes before EMTs arrive to patch the abrasion to
24 his chin. The reason why he was moved from the golf cart
25 to the pickup truck is not because he needed medical

1 attention. It's because Mr. Branch was going to go get
2 supper. There's no reason why he could not have received
3 medical attention on the golf cart versus medical
4 attention on the tailgate. The reason why he's not on
5 video has nothing to do with medical treatment. It's
6 purely the neglect to comply with Section A. And our
7 cases in South Carolina interpreting 56-5-2953(a) and the
8 requirement that the defendant's conduct be recorded state
9 that the dismissal is -- or remedy is dismissal. That's
10 our position.

11 Furthermore, I have an order from the 11th circuit
12 from Judge Addy. The case is Victor Rayford Irby v. State
13 of South Carolina, in which the 11th circuit held that
14 the Section B exceptions only apply where there is no
15 video. Here we actually have a video. Our position is
16 that not only does the affidavit not comply with Section B
17 to excuse the noncompliance with Section A, but
18 additionally, Section B wouldn't even apply, according to
19 the 11th circuit, because we actually have a video. So we
20 would ask that this Court dismiss this case. Thank you,
21 Your Honor.

22 THE COURT: Mr. Shiflet.

23 MR. SHIFLET: May it please the Court. Thank you,
24 Your Honor. And for purposes of brevity, I think the
25 State would concede that a large majority of the facts

Oral Argument by Respondent (Mr. Shiflet)

1 on the fact that the deputy observed the situation,
2 observed that medical attention was certainly necessary,
3 he then did call for EMS to respond to the scene. Based
4 on that, in conjunction with the defendant's actual
5 physical location relative to where the patrol car was
6 positioned, and then Deputy Osborne's subsequent
7 determination that the defendant could then safely be
8 moved at that point, those circumstances enumerated in
9 our -- in the affidavit from Deputy Osborne, the State
10 would contend certainly satisfied the video statute,
11 specifically Subsection B.

12 THE COURT: Mr. Hope.

13 MR. HOPE: Your Honor, just very briefly. The
14 language in 56-5-2953(b), in that very last portion of B
15 that was referred to by the State, "Nothing in this
16 section prohibits the Court from considering any other
17 valid reason for the failure to produce a video recording
18 based on the totality of the circumstances," that
19 discusses failure to produce a video. Here we have a
20 video. And going back to the reason why, claimed by the
21 State, that McAllister could not be on video is because he
22 needed medical attention, Section B is clear about what
23 the State has to do in order for noncompliance with
24 Section A to be excused, and that is to submit an
25 affidavit that it was physically impossible to record the

1 defendant due to the need for medical attention. And we
2 don't have that affidavit. I think what we have is the
3 State conceding that a portion is missing. So it doesn't
4 comply with A. I think the issue for this court to
5 consider is whether the affidavit is sufficient to excuse
6 the noncompliance under Section B. Thank you, Your Honor.

7 THE COURT: I have a 2012 supplement. Are y'all in
8 agreement that that's the most current statement --

9 MR. SHIFLET: Yes, Your Honor.

10 MR. HOPE: Correct, Your Honor.

11 THE COURT: -- that you're attaching?

12 All right, Mr. Hope, now, tell me again why it is you
13 believe this affidavit is insufficient.

14 MR. HOPE: Your Honor, two reasons. Primarily, 56(b)
15 refers to a time when the need for medical attention could
16 excuse a noncompliance with Section A, and the language
17 that I'm referring to is -- let's see. "If the officer
18 submits a sworn affidavit certifying that it was
19 physically impossible to produce the video recording
20 because the person needed emergency medical treatment."
21 That language does not appear anywhere in the affidavit.
22 We would also contend that it was not physically
23 impossible to record the defendant even though he needed
24 medical attention.

25 Also, and just the last thing that I'm referring to

Oral Argument by Respondent (Mr. Shiflet)

1 some reason. Not that it applies only to a missing video
2 altogether as opposed to a video that does exist but has
3 some problem. As I understand the argument from defense,
4 it's that the statute covers a situation where a video
5 doesn't exist, not that there is a video but it has some
6 problem. That would be my understanding of the argument
7 he was making.

8 I'm submitting to the Court that that's not the case.
9 The statute details exceptions for when a video even does
10 exist but has some problem. My basis for that argument
11 would be the reading, "failure to produce a video
12 recording required by this section." That doesn't
13 necessarily mean failure to provide a DVD or a video in
14 its entirety. That just means a recording required by
15 this section. It would be a failure to provide a
16 recording required by this section in an instance when his
17 conduct wasn't recorded at the beginning phase of the
18 video.

19 MR. HOPE: That's correct, Your Honor. Our position
20 is that Section B only applies where there's not a video.
21 But even if this court would disagree, we ask this court
22 to determine the main issue here, whether the affidavit is
23 sufficient to excuse a noncompliance with Section A. And
24 Section B says that in order to do that, the officer must
25 submit a sworn affidavit certifying that it was physically

1 impossible to produce the video recording because the
2 person needed emergency medical treatment. That language
3 does not appear in the affidavit. So for that reason, the
4 defense maintains the affidavit is insufficient.

5 THE COURT: Mr. Shiflet, what portion of Subsection B
6 are you arriving upon that it was physically impossible to
7 produce it or that exigent circumstances existed?

8 MR. SHIFLET: Specifically, Your Honor, we would be
9 relying on sort of a combination of the exigent
10 circumstances prong, which by my reading does not require
11 an affidavit, as well as the latter two portions of the
12 statute stating, you know, where a video -- situations
13 including, but not limited to, the failure to produce a
14 video recording required by this section is not alone
15 grounds for dismissal. However, as soon as it's
16 practical, as soon as they can, it begins and conforms.
17 That'd be Number 2 as far as exceptions under the statute.
18 And finally, the catch-all, nothing in the section
19 prohibits the Court from considering any other valid
20 reason to produce a video recording based on the totality
21 of the circumstances. I would argue that any of those
22 scenarios, those exceptions that are detailed in the
23 statute, none of which from a technical standpoint, I
24 would submit to the Court, require an affidavit. But any
25 of those are just situations that the Court -- consider in

Oral Argument by Respondent (Mr. Shiflet)

1 relay that to the Court for the consideration of totality
2 of the circumstances, as well as submit to the Court that
3 it would come under one of these scenarios beginning in
4 the section of the statute stating "in circumstances
5 including but not limited to." That would be the State's
6 argument.

7 And finally, I may have said this already, but I know
8 I'm probably rambling, but these exceptions that are in
9 the statute, they're not -- I don't think it's necessary
10 that they be considered to the exclusion of one or the
11 other. I think that's sort of the thrust of what I'm
12 arguing.

13 THE COURT: Mr. Hope, what is your position as to the
14 propriety of the State submitting testimony in court
15 regarding the officer's reasons for not having what you
16 contend is a complete video in accordance with the
17 statute?

18 MR. HOPE: Your Honor, I have no problem with taking
19 testimony today of Deputy Osborne in addition to his
20 affidavit as to the reasons why.

21 THE COURT: Okay.

22 MR. HOPE: But all of the reasons in Section B that
23 Mr. Shiflet is referring to, all of the arguments, this
24 amalgamation that they're putting together, there's
25 language in each portion of Section B referring to failure

1 to produce the video, and here we have a video.

2 THE COURT: Well, I understand, but you apparently
3 contend it's not prepared in accordance with the statute.

4 MR. HOPE: That's correct --

5 THE COURT: It doesn't include all the conduct that
6 the statute requires it to include, and, therefore, that
7 video has not been produced. A video has been produced.
8 But you're contending, as I understand it, one in
9 compliance with the statute has not been produced, and,
10 therefore, a video has not been produced.

11 MR. HOPE: No, Your Honor. I'm not contending a
12 video hasn't been produced. I'm only contending that the
13 video that has been produced doesn't comply with Section A
14 and that no exception in Section B excuses that.

15 THE COURT: I understand. But that's what I'm
16 saying. In other words, there is no video that complies
17 with the statute. There is a video, but you contend
18 what's shown does not comply with the statute.

19 MR. HOPE: That's correct, Your Honor.

20 THE COURT: So that video has not been produced, one
21 that complies.

22 MR. HOPE: Right. I'm contending the that State has
23 not provided a video that's compliant with Section A, but
24 they have provided a video, and Section B only provides --
25 Section B only applies where there's not a video. Had we

1 not had a video here today and Officer Osborne submitted
2 an affidavit that it was physically impossible to
3 record -- to produce a video due to the need for medical
4 attention, then I think the State would be right.

5 THE COURT: Well, you're saying under Subsection B,
6 there can't be a video, not one that's not in compliance.
7 There just can't be one at all.

8 MR. HOPE: That's correct, Your Honor.

9 THE COURT: Well, I'm not reading it that way. I
10 think it means one that's in compliance. 'But do you wish
11 to offer some testimony, Mr. Shiflet?

12 MR. SHIFLET: We have to.

13 THE COURT: Sir?

14 MR. SHIFLET: We have to.

15 THE COURT: Okay.

16 MR. SHIFLET: At this time, the State would call
17 Deputy Osborne.

18 DEPUTY JONATHAN OSBORNE, after having first being
19 duly sworn, testified under oath as follows:

20 BY MR. SHIFLET:

21 Q. Good morning, Deputy Osborne.

22 A. Good morning.

23 Q. Let's just sort of jump to the point. When you
24 responded to the scene, what did you first observe? Tell
25 the court about when you first got there what you saw.

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 A. When I first arrived on scene at 2804 Dalehurst Road,
2 this particular residence, you have to turn on a long
3 gravel driveway that goes back up to the house. As I was
4 turning into the driveway, I was approaching a Toyota
5 pickup truck sitting in the middle of the driveway
6 stopped. There was no one in the truck at that location.
7 Over to the left-hand side, there was a golf cart and
8 Mr. Branch was sitting on the golf cart.

9 Q. Who is Mr. Branch?

10 A. That would be the complainant that had called in that
11 day.

12 Q. Is that who lived at the residence?

13 A. He does live at the residence, yes, sir.

14 Mr. Branch was sitting in the front seat of the golf
15 cart behind the steering wheel, and the defendant was
16 sitting on the back of the golf cart. When I pulled up, I
17 got out of the truck -- I mean I got out of my car, walked
18 over, spoke with Mr. Branch --

19 Q. Let me back you up real quick.

20 A. Yes.

21 Q. When you first pulled up, why didn't you just point
22 your car at them in the golf cart?

23 A. The way the driveway -- it's just big enough for one
24 car to go down. There's no way to actual pull around the
25 truck or anything like that. And there's ditches running

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 along the edge of the driveway, so I was concerned about
2 possibly getting my patrol car stuck.

3 Q. Tell me about Mr. McAllister. What did you observe
4 about him?

5 A. On speaking to Mr. McAllister, he was sitting on the
6 back of the golf cart and he had a laceration in his chin.
7 He had -- it was blood on his face and hands. It looked
8 like a significant injury to the face to where he needed
9 medical attention. So therefore, I called for EMS to come
10 treat.

11 Q. Real quick, tell me what kind of training you have.
12 When you respond to a scene and you observe what you
13 perceive to be injuries, do you have any training as to
14 how to proceed at that point?

15 A. In law enforcement, we assume upon a medical case
16 like that, we let EMS come in and determine what type of
17 medical treatment needs to be done. I was a prior first
18 responder in EMT prior to going into law enforcement, so I
19 do have EMT and first responder training, and through all
20 the training that I've had over the years, I've always
21 been taught if someone has a fall or some type of injury,
22 you do not move them until they're properly evaluated.

23 Q. So did you call EMS?

24 A. I called EMS, yes.

25 Q. You feel like it was necessary to call EMS?

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 A. Absolutely. His chin was bleeding out and it was not
2 controlled.

3 Q. Okay. At some point did you move the defendant from
4 over by the golf cart to where he would be in front of the
5 camera?

6 A. Yes, upon --

7 Q. Tell the Court, in making that decision, when you
8 made the decision to do that, what were you considering?
9 What went through your mind as soon as you made the call?

10 A. Initially on scene, when he was sitting on the back
11 of the golf cart bleeding and I had been advised that he
12 had been initially laying beside the truck, so I wasn't
13 for sure if he had fallen out of the truck and landed on
14 his face. I wasn't for sure what extent of injuries he
15 could have possibly had, so I wasn't trying to move him
16 from the golf cart. I left him right there. Upon talking
17 to Mr. Branch and then the defendant actually began
18 starting to move around quite a bit and then he stood up.
19 And when he stood up, at that point, I realized, okay,
20 well, if he can get up and he's ambulatory and moving.
21 Mr. Branch was wanting to go back to his residence. I
22 went ahead and told Mr. Branch that I could at that point
23 clearly see he was ambulatory, so I moved him to the back
24 of the pickup truck so that Mr. Branch could leave.

25 Q. Was he on video at that point?

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 A. Once I moved him from the golf cart over to the back
2 of the truck, yes, sir, he was on video.

3 Q. And very quickly, after you got him there, was he
4 checked out by EMS?

5 A. He was.

6 Q. Did you attempt to offer field sobriety test?

7 A. After EMS declared that he did not need to be
8 transported with them, at that point, I did attempt to
9 offer a field sobriety test.

10 Q. And how did that go?

11 A. Upon offering field sobriety test, I first offered
12 HGN, and which he was so grossly intoxicated, he could not
13 perform the task. So I stopped all field sobriety tests
14 and placed him under arrest.

15 MR. SHIFLET: Thank you. No further questions.

16 Does the Court wish to see the video at this point?

17 THE COURT: If you wish to show it.

18 MR. SHIFLET: Okay. Do I need to lay a foundation,
19 or is there any objection at this point?

20 MR. HOPE: No objection.

21 MR. SHIFLET: I'm just going to play a very specific
22 portion of it as it concerns the substance of the motion.

23 (Videotape played in open court.)

24 MR. SHIFLET: Please answer any questions defense
25 counsel may have.

1 MR. HOPE: I have no questions, Your Honor.

2 THE COURT: You may step down.

3 Anything further?

4 MR. SHIFLET: Nothing from the State.

5 MR. HOPE: Nothing further, Your Honor.

6 THE COURT: All right. Having considered the
7 arguments of counsel, the presentation of the evidence
8 presented, as well as my reading of the statute, I do find
9 that the officer's conduct in this particular case was
10 reasonable. It is in compliance with Section 56-5-2953
11 and, under the circumstances of this case, the video does
12 comply also with 56-5-2953 Subsection B, particularly the
13 last -- looks like four sentences of that section, the
14 last third of the section, in any event.

15 And, therefore, your motion to dismiss on that ground
16 is denied.

17 MR. HOPE: Thank you, Your Honor. Anything else?

18 MR. SHIFLET: At this time, the State would be ready
19 to proceed to a bench trial.

20 MR. HOPE: We're ready to proceed, Your Honor.

21 THE COURT: Mr. Hope, have you talked with
22 Mr. McAllister about his right to have a jury trial in
23 this case?

24 MR. HOPE: I have, Your Honor.

25 THE COURT: And does he appear to understand that

WILLIAM BRANCH - DIRECT EXAMINATION BY MR. SHIFLET

1 THE COURT: Okay.

2 MR. SHIFLET: At this time, the State would call
3 Mr. William Branch to the stand.

4 WILLIAM BRANCH, after having first being duly sworn,
5 testified under oath as follows:

6 BY MR. SHIFLET:

7 Q. Good afternoon, Mr. Branch.

8 A. Good afternoon.

9 Q. Can you please state your full name for the record?

10 A. Yes. William Alexander Branch.

11 Q. Mr. Branch, where do you live, sir?

12 A. 2804 Dalehurst.

13 Q. Were you living there in October of 2012?

14 A. I was.

15 Q. Do you recall the events of October the 3rd, 2012?

16 A. Not the date but the event, I do.

17 Q. Were you at home that day?

18 A. I was.

19 Q. About, you know, just before 6:00, about 5:45?

20 A. Yeah, I'd say 5:45, 6:00.

21 Q. Where were you, sir?

22 A. I came in toward the backside door. And I looked up
23 the road, and there wasn't anything there. I go in --

24 Q. What do you mean there wasn't anything there?

25 A. There wasn't no cars.

WILLIAM BRANCH - DIRECT EXAMINATION BY MR. SHIFLET

1 Q. Okay.

2 A. And I -- basically I looked on kind of the deer
3 crossing. So anyway, I go in about 15 minutes later, 20,
4 I come back out, and a truck is sitting up there with the
5 door open on it.

6 Q. What did you see after that?

7 A. Well, the driver fell out. Literally fell out on the
8 ground.

9 Q. Now, you said "the driver." Did you get a chance to
10 see him up close that day?

11 A. Yes, when I rode up there with the golf cart.

12 Q. Is that gentleman in the courtroom today?

13 A. Yes. Right there.

14 Q. For the record, wearing the green shirt?

15 A. Yes, wearing a green shirt.

16 Q. Thank you, Mr. Branch.

17 After you saw him fall out of the truck, what did you
18 do then?

19 A. I rode up there in my golf cart, and he was laying
20 face down and he didn't respond, so I called 911. And
21 then he began to move and on his -- on insistence got up
22 and at that point while he was leaned back against the
23 truck.

24 Q. How about his truck? Was there anything about the
25 truck that you did or observed?

WILLIAM BRANCH - DIRECT EXAMINATION BY MR. SHIFLET

1 A. The truck was running, and I reached in and took the
2 keys out, cut it off.

3 Q. How about anybody else? Was anybody else in the
4 truck with him?

5 A. Nobody.

6 Q. Did you notice anything about the passenger seat in
7 the truck? Did it have anything in it?

8 A. Yes, it had a certificate where the young man was
9 proud of, and I was proud for him, he had a certificate
10 where he had finished nursing school. And it was laying
11 there, and nobody had sat there because it was...

12 Q. Thank you.

13 MR. SHIFLET: Court's indulgence.

14 No further questions. Please answer any the defense
15 may have.

CROSS-EXAMINATION

17 BY MR. HOPE

18 Q. Good afternoon, Mr. Branch. How are you, sir?

19 A. Doing fine, sir.

20 Q. You mentioned during your testimony a deer crossing
21 on your property; is that right?

22 A. They come back and forth, and I always look for them.
23 I'm just walking around looking, always try to notice
24 animals.

25 Q. Where are you on your property when you normally look

WILLIAM BRANCH - CROSS-EXAMINATION BY MR. HOPE

1 up towards the deer crossing?

2 A. Usually at -- that's when I'm fixing to go in my
3 backside door, side door, right in the back, and I go up
4 the steps and I just look up the long driveway.

5 Q. And on this particular day, you mentioned that you
6 had looked up at this deer crossing?

7 A. Going in the house.

8 Q. Going into the house. And how much time passed
9 before you looked again?

10 A. Probably 15 minutes. Not more than 20. I came back
11 out.

12 Q. So between 15 and 20 minutes?

13 A. That's right. Probably more like 15.

14 Q. Do you recall why you came back out?

15 A. Yes, to finish my evening chores.

16 Q. What are some of your evening chores?

17 A. Well, I have a bird hobby that I take care of, and I
18 was basically doing some of that. And that was basically
19 what I was doing, I think, at the time.

20 Q. When you looked out the second time and you saw the
21 truck, was Mr. McAllister still in it?

22 A. The driver was in it but fell out. Just as I came
23 down the steps, I -- the door was open when I came -- when
24 I came to the back door, the door was open on the
25 passenger -- I mean the driver side. There was a driver

WILLIAM BRANCH - CROSS-EXAMINATION BY MR. HOPE

1 still sitting in it, but as I reached the bottom step,
2 this man fell out. Literally fell out the truck.

3 Q. So if I understand correctly, sometime between you
4 exiting the house and getting to the bottom of the steps,
5 he fell out of the truck?

6 A. He did. I was watching him when he fell out.

7 Q. I understand that you were the person that contacted
8 911 dispatch; is that correct?

9 A. I did.

10 Q. Do you recall what you told them?

11 A. I -- I think I -- well, I told them I had a man down
12 and that I think I need to get some emergency help out
13 there, but I think I made the lady upset with me because
14 she wanted me to stay on the line with her. I had a man
15 down, and I thought I might could have been -- help him,
16 so I laid the phone down and then went to him. I couldn't
17 get response for a minute or two, and then he began to
18 move and groan a little bit. And then I tried to get him
19 to stay down, but he wouldn't, so I got him -- he got up
20 hisself. Leaned back against the truck. At that time, I
21 reached in and cut his truck off.

22 Q. Did you only call 911 once, or did you call a second
23 time?

24 A. Once.

25 Q. Just once.

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 camera as I was coming into the driveway at Dalehurst
2 Road. As I was pulling in, I observed a green Toyota
3 pick-up truck sitting in the middle of the roadway and
4 there was a golf cart sitting off to the left side in the
5 grass. This particular driveway is a gravel road that
6 goes back up to Mr. Branch's house, which testified prior.

7 Q. Did you speak to the defendant?

8 A. I did.

9 Q. What was his physical description at that point?

10 A. On arrival, the defendant was sitting on the back of
11 the golf cart. While sitting on the back of the golf
12 cart, I observed that he had blood all over his hands and
13 he had blood on his face and he had a pretty significant
14 gash in his chin that did not -- it wasn't controlled at
15 that point; it was still bleeding.

16 Q. Did you talk to him, ask him any questions?

17 A. I did talk with him. On talking with him, he
18 appeared to be somewhat disoriented. Also appeared to me
19 to possibly be impaired.

20 Q. Did you ask him any questions about how he got there?

21 A. I did. I asked him how he got there. He stated that
22 he had drove there. Upon -- through our talking with him,
23 basically what I got from him was that he had drove up
24 here from Spartanburg for job interviews that day. He was
25 trying to get a nursing job up here. And he had drove up

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 for job interviews that day. Upon having a successful
2 interview, he had made a stop off at McHale's on Main
3 Street in Rock Hill, and there he left and was looking for
4 a friend's house.

5 Q. Did you ask him if he had been drinking?

6 A. I did. I initially asked him if he had been
7 drinking. I believe his first response to me was that he
8 had not been drinking anything. I could smell a strong
9 odor of an alcoholic beverage coming from his person as
10 well as when he would speak, it was -- it seemed to be
11 coming from his breath, so at which time I already
12 contacted EMS to come treat his injuries to his face. And
13 I wasn't trying to move him due to the injuries. I wasn't
14 sure how significant his injuries were.

15 While waiting for EMS, I continued to speak with him.
16 He -- upon -- I think I asked Mr. Branch for an
17 identification, and when I asked for Mr. Branch for an
18 identification, Mr. McAllister actually stood up off the
19 back of the golf cart and was trying to get his
20 identification out. At which time I realized at that
21 point he was ambulatory, he was moving around, and I moved
22 Mr. McAllister over to the back of the Toyota truck and
23 had him sit on the tailgate due to Mr. Branch, A, wanting
24 to leave that location and, B, to actually get
25 Mr. McAllister on video for -- to offer field sobriety

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 test.

2 Q. Now, based on your investigation at that point, were
3 you concerned that Mr. McAllister was impaired?

4 A. Oh, very, very much so, yes, sir.

5 Q. And also based on your investigation, what did you
6 determine with regard to his having driven the vehicle?

7 A. I had actually ran the tag. The tag come back to an
8 address in Chesnee, South Carolina. Mr. Branch had stated
9 initially that he had -- that Mr. McAllister had fell out
10 of the driver's seat and was laying on the driver's seat
11 of the car, upon his observation. Mr. McAllister advised
12 me that he had drove the truck to that location.

13 Q. How about keys to the vehicle? Where did you first
14 see the keys? Who had those?

15 A. Mr. Branch had the keys to the vehicle, and upon
16 asking Mr. Branch where the keys came from, he stated he
17 took them out of the ignition and put them in his pocket
18 to prevent Mr. McAllister from driving away.

19 Q. Based on your concern about his impairment, did you
20 decide to offer a field sobriety test?

21 A. I did.

22 Q. Have you offered those tests before as part of your
23 training or your experience?

24 A. Absolutely.

25 Q. Now, do you offer field sobriety tests to every

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 individual you encounter who's driving on the roadway or
2 just some people?

3 A. Just some people.

4 Q. Why did you decide to offer those tests to
5 Mr. McAllister in this case?

6 A. Because due to the totality of everything that I was
7 seeing led me to believe that he was driving under the
8 influence.

9 Q. Tell the Court what happened when you initiated the
10 field sobriety tests or tried to administer those to
11 Mr. McAllister.

12 A. I had Mr. McAllister stand up, stand at the rear of
13 the vehicle after EMS had cleared and said that he did not
14 need to be transported. I had him stand at the rear of
15 the vehicle, and I attempted to offer a horizontal gaze
16 nystagmus test, at which time I asked him if he would
17 watch the stimulus. He stated he could see the stimulus,
18 which at that time was my finger. And when I began moving
19 the stimulus, Mr. McAllister fell over and began falling
20 toward the truck. I grabbed ahold of Mr. McAllister and
21 determined he was too grossly intoxicated to continue with
22 any further field sobriety test. For his safety, I placed
23 him under arrest for driving under the influence.

24 Q. What did you do after that?

25 A. I handcuffed Mr. McAllister. Double-locked the

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 Q. Deputy, was there a video created that recorded the
2 events and circumstance we just talked about?

3 A. It did.

4 MR. SHIFLET: May I approach the witness, Your Honor?

5 Q. Deputy, I want to hand you State's Exhibit 1 -- or
6 previously marked for identification State's Exhibit 1.
7 Can you identify that for the Court, please?

8 A. This is going to be a copy of the video.

9 Q. Have you seen that video before coming to court
10 today?

11 A. I did.

12 Q. Does it fairly and accurately represent the events
13 and conditions we just talked about?

14 A. Yes, sir. I dated it as well as initialed that I had
15 reviewed it, sir.

16 Q. Changed or altered in any way?

17 A. No, sir.

18 MR. SHIFLET: At this time, the State would move
19 State's 1 into evidence.

20 MR. HOPE: No objection, Your Honor.

21 THE COURT: It's admitted.

22 MR. SHIFLET: Request to publish, Your Honor.

23 THE COURT: You may.

24 (Videotape played in open court.)

25

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 Q. Deputy, I failed to ask you this initially. What did
2 you observe? Did you observe anything in the truck
3 concerned you with regard to whether or not the defendant
4 might be impaired?

5 A. Yes, sir. In the truck there, was multiple paperwork
6 and certificates laying in the passenger seat and toward
7 the middle of the truck, and in the passenger floor of the
8 vehicle was a Steel Reserve, one of the large Steel
9 Reserve beers, open.

10 MR. SHIFLET: Thank you.

11 (Videotape played in open court.)

12 Q. Deputy Osborne, when you arrested Mr. McAllister,
13 where did you guys go from there?

14 A. Transported him from there to the Moss Justice
15 Center, or to the detention center.

16 Q. What did you do at the detention center?

17 A. There, I transported him to that location to offer
18 him a DataMaster.

19 MR. SHIFLET: Your Honor, at this time, the State --
20 I think spoke with defense counsel -- I don't think
21 there's any objection -- we'd offer into evidence the
22 implied consent form, the blood alcohol risk report form,
23 and the notice of suspension form.

24 MR. HOPE: No objection, Your Honor.

25 THE COURT: Very good.

DEPUTY JONATHAN OSBORNE - DIRECT EXAMINATION BY
MR. SHIFLET

1 Q. Thank you, Deputy. Showing you what's about to be
2 marked as State's Exhibit 5 for identification purposes.

3 (State's Exhibit Number 5 was marked.)

4 Q. Deputy, is there a video-recording system in the BA
5 room?

6 A. It is.

7 Q. Please identify this for the Court.

8 A. This is going to be the Breathalyzer or Data Master
9 video for Mr. McAllister.

10 MR. SHIFLET: At this time, Your Honor, the State
11 would move the BA video into evidence.

12 Any objection?

13 MR. HOPE: No objection.

14 THE COURT: You going to show it?

15 MR. SHIFLET: I'm not going to publish it.

16 THE COURT: Oh, okay.

17 MR. SHIFLET: Is it in evidence, Your Honor?

18 THE COURT: It is.

19 (State's Exhibit Number 5 was admitted.)

20 MR. SHIFLET: Thank you.

21 Q. Deputy Osborne, based on the totality of your
22 investigation, do you have an opinion as to whether or not
23 Mr. McAllister was under the influence?

24 A. I do, yes, sir.

25 Q. What is that opinion?

DEPUTY JONATHAN OSBORNE - CROSS-EXAMINATION BY MR. HOPE

1 A. Yes, sir, I'd been in the Rock Hill area because once
2 I signed on, I hadn't been signed on long, so I was still
3 in the Rock Hill area.

4 Q. Do you recall the nature of the discussion you had
5 with dispatch?

6 A. Somewhat, yes, sir.

7 Q. What information did they relay to you?

8 A. Initially I think I was dispatched to a person in a
9 driveway disoriented. I'm not sure exactly what the
10 extent of that was then. If I'm not mistaken, a sergeant
11 notified me that there was a possible impaired driver,
12 this was possibly an impaired driver.

13 Q. Your patrol car is outfitted with video-recording
14 equipment, and we have a disk that's been placed in
15 evidence from your patrol car; is that correct?

16 A. Yes, sir.

17 Q. Can you describe the patrol car equipment for me? Is
18 that VHS or is that DVR?

19 A. It's DVR.

20 Q. At what point when you were responding to the call
21 did you activate that system?

22 A. Probably as I was pulling up on scene. Yes.

23 Q. Now, you were present in court when we saw the video
24 earlier; is that correct?

25 A. Yes, sir.

DEPUTY JONATHAN OSBORNE - CROSS-EXAMINATION BY MR. HOPE

1 Q. And we saw that video here in court?

2 A. Yes, sir.

3 Q. Would you agree there's a portion of the video where
4 we see your patrol car approaching the scene where you
5 ultimately met the defendant?

6 A. Yes, sir.

7 Q. And as your patrol car approached the defendant, we
8 don't have any dialogue between you and the defendant or
9 you and Mr. Branch, do we?

10 A. No, sir.

11 Q. Okay. And you parked your car directly behind
12 Mr. McAllister's pickup?

13 A. Yes, sir.

14 Q. Do you recall approximately how much time passed
15 between you activating your blue lights and the time that
16 you stopped behind Mr. McAllister's pickup?

17 A. Pretty sure I didn't even activate blue lights
18 period. I never activated blue lights. The camera was
19 activated from my body mike.

20 Q. Do you recall how much time the camera was activated
21 between activation and the time that you parked behind
22 Mr. McAllister's pickup truck?

23 A. The camera would have been -- however long it takes
24 to kick on from the time I turned onto the roadway.

25 Q. Would you agree there's a portion of video of you

STATE OF SOUTH CAROLINA RECEIVED

COUNTY OF YORK 2013 SEP 27 AM 9:56

IN THE COURT OF
GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
YORK COUNTY, SC

AFFIDAVIT

VS.

Patrick G. McAllister

Defendant.

Indictment No. 2013GS4600430

PERSONALLY APPEARED BEFORE ME, Jon Osborne, and after being duly sworn deposes and says the following:


1. My name is Jon Osborne and I hold the position of Deputy with the York County Sherriff's Department.
2. I am the arresting officer in the above-captioned case.
3. The video recording at the incident site fails to record the Defendant during the initial eleven (11) minutes of the recording.
4. Upon my arrival at the incident location, I observed the Defendant sitting in a golf cart located adjacent to the drive where his vehicle was parked. He was with the original 911 caller, Mr. William Branche.
5. Mr. Branch informed that the Defendant had been lying on the ground beside his truck and was unresponsive.
6. It was immediately apparent the Defendant required medical attention, as his chin was bleeding and he appeared to possibly require stitches.

2013 SEP 27 10:56 AM
JON OSBORNE
SHERIFF


7. I requested the assistance of emergency medical personnel to provide aid and determine whether the Defendant needed to be transported to the hospital.
8. After approximately ten (10) minutes of assessing the situation and observing the Defendant, I determined I could safely move him to the area of the rear of his vehicle and also in view of my video.
9. Emergency medical personnel provided medical attention and determined the Defendant did not need to go to the hospital.
10. I then administered field sobriety tests on camera, and he was arrested for driving under the influence.

FILED-RECEIVED
 2013 SEP 27 AM 9:56
 DAVID HAMILTON
 C.C.P. & G.S.
 YORK COUNTY, SC

Respectfully Submitted,


 Deputy Jon Osborne

SWORN TO and subscribed before
 Me, this 18th day of
September, 2013


 Notary Public for the State of South Carolina
 My Commission Expires 12-3-2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 State of South Carolina,)
)
)
 Plaintiff,)
)
 v.)
)
 Patrick Gillis McAllister,)
)
)
 Defendant.)
 _____)

IN THE COURT OF GENERAL SESSIONS
 SIXTEENTH JUDICIAL CIRCUIT

Ticket No.: 62312GB
 DUI - 2nd Offense

MOTION TO DISMISS

2013 JUN 14 AM 10:37
 CLERK OF COURT
 YORK COUNTY

The Defendant, Patrick Gillis McAllister, through his undersigned attorney, Kevin M. Hope, hereby moves the Court to dismiss the charge of Driving Under The Influence. The grounds for this Motion are as follows:

1. On October 3, 2012, at 5:46 PM, William A. Branche of 2804 Dalehurst Road in Rock Hill called 911 and informed police dispatch that man was in his driveway and looked passed out or drunk.
2. At 5:49 PM, Branche informed police dispatch that the vehicle was running and that the person was awake and seemed confused or intoxicated.
3. At 5:57 PM, Officer J. D. Osborne with the York County Sheriff's Office was dispatched to 2804 Dalehurst Road in Rock Hill.
4. Officer Osborne arrived at the scene at 6:08 PM. Osborne met with Branche who identified the Defendant, who was then seated on the rear of a golf cart located in a grassy area near the gravel driveway where the Defendant's vehicle was parked.

5. At 6:44 PM, Officer Osborne placed the Defendant under arrest for Driving Under the Influence in violation of S.C. Code Ann. § 56-5-2930
6. Officer Osborne has produced a video recording of the incident site pursuant to S.C. Code Ann. § 56-5-2953
7. Officer Osborne first spoke to the Defendant after one minute and thirty seven seconds had elapsed in the incident site video.
8. The Defendant is not visible on the incident site video until after twelve minutes and forty eight seconds have elapsed on the video recording.
9. Officer Osborne escorted the Defendant out of view of the video recording equipment after thirty four minutes and forty eight seconds elapsed on the incident site video.
10. A total of thirty three minutes and eleven seconds elapsed between the moment that Officer Osborne first spoke to the Defendant and the moment that the Defendant was escorted out of view of the video recording equipment to be placed in the rear of the patrol car.
11. Within that period, the Defendant's conduct was not video recorded for a total of eleven minutes and eleven seconds.
12. The Defendant's conduct is not shown on video for 33.69% of the time elapsed between the moment that Officer Osborne first spoke to the Defendant and the time that the Defendant was under arrest and escorted into the patrol car.
13. S.C. Code Ann. § 56-5-2953(A) requires that a person charged with Driving Under the Influence have his conduct at the incident site video recorded.
14. The incident site video fails to comply with S.C. Code Ann. § 56-5-2953(A) as over one third of the Defendant's conduct at the incident site was not video recorded.

15. This failure to comply with section 56-5-2953(A) has not been excused by compliance with 56-5-2953(B).

16. In support of this Motion, the Defendant relies on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011), and Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (S.C.App. 2011) (footnote 4).

FOR ALL THE ABOVE REASONS the Defendant moves the Court to dismiss the charge of Driving Under The Influence for noncompliance with South Carolina Code § 56-5-2953.

Respectfully submitted,



Kevin M. Hope
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Rock Hill, South Carolina

Date: 1/14/13

Exhibit A

Event Recorded on Incident Site Video	Time Elapsed on Incident Site Video
Officer Osborne's patrol car came to a stop	0 minutes and 34 Seconds
Officer Osborne exited his patrol car	1 minute and 24 seconds
Officer Osborne first spoke to the Defendant	1 minute and 37 seconds
Defendant first appeared on video	12 minutes and 48 seconds
Officer Osborne escorted Defendant out of view and to the rear of the patrol car.	34 minutes and 48 seconds

37

From	To	Time Elapsed on Video	From	To	Time Elapsed on Video
Officer Osborne's patrol car came to a stop	Officer Osborne escorted Defendant out of view and to the rear of the patrol car.	34 minutes and 14 seconds (34.23 minutes)	Officer Osborne's patrol car came to a stop	Defendant first appeared on video	12 minutes and 14 seconds (12.23 minutes)
Officer Osborne exited his patrol car	Officer Osborne escorted Defendant out of view and to the rear of the patrol car.	33 minutes and 24 seconds (33.4 minutes)	Officer Osborne exited his patrol car	Defendant first appeared on video	11 minutes and 24 seconds (11.4 minutes)
Officer Osborne first spoke to the Defendant	Officer Osborne escorted Defendant out of view and to the rear of the patrol car.	33 minutes and 11 seconds (33.18 minutes)	Officer Osborne first spoke to the Defendant	Defendant first appeared on video	11 minutes and 11 seconds (11.18 minutes)

CONCLUSIONS

IF	THEN
1 Measuring from the moment Officer Osborne's patrol car came to a stop to the moment the Defendant was escorted out of view and into the patrol car.	The Defendant's conduct is not shown on video for 35.72% of the time.
2 Measuring from the moment Officer Osborne exited his patrol car to the moment the Defendant was escorted out of view and into the patrol car.	The Defendant's conduct is not shown on video for 34.13% of the time.
3 Measuring from the moment Officer Osborne first spoke to the Defendant to the moment the Defendant was escorted out of view and into the patrol car.	The Defendant's conduct is not shown on video for 33.69% of the time.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
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 State of South Carolina.)
)
)
 Plaintiff,)
)
 v.)
)
 Patrick Gillis McAllister,)
)
)
 Defendant.)
 _____)

IN THE COURT OF GENERAL SESSIONS
 SIXTEENTH JUDICIAL CIRCUIT

Ticket No.: 62312GB
 DUI - 2nd Offense

DEFENDANT'S BRIEF IN SUPPORT
 OF MOTION TO DISMISS

2013 JAN 14 AM 10:37
 DEPT. OF COURT
 CLERK OF COURT
 YORK COUNTY, SC

The Defendant, Patrick Gillis McAllister, is charged with Driving Under the Influence in violation of section 56-5-2030 of the South Carolina Code of Laws. Through his undersigned attorney, Kevin M. Hope, the Defendant hereby moves the Court to dismiss the charge for failure to comply with section 56-5-2953(A).

FACTS

On October 3, 2012, at 5:46 PM, William A. Branche of 2804 Dalehurst Road in Rock Hill called 911 and informed police dispatch that man was in his driveway and looked passed out or drunk. At 5:49 PM, Branche informed police dispatch that the vehicle was running and that the person was awake and seemed confused or intoxicated. Officer J. D. Osborne with the York County Sheriff's Office was dispatched to 2804 Dalehurst Road in Rock Hill at 5:57 PM. Officer Osborne arrived at the scene at 6:08 PM. Osborne met with Branche who identified the Defendant, who was then seated on the rear of a golf cart located in a grassy area near the gravel driveway where the Defendant's vehicle was parked. According to his report, Osborne observed that the Defendant was bleeding from his chin and appeared to be "grossly intoxicated"

Osborne had dispatch send EMS to clean the Defendant's chin and check the Defendant's vital signs and blood sugar. EMS stated that the Defendant did not need to go to the hospital. The Defendant was offered a standard field sobriety test but Officer Osborne chose to stop during the first test for the Defendant's safety.

A video recording of the incident site was produced by Officer Osborne pursuant to section 56-5-2953(A). Officer Osborne's in-car video camera was facing forward during the investigation. The audio equipment captured the discussion between Osborne and witness William Branche. The Defendant did not appear on video until after twelve minutes and forty eight seconds had elapsed on the video recording. The elapsed time on the video recording in which the Defendant's conduct was not recorded amounts to over one third of the time that elapsed between the time Officer Osborne first spoke to the Defendant and the time that the Defendant was escorted off camera to the rear of the patrol car.

DISCUSSION

Section 56-5-2953(A) provides that a person who violates section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and breath site video recorded. Our appellate courts have held that the videotaping requirements of section 56-5-2953 are mandatory, and that dismissal is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions. City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (S.C.App. 2011).

In this case, the arresting officer produced an incident site video required by section 56-5-2953(A). However, the incident site video that was produced is missing over one third of

the Defendant's conduct during the roadside investigation. From the moment that Officer Osborne first spoke to the Defendant and the moment that the Defendant was escorted out of view of the video recording equipment to be placed in the rear of the patrol car, a total of thirty three minutes and eleven seconds elapsed on video. Within that period, the Defendant's conduct was not video recorded for a total of eleven minutes and eleven seconds.

The incident site video fails to comply with section 56-5-2953(A) because over a third of the Defendant's conduct during the roadside investigation was not video recorded. This failure to comply with section 56-5-2953(A) has not been excused by compliance with 56-5-2953(B). Application of Suchenski requires dismissal of this case.

Respectfully submitted,



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Rock Hill, South Carolina

Date: 1/14/13

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

J. Derham Cole, Circuit Court Judge

Case No. 2013-GS-46-00430
Appellate Case No. 2013-002169

The State..... Respondent.
v.
Patrick Gillis McAllister..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Kevin M. Hope
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Attorney for Appellant
SC Bar Number 80366

June 25, 2014