

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

**APPEAL FROM YORK COUNTY
Court of General Sessions**

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-002169

The State of South Carolina Respondent,

v.

Patrick Gillis McAllister Appellant.

FINAL BRIEF OF APPELLANT

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AUG 22 2014

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STATEMENT OF THE ISSUES ON APPEAL

- I. IS THE STATE'S FAILURE COMPLY WITH THE MANDATORY VIDEO RECORDING PROVISIONS OF S.C. CODE § 56-5-2953(A) EXCUSED WHERE THE ARRESTING OFFICER FILED AN AFFIDAVIT THAT FAILS TO ASSERT ANY OF THE STATUTORY EXCEPTIONS PROVIDED FOR IN § 56-5-2953(B)?

- II. CAN AN ARRESTING OFFICER USE AN AFFIDAVIT PRODUCED PURSUANT TO S.C. CODE § 56-5-2953(B) WHERE AN INCIDENT SITE VIDEO HAS IN FACT BEEN PRODUCED?

STATEMENT OF THE CASE

On October 7, 2013, this matter was tried without a jury with the Honorable J. Derham Cole presiding. The Appellant filed a motion for dismissal for noncompliance with S.C. Code § 56-5-2953(A). The Appellant's motion was denied. The Defendant was found guilty of Driving Under the Influence, Second Offense. On October 8, 2013, the Appellant filed the Notice of Appeal.

FACTS

On October 3, 2012, at approximately 5:45 PM, William A. Branche of 2804 Dalehurst Road in Rock Hill called 911 and informed police dispatch that a man was in his driveway laying face down next to a pickup truck. R. p. 18, lines 11-25; p. 19, lines 3-8, 17-23. The officer dispatched, Deputy Jonathan Osborne with the York County Sheriff's Office, was informed by a sergeant that the call was in reference to a possibly impaired driver. R. p. 30, lines 4-12. When Deputy Osborne arrived at the location, the Defendant was seated on the rear of a golf cart to the left of a gravel driveway where the Defendant's vehicle was parked. R. p. 13, lines 1-16. Deputy Osborne called EMS due to treat a laceration on the Defendant's chin. R. p. 14, lines 3-10. Deputy Osborne moved the Defendant from the golf cart to the back of the truck, where he was treated by EMS. R. p. 16, lines 1-5.

After EMS declared that the Defendant did not need to be transported for medical treatment, Deputy Osborne attempted to offer the Defendant a field sobriety test. R. p. 16, lines 6-9. Deputy Osborne determined that the Defendant was unable to perform the test and placed him under arrest for Driving Under the Influence. R. p. 16, lines 11-14.

Deputy Osborne produced a video recording of the incident site pursuant to S.C. Code Ann. §56-5-2953. The incident site video was admitted into evidence as State's Exhibit 1. R. p. 27 Deputy Osborne also filed a sworn affidavit admitted as Court Exhibit 1.

ARGUMENT

A. THE INCIDENT SITE VIDEO FAILS TO COMPLY WITH THE MANDATORY VIDEO RECORDING PROVISIONS OF § 56-5-2953(A).

Pursuant to the provisions of S.C. Code Ann. § 56-5-2953, as amended in 2009, a person charged with Driving Under the Influence must have their conduct video recorded at the incident site as follows:

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording at the incident site must:

(i) not begin later than the activation of the officer's blue lights;

(ii) include any field sobriety tests administered; and

(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

HISTORY: 1998 Act No. 434, Section 9; 2000 Act No. 390, Section 23; 2003 Act No. 61, Section 8; 2008 Act No. 201, Section 11, eff. February 10, 2009.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). When a statute

is penal in nature, it must be strictly construed against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

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, 646 S.E.2d 879 (2007); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011).

Defense counsel submitted a written motion to dismiss for the State's failure to comply with § 56-5-2953. R. p. 2, lines 2-7. The written motion and attached exhibit detailed the following relevant times on the incident site video:

- (a) Officer Osborne first spoke to the Defendant after one minute and thirty seven seconds elapsed in the incident site video.
- (b) The Defendant is not visible on the incident site video until after twelve minutes and forty eight seconds have elapsed on the video recording.
- (c) 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.

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. Within that period, the Defendant's conduct was not video recorded for a total of eleven minutes and eleven seconds. 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.

Defense counsel argued that the incident site video fails to comply with § 56-5-2953 because the incident site video is missing approximately 33 percent of the Defendant's conduct. R. p. 3, lines 9-15; p. 11, lines 11-14. The Court denied the Defendant's motion to dismiss, stating the following on the record:

“[...] Having considered the arguments of counsel, the presentation of the evidence presented, as well as my reading of the statute, I do find that the officer's conduct in this particular case was reasonable. It is in compliance with Section 56-5-2953 and, under the circumstances of this case, the video does comply also with 56-5-2953 Subsection B, particularly the last - - looks like four sentences of that section, the last third of the section, in any event.”

R. p. 17, lines 6-16

The Trial Court erred in denying the Defendant's motion to dismiss on grounds that the officer's conduct in this case was reasonable. Whether an officer's actions were reasonable is not a question involved or affecting the statutory analysis of whether an incident site video complies with § 56-5-2953(A) or whether noncompliance with § 56-5-2953(A) is excused by one of the provisions in § 56-5-2953(B).

The Trial Court also erred in ruling that the “video does comply with 56-5-2953 Subsection B”. Whether a *video* complies with § 56-5-2953(B) is also not a question involved in the statutory analysis of § 56-5-2953. Subsection (B) only provides the few exceptions by which, if satisfied, failure by the arresting officer to produce a video recording will not result in the dismissal of a charge made pursuant to § 56-5-2930, § 56-5-2933, or § 56-5-2945. The few exceptions enumerated in Subsection B requiring an affidavit only call into question whether an *affidavit* complies with Subsection B.

Here, the incident site video produced by the State fails to comply with § 56-5-2953(A) because the incident site video is missing approximately 33 percent of the Defendant's conduct. The State's failure to comply with § 56-5-2953(A) is not excused by the exceptions enumerated

in § 56-5-2953(B). The videotaping requirements of § 56-5-2953 are mandatory based on our Supreme Court's decision in City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). Our appellate courts have strictly construed § 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case. Suchenski, at 17; Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011). The Trial Court erred in denying the Defendant's motion to dismiss for failure to comply with § 56-5-2953 where the noncompliance was not properly mitigated by Subsection (B) exceptions.

B. THE AFFIDAVIT PROVIDED BY THE ARRESTING OFFICER IS INSUFFICIENT TO EXCUSE NONCOMPLIANCE OF THE INCIDENT SITE VIDEO WITH § 56-5-2953(A).

S.C. Code Ann. § 56-5-2953(B), as amended in 2009, sets forth the following.

- (B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930 , 56-5-2933 , or 56-5-2945 . Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930 , 56-5-2933 , or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

HISTORY: 1998 Act No. 434, Section 9; 2000 Act No. 390, Section 23; 2003 Act No. 61, Section 8; 2008 Act No. 201, Section 11, eff. February 10, 2009.

In response to the Defendant's motion to dismiss, the State submitted a sworn affidavit of Deputy Osborne. The affidavit states as follows:

1. My name is Jon Osborne and I hold the position of Deputy with the York County Sherriff's [sic] 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. Branche informed that the Defendant had been lying on the ground beside his truck and was unresponsive.
6. It was immediately apparent that the Defendant required medical attention, as his chin was bleeding and he appeared to possibly require stitches.
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.

[Court Exhibit 1] R. pp. 32-33

In response to the affidavit of Deputy Osborne, defense counsel submitted several arguments on the record. First, defense counsel argued that the affidavit is not sufficient to

excuse noncompliance with § 56-5-2953(A). R. p. 7, lines 17-21. Specifically, defense counsel argued that the language of § 56-5-2953(B), “If the officer submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment”, does not appear anywhere in the affidavit. R. p. 6, lines 20-25; p. 7, lines 1-6. Secondly, defense counsel argued that the reason [the Defendant] was moved from the golf cart to the pickup truck is not because he needed medical attention, but instead because Mr. Branch was going to get supper, as evidenced by a discussion between Deputy Osborne and Mr. Branch which was recorded on video. R. p. 3, lines 1-7; p. 4, lines 24-25; p. 5, lines 1-10. Thirdly, defense counsel argued that § 56-5-2953(B) only applies where the State has failed to produce a video pursuant to § 56-5-2953(A). R. p. 8, lines 19-20; p.10, lines 22-25; p. 11, line 1; p. 11, lines 22-25; p. 12, lines 1-8.

The State argued that it would be relying on “sort of combination of the exigent circumstances prong” as well as the latter two portions of the statute. R. p. 9, lines 5-25; p. 10 lines 1-12. The State conceded that the affidavit makes no assertion of physical impossibility, but instead “lays out the background or the basis for the exigent circumstances or the totality of the circumstances or one of the scenarios that’s contemplated by legislature whereby the Court can consider that there was some reason that the video does not comply initially but then it does resume compliance when it’s practical.” The State argued further,

“...[We] would not be relying on the physical impossibility based on the medical treatment. We’re sort of relying on this medical situation that was clear to the officer and would be clear on the video to explain why there was either exigent circumstances or relay that to the Court for consideration of totality of the circumstances, as well as submit to the Court that it would come under one of these scenarios beginning in the section of the statute stating “in circumstances including but not limited to.”

In response, defense counsel argued that each portion of § 56-5-2953(B) that the State referred to contained language requiring the failure to produce a video and, because a video had been produced, § 56-5-2953(B) did not apply. R. p. 10, lines 22-25; p. 11, lines 1.

The Trial Court erred in denying the Defendant's motion to dismiss. The State's failure to comply with Subsection (A) of § 56-5-2953 was not properly mitigated by Subsection (B) exceptions.

C. A PLAIN READING OF § 56-5-2953(B) PROVIDES THAT A SUFFICIENT AFFIDAVIT MAY ONLY EXCUSE NONCOMPLIANCE WITH § 56-5-2953(A) WHERE THE STATE HAS FAILED TO PRODUCE A VIDEO RECORDING.

Subsection (B) of § 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Mt. Pleasant, at 346. Noncompliance is excusable: (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 videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances. *Id.*

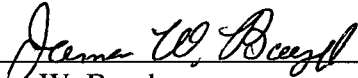
This noncompliance is only excused if the State complies with one of the four exceptions enumerated in § 56-5-2953(B). The State did not contend at trial that the video equipment was inoperable. The State did not submit an affidavit that it was *physically impossible to produce a videotape* because the defendant needed emergency medical treatment. The State did not submit an affidavit that it was physically impossible to produce a videotape because exigent circumstances existed. Also, this was not an unusual traffic stop falling under a category

including but not limited to road blocks, traffic accidents, and citizen's arrests. Lastly, while the State argued that the affidavit "lays out the background or the basis for the exigent circumstances or the totality of the circumstances", the plain language of that provision clearly only applies where there is a *failure to produce a video recording*.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully Submitted,



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August 15, 2014

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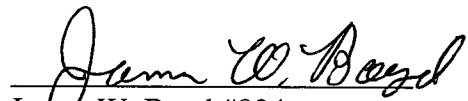
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.



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