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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case Tracking No. 2016-002238

State of South Carolina,

Appellant,

vs.

Kenneth Taylor,

Respondent.

RECORD ON APPEAL

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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 STATE OF SOUTH CAROLINA,)
)
 Appellant,)
)
 vs.)
)
 KENNETH TAYLOR,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

ORDER ON APPEAL

Ticket No: H276630
Appeal No.: 2016-CP-42-2066

HEARING DATE:	September 12, 2016
JUDGE:	The Honorable J. Mark Hayes
STATE'S ATTORNEY:	Spenser H. Smith, Asst. Solicitor
DEFENDANT'S ATTORNEY:	Zachary D. Ellis
COURT REPORTER:	Margaret Woods
CLERK OF COURT:	M. Hope Blackley

THIS MATTER CAME BEFORE THE COURT on September 12, 2016, as a result of the State's Appeal regarding the Honorable James B. Paslay's decision in the Spartanburg County Magistrate Court that dismissed Defendant's Driving Under the Influence charge based upon the prosecuting agency's failure to comply with the mandatory video recording requirements of S.C. Code Section 56-5-2953. Present at the hearing were Assistant Solicitor Spenser S. Smith, of the Spartanburg County Bar, the Defendant and his attorney, Zachary D. Ellis, of the Greenville County Bar.

After reviewing the State's Appeal, other documents in the Clerk's file and considering the arguments presented by both parties, I hereby make the following:

FINDINGS OF FACTS

1. That on June 11, 2015, at approximately 4:35 a.m., Lance Corporal R.B. Thornton of the South Carolina Highway Patrol responded to a call regarding a vehicle in a ditch on

Nahant Street off of Hayne Street in Spartanburg County. Upon arriving on scene, Lance Corporal Thornton was met by Deputy Woodward of the Spartanburg County Sheriff's Office, who had placed a call to the South Carolina Highway Patrol for assistance after locating the vehicle. Lance Corporal Thornton approached Defendant while he was seated in the car and detected an odor of alcohol along with slurred speech coming from Defendant. Lance Corporal then asked Defendant to step out of his vehicle. The Defendant was taken in front of Lance Corporal Thornton's vehicle for field sobriety testing. The video recording at the incident site shows Lance Corporal Thornton offer Defendant a field sobriety test where he is asked to recite the alphabet. Upon completion of the field sobriety testing, Defendant was arrested for Driving Under the Influence and Open Container. Lance Corporal Thornton then chose to move Defendant and place him in the front of his patrol car. After moving Defendant, Lance Corporal Thornton advised Defendant of his Miranda rights while Defendant was not visible on the patrol car's in-car video camera or any other video recording device. The advisement of Miranda rights by Lance Corporal Thornton is audible on the recording, but neither Lance Corporal Thornton nor Defendant are visible on the video recording during the advisement of Miranda rights.

2. At issue in this case is whether the arresting officer complied with the requirements of S.C. Code Ann. §56-5-2953 in the video recording of the advisement of Defendant's Miranda rights. That statute states that the video recording at the incident site must "(iii) include the arrest of the person for 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** (emphasis added) the person being advised of his Miranda rights." In the video recording of Defendant in this matter, the arresting officer's in-car camera is facing forward when

Defendant is advised of his Miranda rights while seated in the passenger seat of Lance Corporal Thornton's patrol car, such that one cannot see Lance Corporal Thornton advising Defendant of his Miranda rights nor any acknowledgment of the same by Defendant, as required by statute.

3. That the video camera of Lance Corporal Thornton was in proper working order when Defendant was arrested, and the State has not submitted any affidavit or argued any statutory exception for noncompliance with the videotaping requirements as provided for by S.C. Code Ann. §56-5-2953(B).

4. That the parties were before the Spartanburg County Magistrate Court for a jury trial on May 25, 2016 with Judge James B. Paslay presiding. Defendant made a motion to dismiss the case alleging a violation of S.C. Code Ann. §56-5-2953. Judge Paslay granted said motion and dismissed Defendant's Driving Under the Influence charge.

5. That the State filed an Appeal on June 2, 2016 alleging the Magistrate's ruling materially and significantly impaired the prosecution of the criminal case under §14-3-330(2)(a) of the Code of Laws of South Carolina, and *Reed & State v. Becka*, 333 S.C. 676, 511 S.E.2d 396 (S.C. App. 1999); *Smart by Clark v. Hampton County School District No.2*, 315 S.C. 192, 432 S.E.2d 487 (S.C. App. 1993); *State v. McKnight*, 287 S.C. 167, 337 S.E.2d 208 (1985); and *State v. Belviso*, 360 S.C. 112, 600 S.E.2d 68 (2004 S.C. App.).

Based upon the above stated findings of fact, I hereby make the following:

CONCLUSIONS OF LAW

1. That this Court has personal jurisdiction and subject matter jurisdiction of the matter before it, and that venue is proper in Spartanburg County.

2. That pursuant to the provisions of S.C. Code Ann. §56-5-2953(A), as amended in 2008, 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 (emphasis added).

3. That the Magistrate issued a thorough order addressing the issues presented to him, and the reasons behind his decision. Upon appeal, the Court finds no error in the Magistrate's reasoning or with his decision. When the statute was amended, the legislature made clear their intention what needed to be seen on the video. While the State argues on appeal the Defendant can show no prejudice, prejudice does not have to be shown to establish a violation of the statute. With the legislature's clear mandate and no exception to the mandate being argued above, the Magistrate was correct in his ruling. Nevertheless, if prejudice was an element that a Defendant needed to establish, when the video requirement is violated, the prejudice is that the conduct mandated to be recorded was not recorded for evidentiary purposes.

THEREFORE, IT IS HEREBY ORDERED that based upon the above stated findings of facts and conclusions of law, the Court hereby denies the State's Appeal.

AND IT IS SO ORDERED.

The Honorable J. Mark Hayes
Presiding Judge, Circuit Court

_____, 2016
Spartanburg, South Carolina



Spartanburg Common Pleas

Case Caption: State Of South Carolina VS Kenneth Taylor
Case Number: 2016CP4202066
Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 The State of South Carolina,)
)
 Appellant,)
)
 vs.)
)
 Kenneth Taylor ,)
)
 Respondent.)
)
 _____)

IN THE COURT OF COMMON PLEAS

Magistrate's Return on Appeal

Uniform Summons No. H276630

Appeal No. 2016-CP-42-2066

2016 JUN -7 PM 4:01
 M. HOPE BLAIRLEY

The above styled case came for jury trial in the Spartanburg Magistrate Court on May 25, 2016, Judge James B. Paslay presiding. The state was represented by Assistant Seventh Circuit Solicitor Spenser H. Smith and the defendant was represented by Attorney Zachary D. Ellis. Prior to swearing a jury, the defense made a motion to dismiss the case alleging a violation of Section 56-5-2953, the DUI videotaping statute.

The statute in question requires the videotaping at the incident site of a number of things, but the relevant part provides : "(iii) include the arrest of a person for 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 (emphasis added) the person being advised of his Miranda rights."

In the instant case, the defendant was arrested for violation of Section 56-5-2930 (DUI). However, it is without dispute that the officer videotaped everything required by the statute with the exception of the advisement of Miranda rights. The advisement is there but the defendant is not shown on the videotape. The tape only provides the audio advisement even though the officer could have easily turned the camera toward the

defendant as he sat in the officer's patrol vehicle. Therefore, the facts show that the officer made a conscious decision not to depict the defendant during this advisement.

It was the court's understanding that these facts were not in dispute. Additionally, the statute in question provides exceptions in Part (B) of the statute, excusing videotaping under certain circumstances, but no exceptions were argued by the state nor are they supported by the facts as set forth above. The court concluded that no exigent circumstances existed, there was no officer safety issue, and no equipment malfunction. There was no life and death traffic accident issues as the recent case of Teamer, S. Ct. Appellate Case No. 2013-001284 (SCCtAppeals 2016).

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A. HOFFELAND
CLERK

Arguments were allowed by both parties and then the court ruled. In so ruling, the court considered a number of cases dealing with alleged violations of the videotaping statute.

The landmark case on this statute was the City of Rock Hill v. Suchenski, 314 S.C. 12, 646 S.E. 2d 879 (2007), in which the videotape ran out at the incident site before the arrest of the defendant for DUI. The S.C. Supreme Court ruled that the proper remedy when the videotape did not include all the mandatory required items and there were no Part(B) exceptions was a *per se* dismissal of the case.

In State vs. Taylor, Appellate Case No 2012-213018 (SCCtAppeals 2014), in interpreting the requirements of the videotaping statute, the Court made it clear: "Therefore, if the statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Taylor further made it clear that "The Legislature clearly intended for

a *per se* dismissal in the event the law enforcement agency violates the mandatory provisions of Section 56-5-2953."

Finally, Taylor clarified that some minor interactions with the officer did not have to be on the video, but "In addition, unlike requiring the video to encompass every action of the defendant, requiring video recording of the person's arrest and the officer issuing Miranda warnings serves to protect important rights of the defendant."

It is axiomatic law that the words of a statute must be given their common meaning. In our society it is clear that the word "show" means something visible. Black's Law Dictionary defines "show" as "something that one views or at which one looks and at the same time hears." The Meriam-Webster Dictionary defines the word "to cause or allow something to be seen."

In State v. Sawyer, 409 S.C. 475, 763 S.E. 2d 183 (2014) the S.C. Supreme Court ruled that a video recording in the breath testing room that depicted the reading of the Miranda rights but had no audio violated the mandate of the statute, the relevant language required that the video "(b) must include the reading of Miranda rights..."

Therefore, it appears that the S.C. Supreme Court has adopted the concept that to "show" something requires both a visual and an audible element. Failure of either is fatal to the case. Simple logic indicates that to "show" something at least always includes a visual element.

Finally, the most recent case is State vs. Gordon, 414 S.C. 94, 777 S.E. 2d 376 (2015). This was a rehearing of a case in which the Court of Appeals ruled that failure to see the defendant's head during the administration of the HGN eye test required a *per se* dismissal of the case. In the latter case, the court ruled that the head was visible... "Thus,

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the requirement that the head be visible on the video is met and the statutory requirement that the administration of the HGN field sobriety test be video recorded is satisfied. Therefore, the per se dismissal of the charges as discussed in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 SE 2d 278 (2011) and City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007) is not appropriate."

It is clear that had the head not been visible, the appropriate remedy as set forth in Suchenski would have been per se dismissal. Otherwise, the Gordon ruling would have not been so apparent that the head's visibility, albeit it not necessary for it to be very clear, was necessary to avoid the pro se dismissal of the case. It is even more significant since the court concluded that the HGN test had no probative value since the finder of facts could not see the defendant's eyes. Therefore, if the Court concluded that something must be shown on the video because of the dictates of the statute, even though it had no probative value, the Court made it clear that the State must follow the requirements of the statute to the letter to avoid the consequences of dismissal.

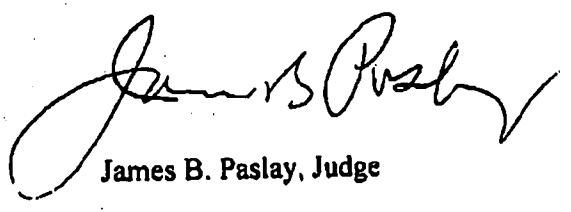
The current case is more akin to Town of Mt. Pleasant v. Roberts cited by the Supreme Court in State v. Gordon. In Roberts, the town intentionally chose not to request additional video cameras for its police vehicles even though many DUI cases were being made. The Supreme Court concluded that this was an effort to circumvent the videotaping requirements and concluded that per se dismissal of the case was the appropriate remedy. In the current case, an experienced officer intentionally chose not to follow the clear and unambiguous dictates of the videotaping statute.

Applying all of these appellate rulings, this court ruled that the officer had violated the mandatory videotaping requirements of the statute, that the violation was not

excused by a Part(B) exception, and the appropriate remedy pursuant to Suchenski was a per se dismissal of the case.

From this ruling the State has appealed. Attached to this Return is the entire record of this case.

Respectfully submitted this 7th day of June, 2016.



James B. Paslay, Judge

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M. HOPE BLACKLEY

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	
STATE OF SOUTH CAROLINA)	
PLAINTIFF,)	TRANSCRIPT OF RECORD
)	2016-CP-42-02066
-vs-)	
)	SEPTEMBER 6, 2016
KENNETH TAYLOR,)	SPARTANBURG, SOUTH CAROLINA
)	
DEFENDANT.)	

B E F O R E:

THE HONORABLE J. MARK HAYES, JUDGE.

A P P E A R A N C E S:

SPENSER SMITH, ASSISTANT SOLICITOR
ATTORNEY FOR THE PLAINTIFF

ZACHARY ELLIS, ESQUIRE
ATTORNEY FOR THE DEFENDANT

MICHAEL R. WATTS
CIRCUIT COURT REPORTER

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(NO WITNESSES CALLED)

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(NO EXHIBITS MARKED)

1 (PROCEEDINGS, SEPTMEBER 6, 2016)

2 THE COURT: All right. I have got down that this
3 is the matter of the State versus Taylor.

4 This is an appeal from the Magistrate's Court
5 filed by the State after the magistrate dismissed the
6 charges for noncompliance with the video recording statute
7 because the video did not show the defendant when he was
8 advised his Miranda Rights at the scene.

9 MR. SMITH: Yes, Your Honor.

10 THE COURT: All right. Now --

11 MR. SMITH: The requirement of the datamaster room
12 is gone.

13 THE COURT: You don't do that anymore?

14 MR. SMITH: No, sir.

15 THE COURT: Okay.

16 All right. If I need to view the video, y'all
17 will have to get me a copy of it, but if y'all agreed that
18 that's what the video shows, then we don't need to see the
19 video.

20 MR. SMITH: We actually didn't make it a part of
21 the record.

22 THE COURT: Okay.

23 MR. SMITH: We agreed on essentially what is in
24 the video.

25 THE COURT: Okay.

1 MR. ELLIS: Yes, sir.

2 THE COURT: I'll be more than happy to hear from
3 you.

4 MR. SMITH: Your Honor, just so we are clear,
5 essentially Tony Woodward of the sheriff's office finds a
6 car that's parked halfway off the side of the road. Someone
7 in the road makes contact with the driver, calls for Highway
8 Patrol to come out there.

9 They put Mr. Taylor through field sobriety tests.
10 He is heavily intoxicated and has a lot of trouble in the
11 alphabet and numbers and then he's arrested.

12 He is taken in view of the camera to the front of
13 the car. Then he's placed into the passenger seat of the
14 car. Trooper Thornton sits down in the front seat of the
15 car and then reads him his Miranda Rights, but prior to
16 doing this he does not flip around the camera so you can
17 actually see the faces of Trooper Thornton and Mr. Taylor as
18 he's reading him his Miranda Rights, but the camera is still
19 looking outside of the front of the vehicle, but you can
20 hear all the necessary prongs of Miranda being read. In
21 fact, you can hear Mr. Taylor say "I understand" after all
22 of them are read, and the magistrate dismissed the case
23 because 56-5-2953 says that the arrest -- or the video must
24 include the arrest and show the reading of Miranda Warnings
25 and interpreted that show means that there must be some

1 visual depiction, I guess, of the reading of the warnings.

2 The State's position initially is that this
3 videotape does require -- does meet the requirements of
4 56-5-2953.

5 Black's Law Dictionary defines show as to make
6 evident or clear by evidence to prove, and in this case the
7 videotape does prove that Miranda was read. It does prove
8 that Mr. Taylor had an understanding of what his rights were
9 at the time of the arrest and going forward as far as any
10 questioning that Trooper Thornton would ask of him.

11 Basically we have clear evidence that he was read
12 his Miranda Rights.

13 The second State's position is that the magistrate
14 largely relied on State v. Sawyer. Sawyer was a case that
15 was decided back when you did have to read the Miranda
16 Rights in the datamaster room. And in that case the audio
17 is muted, through no error of the troopers, but from the
18 problems with the SLED video had the audiotape muted while
19 they were reading the Miranda Rights in the datamaster room,
20 even though the officer testified they ultimately dismissed
21 the case because you couldn't hear the Miranda Warnings.

22 I think it's different in this case because of
23 Miranda is more important to have it heard auditory than
24 visually, because when there is somebody who's reading off
25 of a card, you don't know what they are saying. You

1 can't -- you can't be certain that Mr. Sawyer understood
2 what his rights were.

3 The video in this case you can hear Miranda being
4 read and you can hear Mr. Taylor saying I understand his
5 rights, so the concerns of Sawyer are not really present in
6 this case.

7 And a field sobriety test, I understand, is
8 something that's important to be able to see, because what
9 you are trying to determine it's important to see visually.
10 Miranda is an auditory thing. It's not important to see the
11 trooper's face. It's not important to see the defendant's
12 face while it's being read.

13 Finally, Your Honor, I just don't think that this
14 ruling holds up with what the Supreme Court has recently
15 said. In the last three Supreme Court decisions the Supreme
16 Court has emphasized that the purpose of 56-5-2953 is to
17 create direct evidence of the DUI arrest. In this case the
18 videotape did that. You have the reading of Miranda Rights
19 captured.

20 I also think it leads to funny results. There is
21 plenty of cases where the defendant is arrested up at the
22 front of their car with a good distance between the officer.
23 They are read their Miranda Warnings. You can't see the
24 defendant's face. You can't see that the trooper is
25 mouthing the words that you are hearing on the audio and

1 that those cases are not dismissed. There is no difference,
2 really, in this case between, you know, a person being read
3 their Miranda Rights a hundred feet off the camera versus
4 being read directly into the microphone but without being
5 able to see their face.

6 He's not interrogated after the questions. In
7 light of that it seems that suppression or just saying that
8 Miranda was done, which is the entire purpose of the
9 videotaping statute, has met the requirements. Mr. Taylor
10 has better evidence that he was properly advised of his
11 rights than almost every other defendant in the State of
12 South Carolina.

13 THE COURT: Well, when a court views a statute --
14 well, what standard do you want me to apply to this statute
15 when I view it?

16 MR. SMITH: I think the judge made an error of law
17 in ruling that the case should be dismissed because show
18 means it must be visually depicted the defendant's face.

19 THE COURT: All right. Let me try asking my
20 question again because it probably was not clear.

21 There is a standard that a court in viewing the
22 statute for me to say this judge made an error, I have got
23 to take a look at the statute and then I have got to view it
24 how?

25 Is this one of those statutes that I have to view

1 strictly and narrowly against the State because it is part
2 of a -- because it's a criminal statute, or do I view it
3 broadly and try to give it an overall effect taking a look
4 at the entire statutory scheme? Show -- because you are
5 asking me to interpret that word show.

6 MR. SMITH: Yes, sir.

7 Your Honor, my understanding is that it would be a
8 de novo review to you because it's about the magistrate
9 making an error of law.

10 THE COURT: Okay.

11 Yes, sir, do you agree with him?

12 MR. ELLIS: Well, Your Honor, I believe you are
13 required to make a strict ruling on that based on the case
14 law, if nothing else. I mean, the judge --

15 He is correct under 56-5-2953 is a requirement
16 that the person be shown being read their Miranda and that
17 was a change from the prior law, judge. Your Honor, when
18 the DUI law was written, their version of it before the
19 current one, the word show I don't believe appeared in that
20 videotaping statute with regard to Miranda. Show is added
21 when the law was revised in the last revision of 56-5-2953,
22 I believe, and so it seems clear to me that the legislature
23 did intend that that word be given a great deal of weight
24 because it was added in as a new addition to the law.

25 If I understand the solicitor, he says he found

1 one definition of the word show and cited it. The
2 magistrate who ruled on this case I believe used the more
3 accepted version of show from which he also had a Black's
4 Law Dictionary, judge, show as something that one views or
5 at which one looks and at the same time hears.

6 Also the Merriam Webster dictionary defines it as
7 the cause or allows him to be seen.

8 I believe show typically would be seen as or
9 viewed as a requirement for somebody to be able to be
10 visible and that is a common prong, judge. Of course, the
11 court is under all the case law is required to take those
12 under its plain and ordinary meaning of the word.

13 Your Honor, I will point out that it is solely the
14 officer's choice as to where to position the defendant in
15 regards to the camera at any given time. This is a very
16 experienced trooper. When I was a solicitor in this office
17 I worked with him quite a bit. He's been doing this for a
18 long time and he knows that the video is in his car. He
19 could have given the Miranda Warnings in front of the car
20 and he chose not to. He could have put the defendant in the
21 car and turned the video around and shown it on video, as he
22 is required to do by stature, but he chose not to do that
23 either.

24 There was no valid reason with regard to say
25 injuries or emergency as to not video this. I believe that

1 was not in dispute either, judge. There was no exception
2 under Subsection B of 56-5-2953 that would also excuse
3 noncompliance with the videotaping statute. I have looked
4 up also not in dispute.

5 And, Your Honor, the State just can't choose which
6 section of the law they are going to follow or not follow.
7 They are required to follow the law. There is a great deal
8 of case law at this point on the videotaping issue or video
9 recording issue at this point with the DUI law and all of it
10 requires strict compliance with the law.

11 Going back to the City of Rock Hill v. Suchinski,
12 in that case, I'm sure the court is aware, the officer did
13 not choose to stop the video. He ran out of videotape and
14 that was the reason why the video did not continue all the
15 way through. However, the court found that that was the
16 officer's responsibility to make sure that there was enough
17 videotape to record everything that was required under the
18 statute. Because he did not record everything that was
19 necessary, the case was dismissed.

20 Judge, again also the legislature has noted
21 established procedure that must be followed when making a
22 DUI arrest. If it's not followed, then that case is
23 required to be dismissed.

24 Also, judge, State v. Taylor, a 2014 Court of
25 Appeals case, and that also, again, noted that the video is

1 required and that there is clear intent from the legislature
2 that strict compliance or the video recording statute be
3 complied with, judge. It does note there is a severe
4 sanction for noncompliance, which was dismissal, but State
5 v. Taylor from the Court of Appeals, again 2014, notes that
6 if the State does not comply with the videotaping statute
7 strictly, then the case must be dismissed, unless an
8 exception applies. And, again, no exception applies here.

9 Judge, the Sawyer case that the solicitor noted,
10 which again was also a case that we mentioned or we
11 discussed at the magistrate level, actually was my case,
12 judge, when I was a solicitor here before Judge Couch. And
13 basically what happened in that case was the deputy -- his
14 practice was to walk around into the area of our datamaster
15 room, which as the court is aware is divided into two
16 sections. He walked into the area where the defendant --

17 THE COURT: I have never been in that room. I
18 wouldn't know that.

19 MR. ELLIS: Well, I'm sorry, judge, I thought
20 maybe you have seen the video.

21 Basically, judge, there is a partition between
22 where the officer stands and where the defendant is. He
23 walked into the area where the defendant is. By all
24 accounts, based on the deputy's testimony, the SLED agent
25 who came up from Columbia, his testimony, the audio switches

1 were turned on. There was no way the deputy in that case
2 would have known that the audio was not functioning in the
3 room where the defendant was. It is visible to see him
4 going through the Miranda Rights and the implied consent
5 warnings with the card and the page in front of him. You
6 see the defendant acknowledging that that's what's
7 happening. I don't believe at any point in that hearing
8 that we had that the defense ever actually objected or state
9 that there was no understanding of Miranda Warnings or
10 implied consent rights. And the SLED agent, again,
11 testified there was no way the officer could have known that
12 he was not being audio recorded in Sawyer, but,
13 nevertheless, the court -- Judge Couch actually ruled that
14 the case should be dismissed, and that was upheld all the
15 way up to the Supreme Court. And, again, that was not a
16 choice by the officer. That was just a malfunction that he
17 was unaware of.

18 Judge, there are several other cases as well.
19 State v. Gordon requiring that the head be visible for
20 horizontal gaze nystagmus, even though no in-car camera or
21 dash camera from a patrol car is going to really be able to
22 capture the movement of the eyes, which is one of the
23 issues, in the HNG test. Despite that the court still
24 required that the head be visible on the video or the case
25 should be dismissed.

1 Again, the Town of Mt. Pleasant v. Roberts is
2 another case, Your Honor, where basically in that case the
3 agency had not outfitted its cars with cameras, but
4 basically that was again a choice by a law enforcement
5 agency not to comply with the statute and the State just
6 can't make that choice to comply or not comply. They are
7 required to comply with the statute. If they do not, the
8 case should be dismissed.

9 Finally, Your Honor, I do have another case as
10 well. It actually is a ruling from Judge Couch from
11 Cherokee County in 2012. I have provided that case, if the
12 court would like. I understand it's not binding. It's
13 another ruling at this level, but in that instance, judge,
14 it's State v. Luke Turner, Indictment Number 2011-GS-11-126.
15 And in that case, Your Honor, the finger count test. The
16 defendant is actually visible on the video recording, but
17 his back is to the camera, so the finger count can't be
18 seen, and Judge Couch ruled that that did not comply with
19 the meaning of the statute in that case.

20 THE COURT: What's a finger count? I have never
21 seen that.

22 MR. ELLIS: Judge, that's basically that's one
23 where the officer asked the defendant to go 1, 2, 3, 4, 4,
24 3, 2, 1 and have that revolution where they touch their
25 thumb to their fingers in order and count out loud. And if

1 they don't do it correctly, then they have failed the test.
2 Again, I have copies of that, judge.

3 May I approach?

4 THE COURT: Thank you.

5 MR. ELLIS: Your Honor, my point of going through
6 all that is that, again, this is the clearest point I
7 believe that the legislature does intend for strict
8 compliance to be shown, or show should be given its normal
9 meaning.

10 My client and the trooper, neither one of them are
11 shown on the video during this process and I think the
12 legislature included that word for a very specific purpose
13 and reason. The State has not complied with it, so we
14 believe the magistrate's decision to dismiss was correct.

15 THE COURT: All right.

16 Reply?

17 MR. SMITH: Your Honor, the Luke Turner case,
18 Gordon, all of these cases would have -- the problem and the
19 reason that they would be dismissed is because you can't see
20 a field sobriety test and it's important.

21 The finger count, obviously, has his back is
22 turned. You can't see if he's doing the test. That's the
23 problem.

24 In this case we have the video that clearly shows
25 that he was properly advised of his Miranda Rights. There

1 is no harm. There is absolutely no harm whatsoever that
2 comes to them. It's different from the field sobriety test
3 examples that they are using to dismiss the case, because,
4 you know, the inability to see the head, inability to see
5 the feet, those affect whether you can determine whether the
6 person is under the influence. In this case there is a
7 video, if you watch it, there is no doubt in the world that
8 Kenneth Taylor knew what his Miranda Rights were and that he
9 was read them by Trooper Thornton.

10 I understand there is multiple definitions of
11 show, but, again, as Mr. Ellis talks about in Sawyer, it's
12 more important to hear it. Seeing somebody reading off a
13 card or reading off a piece of paper doesn't tell you what
14 that person read, so it's different in this case.

15 In this one we don't have the video, but we have
16 the person being walked into the passenger seat and the
17 trooper getting in. There is no doubt that the trooper and
18 Mr. Taylor are in there and he reads him his Miranda Rights
19 and he says "I understand them".

20 It just seems stretching, Mt. Pleasant, to dismiss
21 the case where everything is done properly by the officer.
22 He is properly read his Miranda Rights. He understands
23 them. That's the benefit that most people in the State of
24 South Carolina don't get.

25 THE COURT: Okay. He didn't turn the camera

1 around.

2 MR. SMITH: That's true.

3 THE COURT: I think he needed to, in order to
4 comply with the statute, have turned the camera around so
5 that he can be shown being given the Miranda.

6 I understand your argument that, well, the audio
7 is there and the audio is more important than the visual,
8 okay?

9 So he's arguing -- Mr. Ellis is arguing strict
10 compliance and that I have to view that statute strictly.

11 You are arguing something different, though. Can
12 you articulate what that standard is for me that you want me
13 to take a look at?

14 MR. SMITH: Strictly I'm arguing it does comply.

15 THE COURT: You are arguing you think it does
16 comply?

17 MR. SMITH: I do think it complies. I think the
18 entire purpose of the statute is met by what was done in
19 this case. It is shown, shown to prove it, show me state,
20 make it evident. It's very evident if you watch the video,
21 and they agree that he was read his Miranda Rights. It's
22 not like a field sobriety test that would be done off the
23 camera. It doesn't help to hear that. It would help to see
24 that. And when you don't see that, that's the reason that
25 that case is dismissed.

1 Like I said, if the defendant gets arrested, you
2 know, they put space between the trooper's vehicle and the
3 defendant's vehicle. If he makes the decision to arrest him
4 and reads his Miranda Rights up at the back tailgate of the
5 defendant's car, you don't have any better understanding
6 through it being shown because you can see a silhouette of
7 his image being read Miranda Rights than you do in this
8 case.

9 THE COURT: Okay. But if the legislature says you
10 have got to do something, I struggle with me taking a
11 position that, well, it's ludicrous for the legislature to
12 have wanted to do that, because they require things to be
13 done that I might scratch my head going why are they having
14 us to do that, but we still we have to do that.

15 MR. SMITH: Right.

16 Your Honor, Mr. Ellis mentioned -- notes the case
17 under Subsection B. Subsection B has a section that has a
18 part that says any other reason the court sees fit. I think
19 this is a perfect example of any other reason the court sees
20 fit, where everybody knows that he was read his Miranda
21 Rights, which is the important part. That's why the statute
22 is in place, to make sure the person has been advised of
23 their Miranda Rights. The videotape does that.

24 The final line of Subsection B is nothing in this
25 will prevent the court from -- for any other reason that the

1 court sees fit.

2 Your Honor, if you look at Gordon, Hinkle and
3 Teamer, they are -- the Supreme Court is walking away from
4 the strict compliance days of dismissing a case where one
5 footstep being off or for a head not being seen, but he
6 continues to emphasize that the purpose of the videotaping
7 statute creates direct evidence of the DUI arrest, and to me
8 they are indicating that this is all being taken too far,
9 and this case to me is a perfect example of it where the
10 videotape served its purpose. We have documented evidence
11 that he was read his Miranda Rights and understood them
12 prior to any questioning that happened, which ended up not
13 even happening, and to dismiss the case in a situation where
14 there is evidence that he was read his Miranda Rights to me
15 is just harsh. Suppression of whatever comes after this,
16 even though it's technically not a violation of Miranda,
17 it's only an alleged violation of the videotaping statute
18 would be a more appropriate remedy.

19 You know, they say we can't pick and choose which
20 parts to comply with. One, again the State would say that
21 we are complying with the videotaping statute, because the
22 video makes its evidence, but I know, Your Honor, we had --
23 Jarvis Barnes is a case where the defendant walked -- there
24 was rain. It was obscuring the windshield. The defendant
25 walks off for some of his steps. Your Honor ultimately

1 said, you know, I was able to determine that he was under
2 the influence, that this videotape does provide evidence
3 indicating his impairment. The video in this case does show
4 that he was read his Miranda Rights and it shouldn't be
5 dismissed as a result.

6 MR. ELLIS: Again, Your Honor, I'll just go back
7 to the prior law that existed before, the law that applies
8 to my client's case.

9 On the videotaping statute prior to this, judge,
10 the videotaping at the breath site one -- let me take a look
11 at it, judge. The language there about Miranda was
12 videotaping must include the reading of Miranda Rights. The
13 entire breath test procedure, the first one being informing
14 he's being videotaped and that he has right to refuse the
15 test.

16 Judge, again, it says they must show there. They
17 added show and I think there is a reason for that. The word
18 show was added by the legislature and they must have had a
19 very specific intent for that.

20 Again, anything the legislature writes must be
21 given a plain and ordinary meaning. I believe show means
22 that they have to be visible. We have to be able to see it.
23 And under -- again, it's undisputed that there was no
24 ability to see my client or the trooper, to see anything
25 when Miranda is being given, other than an empty roadway out

1 in front of the car. And, again, only one person made that
2 choice and that was the trooper. He had the opportunity to
3 read Miranda on the video either, in front of the car, or to
4 put my client in the car and turn the video around and read
5 Miranda on video in his car. He chose not to do that. And
6 if the legislature says that show is important enough to add
7 into the statute, if they believe that that is the case,
8 then I think that there is a clear reason for it.

9 Again, all the case law I have already cited,
10 judge, which is also mentioned in the magistrate's return we
11 argued it there as well, indicates that strict compliance is
12 needed and that whether or not we might believe there's a
13 technicality or not, if the legislature's intent is not
14 followed, the statute is not followed, there is only one
15 remedy, even though it may be severe, dismissal is the only
16 remedy and I believe that's the correct position that the
17 magistrate made. I believe that decision should be upheld.

18 THE COURT: Okay. I'll take a look at it. Thank
19 you very much.

20 MR. SMITH: Thank you, Your Honor.

21 MR. ELLIS: Thank you, Your Honor.

22 (END OF REQUESTED TRANSCRIPT OF RECORD)
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CERTIFICATE

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I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 6th day of September, 2016.

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

JANUARY 1, 2017

Michael R. Watts

Michael R. Watts
Circuit Court Reporter

Form 438 Rev. 9/10

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS
FIRST NAME: Kenneth, MIDDLE NAME, LAST NAME: Taylor
STREET AND NO., CITY, STATE, ZIP CODE

STATE LICENSED DRIVER'S LICENSE NO. 1, COL, DRI. LIC. CLASS
VEH. LIC. NO., STATE, MAKE OF VEH, YEAR, COND. VEH, ALTD, MFRSR VEH, COMB.
HAZ. MT., MOPED, MTRCYCL, OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT: Magistrate Ct. 180 Magnolia St.
STREET AND NO., CITY, STATE, ZIP CODE
DATE OF TRIAL, TIME OF TRIAL, CITY, STATE, ZIP CODE

VIOLATION - COURT APPEARANCE REQUIRED YES NO, VIOLATION SECTION NO.

OWNER OF VEHICLE: Opau Carolina, DATE OF ARREST
ADDRESS OF OWNER: Taylor - K, DATE OF VIOLATION

BAIL DEPOSITED: Tax, NAME OF ARRESTING OFFICER: RB Thompson, RANK: 140
DESCRIPTION OF ACCUSED: B/M 10/18 5'08 150 160 170 175 180 185 190 195 200 205 210 215 220 225 230 235 240 245 250 255 260 265 270 275 280 285 290 295 300 305 310 315 320 325 330 335 340 345 350 355 360 365 370 375 380 385 390 395 400 405 410 415 420 425 430 435 440 445 450 455 460 465 470 475 480 485 490 495 500 505 510 515 520 525 530 535 540 545 550 555 560 565 570 575 580 585 590 595 600 605 610 615 620 625 630 635 640 645 650 655 660 665 670 675 680 685 690 695 700 705 710 715 720 725 730 735 740 745 750 755 760 765 770 775 780 785 790 795 800 805 810 815 820 825 830 835 840 845 850 855 860 865 870 875 880 885 890 895 900 905 910 915 920 925 930 935 940 945 950 955 960 965 970 975 980 985 990 995 1000

DATE BAIL REC'D. BY, CASE BEFORE, CIRCUIT COURT, FAMILY COURT, FEDERAL COURT

NAME OF TRIAL COURT, DEFENDANT: DID NOT APPEAR, APPEARED

NOLLE PROSSED, FORFEITED BOND, TRIAL BY: TRIAL JUDGE, JURY

VERDICT OF TRIAL IF ANY, GUILTY, NOT GUILTY, DATE OF TRIAL IF ANY

JAIL, SUSPEND, FINE, AMT. COLLECTED, AMT. SUSPENDED

COMMITTED TO: Vehicle Search, Arrest as Result of Collision

CERTIFIED CORRECT, DATE, H 276631

DRIVER'S RECORD COPY

Form 438 Rev. 9/10

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY UNIFORM TRAFFIC TICKET

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STREET AND NO., CITY, STATE, ZIP CODE

STATE LICENSED DRIVER'S LICENSE NO. 1, COL, DRI. LIC. CLASS
VEH. LIC. NO., STATE, MAKE OF VEH, YEAR, COND. VEH, ALTD, MFRSR VEH, COMB.
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DATE BAIL REC'D. BY, CASE BEFORE, CIRCUIT COURT, FAMILY COURT, FEDERAL COURT

NAME OF TRIAL COURT, DEFENDANT: DID NOT APPEAR, APPEARED

NOLLE PROSSED, FORFEITED BOND, TRIAL BY: TRIAL JUDGE, JURY

VERDICT OF TRIAL IF ANY, GUILTY, NOT GUILTY, DATE OF TRIAL IF ANY

JAIL, SUSPEND, FINE, AMT. COLLECTED, AMT. SUSPENDED


COMMITTED TO: Vehicle Search, Arrest as Result of Collision

CERTIFIED CORRECT, DATE, H 276630

DRIVER'S RECORD COPY

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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May 16, 2018

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SC Court of Appeals