

2012-209726

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM CHESTER COUNTY  
Court of General Sessions

Brooks Goldsmith, Circuit Court Judge

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Opinion No. 4912 (S.C. Ct. App., Filed Nov. 23, 2011)

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THE STATE.....Respondent

v.

JUSTIN ELWELL.....Petitioner

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PETITION FOR A WRIT OF CERTIORARI

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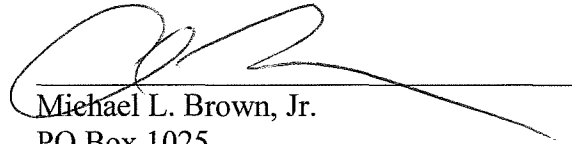
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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 16, 2012.

A handwritten signature in black ink, appearing to read "Michael L. Brown, Jr.", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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QUESTION PRESENTED

Was there a violation of S.C. Code Ann. § 56-5-2953 (2006) and does that violation require dismissal of the DUI charge?

## STATEMENT OF CASE

On January 3, 2009, Petitioner was arrested for driving under the influence and was offered a Data master exam. The Defendant refused the Data Master exam. The arresting officer did not videotape the Defendant's conduct during the required twenty (20) minutes pretest waiting period. Because of the failure to videotape for twenty (20) minutes, the trial court dismissed the charge against the Defendant. The South Carolina Court of Appeals reversed that decision, stating that there is no requirement for videotaping for twenty (20) minutes when there is a refusal.

## ARGUMENT

In 1998 the General Assembly enacted the incident and breath test site videotaping requirement in S.C. Code Ann. § 56-5-2953. S.C. Code Ann. § 56-5-2953 (A)(2) (2006) states as follows:

The videotaping at the breath site:

- (a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;
- (b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being (videotaped), and that he has the right to refuse the test;
- (c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;
- (d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pretest waiting period must be videotaped.

The videotape in the present case is incomplete. The tape does not record the person's conduct during the twenty minute waiting period. The tape is not the required twenty minutes.

Failure to videotape a person's conduct can be excused if certain exceptions apply. S.C. Code Ann. § 56-5-2953 (B) (2006) list the exceptions as follows: "Nothing in this section may be construed as prohibiting the introduction of other 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 videotapes 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 videotape equipment at the time of the arrest, probable cause determination, or breath device was in an inoperable condition, stating 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 videotape because the person needed emergency medical treatment, or; exigent circumstances existed. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrest, where an arrest has been made and the videotaping equipment has

not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping 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 videotape based upon the totality of the circumstances; nor do provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape."

There was no sworn affidavit certifying that the videotape equipment or breath test device was in an inoperable condition. There was no emergency medical treatment required. There were no exigent circumstances. The exceptions listed in the statute do not apply.

Since the statute was violated, the Court must decide what the remedy is. This Court provided that dismissal is the remedy in City of Rock Hill vs. Cynthia Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007). In that case, as in the present one, we have an incomplete videotape. The incident site tape only recorded two out of the field sobriety and failed to show the arrest as required. The Court stated: "Under 56-5-2953, a violation of the statute, with no mention of prejudice, may result in dismissal of the charges. The statute provides, "failure by the arresting officer to produce the videotapes 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 (exceptions apply)..." (emphasis added). Conversely, failure to produce videotapes would be grounds for dismissal if no exceptions apply."

Since this case was tried in Chester General Sessions, this court, in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E. 2d 806 (2011) recognized that "the purpose of section 56-5-2953... is to create direct evidence of a DUI arrest." In finding that the State can prematurely terminate videotaping, the Court of Appeals has taken a clear and unambiguous requirement of a twenty minute waiting period and interpreted it using a "de facto ambiguity theory." The more reasonable and logical interpretation of legislative intent, if such analysis is even allowed, is that the choice of the statutory phrasing including use of the word "conduct," was intended to require more rather than less video evidence of the defendant's conduct for the dual purposes of memorializing at least twenty minutes of the accused's conduct and certain enumerated procedural requirements.

The Court of Appeals stated in its opinion "The statute must be interpreted with realistic circumstances and rationales in mind...". In 2008, the General Assembly enacted an amendment to S.C. Code Ann. Section 56-5-2951 Supp. [2008] which increased the sanction for refusal of a breath test from three months to six months. The twenty minute period also logically creates an extended period for reflection and consideration by the suspect and offers a greater opportunity for the person to agree to testing. If the General Assembly thought that termination of the video taping was appropriate before the twenty minutes had elapsed, it would have included such provision in the law. The Court of Appeals opinion stated that the primary intention behind Section 56-5-2953 "was to reduce the number of DUI trials heard as swearing contest by

mandating the State videotape important events in the process of collecting DUI evidence.”. The primary intention of the statute is to video record a person’s conduct. This serves two purposes in that it shows that the State properly gathered evidence and allows the accused to present evidence as to his or her conduct. The Court of Appeals opinion places emphasis on two words of the statute- required and pretest- while ignoring the intent of the whole statute which is the videotaping of conduct.

The Court of Appeals’ reliance on State v. Parker, 271, S.C. 159, 245 S.E. 2d 904 (1978) and State v. Jansen, 305, S.C. 320, S.E. 2d 235 (1991) is erroneous in the context of the videotaping requirement. Parker and Jansen were decided well before the statutory mandated standards for preservation of video evidence. The General Assembly’s enactment of Section 56-5-2953 in 1998, which mandated videotaping requirements, with no exception for a refusal. Those two cases are rendered obsolete by that statute. The present case is entirely different from the isolated situations found in Parker and Jansen. The 1978 Parker decision adopted the State of Washington’s requirements for admissibility of breath test. It mentions a twenty minute waiting period as a prerequisite for the test and nothing more with no reference or consideration of refusal. In Jansen, the Court concluded that in circumstances of refusal, no foundations are required for tests that did not occur. Unlike the present situation, not only did the legislature unambiguously require twenty minutes of videotaping, but there is a logical basis for doing so. As this Court in Roberts observed, the purpose of videotaping is to gather evidence. What better evidence than twenty minutes of the accused’s conduct preserved on video.

On a procedural note, the exact same issue is currently pending before this Court on Petition for Writ of Certiorari from the Court of Appeals brought by the State. The case is The State v. Ryan Hercheck, Unpublished Opinion No. 2011-UP-161. Any ruling in that matter would be dispositive of the present case.

Based on the above, the Petitioner request that this Court grant Certiorari.

Respectfully Submitted,



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