

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2019-001107

Trial Court Case No. 2017CP2700440

Thomas Ford, III,

Appellant,

Town of Hardeeville,

Respondent.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO DISMISS THE DUI CHARGE FOR FAILING TO COMPLY WITH SECTION 56-5-2953 OF THE SOUTH CAROLINA CODE OF LAWS?

- II. DID THE CIRCUIT COURT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTIONS TO DISMISS THE DUI CHARGE FOR NOT VIDEO RECORDING PORTIONS OF APPELLANT'S CONDUCT BEFORE ARREST IN VIOLATION OF SECTION 56-5-2953 OF THE SOUTH CAROLINA CODE OF LAWS?

RELEVANT FACTS

Respondent disputes Ford's contention that his Response to the [Municipal Court's] Return are a part of the factual record in this matter. While it's possible any aggrieved party may style a response to the Return in response to the Notice of Appeal, that response is not a part of the factual record and should not be considered as a procedural or factual record of the proceedings conducted by the trial court in denying the motions Ford now complains of as grounds for reversal. Additionally, Ford's inclusion of the transcript from the circuit court's appellate review is not part of the record but is rather argument by Ford and Respondent's respective counsel and should not be considered by this Court as part of the relevant facts in this appeal.

Respondent does not dispute the contents or characterization of Municipal Court Judge Nancy Gutierrez's Return in response to Ford's initial Notice of Appeal. However, there is nothing in the record nor any legal authority known to Respondent that permits Ford's Response to the trial court's Return as forming a part of the factual record upon which the Court of Appeals may rely upon in deciding this case.

Respectfully, Respondent disputes inclusion of Ford's Response to the Return or characterization of the video recording as part of the factual record in considering Appellant's arguments. It is worthwhile to note that if a return is defective, SC Code of Laws Ann. § 18-7-80 permits the presiding appellate court to direct a further or amended return. However, it does not appear from the record that Ford made such motion to amend the municipal court judge's Return at either the initial appeal to Circuit Court nor today several years after the trial. Therefore, only the Return contains the relevant facts in this matter.

The record shows that on June 11, 2016, Ofc. Deweese was dispatched to investigate a reckless driver, Thomas Jeffers Ford, III (Ford), driving a dark colored Dodge truck hauling a

motorcycle on I-95 swerving all over the road. (Return Par. 2) Ofc. Deweese arrived at the traffic stop of the Dodge truck initiated by a different police officer and observed tire marks in the grassy median and skid marks in the pavement where Ford collided with the median guard wire after colliding with a 18-wheel truck. (Return Par. 3) Ford was standing next to his driver side door, appeared unsteady on his feet, had an open container in plain view with other beer bottles in the vehicle, had blood shot and glassy eyes, and a heavy odor of alcohol coming from his person. (Return Par. 4,5) It does appear there is some record to indicate another officer, not Ofc. Deweese, asked Ford "do you know what time it is?" (Return Par. 1)

Ofc. Deweese during the course of investigating the accident Ford caused began interviewing him asking what happened, where was he coming from, and where was he going. (Return Par. 6). Ford responded he did not know what happened and that he was coming from Daytona Beach, Florida heading towards Edisto Beach, Florida. (Return Par. 6) Ofc. Deweese conducted field sobriety tests and based upon a totality of circumstances arrested Ford for Driving Under the Influence, Minor in Possession and all of this was captured on video. (Return Par. 7, 8)

ARGUMENT

- I. **Because the Trial Court did not err in finding the Appellant refused the State administered breath test, the arresting officer was not required to comply with the breath test site video recording requirements of S.C. Code Ann. § 56-5-2953(A)(2).**

It is important at the outset to clarify that there is nothing in the record to establish Appellant moved to suppress the breath test, a refusal to take the State administered breath test, or any video recordings. As stated in the trial court's Return, "That [Defense Counsel] presented 2 *motions to dismiss* based on..." There is no record Appellant moved alternatively to suppress. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Issues not raised and ruled upon in the trial court will not be considered on appeal. Humbert v. State, 345 S.C. 332, 548 S.E.2d 682 (2001).

Appellant elected to proceed with a bench trial in the matter, and suppression would have been an unusual motion given that the trial court would be asked to un-ring the bell in her own mind during her deliberations on whether the State proved its case beyond a reasonable doubt. Based on an absence of any record establishing such a motion to suppress was ever made and the inherent contradiction of a trial court suppressing evidence it has already heard, it appears unlikely Appellant ever did in fact move to suppress. Appellant failed to include any written motions memorializing such a characterization of the two motions ruled on by the Municipal Court as part of the record and it simply cannot be assumed in this appeal that such a motion was filed or otherwise made.

As a general rule, the State is not required to comply with the breath site video requirements of S.C. Code Ann. § 56-5-2953 where the person refuses the test. State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2011). The language of the breath site video-taping requirements are unchanged

since the *Elwell* decision and the instant arrest of Appellant in 2016. SC Code of Laws Ann. § 56-5-2953(A)(2) states that the recording at the breath test site must: (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test; (b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and (c) 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 video record this waiting period.

“The word ‘pre-test’ plainly requires a breath test be administered for the videotape requirement to apply, and if there is no test, the statute does not require a videotape.” State v. Hercheck, 403 S.C. 597, 603, 743 S.E.2d 798, 801 (2013). Here, as Ford concedes, there is no test and therefore no requirement to record the 20-minute pre-test observation. Otherwise, the legislature would not have included the “pre-test” modifier in the statute. *See, e.g., Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C.112, 120, 584 S.E.2d 379, 383 (stating “[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.”

While a driver may appear or allege after the fact to be indecisive at the time he or she must blow into a breath test device upon completion of the 20-minute wait period, it is impossible to distinguish between when someone is indecisive then refuses and when someone never intended and then refuses to provide a breath sample. The Appellant asks the Court to distinguish between a “clear refusal” and a “not so clear refusal” in determining whether to apply *Elwell* and *Hercheck*.

The trial Court found in Paragraph 1 of the Return that there was not a sufficient basis to find any noncompliance as grounds for dismissal. While a body camera may not be a SLED approved recording device for recording a breath test site, the trial court correctly references the

plain language of S.C. Code of Laws Ann. § 56-5-2953(B) which states that the trial court can consider “any other valid reason for failure to produce the video recording based upon the totality of the circumstances.” In the instant case, Paragraph 10 the trial court clearly found a valid reason to not dismiss the case for recording a refused breath test with a body worn camera because the “officer discovered that both cameras were inoperable and activated his body camera to record the 20-minute observation period of his action ... [and h] implied consent rights were advised.”

Even assuming there is non-compliance of the breath test statute requirements of S.C. Code of Laws Ann. § 56-5-2953(A)(2), the remedy would be suppression of a refusal as there was no breath test. Ford did not move for a suppression, which would have been error to suppress, but regardless he waived that remedy by not moving for the same. There is no record Appellant ever made such a motion.

The affidavit produced by the arresting officer states that he cannot “produce a video recording of the person’s conduct during the 20-minute pre-test waiting period[.]” The affidavit is not a binding admission of non-compliance with 2953’s breath site requirements. It is merely a tautology that the officer cannot produce a video of a “pre-test” 20-minute observation period where no test in fact occurs. *See State v. Hercheck*, 403 S.C. 597, 603, 743 S.E.2d 798, 801 (2013). In other words, the officer is stating under oath that he cannot produce a video of something which in fact does not exist, that “something” in this instance being that pre-test period with no test.

II. Because the trial court found that the State complied with the breath test video recording requirements of S.C. of Laws Ann. § 56-5-2953(A)(2), the Court should affirm Appellant’s conviction.

The arresting officer activated his body camera to record the breath test room upon discovering the cameras in place were inoperable. (Par. 10 of Return). Nothing in the record supports Defendant’s position that the body camera footage from the breath testing room omits the

actions of the breath test operator; moreover, there was no breath test performed. The State is not required to produce video of the operator's actions in conducting the test when there is no test to record. *See State v. Elwell*, 403 S.C. 606, 743 S.E.2d 802 (2011).

The record does not establish the body camera video produced of the breath test room does not include "the person being informed that he is being video recorded, and that he has the right to refuse the test[.]" SC Code of Laws Ann. § 56-5-2953(A)(2)(a). Additionally, the Appellant fails to show in the record that the video produced does not record Ford "refusing the breath test[.]" SC Code of Laws Ann. § 56-5-2953(A)(2)(b). Assuming Appellant has alleged non-compliance with these specific provisions of the breath test video-taping statute, any portion of the video briefly omits the subject and still captures the audio portions which is the purpose of those specific provisions of SC Code of Laws Ann. § 56-5-2953(A)(2) which is to ensure a person charged with DUI understands his right to refuse. Ford refused the test by not communicating any form of agreement to take the test when prompted by the officer. Regardless, the video tape is not required where there is no test. *State v. Hercheck*, 403 SC 597, 603, 743 S.E.2d 798, 801 (2013)

III. Because the incident site video complies with complies with the incident site video recording requirements of S.C. of Laws Ann. § 56-5-2953(A)(1), the trial court did not err and properly concluded that any non-compliance by asking "what time is it" was based on the totality of circumstances not grounds for dismissal per S.C. of Laws Ann. § 56-5-2953(B).

The trial court cannot dismiss a charge for driving under the influence (DUI) on the basis that statutorily-required video recording of incident site briefly omitted defendant from view was erroneous, where video began recording upon activation of blue lights, continuously recorded the entire time, and captured all field sobriety tests administered, defendant's arrest, and officer advising defendant of her *Miranda* rights, and omission did not occur during any events that either created direct evidence of a DUI or served defendant's important rights. *State v.*

Taylor, 411 S.C. 294, 768 S.E.2d 71 (S.C. App. 2014). Another officer, Sgt. Brown, who was not the arresting officer, can be heard asking Ford who was inside his vehicle at the incident site “what time is it without looking at your watch.” The inquiry about what time is it without looking at his watch is an audible inquiry that can plainly be observed by listening. Since that portion was captured and recorded, the brief visual omission is immaterial.

An officer's recording of sobriety tests such as the Horizontal Gaze Nystagmus (HGN) field sobriety test is only required to show defendant's conduct generally, given that statute required a video recording of any field sobriety tests at the incident site. State v. Gordon, 414 S.C. 94, 777, S.E.2d 376 (2015). In Gordon, the Supreme Court found that the head is the subject of the test and should be recorded but not the eyes themselves which are observed during HGN. Id. Any visual omission of Ford during this alleged field sobriety test is immaterial similar to not being able to view a person’s eyes during administration of the Horizontal Gaze Nystagmus test.

Any lack of video pertaining to visually depicting Ford during the time Sgt. Brown inquired about the time of day with Ford was extremely brief and a visual display was not significant. Moreover, the trial court correctly applied the provisions of S.C. Code Ann. § 56-5-2953(B) which states that dismissal is not appropriate where as here there is valid reason for the failure to produce the portion “based upon the totality of the circumstances.” Here, in the totality of the circumstances, the audio recording is the pertinent inquiry and the in car video would not be able to show whether the driver had a watch or looked at his watch.

The most important aspect of any field sobriety test offered is whether the pertinent conduct is recorded. In Murphy v. State, the incident site video did not capture a full length image of the individual as she attempted field sobriety tests. Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Murphy held that the video adequately reflected the individual's behavior.

Here, defendant's conduct is recorded. The audible inquiry by Sgt. Brown is recorded as Ford sits inside his vehicle. There is no evidence in the record that any visual aspect to this test would be pertinent. As Ford correctly states, the inquiry is not a standard field sobriety test. The question and the answer are the material aspects to the inquiry for the investigation and the conduct is the driver's answer itself.

Lastly, there is nothing in the record establishing that Sgt. Brown's inquiry about the time is a "field sobriety test" any more than inquiring with someone about where they've been drinking or whether they feel safe to drive. This type of routine questioning is not a sobriety test or at least the record is devoid of any facts establishing this as a field sobriety test and therefore it is no recording required whatsoever by S.C. Code of Laws Ann. § 56-5-2953(A)(1).

CONCLUSION

Because the circuit court and this Court are bound by the summary court's findings of fact as contained in the trial court's Return and the reasons set forth above, the Court should affirm the Defendant's conviction.

Respectfully submitted April 13, 2020,

s/ Justin D. Maines
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APPEAL FROM JASPER COUNTY
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Carmen T. Mullen, Circuit Court Judge

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Trial Court Case No. 2017CP2700440

Thomas Ford, III,

Appellant,

Town of Hardeeville,

Respondent.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Initial Brief of Respondent has been served upon Counsel for Appellant Mr. Dayne Phillips by email at dayne@pricebenowitz.com as permitted by the standing emergency order issued by the South Carolina Supreme Court in response to the COVID-19 pandemic.

s/ Justin D. Maines
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March 13, 2020

Hon. Jenny A. Kitchings
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SC Court of Appeals

Re: **Thomas Ford, III v. Town of Hardeeville**
Initial Brief of Respondent
Appellate Case No. 2019-001107

Dear Ms. Kitchings,

Please find enclosed Respondent's Initial Brief in the above referenced matter. Please be aware I have availed myself of the option to digitally sign my name in this matter pursuant to the South Carolina's Supreme Court's standing order permitting the same during the COVID-19 pandemic.

The Nye Law Group, P.C.

s/ Justin D. Maines
Justin D. Maines
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Enc. (as stated)
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March 13, 2020

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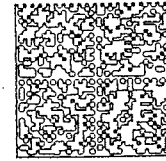
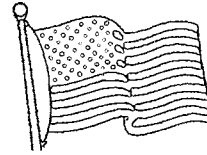
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The Nye Law Group, P.C.

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