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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas
Case No. 2017-CP-46-01617

John C. Hayes, III, Special Circuit Court Judge

Appellate Case No. 2017-002616

Andrew Ryan Maupin,

Respondent,

v.

City of Rock Hill,

Appellant,

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

- I. Does Section 56-5-2953 of the South Carolina Code of Laws require video recording of an individual charged with Driving Under the Influence at other locations in addition to the incident site and the breath test site?

STATEMENT OF THE CASE

Respondent was charged with Driving Under the Influence 1st offense in the City of Rock Hill, South Carolina on August 4, 2016 following a traffic stop of the vehicle Respondent was operating shortly after 3:00 am. The case proceeded to a bench trial on May 19, 2017 and the trial court found Respondent guilty of Driving Under the Influence 1st offense. Respondent was sentenced to thirty (30) days or a fine of \$1,017. On May 30, 2017 Respondent filed a Notice of Appeal from his conviction in municipal court with the York County Court of Common Pleas. The trial court submitted the Return to Appeal on June 22, 2017.

Respondent's appeal was heard by the Honorable John C. Hayes, III, on November 7, 2017. By order dated November 17, 2017 and filed November 20, 2017, Judge Hayes reversed the ruling of the trial court and ordered a new trial in the matter. Appellant filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRPC on December 4, 2017. Judge Hayes subsequently issued an order altering his prior ruling and holding that Respondent's conviction should be dismissed on December 7, 2017 and filed on December 7, 2017.

On December 19, 2017, Appellant filed a timely Notice of Appeal from the rulings of the circuit court. This appeal follows.

STATEMENT OF FACTS

On August 4, 2016 shortly after 3:00 am Officer James Rowland observed the Respondent operating a red 2013 Honda Civic within the city limits of Rock Hill, South Carolina. Officer Rowland noted that the vehicle was operating much slower than the posted speed limit and that the vehicle changed lanes with turn signal remaining on for an extended period of time after the lane change was complete. The vehicle changed lanes again this time without any turn signal and the vehicle began swerving within and over the lane lines. Officer Rowland then activated his blue lights and initiated a traffic stop of the vehicle.

Officer Rowland identified two males in the vehicle. The front seat passenger was intoxicated to the point of incoherence and the Respondent was identified as the driver. Officer Rowland notes Respondent's eyes were bloodshot and his speech was slurred. When questioned by Officer Rowland about his erratic driving the Respondent replied he was unaware he was driving like that. Officer Rowland asked the Respondent if he had been drinking and the Respondent state he had not. Respondent was asked to exit the vehicle and Officer Rowland noted that Respondent was unsteady on his feet. Officer Rowland did not detect any odor of alcohol coming from the Respondent and asked Respondent if he had taken any medication or other drugs. Respondent stated he had taken Adderall and Klonopin earlier in the evening.

Officer Rowland testified that he then administered field sobriety tests to the Respondent. Officer Rowland testified that he administered three field sobriety tests, the horizontal gaze nystagmus test, the walk and turn test and the one leg stand test. Based on the Respondent's poor performance on the field sobriety tests including swaying, failing to maintain his position, stepping off the line, failing to touch heel to toe, using his arms for balance, turning improperly and putting his foot down repeatedly, the Respondent was arrested and charged with driving

under the influence. Officer Rowland advised Respondent of his Miranda rights and placed him in the rear seat of his patrol vehicle. The City of Rock Hill submitted a video recording covering the entire interaction between Officer Rowland and the Respondent at the incident site (roadside).

Officer Rowland transported the Respondent to the City of Rock Hill Law Center. During a search of the Respondent at the Law Center Officer Rowland located and cataloged two pill bottles containing Klonopin and Adderall with Respondent's name on them. Officer Rowland also located three loose Xanax pills on the Respondent.

Officer Rowland then escorted the Respondent to a room to administer the datamaster breath examination. Respondent was advised of his implied consent rights. During the twenty minute waiting period Respondent told Officer Rowland that over a period of several hours prior to his arrest he had ingested Adderall, Klonopin, Xanax and Ambien. Officer Rowland testified that the Respondent appeared lethargic and had difficulty staying awake. Subsequently, the Respondent submitted a breath sample that registered a .00% blood alcohol content. The City of Rock Hill submitted a video recording covering the entire interaction between Officer Rowland and the Respondent at the breath testing site (datamaster room).

Based on his observations of the Respondent, the Respondent's statements concerning the drugs he had ingested, and the result of the breath test, Officer Rowland transported the Respondent to the Piedmont Medical Center and requested that Respondent submit a urine sample. After over an hour at Piedmont Medical Center Respondent failed to submit a urine sample and Officer Rowland treated that as a refusal and issued him a notice of suspension. Respondent was subsequently transported back to the City of Rock Hill Law Center by Officer Rowland.

Upon his return to the City of Rock Hill Law Center, Officer Rowland introduced Officer Sean Bailey to the Respondent. Officer Bailey told the Respondent that he would be requesting that Respondent submit to a drug recognition evaluation.

Officer Bailey was qualified by the trial court as a drug recognition expert. The City of Rock Hill submitted four exhibits in connection with Officer Bailey's testimony consisting of Officer Bailey's certification of training as a drug recognition expert, Officer Bailey's rolling log of all the evaluations he had completed, the drug influence evaluation of the Respondent and drug influence evaluation narrative. Officer Bailey testified to the systematic method he was trained to use as a drug recognition expert, including an interview with the arresting officer, a preliminary examination of the Respondent including taking his pulse, eye examinations of the Respondent, divided attention tests, vital signs and a second taking of his pulse, a dark room test to check pupil size and ingestion examination, a check of the Respondent's muscle tone, a check for injection sites and a third pulse check and an interview, statements and observations of the Respondent. Officer Bailey testified that in his opinion Respondent was under the influence of narcotic analgesics and CNS stimulants and was not able to operate a vehicle safely. Officer Bailey testified that there was no video recording of the drug recognition evaluation that he performed on the Respondent.

Following the testimony of Officer Bailey both the City of Rock Hill and Respondent rested. The City of Rock Hill waived closing argument and the Respondent argued that it was entitled to a dismissal of the charge based on the lack of any video recording of the drug recognition evaluation. The trial court denied the Respondent's motion and found him guilty of Driving Under the Influence 1st offense.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT SECTION 56-5-2953 REQUIRES VIDEO RECORDING IN ADDITION TO INCIDENT SITE AND BREATH TEST SITE RECORDING

A. Standard of Review

“In a criminal appeal from a municipal court, a circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. S.C. Code Ann. § 14-25-105 (Supp. 2012). In criminal appeals from a municipal court, a circuit court is bound by the municipal court's findings of fact if there is any evidence in the record which reasonably supports them. The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. Moreover, questions of statutory interpretation are questions of law, which are subject to de novo review and which the appellate court is free to decide without any deference to the court below.” City of Greer v. Humble, 402 S.C. 609, 611, 742 S.E.2d 15, 16 (Ct. App. 2013)

B. Section 56-5-2953 Requires Video Recording Only at the Incident Site and the Breath Test Site.

The video recording statute, Section 56-5-2953 of the South Carolina Code of Laws provides that an individual charged with driving under the influence (Section 56-5-2930) must have his conduct at the incident site and breath test site video recorded. “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.” S.C. Code Ann. § 56-5-2953(A) (2018). The video recording statute establishes a minimum threshold for what must be video recorded by law enforcement at the incident site and the breath test site. The video recording statute contains no language requiring video recording of other interactions and events between law enforcement and an

individual suspected of driving under the influence. including any additional sobriety testing done by law enforcement.

At the incident site the video recording 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, . . . and show the person being advised of his Miranda rights.” S.C. Code Ann. § 56-5-2953(A)(1)(a) (2018). It is undisputed that the incident site video recording submitted into evidence by the City in this case complied with Section 56-5-2953.

At the breath test site the video recording 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.” S.C. Code Ann. § 56-5-2953(A)(2) (2018). It is undisputed that the breath test site video recording submitted into evidence by the City in this case complied with Section 56-5-2953.

Following the Respondent’s submission of a breath sample which indicated that he had no alcohol present in his blood stream, the arresting officer requested that the Respondent submit to an additional urine test due to the statements the Respondent made regarding his consumption of Adderall, Klonopin, Xanax and Ambien to the arresting officer during the officers administration of the breath test. During the breath test, the officer observed that the Respondent was lethargic and was having difficulty staying awake during the breath testing process.

Respondent was transported to Piedmont Medical Center where after an hour passed he failed to submit a urine sample and was treated as having refused the additional testing.

Upon the Respondent's return to the Rock Hill Law Center he was examined by a trained and certified drug recognition expert. The drug recognition expert testified to the series of tests that he administered and the Respondent's performance on each test. The drug recognition expert also testified that in his opinion that the Respondent was under the influence of narcotic analgesics and central nervous system stimulants and was not able to safely operate a motor vehicle. The drug recognition expert was found qualified to testify based on his training and experience as an expert by the trial court and that determination was not challenged on appeal and is the law of the case. There was no video recording of the sobriety testing conducted at the Rock Hill Law Center of the drug recognition expert.

On appeal the circuit court held that Section 56-5-2953 requires "videotaping of any field sobriety test" regardless of where the sobriety test is conducted, to include the sobriety testing done by the drug recognition expert. (ROA, p. 60) The circuit court makes this finding even though earlier in the same paragraph it notes that "the test at issue here (drug recognition test) is not addressed in Title 56 per se." (ROA, p. 60). The circuit court order omits the first paragraph of Section 56-5-2953 which states that an individual charged with driving under the influence "must have his conduct at the incident site and the breath test site video recorded." S.C. Code Ann. § 56-5-2953(A) (2018). The statute is silent to any requirement for video recording outside of two locations, the incident site and breath test site. The sobriety testing in this case by the drug recognition expert was conducted at the Rock Hill Law Center after completion of the incident site testing and the breath site testing. The plain language of Section 56-5-2953 does not support the finding of the circuit court that Section 56-5-2953 requires video recording of

additional evidence collection by law enforcement. Even where that additional evidence collection includes additional sobriety testing. "Where criminal statute very specifically lists locations covered, those not mentioned are excluded, applying *maxim expressio unius est exclusio alterius*." Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 379, 556 S.E.2d 357, 358 (2001)

"If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning." State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002). The circuit court reads and injects into Section 56-5-2953 a statutory interpretation mandating video recording of additional interactions between law enforcement and an individual charged with driving under the influence that simply does not exist within the language of the statute. Nor is this extreme interpretation supported by the language contained in Section 56-5-2953. The language contained in Section 56-5-2953 is plain and unambiguous in requiring video recording at two locations, the incident site and the breath test site. The ruling below for the circuit court expands this video recording requirement to an almost infinite number of locations.

"It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Leopard, 349 S.C. 467, 470-71, 563 S.E.2d 342, 344 (Ct. App. 2002) The circuit court finds that "a second

field sobriety test, regardless of the name or location, must be videotaped” and “a field sobriety test given post the breath analysis of [Respondent], should have been videotaped.” (ROA, p. 61) The circuit court’s holding below has essentially rewritten and expanded Section 56-5-2953 to include a video recording requirement at locations not even mentioned or intimated at in 56-5-2953. In doing so the circuit court has disregarded the clear and unambiguous language contained within Section 56-5-2953 requiring video recording at only two locations, the incident site and breath test site and disregarded the plain and ordinary meaning of the statute.

C. The Video Recording Statute Explicitly Permits the Introduction of Other Relevant Evidence at Trial for a Violation of Driving Under the Influence

The video recording statute does not limit law enforcement in South Carolina from collecting additional evidence that is relevant to the determination of whether an individual was driving a vehicle while under the influence in violation of S.C. Code 56-5-2930. Contrary to this the circuit court’s order which finds that only two tests (incident site field sobriety tests and a breath test) (ROA, p. 42) are permitted by the video recording statute. This view by the circuit court directly conflicts with Section 56-5-2953. The Video Recording Statute states that “[n]othing 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.” S.C. Code Ann. § 56-5-2953(B) (2018).

The circuit court’s order renders meaningless the provision of the video recording statute that explicitly permits the introduction of any other relevant evidence in a driving under the influence trial. There is no support for the circuit court’s proposition that law enforcement in South Carolina is limited to incident site field sobriety tests and a breath test given the plain language of both Section 56-5-2953(B). The Video Recording Statute mandates that certain

events be video recorded at the incident site and the breath test site. The statute is silent as to requiring video recording of any other actions by law enforcement during a driving under the influence investigation. Silence in 56-5-2953 cannot be read as an affirmative prohibition on law enforcement from conducting further investigation on an individual suspected of driving under the influence, either in the scope or type of evidence collected.

The South Carolina Court of Appeals has previously interpreted the video recording statute as requiring a video recording at the breath test site when the test is administered, on the other hand, where no test is administered, then the waiting period is rendered unnecessary, and so then is the videotape recording of that waiting period. State v. Elwell, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011). In reaching this holding the Court of Appeals noted that “[w]e will not interpret the statute to include such a redundancy. A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” State v. Elwell, 396 S.C. 330, 335 n.4, 721 S.E.2d 451, 453 (Ct. App. 2011). The order of the circuit court in this case is unconstrained in finding that the language or lack thereof in Section 56-5-2953 supports the affirmative requirement that “a second field sobriety test, regardless of name or location, must be videotaped.” (ROA, p. 61). The circuit court’s interpretation renders 56-5-2953(B) legislative surplusage not worthy of consideration and imposes a duty on law enforcement to video record at the incident site, the breath test site and any other site where additional sobriety testing is done (hospital, police station or any other location).

The circuit court finds that 56-5-2953 only permits two tests (a breath test and a field sobriety test) and this “scheme provides for the video taping of certain statutory authorized test [sic].” (ROA, p. 60). The circuit court misreads the language of 56-5-2953 as mandating or authorizing field sobriety tests. Field sobriety testing as an investigatory tool pre-existed the

Video Recording Statute and the statute does not create any authorized test or tests. The Video Recording Statute simply provides that an individual charged with driving under the influence must (absent certain exceptions) have their conduct video recorded “at the incident site and the breath test site.” S.C. Code Ann. § 56-5-2953(A) (2018). The Video Recording Statute goes on to require specifically what conduct must be recorded at both the incident site and breath test site. The Video Recording Statute only addresses those two locations. The Video Recording Statute did not fully take effect until: (1) law enforcement vehicles were equipped with a video recording device; and (2) the breath test site was equipped with a video recording device. See, S.C. Code Ann. § 56-5-2953(G) (2018). This further supports the proposition that 56-5-2953 only requires video recording at two locations: (1) the incident site; and (2) the breath test site.

D. The Driving Under the Influence Statute Explicitly Permits the Introduction of Other Relevant Evidence at Trial for a Violation of Driving Under the Influence

The concept that the Video Recording Statute explicitly allows for collection and use of evidence in addition to incident site and breath test site video is in harmony and supported by similar language contained in the Driving Under the Influence statute (56-5-2930). The Driving Under the Influence statute allows for the introduction of other evidence at trial, in addition the introduction into evidence of the video recording from the incident site and breath test site. Section 56-5-2930(J) provides that “[n]othing contained in this section prohibits the introduction of: (1) the results of any additional tests of the person’s breath or other bodily fluids; (2) **any evidence that may corroborate or question the validity of the breath or bodily fluid test result including, but not limited to: (a) evidence of field sobriety tests; (b) evidence of the amount of alcohol consumed by the person; and (c) evidence of the person’s driving;** (3) a video recording of the person’s conduct at the incident site and breath testing site taken pursuant

to Section 56-5-2953 which is subject to redaction under the South Carolina Rules of Evidence.” S.C. Code Ann. § 56-5-2930(J) (2018) (emphasis added). Both the Video Recording statute and Driving Under the Influence statute explicitly permit the use of evidence of an individual’s lack of sobriety which can include evidence of field sobriety tests, in addition to the video recorded evidence of the individual at the incident site and breath test site. The order of the circuit court requiring video recording of a “second field sobriety test, regardless of name or location” (ROA, p. 61) completely disregards the language contained in both the Video Recording statute and Driving Under the Influence statute that allows for additional sobriety testing done by law enforcement and renders it meaningless.

In construing both the Video Recording statute and Driving Under the Influence statute, “[t]he statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. (Court should consider not merely language of particular clause being construed, but word and its meaning in conjunction with purpose of whole statute and policy of law). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose.” City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492 (Ct. App. 1997) The circuit court appears to have engaged in the reverse engineering in both orders in this case, having an outcome in mind and then searching for the legal reasoning to support the outcome. The result is tortured legal logic and analysis that does not hold up to scrutiny. The circuit court’s holding mandating video recording fails to account for the statutory language in the Video Recording statute and the Driving Under the Influence statute, specifically section 56-5-2953(B) and 56-5-2930(J) respectively. Both 56-5-2953(B) and 56-5-2930(J) permit other relevant evidence in the prosecution of a driving under the influence charge. Including evidence of additional sobriety

tests that are not video recorded. The circuit courts order fails to either address or adequately account for either 56-5-2953(B) and 56-5-2930(J).

E. The Implied Consent Statute Permits the Introduction of Other Relevant Evidence at Trial for a Violation of Driving Under the Influence

The circuit court's initially found that no additional testing or evidence collection can take place after submission of a breath sample at the breath test site. "The plain language of Section 56-5-2950, directs that the officer in this case's only option, was to order a urine sample, not a second field type sobriety test." (ROA, p. 42).

The implied consent statute does not support the above proposition. Section 56-5-2950 provides that "[t]he provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of alcohol and drugs." S.C. Code Ann. § 56-5-2950 (2018).

In this case the testimony of the drug recognition expert provided other additional evidence to support a finding that the Defendant was impaired and under the influence of drugs. The testimony of the drug recognition expert in this case directly corroborated the statements of the Respondent regarding his ingestion of drugs and the observations of the breath test operator. The testimony of the drug recognition expert also corroborated the evidence of the field sobriety tests administered at the incident site by the arresting officer and the poor driving of the Defendant prior to the traffic stop. The implied consent statute is not to be construed as limiting this evidence, however, that is exactly what the order of the circuit court did.

F. Read in Harmony, the Video Recording Statute, the Driving Under the Influence Statute and the Implied Consent Statute all Permit the Introduction of Additional Evidence of Whether or Not a Person is Under the Influence

“The legislature's intent should be derived primarily from the plain language of the statute. The text of a statute is considered the best evidence of the legislative intent or will. The language must be read to harmonize with its subject matter and in accord with its general purpose. The court's primary function in interpreting a statute is to determine the intent of the General Assembly. Once the legislature has made a choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.” Peake v. S.C. DMV, 375 S.C. 589, 596, 654 S.E.2d 284, 289 (Ct. App. 2007)

The order of the circuit court pays lip service to construing 56-5-5953 *in pari materia* (in harmony with Title 56), however, the circuit court either ignores or overlooks that the Video Recording Statute, the Driving Under the Influence Statute and the Implied Consent Statute all expressly permit the introduction of other evidence in addition to video recordings at the incident site and breath test site on the issue of whether an individual is under the influence of alcohol, drugs or a combination of other drugs or substances. None of these statutes require this additional evidence to be video recorded, however, the order of the circuit court does in direct conflict with the language of all three statutes.

CONCLUSION

For all the foregoing reasons, the Appellant respectfully submits that the decision of the circuit court reversing Respondent's conviction should be overturned and his conviction reinstated.

Respectfully submitted,



February 21, 2019

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