STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-213281

City of Fort Mill, Appellant,

vs.

Colin Duane Fitzgerald, Respondent.

**MOTION TO VACATE CIRCUIT COURT RULINGS;
REMAND FOR A NEW TRIAL; AND
DISMISS APPEAL WITHOUT PREJUDICE**

Appellant, through its undersigned counsel, would respectfully show unto this Court as follows:

Procedural History

The appeal arises out of a conviction for Driving with an unlawful alcohol concentration (DUAC). Respondent was arrested for driving under the influence on October 9, 2011. His case proceeded to trial April 24, 2012. The City proceeded on the charge of driving with an unlawful alcohol concentration (DUAC). Prior to trial in the Municipal Court for the City of Fort Mill, Respondent's counsel made several motions to dismiss the charges related to the failure to comply with section 56-5-2953 of the South Carolina Code (Supp. 2011). The Municipal Court, Judge Peter J. Lenzi, Jr., denied the motions. (See Return dated August 14, 2012 attached hereto as EXHIBIT A)

The jury convicted Respondent of DUAC. The jury, however, failed to find a breath alcohol concentration (BAC) in accordance with its duties under section 56-5-2933(L) of the South Carolina Code. The matter was brought to the Court's attention by Respondent's counsel. The Municipal Court did not enter a sentence for Respondent because the jury's determination is necessary to establish the range for sentencing after a conviction for DUAC. Instead, the trial court, *sua sponte*, granted a mistrial because the error was discovered after the jury was dismissed. (See Verdict attached hereto as EXHIBIT B).

On May 1, 2012, Respondent filed his Notice of Appeal and Appellant's Brief. He appealed the conviction, even though the Municipal Court had granted a mistrial. In his Notice of Appeal and Appellant's Brief, he claimed the Municipal Court erred in refusing to dismiss the case based on the failure of the City to comply with section 56-5-2953. Respondent failed to raise any issue related to the mistrial being granted by the Municipal Court. (See Notice of Appeal and Appellant's Brief attached hereto as EXHIBIT C).

The Honorable John C. Hayes, III, considered the appeal.[1] Even though no issue related to the mistrial was before him, Judge Hayes ordered the mistrial be set aside as improvidently granted. Further, he remanded the case for sentencing according to the verdict of the trial jury. (See Form 4 Order dated June 27, 2012 attached hereto as EXHIBIT D). The ruling occurred even though Respondent never requested the mistrial be set aside or the case remanded for sentencing.

[1] Appellant is attempting to obtain a copy of the transcript of this hearing and if successful will provide a copy to this Court upon its receipt.

According to the York County Clerk of Court's stamp, Respondent filed a second Notice of Appeal from the conviction on July 23, 2012.[2] (See Notice of Appeal filed July 23, 2012 attached hereto as EXHIBIT E). As before, Respondent raised three issues related to the videotape and lack of an affidavit in violation of section 56-5-2953(A) and (B). At the time he filed this second Notice of Appeal, Respondent still had not been sentenced by the Municipal Court. (See Return of Appeal dated July 27, 2012 attached hereto as EXHIBIT F). According to the Municipal Court's Return, no conviction existed and the case remained on the Jury Trial Docket.

Counsel for the City attended two hearings in an attempt to have Respondent sentenced, but neither resulted in a sentence. Subsequently, and without parties present or being in open court, the Municipal Court sentenced Respondent to a $997 fine or 30 days in jail. The City learned about his sentencing only after the fact. (See Transcript of September 2012 hearing, pages 3-7, attached hereto as EXHIBIT G). The Department of Motor Vehicles received notice of the conviction on August 6, 2012. (See Uniform Traffic Ticket attached hereto as EXHIBIT H). The conviction as recorded by the DMV and as indicated on the ticket was for DUI, while at the trial, Respondent was convicted of DUAC.

A second hearing was held in circuit court before the Honorable Lee S. Alford. The hearing was held September 7, 2012. At the hearing, the City's attorney explained to

[2] The date of service of this Notice of Appeal is questionable. The Notice of Appeal is stamped filed by the Clerk of Court for York County on July 23, 2012. The Certificate of Service which accompanies the Notice indicates it was not served on the City or the Municipal Court until July 30, 2012, even though the page listing the July 30 date is stamped by the Clerk as filed July 23.

the circuit court the circumstances under which Respondent was sentenced. Further, the parties argued the issues raised by Respondent's second Notice of Appeal and Brief.

After hearing argument, the circuit court issued an Order filed September 28, 2012, reversing the conviction and dismissing the case. The court found the lack of audio on the video recording, and the arresting officer's failure to provide an affidavit pursuant to Section 56-5-2953(B) to explain the lack of audio, necessitated dismissal of the charges. (See Order of the Circuit Court attached hereto as EXHIBIT I).

The City timely filed its Notice of Appeal from the circuit court's determination. The Initial Brief of Appellant and Designation of Matter are due to be served and filed on April 26, 2013.[3]

Merits

Any decisions of the circuit court have been without proper appellate jurisdiction and on interlocutory, unappealable rulings. As a result, the rulings of Judge Hayes and Judge Alford should be vacated, along with the sentence imposed by Judge Lenzi. All these actions occurred subsequent to a mistrial being granted, which ended the case and set the parties back at the position they held prior to the trial.

First, a court's grant of a mistrial is not appealable. Section 14-25-95 of the South Carolina Code provides: "Any party shall have the right to appeal from the sentence or judgment of the municipal court to the Court of Common Pleas of the county in which the trial is held." In the instant case, because the Municipal Court granted a mistrial, there was no sentence or judgment in the case from which Respondent could appeal to the Court of Common Pleas. Respondent's appeal of May 1 was not from a judgment or sentence, but instead from the grant of a mistrial. As a result, the circuit court did not

[3] The undersigned asks this deadline be held in abeyance pending a ruling on this motion.

have jurisdiction to entertain the appeal. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 344, 713 S.E.2d 278, 284 (2011) (finding appellate jurisdiction conferred only when notice of appeal is filed with the municipal court "within ten days after sentence is passed or judgment rendered"); see also, Keels v. Powell, 213 S.C. 570, 573, 50 S.E.2d 704, 705 (1948) (finding premature any appeal brought after a mistrial has been declared and finding Court did not have jurisdiction to hear appeal).

Further, Respondent's Notice of Appeal and Appellant's Brief did not list as an issue on appeal anything related to the grant of the mistrial. Instead, Respondent attempted to appeal the denial of his motions to dismiss. Judge Hayes' Order only related to the grant of the mistrial and as a result, was on a basis not properly appealed to him. Section 14-25-95 requires the party appealing to set forth the ground for appeal in the Notice of Appeal. As a result, Judge Hayes ruled on issues not properly raised in the Notice on Appeal dated May 1.

Additionally, this case is similar to the case of Floyd v. Page, 124 S.C. 400, 117 S.E. 409 (1923). In Floyd, the parties were involved in a civil suit which ended in a mistrial. Both parties filed an appeal from the mistrial alleging the trial court erred in denying their respective motions for directed verdict. The South Carolina Supreme Court stated:

> The effect of the mistrial was to leave the parties litigant in *statu quo ante*, with the cause still pending for trial in the circuit court. The rulings of the trial judge in the court below having eventuated in no binding adjudication of the rights of the parties, the appeal is prematurely brought, and jurisdiction thereof may not be entertained.

Id. As in Floyd, the appeal to the circuit court was premature and Judge Hayes' Order should be declared null and void as he ruled without proper jurisdiction. Because his

order required the sentencing to take place, any sentence given to Respondent is also null and void. The appeal to Judge Alford should then have not taken place and, as a result, the entire case should be remanded to the Municipal Court for a trial in which all issues raised by Respondent in the circuit court can be addressed by the Municipal Court.

In addition, if a party is not entitled to appeal an order of the lower court, any ruling on appeal should be deemed null and void. In State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009), the South Carolina Supreme Court vacated an opinion of the Court of Appeals because the Supreme Court found the State did not have a right to appeal the underlying order of the lower court. Id. at 169, 679 S.E.2d at 182. Under this precedent, this Court should vacate the ruling of Judge Hayes, and all subsequent rulings, because Respondent did not have the right to appeal from the grant of a mistrial. Any ruling by the circuit court would be null and void just as the ruling in Smith.

Also, the appeal brought before Judge Alford was premature and should have been dismissed. The Notice of Appeal was filed with the court on July 23, 2012. On July 27, 2012, the Municipal Court indicated his belief there was no conviction as a result of the mistrial being granted. Respondent had not been sentenced by July 23, 2012, and so the requirement of section 14-25-95 that an appeal lie only from a sentence or a final judgment had not been met. Finally, based on the information from the DMV, it appears the sentence was not sent to them until August 6, which based on information and belief is approximately when the City's attorney learned a sentence had been issued. As a result, the appeal was not from a final conviction and should not have been heard. Respondent never filed an amended Notice of Appeal to indicate the conviction was final after sentencing. Accordingly, Judge Alford was without proper jurisdiction under

section 14-25-95 to hear the appeal and his ruling should be vacated and the case remanded for a new trial pursuant to the mistrial entered by the Municipal Court.

As a final matter, the sentence itself is invalid, null and void and should be vacated. The sentence was not issued in open court with either party present. Further, it was issued in violation of Respondent's right to be present at all important stages of a case. This State has long held that sentences of a convicted defendant must be passed in open court and with the defendant present. See State v. Chancellor, 32 S. C. Law (1 Strob.) 347 (Ct. App. 1847). Additionally, sentences not rendered in open court have been declared null and void. See State v. Nathans, 49 S.C. 199, 27 S.E. 52, 62 (1897). Finally, the South Carolina Supreme Court recently reiterated the need for having an oral pronouncement of a sentence in open court with the defendant present. In Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010), the Court found an oral pronouncement made with the defendant present superseded a later written sentence because the safeguard of having the sentence made in open court without the defendant present was not followed. As a result, in this case, the sentence issued by the Municipal Court with no parties present and without any hearing being conducted should be vacated.

Accordingly, based on the foregoing, the City asks this Court to vacate the rulings of Judge Hayes and Judge Alford as well as the sentence imposed by the Municipal Court. All were made after the grant of a mistrial which had the effect of vitiating the prior trial and proceedings and setting the parties back in the position of awaiting trial. Further, both orders of the circuit court were issued without proper appellate jurisdiction as neither involved an appeal from a final conviction and sentence as required under 14-25-95. Finally, the sentence imposed was null and void because it was not done in open

court with the parties present. As a result, all orders subsequent to the grant of a mistrial by the Municipal Court should be vacated and this case remanded for a new trial.

WHEREFORE, Appellant prays the Court hold this matter in abeyance until ruling on the underlying motion; vacate the orders of Judge Hayes and Judge Alford from the circuit court; vacate the sentence issued by the Municipal Court; remand for a new trial based on the grant of a mistrial by the Municipal Court; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

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ATTORNEYS FOR APPELLANT

April 26, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-213281

City of Fort Mill, Appellant,

vs.

Colin Duane Fitzgerald, Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the Motion To Vacate Circuit Court Rulings; Remand For A New Trial; And Dismiss Appeal Without Prejudice on Respondent by depositing a copy of same in the United States mail, postage prepaid, addressed to:

J. Tyler Burns, Esquire
1012 Market Street Suite 205
Fort Mill, South Carolina 29708

I further certify that all parties required by Rule to be served have been served.

This 26th day of April, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE MUNICIPAL COURT
	)	
COUNTY OF YORK	)	
	)	
The City of Fort Mill	)	TICKET: 46773FT
	)	
Plaintiff	)	
	)	RETURN TO APPEAL
-vs-	)	
	)	
Colin Duane Fitzgerald	)	
	)	
Defendant	)	

STATEMENT OF FACTS

The facts before the Court are generally not in dispute. On the night of the Defendant's arrest for DUI 1st offense, he was originally detained by Sgt. Boone of the York County Sheriff's Department. Sgt. Boone contacted the Fort Mill Police Department and Officer Baird responded to the scene. After speaking to the Defendant and Sgt. Boone, Officer Baird initiated a DUI investigation which included the administration of Field Sobriety Tests and the Defendant was ultimately charged and taken into custody on the charge of DUI 1st offense.

In conjunction with these proceedings, Officer Baird submitted an Affidavit providing an explanation for his failure to produce a video tape of the events which occurred at the road side. It must be noted, however, that notwithstanding Officer Baird's failure to produce a video, Sgt. Boone's in car video captured the events at the road side including, but not limited to, the Field Sobriety Tests as well as the Defendant being advised of his Miranda rights.

LEGAL ARGUMENTS AND ANALYSIS

The gravamen of the Defendant's Appeal all center on alleged violations of S.C. Code Ann. 56-5-2953 focusing on the alleged failure by Officer Baird to provide an Affidavit explaining why "no video of the incident site could be provided:" and why "no audio was included in his video of the incident site" and why the incident site video "does not show the Appellant being advised of Miranda warnings."

The Affidavit submitted by Officer Baird together with the videos admitted into evidence are part of the record before this Court. Candidly, this is a case of first impression for the undersigned in that the on site video, offered into evidence was not produced by the Arresting Officer but rather by another Law Enforcement Officer on the scene.

The undersigned ruled on Pre-Trial Motions filed by the defense on literally the same issues now on Appeal to this Court. The pronouncements of the Court of Appeals in Murphy v. State, 709 S.E.2d 685 (2011) formulated the basis of this court's denial of Motions to Dismiss filed by the defense. In Murphy the Court of Appeals noted that 56-5-2953 provides in part that a person "must have his conduct at the incident site and breath site video taped" and that...the video taping at the incident site must "(a) begin not later than the activation of ... blue lights and conclude after the arrest" "and (b) include the person being advised of his Miranda rights before any Field Sobriety Tests are administered, if the tests are administered."

There is nothing in the Statute that requires the video be produced by the Arresting Officer. According to Judge Thomas in Murphy, "the plain language of the Statute is not violated as long as the recording captures (1) the accused's conduct and (2) Miranda warnings prior to Field Sobriety Tests, if such tests occur."

Respectfully submitted this 14th day of August, 2012.

Peter J. Lenzi, Jr.
Municipal Court Judge
Town of Fort Mill

Exhibits: Verdict Form
Ticket 46773FT

cc: Jenny Desch
Tyler Burns

EXHIBIT B

STATE OF SOUTH CAROLINA
TOWN OF FORT MILL

THE STATE OF SOUTH CAROLINA
AND
THE TOWN OF FORT MILL

VS.

Colin D. Fitzgerald
DEFENDANT

CASE # 467T3FT

OFFENSE DUAC
JUDGE Lenski
TRIAL DATE 4-24-12
VERDICT Guilty
FOREMAN/LADY Paula Hanson
SENTENCE/ORDER MTS Trial

12-2640

EXHIBIT C

2012-CP-46-1625

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM CITY OF FORT MILL
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

Case No. 2012-CP-46- 1625

The City of Fort Mill, Respondent,

v.

Colin Duane Fitzgerald, Appellant.

NOTICE OF APPEAL

April 30, 2012

The Defendant, Colin Duane Fitzgerald, does hereby through his attorney make an Appeal to the Court of Common Pleas of York County for his conviction for the charge of Driving with an unlawful Alcohol Concentration. This Court has Jurisdiction over this matter pursuant to S.C. Code Ann. § 14-25-95 (1976 as Amended) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332 (S.C. 2011).

ISSUES ON APPEAL

1.) The Court erred in not dismissing the case for failure by the Arresting Officer to comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no video of the incident site could be provided.

2.) The Court erred in not dismissing the case for failure of the non-arresting officer comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no audio was included in his video of the incident cite.

3.) The Court erred in not dismissing the case for violation of S.C. Code Ann. § 56-5-2953 in that the video at the incident cite does not show the Appellant being advised of his Miranda warnings.

CONCLUSION

Therefore, the Appellant prays this Court reverse his conviction from the Municipal Court.

Respectfully Submitted,

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ATTORNEY FOR APPELLANT

April 30, 2012
Fort Mill, South Carolina

2012-CP-46-1625

Certificate of Service

I certify that the above document has been served on Municipal Court and the Agent for the Prosecuting Agency as required in S.C. Code Ann. §18-3-30.

April 30, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM CITY OF FORT MILL
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

Case No. 2012-CP-46- 1625

The City of Fort Mill, Respondent,

v.

Colin Duane Fitzgerald, Appellant.

APPELLANT'S BRIEF

April 30, 2012

The Defendant, Colin Duane Fitzgerald, does hereby through his attorney make an Appeal to the Court of Common Pleas of York County for his conviction for the charge of Driving with an unlawful Alcohol Concentration be over turned and the case dismissed. This Court has Jurisdiction over this matter pursuant to S.C. Code Ann. § 14-25-95 (1976 as Amended) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332 (S.C. 2011).

ISSUES ON APPEAL

1.) The Court erred in not dismissing the case against Appellant on the grounds that the Arresting Officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing at trial a sworn affidavit to explain why no video of the incident site could be provided.

2.) The Court erred in not dismissing the case against Appellant on the grounds that the non-arresting officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing a sworn affidavit to explain why no audio was included in his video of the incident cite.

3.) The Court erred in not dismissing the case against Appellant for violation of S.C. Code Ann. § 56-5-2953 on the grounds that the non-arresting officer's video of the incident cite does not show the Appellant being advised of his Miranda warnings.

STATEMENT OF THE FACTS

On October 9, 2011, Sgt. Boone with the York County Sheriff's Office initiated a traffic stop, within the city limits of Fort Mill, on an SUV driven by Appellant. Because Sgt. was already detaining a suspect from a previous unrelated arrest, Sgt. Boone requested Fort Mill Police Department take over the traffic stop. Shortly thereafter, Officer Baird with the FMPD arrived on the scene and took over the traffic stop. Officer Baird removed Appellant from the car, conducted field sobriety tests, and placed Appellant under arrest for Driving under the Influence. Officer Baird took Appellant into custody and transported Appellant to FMPD where Appellant was offered a breath test.

This matter came to Jury trial on April 23, 2012 in the Municipal Court for the city of Fort Mill. The City elected to proceed to trial on the charge of DUAC rather than the initial charge of DUI. Previous to trial, Counsel for the Appellant made motions in

limine to dismiss the charges on several grounds involving the video. Because of a malfunction with his video equipment, Officer Baird was not able to produce a video of the incident site. The only video provided came from Sgt. Boone's patrol car. Counsel for the Appellant moved to dismiss for violation of S.C. Code Ann. § 56-5-2953(A) because Officer Baird positioned himself in such a way that Officer Baird was blocked from the view of Sgt. Boone's camera and the video did not show the Appellant being advised of his Miranda warnings. The Trial Court denied this motion and the matter proceeded to trial. At trial, Counsel for the Appellant moved to dismiss for violation of S.C. Code Ann. § 56-5-2953(B), because Officer Baird, as the arresting officer, failed to submit a sworn affidavit setting forth the reasonable efforts he took to maintain his equipment in an operable condition. Officer Baird did submit a template form affidavit that simply said he took reasonable efforts to maintain his equipment in an operable condition. However, the affidavit submitted by Officer Baird was not sworn, but merely signed by the Officer. Counsel for the Appellant also moved to dismiss for S.C. Code Ann. § 56-5-2953(B), because Sgt. Boone submitted no sworn affidavit explaining why his video of the incident site contained no audio. Both motions were denied and the Appellant was found guilty of Driving with an Unlawful alcohol Concentration.

However, despite the Jury returning a verdict of guilty as to the underlying charge, the Court never instructed the Jury that the Jury must also make a determination of fact for sentencing purposes, as to what the Appellant's breath alcohol concentration was at the time Appellant was driving. The Jury never made such a finding of fact as to the Appellant's BAC and the jury was released from service. Because the Jury never made such a finding of fact, the Appellant was not sentenced. Without motion from either side, the Court moved and ruled Sua Sponte to grant a mistrial. Counsel for the Appellant never moved for a mistrial and maintained that the Jury needed to make the finding of fact as to the Appellant's BAC.

ISSUES ON APPEAL

Despite the fact that the Jury never made a finding of fact as to the Appellant's BAC, the Jury did return a verdict of guilty on the charge of DUAC. Driving with an

Unlawful Alcohol Concentration cases are bifurcated proceedings where the Jury first determines guilt or innocence and then makes a finding of fact as to the sentence. The fact that the Jury did not make a finding of fact for sentencing purposes does not negate the entire conviction of the underlying charge. Nor is the conviction set aside under the "clean slate rule" because the Appellant did not ask or move that the conviction be set aside. Just as in the bifurcated structure of a capital proceeding, the only matter left to be determined by a Jury would be the sentencing range and not the issue of guilt. *State v. Stewart*, 288 S.C. 232, 235 (S.C. 1986). Therefore, since the Appellant has been convicted of the underlying offense, Appellant makes this timely appeal as the underlying errors of the Court that led to conviction are ripe for review as a retrial at this point would only address the matter of sentencing.

The Court erred in not dismissing the case against Appellant on the grounds that the Arresting Officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing at trial a sworn affidavit to explain why no video of the incident site could be provided.

At trial, Counsel for the Appellant argued that this case is directly on point with the case of *State v. Landis*, 362 S.C. 97, 101 (S.C. Ct. App. 2004). In the *Landis* case, Landis was initially pulled over by a State Transport Officer. However, shortly after the Transport Officer initiated the stop, a State Trooper arrived. The State Trooper removed Landis from his car, performed the field sobriety tests, and placed Landis under arrest. In the *Landis* decision, the Court of Appeals held that it is the "arresting officer" that has to be in compliance with § 56-5-2953(B). Since the State Trooper removed Landis from his car, gave Landis field sobriety tests and placed Landis under arrest, the Trooper is considered the arresting officer under § 56-5-2953(B).

These facts are almost the same facts involved in the present case. Officer Baird removed Appellant from his car, gave Appellant field sobriety tests, and placed Appellant under arrest. Under almost exactly the same factual situation, the *Landis* opinion would consider Officer Baird is the arresting officer responsible for compliance with § 56-5-

2953(B).

§ 56-5-2953(B) states that "Failure by the arresting officer to produce the video recording required but this section is not alone grounds for dismissal... if the arresting officer submits a sworn affidavit certifying that the video recording equipment... was in an inoperable condition." As the arresting Officer, Officer Baird was responsible for complying with § 56-5-2953. However, Officer Baird never submitted a sworn affidavit and only submitted an unsworn form signed by Officer Baird. (Appellant's exhibit #1). As a result of this failure by Officer Baird to comply with § 56-5-2953(B), the appropriate remedy should have been dismissal of the case under City of *Rock Hill v. Suchenski*, 374 S.C. 12 (S.C. 2007).

The Court erred in not dismissing the case against Appellant on the grounds that the non-arresting officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing a sworn affidavit to explain why no audio was included in his video of the incident cite.

Appellant contends that *Landis* is controlling in the present case and should have been dismissed because the arresting officer failed to comply with § 56-5-2953(B). However, the Trial Court took the position that *Murphy v. State*, 709 S.E.2d 685 (Ct. App. 2011) was controlling in the present matter. (Appellants exhibit #2). According to the Order issued by the trial Court, "the video produced by Sgt. Boone satisfies the statutory requirement." Should the position of the Trial Court be correct, then the Court erred in not dismissing this case for failure by Sgt. Boone to comply with § 56-5-2953(B).

Immediately after making contact with the Appellant, Sgt. Boone returned to his patrol car, where he remained until Officer Baird left with Appellant to go to FMPD. Because Sgt. Boone sat in his patrol car, there was no audio on the video provided by Sgt. Boone. Appellant maintains that if Sgt. Boone's video should meet the statutory requirement, then Sgt. Boone should have provided an affidavit to explain the lack of audio. § 56-5-2953(A) states that the video must include the conduct of the defendant and any field sobriety tests if any are administered. The manner in which the Appellant spoke to Officer Baird, along with how the Appellant physically appeared, is part of the conduct

required to be on video. In addition, two out of the three field sobriety tests administered to Appellant required Appellant to count aloud while performing some other task. At trial, Officer Baird testified that the manner of counting could be considered clues in determining whether the Appellant was impaired. By his own testimony, it is clear that Officer Baird considers the manner the Appellant counted as part of the field sobriety tests. Since these portions of the field sobriety tests are not on the video, this video would also violate § 56-5-2953.

The Appellant again maintains that it was Officer Baird that must be in compliance with § 56-5-2953(B). However if the position taken by the trial court is correct, then this case should have still been dismissed for failure by Sgt. Boone to comply with § 56-5-2953(B) by submitting a sworn affidavit at trial explaining the lack of audio on his video.

The Court erred in not dismissing the case for violation of S.C. Code Ann. § 56-5-2953 in that the non-arresting officers video at the incident cite does not show the Appellant being advised of his Miranda warnings.

Even if Sgt. Boone's video of the incident site is sufficient to excuse Officer Baird failure to comply with § 56-5-2953, which Appellant contends it does not, this case should have still been dismissed because the video does not show Appellant being advised of his Miranda warnings. At the time of the Appellant's arrest, Officer Baird positioned himself behind the Appellant, which block the camera's view of Officer Baird. As a result of his position behind Appellant, it is not possible to tell whether Officer Baird ever advised Appellant of his Miranda warnings. In *Sullivan v. State*, Case No: 2010-CP-46-3355, the Honorable Judge John C. Hayes III held that "the word show means something that one views or at what one looks and at the same time hears". Because Officer Baird is behind the Appellant, it is impossible to tell whether Officer Baird ever advised Appellant of his Miranda warnings. In addition, because the video has no audio, it would be mere speculation to even guess whether the video shows Appellant being advised of his Miranda warnings.

Because the video does not show Officer Baird advising the Appellant of his Miranda warnings and because Sgt. Boone's video does not contain audio of the Appellant being advised of his Miranda warnings, at the absolute minimum, both Officers should have submitted sworn affidavits. However, neither Officer did submit a sworn affidavit and as a result under *Rock Hill v. Suchenski*, 374 S.C. 12 (S.C. 2007), the case against the Appellant should be dismissed.

CONCLUSION

Therefore, for the above mentioned reasons, the Appellant prays this Court reverse his conviction from the Municipal Court.

Respectfully Submitted,

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ATTORNEY FOR APPELLANT

April 30, 2012
Fort Mill, South Carolina

2012-CP-46-1625

Certificate of Service

I certify that the above document has been served on Municipal Court and the Agent for the Prosecuting Agency as required in S.C. Code Ann. §18-3-30.

April 30, 2012

EXHIBIT D

FORM 4

TATE OF SOUTH CAROLINA
OUNTY OF YORK
I THE COURT OF COMMON PLEAS

FILED-RECEIVED
2012 JUN 28 PM 12:26
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4601625

Fort Mill City of
PLAINTIFF(S)

Colin Duane Fitzgerald
DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

] ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

] ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

] DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

S ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court

Mistrial Set aside as improvidently granted
Remanded for sentencing according to the verdict of the Trial jury

ORDER INFORMATION

order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

plete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, ate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

icable, describe the property, including tax map information and address, referenced in the order:

judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of tion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final er are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

John C. Hayes

cuit Court Judge

2049
Judge Code

6/27/12
Date

ORM4M

For Clerk of Court Office Use Only

his judgment was entered on 4-28-12, and a copy mailed first class or placed in the appropriate attorney's box on 4-28-12, to attorneys of record to parties (when appearing pro se) as follows:

Jenny E. Desch
York County Solicitor'S Office
1675-1A York Hwy
York. SC 29745

ORNEY(S) FOR THE PLAINTIFF(S)

Tyler Burns
1012 Market St
Fort Mill, SC 29716

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Reporter : Karen Ambroziak

RM4M

EXHIBIT E

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM CITY OF FORT MILL
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

Case No. 2012-CP-46- 02640

The City of Fort Mill, Respondent,

v.

Colin Duane Fitzgerald, Appellant.

NOTICE OF APPEAL

July 23, 2012

The Defendant, Colin Duane Fitzgerald, does hereby through his attorney make an Appeal to the Court of Common Pleas of York County for his conviction for the charge of Driving with an unlawful Alcohol Concentration. This Court has Jurisdiction over this matter pursuant to S.C. Code Ann. § 14-25-95 (1976 as Amended) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332 (S.C. 2011).

ISSUES ON APPEAL

1.) The Court erred in not dismissing the case for failure by the Arresting Officer to comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no video of the incident site could be provided.

2.) The Court erred in not dismissing the case for failure of the non-arresting officer comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no audio was included in his video of the incident cite.

3.) The Court erred in not dismissing the case for violation of S.C. Code Ann. § 56-5-2953 in that the video at the incident cite does not show the Appellant being advised of his Miranda warnings.

CONCLUSION

Therefore, the Appellant prays this Court reverse his conviction from the Municipal Court.

Respectfully Submitted,

J. Tyler Burns, Esquire
Reeves, Aiken and Hightower, LLP
Post Office Box 1297
Fort Mill, South Carolina 29716
Telephone: (803) 548-4444
Facsimile: (803) 548-7050

ATTORNEY FOR APPELLANT

July 30, 2012
Fort Mill, South Carolina

Certificate of Service

I certify that the above document has been served on Municipal Court and the Agent for the Prosecuting Agency as required in S.C. Code Ann. §18-3-30.

July 30, 2012

EXHIBIT F

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM CITY OF FORT MILL
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

Case No. 2012-CP-46- 02640

The City of Fort Mill, Respondent,

v.

Colin Duane Fitzgerald Appellant

RETURN OF APPEAL

July 27, 2012

12-2640

PROCEDURAL STAEMENT OF THE CASE:

This case was called to Jury Trial on April 24, 2012, the defendant was originally charged with DUI 1st offense, however the case went to Trial on D.U.A.C. The city was represented by Jenny Desch and the defendant was represented by Tyler Burns. Counsel for the Defense filed pretrial motions for dismissal contending that various violations of 56-5-2953 South Carolina Code of Laws had occurred. These motions were considered by the court and denied.

The case proceeded to trial uneventfully with opening statements, presentation of City case, the City and Defense resting followed by closing arguments and instructions by the Court. Through oversight by the Court, the Jury Foreman was not provided with the appropriate Verdict Forms. The proper forms require the Jury to not only make a determination as to the Defendants guilt or innocence but to make a determination as to the Blood Alcohol Concentration. This matter was brought to the courts attention by Defense Counsel after the Jury had been excused by the Court.

Realizing the mistake the Court announced that it was declaring a Mistrial and the Mistrial was noted on the Verdict Form (attached exhibit I). Therefore, contrary to the allegations in the Defense Notice of Appeal there was not conviction of the Defendant and the case has been placed back on the Jury Trial Docket.

Respectfully Submitted,

Judge P. Lenzi
Town of Fort Mill
Telephone: (803) 547-2022

July 27, 2012
Fort Mill, South Carolina

EXHIBIT G

STATE OF SOUTH CAROLINA

----------x

COLIN DUANE FITZGERALD,

Appellant,

-against-

Case No.

2012-CP-46-2640

THE CITY OF FORT MILL,

Respondent.

----------x

September 7, 2012

York County, S.C.

B E F O R E:

HONORABLE LEE S. ALFORD,

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

J. TYLER BURNS, Esquire

Attorney for the Appellant

JENNIFER DESCH, Esquire

Attorney for the Respondent

Aileen Butler

Official Court Reporter

THE COURT: This is the case of Colin Duane Fitzgerald versus City of Fort Mill.

MS. DESCH: Good morning, Your Honor.

THE COURT: Good morning.

MR. BURNS: May I?

THE COURT: Yes, sir.

MR. BURNS: This is a really procedurally weird case. The more we tried to correct it the worse it got. I filed a brief on the original appeal that was under a different number that Judge Hayes heard and remanded and then I re-filed.

I have essentially the same brief that I sent to counsel for the city before, but I don't know if it made it to this file.

THE COURT: No, sir.

MR. BURNS: If I could, I would like to hand that up.

THE COURT: Yes, sir. Do you have a copy for her?

MR. BURNS: Yes. It is essentially the same thing.

MS. DESCH: By essentially what do you mean?

MR. BURNS: I changed the date and the

number.

THE COURT: Why was it remanded?

MR. BURNS: It was a DUAC in which the jury never made a determination as to the defendant'S blood alcohol concentration. The jury was excused without any sentence being imposed and the city judge declared a mistrial.

I appealed that. It came before Judge Hayes. He essentially said you can't mistry it once they have been convicted and remanded it for sentencing and then basically said I could start over after sentence was imposed.

It was remanded. He was sentenced on it and then I re-filed the appeal based on the same grounds as before.

MS. DESCH: Your Honor, if I may clarify just a few things because this is the one of the points the city would like to say for the record to preserve the record.

It is true we got to the point where the jury came back with a guilty verdict and then Judge Lindsey dismissed the jury. It was at that point that the defense brought to the Court's attention that he had failed to mark on the verdict form that they had to choice what number.

There was some brief discussion about how to deal with it at that point and the the parties obviously could not agree and Judge Lindsey got frustrated and he declared a mistrial.

At that point the defense counsel appealed on the issue that is before you today. Appealed on the fact that he -- that the City did not submit a sworn affidavit to deal with some inconsistent -- or some missing audio on the video. That came up. I pointed out the fact that you can't appeal. It is not ripe when no sentence has been entered under criminal rules of procedure 10-A.

We brought that up again in front of Judge Hayes. He agreed and sent it back down for the purpose of sentencing.

The judge through his law clerk, Nancy, at Fort Mill PD asked us to appear. The defense asked that we go in front of Judge Wood this time and so we did and when Judge Wood's saw essentially the mess that was before him he said I don't feel comfortable dealing with this.

At that point the defendant was not present either way. We were excused at that point. Both counsel and I were excused at that point from

Judge Wood's court and we received an e-mail from Nancy saying sentencing will happen in Rock Hill City Court at noon the next day before Judge Lindsey. I appeared. No one from the defense, neither defendant nor defense counsel, and at that point there was nothing we could do. I did want to be heard on the sentence and I made it clear that I wanted to be heard on the sentence. At that point we couldn't do anything and then I got to work I think that next Monday and I was handed the papers of the appeal.

At no point has the City got any notice of a sentence. I think it was cleared up by your Court, by Miss Strait cleared it up and actually asked Judge Lindsey and he apparently just made a decision without any parties present and gave a fine I think of 997 or maybe thirty days, or 997. To my knowledge I don't know if that was ever entered. I don't know what it was based on. What we have here and what I wanted to put on the record, if this were to go any further the fact that -- despite the fact that the jury didn't pick a number, I think it is clear that the Court has to acknowledge that a breathalyzer was taken. That does make a difference in the fine amount if

if you were to so choose to give a fine instead of the thirty-day sentence.

There is issue of forty-eight hours of mandatory time. None of that has been issued.

I do understood that even if we were standing in front of Judge Lindsey and the defendant was sentenced that defense counsel was going to ask for an appeal bond. The City has no objection to that. I just wanted to lay the foundation that we do object to how it was handled. That it was done without anybody present; the defendant or the City. That we weren't heard on sentencing. So I just wanted to make that part of the record. That brought us here. I think we are here now on the appeal. It is ripe if a sentence had been put in place and I am assuming it has, but the City has not received any record of that.

THE COURT: Is that your understanding of the sentencing?

MR. BURNS: I talked to Nancy Butler of the City the day after we appeared before Judge Wood in Fort Mill and she said he was going to enter the sentence because I made it very clear that Judge Hayes essentially said it is not ripe now.

Let it go down for sentencing. I made it clear I am going to re-file tomorrow. I think he just said fine, 997 or thirty days. We were told by the clerk we didn't have to be there. That the sentence would be entered. It has been entered. It has gone to the D.M.V.. His license is suspended. They wouldn't convey that to the D.M.V. had they not entered the sentencing conviction.

They knew. It was very clear from Judge Hayes' Order that it was technicality of sentencing for the appeal to be ripe. And I believe truly he just entered the sentence based on I would say sort of indicative of what Judge Hayes said during our first go around. Without that first BAC level it would have to be the bottom level. He didn't rule on that issue.

THE COURT: How about the bond issue? He would have automatically gone to jail or paid a fine wouldn't he?

MR. BURNS: Judge, I file the appeal immediately thereafter. I was never noticed that the City had some objection with the sentencing. I was never served with a Notice of Appeal that they disagreed with the imposition of the

sentence. It is well past the time for them to challenge it. I just don't think they can come here today on appeal without even filing an appeal or cross-appealing and argue anything about the sentencing.

I believe should the appeal be heard and it is dispositive in favor of the appellant clearly shouldn't matter anyway.

MS. DESCH: Your Honor, if I can submit two pieces for your review.

Your Honor, this is not the essential issue of the case. But I just I want the record to be clear. This is a messy case. I was never given notice of the sentence to begin with. Defense counsel says he called Nancy Butler. Nancy Butler told him what Judge Lindsey said. And then he appealed based on that.

I was not part of any of that discussion. I don't think it is proper that the clerk decides or conveys the sentence. I do think it is proper that the parties be before the judge. But all I can say is put that in the record and leave it at that. I can't do anything more than that. But as far as being told not to be there I just wanted to present this is an actually notice from

Nancy Butler to the both of us. As you can see I did appear. Nobody else did and this is what Judge Hayes wrote. So if we are talking about a sentence based on what Judge Hayes wrote I thought it would be prudent that you actually see what Judge Hayes wrote. He just basically said remanded for sentencing. So that is it.

I understand this is not the key issue in the case. I understand that if I were given notice I would have ten days to appeal. I was never given notice. But we have bigger fish to fry, so to speak in this case, but I just wanted to lay the record that --

THE COURT: So, you were never given notice of the actually sentencing?

MS. DESCH: Correct. Until I heard from -- I inquired to the Civil Court how can we proceed. Why should we proceed if there has been no sentence issued. We would be at square one if we came before you yet again without a sentence.

So, I was never given notice by Judge Lindsey.

THE COURT: Okay. We will address these as they appear. Of course, again, I don't have any record in this case. Is there a record in this

case? A transcript?

MS. DESCH: Your Honor, we did talk about that yesterday. I have inquired. I don't know if you know this, but Judge Lindsey is no longer the judge in Fort Mill City. Judge Wood has taken over that position and Nancy Butler has retired.

In the mist of all that is when this happened. I did ask Mitzi Blackman who has taken over. When I inquired to the Court if you had received a transcript, if one existed and frankly Mitzi is asking anybody that she can think of to get help from the IT department or to find that laptop. So, I don't know if we know whether one exist or not. I do think it would be incredibly helpful. Although we agree on most things, I think there is little nuances that defense counsel and I don't agree on. We don't have to agree on, obviously.

THE COURT: Let me tell you what my concern is. My concern they based their appeal on, it is not based on the failure of the jury to make a finding on the verdict form, or the jury find the actual alcohol content.

You are not making that as a ground on

appeal?

MR. BURNS: No, Your Honor. My basic argument is it should never have gone to the jury.

THE COURT: Well, I understand. I want to be sure.

MR. BURNS: That is not --

THE COURT: I think your motion there would be for a new trial.

MR. BURNS: Yes, I am not raising that issue.

THE COURT: You are not raising that issue?

Mr. Burns: Yes.

THE COURT: So we are just dealing with three issues and then they all involve no video of the incident site. No audio was included in the video of the incident site. The non-arresting officer video of the incident site does not show the appellant being advised of his Miranda warnings.

Those are your basis for appeal?

MR. BURNS: Yes, Your Honor.

THE COURT: All right. And you made those motions at the pretrial and the judge denied them or during the trial?

MR. BURNS: During the trial, yes, sir.

THE COURT: And he denied those motions.

MR. BURNS: Yes, Your Honor.

THE COURT: See, that's the problem I got. I don't know what he had before him and why he denied them and the only thing he says in his return he made his motion and I denied him. I don't have anything to show what was actually done or what evidence there was. I mean, was there some reason that these weren't provided or were they provided and the judge disagreed the audio wasn't there or the Miranda warnings were not given or whatever.

MS. DESCH: I think on his return he does say that in his view the Miranda -- the giving of the Miranda was shown. And I will be candid Your Honor, essentially what happened is a sergeant from the county was driving through Fort Mill and he sees a car come off the road and swerve in front of him. He follows him for a little bit. The camera is on and you can see the car weaving back and forth. He initiates his blue lights. He pulls the car over. He already has a person in the car with him and he calls for -- as they turn on to Main Street in Fort Mill

and around to I think Tom Hall or somewhere in that area, he calls for Fort Mill PD. They are able to get out there pretty quickly and at that point Sergeant Boon is the one with county jurisdiction. He pulls him over to get him to stop driving recklessly in city limits. He pulls him over. He goes out. He has an interaction with the defendant and gets his license. Comes back and at that point the Fort Mill police officer comes on scene.

Your Honor, the main issue of this case is Fort Mill, the officer did not have video in his car from Fort Mill PD. But knowing that and knowing the issues with Roberts, as I am sure you have seen before you, the Fort Mill PD can not say we are not putting videos in my car to not comply, so the officer was aware of that. Sergeant Boon stayed on seen. He kept his video on the entirety of the incident. Unfortunately when he goes back to his car his mic went with him. The officer not being cognizant of the fact the audio wasn't catching because he knew that the video was catching.

He continues with the investigation. Pulls the defendant out of the car. Performs field

sobriety, which is the HGN walk and turn and the one-legged stand.

He then at that point determines to arrest the defendant for driving under the influence. He turns around. He places handcuffs on him. He pulls out a Miranda card. He shines his flashlight on it and he reads from Miranda. Of course you can't hear that. You can see it and he testified to it in Court and he even put in a copy of his Miranda card and signed it as submission to the Court and to the defense that this what I read from and he did the same thing in front of the the jury to show this is what I did. I pulled it out. This is me. And he pointed out in the video, this is me reading the Miranda card at this point.

The defendant is taken from the scene. He is placed in Fort Mill PD officer's car and taken back for the breathalyzer. Nothing inherently wrong with the video room tape. There has been no objection to that at all.

So what we are faced with here is the City's argument is we have complied with "A", the conduct is captured in its entirety and the video was produced for the defense. The defense's

argument is that we have not. And I will let him do that. But that is where we are.

Of course it would help for you to see that and hear that and I wholeheartedly agree and we can continue to see if it even exists. But I think we don't necessarily disagree with too much. We have to concede there is no audio on the tape and we have to concede there is no sworn affidavit. From there we just have our legal arguments based on what we would present to you.

THE COURT: I will hear from you, but I am just thinking through that.

All right. Go ahead.

MR. BURNS: Thank you, Your Honor.

I don't disagree with most of those facts and I wish to argue on those facts as she pretty much stated.

As you heard, sheriff's deputy pulled my client over and he had a defendant from another arrest in the back of his car. He radioed or called for Fort Mill PD to arrive. Fort Mill PD showed up and at that point the sheriff's deputy Sheriff Boon got back into his car.

Your Honor has recently handed an opinion on State v Landis and my argument during the trial

or at trial was that this was spot on with Landis. You are aware of that case. State transport officer pulled him over but it was highway patrolman who did the field sobriety test, who placed him under arrest and took him and did the data master. Exact same thing here. Deputy pulled him over, but shortly thereafter as counsel said, Fort Mill arrived. It was Fort Mill who performed the field sobriety test. He placed him under arrest. He took him in and he administered the field sobriety test. So I would say spot on, with Landis. And in Landis the Supreme Court says that, it is the arresting officer who must comply with section 56-5-2953 and they go on to define in that case that it was the state trooper who performed all these things, was the arresting officer, and not the transport officer. And I think that is exactly what we have here. Exactly. And during the trial the officer for the City of Fort Mill produced no video from his car. And he produced no sworn affidavit. At that point I moved to dismiss based on violation of the video recording statute.

If you look at the brief I handed up, the

very last page is the affidavit that they sent to me on the issue. And if you will notice at the bottom it was never sworn.

I raised this issue with Judge Lindsey and you know maybe it would have been different even based on Your Honor's decision recently had they gone back and fixed it. But it was still never fixed. They never produced a sworn affidavit. So based on Landis the arresting officer never provided a sworn affidavit and have violated the video recording statute. But on the same side of that same coin, to say that the deputy's video is sufficient I think also violates because he got back in his car and you couldn't hear the field sobriety tests. And the statute says that it must include his conduct. And conduct would clearly be -- and by the officer's testimony, the way he sounds. Is he slurring. The way he speaks. Part of every field sobriety test is whether they count currently. And that evidence is used against him. And I believe that would be conduct that was not shown on the deputy's video. So, even assuming that is correct, and I am just saying assuming that, then the deputy should have provided a sworn affidavit to explain why it

didn't have any audio to it. So either way the video recording statute was never complied with, by presenting a sworn affidavit in either case and it clearly violates the 56 (B) and I believe the conviction should be overturned based on the violation of that.

We went on in the pretrial about whether or not you could see the arresting officer read Miranda. He was standing behind him. You can see him moving around and show a flashlight but you couldn't see what he was doing. Maybe it shows it. Maybe it doesn't. I don't think it does. I can see how that is up to interpretation. You surely can't hear it. But I just don't think we get that far based on the fact that none of the people who either they didn't provide a video and didn't provide a sworn affidavit or they did provide a video and they still didn't provide a sworn affidavit as to why it didn't include all of his conduct.

Based on that reason I believe it should be overturned.

THE COURT: The officer's signature, that is part of your brief, is that the City of Fort Mill officer saying it wasn't operating?

MS. DESCH: Yes, sir.

THE COURT: Am I to understand he didn't have one in the car?

MS. DESCH: That's correct.

THE COURT: Of course it wasn't operating if he didn't have one in his care and that is not and acceptable excuse.

MS. DESCH: Well, let me -- I don't know the answer to that. I know that Fort Mill has had a bevy of problems.

THE COURT: Again, I don't have the benefit of what the trial judge had.

MS. DESCH: Right.

THE COURT: I don't know what was presented to him at the time. That is where I am at. Of course this affidavit is not in proper form. But it would make a big difference as to whether it was in inoperable condition and failed to be maintained or didn't have one at all on his car. But under Roberts I think he didn't have one at all on his car. I don't think he can even raise that defense.

MR. BURNS: I started to see a trend in that to the point that I threw my hands up and started getting subpoenas duces tecum. I said I want to

see these records to see how they are maintained because I am getting a lot of affidavits with no video. So, there was nothing ever presented as to why he didn't have a video. It was simply I just don't have one.

THE COURT: Miss Desch started off by saying that he didn't have one in the car and that wasn't acceptable under Roberts and I agree.

MR. BURNS: Yes, sir.

THE COURT: So if he didn't have one, period, that is one thing. If he had one that was in inoperable condition and provides an affidavit and reasonable efforts had been made then that, you know, if they can establish reasonable efforts had been made. Was there any testimony on that?

MR. BURNS: No, Your Honor.

THE COURT: What had been done to maintain them or whether he had one or not?

MR. BURNS: It never even came up. I argued this point and essentially counsel's argument was we have a video from the deputy and that doesn't even matter as to why Fort Mill doesn't have one. And Judge Lindsey agreed with that and he pretty much says so in his return.

I think it can be seen that was his ruling from his return that yet Fort Mill doesn't have one, but it doesn't matter at all. It wasn't even brought up. We got this video over here from the sheriff's deputy and that is good enough and that is basically how it was left.

THE COURT: Not if it is inadequate. And it is inadequate because he didn't have his mic in a place where you could hear.

MR. BURNS: Yes, sir.

THE COURT: You know if you can hear everything that was done and see it all I might agree with that position. But if the reason you couldn't hear it is because the deputy was back in his car and therefore it was ineffective to get the audio part of it then it is not an effective substitution, it appears to me, that meets the requirement.

MS. DESCH: Your Honor, I understand. I can see where you are going with this, but could I just respond to the argument.

THE COURT: Sure. Of course. Of course.

MS. DESCH: Your Honor, I think what we are faced with here is the fact that -- and to give you a history which I don't know that you need to

know this, but counsel has made sort of this -- he has thrown up his hands with Fort Mill. The history with Fort Mill is essentially this. They spent a lot of money in putting in video cameras in their cars. Little by little those cameras started -- because back when they changed all the laws the department of public safety when they changed all the laws and made this big hit on DUI across the state the Department of Public Safety said don't worry about it. We will provide all this money to the departments to make sure you have them and that is why Roberts is so important. Roberts is so important because despite that movement the town said we don't want to comply with this new rule. We are just not going to put videos in our cars. Well, the judge at that point said, well, you know what, you just can't do that ad nauseam. At some point you got to remedy the problem and you got to comply. It is inexcusable to prolong this and not comply with the statute.

Fort Mill PD on the other hand put videos in their cars and they spent a whole lot of money doing this and as these videos were breaking in the cars the powers that be were trying to remedy

the issue by going back to manufacturer and saying you need to fix this because we need to be able to videotape these cars to be able to comply. So basically as one would break they would try to get it fix and then they would send another car out. So essentially they were fighting this battle. Instead of just spending more money and putting in different videos they were fighting this battle. But what they were trying to do is get the cameras in the car and this is what has been going on for the last two years. And so little by little they would have one car and a Sergeant would try to get to the scene if the Sergeant had the video to make sure something was captured. Well, this is becoming a problem because more and more times. So at some point you know it was excusable if you could explain what was wrong with the video. So all the cars to my knowledge should have video, but most of them do not work. And so this is the problem and the officers would come off the road and they would report it to their superiors and the superiors would continue this battle against the manufacturers of the video. And finally BJ Kennedy said we can't continue to

do this. We are not effective on the streets. We are losing cases in court. So he went back actually to the VHS system until they could get something put in place that was more proper. So Fort Mill PD has been attempting to do that. Whether it is the right remedy or not, I don't know that we have the answer for that. But they were attempting to.

So in this particular case, I honestly don't remember if Officer Barrett[illegible] d that his was not working or no[illegible] e incredibly clear at the onset [illegible] the affidavit was not sworn. So [illegible] were faced with the evidence a[illegible].

Baird (officer)

This was not done in a motion in limine prior to and it was purposely not done because the defense wanted to and has admitted. I am not talking out of court. He admitted he wanted to wait until the jury was sworn if the court ruled in his favor then double jeopardy would have set in.

It was at that point where the Sergeant's video was being placed in evidence. The defense objected to the admission of the video based on these violations. So the technical preservation

of the appeal issue I don't know if that is a proper technical submission of it, but he objected to it going in. The arguments were heard. The case law was presented and he relied very heavily on Landis. But I would like to point that Landis is different in some way. Landis is all about the arresting officer. Who is the defining officer in the sworn affidavit. But in Landis there is no video at all. So then you are dealt with the fact that they have to rely on B because they have not complied with A. There is nothing caught on tape. And so we would argue it is different here. That in "A" it doesn't say the arresting officer has to provide a video or anything about who has to provide it. It just says conduct must be captured on video.

From that premise, Your Honor, I would like to present some case law and really --

THE COURT: Have you got a copy of Landis with you.

MR. BURNS: I do, Your Honor.

THE COURT: Let me look at it.

MR. BURNS: And I am actually trying to find it where they actually come right out and say that therefore it is the arresting officer who

must comply with 56-5-2953.

MS. DESCH: What I said is they define arresting officer in the case.

(Document handed to the Court.)

MS. DESCH: I will give you a moment to get through that and then I will continue with that.

MR. BURNS: Right off the bat, Your Honor --

MS. DESCH: I didn't say I was done arguing.

THE COURT: In actuality Landis predates the current law. The old law was that you had to video conduct. I think that is when Landis was in effect. The new law that passed in 2009, 2010 whatever, it says you got to video. Period. It doesn't say you got to video the field sobriety test, et cetera, and giving them Miranda warnings. It does not say conduct any more. So back then you kind of have had a different standing.

There was a case that dealt with that. I don't think it was Landis. There was a case that dealt with that, that said, you know, under the new statute that would be -- our opinion might be different. In the footnote they said that. Under the new law. But we are under the old law which only requires conduct. But the new one -- am I

correct about that or am I mistaken.

MR. BURNS: No, Your Honor I have a copy from Lexus. I can hand this up.

THE COURT: Yes, sir.

(Document handed to the Court.)

MR. BURNS: But it states must have his conduct at the incident site.

THE COURT: Is this the new statute?

MR. BURNS: Yes, Your Honor.

MR. BURNS: And I am sorry, I scribbled on that one, but that is the only copy I have with me.

THE COURT: Maybe I am just reversing it then. They said under the new statute.

MR. BURNS: But, Your Honor on the flip side of that same coin if the video from the deputy was sufficient he got back in his car and there is no audio, then he should have provided an affidavit as to why there was no audio on it.

MS. DESCH: I will address that if I am allowed to continue my argument.

MR. BURNS: I am sorry.

THE COURT: Go ahead counsel.

MS. DESCH: Your Honor, I presented to you a few cases and Orders from our Circuit and from

the Supreme Court, and I know the Orders that are produced for our Circuit Court judges, by you and Judge Hayes are not precedent setting, but I looked for as much guidance in this as we could possibly get and there is a couple of cases that have come through and so essentially the premise of my argument if I can try and make it as clear as possibly, is that if the city -- or the State complies with "A", then we don't even need to get to "B". In all of the cases that I presented and that are relied on by this defense counsel and many defense counsel that have appeared before you in the last year and a half the essential outline is, they relied on Suchenski in that case no video. Landis, no video at all. In several of these cases there is no video at all. And so they have to rely on "B" or they had to go to "B". And even Suchenski which we all rely on now, as the case went up they said nobody preserved these exceptions in "B" so we don't even need to get to it and yet that is what is before all the courts as what everybody is now relying on.

So the argument there is, the exceptions in B not addressed in Suchenski but addressed by

many Circuit Court judges and the Court of Appeals and Supreme Court, in B there is a catchall. But beginning with "A", Your Honor, what I presented to you is several orders including Lois Scott from Judge Hayes February 7th of this year. Stephanie Langum (phonetics) and I apologize if I am butchering that. That was written by you in June of this year. Carl Sullivan another Order by Judge Hayes.

I think the one issue on Sullivan that I wanted to bring to the Courts attention in that case you could hear but could not see and Judge Hayes very clearly said show conduct means show. You should be able to see it and in that case that was dispositive of that particular case. In ours we now have the opposite. You can see Miranda being given and can you see the conduct that is captured. So we would argue in line with Judge Hayes' thoughts in Sullivan that according to the plain language of the statute that you can in fact see. And I would say to show conduct we have to look at the plain language as you know that that includes the noun version and the verb version. And I think it is easy for the opposite to come in or the person arguing against

the statute to say, well, I don't hear the words. Well frankly, even if you had audio you are not seeing. You are not seeing the words. The words are not -- it is not a cartoon where the words kind of go up in a bubble. And I know that sounds kind of like a ridiculous argument but the word show has been expanded so much to include some things it is becoming impossible to get back to the legislative intent which we should be looking at the legislative intent as the plain language of the Court and I think that is the underlying factor in all these orders before you.

Your Honor, I also included an Order from Judge Addy, and I thought it was actually the closest I could find on this particular issue and if you look and that is for the record, that is Victor Raper Irvy versus State of South Carolina, 2011-CP-24-593. It was heard before the Honorable Frank Addy Jr.

Your Honor, on page two, of that Order, in this particular case there was a -- the Order was from 2011, but it is unclear as to what it might have been the old statute. But essentially what we have here is that the judge was faced

with a problem. The incident site videotaping is missing all of Mr. Irby's verbal contact while Mr. Irby was placed in the arresting officer's patrol car and being arrested. This was probably the closest I could find. We have a video but the audio is missing. And in Judge Addy's analysis of it, and again not precedential in any way. Just looking for guidance in this issue. It says the arresting officer produced the incident site video tape required in subsection "A". The incident site video tape that was produced doesn't meet the mandates established in "A" for what must be seen and heard in the incident site video tape.

Therefore he can not use an affidavit produced pursuant to subsection "B" to excuse the deficient incident site video tape because an incident site video tape has in fact been produced. The pertinent issue in the State's right to use the incident site video tape that was produced.

"A" says it is mandatory as to what must be shown and heard. And "A" says it is mandatory that conduct be captured including field sobriety, if they are given and the showing of

the Miranda rights.

"B" reticent in its totality addresses how the Court proceeds in the absence of a video tape. And Judge Addy says subsection "B" does not purport to cure the State's failure to comply with "A" when a video tape is in fact produced. If that were the case Officer's value. The problem -- so, es.s did end up candidly in a dismissa.ot for that reason. And it really captures, i we comply with "A" and produce a video even if Officer Bear, the arresting officer, produced an affidavit it doesn't -- "B" does not allow for that. We produced "A" and complied with "A" by producing a video. It doesn't say it has to be Officer Bear's. It just says video that captures the conduct of the defendant.

Based on this analysis, we don't have the luxury of then going to "B" and using it essentially as back-up plan. We complied with "A" and that is the City's position. That we complied with "A" by capturing the conduct and there is no guidance as to what to do if you can not hear.

And finally Your Honor, before you is a case

that just came out. It is a felony DUI case. State versus Christopher Manning. It is in the Court of Appeals. Appellant case number 2010-161686. It is an appeal from Lexington County.

Your Honor, I think this is most dispositive of where the Courts are now going with this statute and where the legislative intent is in putting this statute in this way. The plain language discussed in this case, Your Honor, this is a case where it was a felony DUI. The person was air lifted or taken out from the accident to the hospital immediately before police were even on seen. The police had no interaction with him whatsoever. They also failed to produce a video. They had no interaction action, so they failed to produce a video. In this case they also failed to produce an affidavit even explaining. And clearly in "B" I think there is no question that accidents, extrinsic circumstance would fall under exception of "B". But in this particular case they didn't even do that. They didn't comply with "A" and think didn't comply with "B" and yet the appeals Court says, given the totality of the

circumstances the legislative intent and the plain language that that is not a reason to dismiss the case. And in this case I would use this most certainly in our case. In this particular case, on page it is marked 240 in my hand out. Section 56-5-2953 allows the Circuit Court to look at the totality of the circumstance and make a determination as to whether the charges should be dismissed. So Your Honor, based on all of those things and looking for any guidance from anybody that addressed it, this particular issue was novel to Judge Lindsey, he admitted so in his return. But what he was presented with in his return and the trial Court was given a video and in his return he says that it has complied and the reason he denied the motion to dismiss is because it complied with "A" in that the conduct was included and the conduct was shown in the video that was presented to him.

So to be clear we would ask that we have complied with "A". That even if there is no audio there is no way to fix it with "B" and that based on to the totality of the circumstances the Circuit Court has the right to look at all of

those issues.

Judge Bear (sic) attempted to comply as best he could given the circumstances and we would ask that you deny this appeal.

THE COURT: All right. I will take it under advisement and look at it.

MS. DESCH: Thank you, Your Honor.

MR. BURNS: Thank you.

* * * *

(END OF TRANSCRIPT)

C E R T I F I C A T E

I, the undersigned Aileen Butler, 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 all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 7th day of September, 2012.

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

October 28, 2012.

Aileen Butler

EXHIBIT H

Form S-438
Rev 9/10

STATE OF SOUTH CAROLINA

UNIFORM TRAFFIC TICKET

CITY ~~OR COUNTY~~ OF Fort Mill — VERSUS

FIRST NAME	MIDDLE NAME	LAST NAME
Colin	Duane	Fitzsers ld

STREET AND NO	CITY	STATE	ZIP CODE
1027 millhouse Dr	Rock Hill	SC	29730

STATE LICENSED	DRIVER'S LICENSE NO	CDL	DRI LIC CLASS
SC	102284578	☐ YES ☒ NO	D

VEH LIC NO	STATE	MAKE OF VEH	YEAR	COMM VEH	AUTO	M/PSGR VEH	COMB
HNF907	SC	INFI	06	HAZ MT	MOPED	MTRCYCL	OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT	STREET AND NO
Lenz	111 Academy St.

DATE OF TRIAL	TIME OF TRIAL	CITY	STATE	ZIP CODE
10 / 19 / 2011	5:00 PM	Ft Mill	SC	29715

VIOLATION - COURT APPEARANCE REQUIRED ☒ YES ☐ NO — VIOLATION SECTION NO

Driving Under the Influence 1st — 56-5-2930

OWNER OF VEHICLE: Crystal Ann Fitzgerald — DATE OF ARREST: 10 / 9 / 2011

ADDRESS OF OWNER: SAME — DATE OF VIOLATION: 10 / 9 / 2011

BAIL DEPOSITED: Jail — NAME OF ARRESTING OFFICER: W Baird — RANK: PFC

DESCRIPTION OF ACCUSED

RACE	SEX	BIRTH DATE	HT	HAIR	WT	EYES
B	M	5/31/1984	5'01	Blk	150	Blu

COUNTY: York — NUMBER: 46

BADGE: 403 — TROOP: 4

DOCKET NO

DATE BAIL REC'D: ___ / ___ / 20__ — BY: ___

D (Y)	S (N)	M (2)	T (3)	W (4)	T (5)	F (6)	S (7)

CASE BEFORE: MAGISTRATE ☐ MUN COURT ☒ CIRCUIT COURT ☐ FAMILY COURT ☐ FEDERAL COURT ☐

TIME OF VIOLATION: AM 1 PM 2 — WEATHER

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE

DISTANCE IN FEET FROM INTERSECTION OF: Tom Hall St AND Doby's Bridge Rd

DEFENDANT DID NOT APPEAR ☐ APPEARED ☒

DISPOSITION: NOLLE PROSSED ☐ FORFEITED BOND ☐ GUILTY ☒ PLED NOLO CONTENDERE ☐

MILES: .01 — N 1 / E 2 / S 3 / W 4

TRIAL BY: TRIAL JUDGE ☐ JURY ☒

HWY NO: SC 160 E — CITY: Ft Mill

VERDICT OF TRIAL IF ANY: GUILTY ☒ NOT GUILTY ☐ — DATE OF TRIAL IF ANY: 4 / 24 / 2012

Lat: ° ' "

Long: ° ' "

JAIL	SUSPEND	FINE	AMT COLLECTED	AMT SUSPENDED
30		997		

COMMITTED TO — Vehicle Searched — Arrest as Result of Collision

OFFENSE CODE: 99 — BA LEVEL: .16

CERTIFIED CORRECT — DATE: 7 / 25 / 12

46773 FT

DRIVER'S RECORD COPY

~~499~~

$997.00

EXHIBIT I

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)

City of Fort Mill,)

Respondent,)

vs.) C. A. No. 2012-CP-46-02640

Colin Duane Fitzgerald,)

Appellant.)

ORDER

This matter is before the Court on Appeal from the City of Fort Mill Municipal Court. Colin Duane Fitzgerald, Defendant (Appellant), was represented by J. Tyler Burns of the law firm of Reeves, Aiken and Hightower, LLP. The City of Fort Mill was represented by Jenny Desch of the Sixteenth Circuit Solicitor's Office.

Factually and procedurally, this is an unusual case. Fitzgerald was stopped in the City of Fort Mill by a York County Sheriff's Deputy. The deputy was transporting someone in his vehicle at the time, and he called in a Fort Mill policeman to investigate the matter. The police vehicle driven by the city officer did not have a working video recorder. The county deputy remained on scene with his video recorder on. However, the microphone was attached to his person, and when he got into his vehicle, there was no audio recording of the field sobriety test or Miranda warnings being given by the arresting officer.

Fitzgerald was charged with DUI and went to trial on a DUAC charge. Defense counsel made pretrial motions for dismissal on the grounds that the State failed to comply with the requirements of Section 56-5-2953. The motions were denied.

The case was tried before a judge and jury on April 24, 2012. The jury found Fitzgerald guilty of DUAC. The jury was dismissed. Before sentencing, it was brought to the attention of the trial judge that the required verdict form in which the jury was required to make a finding as to alcohol content was not submitted to the jury and no finding was made by the jury. The trial judge realized the oversight and ordered a mistrial, sua sponte, and placed the case back on the jury trial docket.

Fitzgerald appealed to the Circuit Court on June 27, 2012. Judge John C. Hayes, III, ordered the mistrial to be set aside as improvidently granted and remanded back to the trial court for sentencing according to the jury verdict. Fitzgerald was subsequently sentenced by the trial judge.

Issues on Appeal

1. The Court erred in not dismissing the case for failure by the arresting officer to comply with S. C. Code Ann. § 56-5-2953 (B) to provide a sworn affidavit to explain why no video of the incident site could be provided.

2. The Court erred in not dismissing the case for failure of the non-arresting officer to comply with S. C. Code Ann. § 56-5-2953 (B) to provide a sworn affidavit to explain why no audio was included in his video of the incident site.

3. The Court erred in not dismissing the case for violation of S. C. Code Ann. § 56-5-2953 in that the video at the incident site does not show the Appellant being advised of his Miranda warnings.

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Section 56-5-2953 provides in pertinent part 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)(e) The video recording at the incident site **must**:
(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 shows the person being advised of his Miranda rights. [Emphasis added]

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933 or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945, if the arresting officer submitted a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition_ _ _ or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances, including but not limited to, road blocks, traffic accident investigations, and citizens arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the Court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

Section 56-5-2953 was amended in 2008 and rewrote subsection (A) and substituted "video recording" for "videotape," "videotapes" and "videotaping," throughout.

#3

Discussion

The visual part of the video recording of the administration of the field sobriety tests is included in the video recording at the incident site. However, the audio part of the video recording of the field sobriety tests, Miranda warnings, and verbal communication by Fitzgerald is not included. Therefore, the wording of any Miranda warnings, instructions by the officer administering the field sobriety tests, and verbal responses by Fitzgerald are not included.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. The determination of legislative intent is a matter of law. State v. Landis, 362 S.C. 97; 606 S.E. 2d 503 (Ct. App. 2004).

The 2008 amendment to Section 56-5-2953 by the legislature must have been made for a reason and purpose. The only logical and rational basis for the amendment is a legislative intent to require the video at the incident site and the breath test site to include audio of those procedures in the videos.

The arresting officer did not provide an affidavit to the trial court which provides information creating an exception to the video recording required by Section 56-5-2953 (B). Failure to install operative video recording equipment does not meet the requirements of that section. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (S.C. 2011). In fact, no sworn affidavit by the arresting officer was offered to the Court.

The remedy for failure to provide a video recording or an affidavit of the arresting officer which meets the requirements of Section 56-5-2953 is a dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (S.C. 2007).

Conclusion

The State has failed to provide a video recording or an affidavit of the arresting officer creating an exception, as set forth in Section 56-5-2953. The conviction in the Fort Mill City Municipal Court of Colin Duane Fitzgerald on a charge of DUAC is reversed and the charge is dismissed.

IT IS SO ORDERED.

Lee S. Alford
Presiding Judge
of the Sixteenth Judicial Circuit

York, South Carolina

September 27, 2012

ALAN WILSON
ATTORNEY GENERAL

April 26, 2013

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: City of Fort Mill v. Colin Fitzgerald
Appellate Case Tracking No. 2012-213281

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Motion To Vacate Circuit Court Rulings; Remand For A New Trial; And Dismiss Appeal Without Prejudice along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General

Enclosures
cc: J. Tyler Burns, Esquire
Victim Services