



arresting officer failed to provide Miranda warnings to the defendant on the video recording as required by Section 56-5-2953(A)(1)(a)(iii), Defendant's Motion to Dismiss this case is granted.

The Supreme Court addressed the application of the Section 56-6-2953 in City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (S.C. 2007):

Section 56-5-2953 commands the arresting officer to videotape the individual during a DUI arrest. Subsection (A) of the statute outlines the requirements for videotaping at the incident site and at the breath test site. Subsection (B) of the statute provides exceptions that excuse compliance with the statute.

Id. at 15, 880. Subsection (A)(1)(a) specifically mandates that the video recording at the incident site must:

- (i) Not begin later than the activation of the officer's blue lights;
- (ii) Include any field sobriety tests administered; and
- (iii) Include the arrest of a person...or a probable cause determination...*and* show the person being advised of his Miranda rights.

S.C. Code § 56-5-2953(A)(1)(a) (2006) (emphasis added). Subsection (B) states:

Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal... if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination...was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition...or exigent circumstances existed.

S.C. Code § 56-5-2953(B) (2006). At the hearing on this motion, it was undisputed that, though the video recorder did function, the officer failed to advise the Defendant of his Miranda rights on the videotape, thus violating Subsection (A)(1)(a)(iii) of the statute. Additionally, no evidence was presented that an exception in subsection (B) applied. "[D]ismissal of the DU[I] charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." City of Rock Hill v. Suchenski, 374 S.C. 12, 17,

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646 S.E.2d 879, 881 (S.C. 2007).

Conclusion

For the reasons stated above, Defendant's Motion to Dismiss the DUI charge for noncompliance with the recording statute is hereby **GRANTED**.

IT IS SO ORDERED.

May 25 2011



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Letitia H. Verdín  
Circuit Judge



STATE OF SOUTH CAROLINA )  
COUNTY OF PICKENS )  
State of South Carolina )  
v. )  
Jason Todd Acker, )  
Defendant. )

IN THE GENERAL SESSIONS COURT  
THIRTEENTH JUDICIAL CIRCUIT

Ticket Nos.: E478803 and E478804

**DEFENDANT' S BRIEF**

The South Carolina legislature has set forth specific procedures for DUI investigations/procedures. South Carolina Statute Section 56-5-2953(A) requires that the video recording at the incident show the defendant being advised of his Miranda rights:

(1)(a) The video recording **at the incident site must:**

(i) not begin later than the activation of the officer's blue lights;

(ii) include any field sobriety tests administered; and

(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and **show the person being advised of his Miranda rights.**

S.C. Stat. § 56-5-2953(A) (2010) (bold added). If the State fails to produce a video that complies with sub-part (A), and does not provide any exceptions under sub-part (B), South Carolina law is clear: dismissal of the case is the proper remedy, not suppression of the video.

This very issue was addressed by the South Carolina Supreme Court in City of Rock Hill v. Suchenski, 374 S.C. 12 (2007). "The statute provides, 'Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if [exceptions apply] . . .'" Suchenski, 374 S.C. at 16 (quoting S.C. Stat. § 56-5-2953(B) (2006)). Thus, the Court held that "failure to produce videotapes would be a ground for dismissal if no exceptions apply."

Suchenski, 374 S.C. at 16. The statutory language quoted by the Court has essentially remained unchanged by 2008 Act No. 201, § 11 (effective February 10, 2009).<sup>1</sup> The statute now provides, “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 [exceptions apply].” S.C. Stat. § 56-5-2953(B) (2010) (bold added). The legislature only substituted the term “video recording” for “videotapes.” It left the remainder of sub-section (B) unchanged. The Supreme Court in Suchenski is clear: “Dismissal . . . is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions.” Suchenski, 374 S.C. at 17.

Further, the “legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.” Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (citations omitted); *see also* City of Camden v. Fairfield Elec. Co-op., 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007). Here, the legislature knew that in Suchenski, the South Carolina Supreme Court construed Section 56-5-2953 to require dismissal of the case for a violation of Section 56-5-2953(A) not mitigated by any subsection (B) exceptions. It could have easily modified the statute mandating suppression, rather than dismissal, when it enacted 2008 Act No. 201, § 11. However, it chose not to do so. Dismissal remains the proper remedy.

The required statutory dismissal was recently discussed by the Court of Appeals in Murphy v. State, Opinion No. 4816, 2011 WL 1364010 (April 6, 2011).<sup>2</sup> The Court stated that “under subsection (A) of the statute, ‘the videotapes of the incident site and of the breath test site

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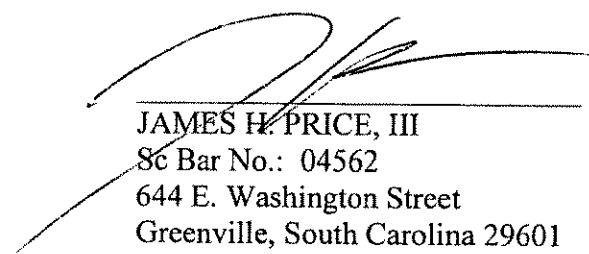
<sup>1</sup> I have attached to this memo a document comparing § 56-5-2953(A) and (B) (2006) with § 56-5-2953(A) and (B) (2010).

<sup>2</sup> The Murphy decision has not yet been released for publication. As in Suchenski, in Murphy the previous version of the statute was at issue. However, the relevant portions of the statute regarding dismissal vs. suppression essentially remained unchanged.

are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.” Murphy at \*2 (quoting S.C. Stat. § 56-5-2953(A) (2006)). This provision essentially remained the same in the current version of the statute, except that “video recordings” was again substituted for “videotapes.” S.C. Stat. § 56-5-2953(A) (2010). Thus, now the statute provides that “[t]he **video recordings** of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.” S.C. Stat. § 56-5-2953(A) (2010) (bold added). As both the Suchenski and Murphy Courts stated, the remedy for noncompliance with the statute is not suppression of the video recordings, “the remedy for noncompliance with the statute is dismissal.” Murphy at \*2 (relying on Suchenski).

Moreover, criminal statutes must be strictly construed against the State and in favor of the defendant. State v. Castineira, 341 S.C. 619, 625-26 (Ct. App. 2000). When the terms of a statute are clear and unambiguous, the Court must apply them according to their literal meaning. State v. Leopard, 349 S.C. 467, 470-71 (Ct. App. 2002). Here, the statute and the related case law is clear, dismissal is the appropriate remedy.

Respectfully submitted,



JAMES H. PRICE, III  
Sc Bar No.: 04562  
644 E. Washington Street  
Greenville, South Carolina 29601  
Telephone: (864) 271-3535  
Facsimile: (864) 242-6560  
Attorney for Defendant

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Greenville, South Carolina