

STATE OF SOUTH CAROLINA)	IN THE MUNICIPAL COURT FOR
)	HILTON HEAD ISLAND
COUNTY OF BEAUFORT)	
)	
STATE OF SOUTH CAROLINA)	TICKET NO.: 13106EY
)	
)	
vs.)	ORDER GRANTING DEFENDANT'S
)	MOTION FOR DISMISSAL
)	
ANDREW R. HIRSCHFELD)	

The Defendant, Andrew R. Hirschfeld was charged with DUI on ticket 13106EY. The Defendant, through his attorney, Samuel C. Bauer, filed a Motion for Discovery in accordance with Rule 5 of the South Carolina Rules of Criminal Procedure. That Motion was filed and served on the prosecuting agency on December 17, 2009. The prosecuting agency acknowledged receipt of the Rule 5 Motion and provided partial discovery on December 18, 2009. At that time, neither an incident site videotape nor an Affidavit submitted in compliance with §56-5-2953(B) was provided to the Defendant. This case was ultimately scheduled for a bench trial on October 19, 2010, at 10:00 a.m. All parties were notified as to the time and date of the trial. The Defendant was present through his counsel of record. The State was present through the arresting officer, Deputy Polites of the Beaufort County Sheriff's Department.

At the commencement of the trial the Defendant renewed his Rule 5 Motion. At that time the State produced an Affidavit in lieu of the incident site videotape. It appears that the Affidavit was sworn and notarized on December 18, 2009, but never provided to the Defendant. The Defendant objected to the submission of the affidavit as not being provided within the 30 day time limit of Rule 5(A)(3). The Court overruled the

Defendant's Rule 5 objection, but did allow the Defense some time to review the Affidavit.

The Defendant then moved to dismiss based on the assertion that the Affidavit submitted did not comply with the requirements of §56-5-2953(B). The affidavit in this case stated that the microphone was in an inoperable condition at the time of the Defendant's arrest, despite reasonable efforts having been made to maintain the equipment in an operable condition. The Affidavit did not state **which** reasonable efforts had been made to maintain the equipment. As such, the Affidavit was deficient as it did not contain a sworn statement of the efforts made to maintain the equipment from which this Court could make any determination as to the reasonableness of the same. The Affidavit, being only summary rather than factual does not meet the requirements of law. Although the State attempted to supplement the Affidavit through oral testimony, our Supreme Court has held that where a statute expressly requires an Affidavit containing certain elements, oral testimony (even under oath and subject to cross-examination) does not satisfy a statute whose plain language requires an Affidavit. Collins v. Doe, 574 S.E. 2d 739 (SC 2002).

In City of Rock Hill v. Suchenski, our Supreme Court considered the consequences of the arresting officer's failure to produce an incident site videotape that complied with the requirements of §56-5-2953(A), where no exceptions to the videotape requirement as allowed by §56-5-2953(B) existed. The Court determined that the proper remedy was dismissal.

I find Suchenski to be controlling. In the instant case, the State cannot produce an incident site videotape which complies with the requirements of §-56-5-2953(A) and

the State has not submitted an Affidavit that complies with the requirements of §56-5-2953(B). The remedy provided by law is dismissal.

IT IS THEREFORE ORDERED

A. That the charge of DUI (ticket 13108EY) against Andrew R. Hirschfeld is dismissed with prejudice.

IT IS SO ORDERED.



Judge of the Municipal Court
For Hilton Head Island

10/28, 2010
Hilton Head, South Carolina