

Feet Not
on Video
dismissal

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

IN THE COURT OF GENERAL SESSIONS
DOCKET NO.: 2012-GS-11-38 and ~~289~~
382

State of South Carolina,)
Plaintiff,)
vs)
John Douglas Pittman,)
Defendant.)

ORDER OF DISMISSAL

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 JUN 23 AM 11 09
BANDY W. MCBEE

Date of Hearing: July 26, 2012
Trial Judge: Lee S. Alford
Attorney for Plaintiff: G. Matthew Kendall
Attorney for Defendant: William G. Rhoden
Court Reporter: Michael Watts

This matter came before the Court on July 26, 2012 pursuant to a Motion by the Defendant to dismiss his charge of driving under the influence. The Defendant asserts in his Motion that the arresting officer failed to comply with the mandatory videotaping requirements of Section 56-5-2953(a)(1)(a)(ii) of the S.C. Code of Laws for 1976, as amended. The Defendant appeared and was represented by William G. Rhoden of the Cherokee County Bar. The State appeared through George Matthew Kendall of the Seventh Circuit Solicitor's Office.

Testimony was taken from the arresting officer, D.W. Sands of the Gaffney City Police Department. The videotape of the Defendant's arrest and his performance of field sobriety tests was played and reviewed by the Court.

On June 18, 2010 officer Sands of the Gaffney City Police Department stopped the Defendant for no working tag lights. After questioning the Defendant, officer Sands detected an odor of an alcoholic beverage about the Defendant's person and asked the Defendant to perform several field sobriety tests. The tests included the Horizontal Gaze Nystagmus (HGN) Test, the walk heel to toe test and the stand on one leg test. The issue in this case is whether the arresting officer complied with the requirements of Section 56-5-2953(A)(1)(a)(ii) of the S.C. Code of Laws for 1876, as amended, in the video recording of these sobriety tests. The Defendant asserts that the arresting officer failed to comply with the statute. The State argues that the arresting officer substantially complied with the statute and that he acted in good faith in his efforts to comply.

It should be first noted ~~that the video~~ that the videotaping equipment was working and the State does not argue that any of the 56-5-2953(B) exceptions apply in this case. The gravamen of the Defendant's argument in that video fails to show the field sobriety test in such a manner as would allow a person watching the recording to view the tests performed so that an assessment could be made as to how well the Defendant performed each test.

Based upon the testimony and evidence the Court makes the following findings of fact and conclusions of law:

1. That this Court has personal jurisdiction and subject matter jurisdiction of the matter before it; and that venue is proper in Cherokee County, South Carolina.

2. That pursuant to the provisions of S.C. Code Ann. Section 56-5-2953(A), as amended in 2009, a person charged with Driving Under the Influence must have their conduct video recorded at the incident site as follows:

(A) A person who violates Section 56-5-930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and breath test site video recorded.

(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 test administered; and
- (iii) include the arrest of a person for a violation of Section 56-5-2930 or 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.

HISTORY: 1998 Act No. 434, Section 9, eff. June 29, 1998; 2000 Act No. 390, Section 23-2003 Act No. 61, Section 8, eff. August 19, 2003; 2008 Act No. 201, Section 11, eff. February 10, 2009.

As noted above, at issue in this case is whether the State has complied with the provisions of Section 56-5-2953(A)(1)(a)(ii), which state that "The video recording at the incident site must:...include any field sobriety test administered." [Emphasis added].

The Court would note that the video recording requirement of "any field sobriety test administered" was added to Section 56-5-2953(A) in 2008, when the General Assembly amended the statute. The amended statute became effective February 9, 2009. Since the 2009 Amendment to Section 56-5-2953(A), there has been no published, or unpublished, opinion by the South Carolina Supreme Court or Court of Appeals interpreting or applying the requirement that there be a video recording of "any

field sobriety test administered." However, the Court is aware that this issue has been addressed by at least three (3) Circuit Court Judges with each finding that the failure to comply with the videotaping requirement warrants dismissal of the charge of DUI. Such rulings are not binding on this Court, however, these rulings can be considered as a persuasive authority.

In construing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011). A Court should not attempt to divine the intent of the legislature when the statutory language of the state is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011). Thus, in interpreting a statute, a Court should give words their plain and ordinary meaning, and not resort to forced construction that would limit or expand the statute in question. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E. 2d 278, 282 (2011). *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 520 (Ct. App. 2011). Lastly, where, as here, the provisions of a statute are penal in nature, the statute must be strictly construed against the State and in favor of the Defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011).

In construing the terms of S.C. Code Ann. Section 56-5-2953(A)(1)(ii), which requires that "any field sobriety test administered" must be video recorded, the plain and ordinary meaning of the statute would appear to be that a field sobriety test be completely or substantially recorded, such that a person watching the recording could

view the test performed by the driver suspect, so that an assessment could be made as to how well the driver-suspect performed the test.

Arguably, one could say that the statutory language is ambiguous, because the statute does not specifically state or define what is required in the recording of a field sobriety test. To the extent there is any ambiguity in the statute, this Court looks to any evidence of the legislature's intent in enacting the statute. Prior to the 2009 Amendment, all that was required by Section 56-5-2953(A)(1), (with respect to the recording of any field sobriety testing), was that the "conduct" of the suspect-driver be recorded at the incident site. Thus, in *Murphy v. State*, 392 S.C. 626, 709 S.E. 2d 685 (2011), under the former provisions of Section 56-5-2953 (A)(1), the video recording at the incident site in that case only showed the suspect-driver doing the Walk and Turn Test from the knees or waistline upwards. Although the feet of the suspect-driver could not be seen during the test, which is an important part of the test, the Court of Appeals held that under the *former* statute the video recording requirements of Section 56-5-2953(A)(1)(a) had been complied with:

While certainly an individual's performance on such tests would be part and parcel of his or her "conduct" at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct. Therefore, the recording need not display all field sobriety tests provided it captures the accused's conduct.⁴

However, footnote number 4 provides as follows:

As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. Section 56-5-2953(A)(1)(a)(ii) (supp. 2010) ("The video recording at the incident site must...include any field sobriety test administered."). We note that the legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior versions, in effect at the time of this action, did not require recording of all tests.

The obvious import of the above quote from *Murphy v. State* is that if the complete recording of a person's performance of any field sobriety test was not required under the former statute, it is now required under the amended statute. The 2009 Amendment specifically provides for the recording of any field sobriety test, which goes beyond the former requirement of merely recording a person's conduct. The requirement that any field sobriety test be recorded would necessarily mean that a person watching the recording would be able to completely or substantially view the test as it was performed by the driver-suspect, such that any person watching the recording could make some assessment as to how well the driver-suspect performed the test. Had the General Assembly only intended that there be a recording of a person doing a field sobriety test, without there being any way to determine the person's performance on the test, as in *Murphy v. State*, there would have been no need to amend the statute. It must be presumed that the General Assembly did not intend a futile or meaningless act by enacting the 2009 Amendment. *State v. Long*, 363 S.C. 360, 610 S.E. 2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E. 2d 645 (Ct. App. 2008).

3. That the video recording provisions of S.C. Code Ann. Section 56-5-2953(A) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2001). When a prosecuting agency fails to comply with the mandatory video recording provision of S.C. Code Ann. Section 56-5-2953(A), the appropriate remedy is the dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516 (Ct. App. 2011). In *Town of Mt. Pleasant v.*

Roberts, 393 S.C. 332, 713 S.E. 2d 278 (2011), the South Carolina Supreme Court returned to the *City of Rock Hill v. Suchenski*, decision and reiterated that the unexcused noncompliance with the S.C. Code Ann. Section 56-5-2953 mandates the dismissal of a DUI/DUAC charge:

As evidenced by this Court's decision in *Suchenski*, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* Section 56-5-2953(B) ("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...if (certain exceptions are met).). The term "dismissal" is significant as it explicitly designated a sanction for an agency's failure to adhere to the requirements of Section 56-5-2953.

Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction for non-compliance.

Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*.

Likewise, the decisions of the South Carolina Court of Appeals have been consistent with *City of Rock Hill v. Suchenski*.¹

4. In the present case the Defendant asserts that the State has failed to

¹ See *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516 (Ct. App. 2011) (officer violated Section 56-6-2953 (A)(2), when he failed to capture the administration of the breath test to the Defendant on videotape, when the first breath test machine was not working, and the officer moved the Defendant to another machine in the same room but failed to activate the videotape for that second machine; although the officer could be seen on the video made from the first machine which was left on the entire time, and the Defendant could be heard, the Defendant himself could not be seen; case should have been dismissed); *Murphy v. State*, 392 S.C. 626, 709 S.E. 2d 685 (2011) (the remedy for noncompliance with Section 56-5-2953 is dismissal of the case, not mere suppression of the evidence).

comply with the videotaping requirement in regard to three (3) field sobriety tests; namely, the HGN test, the walk heel to toe test and the stand on one leg test. The Court finds that the State has complied with the statute in regard to the HGN test and the stand on one leg test. However, the Court finds that the State has failed to comply with the videotaping statute in regard to the walk heel to toe test. In the walk heel to toe test the Defendant is asked to take several steps by lining up the heel of the front foot against the toe of the trailing foot. The Defendant is then required to turn around and walk in the opposite direction in the same manner. Although the video camera was recording during the Defendant's performance of this test, it was positioned in such a manner as the Defendant's feet are not visible. Therefore, the Defendant's performance of an important part of the test is not on the video. After the Defendant performs the test the officer indicates he did not properly walk heel to toe and asks the Defendant to perform the test a second time. Once again the Defendant's feet are not visible on the video.

The State has argued that compliance with the statute should be excused in this case because the actions of the arresting officer in failing to record the field sobriety test was not intentional or in bad faith. Whether an officer acts in good faith, or if any omission in recordings is unintentional, does not excuse noncompliance under S.C. Code Ann. Section 56-5-2953. The General Assembly has provided for exceptions for noncompliance under Section 56-5-2953(B), but none have been invoked by the State in this case. See, *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007) (charge of DUAC was dismissed where arresting officer was unaware that his

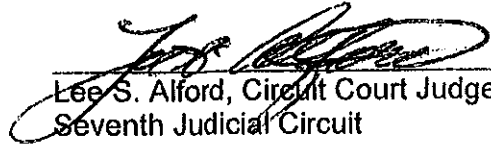
recording tape had run out, and failure to record was neither intentional or done in bad faith).

In the present case the arresting officer did not properly video tape the Defendant being given the walk heel to toe field sobriety test as required by Section 56-5-2953(A)(1)(a)(ii). The recording requirements of Section 56-5-2953 are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007). The only remedy for noncompliance with the video recording requirements of Section 56-6-2953 is dismissal of a case. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007). Admittedly, the sanction of dismissal is severe, but as the South Carolina Supreme Court observed in *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 348-249, 713 S.E. 2d 278, 286 (2011), the Legislature has clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction of dismissal for noncompliance. Accordingly, applying the statute as enacted by the General Assembly, and the opinions of the South Carolina Supreme Court, the case against the Defendant must be dismissed.

IT IS THEREFORE ORDERED, that based upon above stated findings of fact and conclusions of law, the Court hereby dismisses the matter of *State v. John Douglas Pittman*, Indictment No. 2012-GS-11-38 and 2012-GS-11-283.

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AND IT IS SO ORDERED!



Lee S. Alford, Circuit Court Judge
Seventh Judicial Circuit

York, South Carolina
August 20, 2012.

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