Feet not on video

COPY

STATE OF SOUTH CAROLINA)) COUNTY OF CHEROKEE)	IN THE COURT OF GENERAL SESSIONS FOR THE SEVENTH JUDICIAL CIRCUIT Case No. 2012-CP-11-261 Ticket No.: E-831957 (DUI 1st Offense)
STATE OF SOUTH CAROLINA, State-Appellant, vs. CHRISTOPHER SELF, Defendant-Appellee,	**ORDER AFFIRMING RULING OF THE MAGISTRATE COURT**

FILED OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C. 2012 JUL 11 PM 2 17 BRANDY W. MCBEE

DATE OF HEARING:	June 11, 2012
HEARING JUDGE:	J. Mark Hayes, II, Circuit Judge
STATE'S ATTORNEY:	George Matthew Kendall, Asst. Solicitor
DEFENDANT'S ATTORNEY:	Trent N. Pruett
COURT REPORTER:	Margaret Woods
CLERK OF COURT:	Brandy McBee

This matter came before the Court on June 11, 2012, on the State's appeal from the Cherokee County Magistrate Court. By its appeal the State challenges the ruling of Chief Magistrate Robert B. Howell, dismissing the Defendant-Appellee's charge of Driving Under the Influence, based upon the prosecuting agency's failure to comply with the mandatory videotaping requirements of S.C. Code Ann. §56-5-2953 at the incident site.

Present at the appeal hearing were Assistant Solicitor George Matthew Kendall (Member of the Cherokee County Bar Association), representing the State-Appellant, and Trent N. Pruett (Member of the Cherokee County Bar Association), representing the Defendant-

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Appellee. The Court heard from each party as to all matters raised by the State's appeal, and thereafter took the matter under advisement. For the reasons set forth below in this Order, the ruling of the magistrate court is affirmed.

STATEMENT OF THE CASE

The facts of this case do not appear to be in dispute by the parties, and are set forth in the written order issued by Chief Magistrate Howell, dated April 3, 2012.[1] The facts of the case are that on February 6, 2011, at approximately 8:20 a.m., Trooper W.B. Caughman, of the South Carolina Highway Patrol, while on patrol in Cherokee County, South Carolina, initiated a traffic stop of Christopher Self (Defendant-Appelle) for a seat belt violation. Trooper Caughman activated his blue lights and Mr. Self came to a stop in a parking lot of a convenience store. At the time Trooper Caughman initiated the traffic stop, and throughout the traffic stop, the video camera in Trooper Caughman's vehicle was in proper working order. That following the traffic stop by Trooper Caughman, and after some initial questioning of Mr. Self, Trooper Caughman began to administer certain field sobriety tests.

1 It should be noted that in the Return of the Magistrate, the Magistrate's order was included, but not the videotape of the incident site. Neither party to the appeal sought to have the Magistrate's Return amended, as provided for by S.C. Code Ann. §18-7-80. Therefore, the only statement or recitation of facts in the matter before the Court is what appears in Chief Magistrate Howell's written order.

One of the field sobriety tests administered by Trooper Caughman to Mr. Self was the "Walk and Turn" test. The "Walk and Turn" test is described by the National Highway Traffic Safety Administration, as follows:

a. The subject is to place his left foot on a line (real or imaginary), and then his right foot in front of his left foot, touching heel-to-toe.

b. The subject is instructed to hold that position until the test begins.

c. Once the test begins, the subject is to take nine heel-to-toe steps down the line, and then nine heel-to-toe steps back to the starting position.

d. When turning around, the turn is to be made by keeping one foot on the line, while pivoting around on the other foot.

e. The subject is to keep his hands along the sides of his body, watch his feet as he is stepping, and is to count aloud each step he takes.

The scoring of a person's performance on the "Walk and Turn" test is based upon nine points, to wit: (1) whether the subject maintains his balance during the time the instructions are being given; (2)the subject starts the test before being instructed to start the test; (3) the subject stops while walking to steady himself; (4) the subject does not touch heel-to-toe; (5) the subject steps off the line; (6) the subject uses his arms to balance himself; (7) the subject loses his balance while turning; (8) the subject takes an incorrect number of steps; and (9) the subject cannot do the test. That the videotape of the incident

site showed Trooper Caughman giving Mr. Self instructions and a brief demonstration of the Walk and Turn test. As Mr. Self began the test, his feet could not be seen on the videotape, and as he began to walk, his legs gradually could no longer be seen on the videotape because of the positioning of the camera relative to Mr. Self. That at the conclusion of the field sobriety testing, Mr. Self was placed under arrest for Driving Under the Influence.

PROCEDURAL HISTORY OF THE CASE

As noted above, the Defendant-Appellant, Mr. Self, was arrested on February 6, 2011, and charged with Driving Under the Influence, First Offense.

On March 21, 2012, the case against Mr. Self was scheduled for a jury trial before Chief Magistrate Howell. Prior to the trial of the case, a hearing was held on a motion by Mr. Self to dismiss his charge of Driving Under the Influence, based upon the prosecuting agency's failure to comply with the mandatory videotaping requirements of S.C. Code Ann. §56-5-2953 at the incident site. After reviewing the incident site videotape, and hearing from the respective attorneys, Chief Magistrate Howell granted the motion of Mr. Self, and dismissed his charge of Driving Under the Influence.

On April 3, 2012, Chief Magistrate Howell issued a written order setting forth his findings of fact and conclusions of law that confirmed his verbal ruling dismissing the charge against Mr. Self for Driving Under the Influence.

On April 6, 2012, the State was served with Chief Magistrate Howell's written order. Thereafter, on April 10, 2012, the State timely filed its Appeal, setting forth seven (7) exceptions to ruling of Chief Magistrate Howell.

On April 11, 2012, Chief Magistrate Howell filed his Return to the Appeal, which included his written order issued on April 3, 2012. That neither party filed any motion seeking to have the Return of Chief Magistrate Howell amended.

That as noted above, this appeal was argued before the Court on June 11, 2012.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only, with the appellate court being bound by the trial judge's factual findings unless they are clearly erroneous. State v. Bryant, 372 S.C. 305, 642 S.E.2d 583 (2007); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

STATE'S EXCEPTIONS AND LEGAL ANALYSIS

As noted above, in its appeal the State has set forth seven (7) exceptions to the written order issued by Chief Magistrate Howell. Each exception will be addressed separately below in the same order in which the exception appears in the State's appeal.

<u>STATE'S EXCEPTION I.</u> In <u>Murphy v. State</u>, 392 S.C. 626 (S.C.Ct.App. 2011) the South Carolina Court of Appeals expressly found that it was not required that field sobriety tests be conducted in full view of the camera provided the Miranda warning and defendant's conduct are recorded.

The State incorrectly relies upon <u>Murphy v. State</u>, 392 S.C. 626, 709 S.E.2d 685 (2011), where the Court of Appeals applied the former provisions of S.C. Code Ann. §56-5-2953(A)(1), before the statute was amended in 2008. *See* Act No. 201, 2008 Acts 1682-85. (The amended statute became effective February 9, 2009).

In <u>Murphy v. State</u>, the defendant in that case was charged with Driving Under the Influence in 2007. The video recording of the defendant in <u>Murphy v. State</u> showed the defendant being given the Walk and Turn test, however, the recording only showed the defendant doing the test from her knees or waist up. The Court of Appeals held that under the former provisions of S.C. Code Ann. §56-5-2953(A)(1), it was not necessary to video record how the person performed on any field sobriety test, rather, the statute only required that the person's "conduct" be video recorded.

As noted, S.C. Code Ann. §56-5-2953(A)(1) was amended in 2008, so that it now reads 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 breath test site video recorded.

> (1)(a) The video recording at the incident site must:
>
> (i) not began later than the activation of the officer's blue lights;
>
> **<u>(ii) include any field sobriety test administered; and [Emphasis Added]</u>**
>
> (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, §9, eff June 29, 1998; 2000 Act No. 390, §23; 2003 Act No. 61, §8, eff. Aug. 19, 2003; 2008 .Act No. 201, §11, eff February 10, 2009.**

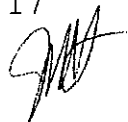
The 2008 amendment to S.C. Code Ann. §56-5-2953(A)(1)(ii) added the language that **<u>"any field sobriety test administered"</u>** must be video recorded. As the Court of Appeals stated in <u>Murphy v. State</u>, it was not applying the newly amended language of S.C. Code Ann. §56-5-2953(A)(1)(ii). <u>Murphy v. State</u>, 392 S.C. 626, 709 S.E.2d 685, 687, n. 3 (2011). Accordingly, the State's exception which relies upon the holding in <u>Murphy v. State,</u> does not apply to this case, given that the amended statute was in effect at the time Mr. Self was arrested in 2011.

<u>STATE'S EXCEPTION II.</u> **In reaching his determination, the magistrate applied an improper or incorrect legal standard constituting legal error.**

It is not clear from this exception what improper or incorrect legal standard the State is referring to in this exception. If the standard in question refers to <u>Murphy v. State</u>, 392 S.C. 626, 709 S.E.2d 685 (2011), then the State is in error for relying upon this standard or construction of S.C. Code Ann. §56-5-2953(A)(1) for the reasons stated above.

As a general matter, the Magistrate committed no legal error in applying the amended statute to the facts of this case. Since the 2008 Amendment to §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 there be a video recording of "any field sobriety test administered." Whether the Magistrate correctly applied §56-5-2953(A)(1)(ii)in this case goes to the statutory construction of the language requiring the recording of "any field sobriety test administered."

In construing the terms of a statute, the primary rule of statutory construction is that all rules of statutory construction are subservient to the one rule that the 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. <u>Town of Mt. Pleasant v. Roberts</u>, 393 S.C. 332, 342 713 S.E.2d 278, 283 (2011); <u>State v. Johnson</u>, 393 S.C.



182, 720 S.E.2d 516, 519 (Ct.App. 2011). The provisions of S.C. Code Ann. §56-5-2953, being penal in nature, 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, 283 (2011); State v. Johnson, 393 S.C. 182, 720 S.E.2d 516, 519 (Ct.App. 2011). If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); State v. Johnson, 393 S.C. 182, 720 S.E.2d 516, 519 (Ct.App. 2011). In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); State v. Johnson, 393 S.C. 182, 720 S.E.2d 516, 520 (Ct.App. 2011).

In construing the terms of S.C. Code Ann. §56-5-2953(A)(1)(a)(ii), which requires that "any field sobriety test administered" must be video recorded, the legislative intent can only reasonably be that the results of the test being performed by the suspect driver are recorded. Prior to the 2008 Amendment, all that was required by §56-5-2953(A)(1)(a), (with respect to any field sobriety testing), was that the "conduct" of the suspect-driver be video 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 S.C. Code Ann. §56-5-2953(A)(1), where the video recording of the suspect-driver doing the Walk and Turn Test was only recorded from her knees or waistline up, such that her feet were not seen on the video recording during the test, the Court of Appeals held that under the former statute the video recording requirement 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**
>
> 4. 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. §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 version, in effect at the time of this action, did not require recording of all tests.
>
> *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685, 688 (Ct. App. 2011).

The obvious import of Footnote 4 in the Court of Appeals opinion in Murphy v. State is that if the complete recording of any field sobriety test was not required under the former statute, it is now required under the amended statute. The 2008 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 could completely or substantially view the test as it was being administered to, and performed by, the driver-suspect, such that a person watching the recording could make some meaningful assessment as to how well the driver-suspect performed on 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 meaningless act by enacting the 2008 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).

In this case, the Magistrate made the determination in his written order that the Walk and Turn test was not fully recorded. As noted above, there is no other evidence in the record addressing the facts in the case other than the Magistrate's written order. Given that the Magistrate's factual determination was not clearly erroneous, the Magistrate correctly found that the recording requirements of S.C. Code Ann. §56-5-2953 had not been complied with by the arresting officer.

STATE'S EXCEPTION III. The defendant's conduct and Miranda warnings were properly recorded.

The third exception of the State is that Mr. Self's conduct and Miranda warnings were properly recorded. This exception is of no help to the State in seeking to overturn the Magistrate's ruling, because the basis for the Magistrate's decision was that the arresting officer failed to record **"any field sobriety test administered"** as required by S.C. Code Ann. §56-5-2953(A)(1)(ii). The State's reliance on Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (2011), i.e., that all that is required under the amended statute is the video recording of a person's conduct and being advised of his Miranda rights, is in error for the reasons stated above in the discussion of State's Exception I.

STATE'S EXCEPTION IV. Suppression and dismissal were inappropriate remedies.

The video recording provisions of S.C. Code Ann. §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. 2011). Beginning with City of Rock Hill v. Suchenski, the appellate courts of South Carolina have repeatedly and consistently held that when a prosecuting agency fails to comply with the mandatory video recording provisions of S.C. Code Ann. §56-5-2953, the appropriate remedy is the dismissal of the case against the defendant.[2] Most recently, in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011), the South Carolina Supreme Court reiterated that the unexcused noncompliance with S.C. Code Ann. §56-5-2953 mandates the dismissal of a DUI/DUAC charge:

2 *See* State v. Johnson, 393 S.C. 182, 720 S.E.2d 516 (Ct.App. 2011)(officer violated §56-5-2953(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 been seen; case should have been dismissed); Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (2011)(the remedy for noncompliance with §56-5-2953 is dismissal of the case, not mere suppression of the evidence).

> 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 provisions 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. §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 designates 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 context. 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 provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.
>
> 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.
>
> Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 348-349, 713 S.E.2d 278, 286 (2011).

Because the Magistrate found that the video recording requirements of S.C. Code Ann. §56-5-2953(A) had not been complied with in this case, he did not err in dismissing the case against Mr. Self.

STATE'S EXCEPTION V. The probative value of the videotape's use outweighs any prejudice.

The case of City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), and its prodigy have repeatedly stressed, that with respect to the mandatory video recording requirements of S.C. Code Ann. §56-5-2953(A), there is no prejudice analysis. Whether a defendant has been prejudiced or not prejudiced by any noncompliance with the statute is irrelevant. If the prosecuting agency has failed to comply with the requirements of S.C. Code Ann. §56-5-2953(A), the only remedy is dismissal, as stated above.

STATE'S EXCEPTION VI. The video is necessary for the prosecution of this case.

The Court assumes that the State has made this exception per the holdings in State v. McSwain, 292 S.C. 206, 355 S.E.2d 540 (1987); State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985), which provide that when a trial court makes a ruling in a pretrial hearing that significantly impairs the State's case, or impairs the ability of the State to receive a fair trial, the State may appeal. While this exception is necessary to establish the State's right to appeal the dismissal of a case, whether a video recording is necessary for the prosecution of a case is irrelevant to the ultimate question as to whether the Magistrate was correct or incorrect in dismissing the case.

STATE'S EXCEPTION VII. **Suppression of the video tape constitutes legal error.**

As stated above in the discussion of State's Exception V, suppression is not a remedy for non-compliance with the video recording requirements of S.C. Code Ann. §56-5-2953(A). City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). If the prosecuting agency has failed to comply with the requirements of S.C. Code Ann. §56-5-2953(A), the only remedy is dismissal, as stated above.

CONCLUSION

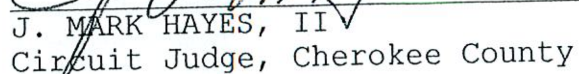
The facts of this case are that the arresting officer did not video record Mr. Self being given a field sobriety test as required by §56-5-2953(A)(1)(a)(ii). With respect to the facts as determined by the Magistrate, there is nothing in the record before the Court to suggest that the factual determinations by the Magistrate were clearly erroneous.

That with respect to any error of law, the Magistrate did not commit any error in dismissing the charge of Driving Under the Influence against Mr. Self. The video recording requirements of §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 §56-5-2953 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 for noncompliance with the recording requirements of §56-5-2953 is severe, but as the South Carolina Supreme Court observed in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 348-349, 713 S.E.2d 278, 286 (2011), the Legislature has clearly intended strict compliance with the provisions of §56-5-2953 and, in turn, promulgated a severe sanction of dismissal for noncompliance. Accordingly, applying the provisions of §56-5-2953 as enacted by the General Assembly, and the opinions of the South Carolina Supreme Court that have construed the provisions of §56-5-2953, the Magistrate did not commit any error of law in dismissing the charge of Driving Under the Influence against Mr. Self.

THEREFORE, IT IS HEREBY ORDERED:

A. That the ruling of the magistrate court in the matter of State v. Christopher Self, Uniform Traffic Ticket Number E-806731, IS HEREBY AFFIRMED.



AND IT IS SO ORDERED.

J. MARK HAYES, II
Circuit Judge, Cherokee County

Spartanburg, South Carolina

July 9, 2012