STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

IN THE COURT OF GENERAL SESSIONS
FOR THE SEVENTH JUDICIAL CIRCUIT

Indictment No.: 2011-GS-11-126
Ticket No.: E-798500
(DUI 2nd)

STATE OF SOUTH CAROLINA,)
)
)
vs.)
)
LUKE EDWARD TURNER,)
)
Defendant.)

**ORDER DISMISSING CASE
FOR FAILURE TO COMPLY WITH
S.C. CODE ANN. S.C. §56-5-2953**

DATE OF HEARING:	June 19, 2012
HEARING JUDGE:	Roger L. Couch, Circuit Judge
STATE'S ATTORNEY:	George Matthew Kendall, Asst. Solicitor
DEFENDANT'S ATTORNEY:	Trent N. Pruett
COURT REPORTER:	Michael Watts
CLERK OF COURT:	Brandy McBee

This matter came before the Court on June 19, 2012, on the Defendant's motion 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(A)(1)(a)(ii) at the incident site. Present at the hearing were the Defendant, and his attorney, Trent N. Pruett (Member of the Cherokee County Bar Association); Assistant Solicitor George Matthew Kendall (Member of the Cherokee County Bar Association), along with the arresting officer, Lance Corporal J.L. Martin, and First Sergeant B.J. Albert, both of the South Carolina Highway Patrol. As a part of the hearing the State called as its witnesses Lance Corporal Martin and First Sergeant Albert, and introduced into evidence the videotape from the incident site.

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BRANDY M. MCBEE

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Based upon the evidence and testimony presented, I hereby make the following

FINDINGS OF FACTS:

1. That on February 19, 2011, at approximately 2:30 a.m., Lance Corporal Martin of the South Carolina Highway Patrol, along with other officers, were conducting a checkpoint in Cherokee County, South Carolina. During the time the checkpoint was being conducted, the Defendant came upon the checkpoint and was stopped. Following the stop of the Defendant, Lance Corporal Martin detected an odor of alcohol coming from the Defendant, and then asked the Defendant to step out his vehicle. The Defendant was then taken in front of Lance Corporal Martin's vehicle, at which point, the video camera inside Lance Corporal Martin's vehicle began recording. The video recording at the incident site shows Lance Corporal Martin giving, or attempting to give, the Defendant certain field sobriety tests, beginning with the Horizontal Gaze Nystagmus (HGN) Test, then an attempt at the Walk and Turn Test, followed by a "finger count" test, and a started attempt at the One Leg Stand Test. The Defendant was not asked to do the Walk and Turn Test or the One Leg Stand Test, because he had as physical impairment or disability with his feet. After the completion of any field sobriety testing, the Defendant was arrested for Driving Under the Influence.

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2. At issue in this case is whether the arresting officer complied with the requirements of S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) in the video recording of the "finger count" test. The testimony of both Lance Corporal Martin and First Sergeant Albert, was that the "finger count" test is a non-standard field sobriety test. (The three standard field sobriety tests being the Horizontal Gaze Nystagmus (HGN) Test, the Walk and Turn Test, and the One Leg Stand Test. The "finger count" test, as testified to by Lance Corporal Martin and First Sergeant B.J. Albert, consists of a suspect-driver using his thumb and touching the tip of each of his four fingers while counting "1-2-3-4," and then reversing the process and counting "4-3-2-1". This is repeated until the suspect-driver is told to stop by the officer. As with most field sobriety tests, the "finger count" test is a divided attention test, requiring a person to simultaneously perform both a mental and physical task. In the video recording of the Defendant, the Defendant's back is facing the camera, such that one cannot see the test being demonstrated by Lance Corporal Martin, or being performed by the Defendant.

3. That the video camera of Lance Corporal Martin was in proper working order when the Defendant was arrested, and the State has not submitted any affidavit or argued any statutory exception for noncompliance with the videotaping requirements as provided for by S.C. Code Ann. §56-5-2953(B).

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Based upon the above stated findings of fact, I hereby make the following

CONCLUSIONS OF LAW:

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

2. That pursuant to the provisions of S.C. Code Ann. §56-5-2953(A), as amended in 2008, 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 56-5-2930, 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;
> > (ii) include any field sobriety test administered;[Emphasis added]; 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, §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.**

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As noted above, at issue in this case is whether the State has complied with the provisions of §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 first note that the video recording requirement of "any field sobriety test administered" was added to §56-5-2953(A) in 2008, when the General Assembly amended the statute. *See* Act No. 201, 2008 Acts 1682-85. The amended statute became effective February 9, 2009. 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 that there be a video recording of "any field sobriety test administered."

The question before the Court then is the statutory construction of the requirement that "any field sobriety test administered" be video recorded. 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, 283 (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 statute is clear and unambiguous. 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). 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, 283 (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, 283 (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. §56-5-2953(A)(1)(a)(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

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statute. Prior to the 2008 Amendment, all that was required by §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 S.C. Code Ann. §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 §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]
>
> 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.
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> Murphy v. State, 392 S.C. 626, 709 S.E.2d 685, 688 (Ct. App. 2011).

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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 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 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 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).

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3. That 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). When a prosecuting agency fails to comply with the mandatory video recording provisions of S.C. Code Ann. §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 S.C. Code Ann. §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 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.

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> 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).

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

1 *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).

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4. That as noted above in the findings of fact, the State has not offered any reason under S.C. Code Ann. §56-5-2953(B) to excuse noncompliance with the video recording requirements of S.C. Code Ann. §56-5-2953(A). That the State has argued that noncompliance with the statute should be excused in this case because the actions of the arresting officer in failing to record any field sobriety test were not intentional or in bad faith. Whether an officer acts in good faith, or if any omission in recording is unintentional, does not excuse noncompliance under S.C. Code Ann. §56-5-2953. The General Assembly has provided for exceptions for noncompliance under §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).

That the State further argues that showing the conduct of the person, and not the actual results of any field sobriety test being performed, satisfies the statute's recording requirements. In essence, the State argues that the statute puts too great a burden on the arresting officer, who has the task of keeping his wits about him while dealing with a person who may be intoxicated and who may present a possible danger to the officer, and all the while during any field sobriety testing have the continuing presence of mind to place the suspect-driver in a position relative to the

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video camera to completely, if not substantially, capture any field sobriety test performed. Moreover, the State has argued, that officers face the additional challenge of video recording where the roadway, terrain or lighting are not conducive to field sobriety testing, such that the officer may have to move a suspect-driver to a different location in the area where the stop was made while always taking care that any test must be in view of the video camera. In this regard, the Court sympathizes the obstacles that present themselves to arresting officers in these cases, which must be both taxing and challenging given the diverse circumstances in which DUI and DUAC cases often arise. But, as discussed above, the recording requirement is one that is imposed by statute. There is no requirement that an arresting officer administer any field sobriety test, however, if the arresting officer elects to administer any field sobriety test it must be video recorded. Moreover, as Lance Corporal Martin testified, officers are specifically aware of the video recording requirement, and are mindful of where they must be positioned to record any field sobriety test. While the video recording of field sobriety tests has its indubitable challenges, the arresting officer always has control of testing procedure. In the matter before the court, the facts are that the Defendant was stopped at a checkpoint, i.e., a location that the troopers specifically chose because it was suited for their purposes. If the Court were to accept the State's argument in this case, and excuse the recording requirement in such

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a controlled setting, then it is difficult to imagine a setting when the recording requirement of field sobriety tests would ever apply. Clearly, this is not what the General Assembly intended, or what the statute provides for.

5. That the facts of this case are that the arresting officer did not video record the Defendant being given a field sobriety test as required by §56-5-2953(A)(1)(a)(ii). That the 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). That 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 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 statute as enacted by the General Assembly, and the opinions of the South Carolina Supreme Court, the case against the Defendant must be dismissed.

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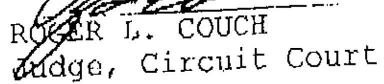
THEREFORE, IT IS HEREBY ORDERED:

A. That based upon above stated findings of fact and conclusions of law, the Court hereby dismisses the matter of State v. Luke Todd Turner, Indictment No.: 2011-GS-11-126 (Ticket No.: E-798500).

AND IT IS SO ORDERED.



ROGER L. COUCH
Judge, Circuit Court

Gaffney, South Carolina

June 22, 2012

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