

STATE OF SOUTH CAROLINA )

COUNTY OF UNION )

The State , )

Respondent, )

vs. )

Albert Barton Woodard, )

Appellant-Defendant. )

\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

Civil Action No: 2008-CP-44-382

FILED  
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ORDER

This matter is before the court on appeal from the Union County Magistrate's Court. Appellant-Defendant appeals his conviction on the charge Driving Under the Influence first offense after a jury trial on November 13, 2008. The Honorable James D. Willingham II presided over the trial. Appellant-Defendant timely filed his Notice of Appeal with this court on November 14, 2008 and the parties appeared before me to argue this appeal on March 16, 2009. The State was represented by Sixteenth Circuit Assistant Solicitor Michael Hickman. The Appellant-Defendant was represented by Thomas H. White IV, Esquire.

**FINDINGS OF FACT:**

Appellant-Defendant was involved in a one-vehicle accident in Union County, South Carolina on August 14, 2007. An off duty Union County Sheriff's Deputy was the first law enforcement officer to arrive on the accident scene and called for assistance from the South Carolina Highway Patrol. Trooper Walker of the South Carolina Highway Patrol responded to the scene and began his investigation. Trooper Walker activated his in-car video camera at the incident site; however, for the first six minutes of the incident site videotape, only the blank front passenger seat of Trooper Walker's cruiser was visible. While the audio portion of the tape captured a recitation of *Miranda* rights and the apparent administration of two field sobriety tests, Appellant-Defendant Woodard's conduct at the incident site was not initially captured. Further, the videotape did not capture Appellant-Defendant Woodard being advised of his *Miranda* rights before any field sobriety tests were administered. Approximately six minutes into the incident site investigation, Trooper Walker realized that the video camera was not properly focused. He then turned the video camera around to focus outside his cruiser and to frame Appellant-Defendant Woodard. Trooper Walker then stated words to the effect of "let's start this over again". He proceeded directly to the administration of field sobriety tests, without advising Appellant-Defendant Woodard of his *Miranda* rights on videotape. Appellant-Defendant moved for dismissal of the charge based upon the State's failure to videotape the entirety of Appellant-Defendant's conduct at the incident site, including the State's failure to capture on videotape the advisement of Appellant-Defendant's *Miranda* rights

State's failure to capture on videotape the advisement of Appellant-Defendant's *Miranda* rights before any field sobriety tests were administered, as required by § 56-5-2953 of the South Carolina Code of Laws and pursuant to the South Carolina Supreme Court case of City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (SC 2007). The trial court denied the motion, relying upon the language of § 56-5-2953(B) which states in pertinent part:

"Nothing in this section prohibits the court from considering another valid reason for the failure to produce the videotape based upon the **totality of the circumstances**; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape".

Though the trial court declined to dismiss the case, the court did suppress the results of the two field sobriety tests that were not captured on videotape.

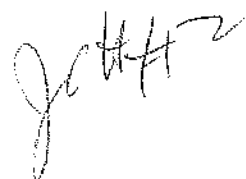
Defendant also moved for the suppression of the Datamaster tests results upon the grounds of the defective nature of the Breath Alcohol Analysis Test Report submitted into evidence by Trooper Walker. That report indicated a date of arrest of 08/15/07 and a time of arrest at 23:55 hours, while also reflecting that the observation time began at 00:56 hours on 08/15/07. The test result of .23 percent on the report was obtained at 01:24 hours 08/15/07, *some 23.5 hours prior to the time and date of the arrest*. The trial court allowed the State to amend the charging document and the Breath Alcohol Analysis Test Report to reflect the proper arrest date, relying upon State v. Pierce, 263 S.C. 23, 207 S.E. 2d 414 (1974), State v. Quarles, 261 S.C. 413, 200 S.E. 2d 284 (1973) and South Carolina Code § 17-19-100 (1976, as amended). The trial court denied Appellant-Defendant's Motion to Suppress.

Though counsel for Appellant-Defendant listed seven separate exceptions on his Notice of Appeal, he emphasized two exceptions at oral argument: the trial court's failure to dismiss the charge based upon the State's violation of § 56-5-2953 of the South Carolina Code of Laws and the holding in the City of Rock Hill v. Suchenski, and the trial court's failure to grant Appellant-Defendant's Motion to Suppress the Datamaster test results due to the defective Breath Alcohol Analysis Test Report.

#### CONCLUSIONS OF LAW:

Upon review of the record and the arguments of counsel, I find and conclude that the verdict of guilty reached in the Magistrate's Court should be set aside.

Trooper Walker failed to comply with the provisions of § 56-5-2953 at the incident site. Specifically, the videotape, as distinguished from any audio recording, does **not** include Mr. Woodard's conduct for at least the first six minutes of the tape, nor does it include the



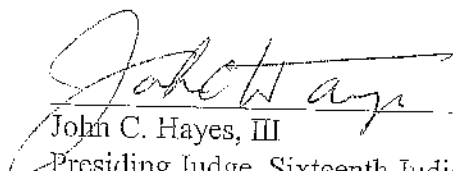
advisement of his *Miranda* rights. Though Trooper Walker attempted “do-over” of the incident site proceedings, in this case, the “do-over” did not correct the problem noted in § 56-5-2953 (A) (1) (b) in that the “do-over” did not include Appellant-Defendant being advised of his *Miranda* rights. The trial court applied an exigent circumstances/ totality of circumstances analysis under Section 56-5-2953 (B) in denying Appellant-Defendant’s motion. However, the record contains no affidavit of the arresting officer setting forth any exigent circumstances, as required by § 56-5-2953 (B). See also Bradley v. Doe, 374 S.C. 622, 649 S.E. 2d. 153 (Ct. App. 2007) as to affidavits per statutory requirement. Further, the issue before the court below was *not* a failure to produce the videotape per se, but rather the validity and use of the videotape that *was* produced. In spite of the ‘totality of circumstances’ language of § 56-5-2953 as to excusing of the *production of the tape*, the pertinent issue here is the right of the State to use the videotape that *was* produced. § 56-5-2953 (A) is **mandatory** as to what must be shown on the videotape. § 56-5-2953 (B), when read in its ‘totality’, addresses how the court proceeds in the *absence* of the videotape; it does not purport to cure the failure to comply with the § 56-5-2953 (A) requirements. Were this *not* the case, Section (A) would have no value.

The record reflects that as to the denial of Appellant-Defendant’s Motion to Dismiss and/or Suppress, one of the “circumstances” considered was that the *Miranda* rights were audibly recorded, but not videotaped. The trial court erroneously held that the audio recording was “sufficient pursuant to the statute”. This is an error of law and therefore the finding of the “sufficient compliance with the statute” based on the totality of the circumstances was based on an error of law. For these reasons, Appellant-Defendant’s conviction should be set aside.

As to Appellant-Defendant’s Motion to Suppress Datamaster results due to the defective Breath Alcohol Analysis Test Report, I find that the time and date errors on that document are obvious scrivener’s errors and do not constitute grounds for dismissal of the charge against Appellant-Defendant.

Based upon the foregoing, Appellant-Defendant’s conviction is hereby reversed, and the case is remanded to the Magistrate’s Court for further proceedings in accordance with this ruling.

AND IT IS SO ORDERED.

  
John C. Hayes, III #7  
Presiding Judge, Sixteenth Judicial Circuit

