

In Gordon, the South Carolina Court of Appeals Issues Latest Decision in the Field of DUI/Drunk Driving

CASE NAME: State vs Gordon (Appellate Case No. 2013-000515; Opinion No. 5226; April 23, 2014)

FACTS:

On October 29, 2011, the South Carolina Highway Patrol stopped Gordon at a license and registration checkpoint. Officers administered three tests to determine if Gordon was under the influence: the Horizontal-Gaze Nystagmus (HGN) test, the walk and turn test, and the one-leg stand test. Following the tests, the officers charged Gordon with DUI. The dashboard camera in the arresting officer's car recorded the events leading to the arrest.

PROCEDURAL HISTORY:

Prior to a trial before the magistrate court, Gordon moved to dismiss the charge on several grounds, including the State's failure to sufficiently record the HGN test because Gordon's head was not visible on the recording during the test. The magistrate denied the motion to dismiss, finding the State properly captured Gordon's conduct on the recording as required by section 56-5-2953 of the South Carolina Code (Supp. 2013) and *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Following a trial, a jury convicted Gordon of DUI.

Gordon appealed his conviction to the circuit court. At the hearing before the circuit court, Gordon argued the HGN test could not be seen on the recording. Gordon provided black and white photographs ("stills") of the recording to the circuit court without objection by the State. Following the conclusion of arguments, the circuit court granted Gordon's motion to dismiss. The court found section 56-5-2953(A) requires the defendant's head be visible during the administration of the HGN test, unless an exception in section 56-5-2953(B) applies. The court noted Gordon was "so far out of view in front of the arresting officer's patrol car for the administration of the test and into the dark[,] which prevented [Gordon's] head from being sufficiently visible through the entire administration of the [HGN] test." This appeal followed.

ISSUE:

Did the video recording of the field tests given to the defendant meet the statutory requirements of Section 56-5-2953(A)?

HOLDING:

The case must be remanded to the initial trial court for a specific factual finding as to the visibility of the defendant's head during the initial field sobriety test (HGN test).

Section 56-5-2953(A) provides:

A person who [commits the offense of DUI] must have his conduct at the incident site . . . video recorded. (1)(a) The video recording at the incident site must . . .

(ii) include any field sobriety tests administered

"As amended in 2009, the current version of section 56-5-2953 expressly requires the recording of field sobriety tests." *Murphy v. State*, 392 S.C. 626, 632 n.4, 709 S.E.2d 685, 688 n.4 (Ct. App. 2011) (citing S.C. Code Ann. § 56-52953(A)(1)(a)(ii) (Supp. 2010) ("The video recording at the incident site must: . . . include any field sobriety tests administered." (alteration by court))).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the state." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 342-43, 713 S.E.2d at 283.

The purpose of section 56-5-2953 is to create direct evidence of a DUI arrest. *Town of Mt. Pleasant*, 393 S.C. at 347, 713 S.E.2d at 285. Dismissal of a DUI charge is an appropriate remedy provided by section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions. *City of Rock Hill v.*

Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Town of Mt. Pleasant*, 393 S.C. at 348, 713 S.E.2d at 286. "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." *Id.* at 349, 713 S.E.2d at 286.

The circuit court properly found the magistrate erred in finding the recording was only required to show the conduct of the defendant. The magistrate relied on *Murphy* in making that determination. Although *Murphy* holds that only the conduct of the defendant must be recorded, *Murphy* was based on a prior version of the statute, which did not include the specific language regarding the tests being recorded. The current version of the statute states: "The video recording at the incident site must . . . include any field sobriety tests administered . . ." § 56-5-2953(A)(1)(a)(ii). Because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless. Accordingly, the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding.

However, because the magistrate court found the recording only needed to capture the conduct, it did not make any findings as to whether the entire test, including the head, was on camera. The magistrate court is to make factual findings in light of the circuit court and our determination that the test must be recorded on camera; specifically for the HGN test, the head has to be visible on the recording.

ACCORDINGLY, the circuit court decision is affirmed in part, vacated in part in accordance with this opinion, and remanded in accordance herewith.