"South Carolina Circuit Court Upholds Lower Court Dismissal of DUI/Drunk Driving Charge"

CASE: South Carolina v Shelby Lorusso (Case No. 2013-CP-46-1390; September 20, 2013)

FACTS:

On December 15, 2012, the defendant, Shelby Lorusso, was stopped by a deputy with the York County, South Carolina Sheriff's Department. After the roadside investigation, the defendant was arrested and charged with DUI/drunk driving.

PROCEDURAL HISTORY:
The case was called for trial on April 23, 2013 in Magistrate Court (misdemeanor DUI/drunk driving court). The defendant filed and argued a pre-trial motion to have her charged dismissed because the arresting officer failed to comply with the mandatory videotaping requirements of South Carolina Code Section 56-5-2953. After reviewing the videotape taken by the arresting officer, and taking testimony, the magistrate granted the defendant's motion dismissing the case. This appeal to the Circuit Court followed.

ISSUE:
Was the Magistrate's decision proper in dismissing the DUI/drunk driving charge in that the State had failed to abide by the mandatory provisions of South Carolina Code Section 56-5-2953 in the making of a DUI/drunk driving arrest?

HOLDING:
Yes. The lower court ruling is hereby affirmed and the State's appeal of said verdict is dismissed.

In sworn testimony provided to the lower court, the arresting deputy acknowledged that the videotape did not show whether the defendant's heels actually touched her toes or not. The deputy also acknowledged that the defendant's feet were not visible on the video camera for the majority of the steps which she took while attempting the "walk the line" test. Whether or not the defendant's heels touched her toes during this test was not visible on the videotape offered by the State.

LEGAL ANALYSIS UNDERTAKEN BY THE COURT:

1. The provisions of S.C. Code Section 56-5-2953(A), as amended in 2009 states in pertinent part that a person charged with driving under the influence must have their conduct video recorded at the incident site as follows:

> (A) A person who violated 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.
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> (l)(a) The video recording at the incident site must:
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> (I) not begin later than the activation of the officer's blue lights;
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> (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; 200 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.

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 of Appeals recently addressed this statute in the context of the mandatory recording requirement for Miranda warnings, see *State v. Henkel,* 746 S.E. 2d, 347 (2013).

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. Spp 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).

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 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. 628, 709 S.E. 2d 685 (2011), under the former provisions of Section 56-5-2953 (A)(l), 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 *performance* if 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. 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 intent 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). To put it plainly, there is no sense in conducting field sobriety tests if the finder of fact can not see the results of such test.

2. 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. 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 proceeding agency fails to comply with the mandatory video recording provisions 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 2001). In *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 713 SE. 2d 278 (2011), the South Carolina Supreme Court return to the *City of Rock Hill v. Suchenski,* decision and reiterated that the un-excused 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 is 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. *!d.* 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.
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> 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 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.*

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

3. In the present case the State failed to comply with the videotaping requirements in regard to the "walk and turn test". The Respondent was asked to take several steps by lining up the heel of the front foot against the toe of the trailing foot. The Respondent was then required to turn around and walk in the opposite direction in the same manner. Although the video camera was recording during the Respondent's performance of this test, it was positioned in such a manner that the Respondent's heels were not visible as they touched or did not touch her toes. Therefore, the Respondent's performance, an important part of the test, was not videotaped.

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 as neither intentional or done in bad faith).

In the present case the arresting officer did not properly video tape the Respondent being given the walk and turn field sobriety 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 56-5-2953 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, 713 S.E. 2d 278 (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.

IT IS THEREFORE ORDERED, that based upon above stated findings of fact and conclusions of law, the Court hereby dismisses the appeal of the State in South Carolina v. Shelby Lorusso, 2013-GS-46-1390.

AND IT IS SO ORDERED.

York, South Carolina