

Roll the tape (or not): A review of recent decisions regarding DUI videotaping



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By Steve Sumner

Since 2009, when South Carolina revised its DUI statute to require video recordings of traffic stops and breath tests, the courts have been required to address various wrinkles in the law. With the season of revelry upon us, it's worth taking a look at some of those decisions.

In *Murphy v. State* (Opinion No: 4816, S.C. Court of Appeals), the Court of Appeals addressed the Circuit Court's decision not to suppress the videotape of the defendant's traffic stop. Although a dashboard camera in the officer's vehicle recorded the stop, the videotape only showed the defendant from essentially the knees up during the walk and turn test, and only displayed half of her body as she walked to the outer limit of the camera's field of view. In affirming the lower court ruling, the Court of Appeals held that nothing in the plain language of the statute required an accused to remain in full view of the camera for the duration of the encounter. Citing the Oxford definition of the word "conduct," the court held that a defendant did not have to remain in full view of the camera at all times for the statute to be satisfied. However, critical to the *Murphy* opinion is that her arrest took place in 2007; and in footnote 4 of the opinion the court stated, in part, "...the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests..., and the plain language of the prior version, in effect at the time of this action, did not require recording of all tests."

In *Mount Pleasant v. Roberts* (Opinion No: 27005, S.C. Supreme Court) there was no recording of the traffic stop, field tests or the arrest of the defendant. Neither the primary officer's nor the backup officer's vehicle was equipped with a dashboard camera. Pursuant to South Carolina Code Section 56-5-2953(B), the officer executed and submitted an "Affidavit for Failure to Produce Videotape." In upholding the lower court's dismissal of the charge, the court emphasized that the purpose of Section 56-5-2953 was to create direct evidence of DUI arrests and that the town's protracted failure to equip its vehicles would not allow it to evade that responsibility as set forth in the law. The court went on to state that the Legislature clearly intended for a per se dismissal if law enforcement violated the mandatory provisions of the code.

Circuit Judge John C. Hayes, III, in *Sullivan v. South Carolina* (Case No: 2010-CP-46-3355, York County) reversed a magistrate's previous ruling and dismissed a DUI charge with prejudice because the incident site video tape did not "show" the defendant being advised of his Miranda rights as mandated in the law. Although the Miranda rights could clearly be heard on the videotape being given

to the defendant, "...the legislation is clear. The video must show ('depict, something that one views or one looks at and at the same time hears') the subject being given their Miranda warning." Three other Circuit Court opinions have offered the same holding: that section 56-5-2953 specifically requires that a defendant's arrest and advisement of Miranda rights be both visually and audio recorded (*State v. Green*, Case No: 2009-CP-14-634, Clarendon County; *State v. Robinson*, Ticket No: E478868, Court of General Sessions, Pickens County; and *State v. Acker*, Ticket No: E478803, Court of General Sessions, Pickens County.)

The Lord giveth....

In *State v. Hercheck*, an unpublished opinion, the Court of Appeals upheld the Circuit Court's dismissal of a DUI charge where law enforcement had failed to videotape the defendant for the entire 20-minute pre-test waiting period after the defendant indicated that he did not wish to submit to the breath test. In upholding the dismissal, the Court of Appeals cited that the plain language of Section 56-5-2953 mandated a full 20-minute video recording of the arrestee's conduct during the breath test waiting period and that no statutory exception existed allowing the premature termination of the video even if the arrested individuals indicate that they would not submit to the breath test. A fair number of Circuit Court opinions reached the same result (*State v. Sean Smith*, Case No: 2011-CP-23-4168, Greenville County, and *State v. Charles Jones*, Case No: 2008-GS-42-1264, Spartanburg County).

... and the Lord taketh away (Job 1:21)

The Court of Appeals, in an opinion filed on November 23, 2011, flipped *Hercheck* by reversing the lower court dismissal of a DUI charge and remanded the case for trial (*State v. Ellwell*, op. number 4912, S.C. Court of Appeals). The basis for the lower court dismissal was that the video recorder in the breathalyzer room was terminated prior to the 20-minute mark after the defendant indicated he would not take the breathalyzer test. The court's holding emphasized that under the basic principles of statutory construction the law does not require the videotape to include a 20-minute waiting period when the suspect refuses the test. As it relates to the waiting period, the statute ensures that *if* a breath test is administered the mandatory videotaping will provide evidence to resolve any credibility disputes as to the administration of the test. The court went on to hold that in all cases the breathalyzer video must include the person being informed that they are being videotaped, being informed that they may refuse the test, and refusing the test if that in fact occurs. However, if a person refuses to take the breath test, dismissal of the charge is not warranted for failure to videotape the person's conduct for 20 minutes so long as the other requirements of Section 56-5-2953 are satisfied.

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