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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski

Appellate Case No.: 2021-000007

Andrew Davis Desilet, Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety, Respondents.

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS**

South Carolina Department of Public Safety)
and)
South Carolina Department of Motor)
Vehicles,)

Petitioners,)

v.)

Andrew Davis Desilet,)

Respondent.)

Docket No. 20-OMVH-01-1160-CC

FINAL ORDER AND DECISION

APPEARANCES: For Petitioners: Trooper S.Z. Brazell, SCDPS
For Respondent: Jack Swerling, Esq.

OTHER INFORMATION: Respondent's Driver's License No.: 101593325
Type of Hearing: Implied Consent (S.C. Code Ann. § 56-5-2950)
Respondent's alleged refusal to take chemical test(s)

STATEMENT OF THE CASE

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) pursuant to Respondent Andrew Davis Desilet's (Respondent) request for a contested case hearing regarding the suspension of his driver's license or driving privilege. Respondent was arrested on March 2, 2020, for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon his alleged refusal to submit to a breath, blood, or urine test, Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 (2018) and received a notice of suspension. The matter was assigned to me to conduct a hearing.

Written notice of the hearing was sent to Petitioners South Carolina Department of Public Safety (SCDPS) and South Carolina Department of Motor Vehicles (DMV), and to Respondent. The hearing was held on August 4, 2020 at the Edgar A. Brown Building in Columbia, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege should be upheld.

FINDINGS OF FACT

Having observed the witness and closely passed upon his credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

Notice of the date, time, place, and subject matter of the hearing was timely given to the parties.

On March 1, 2020, at approximately 4:00 a.m., Trooper Brazell was patrolling on Interstate-26, near the Piney Grove/St. Andrews Exit in Lexington County, South Carolina. He got behind a Kia sedan that was having a hard time maintaining its lane of travel. He activated his in-car camera and followed the vehicle for approximately two miles. He observed the vehicle weaving in and out of the emergency lane and in and out of his lane of travel. Trooper Brazell then initiated a traffic stop at the 104 westbound exit (Piney Grove Exit). He then approached the vehicle and identified the driver as Respondent, who was the sole occupant of the vehicle. When asking Respondent for his driver's license, Trooper Brazell had smelled the odor of alcohol coming from Respondent's breath. Trooper Brazell then asked Respondent whether he had consumed any alcohol, to which Respondent replied that he had had a few drinks and that he was trying to make it back home, which was a few more miles down the road. Trooper Brazell also noticed that Respondent's eyes were red and glossy. He then asked Respondent if he would consent to a standardized field sobriety test, and Respondent consented.

During the horizontal gaze nystagmus (HGN) test, Trooper Brazell noticed HGN in both of Respondent's eyes and again observed Respondent's red, glossy eyes and smelled the odor of alcohol coming from his breath. During the one-leg stand test, Respondent was unsteady on his feet, had to use his arms for balance, had to start over several times, and almost fell over on the side of the roadway. Trooper Brazell then placed Respondent under arrest for driving under the influence (DUI) and transported him to the Lexington County Detention Center (LCDC).

While at LCDC, Respondent was read his implied consent rights. After the twenty-minute observation period, Respondent refused to provide a breath sample. Respondent was then charged with DUI, First Offense.

There was no video footage available of Trooper Brazell following Respondent, the traffic stop, the SFST, the arrest, or his advisement of the *Miranda* rights. Trooper Brazell testified that the reason for this was that although the video was on and appeared to be working

properly at the time, when he went to make a copy of the video for the case file a few days after the incident at issue, he discovered that his camera had malfunctioned, making him unable to make copy of the video. He immediately went to SCDPS's facility on Shop Road to have the video looked at, per department policy. They changed the camera out, but they were unable to retrieve the video footage off the hard drive. He also testified that the camera was working at the DataMaster room, though. He did not provide a copy of the video footage from the DataMaster room but pointed out that it was available to Respondent's counsel on the State Law Enforcement Division (SLED) website. Trooper Brazell also testified that he had completed an affidavit about the video malfunctioning and included it and work orders from the shop that inspected the camera in the case jacket that he gave to the solicitor. Respondent's counsel noted that he had not received discovery from the solicitor's office pursuant to his Rule 5 motion (per the South Carolina Rules of Evidence (SCRE)).

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude as a matter of law the following:

In S.C. Code Ann. § 1-23-600 (Supp. 2019), the General Assembly provided for the creation of the South Carolina Division of Motor Vehicle Hearings. Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of drivers' licenses. The name of the DMVH was changed to the Office of Motor Vehicle Hearings (OMVH) effective October 1, 2008.

All hearings presided over by Hearing Officers of the OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the OMVH. A filing of a request for a hearing stays the suspension until a final decision is issued. S.C. Code Ann. § 56-5-2951(G).

Appeals from final decisions of the Hearing Officers will be to the SCALC in accordance with S. C. Code Ann. § 1-23-600 (Supp. 2019).

Petitioner DMV is an administrative agency of the State of South Carolina which is charged with administering its motor vehicle laws and delivering accurate and secure credentials and transaction documents to the citizens of this state. S.C. Code Ann. § 56-1-5 (2018).

Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, *South Carolina Administrative Practice and Procedure*,

200-201 (2004). Since DMV asserts the affirmative of an issue, i.e. the enforcement of a driver's license suspension, and since it will be subject to an adverse ruling if no evidence is introduced, DMV bears the burden of proof in this enforcement action. See Alex Sanders and John S. Nichols, *Trial Handbook for South Carolina Lawyers*, Second Edition, 2001, § 9:3, p. 366.

Pursuant to S.C. Code Ann. § 56-5-2930 (2018), it is unlawful for a person to drive a motor vehicle within this State while:

- a. under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired;
- b. under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or
- c. under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

S.C. Code Ann. § 56-5-2950(A) (2018) provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of the law enforcement officer who arrested [the] person....

Furthermore, the breath test must be administered by a person trained and certified by Petitioner pursuant to State Law Enforcement Division (SLED) policies. S.C. Code Ann. § 56-5-2950(A) (2018).

S.C. Code Ann. § 56-5-2950(B) (2018) further provides:

No tests may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;

- (2) his privilege to drive must be suspended for at least one month if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

Upon motion by any party, the OMVH Hearing Officer may review the application of the policies, procedures, and regulations promulgated by SLED. If the Hearing Officer finds that the failure to follow any of the policies, procedures, regulations or other provisions of S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The Hearing Officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure. *See* S.C. Code Ann. § 56-5-2950(J) (2018).

If a person drives a motor vehicle and has an alcohol concentration of fifteen one-hundredths of one percent or more, Petitioner must suspend the person's driver's license, permit, or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer shall issue a notice of suspension that is effective beginning on the date of the alleged violation. *See* S.C. Code Ann. § 56-5-2951(A) (2018).

A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (2018). Section 56-5-2951(F) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and

(d) the machine was working properly.

Nothing in this section prohibits the introduction of evidence at the administrative hearing on the issue of the accuracy of the breath test result.

At the close of the evidence, Respondent's counsel argued that the suspension of Respondent's driver's license or driving privilege should be rescinded because S.C. Code Ann. § 56-5-2953 (2018) mandates that there be a camera and that the camera must be activated as soon as the blue lights are activated. He also argued that the *Miranda* rights and field sobriety tests must also be done on camera. Counsel acknowledged that this was not a criminal trial but argued that without being able to establish the threshold of the lawfulness of the arrest, including whether his *Miranda* rights and all had been videotaped, it would not be fair for Respondent to then lose his driver's license for refusing to take the test. He further argued that the sworn affidavit regarding the video malfunction had not been produced, even though the trooper said it was available. When asked if Respondent had subpoenaed the affidavit (via Rule 12(A) of the Rules of Procedure for OMVH (OMVH Rules)), counsel responded that the burden to produce the affidavit was on Petitioners.

Trooper Brazell responded by stating that he had turned over everything in a case jacket to the solicitor, which is what they do in all cases, and that this was available to counsel to pick up from the solicitor. Trooper Brazell argued that the sworn video affidavit, the work order from the repair shop for his video was included in this material and could have been picked up by counsel. He again stated that the video appeared to be working to his knowledge at the time of the incident at issue; and he took all of the necessary steps after discovering the malfunction to retrieve the video footage, including taking it to the repair shop, but was unable to retrieve it and provide a copy of it.¹ He further stated that the video footage of the refusal is available online on SLED's website, and counsel noted that it was not at the hearing, either.

I conclude, as a matter of law, that Petitioners have met the burden of proof pursuant to S.C. Code Ann. §§ 56-5-2950 and -2951. Respondent was lawfully arrested for driving under the influence. Trooper Brazell saw Respondent driving erratically, weaving in and out of his lane of traffic and the emergency lane. This provided Trooper Brazell with reasonable suspicion to

¹ Counsel then attempted to offer into evidence a copy of his Rule 5 Motion for Discovery served on the solicitor on March 18, 2020, but the evidence was closed at that point, and Trooper Brazell did not consent to have it reopened because he had not been served with it. I will note, however, that counsel had already stated on the record that he had served the Rule 5 motion; and though the statement could have been stricken as inappropriate testimony from counsel on cross-examination, it was not objected to during the hearing.

initiate the traffic stop. Upon the traffic stop, Respondent admitted that he had had a few drinks before driving towards home a few miles away. Trooper Brazell noticed that Respondent's eyes were red and glossy, and that his breath smelled of alcohol. Respondent also performed poorly on the SFSTs by demonstrating HGN in both of his eyes, failing to maintain his balance without the aid of his arms, having to restart the test several times, and nearly falling down. Thus, I find that there was probable cause for the arrest based on Trooper Brazell's testimony and the totality of the circumstances.

Further, I conclude that Respondent was advised of his implied consent rights on video based on the testimony of Trooper Brazell, which I find to be competent evidence. Respondent then refused to give a breath sample.

Respondent's argument that Petitioners have failed to meet their burden of proof is based on the premise that Section 56-5-2953 applies in an administrative implied-consent contested case hearing and sets that burden; however, this notion is mistaken. A DUI case and an administrative suspension hearing relating thereto are separate and distinct. *See State v. Kerr*, 330 S.C. 132, 149, 498 S.E.2d 212, 220 (Ct. App. 1998). Thus, the disposition of a DUI case does not automatically dispose of the administrative hearing, or vice versa. The scope of administrative implied-consent contested case hearings is governed by Section 56-5-2951, whereas the scope of criminal DUI cases are governed by Section 56-5-2953.

An administrative hearing is not a trial for DUI, driving with an unlawful alcohol concentration (DUAC), or felony DUI, and Section 56-5-2951 reflects this distinction when it states in subsection 56-5-2951(B) that "[t]he provisions of this subsection do not affect the trial for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945." Indeed, the video (or alternate affidavit where video equipment is inoperable) requirements for offenses falling under these provisions (DUI, DUAC, and felony DUI, respectively) are set forth in a separate section: S.C. Code Ann. § 56-5-2953 (2018). The penalty for failing to produce the video at a trial in these cases (absent certain exceptions, including the sworn affidavit where video equipment is inoperable) is dismissal of the case. However, no such language requiring the submission of video footage or affidavit evidence appears in Section 56-5-2951 (or any penalties for failure to do so). Rather, the scope of an administrative implied-consent contested case hearing where, as here, a refusal is at issue is limited to whether the driver "(1) was lawfully arrested or detained; was given a written copy of and verbally informed of the rights enumerated in Section 56-5-

2950; [and] refused to submit to a test pursuant to Section 56-5-2950[.]” S.C. Code Ann. § 56-5-2951(F)(1)-(3). *See S.C. Dep’t of Motor Vehicles v. Nelson*, 364 S.C. 514, 525, 613 S.E2d 544, 550 (Ct. App. 2005) (concluding that the requirements for suspension for a refusal in an implied consent hearing consists of those elements included as a prerequisite to a license suspension under Section 56-5-2951(F)); *see also Williams v. S.C. Dep’t of Motor Vehicles*, S.C. Admin. Law Ct., docket no. 12-ALJ-21-0420-AP (Oct. 21, 2013) (holding that compliance with the provisions of Section 56-5-2953 is not at issue in an administrative hearing for an implied consent suspension).²

Section 56-5-2951(F)(2) requires, as part of the scope of administrative implied-consent contested case hearings, that Petitioners must demonstrate that the driver was “given a written copy and verbally informed of the rights enumerated in Section 56-5-2950.” Section 56-5-2950(B) states, in pertinent part, “No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed [of his or her implied consent rights].” Though this language does suggest that the advisement of a driver’s implied consent rights must be done on video, i.e., “upon activation of the video recording equipment ...[.]” just as it must also be done before commencing the testing procedure, I find no requirement in Section 56-5-2951 that the actual video footage of this advisement be submitted into evidence at the hearing in order for Petitioners to carry their burden of proof. To the extent Section 56-5-2950(B) requires the advisement of implied consent rights to be given on video in order to be valid in a refusal case, I find that Trooper Brazell’s testimony that such advisement was made on video to be sufficient evidence to satisfy that requirement and shift the burden to Respondent to prove that it was not.³

² To highlight yet another distinction between criminal DUI cases and administrative implied-consent hearings is with respect to *Miranda* rights. Respondent argues that those rights must be given on video, which is required in criminal DUI cases under Section 56-5-2953. However, evidence of the advisement of *Miranda* rights, let alone advisement thereof on video, is not even required in implied consent hearings. *See Hill v. S.C. Dep’t of Motor Vehicles*, S.C. Admin. Law Ct., 2008 WL 4659526, *8 (Sept. 18, 2008) (“[T]he *Miranda* warnings are not and cannot be superimposed on Implied Consent proceedings.”). Rather, *Miranda* applies only in “criminal cases in which the prosecution seeks to admit confessions or less than voluntary incriminating statements.” *Id.* (emphasis in original). Implied consent hearings are not criminal cases, and implied consent suspensions are not part of criminal punishment. *Id.* (citing *State v. Price*, 333 S.C. 267, 510 S.E. 2d 215 (1998); *Parker v. State Highway Dep’t*, 224 S.C. 263, 78 S. E. 2d 382 (1953)).

³ Indeed, Trooper Brazell’s testimony that he read Respondent his implied consent rights on video is sufficient to satisfy Section 56-5-2951(F)(2) even without the advisement of implied consent rights form being in evidence absent a showing by Respondent of prejudice, which was not done in this case. *See Taylor v. S.C. Dep’t of Motor*

Moreover, even had Trooper Brazell been required to produce the video footage from the breath-test site at the hearing, Respondent failed to demonstrate any prejudice that Respondent suffered by not having the video produced at the hearing, i.e. how “[t]he failure to follow ... the provisions of [Section 56-5-2950] ... materially affected ... the fairness of the testing procedure”⁴ S.C. Code Ann. § 56-5-2950(J) (2018); *Taylor v. S.C. Dep’t of Motor Vehicles*, 382 S.C. 567, 677 S.E.2d 588 (2009) (holding that failure to satisfy all of the factors of Section 56-5-2951(F)(1)-(4) does not mandate re-issuance of the driver’s license when there is no prejudice to the driver); *see also* footnote 2, *supra*.⁵

Accordingly, the relief requested by Respondent is denied.

ORDER

Based upon the above findings of fact and conclusions of law, it is hereby:

ORDERED that the suspension of Respondent’s driver’s license or driving privilege is **UPHELD**.

AND IT IS SO ORDERED.


Samuel L. Johnson
OMVH Hearing Officer

August 5, 2020
Columbia, South Carolina

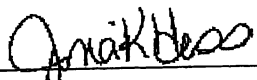
Vehicles, 382 S.C. 567, 677 S.E.2d 588 (2009) (holding that a verbal advisement of implied consent rights alone was sufficient to satisfy Section 56-5-2951(F)(2) as the driver suffered no prejudice from a lack of written notice).

⁴ The phrase “the accuracy or reliability of test results” was omitted because it is not at issue in this case, as this case involved a refusal and thus involved no test results.

⁵ Even had video footage of the breath-test site and of events leading to and including the arrest or an affidavit regarding the malfunctioning equipment been required in this case, Respondent did not avail himself of the administrative remedy to obtain the affidavit (in this case) and breath-test video footage through an OMVH subpoena pursuant to OMVH Rule 12(A). Though Respondent filed a Rule 5 Motion in the criminal matter, pursuant to the South Carolina Rules of Evidence, discovery is only available in OMVH cases through OMVH subpoenas, according to OMVH Rule 11. But again, the affidavit and video footage were not required for Petitioners to carry their burden of proof in this case.

CERTIFICATE OF SERVICE

I, Jena' K. Hess, hereby certify that I have this date served this Order upon all parties to this caused by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Jena' K. Hess

August 5, 2020
Columbia, South Carolina

NOTICE

Motion of Reconsideration

A party may file a written motion with the OMVH within ten (10) days after notice of this order requesting the Hearing Officer reconsider this final decision. However, the filing of a Motion of Reconsideration does not stay the provisions of this final decision nor excuse compliance with its provisions. See OMVH Rule 15 (D). A stay must be requested specifically by motion. See OMVH Rule 15 (E). The filing of a motion for reconsideration does stay the time for an appeal until an order is issued; however, if the hearing officer does not issue a written order on the motion for reconsideration, it is deemed denied thirty days after it is filed.

Only original documents are accepted. Documents must be filed via hand-delivery or by depositing the document in the U.S. Mail, properly addressed, with sufficient first class postage attached. Facsimiles sent to the OMVH and the South Carolina Administrative Law Court do not comply with filing requirements and are not authorized. See ALC Rules 4(B).

South Carolina Office of Motor Vehicle Hearings

1205 Pendleton Street, Ste 325

Columbia, SC 29201

The Rules of the Administrative Law Court are found at: www.scalc.net

The Rules of the Office of Motor Vehicle Hearings are found at: www.scomvh.net

Appeal

A party may appeal this final decision by filing written notice with the South Carolina Administrative Law Court within thirty (30) days of receipt of the order to the following address:

Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

The notice must be accompanied by proof of service of the notice on all parties and a filing fee in the amount of \$150.00 made payable to the South Carolina Administrative Law Court. See ALC Rules 3(A), 4(B), 31(A), 33 and 71(A). A copy of the notice must also be sent to the OMVH and a copy of the transcript shall be ordered within ten days after service of the notice. The transcript must be ordered by the Appellant and the Appellant is responsible for the cost thereof.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Andrew Davis Desilet,

Appellant,

vs.

South Carolina Department of Motor
Vehicles and South Carolina Department of
Public Safety,

Respondents.

Docket No. 20-ALJ-21-0213-AP

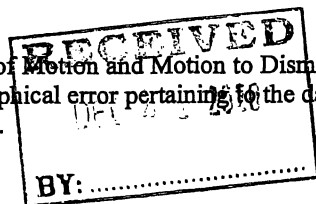
**ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS**

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a Notice of Appeal filed by Andrew Davis Desilet (Appellant) on August 17, 2020. On October 5, 2020, the South Carolina Department of Motor Vehicles (Department) filed an Amended Notice of Motion and Motion to Dismiss (Amended Motion) for the Appellant's failure to serve the Notice of Appeal on the Department in accordance with Rules 33 and 38 of the Rules of Procedure for the Administrative Law Court (SCALC Rules).¹

Rule 33 directs that a party appealing from the decision of an agency must file and serve on each party with a copy of the notice of appeal within thirty (30) days of receipt of the decision from which the appeal is taken. SCALC Rule 33(E). In this case, the Office of Motor Vehicle Hearings (OMVH) issued its Final Order and Decision on August 5, 2020, therefore, the Appellant had until September 4, 2020, to properly serve the Department with his Notice of Appeal. The Appellant timely filed his appeal with the court on August 17, 2020, however, according to the Department's Amended Motion, the Appellant failed to serve his Notice of Appeal on the Department.

The Appellant's Proof of Service filed with the court on August 17, 2020, asserts that the Notice of Appeal was served on the Office of General Counsel, South Carolina Department of Motor Vehicles, 1205 Pendleton Street, Suite 325, Columbia, South Carolina, 29201. While that addressee is correct, the address itself corresponds to the Office of Motor Vehicle Hearings, not

¹ The Department originally filed a Notice of Motion and Motion to Dismiss for the same grounds on September 28, 2020. That notice, that contained a typographical error pertaining to the date the agency decision was rendered. The Amended Motion merely corrects that error.



FILED

DEC 18 2020

SC ADMIN. LAW COURT

the South Carolina Department of Motor Vehicles. The Department and OMVH are separate state agencies. S.C. Code Ann. §§ 1-23-660 (Supp. 2019); 56-1-5 (2018).

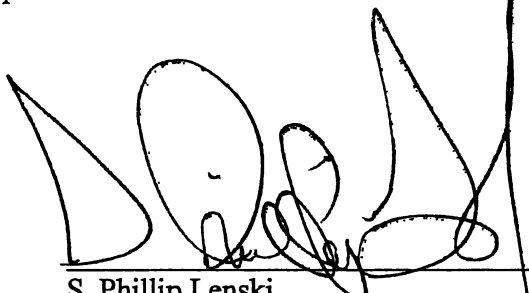
Timely filing and service of a notice of appeal is a jurisdictional requirement, and this court has no authority to extend or expand the time in which the notice of intent to appeal must be served.² *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004); *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985). Here, while the court understands that the error was inadvertent and that there was no intent by the Appellant to subvert or disregard the rules, the Notice of Appeal was not served on the Department. Therefore, because the Appellant did not serve his Notice of Appeal on the Department, this court is without jurisdiction to adjudicate his underlying appeal, and must dismiss this action. *See* SCALC Rule 38 (providing that, upon motion of any party or on its own motion, the court may dismiss an appeal for failure to comply with any of the rules for appeals, including those pertaining to service of a notice of appeal).

ORDER

IT IS THEREFORE ORDERED that the Department's Amended Motion to Dismiss is **GRANTED** and this appeal is hereby **DISMISSED**.

AND IT IS SO ORDERED.

December 18, 2020
Columbia, South Carolina



S. Phillip Lenski
Administrative Law Judge

² The Appellant cites to *Weatherford v. Price* for the proposition that mere clerical errors in a notice of appeal are not fatal, particularly where opposing counsel demonstrates no prejudice as a result. *See Weatherford v. Price*, 340 S.C. 572, 577-78, 532 S.E.2d 310, 313 (Ct. App. 2000). In that case, the notice of appeal in question referred to an order denying a motion for reconsideration but included an attached copy of the original merits order with the notice. *Id.* The South Carolina Supreme Court determined that it had jurisdiction to hear the appeal, finding that, under those circumstances, the error was merely clerical in nature and that counsel demonstrated no prejudice as a result of the error. *Id.*; *see also Charleston Lumber Co., Inc. v. Miller Hous. Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995) (rejecting an attempt to have an appeal dismissed on jurisdictional grounds when the appellant neglected to appeal one of a series of cases tried and appealed together). *Weatherford*, however, is distinguishable from the present case. Here, the Department asserts that it never received a copy – in whole or in part – of the Appellant's Notice of Appeal. Unlike *Weatherford* and *Charleston Lumber*, therefore, where counsel for the parties were served with incomplete or incorrect notices of appeal, counsel for the Department received no notice of the Appellant's challenge. While the court acknowledges that the error in this case may have been clerical in nature, the resulting lack of notice to the Department gives the error substance and heightens it beyond what could be considered a clerical error.

CERTIFICATE OF SERVICE

I, Emily B. Howard, hereby certify that I have this date served this Order upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Jack B. Swerling, Esquire
Law Offices of Jack B. Swerling
1720 Main St., Suite 301
Columbia, South Carolina 29201

Brandy A. Duncan, Esquire
S.C. Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016-0020

Teckla S. Henderson, Esquire
SC Department of Public Safety
Office of General Counsel
Post Office Box 1993
Blythewood, South Carolina 29016



Emily B. Howard
SCALC Staff Attorney

December 19th, 2020
Columbia, South Carolina

FILED

DEC 18 2020

SSC ADMIN LAW COURT

The South Carolina Court of Appeals

Andrew Davis Desilet, Appellant,

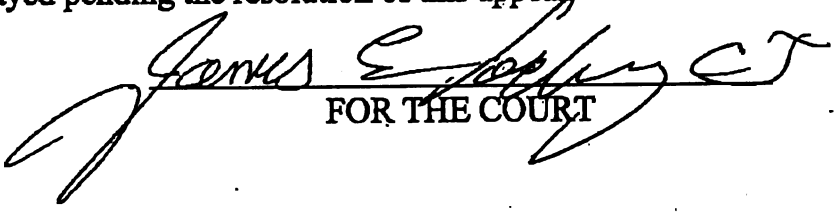
v.

South Carolina Department of Motor Vehicles and South
Carolina Department of Public Safety, Respondents.

Appellate Case No. 2021-000007

ORDER

Appellant's motion to stay is granted and the suspension of Appellant's driver's license shall remain stayed pending the resolution of this appeal.


FOR THE COURT

Columbia, South Carolina

FILED
Feb 04 2021

cc:

Larry Conrad Marchant, Jr., Esquire

Brandy Anne Duncan, Esquire

Teckla S. Henderson, Esquire



South Carolina Department of Motor Vehicles
NOTICE OF SUSPENSION

MV-65
(Rev. 1/15)

Driver's Name Andrew D Des.let BP/DL State and Number SC 10189337S Date of Birth 07/19/1991
Address on Driver's License: Street address, Apt. No., City, State, Zip Code 4 Woodstar Ct Trmo SC 29063

Special mailing address for notices (if different from driver's license address): Street address, Apt. No., City, State, Zip Code

Vehicle License Plate State and No. _____ Vehicle Type: Commercial ☐ Yes ☐ No Hazardous Material ☐ Yes ☐ No

YOUR PRIVILEGE TO DRIVE IN SOUTH CAROLINA IS SUSPENDED IMMEDIATELY FOR THE FOLLOWING:
(CHECK ONLY ONE BOX)

UNDER THE AGE OF TWENTY-ONE (21)
AND NOT UNDER ARREST FOR DUI*

- ☐ Registering an alcohol concentration of .02 or greater*
☐ Refusing to submit to a breath, blood or urine test*
Date of Test/Refusal _____

ANY AGE UNDER ARREST FOR DUI

- ☐ Registering an alcohol concentration of .15 or greater
☒ Refusing to submit to a breath, blood or urine test
Date of Test/Refusal 03/02/2010

*A person who is taken for testing under 56-1-286 cannot be prosecuted under 20-7-8920, 20-7-8925, 56-5-2930 or 56-5-2933. Everyone who receives this Notice of Suspension can request a hearing to challenge the suspension. A request for a hearing must be filed with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the notice of suspension. There is a \$200.00 filing fee. (Personal checks are not accepted.) See the back of this form for more information on how to ask for a hearing.

If a hearing is scheduled, you may be able to get a temporary alcohol restricted license. The temporary alcohol restricted license costs \$100.00 and allows you to drive without restrictions until the hearing results are mailed to you. See the back of this form for instructions on how to obtain a temporary alcohol restricted license.

If you do not obtain a temporary alcohol restricted license, your suspension continues. You must either obtain a route-restricted license or your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do obtain a temporary alcohol restricted license and the hearing officer rules against you after your hearing, your suspension will go back into effect. If you were suspended after having been arrested for DUI, you may be eligible for a route-restricted license to allow you to drive for the remainder of the suspension. There are instructions on the back of this form to explain how to obtain a route-restricted license. If you do not obtain a route-restricted license or if you are under the age of twenty-one (21) and were not arrested for DUI, you cannot drive until your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do obtain a temporary alcohol restricted license and the hearing officer rules in your favor, the suspension will be cancelled. Your driving privileges will be reinstated. However, you must go to a Department of Motor Vehicles office to have a regular license issued.

If you were suspended after having been arrested for DUI, you may be entitled to have a route-restricted license during your suspension period. You do not have to request a hearing to be eligible for a route-restricted license. The route-restricted license costs \$100.00 and allows you to drive only to and from work, college, ADSAP classes, and a court-ordered drug program, plus during the course of your employment or college. However, you must enroll in ADSAP before a route-restricted license will be issued. See the back of this form for instructions on how to obtain a route-restricted license.

I understand that I cannot drive until a license has been issued to me.

Signature of Driver Imued

Date Signed 03/02/2010

Driver's license or permit surrendered (yes or no) yes (If yes, license must be attached to yellow copy of this form)

Date Signed 03-01-2010 Signature of Arresting Officer SC 29063

Agency Name SCHP Agency Code SSSHV3209

Date Signed 03-02-2010 Signature of Data Master Operator SCHP

Agency Name _____ Agency Code _____

Printed Name of Arresting Officer S2 Braiton

Agency Telephone Number 808-4700

Printed Name of Data Master Operator S2 Braiton

Agency Telephone Number 808-4700

Blue Copy - Driver Yellow Copy - DMV/Driver Records Green Copy - Officer White Copy - Officer's Agency

Email = Andrew.desilet@yahoo.com

HEARING REQUEST:

I am requesting an administrative hearing. I understand that I must file my request with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the Notice of Suspension. I have a hearing and to obtain a temporary alcohol restricted license.

3-4-20

Date of Driver

15 N. Main St. Ct., Columbia, SC 29212 803-381-3484

Driver's Mailing Address, Phone Number, and Email Address for Notice

Jack Swerling
Your Attorney's Name

1720 Main St. #201, Columbia, SC 29201 803-265-2626

Attorney's Address, Phone Number, and Email Address

jack.law@aol.com

If you do not list your attorney's address, you must tell your attorney when your hearing is scheduled.

INSTRUCTIONS FOR USING THIS FORM TO REQUEST A HEARING

1. Complete this form and return it to the SC Office of Motor Vehicle Hearings, 1205 Pendleton St., Suite 225, Columbia, SC 29201. Your completed form and the fee must be either hand-delivered or mailed on or before the thirtieth (30th) day of the filing of this notice of suspension.
2. Place in a \$1.00 fee in the form's hearing (Personal checks are not accepted).
3. Bring or mail your completed form and the fee to the SC Office of Motor Vehicle Hearings, 1205 Pendleton St., Suite 225, Columbia, SC 29201. Your completed form and the fee must be either hand-delivered or mailed on or before the thirtieth (30th) day of the filing of this notice of suspension.

INSTRUCTIONS FOR REQUESTING A HEARING WHEN NOT USING THIS FORM

1. You may use the Official Notice letter you will receive from the DMV to request a hearing. However, the thirty (30) days to file begins at the time the original Notice of Suspension was issued to you. Be sure to include your mailing address, phone number, and email address, along with your attorney's mailing address, phone number, and email address.
2. There is a \$200.00 filing fee for a hearing. (Personal checks are not accepted.)
3. Without either form, you may submit a written request for a hearing. However, be aware the case will not be assigned and the request will not be forwarded to the DMV until the filing fee and either the Notice of Suspension or the Official Notice from the DMV have been received.
4. You must follow the time, delivery, and mailing instructions in the previous section.

INSTRUCTIONS FOR OBTAINING A TEMPORARY ALCOHOL RESTRICTED LICENSE

1. If you meet the criteria for requesting a hearing, you may be eligible for a non-commercial temporary alcohol restricted license. The fee for a temporary alcohol restricted license is \$100.00.
2. After you file your request for a hearing, the SC Department of Motor Vehicles will determine whether you are eligible for a temporary alcohol restricted license. If you are eligible, SC DMV will mail you a letter stating your eligibility.
3. If YOU ARE NOT A FULLY LICENSED DRIVER, you must take that letter to any SC DMV office in the state, pay the \$100.00 license fee, and have the temporary alcohol restricted license issued.
4. If YOU ARE A LICENSED DRIVER FROM ANOTHER STATE, you must take that letter and the \$100.00 license fee to the SC DMV, Special Services, 1205 Shop Road, Columbia, SC 29201, Suite 225, North of I-77 Exit 69. That office can issue the temporary alcohol restricted license. You may also mail that letter, a completed Driver's License Application (Form 4-1), a \$100.00 license fee, and the \$100.00 license fee to SC DMV, Driver Records, Box 1498, Blythewood, SC 29016-0028. That office will mail you the temporary alcohol restricted license.

INSTRUCTIONS FOR OBTAINING A ROUTE-RESTRICTED LICENSE

1. If you were suspended after having been arrested for DUI, you may be eligible for a non-commercial route-restricted license. Route-restricted licenses are not available in Class A, B or C commercial driver licenses.
2. A route-restricted license allows you to drive only to and from work, college, ADSAP classes, and a court-ordered drug program, plus during the course of your employment or college.
3. The fee for the route-restricted license is \$100.00. If you are licensed in another state, you must also pre-pay the \$100.00 reinstatement fee.
4. You must enroll in ADSAP before a route-restricted license will be issued.
5. You do not have to request a hearing to be eligible for a route-restricted license.
6. You must apply for a route-restricted license by submitting an application (Form 4-1) to the SC DMV. This application will be mailed to you with your suspension notice. It is also available on the Internet at www.scdmv.com.
7. You are advised to complete the application and bring it, with the \$100.00 license fee and the \$100.00 reinstatement fee, if you are licensed in another state, to SC DMV, Special Services, 1205 Shop Road, Columbia, SC 29201, Suite 225, North of I-77 Exit 69. Once the application and the route are approved, that office can issue the route-restricted license. You may also mail the application, a completed Driver's License Application (Form 4-1), available on the Internet at www.scdmv.com, the \$100.00 license fee (and the \$100.00 reinstatement fee if you are licensed in another state) to SC DMV, Driver Records, Box 1498, Blythewood, SC 29016-0028. Upon approval of the application and route, that office will mail you the route-restricted license.

ADSAP is an abbreviation for Alcohol and Drug Safety Action Program, which is operated under the direction of the SC Department of Alcohol and Other Drug Abuse Services (DAODAS). You must go to an ADSAP office to enroll. Numbers for ADSAP are in the County Government Section of most telephone directories. If you reside in another state, you can make arrangements to attend an equivalent program there.

*Law Offices of
Jack B. Swerling*

*Jack B. Swerling, Esq.
Allisa L. Wilson, Esq.*

*1120 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone 803-765-2626
Fax 803-799-4059*

August 17, 2020

VIA HAND-DELIVERY

Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

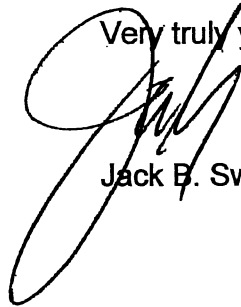
RE: South Carolina Department of Public Safety and South Carolina Department
of Motor Vehicles v. Andrew Davis Desilet
Docket No.: 20-OMVH-01-1160-CC

To Whom It May Concern:

Enclosed herewith please find a Notice of Appeal and a Proof of Service for filing in the above referenced matter. Also enclosed is a check representing the filing fee in the amount of \$150.00.

If you have any questions, do not hesitate to contact me.

Very truly yours,



Jack B. Swerling

JBS/ksr
Enclosures

cc: Trooper S. Z. Brazell, SCDPS
Clerk, South Carolina Office of Motor Vehicle Hearings
Office of General Counsel, South Carolina Department of Public Safety
Office of General Counsel, South Carolina Department of Motor Vehicles
Andrew D. Desilet

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

APPEAL FROM DIVISION OF OFFICE OF MOTOR VEHICLE HEARINGS
Samuel L. Johnson, OMVH Hearing Officer

Case No. 20-OMVH-01-1160-CC

South Carolina Department of Public Safety
and South Carolina Department of Motor Vehicles,

Respondent,

v.

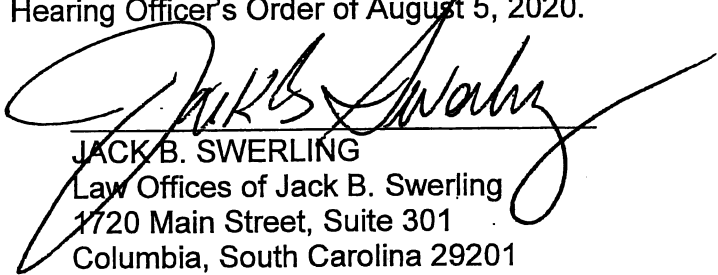
Andrew Davis Desilet,

Appellant.

NOTICE OF APPEAL

Andrew Davis Desilet appeals the attached Order upholding the suspension of his driver's license and driving privileges. The grounds for appeal are that (1) the ruling violates constitutional and statutory provisions, specifically S.C. Code Ann. §§ 56-5-2951 and 56-5-2953, as well as shifting the burden of proof to the Respondent; and (2) the decision is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. See S.C. Code Ann. § 1-23-380. Pursuant to S.C. Code Ann. § 56-5-2951(G) and Rule 34 of the Rules of Procedure for The Administrative Law Court, Andrew Davis Desilet requests a stay of the Hearing Officer's Order of August 5, 2020.

August 17, 2020



JACK B. SWERLING
Law Offices of Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
(803) 765-2626 phone
(803) 799-4059 facsimile
Attorney for the Appellant

Other Parties of Record:

Trooper S. Z. Brazell, SCDPS
Post C Headquarters
111 Maiden Lane
Lexington, SC 29072

Appellant:

Andrew Davis Desilet
15 N. Oak Court
Columbia, SC 29212

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

APPEAL FROM DIVISION OF OFFICE OF MOTOR VEHICLE HEARINGS
Samuel L. Johnson, OMVH Hearing Officer

Docket No. 20-OMVH-01-1160-CC

South Carolina Department of Public Safety
and South Carolina Department of Motor Vehicles,

Respondent,

v.

Andrew Davis Desilet,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties below by depositing a copy of said Notice of Appeal in the United States Mail, first-class postage prepaid, on August 17, 2020 addressed to the parties of record below:

Trooper S. Z. Brazell, SCDPS
Post C Headquarters
111 Maiden Lane
Lexington, SC 29072

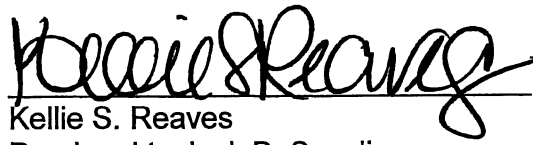
Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Attn: Clerk
South Carolina Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, SC 29201

Office of General Counsel
South Carolina Department of Public Safety
PO Box 1993
Blythewood, SC 29016

Office of General Counsel
South Carolina Department of Motor Vehicles
1205 Pendleton Street, Suite 325
Columbia, SC 29201

August 17, 2020

A handwritten signature in black ink, appearing to read "Kellie S. Reaves", written over a horizontal line.

Kellie S. Reaves
Paralegal to Jack B. Swerling



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Andrew Davis Desilet,

Appellant,

vs.

South Carolina Department of Motor Vehicles
and South Carolina Department of Public
Service,

Respondents.

NOTICE OF ASSIGNMENT
(Appeal)

DOCKET NO. 20-ALJ-21-0213-AP

NOTICE IS GIVEN that a notice of appeal seeking review of a decision of the Office of Motor Vehicle Hearings was filed on August 17, 2020. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2019), the **Honorable S. Phillip Lenski**, Administrative Law Judge, has been assigned to preside in this appeal. The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550. Pursuant to SCALC Rule 4A, all future filings must be filed directly with the above assigned Judge and shall include the docket number.

FURTHER, NOTICE IS GIVEN that the parties are required to meet the following deadlines, unless otherwise ordered by the assigned Administrative Law Judge:

Record on Appeal	Due within forty-five (45) days of the date of this Notice
Appellant's Brief	Due within thirty (30) days after the Record on Appeal is filed
Respondent's Brief	Due within thirty (30) days after the Appellant's Brief is filed
Reply Brief	Due within ten (10) days after the Respondent's Brief is filed

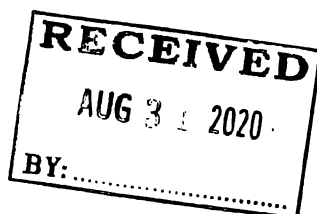
The parties are directed to the relevant provisions of the Rules of Procedure regarding these deadlines and other requirements applicable to the appeal process. Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net.

This the twenty-eighth day of August 2020.

Ralph King Anderson, III
Chief Administrative Law Judge

By: _____

Jana E. Shealy
Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201



FILED

AUG 28 2020

SC ADMIN. LAW COURT

**THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA**

Andrew Davis Desilit,
Appellant,

v.

South Carolina Department of Motor
Vehicles and South Carolina Department
of Public Safety,

Respondents.

Docket No. 20-ALJ-21-0213-AP
SCDL No. 101593325

**NOTICE OF MOTION
AND MOTION TO DISMISS**

TO: APPELLANT ANDREW DAVIS DESILIT AND HIS ATTORNEY, PLEASE TAKE NOTICE that Respondent South Carolina Department of Motor Vehicles ("SCDMV") will move before the Honorable Judge S. Phillip Lenski ten (10) days from this notice or as soon thereafter as the matter may be heard or determined, to dismiss the above-referenced action. The grounds of this motion are set forth below.

Rule 33 of the Rules of the Administrative Law Court directs that a party appealing from the decision of an agency file and serve on each other party and the agency whose final decision is subject to the appeal a copy of a Notice of Appeal within thirty (30) days of receipt of the decision from which the appeal is taken.

The record in this matter indicates the decision appealed from was rendered on April 5, 2020, and served on the parties by mail or email. R. p. 28-38. The appeal was filed on or about August 17, 2020, however, the SCDMV was not served with the Notice of Appeal as required by the ALC Rules. The Record on Appeal does contain a Proof of Service of the Notice of Appeal upon the SCDMV, but that Proof of Service lists an address that does not belong to the SCDMV as the place to which SCDMV's copy of the Notice of Appeal was mailed. R. p. 26-27. In fact, the Certificate of Service states that SCDMV's copy of the Notice of Appeal was mailed to "1205 Pendleton Street, Suite 325, Columbia, SC 29201," which is the address for the Office of Motor Vehicle Hearings, not an address for SCDMV. *Id.* The Office of Motor Vehicle Hearings is part of the Administrative Law Court. See S.C. Code §1-23-660. Significantly, SCDMV and the Administrative Law Court (and thus also the Office of Motor Vehicle Hearings) are two



separate state agencies. Therefore, serving SCDMV's copy of the Notice of Appeal on the Office of Motor Vehicle Hearings, even if it is addressed to SCDMV, does not constitute proper service on SCDMV. Additionally, SCDMV never received a copy of the Notice of Appeal from Appellant. The South Carolina Supreme Court has held "[T]he requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transportation*, 361 S.C. 9, 602 S.E. 2d 772, 775 (2004); See also *Southbridge Properties, Inc. v. Jones*, 292 S.C. 198, 355 S.E. 2d 535 (1987) (applying appellate court rules and dismissing case for failure to serve a notice of intent to appeal in a timely manner). Therefore, this court lacks appellate jurisdiction over this appeal and the appeal should be dismissed.

Rule 38 of the Rules of the Administrative Law Court provides that the Court may of its own motion or on motion from any party dismiss an appeal for the failure to comply with any rule of procedure for appeals.

Respondent SCDMV therefore moves to have this appeal dismissed for lack of jurisdiction and for the Appellant's failure to comply with the applicable Rules.

And we so move.



BRANDY A. DUNCAN, SC Bar # 72052

Assistant General Counsel

FRANK L. VALENTA, JR., SC Bar # 5682

General Counsel

PHILIP S. PORTER, SC Bar # 4526

Deputy General Counsel

South Carolina Department of Motor Vehicles

Post Office Box 1498

Blythewood, South Carolina 29016-0020

Telephone: 803.896.9900

Email: hearingsprocessingunit@scdmv.net

September 26, 2020

Blythewood, South Carolina

**THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA**

Andrew Davis Desilet,

Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety,

Respondents.

Docket No. 20-ALJ-21-0213-AP
SCDL No. 101593325

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 2020, I mailed, via USPS first class mail, a true and correct copy of the foregoing *Notice of Motion and Motion to Dismiss* upon the following:

Jack B. Swerling, Esquire
Law Offices of Jack B. Swerling
1701 Main Street, Suite 301
Columbia, South Carolina 29201

As Counsel of Record for the Appellant, and upon:

Teckla Henderson, Deputy General Counsel
South Carolina Department of Public Safety
P. O. Box 1993
Blythewood, South Carolina @9016

As Counsel of Record for the South Carolina Department of Public Safety.



Brandy A. Duncan
Assistant General Counsel

Blythewood, South Carolina

*Law Offices of
Jack B. Swerling*

*Jack B. Swerling, Esq.
Missa L. Wilson, Esq.*

*1120 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone 803-765-2626
Fax 803-739-4059*

October 2, 2020

The Honorable S. Phillip Lenski
Administrative Law Judge
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

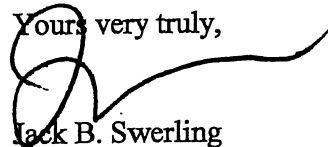
RE: *Appellant's Response to Respondent's Motion to Dismiss
Andrew Davis Desilet vs. South Carolina Department of Motor Vehicles and South
Carolina Department of Public Safety*
Docket No.: 20-ALJ-21-0213-AP
OMVH Docket No.: 20-OMVH-01-1160-CC
SCDL No.: 101593325

Dear Judge Lenski:

In regard to the above-referenced matter, please find one original and one copy of Appellant's Response to Respondent's Motion to Dismiss enclosed for filing. As shown by the attached Certificate of Service, I am serving the parties with a copy of same. I respectfully request your clerk file the original and return a clocked copy to me in the enclosed self-addressed stamped envelope.

Please feel free to contact my office with any questions or concerns.

Yours very truly,


Jack B. Swerling

Enclosures

cc: Brandy A. Duncan, Assistant General Counsel, SCDMV
Teckla Henderson, Deputy General Counsel, SCDPS
Trooper S. Z. Brazell, SCDPS
Office of Motor Vehicle Hearings

THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA

ANDREW DAVIS DESILET,

Appellant

vs.

SOUTH CAROLINA DEPARTMENT
OF MOTOR VEHICLES AND SOUTH
CAROLINA DEPARTMENT OF
PUBLIC SAFETY,

Respondents.

Docket No.: 20-ALJ-21-0213-AP
SCDL No. 101593325

**APPELLANT'S RESPONSE
TO RESPONDENT'S
MOTION TO DISMISS**

The Appellant through counsel responds as follows:

Rule 33 of the Rules of the Administrative Law Court directs that a party appealing from the decision of an agency, file and serve on each other party and the agency whose final decision is subject to the appeal, a copy of the Notice of Appeal within thirty (30) days of receipt of the decision from which the appeal is taken.

The decision appealed from was rendered on August 5, 2020, not April 5, 2020 as written in the Respondent's Motion to Dismiss. The Notice of Appeal was timely filed on or about August 17, 2020. The Record on Appeal contains Proof of Service of the Notice of Appeal upon the South Carolina Department of Motor Vehicles, the Trooper, the South Carolina Administrative Law Court, and the Office of General Counsel of the South Carolina Department of Public Safety; however it appears that the South Carolina Department of Motor Vehicles' copy of the Notice of Appeal was inadvertently sent to 1205 Pendleton Street in Columbia, the Office of Motor Vehicle Hearings.

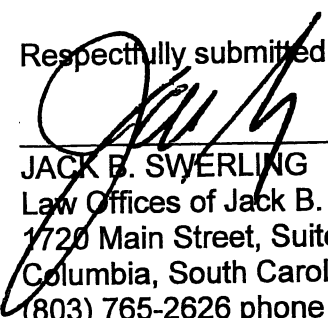
The Notice of Appeal was timely and properly filed and all the above referenced parties were properly served, however the failure to serve the Department of Motor

Vehicles at the correct address was based on an inadvertent clerical error. It appears that the Department of Motor Vehicles did become aware of the Notice of Appeal since the Department filed the Motion to Dismiss. The Department of Motor Vehicles has not been prejudiced by this inadvertent clerical error in the mailing of the Notice of Appeal to the Office of Motor Vehicle Hearings to the wrong address. Furthermore, the Department of Motor Vehicles mailed the Motion to Dismiss to 1701 Main Street, Columbia, SC which is the address of the Richland County Courthouse. Counsel's address is 1720 Main Street, Columbia, SC and counsel has still not received a hard copy by mail of the Motion to Dismiss because of the address issue. (Counsel acknowledges receipt of the Motion to Dismiss by email). Counsel points this out to show that inadvertent mistakes happen and since the Notice of Appeal was filed and served on all parties by mail except the Department of Motor Vehicles, the Department should not be held to any less standard than Appellant.

The Department refers to *Elam v. SC Department of Transportation*, 602 S.E. 2d 772 (2004) for the proposition that the filing and service of the Notice of Appeal on all parties is jurisdictional. In *Weatherford v. Price*, 532 S.E. 2d 310 (Ct. App. 2000), the Court of Appeals held that a clerical error in the Notice of Appeal does not warrant dismissal of the appeal, especially where counsel demonstrates no prejudice as a result.

Wherefore, counsel prays that the Respondent's Motion be dismissed.

Respectfully submitted,



JACK B. SWERLING
Law Offices of Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
(803) 765-2626 phone
(803) 799-4059 facsimile
Attorney for the Appellant

Columbia, South Carolina
October 1, 2020

ANDREW DAVIS DESILET,

Appellant

vs.

SOUTH CAROLINA DEPARTMENT
OF MOTOR VEHICLES AND SOUTH
CAROLINA DEPARTMENT OF
PUBLIC SAFETY,

Respondents.

CERTIFICATE OF SERVICE

**Attn: Clerk
South Carolina Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201**

Trooper S. Z. Brazell, SCDPS
Post C Headquarters
111 Maiden Lane
Lexington, South Carolina 29072

A handwritten signature in black ink, appearing to read 'Alissa Wilson', written over a horizontal line.

Alissa L. Wilson, Esq.
Associate Attorney

October 2, 2020

*Law Offices of
Jack B. Swerling*

*Jack B. Swerling, Esq.
Alisa L. Wilson, Esq.*

*1120 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone 803-765-2626
Fax 803-739-4059*

October 5, 2020

The Honorable S. Phillip Lenski
Administrative Law Judge
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

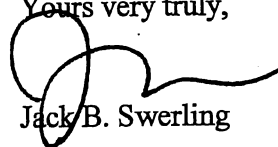
RE: *Notice of Appeal with Corrected Service Address*
Andrew Davis Desilet vs. South Carolina Department of Motor Vehicles and South
Carolina Department of Public Safety
Docket No.: 20-ALJ-21-0213-AP
OMVH Docket No.: 20-OMVH-01-1160-CC
SCDL No.: 101593325

Dear Judge Lenski:

In regard to the above-referenced matter, Appellant has resent the Notice of Appeal to all listed parties in order to ensure receipt by all parties.

Please feel free to contact my office with any questions or concerns.

Yours very truly,



Jack B. Swerling

Enclosures

cc: Brandy A. Duncan, Assistant General Counsel, SCDMV
Teckla Henderson, Deputy General Counsel, SCDPS
Trooper S. Z. Brazell, SCDPS
Office of Motor Vehicle Hearings

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

APPEAL FROM DIVISION OF OFFICE OF MOTOR VEHICLE HEARINGS
Samuel L. Johnson, OMVH Hearing Officer

Case No. 20-OMVH-01-1160-CC

South Carolina Department of Public Safety
and South Carolina Department of Motor Vehicles,

Respondent,

v.

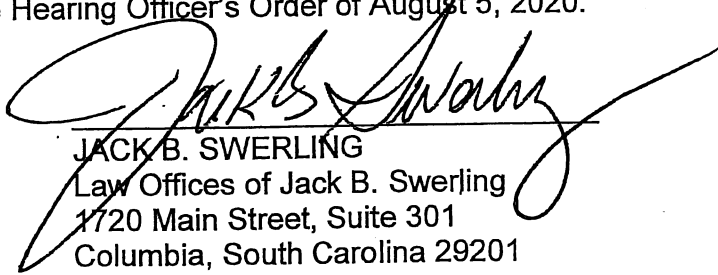
Andrew Davis Desilet,

Appellant.

NOTICE OF APPEAL

Andrew Davis Desilet appeals the attached Order upholding the suspension of his driver's license and driving privileges. The grounds for appeal are that (1) the ruling violates constitutional and statutory provisions, specifically S.C. Code Ann. §§ 56-5-2951 and 56-5-2953, as well as shifting the burden of proof to the Respondent; and (2) the decision is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. See S.C. Code Ann. § 1-23-380. Pursuant to S.C. Code Ann. § 56-5-2951(G) and Rule 34 of the Rules of Procedure for The Administrative Law Court, Andrew Davis Desilet requests a stay of the Hearing Officer's Order of August 5, 2020.

August 17, 2020



JACK B. SWERLING
Law Offices of Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
(803) 765-2626 phone
(803) 799-4059 facsimile
Attorney for the Appellant

Other Parties of Record:

Trooper S. Z. Brazell, SCDPS
Post C Headquarters
111 Maiden Lane
Lexington, SC 29072

Appellant:

Andrew Davis Desilet
15 N. Oak Court
Columbia, SC 29212

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

APPEAL FROM DIVISION OF OFFICE OF MOTOR VEHICLE HEARINGS
Samuel L. Johnson, OMVH Hearing Officer

Docket No. 20-OMVH-01-1160-CC

South Carolina Department of Public Safety
and South Carolina Department of Motor Vehicles,

Respondent,

v.

Andrew Davis Desilet,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties below by depositing a copy of said Notice of Appeal in the United States Mail, first-class postage prepaid, on October 5, 2020 addressed to the parties of record below:

Trooper S. Z. Brazell, SCDPS
Post C Headquarters
111 Maiden Lane
Lexington, SC 29072

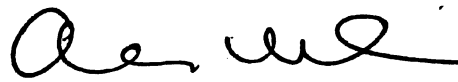
Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Attn: Clerk
South Carolina Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, SC 29201

Teckla Henderson, Deputy General Counsel
South Carolina Department of Public Safety
PO Box 1993
Blythewood, SC 29016

Brandy Duncan, Assistant General Counsel
South Carolina Department of Motor Vehicles
PO Box 1498
Blythewood, SC 29016

October 5, 2020

A handwritten signature in black ink, appearing to read 'Alissa Wilson', written over a horizontal line.

Alissa Wilson, Esq.
Associate Attorney

**THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA**

Andrew Davis Desilit,
Appellant,

v.

South Carolina Department of Motor
Vehicles and South Carolina Department
of Public Safety,

Respondents.

Docket No. 20-ALJ-21-0213-AP
SCDL No. 101593325

**AMENDED NOTICE OF MOTION
AND MOTION TO DISMISS**

TO: APPELLANT ANDREW DAVIS DESILIT AND HIS ATTORNEY, PLEASE TAKE NOTICE that Respondent South Carolina Department of Motor Vehicles ("SCDMV") will move before the Honorable Judge S. Phillip Lenski ten (10) days from this notice or as soon thereafter as the matter may be heard or determined, to dismiss the above-referenced action. The grounds of this **amended motion** are set forth below. **This amended motion is filed to correct a typo in the original motion regarding the date of issuance of the final decision in the lower court. All additions and/or amendments from the original motion are placed in bold print to assist the Court and parties in their review of the changes.**

Rule 33 of the Rules of the Administrative Law Court directs that a party appealing from the decision of an agency file and serve on each other party and the agency whose final decision is subject to the appeal a copy of a Notice of Appeal within thirty (30) days of receipt of the decision from which the appeal is taken.

The record in this matter indicates the decision appealed from was rendered on **August 5, 2020**, and served on the parties by mail or email. R. p. 28-38. The appeal was filed on or about August 17, 2020, however, the SCDMV was not served with the Notice of Appeal as required by the ALC Rules. The Record on Appeal does contain a Proof of Service of the Notice of Appeal upon the SCDMV, but that Proof of Service lists an address that does not belong to the SCDMV as the place to which SCDMV's copy of the Notice of Appeal was mailed. R. p. 26-27. In fact, the Certificate of Service states that SCDMV's copy of the Notice of Appeal was mailed to "1205 Pendleton Street, Suite 325, Columbia, SC 29201," which is the address for the Office

of Motor Vehicle Hearings, not an address for SCDMV. *Id.* The Office of Motor Vehicle Hearings is part of the Administrative Law Court. See S.C. Code §1-23-660. Significantly, SCDMV and the Administrative Law Court (and thus also the Office of Motor Vehicle Hearings) are two separate state agencies. Therefore, serving SCDMV's copy of the Notice of Appeal on the Office of Motor Vehicle Hearings, even if it is addressed to SCDMV, does not constitute proper service on SCDMV. Additionally, SCDMV never received a copy of the Notice of Appeal from Appellant. The South Carolina Supreme Court has held "[T]he requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transportation*, 361 S.C. 9, 602 S.E. 2d 772, 775 (2004); See also *Southbridge Properties, Inc. v. Jones*, 292 S.C. 198, 355 S.E. 2d 535 (1987) (applying appellate court rules and dismissing case for failure to serve a notice of intent to appeal in a timely manner). Therefore, this court lacks appellate jurisdiction over this appeal and the appeal should be dismissed.

Rule 38 of the Rules of the Administrative Law Court provides that the Court may of its own motion or on motion from any party dismiss an appeal for the failure to comply with any rule of procedure for appeals.

Respondent SCDMV therefore moves to have this appeal dismissed for lack of jurisdiction and for the Appellant's failure to comply with the applicable Rules.

And we so move.

S/

BRANDY A. DUNCAN, SC Bar # 72052

Assistant General Counsel

FRANK L. VALENTA, JR., SC Bar # 5682

General Counsel

PHILIP S. PORTER, SC Bar # 4526

Deputy General Counsel

South Carolina Department of Motor Vehicles

Post Office Box 1498

Blythewood, South Carolina 29016-0020

Telephone: 803.896.9900

Email: hearingsprocessingunit@scdmv.net

October 5, 2020

Blythewood, South Carolina

**THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA**

Andrew Davis Desilet,

Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety,

Respondents.

Docket No. 20-ALJ-21-0213-AP
SCDL No. 101593325

CERTIFICATE OF SERVICE

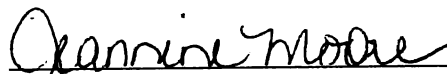
I HEREBY CERTIFY that on November 10, 2020, I mailed, via USPS first class mail, a true and correct copy of the foregoing *Amended Notice of Motion and Motion to Dismiss* upon the following:

Jack B. Swerling, Esquire
Law Offices of Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201

As Counsel of Record for the Appellant, and upon:

Teckla Henderson, Deputy General Counsel
South Carolina Department of Public Safety
P. O. Box 1993
Blythewood, South Carolina 29016

As Counsel of Record for the South Carolina Department of Public Safety.



Jeannine Moore, Paralegal
Office of General Counsel

Blythewood, South Carolina

042

I. STATEMENT OF THE ISSUES ON APPEAL

1. Did the Hearing Officer err in holding that Trooper S. Z. Brazell of the South Carolina Department of Public Safety did not have to produce the video recording from the incident site (S.C. Code Ann. § 56-5-2953(A)(1)(a)), or an Affidavit as to why there was no video recording at the incident site (S.C. Code Ann. § 56-5-2953(B)) in order to establish that the Respondent was "lawfully arrested or detained", as required by S.C. Code Ann. § 56-5-2951(F)(1).

2. Did the Hearing Officer err in holding that Trooper S. Z. Brazell had no burden to produce the video from the breath site, 56-5-2953(A)(2), in order to satisfy the Respondent's burden of proof under S.C. Code Ann. § 56-5-2951(F)(2) that the Appellant was given a written copy of and informed of the rights enumerated in S.C. Code Ann. § 56-5-2950.

3. Did the Hearing Officer err in holding that it was the Appellant's burden to subpoena the video or the Affidavit as to why there was no video from the incident site, or the video and written implied consent warnings from the breath site.

II. STATEMENT OF THE CASE

The Respondent, Andrew Davis Desilet, was arrested on March 1, 2020 for driving a motor vehicle while under the influence of alcohol, drugs or a combination of alcohol and drugs in violation of S.C. Code Ann. § 56-5-2950 (2018). Upon his alleged refusal to submit to a breath, blood, or urine test, the Respondent received a notice of suspension, and thereafter on March 4, 2020 requested a hearing on the suspension from the Office of Motor Vehicle Hearings (OMVH).

Samuel L. Johnson of the OMVH was assigned the case and conducted a hearing on August 4, 2020. On August 5, 2020, Mr. Johnson issued an Order that upheld the suspension of the Respondent's driver's license or driving privilege.

On August 17, 2020, the Respondent served and filed a Notice of Appeal. (ROA 24).

The nature of the of the defense or response is set forth in the Statement of Issues on Appeal and Argument below.

III. ARGUMENT

A. SUMMARY OF EVIDENCE

Trooper Brazell testified that he was patrolling on Interstate 26 near Piney Grove Road in Lexington County. He got behind the Appellant and noticed that Appellant's vehicle was having a hard time maintaining its lane of travel. He activated his in-car camera and followed the vehicle for two miles as the vehicle weaved in and out of the emergency lane, and in and out of his lane of travel. Trooper Brazell initiated a traffic stop and approached the vehicle being driven by Appellant. The Trooper smelled an odor of alcohol on

Appellant's breath and Appellant stated he had a few drinks. The Trooper also noticed that Appellant's eyes were red and glossy. Appellant consented to the administration of field sobriety tests. (ROA 8).

Trooper Brazell testified he performed the HGN Test and noticed HGN in Appellant's eyes and again noticed red, glossy eyes and the odor of alcohol. Appellant attempted the one leg stand and Appellant was unsteady on his feet, had to use his arms for balance, had to start the test several times and almost fell over on the side of the roadway according to the Trooper. (ROA 9).

The Appellant was placed under arrest for driving under the influence and transported to the Lexington County Detention Center. The Trooper testified that he advised the Appellant of his implied consent rights on video and waited the appropriate time and Appellant refused the test. (ROA 9).

The Trooper testified that he discovered that the video camera from the incident site had malfunctioned and was not recording the Appellant's driving, the stop, the advise of rights or the field sobriety tests. He stated that he prepared an Affidavit as to why there was no video available as required by S.C. Code Ann. § 56-5-2953(B) and turned it over to the Solicitor and did not have it present at the hearing. (ROA 11-12). He argued that counsel for Appellant could have gotten the material from the Solicitor. (ROA 16). Counsel for Appellant argued that he had requested discovery, but had never received it. (ROA 13). The Hearing Officer also stated that counsel for Appellant could have subpoenaed the documents (ROA 15). Counsel for Appellant argued that the Appellant had no burden and the burden was solely on the Respondent to produce evidence, and the burden could not be shifted to the Appellant as to whether this was a lawful arrest.

(ROA 15). Similar arguments were made by both sides as to the Trooper failing to produce the video of the test sight or the written implied consent warnings at the hearing. (ROA 14).

B. APPEAL ISSUE 1 — Did the Hearing Officer err in holding that Trooper S. Z. Brazell of the South Carolina Department of Public Safety did not have to produce the video recording from the incident site (S.C. Code Ann. § 56-5-2953(A)(1)(a)), or an Affidavit as to why there was no video recording from the incident site (S.C. Code Ann. § 56-5-2953(B)) in order to establish that the Respondent was “lawfully arrested or detained”, as required by S.C. Code Ann. § 56-5-2951(F)(1).

Pursuant to S.C. Code Ann. § 56-5-2951(F)(1), the scope of the hearing before the Hearing Officer is limited inter alia as to whether an individual “was lawfully arrested or detained.”

The Appellant maintains that S.C. Code Ann. § 56-5-2951(F)(1) and S.C. Code Ann. § 56-5-2953(A)(1)(a)(i-iii) should be read together in determining whether an individual “was lawfully arrested or detained.” S.C. Code Ann. § 56-5-2953 requires that a person who violates S.C. Code Ann. § 56-5-2930 must have his conduct video recorded and the video recording must begin no later than the activation of the officer’s blue lights, include any field sobriety tests administered, include the arrest of the person for a violation of S.C. Code Ann. § 56-5-2930, and include the person being advised of his Miranda rights.

If the video is not available the officer must produce an Affidavit certifying that the video equipment at the time of arrest or probable cause determination was inoperable. Here the Trooper failed to produce the video recording or Affidavit, and thus the Respondent failed to establish that the Appellant was “lawfully arrested or detained” as required by S.C. Code Ann. § 56-5-2951(F)(1).

C. APPEAL ISSUE 2 — Did the Hearing Officer err in holding that Trooper S. Z. Brazell had no burden to produce the video from the breath site, 56-5-2953(A)(2), in order to satisfy the Respondent's burden of proof under S.C. Code Ann. § 2951(F)(2) that the Appellant was given a written copy of and informed of the rights enumerated in S.C. Code Ann. § 56-5-2950.

Neither the video recording at the breath test site, nor a written copy of the rights enumerated in S.C. Code Ann. § 56-5-2950 were admitted during the hearing. S.C. Code Ann. § 56-5-2953(A)(2)(a-c) requires that a video recording must be made at the breath test site which would show the entire breath test procedure, the person being informed that he is being video recorded, that he has a right to refuse the test, the person taking or refusing to take the test and the person's conduct during the twenty minute waiting period. Pursuant to S.C. Code Ann. § 56-5-2951(F)(2)(3), the issues that the Respondent must prove are that the person was given a written copy of and verbally informed of the rights enumerated in S.C. Code Ann. § 56-5-2950. As a result of the failure to produce the video recording or the written advice of rights under S.C. Code Ann. § 56-5-2950(B)(1-5), the Respondent failed in its burden of proof to establish what was required in S.C. Code Ann. § 56-5-2951(F)(1-4).

D. APPEAL ISSUE 3 — Did the Hearing Officer err in holding that it was the Appellant's burden to subpoena the video or the Affidavit as to why there was no video from the incident site, or the video and written implied consent warnings from the breath site.

Both the Hearing Officer and the Trooper referenced the fact that the Affidavit regarding the video recording from the incident site, and the video recording from the test site as well as the written advise of rights under S.C. Code Ann. § 56-5-2950(B)(1-5) could have been picked up from the Solicitor or subpoenaed by the Appellant.

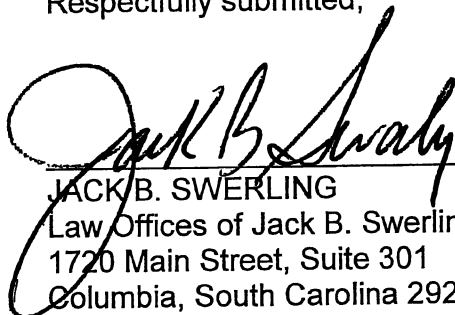
Counsel for the Appellant stated at the hearing that he had filed a Rule 5 Discovery

Motion, but nothing had been produced by the Solicitor and that further the burden of proof at the hearing before the Hearing Officer was upon the Respondent to prove compliance with S.C. Code Ann. § 56-5-2951(F)(1-5). Pursuant to 15(B) of the Rules of Procedure for OMVH, the burden of proof is upon the Department of Motor Vehicles and that burden is proof by a preponderance of the evidence. Requiring the Appellant to come forward with the proof would constitute improper burden shifting.

IV. CONCLUSION

Based on the Arguments set forth above, the Appellant submits that the Respondent failed to establish by a preponderance that the requirements under S.C. Code Ann. § 56-5-2951(F)(1-5) were met. Therefore, Appellant requests that the Hearing Officer's Order of August 5, 2020 be reversed and his driving privileges reinstated.

Respectfully submitted,



JACK B. SWERLING
Law Offices of Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
(803) 765-2626 phone
(803) 799-4059 facsimile
Email: jacklaw@aol.com

Attorney for Appellant

Columbia, South Carolina
October 21, 2020

049

Trooper S. Z. Brazell, SCDPS
Post C Headquarters
111 Maiden Lane
Lexington, South Carolina 29072


KELLIE S. REAVES
Paralegal to Jack B. Swerling

October 21, 2020
Columbia, South Carolina

FILED

OCT 21 2020

SC ADMIN. LAW COURT

RECEIVED

Jan 05 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 20-ALJ-21-0213-AP

Andrew Davis Desilet, Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety, Respondents.

NOTICE OF APPEAL

Appellant files this Notice of Appeal in regard to the attached Order filed with the South Carolina Administrative Law Court on December 18, 2020, and in which Appellant received from the Court on December 21, 2020. The attached Order is the ruling of Judge S. Phillip Lenski, Presiding Judge of the Administrative Law Court, granting the Department of Motor Vehicle's Motion to Dismiss for Appellant's failure of service of Notice of Appeal.

s/Larry C. Marchant, Jr., SC Bar 102071 
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larry@larrycmarchant.com
ATTORNEY FOR APPELLANT

January 5, 2021
Columbia, South Carolina

RECEIVED

Jan 05 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 20-ALJ-21-0213-AP

Andrew Davis Desilet, Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety, Respondents.

PROOF OF SERVICE

I certify that I served the Notice of Appeal on the Respondents, and the Administrative Law Court, by depositing a copy of it in the United States Mail, postage prepaid, on January 5, 2021, addressed as follows:

The Honorable S. Phillip Lenski
SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Jana E. Shealy, Clerk
SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Teckla Henderson, Esq.
SC Department of Public Safety
P.O. Box 1993
Blythewood, South Carolina 29016

Brandy Duncan, Esq.
SC Department of Motor Vehicles
P.O. Box 1498
Blythewood, South Carolina 29016

s/Larry C. Marchant, Jr., SC Bar 102071

1720 Main Street, Suite 301

Columbia, South Carolina 29201

Telephone: 803-771-1507

Facsimile: 803-771-9752

Email: larry@larrycmarchant.com

ATTORNEY FOR APPELLANT

January 5, 2021
Columbia, South Carolina

RECEIVED

Jan 05 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 20-ALJ-21-0213-AP

Andrew Davis Desilet, Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety, Respondents.

MOTION TO STAY ORDER PENDING APPEAL

Appellant hereby respectfully moves before this Honorable Court to grant an Order to Stay the Decision of the Administrative Law Court to grant Respondents' Motion to Dismiss, pending the resolution of the appeal filed with this Court January 5, 2021.

On or about August 5, 2020, the Office of Motor Vehicle Hearings (OMVH) issued its Final Order and Decision on a contested case hearing regarding the suspension of Appellant's driving privileges.

On or about August 17, 2020, Appellant timely filed a Notice of Appeal with the South Carolina Administrative Law Court.

Notice of the Appeal was also timely mailed to the South Carolina Department of Motor Vehicles, the South Carolina Department of Public Safety, and the State Trooper. However, the South Carolina Department of Motor Vehicles notice, while clearly

addressed to the South Carolina Department of Motor Vehicles, was inadvertently mailed to 1205 Pendleton Street in Columbia, which is the Office of the South Carolina Administrative Law Court.

Both the South Carolina Department of Public Safety and the South Carolina Department of Motor Vehicles share the same location at 10311 Wilson Boulevard, Blythewood, South Carolina 29016.

Appellant is informed and believes the South Carolina Department of Motor Vehicles received the Notice of Appeal as evidenced by the Assistant Legal Counsel of the South Carolina Department of Motor Vehicles is whom filed of Motion to Dismiss.

Because Appellant filed the Notice of Appeal less than two weeks of the Final Order, Appellant is informed and believes if the Notice of Appeal to the South Carolina Department of Motor Vehicles would have been returned to sender, as normally the procedure with incorrect or wrong address, the clerical mistake could have been cured well within the time period required under the rules.

However, the Notice of Appeal was never returned to Appellant and therefore Appellant was not aware of the inadvertent mistake. Appellant did not become aware of the clerical mistake until the Department of Motor Vehicles filed the Motion to Dismiss months later.

Appellant is informed and believes the Department of Motor Vehicles cannot show prejudice as to the Appellant's clerical error, as they obviously were in receipt of the Notice of Appeal as they were the party that filed the Motion to Dismiss.

Appellant is informed and believes the inadvertent mistake as to the address of the South Carolina Department of Motor Vehicle's Notice of Appeal was a clerical error and did not warrant the dismissal of the Appeal.

In *Weatherford v. Price*, 532 S.E. 2d 310 (Ct. app. 2000), the Court held that a clerical error in the Notice of Appeal does not warrant dismissal of the appeal, especially where counsel demonstrates no prejudice as a result.

Furthermore, the South Carolina Department of Motor Vehicle also made an inadvertent mistake when they incorrectly mailed their Motion to Dismiss to the wrong address, sending it to the Richland County Courthouse at 1701 Main Street, instead of Appellant Counsel's correct address of 1720 Main Street.

Wherefore, the Appellant asks this Honorable Court to Stay the Order of the Administrative Law Court to Dismiss Appellant's Appeal of the Final order and Decision by the Office of Motor Vehicles until such time as this Court has made a final decision on this case. This Motion will be supported by subsequent filings, memoranda of law, statutory and case law as well as any oral argument to be presented by counsel at a hearing in this matter.

s/Larry C. Marchant, Jr., SC Bar 102071 
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larry@larrycmarchant.com
ATTORNEY FOR APPELLANT

January 5, 2021
Columbia, South Carolina

RECEIVED

Jan 05 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 20-ALJ-21-0213-AP

Andrew Davis Desilet, Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety, Respondents.

PROOF OF SERVICE

I certify that I served the Motion to Stay Order Pending Appeal on the Respondents, and the Administrative Law Court, by depositing a copy of it in the United States Mail, postage prepaid, on January 5, 2021, addressed as follows:

The Honorable S. Phillip Lenski
SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Jana E. Shealy, Clerk
SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Teckla Henderson, Esq.
SC Department of Public Safety
P.O. Box 1993
Blythewood, South Carolina 29016

Brandy Duncan, Esq.
SC Department of Motor Vehicles
P.O. Box 1498
Blythewood, South Carolina 29016

s/Larry C. Marchant, Jr., SC Bar 102071
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larry@larrycmarchant.com
ATTORNEY FOR APPELLANT

January 5, 2121
Columbia, South Carolina

RECEIVED

Feb 22 2021

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Appellate Case No.: 2021-000007

Andrew Davis Desilet, Appellant,

vs.

South Carolina Department of Motor Vehicles
South Carolina Department of Public Safety..... Respondents.

MOTION FOR EXTENSION OF TIME TO FILE INITIAL BRIEF

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rules 208, 209, 240, and 263(b) of the South Carolina Appellate Court Rules, the Appellant Andrew Davis Desilet, by and through his undersigned attorney, moves for an Order granting an additional thirty (30) day extension of time within which to file the Initial Brief of Appellant and Designation of Matter—through March 24, 2021. This motion is the Appellant’s first request for extension and is made on the grounds that the undersigned counsel has had other deadlines, depositions, hearings, and other case commitments arise unavoidably over the past several weeks, and proper preparation for which has precluded counsel’s ability to devote the requisite time to the research and drafting of the Initial Brief of Appellant. Furthermore, counsel has faced several delays in other matters due to issues arising from COVID-19, thus counsel needs the additional time requested herein to properly present focused and cogent arguments.

[SIGNATURE BLOCK TO FOLLOW]

BY: s/ Larry C. Marchant, Jr.
S.C. Bar No. 102071
1720 Main St., Suite 301
Columbia, SC 29201
(t)(803) 771-1507; (f)(803) 771-9752
larry@larrycmarchant.com
ATTORNEY FOR APPELLANT

February 22, 2021

RECEIVED

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SC Court of Appeals

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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Andrew Davis Desilet, Appellant,

vs.

**South Carolina Department of Motor Vehicles
South Carolina Department of Public Safety..... Respondents.**

PROOF OF SERVICE

I, Larry C. Marchant, attorney for the Appellant, do hereby certify that I have served the following with the foregoing **MOTION FOR EXTENSION OF TIME TO FILE INITIAL BRIEF**, by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to them at the following address:

The Honorable S. Phillip Lenski
SC Administrative Law Court
1205 Pendleton St., Suite 224
Columbia, SC 29201

Jana E. Shealy, Clerk
SC Administrative Law Court
1205 Pendleton St., Suite 224
Columbia, SC 29201

Teckla S. Henderson, Esq.
SC Dept. of Public Safety
PO Box 1993
Blythewood, SC 29016

Brandy Duncan, Esq.
SC Dept. of Motor Vehicles
PO Box 1498
Blythewood, SC 29016

On this 22nd day of February 2021, all in accordance with Rule 5(b)(1) of the South Carolina Rules of Civil Procedure.

BY: s/ Larry C. Marchant, Jr.
S.C. Bar No. 102071
1720 Main St., Suite 301
Columbia, SC 29201
(t)(803) 771-1507; (f)(803) 771-9752
larry@larrycmarchant.com
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
20-OMVH-01-1160-CC

South Carolina Department of
Public Safety and South Carolina
Department of Motor Vehicles

Petitioner,

vs.

Andrew Davis Disilent,

Respondent.

HEARING

ORIGINAL

Tuesday, August 4, 2020

The Office of Motor Vehicle Hearing was held
before the Honorable Samuel Johnson, Hearing Officer,
in Columbia, South Carolina on the 4th day of August,
2020.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

APPEARANCES

Hearing Officer:

The Honorable Samuel Johnson

Trooper S. Z. Brazell (ph)

South Carolina Highway Patrol

Jack B. Swerling, Esquire

Attorney at Law

1720 Main Street, Suite 301

Columbia, South Carolina 29201

Attorney for Respondent

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OPENING REMARKS:

HEARING OFFICER: All right. We're now on the record. This is case number 20-OMVH-01-1160-CC in the matter of the South Carolina Department of Public Safety and the South Carolina Department of Motor Vehicles. Petitioners versus Andrew Davis Disilent, Respondent. My name is Samuel Johnson. I've been appointed by the Chief Judge of the Administrative Law Court to conduct this hearing on behalf of the South Carolina Office of Motor Vehicle Hearings. We're here in Columbia, South Carolina. It's August the 4th, 2020. Present on behalf of Petitioners is Trooper S. Z. Brazell (ph). On behalf of Respondent is his attorney, Jack Swerling. All right. Anything before we get started? All right. Trooper Brazell will you please raise your right hand. Do you solemnly swear or affirm that the testimony your about to provide will the truth, the whole truth and nothing but the truth so help you God?

TROOPER BRAZELL: I do.

HEARING OFFICER: All right. Can you state your name for the record?

TROOPER BRAZELL: Trooper S. Z. Brazell.



1 HEARING OFFICER: All right. Go ahead.

2 TROOPER S. Z. BRAZELL, having been duly sworn,
3 testifies as follows:

4 TROOPER BRAZELL - DIRECT TESTIMONY:

5 TROOPER BRAZELL: Yes, sir. On March the 1st, 2020,
6 0400 hours I was patrolling on Interstate 26
7 near the Piney Grove, St. Andrews exit -- which
8 is in Lexington County, South Carolina -- I got
9 behind a Kia sedan that was having a hard time
10 maintaining their lane. I activated my in car
11 camera and followed the vehicle for
12 approximately two miles, initiated a traffic
13 stop at the 104 westbound exit which is Piney
14 Grove. At that point in time I approached the
15 vehicle, identified the driver as Mr. Andrew
16 Desilent. He was a sole occupant of the
17 vehicle. Upon asking him for his driver's
18 license I could smell an odor of alcohol coming
19 from his breath. I then asked him if he had
20 any alcohol. He stated that he had had a few
21 drinks and that he was trying to make it back
22 home to his address which was only a few more
23 miles down the road. I observed his eyes to be
24 red and glossy and asked Mr. Desilent if he was
25 willing to submit to a field sobriety. At that



1 point in time he did. Upon field sobriety I
2 observed (inaudible) in both eyes. I observed
3 his red -- his red glossy eyes. I could smell
4 the odor of alcohol coming from his breath.
5 Upon conducting the one leg stand Mr. Desilent
6 was extremely unsteady on his feet having to
7 use his use balance, having to start over
8 several times and almost falling over on the
9 side of the roadway at that point in time.
10 There was enough clues present for me to place
11 Mr. Desilent under arrest for driving under the
12 influence. I transported him to the Lexington
13 County Detention Center where we -- where he
14 was read his implied consent rights. After the
15 20 minute observation period was up Mr.
16 Desilent refused to provide a breath sample,
17 and he was charged with DUI first offense.

18 **HEARING OFFICER:** All right. Is that it?

19 **TROOPER BRAZELL:** Yes, sir.

20 **HEARING OFFICER:** All right. Any questions, Mr.
21 Swerling?

22 **TROOPER BRAZELL - CROSS-EXAMINATION BY MR. SWERLING:**

23 **Q:** The original reason for the stop was what?

24 **A:** He was failure to maintain the lane. He was
25 seen weaving. He was seen inside the emergency



1 lane weaving in and out of his traffic lane.
2 I followed Mr. Desilent for approximately two
3 miles and observed him doing this before I
4 initiated a traffic stop.

5 Q: All right. And I understand that there is no
6 video available for the -- you following him or
7 stopping him or any field sobriety test on the
8 random one; is that correct?

9 A: That is correct, yes.

10 Q: And what was the reason?

11 A: The reason for what?

12 Q: For not being videoed.

13 A: At the time my video was activated and
14 everything presumed to be correct. Everything
15 turned on in my car. There was no reason for
16 me not to believe that nothing was being
17 recorded. At a later day when I tried to make
18 a copy of the file it was determined that my
19 camera malfunctioned, and I was unable to make
20 a copy of that traffic stop.

21 Q: So am I correct -- so there's no -- it doesn't
22 show you activating blue light, doesn't show
23 you stopping him, doesn't show you advising him
24 of Miranda or doing a field sobriety test; is
25 that correct?



1 A: That is correct, yes.

2 Q: Was the camera working at the incident site?

3 A: It was, yes, the whole time.

4 Q: And you have a copy of that video?

5 A: Of the ---

6 Q: Of the incident site?

7 A: When he was at the jail?

8 Q: Yeah. I'm sorry, not the incident site, the
9 jail. I apologize.

10 A: Well the camera working at the jail it was.
11 Everything was inside the data master and
12 that's correct.

13 Q: Okay.

14 A: I do not personally have a copy of it. SLED
15 will have a copy of it. You'll have to go
16 online and type in that code and you can ---

17 Q: Right.

18 A: --- you can get a copy of it.

19 Q: Okay. I don't know why I kept saying the
20 incident site. The -- and you didn't discover
21 the camera malfunctioning until after ---

22 A: Several days.

23 Q: You thought it was working?

24 A: That's correct. Several days prior -- after --
25 correction -- several days after the incident



1 I then tried to make a copy of the video 'cause
2 we have to do case files for all of our DUI's
3 and it was that point in time that I discovered
4 that it was not working, and I immediately went
5 to Shop Road to have the camera looked at which
6 is what we're required to do by policy. They
7 changed the camera out and I tried to retrieve
8 the video. They sent it to a Watch Squad (ph)
9 and tried to retrieve it off the hard drive.
10 Watch Squad was unable to receive anything so
11 I do not have any video of the incident.

12 Q: Okay. Did you do an affidavit with respect to
13 the incident site -- I mean, not the -- yeah,
14 the incident site camera, stopping the car
15 explaining what the circumstances were?

16 A: Like a probable cause arrest warrant -- or
17 affidavit?

18 Q: No, an affidavit saying that the camera was
19 inoperable?

20 A: Yeah, all that would -- all of that is included
21 in the case check, and I did a -- I did all of
22 that affidavit and by policy we have to do a
23 video affidavit that states that the camera was
24 not working at the time of the incident and
25 that we retrieved our camera. And also I had



1 the work orders from shop -- from the shop
2 where I went over there to get the camera
3 looked at and it has -- and they're aware the
4 camera was being taken out and replaced since
5 then.

6 Q: And the reason I'm asking is I have not
7 received any discovery in the case from ---

8 A: Okay.

9 Q: --- the Solicitor's office.

10 A: Okay. But everything pursuant to that is
11 inside that case file.

12 Q: And did you film -- did you -- you left the
13 site. You got film his using the tape, the ---

14 A: That's correct. Everything inside the data
15 master room was recorded by camera and then
16 it'll, you know, go on the SLED website to be
17 able to retrieve that video. But everything
18 was recorded in the data master room. That's
19 correct.

20 MR. SWERLING: I think that's all I have. I'm not
21 going to present any testimony.

22 HEARING OFFICER: Okay.

23 MR. SWERLING: I would have some argument.

24 HEARING OFFICER: First of all, Trooper Brazell, do
25 you have anything else that you would like to



1 add testimony in response to anything you've
2 been shown?

3 TROOPER BRAZELL: No, sir.

4 HEARING OFFICER: All right. So Respondent is not
5 gonna present a case so therefore arguments.
6 All right. Go ahead, Mr. Swerling.

7 CLOSING ARGUMENT - BY MR. SWERLING:

8 MR. SWERLING: Judge, I mean, the only thing I
9 wanted to say is that you are aware of 29 --
10 I'm sorry, 56 -- I just had it up here. Excuse
11 me. 56-5-29-53 mandates that there be a
12 camera and that the camera -- it seems the blue
13 light's been activated the camera must be
14 activated, and in addition to that the Miranda
15 Rights must be videotaped as well as any field
16 sobriety test. We do not have that, and even
17 though this is not the criminal trial it would
18 seem that without being able to establish the
19 threshold issue about whether or not this was
20 a lawful arrest, given his Miranda warnings and
21 everything had been videotaped, since they
22 cannot get past the threshold question it would
23 seem to me that it would not be fair to go
24 ahead and have him lose his license for 90 days
25 for refusing to take the test. I mean, it's a



1 threshold issue. And in addition to that
2 there's the affidavit for the video has not
3 been produced. I mean, Trooper says it is
4 available but it has not been produced so that
5 would be the only excuse if producing that
6 sworn affidavit certifying that they could not
7 -- would not be able to record it because it
8 was inoperable. So I would submit that it
9 should be dismissed.

10 **HEARING OFFICER:** Did you subpoena that affidavit?

11 **MR. SWERLING:** No, it's their burden.

12 **HEARING OFFICER:** Well, I would argue that we have
13 an administrator remedy for issuance of
14 subpoenas from this office for documents.
15 That's there -- I don't think that's there just
16 as a -- I mean, it's an option. I think that
17 a party must avail themselves of and exhaust
18 those administrative remedies.

19 **MR. SWERLING:** But don't they have the burden of
20 proof?

21 **HEARING OFFICER:** They do have the burden of proof,
22 but you can't come here and complain about
23 documents you didn't receive when you made no
24 effort to get -- to get those documents.

25 **MR. SWERLING:** No, I mean, here at this hearing they



1 have a burden to prove.

2 HEARING OFFICER: I agree.

3 MR. SWERLING: I mean, I have no burden.

4 HEARING OFFICER: Testimony is evidence as well.

5 Any response, Mr. Brazell -- or Trooper
6 Brazell?

7 RESPONSE - BY TROOPER BRAZELL:

8 TROOPER BRAZELL: Just to clarify that everything is
9 with the Solicitor when I'm required to do turn
10 in a case track and so everything is readily
11 available to Mr. Swerling to pick up from the
12 Solicitor. Which is what we do with all of my
13 cases, and if you were to pick up that he would
14 be able to find the sworn video affidavit and
15 the work order from the repair shop for my
16 video camera that as I stated everything
17 appeared to functioning and working properly at
18 the time of the arrest. Everything was on the
19 video to my knowledge. It was not to my
20 knowledge that my -- that I was not gonna be
21 able to make a copy of the DUI arrest. And I
22 made all the necessary duty and I made all the
23 necessary precautions to make sure that I did
24 provide that. You know, going as far as making
25 sure that my camera was spent over to Watch



1 Squad to try to retrieve that video. And Watch
2 Squad was unable to retrieve it so that was the
3 only thing that I -- at that point there would
4 be nothing else that I could do to provide a
5 copy of that video.

6 **HEARING OFFICER:** Okay.

7 **MOTION - BY MR. SWERLING:**

8 **MR. SWERLING:** Your Honor, this is -- I'd like to
9 introduce this. This is my motion for
10 discovery. It was filed in the Clerk of the
11 Courts Office and served on the Solicitor March
12 18th, and that is my obligation to go ahead and
13 file the discovery under Rule 5 and that's
14 that. It's not been produced.

15 **HEARING OFFICER:** First of all, Rule 5 doesn't apply
16 here and we have our own rules for subpoenas.
17 Rule 5 is criminal. And also Respondent's case
18 is closed at this time and therefore I don't
19 think I can introduce that into evidence at
20 least without consent of the Trooper to reopen
21 your case.

22 **MR. SWERLING:** I'd move to reopen at this time. I
23 mean, I did say that we made a request so I'm
24 just showing you.

25 **HEARING OFFICER:** That's fine but I mean ---



1 MR. SWERLING: Do you have any problem with that?

2 RESPONSE - BY TROOPER BRAZELL:

3 TROOPER BRAZELL: Yeah, I don't -- I never received
4 the discovery. I just received -- I just
5 didn't receive actually anything. I know if
6 you sent a Rule 5 it would have been to the
7 Solicitor. The Solicitor would then give him
8 a copy. A discovery -- I never received a
9 discovery or anything for providing
10 documentation for this case until today.

11 MR. SWERLING: I'm not saying he received it. What
12 I'm saying is that they have the burden of
13 proof. I've requested discovery, and I don't
14 have to do any subpoena. That's their burden
15 to come to this hearing and be able to prove
16 that he refused it and to satisfy the statute.
17 Your Honor, with all due respect.

18 TROOPER BRAZELL: I would also say that it is on
19 camera that he refused as well. You can also
20 get a copy of that video if you go the SLED
21 website and type in the video code that's
22 produced. He can -- you can see on camera that
23 he did refuse to the data master. That there
24 is a video available of that, but it's not
25 obligation to provide that.



1 MR. SWERLING: But that's not here either.

2 HEARING OFFICER: Anything else from the parties?

3 MR. SWERLING: No.

4 TROOPER BRAZELL: No, sir.

5 HEARING OFFICER: Okay. With that then I consider
6 this hearing now closed. I'll issue a decision
7 soon in writing. Thank you.

8 (There being nothing further, the hearing concluded.)

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CERTIFICATE

This is to certify that the within hearing consisting of fifteen (15) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on September 14, 2020.

Coral Strickland

Coral Strickland

Notary Public for South Carolina
My Commission Expires: July 2, 2028



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

COPY

*Law Offices of
Jack B. Swerling*

*1720 Main Street, Suite 301
Columbia, South Carolina 29201*

*Telephone 803-765-2626
Fax 803-799-4059*

October 12, 2020

The Honorable S. Phillip Lenski
Administrative Law Judge
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

RE: *Affidavit of Kellie S. Reaves
Andrew Davis Desilet vs. South Carolina Department of Motor Vehicles and South
Carolina Department of Public Safety*
Docket No.: 20-ALJ-21-0213-AP
OMVH Docket No.: 20-OMVH-01-1160-CC
SCDL No.: 101593325

Dear Judge Lenski:

In regard to the above-referenced matter, please find one original and one copy of the Affidavit of Kellie S. Reaves enclosed for filing. As shown by the attached Certificate of Service, I am serving the parties with a copy of same. I respectfully request your clerk file the original and return a clocked copy to me in the enclosed self-addressed stamped envelope.

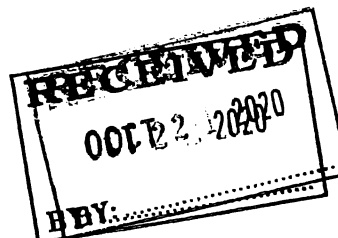
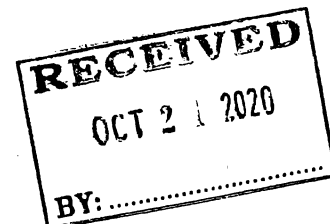
Please feel free to contact my office with any questions or concerns.

Very truly yours,

Jack B. Swerling

Enclosures

cc: Brandy A. Duncan, Assistant General Counsel, SCDMV
Teckla Henderson, Deputy General Counsel, SCDPS
Trooper S. Z. Brazell, SCDPS
Office of Motor Vehicle Hearings



FILED
OCT 12 2020
SC ADMIN. LAW COURT

THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA

ANDREW DAVIS DESILET,

Appellant

vs.

SOUTH CAROLINA DEPARTMENT
OF MOTOR VEHICLES AND SOUTH
CAROLINA DEPARTMENT OF
PUBLIC SAFETY,

Respondents.

Docket No.: 20-ALJ-21-0213-AP
SCDL No. 101593325

AFFIDAVIT OF KELLIE S. REAVES

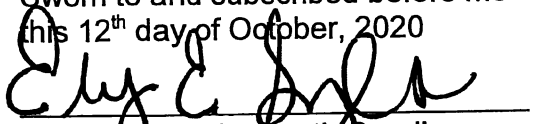
Personally appeared before me, Kellie S. Reaves, who after being duly sworn deposes and says:

1. I am a paralegal for attorney Jack B. Swerling and have been so engaged in that position for thirteen (13) years.
2. I prepared the paperwork for the appeal in the above referenced matter.
3. I timely filed the Notice of Appeal and served it on all the parties; however, I inadvertently sent the South Carolina Department of Motor Vehicles' copy of the Notice of Appeal to 1205 Pendleton Street, Columbia, South Carolina, which is the Office of Motor Vehicle Hearings.
4. This was a clerical mistake.


Kellie S. Reaves

October 12, 2020
Columbia, South Carolina

Sworn to and subscribed before me
this 12th day of October, 2020


Notary Public for South Carolina
My Commission Expires: 6/3/2028

THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA

ANDREW DAVIS DESILET,

Appellant

vs.

SOUTH CAROLINA DEPARTMENT
OF MOTOR VEHICLES AND SOUTH
CAROLINA DEPARTMENT OF
PUBLIC SAFETY,

Respondents.

Docket No.: 20-ALJ-21-0213-AP
SCDL No. 101593325

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 12, 2020, I mailed, via USPS first class mail,
first-class postage prepaid, the *Affidavit of Kellie S. Reaves* upon the following:

Teckla Henderson, Deputy General Counsel
South Carolina Department of Public Safety
P.O. Box 1993
Blythewood, South Carolina 29016

Brandy Duncan, Assistant General Counsel
South Carolina Department of Motor Vehicles
P.O. Box 1498
Blythewood, South Carolina 29016

Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

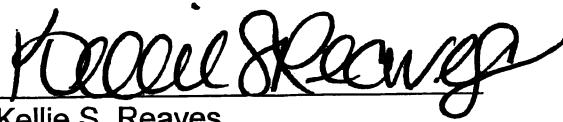
Attn: Clerk
South Carolina Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201

FILED

OCT 12 2020

SC ADMIN. LAW COURT

Trooper S. Z. Brazell, SCDPS
Post C Headquarters
111 Maiden Lane
Lexington, South Carolina 29072

A handwritten signature in black ink, appearing to read "Kellie S. Reaves", written over a horizontal line.

Kellie S. Reaves
Paralegal to Jack B. Swerling

October 2, 2020
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS**

South Carolina Department of Public Safety
and
South Carolina Department of Motor
Vehicles,

Petitioner,

vs.

Andrew Davis Desilet,
Respondent.

Docket No. 20-OMVH-01-1160-CC
DL# 101593325

NOTICE OF HEARING

On Monday, March 2 2020 Respondent was arrested by S Z Brazell and Respondent's driver's license or privilege was suspended. The Respondent is being represented by Attorney Jack Swerling. This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) pursuant to Respondent's request for a contested case hearing.

IT IS HEREBY NOTICED that a hearing on the merits of this action before Hearing Officer Samuel Johnson is scheduled to begin at 9:30 AM on Tuesday, April 14 2020 at Office of Motor Vehicle Hearings 1205 Pendleton Street, Suite 325 Columbia SC. All parties are to arrive at least fifteen minutes prior to the time set for the hearing.

1. This hearing will be conducted in accordance with the Rules of Procedure for the South Carolina Office of Motor Vehicle Hearings (OMVH). A copy may be obtained from the Administrative Coordinator of the OMVH or from the OMVH website, www.scomvh.net. The South Carolina Rules of Evidence apply.

2. All parties must bring to the hearing all documents, records, and witnesses needed to present their case. All exhibits moved for introduction at the hearing must be originals. Upon good cause shown at the hearing, copies may be substituted for original exhibits.

3. Subpoenas are available to the parties pursuant to S.C. Code Ann. § 1-23-320(d) (as amended) and the rules of the OMVH, to compel the attendance of witnesses or for the production of documents at the hearing. The parties are responsible for service of subpoenas and any cost involved. Subpoena may be obtained from the OMVH website.

4. A party may represent himself or may be represented by an attorney at the hearing.

5. **FOR GOOD CAUSE SHOWN**, a party may request a continuance no later than two (2) business days prior to the scheduled hearing date. All requests must be made in writing and forwarded to the scheduling assistant listed below for the assigned hearing officer of the OMVH by U.S. Mail, Fax, or email. A copy of your request must be sent to all parties.

6. In case a party settles a case or wishes to withdraw their request for a hearing, they must notify the scheduling assistant of the OMVH as soon as possible. If in the event you cannot reach the scheduling assistant then contact the Administrative Coordinator as soon as possible at (803) 734-3201.

Yolanda P. Williams, Administrative Coordinator, OMVH

By: Jena' K. Hess

Scheduling Assistant

March 5, 2020
Columbia, South Carolina

000042

Jena' K. Hess

From: Jena' K. Hess
Sent: Thursday, March 5, 2020 11:03 AM
To: hpu@scdmv.net; Troop 1 (ChristopherShelton@SCDPS.GOV); Troop 1 (MarkDanback@SCDPS.GOV); Jack B. Swerling - Attorney at Law (jacklaw@aol.com); Jack B. Swerling - Attorney at Law (eenglish@jbswerling.com)
Subject: NOH Andrew Desilet 4-14-20 dk# 20-1160
Attachments: NOH Andrew Desilet 4-14-20 dk# 20-1160.pdf

Jena' K. Hess
Scheduling Assistant for Hearing Officer
Samuel Johnson
SC Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street Ste. 325
Columbia SC 29201
803-734-3203
803-734-3200 (fax)

Jena' K. Hess

From: Jena' K. Hess
Sent: Wednesday, April 8, 2020 10:24 AM
To: hpu@scdmv.net; Lexington Police Department (tstowe@lexsc.com); Lexington Police Department (cbledsoe@lexsc.com); Lexington Police Department (rhazewinkel@lexsc.com); Troop 1 (ChristopherShelton@SCDPS.GOV); Troop 1 (MarkDanback@SCDPS.GOV); tlupton@lcsd.sc.gov; dsmith@lcsd.sc.gov; USC PD (WEINSCHS@mailbox.sc.edu); dlesrecd@mailbox.sc.edu; West Columbia Police Department (dhook@westcolumbiasc.gov); Columbia PD (beatrice.fields@columbiasc.gov); Columbia Police Department (ytwilson@columbiasc.net); kashe@rcsd.net; Neal Truslow; Mackenzie Woodward; jwalters@kcw-law.com; ccox@kcw-law.com; Robert T. Williams (twilliams@wsblegal.com); Theo Williams (lcook@wsblegal.com); Robert T. Williams (gamick@wsblegal.com); Marion Moses; Elizabeth M. Johnson; Jack B. Swerling - Attorney at Law (jacklaw@aol.com); Jack B. Swerling - Attorney at Law (eenglish@jbswerling.com); Hank Burris (hank@burrislaw.com); Hank Burris (Kip@burrislaw.com); Seth Rose; seth@sethroselaw.com; shameka@sethroselaw.com; michael@laubshirelaw.com; Tori Ford; jkata@thegieselawfirm.com; barneygiese@gmail.com; collins_law@hotmail.com; kent@kentcollinslaw.com; juliareid12@aol.com
Subject: COLUMBIA bulk reschedules 4-14-20 to 8-4-20
Attachments: COLUMBIA bulk reschedules from 4-14-20 to 8-4-20.pdf
Importance: High

Morning all,

Please find attached a notice which reschedules OMVH hearing(s) in which you are a party due to COVID-19.

If you believe that it is important that your hearing go forward immediately, you may submit your reason in writing to the OMVH. You may submit it by e-mail. You must state the reason why you believe the hearing must go forward now and state the reason why it would be detrimental to you to wait for the rescheduled date. The hearing officer will make a decision based on your reasons. If the hearing officer agrees that the hearing should go forward as planned, the OMVH will make an effort to hold the hearing in the safest manner possible for all concerned.

Mailed to the following respondents

Kennedy Daniels @ 120 Archie Drive Cola SC 29223
Kelly Roth @ 104 N Calhoun Street Greenville SC 29601
Cornie Davis @ 3 Sandpine Court Cola SC 29229

Jena' K. Hess
Scheduling Assistant for Hearing Officer
Samuel Johnson
SC Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street Ste. 325

**State of South Carolina
Office of Motor Vehicle Hearing**

The matters listed below were currently scheduled to be heard before hearing officer Samuel Johnson, on **Tuesday April 14, 2020**. Pursuant to the Governor's State of Emergency declaration as a result in the ongoing COVID-19 threat, all hearings must be rescheduled. These cases have been rescheduled and will now be held on **Tuesday August 4, 2020 at Office of Motor Vehicle Hearings 1205 Pendleton Street, Suite 325 Columbia, SC.**

All other provisions of the original Notice of Hearing remain in effect

- 9:00** Justin Carey-IC (Neal Truslow, Atty) D Hare Lexington PD dk# 20-1180
Kyle Sturkie-IC (Jamie Walters, Atty) Trp C R Nelson Lexington HP dk# 20-0361
Jason Rawl-IC (Robert T Williams, Atty) Trp B Compton Lexington HP dk# 20-0346
- 9:30** Patience Boozer-IC (Marion Moses, Atty) AO J A Hyatt Lexington County SD dk# 20-0358
Austin Keane-IC (Marion Moses, Atty) AO K R Gilbert USC PD dk# 20-0366
Andrew Desilet-IC (Jack Swerling, Atty) Trp S Z Brazell Lexington HP dk# 20-1160
- 10:00** Andrew Senn-IC (Hank Burris, Atty) AO William Beanham West Cola PD dk# 20-0232
Brian McDonald-IC (Seth Rose, Atty) AO K R Gilbert USC PD dk# 20-0386
Julia Reid-IC Trp N Maxwell Richland HP dk# 20-0393
Kennedy Daniels-IC Trp Javier Milona Barboza Richland HP dk# 20-0419
- 10:30** Marquel Jenkins-IC (Michael Laubshire, Atty) AO Don Timmons Columbia PD dk# 20-0414
Kentra Tucker-IC (Justin Kata, Atty) AO David Kopenhaver Richland County SD dk# 20-0417
Addison Baker-IC (Seth Rose, Atty) AO T Jones Lexington County SD dk# 20-0412

000039

1:30 Brady Edwards-IC (Marion Moses, Atty) AO K R Gilbert USC PD dk# 20-0409

Marshall Anderson-IC (Marion Moses, Atty) AO JA Hyatt Lexington County SD dk# 20-0410

Deana Black-IC- (Kent Collins, Atty) AO N. Thompson-Lexington PD-dk# 6098

Kelly Roth-IC AO Ethan Dopp USC PD dk# 20-0454

2:00 Cornie Davis-FR dk#20-0664

Jena' K. Hess
Scheduling Assistant

April 8, 2020 Columbia, South Carolina

NOTICE

Motion of Reconsideration

A party may file a written motion with the OMVH within ten (10) days after notice of this order requesting the Hearing Officer reconsider this final decision. However, the filing of a Motion of Reconsideration does not stay the provisions of this final decision nor excuse compliance with its provisions. See OMVH Rule 15 (D). A stay must be requested specifically by motion. See OMVH Rule 15 (E). The filing of a motion for reconsideration does stay the time for an appeal until an order is issued; however, if the hearing officer does not issue a written order on the motion for reconsideration, it is deemed denied thirty days after it is filed.

Only original documents are accepted. Documents must be filed via hand-delivery or by depositing the document in the U.S. Mail, properly addressed, with sufficient first class postage attached. Facsimiles sent to the OMVH and the South Carolina Administrative Law Court do not comply with filing requirements and are not authorized. See ALC Rules 4(B).

South Carolina Office of Motor Vehicle Hearings

1205 Pendleton Street, Ste 325

Columbia, SC 29201

The Rules of the Administrative Law Court are found at: www.scalc.net

The Rules of the Office of Motor Vehicle Hearings are found at: www.scomvh.net

Appeal

A party may appeal this final decision by filing written notice with the South Carolina Administrative Law Court within thirty (30) days of receipt of the order to the following address:

Attn: Clerk

South Carolina Administrative Law Court

1205 Pendleton Street, Suite 224

Columbia, SC 29201

The notice must be accompanied by proof of service of the notice on all parties and a filing fee in the amount of \$150.00 made payable to the South Carolina Administrative Law Court. See ALC Rules 3(A), 4(B), 31(A), 33 and 71(A). A copy of the notice must also be sent to the OMVH and a copy of the transcript shall be ordered within ten days after service of the notice. The transcript must be ordered by the Appellant and the Appellant is responsible for the cost thereof.

Transcript Request

Appeal

Yolanda Williams

From: Yolanda Williams
Sent: Wednesday, August 19, 2020 1:28 PM
To: Creel Reporting (contact@creelreporting.com); 'Coral Strickland'
Subject: Transcript Request for Andrew Davis Desilet 20-OMVH-01-1160-cc
Attachments: 842020 Desilet.m4a

Importance: High

Attached please find the transcript request for Andrew Davis Desilet. Below is the contact information for the attorney that requested the transcript. If you have any question please let me know.

Jack B. Swerling
Attorney at Law
1720 Main Street, Ste 301
Columbia, SC 29201
803-765-2626

Yolanda P. Williams
Administrative Coordinator
Scheduling Assistant for
Brigitte Autry and Tracy Holland
South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Ste 325
Columbia, SC 29201
803-734-3201
803-734-3200 fax
www.scomvh.net

000001.

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- ☐ Transcript Ordered/Pending
- ☐ Audiotape Request
- ☒ Notice of Appeal
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- ☒ Final Order and Decision
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Certificate of Service 4

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
OFFICE OF MOTOR VEHICLE HEARINGS**

RALPH K. ANDERSON, III
Director



(803) 734-3201
FAX (803) 734-3200
WWW.SCOMVH.NET

September 21, 2020

Jana Shealy, Clerk
SC Administrative Law Court
1205 Pendleton Street, Ste 224
Columbia, SC 29201

Re: S.C. Dept of Motor Vehicles
vs
Andrew Davis Desilet
DL/Customer 101593325

Dear Ms. Shealy:

In compliance with Section 1-23-380 (d) of the 1976 Code of Laws of South Carolina, please find enclosed a certified copy of the record for the Judge's review. Please file in the appropriate case file. This is a petition for judicial review of the administrative decision, which was filed in the South Carolina Administrative Law Court.

If we can be of any further assistance, please advise.

Sincerely,

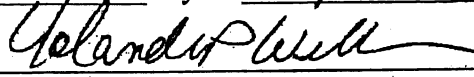
Yolanda P. Williams
Administrative Coordinator, OMVH

Cc: Jack B. Swerling, Esquire
Frank L. Valenta, SCDMV General Counsel

Certificate of Service

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage aid, or in the interagency Mail Service addressed to the party (ies) or their attorney(s).

This 21st day of September 2020

By: 

Title: Administrative Coordinator, OMVH

Ebony English

From: Duncan, Brandy A <Brandy.Duncan@scdmv.net>
Sent: Saturday, September 26, 2020 6:37 PM
To: Erika S. Easler
Cc: jacklaw@aol.com; Ebony English; Henderson, Teckla S.
Subject: Andrew Desilet vs. SCDMV & SCDPS - dkt # 20-AJ-21-0213-AP - Motion to Dismiss
Attachments: Desilet, Andrew - Motion to Dismiss.pdf

Ms. Easler,

As courtesy to the Court and parties, please find a PDF of SCDMV's Motion to Dismiss the above referenced case. Hard copies of these documents have already been placed in the mail to the ALC and parties.

Thanks,

Brandy A. Duncan, Asst. General Counsel
S.C. Department of Motor Vehicles
P. O. Box 1498
Blythewood, South Carolina 29016

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Visit <http://www.scdmvonline.com/Driver-Services/Drivers-License/REAL-ID> for more information on REAL ID.

Alissa Wilson

From: Alissa Wilson
Sent: Friday, October 2, 2020 11:21 AM
To: Duncan, Brandy A; Jack Swerling; tecklahenderson@scdps.gov; eeasler@scalco.net
Subject: Andrew Desilet v. SCDMV & SCDPS dkt 20-AJ-21-0213-AP
Attachments: 20201002111700904.pdf

As a courtesy to the Court and parties, please find an attached copy of Appellant's Response to Respondent's Motion to Dismiss in the above referenced case. Hard copies of these documents have been placed in the mail to all parties.

Thanks,

Alissa Wilson

Alissa L. Wilson
Associate Attorney
Law Offices of Jack B. Swerling
1720 Main Street, Ste.301
Columbia SC 29201
(803)765-2626-Business Phone
(803)799-4059-Business Fax

Kellie Switzer

Subject:

FW: [External] Andrew Desilet v. SCDMV & SCDPS - dkt # 20-AJ-21-0213-AP - Amended Motion to Dismiss

-----Original Message-----

From: Duncan, Brandy A <Brandy.Duncan@scdmv.net>

Sent: Monday, October 5, 2020 11:21 AM

To: Alissa Wilson <awilson@jbswerling.com>; Jack Swerling <jacklaw@aol.com>; Henderson, Teckla S. <TecklaHenderson@SCDPS.GOV>; SC - HOWARD EMILY <EHOWARD@SCALC.NET>

Subject: [External] Andrew Desilet v. SCDMV & SCDPS - dkt # 20-AJ-21-0213-AP - Amended Motion to Dismiss

*****NOTICE***** EXTERNAL EMAIL. Please do not click on a link or open any attachments unless you are confident it is from a trusted source.

Ms. Howard,

As courtesy to the Court and parties, please find a PDF of SCDMV's Amended Motion to Dismiss the above referenced case, including a Certificate of Service demonstrating that this Amended Motion to Dismiss has been served upon Appellant's Counsel at the correct address. Hard copies of these documents have already been placed in the mail to the ALC and parties.

Thanks,

Brandy A. Duncan, Asst. General Counsel
S.C. Department of Motor Vehicles
P. O. Box 1498
Blythewood, South Carolina 29016

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Visit

<https://gcc02.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.scdmvonline.com%2FDriver-Services%2FDrivers-License%2FREAL-ID&data=02%7C01%7Ctecklahenderson%40scdps.gov%7Cff43c5f3fa994a3a20ed08d869424e83%7Ce9f8d01480d84f27b0d6c3d6c085fcdd%7C1%7C0%7C637375080818494162&sdata=05TuDmk9812Edv8dLW71EjwUeTG1XSvI7YjwywnYY5Q%3D&reserved=0> for more information on REAL ID.

Alissa Wilson

From: Alissa Wilson
Sent: Monday, October 5, 2020 1:49 PM
To: 'Duncan, Brandy A'; 'Jack Swerling'; 'tecklahenderson@scdps.gov'; 'eeasler@scal.c.net'
Subject: Andrew Desilet v. SCDMV & SCDPS dkt 20-AJ-21-0213-AP
Attachments: 20201005132828405.pdf

As a courtesy to the Court and parties, please find an attached copy of Appellant's original Notice of Appeal and revised Certificate of Service. Appellant has resent hard copies of the Notice of Appeal to all listed parties by US Mail.

Alissa L. Wilson
Associate Attorney
Law Offices of Jack B. Swerling
1720 Main Street, Ste.301
Columbia SC 29201
(803)765-2626-Business Phone
(803)799-4059-Business Fax

*Law Offices of
Jack B. Swerling*

*Jack B. Swerling, Esq.
Missa L. Wilson, Esq.*

*1120 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone 803-765-2626
Fax 803-729-4059*

October 5, 2020

The Honorable S. Phillip Lenski
Administrative Law Judge
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

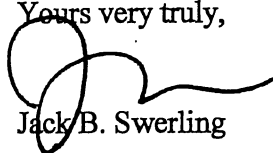
RE: *Notice of Appeal with Corrected Service Address
Andrew Davis Desilet vs. South Carolina Department of Motor Vehicles and South
Carolina Department of Public Safety*
Docket No.: 20-ALJ-21-0213-AP
OMVH Docket No.: 20-OMVH-01-1160-CC
SCDL No.: 101593325

Dear Judge Lenski:

In regard to the above-referenced matter, Appellant has resent the Notice of Appeal to all listed parties in order to ensure receipt by all parties.

Please feel free to contact my office with any questions or concerns.

Yours very truly,



Jack B. Swerling

Enclosures

cc: Brandy A. Duncan, Assistant General Counsel, SCDMV
Teckla Henderson, Deputy General Counsel, SCDPS
Trooper S. Z. Brazell, SCDPS
Office of Motor Vehicle Hearings

Kellie Switzer

From: Kellie Switzer
Sent: Monday, October 12, 2020 2:25 PM
To: ehoward@scal.c.net; brandy.duncan@scdmv.net; tecklahenderson@scdps.gov
Cc: jacklaw@aol.com
Subject: Andrew Desilet v. SCDMV & SCDPS - 20-AJ-21-0213-AP
Attachments: 20201012142411256.pdf

Good afternoon,

As a courtesy to the Court and parties, please find an attached copy of the Affidavit of Kellie S. Reaves, along with a Certificate of Service, in the above-referenced case. Hard copies of these documents have been placed in the mail to all parties.

Thank you –

Kellie S. Reaves

Paralegal

Law Offices of Jack B. Swerling

1720 Main Street • Suite 301 • Columbia • SC • 29201

(803) 765-2626 • (803) 799-4059 fax

Kellie Switzer

From: Kellie Switzer
Sent: Wednesday, October 21, 2020 4:01 PM
To: brandy.duncan@scdmv.net; tecklahenderson@scdps.gov; ehoward@scal.c.net
Cc: jacklaw@aol.com
Subject: Andrew Desilet v. SCDMV & SCDPS - 20-AJ-21-0213-AP
Attachments: Brief.pdf

Good afternoon,

As a courtesy to the Court and parties, please find an attached copy of the Brief of Appellant, along with a Certificate of Service, in the above-referenced case. Hard copies of these documents have been placed in the mail to all parties.

Thank you –

Kellie S. Reaves
Paralegal
Law Offices of Jack B. Swerling
1720 Main Street • Suite 301 • Columbia • SC • 29201
(803) 765-2626 • (803) 799-4059 fax

Kellie Switzer

From: Duncan, Brandy A <Brandy.Duncan@scdmv.net>
Sent: Wednesday, October 21, 2020 4:08 PM
To: Kellie Switzer; tecklahenderson@scdps.gov; ehoward@scal.net
Cc: jacklaw@aol.com
Subject: RE: Andrew Desilet v. SCDMV & SCDPS - 20-ALJ-21-0213-AP

Received. Thank you.

Ms. Howard,

Rule 34(B), SCALCR states "A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided." Thus, it is SCDMV's understanding that no brief is required to be filed by the Respondent's in this appeal until a decision has been issued with regard to SCDMV's Motion to Dismiss that was filed previously. If my understanding is incorrect, please let me know as soon as possible.

Thanks,

Brandy A. Duncan, Asst. General Counsel
S.C. Department of Motor Vehicles
P. O. Box 1498
Blythewood, South Carolina 29016

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From: Kellie Switzer <KSwitzer@jbswerling.com>
Sent: Wednesday, October 21, 2020 4:01 PM
To: Duncan, Brandy A <Brandy.Duncan@scdmv.net>; tecklahenderson@scdps.gov; ehoward@scal.net
Cc: jacklaw@aol.com
Subject: Andrew Desilet v. SCDMV & SCDPS - 20-ALJ-21-0213-AP

CAUTION: EXTERNAL EMAIL! Ensure you trust this sender and validate attachments or links before opening them.

Good afternoon,

As a courtesy to the Court and parties, please find an attached copy of the Brief of Appellant, along with a Certificate of Service, in the above-referenced case. Hard copies of these documents have been placed in the mail to all parties.

Thank you –

Kellie S. Reaves
Paralegal
Law Offices of Jack B. Swerling

1720 Main Street • Suite 301 • Columbia • SC • 29201
(803) 765-2626 • (803) 799-4059 fax

Visit <http://www.scdmvonline.com/Driver-Services/Drivers-License/REAL-ID> for more information on REAL ID.

Kellie Switzer

From: Emily Howard <ehoward@scalcn.net>
Sent: Thursday, October 22, 2020 9:54 AM
To: Duncan, Brandy A; Kellie Switzer; tecklahenderson@scdps.gov
Cc: jacklaw@aol.com
Subject: RE: Andrew Desilet v. SCDMV & SCDPS - 20-AJ-21-0213-AP

All,

We are in receipt of all filings in this matter and will work diligently to address the Motion to Dismiss in the coming weeks. Our schedule has been packed lately and remains so throughout November, but Judge Lenski is aware of the outstanding Motion and I will ensure he looks it over as soon as possible. In the meantime, you are free to file anything you please but all time limits are stayed pending Judge Lenski's review and forthcoming order. Please let me know if I can be of further assistance to any of you.

Thanks so much,

Emily

From: Duncan, Brandy A <Brandy.Duncan@scdmv.net>
Sent: Wednesday, October 21, 2020 4:08 PM
To: Kellie Switzer <KSwitzer@jbswerling.com>; tecklahenderson@scdps.gov; Emily Howard <ehoward@scalcn.net>
Cc: jacklaw@aol.com
Subject: RE: Andrew Desilet v. SCDMV & SCDPS - 20-AJ-21-0213-AP

Received. Thank you.

Ms. Howard,

Rule 34(B), SCALCR states "A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided." Thus, it is SCDMV's understanding that no brief is required to be filed by the Respondent's in this appeal until a decision has been issued with regard to SCDMV's Motion to Dismiss that was filed previously. If my understanding is incorrect, please let me know as soon as possible.

Thanks,

Brandy A. Duncan, Asst. General Counsel
S.C. Department of Motor Vehicles
P. O. Box 1498
Blythewood, South Carolina 29016

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From: Kellie Switzer <KSwitzer@jbswerling.com>
Sent: Wednesday, October 21, 2020 4:01 PM

To: Duncan, Brandy A <Brandy.Duncan@scdmv.net>; tecklahenderson@scdps.gov; ehoward@scalv.net
Cc: jacklaw@aol.com
Subject: Andrew Desilet v. SCDMV & SCDPS - 20-ALJ-21-0213-AP

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Good afternoon,

As a courtesy to the Court and parties, please find an attached copy of the Brief of Appellant, along with a Certificate of Service, in the above-referenced case. Hard copies of these documents have been placed in the mail to all parties.

Thank you –

Kellie S. Reaves
Paralegal
Law Offices of Jack B. Swerling
1720 Main Street • Suite 301 • Columbia • SC • 29201
(803) 765-2626 • (803) 799-4059 fax

Visit <http://www.scdmvonline.com/Driver-Services/Drivers-License/REAL-ID> for more information on REAL ID. . .

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Henry McMaster
Governor



State of South Carolina
Department of Motor Vehicles

Karin A. Sharada
Executive Director



SEQUENCE 000083
0201000033

12/22/2020

DESILET, ANDREW DAVIS
15 N OAK CT
COLUMBIA, SC 29212-2910

CUSTOMER NO: 31619371
FILE NO: 29326747
DL NO: 101593325

AMENDED NOTICE OF DRIVING STATUS

This is official notification that the information on your driving record has changed effective 12/22/2020. This official notice cancels previous notices of suspension, cancellation, revocation or disqualification concerning the listed description(s).

The Driver Records Office has received the results of your administrative hearing for Implied Consent, dated 03/02/2020. The Office of Motor Vehicle Hearings (OMVH) has ruled that the action by the Department be Sustained.

DRIVING STATUS: No Suspension No Disqualification

BEGINNING DATE: 12:01 AM 01/06/2021 ENDING DATE: MIDNIGHT 07/03/2021

Suspension, revocation, cancellation and/or disqualification modified or deleted:

DATE	BEGIN DATE	END DATE	ACTION	SUSP DESCRIPTION
------	------------	----------	--------	------------------

IMPORTANT INFORMATION
DEFINITIONS OF DEPARTMENTAL STATUS AND ACTIONS

DRIVING STATUS:

NO SUSPENSION-Your driving privileges are clear.

SUSPENDED/DISQUALIFIED-All driving privileges to operate commercial and non-commercial vehicles are suspended and disqualified. If you are holding a driver's license, beginner's permit or special driving credential, it must be surrendered to the Department before the date of suspension listed above.

DISQUALIFIED-All driving privileges to operate commercial vehicles are disqualified.

SUSPENDED-Provisional, Route Restricted or Temporary Alcohol license. You have special driving privileges.

RESCINDED-The Office of Motor Vehicle Hearings has ruled that no suspension action will be taken as a result of this occurrence.

SUSTAINED-You are required to serve the suspension period. You may not make application for a driver's license until the suspension period has ended. You are required to meet all reinstatement requirements for any suspension, revocation, cancellation or disqualification. For reinstatement requirements or eligibility for special driving privileges, please refer to previous notices or contact a DMV Customer Service Representative at (803) 896-5000.

Information may also be obtained by visiting our website a www.scdmvonline.com.

Post Office Box 1498, Blytheville, South Carolina 29016

Henry McMaster
Governor



Kevin A. Shwedo
Executive Director



State of South Carolina
Department of Motor Vehicles

SEQUENCE 000093
0202000093

If your driving status shows "No Suspension", you may make application for a driver's license by presenting this notice to your local DMV Office. You may be required to take a vision, knowledge and/or skills test in order to be issued a license.

Driver Records Manager

South Carolina
Department of Motor Vehicles



01/05/2021

DESILET, ANDREW DAVIS
15 N OAK CT
COLUMBIA, SC 29212-2910

CUSTOMER NO: 31619371
FILE NO: 29385554
DL NO: 101593325

AMENDED NOTICE OF DRIVING STATUS

This is official notification that the information on your driving record has changed effective 01/05/2021. This official notice cancels previous notices of suspension, cancellation, disqualification or revocation. The suspension action placed against your record for Implied Consent, dated 03/02/2020 has been stayed pending the outcome of the appeal.

DRIVING STATUS: No Suspension No Disqualification

BEGINNING DATE: 12:01AM 03/02/2020 ENDING DATE: MIDNIGHT 07/03/2021

Suspension, cancellation, revocation or disqualification(s) pending:

Date	Begin Date	End Date	Susp Description
------	------------	----------	------------------

IMPORTANT INFORMATION
DEFINITIONS OF DEPARTMENTAL STATUS AND ACTIONS

NO SUSPENSION-Your driving privileges are clear.

SUSPENDED/DISQUALIFIED-All driving privileges to operate commercial and non-commercial vehicles are suspended and disqualified. If you are holding a driver's license, beginner's permit or special driving credential, it must be surrendered to the Department before the date of suspension listed above.

DISQUALIFIED-All driving privileges to operate commercial vehicles are disqualified.

If your driving status is suspended and/or disqualified, you are required to meet all reinstatement requirements for any suspension, revocation, cancellation or disqualification. For reinstatement requirements or eligibility for special driving privileges, please refer to previous notices or contact a DMV Customer Service Representative at (803)896-5000. Information may also be obtained by visiting our website at www.scdmvonline.com

If your driving status shows "No Suspension", you may make application for a driver's license by presenting this notice to your local DMV Office. You may be required to take a vision, knowledge and/or skills test in order to be issued a license.

Driver Records Manager

From: Ritchie, Sierra siritchie@sccourts.org
Subject: Andrew Desilet v. SCDMV // 2021-000007
Date: January 5, 2021 at 4:52 PM
To: larry@larrymarchant.com, brandy.duncan@scdmv.net, tecklahenderson@scdps.gov

SR

Dear Counsel:

Attached please find correspondence from the Court of Appeals.

Respectfully,
Sierra Ritchie
Appeals Specialist
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29021
Ph: (803) 734-1890
F: (803) 734-1839
Email: siritchie@sccourts.org
E-Filing Email: ctappfilings@sccourts.org

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message and any attachments. SR Desilet v.  
SCDM...tter.pdf



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

January 05, 2021

Mr. Larry Conrad Marchant, Jr., Esquire  
1720 Main Street  
Suite 301  
Columbia SC 29201

Re: Andrew Desilet v. SCDMV  
Appellate Case No. 2021-000007

Dear Counsel:

This Court has received your notice of appeal, and the case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at [www.sccourts.org/courtreg](http://www.sccourts.org/courtreg). Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at [www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-04-15-02](http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-04-15-02). Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will *not* review

filings for redaction or to determine if materials should be sealed.

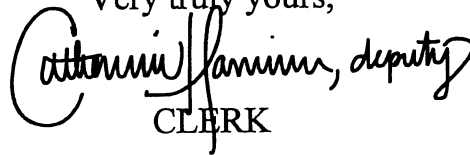
This is to advise that the title in the above matter has been changed to read as follows:

**Andrew Davis Desilet, Appellant,**

**v.**

**South Carolina Department of Motor Vehicles and South Carolina  
Department of Public Safety, Respondents.**

All future records in this matter should be changed to reflect this title. If you have any questions, please do not hesitate to contact this office.

Very truly yours,  
  
CLERK

cc: Brandy Anne Duncan, Esquire  
Teckla S. Henderson, Esquire

**From:** Duncan, Brandy A Brandy.Duncan@scdmv.net  
**Subject:** RE: Andrew Desilet v. SCDMV // 2021-000007

**Date:** January 5, 2021 at 5:10 PM

**To:** Ritchie, Sierra siritchie@sccourts.org, larry@larrymarchant.com, tecklahenderson@scdps.gov

BD

Ms. Sierra,

Please note that a ruling is not needed on Mr. Marchant's Motion to Stay suspension. Mr. Marchant's appeal on Mr. Desilet's behalf has been timely filed and, as a result, consistent with state statutes, SCDMV has stayed Mr. Desilet's suspension that was scheduled to begin tomorrow. This stay will remain in effect until the Court of Appeals issues a final ruling in this appeal.

Thanks,

Brandy A. Duncan, Asst. General Counsel  
S.C. Department of Motor Vehicles  
P. O. Box 1498  
Blythewood, South Carolina 29016

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**From:** Ritchie, Sierra <siritchie@sccourts.org>  
**Sent:** Tuesday, January 5, 2021 4:52 PM  
**To:** larry@larrymarchant.com; Duncan, Brandy A <Brandy.Duncan@scdmv.net>; tecklahenderson@scdps.gov  
**Subject:** Andrew Desilet v. SCDMV // 2021-000007

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Dear Counsel:

Attached please find correspondence from the Court of Appeals.

Respectfully,  
Sierra Ritchie  
Appeals Specialist  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29021  
Ph: (803) 734-1890  
F: (803) 734-1839  
Email: siritchie@sccourts.org

~~Email: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)~~

E-Filing Email: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

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Visit <http://www.scdmvonline.com/Driver-Services/Drivers-License/REAL-ID> for more information on REAL ID.

From: Larry Marchant, Esq. larry@larrycmarchant.com
Subject: Desilet v. SCDMV and SCDPS Appeal
Date: January 5, 2021 at 5:24 PM
To: Brandy Duncan brandy.duncan@scdmv.net



Brandy- I have been retained on appeal. The attached was filed and hard copy mailed today. I look forward to working with you.

Larry C. Marchant Jr.
Attorney & Counselor at Law
1720 Main Street Columbia, SC 29201
www.larrycmarchant.com

January 5, 2021

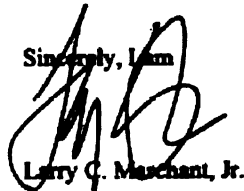
Brandy Duncan, Esq.
SC Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016

RE: Notice of Appeal and Motion to Stay Order Pending Appeal
*Andrew Davis Desilet v. South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety*
Administrative Law Court Docket No.: 20-ALJ-21-0213-AP

Dear Assistant General Counsel Duncan:

Pursuant to the South Carolina Appellant Court Rules, I respectfully serve upon you the enclosed: 1) filed and clocked copy of Appellant's Notice of Appeal; 2) Order Granting Respondent's Motion to Dismiss, dated December 18, 2020; and 3) Appellant's Motion to Stay Order Pending Appeal. Please contact me if you have any questions or concerns.

Sincerely, I am



Larry C. Marchant, Jr.

Enclosures as stated

cc: Teckla Henderson, Esq., Deputy General Counsel, SCDPS

(Phone) 803-771-1507 (Fax) 803-799-4059 (Mobile) 803-606-9102 (Email) larry@larrycmarchant.com



Desilet v.
SCDM...OA.pdf



Desilet v.
SCDM...OR.pdf



Desilet v.
SCDM...tay.pdf

Larry C. Marchant, Jr.
Attorney and Counselor at Law
1720 Main Street, Suite 301
Columbia, SC 29201

Office: 803-771-1507
Mobile: 803-606-9102
Fax: 803-799-4059
larry@larrycmarchant.com
www.larrycmarchant.com

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From: Ritchie, Sierra siritchie@sccourts.org
Subject: RE: Andrew Desilet v. SCDMV // 2021-000007
Date: January 6, 2021 at 8:37 AM
To: Duncan, Brandy A Brandy.Duncan@scdmv.net, larry@larrycmarchant.com, tecklahenderson@scdps.gov

SR

Received.

Thank you.

From: Duncan, Brandy A <Brandy.Duncan@scdmv.net>
Sent: Tuesday, January 5, 2021 5:11 PM
To: Ritchie, Sierra <siritchie@sccourts.org>; larry@larrycmarchant.com;
tecklahenderson@scdps.gov
Subject: RE: Andrew Desilet v. SCDMV // 2021-000007

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Ms. Sierra,

Please note that a ruling is not needed on Mr. Marchant's Motion to Stay suspension. Mr. Marchant's appeal on Mr. Desilet's behalf has been timely filed and, as a result, consistent with state statutes, SCDMV has stayed Mr. Desilet's suspension that was scheduled to begin tomorrow. This stay will remain in effect until the Court of Appeals issues a final ruling in this appeal.

Thanks,

Brandy A. Duncan, Asst. General Counsel
S.C. Department of Motor Vehicles
P. O. Box 1498
Blythewood, South Carolina 29016

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From: Ritchie, Sierra <siritchie@sccourts.org>
Sent: Tuesday, January 5, 2021 4:52 PM
To: larry@larrycmarchant.com; Duncan, Brandy A <Brandy.Duncan@scdmv.net>;
tecklahenderson@scdps.gov
Subject: Andrew Desilet v. SCDMV // 2021-000007

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Dear Counsel:

Attached please find correspondence from the Court of Appeals.

Respectfully,
Sierra Ritchie
Appeals Specialist
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29021
Ph: (803) 734-1890
F: (803) 734-1839
Email: siritchie@sccourts.org
E-Filing Email: ctappfilings@sccourts.org

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**From:** "Ritchie, Sierra" <[siritchie@sccourts.org](mailto:siritchie@sccourts.org)>  
**Subject:** RE: Andrew Desilet v. SCDMV // 2021-000007  
**Date:** February 4, 2021 at 1:36:35 PM EST  
**To:** "Duncan, Brandy A" <[Brandy.Duncan@scdmv.net](mailto:Brandy.Duncan@scdmv.net)>, "[larry@larrycmarchant.com](mailto:larry@larrycmarchant.com)" <[larry@larrycmarchant.com](mailto:larry@larrycmarchant.com)>, "[tecklahenderson@scdps.gov](mailto:tecklahenderson@scdps.gov)" <[tecklahenderson@scdps.gov](mailto:tecklahenderson@scdps.gov)>

Ms. Duncan,

I sent your response which was construed as a return to the motion to stay to the Court as well as the motion to stay. Appellant did not file a motion to withdraw the motion to stay thus the motion still had to go to the Court for review. Please let me know if you have any other questions or concerns.

Respectfully,  
Sierra Ritchie  
Appeals Specialist  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29021  
Ph: (803) 734-1890  
F: (803) 734-1839  
Email: [siritchie@sccourts.org](mailto:siritchie@sccourts.org)  
E-Filing Email: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

**From:** Duncan, Brandy A <[Brandy.Duncan@scdmv.net](mailto:Brandy.Duncan@scdmv.net)>  
**Sent:** Thursday, February 4, 2021 10:09 AM  
**To:** Ritchie, Sierra  
<[siritchie@sccourts.org](mailto:siritchie@sccourts.org)>; [larry@larrycmarchant.com](mailto:larry@larrycmarchant.com); [tecklahenderson@scdps.gov](mailto:tecklahenderson@scdps.gov)  
**Subject:** RE: Andrew Desilet v. SCDMV // 2021-000007

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Ms. Ritchie,

Mr. Desilet's suspension was already stayed on January 5, 2021 pending the outcome of this appeal. I e-mailed the Court in early January to let you all know that SCDMV had already taken that action (see attached).

Thanks,

Brandy A. Duncan, Asst. General Counsel  
S.C. Department of Motor Vehicles  
P O Box 1498

116 Blythewood, South Carolina 29016

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**From:** Ritchie, Sierra <[siritchie@sccourts.org](mailto:siritchie@sccourts.org)>  
**Sent:** Thursday, February 4, 2021 9:47 AM  
**To:** [larry@larrycmarchant.com](mailto:larry@larrycmarchant.com); Duncan, Brandy A  
<[Brandy.Duncan@scdmv.net](mailto:Brandy.Duncan@scdmv.net)>; [tecklahenderson@scdps.gov](mailto:tecklahenderson@scdps.gov)  
**Subject:** Andrew Desilet v. SCDMV // 2021-000007

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Dear Counsel:

Attached please find correspondence from the Court of Appeals.

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1220 Senate Street  
Columbia, SC 29021  
Ph: (803) 734-1890  
F: (803) 734-1839  
Email: [siritchie@sccourts.org](mailto:siritchie@sccourts.org)  
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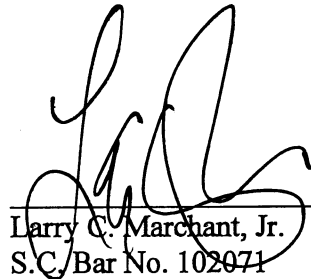
RECEIVED

Jul 08 2021

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.



Larry C. Marchant, Jr.
S.C. Bar No. 102071
1720 Main St., Suite 301
Columbia, SC 29201
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larry@larrycmarchant.com
Attorney for Appellant

July 8, 2021