

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Court Judge

Docket No. 2012-211047

Mark Schnee, Appellant.

v.

South Carolina Department of Motor Vehicles and West
Columbia Police Department

..... Respondents,

FINAL BRIEF OF APPELLANT

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ISSUES PRESENTED

1. Did the Department of Motor Vehicle Hearings err in deciding that Officer Ronald Fair was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies and S.C. Code §56-5-2950(A) as amended?

2. Did the Department of Motor Vehicle Hearings err in deciding that Officer Ronald Fair had probable cause for arrest?

STATEMENT

On October 31, 2009, Mark Schnee was arrested for suspicion of Driving Under the Influence (DUI) by Officer Ronald Fair of the West Columbia Police Department. Mr. Schnee was transported to the police department and Officer Fair requested a breath sample. Mr. Schnee refused.

On July 27, 2010, an administrative hearing pursuant to S.C. Code § 56-5-2951 was held to determine if the statutory requirements of implied consent were met. Officer Fair was the only witness to testify at this hearing.

The Final Order and Decision from the Department of Motor Vehicle Hearings was filed September 21, 2011. Notice of Intent to Appeal was timely filed in the Administrative Law Court and an Order Denying Appellant's Motion for Reconsideration and Motion for Rehearing was issued March 28, 2012. This appeal follows.

ARGUMENT

1. The Department of Motor Vehicle Hearings erred in deciding that Officer Ronald Fair was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies and S.C. Code §56-5-2950(A) as amended.

The Department of Motor Vehicle Hearings (DMVH) is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660. Therefore, the DMVH is an “agency” under the Administrative Procedures Act (“APA”). See S.C. Code Ann. §1-23-310(2). As such, the APA’s standard of review governs appeals from decisions of the DMVH. See S.C. Code Ann. § 1-23-380(A); see also S.C. Code Ann. § 56-5-2951(G); (Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm’n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995)). The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. §1-23-380(A)(5). See S.C. Code Ann. §1-23-380(B) (directing Administrative Law Judges to conduct appellate review in the same manner prescribed in Section 1-23-380(A)). This section provides:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(5).

A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). A decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters

v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917."

South Carolina Department of Motor Vehicles v. Ringlein, 06-ALJ-21-0905-AP (2007).

During the July 27, 2010 hearing, Officer Fair never testified or presented any evidence that he was trained and certified as a datamaster operator as required by S.C. Code §56-5-2950(A) and SLED policies. After Officer Fair completed his testimony, Counsel for Appellant moved to rescind the suspension of Appellant's driver's license based on this lack of testimony. ROA pg. 78. Officer Fair attempted to offer evidence after the motions by Appellant's Counsel were made, but that evidence was properly excluded since it was not introduced in the Officer's actual testimony. ROA pg. 80-81. Without testimony or evidence showing Officer Fair was properly trained or certified, no evidence was presented to show that a valid test was ever offered to Mr. Schnee.

The Administrative Law Court has decided similar cases before and determined that a failure to provide testimony or evidence of DataMaster training and certification requires the reversal of a suspension under implied consent. See South Carolina Department of Motor Vehicles v. Bauer, 06-ALJ-21-0531-AP (2007) see also South Carolina Department of Motor Vehicles v. Ringlein, 06-ALJ-21-0905-AP (2007). In

both Bauer and Ringlein, this Court upheld the rescission of the driver's license suspension for this exact issue.

SLED defines a "Breath Test Operator" as "an individual **currently holding a valid permit** from SLED to perform chemical analysis of the type set forth within the permit, under the provision of Sections 23-31-410, 50-21-114, 55-1-100, 56-1-286, 56-1-2130 and **56-5-2950**." (emphasis added). See SLED policy 73-1.E.

S.C. Code §56-5-2950(A) as amended states **ONLY** a SLED certified datamaster operator may administer any type of breath test. Inherent in the breath test procedure are the implied consent issues subject to this appeal. S.C. Code Ann. §56-5-2950(A) states in relevant part:

The breath test **must** be administered by a person trained and certified by the South Carolina Criminal Justice Academy, **pursuant to SLED policies**. (emphasis added).

S.C. Code Ann. § 56-5-2951(F) states, in pertinent part: "The scope of the hearing must be limited to whether the person: (1) was lawfully arrested or detained; (2) was advised in writing of the rights enumerated in Section 56-5-2950; (3) Refused to submit to a test pursuant to Section 56-5-2950;..." The only way to comply with § 56-5-2951(F)(2) and (3) is to follow SLED policy and procedure.

Specifically, SLED policy 8.12.4(C) states in relevant part "Only certified operators may perform tests on certified DataMaster DMTs." SLED policy 8.12.5, titled "IMPLIED CONSENT – ADMINISTRATION OF BREATH ALCOHOL TEST" defines what is included in the breath testing procedure, which includes the requirements of the implied consent advisement.

SLED policy 8.12.5(C) addressed the sequence of events that **MUST** be completed before an implied consent advisement and test may be initiated. Included in this procedure is clear evidence that only the SLED certified operator may get to the point in the testing where implied consent rights are given to a person under suspicion of DUI.

SLED policy 8.12.5(D) addresses what advisement forms must be used in order for the implied consent to be valid. Specifically, it states in part “Based on the **type of test selected to be run**, the DataMaster DMT will print the applicable advisement forms utilizing the stand-alone printer.” (emphasis added). In order for the correct form and proper advisement to be given, the DataMaster must be provided with the correct information by the operator. Also see SLED policy 8.12.5(K)(5)(c), where almost half-way through the testing procedure the operator must select the type of test to be run and, therefore, which advisement process must be completed. As already established, only a SLED certified operator can get to this point in the advisement and testing procedure.

SLED policy 8.12.5(K) provides a detailed explanation of the exact protocol a certified test operator must follow in order to either complete a full breath test or get to the point where a refusal can exist. SLED policy 8.12.5(K)(1-6) details the exact information about the “subject” that **MUST** be entered into the DataMaster prior to the start of any “test.” The word “Operator,” as defined in SLED 73-1.E, is used multiple times in those six sections, clearly indicating SLED regulation regarding who may and may not perform these tasks.

SLED policy 8.12.5(K)(6)(h) is the first and only time in the procedure where a SLED certified operator can establish **ANY** proof that implied consent laws pursuant to

S.C. Code §56-5-2950 have been met. SLED policy 8.12.5(K)(6)(p)(i), which is almost near the end of the SLED mandated procedure, is the ONLY place where a SLED certified operator may determine a person “refused” to provide a sample pursuant to the implied consent laws. When one looks at the “Notice of Suspension”, the only place for a law enforcement signature and name states “Signature of DataMaster Operator” and “Printed Name of DataMaster Operator.” ROA pg. 114. It is, therefore, very clear that only a SLED certified DataMaster operator can give the required implied consent to a person, determine if there is a refusal and, ultimately, request the Department of Motor Vehicles to suspend a person’s driver’s license.

The Final Order and Decision in this case states Officer Fair is a certified DataMaster operator. ROA pg. 93. This factual finding is error as a review of the transcript clearly shows no evidence to support this factual determination was introduced. Pursuant to S.C. Code §1-23-380(5)(e) & (f), this Court must reverse the decision to uphold the suspension since no valid test was ever offered without testimony or evidence of DataMaster training and certification.

In conclusion, it is clear the requirements of S.C. Code §56-5-2950 and SLED Policies and Regulations were not met in this case since there is no evidence that Officer Fair was as SLED certified datamaster operator. Officer Fair, therefore, could not have complied with the requirements of the statute nor SLED polices and procedures in order to complete the implied consent process. Without a proper implied consent process, there can be no license suspension.

2. The Department of Motor Vehicle Hearings erred in deciding that Officer Ronald Fair had probable cause for arrest.

After the initial traffic stop, Officer Fair requested Mr. Schnee drive to a side street. ROA pg. 69. On cross-examination, Office Fair admitted he arrested Mr. Schnee without knowing if he “was okay to drive.” ROA pg. 74. Officer Fair further admitted there was no safe distance a person could drive if they were impaired. ROA pg. 74-75. Officer Fair further stated in his arguments that he was unsure about impairment. ROA pg. 79. The burden for establishing probable cause for the arrest is on the arresting officer. See S.C. Code 56-5-2951 (F)(1) (providing that whether a person was lawfully arrested or detained is an issue to be determined at the administrative hearing). “Probable cause to arrest without a warrant exists when the ‘circumstances within the arresting officer’s knowledge are sufficient for a reasonable person to believe a crime has been committed by the person to be arrested.’” “In determining whether probable cause exists, ‘all the evidence within the arresting officer’s knowledge may be considered, including the details observed while responding to information received.’” State v. Manning, Op. 5017 (S.C. Ct. App. 10-10-2012 p. 6)(quoting State v. Cuevas, 365 S.C. 198, 203 (Ct.App. 2005). Here, in order for a finding of probable cause to be justified, it would be necessary for the hearing officer to irrationally conclude that Officer Fair, who admitted that there was no safe distance for an impaired person to drive, ordered Appellant to do exactly that. Appellant refused to submit to any field sobriety tests, so there is no additional evidence from which to draw the conclusion that there was probable cause to arrest Appellant. As a result of the lack of evidence, probable cause for the arrest did not exist. This Court must, therefore, reverse the suspension.

CONCLUSION

Based on the arguments presented, the Final Order and Decision of the DMVH must be reversed and the driver's license of Mr. Schnee must be reinstated.



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This 10 day of April, 2013

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Mark Schnee, Appellant.

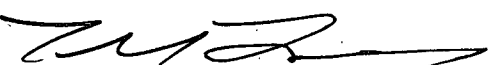
v.

West Columbia Police Department and
South Carolina Department of Motor Vehicles, Respondents;

PROOF OF SERVICE

I hereby certify that a true copy of the Final Brief of Appellant in the above-referenced case has been served upon opposing counsel by delivering same this date to her office via U.S. Mail at the South Carolina Department of Motor Vehicles, P.O. Box 1498, Blythewood, SC 29016-0020.

April 10, 2013



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