STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edward Eli Saleeby, III, Appellant, v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety, Respondents.	Docket No. 11-ALJ-21-0563-AP ORDER

STATEMENT OF THE CASE

This matter is an appeal by Appellant Edward Eli Saleeby, III ("Appellant") from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings ("OMVH") dated October 24, 2011. The OMVH's decision was issued following an administrative hearing held pursuant to S.C. Code Ann. § 56-5-2951(B)(2). Upon careful review of the matter, OMVH's decision is affirmed.

BACKGROUND

On July 3, 2010, Trooper Brigham of the South Carolina Department of Public Safety, while on routine patrol in Darlington County, observed a truck following too closely to a vehicle in front of it. Trooper Brigham initiated a traffic stop on the truck. Trooper Brigham approached the vehicle, and he identified Appellant as the driver. Trooper Brigham noticed a very strong odor of alcohol coming from within the truck. However, upon speaking with Appellant outside of the vehicle, there was no odor of alcohol. Trooper Brigham observed that Appellant appeared disoriented, and his eyes were dilated. Appellant subsequently stated that he had taken Lorcet because he had a chipped tooth.

Trooper Brigham then requested Appellant to perform field sobriety tests. Prior to performing the field sobriety tests, Appellant informed the Trooper that Appellant had a medical condition that caused problems with balance. During the Horizontal Gaze Nystagmus test, Appellant had no nystagmus; however his pupils were dilated. During the walk-and-turn test, Appellant started the test before instructions were finished, stepped off the line, and took the

incorrect number of steps. During the one-leg stand test, Appellant swayed while balancing and used his arms to balance himself, as well as placed his foot down. Appellant was subsequently placed under arrest for driving under the influence and transported to the Hartsville Police Department for a DataMaster test. While conducting an inventory search of Appellant's vehicle, Trooper Brigham found a prescription bottle of Xanax located in the center console.

Prior to beginning the DataMaster test, Appellant was advised that he was being video-recorded. Trooper Brigham further advised Appellant that he believed Appellant to be under the influence of narcotics. Appellant then informed Trooper Brigham that he wanted to give a blood sample and not a breath sample. Trooper Brigham advised Appellant that he was required to give Appellant a breath test first because Appellant was medically able to provide the breath sample. Trooper Brigham, a certified DataMaster operator, advised Appellant of his implied consent rights verbally and in writing. Appellant's mouth was checked for foreign material, he was observed for twenty minutes, and the DataMaster machine was working properly. Appellant consented to the test and provided a breath sample of 0.00%. Based upon the breath test result, Trooper Brigham advised Appellant that he would be transported to Carolina Pines Hospital for a urine test.

During transport to Trooper Brigham's vehicle, Appellant verbally refused the urine test. Appellant's refusal to urine testing was not videotaped. Based upon Appellant's refusal to submit to a urine test, a notice of suspension was issued to him. Appellant signed a copy of the notice of suspension indicating his license was being suspended due to refusing to submit to a urine sample. After Respondent South Carolina Department of Motor Vehicles ("Department") received the notice of suspension, it suspended Appellant's driver's license in accordance with state law.

Appellant subsequently requested an administrative hearing. The hearing was held on October 19, 2011. On October 24, 2011, the OMVH hearing officer issued a Final Order and Decision sustaining Appellant's suspension. Appellant then filed this appeal with the ALC on November 4, 2011.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660. Therefore, the OMVH 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 OMVH. See S.C. Code Ann. § 1-23-380; see also 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(5). 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(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 W. 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 Res. 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.

ISSUES ON APPEAL

1. Did the Hearing Officer err in finding that sufficient evidence had been presented to establish probable cause for Appellant's arrest?

2. Did the Hearing Officer err by failing to rescind Appellant's suspension based upon the arresting officer's failure to videotape Appellant's refusal?

3. Did the arresting officer err in his advisement to Appellant concerning the blood test?

4. Did the Hearing Officer err in his determination regarding Appellant's request for "affirmative assistance"?

DISCUSSION

Probable Cause

Appellant argues that the Hearing Officer erred in relying upon portions of Trooper Brigham's testimony in making his determination that probable cause existed to arrest Appellant for driving under the influence. More specifically, Appellant argues that the Hearing Officer erred in relying upon testimony regarding a prescription bottle found within Appellant's vehicle and Appellant's performance on the field sobriety tests.

Appellant argues that the Hearing Officer should not have considered any testimony regarding the prescription bottle of Xanax found within Appellant's vehicle because there was no evidence or testimony that Appellant had consumed that medication on the night in question. Appellant also argues that he has a medical condition which prevents him from properly performing field sobriety tests. Specifically, Appellant asserts that he suffers from Ataxia, which can cause an individual to have balancing problems. Because Appellant informed Trooper Brigham of his medical condition, Appellant argues that Trooper Brigham should not have requested him to perform any field sobriety tests which include balancing as a component.

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been

committed by the person being arrested. Id. Whether probable cause exists depends on the totality of the circumstances surrounding the information at the officer's disposal. Id.

With regard to the prescription bottle found within the vehicle, there is no requirement that the arresting officer prove that Appellant was under the influence of this particular medicine at the time of the traffic stop. Notably, the question before the Hearing Officer was not whether the Department had proved that Appellant was guilty of driving under the influence, or much less, under the influence of this particular medicine. See Lapp v. S.C. Dep't of Motor Vehicles, 387 S.C. 500, 506, 692 S.E.2d 565, 568 (Ct. App. 2010) (noting that an implied consent hearing "'is *not* a trial in regard to the guilt or innocence of the defendant on a DUI charge'") (emphasis in original). Instead, the question was merely whether the circumstances within the Trooper's knowledge were sufficient to lead a reasonable person to believe that Appellant had committed the offense of driving under the influence. See Baccus, 367 S.C. at 49, 625 S.E.2d at 220.

Given the totality of the circumstances in the case before this Court, the Hearing Officer did not err in concluding that Trooper Brigham's testimony established that probable cause existed for Appellant's arrest for driving under the influence. Trooper Brigham testified that he placed Appellant under arrest for driving under the influence based upon his observations, including: following too closely to the vehicle in front of him; a strong odor of alcohol coming from within the vehicle; when speaking with Appellant, he appeared disoriented; Appellant's pupils were dilated; Appellant admitted "he was on Lorcet"; Appellant's performance on the field sobriety tests; and, upon searching Appellant's vehicle, Trooper Brigham found a prescription bottle for Xanax. Trooper Brigham's testimony was clearly sufficient, as a whole, to establish probable cause for Appellant's arrest. Cf. State v. Goodstein, 278 S.C. 125, 127, 292 S.E.2d 791, 792 (1982) (holding that there was "abundant testimony" to sustain the conclusion that motorist's arrest for driving under the influence was lawful where arresting officer testified that the motorist was speeding, had a strong odor of alcohol about his person, had slurred speech, and was obnoxious and unsteady on his feet). Moreover, South Carolina courts have found probable cause to arrest for driving under the influence where there was no mention of evidence that the motorist had slurred speech or bloodshot eyes. See e.g., Kelly v. S.C. Dep't of Highways, 323 S.C. 334, 474 S.E.2d 443 (Ct. App. 1996); State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (1978).

Videotape

Appellant next argues that his "alleged" refusal to submit to urine testing should not have been considered by the Hearing Officer because the refusal is "a misstatement of fact" and because no videotape exists to support the alleged refusal. Although Appellant argues that the Hearing Officer's determination that Appellant refused the urine test is a misstatement of fact, there is substantial evidence in the Record to support the contrary determination reached by the Hearing Officer. See Lark, 276 S.C. at 135, 276 S.E.2d at 306 (stating "'[s]ubstantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.").

Trooper Brigham testified that Appellant refused the urine test during transport from the Detention Center to his patrol car. Although Appellant testified that he did not refuse the Trooper's request, he later testified that he "did not recall" refusing to submit to the urine test. Moreover, Appellant signed the notice of suspension issued to him as a result of his refusal to submit to a urine test. "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (citing Palmetto Alliance, Inc. v. S.C. Public Service Commission, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). Based on the testimony and the evidence presented during the hearing, reasonable minds could reach the conclusion the Hearing Officer reached in this matter. The Hearing Officer observed the witnesses and is in the best position to judge their demeanor and veracity and to evaluate the credibility of each witness' testimony. See Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

With regard to Appellant's argument that the Trooper must videotape Appellant's refusal to submit to a urine test, Appellant cites State v. Elwell, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011) as "related case law" to support his assertion. In Elwell, the Court recognized that in all driving under the influence cases, "the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so." Elwell, 396 at 336-7, 721 S.E.2d at 454 (citing S.C. Code Ann. § 56-5-

2950(A)(2)(b)-(c)).[1] As acknowledged by Appellant in his brief, there is no case law, statute or regulation that requires a videotape of a person who refuses a urine test in a driving under the influence matter. In Elwell, the Court discussed the videotape in the context of a breath test, not a urine test like the instant matter. Id. The Court, therefore, finds the Hearing Officer properly determined that a video was not required regarding Appellant's refusal to submit to urine testing. Moreover, Appellant was video-recorded during the DataMaster pre-test procedures, and this video was made available online.

Advisement

Appellant next argues that Trooper Brigham wrongfully advised Appellant that a blood test was not an option, and thus, failed to provide affirmative assistance to Appellant when he requested the blood test. Appellant further argues that he should have been granted a blood test because it "provides the most comprehensive determination of what amount, if any, of narcotics was in [Appellant's] system."

In reviewing the Record, Trooper Brigham advised Appellant that proceeding with a blood test at the time Appellant requested it was premature. Pursuant to S.C. Code Ann. § 56-5-2950, the Trooper was required to first offer a breath test to Appellant: "At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration." § 56-5-2950(A). The only statutory exception applies if the motorist is "physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel." Id. None of these exceptions applied in Appellant's circumstances.

Moreover, § 56-5-2950(A) also provides that "[i]f the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that urine sample be taken for testing." The statute further directs the officer that the "breath sample taken for testing must be collected within two hours of the arrest" and that "[a]ny additional tests to collect other samples must be collected within three hours of the arrest. Id. Based upon the Trooper's observations during the traffic stop, it is reasonable to conclude that the Trooper was required, by time-constraints, to

---

[1] The motorist appealed the Court of Appeals' decision in Elwell. The South Carolina Supreme Court granted review and issued a decision affirming the Court of Appeals' decision. State v. Elwell, No. 2012-209726, 2013 WL 2325600 (S.C. May 29, 2013).

administer the breath test prior to administering any additional tests including blood or urine tests.

And while a blood test may or may not provide a more "comprehensive" determination of any narcotics in a person's system, nothing in the statute requires the officer to proceed with a blood test prior to administering a breath test. As noted above, the officer is required, by statute, to first administer a breath test to an individual to determine his alcohol concentration. See § 56-5-2950(A).

Affirmative Assistance

Appellant next argues that the Hearing Officer erred in his determination that affirmative assistance is not an issue in this case. More specifically, the Hearing Officer concluded that because Appellant "refused a urine test, there was no initial test and therefore no duty to provide affirmative assistance for additional tests."

Section 56-5-2950(D) and (E) provide for the following:

> (D) The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.
>
> (E) The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED must test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.

Appellant first requested a blood test prior to receiving his implied consent rights and prior to submitting to the breath test. At that point, affirmative assistance was not applicable: Section 56-5-2950(D) authorizes a "person tested or giving samples for testing" to have a "qualified person of his own choosing conduct additional tests at his expense." (emphasis

added). Appellant had not submitted to any tests, and therefore, affirmative assistance to receive a blood test was not applicable. Appellant subsequently consented to a breath test, and the test result registered 0.00%. At this point, Appellant was advised by Trooper Brigham that a urine sample was being requested due to the Trooper's belief that Appellant was under the influence of narcotics. Trooper Brigham advised Appellant that he was being transported to Carolina Pines Regional Medical Center for urine testing. Appellant verbally refused to provide a urine sample. Despite the Trooper's statement that Appellant was being transported to the hospital, Appellant did not make any further requests for a blood test after he refused to provide a urine sample.

Trooper Brigham was not required to provide affirmative assistance to Appellant after his refusal to provide a urine sample. The purpose of the statute is to provide a person the opportunity to challenge the state's test or procedures. See Town of Fairfax v. Smith, 285 S.C. 458, 459, 330 S.E.2d 290, 290 ("The purpose of [§§ 56-5-2950(D) and (E)] is to permit an accused person to gather independent evidence to submit in reply to that of the prosecuting authority.")[2]. In Appellant's case, Appellant is not seeking to challenge the DataMaster test result or any procedures related to the test. Nevertheless, even if Trooper Brigham failed to provide affirmative assistance to Appellant, the remedy for such failure is to bar "the admissibility of the breath test result in any judicial or administrative proceeding." S.C. Code Ann. § 56-5-2950(E). Appellant does not challenge the breath test result or procedures in any way. Rather, he is attempting to challenge the Hearing Officer's determination that Appellant refused to submit to urine testing.

Accordingly, the OMVH Hearing Officer did not err in finding that there was probable cause to arrest Appellant for driving under the influence, that Appellant's refusal to submit to urine testing was not required to be videotaped, that the Trooper did not err in his advisement to Appellant regarding the blood test, and that Appellant's suspension will not be rescinded based upon "affirmative assistance." Moreover, the OMVH Final Order and Decision is supported by the substantial evidence in the Record.

ORDER

IT IS HEREBY ORDERED that the OMVH Final Order and Decision sustaining the suspension of Appellant's driver's license or driver's privilege is **AFFIRMED.**

---

[2] Town of Fairfax v. Smith, 285 S.C. 458, 330 S.E.2d 290, was decided under prior versions of S.C. Code Ann. §§ 56-5-2950(D) and (E). The amendments to these sections did not change the substance of the statute.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

August 2nd, 2013
Columbia, South Carolina

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 paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).
This 2 day of August 2013
By: Judicial Law Clerk