

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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On Writ of Certiorari to the Court of Appeals

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S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Carolyn C. Matthews, Administrative Law Judge

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UNPUBLISHED OPINION NO. 2011-UP-130

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South Carolina Department of Motor Vehicles . . . . . Respondent,

v.

Phillip Samuel Brown . . . . . Appellant.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

Table of Contents .....	i
Table of Authorities .....	ii, iii
Statement of Issues on Appeal .....	1
Statement of the Case .....	1
Argument:	
THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE ISSUE OF WHETHER THE BREATH TEST WAS CONDUCTED PURSUANT TO S.C. CODE ANN. § 56-5-2950 WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW .....	3
Conclusion .....	10

**TABLE OF AUTHORITIES**

**Cases**

*Arkwright Mills v. Clearwater Mfg. Co.*, 217 S.C.530, 539, 61 S.E. 2d 165, 168-69 (1950) ..... 6

*Browning v. Browning*, 266 S.C. 255, 262, 621 S.E.2d 389, 392 (Ct. App. 2005) . . . . 5

*Daisy Outdoor Advertising Co., Inc. v. south Carolina Dep't of Transportation*, 352 S.C. 113, 118, 572 S.E. 2d 462, 465 (Ct. App. 2002) ..... 5

*Felder v. Johnson*, 127 S.C. 215, 217, 121 S.E.54 (1924) ..... 6

*Moffitt v. Commonwealth*, 434 S.E.2d 684, 687 (Va Ct. App. 1993) ..... 6

*S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 705 S.E.2d 425 ..... 9

*S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 523, 613 S.E. 2d 544, 549 (Ct. App. 2005) ..... 5

*S.C. Nat'l Bank v. Florence Sporting Goods, Inc.* 241 S.C. 110, 115-116, 127 S.E.2d 199, 202 (1962) ..... 6

*South Carolina Hwy. Dept v. Harbin*, 226 S.E. 585, 595, 86 S.E. 2d 466, 470 (1955) .. 3

*State v. Abraham*, 395 S.C. 645, 720 S.E.2d 491 ..... 7

*State v. Bridgers*, 329 S.C. 11, 495 S.E.2d 196 (1977) ..... 6

*State v. Burton*, 356 S.C. 259, 266, 589 S.E.2d 6, 9 (2003) ..... 7

*State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980) ..... 6

*State v. Kerr*, 330 S.C. 132, 149, 498 S.E. 2d 212, 220-21 (Ct. App. 1998) ..... 3

*State v. Newton*, 274 S.C. 287, 294, 262 S.E. 2d 906, 910 (1980) ..... 3

*State v. Owens*, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) ..... 7

*State v. Parker*, 271 S.C. 159, 163-64, 245 S.E.2d 904, 906 1978) ..... 8

**Statutes**

*S.C. Code Ann.* § 56-5-2950 ..... 1, 2, 3, 4, 5, 7,  
8, 9, 10

*S.C. Code Ann.* § 56-5-2951 ..... 1, 3,  
4, 5

**Other Authorities**

*Randolph R. Lowell, South Carolina Administrative Practice and Procedure* 178 (2d ed.  
2008) ..... 5

30 S.C. Jur. Evidence § 29 (2006) ..... 6

## STATEMENT OF ISSUE ON APPEAL

**DID THE COURT OF APPEALS ERR IN HOLDING THAT THE ISSUE OF WHETHER THE BREATH TEST WAS CONDUCTED PURSUANT TO S.C. CODE ANN. § 56-5-2950(2006) WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW?**

## STATEMENT OF THE CASE

On July 7, 2008, Respondent was arrested for driving under the influence by Officer A. S. Wilson of the Columbia Police Department. (Appendix p. 33). Prior to his arrest, Appellant was stopped for failing to turn on his headlights during hours of darkness. (Appendix p. 33) Officer Wilson testified that upon his initial contact with Appellant, he detected the odor of alcohol on Appellant, observed that he had bloodshot eyes, slurred speech and had slow and deliberate movements. (Appendix p. 34) Following his arrest, Appellant was transported to the Columbia Police Department for a DataMaster test. (Appendix p. 34). Officer Wilson testified that Appellant registered an alcohol concentration of seventeen one hundredths of one percent (0.17%) and that the machine was working properly. (Appendix p. 34) Appellant's privilege to drive in South Carolina was suspended for registering an alcohol concentration of fifteen one hundredths of one percent (0.15%) or greater on the breath test and he was issued the requisite notice of suspension. (Appendix p. 34). Appellant timely requested an administrative hearing pursuant to S.C. Code Ann. 56-5-2951 (2006).

A hearing was held before Office of Motor Vehicle Hearings (OMVH) hearing officer Robert F. Harley, Jr. on August 26, 2008. At the close of evidence, counsel for the Appellant moved to rescind the suspension based upon the DataMaster operator's failure to prove the test administered and samples obtained were conducted pursuant to S.C. Code Ann. 56-5-2950 (2006). (Appendix p. 36) By Order dated September 25, 2008,

OMVH hearing officer, Robert F. Harley, Jr. ruled that Respondent's driving privileges should be restored and rescinded the administrative license suspension based upon Officer Wilson's failure to prove that the DataMaster was functioning properly and that Officer Wilson failed to prove Appellant registered fifteen one hundredths of one percent (0.15%) or greater on the breath test. (Appendix p. 30-31).

The Department of Motor Vehicles appealed citing two issues on appeal: (1) Did the OMVH hearing officer err when he concluded that the arresting officer failed to present evidence to show that the Respondent registered 0.15% or greater on a breath test?; and (2) Did the OMVH hearing officer err when he concluded that the arresting officer failed to prove that the machine was working properly? (Appendix p. 16) The Respondent – Appellant raised a third issue in his brief as an additional sustaining ground: (3) Did the OMVH hearing officer err when he concluded that the arresting officer failed to prove that the test administered and the sample obtained from Respondent complied with S.C. Code Ann. 56-5-2950 (2006)? (Appendix p. 16)

The Administrative Law Court held that the OMVH hearing officer erred by concluding that Officer Wilson failed to present evidence to show that the Respondent registered 0.15% or greater on the breath test and the Respondent concedes that the hearing officer erred in reaching this conclusion (Appendix p. 19). The Court also found that the hearing officer's conclusion that the Department failed to carry its burden of proof was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record (Appendix p. 20).

Addressing the additional sustaining ground proposed by the Respondent in his brief, the Court concluded that Officer Wilson's failure to specifically testify that the

“breath test was administered and the sample obtained was conducted pursuant to 56-5-2950: did not mandate rescission of Respondent’s suspension since Respondent failed to timely raise the issue and Officer Wilson testified to the test results without objection from Respondent’s attorney (Appendix p. 22).

Appellant filed a timely appeal to the Court of Appeals. The Court of Appeals affirmed the decision of the Administrative Law Court (Appendix pp. 1-2). By Petition for a Writ of Certiorari filed on June 22, 2011, Appellant sought review of the decision of the Court of appeals. This Court granted the Petition by Order filed on March 9, 2012.

### **ARGUMENT**

#### **THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE ISSUE OF WHETHER THE BREATH TEST WAS CONDUCTED PURSUANT TO S.C. CODE ANN. § 56-5-2950 WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.**

The license to operate a motor vehicle upon the public highways of this State is not a right, but a mere privilege that is subject to reasonable regulations in the interests of public safety and welfare. *State v. Newton*, 274 S.C. 287, 294, 262 S.E. 2d 906, 910 (1980); *State v. Kerr*, 330 S.C. 132, 149, 498 S.E. 2d 212, 220-21 (Ct. App. 1998). This privilege is always subject to revocation or suspension for any cause relating to public safety. *South Carolina Hwy. Dept. v. Harbin*, 226 S.E. 585, 595, 86 S.E. 2d 466, 470 (1955). This privilege cannot be revoked arbitrarily or capriciously. *Id.*

The legislature, consistent with these principles, enacted S.C. Code Ann. § 56-5-2950 (2006) and S.C. Code Ann. § 56-5-2951 (2006). S.C. Code Ann. § 56-5-2950 declares that a person who drives a motor vehicle in this State implicitly consents to a chemical test of his breath, blood or urine for the purpose of determining the presence of

alcohol or drugs. The statute requires that, at the direction of the arresting officer, a breath test be administered to a motorist arrested for DUI. S.C. Code Ann. § 56-5-2950 (a) (2006). However, § 56-5-2950 also provides that before any type of chemical test is administered, the motorist must be informed, in writing:

- (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 ninety days if he refuses to submit to the tests and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least thirty days if he takes the test 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.

S.C. Code Ann. § 56-5-2950(a) (2006). Section 56-5-2951, in turn, mandates that the driver's license of a motorist who has an alcohol concentration of fifteen one-hundredths of one percent or more be suspended immediately. This Section also grants motorists the right to request an administrative hearing to challenge such suspensions. S.C. Code Ann. § 56-5-2951 (B)(2) (2006). If a hearing is requested, the scope of the hearing must be limited to whether the motorist:

- (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, 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.

S.C. Code Ann. § 56-5-2951(F) (2006).

In a Section 56-5-2951 hearing, the initial burden of proof is borne by the Department and/or the applicable law enforcement agency. Randolph R. Lowell, South Carolina Administrative Practice and Procedure 178 (2d ed. 2008) However, once a prima facie case is established against the motorist, the burden shifts to the motorist to present evidence to rebut the prima facie case. *Daisy Outdoor Advertising Co., Inc. v. south Carolina Dep't of Transportation*, 352 S.C. 113, 118, 572 S.E. 2d 462, 465 (Ct. App. 2002). *Browning v. Browning*, 266 S.C. 255, 262, 621 S.E.2d 389, 392 (Ct. App. 2005)

The department's prima facie case in an implied consent hearing consists of those elements included as a prerequisite to license suspension under Section 56-5-2951(A), which may be enumerated as follows:

- (1) a person;
- (2) operating a motor vehicle;
- (3) in South Carolina;
- (4) be arrested for an offense arising out of acts alleged to have been committed while the person was driving under the influence of alcohol, drugs, or both; and
- (5) refuses to submit to alcohol or drug testing or has an alcohol concentration of fifteen one-hundredths of one percent or more.

See S.C. Code Ann. § 56-5-2951 (A) (2006) ("The Department of Motor Vehicles must suspend the driver's license, permit or non-resident operating privileges of... a person who drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950 or has an alcohol concentration of fifteen one-hundredths of one percent or more."); *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 523, 613 S.E. 2d 544, 549 (Ct. App. 2005) (citing §§ 56-5-2950, -2951) listing elements of Department's prima facie case of suspension and excluding items listed in S.C. Code Ann. § 56-5-2951(F), which are cited as being properly within the scope of administrative hearing). Once a

prima facie case is established against a motorist, the burden shifts to the motorist to present evidence to rebut the prima facie case.

If a prima facie case is established against the motorist and the motorist fails to present any evidence to rebut it, then judgment must go against the motorist. See *Arkwright Mills v. Clearwater Mfg. Co.*, 217 S.C.530, 539, 61 S.E. 2d 165, 168-69 (1950) (“It is the settled rule of law that once a party establishes a prima facie case, judgment will go in his favor unless the opposite party produces evidence sufficient to overcome the prima facie presumption.”); accord *Moffitt v. Commonwealth*, 434 S.E.2d 684, 687 (Va Ct. App. 1993) (“Once the Commonwealth has established a prima facie case, it is entitled to judgment, unless the respondent goes forward with evidence that refutes an element of the Commonwealth’s case or rebuts the prima facie presumption.”).

Officer Wilson, a certified Datamaster operator testified that the Respondent took the breath test and blew a .17. In the absence of any proof to the contrary, public officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged. *S.C. Nat’l Bank v. Florence Sporting Goods, Inc.* 241 S.C. 110, 115-116, 127 S.E.2d 199, 202 (1962); 30 S.C. Jur. Evidence § 29 (2006). The South Carolina Supreme Court has held that the state highway patrol and troopers, as well as city police officers, fall within the common law definition of “public officer”. See *State v. Bridgers*, 329 S.C. 11, 495 S.E.2d 196 (1977); *State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980). In this case, there was no evidence or testimony that the officer did not follow the procedures in accordance with his training. See *Felder v. Johnson*, 127 S.C. 215, 217, 121 S.E.54 (1924) (“In the absence of evidence to the

contrary, courts are bound to presume that public officers have properly discharged their duties and that their acts are in all respects regular.”)

The Appellant contends that the arresting officer failed to establish that the breath test was administered and the sample obtained by procedures conducted pursuant to S.C. Code Ann. § 56-5-2950. However, while the Respondent’s attorney challenged the results and the procedures in his closing remarks, there was absolutely no evidence before the hearing officer to support the conclusion that requirements of Section 56-5-2950 and SLED policy were not followed. In fact, the only evidence presented at the hearing supports just the opposite conclusion and supports the further conclusion that the test results were reliable and accurate. The Appellant did not object to, nor did he move to strike the officer’s testimony. The Appellant raised the sufficiency of the officer’s testimony after the close of the Respondent’s case in chief after the testimony pertaining to the test had already been admitted. Therefore, and the Administrative Law Court and the Court of Appeals did not err in finding that the issue was not preserved for appellate review. *See State v. Abraham*, 395 S.C. 645, 720 S.E.2d 491 (finding that the defendant failed to preserve for appellate review argument that the police officer did not have reasonable suspicion to stop him while he was riding his bike, where, at trial, State questioned officer about chain of events leading up to officer’s decision to approach defendant, defendant did not object to or move to strike officer’s testimony, and defendant only raised propriety of officer’s seizure of defendant in a motion after close of State’s case-in-chief); *State v. Owens*, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) (finding constitutional claims not preserved for review without a contemporaneous objection at trial); *State v. Burton*, 356 S.C. 259, 266, 589 S.E.2d 6, 9 (2003) (holding

that the failure to object to, or the failure to move to strike evidence, renders such evidence competent and entitled to consideration to the extent it is relevant).

Because the officer was a certified DataMaster operator, it can be assumed, absent any evidence to the contrary, that he properly administered the breath test. See *State v. Parker*, 271 S.C. 159, 163-64, 245 S.E.2d 904, 906 (1978) (holding that a breath test operator's testimony that he had been certified by the South Carolina Law Enforcement Division constituted prima facie evidence that the breath test was administered by a qualified person in the proper manner). Therefore, once the officer presented his testimony, the burden shifted to the Respondent to present evidence showing that the officer failed to follow the requisite sections of 56-5-2950 in administering the breath test. The Respondent offered no evidence to contradict the officer's testimony.

The administrative law judge correctly concluded that S.C. Code Ann. § 56-5-2950 (e) governs situation where a violation of compliance with §56-5-2950 (a) is alleged. Under this section, the provisions in § 56-5-2950 must not be considered by OMVH hearing officers unless a party expressly moves for their consideration. Moreover, even in case where a violation of SLED policy is shown, rescission of the motorist's administrative suspension is not automatic under § 56-5-2950 (e). Rather, in such cases, exclusion of the motorist's test results may occur if the hearing officer "finds that such failure materially affected the accuracy or reliability of the test results or the fairness of the procedure." Based on these provisions of §56-5-2950 (e), it is certainly reasonable to infer that the compliance with SLED policies is not an element of the State's prima facie case in administrative hearings as was held below.

Based upon the above argument, the Appellant's assertion that the shift of the burden of production and proof is impermissible burden shifting is totally without merit. Clearly, the Respondent presented a solid prima facie case which was not rebutted by the Appellant. Had the Appellant met his burden by presenting some evidence that called into question the sufficiency of the testimony regarding the conduct of the breath test, the Department would have had the ultimate burden of persuasion to convince the Hearing Officer by a preponderance of the evidence that the conduct of the breath test was pursuant to 56-5-2950.

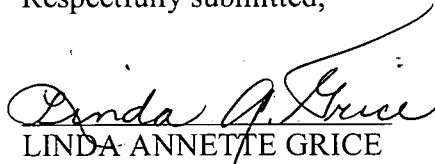
The Appellant's reliance upon the South Carolina Supreme Court's holding in *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 705 S.E.2d 425, is misplaced. In *McCarson*, the Court found that the police sergeant's observations of the licensee's erratic driving were not admissible through police officer's incident report and testimony to establish probable cause for licensee's driving under the influence (DUI) arrest. The Court found that the Department failed to present *admissible* evidence in that the evidence presented was hearsay. There is no question of hearsay in the instance case. In *McCarson*, the evidence which would have established probable cause, the incident report which contained the observations of another officer, was challenged in the case in chief. The proffered evidence was excluded and the State was unable to establish probable cause. In the instance matter, the officer's testimony was based upon his own observations and conclusions and was competent to establish the testimonial facts and was, of course, admissible and was offered without objection. The OMVH Hearing Officer erred in rescinding the Appellant's suspension because the Department failed to meet its burden of proof when the Appellant presented no evidence whatsoever that the

conduct of the test was not pursuant to section 56-5-2950. Appellant's attorney cross-examined the officer but did not inquire into the conduct of the test. Appellant presented no witnesses and he did not testify. His attorney raised the issue of the conduct of the test during closing argument, having failed to present any evidence whatsoever calling the conduct of the test into question. There is absolutely no evidence in the Record – much less substantial evidence – that the test was not conducted pursuant to section 56-5-2950. The administrative Law Court and the Court of Appeals did not err in finding that the issue was not preserved for appellate review.

### CONCLUSION

For the reasons set forth above, the opinion of the Court of Appeals in this matter should be affirmed.

Respectfully submitted,



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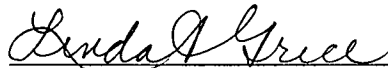
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**CERTIFICATE OF COUNSEL**

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The Undersigned Counsel certifies that the Brief of Respondent complies with Rule 211(b), SCACR.

April 26, 2012



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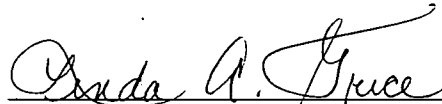
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Phillip Samuel Brown . . . . . Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02, filed August 13, 2007.

April 26, 2012



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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, April 26, 2012,  
I served the Brief of Respondent by depositing with the United States Postal  
Service, correct postage prepaid, to Counsel for the Appellant at the address  
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April 26, 2012  
Blythewood, South Carolina

Nikki R. Haley  
Governor



Kevin A. Schwedo  
Executive Director

*State of South Carolina*  
*Department of Motor Vehicles*

April 26, 2012

The Honorable Daniel E. Shearhouse  
Clerk of Court, S.C. Supreme Court  
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Re: *South Carolina Department of Motor Vehicles vs. Philip S. Brown*  
Unpublished Opinion No. 2011-UP-130

Dear Mr. Shearhouse:

I enclose with this letter an original and fifteen (15) copies of our Final Brief together with an original and one (1) copy of the certificate of service, and certificate of compliance. If you will be so kind as to return the extra copy in the envelope provided.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristy L. Corley".

Kristy L. Corley  
Administrative Specialist  
Office of General Counsel

cc: Heath P. Taylor, Esquire