

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ADMINISTRATIVE LAW COURT
DIVISION OF MOTOR VEHICLES HEARINGS

Shirley C. Robinson, Administrative Law Judge

RECEIVED
DEC 27 2013

Appellate Case No. 2013-002225

SC Court of Appeals


Tracy Lynn Adams Appellant.

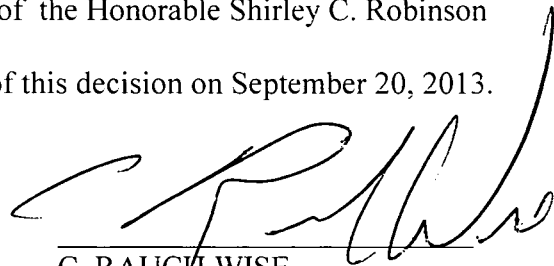
vs.

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

AMENDED NOTICE OF INTENT TO APPEAL

Tracy Lynn Adams hereby appeals the decision of the Honorable Shirley C. Robinson
dated September 20, 2013. Appellant received a copy of this decision on September 20, 2013.


_____, 2013



C. RAUCH WISE
Attorney at Law
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Attorney for Appellant

Other Counsel of Record:

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(803) 896-9900

Attorneys for Respondent

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Tracy Lynn Adams,)
)
 Appellant,)
 v.)
)
 South Carolina Department of Motor)
 Vehicles and South Carolina Department)
 of Public Safety,)
)
 Respondents.)
)
 _____)

Docket No. 12-ALJ-21-0379-AP

ORDER

STATEMENT OF THE CASE

This matter is an appeal by Appellant Tracy Lynn Adams (“Appellant”) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (“OMVH”) dated July 30, 2012. 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 February 10, 2012, Trooper O’Dell of the South Carolina Department of Public Safety observed a green Nissan pickup truck swerving back and forth in its lane of travel. Specifically, the Appellant’s vehicle tires crossed over the yellow line into the median and the broken white lines that divide the traffic lanes. Trooper O’Dell initiated a traffic stop of the vehicle, and when he approached the vehicle, Trooper O’Dell identified Appellant as the driver. While speaking with Appellant during the traffic stop, Trooper O’Dell observed an odor of alcoholic beverage coming from the vehicle. In response to an inquiry by Trooper O’Dell, the Appellant stated that she had been drinking. Trooper O’Dell asked Appellant to exit the vehicle and perform three field sobriety tests: the Horizontal Gaze Nystagmus (“HGN”); the walk and turn test; and the one-leg stand test. Appellant performed poorly on all the field sobriety tests. Following Appellant poor performance on the field tests, Trooper O’Dell read Appellant her Miranda Rights and placed Appellant under arrest for driving under the influence and transported her to the Greenwood Detention Center for a DataMaster test.

Prior to requesting a breath sample from the Appellant, Trooper O’Dell advised Appellant of

her Advisement of Implied Consent Rights, verbally and in writing, and observed Appellant for the requisite time period. When Trooper O'Dell requested Appellant submit a breath sample, she refused. Based upon the refusal, Appellant was issued a notice of suspension. After the 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 April 12, 2012. On July 30, 2012, the OMVH Hearing Officer issued a Final Order and Decision sustaining Appellant's suspension. Appellant then filed this appeal with the ALC on August 18, 2012.

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 outlined in 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. 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 the stop and arrest of Appellant was lawful and based upon probable cause?
2. Did the Hearing Officer err in failing to declare the implied consent law unconstitutional?

DISCUSSION

Probable Cause

Appellant argues that the Hearing Officer erred by concluding that Trooper O'Dell's testimony established that he had probable cause to stop Appellant. As noted above, the Hearing Officer's factual conclusions must be affirmed if there is evidence in the Record that would allow a reasonable mind to reach the same conclusion as the Hearing Officer. Based upon the Record in this matter, there is evidence that supports the conclusion reached by the Hearing Officer.

Generally, an officer is reasonable in stopping a vehicle when he has probable cause to believe that a traffic violation has occurred. State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (stating that an officer is reasonable in stopping a vehicle if he has probable cause to believe that a traffic violation has occurred). Further, an officer may also stop and briefly detain a vehicle if he has a reasonable suspicion that the occupants are involved in criminal activity. Id.

In this case, Trooper O'Dell observed and testified that Appellant's vehicle swerved within its lane of travel and crossed over the yellow and white dotted lines – on two occasions, which

established reasonable suspicion that Appellant may have been driving under the influence. This testimony demonstrated that Trooper O'Dell was justified in stopping Appellant. See Kelly v. S.C. Dep't of Highways, 323 S.C. 334, 474 S.E.2d 443 (Ct. App. 1996) (finding probable cause to arrest for driving under the influence where officer observed motorist's car swerve abruptly to the right, motorist smelled of alcohol, motorist admitted to having drunk a few beers, and motorist performed poorly on field sobriety tests); State v. Durr, 618 S.E.2d 117 (Ga. Ct. App. 2005) (finding stop was justified where arresting Officer observed motorist weaving within his lane); People v. Greco, 783 N.E.2d 201, 204 (Ill. App. Ct. 2003) ("[E]rratic driving, including weaving within a single lane, is sufficient to justify a traffic stop."); State v. Malaney, 871 S.W.2d 634 (Mo. Ct. App. 1994) (finding stop was justified where Officer observed motorist's vehicle weave within lane three times over approximately a mile); State v. Thomte, 413 N.W.2d 916 (Neb. 1987) (finding stop was justified where Officer observed motorist's vehicle weave twice within lane, including one "sharp weave"); State v. Ellanson, 198 N.W.2d 136 (Minn. 1972) (finding stop was justified where Officer observed motorist's vehicle weaving within its lane, even though Officer did not feel that weaving constituted a violation of the traffic laws).

Appellant next argues that Trooper O'Dell's testimony did not establish that he had probable cause to arrest Appellant for driving under the influence. Pursuant to State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006), the fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. 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 upon the totality of the circumstances surrounding the information at the officer's disposal. Id.

Here, Trooper O'Dell testified at the administrative hearing that he identified Appellant as the driver of the vehicle, and he also testified that he smelled an odor of alcoholic beverage coming from Appellant's person. Further, Appellant admitted to drinking alcohol, and she performed poorly on all three field sobriety tests. Based upon the totality of the circumstances, the Hearing Officer did not err in concluding that Trooper O'Dell's testimony established that probable cause existed for Appellant's arrest for driving under the influence. See Lapp v. S.C. Dep't of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010) (finding probable cause for arrest for driving under the

influence based upon admission of driving, odor of alcohol and refusal to perform field sobriety tests). Whether probable cause exists depends upon the totality of the circumstances, and not a particular set of facts. See Baccus, 367 S.C. at 49, 625 S.E.2d 904 (1978). Further, 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).

Accordingly, the Hearing Officer did not err in concluding that Trooper O'Dell's testimony established probable cause for Appellant's traffic stop and subsequent arrest for driving under the influence.

Constitutionality of Implied Consent Law

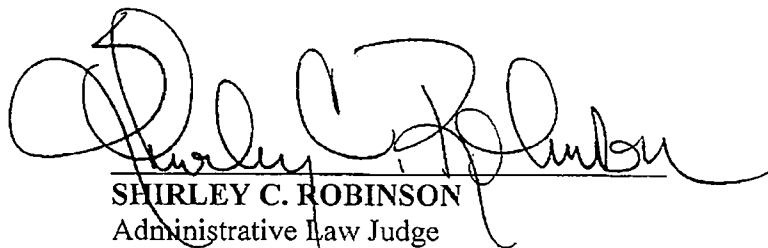
Appellant also argues that the Hearing Officer erred in failing to address the constitutionality of the Implied Consent Law. The Court disagrees. It is well established that the ALC does not have the authority to rule on the facial constitutionality of statutes. See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000) ("ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.").

Accordingly, the Court concludes that the OMVH Hearing Officer did not err in sustaining Appellant's suspension.

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**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

September 20th, 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 emergency Mail Service addressed to the party(ies) or their attorney(s).

This 20 day of September 2013
By: Jeelba Henderson
Judicial Law Clerk

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
DIVISION OF MOTOR VEHICLES

Tracy Holland, Hearing Officer
Appellate Case No. 2013-002225

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DEC 27 2013
SC Court of Appeals

Tracy Lynn Adams, Appellant,

v

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

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on December 20, 2013, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Notice of Appeal and Affidavit of Service in the above case addressed to Frank L. Valenta, Office of General Counsel, P.O. Box 1498, Blythewood, SC.

SWORN to and Subscribed

Sandy Traynham

before me this 20 day

of December, 2013.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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December 20, 2013

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SC Court of Appeals

Jenny Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
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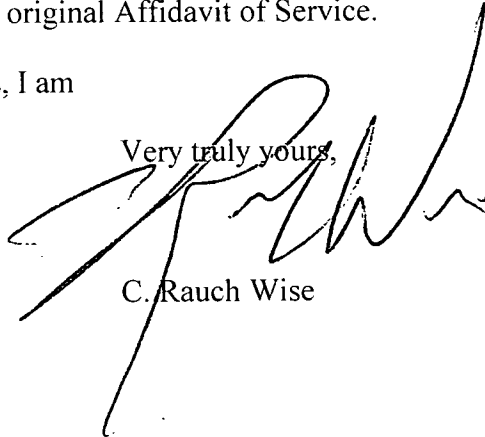
Re: Tracy Lynn Adams vs. South Carolina Department of Motor Vehicles (2013-002225)

Dear Ms. Kitchings:

Enclosed herewith for filing is the original corrected Notice of Appeal concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

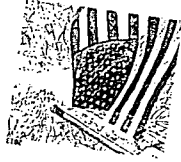
CRW/mjh

cc: Frank Valentina
Linda Annette Grice

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