STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Appellate Case No. 2011-194026

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

v.

Phillip Samuel Brown..... Petitioner.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant hereby respectfully petitions the Court for a rehearing of its opinion in this matter filed January 8, 2014. In the opinion, the Court affirmed the decision of the Court of Appeals holding that the issue raised by Petitioner was not properly preserved.

The issue raised by Petitioner centered upon a failure of proof on the part of the arresting officer. Specifically, Petitioner argued that the arresting officer failed to prove the breath test was administered pursuant to S.C. Code Ann. § 56-5-2950 (2006) as required by S.C. Code Ann. § 56-5-2951 (F) (4) (c) (2006).

The primary opinion of the Court, as well as the concurring opinion, were both based upon issue preservation. In the primary opinion, the Court held that Petitioner never moved to exclude the breath test results pursuant to S.C. Code Ann. § 56-5-2950 (e) (2006) thereby assessing a duty to preserve the failure of the movant (the bearer of the burden of proof) to establish one of the movant's essential elements and as such the results should not have been excluded. In the concurring opinion, the Court held that ". . . an objection to the sufficiency of evidence made in a closing argument comes too late," and "[m]oreover, to the extent Petitioner's complaint is that the officer's testimony relating to the Data Master (sic) results should not have been admitted, Petitioner waived his right to make that argument when he failed to object to the testimony when it was offered." Both opinions are entirely correct *if* Petitioner had moved to exclude the DataMaster test results. However, a careful review of the record reveals that counsel for Petitioner did not move to exclude the test results and instead conceded that the DataMaster produced a result exceeding 0.15%. (Appendix p. 21 at Footnote 3). The test result was not the issue. The issue at the hearing was and remains whether or not Respondent met its burden of proof establishing the statutorily mandated elements of an implied consent hearing set forth in section 2951.

The issues to be addressed in the administrative hearing as set forth in S.C. Code Ann. § 56-5-2951 (F) (2006) are not mere subjects of technicality to be addressed via an objection or cross examination. As correctly noted by the dissent, they are actual elements of proof which must be established through the testimony of the arresting officer or other relevant evidence, such as the breath test report, with the burden of proof resting on the shoulders of the accuser, not the accused, consistent with hundreds of years of jurisprudence. Based upon this Court's interpretation of S.C. Code Ann. § 56-5-2951 in *S. C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 149, 705

S.E.2d 425, 431 (2011), proof through testimony or documents that the test was conducted pursuant to S.C. Code Ann. § 56-5-2950 (2006) is an element of proof set forth in S.C. Code Ann. § 56-5-2951 (F) (4) (c) that must be established by competent evidence. Counsel for Petitioner did not surprise or ambush the arresting officer nor did he raise an issue in a manner which prohibited the arresting officer from responding. He merely pointed out the arresting officer's failure to testify with regard to a statutorily defined element required to sustain the suspension. Had the arresting officer simply offered the breath test report into evidence, this issue would not be before this Court. Testimony simply that the machine was "working properly" does not satisfy this element because S.C. Code Ann. § 56-5-2951 (F) (4) (d), requires the additional element of testimonial proof through testimony that the machine was working properly by identifying the proper procedural steps in the breath test process.

This Court has consistently held that it ". . . will not construe a statute in a way which leads to an absurd result or renders it meaningless," and that it ". . . must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). As was the concern in *McCarson,* the Court's opinion in the present case renders the requirements set forth in S.C. Code Ann. § 56-5-2951 by our Legislature meaningless. The primary opinion stated: "We agree with the ALC that, in order for the Hearing Officer to consider the 'provisions' of section 56-5-2950, a motion must be made for their consideration." This holding ignores the statutorily mandated procedure for reviewing implied consent suspensions. In South Carolina, during an administrative license suspension hearing, the individual offering evidence must prove that the driver:

(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; 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 the samples was qualified pursuant to Section 56-5-2950;

(c) test 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) (emphasis added). In addition to testifying about the result of the test, the arresting officer and/or breath test operator must offer evidence that he or she is qualified pursuant to section 56-5-2950, that the test was conducted pursuant to section 56-5-2950 and that the machine was working properly. The admission of the test results under subsection (a) is not conditioned upon testimony satisfying subsections (b), (c) and (d) but is simply a fact that must be offered into evidence *in addition to* evidence required by subsections (b), (c) and (d). Section 56-5-2950 (e) is not applicable when a party does not attempt to exclude the results of the test. Again, Petitioner has never contested that he submitted a breath sample and the machine produced a result exceeding fifteen one hundredths of one percent. His argument has been and remains quite simple: The officer failed to testify to an element of proof required by the Legislature. Requiring a contemporaneous objection or motion absolves Respondent of its statutory duty to prove all elements set forth in section 56-5-2951 and renders the hearing procedure approved by the Legislature

meaningless. Such an objection has never been required in order to object to a party's omission – only to preserve an objection to an asserted impropriety of testimony or procedure. Taken to its extreme, the opinion suggests that an officer need only testify that "everything was done right" and end his or her testimony.

The Court's holding also has the potential for producing an absurd result. As noted by the dissent, Petitioner's argument was akin to a directed verdict motion. In a contested implied consent hearing, the hearing officer can only sustain the suspension or rescind the suspension. There is no verdict of guilty or not guilty. Counsel for Petitioner argued the following:

> . . . I would move to rescind on several grounds, or actually principally just one under 2951 (f) (4) (c), in that the test or samples were conducted pursuant to 56-5-2950. Officer Wilson never testified as to what simulator solution was used in this machine when the test was conducted, nor prior to evidence being closed was there actually any evidence offered such as the breath alcohol analysis test report, which would indicate what the simulator solution was. As you're aware, 56-5-2950 requires that the simulator solution be between .076 and .084. There's no testimony or evidence introduced with regard to that issue.

(Appendix p. 36, lines 9 – 25). Counsel sought and received the only relief the hearing officer could give Petitioner. The argument was not an objection to the admission of the DataMaster results as asserted by the primary opinion or "an objection to the sufficiency of the evidence made in a closing argument" as asserted by the concurring opinion but a request for relief as a matter of law, based upon Respondent's failure to satisfy its burden of proof by offering evidence as to a statutorily defined element. The argument would be no different from counsel in a criminal bench trial requesting a verdict of not guilty following the close of the State's case when the State offered no evidence as to an element of the charged offense.

As noted herein, the majority opinions clearly focus on counsel's failure to object to the

DataMaster evidence. For the benefit of both the bench and the bar, it would be helpful for the Court to advise as to how to object to a matter when the matter was never offered as evidence and why the defense must now assume a quality control role for the prosecution. If counsel is required to object to a defect in proof or the sufficiency of the evidence, he or she has to somehow be put on notice that the opposing party is going to fail to satisfy its burden of proof prior to resting its case. Such an objection would seem to be a quite difficult absent some knowledge of what element of proof the officer was going to omit.

Additionally, if the procedure for contesting evidence in implied consent hearing endorsed by the majority is indeed proper, how does counsel contest whether or not a driver is lawfully arrested or detained under S.C. Code Ann. §56-5-2951 (F) (1) (2006)? Prior to this opinion, in the event the driver was not lawfully arrested or detained, counsel for a driver would move to rescind the suspension in his or her closing argument based upon the State's failure to prove that the driver was lawfully arrested or detained and typically cite a lack of probable cause or some similar theory. However, based somewhat on the primary opinion but more so on the concurring opinion, counsel would have to make a contemporaneous objection to the State's failure to establish probable cause in order to move to rescind the suspension during the closing statement. Again, such an objection is impossible if the evidence is never offered. However, the majority opinion now places defense counsel in the untenable and inappropriate position of notifying his adversary, via a contemporaneous objection to facts that were never offered into evidence, when the State has failed to prove its case. Surely, it is not the intent of the Court to create such an absurd result and render section 56-5-2951 meaningless.

For the forgoing reasons, Appellant urges this Court to grant Appellant's Petition for

Rehearing and reconsider the opinion issued in this case.

Respectfully Submitted,

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January 22, 2014

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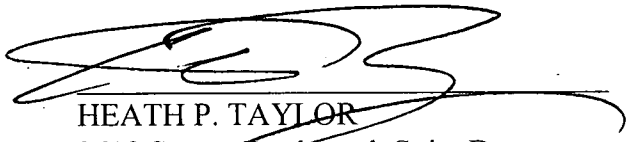
PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the South Carolina Department of Motor Vehicles by causing it to be mailed to its attorneys of record, Linda Annette Grice, Esquire, Phillip S. Porter, Esquire and Frank L. Valenta, Jr., Esquire, at their office at 10311 Wilson Boulevard, Blythewood, South Carolina 29016-0020 on January 22, 2014.

January 22, 2014

TAYLOR LAW FIRM LLC



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The Supreme Court of South Carolina

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01/22/2014

RECEIPT #71045

Case No:	2011-194026
Case Short Title:	SCDMV v. Phillip Samuel Brown
Event:	
Fee Type:	Motion Fee
Amount:	$25.00
Payment Type:	Check
Reference No:	9530
Check/Money Order Date:	01/22/2014
Comments:	SCDMV v. Phillip S. Brown