THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

7/1/47

Case No. 11-ALJ-30-0489-AP

E. Shawn Sorrell, Appellant,

v.

South Carolina Department of Public Safety, Respondent

PETITION FOR REHEARING AND MEMORANDUM OF LAW

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Appellant, E. Shawn Sorrell, respectfully petitions before this Honorable Court to reconsider it's decision of 1/15/2014 on the following grounds:

On 7/9/2010 Officer Sorrell was notified by SCDPS that he was terminated from his employment effective 7/12/2010. The action was imposed upon him for violation of SCDPS policies and procedures as to Policy 400.08 - Disciplinary Action of 400.08 *Improper Conduct.*

The termination letter goes on to say that the investigation conducted by the Office of Professional Responsibility (hereinafter "OPR") reveal that you acted improperly, specifically on 3/28/2010 at 3:00am you arrested three individuals for disorderly conduct where there was no

probable cause. The sole ground for the termination was the arrest without probable cause. (letter attached- appendix 1)

The Opinion issued by The Court of Appeals on 1/15/2014 cites that the two issue rule required that the ALC's decision be upheld. This Court found that Sorrell was fired for two independent reasons: (1) for improperly arresting individuals without probable cause; and (2) for his improper conduct during that arrest. The Court cites the failure to raise the improper conduct on appeal to this Court citing Jones v. Lott, 387 S.C. 339 (2010). It is the position of the Appellant that there were never two issues in this case, there was simply **one**. The Court was in error in its finding as to the improper conduct since he was never charged with any improper conduct other than making an arrest absent probable cause. It was but one issue that was the sole reason why only one issue was brought before this Court. However in arguments before this Court on or about 12/11/2013, counsel was asked as to this alleged other improper conduct. Counsel stated there was in fact no other improper conduct that was the reason it was not specifically appealed. The arrest and procedures utilized by the officer were inseparable at the Committee hearing where the chief investigator of the O.P.R. tesified that probable cause existed (page 342). Any "improper conduct" came as a result of the Department's decision that the arrest was improper due to lack of probable cause; making search, handcuffing, and arrest improper.

The Opinion of the Committee was that there was insufficient evidence to show that there was a violation of the state disorderly conduct statute since there was no intoxication or fighting words. The interpretation of State v. Perkins, 306 S.C. 353 (1991) is totally inapplicable based on the facts of this case. The Committee failed to recognize that the statute on its face covers actions other than fighting words, specifically, the statute states in S.C. Code of Laws §

16-17-530 that any person who shall (a) be found on any highway or any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner. It was the "**or** otherwise conducting himself in a disorderly or boisterous manner" which was completely overlooked by the Committee. Clearly there is a total misinterpretation as to the state statute when applied to the facts of the case before it. Section 8-17-340 of the Code of Laws of the Grievance Act allows the Committee to sustain, reject, or modify any grievance in a hearing decision of an agency in certain specified conditions. In § 8-17-340(e)(2)(a)(b)(c)(d)(e)(f) the grounds are set forth that upon which the Committee can react. Specifically one ground that referenced (a) and (d). Both of those sections reflect an issue as to whether there was an error of law. Clearly there was an error of law in interpretation as to the statutory authority of 16-17-530. It was totally improper for the Committee to totally disregard the issue as to boisterous conduct. The arrest was made and it has been the position of the Appellant in the briefs submitted to this Court that probable cause in fact existed. Any additional "improper conduct" was never specifically charged, but would be the result of the alleged improper arrest. The logic of the agency as well as the Committee was that the arrest was improper, therefore, the procedures utilized were improper. The truth is that the arrest was legitimate and based upon probable cause, and the procedures were totally appropriate and consistent with all arrests that officers make throughout the State of South Carolina. The requirement for arrest by an officer is "probable cause" not "beyond a reasonable doubt". The bottom line is that the officer observed a misdemeanor, he made a decision which was presented to the Court in briefs, that the decision was to make an arrest as opposed to issuance of a warning or a traffic citation which could be taken to court.

The Committee ultimately made a decision in favor of the agency in upholding the termination of officers E. Shawn Sorrell. This matter was then appealed to the ALC and an Opinion was issued on 7/12/2012 by the ALC by the Honorable Debra Brooks Durden, Administrative Law Judge. On page 5 of her decision she states clearly that the Committee's finding that Sorrell made an arrest without probable cause and his conduct with respect to the arrest was improper is the primary underpinning of the decision of SCDPS's termination of Appellant's employment. The sole issue that Judge Durden thought existed was the improper arrest as a result of the lack of probable cause. Appellant, through his counsel, in reading the Opinions, it was clear that the only issue here to appeal was the improper conduct in making the bad arrest. The bad arrest being the sole issue. The decision of the ALC interpreted the opinion of the Committee whereas to State v. Perkins. It is the position of Appellant that both the ALC and the Committee misinterpreted not only the state law, but likewise any facts and circumstances surrounding State v. Perkins, 306 S.C. 353 and its application to this case.

In reviewing ALC Opinion (pg. 8) it states, therefore, the substantial evidence in the record supports the finding that Sorrell lacked probable cause for the arrest for disorderly conduct. The sole ground which she used was the issue as to probable cause. The decision of both the Committee as well as the ALC solely referred to the issue as to probable cause only. There never has been nor has Appellant been charged with an improper conduct other than making the bad arrest. At no time were there additional Department charges brought for violations of search, handcuffing, or transporting arrestees.

In reading both of the opinions, we ask that this Court reverse the original decision since it is the belief of Appellant that the Court misinterpreted the cases as to the two issue rule since

there have never been two issues that were ruled on by the Committee nor the ALC. The agency could have charged multiple counts, but the only count ever charged was the agency termination 7/9/2010 letter which was incorporated and included in the documents filed with the Court. The sole issue was probable cause; absent probable cause the procedures would have been improper.

Had the Appellant been charged with two different violations of policies and procedures manual, the issues would have been litigated before the Committee, possibly appealed to the ALC and ultimately the SC Court of Appeals.

The Department may well have found or charged additional violations, but the fact is that no additional charges were made. The Agency was upset because an arrest was made; however, the issue as to the improper conduct and limiting it to the issue as to probable cause came from the 7/9/2010 letter. At the Committee hearing that sole issue was taken into consideration by the Committee. On the appeal to the ALC, the Court then looked solely at the issue as to probable cause.

It has been the position of Appellant from the very beginning that it is absolutely impossible to separate the issue as to the hand-cuffing and the searching from the question as to whether the arrest itself was legal. The arrest was legal and reasonable because it was based upon probable cause, a decision made by the arresting officer. Graham v. Conner, 490 U.S. 386.

We would ask that this Court consider reversing its decision and finding that there was a determination of probable cause and ordering that the Department reinstate Appellant to his previous position, or in the alternative, we ask that this Court rule that the arrest made by officer Sorrell was in fact legitimate based upon probable cause and remand for additional clarification and proof by SCDPS and/or O.P.R. for that Department. To do otherwise is simply unfair. To

charge a person with one thing and to have a Committee hearing in which that one issue was litigated and now to find that there were additional reasons for which he was fired but never charged is fundamentally wrong. In no system can a person defend (civil, criminal, or administrative) charges when they do not know exactly with what they are charged. In this case, he was charged with making a bad arrest and that was the basis for the defense. Since that was the sole basis for the defense, that was the sole basis for the appeal. Appellant contends that the Committee as well as the ALC were in error in citing the authority that they did as the basis to sustain their decision.

It may well be that the final determination of that Court (pg. 8) was over-looked. That Court (pg. 8) ruled "therefore, the substantial evidence in the record supports the finding that Sorrell lacked probable cause to make the arrest for disorderly conduct." This paragraph on its face created for the Appellant the sole issue as to whether there was probable cause.

Appellant made a discretionary decision to make an arrest as opposed to the other alternatives available to any officer who encounters a misdemeanor committed in his presence.

In the decision from Judge Durden (pg. 8) of the opinion, found that there was substantial evidence in the record to support the Committee's conclusion that an ordinary, prudent person would not have had a good faith belief that the three individuals were disorderly or boisterous. "The Court then stated therefore the substantial evidence in the record supports the finding that Sorrell lacked probable cause to make the arrest for disorderly conduct." The sole basis for the decision was that of probable cause. It was for this reason, together with the earlier readings of the decision by the agency for the termination as well as the decision of the Committee that the sole issue in this case in fact was probable cause. The courts require that officers act reasonably

Graham v. Conner, 490 U.S. 386 and U.S. v. Knights, 534 U.S. 151, Led2 497. To determine whether the arrest was reasonable the courts utilize a "reasonable officer" test, specifically an officer's actions are reasonable if a reasonably well-trained officer might have done what the officer did. In the case before this Court, the O.P.R. Investigator found probable cause (ROA.pg. 505).

Counsel for Appellant determined the one issue of lack of probable cause, based upon not only the initial termination letter but likewise the Committee's determination, together with the decision of the ALC (pg. 8), that the substantial evidence in the records supports the finding that Sorrell lacked probable cause for making the arrest for disorderly conduct. Clearly each tribunal making the determination as to the lack of probable cause is erroneous. It is critical that this Court set forth clearly and distinctly to officers the grounds and parameters for which an officer can arrest for a misdemeanor such as this, specifically disorderly conduct. The laws of arrest likewise come into play and were argued before the Court. At the presentation before this Court, counsel was asked specifically where there were other issues as to the procedures utilized in the arrest as to their propriety. Counsel stated to the Court in no uncertain terms that there was no improper procedure following the arrest. In testimony and in sworn affidavit the first witness at the scene, Mr. Bernard Malone described (ROA.224-234) exactly what occurred all without reference to any alleged improper procedures (ROA. 626-627). The whole thrust of this case arose out of one sole issue and that being probable cause. Had the Appellant not in fact arrested the parties, one of whom was the son of a former FBI/SAC, this issue agreed to by the then Director of the agency in his testimony would probably not have been the subject of discipline nor before this Court.

To every officer on the street, the issue of probable cause is critical since it is the sole basis upon which a lawful arrest can be made. To say that a crime that was witnessed by the officer could not be the subject of probable cause, not only clouds the area, but make for uncertainty for every officer in their daily decision making process. The ultimate decision as to whether to arrest or to write a citation or to simply do nothing is one that is left to the officers in every instance. This has been the law from the very beginning. The law of probable cause has been the standard for which our entire judicial system has been based and it is clear that this case falls under that issue.

The Opinion as set forth in the attachments states (pages 24 and 25) that a review of all the evidence submitted at the hearing indicates that the actions were inconsistent with acceptable conduct for a DPS officer. A review of the incident by Appellant's superiors found that Charles Spaht, Matthew Keith, and Samantha Swanson's actions did not constitute disorderly conduct under the law because there was no evidence that the individuals were intoxicated or used fighting words when talking with the Appellant, State v. Perkins, 306 S.C. 353.

It has been the position of Appellant and counsel that he did absolutely nothing wrong. Appellant simply arrested individuals based upon the standard of probable cause. On page 25 of the Opinion, the Committee found that Mr. Keith's and Ms. Swanson's testimony less than totally credible. The evidence presented by the Department found that Appellant acted inappropriately by making the arrest. The fact is that the entire matter evolved from the question of whether the arrest was lawful.

This Court ruled that there were two independent reasons. Nowhere on the face of the documents of 7/9/2010, nor the decision of 8/26/2011 by the Committee does it set forth two

independent reasons for the termination - only one improper conduct/Improper arrest. The termination was solely for the improper conduct which arose as a result of an "improper" arrest as alleged by the Department.

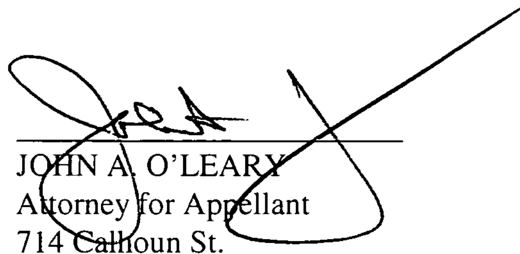
WHEREFORE, we ask that this Court reconsider its determination since it has never been a question to Appellant nor counsel that there was more than one issue and that one issue was that of probable cause. All improper conduct flowed from the alleged improper arrest. It is clear in reading the testimony at the hearing that there was nothing ever alleged as to the inappropriate procedures upon which the ruling may hinge. It has always been the position of Appellant and counsel that he appealed the only issue for which he was ultimately terminated.

The finding on page 25 of the Opinion of the SC Budget & control Board when they found Mr. Keith's and Ms. Swanson's testimony less than totally credible was a correct finding. It is unfortunate that a persons career could be terminated as a result of this less than credible testimony as to an arrest which was lawfully made. The bottom line is that the arrest was lawful and we ask the Court to reconsider this. The only charge against Appellant which was made part of the record sets forth that Appellant arrested all three individuals and took them to jail based upon an unlawful charge of disorderly conduct. That has been the **only** allegation made against Appellant in this case and it is for that reason that the only issue appealed to this court was that of whether Appellant had probable cause to make the initial arrest.

There was absolutely no finding that there would be sufficient evidence to support a termination of Mr. Sorrell in the event that the underlying arrest was in fact legal and based upon probable cause. There is insufficient evidence to show that Mr. Sorrell could in fact be terminated for any violation of Departmental Policy concerning the searching, handcuffing, and

transporting of the suspects who have been lawfully arrested.

Respectfully submitted,



JOHN A. O'LEARY
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Phone: (803) 779-5556

Columbia, South Carolina
January 31, 2014

Appendix 1.

South Carolina Department of Public Safety

July 9, 2010

HAND-DELIVERED

Officer E. S. Sorrell
236 Tamara Way
Columbia, S.C. 29229

Dear Officer Sorrell:

This letter is to officially inform you that you are hereby terminated effective close of business, effective July 12, 2010. This action is imposed upon you for violation of South Carolina Department of Public Safety policies and procedures in accordance with Policy #400.08, *Disciplinary Action Policy*, for **Improper Conduct**.

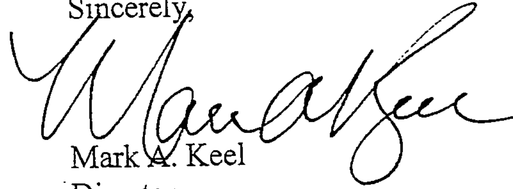
An investigation conducted by the Office of Professional Responsibility (OPR) revealed that you acted improperly. Specifically, on March 28, 2010, at approximately 3:00 a.m., you arrested three individuals for disorderly conduct where there was no probable cause. The arrest was based on the fact that two of the individuals had tossed water balloons at a friend for a practical joke. The incident occurred near the Lottery Commission entrance which is located across the street from an apartment building where one of the individuals resides. All three individuals complained that you were overly aggressive and threatening in manner, and that you kicked the female's legs apart after accusing her of not being in a proper search position. You arrested and took all three individuals to jail based on an unlawful charge of disorderly conduct. However, you also indicated to another officer that they were arrested because the female was disobedient and did not spread her feet apart when you initiated the search.

You intimidated, threatened, and bullied these individuals for engaging in what was basically a harmless practical joke among friends. Your actions are viewed as an abuse of authority which constitutes improper conduct. You have had a history of incidents in which you conducted yourself in a rude and aggressive manner. Yet, despite having completed mandated counseling through the department's Employee Assistance Program, you have once again abused your position as a law enforcement officer, thus authorizing termination in accordance with the department's *Disciplinary Action Policy*.

Please contact Ms. Patty Duggan in the Department's Human Resources Office at (803) 896-8018 regarding your separation and State benefits. Any questions regarding this matter should be directed to Chief Wise.

If you wish to appeal this action, you should do so in accordance with the enclosed grievance procedure policy.

Sincerely,



Mark A. Keel
Director

c: Chief Zackary Wise
Captain John Hancock
Captain Allen Curtis

My signature acknowledges that I received this document and the contents were discussed with me by my supervisor.

Employee Signature ____________ **Date** 7-12-10

THIS DOCUMENT WILL BECOME PART OF YOUR PERSONNEL RECORD

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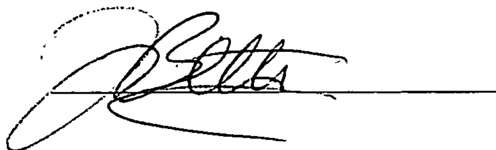
CERTIFICATE OF SERVICE

I, the undersigned employee of O'Leary Associates, P.A., attorney for E. Shawn Sorrell, certify that I have served the foregoing document(s) on the individual(s) listed below on January 31, 2014 by placing a copy of the same in the United States Mail, postage prepaid, and return address clearly affixed to the following address:

PERSON SERVED: **Vance Bettis**
Gignilliat Savitz & Bettis, LLP
900 Elmwood Street, Suite 100
Columbia, SC 29201

DOCUMENTS: **PETITION FOR REHEARING**



Columbia, South Carolina
January 31, 2014

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