

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 13-ALJ-21-0235-AP


Kenneth Ray Anderson Appellant,

vs.

South Carolina Department of Motor Vehicles and
Clemson University Police Department Respondents.

APPELLANT'S REPLY BRIEF

Respectfully Submitted,



Ryan L. Beasley, No. 68307
RYAN L. BEASLEY, P.A.
650 E. Washington Street
Greenville, SC 29601
(864) 679-7777 (Phone)
(864) 672-1406 (Fax)
rlb@ryanbeasleylaw.com

Dated this 20th day of March, 2014

Other counsel of record:
Linda A. Grice, Assistant General Counsel
Philip S. Porter, Deputy General Counsel
Frank L. Valenta, Jr., General Counsel
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Blythewood, SC 29016
(803) 896-9900
Attorneys for Respondent South Carolina Department of Motor Vehicles

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I. The administrative law court erred in affirming the appellant's suspension because the respondent failed to establish that the appellant was given a written copy and verbally informed of the rights enumerated in S.C. Code Ann. § 56-5-2950.

Relying on State v. Parker, 271 S.C. 159, 164, 245 S.E.2d 904, 906 (1978), the respondent asserts that at an administrative hearing, the respondent must only make a prima facie case that the appellant was given a written copy and verbally informed of the rights enumerated in S.C. Code Ann. § 56-5-2950. (Respondent's Brief at 2-3). The administrative law court also relied on Parker and the prima facie threshold to reach its holding. (Admin Order at 4; *see also* Appellant's Brief at 5). The administrative law court held that "[i]f the [respondent] establishes a prima facie case and the motorist fails to present any evidence to rebut it, then judgment must go in the [respondent's] favor." (Admin. Order at 4).

The administrative law court confuses prima facie case with the burden of proof. Parker involved establishing a foundation for the introduction of a breathalyzer test. Parker, 271 S.C. at 163-64, 245 S.E.2d at 906. The Court held that before admitting a breathalyzer test, the State must produce prima facie evidence that (1) the machine was in proper working order at the time of the test; (2) the correct chemicals had been used; (3) the accused was not allowed to put anything in his mouth for 20 minutes prior to the test; and (4) that the test was administered by a qualified person in the proper manner. Parker, 271 S.C. at 163-64, 245 S.E.2d at 906. Establishing a foundation for the admission of evidence is not the same as the meeting a burden of proof pursuant to S.C. Code Ann. § 56-5-2951(F).

"Absent an allegation of fraud or a statute or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence. Utilization of a higher level of proof is ordinarily reserved for situations where particularly

important individuals interests or rights are at stake, such as the potential deprivation of individual liberty, citizenship, or parental rights.” Anonymous (M-156-90) v. State Bd. of Medical Examiners, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (quoting 2 Am.Jur.2d *Administrative Law* § 363 (1994)). “Because a license-suspension hearing constitutes a final adjudication of an important interest,” South Carolina Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 148, 705 S.E.2d 425, 431 (2011), the respondent must prove its case by clear and convincing evidence. Even if the burden of proof is not “clear and convincing evidence,” at minimum, the respondent must prove its case by preponderance of the evidence. See Anonymous (M-156-90), 329 S.C. at 375, 496 S.E.2d at 19.

Nevertheless, the respondent did not even make a prima facie case that the appellant “was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950.” S.C. Code Ann. § 56-5-2951(F). The respondent must present sufficient evidence that the appellant was given a written copy and verbally informed of the following rights:

- (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 six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the test or gives the samples 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. §§ 56-5-2951(F)(2), 56-5-2950.

The administrative law court concluded that the respondent met its “prima facie” burden because “[Sergeant] McDonald testified that he advised the [a]ppellant of his implied consent rights, verbally and in writing.” (Admin. Order at 5). It further held that this testimony was “not contradicted, and there is nothing in the Record that is inconsistent with it.” (Admin Order at 5). As mentioned in the appellant’s opening brief, this conclusion is clearly erroneous and unsupported by substantial evidence. In fact, there is no evidence that *Sergeant McDonald* advised the appellant of his implied consent rights, verbally and in writing. (See Tr. at pp. 1-10). The only evidence presented was that *Lieutenant Evans* conducted the Datamaster test and that “[d]uring the test, [the appellant’s] implied consent rights were read to him. He signed those.” (Tr. at 6, ln. 17-19, 21-22). The respondent does not dispute this.

Further, the respondent does not dispute that the South Carolina Law Enforcement Division (“SLED”) has 8 different “implied consent” advisement forms. (See Respondent’s Brief). However, it argues that Sergeant McDonald’s testimony that “[d]uring the test, [the appellant’s] implied consent rights were read to him. He signed those” was enough to prove that the appellant was given a written copy and verbally informed of all the rights listed above. (See Respondent’s Brief at 2; Tr. at 6, ln. 21-22).

Despite the respondent’s contention, this testimony was not enough to prove that the respondent, for example, was given a written copy and verbally informed that “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 six months if he refuses to submit to the test and that his refusal may be used against him in court” or that “his privilege to drive must be suspended for at least one month if he takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one

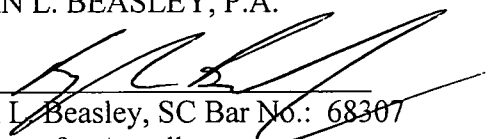
percent or more.” For these reasons, the administrative law court erred in affirming the appellant’s suspension.

II. The administrative law court erred in affirming the appellant’s suspension because the respondent failed to establish that the appellant was lawfully arrested for driving under the influence.

It was the respondent’s burden to prove that the appellant was lawfully arrested or detained for driving under the influence. McCarson, 391 S.C. at 149, 705 S.E.2d at 431. The administrative law court upheld the appellant’s suspension because there was evidence that the appellant performed poorly on the field sobriety tests administered and the appellant resisted arrested and used several racial slurs towards [Sergeant] McDonald. (Admin. Order at 6; Respondent’s Brief at 4). However, this evidence does not establish that the appellant was lawfully arrested for driving under the influence. Sergeant McDonald admitted that he never told the appellant that he was under arrest. (Tr. at 8, ln. 17-20). There was no evidence that the appellant was speeding, driving erratically, or swerving. There was no evidence that the appellant had blood shot eyes or smelled of alcohol. The respondent does not dispute this. (Respondent’s Brief at 4-6). Simply, the respondent failed to show that the appellant was lawfully arrested for driving under the influence, therefore the decision of the administrative law court must be reversed.

Respectfully submitted,

RYAN L. BEASLEY, P.A.

BY: 
Ryan L. Beasley, SC Bar No.: 68307
Attorney for Appellant
650 East Washington Street
Greenville, SC 29601
(864) 679-7777

Greenville, South Carolina
This 20th day of March, 2014

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PROOF OF SERVICE

I certify that I have served Appellants Reply Brief on the following parties and/or entities by depositing a copy of the same in the United States Mail, postage prepaid, on March 21, 2014, addressed as follows:

Linda A. Grice, Assistant General Counsel
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Blythewood, SC 29016

Philip S. Porter, Deputy General Counsel
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Blythewood, SC 29016

Frank L. Valenta, Jr., General Counsel
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Blythewood, SC 29016

Clemson University Police Department
Centennial Boulevard
Clemson, SC 29634

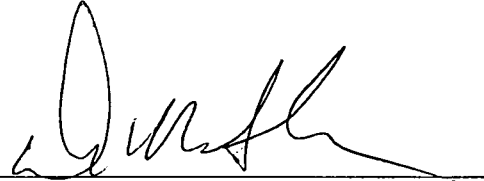
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SC Court of Appeals

S.C. Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, SC 29201

The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

A handwritten signature in black ink, appearing to read "Denise M. Allen", written over a horizontal line.

Denise M. Allen
Paralegal to Ryan Beasley

RYAN L. BEASLEY, P.A.
ATTORNEY AT LAW
650 EAST WASHINGTON STREET
GREENVILLE, SOUTH CAROLINA 29601

The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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