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.

BRIEF OF APPELLANT

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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.**

STATEMENT OF THE CASE

This appeal arises out of the South Carolina Department of Motor Vehicles' suspension of the appellant's driver's license for refusing to submit to a breath test. The appellant requested a contested case hearing, which was conducted on March 27, 2013. (R. p. 17, ln. 1-9). The State of South Carolina Office of Motor Vehicle Hearings ("OMVH") issued a Final Order and Decision on May 20, 2013 sustaining the appellant's suspension. (R. p. 9). The appellant thereafter timely appealed to the administrative law court. (R. pp. 31-32). On November 18, 2013, the administrative law court issued an order affirming the appellant's suspension. (R. p. 47). The appellant now appeals the administrative law court's order.

The appellant contested all issues at the administrative hearing. (R. p. 19, ln. 2-4). Sergeant McDonald testified that he pulled the appellant over for driving a golf cart "heavily loaded with occupants" and because some of the occupants had "open containers on this golf cart." (R. p. 21, ln. 13-20). He thereafter administered field sobriety tests to the appellant. (R. p. 22, ln. 1-6). However, Sergeant McDonald never advised the appellant that he was under arrest for driving under the influence. (R. p. 27, ln. 17-20).

Sergeant McDonald thereafter transported the appellant to the jail. (R. p. 22, ln. 15-16). Sergeant McDonald testified that Lieutenant Evans performed the Datamaster

test while he was present. (R. p. 22-23). Lieutenant Evans was not present at the administrative hearing. (*See* R. p. 24). The respondent did not admit into evidence a signed Driving Under the Influence Advisement showing that the appellant was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950. (*See* R. pp. 17-24, 27-28). In fact, there was no evidence that the appellant was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950. (*See* R. pp. 17-24, 27-28). Nevertheless, the hearing officer sustained the appellant's suspension. (R. p. 9). On appeal, the administrative law court affirmed the hearing officer's decision.

ARGUMENT

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.

"Because a license-suspension hearing constitutes a final adjudication of an important interest . . . the Legislature promulgated [S]ection 56-5-2951 in such a way that guards against an automatic or rote elimination of this interest." South Carolina Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 148, 705 S.E.2d 425, 431 (2011). "[Section 56-5-2951] sets forth several statutory prerequisites that must be established before a Hearing Officer suspends a citizen's driver's license following an arrest for DUI." Id. One of these statutory prerequisites is 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). By including this element in Section 56-5-2951, the Legislature placed the burden on the respondent to present sufficient evidence that the appellant was given a

written copy of and verbally informed of the rights enumerated in Section 56-5-2950. *See* McCarson, 391 S.C. at 149, 705 S.E.2d at 431.

In other words, 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.

In many cases, the Driving Under the Influence Advisement itself will sufficiently demonstrate that these enumerated rights were given, since such Driving Under the Influence Advisements include these warnings. However, a Driving Under the Influence Advisement was never admitted into evidence here. The only evidence presented by the respondent was the following testimony of Sergeant McDonald: "[d]uring the test, [the appellant's] implied consent rights were read to him. He signed those." (R. p. 22, ln. 21-22). The administrative law court held that this was enough to establish that the appellant was given a written copy and verbally informed of the five rights enumerated above. (R. p. 14).

As an initial matter, South Carolina Law Enforcement Division ("SLED") has 8 different "implied consent" advisement forms: (1) Driving Under the Influence Advisement; (2) Felony Driving Under the Influence Advisement; (3) Commercial Driver's License Advisement; (4) Zero Tolerance Advisement; (5) Boating Under the Influence Advisement; (6) BUI Involving Death, Bodily Injury, or Property Damage Advisement; (7) Flying Under the Influence Advisement; and (8) Shooting Under the Influence Advisement. SLED Policy 8.12.5. The Driving Under the Influence Advisement is the form applicable here and states the rights enumerated in Section 56-5-2950. Not only did the respondent fail to admit the correct form showing that the appellant was advised of his rights enumerated in Section 56-5-2950, but it also failed to present any evidence that the appellant was given the "Driving Under the Influence Advisement" containing these rights. Again, Sergeant McDonald did not even administer the test himself. He was in the room while Lieutenant Evans administered the test. (R. pp. 22-23).

Moreover, the respondent failed to present any evidence that the appellant was given a written copy and verbally informed of the rights enumerated in Section 56-5-2950. For example, the respondent failed to present any evidence that the appellant 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." As mentioned above, the Driving Under the Influence

Advisement itself will sufficiently demonstrate that these enumerated rights were given, since such Driving Under the Influence Advisements include these warnings. But, the respondent failed to admit the Driving Under the Influence Advisement as evidence. There is no evidence that the appellant was given a written copy and verbally informed of the rights enumerated in Section 56-5-2950.

Further, the administrative law court's decision was based on errors of law. It correctly held that at the administrative hearing, the respondent had the burden of proof. S.C. Code Ann. § 56-5-2951(F). However, it then incorrectly found that "once the [respondent] establishes a prima facie case, the burden shifts to the motorist to present evidence to rebut the [respondent's] case." This is not the law.

In reaching this conclusion, the administrative law court improperly relied upon State v. Parker, 271 S.C. 159, 164, 245 S.E.2d 904, 906 (1978) to support its holding. (R. p. 44). 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). Prima facie evidence may be sufficient to prove a particular proposition or fact, however it does not necessitate that finding. Here, the respondent

needed to present prima facie evidence for the case to be submitted to the fact finder, however this does not necessitate a finding that the respondent met its burden of proof.

Nevertheless, the administrative law court's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The administrative law court concluded that the respondent met its prima facie case because "[Sergeant] McDonald testified that he advised the [a]ppellant of his implied consent rights, verbally and in writing." (R. p. 45). It further held that this testimony was "not contradicted, and there is nothing in the Record that is inconsistent with it." (R. p. 45). 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* R. pp. 17-24, 27-28). The only evidence presented was that *Lieutenant Evan*s conducted the Datamaster test and that "[d]uring the test, [the appellant's] implied consent rights were read to him. He signed those." (R. p. 22, ln. 17-19, 21-22). This is not even enough to establish a prima facie case that the appellant was given a written copy and verbally informed of the rights enumerated in Section 56-5-2950.

Even further, the administrative law court's decision was controlled by another error of law. It affirmed the appellant's suspension because Sergeant McDonald is a law enforcement officer, therefore his testimony is worthy of reliance. (R. p. 37). A law enforcement officer's testimony is not credible based on the fact that he is a law enforcement officer.

For these reasons, the administrative law court's decision must be reversed.

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.

Again, Section 56-5-2951 "sets forth several statutory prerequisites that must be established before a Hearing Officer suspends a citizen's driver's license following an arrest for DUI." McCarson, 391 S.C. at 149, 705 S.E.2d at 431. Like in McCarson, at issue in the instant case is the determination of whether the appellant "was lawfully arrested or detained for DUI." "By including this element in [S]ection 56-5-2951, the Legislature placed the burden on the Department to present sufficient evidence of probable cause." Id. 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." 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. (R. p. 27, 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.

For these reasons, the administrative law court's decision must be reversed.

CONCLUSION

The decision of the administrative law court must be reversed because (1) 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 and (2) 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.

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Certificate of Counsel

In accordance with Rule 211(b), *South Carolina Appellate Court Rules*, the undersigned, as counsel for Appellant, certifies that this Brief of Appellant contains all material proposed by all parties to be included and not any other material.

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PROOF OF SERVICE

I certify that I have served the Brief of Appellant on the following parties and/or entities by depositing a copy of the same in the United States Mail, postage prepaid, on May 6, 2014, addressed as follows:

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