

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2013-002081

Edward Eli Saleeby, III Appellant,

v.

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

FINAL BRIEF OF THE RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. *DID THE ALJ ERR IN UPHOLDING THE HEARING OFFICER'S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY REFUSING TO ASSIST APPELLANT WITH OBTAINING A BLOOD TEST AFTER APPELLANT SUBMITTED TO A BREATH TEST BECAUSE APPELLANT'S REQUEST WAS MADE PRIOR TO THE OFFICER OFFERING APPELLANT A BREATH TEST?*

- II. *DID THE ALJ ERR IN UPHOLDING THE HEARING OFFICER'S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY FAILING TO VIDEOTAPE REFUSAL TO TAKE THE BLOOD TEST?*

STATEMENT OF THE CASE

On July 3, 2010, Trooper Brigham of the South Carolina Department of Public Safety, while on routine patrol in Darlington County, observed a truck following too closely to a vehicle in front of it. Trooper Brigham initiated a traffic stop on the truck. (R. p. 59, ll. 17-25) Trooper Brigham approached the vehicle, and identified Appellant as the driver. Trooper Brigham noticed a very strong odor of alcohol coming from within the truck. However, upon speaking with Appellant outside of the vehicle, there was no odor of alcohol and there were two passengers inside the vehicle. Trooper Brigham observed that Appellant appeared disoriented, and his eyes were dilated. (R. p. 60, lines 20-25). Appellant subsequently stated that he had taken Lorcet because he had a chipped tooth (R. p. 61, lines 2-3; R. p. 68, lines 1-3).

Trooper Brigham then requested Appellant to perform standardized field sobriety tests. Prior to performing the field sobriety tests, Appellant informed the Trooper that he had a medical condition that caused problems with balance (R. p. 68, lines 17-19). During the Horizontal Gaze Nystagmus test, Appellant had no nystagmus; however his pupils were

dilated. During the walk-and-turn test, Appellant started the test before instructions were finished, stepped off the line, and took the incorrect number of steps. During the one-leg stand test, Appellant swayed while balancing and used his arms to balance himself, as well as placed his foot down. (R. p. 61, lines 16-23). Appellant was subsequently placed under arrest for driving under the influence and transported to the Hartsville Police Department for a DataMaster test. While conducting an inventory search of Appellant's vehicle, Trooper Brigham found a prescription bottle of Xanax located in the center console (R. p. 62, lines 19-22).

Prior to beginning the DataMaster test, Appellant was advised that he was being video-recorded. Trooper Brigham further advised Appellant that he believed Appellant to be under the influence of narcotics. Appellant then informed Trooper Brigham that he wanted to give a blood sample and not a breath sample. Trooper Brigham advised Appellant that he was required to give Appellant a breath test first because Appellant was medically able to provide the breath sample. Trooper Brigham, a certified DataMaster operator, advised Appellant of his implied consent rights verbally and in writing. Appellant's mouth was checked for foreign material, he was observed for twenty minutes, and the DataMaster machine was working properly. Appellant consented to the test and provided a breath sample of 0.00%. Based upon the breath test result, Trooper Brigham advised Appellant that he would be transported to Carolina Pines Hospital for a urine test. (R. p. 62, lines 12-19; R. 63, lines 1-18 and 23-25; R. p. 64, lines 1-7 and 11-19).

During transport to Trooper Brigham's vehicle, Appellant verbally refused the urine test. Appellant's refusal to urine testing was not videotaped. Based upon Appellant's

refusal to submit to a urine test, a notice of suspension was issued to him. Appellant signed a copy of the notice of suspension indicating his license was being suspended due to refusing to submit to a urine sample. Upon receipt of the notice of suspension, Respondent, South Carolina Department of Motor Vehicles ("Department"), suspended Appellant's driver's license in accordance with state law.

Appellant requested an OMVH administrative hearing. The hearing was held on October 19, 2011. On October 24, 2011, the OMVH hearing officer issued a Final Order and Decision sustaining Appellant's suspension. Appellant then filed an appeal with the Administrative Law Court on November 4, 2011. On August 2, 2013, the ALC sustained the Appellant's suspension and this appeal followed.

ARGUMENT

I. DID THE ALJ ERR IN UPHOLDING THE HEARING OFFICER'S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY REFUSING TO ASSIST APPELLANT WITH OBTAINING A BLOOD TEST AFTER APPELLANT SUBMITTED TO A BREATH TEST BECAUSE APPELLANT'S REQUEST WAS MADE PRIOR TO THE OFFICER OFFERING APPELLANT A BREATH TEST?

Appellant argues that the Hearing Officer erred in finding that because the Appellant refused the urine test, "there was no initial test and therefore no duty to provide affirmative assistance for **additional tests.**" (OMVH Final Order and Decision R. p. 8) Appellant maintains that it was error to refuse assistance because the request was made prior to the offering of a breath or urine test. He also argues that the Hearing Officer erred in not offering assistance for a blood test after the Appellant submitted to a breath test. Neither of the arguments have merit. In the instance case, the Hearing Officer correctly concluded and ruled

that because Appellant "refused a urine test, there was no initial test and therefore no duty to provide affirmative assistance for additional tests."

Section 56-5-2950(D) and (E) provide for the following:

(D) The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

(E) The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED must test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.

Appellant requested a blood test prior to receiving his implied consent rights and prior to submitting to the breath test. Upon entering the Datamaster room, the Appellant was advised that he was being video recorded and that the trooper suspected that the Appellant was under the influence of narcotics, not alcohol (R. p. 62, lines 16-19). While Section 56-5-2950 provides that a person arrested for driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs "must be first be offered a breath test to determine the person's alcohol concentration", it further provides that "[I]f the officer has reasonable grounds to believe that the person is under the influence of drugs other than alcohol, the officer may order that a

urine sample be taken for testing". Appellant was advised of his implied consent rights and he offered to submit to a blood test rather than a breath test (R. p. 63, lines 3-4). The trooper explained the statutory requirements and proceeded with the breathalyzer test. At that point, affirmative assistance was not applicable: Section 56-5-2950(D) authorizes a "person tested or giving samples for testing" to have a "qualified person of his own choosing conduct additional tests at his expense." (Emphasis added). Appellant had not submitted to any tests, and therefore, affirmative assistance to receive a blood test was not applicable. Appellant subsequently consented to a breath test, and the test result registered 0.00%. Appellant was advised by the trooper that a urine sample was being requested due to the narcotics that may have been in his system and he was going to be transported to Carolina Pines for testing. During transport to the vehicle, the Appellant refused to submit to the urine sample. (R. pp. 63-64). Appellant verbally refused to provide a urine sample. Despite the Trooper's statement that Appellant was being transported to the hospital, Appellant did not make any further requests for a blood test after he submitted to the breath test and refused to provide a urine sample. The trooper and the Appellant testified regarding whether the Appellant refused to submit to urine testing. The Hearing Officer concluded that the true, steadfast and without a doubt testimony of the trooper was most credible in that the Appellant initially testified that he did not refuse urine testing; however, under cross-examination, he testified that he did not recall refusing the urine test (R. p. 106). Appellant signed the notice of suspension issued to him as a result of the refusal to submit to a urine test (R. p. 87, lines 20-22).

Trooper Brigham was not required to provide affirmative assistance to Appellant after his refusal to provide a urine sample. The purpose of the statute is to provide a person the opportunity to challenge the state's test or procedures. See Town of Fairfax v. Smith, 285 S.C.

458, 459, 330 S.E.2d 290, 290 ("The purpose of [§§ 56-5-2950(D) and (E)] is to permit an accused person to gather independent evidence to submit in reply to that of the prosecuting authority.")². In Appellant's case, Appellant is not seeking to challenge the DataMaster test result or any procedures related to the test. Nevertheless, even if Trooper Brigham failed to provide affirmative assistance to Appellant, the remedy for such failure is to bar "the admissibility of the breath test result in any judicial or administrative proceeding." S.C. Code Ann. § 56-5-2950(E). Appellant does not challenge the breath test result or procedures in any way. Because the Hearing Officer correctly found that Section 56-5-2950 provides for *additional* testing and because the Appellant refused to submit to the ordered urine testing, affirmative assistance to obtain additional testing is not an issue in this case. In point of fact, it should be noted that the Appellant was released and not held in jail (R. p. 66, lines 3-5). It would appear that the affirmative assistance in getting additional tests would be required because of the person being in custody and requiring custodial transportation. The record reflects that the Appellant was not held at the detention center. The Hearing Officer did not err in determining that affirmative assistance was not an issue in this matter.

II. DID THE ALJ ERR IN UPHOLDING THE HEARING OFFICER'S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY FAILING TO VIDEOTAPE REFUSAL TO TAKE THE BLOOD TEST?

The Appellant asserts error in the failure of the trooper to video tape the refusal to submit to urine testing, however, he provides no statutory or case law that supports this assertion. Appellant argues that the statutory requirements under Section 56-5-2953 for videotaping the conduct at the breath test site of a person arrested for DUI *should* apply when the officer seeks a urine test. While the Appellant cites several cases in which appellate courts

have discussed and ruled upon the video tape requirements in DUI arrests, he failed to cite any case law, statute or regulation to support his contention that requires that a person under arrest for driving under the influence must have the refusal to take a urine test videotaped. With regard to his argument that the Trooper must videotape Appellant's refusal to submit to a urine test, Appellant cites State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013) as "related case law" to support his assertion. In Elwell, the Court recognized that in all driving under the influence cases, "the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so." In Elwell, the Court discussed the videotape in the context of a breath test, not a urine test as in this matter. Id. The Hearing Officer properly determined that a video was not required regarding Appellant's refusal to submit to urine testing. Appellant was video-recorded during the DataMaster pre-test procedures as required by the statutes.

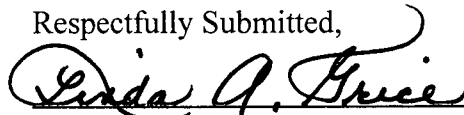
In S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 523, 613 S.E.2d 544, 549 (Ct. App. 2005) (citing S.C. Code Ann. §§ 56-5-2950, 2951), the Court of Appeals held that the "requirements for suspension for refusal to consent are: (1) a person (2) operating a motor vehicle (3) in South Carolina (4) be arrested for an offense arising out of acts alleged to have been committed while the person was driving under the influence of alcohol, drugs, or both, and (5) refuse to submit to alcohol or drug testing". The evidence presented at the hearing established that the Respondents met the burden of proof by making a prima facie showing that the Appellant was (1) lawfully arrested for Driving under the Influence; (2) read and given a copy of the appropriate Implied Consent Advisement and (3) Appellant refused to submit to urine testing. The statutory requirements for videotaping are found in Section 56-5-2953 which provides that "A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 shall have his conduct at

the incident site and the breath test site videotaped. In Nelson, the court held the “[N]othing in the code instructs that a failure to comply with Section 56-5-2953 warrants the dismissal of prosecution for failure to submit to testing pursuant to Section 56-5-2950. In addition there in nothing in the Code which requires videotaping of the transport of a person under arrest for DUI. The evidence presented at the hearing established that the Respondents met the burden of proof by making a prima facie showing that the Appellant was (1) lawfully arrested for Driving under the Influence; (2) read and given a copy of the appropriate Implied Consent Advisement and (3) Appellant refused to submit to urine testing.

CONCLUSION

Based upon the above arguments, the Order of the Administrative Law Court should be affirmed.

Respectfully Submitted,



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May 19, 2014

Blythewood, South Carolina

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Of Whom the South Carolina Department of Motor Vehicles is the Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02, filed August 13, 2007.

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May 19, 2014
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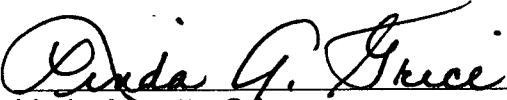
vs.

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Of Whom the South Carolina Department of Motor Vehicles is the
Respondent.

CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief is in
compliance with SCACR 211(b).


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May 19, 2014
Blythewood, SC

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PROOF OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, May 19, 2014,
I served one (1) copy of the Final Brief of Respondent by depositing with the United
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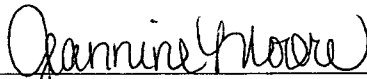
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