THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable Philip Lenski, Administrative Law Judge

Appellate Case No. 2015-000014

Spring Champion ..... Appellant,

v.

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

FINAL BRIEF OF THE RESPONDENT

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3. *WHETHER APPELLANT'S ALLEGED CONFUSION REGARDING A WARNING LETTER'S REFERENCE TO RECKLESS DRIVING AS A MAJOR AND MINOR VIOLATION INVALIDATED THE SUSPENSION MANDATED BY SECTION 56-1-1030 (A).*

4. *WHETHER APPELLANT'S ALLEGED CONFUSION REGARDING THE WARNING LETTER'S REFERENCE TO RECKLESS DRIVING AS A MAJOR AND MINOR VIOLATION IS SUPPORTED BY ANY EVIDENCE IN THE RECORD THAT SHE RELIED TO HER DETRIMENT.*

STATEMENT OF THE CASE

On July 25, 2009, Appellant was charged with driving under the influence and was convicted of the offence on September 3, 2009 (R. pp. 32, 34). On April 8, 2010, Appellant was charged with driving under suspension and was convicted of the offense on May 4, 2010 (R. pp. 31, 34). On September 12, 2011, Appellant was charged with reckless driving and was convicted of the offense on October 12, 2011 (R. pp. 30, 33-34).

As a result of the three convictions, on October 27, 2011, in accordance with *S.C. Code Ann.* § 56-1-1090, SCDMV declared the Appellant to be an habitual offender and her driving privileges were suspended from November 26, 2011 until November 26, 2016 (R. p. 38). On November 22, 2011, Appellant requested an administrative hearing to challenge the determination and suspension (R. p. 39).

Pursuant to written notice to the parties, a hearing was held before OMVH Hearing Officer Robert F. Harley, Jr. on February 16, 2012. The SCDMV submitted documentation prior to the hearing which was made a part of the record pursuant to *S.C. Code Ann.* § 1-23-660 (B).

A Final Order and Decision ("FOD") was issued on August 21, 2013, sustaining the suspension of the Appellant's driver's license (R. pp. 8-12). The FOD was served on the parties on August 21, 2013. *Id.* This appeal was timely filed in the Administrative Law Court ("ALC") on September 16, 2013 (R. p. 20). By Final Order issued December 10, 2014, the ALC found that the FOD issued by the OMVH on August 21, 2013, should be affirmed, because there was substantial evidence in the record to support the Department's finding of habitual offender status, and the FOD's holding that the suspension of Appellant's driver's license or driving privileges should be upheld was sustained (R. pp. 2-7). This appeal followed.

ARGUMENT

1. APPELLANT DID NOT PRESERVE ANY ISSUE FOR APPEAL.

By enacting *S.C. Code Ann.* § 56-1-1010 the General Assembly emphatically stated the public policy with regard to habitual traffic offenders as follows:

> It is hereby declared to be the policy of this State:
>
> (a) To provide maximum safety for all persons who use the public highways of this State; and
>
> (b) To deny the privilege of operation motor vehicles on such highways to persons who by their conduct and record have demonstrated their indifference to the safety and welfare of others and their disrespect for the laws of this State; and

(c) To discourage repetition of unlawful acts by individuals against the peace and dignity of this State and her political subdivisions and to impose additional penalties upon habitual offenders who have been convicted repeatedly of violations of the traffic laws of this State.

The Department of Motor Vehicles' administration of the habitual offender laws is an exercise of the State's police power and implementation of the State's public policy. *See, Sponar v. S.C. Dep't of Public Safety,* 361 S.C. 35, 603 S.E. 2d 412 (Ct. App. 2004) (license to operate a motor vehicle is a mere privilege subject to reasonable regulations under the state's police power in the interest of public safety and welfare).

Appellant was not represented at the hearing of February 16, 2012. While the record discloses that there were portions of the testimony deemed inaudible, it also discloses that Appellant made no statement that could be construed as relying to her detriment on the supposedly confusing letter that the Department sent to her. Appellant made no attempt to explain why, if she read a warning letter that listed reckless driving as a major and minor violation, she believed she could interpret the letter to protect her from habitual offender status when she was driving recklessly over a year after the letter was sent.

It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled on by the trial judge to be preserved for appellate review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E. 2d 731, 733 (1998);

Appellant and her other witnesses essentially only stated she was reformed as of the time of the hearing and mentioned the term "minor violation" on several occasions, asserting confusion (R. p. 23, ll. 10-25; p. 25, l. 4 - p. 26, l. 10; p. 26, l. 17

– p. 28, l. 16.). Nevertheless, she did not testify that she reasonably relied on her understanding of a reckless driving violation as a minor violation to authorize her drive recklessly without being deemed a Habitual Offender.

While Appellant asserts that the record contains a number of instances in which portions of sentences were inaudible, the gist of her testimony and that of her witnesses is clear. She alleged she was confused by the notice, that she had turned her life around, and being without a license is a difficulty in her situation.

The Hearing Officer correctly noted that the statute itself dictates that reckless driving be denominated as a major and a minor violation since it is listed in Section 56-1-1020 (a) and also as one of the points violations listed in Section 56-1-720 that potentially contribute to a combination of ten violations resulting in Habitual Offender status in Section 56-1-1020(b).[1] Regardless of the weight the Hearing Officer might have given to Appellant's alleged confusion, he found that the suspension was upheld by substantial evidence, so the inquiry should end there (R. p. 11). *See, Lark v. Bilo, Inc.,* 276 S.C. 130, 276 S.E.2d 304 (1981).

Appellant, in any case, did not state an objection or position in a manner that allowed the Hearing Officer to rule on the points she argues now and thus preserve the issues for appeal. *See, Rickborn v. Liberty Life Ins. Co.,* 321 S.C. 291, 300, -1, 468 S.E.2d 292, 305 (1996) (party failed to preserve for review the issue that the court erroneously calculated prejudgment interest where it failed to raise that issue in a post judgment motion); *Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E. 2d 621, 625

[1] Appellant's arguments illogically demand a "Heads I win, tails you lose" result. In her first argument, she apparently asserts that a notice failing use the exact terminology of the statute must invalidate the suspension. The second argument appears to assert that if the notice accurately describes the classifications set forth in the statute, and the notice can nevertheless be characterized as confusing, the suspension must also be invalidated.

(Ct. App. 2001) (generally an appellate court cannot address an issue unless it was raised to and ruled upon by the lower court); *Floyd v. Floyd*, 365 S.C. 56, 72, 615 S.E.2d 465, 474 (Ct. App. 2005) *overruled in part on other grounds by statutory amendment* (where trial judge never made a specific ruling on an argument, appellate court cannot address the issue on appeal); *Halbersberg v. Berry*, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (Ct. App. 1990) (issue not explicitly ruled on by court was waived for appellate review where omission was not brought to court's attention by way of proper motion).

Here Appellant is doubly precluded having not adequately stated grounds for the Hearing Officer to rule for her or to reconsider his ruling, she appealed and raised no new issues to the Administrative Law Court, aside from additional handwritten letters restating her position that she is now reformed and the suspension is very inconvenient to her life and so forth (R. pp. 17, 19-20). While Appellant would have been precluded from asserting the issues she now asserts anyway, even if she had been free to assert them she did not do so, and the issues were not preserved before the Administrative Law Court.

A *pro se* litigant should be given a reasonable amount of leeway, and the Hearing Officer did so. The Administrative Law Court did also, inviting Appellant to file a brief after the scheduled deadline (R. pp. 13, 15), accepting a handwritten brief (R. p. 17) and discussing the merits in his Order despite Appellant's failure preserve issues. Nevertheless, court rules and precedent cannot be done away with because a person acts as her own lawyer. *State v. Hollman*, 232 S.C. 489, 498, 102 S.E. 2d 873, 877 (1958) (stating that established rules of procedure are not to be discarded on

appeal merely because a party appeared *pro se*), *overruled on other grounds by Stevenson v. State,* 335 S.C. 193, 516 S.E. 2d 434 (1999).

2. *THE DEPARTMENT'S WARNING LETTER OF HABITUAL OFFENDER STATUS, WHICH DEVIATED SLIGHTLY FROM THE EXACT TERMINOLOGY OF THE STATUTE REGARDING THE DRIVER'S OPPORTUNITY FOR HEARING, DID NOT INVALIDATE THE SUSPENSION MANDATED BY SECTION 56-1-1030 (A).*

The Department steadfastly maintains that nothing resembling this argument was presented to either the Hearing Officer or the Administrative Law Court for a ruling and it is therefore not preserved for review. Even if the argument had been squarely put before the OMVH and the Administrative Law Court, the argument is manifestly without merit.

There is no suggestion in the Habitual Offender statute that the slightest deviation from the language of the statute in a notice should thwart the suspension mandated by it. *S.C. Code Ann.* § 56-1-1030 (B) states as follows:

> (B) If the department determines the person is an habitual offender, the department shall give notice of its determination to the person and direct the person not to operate a motor vehicle on the highways of this State and to surrender his driver's license or permit to the department. The notice must provide that a person aggrieved by the department determination may file a request for a contested case hearing with the Office of Motor Vehicle Hearings in accordance with its rules of procedure. The Office of Motor Vehicle Hearings has exclusive jurisdiction to conduct these hearings.

The record reflects that all of the elements set forth in the statute were effectively accomplished. By the Notice (R. p. 38), Appellant was told not to operate a vehicle in South Carolina, and to surrender her license. The Notice told her she was allowed to have a *hearing* regarding the decision if she thought the Department's decision was in error, how to do so, who to contact, the amount of the fee to pay, and

the ability to request a reduction after two years. Appellant in fact asked for a hearing (R. p. 39). Appellant did not testify or even argue that having the hearing described as a "hearing" or "appeal" instead of a "contested case" hearing caused her not to ask for a hearing, because she *did* ask for one.

Appellant did not testify or even argue that having the hearing described as a "hearing" or "appeal" instead of a "contested case" hearing caused her to alter her strategy at the hearing, nor even that it confused her. She did not testify or argue that she was confused by the absence of a reference to the procedural rules of the OMVH. Appellant acknowledges that the Office of Motor Vehicle Hearings' own Notice of Hearings contained the terminology she appreciated better, including the reference to the OMVH's Rules of Procedure (R. p. 40). In Appellant's view, this is without avail. In her view, it does not matter that the statute does not hint that minor deviations in terminology should invalidate the suspension required by the statute. In her view, it does not matter that she cited no law requiring that result. In her view, it does not matter that she did not argue that her approach to the hearing would have been different had she received the preferred terminology in the initial notice, even though she had nearly three months to consider her approach.

Instead, Appellant philosophically asserts that language there is no evidence that she relied on is "critical at the first instance of notice" and "that the aggrieved party *may* become prejudiced for want of clarity" (Appellant's Brief at 8) even though the only evidence as to her understanding of the notice is that it informed her to ask for a hearing and she did, and there is no evidence in the record she was prejudiced in any way.

The law does not require strict procedural defaults such as she suggests. Since Article 5 of Chapter 1 of Title 56 of the South Carolina Code of laws does not suggest a strict verbatim recitation of the statute must be adhered to avoid invalidation of the Habitual Offender suspension, one must look to the adequacy of notice. The Administrative Procedures Act provides that notice is adequate if the party is advised of the time place and nature of the hearing, a statement of the legal authority under which the hearing is held, a reference to particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted. *S.C. Code Ann.* § 1-23-320 (a). Since the actual hearings are held but the OMVH under *S.C. Code Ann.* § 1-23-660, and the Department cannot control the OMVH's scheduling of hearings, it is not possible for the Department to provide notice of a scheduled hearing. Otherwise, the Department's Official Notice of October 27, 2011 (R. p. 38) met all the requirements of the APA, and the OMVH's subsequent actual Notice of Hearing met all of the rest, including reference to the requirements of its own rules.

Where the statute does not require perfect adherence to specific terminology, a party's due process rights are satisfied by notice giving the party a meaningful opportunity to be heard and participate at hearing. *Ross v. Medical University of South Carolina,* 328 S.C. 51, 492 S.E. 2d 62 (1997).

Moreover, our Courts have specifically rejected the idea that a failure to strictly adhere to notice requirements, even where requirements are specifically set forth in the statute, should not be regarded as disqualifying if the statute does not specifically require such a disqualification. "If the Legislature had intended the lack of written notice (or any other factor) to be a fatal defect, it could have said so in the statute."

Taylor v. S. C. Department of Motor Vehicles, 382 S.C. 567, 570, 677 S.E. 2d 588, 590 (2009); *Carroll v. South Carolina Dep't. of Public Safety*, 388 S.C. 39, 44, 693 S.E. 2d 430, 433 (Ct. App. 2010) (both cases applying a prejudice standard as opposed to strict compliance with the requirement for giving implied consent disclosures in writing).

3. *APPELLANT'S ALLEGED CONFUSION REGARDING A WARNING LETTER'S REFERENCE TO RECKLESS DRIVING AS A MAJOR AND MINOR VIOLATION DID NOT INVALIDATE THE SUSPENSION MANDATED BY SECTION 56-1-1030 (A).*

The gist of Appellant's argument is that Appellant was confused by the references to reckless driving both as a major and a minor violation, and because of her confusion, the suspension resulting from her violations should be invalidated. Appellant insists on this invalidation even though she did not actually state this argument until this appeal. The Hearing Officer correctly noted that Appellant did not really dispute the existence of the three separate and distinct major traffic violations putting her in habitual offender status (R. p. 23, l. 13–p. 24, l. 8). The Administrative Law Court agreed (R. p. 3). Thus, Appellant is really not arguing that she did not commit the offenses that require habitual offender status, but instead because of her alleged confusion, the Department should be estopped from applying the status. There are a number of reason why this is incorrect.

First, *S.C. Code Ann.* § 56-1-1130 provides that the SCDMV shall send a written notice to a person who it determines is in danger of becoming a habitual offender. The SCDMV notified the Appellant of her standing under the Habitual Offender law by letter dated May 14, 2010 (R. p. 36), that persons who are convicted

of three major violations within a three year period will be classified as a habitual offender. The Appellant has misinterpreted the letter.

The letter was not an effort by the SCDMV to advise the recipient of legal rights under it in any specific case, since of course her third predicate violation had not yet occurred. The letter was not an invitation construe portions of the letter in her favor and plan her future violations accordingly. It was to simply advise her that she was in danger of becoming a habitual offender based upon the records of the SCDMV. The letter clearly stated, as does the statute in Section 56-1-1020(a), that a combination of three violations including Driving under the Influence, Driving Under Suspension and Reckless Driving, would result in habitual offender status, as it eventually did in her case.

The letter also stated, consistently with Section 56-1-1020 (b), that a combination violations totaling ten violations, including Reckless Driving, as set forth in the points designation provisions of Section 56-1-720, could also place a driver in habitual offender status. It is true that Reckless Driving is placed in both categories, as the statute requires, and that the letter distinguished the categories as "Major Violations" and "Minor Violations." It would have been difficult to devise any warning letter regarding Section 56-1-1020 and these violations that someone could not have claimed were confusing. If, as Appellant appears to claim, she read the warning letter prior to her reckless driving ticket, she was capable of reading that she was regarded as having two "major" violations and she knew that she had been convicted for Driving Under the Influence and Driving Under Suspension, both on the list designated as "Major." If she read it, she could have read that "Reckless

Driving" was also on the list of major violations of which three violations would result in habitual offender status, of which she was within one such offense of being deemed a habitual offender.

Viewed in a light most favorable to Appellant, the letter warned her that she was potentially within one violation of habitual offender status but because Reckless Driving was found in both lists the letter was at most ambiguous. Thus, Appellant would have this Court believe that her confusion over a warning letter that was at most ambiguous should be relied on to assure her that Reckless Driving could *only* be regarded as a "minor" violation, instead of the "major" violation to which the letter specifically referred. She further insists that her memory of this assurance over fifteen months later resulted a violation that either would not have occurred or should be ignored because of her alleged confusion.

All of this ignores one very fundamental principle: that citizens are presumed to know the law and are responsible for exercising reasonable care to protect their interests. *Ahrens v. State*, 392 S.C. 340, 355, 709 S.E. 2d 54, 62 (2011). Appellant is actually arguing that the alleged ambiguity prevents the Department from applying the law as the predicate violations require. Appellant is essentially arguing that the Department is estopped from applying the law.

In fact, the letter of October 27, 2011 clearly set forth citations to portions of the Habitual Offender Statute and the definitional Section 56-1-1020 immediately preceded them. Appellant did not testify she actually read the statute. Whether she did or not she was held to know its provisions, and since the statute clearly outlines the law, Appellant must fail in the first element of estoppel (the lack of knowledge or a

means of knowledge) against the State. *Morgan v. S.C. Budget and Control Bd.*, 377 S.C. 313, 321, 659 S.E. 2d 263, 267-68 (Ct. App. 2009).

4. APPELLANT'S ALLEGED CONFUSION REGARDING THE WARNING LETTER'S REFERENCE TO RECKLESS DRIVING AS A MAJOR AND A MINOR VIOLATION IS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD THAT SHE RELIED TO HER DETRIMENT.

Ahrens, *supra*, sets forth all the elements of estoppel as applied to the government: "To prove estoppel against the government, the relying party must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position" at 353, 709 S.E. 2d at 61. Appellant must fail the second and third elements as well.

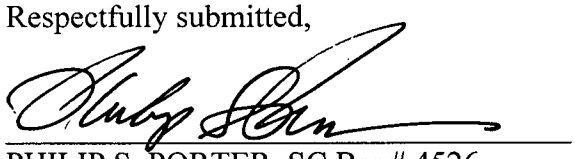
Appellant cannot prove justifiable reliance because at most the May 14, 2010 letter was ambiguous, and the truth of her situation and proximity to habitual offender status could have been determined from a careful reading of it, or of the statute itself. At the very least had Appellant read the letter carefully she could have recognized any ambiguity and contacted the Department for a clarification. Appellant cannot prove justifiable reliance because she did not testify that she arranged her driving over a year in advance to allow herself to commit one more violation on the assurance that it would be deemed a minor violation. If she did assert such a claim she could not be taken seriously.

Most importantly, she did not testify or argue that she drove any differently because of the alleged ambiguity and her confusion regarding it. Again, if she did assert such a claim she could not be taken seriously. Thus, Appellant has not been prejudiced by the letter.

CONCLUSION

For the reasons set forth above, the order of the administrative law judge sustaining the order of the OMVH hearing officer should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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

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July 2, 2015
Blythewood, SC

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Final Brief of Respondent complies with South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02, filed April 15, 2104.

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Deputy General Counsel
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July 2, 2015
Blythewood, SC

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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, July 2, 2015, I served one (1) copy of the Final Brief of Respondent by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Appellant at the address indicated below:

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State of South Carolina

Department of Motor Vehicles

July 2, 2015

The Honorable Jenny Abbott Kitchings
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RE: ***Spring Champion v. South Carolina Department of Motor Vehicles***
Appellate Case No: 2015-000014

Dear Ms. Kitchings:

Enclosed for filing please find the unbound original along with fifteen (15) bound copies of the Final Brief of Respondent in the above-captioned matter.

Please file the original and fifteen (15) copies necessary for SCACR compliance and return the extra copy to me with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter.

In kind regards,

Jeannine Moore

Jeannine (Nina) Moore, Paralegal
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Enclosures

cc: James R. Snell, Jr., Esquire
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