THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

S. Phillip Lenski, Administrative Law Judge

Case no. 2015 - 000014

Spring Champion, Appellant,

v.

South Carolina Department of Motor Vehicles, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED IN SUSTAINING THE HEARING OFFICER'S DESIGNATION OF THE APPELLANT AS A HABITUAL OFFENDER DUE TO TWO DEFICIENT NOTICES TO THE APPELLANT BY THE DEPARTMENT OF MOTOR VEHICLES.

STATEMENT OF THE CASE

Notice of appeal in this case was filed on December 31, 2014. Appellant is challenging administrative law judge S. Phillip Lenski's decision on December 10, 2014, affirming the Order and Decision of the Office of Motor Vehicles' Hearing Officer. The Appellant, Spring Champion, seeks review of the final order of the Administrative Law Court affirming her license suspension due to her designation as a Habitual Offender as provided for in S.C. Code Ann. 56-1-1030. Appellant believes that the administrative law judge erred in affirming the decision of the Hearing Officer because the Department of Motor Vehicles ("the Department") did not provide her with proper notice that she could specifically request a contested case hearing. (R. p. 38). The Department will respond that it has taken appropriate measures under its regulatory authority to notify Appellant prior to her third major moving violation, and at relevant periods following her administrative determination when she was determined a Habitual Offender for having received three major moving violations within three years, as set forth in S.C. Code Ann. 56-1-1030.

Pursuant to Appellant's request for a hearing to challenge her habitual offender status and suspension of her driver's license, Hearing Officer Robert F. Harley presided over the matter on

February 16, 2012. The contested case hearing was conducted in accordance with the Administrative Procedures Act as well as the rules of procedure of the South Carolina Office of Motor Vehicle Hearings, authorized by S.C. Code Ann. 1-23-660 (Supp. 2010). Present at the hearing were the respondent, Spring McIntosh Champion, and two of her witnesses whom the transcript identifies as "Ms. Brown," her friend, and "Unidentified Male," her roommate. (R. p. 22, lines 14-21). Numerous portions of the transcript, provided as part of the record on appeal, are designated as "inaudible." The petitioner, South Carolina Department of Motor Vehicles, was not required to appear pursuant to S.C. Code Ann. 1-23-660 (Supp. 2010).

The Hearing Officer rendered his Final Order and Decision on August 21, 2013, sustaining Appellant's suspension of her driving privileges due to her habitual offender designation by the Department of Motor Vehicles. (R. pp. 8-12). Regarding Appellant's efforts at rehabilitation and her need for a driver's license, the Hearing Officer acknowledged that the facts established Appellant's improvements but that this was not an issue for consideration. (R. p. 11). The Hearing Officer also declared that reckless driving is clearly a major violation as provided by the habitual offender statute, despite Appellant's uncertainty on this point. (R. p. 11). The Appellant did not challenge her three violations and convictions. (R. p. 9). Regarding the Official Notice provided by the Department to the Appellant, the Hearing Officer found that this notice advised Appellant that she had been declared a Habitual Offender and that her driving privileges were subject to a five year suspension beginning on November 26, 2011 and ending on November 26, 2016. (R. p. 9).

Notice of Appeal from the agency action was filed on September 16, 2013, and on September 20, 2013, Notice of Assignment before administrative law judge S. Phillip Lenski was provided to Appellant. (R. p. 20). The administrative law judge rendered his final decision on December 10, 2014, affirming Appellant's habitual offender status as determined by the Department of Motor Vehicles (the Department). (R. pp. 2-7). Administrative Law Judge S. Phillip Lenski declared that the issue over Appellant's need for a driver's license was not properly before the Administrative Law Court or the Hearing Officer. (R. p. 7). The administrative law judge ruled that the record contained substantial evidence sufficient to affirm the Department of Motor Vehicle's determination of Appellant as a habitual offender, and that this determination was properly sustained by the Office of Motor Vehicles' Hearing Officer. (R. p. 6). The decision therefore affirmed Appellant's habitual offender designation by the Department as well as the suspension of her lawful driving privileges. (R. p. 7).

STATEMENT OF FACTS

The Department of Motor submitted and Official Notice to the Appellant on October 27, 2011 which informed Appellant she had been determined a Habitual Offender. (R. p. 38). Appellant's driving record as it relates to her being declared a Habitual Offender is as follows: Ticket Number E023643 for Driving Under the Influence, violation date on July 25, 2009, conviction date on September 3, 2009; Ticket Number 59667EP for Driving Under Suspension, violation date of April 8, 2010, conviction date on May 4, 2010; Ticket Number 18383FV for Reckless Driving, violation date on September 12, 2011, conviction date on October 12, 2011. (R. pp. 30-31, 38). Appellant's most recent conviction for Reckless Driving was her third major

moving violation within a three year period. (R. p. 38). Due to this third moving violation, the Department of Motor Vehicles sent Appellant the Official Notice designating her as a Habitual Offender under South Carolina Code 56-1-1030 and 56-1-1090. (R. p. 38). Appellant was provided with notice in this letter that stated, "Section 56-1-1030 allows you to appeal the DMV's decision," and also set forth a thirty day deadline for Appellant to request a hearing through submission of a written request. (R. p. 38). The Official Notice also informed Appellant of the means by which she could seek reinstatement of her driver's license, and specifically declared that no special driving privileges were available to her at that time. (R. p. 38).

Appellant had also been provided with a letter from the Department on May 14, 2010, informing her that her driving record at that time had accumulated two major violations. (R. p. 36). This letter advised Appellant that within a three year period, a conviction for a third major violation, or a combination of ten minor and/ or major violations, would potentially classify her as a Habitual Offender and that this would suspend her driving privileges for five years. (R. p. 36). However, this letter had "reckless driving" listed as both a "major violation" and a "minor violation," which was an error committed by the Department, and one that Appellant relied on to her detriment. (R. p. 36). The transcript from the contested case hearing before Robert Harley reveals that Appellant raised this issue, although the entirety of that discussion is unknown, for the transcript frequently references "inaudible" portions. Specifically, Appellant did challenge whether the most recent reckless driving conviction on her record was in fact a "major violation," to invoke the habitual offender statute. (R. p. 23, lines 13-25, p. 24, lines 1-25). Appellant stated that she received four points for the reckless driving conviction. (R. p. 24, lines

19-21). Appellant also stated her confusion regarding the duplicative "major" and "minor" classification for reckless driving, as provided in the warning letter from the Department dated May 14, 2010. (R. p. 24, lines 1-18, p. 36).

On November 22, 2011, Appellant properly notified the Department through a written request for a hearing to challenge her habitual offender status. (R. p. 39). Appellant's request stated, in relevant part: "Please accept this letter to request a hearing and for my provisional license according to Title 56 Chapter 1 S.C. state law." (R. p. 39). Appellant also informed the Department that she is a single mother, that she was employed at the Holiday Inn and as event staff with the University of South Carolina, and that she had chosen to enroll in LRADAC in Lexington, South Carolina in order to seek treatment for alcohol abuse. (R. p. 39). The Department subsequently sent Appellant a Notice of Hearing that was scheduled for February 16, 2012 before Hearing Officer Robert Harley. (R. p. 40). In this notice, the Department advised that the hearing would be conducted in accordance with the Rules of Procedure for the South Carolina Office of Motor Vehicle Hearings, that the South Carolina Rules of Evidence would apply, and that a copy of the rules could be obtained from the Administrative Coordinator or online from the OMVH website, which was also provided in the notice. (R. p. 40). The Notice of Hearing also provided information regarding the use of documents as exhibits, subpoenas, the right to self-representation or to an attorney, and requesting a continuance or withdrawing the request for a hearing. (R. p. 40).

The record on appeal included correspondence between the Department and Appellant regarding her habitual offender designation, as well as a copy of the transcript from the contested

case hearing before Robert Harley. However, this transcript consists largely of "inaudible" portions which appear on the transcript approximately fifty-eight times throughout the entirety of eight pages. During the hearing before Robert Harley, Appellant's testimony revealed her incomplete understanding regarding which offenses were major violations that would subject her to suspension under the habitual offender law. (R. p. 23, lines 3-25, p. 24, lines 1-25, p. 25, line 1). Although the record is unclear due to the "inaudible" portions of the transcript, it is clear that Appellant challenged whether her reckless driving offense should constitute a major violation under the habitual offender statute. (R. p. 23, lines 17-25, p. 24, lines 1-18).

ARGUMENT

I. THE OFFICIAL NOTICE WHICH THE DEPARTMENT OF MOTOR VEHICLES PROVIDED TO APPELLANT WAS DEFECTIVE IN THAT SAID NOTICE FAILED TO FOLLOW THE CLEAR MANDATE OF THE NOTICE PROVISION IN THE GOVERNING STATUTE, S.C. CODE ANN. 56-1-1030(b), AND RESULTED IN PREJUDICE TO APPELLANT'S SUBSTANTIVE RIGHTS

The Department sent its Official Notice to Appellant by way of a letter that informed her that she could "Section 56-1-1030 allows you to appeal the DMV's decision," and referenced a "hearing," which Appellant could request in writing. (R. p. 38). However, the Official Notice was deficient in its omission of the mandatory statutory language as set forth in S.C. Code Ann. 56-1-1030(b). The relevant statute, S.C. Code Ann. 56-1-1030 "Determination that person is habitual offender; revocation of license; notice of determination and appeal," clearly incorporates specific language that should be included in the Department's notice to an aggrieved party. This mandate is found in subsection (b) of the statute, which reads:

> 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. S.C. Code Ann. 56-1-1030(b).

Therefore, given this clear statutory directive, the notice following a party's determination as a habitual offender by the Department must apprise that party of their option to request a "contested case hearing" with the Office of Motor Vehicle Hearings, and must also advise that such contested case hearing will be conducted according to the rules of procedure of the Office of Motor Vehicle Hearings. In this case, the initial notice ("Official Notice") letter submitted to Appellant was silent as to each of these statutory requirements. (R. p. 38).

It shall be noted that, after Appellant's written request for a hearing, the Department submitted a second letter titled "Notice of Hearing" which did in fact reference the "contested case hearing" language as set forth in the notice statute. (R. p. 40). This Notice of Hearing letter also provided that the hearing would be conducted according to the Rules of Procedure for the South Carolina Office of Motor Vehicle Hearings. (R. p. 40). However, for the reasons set forth in this appeal, this subsequent notice cannot substitute the statutory mandate of the initial notice that was not properly given to the Appellant. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Yet, "[i]f a statute's language is plain,

unambiguous, and conveys a clear and definite meaning, rules of statutory interpretation are not necessary, and the court has no right to look for or impose another meaning. Hodges, 341 S.C. at 85, 533 S.E.2d at 581. A study of the plain language in the habitual offender statute provides support for Appellant's argument that the initial notice from the Department to an aggrieved party must include, at a minimum, language indicating that the hearing is "contested" as well as language identifying that such contested hearing will be held according to the rules of procedure for the Office of Motor Vehicle Hearings. The reason this language is critical at the first instance of notice- rather than in a follow-up notice as the Department has done in this case- is that the aggrieved party may become prejudiced for want of clarity during an agency's preliminary determination of that party's rights or privileges.

If the legislature did not intend for the notice following a habitual offender classification to specifically advise an aggrieved party of their right to request a contested case hearing, then this would have been omitted from the statute, and the term "hearing" would have arguably sufficed. The term "contested case" is defined in S.C. Code Ann. 1-23-505(3): *"Contested case" means a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.* S.C. Code Ann. 1-23-505(3). The importance of specifically identifying the nature of the hearing as a "contested case" hearing in the initial notice should not be understated, as it is an statutorily defined proceeding whose function is to determine a party's legal rights and privileges in such a manner as to set binding precedent which cannot be disturbed save for appellate review of the agency's determination. Therefore, although the Department provided a Notice of Hearing to the Appellant which advised her of the rules and procedures and the nature of the "contested case hearing" after Appellant already made a

request for a hearing, the Department's failure to do so at the initial notice contravened the plain language of the habitual offender statute.

The administrative law judge was provided with the record on appeal that included the Department's initial "Official Notice" to Appellant. The Order from the administrative law judge discussed the Department's October 27, 2011 Official Notice letter whereby Appellant was informed of her status as a habitual offender. (R. pp. 3, 40). However, the administrative law judge did not consider the propriety of the notice that was submitted to the Appellant. The administrative law judge stated that Appellant requested a contested case hearing on November 22, 2011; however, the judge assumed this fact was true on what appears to be an incomplete review of the record. (R. p. 3). As stated previously, the Department first sent an Official Notice to Appellant which did not mention that she may request a "contested case hearing." (R. p. 38). The Appellant's request that followed mentioned only a "hearing," as that was the only indication of the proceeding which she had been given notice by the Department. (R. p. 39). The administrative law judge assumed that Appellant was properly advised of her rights to request a contested case hearing and proceeded to make his decision based on this assumption.

A review of an administrative law judge's order by the court of appeals must be confined to the record. S.C. Code Ann. 1-23-610(B). The court of appeals cannot substitute its own judgment for that of the administrative law judge as to the weight of the evidence on questions of fact. *Id.* The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. The record on appeal shows that the Official Notice provided to Appellant was defective, as it did not comply with the mandates of the notice provision in the habitual offender statute, S.C. Code Ann. 56-1-1030(b). Appellant was prejudiced from the Official Notice as demonstrated in her handwritten request for a "hearing," where she also included a demand to seek a provisional license, despite the Official Notice having declared that "[t]here are no special driving privileges available to you." (R. p. 38). Unaware of the nature of the hearing, Appellant appeared pro se, did not make challenges to the convictions, and made an erroneous legal challenge to the habitual offender criteria by alleging that her reckless driving conviction should not count towards being declared a habitual offender since it the conviction was reduced from a driving under the influence charge. (R. p. 23, lines 13-25, p. 24, lines 1-25). Although the Department provided a second notice to Appellant by way of "Notice of Hearing" which did identify the matter as a "contested case hearing," this second notice could not remove the prejudice following the initial letter that failed to apprise Appellant of the nature of the proceeding. The Appellant was prejudiced *ab initio* because she was not informed in the Official Notice that the hearing she was entitled to request would be on the merits by way of a "contested case hearing," as provided for by statute in S.C. Code Ann. 56-1-1030(b).

II. THE WARNING LETTER FROM THE DEPARTMENT OF MOTOR VEHICLES ERRONEOUSLY LISTED RECKLESS DRIVING AS BOTH A "MAJOR" AND "MINOR"

VIOLATION WHICH RESULTED IN PREJUDICE TO THE APPELLANT'S SUBSTANTIVE RIGHTS.

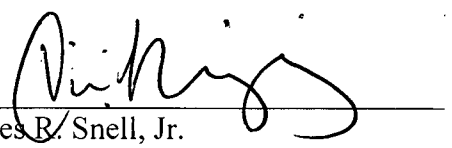
Appellant was justifiably confused and prejudiced by the May 14, 2010 letter from the Department which advised her of her current standing under the Habitual Offender law. (R. p. 36). Appellant's testimony revealed her incomplete understanding regarding which offenses were major violations that would subject her to suspension under the habitual offender law. (R. p. 23, lines 3-25, p. 24, lines 1-25, p. 25, line 1). At the time, the letter advised that Appellant had two major violations and no minor violations. (R. p. 36). Furthermore, the letter provided a comprehensive list of "major violations," as well as "minor violations." (R. p. 36). Reckless driving was listed under both "major" and "minor" violations, however. The letter informed Appellant that, in order to be determined a Habitual Offender by the Department, an aggrieved party must have received three major violations within three years, or a combination of ten major and minor violations within three years. (R. p. 36). Because reckless driving was listed under both "major" and "minor" offenses, Appellant relied on this official warning letter to her detriment and chose to plead to reckless driving under the assumption that this plea would not invoke her license status as a habitual offender. Appellant's substantive rights were thereby prejudiced when she relied on this official warning letter as an accurate statement of the law and as a statement of her driving record. Had the letter made it clear to Appellant that reckless driving was a major violation, then Appellant would have taken necessary steps to avoid a third moving violation on her driving record in order to protect her interests.

"A person's interest in his driver's license is property that a state may not take away without satisfying the requirements of due process." Hipp vs. South Carolina Department of Motor Vehicles, 673 S.E.2d 416, 417, 381 S.C. 323 (S.C. 2009). "Due process is violated when a party is denied fundamental fairness." *Id* at 417. Here, requiring a driver to undergo a habitual offender suspension after receiving an unclear advisement from the Department of Motor Vehicles is a denial of fundamental fairness.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Administrative Law Judge because the decision was at least based on a violation of statutory provisions, made upon unlawful procedure, or affected by other error of law, as set forth in S.C. Code Ann. 1-23-610(B)(a), (c), and (d), respectively.

Respectfully submitted,



June 25, 2015

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RULE 211(b) CERTIFICATION

I hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, a copy of the Rule 211(b) Certification, a copy of the Proof of Service, and a copy of the Record on Appeal on the Respondent, South Carolina Department of Motor Vehicles, by depositing a copy of it via Certified U.S. mail, postage prepaid, on June 29, 2015, addressed to its attorney of record, Frank L. Valenta, Jr., at the address indicated below:

Frank L. Valenta, Jr.
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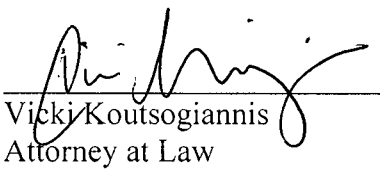

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