STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

UNPUBLISHED OPINION NO. 2011-UP-130

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

v.

Phillip Samuel Brown..... Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

I. **DID THE COURT OF APPEALS ERR IN HOLDING THAT THE ISSUE OF WHETHER THE BREATH TEST WAS CONDUCTED PURSUANT TO S.C. CODE ANN. § 56-5-2950 (2006) WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW?**

STATEMENT OF THE CASE

On July 7, 2008, Petitioner was arrested for driving under the influence by Officer A. S. Wilson of the Columbia Police Department (Appendix p. 15). Following his arrest, Petitioner was transported to the Columbia Police Department for a DataMaster test (Appendix p. 16). Petitioner's privilege to drive in South Carolina was suspended for registering an alcohol concentration of fifteen one hundredths of one percent (0.15%) or greater on the breath test and he was issued the requisite notice of suspension (Appendix p. 16).

Petitioner timely requested an administrative hearing pursuant to S.C. Code Ann. § 56-5-2951 (2006). A hearing was held before Office of Motor Vehicle Hearings (OMVH) hearing officer Robert F. Harley, Jr. on August 26, 2008. By Order dated September 25, 2008, OMVH hearing officer Harley ruled that Petitioner's driving privileges should be restored and rescinded the administrative license suspension (Appendix p. 31). Respondent appealed the September 25, 2008 order of OMVH hearing officer Harley and by order filed August 27, 2009, the Honorable Carolyn C. Matthews reversed the decision of OMVH hearing officer Harley (Appendix p. 10).

Petitioner filed a timely appeal to the Court of Appeals. The Court of Appeals affirmed the decision of the Administrative Law Court (Appendix pp. 1 – 2). By Petition for a Writ of Certiorari filed June 22, 2011, Petitioner sought review of the decision of

the Court of Appeals. By order filed March 9, 2012, this Court granted the Petition for a Writ of Certiorari.

FACTS

On July 7, 2008, Petitioner was arrested for driving under the influence by Officer A. S. Wilson of the Columbia Police Department. Prior to his arrest, Petitioner was stopped for failing turn on his headlights during hours of darkness (Appendix p. 33, lines 21 - 25 - p. 34, line 1). Officer Wilson testified that upon his initial contact with Petitioner, he detected the odor of alcohol on Petitioner, observed that he had bloodshot eyes, slurred speech and had slow and deliberate movements (Appendix p. 34, lines 2 - 5). Officer Wilson then testified that based upon Petitioner's unsatisfactory performance on three of four field sobriety exercises, he placed Petitioner under arrest (Appendix p. 34, lines 7 – 9). Following his arrest, Petitioner was transported to the Columbia Police Department for a DataMaster test (Appendix p. 34, lines 9 - 10). Officer Wilson testified that Petitioner registered an alcohol concentration of seventeen one hundredths of one percent (0.17%) and that the machine was working properly (Appendix p. 34, lines 15 – 18). Petitioner's privilege to drive in South Carolina was suspended for registering an alcohol concentration of fifteen one hundredths of one percent (0.15%) or greater on the breath test and he was issued the requisite notice of suspension (Appendix p. 34, lines 18 - 20). Petitioner timely requested an administrative hearing pursuant to S.C. Code Ann. § 56-5-2951 (2006).

A hearing was held before OMVH hearing officer Robert F. Harley, Jr. on August 26, 2008. Officer Wilson offered no testimony that the test administered and samples obtained were conducted pursuant to S.C. Code Ann. § 56-5-2950 (2006) nor did he offer

any documentary evidence.[1] At the close of evidence, counsel for the Petitioner moved to rescind the suspension based upon the DataMaster operator's failure to prove the test administered and samples obtained were conducted pursuant to S.C. Code Ann. § 56-5-2950 (2006) (Appendix p. 36, lines 9 – 25 – p. 37, lines 1 – 7). By Order dated September 25, 2008, OMVH hearing officer Harley ruled that Appellant's driving privileges should be restored and rescinded the administrative license suspension based upon Officer Wilson's failure to prove that the DataMaster was functioning properly and that Officer Wilson failed to prove Appellant registered fifteen one hundredths of one percent (0.15%) or greater on the breath test (Appendix pp. 30 - 31).

In reversing the OMVH hearing officer's decision, Judge Matthews held that the OMVH hearing officer erred in rescinding the suspension and ruled that counsel for Appellant must raise alleged defects in proof during Respondent's case-in-chief in order to allow Respondent sufficient opportunity to respond (Appendix p. 22). The decision of the Administrative Law Court was affirmed by the Court of Appeals (Appendix pp. 1 – 2).

STANDARD OF REVIEW

"The review of the administrative law judge's order must be confined to the record. The reviewing tribunal 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 has [sic] been prejudiced because of [sic] the finding, conclusion or decision is:

a) in violation of constitutional or statutory provisions;

[1] Had Officer Wilson offered the Breath Alcohol Test Report into evidence, this matter would not be before the Court. Every Breath Alcohol Test Report contains a verification that the simulator solution required by § 56-5-2950 was used as well as other verifications of compliance with § 56-5-2950.

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

c) made upon unlawful procedures;

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."

S.C. Code Ann. § 1-23-610 (Supp. 2007).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE ISSUE OF WHETHER THE BREATH TEST WAS CONDUCTED PURSUANT TO S.C. CODE ANN. § 56-5-2950 (2006) WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

The Court of Appeals erred in affirming the decision of the Administrative Law Court officer when the arresting officer failed to establish that the breath test was administered and sample obtained were conducted pursuant to S.C. Code Ann. § 56-5-2950 and in specifically holding that the issues was not properly preserved for appellate review. This case is not about issue preservation. It is about the presentation of evidence and involves an important procedural question with regard to contested administrative license suspension hearings before the South Carolina Office of Motor Vehicle Hearings. For the benefit of both the bench and the bar, Petitioner seeks a reversal of the opinion of the Court of Appeals and an interpretation of S.C. Code Ann. § 56-5-2951 (F) as to how the items set forth therein must be proven by the prosecuting agency and/or contested by the person whose driving privileges have been suspended.

In South Carolina, the scope of an administrative license suspension hearing is limited to whether the person:

(1) was lawfully arrested or detained;

(2) was advised in writing of the rights enumerated in Section 56-5-2950;

(3) refused to submit to a test pursuant to Section 56-5-2950; or

(4) consented to taking a test pursuant to Section 56-5-2950, and the:

(a) reported alcohol concentration at the time of testing was fifteen one hundredths of one percent or more;

(b) individual who administered the test or took the samples was qualified pursuant to Section 56-5-2950;

(c) test administered and samples obtained were conducted pursuant to Section 56-5-2950; and

(d) the machine was working properly.

S.C. Code Ann. §56-5-2951 (F) (2006).

At the hearing before the OMVH hearing officer, counsel for Petitioner moved to rescind the suspension based upon the fact that the arresting officer failed to offer evidence that the test administered and samples obtained were conducted pursuant to S.C. Code Ann. § 56-5-2950 as required by S.C. Code Ann. § 56-5-2951 (F) (4) (c) (2006). Specifically, counsel argued that S.C. Code Ann. § 56-5-2950 (a) requires that a simulator solution registering between 0.076 percent and 0.084 percent be used (Appendix p.36, lines 9 - 25 – p.37, lines 1 - 7).

In his order rescinding the suspension, the OMVH hearing officer did not specifically address the aforementioned argument but the arguments were properly raised before the administrative law judge pursuant to *I'on v. Town of Mount Pleasant*, 338 S.C.

406, 526 S.E.2d 716 (2000) (holding appellate courts may review additional sustaining grounds and rely on them, or any other reason appearing in the record, to affirm).

Counsel's argument that the suspension should be rescinded came at the close of Respondent's case. Petitioner offered no evidence at the hearing. In addressing Petitioner's argument with respect to S.C. Code Ann. § 56-5-2951 (F) (4) (c) and reversing the decision of the OMVH hearing officer, the administrative law judge held:

> "...test results cannot be excluded simply because an arresting officer failed to testify that a specific provision in § 56-5-2950 was followed, unless the motorist makes a motion during the hearing requesting the OMVH hearing officer to review such provision and the hearing officer determines that the law enforcement's failure to comply with the provision materially affected the accuracy or reliability of the tests (sic) results or the fairness of the testing procedure."

(Appendix pp. 21 - 22) (emphasis in original). In arriving at this conclusion, the administrative law judge relied on S.C. Code Ann. § 56-5-2950 (e) which allows a trial judge or hearing officer, upon motion of either party, to review policies, procedures, regulations promulgated by SLED or § 56-5-2950 and rule on the admissibility of test results. The administrative law judge effectively held that counsel for Petitioner had an affirmative duty to raise the simulator solution issue during the testimony of Respondent's witness in order to allow the witness to respond. The Court of Appeals agreed with the decision of the administrative law judge and held that the issue of whether the test was conducted pursuant to S.C. Code Ann. § 56-5-2950 was not properly preserved for appellate review by a contemporaneous objection.

This decision amounts to impermissible burden shifting and should be reversed. Pursuant to Rule 15(B) of the Rules of Procedure for the Office of Motor Vehicle

Hearings, Respondent bears the burden of proof in matters involving the suspension of a driver's license. This rule is consistent with South Carolina law in that a party making an allegation as to an issue bears the burden of production and persuasion on that issue. Sanders, et al., *Trial Handbook for South Carolina Lawyers*, 9:1 at 410 (2009); *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E. 2d 425 (1991); *S.C. Dept. of Motor Vehicles v. Cannon*, Docket No. 06-ALJ-21-0555-AP, 2007 WL 470534 (S.C. Admin. Law Ct. 2007); *S.C. Dept. of Motor Vehicles v. Powers*, Docket No. 06-ALJ-21-0578-AP, 2007 WL 286784 (S.C. Admin. Law Ct. 2007).

With all due respect to the Court of Appeals and the Administrative Law Court, it appears both tribunals have failed to grasp the real issue before them and any reliance on S.C. Code Ann. § 56-5-2950 (e) is misplaced. Counsel for Petitioner did not contest the admissibility of the breath test result. However, counsel, in his closing argument did raise the issue of a failure of proof on the part of Respondent. The issue before the lower courts was not one of admissibility but whether or not Respondent's witness adequately addressed each issue or element set forth in the scope of the hearing by the Legislature in S.C. Code Ann. § 56-5-2951 (F) (2006).

The issues to be addressed in the administrative hearing as set forth in S.C. Code Ann. § 56-5-2951 (F) (2006) are not mere areas of concern to be addressed via an objection or cross examination. They are actual elements of proof which must be established through the testimony of the arresting officer. In *S. C. Dep't of Motor Vehicles v. McCarson*, this Court observed the following with regard to S.C. Code Ann. § 56-5-2951 (F) (2006):

> Specifically, this section 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. In the instant case, a determination of whether McCarson was lawfully arrested or detained for DUI. By including this **element** in section 56-5-2951, the Legislature placed the **burden** on the Department **to present sufficient evidence** of probable cause. . . . Thus, in proving that a driver was lawfully arrested or detained for DUI, the Department **must present admissible evidence** of probable cause. If we were to find otherwise, we would essentially render meaningless the procedure established by our Legislature in section 56-5-2951.

McCarson, 391 S.C. 136, 149, 705 S.E.2d 425, 431 (2011) (emphasis added).

Based upon this Court's interpretation of S.C. Code Ann. § 56-5-2951, testimony that the test was conducted pursuant to S.C. Code Ann. § 56-5-2950 (2006) is an element of proof set forth in S.C. Code Ann. § 56-5-2951 (F) (4) (c) that must be established by competent evidence. Testimony that the machine was working properly does not satisfy this element because S.C. Code Ann. § 56-5-2951 (F) (4) (d) sets forth an additional element requiring testimony that the machine was working properly. Again, the issue raised before the OMVH hearing officer was not one of admissibility, but of the sufficiency of the evidence offered during Respondent's case-in-chief. The arresting officer simply failed to offer any evidence that the test was conducted pursuant to S.C. Code Ann. § 56-5-2950 and that the appropriate simulator solution was used as required by the Legislature.

The Legislature, in enacting S.C. Code Ann. § 56-5-2951 (F), clearly intended for the arresting officer to present testimony or other evidence that the test was conducted pursuant to S.C. Code Ann. § 56-5-2950. By requiring Petitioner to challenge the lack of evidence during Respondent's case-in-chief and raise a contemporaneous objection, the Court of Appeals and administrative law judge have created a situation whereby Petitioner is required to notify Respondent, or its witness, of defects in the case and thus

allow Respondent to remedy the defect. The opinion of the Court of Appeals has the practical effect of requiring counsel representing a driver at an administrative license suspension hearing to object to any failure of proof during Respondent's case-in-chief. For instance, if Respondent failed to prove that an individual was lawfully arrested or detained, counsel is now required to raise a contemporaneous objection. Such a result should not be sustained by this Court.

Counsel for Petitioner is unaware of any other type of hearing where the party not bearing the burden of proof is required to contemporaneously object to a failure of proof or absence of evidence on the part of the party bearing the burden of proof. As noted in Petitioner's Final Brief to the Court of Appeals, this position is antithetical to our entire adversarial process. The opinion of the Court of Appeals has the effect of directing counsel in and administrative license suspension hearing to "assist" Respondent in satisfying its burden of proof. Query: In the trial of a fraud case, if the plaintiff fails to prove one of the nine elements of fraud, is defense counsel required to notify plaintiff's counsel of the defect and allow counsel the opportunity to correct it? In the trial of a burglary case, if the prosecution fails to prove that the defendant entered the dwelling without consent, is defense counsel required to raise the issue during the State's case? The answer to both questions is obvious and should be no different in the context of an administrative hearing for implied consent suspensions.

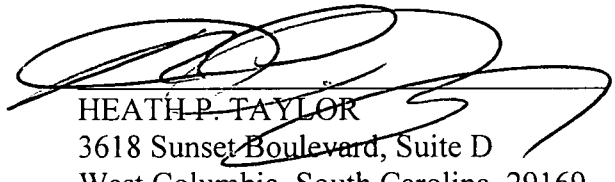
As was the concern in *McCarson*, the opinion of the Court of Appeals in the present case renders the administrative hearing procedure established by our Legislature meaningless. Respondent is now absolved of its burden to present sufficient evidence establishing that the test was conducted pursuant to S.C. Code Ann. § 56-5-2950 as

required by the Legislature, or any other element for that matter, and defense counsel is required to object in a manner that informs Respondent of the defect in its presentation of proof. Such a ruling subverts the intent of S.C. Code Ann. § 56-5-2951 (F) as interpreted by the *McCarson* court. "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict." *Costello v. United States*, 350 U.S. 359, 364, 76 S.Ct. 406, 409 (1956). Parties to an administrative license suspension hearing deserve the same strict observance because the hearing is the final hearing on the merits. This hearing is the only opportunity for an individual to contest a violation of the implied consent laws. Requiring contemporaneous objections to a failure of proof creates a contested case procedure unlike any other in our judicial system. Based upon the foregoing, this court should reverse the decision of the Court of Appeals which effectively shifts the burden of proof to the motorist in an administrative license suspension hearing.

CONCLUSION

If the decision of the Court of Appeals is not reversed, the meaningfulness of administrative license suspension hearings will be severely diminished. Based thereon and for the reasons set forth above, the opinion of the Court of Appeals in this matter should be reversed.

Respectfully submitted,



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This 2nd day of April, 2012.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Petitioner complies with Rule 211(b), SCACR.

April 2, 2012

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appendix and Brief of Petitioner in the above captioned matter complies with Supreme Court Order 2007-08-13-02 filed August 13, 2007

April 2, 2012

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CERTIFICATE OF SERVICE

I hereby certify that today, April 2, 2012, I served the Brief of Petitioner, Certificate of Compliance and Certificate of Counsel upon the South Carolina Department of Motor Vehicles by causing it to be mailed to its attorneys of record, Linda Annette Grice, Esquire, Phillip S. Porter, Esquire and Frank L. Valenta, Jr., Esquire, at their office at 10311 Wilson Boulevard, Blythewood, South Carolina 29016-0020.

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April 2, 2012
West Columbia, South Carolina