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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

DOCKET NO. 15-ALJ-21-0124-AP

Bradley Sanders..Appellant,

v.

South Carolina Department of Motor Vehicles
and Columbia Police Department.................................... Respondents below,

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW JUDGE ERR IN AFFIRMING THE DECISION OF THE OMVH HEARING OFFICER PERMITTING HEARSAY EVIDENCE TO ESTABLISH APPELLANT'S ALLEGED INABILITY TO SUBMIT TO A BREATH TEST?

II. DID THE ADMINISTRATIVE LAW JUDGE ERR IN AFFIRMING THE OMVH HEARING OFFICER'S DECISION THAT THE ARRESTING OFFICER PRESENTED A *PRIMA FACIE* CASE THAT THE INDIVIDUAL WHO DETERMINED APPELLANT WAS UNABLE TO SUBMIT TO A BREATH TEST WAS LICENSED MEDICAL PERSONNEL AS REQUIRED BY S.C. CODE ANN. § 56-5-2950 (A) (SUPP. 2012)?

STATEMENT OF THE CASE

Following a single car collision, Appellant, Bradley Sanders, was arrested on November 21, 2012, for Driving Under the Influence (DUI), first offense, by Officer S.B. Desrochers of the Columbia Police Department (R. p. 2). Appellant was transported to Lexington Medical Center for medical care (R. p. 2). Appellant was allegedly physically unable to submit to a breath test (R. p. 2). The arresting officer advised Appellant of his implied consent rights and requested that Appellant submit to a blood test in order to determine his blood alcohol concentration. Appellant refused to submit to a blood test. Officer Desrochers informed Appellant that his privilege to drive in South Carolina was immediately suspended and issued a notice of suspension pursuant to S.C. Code Ann. §56-5-2951 (Supp. 2012) (R. p. 32, lines 10 – 23).

Appellant timely requested an administrative hearing pursuant to S.C. Code Ann. §56-5-2951 (Supp. 2012) in order to challenge the propriety of the suspension (R. pp. 48 - 49). On March 5, 2013, a hearing was held before the South Carolina Office of Motor

Vehicle Hearings (OMVH). Hearing officer Robert F. Harley, Jr. presided (R. pp. 15 – 21). The suspension was sustained by order filed February 13, 2015 (R. pp. 15 – 21).

The OMVH hearing officer's decision was appealed to the South Carolina Administrative Law Court on March 3, 2015 (R. pp. 22 – 23). By Order filed January 20, 2016, the Honorable S. Phillip Lenski affirmed the order of the OMVH hearing officer (R. pp. 8 – 13). The Honorable S. Phillip Lenski issued an Amended Final Order on January 27, 2016 (R. pp. 2 – 7). This appeal followed.

FACTS

On November 21, 2012, Officer S.B. Desrochers, of the Columbia Police Department, was dispatched to the scene of a single car collision. Officer Desrochers arrived at the scene and found Appellant standing near a gas station. Appellant was identified by witnesses on the scene and was bleeding from his head. Officer Desrochers located Appellant's personal belongings in the vehicle and noticed blood in the vehicle. Appellant denied being in a collision. Officer Desrochers observed a strong odor of alcoholic beverage about Appellant's breath and person. Based upon the testimony of Officer Desrochers, Appellant "[s]eemed a little off balance – not just physically off balance, but mentally not there." Appellant was transported by ambulance to Lexington Medical Center for treatment (R. p. 27, lines 13 – 25 – p. 28, lines 1 - 16).

At the hearing before the OMVH hearing officer, over the hearsay objection of counsel for Appellant, Officer Desrochers testified that he ". . . was told that he [Appellant] would not be able to provide a breath sample." The objection was noted for the record and the OMVH hearing officer admitted the statement ". . . but not for the truth of the matter

asserted. . . ." (R. p. 28, lines 18 – 25 – p. 29, lines 1 - 8). Officer Desrochers went on to testify that ". . . what I was told was that he [Appellant] would not be able to get out in a timely manner in order to provide that breath sample." (R. p. 32, lines 6 - 9).

Officer Desrochers then offered a SLED Urine/Blood Collection Report signed by Angela Albright, who was alleged to be a registered nurse, stating that Appellant was unable to take a breath test due to any reason deemed acceptable by that licensed medical person. The document does not specify the reason Appellant was unable to submit to a breath test (R. p. 50). Counsel for Appellant noted a timely objection to the report and its contents. The report was admitted by the OMVH hearing officer. In arguing his objection to the report, counsel for Appellant questioned whether or not Ms. Albright was actually a registered nurse or otherwise licensed medical personnel eligible to sign the report and to determine whether Appellant was unable to submit to a breath test. Officer Desrochers testified that Ms. Albright had a name badge that indicated she was a registered nurse. He offered no testimony with regard to her attire and acknowledged that he had no information with regard to her education and training (R. p. 29, lines 9 – 25 – p. 32, lines 1 – 9; p. 33, lines 18 - 23).

In reliance on statements made to him by Ms. Albright, Officers Desrochers requested that Appellant submit a blood sample. Appellant refused. Both the OMVH hearing officer and the administrative law judge refused to rescind the suspension finding that the statements made by Ms. Albright and the SLED Urine/Blood Collection Report were not hearsay and therefore, sufficient to warrant a blood test. They further held that Ms. Albright's presence in the hospital, along with her name badge, constituted sufficient evidence that Ms. Albright was licensed medical personnel for purposes S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012)

(R. pp. 15 – 21; R. pp. 2 – 7).

STANDARD OF REVIEW

"The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. 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 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. 2012).

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE ERRED IN AFFIRMING THE DECISION OF THE OMVH HEARING OFFICER PERMITTING HEARSAY EVIDENCE TO ESTABLISH APPELLANT'S ALLEGED INABILITY TO SUBMIT TO A BREATH TEST.

The Administrative Law Judge erred in ruling that testimony from the arresting officer with regard to statements made to him by an individual at the hospital and the SLED Urine/Blood Collection Report were not hearsay. Specifically, Officer Desrochers presented hearsay testimony from Angela Albright, alleged to be a registered nurse, in attempting to establish Appellant's alleged inability to submit to a breath test. In addition to these hearsay statements, Officer Desrochers presented a SLED Urine/Blood Collection Report, alleged to have been signed by Ms. Albright, indicating Appellant was unable to submit to a breath test for a reason deemed acceptable to licensed medical personnel which also amounts to hearsay evidence. Over the objections of counsel, the hearing officer admitted the evidence. In doing so, the hearing officer concluded:

> . . . the testimony was not hearsay because it was not admitted to prove that the Respondent was actually unable to leave, only that the blood test was warranted because licensed medical personnel determined he was unable to provide a breath sample.

(R. pp. 20 – 21, ¶ 11). The Administrative Law Judge agreed but with slightly different reasoning:

> Under the facts of this case, the officer's testimony on this point was not hearsay, because it was not offered to prove that Appellant was, in fact, medically unable to provide a breath test at the time, but rather to show that the officer had reasonable grounds to request that the Appellant submit to a breath test.

(R. p. 5). For the reasons more fully set forth below, the aforementioned evidence constitutes inadmissible hearsay, and the decision of the Hearing Officer should be reversed.

S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) states:

> . . . At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. . . .

Pursuant to this statute, arresting officer may only request a blood test, if the arrested person had an injured mouth, was unconscious or dead. Absent these conditions, the arresting officer is required to present the testimony of licensed medical personnel indicating any reason considered acceptable by the licensed medical personnel that the person could not take a breath test.

Our courts have ruled on this issue on multiple occasions. In *State v. Stacy*, 315 S.C 105, 431 S.E.2d 640 (1993), the defendant led law enforcement officers on a high speed car chase which ended in a wreck. He suffered injuries requiring hospital treatment. Stacy contended the blood results were erroneously admitted into evidence because the State failed to comply with S.C. Code Ann. § 56-5-2950 (a) (1991). The pertinent passage of S.C. Code Ann. § 56-5-2950 (a) analyzed by the *Stacy* court is virtually identical to the portion applicable in the present case. At trial, the State presented the testimony of Staci York who drew Stacy's blood sample. York testified that she was trained to take blood samples and that it was not possible for law enforcement to take Stacy to a breath testing site because he had not been treated for his injuries. The court determined that the need for additional

medical treatment was an acceptable reason for York to determine Stacy could not give an acceptable breath sample and affirmed the lower court's ruling.

This Court addressed a similar issue in *City of Columbia v. Moore*, 318 S.C. 292, 457 S.E.2d 346 (Ct. App. 1995). Moore was involved in an automobile accident and complained of chest pains at the scene. At his request, Moore was transported via ambulance to the hospital. As in the present case, the arresting officer testified that ". . . someone at the hospital told him Moore could possibly be in the hospital all night for observation." *Moore*, 318 S.C. at 294, 457 S.E. 2d at 347. The Court noted that because Moore did not have an injury to his mouth and was conscious at all times, the City was required to present evidence Moore was physically unable to give an acceptable breath sample for a reason found acceptable by licensed medical personnel. The arresting officer's testimony of what someone told him at the hospital did not comply with the statutory requirements necessary to request a blood sample from Moore. The Court affirmed the reversal of Moore's conviction.

This Court again addressed the issue in *State v. Kimbrell*, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997). Kimbrell was injured in an accident and transported to the hospital for treatment. As Kimbrell was leaving the hospital, the state trooper asked her to submit to a blood test and she consented. The trooper's justification for requesting a blood sample was based upon his observation that Kimbrell had blood in her teeth. The circuit court reversed Kimbrell's magistrate court conviction ruling that S.C. Code Ann. § 56-5-2950 (a) required medical personnel, not the arresting officer, determine if Kimbrell could not give an acceptable breath sample. In affirming the circuit court decision, this Court stated:

> As we held in *Moore,* the determination that the accused is physically unable to provide an acceptable breath sample due to any reason other than

> unconsciousness, death, or injury to the mouth requires the determination of licensed medical personnel. Even where there is an indication of an injury to the mouth, however, the statute still requires a determination that the accused is physically unable to provide an acceptable breath sample. . . .
>
> We conclude the plain meaning of the statute requires the arresting officer to offer a breath test, absent a valid determination that the defendant is physically unable to give an acceptable breath sample. Where the evidence shows a person is dead, unconscious, or physically unable to provide an acceptable breath sample as determined by authorized medical personnel, no breath test need first be offered, and the blood test results are admissible.

Kimbrell, 326 S.C. at 348 – 349, 481 S.E.2d at 458 – 459.

This court again made clear its intention that licensed medical personnel make the determination that an individual is unable to submit to a breath test in *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). In *Peake*, the motorist was involved in a one car accident and transported to the hospital. The trooper noted the strong smell of alcohol on Peake's breath and slurred speech. Peake was placed under arrest at the hospital and advised of his *Miranda* and implied consent rights. Peake was asked to provide a blood sample. He refused and his license was suspended. At the administrative hearing, the trooper testified that he requested a blood sample because he believed Peake's condition prevented him from providing a breath sample. The hearing officer sustained the suspension and the circuit court affirmed on appeal. This Court, in reversing the circuit court's decision, relied on the cases cited above and noted that ". . . the administrative hearing officer and circuit court relied only on an unsubstantiated reason considered acceptable by Trooper Manly." *Peake*, 375 S.C. at 603, 654 S.E.2d 292. The Court further noted:

> Although this court in *Moore* held the inability to leave a medical facility could form a legally sufficient basis for ordering a blood test, we expounded the record must show this determination is based on the opinion of licensed medical personnel.

Id. Accordingly, this Court remained consistent in its requirement that the arresting officer must comply with the mandates of S.C. Code Ann. § 56-5-2950 prior to requesting a blood sample.

In the present case, the only attempt to comply with this requirement came when the arresting officer introduced hearsay testimony indicating that he ". . . was told that he [Appellant] would not be able to provide a breath sample. . . ."; that the SLED Urine/Blood Collection Report signed by Angela Albright, who is alleged to be a registered nurse, was ". . . checkmarked that he could not leave because of medical reasons to take the breath sample."; and that the officer was told ". . . he would not be able to get out in a timely manner in order to provide that breath sample." (R. p. 28, lines 18 – 19; p. 29, lines 17 – 22; and p. 32, lines 6 – 9). Counsel for Appellant noted timely objections to this hearsay testimony as well as the admission of the SLED Urine/Blood Collection Report (R. p. 28, lines 20 – 22; and p. 29, lines 23 – 25 – p. 30, lines 1 - 24). Angela Albright was not presented as a witness in the proceeding.

The same type of evidence was not deemed sufficient by this Court in *Moore*. As noted above, the arresting officer testified that ". . . someone at the hospital told him Moore could possibly be in the hospital all night for observation." *Moore*, 318 S.C. at 294, 457 S.E. 2d at 347. Although the court did not explicitly address the officer's testimony from a hearsay perspective, it is clear from the court's holding that hearsay statements received from a person found within the walls of a medical facility were not enough to warrant compliance with S.C. Code Ann. § 56-5-2950. Certainly, had the court been so inclined, it could have adopted the same reasoning used by the hearing officer and administrative law judge in the

present case. However, the analysis should be the same. Like the officer in *Moore*, Officer Desrochers based his decision to request a blood test on what he was told by someone at hospital. The *Moore* court stated:

> The City argues Wadford's belief that Moore would not be released for a long period of time, coupled with the reasonable inferences which can be derived from the circumstances under which he was transported to the hospital, is a sufficient basis to conclude Moore was physically incapable of giving a breath sample. However reasonable these conclusions may be under the circumstances, they are legally insufficient.

Moore, 318 S.C. at 295, 457 S.E.2d at 347. The City of Columbia's argument in *Moore* was similar to the hearing officer's and administrative law judge's reasoning that the testimony was not hearsay.

Both the hearing officer and administrative law judge held that the statements of Ms. Albright were not hearsay because the statements were not used to prove the truth of the matter asserted. "Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *State v. Brewer,* 411 S.C. 401, 407, 768 S.E.2d 656, 659 (2015) *citing State v. Jennings*, 394 S.C.473, 478, 716 S.E.2d 91, 93 (2011); Rule 801, SCRE. "Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules." *S.C. Dep't of Motor Vehicles v. McCarson,* 391 S.C. 136, 146 ,705 S.E.2d 425, 430 (2011). The South Carolina Rules of Evidence are clearly applicable to administrative hearings of this nature. *Id.*, at 147, 750 S.E.2d at 430.

The administrative law judge ruled that the statements attributed to Ms. Albright were not ". . . offered to prove that Appellant was, in fact, medically unable to provide a breath test

at the time, but rather, to show that the officer had reasonable grounds to request that the Appellant submit to a blood test." (R. p. 4). This reasoning is virtually identical to the City of Columbia's argument this Court rejected in *Moore*. As noted above, the inability to leave a medical facility due to ongoing treatment, if the determination is made by licensed medical personnel, is a valid reason for an officer to request a blood test.

However, the administrative law judge's conclusion was based solely on hearsay. The statements were used to substantiate the "reason" considered acceptable by licensed medical personnel. Licensed medical personnel considered the blood test acceptable and that Appellant was unable to provide a breath sample *because* Appellant was unable to leave the hospital (R. p. 28 lines 17 – 19; p. 29, lines 17 – 22; and p. 32, lines 6 -9). Officer Desrochers clearly based his decision to request a blood sample on the truth of the statements attributed to Ms. Albright. Although he ultimately ruled differently, the hearing officer agreed:

> I tell you what now, I'm going to let it come in, Attorney Leventis, not for the fact that she was a licensed nurse practitioner, but that **he relied upon what she said.**

(R. p. 30, line 25 – p. 31, lines 1 – 3)(emphasis added). The administrative law judge made a similar conclusion:

> Likewise, under the facts of this case, the arresting officer **relied** on information he received from a person he reasonably believed was qualified to opine that the Appellant was unable to take a breath test under the provisions of Section 56-5-2950(A). The officer then, as required under the statute, offered the Appellant the opportunity to submit to a blood test, to which he refused. (*citations omitted*). This court agrees with the hearing officer's conclusion that the evidence was not offered for the truth of the matter asserted, but rather to show that a blood test was warranted under the statute.

(R. pp. 5 – 6)(emphasis added). The statements were clearly used to prove the truth of the matter asserted. The claim that Appellant could not leave the hospital was the basis for Ms. Albright's opinion that Appellant could not provide a breath sample. Officer Desrochers relied upon the statements as being the truth.

At least two courts in other jurisdictions have analyzed nearly identical hearsay issues and reached opposite conclusions to that of the administrative law judge in the present case. In *Heuton v. Commissioner of Public Safety*, 541 N.W.2d 361 (Minn. Ct. App. 1995), the Minnesota Court of Appeals addressed statements from medical professionals and a law enforcement officer's determination that the driver was incapable of refusing a blood test due to incapacity. Heuton was involved in a single car collision and sustained serious injuries. She was semiconscious at the scene. An officer on the scene ordered that a blood test be given to Heuton. Later, a different officer arrived at the hospital with a blood test kit and an implied consent form. The officer was not permitted to see Heuton, but a medical technician obtained a sample of Heuton's blood. The relevant Minnesota statute provided that a person who is unconscious or in a condition making the person incapable of refusing a blood test is deemed not to have withdrawn his or her implied consent to testing and the test may be given. At the administrative hearing, the officer who obtained the blood sample testified that emergency room staff told him that the doctor would not permit him to see Heuton and that a paramedic told him that her injuries were life threatening. Based on these statements, the officer determined that Heuton was incapacitated and he was justified in obtaining a blood sample.

On appeal, Heuton argued that the officer's statements regarding her condition were

hearsay and should not have been considered to determine her capacity to submit to the blood test. While the court affirmed the license suspension on other grounds, it agreed with Heuton's hearsay argument:

> They [the statements] are offered to assist the Commissioner in proving by a preponderance of the evidence that Heuton was incapable of refusal.
>
> Neither can we accept the state's argument that the statements of emergency room personnel regarding Heuton's condition were not offered to prove the truth of the matter asserted and that, therefore, the challenged testimony is non-hearsay under the 'state of mind' exception set forth in rule 803(3). The statements of the medical personnel clearly addressed one of the facts that the Commissioner was required to prove by a preponderance of the evidence, to wit, Heuton's incapacity to refuse testing.

Heuton, 514 N.W.2d at 364. The same holds true in the present case. The statements of Ms. Albright presented by Officer Desrochers were undeniably introduced to satisfy the threshold question of whether or not Appellant could submit to a breath test.

In *State v. Anger*, 98 P.3d 630 (Haw. 2004), the Hawaii Supreme Court also addressed out of court statements of medical personnel. Anger was involved in a single car accident that required emergency officials to extract him from his vehicle. He denied being injured but was transported to the hospital. An officer on the scene requested that dispatch send another officer to the hospital to obtain a blood test. Pursuant to Hawaii law, the officer could obtain an involuntary blood sample from Anger if Anger sustained injuries. At the hospital, Anger again denied that he was injured and the arresting officer awaited a diagnosis from a physician to determine whether the involuntary blood draw was warranted. A blood sample was obtained despite Anger's protest. At a hearing to suppress Anger's blood results, the officer present at the hospital testified that a doctor told him that Anger was injured and

therefore, the blood draw was warranted. Counsel for Anger noted a timely hearsay objection and the prosecutor responded that the statement ". . . doesn't go to the truth of the matter asserted." *Anger*, 98 P.3d at 634.

The Hawaii Supreme Court disagreed. The court held that the lower court erred in denying Anger's motion to suppress because the testimony of the officer concerning what the doctor told him amounted to inadmissible hearsay. The court stated:

> Nevertheless, Officer Silva's testimony that an anonymous physician had told him that Anger had sustained injuries was the purported and sole statutory predicate, under HRS § 286-163, for the involuntary draw of Anger's blood. Therefore, Officer Silva's testimony was obviously adduced to prove the truth of the matter asserted, inasmuch as the legal justification under HRS § 286-163(c) for such an involuntary draw depended upon proving that Anger had, in fact suffered injury in the motor vehicle accident.

Anger, 98 P.3d at 638. As in *Anger*, the hearsay statements of Ms. Albright were the "sole statutory predicate" for Officer Desrochers decision to request a blood sample and were clearly offered for the truth of the matter asserted.

Recently, in *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), our Supreme Court reviewed the issue of hearsay statements that the State contended were admissible for purposes of context or for the effect the statements had on the defendant. In *Brewer*, the State introduced an audiotaped interrogation of the defendant. During the interrogation, the investigators repeatedly referenced and quoted alleged eye witnesses. The Court held that hearsay statements of witnesses were ". . . offered for the sole purpose of proving the truth of the matter asserted" and not for the purpose of showing what effect the statements had on Brewer. *Brewer*, 411 S.C. at 406 - 407, 768 S.E.2d at 659. The Court took the time to quote *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004):

> So to what issue *other* than truth might the testimony have been relevant? . . . Allowing agents to narrate the course of their investigations, and thus spread before juries *damning information* that is not subject to cross examination, would go far toward abrogating the defendant's rights under the [S]ixth [A]mendment and the hearsay rule.

Brewer, 411 S.C at 407, 768 S.E.2d 656. The Court, citing *State v. Miller*, 676 S.E.2d 546, 556 (N.C. Ct. App. 2009) also noted:

> . . . [H]owever, caution must be exercised in the admission of such evidence to ensure that all out-of-court statements are either 'admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay.'

Brewer, 411 S.C at 407 - 408, 768 S.E.2d 656.

Both passages are particularly applicable in the present case. The question posed in *Silva* is the same. To what issue, other than the fact that Appellant could not leave the hospital, might have the testimony been relevant? The answer is none. The fact that Appellant could not leave was the sole reason the officer requested the blood test and had Ms. Albight sign the SLED Urine/Blood Collection Report. The concerns of the *Miller* court are also the same in the present case. The ruling that the statements were not used to prove Appellant was unable to leave but to show that a blood test was warranted under the statute amounts to an attempted "end-run" around the hearsay rule. The nurse that allegedly stated Appellant was unable to leave the hospital, which formed the basis of her determination that a blood test was warranted, was not subject to cross examination. It *may* be that the nurse was not informed of the time limit for a breath test. Could Appellant have been more expeditiously cared for and discharged had she known? Did the officer ask her to speed up the process or did the officer simply present a form for her to sign for his own convenience?

Was Appellant released from the hospital in time to reasonably be offered a breath test? Obviously, we cannot know the answer to these questions because the nurse did not testify.

Based upon the foregoing, this Court should reverse the decision of the administrative law judge. The statements from Albright and the SLED Urine/Blood Collection Report amount to hearsay because they serve as the justification for the decision to request a blood test. The determination that a blood test was warranted was premised solely on Appellant's inability to leave. If the alleged statements were false, then the decision to request a blood test is invalid and the arresting officer had no basis to rely on the statements to request the blood test. Consequently, the statements were offered for the truth of the matter asserted and constitute inadmissible hearsay warranting reversal of the administrative law judge's decision.

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN AFFIRMING THE OMVH HEARING OFFICER'S DECISION THAT THE ARRESTING OFFICER PRESENTED A *PRIMA FACIE* CASE THAT THE INDIVIDUAL WHO DETERMINED APPELLANT WAS UNABLE TO SUBMIT TO A BREATH TEST WAS LICENSED MEDICAL PERSONNEL AS REQUIRED BY S.C. CODE ANN. § 56-5-2950 (A) (SUPP. 2012).

The Administrative Law Judge erred in ruling that the arresting officer presented a *prima facie* case that the individual who informed Officer Desrochers that Appellant was unable to leave the medical facility was licensed medical personnel. This ruling, based on hearsay testimony and unsubstantiated assumptions, should be reversed.

A. The determination that Angela Albright was licensed medical personnel as required by S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) was based upon hearsay.

The determination that Angela Albright was a registered nurse was based solely on

the hearsay testimony of the arresting officer. At the hearing, the hearing officer initially stated that he was admitting hearsay testimony with regard to Ms. Albright, over the objection of counsel, ". . . not for the fact that she was a licensed nurse practitioner, but that he relied upon what she said." (R. p. 31, lines 1 – 3). However, the Final Order and Decision indicates the opposite and the Amended Final Order of the administrative law judge agreed.

The administrative law judge clearly accepted the statements with regard to Ms. Albright's qualifications for the truth of the matter asserted – that she was a registered nurse. He notes that ". . . Officer Desrochers was informed by Angela Albright, who held herself out as a registered nurse. . ." and made a finding that ". . . the nurse signed the SLED Urine/Blood Collection Report, and also indicated on that form that she was a registered nurse when she listed her title on that report." (R. pp. 2 and 5). He further concluded Officer Desrochers ". . . saw Albright in the hospital wearing a nametag and hospital scrubs[1] that reasonably indicated she was a registered nurse (R. p. 6).

Therefore, it appears the administrative law judge based his conclusion upon Ms. Albright's alleged signature on the SLED Urine/Blood Collection Report; her representations to the arresting officer; her hospital scrubs[2]; and her name tag all of which constitute out of court statements used for the truth of the matter asserted. Based upon the administrative law judge's erroneous reliance on hearsay statements to establish Ms. Albright's credentials as licensed medical personnel, this Court should reverse Amended Final Order in this matter.

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[1] The record is devoid of any testimony indicating Ms. Albright was wearing scrubs. However, both the hearing officer and administrative law judge made specific findings that she was wearing scrubs.

[2] See footnote 1.

B. The arresting officer did not present a *prima facie* case that Ms. Albright qualifies as licensed medical personnel pursuant to S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012).

The administrative law judge ruled that the arresting officer presented *prima facie* evidence that the person who told him Appellant would be unable to leave the hospital and signed the SLED Urine/Blood Collection Report was licensed medical personnel. He based the ruling on the testimony of Officer Desrochers who ". . . testified that he saw Albright in the hospital wearing a nametag and scrubs that reasonably indicated she was a registered nurse." (R. p. 6). This ruling ignored well settled law interpreting S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) with respect to the identification and qualification of licensed medical personnel and should be reversed.

In *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005), this Court reviewed the admission of blood test results when the State failed to properly establish that the individual that drew the sample was qualified as required under the implied consent statute. The facts of the present case are similar. In *Frey*, the defendant was injured in an automobile accident and transported to the hospital. The investigating officer met Mr. Frey at the hospital and advised him of all applicable rights. Mr. Frey then consented to a blood test. The trooper prepared the standard SLED Urine/Blood Collection Report which was signed by an individual named Scott Darragh. Mr. Darragh signed the form in the space labeled "licensed or trained collector." The report did not indicate Mr. Darragh's position and the State did not offer any evidence of Mr. Darragh's medical credentials. *Frey*, 362 S.C. at 515, 608 S.E.2d at 876 – 877.

At trial, counsel for Mr. Frey moved to suppress the blood test results based upon the

State's failure to present evidence that the blood test was drawn by a qualified individual as required by the implied consent statute. The motion was denied based upon the circuit court's finding that there was enough "circumstantial evidence" to establish compliance based upon the fact that Darragh appeared in the emergency room wearing "hospital like scrubs." *Frey*, 362 S.C. at 515 – 516, 608 S.E.2d at 877.

In writing for the court, now Justice Kittredge, joined by now Justice Hearn and Judge Huff, made it very clear that one's presence in an emergency room and signature on a SLED form was not sufficient to establish an individual's medical credentials. The court stated:

> The plain language of section 56–5–2950 further requires that we reject the State's suggestion that the mere appearance of Scott Darragh in the emergency room is sufficient, for the statute mandates that the blood sample "must" be obtained by a trained medical professional. One's mere appearance in a hospital wearing generic hospital attire is not evidence of one's medical training. We likewise reject the State's assertion that Darragh's signature on the SLED form in the space labeled "licensed or trained collector" is sufficient to establish compliance with the statute. Simply signing a preprinted form does not provide any indicia that the signatory's qualifications meet the specific licensing or training requirements of section 56–5–2950. To hold otherwise would render the minimal foundational requirement of section 56–5–2950 without any meaningful force or effect. In light of the State's failure to satisfy this basic requirement, we are constrained to find the circuit court erred in finding the foundational requirements of section 56–5–2950 had been satisfied.

Frey, 362 S.C. at 517, 608 S.E.2d at 877 – 878.

The facts in the present case are strikingly similar. The administrative law judge's decision that Ms. Albright was qualified to opine that Appellant was unable to submit to a breath test is based on the very same factors rejected by the *Frey* court as insufficient to establish Mr. Darragh's medical credentials. The administrative law judge attempted to

distinguish the present case from *Frey* based upon the fact that *Frey* was a criminal proceeding. In *Frey*, the State was attempting to introduce a blood sample. The present case is a civil administrative proceeding and Appellant refused to provide a blood sample.

First, the construction and application of S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012), is the same regardless of the nature of the proceeding. Our Supreme Court has recognized the significant importance of administrative license suspension hearings:

> [A] license-suspension may potentially terminate an important interest of the licensee. . . . Because a license-suspension hearing constitutes a final adjudication of an important interest, we believe the Legislature promulgated section 56-5-2951 in such a way that guards against an automatic or rote elimination of this interest.

S.C. Dep't of Motor Vehicles v. McCarson, 391 S.C. 136, 148, 705 S.E.2d 425, 431 (2011). Likewise, the United States Supreme Court has recognized that a driver's license is a property interest protected by the Fourteenth Amendment and, once issued, a driver's license may not be taken away without affording a licensee procedural due process. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589 (1971). Whether this matter involves an administrative license suspension or a criminal proceeding has no bearing the requirements of the statute.

Second, the administrative law judge attempts to distinguish the present case from *Frey* based upon the fact that in *Frey*, the state sought to introduce a blood sample that must be collected by licensed medical personnel as opposed Appellant's refusal to provide a blood sample. However, this premise is simply a distinction without a difference. S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) references licensed medical personnel twice. First, in the event the person arrested does not have an injured mouth, is not dead or unconscious, licensed medical personnel must make the determination that the person cannot submit to a

breath test. Second, in the event the person agrees to submit a blood or urine sample, the sample must be obtained by a licensed physician, a licensed registered nurse or other medical personnel trained to obtain samples in a licensed medical facility. The statute does not distinguish between the licensure requirements for determining if an individual is unable to submit to a breath test versus the licensure requirements for obtaining a blood or urine sample. Under the administrative law judge's reasoning, in a criminal proceeding in which a sample is obtained, the State must provide proof of the medical personnel's licensure. However, in an administrative proceeding, where an individual refuses to provide a sample, he ruled the State need only show that some person wearing scrubs and a name tag placed her signature on a preprinted form and this complied with the statute. This exact reasoning was expressly rejected in *Frey* with regard to the proof necessary to establish the qualifications of licensed medical personnel.

Based upon the *Frey* decision, this Court should reverse the Amended Final Order of the administrative law judge.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court reverse the decision of the administrative law judge and order that the suspension related to this case be rescinded.

June 1, 2016

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

DOCKET NO. 15-ALJ-21-0124-AP

Bradley Sanders..Appellant,

v.

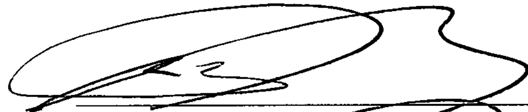
South Carolina Department of Motor Vehicles
and Columbia Police Department.................................... Respondents below,

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Record on Appeal and Final Brief in the above captioned matter complies with Supreme Court Order 2007-08-13-02 filed August 13, 2007.

June 6, 2016



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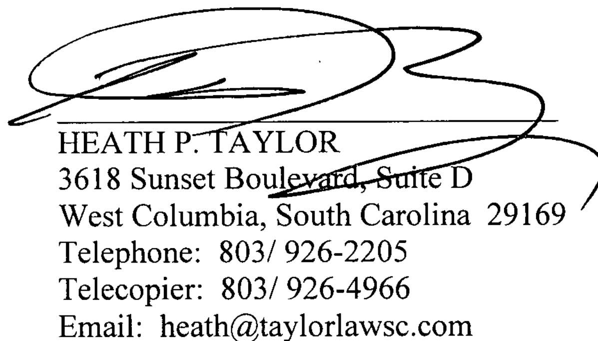
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

June 6, 2016



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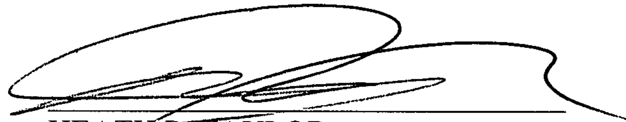
PROOF OF SERVICE

I certify that I have served the Final Brief on the South Carolina Department of Motor Vehicles by causing it to be mailed to its attorneys of record, Frank L. Valenta, Jr., Esquire, Philip S. Porter, Esquire and Brandy A. Duncan, Esquire at their office at 10311 Wilson Boulevard, Post Office Box 1498, Blythewood, South Carolina 29016-0020 on June 7, 2016.

June 7, 2016



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