

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McCluney,

Docket No. 16-ALJ-21-0437-AP

Appellant,

vs.

ORDER

South Carolina Department of Motor Vehicles
and South Carolina Department of Public
Safety,

RECEIVED

MAY 30 2017

Respondent.

SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed by Corey McCluney (Appellant). Appellant seeks review of a decision by a hearing officer with the Office of Motor Vehicle Hearings (OMVH), which found in favor of the South Carolina Department of Motor Vehicles (Department) and the South Carolina Department of Public Safety (Respondent). Appellant argues that the hearing officer's order is predicated upon unlawful procedure. The Court has jurisdiction to review this matter pursuant to South Carolina Code Section 1-23-660(D).

BACKGROUND

On May 23, 2016, Trooper Thornton responded to an accident on I-85. When the trooper arrived, he found Appellant standing by his vehicle, which was in a ditch on the shoulder of the road. Appellant stated that he ran into the ditch. Trooper Thornton smelled alcohol on Appellant and administered a horizontal gaze nystagmus test. The trooper observed signs of nystagmus in Appellant's eyes. Appellant failed to completely comply with further tests or requests from Trooper Thornton. The trooper placed Appellant under arrest and transported him to county jail for a DataMaster breath test. Trooper Thornton gave Appellant a copy of the Advisement of Implied Consent Rights. After waiting twenty minutes per protocol, Appellant informed Trooper Thornton that he would not take the test. Appellant's license was suspended for refusing the test and he filed for a contested case hearing with the OMVH.

ISSUE ON APPEAL

Whether the hearing officer erred in utilizing improper procedure.

FILED

May 4, 2017

SC ADMIN. LAW COURT

STANDARD OF REVIEW

The ALC hears appeals from the OMVH under the Administrative Procedures Act (APA).¹ See S.C. Code Ann. § 1-23-660(D) & § 1-23-600(E) (Supp. 2016). Consequently, the Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2016). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2016). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

DISCUSSION

The contested case hearing in this matter was held pursuant to Appellant's request after his license was suspended for refusal to take a breathalyzer test. Hearings on that issue are confined to a specific set of inquiries; namely, whether the driver:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed 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 samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
 - (d) machine was working properly.

S.C. Code Ann. § 56-5-2951(F) (Supp. 2016). The statute further provides that, "The Department of Motor Vehicles and the arresting officer shall have the burden of proof in contested case hearings conducted pursuant to this section." Id.

¹ For the purposes of the APA, the OMVH functions as an "agency." See S.C. Dept. of Motor Vehicles v. Brown, 406 S.C. 626, 636, 753 S.E.2d 524, 529 (2014) (Beatty, J., dissenting) (quoting S.C. Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011)).

In this case, evidence by which Trooper Thornton met the burden of proof was introduced at two different times. The trooper initially gave direct testimony and rested his case. Appellant's attorney did not cross-examine Trooper Thornton and chose not to put on a case. At that point, Appellant's attorney moved to dismiss the suspension. He argued that the trooper had not proved that his client was the driver of the car in the ditch, that he had not proved probable cause, and that he did not prove advisement of rights. The hearing officer allowed the trooper to provide additional testimony on the contested points. During the interchange that followed, Appellant's attorney stringently objected to allowing additional testimony—on the ground that the record was closed, among other things. The hearing officer stated that the hearing was not adjourned and that she had not closed the record or called for closing statements and therefore the trooper's testimony was allowable. She pointed out that an administrative hearing is for getting to the truth and that she was relying on prior case law in allowing the additional testimony.

Appellant now argues that the procedure used by the hearing officer was unlawful, or in the alternative, that it wrongly shifted the burden of proof from the Department to himself. Appellant argues that the case should have been decided in his favor when the trooper initially failed to establish a *prima facie* case, that allowing the trooper a chance to add further testimony violates rudimentary procedural rules, and that by allowing the additional testimony the hearing officer shifted the burden of proof. In response, the Department points out that the hearing officer was relying on precedent established in South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753, S.E.2d 524 (2014). That case involved a motion during closing arguments about the sufficiency of evidence on compliance with policy and procedure at the time of administration of a breath test under Section 56-5-2950(e). The Supreme Court ruled that moving on the issue of sufficiency of the evidence during closing prevented the Department from having a meaningful opportunity to respond. *Id.*, 406 S.C. at 633–34, 753 S.E.2d at 528. While the issues in this case are not identical to those in Brown, the case stands for the proposition that evidentiary rulings should not be used a trap rather than a tool to discover the facts in a DUI suspension hearing.

South Carolina courts have often held that procedure in an administrative hearing need not be as precise as that in a criminal or other serious matter. For instance, the Supreme Court has stated that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.” Stono River Envtl. Prot. Ass'n v. S.C. Dept. of Health & Envtl. Control, 305

S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (quotation marks and citation omitted). "Due process does not require the full gamut of rules and procedures" that some parties have claimed. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).

Moreover, a hearing officer has broad discretion when presiding over an administrative hearing. "Considering that the trial judge is vested with discretion to admit or exclude evidence, *a fortiori* the trial judge may regulate the manner in which evidence is offered to the court, subject to review for abuse of discretion or error of law." Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 242, 616 S.E.2d 431, 436 (Ct. App. 2005). "The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." Brenco v. S.C. Dept. of Transp., 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008) (citation omitted).

In reviewing the record in this matter, it is apparent that, although the trooper had rested his case, the record was not closed, nor had closing statements commenced. The hearing officer was within her discretion to allow additional testimony in order to ascertain the truth of the matters before her.

ORDER

IT IS THEREFORE ORDERED that the OMVH's Final Order and Decision is **AFFIRMED**.

IT IS SO ORDERED.

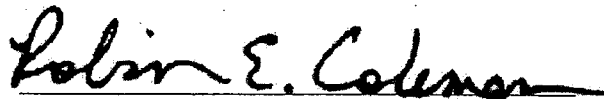


Deborah Brooks Durden, Judge
S.C. Administrative Law Court

May 4, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 4, 2017
Columbia, South Carolina

FILED

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