THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2017-001247

Corey Arness McCluney,

Appellant,

v.

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

Defendants,

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

INITIAL REPLY BRIEF OF THE APPELLANT

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REPLY ARGUMENT

That in reply to the Brief of the Respondent, (South Carolina Department of Motor Vehicles), the Appellant has set forth below the two arguments made by the Respondent in response to the Appellant's brief. The Appellant will reply to each argument in the same order as it appears in the Respondent's brief.

1. THE HEARING OFFICER DID NOT ERR IN ALLOWING RESPONDENT TO PROVIDE TESTIMONY IN RESPONSE TO APPELLANT'S MOTION TO DISMISS WHEN THE HEARING OFFICER HAD NOT YET CLOSED THE EVIDENTIARY PART OF THE HEARING.

The first argument set forth in the brief of the Respondent, is that the hearing officer did not err in allowing Trooper Thornton to testify in response to the Appellant's motion to dismiss when the hearing officer had not yet closed the evidentiary part of the hearing.

As stated in contested case hearing transcript, at the conclusion of Trooper Thornton's testimony, after the Department had "rested," the hearing officer first asked the Appellant's attorney if there was any cross-examination from the Appellant. ALC ROA, p. 10, l. 12-17. The Appellant's attorney answered: "No questions." ALC ROA, p. 10, l. 18. At this juncture the hearing officer then asked the Appellant's attorney "Is there anything from the [Appellant]?" ALC ROA, p. 10, l. 19-20. Presumably, "anything" would include a motion to dismiss, especially since it is a rudimentary matter of procedure in any proceeding that when the

party with the burden of proof in an action rests, (whenever that may be), that before the opposing party presents any evidence there should first be a motion to dismiss. That a motion to dismiss is to be made before the presentation of evidence by the opposing party is not only a matter of fundamental procedure, but also of common sense, for if the party with the burden of proof has failed to meet its burden of proof, as was the case in the matter before the Court, there is no need to further proceed with the hearing. Thus, the suggestion by the Respondent that the hearing officer was asking whether the Appellant had any testimony or evidence to present is not consistent with the proceeding itself.

Moreover, and most telling, when the Appellant's attorney made a motion to dismiss the hearing officer did not stop or correct the Appellant's attorney and state that the hearing officer was only asking whether the Appellant had any testimony or evidence to present. Instead, the hearing officer asked Trooper Thornton whether he had any "rebuttal to [Appellant's] motion to dismiss." ALC ROA p. 10, l. 15-23. The hearing officer then allowed Trooper Thornton to provide "rebuttal" testimony in reply to the Appellant's motion to dismiss. If the hearing officer was in fact requesting whether Appellant has any evidence or testimony to present, the hearing officer could have so stated before entertaining any motion. Assuming that the hearing officer was requesting whether the Appellant had any evidence or testimony to

present, and the Appellant had stated "no," (since no evidence was ever presented by the Appellant), the case would have been in the very same procedural posture with the Appellant making a motion to dismiss. Thus, we have circled back to the very issue that is at the heart of this appeal, whether the hearing officer erred in allowing Trooper Thornton to continue testifying in reply to the Appellant's legal motion to dismiss?

Admittedly, the Appellant's attorney was flummoxed during the contested case hearing as to exactly at what point in the twilight zone of the hearing, (somewhere between the time when the Department had rested its case and no other evidence was being offered by any party, and closing arguments---at which time it would be too late to make a motion to dismiss), that he was required to make a motion to dismiss based upon the Department's failure to establish a prima facie case.

The Respondent has argued that the record continued to remain open after the arresting officer had rested his case, and no evidence was offered by the Appellant. The fallacy with the procedure advanced by the Department is that once the Department rests, and the motorist does not cross-examine any witness or offer any evidence, that somehow the "evidentiary record" is still open to receive additional evidence. The absurdity of this position is how can the evidentiary record remain open when neither party is seeking to admit any testimony or evidence.

The Department then argues that at this point in the proceeding, when no further evidence is to be received, the motorist must make a motion to dismiss based upon the evidence presented; however, once a legal motion to dismiss is made by the attorney for the motorist, the Department argues that it may respond to such motion by presenting further testimony and evidence. By this procedure the record reopens when a motion to dismiss is made, the arresting officer is then allowed to testify again, and rest again, which is followed by another motion to dismiss, etc. This is exactly what transpired in the Appellant's case. The reasoning of the Department is worthy of the late Yogi Berra, who might have summarized the Department's proposed procedure by saying that, "The record is open, until it's not, and then it's open."

Contrary to the Respondent's idea of how a contested case hearing should be conducted, the Appellant would state that the arresting officer and the Department have a full, fair and unfettered opportunity to present their case, and once they have rested, and there is no other evidence for the hearing officer to consider, then a motion to dismiss should be heard and ruled upon by the hearing officer based upon the evidence presented.

The Respondent states in its brief that "...Appellant now admits that the evidentiary period of this contested case hearing had not closed at the time Appellant's counsel first moved to

dismiss..." The Appellant, far from admitting that the record was to be left indeterminably open, only noted that under South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), that the Appellant's motion to dismiss in this case was timely made given that the arresting officer had supposedly rested his case, that no other evidence was being offered by any party, and that there was an insufficient showing to establish a prima facie case.

The Respondent further argues that because OMVH contested case hearings are "fact finding hearings" that the normal rules of procedure should not apply. Presumably, all non-appellate proceedings in South Carolina are "fact finding" proceedings in which basic rules of procedure apply. Even in the summary courts of our State most of the litigants or defendants have no legal training, but they are required to strictly comply with rules of procedure. One can hardly argue that it is a strict application of the law to require a party present the minimal testimony or evidence needed to establish a prima facie case.

Lastly, the Respondent expended several paragraphs in its brief discussing whether or not the Department would be required to present evidence in a contested case hearing if the arresting officer appeared, but the motorist and the attorney for the motorist failed to appear. That issue was not raised by the Appellant in this appeal since that is not what occurred, nor was

such issue intended to be raised by the statement in the Appellant's brief. The only meaning of the statement in the Appellant's brief that the motorist or his attorney need not appear at a hearing was a reference to the lack of any burden of proof by the motorist as set forth in S.C. Code Ann. §56-5-2951(F).

2. THE PROCEDURE USED BY THE HEARING OFFICER DID NOT SHIFT THE BURDEN OF PROOF TO THE APPELLANT

The second argument in the Respondent's brief is that the procedure followed by the Hearing Officer, which allowed the arresting officer, Trooper Thorton, to continue testifying in response to the Appellant's motion to dismiss, did not shift the burden of proof to the Appellant.

As outlined in the Appellant's brief, by treating a motion to dismiss as a question, instead of a motion, such procedure effectively makes the opposing counsel the attorney for the arresting officer or the Department.

The procedure advanced by the Respondent would in practice place no burden of proof on the Department. Using the Respondent's procedure, an arresting officer could appear at a OMVH hearing and offer no substantive evidence as to those matters required by S.C. Code Ann. §56-5-2951(F). As noted by the Respondent, in the absence of a prima facie showing it is required that the motorist make a motion to dismiss, however, such required motion is then treated as a question to elicit the requisite facts needed to establish a

prima facie case. This is the essence of burden shifting, that is, to require opposing counsel to elicit evidence from a witness to establish that party's prima facie case.

CONCLUSION

That based upon the above argument and the applicable law, the Order of the Administrative Law Court, and the Final Order and Decision of the Hearing Officer, should be reversed, and the suspension of the Appellant rescinded.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the "Initial Reply Brief of the Appellant," by depositing the original or copies in the United States Mail, first class postage prepaid, on July 14, 2017, addressed to the following:

The Honorable Jenny Abbott Kitchings
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Re: Corey Arness McCluney v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety
Appellate Case No. 2017-001247

Dear Ms. Kitchings:

Please find enclosed the Initial Reply Brief of the Appellant, with Proof of Service.

Please contact my office if you have any questions about this matter.

Sincerely,

Trent N. Pruett
Attorney for the Appellant

Encl.: As Stated

c: Brandy Duncan, Esq.
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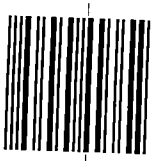

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