

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Desmond Aldo McKelvey, )  
)  
Appellant, )  
vs. )  
)  
South Carolina Department of Motor )  
Vehicles, )  
)  
Respondent. )  
\_\_\_\_\_ )

Docket No. 17-ALJ-21-0103-AP

ORDER

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AUG 30 2017

SC Court of Appeals

STATEMENT OF THE CASE

This matter is an appeal by Desmond Aldo McKelvey (“Appellant”) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (“OMVH”) dated March 2, 2017. In its decision, the OMVH Hearing Officer sustained the South Carolina Department of Motor Vehicle’s (“the Department” or “Respondent”) determination that Appellant is a habitual offender as defined in S.C. Code Ann. §§ 56-1-1020 and 56-1-1030 (Supp. 2014). This determination resulted in the suspension of Appellant’s driver’s license for a five-year period. The South Carolina Administrative Law Court (“ALC”) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 1-23-660. After careful review of the matter, OMVH’s decision is affirmed.<sup>1</sup>

BACKGROUND

On February 12, 2012, Appellant was charged with Driving with an Unlawful Alcohol Concentration and was convicted of this offense on January 15, 2013. The Department posted the conviction to Appellant’s driving record on January 29, 2013. On November 26, 2012, Appellant was charged with Driving under Suspension and was convicted of this offense on May 6, 2014. The Department posted the conviction to Appellant’s driving record on May 15, 2014. Also, on May 15, 2014, the Department sent Appellant a letter advising him that his record reflected he was convicted of two major violations and one minor violation, and any further convictions could result in him being classified as a habitual offender. He was further advised that if he was classified a habitual offender, his driving privileges would be suspended for a five-year period.

<sup>1</sup>This case was decided without oral argument pursuant to SCALC Rule 39.

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SC ADMIN. LAW COURT

On May 3, 2014, Appellant was charged with Reckless Driving and was convicted of this offense on November 25, 2014. The Department posted this conviction to Appellant's driving record on December 12, 2014. Also, on December 12, 2014, the Department sent Appellant an official notice that, as a result of three major convictions, he had been declared a habitual offender and his driving privileges were suspended from January 11, 2015 to January 11, 2020. Appellant timely requested an administrative hearing to challenge the habitual offender declaration and the five-year suspension of his driving privileges on January 8, 2015. The OMVH hearing was held on May 5, 2016.<sup>2</sup> Thereafter, on March 2, 2017<sup>3</sup>, the OMVH Hearing Officer issued a Final Order and Decision sustaining Appellant's habitual offender suspension. Appellant filed this appeal with the ALC on March 31, 2017.

### STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660. Therefore, the OMVH is an "agency" under the Administrative Procedures Act ("APA"). See S.C. Code Ann. § 1-23-310(2). As such, the APA's standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380; see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard used by appellate bodies, including the ALC, to review agency decisions is established by S.C. Code Ann. § 1-23-380(5). This section provides:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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;

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<sup>2</sup> The court notes that the OMVH hearing was held after three continuances. Two continuances were at the request of Appellant and one continuance was at the request of OMVH.

<sup>3</sup> The court notes that OMVH's governing statutes imposes no deadline or timeframe in which a hearing officer must issue a decision.

- (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. § 1-23-380(5).

### **ISSUE ON APPEAL**

Did the OMVH Hearing Officer err in finding that Appellant is a habitual offender as defined by S.C. Code Ann. §§ 56-1-1020 and 56-1-1030, and in sustaining the suspension of Appellant's driving privileges?

### **DISCUSSION**

South Carolina law defines a habitual offender as "any person whose record as maintained by the Department of Motor Vehicles shows that he has accumulated the convictions for separate and distinct offenses described in subsections (a), (b) and (c) committed during a three year period . . . ." S.C. Code Ann. § 56-1-1020. Under the statute, an individual is declared a habitual offender when the Department records show the accumulation of convictions for three or more separate and distinct major offenses, or ten or more separate and distinct minor offenses committed within a three-year period. S.C. Code Ann. § 56-1-1020(a)(2), (3), and (4). When a motorist is convicted of one or more of the offenses listed in section 56-1-1020, the Department must review the motorist's driving record, and if the record reveals that the person meets the requirements to be declared a habitual offender, the Department must revoke or suspend the person's driver's license for a five-year period. S.C. Code Ann. §§ 56-1-1030 and 56-1-1090.

In this appeal, Appellant's driving record shows he was charged with and convicted of three separate and distinct major traffic offenses committed within a three-year period. Appellant was charged with Unlawful Alcohol Concentration on February 12, 2012 and convicted on January 15, 2013; he was charged for Driving under Suspension on November 26, 2012 and convicted on May 6, 2014; and, he was charged with Reckless Driving on May 3, 2014 and convicted on November 25, 2014. Appellant does not dispute that his driving record reflects convictions for three separate and distinct major offenses committed during a three-year period. Rather, Appellant argues that the three year period the OMVH examined to determine if he committed three major offenses within three years should run from the OMVH hearing date. Specifically, Appellant contends that the OMVH

hearing took place on May 5, 2016 and three years preceding the hearing date would be May 5, 2013, and any offenses occurring prior to that date are outside the scope of the habitual offender statute.

The Department contends that the determination whether Appellant committed three major offenses within a three-year period does not run from the OMVH hearing date, rather the offense date is the relevant date. This Court agrees. S.C. Code § 56-1-1020(d) specifically states:

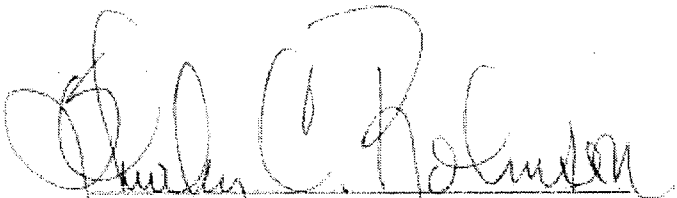
For purposes of determining the number of convictions for separate and distinct offenses committed during any three-year period, **a person shall be deemed to be convicted of an offense on the date the offense was committed if he is subsequently convicted of committing such offense.**

A review of the Record on Appeal shows that the Department records reflect Appellant committed three major offenses within a three-year period, specifically on February 12, 2012, November 26, 2012, and May 3, 2014, and he was subsequently convicted of each of the offenses.

Accordingly, this Court finds there is substantial evidence in the Record to support the OMVH hearing officer's conclusion that "Respondent's driver record meets the requirements to be declared a Habitual Offender as defined by S.C. Code Ann. § 56-1-1020 (2006)." See Friends of the Earth v. Pub. Serv. Comm'n of S.C., 387 S.C 360, 366, 692 S.E.2d 910, 913 (2010) (holding a decision is supported by "substantial evidence" when the record as a whole, would allow reasonable minds to reach the same conclusion as the agency).

**THEREFORE, IT IS HEREBY ORDERED** that the OMVH Final Order and Decision sustaining the suspension of Appellant's driver's privileges is **AFFIRMED**.

**AND IT IS SO ORDERED.**

  
**SHIRLEY C. ROBINSON**  
Administrative Law Judge

August 11, 2017  
Columbia, South Carolina

CERTIFICATE OF SERVICE  
This is to certify that the undersigned herein has duly served this order on the above entitled party or upon all parties to this cause by depositing the same in the United States mail postage paid or by the emergency Mail Service addressed to the party, last by mail attorney(s)  
On 11 August 2017  
By Via Hazel  
Lucas Law Firm