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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

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SC Court of Appeals

Case No. 2017-001575

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

v.

Christopher McMahan . . . . . Respondent.

FINAL REPLY BRIEF OF THE APPELLANT

BRANDY A. DUNCAN, SC Bar # 72052
Assistant General Counsel
FRANK L. VALENTA, JR., SC Bar # 5682
General Counsel
PHILIP S. PORTER, SC Bar # 4526
Deputy General Counsel
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Post Office Box 1498
Blythewood, South Carolina 29016-0020
Telephone: (803) 896-9900
Facsimile: (803) 896-9901
Email: hearingsprocessingunit@scdmv.net
Attorneys for the Appellant

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Post Office Box 1498
Blythewood, South Carolina 29016-0020
Telephone: (803) 896-9900
Facsimile: (803) 896-9901
Email: hearingsprocessingunit@scdmv.net
Attorneys for the Appellant

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STATEMENT OF ISSUES ON APPEAL

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2) THE ADMINISTRATIVE LAW COURT JUDGE CORRECTLY RULED THAT THE OFFICE OF MOTOR VEHICLE HEARINGS HEARING OFFICER ERRED BY RULING *SUA SPONTE* ON AN ISSUE THAT RESPONDENT NEVER RAISED.

STATEMENT OF THE CASE

Appellant retains the statement of the case set forth in its initial brief.

STANDARD OF REVIEW

Appellant retains the standard of review set forth in its initial brief.

ARGUMENT

1) A PERSON CANNOT ESCAPE A STATUTORILY MANDATED SUSPENSION BECAUSE THE OFFICE OF MOTOR VEHICLE HEARINGS TOOK "TOO LONG" TO REVIEW AN ADMINISTRATIVE ACTION.

Appellant retains all arguments under this section set forth in its initial brief and adds the following arguments.

Respondent asserts that "As the moving party [SCDMV] had the obligation to follow up on the absence of an order" from the Office of Motor Vehicle Hearings (hereinafter, "OMVH"). This statement is not accurate. SCDMV is not the moving party in a challenge to a habitual offender declaration. Rather, Respondent brought this challenge/action in the OMVH (SCDMV is merely listed as the petitioner because SCDMV carries the burden of proof at the hearing). Thus, if our case law places a burden on any party to follow up on the absence of an order from the OMVH, that burden would only fall Respondent as the party that initiated this action in the OMVH. For a

more in depth discussion of this concept, please see the discussion regarding case *State v. Adams*, 244 S.C. 323, 137 S.E.2d 100 (1964), contained in Initial Brief of Appellant filed on July 27, 2017.

Next, Respondent asserts that because the "Department failed to take any action for almost seven years after the hearing in 2009, the Department should not be able to now suspend the driver's license of [Respondent]." This statement blindly ignores the statutory requirement that SCDMV stay this suspension pending the outcome of the OMVH hearing. See S.C. Code 1-23-600(H)(1) ("A request for a contested case hearing for an order to revoke or suspend a license stays the revocation or suspension.") Further, this statement argues, with no statutory authority or case law to support the argument, that SCDMV must badger the OMVH for decisions to be issued in whatever timeframe the Respondent deems to be appropriate (Respondent does not clarify what timeframe he deems to be appropriate other than the clear implication that he believes seven years is too long). Nothing requires SCDMV to take such action. In fact, past experience indicates the Court of Appeals expects the exact opposite of SCDMV.[1]

Additionally, Respondent asserts that "ample evidence also exists [in this case] to support the finding that a seven-year delay in sending the notice of being an [sic] habitual offender is fundamentally unfair." First, Respondent was first notified that he was being declared a habitual offender on April 17, 2009 (R. p. 198). Respondent was convicted of his third driving under suspension offense on April 1, 2009. Thus, a notice on April 17, 2009, a mere 16 days later, is not a sizeable delay and certainly is not a seven year delay

[1] In oral argument for the *South Carolina Department of Motor Vehicles v. Russo Dumpster, Inc.* case, SCDMV Deputy General Counsel Phillip Porter was strongly questioned and criticized by the Court of Appeals Judicial panel for attempting to coax a final order out of the OMVH in a more timely fashion.

as asserted by Respondent. Second, during the hearing regarding this matter, Respondent presented no testimony or argument that he would be any more prejudiced now, than he would have been seven years ago, if he is required to serve this habitual offender suspension now that the OMVH has issued its' decision on his challenge to that suspension.

For these reasons and the reasons discussed in Initial Brief of Appellant, the section of the ALC's *Order Affirming as Modified* that discusses and holds that a court delay of seven years to adjudicate Respondent's challenge to his habitual offender suspension was "manifestly a denial of fundamental fairness" in violation of *Hipp v. SCDMV,* 381 S.C. 323, 673 S.E.2d 416 (2009) should be overturned.

2) THE ADMINISTRATIVE LAW COURT JUDGE CORRECTLY RULED THAT THE OFFICE OF MOTOR VEHICLE HEARINGS HEARING OFFICER ERRED BY RULING SUA SPONTE ON AN ISSUE THAT RESPONDENT NEVER RAISED.

Respondent asserts as an additional sustaining ground that the OMVH Hearing Officer properly found that Respondent was not charged with driving under suspension (hereinafter, "DUS") on March 18, 2007 was later erroneously convicted of that offense. Interestingly, Respondent, in this section of his brief, has explicitly admitted he was convicted of DUS for the March 18, 2007 violation. Despite this admission, Respondent argues that he was not charged with DUS on that date and, therefore, this conviction should not be treated as a conviction for DUS. Contrary to this argument, for purposes of driver's license suspensions that are triggered by criminal convictions, only the charge the driver is convicted of committing is relevant, not the charge the driver was originally charged with. To find otherwise, for example, would mean that drivers originally charged with driving under the influence who make a plea deal to plead guilty to reckless

driving would still undergo all the suspension ramifications associated with a driving under the influence conviction. That is not the law in South Carolina. Thus, based solely on Respondent's admission that he was convicted of DUS for his March 18, 2007 violation, Respondent's additional sustaining ground should fail in its entirety.

For the sake of argument, however, even if evaluated on the merits Respondent's additional sustaining ground fails. State law defines a habitual offender as any person whose record *as maintained by the Department of Motor Vehicles* shows that Respondent has accumulated convictions for three or more separate and distinct major offenses committed within a three (3) year period. See S. C. Code Ann. § 56-1-1020 (2006) and R. pp. 167, 170-171, 175-176, 184-185, 188-190, 198-203. The ALC Record on Appeal shows that Respondent was charged with DUS on February 25, 2007, and convicted of this violation on April 3, 2007; charged with DUS on March 18, 2007, and convicted of this violation on April 9, 2007; and, charged with DUS on October 26, 2008, and convicted of this violation on April 1, 2009 (R. pp. 160-203). It is therefore undisputed that the record as maintained by the SCDMV establishes a prima facie case and supports a finding that the Respondent is a habitual offender as defined by the statute. Despite these facts the OMVH Hearing Officer held that because the statute number listed on ticket 64031DW was "56-1-520," rather than "56-1-460" it was "not clear from the evidence what the Respondent was supposed to be convicted of." This holding, however, ignores several pieces of evidence that were before the OMVH Hearing Officer. Specifically, pages 170, 177-178, 185, 189, 198, and 202 of the Record on Appeal. Reviewing these pieces of evidence reveals the following:

1) An Official Notice of suspension dated May 24, 2007 was sent to Respondent. This notice of suspension stated Respondent would undergo a suspension for "Driving Under Suspension" pursuant to S.C. Code §56-1-460 for ticket # 64031DW. This is a letter generated by Appellant and maintained as part of the driver records of Respondent (R. p. 170);

2) A Notice of Suspension was submitted to Appellant by Judge W. Frank Partridge of the City of Newberry. This Notice of Suspension noted that Respondent should be suspended for failure to respond to a citation or pay a fine for the violation "described herein." This Notice of Suspension was for ticket #64031DW. This Notice of Suspension stated the code section violated was "56-01-0460(1)" and described the violation as "Driving Under Suspension – 1st." Although this Notice of Suspension is not generated by Appellant, it is maintained as part of the driver records of Respondent (R. p. 177);

3) A Notice of Withdrawal of Suspension was submitted to Appellant. This Notice of Withdrawal of Suspension stated that Respondent had made payment of ticket #64031DW. This Notice of Withdrawal of Suspension stated the code section violated was "56-01-0460(1)" and the described the violation as "Driving Under Suspension – 1st." Although this Notice of Withdrawal of Suspension is not generated by Appellant, it is maintained as part of the driver records of Respondent (R. p. 178);

4) An Official Notice of suspension dated April 17, 2009 was sent to Respondent. This notice of suspension stated Respondent would undergo a

suspension for being declared a habitual offender pursuant to S.C. Code §56-1-1090. This Official Notice listed the three (3) major offenses that lead to Respondent being declared a habitual offender. One of the major offenses listed was "Driving Under Suspension" for ticket #64031DW." This is a letter generated by Appellant and maintained as part of the driver records of Respondent (R. p. 185);

5) Page 2 of Respondent's 10 Year Driver Record – External, reveals that Appellant recorded ticket # 64031DW as a conviction for "Driving Under Suspension." This is a report created and maintained by Appellant that consolidates the driver records of Respondent (R. p. 189);

6) Page 2 of Respondent's 10 Year Driver Record – External, also reveals that Appellant recorded the failure to pay traffic ticket for ticket # 64031DW as a conviction for "Driving Under Suspension – FTPPT." This is a report created and maintained by Appellant that consolidates the driver records of Respondent (R. p. 189);

7) Page 198 of the Record on Appeal reveals a second copy of the document described in #4, above;

8) Page 3 of Respondent's "Certification for Court" driver record, reveals that Appellant recorded ticket # 64031DW as a conviction for "Driving Under Suspension." This is a report created and maintained by Appellant that consolidates the driver records of Respondent (R. p. 202);

9) Page 3 of Respondent's "Certification for Court" driver record, reveals that Appellant recorded the failure to pay traffic ticket for ticket # 64031DW as a

conviction for "Driving Under Suspension – FTPPT." This is a report created and maintained by Appellant that consolidates the driver records of Respondent (R. p. 202);

10) All three of the tickets in this case list an "Offense Code" of "96" (see the bottom right corner of R. pp. 167, 168, 179, 182, 192, 194, and 196).

Each of these pieces of evidence directly state or indicate that for ticket # 64031DW Respondent was convicted of DUS. Despite these numerous documents, the OMVH Hearing Officer decided to focus on only one document, the ticket itself. This ticket itself stated Respondent was charged with "DUS," but erroneously listed the "violation section no" as "56-1-520." The OMVH Hearing Officer correctly noted that the South Carolina Code of Law does not contain a section "56-1-520." Then despite this notation and the other evidence detailed above, including the fact that ticket # 64031DW itself stated the charge was for "DUS," the OMVH Hearing Officer held that "it is not clear from the evidence what the Respondent was supposed to be convicted of." This finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Significantly, Respondent has never asserted that ticket # 64031DW was a conviction for any offense other than DUS. Rather, this was an issue raised *sua sponte* by the OMVH Hearing Officer. The fact that Respondent has never alleged that ticket # 031DW is not a conviction for DUS is further evidence that, despite the typo in the "violation section no" part of ticket # 64031DW, the conviction was, in fact, a conviction for DUS. Further supporting the conclusion that there was merely a typo on ticket # 64031DW is the fact that there is no statute in the South Carolina Code of Laws that goes by the number 56-1-520. There simply is not any traffic violation, or any statute at all,

that is contained in S.C. Code §56-1-520. It just doesn't exist. Given these facts and all the other evidence in this case, it was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record for the OMVH Hearing Officer to conclude that "it is not clear from the evidence what the Respondent was supposed to be convicted of... [r]egardless of the fact that the officer wrote the letters DUS." Contrary to this finding by the OMVH Hearing Officer, the evidence leads only to the conclusion that Respondent was convicted of DUS for ticket # 64031DW.

Importantly, in this regard, once a prima facie case is established against a motorist, the burden shifts to the motorist to present evidence to rebut the prima facie case. *Daisy Outdoor Advertising Co., Inc. v. South Carolina Dep't of Transp.*, 352 S.C. 113, 118, 572 S.E.2d 462, 465 (Ct.App. 2002). See also, *S.C. Dep't of Motor Vehicles v. Powers*, 06-ALJ-21-0578-AP (January 10, 2007) (explaining the application of this principle throughout the states). A prima facie case is made by presenting evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. *LaCount v. Gen. Asbestos & Rubber Co.*, 184 S.C. 232, 240, 192 S.E. 262, 266 (1937); see also, *Mack v. Branch No. 12, Post Exchange, Fort Jackson*, 207 S.C. 258, 272, 35 S.E.2d 838, 844 (1945) ("The words [prima facie evidence] import that the evidence produces for the time being a certain result; but that result may be repelled.")

Thus, if a prima facie case is established against the motorist and the motorist fails to present any evidence to rebut it, then judgment must go against the motorist. See *Arkwright Mills v. Clearwater Mfg. Co.*, 217 S.C. 530, 539, 61 S.E.2d 165, 168-69 (1950) ("It is the settled rule of law that once a party establishes a prima facie case, judgment will go in his favor unless the opposite party produces evidence sufficient to

overcome the prima facie presumption.") As stated above, Respondent has never asserted that he was not convicted of these three (3) DUS offenses. Significantly, as discussed more fully above, Respondent has now admitted that this charge did result in a DUS conviction.

Thus, in this case, despite the finding of the OMVH Hearing Officer, Respondent did not provide any evidence to contradict and/or rebut the evidence submitted by SCDMV that he was convicted of three (3) separate DUS offenses within a three (3) year period.

Further, in making her ruling the OMVH Hearing Officer relied on the case *State v. Bennett*, 375 S.C. 165, 650 S.E.2d 490 (Ct. App. 2007). The *Bennett* case dealt with the use of CDR codes for classification of a criminal's sentence. In particular, the *Bennet* case held that

> While the [CDR] codes were developed and used to provide an administrative shortcut, they were never intended to replace statutory law... because the South Carolina Code of Laws is the controlling authority for classifications, definitions and penalties for criminal offenses, a statute listed on a sentencing sheet, and not a CDR code, will dictate a criminal's sentence.

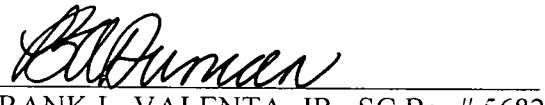
Bennett, 375 at 173-174. The *Bennett* case is distinguishable from this case. In this case, no one relied on a code to provide an administrative shortcut. Rather, this conviction was entered as it was listed on the ticket, as a DUS. Using the name of a criminal offense or the commonly used abbreviation for the criminal offense to enter that conviction in a person's driver record is not the same as relying on a CDR code to determine a person's criminal sentence. For these reasons, the *Bennett* case is inapplicable to this case and should not have been relied on by the OMVH Hearing Officer in making her ruling.

Moreover, the ALC held that in this case "the OMVH hearing officer committed error by ruling *sua sponte* on an issue that Respondent's never raised" and "Respondent failed to present any evidence to overcome the presumption that was established after the Department's establish a prima facia case for upholding the suspension." Appellant agrees with both of these holdings and argues that for the reasons outlined above this Court should rule similarly.

CONCLUSION

For the reasons set forth above and in Appellant's initial brief, the ALC *Order Affirming as Modified* should be partially overruled and Respondent's habitual offender suspension should be sustained in full.

Respectfully submitted,



FRANK L. VALENTA, JR., SC Bar # 5682
General Counsel
PHILIP S. PORTER, SC Bar # 4526
Deputy General Counsel
BRANDY A. DUNCAN, SC Bar # 72052
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Post Office Box 1498
Blythewood, South Carolina 29016-0020
Telephone: 803.896.9900
Fax: 803.896.9901
Email: hearingsprocessingunit@scdmv.net
Attorneys for the Appellant

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Blythewood, South Carolina

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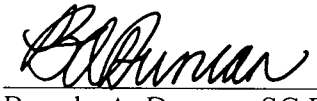
CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b) SCACR.



Brandy A. Duncan, SC Bar # 72052
Assistant General Counsel
S.C. Department of Motor Vehicles

September 29, 2017
Blythewood, SC

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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, September 29, 2017, I served one (1) copy of the Appellant's Final Reply Brief by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Respondent at the address indicated below:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

Brandy A. Duncan, Asst. General Counsel
Office of General Counsel

September 29, 2017
Blythewood, South Carolina