THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Court of Common Pleas

Honorable John D. McLeold, Administrative Court Judge

Case № 2017-001575

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

vs.

Christopher McMahan, ... Respondent.

FINAL BRIEF OF RESPONDENT

October 12, 2017

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Statement of Issue on Appeal

Does a delay of seven years in failing to rule upon a hearing deprive the ability of the South Carolina Department of Motor Vehicles to suspend the driver's license of a driver under the principles established in Hipp v. S.C. Dep't of Motor Vehicles, 381 S.C. 323, 673 S.E.2d 416 (2009)?

Additional Sustaining Grounds

The hearing officer properly found that Respondent was not charged with driving under suspension on March 18, 2007 and was later erroneously convicted of that offense.

Argument

Question I

Does a delay of seven years in failing to rule upon a hearing deprive the ability of the South Carolina Department of Motor Vehicles to suspend the driver's license of a driver under the principles established in *Hipp v. S.C. Dep't of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009)?

This Court should sustain the ruling of the Administrative Law Judge on the ground that *Hipp v. S.C. Dep't of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009) prevented the Department from revoking the license of Mr. McMahan. In *Hipp* the Court said "While we do not intend to set forth a bright line rule, we find that imposition of a suspension after more than twelve years delay, *where Respondent bears no fault* for the delay, is manifestly a denial of fundamental fairness." *Id.* at 325, 673 S.E.2d at 417 (emphasis added). The Court did not base its decision on the ground that the Department had any responsibility for the delay, but only where the driver had no fault in causing the delay. A review of the facts in the case shows that the Court was not concerned as to whether the delay was caused by the Department or the State of Georgia, as long as the driver was not responsible for the delay. The same principle should apply here. McMahan had been led to believe his license would be given back. Rec. on App. at 103, ll 5-11. He was not at fault in creating the delay.

The Department is the party moving to suspend the driver's license of Mr. McMahan. Mr. McMahan was informed at the hearing in 2009 that he could obtain a

regular license. Rec. on App. at 103, ll 10-21.[1] He acted upon that advice and did in fact obtain a regular license issued by the Department after paying his taxes and reinstatement fee.. He had no reason to either know an order had not been issued or even to inquire as to whether an order had been issued. The Department issued him a new license. The Department, however, knew or should have known, that an order had not been issued. As the moving party they had the obligation to follow up on the absence of an order. For almost seven years the Department ignored the fact that an order had not been issued. During that same period of time, Mr. McMahan only knew that he had been told the suspension had been lifted and that he had obtained a regular driver's license. Under these facts, the principles set forth in *Hipp* are applicable. As 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 Mr. McMahan.

Recently this Court said concerning a long delay in the issuance of a suspension notice "Upon our review, substantial evidence exists in the record to support the ALC's finding the six-year delay between Davis's third DUS conviction and the suspension of his license was fundamentally unfair." *Davis v. S.C. Dep't of Motor Vehicles*, 420 S.C. 98, 106, 800 S.E.2d 493, 497 (Ct. App. 2017). In this case ample evidence also exists to support the finding that a seven-year delay in sending the notice of being an habitual offender is fundamentally unfair. It matters not whether the South Carolina Department of Motor Vehicle is at fault. In *Davis,* the delay was caused by the local law enforcement

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The Department did not appear at the hearing below. The testimony of Mr. McMahan was not contested. Rec. on App. at 92, ll 16-20.

agency. In *Hipp,* it was the State of Georgia.

Respondent argues "The crux of this case is that neither party did anything wrong here and the OMVH did not intentionally fail to quickly issue a final order in this case." Br. of Resp. at 17. In *Hipp* and *Davis* neither party did anything wrong. What the Respondent does not address in its brief, is that the due process clause of Article I § 3 of the Constitution of the State of South Carolina and the 14th Amendment to the Constitution of the United States of America protects a citizen from the state and does not protect one state agency from the actions of another state agency. Simply put, if neither party to this appeal party did any thing wrong and the citizen is deprived of a right because of the action of another state agency, the citizen wins as the citizen has been deprived of his due process rights.

The State relies upon *State v. Adams*, 244 S.C. 323, 137 S.E.2d 100 (1964) for the proposition that Mr. McMahan should have taken action to obtain a ruling after the first hearing. In *Adams* the Court said "Respondent was charged with knowledge of the time limit imposed on the Magistrate for filing the record and of the 60 day supersedeas provided by Section 46–189 of the Code." *State v. Adams*, 244 S.C. 323, 326, 137 S.E.2d 100, 101 (1964). Here the only "knowledge" Mr. McMahan is charged with is the verbal notice the hearing officer had ruled in his favor. He was not involved in misplacing the recordings or otherwise failing to provide the hearing officer with any documents as occurred in *Adams*. As the Respondent acknowledges, the delay was not the fault of Mr. McMahan.

The Administrative Law Judge below had ample evidence to find "that the evidence in the record of the delay of Respondent's OMVH appeal shows that the imposition of the suspension, after a period of seven years, would be 'manifestly a denial of fundamental fairness.'" Rec. on App. at 9.

Additional sustaining grounds

The hearing officer properly found that Respondent was not charged with driving under suspension on March 18, 2007 and was later erroneously convicted of that offense.

The South Carolina Supreme Court has said "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420,526 S.E.2d 716, 723 (2000).

The hearing officer properly found that Christopher McMahan was not issued a ticket for driving under suspension. As a result, the Department improperly found he was convicted of his third major driving offense in three years.

The question before the hearing officer below was not what charge did the arresting intend to place against Christopher McMahan. The officer's intent is simply not relevant when the hearing officer determined what charge was actually placed against Mr. McMahan. In this case the officer did not charge Mr. McMahan with driving under suspension. Based upon the findings of the hearing officer, Mr. McMahan did not appear before a judge to be informed of the fact that the code section on his ticket was not the charge against him nor was he informed of the collateral consequences of his plea.

Rec. on App. at 17. He was not required to appear and could rely upon the code section used by the arresting officer on the ticket. For purposes of this appeal, he need not know exactly what charge was placed against him as long as the charge was not driving under suspension.

The Department argued that the proper charge was S.C. Code § 56-1-460. The argument could just as easily be made that the proper charge was S.C. Code 56-1-440, driving with no South Carolina driver's license. Neither charge is close to S.C. Code § 56-1-520, which is the code section written on the ticket. The Department upon receiving the ticket with no valid code section simply did not have the authority to re-write the code section. The fact that the trial court, without notice to Mr. McMahan, also re-wrote the code section from the original ticket does not authorize the Department to perpetuate the same error.

The hearing officer here did not "weight" the evidence nor did she substitute her judgment for that of the Department. The hearing officer simply held that when the Department receives a ticket citing a violation of code section 56-1-520, that is not a ticket for driving under suspension. The Department concedes this fact below. But conceding there is no such code section does not mean it is a ticket for driving under suspension. Without three tickets for driving under suspension, the Department has no authority to declare Mr. McMahan an habitual offender.

The Department fairs no better by contending that the hearing officer decided this case on an issue not raised by Mr. McMahan. As the South Carolina Supreme Court has said "In determining whether the ALJ's decision was supported by substantial evidence,

this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached." *Hill v. South Carolina Dept. of Health and Environmental Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010). Thus, in affirming a hearing officer an appellate court is entitled to consider the entire record. The hearing officer is also entitled to consider the entire record. Surely the Department does not mean that a citizen should be deprived of a right when evidence in the record supports the position of the citizen and the hearing officer, rather than the lawyer, raises it.

The only notice of the charge given to Mr. McMahan was the ticket. To punish a citizen for a charge for which he did not have notice is a basic violation of due process. As the Court of Appeals has said "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Ogburn Matthews v. Loblolly Partners (Ricefields Subdivision)* 332 S.C. 551, 562,505 S.E.2d 598, 603, (Ct. App.1998). The Department simply cannot change the charges against Mr. McMahan without giving him some type of notice as to their intent to change the charges and providing him an opportunity to be heard.

The Department fairs no better by contending that the Department sent a notice of the suspension to Mr. McMahan. Every ticket issued to Mr. McMahan had his correct address. Rec. on App. at 105, 106, and 108. That address was "219 Greenway Drive, Greenwood, SC." The notices sent by the Department, however, had an incorrect address - "435 Haltiwanger Rd, Apt. 22, Greenwood, SC." Rec. on App. at 98, 100, 102, 106, 108, and 109. The first notice to the correct address was on April 17, 2009. Rec. on App.

at 29. When Mr. McMahan received this notice of being an Habitual Offender, he requested a hearing. Rec. on App. at 29. The Department, for reasons never explained, did not change the address of Mr. McMahan even though the record establishes, that the address on his driver's license has been changed for a number of years before 2009. Rec. on App. at 105, ll 8-24.

The Department further argued that the hearing officer should have examined the whole record. They argued "This finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Rec. on App. at 42 before the ALC (emphasis in the original).[2] As noted above, the Department fails to consider that through their error, Mr. McMahan was never given notice of any of the suspensions because the department used the wrong address.

The Department relies upon improper notices to contend that Mr. McMahan should have known about the license suspension. This argument violates the spirit, if not the letter, of Article I, § 22 of the Constitution of the State of South Carolina. This section provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

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Ironically, the Department is critical of the hearing officer for considering the "whole record" and raising an issue not raised by the attorney for Mr. McMahan.

Due to the fact that the notices were sent to the wrong address when the Department had the correct address, Mr. McMahan had neither "due notice" nor "an opportunity to be heard" as required by this provision of our state constitution. The record supports the position of the hearing officer.

CONCLUSION

For the forgoing reasons, the decision of the Administrative Law Court that the suspension of the driver's license of Christopher McMahan be rescinded should be upheld.

October 12, 2017

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CERTIFICATE OF COUNSEL

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

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