

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

19839

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 11-ALJ-21-0328-AP

Douglas Madison, Appellant,

v.

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

RECORD ON APPEAL

H. Woodrow Gooding
State Bar# 2180
Mark B. Tinsley
State Bar# 15597
Gooding and Gooding, PA
Post Office Box 1000
Allendale, South Carolina 29810
(803) 584-7676
Attorney for Appellant

Linda Annette Grice
Assistant General Counsel
Philip S. Porter
Deputy General Counsel
Frank L. Valenta, Jr.
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
Attorneys for Respondents

RECEIVED

MAR 06 2012

SC Court of Appeals

INDEX

Order from Administrative Law Court
dated November 7, 2011 3

Final Order and Decision from Hearing
Officer dated April 15, 2011. 9

Notice of Motion and Motion for
Reconsideration dated April 25, 201117

Notice of Appeal and Appeal to
Administrative Law Court
dated June 17, 2011 20

Transcript of Hearing (12/02/10) 22

 Hearing Officer's Introduction 22

 Testimony of Trooper George A. Folk 23

 Direct Testimony 23

 Motion by H. Woodrow Gooding,
 Counsel for Appellant 25

Appellant's Brief to Administrative Law
Court (with attached Exhibit)
dated August 25, 2011 28

Letter serving subpoena dated
October 28, 2010 45

Subpoena dated October 26, 2010 46

Proof of Service of Subpoena dated
October 27, 2010 47

Unpublished Order dated March 3, 2010,
issued in Gilbert v. SCDMV, Docket
No. 09-ALJ-21-0361-AP 48

Certificate of Counsel, Rule 210(y), SCACR 56

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Douglas Madison,

Appellant,

vs.

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

Respondents.

Docket No. 11-ALJ-21-0328-AP

ORDER

STATEMENT OF THE CASE

This matter is an appeal by Appellant Douglas Madison (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH) issued April 15, 2011. The OMVH's Final Order and Decision was issued following an administrative hearing held pursuant to S.C. Code Ann. § 56-5-2951(B)(2) (Supp. 2010). The Administrative Law Court (ALC) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 1-23-660 (Supp. 2010). Upon careful review of this matter, the OMVH's Final Order and Decision is affirmed.

BACKGROUND

Appellant was arrested on September 18, 2010 pursuant to S.C. Code Ann. § 56-5-2930 for driving a motor vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs. Appellant was taken in for a breath test. Upon registering an alcohol concentration of .15% or greater, Appellant was charged with a violation of S.C. Code Ann. § 56-5-2950. Appellant was issued a written notice of suspension at that time.

Appellant subsequently requested a hearing challenging the suspension. Pursuant to notice to the parties, a hearing was held on December 2, 2010 before Hearing Officer Robert Harley at the Bamberg County Courthouse in Bamberg, South Carolina. The Hearing Officer issued a Final Order and Decision which sustained Appellant's suspension on April 15, 2011.

FILED

November 7, 2011

SC ADMIN. LAW COURT

Appellant filed a Motion to Reconsider on April 25, 2011. No action was taken by the Hearing Officer, and pursuant to Rule 15 of the OMVH Rules, the Motion to reconsider was deemed denied on May 25, 2011. Appellant timely filed this appeal to the ALC on June 17, 2011.

ISSUE ON APPEAL

Did the OMVH hearing officer err in finding that the videotaping requirements set forth in S.C. Code Ann. § 56-5-2953 are not applicable to administrative hearings?

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the South Carolina Department of Motor Vehicles (Department). See S.C. Code Ann. § 1-23-660 (Supp. 2010). Therefore, the OMVH is an “agency” under the Administrative Procedures Act (APA). See S.C. Code Ann. § 1-23-310(2) (2005 & Supp. 2010). As such, the APA’s standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2010); 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 to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5). See S.C. Code Ann. § 1-23-600(D) (Supp. 2010) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). 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;
- 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). Thus, pursuant to the APA, this court’s review is limited to deciding whether the OMVH’s Order of Dismissal is unsupported by substantial evidence or is affected by an error of law. Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 581 (Ct. App. 2005).

The findings of the agency are presumed correct and must be affirmed if supported by substantial evidence. Substantial evidence is something less than the weight of the evidence. It is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. Jones v. Georgia-Pac. Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003); Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001); Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

An abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. Converse Power Corp v. S.C. Dep't of Health and Env'tl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002).

Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. Hamm v. South Carolina Public Service Commission, 294 S.C. 320, 364 S.E.2d 455 (1988).

DISCUSSION

In this matter, Appellant argues that the OMVH hearing officer erred in determining that the failure to comply with S.C. Code Ann. § 56-5-2953 is not applicable to an administrative hearing. Specifically, Appellant contends that because the incident was not videotaped and the arresting officer did not provide an affidavit certifying the reasons it was not videotaped, Appellant's driver's license suspension should be rescinded. In response, the Department argues that, because Section 56-5-2951(F) limits the scope of the administrative hearing to certain

issues, none of which includes the issue of whether law enforcement complied with Section 56-5-2953, the OMVH's order should not be reversed on this ground.

A similar issue was addressed by the Court of Appeals in South Carolina Department of Motor Vehicles v. Nelson, 364 S.C. 514, 613 S.E.2d 544 (Ct. App. 2005). In that case, a motorist who was arrested for DUI had his driver's license suspended pursuant to Section 56-5-2951 after he refused to submit to a breath test. The Department's hearing officer upheld the suspension. However, the circuit court reversed, concluding that the breath test was not offered within three hours of the arrest as required by Section 56-3-2953. The Court of Appeals subsequently reversed the circuit court's decision and reinstated the suspension. In doing so, the Court of Appeals acknowledged that law enforcement did not comply with Section 56-5-2953. Nonetheless, the Court held that law enforcement's non-compliance with Section 56-5-2953 did not warrant the rescission of the motorist's administrative suspension. In making this holding, the Court of Appeals explained:

[N]othing in the code instructs that a failure to comply with section 56-5-2953 warrants the dismissal of prosecution for failure to submit to testing pursuant to section 56-5-2950 . . . Because Nelson did not consent to testing, the scope of the hearing was limited to whether Nelson (1) was lawfully arrested, (2) was advised in writing of his section 56-5-2950 rights, and (3) refused to submit to a test. The hearing officer determined that Nelson had been lawfully arrested, had been advised of his rights, and had refused to submit to the test offered in accordance with section 56-5-2950. The circuit court's reversal of the hearing officer was outside the purview of the proper scope of review. Accordingly, we find the only relevant issues at the administrative hearing were not in dispute. The circuit court erred in considering the violation of the three-hour videotaping requirement.

Nelson, 364 S.C. at 524-26, 613 S.E.2d at 549-550.

Likewise, in this case, as Section 56-5-2951(F) makes clear, the scope of the implied consent hearing is limited to whether the driver was (1) lawfully arrested or detained; (2) advised in writing and verbally of the rights enumerated in Section 56-5-2950; and, (3) refused to submit to the DataMaster test; or, (4) submitted to the test and registered a breath alcohol concentration in excess of fifteen one-hundredths of one percent or above, the individual who administered the test was qualified pursuant to Section 56-5-2950, the tests administered and samples obtained were conducted pursuant to Section 56-5-2950, and the DataMaster machine was working properly. The scope of the hearing simply does not include the issue of whether or not law enforcement complied with Section 56-5-2953.

Here, the OMVH hearing officer concluded that Appellant was lawfully arrested, properly advised of the Implied Consent Advisement, submitted to the DataMaster test, and registered a reported alcohol concentration in excess of fifteen one-hundredths of one percent. Accordingly, because compliance with Section 56-5-2953 was not a proper issue to be considered at the hearing, the OMVH hearing officer's decision will be not reversed on this ground.

ORDER

For the foregoing reasons,

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

AND IT IS SO ORDERED.

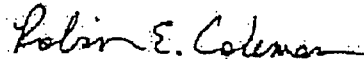


Deborah Brooks Durden
Administrative Law Judge

November 7, 2011
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

November 7, 2011
Columbia, South Carolina

FILED

November 7, 2011

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS**

South Carolina Department of Public Safety)	Docket No. 10-OMVH-01-4887-CC
and)	
South Carolina Department of Motor)	
Vehicles,)	
)	
Petitioners,)	
vs.)	FINAL ORDER AND DECISION
)	
Douglas Madison,)	
)	
Respondent.)	

Appearances:

For the Respondent: Woodrow Gooding, Esquire
For the Petitioner: (Witness) Trooper George Folk, SC DPS

Other information:

Respondent's Driver's License No.: 011602797
Typed of Hearing: Implied consent (S. C. Code Ann. § 56-5-2950)

INTRODUCTION

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) upon request by Douglas Madison (Respondent) for a hearing. Respondent was arrested on September 18, 2010, for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon Respondent's alleged registering of an alcohol concentration of 0.15% or greater on the breath test, he was charged with a violation of S.C. Code Ann. §56-5-2950 (Supp. 2009). As a result, the primary investigating officer issued a written notice of suspension to Respondent suspending his driver's license or driving privilege. Pursuant to written notice to the parties, a hearing was held before me on December 2, 2010, at the Bamberg County Courthouse in Bamberg, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege is sustained.

FINDINGS OF FACT

Having observed the witness and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

1. Notice of the date, time, place and nature of the hearing was given to all the parties.

2. Douglas Madison was over 21 years of age on December 2, 2010.
3. On December 2, 2010, the trooper was on patrol in Allendale County when he noticed a vehicle exiting The Lobster House in Allendale. The vehicle accelerated rapidly and switched lanes rapidly without signaling. The trooper then observed the vehicle cross the center line a couple of time. The trooper then activated his radar which showed the Respondent was speeding.
4. The trooper conducted a traffic stop on the vehicle and identified the Respondent as the driver. The trooper smelled an odor of alcohol and food coming from the vehicle. The Respondent admitted to drinking three drinks.
5. The trooper asked the Respondent to get out of the vehicle and to perform field sobriety tests. The Respondent performed satisfactorily on the walk and turn test. He did not perform satisfactorily on the Horizontal Gaze Nystagmus (HGN) test and the one-leg stand test. The Respondent's wife was a passenger in the vehicle and she stated that she told the Respondent not to drive because he had been drinking.
6. The Respondent was placed under arrest for driving under the influence and was transported for a Datamaster test.
7. None of the events regarding the stop of the Respondent are on video because the recording equipment malfunctioned.
7. Upon arrival at the testing site, the Respondent was advised his Implied Consent rights.
8. The Respondent submitted to the Datamaster test and registered a .20%. The Respondent was issued a Notice of Suspension based on the results.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude as a matter of law the following:

1. In S. C. Code Ann. §1-23-660 (Supp. 2009), the General Assembly provided for the creation of the South Carolina Division of Motor Vehicle Hearings. Effective January 1, 2006, the Division was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of driver's licenses. Effective October 1, 2008, the General Assembly changed the name to the Office of Motor Vehicle Hearings (OMVH).

2. All hearings presided over by Hearing Officers of OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the OMVH. A filing of a request for a hearing stays the suspension until a final decision is issued. S. C. Code Ann. §56-5-2951(G).

3. Appeals from final decisions of the Hearing Officers will be to the SCALC in accordance with S. C. Code Ann. § 1-23-660 (Supp. 2009).

4. Petitioner is an administrative agency of the State of South Carolina which is charged with administering its motor vehicle laws and delivering accurate and secure credentials and transaction documents to the citizens of this state. S. C. Code Ann. §56-1-5 (2006)

5. Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, *South Carolina Administrative Practice and Procedure*, 200-201 (2004). Since Petitioner asserts the affirmative of an issue, i.e. the enforcement of a driver's license suspension and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this enforcement action. *See Alex Sanders and John S. Nichols, Trial Handbook for South Carolina Lawyers*, Second Edition, 2001, § 9:3, p. 366.

6. Pursuant to S. C. Code Ann. § 56-5-2930 (Supp. 2009), it is unlawful for a person to drive a motor vehicle within this State while:

- a. under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciable impaired;
- b. under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciable impaired; or
- c. under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to Drive is materially and appreciable impaired.

7. S.C. Code Ann. § 56-5-2950(A) (Supp. 2009) provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and

drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of the law enforcement officer who arrested [the] person....

8. S.C. Code Ann. § 56-5-2950(B) (Supp. 2009) further provides:

No tests may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

9. Upon motion by any party, the OMVH Hearing Officer may review the application of the policies, procedures, and regulations promulgated by SLED. If the Hearing Officer finds that the failure to follow any of the policies, procedures, regulations or other provisions of S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The hearing officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure. See S.C. Code Ann. § 56-5-2950(J) (Supp.2009).

10. If a person drives a motor vehicle and refuses to submit to a test as provided for in Section 56-5-2950, Petitioner Department of Motor Vehicles must suspend the person's driver's license, permit or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer issues a notice of suspension which is effective beginning on the date of the alleged violation. See S.C. Code Ann. § 56-5-2951(A) (Supp. 2009).

11. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (Supp.2009). Section 56-5-2951(F) requires that the scope of the hearing be limited to whether the person:

- (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;
- 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) the machine was working properly.

Nothing in this section prohibits the introduction of evidence at the administrative hearing on the issue of the accuracy of the breath test result.

12. Counsel for the Respondent argues that the absence of the roadside video prejudices the Respondent and therefore the suspension should be rescinded. I disagree. The videotaping requirements set out in S.C. Code Ann. §56-5-2953 do not apply to administrative hearings. The scope of an implied consent hearing is set out §56-5-2950 and §56-5-2951 and does not extend to §56-5-2953. See Gilbert vs. S.C. Dep't of Motor Vehicles and Greenwood Police Dep't., Docket No. 09-ALJ-21-0361-AP.

13. I conclude that the Respondent was lawfully arrested for driving under the influence. The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. Id. Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal. Id. Trooper Folk witnessed the Respondent driving erratically and smelled an odor of an alcoholic beverage after conducting a traffic stop. The Respondent admitted to drinking and his wife also stated that he had been drinking. He did not

perform satisfactorily on two of the three field sobriety tests. Based upon the totality of the circumstances as given in the officer's testimony, there was probable cause for a lawful arrest for driving under the influence.

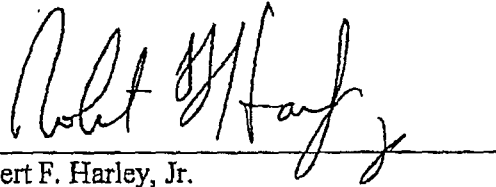
Trooper Folk administered a Datamaster test. The Respondent was advised of his Implied Consent rights. The Respondent gave a breath sample which registered a 0.16%.

Based on the above, the relief sought by the Respondent in his request for an administrative hearing must be denied.

ORDER

Based upon the above findings of facts and conclusions of law, it is hereby:
ORDERED that the suspension of Respondent's driver's license or driving privilege is sustained.

AND IT IS SO ORDERED.



Robert F. Harley, Jr.
Senior OMVH Hearing Officer

April 15, 2011
Columbia, South Carolina

NOTICE

A party may appeal this final decision by filing written notice with the South Carolina Administrative Law Court within thirty (30) days of receipt of the order to the following address:

Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

The notice must be accompanied by proof of service of the notice on all parties and a filing fee in the amount of \$100.00 made payable to the South Carolina Administrative Law Court. See ALC Rules 3(A), 4(B), 31(A), 33 and 71(A). A copy of the notice must also be sent to the OMVH and a copy of the transcript shall be ordered within ten days after service of the notice. The transcript must be ordered by the Appellant and the Appellant is responsible for the cost thereof.

Furthermore, a party may file a written motion with the OMVH within ten (10) days after notice of this order requesting the Hearing Officer reconsider this final decision. However, the filing of a Motion of Reconsideration does not stay the provisions of this final decision nor excuse compliance with its provisions. See OMVH Rule 15 (D). The filing of a motion for reconsideration does stay the time for an appeal until an order is issued; however, if the hearing officer does not issue a written order on the motion for reconsideration, it is deemed denied thirty days after it is filed.

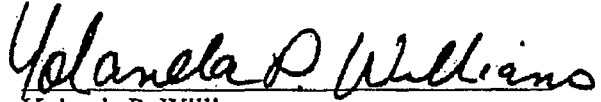
Only original documents are accepted. Documents must be filed via hand-delivery or by depositing the document in the U.S. Mail, properly addressed, with sufficient first class postage attached. Facsimiles sent to the OMVH and the South Carolina Administrative Law Court do not comply with filing requirements and are not authorized. See ALC Rules 4(B).

The Rules of the Administrative Law Court are found at: www.scalc.net

The Rules of the Office of Motor Vehicle Hearings are found at: www.scomvh.net

CERTIFICATE OF SERVICE

I, Yolanda P. Williams, 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).


Yolanda P. Williams

April 15, 2011
Columbia, South Carolina

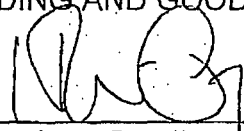
§ 56-5-2953 as to why the arresting officer cannot produce a video recording.

Alternatively, if in fact a video recording exists but was not properly produced to Respondent in response to his Rule 12 subpoena, Respondent has been unduly prejudiced by being denied the opportunity to review such video recording prior to the implied consent hearing to prepare his defense.

Based on the above arguments and any memorandum of Law that may be filed with the Court, the Respondent respectfully requests the Court to reconsider its Final Order and Decision.

GOODING AND GOODING, P.A.

BY:



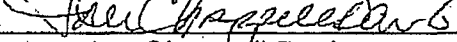
H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676
Attorneys for Respondent

Date:

4/25/11

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 25th day of April, 2011.

By: 
Jan Chappell Davis
Paralegal to H. Woodrow Gooding

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Douglas E. Madison)	Docket No: 10-OMVH-01-4887-CC
)	
Appellant,)	
)	
vs.)	NOTICE OF APPEAL
)	AND
South Carolina Department of)	APPEAL
Public Safety and South Carolina)	
Department of Motor Vehicles,)	
)	
Respondents.)	
<hr/>		

YOU WILL PLEASE take notice that the undersigned counsel hereby appeals the Final Order and Decision dated April 15, 2011, a copy of which is attached hereto, and denial of Appellant's Motion for Reconsideration dated April 25, 2011. ¹

The grounds for this appeal are as follows:

(1) The Respondents failed to produce a roadside videotape. S.C. Code Ann. § 56-5-2950 (2009) specifically requires "activation of the video recording equipment prior to the commencement of the testing procedure." S.C. Code Ann. § 56-5-2950(B)(2009). Moreover, S.C. Code Ann. § 56-5-2951 (F)(4)(c) requires the hearing officer to determine whether the "tests administered and samples obtained were conducted pursuant to Section 56-5-2950." Therefore, the Respondents did not comply with the implied consent statutes and the Appellant's driving privileges should not have been suspended.

(2) The Court relied on Gilbert v. S.C. Dept. of Motor Vehicles in holding that the

¹Appellant filed a Motion for Reconsideration on April 25, 2011. No action was taken by the Administrative Law Judge within thirty days after the Motion for Reconsideration was filed; therefore, the Motion was deemed denied on May 25, 2011.

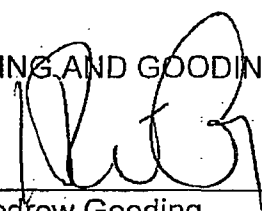
videotaping requirements of S.C. Code Ann. § 56-5-2953 do not apply to administrative hearings. However, the Court in Gilbert was interpreting the former version of S.C. Code Ann. § 56-5-2950 which did not include the requirement of videotaping as our current § 56-5-2950(B) does.

(3) Additionally, Respondents failed to present an affidavit as required by S.C. Code Ann. § 56-5-2953 as to why the arresting officer cannot produce a video recording.

(4) Alternatively, if in fact a video recording exists but was not properly produced to Appellant in response to his Rule 12 subpoena, Appellant has been unduly prejudiced by being denied the opportunity to review such video recording prior to the implied consent hearing to prepare his defense.

GOODING AND GOODING, P.A.

BY:



H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676
Woody@goodingandgooding.com
Attorneys for Appellant

Date:

6/17/11

Douglas E. Madison
10770 Ehrhardt Road
Ehrhardt, SC 29081
(803) 300-0116

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

ORIGINAL

South Carolina Department)
of Public Safety,)
)
Petitioner,)
)
vs.)
Douglas Madison,)
)
Respondent.)
-----)

TRANSCRIPT OF
HEARING
December 2, 2010

THE COURT: My name is Robert Harley. I've been appointed by the South Carolina Office of Motor Vehicle Hearings to preside at this implied consent hearing scheduled for the 2nd of December 2010 at the Bamberg County Courthouse, Bamberg, South Carolina. For the record, the petitioner in this matter, South Carolina Department of Public Safety, their witness is present. The respondent, Mr. Douglas Madison, is present and represented by Attorney H. Woodrow Gooding. At this time we will swear in the petitioner's witness. State your full name, sir.

TROOPER FOLK: Name is George A. Folk with the South Carolina Highway Patrol.

1 **THE COURT:** All right. Please raise your right
2 hand. Solemnly swear your testimony in this
3 matter will be the truth, the whole truth, and
4 nothing but the truth?

5 **TROOPER FOLK:** Yes, sir.

6 **THE COURT:** At this time you can move forward with
7 testimony and evidence, Trooper Folk, regarding
8 this matter.

9 **DIRECT TESTIMONY BY TROOPER FOLK:**

10 **TROOPER FOLK:** Well, on September 18th, 2010, in
11 Allendale County, which is part of my troop, I
12 was heading northbound on U.S. 301 coming out
13 of Allendale City when I noticed a car pulled
14 out from the Lobster House in Allendale. The
15 car sped up pretty quick coming out of the
16 parking lot, switching lanes pretty rapidly
17 without using a signal. I followed the car for
18 a while on 301 North. Subject was ... he
19 crossed the center line a couple of times and
20 I activated my radar. He was speeding. I
21 monitored the subject driving, I thought he
22 might have been reaching for something or
23 whatever, but it didn't never straighten up so
24 I went ahead and activated and stopped the
25 subject at ... on U.S. 301 at Mount Calvary

1 Road. When I got to the car, I spoke with Mr.
2 Madison and explained to him why I stopped him,
3 different things. Went back to my patrol car,
4 went back to Mr. Madison's car after I went to
5 my patrol car, and I smelled the odor of
6 alcohol and food coming out of the car. After
7 a while, I ... you know, I asked Mr. Madison
8 had he been drinking. The subject stated he
9 had three drinks, no specific drinks or
10 anything. After I asked Mr. Madison about the
11 drinks and got him out of the car, performed a
12 couple field sobriety tests. Mr. Madison did
13 pretty good on his walk and turn, different
14 things. His HGN was bad; his one-leg stand, he
15 couldn't keep his balance too good. So I went
16 ahead and placed Mr. Madison under arrest for
17 DUI, read him his rights, placed him in the
18 car. Had his wife in the car, went back and
19 explained to his wife what was going on.
20 Although the things I'm saying here, Mr.
21 Gooding is not ... don't have any knowledge of
22 because the tape wasn't working from the
23 understanding I got, but Mr. Madison's wife
24 stated that she told him not to be drinking ...
25 not to drive. She told him she wanted to drive

1 because of his CDL Class A license. We had to
2 wait beside the road for a while because I had
3 to get somebody there to pick Mr. Madison's
4 wife up. I couldn't leave her on the side of
5 the road. So we did get in contact with her
6 sister, she picked Mr. Madison up and ... Mr.
7 Madison's wife up and transported her home. I
8 then left the traffic stop location, took Mr.
9 Madison to Allendale County Detention Center
10 where I performed a breath alcohol test. Mr.
11 Madison was read his advisement of rights and
12 ... implied consent rights and waited the 20
13 minute observation period and we went on to
14 continue with the test. At the end of the
15 test, Mr. Madison's alcohol level was a 0.16.

16 **THE COURT:** All right. Please answer any questions
17 Attorney Gooding may have.

18 **MR. GOODING:** Mr. Hearing Officer, I have a motion
19 prior to any ... any questions of Mr. Folk.
20 And, actually, it's sort of hinders my cross-
21 examination of Mr. Folk because I filed a Rule
22 5 on September 30th of 19 ... 10 ... I filed and
23 served a subpoena under Rule 12 on 10/27/10.
24 Trooper Folk attempted to comply with the
25 subpoena and the Rule 5. He actually brought

1 the discovery to me that I subpoenaed. The
2 information that I subpoenaed, he brought it to
3 me on 11/23/10, but the problem we've been
4 encountering in a lot of these cases, the DVD
5 is unformatted. It's absolutely blank. The
6 site video. And for that reason, I would move
7 to rescind the suspension because I am
8 obviously in a position of not being able to
9 defend my client without this material, which
10 is required under our statute ... our video
11 statute. And without the State being able to
12 meet their obligation under the video statute
13 requirement, then obviously they can't
14 establish that he was lawfully detained or
15 arrested and, therefore, I would move to
16 rescind the suspension based on the lack of the
17 video site tape. And I would have no
18 questions.

19 THE COURT: Okay. Argument against that, Mr. Folk?

20 TROOPER FOLK: No, sir.

21 THE COURT: All right. I'll take your motion into
22 consideration. All right. This hearing is now
23 closed.

24 (There being nothing further, the hearing was
25 concluded.)

CERTIFICATE

This is to certify the transcript of the Hearing Re: DOUGLAS MADISON consists of Five (5) pages. This transcript was prepared by me without the benefit of my being present during the hearing. Additionally, this transcript was prepared from a audio recording provided to me.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this July 19, 2011.

Carenn N. Moore
Carenn N. Moore
Court Reporter

Notary Public for South Carolina
My Commission Expires: 3/24/2019

STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS

Douglas Madison,)
)
)
 Appellant,)
)
)
 vs.)
)
)
 South Carolina Department of Motor)
 Vehicles,)
)
 Respondent.)

Docket No. 11-ALJ-21-0328-AP

BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

APPEAL FROM
SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS

Robert Harley, Hearing Officer

Mr. Frank L. Valenta
Office of General Counsel
P. O. Box 1498
Blythewood, South Carolina
(803) 896-9902
Attorney for Respondent

Mr. H. Woodrow Gooding, Esquire
P. O. Box 1000
Allendale, SC 29810
(803) 584-7676
Attorney for Appellant

STATEMENT OF ISSUES ON APPEAL

- I. Did the Hearing Officer err in failing to rescind the suspension of Appellant's driving privileges where the arresting officer failed to video record the incident site?
- II. Did the Hearing Officer err in relying on Gilbert v. S.C. Dept. of Motor Vehicles in holding that the video recording requirements of S.C. Code Ann. § 56-5-2953 do not apply to implied consent hearings?
- III. Did the Hearing Officer err in refusing to rescind the suspension where the arresting officer failed to present an affidavit explaining why the arresting officer could not produce a video recording as required by S.C. Code Ann. § 56-5-2953?
- IV. Did the Hearing Officer err in failing to rescind the suspension on the grounds that the Appellant was unduly prejudiced by the arresting officer's failure to video record the incident site?

STATEMENT OF THE CASE

This is an appeal from an implied consent hearing in which the Hearing Officer denied the Appellant's motion to rescind the suspension of his driving privileges.

On September 18, 2010, Appellant was operating his vehicle in a northerly direction on Highway 301 in Allendale County, South Carolina. Trooper Folk initiated his blue light and conducted a traffic stop of the Appellant. Trooper Folk proceeded to arrest Appellant for DUI pursuant to S.C. Code Ann. § 56-5-2930 and transported him to the Allendale County Detention Center where the breath alcohol test was administered. Based on the breath alcohol test results, Appellant's driving privileges were suspended pursuant to S.C. Code Ann. § 56-5-2951.

Appellant requested an implied consent hearing and served a Rule 12 subpoena on Trooper Folk on October 26, 2010. Trooper Folk responded to the Rule 12 subpoena on November 23, 2010, by producing a DVD that is blank. Trooper Folk has been unable to produce a video recording of the incident site because his equipment allegedly malfunctioned.

The implied consent hearing was held before Hearing Officer Robert Harley on December 2, 2010. Trooper Folk testified on behalf of the S.C. Department of Public Safety but was unable to produce a video recording of the incident site. The Appellant moved to rescind the suspension of his driving privileges based on the failure of the Respondent to produce a videorecord of the incident site as required by statute and based on the prejudice to Appellant in being unable to effectively cross-examine Trooper Folk without the roadside video.

Hearing Officer Harley issued a Final Order and Decision on April 15, 2011, denying Appellant's motion to rescind the suspension. On April 25, 2011, Appellant filed and served a Notice of Motion and Motion for Reconsideration. No action was taken by Hearing Officer Harley within 30 days, and the Motion for Reconsideration was deemed denied on May 25, 2011. On June 16, 2011, Appellant filed and served a Notice of Appeal.

ARGUMENT

The standard of review is set forth in S.C. Code Ann. § 1-23-380(A)(5)(2008)

which states:

The court may reverse or modify the decision 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;
- 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.

Here, the Hearing Officer's decision is in violation of specific statutory provisions and affected by other error of law.

- I. **The hearing officer erred in failing to rescind the suspension because video recording of the incident site is mandatory pursuant to S.C. Code Ann. § 56-5-2950.**

Pursuant to the unambiguous terms of § 56-5-2950(B), video recording is required in order to suspend an individual's driving privileges. Section 56-5-2950(B) provides:

No tests may be administered or samples obtained unless, upon activation of the video recording

equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

S.C. Code Ann. § 56-5-2950(B)(2009)(emphasis added). Moreover, § 56-5-2951 specifically incorporates the requirements of § 56-5-2950 and requires the hearing officer to determine whether the requirements set forth in § 56-5-2950 were met by the arresting officer. *Id.* Without any doubt, the language of § 56-5-2950 requiring

a video recording is mandatory. Likewise, § 56-5-2951 requires the hearing officer to determine whether the mandates of § 56-5-2950 were followed. When a statute's language is plain, unambiguous, and conveys a clear and definite meaning, the court must apply its literal meaning and should not "resort to subtle or forced construction in an attempt to limit or expand a statute's scope." Paschal v. State Election Comm'n, 317 S.C. 434, 454, S.E.2d 890(1995). The language of § 56-5-2950 and 56-5-2951 is clear and unambiguous. Just as clear is the fact that the arresting officer did not follow the mandates of § 56-5-2950.

The video recording requirement that § 56-5-2950 incorporates is found in § 56-5-2953. The legislative history of § 56-5-2950 is particularly instructive and confirms that the Legislature intended for § 56-5-2953 to apply to implied consent matters. Prior to February 10, 2009, the applicable portion of § 56-5-2950 stated that "[n]o tests may be administered or samples obtained unless the person has been informed in writing" of certain things. S.C. Code Ann. § 56-5-2950 (2008)(see Exhibit 1 attached hereto). In 2009, our Legislature amended § 56-5-2950 to specifically require video recording. The Legislature amended § 56-5-2950 to include video recording in order to make the implied consent statute consistent with the law surrounding the charge of DUI. The Legislature recognized that it makes little sense to require video recording to prove a DUI case but not to require video recording to prove an implied consent case. Otherwise, the DUI charge may be dismissed for failure to video record the incident site but the driving privileges may still be suspended as in this case. The Legislature recognized this illogical inconsistency and amended § 56-5-2950 to eliminate this inconsistent result. The

rationale behind video recording applies in both contexts: to provide assurance that the arresting officer has complied with the law. Viewing the history of § 56-5-2950 and the Legislature's intentional extension of the video recording requirement to the implied consent statute, it becomes clear that the Legislature intended for the requirements of § 56-5-2953 to apply to an implied consent hearing.

Even though § 56-5-2953 does not specifically mention § 56-5-2950, it does specifically mention § 56-5-2930, § 56-5-2933 and § 56-5-2945 which are the statutes defining the charges of DUI, DUAC and Felony DUI. The implied consent statute is inextricably linked to the DUI statute. After all, a breath alcohol test is only offered after a motorist is arrested for DUI, DUAC, or Felony DUI. The only logical conclusion is that in amending 56-5-2950 to include the video recording requirement, the Legislature intended for the specific requirements of § 56-5-2953 to apply to § 56-5-2950. The Hearing Officer thereby erred as a matter of law in holding that the requirements of § 56-5-2953 do not apply to implied consent hearings. Moreover, our Supreme Court has recently expressed that § 56-5-2951 requires strict compliance. In S.C. Dept. of Motor Vehicles v. McCarson, the Court held that the statutory prerequisites set forth in § 56-5-2951 must be satisfied before a motorist's driving privileges may be met. 391 S.C. 136, 705 S.E.2d 425 (2011). Moreover, the State bears the burden of proving that the prerequisites have been met. Id. The State failed to satisfy the prerequisite that the incident site be video recorded. Therefore, the Hearing Officer erred as a matter of law in refusing to rescind the suspension.

- II. The Hearing Officer erred as a matter of law in relying on Gilbert in ruling that the requirements of § 56-5-2953 do not apply to implied consent hearings.

Hearing Officer Harley relied on Gilbert v. S.C. Dept. of Motor Vehicles in holding that the requirements of § 56-5-2953 do not apply to implied consent hearings. Gilbert was arrested for DUI in April of 2009 and refused the breath alcohol test. Gilbert's driving privileges were therefore suspended pursuant to § 56-5-2950. At the implied consent hearing, Gilbert argued that the suspension should be rescinded because the arresting officer did not verbally inform him that he was being videotaped as required by S.C. Code Ann. § 56-5-2953. The hearing officer upheld the suspension and Gilbert appealed. On appeal, the Administrative Law Judge upheld the suspension and held that "[b]ecause Section 56-5-2951(f) limits the scope of the administrative hearing to a handful of issues, none of which includes the issue of whether the Department complied with Section 56-5-2953, the OMVH's decision will not be reversed on this ground." Gilbert v. S.C. Dept. of Motor Vehicles, Docket No. 09-ALJ-21-0361-AP(citing S.C. Dept. of Motor Vehicles v. Nelson, 364 S.C. 514, 613 S.E.2d 544 (Ct. App. 2005)).

The Gilbert court's reliance on Nelson was misplaced. In Nelson, the motorist was arrested for DUI and refused the breath alcohol test. Nelson argued that the suspension should be rescinded because the officer did not offer him the breath test within three hours of the arrest as required by § 56-5-2953. The Court of Appeals held that "nothing in the code instructs that a failure to comply with section 56-5-2953 warrants the dismissal of prosecution for failure to submit to

testing pursuant to section 56-5-2950." Nelson at 524-26, 549-550.

The Gilbert court failed to recognize that Nelson was decided in 2005 when § 56-5-2950 did not require video recording. While the Nelson court properly applied the existing statutes which did not in any way require video recording in the implied consent context, the Gilbert court erroneously relied on Nelson even though the amendment of § 56-5-2950 became effective in February 2009, approximately two months before Gilbert was arrested for DUI. Likewise, the Hearing Officer in the instant case erred as a matter of law in relying on Gilbert and Nelson.

- III. The Hearing Officer erred as a matter of law in refusing to rescind the suspension where the arresting officer did not produce an affidavit.**

S.C. Code Ann. § 56-5-2953 requires the arresting officer to submit

a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county.

Here, it is undisputed that the arresting officer did not video record the incident site.

Moreover, it is undisputed that the arresting officer did not submit a sworn affidavit as required by the statute. Therefore, the Hearing Officer erred as a matter of law in refusing to rescind the suspension of Appellant's driving privileges.

- IV. The Hearing Officer erred as a matter of law in ruling that the Appellant was not unduly prejudiced by the arresting officer's failure to record the incident site.**

In S.C. Dept. of Motor Vehicles vs. McCarson, our Supreme Court made it

clear that the specific requirements of § 56-5-2951 must be met before a motorist's driving privileges may be suspended. 391 S.C. 136, 705 S.E.2d 425 (2011). The Court explained its rationale and held as follows:

Because a license-suspension hearing constitutes a final adjudication of an important interest, we believe that the Legislature promulgated section 56-5-2951 in such a way that guards against an automatic or rote elimination of this interest. Specifically, this section sets forth several statutory prerequisites that must be established before a Hearing Officer suspends a citizen's driver's license following an arrest for Driving Under the Influence.

Id. at 148, 149. Moreover, the "Legislature placed the burden on the Department to present sufficient evidence" of the prerequisites outlined in § 56-5-2951. Id. "If we were to find otherwise, we would essentially render meaningless the procedure established by our Legislature in section 56-5-2951." Id. at 149.

McCarson involved a situation where one officer witnessed the motorist's erratic driving and pulled him over. Because his car was not equipped with a video camera, the first officer called in another officer to perform the testing and to conduct the arrest. At the implied consent hearing, the arresting officer attempted to introduce into evidence the incident report which included the first officer's observations of the motorist's erratic driving prior to the stop. The first officer was not present at the hearing. Ultimately, our Supreme Court held that the incident report constituted inadmissible hearsay that could not be used to establish that the motorist was lawfully arrested pursuant to § 56-5-2951. The Court recognized that an implied consent hearing "may potentially terminate an important interest of the licensee." Id. Based on that recognition by the Court that implied consent hearings

involve important rights, the Court required specific compliance with the mandates of § 56-5-2951 and was unwilling to extend a hearsay exception to implied consent hearings. The Court recognized the significance of requiring proof of a lawful arrest before allowing suspension of one's driving privileges.

It is important to note that the Court in McCarson was interpreting the former version of § 56-5-2950 which did not require video recording. As explained above, our Legislature amended § 56-5-2950 to require video recording to provide a safeguard against a motorist losing his driving privileges without the State proving that he was lawfully arrested. Here, the safeguard of video recording has been obliterated by the Hearing Officer's holding that a roadside video is not required in the implied consent context. The Appellant was stripped of his right to effectively cross-examine the arresting officer on the issues of probable cause and lawful arrest and was therefore substantially prejudiced. Such a result is not acceptable under our Supreme Court's holding in McCarson. The Hearing Officer clearly erred in failing to find that the State did not meet its burden of proof in establishing the statutory prerequisites outlined in § 56-5-2951 and in finding that the Appellant was not unduly prejudiced by the failure of the arresting officer to video record the incident site.

CONCLUSION

For the reasons stated above, the Appellant respectfully requests this Court to reverse the Hearing Officer's decision and rescind the suspension of Appellant's driving privileges.

GOODING AND GOODING, P.A.

BY: 

H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676
Attorneys for Respondent

Date: 8-25-11

FOCUS™ Terms: 56-5-2950

Search Within Original Results (1 - 18)



Advanced..

View Tutorial

Source: Legal > / ... / > SC - South Carolina Code Annotated, 2008
 Terms: 56-5-2950 (Suggest Terms for My Search)

Select for FOCUS™ or Delivery

S.C. Code Ann. § 56-5-2950

SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

*** ARCHIVE DATA ***

*** This document is current through the 2008 Regular Session ***
 *** Annotations are current through November 10, 2009 ***

TITLE 56. MOTOR VEHICLES

CHAPTER 5. UNIFORM ACT REGULATING TRAFFIC ON HIGHWAYS

ARTICLE 23. RECKLESS HOMICIDE; RECKLESS DRIVING; DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR, DRUGS OR NARCOTICS

S.C. Code Ann. § 56-5-2950 (2008)

§ 56-5-2950. Implied consent to testing for alcohol or drugs; procedures; inference of DUI.

[Section effective until 12:00 p.m. on February 10, 2009.]

(a) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. If the officer has reasonable grounds to believe that the person is under the influence of drugs other than alcohol, the officer may order that a urine sample be taken for testing. If the alcohol concentration is eight one-hundredths of one percent or above, the officer may not require additional tests of the person as provided in this chapter. The breath test must be administered by a person trained and certified by the Department of Public Safety, pursuant to SLED policies. The arresting officer may administer the tests if the person's conduct during the twenty-minute pre-test waiting period is videotaped pursuant to Section 56-5-2953(A)(2)(d). Before the breath test is administered, an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent. Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

No tests may be administered or samples obtained unless the person has been informed in writing that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least ninety days if he refuses to submit to the tests and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least thirty days if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

A hospital, physician, qualified technician, chemist, or registered nurse who obtains the samples or conducts the test or participates in the process of obtaining the samples or conducting the test in accordance with this section is not subject to a cause of action for assault, battery, or another cause alleging that the drawing of blood or taking samples at the request of the arrested person or a law enforcement officer was wrongful. This release from liability does not reduce the standard of medical care required of the person obtaining the samples or conducting the test. This qualified release also applies to the employer of the person who conducts the test or obtains the samples.

The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which provides blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED must test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.

SLED must administer the provisions of this subsection and must make regulations necessary to carry out its provisions. The costs of the tests administered at the direction of the law enforcement officer must be paid from the general fund of the State.

A qualified person who obtains samples or administers the tests or assists in obtaining samples or the administration of tests at the direction of a law enforcement officer is released from civil and criminal liability unless the obtaining of samples or tests is performed in a negligent, reckless, or fraudulent manner. No person may be required by the arresting officer, or by another law enforcement officer, to obtain or take any sample of blood or urine.

(b) In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 relating to driving a vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs, the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:

- (1) If the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol.

RECEIVED
 800-66

EXHIBIT

00041

(2) If the alcohol concentration was at that time in excess of five one-hundredths of one percent but less than eight one-hundredths of one percent, this fact does not give rise to any inference that the person was or was not under the influence of alcohol, but this fact may be considered with other evidence in determining the guilt or innocence of the person.

(3) If the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.

(4) If the alcohol concentration was at that time eight one-hundredths of one percent or more and the original testing of the person's breath or collection of other bodily fluids was performed within two hours of the time of arrest, the person has violated Section 56-5-2933.

The provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them.

(c) A person who is unconscious or otherwise in a condition rendering him incapable of refusal is considered to be informed and not to have withdrawn the consent provided by subsection (a) of this section.

(d) A person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence. A person who obtains additional tests must furnish a copy of the time, method, and results of any test to the officer before any trial, hearing, or other proceeding in which the person attempts to use the results of the additional tests as evidence.

(e) Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party. The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any tests results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure.

(f) If a state employee charged with the maintenance of breath testing devices in this State and the administration of breath testing policy is required to testify at an administrative hearing or court proceeding, the entity employing the witness may charge a reasonable fee to the defendant for these services.

[Section effective at 12:00 p.m. on February 10, 2009.]

(A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing. A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest. The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. Before the breath test is administered, an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent. Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

(B) No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

(1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;

(2) his privilege to drive must be suspended for at least one month if he takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;

(3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;

(4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and

(5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

(C) A hospital, physician, qualified technician, chemist, or registered nurse who obtains the samples or conducts the test or participates in the process of obtaining the samples or conducting the test in accordance with this section is not subject to a cause of action for assault, battery, or another cause alleging that the drawing of blood or taking samples at the request of the arrested person or a law enforcement officer was wrongful. This release from liability does not reduce the standard of medical care required of the person obtaining the samples or conducting the test. This qualified release also applies to the employer of the person who conducts the test or obtains the samples.

(D) The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

(E) The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED must test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.

SLED must administer the provisions of this subsection and must make regulations necessary to carry out its provisions. The costs of the tests administered at the direction of the law enforcement officer must be paid from the general fund of the state. However, if the person is subsequently convicted of violating Section 56-5-2930, 56-5-2933, or 56-5-2945, then, upon conviction, the person must pay twenty-five dollars for the costs of the tests. The twenty-five dollars must be placed by the Comptroller General into a special restricted account to be used by the State Law Enforcement Division to offset the costs of administration of the breath testing devices, breath testing site video program, and toxicology laboratory.

(F) A qualified person who obtains samples or administers the tests or assists in obtaining samples or the administration of tests at the direction of a law enforcement officer is released from civil and criminal liability unless the obtaining of samples or tests is performed in a negligent, reckless, or fraudulent manner. No person may be required by the arresting officer, or by another law enforcement officer, to obtain or take any sample of blood or urine.

(G) In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:

- (1) If the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol;
- (2) If the alcohol concentration was at that time in excess of five one-hundredths of one percent but less than eight one-hundredths of one percent, this fact does not give rise to any inference that the person was or was not under the influence of alcohol, but this fact may be considered with other evidence in determining the guilt or innocence of the person; or
- (3) If the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.

The provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them.

- (H) A person who is unconscious or otherwise in a condition rendering him incapable of refusal is considered to be informed and not to have withdrawn the consent provided by subsection (A) of this section.
- (I) A person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence. A person who obtains additional tests must furnish a copy of the time, method, and results of any test to the officer before any trial, hearing, or other proceeding in which the person attempts to use the results of the additional tests as evidence.
- (J) Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party. The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.
- (K) If a state employee charged with the maintenance of breath testing devices in this State and the administration of breath testing policy is required to testify at an administrative hearing or court proceeding, the entity employing the witness may charge a reasonable fee to the defendant for these services.

History:

1962 Code § 46-344; 1952 Code § 46-344; 1949 (46) 466; 1969 (56) 395; 1987 Act No. 95 § 9; 1987 Act No. 179 § 2; 1988 Act No. 348; 1988 Act No. 616; 1993 Act No. 181, § 1420; 994 Act No. 497, Part II, § 36T; 1998 Act No. 434, § 7; 2000 Act No. 390, § 14; 2003 Act No. 61, § 6.

Amended by 2008 Act No. 201, § 9, eff 12:00 p.m. February 10, 2009.

NOTES: Code Commissioner's Note

Pursuant to the directive to the Code Commissioner in 2003 Act No. 51, § 18, "Department of Public Safety" was substituted for "department".

Editor's Note

The term "SLED" refers to the State Law Enforcement Division. See §§ 23-3-10 et seq.

Effect of Amendment

The 2008 amendment rewrote this section and redesignated the subsections.

NOTES:

LexisNexis (R) Notes:

CASE NOTES

- CROSS REFERENCES.--Blood and urine testing, see S.C. Code Ann. § 23-31-410.
- Protective custody; procedures, see S.C. Code Ann. § 44-13-05.
- Suspension of license or permit or denial of issuance of license or permit to persons under the age of twenty-one who drive motor vehicles with certain amount of alcohol concentration, see S.C. Code Ann. § 56-1-286.
- Tests for alcohol or drugs; presumption of consent; administration of tests; warnings; refusal to take test; reports required, see S.C. Code Ann. § 56-1-2130.
- Driving with an unlawful alcohol concentration, see S.C. Code Ann. § 56-5-2933.
- Submission to testing for alcohol or drugs, see S.C. Code Ann. § 56-5-2946.
- Suspension of license for refusal to submit to testing or for certain level of alcohol concentration; temporary alcohol restricted license; administrative hearing; special restricted driver's license; automobile insurance increases, see S.C. Code Ann. § 56-5-2951.
- Admissibility of evidence obtained under Section 56-5-2950, see S.C. Code Ann. § 56-5-2955.

Case Notes:

- Administrative Law > Agency Adjudication > Hearings > General Overview
- Administrative Law > Judicial Review > Standards of Review > General Overview
- Administrative Law > Separation of Powers > Legislative Controls > General Overview
- Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
- Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
- Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege
- Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > General Overview
- Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview
- Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > General Overview
- Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Prerequisites
- Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Implied Consent > Warning Requirements
- Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > License Violations > General Overview
- Criminal Law & Procedure > Arrests > Probable Cause
- Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope
- Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence
- Criminal Law & Procedure > Jury Instructions > Objections
- Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
- Criminal Law & Procedure > Appeals > Remands & Remittitur

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have had a true and correct copy of the above and foregoing Brief of Appellant were served to all parties listed below either by 1st Class

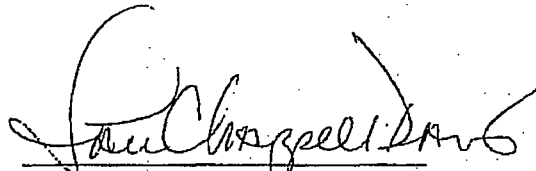
Mail this 25th day of August, 2011:

Honorable Deborah Brooks Durden
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Frank L. Valenta, Esquire
S.C. Department of Motor Vehicles
Office of General Counsel
P.O. Box 1498
Blythewood, SC 29016-0020

South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
Edgar A. Brown Building
1205 Pendleton Street, Suite 325
Columbia, SC 29201

By:



Jan Chappell Davis
Paralegal to H. Woodrow Gooding

GOODING AND GOODING
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

265 BARNWELL HIGHWAY
POST OFFICE BOX 1000
ALLENDALE, SOUTH CAROLINA 29810

H. WOODROW GOODING
ELIZABETH KEARSE GOODING
MARK B. TINSLEY

LAINE BRABHAM GOODING

Telephone #
(803) 584-7676

Facsimile #
(803) 584-3614

October 28, 2010

South Carolina Administration Law Court
Office of Motor Vehicle Hearings
Edgar A. Brown Building
1205 Pendleton Street, Suite 325
Columbia, SC 29201

Re: Douglas Madison - DL#11602797
Docket Number: 10-OMVH-01-4887-CC

Dear Sir/Madam:

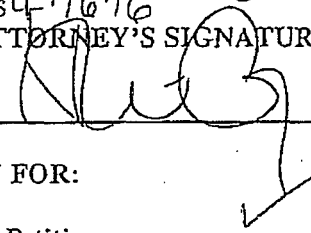
Pursuant to the Office of Motor Vehicle Hearings Rules of Procedure Rule 12, enclosed please find a copy of the Subpoena served on the arresting officer and proof of service by mail in regards to the above matter.

Sincerely,


H. Woodrow Gooding

HWG/jcd
enc

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

OFFICE OF MOTOR VEHICLE HEARINGS	SUBPOENA (Appearance/Production)
SC Department of Public Safety and SC Department of Motor Vehicles V. Douglas Madison	Docket Number: 10-QMVH-01-4887-CC DL# 11602797
TO: (Name and address of witness being served) Trooper George A. Falk Post A Headquarters 64 Bridge Street Bamberg, SC 29003	
YOU ARE HEREBY COMMANDED to: <input type="checkbox"/> Appear and testify in the above-captioned case at the place, date and time shown below; and/or <input checked="" type="checkbox"/> Produce the following items at the place, date and time shown below.	
LIST DOCUMENT(S) or OBJECT(S): Any and all written statements, drawings or writings made by Defendant; any and all oral statements made by Defendant; the complete arrest and conviction records of witnesses; copies of all hand-written notes, etc. by officers; photographs, video-tapes involving Defendant regarding ticket # E 500779	
PLACE: Goodings & Goodings, PA 265 Barnwell Highway Allendale, SC 29810	DATE: 11/24/10 TIME: 10:00 AM
NAME AND ADDRESS OF PARTY REQUESTING SUBPOENA: H. Woodrow Gooding, Esquire PO Box 1000 Allendale, SC 29810	TELEPHONE OF PARTY REQUESTING SUBPOENA: 803-584-7676
I CERTIFY THAT THIS SUBPOENA IS ISSUED IN COMPLIANCE WITH DMVH RULE 12(A).	DATE of ISSUE:
ISSUING ATTORNEY'S NAME, ADDRESS AND TELEPHONE: H. Woodrow Gooding, PO Box 1000, Allendale, SC 29810 803-584-7676	10/26/10
ISSUING ATTORNEY'S SIGNATURE AND TITLE: 	S.C. BAR #: 2180
ATTORNEY FOR: <input type="checkbox"/> Petitioner <input type="checkbox"/> Respondent <input type="checkbox"/> Other	
Revised June 2008 (attorney form)	

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits. *Madison*

1. Article Addressed to:

*Trooper George A. Folk
SC Highway Patrol
Post A Headquarters
64 Bridge Street
Zenoberg, SC 29003*

2. Article Number

(Transfer from service label)

7009 2820 0003 8691 8968

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

J. Morris

Agent

Addressee

B. Received by (Printed Name)

T. J. MORRIS

C. Date of Delivery

10/27/10

D. Is delivery address different from Item 1?

Yes

If YES, enter delivery address below:

No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Joseph Glenn Gilbert,)	Docket Number: 09-ALJ-21-0361-AP
)	
Appellant,)	
)	
vs.)	ORDER
)	
South Carolina Department of)	
Motor Vehicles and)	
Greenwood Police Department,)	
)	
Respondents.)	
<hr/>		

Appearances: Heath P. Taylor, Esquire
Carson M. Henderson, Esquire
For Appellant

Linda A. Grice, Esquire
Philip S. Porter, Esquire
Frank L. Valenta, Jr., Esquire
For Respondent South Carolina Department of Motor Vehicles

Adam S. Bacot, Esquire
James Graham Padgett, III
For Respondent Greenwood Police Department

STATEMENT OF THE CASE

This matter is an appeal by Joseph Glenn Gilbert (“Gilbert” or “Appellant”) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH). The OMVH’s Final Order and Decision was issued in connection with an administrative hearing that it held pursuant to S.C. Code Ann. § 56-5-2951(B)(2) (2008). The Administrative Law Court (ALC) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 1-23-660 (Supp. 2008). Upon consideration of the briefs, I affirm the decision.

BACKGROUND

On April 28, 2009, Appellant was arrested for driving under the influence by Officer M.J. Martin of the Greenwood Police department. Prior to the arrest, Officer Martin responded to the

scene of a one vehicle accident involving Appellant. After noticing Appellant walking down the railroad tracks with no shoes, Officer Martin noticed a strong odor of alcohol about Appellant's person. Appellant stated that he had been involved in an accident and that he was the driver. Appellant stated that he had three beers at the golf course within three hours. Officer Daniel Watt responded to assist Officer Martin. The Appellant was administered field sobriety tests that he did not pass.

Appellant was arrested and transported by Officer Martin to a local breath testing facility for a DataMaster test. Officer Watt is a certified DataMaster Operator. At the DataMaster site, Officer Watt activated the video camera. Officer Watt printed two copies of the Advisement of Implied Consent Rights and handed Appellant a copy and read it aloud. Officer Watt checked the Appellant's mouth for foreign objects and nothing was removed. Officer Watt observed the Appellant during the twenty-minute observation period. Appellant was allowed to use his cell phone during the twenty minute observation period. The DataMaster machine was working properly.

Appellant was given an opportunity to submit a breath sample, but he refused. The SLED Breath Alcohol Analysis Test Report printed Appellant's refusal at 12:24AM. At that time, Appellant was informed that his privilege to drive in South Carolina was suspended.

Appellant timely requested an administrative hearing pursuant to S.C. Code Ann. 56-5-2951 (supp 2008), which was held before the Hearing Officer Tracy Holland on June 4, 2009. At the hearing, counsel for Appellant argued that because Appellant had not been verbally informed that he was being videotaped at the breath test site, his refusal to submit to the test was invalid and should not have been considered by the Hearing Officer.

By Final Order and Decision dated June 30, 2009, OMVH Hearing Officer Tracy Holland ruled that Appellant's driving privileges should remain suspended and sustained the administrative license suspension. Counsel for Appellant filed a Motion for Reconsideration and Stay on July 10, 2009 seeking a ruling based on the aforementioned argument. Officer Robert F. Harley, Jr. denied this motion on July 21, 2009¹. This appeal followed.

¹ This case was reassigned to Officer Harley on July 21, 2009.

ISSUES ON APPEAL

1. Did the OMVH hearing officer correctly sustain Appellant's suspension when the arresting officer did not inform Appellant that he was being videotaped at the breath test site?

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested case hearings of the Department of Motor Vehicles. See S.C. Code Ann. § 1-23-660 (Supp. 2008). Therefore, appeals from the decisions of the OMVH are properly decided under the Administrative Procedures Act's (APA) standard of review. S.C. Code Ann. § 1-23-380(A)(5) (2008) governs the circumstances in which an appellate body may review an agency decision. That section states:

The court may reverse or modify the decision 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;
- (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.

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). The well-settled case law in this state has also interpreted the "substantial evidence" rule to mean that a decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm'n., 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (citing Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984)). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

A. Appellant's objection was not contemporaneous.

Appellant contends that the results of the breath test should not have been admitted at the hearing. However, he did not object to the admission of the test results or the testimony concerning the test results until his closing argument and his subsequent Motion for Reconsideration. It is well settled in South Carolina that "[a] contemporaneous objection is required to properly preserve an error for appellate review." State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994); see also State v. Black, 319 S.C. 515, 521-22, 462 S.E.2d 311, 315 (Ct. App. 1995) ("Failure to object when the evidence is offered constitutes a waiver of right to object.").

Although the court was unable to find a South Carolina case that directly addresses the issue raised here, the Missouri Supreme Court's decision in Reinert v. Director of Revenue, 894 S.W.2d 162, 164 (Mo. 1995) is squarely on point.² In that case, the defendant's driver's license was suspended pursuant to a Missouri statute that required the State's Department of Revenue to suspend a person's license upon determining that the person was arrested, with probable cause, for driving a motor vehicle while the alcohol concentration in his blood was ten-hundredths of one percent or more. During the trial, the printout from the breath analysis machine reflecting the defendant's blood alcohol level was admitted into evidence without objection. However,

² While decisions of the Missouri Supreme Court are not binding on this court, they do constitute persuasive authority.

when the department's director sought to admit the maintenance report for the breath analysis machine, the defendant objected. The trial court reserved ruling on the defendant's objection to allow the parties to file briefs on the issue. In its final order, the trial court sustained the defendant's objection to the maintenance report and ordered that the defendant's driving privileges be reinstated. On appeal of the matter, the Missouri Supreme Court reversed the trial court's decision. Specifically, it held that:

Admission of the maintenance report was unnecessary in this case. *Although one of the foundational prerequisites for the admission of the results of a breath alcohol test is proof that the machine has been properly maintained, the foundational prerequisites are unnecessary where the test result is admitted in evidence without objection.* When evidence of one of the issues in the case is admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection. In the present case, the evidence of Reinert's blood alcohol content was admitted without objection. The trial court, therefore, should have considered the evidence.

Id. at 164 (emphasis added) (internal citations omitted).

Like in Reinert, in this case, Respondent did not object when Officer Watt testified as to the results of Respondent's DataMaster test. South Carolina appellate courts have held that "evidence received without objection is competent." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 266, 442 S.E.2d 611, 616 (1994); see also Brown v. Ryder Truck Rental, 300 S.C. 530, 534 n.3, 389 S.E.2d 161, 164 n.3 (Ct. App. 1990) ("By the Commission's receiving this testimony without objection, it became competent."); State v. White, 215 S.C. 450, 459, 55 S.E.2d 785, 787 (1949) ("The rule is well settled that evidence even though incompetent, if admitted without objection or motion to strike, is to be given the same probative force as that to which it would be entitled if it were competent."). Therefore, Appellant has not properly preserved this issue for appeal.

A. S.C. Code Ann. § 56-5-2953

Appellant argues that the hearing officer erroneously sustained the suspension because the arresting officer violated S.C. Code Ann. § 56-5-2953 (2008) by failing to notify Appellant that he was being videotaped at the breath test site. I disagree.

Section 56-5-2953(A) states that "a person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped." Thereafter, Section 56-5-2953(A)(2)(a) states in pertinent part:

- (2) The video recording at the breath test site must:
 - (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test...(emphasis added)

At the hearing, during cross-examination, Officer Watt stated that he notified Appellant of the taping. Appellant's attorney contends that both the videotape and Appellant's testimony show that the Appellant was not advised that he was being taped. While it appears that Officer Watt did not comply with 56-5-2953, that alone does not constitute the basis for a rescission of the suspension.

In hearings involving refusals to submit to breath tests, S.C. Code Ann. Section 56-5-2951 is determinative. That statute states in pertinent part:

...The scope of the hearing must be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was advised in writing of the rights enumerated in Section 56-5-2950
- (3) refused to submit to a test pursuant to Section 56-5-2950 \

Because Section 56-5-2951(f) limits the scope of the administrative hearing to a handful of issues, none of which includes the issue of whether the Department complied with Section 56-5-2953, the OMVH's decision will not be reversed on this ground. See S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 613 S.E.2d 544 (Ct. App. 2005).

In Nelson, a motorist's driver's license was suspended under Section 56-5-2951 for refusing to submit to chemical testing after being arrested for driving under the influence. The Department's hearing officer upheld the suspension. However, the circuit court reversed, concluding that the breath test was not offered within three hours of the arrest as required by Section 56-3-2953. The Court of Appeals subsequently reversed the circuit court's decision and reinstated the suspension. In doing so, the Court of Appeals acknowledged that the Department did not comply with Section 56-5-2953. Nonetheless, the Court held that law enforcement's non-compliance with Section 56-5-2953 did not warrant the rescission of the motorist's summary suspension. In making this holding, the Court of Appeals explained:

. . . [N]othing in the code instructs that a failure to comply with section 56-5-2953 warrants the dismissal of prosecution for failure to submit to testing pursuant to section 56-5-2950 . . . Because Nelson did not consent to testing, the scope of the hearing was limited to whether Nelson (1) was lawfully arrested, (2) was advised in writing of his section 56-5-2950 rights, and (3) refused to submit to a test. The hearing officer determined that Nelson had been lawfully arrested, had been advised of his rights, and had refused to submit to the test offered in accordance with section 56-5-2950. The circuit court's reversal of the hearing officer was outside the purview of the proper scope of review. Accordingly, we find the only relevant issues at the administrative hearing were not in dispute. The circuit court erred in considering the violation of the three-hour videotaping requirement.

Nelson, 364 S.C. at 524-26, 613 S.E.2d at 549-550.

Similarly, OMVH's decision should not be reversed in this case simply because Officer Watt failed to notify Appellant that he was being videotaped. The scope of the hearing simply did not include the issue of whether or not Section 56-5-2953 was violated. Thus, because compliance with Section 56-5-2953 is not a proper issue to be considered at the hearing, the OMVH Hearing Officer was correct in not considering it and the OMVH's decision must be affirmed.

B. SLED Policy 8:12.5.C.2 (February 10, 2009) and S.C. Code Ann. Section 56-5-2950(J)

Appellant also contends that it was reversible error to admit the refusal because S.C. Code Ann. § 56-5-2953(J) and SLED Policy 8:12.5.C.2 (February 10, 2009) were not complied with.

Section 56-5-2950(J) states that:

Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party. The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the

testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.

Moreover, pursuant to SLED Policy 8:12.5.C.2 (February 10, 2009):
if a statute requires a video recording of the breath test, the test operator will activate the video recording equipment, advise the subject they are being video recorded, and inform the subject verbally and in writing of their Implied Consent Rights...

While it is true that Officer Watt violated SLED policy by failing to advise the Appellant that he was being videotaped, the failure to do so does not result in an automatic exclusion of the evidence. Under S.C. Code Ann. Section 2950(J), the failure of SLED policy will result in an exclusion of evidence if the hearing officer finds that the failure (1) materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and (2) the hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure. The hearing officer in this case made the appropriate decision to allow evidence of the refusal. It is undisputed that the Appellant knew that he had the right to refuse the test, as evidenced by having received a copy of his Implied Consent Rights and having them read aloud to him and the fact that he did refuse to take the test. Therefore, I find that Officer Watt's failure to inform Appellant that he was being videotaped did not affect the fairness of the procedure and the suspension must be affirmed.

ORDER

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

AND IT IS SO ORDERED.

Carolyn C. Matthews
Administrative Law Judge

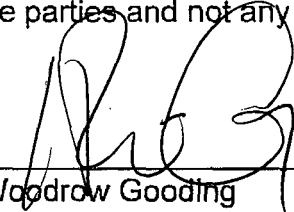
March 3, 2010
Columbia, South Carolina

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

March 2, 2012

By: _____



H. Woodrow Gooding
State Bar# 2180
Mark B. Tinsley
State Bar# 15597
Gooding and Gooding, PA
Post Office Box 1000
Allendale, South Carolina 29810
(803) 584-7676
Attorney for Appellant