

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Case Number 11-ALJ-21-0328-AP

Douglas Madison Appellant,

v.

South Carolina Department of Motor Vehicles Respondent.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT ERR IN HOLDING THAT THE VIDEO RECORDING REQUIREMENTS OF SC CODE ANN 56-5-2953 DO NOT APPLY TO THE SUSPENSION OF ONE'S DRIVING PRIVILEGES UNDER S.C. CODE ANN 56-5-2950 AND 56-5-2951?

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DID THE ADMINISTRATIVE LAW COURT ERR IN THE SUSPENSION OF APPELLANT'S DRIVING PRIVILEGES WHERE THE ARRESTING OFFICER FAILED TO PRODUCE AN AFFIDAVIT EXPLAINING WHY THE ARRESTING OFFICER COULD NOT PRODUCE A VIDEO RECORDING AS REQUIRED BY S.C. CODE ANN § 56-5-2953?

STATEMENT OF THE CASE

The Respondent accepts the Appellant's Statement of the Case.

ARGUMENT

The requirements of § 56-5-2953 do not apply to the suspension of one's driving privileges pursuant to § 56-5-2950 and 56-5-2951 and the Administrative Law Court's reliance upon *SCDMV v. Nelson* in determining this matter was not error. Section 56-5-2951 (F) specifically limits the scope of the implied consent hearing to whether the driver was (1) lawfully arrested or detained; (2) advised on writing and verbally of the rights enumerated in § 56-5-2950, and (3) refused to submit to the DataMaster test or submitted to the test and registered a breath alcohol concentration in excess of fifteen one-hundredths of one percent or above. In the instance case, the Hearing Officer found that the Appellant was lawfully arrested, properly advised of the Implied Consent Advisement, and submitted to the test and

registered a reported alcohol concentration in excess of fifteen one-hundredths of one percent, the test was administered by an individual who was qualified pursuant to Section 56-5-2950, the test was administered and the samples obtained were conducted pursuant to Section 56-5-2950, and the DataMaster machine was working properly. 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 § 56-5-2953, the OMVH's Final Order and Decision should not be reversed on this ground. See. *S.C. Dept of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E.2d 544 (Ct. App. 2005). Therefore, any alleged non-compliance with § 56-5-2953, which pertains to videotaping of the incident and breath testing site, is beyond the scope of the hearing.

The Appellant asserts that because *Nelson* was decided prior to the 2008 amendment (effective date February 10, 2009) to Section 56-5-2950, the holding is not applicable in this case. Prior to the 2008 amendment Section 56-5-2950 provided for the issuing of what is widely known as "implied consent rights" for persons under arrest for driving under the influence and provided that:

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

The amended statute 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: ...

The amendment clearly is not a mandate for video recording. Section 56-5-2953 mandates and provides for video recording of the incident and breath sites. Section 56-5-2950 is a mandate to provide notice to the motorists of the rights regarding the implied consent laws. Furthermore, the scope of an administrative hearing is statutory and provided in Section 56-5-2951 which was not amended to include a reference to video recording in the 2008 amendments to the Code. Had it been the intention of the legislature to make compliance

with Section 56-5-2953 an issue in an administrative hearing it would have amended Section 56-5-2951 to include it in the limited scope of the suspension hearing.

The Respondent submits that the Appellant is mistaken in his assertion that the intention of the legislature was to “include video recording in order to make the implied consent statutes consistent with the law surrounding the charge of DUI”. Adjudication of charges for violations of Sections 56-5-2930, 56-5-2933 and 56-5-2945 are criminal in nature and subject to different standards of proof than that for the adjudication of the propriety of a driver’s license suspension imposed pursuant to Section 56-5- 2951(A). Section 56-5-2951 (F) 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; or
- (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 sampled obtained were conducted pursuant to Section 56-5-2950; and
 - (d) The machine was working properly.

Even though the 2008 amendment to the Code rewrote this section, there was no change to the “scope of the hearing”. Had the legislature intended to expand the scope, it could and would have, definitively and unequivocally. It did not.

Appellant argues that Section 56-5-2951 requires strict compliance and cites the holding in *SCDMV v. McCarson*, 391 S.C. 136, 705 S.E. 2d 425 (2011). In *McCarson*, the issue was regarding the establishment of a lawful arrest which is the number one issue required to be established in an administrative hearing held pursuant to Section 56-5-2951. However, in this case, as outlined above, the issue of video recording is not among the statutory prerequisites that a Hearing Officer must establish prior to a driver’s license

suspension. Because there was no requirement for compliance with Section 56-5-2953, the Appellant's assignment of error based upon *McCarson* is misplaced. *McCarson* requires strict compliance with the statutory requirements of Section 56-5-2951, not 56-5-2953.

Because there was no statutory requirement for providing proof of compliance with the requirements of Section 56-5-2953, there was no undue prejudice to the Appellant by the arresting officer's failure to record the incident site or his failure provide an affidavit as provided by Section 56-5-2953. Because compliance with Section 56-5-2953 is not a proper issue to be considered at the administrative hearing, the Administrative Law Court did not err as a matter of law in affirming the Hearing Officer's decision.

CONCLUSION

For the reasons set forth above, the order of the administrative law judge sustaining the order of the OMVH hearing officer should be affirmed.

Respectfully submitted,


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March 19, 2012

Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden
Richland County

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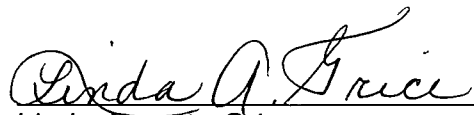
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CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief is in compliance with SCACR 211(b).



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March 21, 2012
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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02, filed August 13, 2007.

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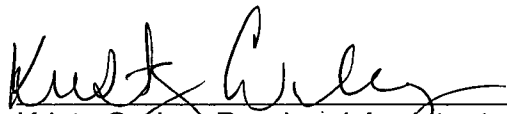
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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, March 21, 2012, I served one (1) copy of the Respondent's Final Brief by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Appellant at the address indicated below:

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