IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable H.W. Funderburk, Jr., Administrative Law Judge

Case No. 17-LJ-21-0102-AP

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

v.

Samuel James.....Respondent.

RESPONDENT'S REPLY BRIEF TO APPELLANT'S INITIAL BRIEF

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THE ADMINISTRATIVE LAW COURT'S *ORDER AFFIRMING DECISION* AND THE OFFICE OF MOTOR VEHICLES' *FINAL ORDER AND DECISION* DID NOT ERR IN RESCINDING THE REPONDENT'S SUSPENSION BECAUSE BOTH UPHELD THE PLAIN LANGUAGE OF S.C. CODE § 56-5-2950(A) THAT REQUIRES A BREATH SAMPLE TO BE TAKEN WITHIN TWO HOURS OF ARREST TO INSURE THE ACCRACY AND RELIABLITY OF THE TEST.

STATEMENT OF THE CASE

On March 6, 2016 a motor vehicle accident occurred involving Respondent and another driver. (ALC ROA, p. 9, lines 20-24). At 3:39 am Trooper Pence of the South Carolina Department of Public Safety was dispatched to the scene and arrived at approximately 4:13 am. (ALC ROA, p. 18, lines 9-11). She observed fire department personnel extracting Respondent from an overturned SUV. (ALC ROA, p. 10, lines 9-13). Respondent was transported to Colleton Medical Center. (ALC ROA, p. 9, lines 20-24). Thereafter, Trooper Pence cleared the accident scene after 6:30 am. (ALC ROA, p. 11, lines 1-5). She did not talk to Respondent at the scene nor conduct field sobriety tests. (ALC ROA, p. 11, lines 6-8). (ALC ROA, p. 12, lines 17-18). Shortly after clearing the scene Trooper Pence went to the hospital where she spoke to the Respondent and smelled a very strong odor of alcohol emitting from his person. (ALC ROA, p. 12, lines 1-22). Based on this evidence she arrested Respondent for DUI and read his Miranda Rights to him. (ALC ROA, p. 12, lines 20-24). Trooper Pence recorded in her notes the time of arrest was 6:45 am. (ALC ROA, p. 13, lines 6-7). The hospital did not release Respondent until after 7:00 am. (R. p. 21, lines 23-25). He was thereafter transported to the Colleton County jail for a breath test. (ALC ROA, p. 13, lines 1-6). Trooper Pence escorted Respondent to the Data Master room for the test.

(ALC ROA, p. 14, lines 10-21). She gave him a written copy of the DUI implied consent rights form and also read it aloud to him. *Id.* Respondent consented to the test and provided a breath sample at 8:48 am which was .17 at that time. (ALC ROA, p. 14, lines 14-16). Trooper Pence testified that the time of arrest could not be any earlier than 6:45 am but she had also recorded 7:17 am as the time of arrest. (ALC ROA, p. 14, lines 18-22). She stated she was unsure which time of arrest was accurate. *Id.*

Trooper Pence issued a Notice of Suspension of driver's license to Respondent (ALC ROA, p. 64). An Administrative Hearing, requested by Respondent, was held on August 5, 2016 before OMVH Bridgette Autry. (ALC ROA, p. 60-61). The suspension was rescinded by Final Order and Decision on February 9, 2017. (ALC ROA, p. 48-56). The hearing officer specifically found that there was conflicting evidence as to the time of arrest. (ALC ROA, p. 40). She also found that Respondent was advised of his Miranda rights at approximately 6:45 am, which was after his arrest. *Id.* Based on the evidence before her, she concluded that the time of arrest was 6:45 am and the time of the breath test was 8:48 am. Since Respondent did not collect the breath sample within the mandated two-hour timeframe post arrest, S.C. Code § 56-5-2950(A) was violated and the breath test results were excluded from evidence as a result. *Id.* Appellant filed a Motion for Reconsideration, which was denied on March 27, 2017. (ALC ROA, p. 41, 44-46). The Appellant thereafter filed this appeal to the Administrative Law Court. (ALC ROA, p. 32). On October 11, 2017 the Administrative Law Court ("ALC") issued an *Order Affirming Decision* of the hearing officer. On November 9, 2017 the ALC issued an *Order Denying Motion to Reconsider* that Appellant had filed with the court. The Appellant thereafter filed this appeal.

STANDARD OF REVIEW

The matter before the Court involves an appeal from a decision made by the Office of Motor Vehicles, which is an agency under the South Carolina Administrative Procedures Act (APA). S.C. Code § 1-23-310(2) (Supp. 2016). The APA determines the standard of judicial review in cases such as the one before the Court. S.C. Code § 1-23-380 (2013). The statute states in pertinent part, "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." The Administrative Procedures Act establishes the standard of review an administrative law court must apply when reviewing an agency's decision:

> 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 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 (2013).

The court can reverse or modify the agency decision if substantial rights of the appellant have been "prejudiced because the administrative findings, inferences, conclusions or decisions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or the administrative findings, inferences, conclusions or decisions are arbitrary or capricious or characterized by abuse of

discretion or clearly unwarranted exercise of discretion. *Marietta Garage, Inc. v. S.C. Dept. of Public Safety*, 337 S.C. 133, 522 S.E.2d 605 (Ct. App.1999); S.C. Code § 1-23-380(5) (e) & (f) (2013).

"Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Friends of the Earth v. Public Service Com'n of South Carolina*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010); *Lark v. Bi-Lo*, 276 S.C. 348, 461 S.E.2d 388 (1995). The possibility of reaching conflicting conclusions from the evidence presented to the agency does not prevent its findings from being support by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). Where an administrative agency's decision is supported by substantial evidence, the decision must be upheld on appeal. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 212, 394 S.E.2d 842 (1990).

The burden rests "squarely on the appellant to prove that substantive rights were prejudiced" based on one of the six criteria set forth in S.C. Code Ann. § 1-23-380. *S.C. Dept. of Corrections v. Mitchell*, 377 S.C. 256, 659 S.E.2d 233 (2008). "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). "The burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). The appellant tribunal must apply the substantial evidence rule and in doing so it must presume the findings of fact

of the administrative agency to be correct. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). On appeal the review Court can only reviewing evidence that was presented at the hearing.

ARGUMENT

As the ALC indicated in its *Order Affirming Decision*, the issue before this Honorable Court is the application of a statute. The statute in question is South Carolina Code § 56-5-2950(A) and (J)(Supp. 2015).

South Carolina Code § 56-5-2950(A) and (Supp. 2015) 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 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....**A breath sample taken for testing must be collected within two hours of the arrest.** (Emphasis added)

Furthermore South Carolina Code § 56-5-2950(J)(Supp. 2015) provides:

> 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. (Emphasis added)

The court must adhere to the plain and unambiguous language of a statute in making its decisions. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994). There is no

requirement for a court to read anything into a statute. South Carolina Code § 56-5-2950(A) plainly and unambiguously requires a sample to be taken within two hours of arrest. The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Kearse v. State Health & Human Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995); *Broughton v. South of the Border*, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct.App.1999). The evidence in the present case plainly showed that the breath test was administered more than two hours after arrest. Admission into evidence of the test results would have been a clear violation of the mandate of § 56-5-2950. Admission into evidence of tests results that occurred outside the time limit of two hours would have materially affected the fairness of the procedure in and of itself. The statute in question plainly provides for this provision. No further interpretation was needed by the hearing officer.

Appellant has failed to show convincingly that the OMVH decision to reinstate Respondent's driving privileges was unsupported by the evidence presented at the hearing. Appellant incorrectly argues that the hearing officer failed to explain how the collecting of the breath sample after the two hour timeframe materially affected the accuracy of the test. The hearing officer explained that "a breath sample is deemed not to be an accurate and reliable indicator of the level of alcohol while driving once two hours have passed from the time of arrest." (ALC ROA, p. 32). Furthermore, Appellant misconstrues the agency's conclusions in citing the case of *S. C. Dept. of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E.2d 544, 549-550 (Ct. App. 2005). Appellant states that that case held in part that "when a breath test is not performed within the required timeframe, the hearing office might still have considered the totality of the

circumstances and found valid reasons for the Department's failure to comply with the statute." In the case at hand, the hearing officer did evaluate the totality of the circumstances and concluded that Trooper Pence presented conflicting evidence regarding the time of arrest and actually admitted that she was unsure which arrest was accurate. (ALC ROA, p. 40). The possibility of reaching conflicting conclusions from the evidence presented to the agency does not prevent its findings from being support by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). The substantial evidence before the agency was that of the time of arrest, the time of the Miranda rights, and the time of the breath test. The Miranda rights were read to the Respondent at 6:45 am, just after being arrested. (ALC ROA, p. 40). Logically, the time of arrest was actually earlier than 6:45 am as arrest and the reading of the Miranda rights could not happen simultaneously. The breath test was administered at 8:48 am, three minutes outside the timeframe of the statute. This evidence which, considering the Record as a whole, would allow reasonable minds to reach the same conclusion that the administrative agency reached. *Lark v. Bi-Lo*, 276 S.C. 348, 461 S.E.2d 388 (1995). Thus, the test results were correctly excluded because the admission would have violated the clear mandate of South Carolina Code § 56-5-2950(J).

In its Brief to the ALC, Appellant attempted to rely on sources regarding alcohol elimination rates that were not presented at the hearing. Once again, Appellant now attempts to rely on these same cites in its Brief before this Honorable Court. Appellant did not put forth any such evidence or argument regarding alcohol elimination rates at the hearing and the hearing officer properly refused to rely on such evidence on

Appellant's Motion for Reconsideration. (ALC ROA, p. 41). Likewise, Appellant's introduction of such arguments in its Brief to the ALC was improper procedure. Such evidence is not now properly before this Court either. The Appellant has simply not met its burden of proving that any of its substantive rights were prejudiced.

CONCLUSION

Based on the above facts and arguments the *Final Order and Decision* dated March 27, 2017, the ACL's *Order Affirming Decision*, and the ALC's *Order Denying Motion to Reconsider* should be affirmed. Respondent's driver's license was properly reinstated.

Respectfully submitted,

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February 26, 2018

Margie Bright Matthews **Margie@BrightMatthewsLaw.com**

The South Carolina Court of Appeals
Clerk of Court
P. O. Box 11629
Columbia, SC 29211

Re: South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles vs. Samuel James
BMLF File No. : 16-5178
Docket No. : 16-OMVH-01-1480-CC
SCDL No. : 4871601

Dear Clerk:

In regards to the above matter, enclosed for filing is the original and one copy of the Respondent's Reply Brief to Appellant's Initial Brief.

Please send me a clocked in copy in the enclosed stamped envelope.

With kind regards, I am

Sincerely,

Margie Bright Matthews

MBM/ttm
Encs.

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