

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2017-001811

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SC Court of Appeals

Desmond Aldo McKelvey. Appellant,

v.

South Carolina Department of Motor Vehicles Respondent.

INITIAL BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

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STATEMENT OF ISSUES ON APPEAL

- 1) *THE HEARING OFFICER DID NOT ERR IN FINDING THAT APPELLANT IS A HABITUAL OFFENDER AS DEFINED BY S.C. CODE ANN. § 56-1-1020 (2006) AND § 56-1-1030 (SUPP. 2012), AND IN SUSTAINING THE SUSPENSION OF APPELLANT'S DRIVING PRIVILEGES.*
- 2) *BECAUSE APPELLANT FAILED TO PERFECT THIS APPEAL, THE APPEAL SHOULD BE DISMISSED WITHOUT REACHING THE MERITS OF THE CASE.*

STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to the appeal of Desmond A. McKelvey, who seeks review of the August 11, 2017 *Order* from the Administrative Law Court (hereinafter, "ALC") and the March 2, 2017 *Final Order & Decision* from the Office of Motor Vehicle Hearings (hereinafter, "OMVH") sustaining the Appellant's habitual offender suspension. The Respondent South Carolina Department of Motor Vehicles (SCDMV) seeks to have the *Order* of the ALC and the *Final Order and Decision* of the OMVH affirmed and the suspension remain.

The Appellant was arrested on February 12, 2012 for Driving with an Unlawful Alcohol Concentration (Ticket #F487215) and was convicted of this offense on January 15, 2013 (ALC R. p. 36). This conviction was posted to Appellant's driving record on January 29, 2013 (ALC R. p. 40).

The Appellant was arrested on November 26, 2012 for Driving Under Suspension (Ticket 12616GT) and was convicted of this offense on May 6, 2014 (ALC R. p. 35). This conviction was posted to Appellant's driving record on May 15, 2014 (ALC R. p. 38). On May 15, 2014, Respondent sent Appellant a letter warning him that any further

convictions could result in him being declared a habitual offender and undergoing a habitual offender suspension (ALC R. p. 33).

The Appellant was arrested on May 3, 2014 for Reckless Driving (Ticket H083080) and was convicted of this offense on November 25, 2014 (ALC R. p. 34). This conviction was posted to Appellant's driving record on December 12, 2014 (ALC R. p. 38). On December 12, 2014, Respondent notified Appellant that he had been declared a habitual offender and would undergo a habitual offender suspension starting on January 11, 2015 (ALC R. p. 32).

On January 8, 2015, Appellant requested a hearing before the OMVH to challenge this habitual offender suspension (ALC R. p. 59-60). A hearing was held before the OMVH on May 5, 2016 (ALC R. p. 5-12). Following that hearing, the OMVH issued its' March 2, 2017 *Final Order & Decision* sustaining this habitual offender suspension (ALC R. p. 20-26). The March 2, 2017 *Final Order & Decision* held that Appellant was convicted of three (3) separate and distinct traffic violations within a three (3) year period and, as a result, the Appellant's driver's record as maintained by SCDMV meets the criteria of a Habitual Offender as defined by S.C. Code Ann. § 56-1-1020 (2006) and § 56-1-1030 (Suppl. 2012). *Id.*

An appeal was timely filed in the ALC on March 31, 2017. By *Order* filed August 11, 2017, the ALC affirmed the OMVH's *Final Order and Decision* sustaining the suspension of Appellant's driver's license and driving privileges.

This appeal followed.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code Section 1-23-380.

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....

- (5) 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.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

[Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.

We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc., supra*. In *Lark*, our Supreme Court quoted *Consolo v. Federal Maritime Commission*, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also, Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion.

Dorman v. DHEC, supra; Hamm v. American Telephone & Telegraph Co., supra; Chemical Leaman Tank Lines v. South Carolina Public Service Commission, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis, 260 S.C. 54, 194 S.E.2d 191 (1973).*

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). 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).*

ARGUMENT

- 1) *THE HEARING OFFICER DID NOT ERR IN FINDING THAT APPELLANT IS A HABITUAL OFFENDER AS DEFINED BY S.C. CODE ANN. § 56-1-1020 (2006) AND § 56-1-1030 (SUPP. 2012), AND IN SUSTAINING THE SUSPENSION OF APPELLANT'S DRIVING PRIVILEGES.*

State law defines a habitual offender as any person whose record as maintained by the Department of Motor Vehicles shows that he has accumulated the convictions for three or more separate and distinct major offenses or ten or more separate and distinct minor offenses committed within a three (3) year period. S. C. Code Ann. § 56-1-1020 (2006). The Appellant, according to his driving record, was charged with and convicted in three separate and distinct major traffic offenses committed within a three year period (ALC R. p. 32-44). The ALC Record on Appeal shows that Appellant was charged with

Driving with an Unlawful Alcohol Concentration on February 12, 2012, and convicted of this violation on January 15, 2013; charged with Driving Under Suspension on November 26, 2012, and convicted of this violation on May 6, 2014; and, charged with Reckless Driving on May 3, 2014, and convicted of this violation on November 25, 2014. *Id.* It is therefore undisputed that the record as maintained by the SCDMV establishes a *prima facie* case and supports the finding that the Appellant is a habitual offender as defined by the statute.

There is nothing in the ALC Record on Appeal which challenges the findings and conclusions of the OMVH Hearing Officer. Accordingly, the ALC Record contains substantial evidence to support the reasoning and determination reached by the Hearing Officer. *See Lark v. Bilo, Inc.*, 276 S.C. 130, 276 S.E.2d 304.

Appellant argues that that the three year period the OMVH examines to determine if he committed three major offenses within three years should run from the OMVH hearing date. This is in direct contravention with South Carolina law. S.C. Code §56-1-1020(d) states:

For purposes of determining the number of convictions for separate and distinct offenses committed during any three-year period, a person shall be deemed to be convicted of an offense on the date the offense was committed if he is subsequently convicted of committing such offense.

Thus, it is clear that the offense date is the relevant date for determining whether someone committed three major violations within a three year period or not. If the OMVH hearing date or the conviction dates were used, delays in bringing a case to hearing or trial could push one or more of the conviction(s) outside the three year period, thus defeating the purpose of the S.C. Code §56-1-1010 et seq. In fact, this case is a great

example of exactly that issue. This hearing was originally scheduled to take place on March 24, 2015, but it was continued three times (twice at the request for Appellant and once due to the needs of the OMVH), which pushed the actual hearing date to May 5, 2016 (ALC R. p. 45-48 and 53-56). So, even if Appellant's argument regarding the hearing were accurate, if this hearing had taken place on the date it was originally scheduled, then all three of these offenses would have occurred with three years of the hearing date. For the reasons outlined above, however, the offense date, not the hearing date, is the relevant date for determining whether someone committed three major violations within a three period or not.

Because the Record contains substantial evidence to support the reasoning and determination reached by the Hearing Officer and affirmed by the Administrative Law Court this case should be affirmed. *See Lark v. Bilo, Inc.*, 276 S.C. 130, 276 S.E.2d 304.

2) *BECAUSE APPELLANT FAILED TO PERFECT THIS APPEAL, THE APPEAL SHOULD BE DISMISSED WITHOUT REACHING THE MERITS OF THE CASE.*

Throughout this appeal the Appellant repeatedly failed to perfect this appeal in accordance with the Rules of the Court of Appeals.¹ Appellant was given numerous opportunities to correct these failures. Most recently, however, Appellant failed to take corrective action for a deficiency within the deadline set by this Court and, for that reason, this appeal should be dismissed without reaching the merits of the case. Specifically, on January 8, 2018 this Court issued an *Order* stating “[w]ithin thirty days of the date of this order, Appellant shall serve and file Appellant’s initial brief.” Despite this *Order*, Appellant did not file his initial brief until February 12, 2018. Thus,

¹ See deficiency notices dated September 5, 2017, October 5, 2017, October 17, 2017, November 9, 2017, and January 4, 2018.

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Appellant did not file his initial brief four days after the deadline set forth in this Court's January 8, 2018 *Order*. For this reason alone, this appeal should be dismissed without reaching the merits of the case.

Further, however, although the Proof of Service attached to Appellant's initial brief stated that Appellant's initial brief was served on SCDMV on February 5, 2018, the copy of Appellant's initial brief received by SCDMV contained the February 12, 2018 clocked in stamp from the Court of Appeal's Clerk of Court Office. In fact, SCDMV's copy of Appellant's initial brief looks exactly the same as the one contained in the Clerk of Court's Record in C-Track showing a filed date of 2/12/2018 and titled "Correspondence – Incoming (Regarding Initial Brief)."² Additionally, the envelope containing Appellant's initial brief mailed to SCDMV is post marked February 12, 2018.³ Obviously, Appellant did not serve a document on SCDMV on February 5, 2018 if that same document contains a February 12, 2018 clocked in stamp from the Court of Appeal's Clerk of Court Office. So, in addition to not filing his initial brief within the deadline set by this Court, Appellant also did not serve his initial brief within the deadline set by this Court, and for this reason this appeal should be dismissed without reaching the merits of the case.

CONCLUSION

For the reasons set forth above, the *Order* of the ALC sustaining the *Final Order and Decision* of the OMVH should be affirmed or, alternatively, this appeal should be dismissed without reaching the merits of the case due to Appellant's failure to file and

² SCDMV can provide a copy of Appellant's initial brief received by SCDMV should the Court want to review it.

³ SCDMV can provide a copy of this envelope should the Court want to review it.

serve his initial brief within the deadline set by this Court via the *Order* dated January 8, 2018.

Respectfully submitted,



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February 26, 2018
Blythewood, South Carolina

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Desmond Aldo McKelvey Appellant,

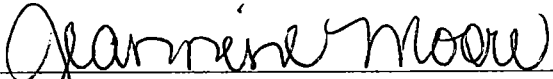
v.

South Carolina Department of Motor Vehicles Respondent.

PROOF OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, February 26, 2018, I served one (1) copy of the Respondent's Initial Brief and Designation of Matter by depositing with the United States Postal Service, correct postage prepaid, to *Pro Se* Appellant at the address indicated below:

Desmond A. McKelvey
2213 Bentley Court
Columbia, South Carolina 29210
***Pro Se* Appellant**


Jeannine (Nina) Moore, Paralegal
Office of General Counsel

February 26, 2018
Blythewood, South Carolina

Henry McMaster
Governor



Kevin A. Shwedo
Director

State of South Carolina
Department of Motor Vehicles

February 26, 2018

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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**RE: Desmond Aldo McKelvey v. South Carolina Department of Motor Vehicles
Appellate Case No: 2017-001811**

Dear Ms. Kitchings:


Enclosed for filing please find the following documents:

1. Unbound original and two (2) copies of the Respondent's Initial Brief;
2. Original and two (2) copies of the Respondent's Designation of Matter To Be Included In the Record on Appeal with Certificate of Counsel of SCACR, Rule 209 (c) compliance; and
3. Certificate of Service of these documents on counsel for the Appellant.

Please file the original and copies necessary for SCACR compliance and return the extra copies to me with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter.

In kind regards,


Jeannine (Nina) Moore, Paralegal
Office of General Counsel

Enclosures

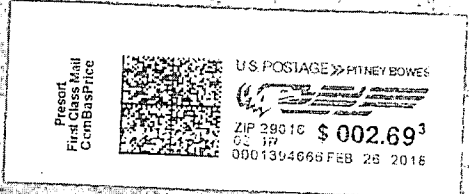
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The Honorable Jenny Abbott Kitchings
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