

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
ADMINISTRATIVE LAW COURT

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SC Court of Appeals

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

Appellate Case No. 2017-002394

South Carolina Department of Motor Vehicles Appellant,

v.

Samuel James Respondent.

AMENDED RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

South Carolina Department of Motor Vehicles,) Docket No. 17-ALJ-21-0102-AP
)

Appellant,)
)

vs.)
)

Samuel James,)
)

Respondent.)
)

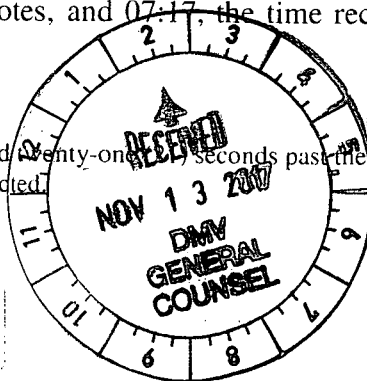
**ORDER DENYING
MOTION TO RECONSIDER**

This matter comes before the Administrative Law Court ("ALC" or "Court") on a Motion to Reconsider filed October 20, 2017, by the South Carolina Department of Motor Vehicles ("Department"). The Department asks the Court to reconsider its Final Order issued on October 11, 2017, affirming the hearing officer's decision.

The Department argues that neither this Court nor the hearing officer specifically explained how the three-minute¹ delay affected the accuracy or reliability of the breath alcohol test. The Department is correct that the amendment of S.C. Code Ann. § 56-5-2950(J) added the requirement that the trial judge or hearing officer 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." At the same time, the legislature added a bright line requirement that a breath sample must be collected within two hours of arrest. The Department contends that trial judges and hearing officers must explain why or how they determined a sample taken outside the statutorily required two-hour window materially affected the accuracy or reliability of the test results. That would inappropriately require the judge or hearing officer to explain why the legislature added the two-hour time limit. A trial court's job is to apply the law as written, not to guess at its purpose in order to enlarge or condense its application.

The Department also complains that the hearing officer did not explain how she decided between 06:45, the time written in the officer's notes, and 07:17, the time recorded on the breathalyzer

¹ The delay was approximately two (2) minutes and twenty-one (21) seconds past the two-hour window from the time of arrest until Respondent's sample was collected.



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SC ADMIN. LAW COURT

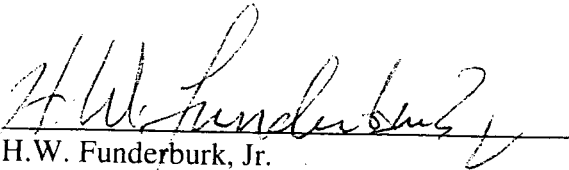
report, in determining the time of arrest. The arresting officer testified that she advised Respondent of his Miranda rights at 6:45 AM, after his arrest.

The reviewing court must defer to the hearing officer's factual finding when there is "substantial" evidence to support it. The arresting officer provided both times and could not say which one was accurate. The hearing officer also considered the officer's statement about the time she provided the Miranda rights to fix the time of arrest at 06:45. Thus, there is substantial evidence to support the hearing officer's finding. That finding is binding on this Court.

Finally, in a footnote, the Department denies that the purpose of the breath test result is to provide an accurate or reliable indicator of the alcohol level while an individual is driving. That argument ignores the reason Section 56-5-2950 exists, which is to establish whether a person has operated a motor vehicle while under the influence of alcohol or drugs. S.C. Code Ann. § 56-5-2930 (Supp. 2016). If breath, field sobriety, blood, urine, or other scientific tests cannot reliably determine whether an individual is under the influence of alcohol or drugs while driving, the enforcement of Section 56-5-2930 would be impossible.

Accordingly, the Department's Motion to Reconsider is **DENIED**.

November 9, 2017
Columbia, S.C.


H.W. Funderburk, Jr.
Administrative Law Judge

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SC ADMIN. LAW COURT

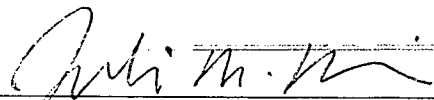
CERTIFICATE OF SERVICE

I, Julia M. Miller, 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).

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November 9, 2017
Columbia, SC

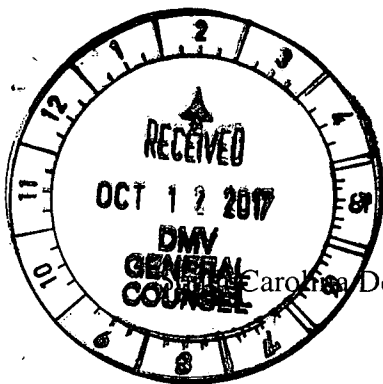


Julia M. Miller
Judicial Law Clerk

FILED

NOV 09 2017

SC ADMIN. LAW COURT



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Motor Vehicles,)
)
Appellant,)
)
vs.)
)
Samuel James,)
)
Respondent.)
_____)

Docket No. 17-ALJ-21-0102-AP

ORDER AFFIRMING
DECISION

STATEMENT OF THE CASE

This is an appeal before the Administrative Law Court (“ALC” or “Court”) from a Final Order and Decision dated February 9, 2015, issued by Brigitte B. Autry, an Administrative Hearing Officer of the Office of Motor Vehicle Hearings (“OMVH”). The South Carolina Department of Motor Vehicles (“SCDMV”) moved for a reconsideration of the February 9th OMVH decision. Administrative Hearing Officer Autry denied the Motion to Reconsider on March 15, 2017. The Administrative Law Court has jurisdiction to review SCDMV’s appeal pursuant to S.C. Code Ann. § 1-23-660(D) (Supp. 2016).

On July 19, 2017, SCDMV filed a Motion to Resolve Appeal Adversely to Respondent and in Appellant’s favor or, Alternatively, to Strike Respondent’s Brief. Respondent did not respond to the motion.¹

SCALC Rule 38 provides that the Court “may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided in these rules or by order of the Court.” Rule 208(a)(4), SCACR similarly states, “Upon failure of respondent to timely file a brief, the appellate court may take such action as it deems proper.” The issue in this case involves the application of a statute. The Court, with or without Respondent’s brief, must construe the statute and its application to the case at hand. Therefore, the Court denies Appellant’s Motion to Resolve Appeal Adversely to Respondent.

FILED

OCT 11 2017

¹ Respondent submitted a brief on September 25, 2017. No motion to allow late filing was included with the brief or filed subsequently.

SC ADMIN. LAW COURT

BACKGROUND

Trooper Pence of the South Carolina Department of Public Safety was dispatched to the scene of a two-car accident on US 17A/Hendersonville Highway in Colleton County, South Carolina. She arrived at the location at approximately 4:13 A.M. on March 6, 2016. After investigating the accident, she determined that Respondent was at fault. Respondent was trapped in his vehicle and had to be extracted by the local fire department. After extraction, Respondent was transported to Colleton Medical Center.

When Pence arrived at the hospital, Respondent was being treated and having mud, which was impacted behind his eye, removed. Pence testified that her notes showed 06:45 [A.M.] on March 6, 2016, as the time of arrest. The Breath Alcohol Analysis Test Report records an arrest time of 07:17. Pence testified that she did not know which was the more accurate time.

Sometime after 7:00 A.M., Respondent was released from the hospital and given clothes to wear. Pence took Respondent to her vehicle and, for the second time, advised him of his Miranda rights before transporting him to the Colleton County jail for a breath alcohol test.

Once there, Pence gave Respondent a copy of the Advisement of Implied Consent Rights form and read it to him. The mandatory twenty-minute observation period began at 8:22:18. At the conclusion of the observation period, the machine went through its self-tests and simulation test. Respondent consented to the breath test and provided a breath sample at 8:48:21. Because of the test result, Pence issued a Notice of Suspension, and Respondent surrendered his license.

On March 21, 2016, Respondent requested a contested case hearing pursuant to a Notice of Suspension issued by the SCDMV. The contested case hearing was held on August 5, 2016. After reviewing the record and considering all the evidence, the hearing officer rescinded the suspension of the Respondent's driving license or driving privileges. SCDMV appealed.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. S.C. Code Ann. § 1-23-600 (Supp. 2016). The ALC has jurisdiction to hear appeals of OMVH decisions pursuant to S.C. Code Ann. § 1-23-660(D) (Supp. 2016). As the OMVH is an "agency"

under the South Carolina Administrative Procedures Act (APA), the APA's standard of review governs appeals from the decisions and orders of the APA. S.C. Code Ann. §§ 1-23-310(2) (Supp. 2016); *See also Byerly Hosp. v. South Carolina State Health & Human Services Finance Com'n*, 319 S.C. 225,229,460 S.E.2d 383,385 (1995). Section 1-23-380(5) of the South Carolina Code provides the standard of review to be utilized by appellate bodies, including the ALC, when reviewing agency decisions:

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. Ann. § 1-23-380(5) (Supp. 2016); *See also* S.C. Code Ann. §1-23-600(E) (Supp. 2016) (directing administrative law judges to conduct appellate review in the same manner prescribed in Section 1-23-380).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Public Service Com'n of South Carolina*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010); *Bilton v. Best Western Royal Motor Lodge*, 282 S.C. 634, 641,321 S.E.2d 63, 68 (Ct. App. 1984). The fact that the record 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 Com'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); *Bilton*, 282 S.C. at 641, 321 S.E.2d at 68 (citing *Lark v. Bi-Lo*, 276 S.C. 130,276 S.E.2d 304 (1981)).

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. *Byerly Hosp., supra*. 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) (citing *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 118 (1981)). An appeal from an action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 212, 394 S.E.2d 842 (1990).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing *Kearse v. State Health & Human Services Fin. Com'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). "A reviewing court 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." *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark*, 276 S.C. at 136, 276 S.E.2d at 307 (1981)). 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.

ISSUE ON APPEAL

Did the OMVH Hearing Officer err in holding that Respondent's breath test result could not be considered?

DISCUSSION

The OMVH hearing officer found that Respondent was arrested at 6:45 A.M. and the breath test was administered at 8:48 A.M., more than two hours after the arrest.² S.C. Code Ann. § 56-5-2950(A) (Supp. 2015) requires that a "breath sample taken for testing must be collected within two hours of the arrest." Section 56-5-2950(J) provides as follows:

² Pence testified that she was dispatched to the scene at 3:30 A.M. Therefore, more than five hours elapsed between the time of the accident and the administration of the breath test.

The failure to follow 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 ... 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 concluded that the breath test result is not an accurate or reliable indicator of the alcohol level while driving if administered more than two hours after arrest. In this case, not only was the statutory mandate exceeded, but the sample was taken and tested at least five hours after the accident.

Appellant also argues, based on *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E.2d 544 (Ct. App. 2005), that a hearing officer could have found valid reasons for the Department's failure to comply with statutory procedures. *Nelson*, however, deals with videotaping based on an earlier version of the statute which requires videotaping to be completed within three hours of the person's arrest and excuses compliance in specified circumstances and provides that failure to produce the video required is "not alone a ground for dismissal of any charge made pursuant to Section 56-5-2950" and other sections cited in S.C. Code Ann. § 56-5-2953(A), (B) (Supp. 2002). The statute in effect at the time of this case require a sample to be taken and provides for the exclusion of any test results obtained when the provisions of this section (§ 56-5-2950) have not been followed.

The Department also raised in its reconsideration motion and in its brief scientific evidence of elimination rates and peak concentration times for blood alcohol associated with the consumption of alcohol. This evidence was not presented at the hearing, and its consideration was properly refused by the Hearing Officer. Likewise, this Court cannot consider evidence that was not subject to the adversarial process and the application of which depends on unknown times of consumption.

The Hearing Officer's factual findings are supported by the substantial evidence in the record as a whole. The suspension of Respondent's driver's licenses is also not warranted as a matter of law. It is, therefore,

ORDERED that the OMVH decision appealed from is **AFFIRMED**, and Respondent's driver's license or driving privilege should be restored upon his compliance with the laws of this State.

AND IT IS SO ORDERED.

October 11, 2017
Columbia, S.C.

A handwritten signature in black ink, appearing to read "H.W. Funderburk, Jr.", written over a horizontal line.

H.W. Funderburk, Jr.
Administrative Law Judge

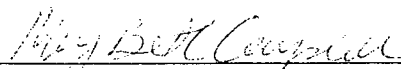
CERTIFICATE OF SERVICE

I, Mary Elizabeth Campbell, 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).

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Post Office Box 1498
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October 11, 2017
Columbia, S.C.



Mary Elizabeth Campbell
Staff Attorney

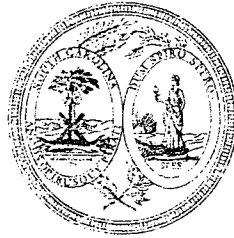
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OCT 11 2017

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
Administrative Law Court

H.W. Funderburk, Jr.
Administrative Law Judge



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May 16, 2017

Margie Bright Matthews
Bright Matthews Law Firm, LLC
P.O Box 499
Walterboro, SC 29488

Re: S.C. Dept. of Motor Vehicles vs. Samuel James
17-ALJ-21-0102-AP

Ms. Bright-Matthews:

The Court is in receipt of your letter, dated May 8, 2017, in which you request the aforementioned matter be stayed pending the end of the General Assembly session.

Upon a review of the file, it appears the Record in this case is due on or before May 30, 2017. Appellant's brief is not due until 30 (thirty) days after the Record is filed, therefore Respondent's Brief would not be due until 30 (thirty) days beyond that. While the session should be over well before your brief is due, Judge Funderburk will, of course, consider any motions requesting an extension; should one be required.

Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Julia M. Miller".

Julia M. Miller
Judicial Law Clerk

cc: Brandy Duncan, Esquire
Warren V. Ganjehsani, Esquire



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REDACTED

THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT

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

Appellants,

v.

Samuel James,

Respondent.

Docket No. 17-ALJ-21-0102-AP
SCDL No.

NOTICE OF MOTION
AND MOTION FOR
RECONSIDERATION

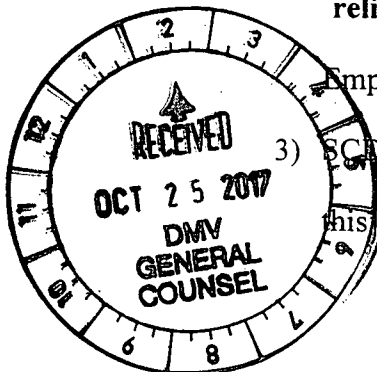
On October 12, 2017, the South Carolina Department of Motor Vehicles ("SCDMV") received the Order Affirming Decision filed October 11, 2017. A copy of that Order Affirming Decision is attached as Exhibit A. The SCDMV respectfully moves the Administrative Law Court for reconsideration based upon the following:

- 1) This Court held "The Hearing Officer concluded that the breath test result is not an accurate or reliable indicator of the alcohol level while driving if administered more than two hours after arrest."
- 2) S.C. Code §56-5-2950(J) states, in part:

The failure to follow 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 material affected the accuracy or reliability of the test results or the fairness of the procedure.**

Emphasis added.

- 3) SCDMV's objection to the Hearing Officer's Final Order and Decision and, now this Court's Order Affirming Decision, is the fact that S.C. Code §56-5-2950(J)



A handwritten signature in black ink, appearing to be "B. J. [unclear]".

FILED

OCT 20 2017

SC ADMIN. LAW COURT

requires a ruling that specifically states how the alleged¹ three minute delay in testing materially affected the accuracy or reliability of the test results or the fairness of the procedure. Neither Court has provide such an explanation. The OMVH Hearing Officer simply stated that because S.C. Code §56-5-2950(A) requires collection of the sample within two hours of arrest, then any sample collected more than two hours after arrest “clearly... is deemed not to be an accurate and reliable indicator of the level of alcohol while driving....”² In other words, the OMVH Hearing Officer basically said, because the statute says two hours after arrest is the deadline for collecting a breath sample, then any breath sample collected more than two hours after arrest will always be inaccurate and unreliable without any further factual or scientific analysis.³ This logic flies in the face of S.C. Code §56-5-2950(J), which requires specific rulings be made as to how the delay materially affect the accuracy and reliability of the test results or the fairness of the procedure. In other words, the Hearing Officer was required, by statute, to provide a ruling that gave reasons why the alleged delay in this specific case materially affected the accuracy or reliability of the test results or the

¹ There is discussion in the *Brief of Appellant* and in this *Motion for Reconsideration* regarding the possible inaccuracy of the time deemed by the OMVH Hearing Officer to be the time of arrest.

² Nothing in S.C. Code §56-5-2950 states or even indicates that the breath test result is supposed to provide “an accurate or reliable indicator of the alcohol level while driving...” as was required by the OMVH Hearing Officer in this case. (Emphasis added). Rather, S.C. Code §56-5-2950 merely requires that the breath test result provide an accurate or reliable indicator of the blood alcohol concentration at the time of testing.

³ Additionally, the OMVH Hearing Officer’s ruling is an indication that even if the State had an expert witness testify regarding the average rate of elimination (or even this specific driver’s typical rate of elimination) and peak concentrations, it would still find the three minute delay, based on the delay alone, had rendered the test inaccurate and unreliable.



fairness of the procedure. The OMVH Hearing Officer's failure to provide a ruling giving these reasons is even more important and necessary in this case because there are questions as to the exact time of arrest. Specifically, Trooper Pence testified that she did not leave the scene of the collision until "after 6:30" (R. p. 11, lines 4-5). Trooper Pence then travelled from the collision scene located at Hendersonville Highway in Colleton County to the Colleton Medical Center, approximately a 10-20 minute drive, where she met with and spoke with Respondent (R. p. 9, lines 22-24 and p. 12, lines 1-17). Only after that meeting was Respondent arrested (R. p. 12, lines 22-23). Trooper Pence testified that she had written in her notes that the time of arrest was "06:45," but on the breath test report the time of arrest was noted as "07:17." Thus, there is a significant factual question about whether Trooper Pence could have cleared the collision scene after 6:30 a.m., traveled to Colleton Medical Center (10-20 minutes away), interviewed Respondent, and arrested him by 6:45 a.m. Despite these serious factual issues, the OMVH Hearing Officer did not explain how she determined that 6:45 a.m. was the time of arrest, and then the OMVH Hearing Officer compounded this error by failing to explain how she determined that the collection of Respondent's breath sample at 8:48 a.m. materially affect the accuracy or reliability of the test results or the fairness of the procedure. Because the OMVH Hearing Officer did not provide rulings, analysis, or findings to explain how she determined the accuracy or reliability of the test results or the fairness of the procedure was impacted, her decision is in violation of S.C. Code §56-5-2950(J), made upon



unlawful procedure, affected by error of law, and arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

- 4) The OMVH Hearing Officer's ruling, without a discussion about how the she found the alleged three minute delay affected the accuracy or reliability of the test results or the fairness of the procedure, is also remarkable given:

- a. S.C. Code §56-5-2950(A) allowing blood and urine samples to be collected within three hours of the arrest;
- b. S.C. Code §56-5-2950(D) allowing blood and urine sample to be collected by a person of the driver's choosing to conduct additional tests at the driver's expense and no time limit is set on when those collections must occur;
- c. Prior to Noon on February 10, 2009, there was no time limit for when a breath, blood, or urine sample could be collected from a driver suspected of driving under the influence; and
- d. Prior to Noon on February 10, 2009, S.C. Code §56-5-2950(e) simply stated:

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.

After Noon on February 10, 2009, S.C. Code §56-5-2950(J) stated:

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, underlining indicates the words that were added to the statute with this revision). Thus, it is clear that the Legislature intended for trial judges and hearing officers to explain why or how they determined a sample taken outside the two hour window was found to be inaccurate, unreliable, or to have affected the fairness of the procedure. In this case, no such explanation was provided, which violated the requirements of S.C. Code §56-5-2950(J).

CONCLUSION

Based upon the foregoing arguments, the SCDMV respectfully requests that the Order Affirming Decision be withdrawn, the Final Order and Decision of the OMVH reversed, and the suspension of Respondent's driver's license be upheld.

Alternatively, SCDMV respectfully requests that the Order Affirming Decision be withdrawn and an Order of Remand be issued to the OMVH requiring the OMVH Hearing Officer to explain:

- 1) how she determined the time of arrest in this case; and
- 2) how she determined the alleged three minute delay affected the accuracy or reliability of the test results or the fairness of the procedure in this case.



Respectfully submitted,



PHILIP S. PORTER

Deputy General Counsel

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General Counsel

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October 20, 2017

Blythewood, South Carolina

REDACTED

THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA

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

ALJ Docket No. 17-ALJ-21-0102
SCDL No.

v.

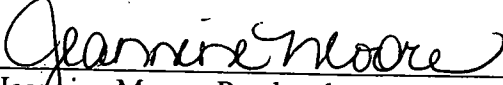
CERTIFICATE OF SERVICE

Samuel James,

Respondent.

I HEREBY CERTIFY that on October 20, 2017, I mailed, via USPS first class mail, a true and correct copy of the foregoing *Notice of Motion and Motion for Reconsideration* upon the following:

Margie Bright Matthews, Esquire
Bright Matthews Law Firm, LLC
P.O. Box 499
Walterboro, SC 29488


Jeannine Moore, Paralegal
Office of General Counsel
SCDMV

Blythewood, South Carolina

FILED
OCT 20 2017
SC ADMIN. LAW COURT

**THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA**

South Carolina Department of Motor
Vehicles,

Appellant,

v.

Samuel James,

Respondent.

Docket No. 17-ALJ-21-0102-AP

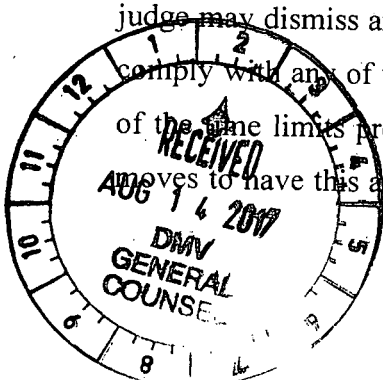
**NOTICE OF MOTION
AND MOTION TO RESOLVE
APPEAL ADVERSELY TO RESPONDENT
AND IN APPELLANT'S FAVOR
OR, ALTERNATIVELY, TO
STRIKE RESPONDENT'S BRIEF**

TO: RESPONDENT SAMUEL JAMES AND HIS ATTORNEY, PLEASE TAKE NOTICE that Appellant South Carolina Department of Motor Vehicles ("SCDMV") will move before this Honorable Court ten (10) days from this notice or as soon thereafter as the matter may be heard or determined, to resolve the above-referenced action in Appellant's favor or, alternatively, to strike Respondent's brief in full. The grounds of this motion are set forth below.

Rule 37(A), SCALCR requires Respondent to file one copy of his brief within thirty (30) days after the Appellant's brief is filed. Additionally, Rule 37(C), SCALCR requires Respondent to serve a copy of his brief on all parties to the appeal within thirty (30) days after the Appellant's brief is filed. Additionally, on April 14, 2017, this Court issued a Notice of Assignment that specifically stated Respondent's brief was "due within thirty (30) days after the Appellant's Brief is filed."

Brief of Appellant was filed on May 31, 2017 and served on the parties. Therefore, Respondent's brief was due to be filed and served on the other parties by no later than June 30, 2017 (Rule 37(A), SCALCR). As of the filing of this motion, Respondent has failed to file or serve his brief. The undersigned is aware that Respondent's counsel is a South Carolina State Senator. However, SCDMV is not aware of Respondent requesting an extension for the filing date of Respondent's brief due to Respondent's counsel's legislative duties.

Rule 38, SCALCR provides that "[u]pon motion of any party... an administrative law judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided in these rules or by order of the Court." Thus, Appellant SCDMV moves to have this appeal resolved adversely to Respondent for Respondent's failure to comply



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JUL 19 2017

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SC ADMIN LAW COURT

with the applicable Rules by failing to file and serve his brief within the time limits set by Rule 37(A), SCALCR and this Court's Notice of Assignment filed April 14, 2017. Alternatively, if this case is allowed to proceed before this Court, Appellant SCDMV moves to have Respondent's Brief struck in its entirety.

And we so move.



BRANDY A. DUNCAN, SC Bar #72052

Assistant General Counsel

FRANK L. VALENTA, JR., SC Bar # 5682

General Counsel

PHILIP S. PORTER, SC Bar # 4526

Deputy General Counsel

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Email: hearingsprocessingunit@scdmv.net

July 19, 2017

Blythewood, South Carolina

FILED

JUL 19 2017

SC ADMIN. LAW COURT

IN THE SOUTH CAROLINA ADMINISTRATIVE
IN THE STATE OF SOUTH CAROLINA

South Carolina Department of Motor Vehicles,

Appellant,

v.

Samuel James,

Respondent.

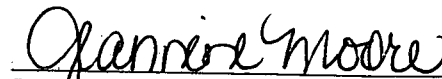
Docket No. 17-ALJ-21-0102-AP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 19, 2017, I mailed, via USPS first class mail, a true and correct copy of the foregoing **Notice of Motion and Motion to Resolve Appeal Adversely to Respondent and in Appellant's Favor or, Alternatively, to Strike Respondent's Brief** upon the following:

Margie Bright Matthews, Esquire
Bright Matthews Law Firm, LLC
Post Office Box 499
Walterboro, South Carolina 29488

As Counsel of Record for the Respondent Samuel James.



Jeanine (Nina) Moore, Paralegal
Office of General Counsel
SCDMV

Blythewood, South Carolina

FILED

JUL 19 2017

SC ADMIN. LAW COURT

THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT
ALJ DOCKET NO: 17-ALJ-21-0102-AP

APPEAL FROM SOUTH CAROLINA
OFFICE OF MOTOR VEHICLES HEARINGS
OMVH DOCKET NO: 16-OMVH-01-1480-CC

BRIGETTE B. AUTRY, OMVH HEARING OFFICER

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY AND
SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES..... APPELLANTS

VS

SAMUEL JAMES.....RESPONDENT

Of Whom South Carolina Department of Motor Vehicles is the Appellant

BRIEF OF APPELLANT
SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES



FRANK L. VALENTA, JR., SC Bar # 5682

General Counsel

PHILIP S. PORTER, SC Bar # 4526

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Email: hearingsprocessingunit@scdmv.net

Counsel for the Appellant

FILED

MAY 31 2017

THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT

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

Appellants,

v.

Samuel James,

Respondent.

Docket No. 17-ALJ-21-0102-AP
SCDL No.

BRIEF OF APPELLANT
SOUTH CAROLINA
DEPARTMENT OF MOTOR
VEHICLES

This case comes before the Administrative Law Court pursuant to the appeal South Carolina Department of Motor Vehicles ("SCDMV"), which seeks review of the February 9, 2017 Final Order & Decision rescinding the Respondent's breath alcohol concentration of .15 or greater suspension. The Appellant SCDMV seeks to have the Final Order & Decision overturned and the suspension sustained.

STATEMENT OF THE ISSUES ON APPEAL

Did the Hearing Officer err in rescinding the suspension on the ground that Respondent's breath sample was collected two hours and three minutes after Respondent's arrest without any explanation as to how that "failure material[ly] affected the accuracy or reliability of the test results or the fairness of the procedure?"

STATEMENT OF THE CASE

The Respondent was arrested on March 6, 2016 for driving under the influence (R. p. 12, lines 21-23). Trooper Pence testified that at approximately 3:39 a.m. on Sunday, March 6, 2016, she was dispatched to a possible head-on collision on US-17A/Hendersonville Highway in Colleton County, South Carolina (R. p. 9, lines 20-25). Trooper Pence testified that she arrived at the scene of this collision at approximately

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SC ADMIN. LAW COURT

4:13 a.m. and observed an SUV on its side in the swamp and a heavily damaged truck that had been pulling a boat trailer on the shoulder of the southbound side of the roadway (R. p. 9, line 25 – p. 10, line 7 and p. 18, line 11). Trooper Pence testified that Respondent was the driver of the SUV, was entrapped and the fire department was working to extract him from his vehicle (R. p. 10, lines 9-11, p. 18, lines 17-21, and p. 21, lines 5-6). Trooper Pence observed Respondent being extracted from the SUV, but was unable to talk to him because he needed immediate medical attention (R. p. 10, lines 11-13 and p. 11, lines 5-9). Respondent was transported to Colleton Medical Center for treatment. *Id.* Trooper Pence testified that she was unsure of what time she arrived at the hospital, but she left the scene of the collision no earlier than 6:30 a.m. (R. p. 11, lines 4-5 and p. 23, lines 8-12). As soon as Trooper Pence was able to speak with Respondent, she immediately smelled a strong odor of alcohol as she got close to him (R. p. 12, lines 5-7 and p. 20, line 25 – p. 21, line 4). At that time, Trooper Pence testified she had not yet determined whether or not she was going to arrest Respondent for driving under the influence (R. p. 21, lines 13-14). Respondent informed Trooper Pence that he did not remember what happened or being in a motor vehicle collision (R. p. 12, lines 7-12). Respondent admitted to drinking a couple alcoholic beverages before 11:00 p.m. at an anniversary party R. p. lines 12-15). Trooper Pence was unable to administer standardized field sobriety tests to Respondent because he had been pinned under the vehicle and had an injury to his eye (R. p. 12, lines 17-20). While in the hospital, Trooper Pence placed Respondent under arrest for driving under the influence, and at approximately 6:45 a.m., she advised Respondent of his Miranda rights, which Respondent acknowledged he understood (R. p. 12, lines 22-24). Respondent was

released from the hospital sometime after 7:00 a.m. Once Respondent was released from the hospital, the hospital provided Respondent with clothing and Trooper Pence took him to her car, where she again advised him of his Miranda rights on video (R. p. 12, line 25 – p. 13, line 3). Respondent was transported to the Colleton County jail for a breath test (R. p. 14, line 9-10). Upon her arrival at the jail, Trooper Pence escorted Respondent into a DataMaster room. *Id.* Trooper Pence provided Respondent with a written copy of the driving under the influence advisement of implied consent rights form, and she read the form aloud to Respondent (R. p. 14, lines 12-14 and p. 59). The twenty minute observation period started at 8:22:18 (Petitioner's Exhibit #2 at hearing, an unnumbered page of the Record on Appeal between pages 59 and 60 of the Record on Appeal). At the conclusion of the observation period, the machine performed a series of self-tests, including a simulator test that reflected a reading of .078%. *Id.* Respondent consented to the test and provided a breath sample of .17% at 8:48:21. *Id.* and R. p. 14, lines 14-16.

Respondent was issued a written notice of suspension of the driver's license or driving privileges for violation of S.C. Code Ann. Section 56-5-2950 (R. p. 64).

The Appellant requested an administrative hearing (R. p. 63-65). Pursuant to notice to the parties, a hearing was held before OMVH Bridgette Autry on August 5, 2016 (R. p. 6-27). The Appellant appeared and was represented by Margie Bright Matthews, Esquire. By Final Order & Decision dated February 9, 2017, the suspension was rescinded (R. p. 33-40). Appellant filed a Motion for Reconsideration on February 16, 2017 (R. p. 44-47). The OMVH denied the Motion for Reconsideration on March 27, 2017 (R. p. 41). The Appellant then filed the present appeal (R. p. 32-42).

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....

- (6) The court shall not substitute its judgment for that 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. *Kearse v. State Health and Human Serv. Fin. Comm'n.*, 318 S.C. 198, 456 S.E. 2d 892 (1995); *S.C. Dept. of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E. 2d 544 (Ct. App. 2005); 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Appellant 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

Did the Hearing Officer err in rescinding the suspension on the ground that Respondent's breath sample was collected two hours and three minutes after Respondent's arrest without any explanation as to how that "failure material[ly] affected the accuracy or reliability of the test results or the fairness of the procedure?"

The Final Order and Decision filed February 9, 2017 stated:

Based upon §56-5-2950(A), clearly, a breath sample is deemed not to be an accurate and reliable indicator the level of alcohol while driving once two hours have passed from the time of arrest. As a result, I conclude that the failure to collect the breath sample within two hours of the arrest as required by § 56-5-2950(A) materially affected the accuracy and reliability of the test result, and that the test result must be excluded from evidence as a result.

S.C. Code §56-5-2950(J) states, in part:

The failure to follow 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 material affected the accuracy or reliability of the test results or the fairness of the procedure.**

Emphasis added.

In this case, the OMVH provided no explanation specifying how collection of the breath sample more than two hours after the arrest materially affected the accuracy or reliability of the test results or the fairness of the procedure. The case *S.C. Dept of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E.2d 544, 549-550 (Ct. App. 2005) held, in part, that when a breath test is not performed within the required time frame, "the hearing officer might still have considered the totality of the circumstances and found valid reasons for the Department's failure to comply with the statute." Likewise, the OMVH could have considered the totality of the circumstances and found valid reasons for the Department's failure to comply obtain the breath sample within two hours, particularly in light of the fact that this breath sample was obtained three minutes after the two hours had passed and there were questions about the exact time Respondent was arrested. At the very least, it appears S.C. Code §56-5-2950(J) requires specific findings be made to explain the OMVH's ruling that the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.

In this case, this OMVH determined the time of arrest was 6:45 a.m. This determination was made despite Trooper Pence's testimony that:

- 1) she "didn't even clear the scene until after 06:30" a.m.;
- 2) that in her notes she listed the time of arrest as 6:45 a.m., but on the Datamaster DMT machine she listed the time of arrest as 7:17 a.m.; and

3) that Respondent was "arrested no earlier than 06:45" a.m.

(R. p. 11, lines 4-5, p. 13, lines 6-9, p. 14, lines 18-19,). The OMVH also found that the Respondent submitted a breath sample at 8:48:21 (8:48 a.m.). Thus, even going by the time of arrest determined by the OMVH Hearing Officer, this breath sample was obtained a mere three (3) minutes after the two (2) hour limit given in S.C. Code §56-5-2950(A).

"The average rate of elimination [of blood alcohol] (combining metabolism, excretion and evaporation) is between 0.015 to 0.018% per hour." See Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers, (2003). Alcohol Toxicology for Prosecutors, p. 16. Additionally, peak concentrations of blood alcohol are "generally attained within 30-60 minutes of the cessation of drinking" alcohol. *Id.*, p. 13. "When alcohol is consumed successively over time, as in a social drinking situation, peak concentrations are generally attained within 30 minutes of the last drink and may even be attained before the last drink is finished." *Id.*, p. 14. Thus, in this case, with Respondent being unable to consume any alcohol after Trooper Pence arrived on scene at 4:13 a.m., there is no question that Respondent had long since hit peak blood alcohol concentration at the time of his arrest. Moreover, since Respondent had no opportunity to continue drinking after Trooper Pence arrived on scene, there is no question that when Respondent's breath was tested over five (5) hours after this collision, his blood alcohol concentration was doing nothing but dropping, perhaps for several hours. Thus, a delay of an additional three (3) minutes, scientifically could not have materially affected the accuracy or reliability of the test results or the fairness of the procedure. In fact, the great delay in time between the collision and when Respondent's breath test was finally completed was of great advantage to Respondent because he had over five (5) hours to

reach peak concentration (if he had not already reach peak concentration at the time of this collision) and have his blood alcohol concentration drop by approximately 0.06%-0.072% (assuming no more than 4 hours of drop time and using the average rate of elimination). Despite this commonly understood scientific knowledge about peak alcohol concentrations and average rates of elimination and the confusion regarding the true and accurate arrest time in this case, the OMVH Hearing Officer ruled that the breath test results in this case were not accurate or reliable based solely on the sample being obtained three minutes beyond the two hour limit. The OMVH Hearing Officer made this ruling without any explanation as to how this three minute difference "material[ly]" affected the accuracy or reliability of the test results or the fairness of the procedure" as required by S.C. Code. §56-5-2950(J). For this reason, the failure to explain how the three minutes made a difference, Appellant SCDMV believes the OMVH Hearing Officer erred in her ruling and, as a result, should have affirmed Respondent's suspension.

CONCLUSION

Based upon the foregoing arguments, the SCDMV respectfully requests that the Final Order and Decision be overruled and Respondent's suspension sustained.

[SIGNATURE ON THE FOLLOWING PAGE]



Respectfully submitted,



PHILIP S. PORTER

Deputy General Counsel

FRANK L. VALENTA, JR.

General Counsel

BRANDY A. DUNCAN, SC Bar # 72052

Assistant General Counsel

SC Department of Motor Vehicles

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May 31, 2017

Blythewood, South Carolina

FILED

MAY 31 2017

SC ADMIN. LAW COURT

REDACTED

THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT

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

Docket No. 17-ALJ-21-0102-AP

SCDL No.

Appellants,

v.

CERTIFICATE OF SERVICE

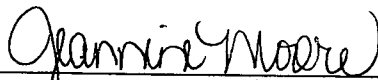
Samuel James,

Respondent.

I HEREBY CERTIFY that on May 31, 2017, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing **Brief of Appellant South Carolina Department of Motor Vehicles** to the following:

Margie Bright Matthews, Esquire
Bright Matthews Law Firm, LLC
Post Office Box 499
Walterboro, South Carolina 29488

as Counsel of Record for Respondent Samuel James.



Jeanhine (Nina) Moore, Paralegal
Office of General Counsel

May 31, 2017
Blythewood, South Carolina

FILED

MAY 31 2017

SC ADMIN. LAW COURT

0034

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

South Carolina Department of Motor
Vehicles,

Appellant,

vs.

Samuel James,

Respondent.

Docket No. 17-ALJ-21-0102-AP

RECORD ON APPEAL

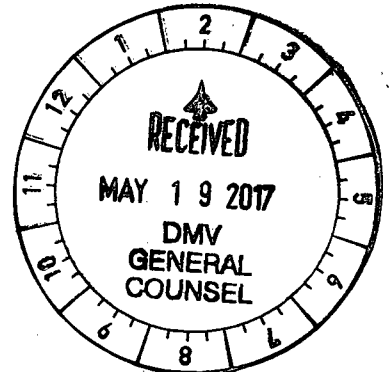
THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

APPEAL FROM
SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS

Brigette Autry, Hearing Officer

Frank L. Valenta
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Attorney for Respondent



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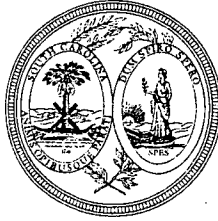
Post-Hearing	1
☒ Notice of Assignment ☒ Transcript ☒ Order of Transcript ☒ Request for Transcript ☐ No Transcript Request Received ☐ No appeal served on OMVH as required in accordance with ALC Rule 33 ☐ Transcript Ordered/Pending ☐ Audiotape Request ☐ Brief of Appellant ☐ Notice of Appeal ☐ Order of Dismissal ☒ Final Order and Decision ☒ Order for Motion to Reconsider ☒ Motion to Reconsider ☐ Objection to Motion to Reconsider ☐ No Audiotape Available: _____	
Hearing / Exhibits	2
☐ Notice of Suspension ☒ Breath Alcohol Test Report ☒ Implied Consent Advisement ☐ Datamaster Certification ☐ Accident Report ☐ Character Affidavits ☐ Official 10-year Driver Record ☐ VHS/DVD available in OMVH office ☐ Other Exhibits _____	
Pre-Hearing.....	3
☐ Order of Continuance: ____ 2nd ____ 3rd ____ 4th ☐ Request for Continuance ____ Granted ____ Denied ☐ Subpoena Request ☒ Legal Representation Letter ☐ Pretrial Motion ☒ Notice of Hearing ☒ Hearing Request Receipt ☐ PPP Suspension Notice ☐ Official 10-year Driver Record ☒ Written Request for Hearing ☒ SCDMV Notice of Suspension ☒ General Correspondence	
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REDACTED

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
OFFICE OF MOTOR VEHICLE HEARINGS

RALPH K. ANDERSON, III
Director



(803) 734-3201
FAX (803) 734-3200
WWW.SCOMVH.NET

May 19, 2017

Jana Shealy, Clerk
SC Administrative Law Court
1205 Pendleton Street, Ste 224
Columbia, SC 29201

Re: S.C. Dept of Motor Vehicles
vs
Samuel James
SCDL/Customer NO.:

Dear Ms. Shealy:

In compliance with Section 1-23-380 (d) of the 1976 Code of Laws of South Carolina, please find enclosed a certified copy of the record for the judge's review. Please file in the appropriate case file. This is a petition for judicial review of the administrative decision, which was filed in the South Carolina Administrative Law Court.

Please be aware that the transcript was ordered and Creel Reporting has the audio recording. The transcript has not been delivered. I will check on it and I will forward it to the judge and the parties as soon as it is received.

If we can be of any further assistance, please advise.

Sincerely,

Yolanda P. Williams
Administrative Coordinator, OMVH

Cc: Margie Bright Matthews, Esquire
Frank L. Valenta, SCDMV General Counsel

000003

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Appellants,

vs.

Samuel James,

Respondent,

of which South Carolina Department of
Motor Vehicles is,

Appellant,

and

Samuel James,

Respondent.

AMENDED
NOTICE OF ASSIGNMENT
(Appeal)

DOCKET NO. 17-ALJ-21-0102-AP

NOTICE IS GIVEN that a notice of appeal seeking review of a decision of the Office of Motor Vehicle Hearings was filed on March 27, 2017. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2016), the **Honorable H. W. Funderburk, Jr.**, Administrative Law Judge, has been assigned to preside in this appeal. Due to a clerical error, the Caption was incorrect on the original Notice of Assignment. Therefore, this Amended Notice of Assignment is issued to reflect the correct Caption. All other provisions of the original Notice of Assignment remain in effect.

This the twenty-eighth day of April, 2017.

Ralph King Anderson, III
Chief Administrative Law Judge

By: _____

Jana E. Shealy
Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

FILED

APR 28 2017

000004

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioners,

vs.

Samuel Jones,

Respondent,

of which South Carolina Department of Motor
Vehicles is,

Appellant,

and

Samuel Jones,

Respondent.

NOTICE OF ASSIGNMENT
(Appeal)

DOCKET NO. 17-ALJ-21-0102-AP

NOTICE IS GIVEN that a notice of appeal seeking review of a decision of the Office of Motor Vehicle Hearings was filed on March 27, 2017. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2016), the **Honorable H. W. Funderburk, Jr.**, Administrative Law Judge, has been assigned to preside in this appeal. The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550.

Pursuant to SCALC Rule 4A, all future filings must be filed directly with the above assigned Judge and shall include the docket number.

FURTHER, NOTICE IS GIVEN that the parties are required to meet the following deadlines, unless otherwise ordered by the assigned Administrative Law Judge:

Record on Appeal	Due within forty-five (45) days of the date of this Notice
Appellant's Brief	Due within thirty (30) days after the Record on Appeal is filed
Respondent's Brief	Due within thirty (30) days after the Appellant's Brief is filed
Reply Brief	Due within ten (10) days after the Respondent's Brief is filed

The parties are directed to the relevant provisions of the Rules of Procedure regarding these deadlines and other requirements applicable to the appeal process. Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net.

This the fourteenth day of April, 2017.

Ralph King Anderson, III
Chief Administrative Law Judge

By: Jana E. Shealy

Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

000005

FILED

APR 14 2017

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioners,)

vs.)

Samuel James,)

Respondent.)
-----)

HEARING

ORIGINAL

August 5, 2016



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
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1 **HEARING OFFICER:** Docket number 16-OMVH-01-1480CC,
 2 South Carolina Department of Public Safety and
 3 DMV versus Samuel James. Driver's license
 4 number is My name's Brigitte Autry
 5 and I've been appointed to preside over this
 6 implied consent hearing which is being held
 7 Friday, August 5th, 2016, at the Jasper County
 8 Courthouse. Present with the Department of
 9 Public Safety is Trooper Sherry Pence. DMV's
 10 not present. And respondent's represented by
 11 Margie Bright Matthews. I would like to remind
 12 you this matter is being recorded and is a
 13 matter of public record. Is there anything in
 14 opening before testimony? Officer, anything in
 15 opening?

16 **TROOPER PENCE:** (Inaudible)

17 **HEARING OFFICER:** No. Ms. Bright Matthews, anything
 18 in opening?

19 **OPENING REMARKS:**

20 **MS. BRIGHT MATTHEWS:** Your Honor, just for brevity
 21 sake, I think the only issue here is whether or
 22 not the two-hour time frame -- not -- I think
 23 the primary issue, not the only issue, is going
 24 to be the issue of how you look at the time
 25 frame from the date -- from the time of arrest



1 and when the Breathalyzer was given.

2 **HEARING OFFICER:** Are you wishing to make
3 stipulations as to the other parts or --

4 **MS. BRIGHT MATTHEWS:** No.

5 **HEARING OFFICER:** -- Okay. I was just making sure.
6 I know sometimes attorneys do that, so I'm was
7 trying to see if that's where you were going.

8 **MS. BRIGHT MATTHEWS:** I might get a (inaudible)

9 **HEARING OFFICER:** Okay. Just making sure. All
10 right. Trooper Pence, if you'll please raise
11 your right hand and state your full name for
12 me.

13 **TROOPER PENCE:** Sherry Ann Pence.

14 **HEARING OFFICER:** Swear to tell the truth, the whole
15 truth, and nothing but the truth?

16 **TROOPER PENCE:** I do.

17 **HEARING OFFICER:** Okay. You may present your
18 testimony.

19 **TROOPER PENCE - DIRECT TESTIMONY:**

20 **TROOPER PENCE:** On the morning of Sunday, March 6,
21 2016, around 3:30, it was a little after 3:30
22 in the morning, I was called to a motor vehicle
23 collision on U.S. 17-A, Hendersonville Highway,
24 in Colleton County. It was -- I was told at
25 the time it was a head-on collision. When I



1 got on scene, there was an SUV on its side in
2 the swamp and there was a pick-up truck pulling
3 what was left of a boat and boat trailer on the
4 shoulder on the southbound side. Both vehicles
5 were on the southbound -- pardon me, on the
6 westbound -- on the southbound side, west of
7 the roadway is best I can describe it.

8 **HEARING OFFICER:** Okay.

9 **TROOPER PENCE:** The driver of the SUV was entrapped
10 and the fire department was on hand trying to
11 -- trying to get him out of the vehicle. They
12 did get him extracted and they sent him to
13 Colleton Medical Center. I remained on scene.
14 He requested a tow truck. I made sure that his
15 tow truck was requested and requested a tow
16 truck for the other vehicle. Kind of -- it
17 took a long time to get him extracted. We had
18 some difficulties with getting the other
19 vehicle -- with getting his vehicle. And then
20 on top of everything else, the party that I was
21 working with, the other party involved in the
22 motor vehicle collision who had stayed on
23 scene, at first were trying to get their own
24 tow truck, so at first, I did not call a tow
25 truck for them. As I was getting ready to



1 clear the scene, they informed me that they
2 did, in fact, need not only a tow truck for
3 their vehicle, but for their boat and trailer.
4 So I had to remain on scene even longer, so I
5 didn't even clear scene until after 6:30. I
6 saw when they extracted Mr. James from the
7 vehicle, but I did not get an opportunity to
8 talk to him, nor did I try very hard because I
9 figured he needed immediate medical attention.
10 I got the information on his vehicle; completed
11 most of the collision report, the FR-10 portion
12 which has the insurance information; provided
13 that to the other driver also with information
14 in case something happened that I would have to
15 change it. At the time, based on what he told
16 me and the evidence on the scene, I found the
17 driver of the SUV, Mr. James, contributing to
18 the collision. He basically crossed the center
19 line. The other vehicle had swerved to avoid
20 him. However, he had managed to strike the
21 pick-up truck, a glancing blow on the left-hand
22 side and then proceeded and struck the boat
23 trailer, which caused most of the damage to
24 his vehicle. At the time, Mr. James was
25 traveling north and the other vehicle was



1 traveling south. When I got to Colleton
2 Medical Center, they were treating Mr. James.
3 They were trying to get -- basically, he had --
4 he had impacted mud behind his eye, so they
5 were treating him at the time. So I was
6 finally able to talk to him. And as soon as
7 I got close to him, I could smell alcohol. I
8 spoke to him, asked him, you know, what
9 happened. He said he didn't remember. He
10 didn't know what happened. He knew he had been
11 in a motor vehicle collision; he had been
12 conscious on scene. I asked him how much he
13 had had to drink. He stated that he had only
14 had a couple and that was prior to 11:00 p.m.,
15 the night before, or that evening. 11:00 p.m.
16 And the collision happened at 3:30. He had
17 attended an anniversary party. I couldn't do
18 standard field sobriety tests on him. He had
19 been pinned under the vehicle and the one eye
20 obviously needed -- required treatment.
21 However, based on the very strong odor of
22 alcohol, I arrested him for driving under the
23 influence. I advised him of his Miranda
24 rights. He acknowledged he understood them.
25 His clothes were in bad shape. They provided



1 clothing for him And I took him out to my car
2 and on camera, I once again read him his
3 Miranda rights on video. And transported him
4 to -- this was after he was released -- he was
5 released. Transported him to Colleton Medical
6 Center. The time of arrest I have down on my
7 notes 06:45, but I have down on the BA, 07:17
8 and I'm going to have to go back and check as
9 far as which one's the more accurate time. And
10 I cannot determine that at this time. We'll
11 have to go back on my video and check. The end
12 of the test, if you look -- and, Your Honor,
13 I'd like to submit these -- these copies
14 because I'm going to need these for court.

15 **HEARING OFFICER:** Okay.

16 **TROOPER PENCE:** But I brought them for your --

17 **HEARING OFFICER:** What do you have?

18 **TROOPER PENCE:** (Inaudible) these are the originals
19 and these are the advisement of implied consent
20 and the BA results. This is what I'd like to
21 submit for my evidence.

22 **HEARING OFFICER:** Okay. Any objection to the test
23 report and to the advisement of implied consent
24 rights?

25 **MS. BRIGHT MATTHEWS:** I would object to them until



1 a foundation has been laid upon when and how
2 they were given to the defendant.

3 **HEARING OFFICER:** All right. If you're going to
4 give some more testimony and then present
5 these, you can, okay, but at this time I'm
6 going to --

7 **TROOPER PENCE:** All right.

8 **HEARING OFFICER:** -- sustain the objection.

9 **TROOPER PENCE:** Okay. When I got to the jail, I
10 took Mr. James to the BA room. I turned on the
11 BA machine. The machine required a change. I
12 changed it and read -- provided Mr. James a
13 copy of this advisement of implied consent and
14 read it to him aloud. I provided him the
15 opportunity to take a breath sample and he gave
16 a breath sample, which was .17 at 08:48. The
17 question came up as to, you know, what time he
18 was arrested. He was arrested no earlier than
19 06:45. His test sample was at 08:48. However,
20 on my sheet on (inaudible) data I have 07:17 as
21 the arrest time, so that's why I'm saying I
22 have to review it. But regardless, it is still
23 within a margin of error, I believe, because
24 that's two minutes.

25 **HEARING OFFICER:** Okay. Anything else?



1 **TROOPER PENCE:** At this time, I'd like to present
2 this is the advisement of implied consent that
3 I read him.

4 **HEARING OFFICER:** Okay.

5 **TROOPER PENCE:** And I provided him with his copy.

6 **HEARING OFFICER:** All right. Any objection to the
7 advisement of implied consent right form?

8 **MS. BRIGHT MATTHEWS:** Yes, there's no testimony --
9 my client didn't have that at the time that he
10 was let out of the jail. There's no testimony
11 that it was actually given to him as is
12 required.

13 **TROOPER PENCE:** I -- I did testify that I gave it to
14 him.

15 **HEARING OFFICER:** I think she's giving --

16 **TROOPER PENCE:** I provided it to him in the BA room.

17 **HEARING OFFICER:** I'm going to overrule your
18 objection on that. I'm going to allow the test
19 -- I mean, excuse me, the advisement of implied
20 consent rights form, in. And you have the
21 original with you?

22 **TROOPER PENCE:** I do.

23 **HEARING OFFICER:** Okay. All right. You want to
24 substitute a copy because you need that for
25 court, correct?



1 TROOPER PENCE: Correct.

2 HEARING OFFICER: All right. I'll take a copy then
3 as Petitioner's Number One.

4 (Petitioner's Exhibit Number One was marked for
5 identification purposes).

6 HEARING OFFICER: Okay.

7 TROOPER PENCE: And then this is the BA results.

8 HEARING OFFICER: Okay. Any objection?

9 MS. BRIGHT MATTHEWS: Same objection.

10 HEARING OFFICER: What was your objection again?

11 MS. BRIGHT MATTHEWS: That it was not given to him
12 after his arrest.

13 HEARING OFFICER: Okay. All right. If that's your
14 objection, then -- do you have any response to
15 that before I rule on it?

16 TROOPER PENCE: I gave it to him.

17 HEARING OFFICER: All right.

18 MS. BRIGHT MATTHEWS: I get it --

19 HEARING OFFICER: Okay. I'm going to have to
20 overrule the objection.

21 MS. BRIGHT MATTHEWS: No problem.

22 HEARING OFFICER: It'll be Petitioner's Number Two.
23 (Petitioner's Exhibit Number Two was marked for
24 identification purposes).

25 MS. BRIGHT MATTHEWS: My client just says that he



1 never -- he kept looking for it and couldn't
2 find it.

3 **HEARING OFFICER:** Okay.

4 **MS. BRIGHT MATTHEWS:** But anyway, that's okay. Go
5 ahead.

6 **HEARING OFFICER:** Any other testimony, Trooper?

7 **TROOPER PENCE:** After -- after the results of the
8 test, I provided him a notice of suspension,
9 which --

10 **MS. BRIGHT MATTHEWS:** The only thing he got was the
11 ticket when he left the jail. That's it.

12 **TROOPER PENCE:** I provided a notice of suspension.

13 **MS. BRIGHT MATTHEWS:** (Inaudible)

14 **TROOPER PENCE:** I also explained it to him.

15 **HEARING OFFICER:** Okay.

16 **TROOPER PENCE:** And I also provided him a citation.
17 I know he got that. --

18 **MS. BRIGHT MATTHEWS:** We got that. We got that.

19 **TROOPER PENCE:** Right, for driving under the
20 influence.

21 **HEARING OFFICER:** All right. Anything else?

22 **TROOPER PENCE:** No, I believe that covers it.

23 **HEARING OFFICER:** All right. Please answer any
24 questions Ms. Matthews may have.

25 **TROOPER PENCE - EXAMINATION BY MS. MATTHEWS:**



1 Q: Just a few questions. The time of the wreck
2 that you got on dispatch was 3:30 a.m.?

3 A: Yes.

4 Q: And your time of arrival?

5 A: 3 -- Okay. (Inaudible) time was 03:30, and I
6 arrived on scene -- this is -- no, 3:39 was
7 when I got --

8 Q: At 3:39 is what it says down here.

9 A: Well, it says at 3:39, I was dispatched.

10 Q: Okay. Yeah, dispatched time.

11 A: Arrival time was 04:13.

12 Q: So you arrived on the scene at 4:13?

13 A: Correct.

14 Q: Around what time did you have contact on the
15 scene with Mr. James?

16 A: I didn't.

17 Q: No contact at all; didn't get around his body?

18 A: Visual. Visual.

19 Q: Okay.

20 A: I had visual contact, but I saw the driver of
21 the vehicle.

22 Q: Okay. Did you -- you were talking about how
23 they had extracted him. How many EMTs were
24 there taking him out of the vehicle?

25 A: The Fire Department was there on scene. I know



1 -- I don't know. It was -- I don't know.

2 Q: So did you get say within this proximity to Mr.
3 James at the scene?

4 A: Yes.

5 Q: Okay. Did you get as close as I am, a few
6 feet?

7 A: No.

8 Q: When you were at the scene, I think you
9 testified that he was not unconscious, so you
10 were surprised that he didn't know what
11 happened, so you were able to see him close
12 enough that you were able to testify that he
13 was not unconscious at the scene?

14 A: Correct.

15 Q: Okay. And is it your testimony -- how close
16 were you to Mr. James at the scene?

17 A: Probably about -- about ten feet away.

18 Q: Was -- at that particular time, was he
19 communicating with the EMTs?

20 A: I couldn't tell. I know I could hear voices.
21 I could tell that he was speaking, but I
22 couldn't tell what he was saying.

23 Q: Did you check on his condition with the EMTs?

24 A: I checked with the -- the Fire Department that
25 was there and they said that he was entrapped



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1 and they were getting him out and that he was
2 conscious and that's basically all they told
3 me.

4 Q: Okay. They told you nothing else?

5 A: Nothing else.

6 Q: Okay. And you explained how long you stayed on
7 scene regarding getting the vehicles moved and
8 the boat and the boat trailer, right?

9 A: Right.

10 Q: Okay. The issue then is you got to the
11 hospital and he was injured in this wreck,
12 right?

13 A: Yes.

14 Q: Did you at that -- when you -- you said the
15 first thing you noticed when you walked in to
16 talk to Mr. James was a strong odor of alcohol.

17 A: The first thing I noticed when I walked in and
18 saw Mr. James was his injury to his eye.

19 Q: Okay. I'm sorry. I wrote that. I knew you
20 were talking about the eye and the mud and all
21 of that, but you said that at the hospital,
22 they were treating the mud and you were finally
23 able to talk to him and you smelled alcohol
24 immediately.

25 A: When I was finally able to talk to him and I



1 approached him to speak to him, I smelled the
2 odor of alcohol.

3 Q: And you know --

4 A: Strong odor of alcohol.

5 Q: And you know he was the driver?

6 A: Yes.

7 Q: Okay. At that particular time, pursuant to
8 *State vs. Medley*, did you mirandize him?

9 A: I did not because I am authorized to do a motor
10 vehicle collision investigation. And at that
11 time, that was my focus.

12 Q: Okay. And that was around what time?

13 A: And I had not made the determination as to
14 whether or not I was going to make an arrest.

15 Q: But you testified that it was a strong odor of
16 alcohol.

17 A: I did.

18 Q: Right?

19 A: Yes.

20 Q: And they were still getting the mud out of his
21 eyes?

22 A: Yes.

23 Q: And that would have been how many minutes
24 before you -- they released him?

25 A: They didn't release him until after 7.



1 Q: Okay. So you said you think you took him
2 outside somewhere around 6:45, outside of the
3 ER?

4 A: No.

5 Q: What's this 6:45 a.m. and you put him in front
6 of -- in front of your camera of your car to
7 mirandize?

8 A: Let me see. At 6:45 was while he was still in
9 the hospital.

10 Q: Okay.

11 A: That was when I advised him of his Miranda
12 rights.

13 Q: Got it. So when in between the time that you
14 first questioned him, how much time elapsed
15 before you mirandized him?

16 A: That was in -- it was within -- it was within
17 five to ten minutes.

18 Q: Okay. So -- so when is it that you took him
19 out and put him in front of your car?

20 A: After they released him.

21 Q: Okay. You knew that he was involved in a
22 wreck; you smelled the odor of alcohol; you
23 said that when you got there, they were still
24 trying to remove the mud from behind his eye.

25 A: Yes.



1 Q: At that particular time, did you fill out any
2 forms to request a blood alcohol test?

3 A: No, I did not.

4 Q: Okay. So 3:30; you arrived on the scene 4:13;
5 and then you got to the hospital realized
6 alcohol was involved; you did not mirandize
7 him, but around -- let me ask you. I'm sorry.
8 In your report, do you detail what time you go
9 to the hospital?

10 A: That's what I was trying to see. I'm going to
11 have to -- because I should have the time I
12 cleared scene. No, I do not.

13 Q: Okay. So --

14 A: That I can find out, however.

15 Q: How long did you stay at the hospital?

16 A: Grand total, I was probably there -- it was
17 less than an hour. I really can't make an
18 estimate beyond that --

19 Q: Okay.

20 A: -- without reviewing my in-car video.

21 Q: Camera, okay. I don't have any further
22 questions.

23 **HEARING OFFICER:** Okay. No other questions. Okay.
24 Any other testimony in response to those
25 questions?



1 TROOPER PENCE: No.

2 HEARING OFFICER: No. Do you wish to call Mr.
3 James?

4 MS. BRIGHT MATTHEWS: No.

5 HEARING OFFICER: Okay. Anything in closing?
6 Trooper, anything in closing?

7 TROOPER PENCE: No.

8 HEARING OFFICER: Ms. Bright Matthews?

9 CLOSING REMARKS:

10 MS. BRIGHT MATTHEWS: Your Honor, the burden is on
11 the Trooper to first establish under the
12 statute that two hours from the time that she
13 had probable cause of him being -- driving
14 under the influence and the arrest, that the
15 burden is on her to establish that not more
16 than two hours has elapsed until she gives the
17 breathalyzer. We have a breathalyzer report I
18 believe here that says 8:48 in the morning.
19 She says that they received -- they were
20 dispatched to the scene. She received -- the
21 wreck occurred around 3:30; she -- they
22 received the dispatch at 3:30 a.m. 4:13, she
23 arrived on the scene. Somewhere around 6:00,
24 I'm not sure, there again we go to the burden,
25 somewhere around 6:00, she's at the hospital.



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1 The issue then goes to -- and I hate jumping to
2 issues, she says -- heard her in direct say
3 that as soon as she walked in, she noticed the
4 strong odor of alcohol and, of course, she
5 doesn't mirandize him; she knows he's the
6 driver, therefore, you've got *State v. Medley*
7 and our motion regarding that, but as to the
8 two-hour -- from the time that she reasonably
9 believes and the arrest issue, that's a lot of
10 time that has elapsed. And I believe based
11 upon that, that she -- in fact, the statute has
12 been violated and that this implied consent
13 suspension should be rescinded on that basis.
14 I also believe that any -- any statements that
15 she made that my client said should be stricken
16 under *State v. Medley* because she said she knew
17 that he was the driver and smelled alcohol.

18 **HEARING OFFICER:** Okay. Anything further? All
19 right. Anything in response without further
20 testimony, of course?

21 **TROOPER PENCE:** Just reiterating what I said before.
22 His time of arrest, from the two-hour window.

23 **HEARING OFFICER:** All right. I'll take everything
24 under advisement then if there's nothing
25 further and I'll close the hearing and issue a



1 written order, okay?

2 **MS. BRIGHT MATTHEWS:** Thank you, Your Honor.

3 **HEARING OFFICER:** Thank you.

4 **(There being nothing further, the hearing was**
5 **concluded.)**

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CERTIFICATE

This is to certify the transcript of the hearing consists of twenty one (21) 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 May 4, 2017.

Carenn N. Moore
Carenn N. Moore
Notary Public for South Carolina
My Commission Expires: 3/24/2019

Yolanda Williams

Transcript

Request

Appeal

From: Yolanda Williams
Sent: Tuesday, March 28, 2017 3:15 PM
To: 'Coral Strickland'; Creel Reporting (contact@creelreporting.com)
Subject: Transcript Request for Samuel James- 16-OMVH-01-1480-CC
Attachments: James, Samuel_20160805-1123_01d1ef0bd60007e0.wma

Attached please find the transcript request for Samuel James. Below is the contact information for the attorney that requested the transcript. If you have any question please let me know.

Frank L. Valenta
General Counsel
SC Dept. of Motor Vehicles
P.O. Box 1498
Blythewood, SC 29016

Yolanda P. Williams
Administrative Coordinator
Scheduling Assistant for
Brigette Autry and Tracy Holland
South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Ste 325
Columbia, SC 29201
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Henry McMaster
Governor



REDACTED

Kevin A. Shwedo
Executive Director

State of South Carolina
Department of Motor Vehicles

March 27, 2017

Yolanda P. Williams
Administrative Coordinator
Office of Motor Vehicles Hearings
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201

RE: **Transcript Request**

South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles v. Samuel James

Docket No. 16-OMVH-01-1480-CC

SCDL No.

Hearing Date: August 5, 2016

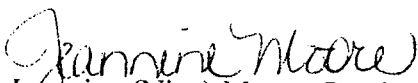
Order Date: February 9, 2017

Hearing Officer: Brigitte B. Autry

Dear Ms. Williams:

For use in the South Carolina Department of Motor Vehicles' appeal in this case, I request a transcript of the above-referenced hearing. You can send it by US Mail or by interagency mail.

Sincerely,


Jeannine (Nina) Moore, Paralegal
Office of General Counsel

cc: Margie Bright Matthews, Esquire
Warren V. Ganjehsani, Esquire
Jana E. Shealy, Clerk, Administrative Law Court

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Walterboro, South Carolina 29488
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Facsimile (843) 549-6107

Margie Bright Matthews

Margie@BrightMatthewsLaw.com

April 27, 2017

Yolanda P. Williams, Administrative Coordinator
Office of Motor Vehicles Hearings
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 325
Columbia, SC 29201

Re: South Carolina Dept. of Motor Vehicles vs. Samuel James

BMLF File No. : 16-5178
Docket No. : 16-OMVH-01-1480-CC
Hearing Date : August 5, 2016

Dear Ms. Williams:

We would like to request a transcript of the above referenced hearing.

If you should have any questions or concerns regarding this matter, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

Teresa T. McDonald, Legal Assistant to
Margie Bright Matthews

*Spoke w/ Teresa
They will wait for
the Record on Appeal*

/ttm

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Kevin A. Shwedo
Executive Director

State of South Carolina
Department of Motor Vehicles

March 27, 2017

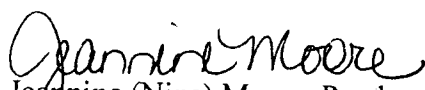
The Honorable Jana E. Shealy
Clerk, South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

RE: *South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles v. Samuel James*
OMVH Docket No. 16-OMVH-01-1480-CC
SCDL No.

Dear Ms. Shealy:

Enclosed for filing please find one original and one copy of the South Carolina Department of Motor Vehicle's Notice to Appeal in the above-captioned matter. Please file the original and return a clocked copy to me in the self-addressed envelope provided.

Sincerely,


Jeannine (Nina) Moore, Paralegal
Office of General Counsel

Enclosures

cc: Margie Bright Matthews, Esquire
Warren V. Ganjehsani, Esquire
Yolanda P. Williams, Admin. Coordinator, OMVH

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REDACTED

THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT

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

Petitioner,

v.

Samuel James,

Respondent.

Docket No. 16-OMVH-01-1480-CC
SCDL No.

NOTICE OF APPEAL

On or about February 9, 2017, the South Carolina Department of Motor Vehicles (SCDMV) received the Final Order and Decision issued on February 9, 2017, resulting from a hearing held on August 5, 2016, before the Office of Motor Vehicle Hearing Officer Brigitte B. Autry (copy attached as Exhibit A). On February 16, 2017, SCDMV filed a Notice of Motion and Motion to Reconsider the Final Order and Decision issued on February 9, 2017. On March 15, 2017, Hearing Officer Brigitte B. Autry issued an Order Denying Petitioner SCDMV's Motion for Reconsideration (copy attached as Exhibit B). Petitioner SCDMV hereby appeals from the Final Order and Decision of Hearing Officer Brigitte B. Autry issued February 9, 2017.

Respectfully submitted,



FRANK L. VALENTA, JR., SC Bar # 5682
General Counsel

PHILIP S. PORTER, SC Bar # 4526
Deputy General Counsel

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MAR 27 2017

SCOMVH

March 27, 2017
Blythewood, South Carolina

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REDACTED

STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS

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

Petitioners,

vs.

Samuel James,

Respondent.

Docket No. 16-OMVH-01-1480-CC
DL#¹

FINAL ORDER AND DECISION

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Appearances:

For South Carolina Department of Public Safety: Trooper SA Pence

For S.C. Department of Motor Vehicles: no appearance¹

For Respondent: Margie Bright Matthews, Esquire

Other information:

Type of Hearing: Implied Consent (S.C. Code Ann. § 56-5-2950)
[Registering .15% or greater]

STATEMENT OF THE CASE

This matter is before the South Carolina Office of Motor Vehicle Hearings ("OMVH") pursuant to a request for a contested case hearing filed by Samuel James ("Respondent"). Respondent was arrested on March 6, 2016, for an offense allegedly committed while he was driving a motor vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs. Respondent purportedly submitted to chemical testing, after which 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 August 5, 2016, at the Jasper County Court House in Ridgeland, South Carolina. After considering all the

¹ Pursuant to S.C. Code Ann. § 1-23-660(B), the South Carolina Department of Motor Vehicles is not required to appear at implied consent hearings.

evidence presented, I conclude that the suspension of Respondent's driver's license or driving privilege must be rescinded.

FINDINGS OF FACT

Having observed the witness and reviewed the exhibits presented at the hearing and closely passed upon their credibility, and having taken into consideration the burden of persuasion by the parties, I make the following Findings of Fact by a preponderance of the evidence:

1. At approximately 3:39 a.m. on Sunday, March 6, 2016, Trooper Pence of the South Carolina Department of Public Safety was dispatched to a possible head-on collision on US 17A/Hendersonville Highway in Colleton County, South Carolina.

2. Upon her arrival at the scene at approximately 4:13 a.m., Trooper Pence observed a SUV on its side in the swamp and a heavily damaged truck that had been pulling a boat trailer on the shoulder of the southbound side of the roadway.

3. The driver of the SUV, whom Trooper Pence identified as Respondent, was entrapped and the fire department was attempting to extract him from his vehicle.

4. Trooper Pence observed Respondent being extracted from the SUV but was unable to talk to him because he needed immediate medical attention. Respondent was conscious on the scene.

5. After a lengthy extraction, Respondent was transported to Colleton Medical Center.

6. Trooper Pence found Respondent at-fault for the collision. During the course of her investigation, she determined Respondent was traveling north when he crossed the center line, causing the truck, which was traveling south, to swerve to avoid Respondent's vehicle, but Respondent's vehicle still struck the left side of the truck and then the boat trailer.

7. Trooper Pence completed the collision report and remained on scene to call for a tow truck for the other vehicle. Once she was about to clear the scene, the driver of the truck informed her he also needed a tow truck for the boat trailer, which required her to stay on scene even longer.

8. When Trooper Pence arrived at the hospital, she found Respondent was still being treated for mud that was impacted behind his eye.

9. Trooper Pence is unsure of what time she arrived at the hospital, but she remained at the hospital less than one hour.
10. As soon as Trooper Pence was able to speak with Respondent, she immediately smelled a strong odor of alcohol as she got close to him. At that time, Trooper Pence testified she had not yet determined whether or not she believed Respondent was driving under the influence.
11. Respondent informed Trooper Pence that he did not remember what happened or being in a motor vehicle collision.
12. Respondent admitted to drinking a couple alcoholic beverages before 11:00 p.m. at an anniversary party.
13. Trooper Pence was unable to administer standardized field sobriety tests to Respondent because he had been pinned under the vehicle and had an injury to his eye.
14. While in the hospital, Trooper Pence placed Respondent under arrest for driving under the influence, and at approximately 6:45 a.m., she advised Respondent of his Miranda rights, which Respondent acknowledged he understood.
15. Respondent was released from the hospital sometime after 7:00 a.m. Once Respondent was released, the hospital provided Respondent with clothing and Trooper Pence took him to her car, where she again advised him of his Miranda rights on video.
16. Respondent was transported to the Colleton County jail for a breath test.
17. Upon her arrival at the jail, Trooper Pence escorted Respondent into a DataMaster room.
18. Trooper Pence, who is a certified DataMaster DMT operator², changed the simulator solution.
19. Trooper Pence provided Respondent with a written copy of the driving under the influence advisement of implied consent rights form, and she read the form aloud to Respondent.
20. The twenty minute observation period started at 8:22:18. At the conclusion of the observation period, the machine performed a series of self-tests, including a simulator test that reflected a reading of .078%.³
21. Respondent consented to the test and provided a breath sample at 8:48:21.
22. Trooper Pence issued a notice of suspension to Respondent.

² DMT #007714. See Petitioner's Ex. #2.

³ See Petitioner's Ex. #2.

23. Trooper Pence testified that her notes reflect the time of arrest as 6:45 a.m. but the Breath Alcohol Analysis Test Report reflects 7:17 a.m. as the time of arrest. She further testified that she is unsure of which arrest time was accurate.

CONCLUSIONS OF LAW

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

1. Pursuant to S.C. Code Ann. §1-23-660(A) (Supp. 2015), the Hearing Officers of the OMVH, effective January 1, 2006, preside over contested case hearings involving suspensions, cancellations, or revocations of drivers licenses by the Department. All hearings presided over by the Hearing Officers of the OMVH are contested case hearings and must be conducted in accordance with the Administrative Procedures Act ("APA") and the rules of procedure for the OMVH. § 1-23-660(B) (Supp. 2015). Furthermore, all appeals from final decisions of the Hearing Officers are to the South Carolina Administrative Law Court in accordance with its rules of procedure. § 1-23-660(D) (Supp. 2015).

2. The Department is an administrative agency of the State of South Carolina and is charged with administering the motor vehicle laws of this state. S.C. Code Ann. § 56-1-5 (2006).

3. 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, revocation or cancellation, and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this matter. See Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 9.3 at 366 (2nd ed. 2001).

4. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992); see also Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996) (holding that a trial judge, when acting as a finder of fact, "has the authority to determine the weight and credibility of the evidence before him").

5. Pursuant § 56-5-2930 (Supp. 2015):

Page 4 of 8

It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, 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 a motor vehicle are materially and appreciably impaired, or 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 a motor vehicle are materially and appreciably impaired. . . .

6. Section § 56-5-2950(A) (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 the law enforcement officer who has arrested [the] person....

Furthermore, the breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy pursuant to South Carolina Law Enforcement Division ("SLED") policies. § 56-5-2950(A) (Supp. 2015).

7. Section 56-5-2950(B) (Supp. 2015) 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.

8. 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 § 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 § 56-5-2950(J)(Supp. 2015).

9. If a person drives a motor vehicle and has an alcohol concentration of fifteen one-hundredths of one percent or more, the Department 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. § 56-5-2951(A) (Supp. 2015).

10. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. § 56-5-2951(B) (Supp. 2015). Section 56-5-2951(F) (Supp. 2015) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) given a written copy of and verbally informed of the rights enumerated in 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.

11. 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

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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. After reviewing the evidence presented, I conclude that Respondent was lawfully arrested for driving under the influence.

In this case, Trooper Pence arrived on the scene of a two-car collision on US 17A in Colleton County, South Carolina, and she identified Respondent as the driver of one of the vehicles involved. Respondent, whom Trooper Pence later determined was at-fault for the collision, was entrapped in his SUV when she arrived, and the fire department was attempting to extract him. Respondent was conscious on the scene, but Trooper Pence was unable to talk to him after the extraction because he needed immediate medical attention and was transported to Colleton Medical Center. After Trooper Pence cleared the collision scene, she proceeded to the hospital, where she met with Respondent. Trooper Pence immediately smelled a strong odor of alcohol as she got close to Respondent, and Respondent admitted to drinking a couple alcoholic beverages at a party before 11:00 p.m. Respondent did not remember being in a motor vehicle collision, and due to his injuries, Trooper Pence did not administer field sobriety tests to Respondent.

At the hearing, counsel for Respondent moved to exclude all statements made by Respondent after Trooper Pence smelled alcohol on him, including his admission to drinking, on the ground that Respondent had not yet been advised of his Miranda warnings. I conclude the motion is denied. This matter was an accident investigation, and I find that Respondent was not in custody until Trooper Pence placed him under arrest for driving under the influence. Furthermore, the requirement of Miranda warnings only applies to criminal cases and cannot be extended to apply to implied consent hearings. See Hill v. SC Dep't of Motor Vehicles 06-ALJ-21-0574-AP at 13-15, (S.C. Admin. Law Court, J. McLeod, September 18, 2008). Based upon the totality of the facts and circumstances before Trooper Pence at the time of the arrest, including Respondent's admission to drinking, I conclude there was probable cause for Respondent's arrest for driving under the influence.

Moreover, Respondent was advised of his implied consent rights, verbally and in writing, and he consented to the DataMaster test, which was conducted by Trooper Pence, who is a certified DataMaster operator. After the conclusion of the twenty minute observation period, Respondent submitted a breath sample.

At the hearing, counsel for Respondent moved to rescind the suspension of Respondent's driver's license or driving privilege on the ground that the breath sample was not collected within two hours of Respondent's arrest. Trooper Pence presented conflicting evidence regarding the time of arrest. While the time of arrest entered on the Breath Analysis Test Report is 7:17 a.m., Trooper Pence testified that her notes reflected an arrest time of 6:45 a.m., and she admitted that she was unsure of which arrest time was accurate. However, she also testified that she advised Respondent of his Miranda rights at approximately 6:45 a.m., which was after his arrest, and that Respondent was released from the hospital after 7:00 a.m. Based upon the evidence before me, I conclude Respondent's time of arrest was 6:45 a.m. Though the observation period for the breath test started at 8:22:18 a.m., Respondent did not submit a breath sample until 8:48:21, which is more than two hours after the arrest. S.C. Code § 56-5-2950(A) requires that "[a] breath sample taken for testing must collected within two hours of the arrest." Based upon §56-5-2950(A), clearly, 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. As a result, I conclude that the failure to collect the breath sample within two hours of the arrest as required by § 56-5-2950(A) materially affected the accuracy and reliability of the test result, and that the test result must be excluded from evidence as a result. Accordingly, the suspension of Respondent's driver's license or driving privilege must be rescinded.

ORDER

Based upon the above findings of facts and conclusions of law,

IT IS HEREBY ORDERED the suspension of Respondent's driver's license or driving privilege is **RESCINDED**; and

IT IS FURTHER ORDERED that upon Respondent's compliance with the laws of this State, the Department must restore Respondent's driver's license or driving privilege.

AND IT IS SO ORDERED.

Brigitte B. Autry

Brigitte B. Autry
Hearing Officer, OMVH

February 9, 2017
Ridgeland, South Carolina

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**THE ADMINISTRATIVE LAW COURT
IN THE STATE OF SOUTH CAROLINA**

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

Petitioner,

v.

Samuel James,

Respondent.

Docket No. 16-OMVH-01-1480-CC
SCDL No.

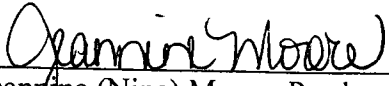
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2017, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing **Notice of Appeal** to the following:

Margie Bright Matthews, Esquire
Bright Matthews Law Firm, LLC
Post Office Box 499
Walterboro, South Carolina 29488

Warren V. Ganjehsani, Esquire
S.C. Department of Public Safety
Post Office Box 1993
Blythewood, South Carolina 29106

Yolanda P. Williams, Admin. Coordinator
Office of Motor Vehicle Hearings
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201



Jeanne (Nina) Moore, Paralegal
Office of General Counsel

March 27, 2017

Blythewood, South Carolina

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Henry McMaster
Governor



REDACTED

Kevin A. Shwedo
Executive Director

State of South Carolina
Department of Motor Vehicles

January 16, 2017

Brigette B. Autry, Administrative Hearing Officer
SC Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201

RE: *South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles v. Samuel James*
Docket No. 16-OMVH-01-1480-CC
SCDL No.

Dear Hearing Officer Autry:

Enclosed for filing please find one original and two copies of SCDMV's Motion to Reconsider in the above-mentioned case. Please file the original and return a clocked copy to me in the self-addressed envelope.

If you have any questions, please contact me at 803.896.9900.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brandy A. Duncan".

Brandy A. Duncan
Assistant General Counsel

Enclosures

c: Margie Bright Matthews, Esquire

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

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

Docket No. 16-OMVH-01-1480-CC
SCDL No.

Petitioners,

v.

**MOTION TO
RECONSIDER**

Samuel Jones,

Respondent.

On February 9, 2017, the South Carolina Department of Motor Vehicles (SCDMV) received notice of the Final Order and Decision filed on February 9, 2017, in regard to the above-captioned matter. A copy of that Final Order and Decision is attached herewith. The SCDMV respectfully moves the Office of Motor Vehicle Hearings (OMVH) for reconsideration of the Final Order and Decision filed February 9, 2017, based upon the following:

1. The Final Order and Decision filed February 9, 2017 stated:

Based upon §56-5-2950(A), clearly, a breath sample is deemed not to be an accurate and reliable indicator the level of alcohol while driving once two hours have passed from the time of arrest. As a result, I conclude that the failure to collect the breath sample within two hours of the arrest as required by § 56-5-2950(A) materially affected the accuracy and reliability of the test result, and that the test result must be excluded from evidence as a result.

2. S.C. Code §56-5-2950(J) states, in part:

The failure to follow 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 material affected the accuracy or reliability of the test results or the fairness of the procedure.**

Emphasis added.

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3. In this case, no explanation has been provided to specify how the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure, beyond the finding that the breath sample was collected more than two hours after the arrest. The case *S.C. Dept of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E.2d 544, 549-550 (Ct. App. 2005) held, in part, that when a breath test is not performed within the required time frame, "the hearing officer might still have considered the totality of the circumstances and found valid reasons for the Department's failure to comply with the statute." Likewise, this Court could have considered the totality of the circumstances and found valid reason for the Department's failure to comply with the statute. At the very least, however, it appears S.C. Code §56-5-2950(J) requires specific findings be made to explain the Court's ruling that the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.
4. In this case, this Court has already determined the time of arrest was 6:45 a.m. This Court also found that the Respondent submitted a breath sample at 8:48:21 (8:48 a.m.). Thus, this breath sample was obtained a mere three (3) minutes after the two (2) hour limit given in S.C. Code §56-5-2950(A). "The average rate of elimination [of blood alcohol] (combining metabolism, excretion and evaporation) is between 0.015 to 0.018% per hour." See Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers, (2003). Alcohol Toxicology for Prosecutors, p. 16. Additionally, peak concentrations of blood alcohol are "generally attained within 30-60 minutes of the cessation of drinking" alcohol. *Id.*, p. 13. "When alcohol is consumed successively over time, as in a social drinking situation, peak concentrations are generally attained within 30 minutes of the last drink and may even be attained before the last drink is finished."



Id., p. 14. Thus, in this case, with Respondent being unable to consume any alcohol after Trooper Pence arrived on scene at 4:13 a.m., there is no question that Respondent had long since hit peak blood alcohol concentration at the time of his arrest at 6:45 a.m. Moreover, since Respondent had no opportunity to continue drinking after Trooper Pence arrived on scene, there is no question that when Respondent's breath was tested over five (5) hours after this collision, his blood alcohol concentration was doing nothing but dropping, perhaps for several hours. Thus, a delay of an additional three (3) minutes scientifically could not have materially affected the accuracy or reliability of the test results or the fairness of the procedure. In fact, the great delay in time between the collision and when Respondent's breath test was finally completed was of great advantage to Respondent because he had over five (5) hours to reach peak concentration (if he had not already reach peak concentration at the time of this collision) and have his blood alcohol concentration drop by approximately 0.06%-0.072% (assuming no more than 4 hours of drop time and using the average rate of elimination).

Wherefore, Petitioner SCDMV respectfully moves that the Hearing Officer reconsider the Final Order and Decision filed February 9, 2017, fully admit the BAC Test results, and affirm Petitioner SCDMV's suspension of Respondent's driving privileges.

[SIGNATURE ON THE FOLLOWING PAGE]

A handwritten signature in black ink, appearing to be "BOD", is located at the bottom center of the page.

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Respectfully submitted,



BRANDY A. DUNCAN, SC Bar #72052

Assistant General Counsel

PHILIP S. PORTER

Deputy General Counsel

FRANK L. VALENTA, JR.

General Counsel

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February 16, 2017

Blythewood, South Carolina

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

South Carolina Department of Public Safety	)	Docket No. 16-OMVH-01-1480-CC
and	)	DL#
South Carolina Department of Motor Vehicles	)	
	)	
Petitioners,	)	
	)	FINAL ORDER AND DECISION
vs.	)	
	)	
Samuel James,	)	
	)	
Respondent.	)	

Appearances:

For South Carolina Department of Public Safety: Trooper SA Pence
 For S.C. Department of Motor Vehicles: no appearance¹
 For Respondent: Margie Bright Matthews, Esquire

Other information:

Type of Hearing: Implied Consent (S.C. Code Ann. § 56-5-2950)
 [Registering .15% or greater]

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STATEMENT OF THE CASE

This matter is before the South Carolina Office of Motor Vehicle Hearings ("OMVH") pursuant to a request for a contested case hearing filed by Samuel James ("Respondent"). Respondent was arrested on March 6, 2016, for an offense allegedly committed while he was driving a motor vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs. Respondent purportedly submitted to chemical testing, after which 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 August 5, 2016, at the Jasper County Court House in Ridgeland, South Carolina. After considering all the

¹ Pursuant to S.C. Code Ann. § 1-23-660(B), the South Carolina Department of Motor Vehicles is not required to appear at implied consent hearings.

evidence presented, I conclude that the suspension of Respondent's driver's license or driving privilege must be rescinded.

FINDINGS OF FACT

Having observed the witness and reviewed the exhibits presented at the hearing and closely passed upon their credibility, and having taken into consideration the burden of persuasion by the parties, I make the following Findings of Fact by a preponderance of the evidence:

1. At approximately 3:39 a.m. on Sunday, March 6, 2016, Trooper Pence of the South Carolina Department of Public Safety was dispatched to a possible head-on collision on US 17A/Hendersonville Highway in Colleton County, South Carolina.

2. Upon her arrival at the scene at approximately 4:13 a.m., Trooper Pence observed a SUV on its side in the swamp and a heavily damaged truck that had been pulling a boat trailer on the shoulder of the southbound side of the roadway.

3. The driver of the SUV, whom Trooper Pence identified as Respondent, was entrapped and the fire department was attempting to extract him from his vehicle.

4. Trooper Pence observed Respondent being extracted from the SUV but was unable to talk to him because he needed immediate medical attention. Respondent was conscious on the scene.

5. After a lengthy extraction, Respondent was transported to Colleton Medical Center.

6. Trooper Pence found Respondent at-fault for the collision. During the course of her investigation, she determined Respondent was traveling north when he crossed the center line, causing the truck, which was traveling south, to swerve to avoid Respondent's vehicle, but Respondent's vehicle still struck the left side of the truck and then the boat trailer.

7. Trooper Pence completed the collision report and remained on scene to call for a tow truck for the other vehicle. Once she was about to clear the scene, the driver of the truck informed her he also needed a tow truck for the boat trailer, which required her to stay on scene even longer.

8. When Trooper Pence arrived at the hospital, she found Respondent was still being treated for mud that was impacted behind his eye.

9. Trooper Pence is unsure of what time she arrived at the hospital, but she remained at the hospital less than one hour.

10. As soon as Trooper Pence was able to speak with Respondent, she immediately smelled a strong odor of alcohol as she got close to him. At that time, Trooper Pence testified she had not yet determined whether or not she believed Respondent was driving under the influence.

11. Respondent informed Trooper Pence that he did not remember what happened or being in a motor vehicle collision.

12. Respondent admitted to drinking a couple alcoholic beverages before 11:00 p.m. at an anniversary party.

13. Trooper Pence was unable to administer standardized field sobriety tests to Respondent because he had been pinned under the vehicle and had an injury to his eye.

14. While in the hospital, Trooper Pence placed Respondent under arrest for driving under the influence, and at approximately 6:45 a.m., she advised Respondent of his Miranda rights, which Respondent acknowledged he understood.

15. Respondent was released from the hospital sometime after 7:00 a.m. Once Respondent was released, the hospital provided Respondent with clothing and Trooper Pence took him to her car, where she again advised him of his Miranda rights on video.

16. Respondent was transported to the Colleton County jail for a breath test.

17. Upon her arrival at the jail, Trooper Pence escorted Respondent into a DataMaster room.

18. Trooper Pence, who is a certified DataMaster DMT operator², changed the simulator solution.

19. Trooper Pence provided Respondent with a written copy of the driving under the influence advisement of implied consent rights form, and she read the form aloud to Respondent.

20. The twenty minute observation period started at 8:22:18. At the conclusion of the observation period, the machine performed a series of self-tests, including a simulator test that reflected a reading of .078%.³

21. Respondent consented to the test and provided a breath sample at 8:48:21.

22. Trooper Pence issued a notice of suspension to Respondent.

² DMT #007714. See Petitioner's Ex. #2.

³ See Petitioner's Ex. #2.

23. Trooper Pence testified that her notes reflect the time of arrest as 6:45 a.m. but the Breath Alcohol Analysis Test Report reflects 7:17 a.m. as the time of arrest. She further testified that she is unsure of which arrest time was accurate.

CONCLUSIONS OF LAW

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

1. Pursuant to S.C. Code Ann. §1-23-660(A) (Supp. 2015), the Hearing Officers of the OMVH, effective January 1, 2006, preside over contested case hearings involving suspensions, cancellations, or revocations of drivers licenses by the Department. All hearings presided over by the Hearing Officers of the OMVH are contested case hearings and must be conducted in accordance with the Administrative Procedures Act ("APA") and the rules of procedure for the OMVH. § 1-23-660(B) (Supp. 2015). Furthermore, all appeals from final decisions of the Hearing Officers are to the South Carolina Administrative Law Court in accordance with its rules of procedure. § 1-23-660(D) (Supp. 2015).

2. The Department is an administrative agency of the State of South Carolina and is charged with administering the motor vehicle laws of this state. S.C. Code Ann. § 56-1-5 (2006).

3. 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, revocation or cancellation, and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this matter. See Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 9.3 at 366 (2nd ed. 2001).

4. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992); see also Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996) (holding that a trial judge, when acting as a finder of fact, "has the authority to determine the weight and credibility of the evidence before him").

5. Pursuant § 56-5-2930 (Supp. 2015):

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It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, 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 a motor vehicle are materially and appreciably impaired, or 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 a motor vehicle are materially and appreciably impaired. . . .

6. Section § 56-5-2950(A) (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 the law enforcement officer who has arrested [the] person....

Furthermore, the breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy pursuant to South Carolina Law Enforcement Division ("SLED") policies. § 56-5-2950(A) (Supp. 2015).

7. Section 56-5-2950(B) (Supp. 2015) 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.

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8. 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 § 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 § 56-5-2950(J)(Supp. 2015).

9. If a person drives a motor vehicle and has an alcohol concentration of fifteen one-hundredths of one percent or more, the Department 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. § 56-5-2951(A) (Supp. 2015).

10. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. § 56-5-2951(B) (Supp. 2015). Section 56-5-2951(F) (Supp. 2015) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) given a written copy of and verbally informed of the rights enumerated in 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.

11. 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. After reviewing the evidence presented, I conclude that Respondent was lawfully arrested for driving under the influence.

In this case, Trooper Pence arrived on the scene of a two-car collision on US 17A in Colleton County, South Carolina, and she identified Respondent as the driver of one of the vehicles involved. Respondent, whom Trooper Pence later determined was at-fault for the collision, was entrapped in his SUV when she arrived, and the fire department was attempting to extract him. Respondent was conscious on the scene, but Trooper Pence was unable to talk to him after the extraction because he needed immediate medical attention and was transported to Colleton Medical Center. After Trooper Pence cleared the collision scene, she proceeded to the hospital, where she met with Respondent. Trooper Pence immediately smelled a strong odor of alcohol as she got close to Respondent, and Respondent admitted to drinking a couple alcoholic beverages at a party before 11:00 p.m. Respondent did not remember being in a motor vehicle collision, and due to his injuries, Trooper Pence did not administer field sobriety tests to Respondent.

At the hearing, counsel for Respondent moved to exclude all statements made by Respondent after Trooper Pence smelled alcohol on him, including his admission to drinking, on the ground that Respondent had not yet been advised of his Miranda warnings. I conclude the motion is denied. This matter was an accident investigation, and I find that Respondent was not in custody until Trooper Pence placed him under arrest for driving under the influence. Furthermore, the requirement of Miranda warnings only applies to criminal cases and cannot be extended to apply to implied consent hearings. See Hill v. SC Dep't of Motor Vehicles 06-ALJ-21-0574-AP at 13-15, (S.C. Admin. Law Court, J. McLeod, September 18, 2008). Based upon the totality of the facts and circumstances before Trooper Pence at the time of the arrest, including Respondent's admission to drinking, I conclude there was probable cause for Respondent's arrest for driving under the influence.

Moreover, Respondent was advised of his implied consent rights, verbally and in writing, and he consented to the DataMaster test, which was conducted by Trooper Pence, who is a certified DataMaster operator. After the conclusion of the twenty minute observation period, Respondent submitted a breath sample.

At the hearing, counsel for Respondent moved to rescind the suspension of Respondent's driver's license or driving privilege on the ground that the breath sample was not collected within two hours of Respondent's arrest. Trooper Pence presented conflicting evidence regarding the time of arrest. While the time of arrest entered on the Breath Analysis Test Report is 7:17 a.m., Trooper Pence testified that her notes reflected an arrest time of 6:45 a.m., and she admitted that she was unsure of which arrest time was accurate. However, she also testified that she advised Respondent of his Miranda rights at approximately 6:45 a.m., which was after his arrest, and that Respondent was released from the hospital after 7:00 a.m. Based upon the evidence before me, I conclude Respondent's time of arrest was 6:45 a.m. Though the observation period for the breath test started at 8:22:18 a.m., Respondent did not submit a breath sample until 8:48:21, which is more than two hours after the arrest. S.C. Code § 56-5-2950(A) requires that "[a] breath sample taken for testing must collected within two hours of the arrest." Based upon §56-5-2950(A), clearly, 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. As a result, I conclude that the failure to collect the breath sample within two hours of the arrest as required by § 56-5-2950(A) materially affected the accuracy and reliability of the test result, and that the test result must be excluded from evidence as a result. Accordingly, the suspension of Respondent's driver's license or driving privilege must be rescinded.

ORDER

Based upon the above findings of facts and conclusions of law,

IT IS HEREBY ORDERED the suspension of Respondent's driver's license or driving privilege is **RESCINDED**; and

IT IS FURTHER ORDERED that upon Respondent's compliance with the laws of this State, the Department must restore Respondent's driver's license or driving privilege.

AND IT IS SO ORDERED.

Brigitte B. Autry

February 9, 2017
Ridgeland, South Carolina

Brigitte B. Autry
Hearing Officer, OMVH

Page 8 of 8

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FEB 16 2017

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CERTIFICATE OF SERVICE

I, Yolanda P. Williams, hereby certify that I have this date served this Order upon all parties to this caused 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

Yolanda P. Williams

February 9, 2017
Columbia, South Carolina

FILED

FEB 16 2017

SCOMVH

000056

THE STATE OF SOUTH CAROLINA
IN THE OFFICE OF MOTOR VEHICLE HEARINGS

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

Petitioner,

v.

Samuel James,

Respondent.

Docket No. 16-OMVH-01-1480-CC
SCDL No.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the January 16, 2017, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing *Motion to Reconsider* to:

Margie Bright Matthews, Esquire
Bright Matthews Law Firm, LLC
Post Office Box 499
Walterboro, South Carolina 29488

as counsel of record for Samuel James, and:

Warren V. Ganjehsani, Esquire
S.C. Department of Public Safety
Post Office Box 1993
Blythewood, South Carolina 29016

as counsel of record for South Carolina Department of Public Safety.



Brandy A. Duncan
Assistant General Counsel

January 16, 2017
Blythewood, South Carolina

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FEB 16 2017

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Exhibits - Implied Consent Hearing

Hearing: Petitioner: South Carolina Dept. of Public Safety
Respondent: Samuel James
Attorney: Margie Bright Matthews, Esq.

Docket No.: 16-OMVH-01-1480-CC.

Date of Hearing: Aug 5, 2016 Location: Jasper County Court House

Hearing Officer: Brigette B. Autry

☐ I hereby certify that neither party offered exhibits into the record.

☒ I hereby certify that exhibit(s) were offered into the record and are indicated below.

PETITIONER:

RESPONDENT

☐ Notice of Suspension

☐ Notice of Suspension

☒ Advisement of Implied Consent Rights forms

☐ Advisement of Implied Consent Rights

☒ SLED Breath Alcohol Analysis Test Report

☐ SLED Breath Alcohol Analysis Test Reports.

☐ Datamaster certification

☐ In-car videotape

☐ SFST Certification

☐ Datamaster site video via SLED website

☐ SLED Breath Records

☐ Other _____

☐ I hereby certify that no exhibits were attached to this form and it was delivered to the OMVH Office by either ____ hand delivery or ____ e-mail

☒ I hereby certify that the listed exhibits were attached to this form and delivered to the OMVH Office by either ____ hand delivery or X e-mail.

Date e-mailed February 9, 2017 or Date hand delivered

Signature Brigette B. Autry

000058

ADVISEMENT OF IMPLIED CONSENT RIGHTS

SAMUEL JAMES
Subject's Name (Print)

4-14-53
Date of Birth



SC
State Licensed

REDACTED

Driver's License Number

DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here - Inform subject of video recording.
If answer is No, start here - Inform subject of type samples requested (e.g. breath, blood, urine).
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months, with the option of ending the suspension if you enroll in the Ignition Interlock Device Program, and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2935.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month, with the option of ending the suspension if you enroll in the Ignition Interlock Device Program.
 - You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, shall provide you affirmative assistance.
 - You have the right to request a contested case hearing within thirty (30) days of the issuance of the notice of suspension.
 - If you do not request a contested case hearing or if your suspension is upheld at the contested case hearing, you shall enroll in an Alcohol and Drug Safety Action Program.
- If applicable, perform the following procedures:
- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.)
- (D) Enter biographical data into DataMaster DMT. (Required for all tests, including refusals.)
- (E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.)

ADVERTENCIA Y LECTURA DE DERECHOS POR MANEJAR BAJO LOS EFECTOS DE ALCOHOL O DROGAS (DUI)

- (A) ¿Se grabará el análisis en video? Si la respuesta es Sí, empiece aquí - Informe a la persona que va a ser grabada en video.
Si la respuesta es No, empiece aquí - Informe a la persona de las muestras que se requieran (ejemplos: soplo, sangre, orina).
- (A) Dete a la persona una copia escrita de la advertencia siguiente y lea la advertencia al sujeto.
- (B) Dete a la persona una copia escrita de la advertencia siguiente y léasela a la persona:
- Usted está arrestado por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código Legal de Carolina del Sur de 1976, según su condena.
 - El policía que efectuó el arresto dispuso que le sacaran muestras de alcohol y/o drogas para ser analizadas.
 - Se obtendrán y analizarán las muestras según la Sección 56-5-2950 y las normas del SLED.
 - Usted no está obligado a hacerse los análisis ni a proporcionar muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar su privilegio de manejar en Carolina del Sur por lo menos durante seis (6) meses con la opción de terminar la suspensión si se inscribe en el Programa del Dispositivo de Bloqueo del Arnanque. Negarse a ello podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o proporciona las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0.08%) o más, podría ser acusado en vez de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2935.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0.15%) o más, su privilegio de manejar en Carolina del Sur debe ser suspendido por lo menos durante un (1) mes con la opción de terminar la suspensión si se inscribe en el Programa del Dispositivo de Bloqueo del Arnanque.
 - Usted tiene el derecho de que una persona que usted elija y que esté capacitada para hacerlo, pague por su cuenta los análisis adicionales que usted tendrá que pagar y en ese caso, el agente debe brindarle ayuda si usted la solicita.
 - Usted tiene el derecho de solicitar una audiencia para disputar el caso dentro de los treinta (30) días a partir de la fecha en que se emitió la notificación de la suspensión.
 - Si usted no solicita una audiencia para disputar el caso o si se le confirma la suspensión en la audiencia para disputar el caso, usted tiene que inscribirse en un Programa de Medidas de Seguridad para el Consumo Responsable del Alcohol y las Drogas.
- Si es pertinente, haga lo siguiente:
- (C) Inspeccione la boca de la persona y quite todo material extraño de la boca. (No se requiere si se niega la persona.)
- (D) Ingrese los datos biográficos en el DataMaster DMT. (Obligatorio para todos los análisis aunque se niegue la persona.)
- (E) Observe a la persona un mínimo de (20) minutos antes de obtener una muestra de su aliento. (No se requiere si se niega la persona.)

000059

Subject's Signature
Firma de la Persona (recibió una copia)

Officer's Signature
Firma del Agente

La Pence 3-6-16 0827
date/time
fecha/hora

© 2015 Prometix, Inc. 4105 3rd, October 1, 2015

REDACTED

Pt #2



SOUTH CAROLINA LAW ENFORCEMENT DIVISION
BREATH ALCOHOL ANALYSIS TEST REPORT
DRIVING UNDER THE INFLUENCE



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: SAMUEL JAMES
RACE: BLACK
SEX: M
DOB: [REDACTED]

DL NUMBER: [REDACTED]
DRIVER'S LICENSE: SC
SUBJECT ADDRESS: 367 HABERSHAM LN
YEMASSEE SC 29945

ARREST INFORMATION

OFFICER NAME: SHERIA PENCE
TICKET NUMBER: H408399
ARREST DATE: 03/06/2016

AGENCY ORI: SCSHP0600
COUNTY OF ARREST: 15 - COLLETON
ARREST TIME: 07:17

OPERATOR INFORMATION

TEST OPERATOR: SHERIA PENCE
CERTIFICATION #: DM1097714
SOLUTION LOT #: 15801

AGENCY ORI: SCSHP0600
EXPIRATION DATE: 04/27/2017
BOTTLE: 1556

BREATH TEST VIDEO RECORDED? YES
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED? YES
SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

SUBJECT INFORMED OF VIDEO RECORDING? YES
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES? YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATA MASTER DMT SERIAL # 107507

TEST DATE		03/06/2016
OBSERVATION START TIME		08:22:18
BLANK TEST	0.00	08:45:17
INTERNAL STANDARD	VERIFIED	08:45:24
0.08% SIMULATOR TEMPERATURE	34.00°C	08:45:46
0.08% SIMULATOR VERIFICATION	0.078	08:45:46
BLANK TEST	0.00	08:46:39
SUBJECT SAMPLE	0.17	08:46:39
BLANK TEST	0.00	08:49:36
INTERNAL STANDARD	VERIFIED	08:49:42

Subject Signature

(Received Copy) Date/Time

Arresting Officer's Signature

Test Operator's Signature

VISIT WWW.SLED.SC.GOV AND CLICK ON IMPLIED CONSENT. THEN CHECK ON BREATH TEST VIDEO RECORDED. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST.

SUBJECT ID: 007406579
SUBJECT PASSWORD: 06060

DATE/TIME: 03-06-2016 08:44:19
DMT SERIAL NUMBER: 107507

IMPORTANT NOTICE

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT INFORMATION. IT IS YOUR RESPONSIBILITY FOR UNAUTHORIZED ACCESS.



BRIGHT MATTHEWS LAW FIRM, LLC

205 East Washington Street
Post Office Box 499
Walterboro, South Carolina 29488
Phone (843) 549-6028
Facsimile (843) 549-6107

REDACTED

Margie Bright Matthews

Margie@BrightMatthewsLaw.com

March 21, 2016

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

Re: State of South Carolina vs. Samuel James
BMLF File No. : 16-5178
Ticket No. : H 408399 GS (DUI 1st)
Driver's License No. :

Dear Sir/Madam:

I have been retained to represent Samuel James in the above referenced charge. On behalf of my client, I request an Administrative Hearing. Please notify me of the set date, time and place of hearing. I have enclosed a check for **Two Hundred and 00/100 (\$200.00) Dollars** for the administrative fee.

If you should have any questions or concerns regarding this matter, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

Reatha M. Orr,

Assistant to:

Margie Bright Matthews

MBM/rmo
Enclosure

cc: Samuel James

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

Docket No. 16-OMVH-01-1480-CC
DL#

NOTICE OF HEARING

Respondent.

0096

Yolanda Williams

From: Yolanda Williams
Sent: Monday, April 18, 2016 11:22 AM
To: Margie Bright Matthews (Margie@brightmatthewslaw.com); Leon Scarborough.
(ltscarborough@schp.org); HPU@scdmv.net
Cc: 'orr@brightmatthewslaw.com'
Subject: Notice of Hearing, Samuel James, 08-05-16 dk# 16-1480
Attachments: Notice of Hearing, Samuel James, 08-05-16 dk# 16-1480.pdf

Yolanda P. Williams
Administrative Coordinator
Scheduling Assistant for
Brigette Autry and Tracy Holland
South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Ste 325
Columbia, SC 29201
803-734-3201
803-734-3200 fax
www.scomvh.net

000062

Cash Receipt

Number: CR1603-0466 Dated: 03-23-2016
Till: Total Paid: \$200.00
Posted: Yes

Void Information

Void Method: Voided: No
Void Posted: No
Void Explanation:

Generate

 Generate

Checklists (0)

Go to top

None Available

Invoices (1)

Go to top

					Show: 40
					Paid
	<u>Date</u>	<u>Number</u>	<u>Item Type</u>	<u>Customer</u>	
	03-23-2016	NV1603-0468	Case Filing Fee - \$200	Samuel James	\$200.00

Payments (1)

Go to top

			Show: 40
			Paid
<u>Payment Method</u>	<u>Reference</u>		
Check	Bright Matthews ck 5755		\$200.00

000063

0098



2006-OMVH-01-1480

South Carolina Department of Motor Vehicles

NOTICE OF SUSPENSION

MV-65
(Rev. 8/12)

SAMUEL JAMES

Driver's Name

BP/DL State and Number

Date of Birth

367 HABERSHAM LN YEMASSEE SC 29945

Address on Driver's License: Street address, Apt. No., City, State, Zip Code

REDACTED

Special mailing address for notices (if different from driver's license address): Street address, Apt. No., City, State, Zip Code

Vehicle License Plate State and No. JUU418 Vehicle Type: Commercial ☐ Yes ☒ No Hazardous Material ☐ Yes ☒ No

**YOUR PRIVILEGE TO DRIVE IN SOUTH CAROLINA IS SUSPENDED IMMEDIATELY FOR THE FOLLOWING:
(CHECK ONLY ONE BOX)**

**UNDER THE AGE OF TWENTY-ONE (21)
AND NOT UNDER ARREST FOR DUI***

- ☐ Registering an alcohol concentration of .02 or greater*
☐ Refusing to submit to a breath, blood or urine test*
Date of Test/Refusal

ANY AGE UNDER ARREST FOR DUI

- ☒ Registering an alcohol concentration of .15 or greater
☐ Refusing to submit to a breath, blood or urine test
3-6-16 Date of Test/Refusal

***A person who is taken for testing under 56-1-286 cannot be prosecuted under 20-7-8920, 20-7-8925, 56-5-2930 or 56-5-2933.** Everyone who receives this Notice of Suspension can request a hearing to challenge the suspension. A request for a hearing must be filed with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the Notice of Suspension. There is a \$200.00 filing fee. (Personal checks are not accepted.) See the back of this form for more information on how to ask for a hearing.

If a hearing is scheduled, you may be able to get a temporary alcohol restricted license. The temporary alcohol restricted license costs \$100.00 and allows you to drive without restrictions until the hearing results are mailed to you. See the back of this form for instructions on how to obtain a temporary alcohol restricted license.

If you do not obtain a temporary alcohol restricted license, your suspension continues. You cannot drive until you either obtain a route-restricted license or your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do obtain a temporary alcohol restricted license and the hearing officer rules against you after your hearing, your suspension will go back into effect. If you were suspended after having been arrested for DUI, you may be eligible for a route-restricted license to allow you to drive for the remainder of the suspension. There are instructions on the back of this form to explain how to obtain a route-restricted license. If you do not obtain a route-restricted license or if you are under the age of twenty-one (21) and were not arrested for DUI, you cannot drive until your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do obtain a temporary alcohol restricted license and the hearing officer rules in your favor, the suspension will be cancelled. Your driving privileges will be reinstated. However, you must go to a Department of Motor Vehicles office to have a regular license issued.

If you were suspended after having been arrested for DUI, you may be entitled to have a route-restricted license during your suspension period. You do not have to request a hearing to be eligible for a route-restricted license. The route-restricted license costs \$100.00 and allows you to drive only to and from work, college, ADSAP classes, and a court-ordered drug program, plus during the course of your employment or college. However, you must enroll in ADSAP before a route-restricted license will be issued. See the back of this form for instructions on how to obtain a route-restricted license.

I understand that I cannot drive until a license has been issued to me.

Signature of Driver

Date Signed

Driver's license or permit surrendered (yes or no) YES. (If yes, license must be attached to yellow copy of this form)

3-6-16 Date Signed

Signature of Arresting Officer

SC SHP0600 Agency Code

Agency Name

3-6-16 Date Signed

Signature of DataMaster Operator

SC SHP0600 Agency Code

Agency Name

Printed Name of Arresting Officer

SA 843-953-6000

Agency Telephone Number

SA PENCE

Printed Name of DataMaster Operator

843-953-6000

Agency Telephone Number

Blue Copy - Driver Yellow Copy - DMV/Driver Rec

White Copy - Officer's Agency

0099

000064

REDACTED

Form 438
Rev. 9/10

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME: **SAMUEL** MIDDLE NAME: LAST NAME: **JAMES**

STREET AND NO. CITY STATE ZIP CODE

367 HABERSHAM LN Yemassee SC 29945

STATE LICENSED **SC** CDL ☐ YES ☒ NO DRI. LIC. CLASS **D**

VEH. LIC. NO. STATE MAKE OF VEH. YEAR COMM. VEH. ☒ AUTO ☐ MOTOR VEH. ☐ COMB. ☐ HAZ. MT. ☐ MOPED ☐ MTRCYCL. ☐ OTHER

JW 418 SC GMC 01

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT: CITY: STATE: ZIP CODE:

CTC PO BOX 1732/40 KLEIN ST

DATE OF TRIAL: TIME OF TRIAL: CITY: STATE: ZIP CODE:

4/21/16 1400 WALTERBORO SC 29488

VIOLATION: COURT APPEARANCE REQUIRED: ☒ YES ☐ NO VIOLATION SECTION NO.

DUI 1st 56-5-2930

OWNER OF VEHICLE DATE OF ARREST:

SAME 3/8/16

ADDRESS OF OWNER DATE OF VIOLATION:

SAME 3/6/16

BAIL DEPOSITED: NAME OF ARRESTING OFFICER: RANK:

CASH SaPence SGT

ALL TIMES SHOWN ON THIS SUMMONS ARE IN MILITARY TIME

PRESENT THIS SUMMONS TO THE TRIAL COURT SHOWN ABOVE

Be sure you understand from the arresting officer the exact time and before whom you are to appear. IF THIS TICKET IS WRITTEN FOR A TRAFFIC VIOLATION AND YOU FORFEIT BAIL, PLEAD GUILTY OR NOLO CONTENDERE OR ARE CONVICTED AFTER A TRIAL THIS VIOLATION WILL BE PLACED AGAINST YOUR DRIVING RECORD OR FORWARDED TO YOUR HOME STATE. FAILURE TO COMPLY WITH THE TERMS OF THIS SUMMONS MAY RESULT IN THE SUSPENSION OF YOUR DRIVERS LICENSE BY YOUR HOME STATE. YOU ARE REQUIRED BY LAW TO APPEAR IN COURT FOR CERTAIN OFFENSES.

SEE IMPORTANT INFORMATION ON THE REVERSE SIDE OF THIS TICKET

VIOLATOR'S COPY

COUNTY	NUMBER
COLLETON	15
BADGE	TRUCK
957	6
DATE OF VIOLATION	WEATHER
0330	CLR
MILES	IN
10	0
CITY	CODE
WALTERBORO	1
Lat	Long
32434030	80472320
OFFENSE CODE	B.A. LEVEL
99	17

H 408399

000065

Yolanda Williams

From: Scarborough, Leon T. <LeonScarborough@SCDPS.GOV>
Sent: Friday, March 25, 2016 1:37 PM
To: Yolanda Williams
Cc: Hardee, Robert L.; Pence, Sheri A.
Subject: RE: Samuel James

Yolanda, please schedule this hearing for Ridgeland.

Thanks
Leon

Leon T. Scarborough
South Carolina Highway Patrol / Troop 6
South Carolina Department of Public Safety
8740 North Park Blvd.
North Charleston, S. C. 29406
843-953-6010 FAX.843-953-6009
ltscarborough@scdps.gov
www.scdps.gov/schp

-----Original Message-----

From: Yolanda Williams [mailto:ywilliams@scalc.net]
Sent: Thursday, March 24, 2016 1:25 PM
To: Scarborough, Leon T.
Subject: Samuel James
Importance: High

I received this request for a hearing today. I believe the Trooper patrol multiple counties. Is there any way to determine where this stop was made so I can schedule it in the correct location. Thanks.

Yolanda P. Williams
Administrative Coordinator
Scheduling Assistant for
Brigette Autry and Tracy Holland
South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Ste 325
Columbia, SC 29201
803-734-3201
803-734-3200 fax
www.scomvh.net

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court.

000066

Yolanda Williams

From: Yolanda Williams
Sent: Monday, March 28, 2016 3:28 PM
To: 'orr@brightmatthewslaw.com'; Leon Scarborough. (lts Scarborough@schp.org); Margie Bright Matthews (Margie@brightmatthewslaw.com)
Subject: FW: Traffic Ticket - Samuel James
Attachments: SKMBT_C284e16032416530.pdf

Importance: High

Tracking:	Recipient	Read
	'orr@brightmatthewslaw.com'	
	Leon Scarborough. (lts Scarborough@schp.org)	
	Margie Bright Matthews (Margie@brightmatthewslaw.com)	
	Brigette Autry	Read: 3/28/2016 3:28 PM

Because Mrs. Autry only goes to Jasper on once or twice a month for pre-approved scheduled dates, this case will have to be scheduled after the legislative session is over. We get dates for six months at a time. Currently we do not have dates for that location for July. If this case is resolved before the schedule date, please notify our office immediately. Thanks.

Yolanda P. Williams
Administrative Coordinator
Scheduling Assistant for
Brigette Autry and Tracy Holland
South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Ste 325
Columbia, SC 29201
803-734-3201
803-734-3200 fax
www.scomvh.net

*Jasper
Aug 5
10:20*

From: retha orr [mailto:orr@brightmatthewslaw.com]
Sent: Thursday, March 24, 2016 4:50 PM
To: Yolanda Williams <ywilliams@scalc.net>
Subject: Traffic Ticket - Samuel James

The attachment is the Uniform Traffic Ticket # H408399 – Samuel James

000087

Certificate of Service

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage aid, or in the interagency Mail Service addressed to the party (ies) or their attorney(s).

This 19th day of May 2017

By: Yolanda P. Williams

Title: Administrative Coordinator, OMVH

000068

RECEIVED

MAR 08 2018

SC Court of Appeals

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

Appellate Case No. 2017-002394

South Carolina Department of Motor Vehicles Appellant,

v.

Samuel James Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies pursuant to SCARC Rule 210(g) that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Brandy A. Duncan, SC Bar # 72052
Assistant General Counsel
S.C. Department of Motor Vehicles

March 2, 2018
Blythewood, SC