

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2017-001247

Corey Arness McCluney,

Appellant,

v.

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

Defendants,

Of which South Carolina Department of
Motor Vehicles is the Respondent.

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Corey Arness McCluney,

Docket No. 16-ALJ-21-0437-AP

Appellant,

vs.

ORDER

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

Respondent.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed by Corey McCluney (Appellant). Appellant seeks review of a decision by a hearing officer with the Office of Motor Vehicle Hearings (OMVH), which found in favor of the South Carolina Department of Motor Vehicles (Department) and the South Carolina Department of Public Safety (Respondent). Appellant argues that the hearing officer's order is predicated upon unlawful procedure. The Court has jurisdiction to review this matter pursuant to South Carolina Code Section 1-23-660(D).

BACKGROUND

On May 23, 2016, Trooper Thornton responded to an accident on I-85. When the trooper arrived, he found Appellant standing by his vehicle, which was in a ditch on the shoulder of the road. Appellant stated that he ran into the ditch. Trooper Thornton smelled alcohol on Appellant and administered a horizontal gaze nystagmus test. The trooper observed signs of nystagmus in Appellant's eyes. Appellant failed to completely comply with further tests or requests from Trooper Thornton. The trooper placed Appellant under arrest and transported him to county jail for a DataMaster breath test. Trooper Thornton gave Appellant a copy of the Advisement of Implied Consent Rights. After waiting twenty minutes per protocol, Appellant informed Trooper Thornton that he would not take the test. Appellant's license was suspended for refusing the test and he filed for a contested case hearing with the OMVH.

ISSUE ON APPEAL

Whether the hearing officer erred in utilizing improper procedure.

FILED

May 4, 2017

SC ADMIN. LAW COURT

STANDARD OF REVIEW

The ALC hears appeals from the OMVH under the Administrative Procedures Act (APA).¹ See S.C. Code Ann. § 1-23-660(D) & § 1-23-600(E) (Supp. 2016). Consequently, the Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2016). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2016). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

DISCUSSION

The contested case hearing in this matter was held pursuant to Appellant's request after his license was suspended for refusal to take a breathalyzer test. Hearings on that issue are confined to a specific set of inquiries; namely, whether the driver:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
 - (d) machine was working properly.

S.C. Code Ann. § 56-5-2951(F) (Supp. 2016). The statute further provides that, "The Department of Motor Vehicles and the arresting officer shall have the burden of proof in contested case hearings conducted pursuant to this section." Id.

¹ For the purposes of the APA, the OMVH functions as an "agency." See S.C. Dept. of Motor Vehicles v. Brown, 406 S.C. 626, 636, 753 S.E.2d 524, 529 (2014) (Beatty, J., dissenting) (quoting S.C. Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011)).

In this case, evidence by which Trooper Thornton met the burden of proof was introduced at two different times. The trooper initially gave direct testimony and rested his case. Appellant's attorney did not cross-examine Trooper Thornton and chose not to put on a case. At that point, Appellant's attorney moved to dismiss the suspension. He argued that the trooper had not proved that his client was the driver of the car in the ditch, that he had not proved probable cause, and that he did not prove advisement of rights. The hearing officer allowed the trooper to provide additional testimony on the contested points. During the interchange that followed, Appellant's attorney stringently objected to allowing additional testimony—on the ground that the record was closed, among other things. The hearing officer stated that the hearing was not adjourned and that she had not closed the record or called for closing statements and therefore the trooper's testimony was allowable. She pointed out that an administrative hearing is for getting to the truth and that she was relying on prior case law in allowing the additional testimony.

Appellant now argues that the procedure used by the hearing officer was unlawful, or in the alternative, that it wrongly shifted the burden of proof from the Department to himself. Appellant argues that the case should have been decided in his favor when the trooper initially failed to establish a *prima facie* case, that allowing the trooper a chance to add further testimony violates rudimentary procedural rules, and that by allowing the additional testimony the hearing officer shifted the burden of proof. In response, the Department points out that the hearing officer was relying on precedent established in South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753, S.E.2d 524 (2014). That case involved a motion during closing arguments about the sufficiency of evidence on compliance with policy and procedure at the time of administration of a breath test under Section 56-5-2950(e). The Supreme Court ruled that moving on the issue of sufficiency of the evidence during closing prevented the Department from having a meaningful opportunity to respond. *Id.*, 406 S.C. at 633–34, 753 S.E.2d at 528. While the issues in this case are not identical to those in Brown, the case stands for the proposition that evidentiary rulings should not be used a trap rather than a tool to discover the facts in a DUI suspension hearing.

South Carolina courts have often held that procedure in an administrative hearing need not be as precise as that in a criminal or other serious matter. For instance, the Supreme Court has stated that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.” Stono River Envtl. Prot. Ass’n v. S.C. Dept. of Health & Envtl. Control, 305

S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (quotation marks and citation omitted). "Due process does not require the full gamut of rules and procedures" that some parties have claimed. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).

Moreover, a hearing officer has broad discretion when presiding over an administrative hearing. "Considering that the trial judge is vested with discretion to admit or exclude evidence, *a fortiori* the trial judge may regulate the manner in which evidence is offered to the court, subject to review for abuse of discretion or error of law." Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 242, 616 S.E.2d 431, 436 (Ct. App. 2005). "The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." Brenco v. S.C. Dept. of Transp., 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008) (citation omitted).

In reviewing the record in this matter, it is apparent that, although the trooper had rested his case, the record was not closed, nor had closing statements commenced. The hearing officer was within her discretion to allow additional testimony in order to ascertain the truth of the matters before her.

ORDER

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

IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

May 4, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman

Judicial Aide to Deborah Brooks Durden

May 4, 2017
Columbia, South Carolina

FILED

May 4, 2017

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Corey Arness McCluney,

Appellant,

vs.

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

Respondent.

Docket No. 16-ALJ-21-0437-AP

**ORDER DENYING
APPELLANT'S MOTION
FOR RECONSIDERATION**

This matter is before the Administrative Law Court (ALC or Court) pursuant to the motion of counsel for Appellant, Corey Arness McCluney, seeking reconsideration of the Court's Order filed on May 4, 2017. The motion merely reiterates the arguments made in Appellant's Brief, which were carefully considered and ruled upon by this Court. This motion does not seek to correct manifest errors of law or fact or to present newly discovered evidence. Therefore,

IT IS HEREBY ORDERED that Appellant's Motion for Reconsideration is **DENIED**.
AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

May 17, 2017
Columbia, South Carolina

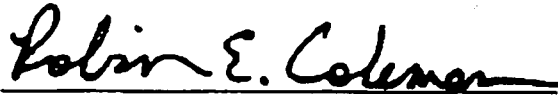
FILED

May 17, 2017

SC ADMIN. LAW COURT

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman

Judicial Aide to Deborah Brooks Durden

May 17, 2017
Columbia, South Carolina

FILED

May 17, 2017

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McClunney,	)	
	)	Docket No. 16-ALJ-21-0437-AP
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department	)	BRIEF OF THE APPELLANT
of Motor Vehicles,	)	
	)	
Respondent.	)	

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STATEMENT OF ISSUE ON APPEAL

1. DID THE HEARING OFFICER ERR BY ALLOWING THE WITNESS FOR THE RESPONDENT, SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES (DEPARTMENT), TO TESTIFY AS TO NEW MATTERS IN RESPONSE TO THE APPELLANT'S MOTION(S) TO DISMISS, AFTER THE SAID WITNESS HAD CONCLUDED HIS TESTIMONY, AND THE DEPARTMENT HAD RESTED ITS CASE, BECAUSE SUCH PROCEDURE WAS UNLAWFUL, AND IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT IN VIOLATION OF S.C. CODE ANN. §56-5-2951(E)?

STATEMENT OF THE CASE

On May 22, 2016, Trooper R.B. Thorton, of the South Carolina Department of Public Safety, arrested the Appellant, Corey McCluney, for Driving Under the Influence. Immediately following the Appellant's arrest he was transported to the Spartanburg County Detention Center, where Trooper Thorton offered the Appellant a breath test. The Appellant refused the breath test, which resulted in the suspension of his driving privileges. Thereafter, the Appellant timely requested a contested case hearing with the Office of Motor Vehicle Hearings (OMVH) pursuant to S.C. Code Ann. §56-5-2951(B)(2).

On August 29, 2016, a contested case hearing was held as provided for by S.C. Code Ann. §56-5-2951. At the hearing, Trooper Thorton was the sole witness for the Department of Motor Vehicles. At the conclusion of Trooper Thorton's direct testimony, the Appellant did not cross-examine Trooper Thorton. The Department then rested. No evidence was offered in rebuttal by the Appellant.

Based upon the limited testimony of Trooper Thorton, the Appellant then made a motion to dismiss. In response to the Appellant's motion to dismiss, Trooper Thorton was then allowed to continue testifying to new matters, over the objection of the Appellant. This procedure was again employed when the Appellant again moved to dismiss. The Appellant objected to the procedure followed by the Hearing Officer, and the hearing was concluded.

Following the hearing, the Hearing Officer issued a "Final Order and Decision" on October 18, 2016, sustaining the suspension of the Appellant.

On November 9, 2016, the Appellant filed a "Notice of Appeal" with the Administrative Law Court. The Appellant's "Notice of Appeal" set forth two grounds for appeal, which stated that the Hearing Officer erred by employing an unlawful procedure, and that the said procedure employed improperly shifted the burden of proof to the Appellant. Because the two grounds involve the same issue, that being the procedure used by the Hearing Officer at the Appellant's contested case hearing, the Appellant has restated and combined these matters into one issue, as provided for by Rule 33(B), of the Rules of Procedure for the Administrative Law Court.

STANDARD OF REVIEW

The Office of Motor Vehicle Hearings (OMVH) is authorized by law to determine contested cases arising from the Department of Motor Vehicles. S.C. Code Ann. §1-23-660 (Supp. 2016). Therefore, the OMVH is an "agency" under the Administrative Procedures Act ("APA"). S.C. Code Ann. §1-23-310(2) (Supp. 2016). As such, the APA's standard of review governs appeals from decisions of the OMVH. S.C. Code Ann. §1-23-380 (Supp. 2016). The provisions of S.C. Code Ann. §1-23-380(5) (Supp. 2016) state the standard of review used to review an agency decision:

The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(5) (Supp. 2009).

In the matter before the Court, the Appellant has stated that the basis of his appeal is that the Hearing Officer's decision was the result of an unlawful procedure (S.C. Code Ann. §1-23-380(5)(c)), and that such unlawful procedure, or procedure, that was used by the Hearing Officer, improperly shifted the burden of proof to the Appellant in violation of the statutory provisions of S.C. Code Ann. §56-5-2951(E) (Supp. 2008) (S.C. Code Ann. §1-23-380(5)(a)).

ARGUMENT

1. THE HEARING OFFICER ERRED BY ALLOWING THE WITNESS FOR THE RESPONDENT, SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES (DEPARTMENT), TO TESTIFY AS TO NEW MATTERS IN RESPONSE TO THE APPELLANT'S MOTION(S) TO DISMISS, AFTER THE SAID WITNESS HAD CONCLUDED HIS TESTIMONY, AND THE DEPARTMENT HAD RESTED ITS CASE, BECAUSE SUCH PROCEDURE WAS UNLAWFUL, AND IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT IN VIOLATION OF S.C. CODE ANN. §56-5-2951(E).

A. Statement of Applicable Law

Pursuant to the provisions of S.C. Code Ann. §56-5-2950(A) (Supp. 2008), a person arrested in South Carolina for Driving Under the Influence has given their consent to chemical tests of the person's breath, blood or urine for the purpose of determining the presence of alcohol and/or drugs. Under the provisions of S.C. Code Ann. §56-5-2951(A), when a motorist refuses to submit to a test conducted pursuant to section 56-5-2950(A), the license of such person must be immediately suspended. Under S.C. Code Ann. §56-5-2951(B)(2), a motorist who has his license suspended because of refusing to submit to testing may request a contested case hearing to challenge the suspension. When a contested case hearing is requested, the scope of the hearing is limited to whether the motorist:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;

- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant; and
 - (d) the machine was working properly,

S.C. Code Ann. §56-5-2951(F) (Supp.2016).

Pursuant to the provisions of S.C. Code Ann. §56-5-2950(B) (Supp. 2008), which is referenced in the above quoted statute, before a breath test may be administered, the person arrested must first be given a written copy of and verbally informed that:

- (1) the person does not have to take the test or give the samples, but his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;

- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

The plain language of §56-5-2950(B) makes it clear that a person must be informed of all of the enumerated rights before a breath test may be administered.

In a Section 56-5-2951 hearing, the burden of proof is borne by the Department of Motor Vehicles and the applicable law enforcement agency, as expressly provided for by S.C. Code Ann. §56-5-2951(E),¹ which reads in pertinent part:

The Department of Motor Vehicles and the arresting officer shall have the burden of proof in contested case hearings conducted pursuant to this section. If neither the Department of Motor Vehicles nor the arresting officer appears at the contested case hearing, the hearing officer shall rescind the suspension of the person's license, or nonresident's operating privileges regardless of whether the person requesting the contested case hearing or the person's attorney appears at the contested case hearing.

¹ It should be noted that the provisions of S.C. Code Ann. §56-5-2951 were substantially amended by the General Assembly in 2016 by Act No. 275, §§75, 76, to take effect on July 1, 2016, which was prior to the Appellant's contested case hearing on August 29, 2016. With respect to the effective date of any rule of evidence or procedure, a rule becomes effective, unless otherwise specified, to all pending cases as of the effective date. See State v. Needs, 333 S.C. 134, 508 S.E.2d 857, 864 (1998).

That as quoted above, the provisions of S.C. Code Ann. §56-5-2951(E), expressly state that the Department and the arresting officer have the burden of proof in a contested case hearing to establish the lawfulness of any arrest, and whether the motorist was properly advised of his implied consent rights. Indeed, in a contested case proceeding, the motorist or his attorney need not appear at all, because the motorist has no burden of proof. Concomitantly, a motorist, or his attorney, may choose to appear at a hearing and simply remain silent during the presentation of evidence by the Department, to see whether the Department and the arresting officer can satisfy their burden of proof. In either case, the Department and the arresting officer bear the burden of proof under the statute to present evidence to establish the lawfulness of any arrest, and whether the motorist was properly advised of his implied consent rights.

If the arresting officer establishes a prima facie case against the motorist, then the burden shifts to the motorist to present evidence to rebut the prima facie case. S.C. Department of Motor Vehicles v. Powers, 06-ALJ-21-0578-AP (January 10, 2007) (explaining the application of this principle throughout the states). A prima facie case is made by presenting evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. LaCount v. Gen. Asbestos & Rubber Co., 284 S.C. 232, 240, 192 S.E. 262, 266 (1937).

If the motorist fails to rebut the prima facie, then judgment must go against the motorist. See Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 539, 61 S.E.2d 165, 168-69 (1950) ("it is the settled rule of law that once a party establishes a prima facie case, judgment will go in his favor unless the opposite party produces evidence sufficient to overcome the prima facie presumption.").

B. Statement of Applicable Facts

In the matter before the Court, during the Appellant's contested case hearing the sole witness for the Department was Trooper R.B. Thorton, who was the arresting officer and the breath test operator in the driving under the influence case against the Appellant. The totality of Trooper Thorton's initial testimony was as follows:

Trooper Thorton: Thank you. On May 23rd of this year here in Spartanburg County, I was called to an accident on 85 Southbound near the 82 mile marker. When I arrived on scene, there was a Nissan - four-door Nissan in the ditch on the shoulder of the road and when I arrived on the scene, Mr. McCluney was standing outside of his vehicle talking with a bystander who had pulled over to check on him to make sure he was okay. He just ran off and was just stuck into the ditch. As I was speaking with him, I could notice an odor of alcohol coming from him as he's speaking to me, so I asked him just to step back to the - my patrol car so I could speak to him a little

further. And due to the closeness of the highway there to the interstate, I didn't want - I didn't do the normal field sobriety tests because of how close we were to the lane of traffic, so I just did the HGN test on him and observed the clues in his eyes there, nystagmus. And then asked him just to, you know, say the simple just alphabet just so I can just get a feel from that, and he would not. He would say A to Z, but he would not do anything else as far as alphabet E to X is what I normally just ask them where they have to remember to start and stop, and he refused to do that. And just based on him having no reason to wreck on the side of the road and the odor of alcohol and refusing to really comply with other requests, I placed him under arrest there for DUI and transported him to the county jail and offered him a breath test and waited the 20 minutes and he advised that he was not going to - he was advising from the beginning, but wasn't going to take the test. So I waited the 20 minutes anyway and offered him and he still refused to take the test. Then I was (inaudible) just for a minute.

Hearing Officer: Okay.

Trooper Thorton: Just put in a note charged with DUI and booked him in there at the County.

Hearing Officer: Okay. State's resting?

Trooper Thorton: Yes, ma'am.

Hearing Officer: Cross-examination?

Mr. Pruett: No questions.

Hearing Officer: Is there anything from the respondent?

Mr. Pruett: I'd move to dismiss the suspension...

ROA, p. 8, l. 21 through p. 10. L. 22.

As just noted, at the conclusion of Trooper Thorton's testimony, the Department rested. The Appellant did not cross-examine Trooper Thorton, and the Appellant presented no evidence. The Appellant then made a motion to dismiss the Appellant's suspension, based upon Trooper Thorton and the Department's failure to establish that the arrest of the Appellant was lawful, and that the Appellant had been advised of his implied consent rights. While it might be argued that Trooper Thorton's testimony established a prima facie case as to the lawfulness of the Appellant's arrest, there was absolutely no testimony or evidence presented that the Appellant was given any implied consent advisement, verbal or written, as required by S.C. Code Ann. §56-5-2951(F). In response to the Appellant's motion to dismiss, the Hearing Officer then stated that no ruling would be made on the Appellant's motion to dismiss, "I will not make a ruling on your dismissal." ROA p. 11, l. 16-17, Instead, the Hearing Officer allowed Trooper Thorton to introduce "rebuttal" testimony, although there was no testimony or evidence to rebut from the Appellant. Trooper Thorton then begin to testify as to new additional facts, to which the Appellant objected. ROA p. 11, l. 24-15 through p. 12, l. 1-6. The Hearing Officer overruled the Appellant's objection regarding the new "rebuttal testimony," holding that the record was not closed, even though the Department had "rested." The Hearing Officer stated that the hearing was a "fact finding administrative hearing," and as

such, the record would remain open, until it was closed. The Hearing Officer further advised Appellant's attorney that once the record was closed, then any motion to dismiss would be too late, because then it would be time for closing statements. ROA p. 12, 1. 7-16. What then followed was an exchange between the Hearing Officer and the Appellant's attorney that is set forth in the ROA, pps. 12-20, which consumes most of the transcription of the hearing, in which the Hearing Officer reiterated that under the procedure being used by the Hearing Officer, the Department could continue to introduce new evidence after the Department had rested, even though there had been no cross-examination or the introduction of evidence by the Appellant.

C. Use of Unlawful Procedure and Shifting of Burden of Proof

In the Appellant's contested case hearing, the Department and the arresting officer were given a full, fair and unfettered opportunity to present their case in order to satisfy their burden of proof. After Trooper Thorton testified, and there was no cross-examination, the Department rested its case. There being no evidence offered by the Appellant, the Appellant timely moved for a dismissal of the case, noting that Trooper Thorton had failed to present evidence to satisfy the requirements of S.C. Code Ann. §56-5-2951(F). At this juncture the Hearing Officer should have ruled on the motion before it, and dismissed or rescinded the suspension

of the Appellant. Instead, the Hearing Officer essentially treated the Appellant's motion as rebuttal evidence, or perhaps cross-examination, and allowed Trooper Thorton to present reply or rebuttal testimony. The legal fallacy of the Hearing Officer's procedure, is that the attorney's motion was not evidence or cross-examination, nor was it presented as such by the Appellant. The record unequivocally states the Appellant neither cross-examined Trooper Thorton, or offered evidence to rebut Trooper Thorton's testimony.² Therefore, in the absence of any cross-examination or rebuttal evidence, there was nothing for Trooper Thorton to further testify to in response or reply. Once the Department has rested its case, with all its evidence presented, the only evidence to be considered in a motion to dismiss was the evidence that was before the Hearing Officer at that juncture.

The procedure employed by the Hearing Officer is unknown in South Carolina law. Nowhere, under any rule of procedure in any court, including the Rules of Procedure for the Office of Motor Vehicle Hearings, is an opposing party in response to a motion to

² It is a rudimentary point of procedure and evidence, that cross examination involves the questioning of an opposing party's witness, and likewise, re-examination can only follow the cross-examination of a witness. See Rule 611(c), (d), of the South Carolina Rules of Evidence. Similarly, reply testimony can only be presented to rebut, contradict, or impeach the case presented by the opposing party. Moreover, reply testimony may not be used to complete a party's case-in-chief. State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781, 786 (Ct. App. 2010); State v. Farrow, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct.App. 1998).

dismiss, allowed to continue to testify and present additional evidence in reply to a legal motion.³

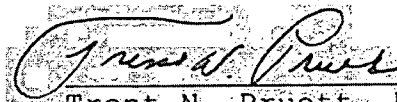
Perhaps of greater import, is that the procedure used by the Hearing Officer essentially shifted the burden of proof to the Appellant. The Appellant had no burden of proof, and therefore had no affirmative duty to question any witness, or to present any testimony or evidence. When Trooper Thorton's testimony fell short of what was required under S.C. Code Ann. §56-5-2951(F), and the Appellant's motion to dismiss was made, the Hearing Officer improperly treated the motion as cross-examination or as rebuttal evidence. By the Hearing Officer treating the Appellant's motion as questioning or as rebuttal evidence, the Hearing Officer effectively made the Appellant's attorney the interlocutor and counsel for the Department, with Appellant's counsel pointing out the deficiencies of the Department's case, and slowly bringing Trooper Thorton up to the legal task of establishing the Department's burden of proof that was the subject of the contested case hearing. The role of opposing counsel in a "contested case

³ Rule 15, of the Rules of Procedure for the OMVH, provides that "Normally, the party with the burden of proof will be the first to present evidence, all other parties being allowed to cross-examine in an orderly fashion. When that party rests, other parties will then be allowed to present evidence, again allowing for cross-examination." For other comparable rules of procedure in South Carolina addressing motions to dismiss at the close of the case of the party with the burden of proof, see: Rule 50(a), SCRCPP, a motion for a directed verdict is to be at the close of the evidence offered by the opponent; Rule 19(a), SCRCrimP, a directed verdict may be granted after the close of evidence on either side; Rule 16(a), South Carolina Rules of Magistrates Courts, at the close of evidence offered by a party, a magistrate may grant a directed verdict.

hearing" is not to painstakingly elicit from an opposing witness that testimony and evidence needed for the party-opponent to establish its case. Rather, the role of opposing counsel is to hold a party to its burden of proof. In this instance, the Department and the arresting officer failed in its burden of proof to establish those matters set forth in S.C. Code Ann. §56-5-2951(F), after having had a full and fair opportunity to present its case. Having failed to meet its burden of proof, the motion of the Appellant to dismiss the case was timely made, and should have been granted based upon the lack of evidence presented by the Department and the arresting officer.

CONCLUSION

That based upon the above argument and the applicable law, the Final Order and Decision of the Hearing Officer should be reversed, and the suspension of the Appellant rescinded.



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February 7, 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McClunney,
Appellant,

vs.

South Carolina Department
of Motor Vehicles,

Respondent.

Docket No. 16-ALJ-21-0437-AP

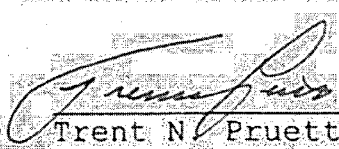
CERTIFICATE OF SERVICE
BY MAIL

I certify that I have served the "Brief of the Appellant" in the above captioned action, by depositing the original or copies in the United States Mail, first class postage prepaid, on February 8, 2017, addressed to the following:

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February 8, 2017

**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT
ALJ DOCKET NO: 16-ALJ-21-0437-AP**

**APPEAL FROM SOUTH CAROLINA
OFFICE OF MOTOR VEHICLES HEARINGS
OMVH DOCKET NO: 16-OMVH-01-2791-CC**

TRACY HOLLAND, OMVH HEARING OFFICER

COREY ARNESS MCCLUNEY APPELLANT

VS

SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES RESPONDENT

**BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES**

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

Corey Arness McCluney,

Appellant,

v.

South Carolina Department of Motor Vehicles,

Respondent.

Docket No. 16-ALJ-21-0437-AP
SCDL No. 8672372

**BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT
OF MOTOR VEHICLES**

This matter comes before the Administrative Law Court pursuant to the appeal of Corey Arness McCluney, who seeks review of the October 18, 2016 Final Order & Decision sustaining the Appellant's implied consent suspension. The Respondent South Carolina Department of Motor Vehicles (SCDMV) seeks to have the Final Order & Decision affirmed and the suspension remain.

STATEMENT OF THE ISSUE ON APPEAL

1. THE HEARING OFFICER DID NOT ERR IN ALLOWING RESPONDENT TO PROVIDE TESTIMONY IN RESPONSE TO APPELLANT'S MOTION TO DISMISS WHEN THE HEARING OFFICER HAD NOT YET CLOSED THE EVIDENTIARY PART OF THE HEARING.
2. EVEN IF THE EVIDENTIARY PART OF THE HEARING WAS ALREADY CLOSED, UNDER *SCDMV V. BROWN*, 406 S.C. 626 (2014), APPELLANT WAS REQUIRED TO RAISE HIS OBJECTION DURING THE EVIDENTIARY PART OF THE HEARING.
3. THE PROCEDURE USED BY THE HEARING OFFICER DID NOT SHIFT THE BURDEN OF PROOF TO THE APPELLANT.

STATEMENT OF THE CASE

The Appellant was arrested on May 23, 2016 for driving under the influence. Upon refusal to submit to a breath sample, Appellant was found to be in violation of S.C. Code Ann. §

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56-5-2950, and the arresting officer issued a Notice of Suspension form pursuant to S.C. Code Ann. § 56-5-2951. Appellant timely requested a contested case hearing which was held, after notice to the parties, on August 29, 2016. After reviewing the record and considering all the evidence, the hearing officer issued an order affirming the suspension of the Appellant's driving license or driving privileges.

The Appellant then timely filed this appeal.

STANDARD OF REVIEW

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

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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

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

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

The Court further noted that:

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

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

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

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

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

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC*, *supra*; *Hamm v. American Telephone & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

1. THE HEARING OFFICER DID NOT ERR IN ALLOWING RESPONDENT TO PROVIDE TESTIMONY IN RESPONSE TO APPELLANT'S MOTION TO DISMISS WHEN THE HEARING OFFICER HAD NOT YET CLOSED THE EVIDENTIARY PART OF THE HEARING.

In this case, Trooper Thornton testified first (R. pp. 8-10). At the conclusion of Trooper Thornton's initial presentation, the following conversation occurred:

Hearing Officer: Okay. State's resting?

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Trooper Thornton: Yes, ma'am.

Hearing Officer: Cross-examination?

Mr. Pruett: No questions.

Hearing Officer: Is there anything from the [appellant]?

Mr. Pruett: I'd move to dismiss the suspension...

(R. p. 10, lines 15-22). In this section, it is clear the hearing officer was asking Appellant's counsel if Respondent had any evidence to present. Despite this, Appellant's counsel did not answer the hearing officer's question and instead launched into a motion to dismiss this suspension. The hearing officer then clarified her question for Appellant's counsel asking "Is there any - - any rebuttal from the respondent?" (R. p. 11, lines 15-16). Despite this clarification, Appellant's counsel continued to assert that he was making a "Motion to dismiss based upon the failure to establish what the statute requires at the administrative hearing stage." (R. p. 11, lines 19-21). Since the evidentiary period had not yet been closed by the hearing officer and due to the motion to dismiss that was interjected in the middle of the evidentiary period of this hearing, the hearing officer then asked Trooper Thornton if he had "a rebuttal to his motion to dismiss?" (R. p. 11, lines 22-23). Trooper Thornton then went on to supply a rebuttal via additional testimony stating, "The implied consents were given. They were on the - - of course, they were, you know, recorded on the camera there. They were given to him prior to offering - - offering him the test." (R. p. 11, line 24 - p. 12, line 3). Appellant's counsel then objected to this response on the basis that "the record's closed at this point" and the hearing officer explicitly stated "I have not closed the evidence - - testimony and/or evidence." (R. p. 12, lines 4-10). The hearing officer then went on to explain to Appellant's counsel that under the *SCDMV v. Brown*, 406 S.C. 626 (2014) case he had to make his motion regarding lack of testimony or insufficient

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testimony by the officer during the officer's testimony and that if he had not done so, then his motion would have failed due to not being timely made (R. p. 12, lines 12-16). The hearing officer then explained once again that she had merely asked Appellant's counsel if Appellant had any evidence to present and, rather than answering this question Appellant's counsel made the motion to dismiss (R. p. 12, lines 17-21). The hearing officer then further explained the *Brown* case to Respondent's counsel stating:

if you make your motion during the closing statement, then you have not made a timely motion and that way that whatever did come into the record, stands into the record until the hearing officer - - until I state for the record this ends the testimonial and evidentiary part of the hearing. I 'm now ready for a closing statement. I have stated that for the record.

(R. p. 13, lines 12-24). Appellant's counsel then stated, "So even after I - - I don't present any evidence and you asked for motions or statements - - the record's still open" (R. p. 14, line 23 - p. 15, line 2). The hearing officer responded to this question stating, "No, sir, I didn't. No, sir, I asked is there anything coming in from the [appellant]." (R. p. 15, lines 1-4). Appellant's counsel stated that he responded to that question by saying "no." (R. p. 15, line 5). The transcript of the hearing, however, does not reflect Appellant's counsel answering "no" to the question "Is there anything from the [appellant]?" (R. p. 10, lines 19-22). Rather, the transcript of the hearing reflects that Appellant's counsel did not answer the hearing officer's question and instead immediately made a motion to dismiss the suspension. *Id.* Thus, it is clear from the record that the evidentiary part of the hearing was not closed and the hearing officer was correct to allow Trooper Thornton to provide his additional testimony regarding advising Appellant of his implied consent rights.

Even after the several clarifications from the hearing officer, however, Appellant's counsel continued to argue with the hearing officer stating, "You asked if I had any motion to

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make. I made the motion. You can't introduce new evidence at this point in the proceeding." (R. p. 17, lines 10-12). As quoted previously, the hearing officer did not ask if Appellant had any motions to make; rather, the hearing officer asked "Is there anything from the [appellant]?" (R. p. 10, lines 19-20). At the close of the evidentiary portion of the hearing, the hearing officer did state, "this ends the testimonial and evidentiary part of this administrative hearing. We're now ready for closing statement. Closing is a summation as to why (inaudible)." (R. p. 23, lines 17-21). All parties were then provided an opportunity to give a closing argument.

2. EVEN IF THE EVIDENTIARY PART OF THE HEARING WAS ALREADY CLOSED, UNDER *SCDMV V. BROWN*, 406 S.C. 626 (2014), APPELLANT WAS REQUIRED TO RAISE HIS OBJECTION DURING THE EVIDENTIARY PART OF THE HEARING.

The *Brown* case held that if "no motion is made at the appropriate time – *when the State seeks to introduce that evidence* – then the [driver] has waived his opportunity to challenge its reliability." *Id.* 406 at 633, emphasis in the original. In this case, Appellant has argued that Trooper Thornton did not establish a prima facie case, because there was no evidence Appellant was given the implied consent advisement. Contrary to this argument, Trooper Thornton testified that the "implied consents were given. They were on the - - of course, they were, you know, recorded on the camera there. They were given to him prior to offering - - offering him the test." (R. p. 11, line 24 – p. 12, line 3). If the evidentiary part of the hearing was closed when Appellant moved to dismiss this case on the basis that the implied consent warning was not given or was not sufficient, which was then followed by Trooper Thornton's testimony regarding the implied consent warning that was given, then under the requirements of *Brown*, Appellant's objection was untimely made and not preserved for appeal. *Brown*, 406 at 633-634. Specifically, *Brown* held that a suspension cannot be rescinded

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simply because an arresting officer failed to testify that a specific provision in §56-5-2950 was followed, *unless* the motorist makes a motion during the hearing requesting the OMVH hearing officer to review such provision *and* the hearing officer determines that law enforcement's failure to comply with the provision materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.

Id. 406 at 634, emphasis in the original. S.C. Code §56-5-2951(F) states, in part:

The scope of the hearing is limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950...

So, whether Appellant was "given a written copy of and verbally informed of [his] rights enumerated in Section 56-5-2950" is an issue that must be contemporaneously objected to if Appellant believed the implied consent warning given by Trooper Thornton was insufficient to satisfy the requirements of S.C. Code §56-5-2950. Thus, even if this Court determines that the evidentiary part of this hearing was closed when Trooper Thornton stated that the State was "resting," that would mean that Appellant's challenge to whether the implied consent warning was sufficient would be untimely under the analysis of *Brown*.¹

Moreover, the Appellant offered no evidence which contradicted, or questioned the accuracy of Trooper Thornton's testimony. Further corroboration is not necessary or required. If the Appellant wanted clarification about what warnings were given, he was required to ask for that clarification on cross examination. *Brown*, 406 S.C. at 626-630. Since the Appellant did not

¹ Interesting, in OMVH hearings and other types of trials, just because one party "rests" does not mean the evidentiary period is automatically closed. Rather, the other parties to the hearing or case also have an opportunity to present testimony and other types of evidence. Despite this exceptionally common procedure for hearings and trials, Respondent has argued that the evidentiary period automatically closed as soon as Trooper Thornton said the State was resting.

cross-examine on this point and did not testify to contradict Trooper Thornton's testimony, it is established that the Appellant was given the correct warnings.

Further, even if the Appellant had been given the wrong warnings, he would have to show that he was prejudiced by that fact. Since he did not testify, he did not show any prejudice.

Taylor v. South Carolina Department of Motor Vehicles, 382 S.C. 567, 570, 677 S.E.2d 588, 590 (2009). S.C. Code Ann. § 56-5-2950(J) states:

(J) Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party. The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, *if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.* (emphasis added)

Clearly, the hearing officer did not find any prejudice. If there had been any prejudice, she would have been required to make a specific finding to that effect. Since the Appellant did not file a motion for reconsideration of that issue, the issue is fixed that there was no prejudice caused by any alleged error regarding the implied consent warning that was given to Appellant.

For these reasons, the hearing officer properly found that there was sufficient evidence that Appellant had been informed of his implied consent rights and, if, as asserted by Appellant, the evidentiary part of the hearing was closed when Trooper Thornton testified regarding the implied consent warning given, then Appellant's objection was untimely made and not preserved for appeal under *Brown*.

3. THE PROCEDURE USED BY THE HEARING OFFICER DID NOT SHIFT THE BURDEN OF PROOF TO THE APPELLANT.

Appellant has argued that by enforcing the holding of the *Brown* case, the hearing officer shifted the burden of proof in this case to Appellant. This is simply not accurate. Trooper

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Thornton was still required to present evidence to satisfy all the requirements of S.C. Code §56-5-2951(F) and the hearing officer discussed each of these elements in the Final Order and Decision that was issued on October 18, 2016 (R. pp. 38-45). Please see specifically paragraphs 3-13 of the Findings of Fact and paragraphs 11-13 of the Conclusions of Law of the Final Order and Decision. For example, after Respondent's counsel stated his objection regarding the implied consent rights, if Trooper Thornton had stated he did not give Respondent his implied consent rights, there is no evidence that the hearing officer would have sustained this suspension. In fact, the detailed discussion contained in the Final Order and Decision indicates that the exact opposite would have happened. The hearing officer had a detailed discussion of each element required to be fulfilled by the State in this case and then discussed the findings of fact that lead her to believe the State had met its evidentiary burden of proof. Nowhere in the Final Order of Decision does the hearing officer state that Appellant failed to meet his burden of proof or challenge strongly enough an assertion made by the State. For these reasons, the procedure used by the hearing officer did not shift the burden of proof to the Appellant. Rather, this procedure merely required the Appellant to comply with the requirements of the *Brown* case by making a contemporaneous objection to his perception that Trooper Thornton's testimony was insufficient. Moreover, what is at issue with regard to the implied consent rights is whether the driver was informed of the consequences of refusing to submit to testing. The testimony in this case clearly shows that Appellant was informed of those consequences. Thus, the hearing officer's ruling in this case was error free and should be upheld.

CONCLUSION

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

10. 

Respectfully submitted,



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March 9, 2017

Blythewood, South Carolina

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

Corey Arness McCluney,

Appellant,

v.

South Carolina Department of Motor Vehicle,

Respondent.

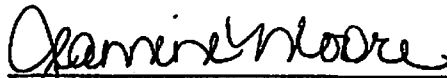
Docket No. 16-ALJ-21-0437-AP
SCDL No. 8672372

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 2017, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing Brief of Respondent to the following:

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Jeannine (Nina) Moore, Paralegal
Office of General Counsel

March 9, 2017

Blythewood, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McClunney,	)	
	)	ALJ Docket No. 16-ALJ-21-0437-AP
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department	)	REPLY BRIEF OF THE APPELLANT
of Motor Vehicles,	)	
	)	
Respondent.	)	

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REPLY ARGUMENT

That in reply to the Brief of the Respondent, (South Carolina Department of Motor Vehicles), the Appellant has set forth below the three separate issues and arguments made by the Respondent in response to the Appellant's brief. The Appellant will reply to each issue and argument in the same order as they appear in the Respondent's brief.

1. WHETHER THE HEARING OFFICER ERRED IN ALLOWING RESPONDENT TO PROVIDE TESTIMONY IN REPOSE TO APPELLANT'S MOTION TO DISMISS WHEN THE HEARING OFFICER HAD NOT YET CLOSED THE EVIDENTIARY PART OF THE HEARING.

The first argument set forth in the brief of the Respondent, is that the hearing officer did not err in allowing Trooper Thornton to testify in response to the Appellant's motion to dismiss when the hearing officer had not yet closed the evidentiary part of the hearing.

As stated in hearing transcript, at the conclusion of Trooper Thornton's testimony, after the Department had "rested," the hearing officer first asked the Appellant's attorney if there was any cross-examination from the Appellant. ROA, p. 10, l. 12-17. The Appellant's attorney answered, "No questions." ROA, p. 10, l. 18. At this juncture the hearing officer then asked the Appellant's attorney "Is there anything from the [Appellant]?" ROA, p. 10, l. 19-20. Presumably, "anything" would include a

motion to dismiss, especially since it is a rudimentary matter of procedure in every proceeding in this State, that when the party with the burden of proof in an action rests, (whenever that may be), that before the opposing party presents any evidence, there should first be a motion to dismiss. See for example Rule 19(b), SCRCrimP ("If defendant's motion for a directed verdict at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right.") That a motion to dismiss is to be made before the presentation of evidence by the opposing party is not only a matter of fundamental procedure, but also of common sense, for if the party with the burden of proof has failed to meet its burden of proof, as was the case in the matter before the Court, there is no need to further proceed with the hearing. Thus, the suggestion by the Respondent that the hearing officer was asking whether the Appellant had any testimony or evidence to present is not consistent with the proceeding itself. First, and most telling, when the Appellant's attorney made a motion to dismiss the hearing officer did not stop or correct the Appellant's attorney and state that the hearing officer was only asking whether the Appellant had any testimony or evidence to present. Instead, the hearing officer asked Trooper Thorton whether he had any "rebuttal to [Appellant's] motion to dismiss." ROA p. 10, 1. 15-23. The hearing officer then allowed

Trooper Thorton to provide "rebuttal" testimony in reply to the Appellant's motion to dismiss. If the hearing officer was in fact requesting whether Appellant had any evidence or testimony to present, the hearing officer could have so stated before entertaining any motion. Second, the only persons present at the hearing were the hearing officer, Trooper Thorton and the Appellant's attorney. Given that the Appellant's attorney stated he had no questions for Trooper Thorton, after the Department had rested, there was no legal means for the Appellant to present any evidence, since the Appellant's attorney could not testify. Third, even if the Court were to ignore the reality of what transpired during the hearing, and assume that the hearing officer was requesting whether the Appellant had any evidence or testimony to present, and the Appellant had stated "no," (since no evidence was ever presented by the Appellant), the case would have been in the very same procedural posture with the Appellant making a motion to dismiss. Thus, we have circled back to the very issue that the Respondent has avoided addressing in its brief, "Did the hearing officer err in allowing Trooper Thorton to continue testifying in reply to the Appellant's legal motion to dismiss?"

The fallacy with the administrative procedure advanced by the Department in its brief is that once the Department rests, and the motorist does not cross-examine any witness or offer any evidence,

that somehow the "evidentiary record" is still open. The absurdity of this position is how can the evidentiary record remain open when neither party is seeking to admit any testimony or evidence.

The Department then argues that at this point in the proceeding, when no further evidence is to be received, the motorist must make a motion to dismiss based upon the evidence presented; however, once a legal motion to dismiss is made by the attorney for the motorist, the Department argues that it may respond to such motion by presenting further testimony and evidence. In support of this position, the Respondent cites South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), for the proposition that the Appellant's attorney was required to make a motion to dismiss before closing arguments. Admittedly, the Appellant's attorney was flummoxed during the hearing as to exactly at what point in the twilight zone of the hearing, (somewhere between the time when the Department had rested its case and closing arguments), that he was required to make a motion to dismiss based upon the Department's failure to establish a prima facie case. As will be further discussed below, the Appellant's attorney made the motion in a timely matter, at the correct procedural point in the hearing, i.e., after the Department had rested and no other evidence was presented.

2. ASSUMING THE EVIDENTIARY PART OF THE HEARING WAS ALREADY CLOSED, UNDER SCDMV V. BROWN, 406 S.C. 626 (2014), APPELLANT WAS REQUIRED TO RAISE HIS OBJECTION DURING THE EVIDENTIARY PART OF THE HEARING.

The second argument in the Brief of the Respondent is that even if the evidentiary part of the hearing was in fact closed, that the Appellant was required to object to the sufficiency of the Department's case during the evidentiary part of the hearing.

In support of this argument the Department cites South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), which held that when the Department seeks to introduce evidence the motorist must timely object to the introduction of such evidence to challenge it's admissibility. The Brown case is not applicable to the facts before the court.

In Brown, the motorist submitted a breath sample which registered a .17 blood alcohol concentration. In that case, at the administrative hearing the police officer presented general testimony regarding the breath testing procedure as required by S.C. Code Ann. §56-5-2951. Significantly, in Brown, the Supreme Court found that the police officer's general testimony in the officer's case-in-chief established a prima facie case as to those matters listed in S.C. Code Ann. §56-5-2951. After the police officer in Brown concluded his testimony, no motion to dismiss was made by the attorney for the motorist. During closing arguments,

the attorney for the motorist belatedly objected to admission of the .17 breath test result on the specific grounds that there was no testimony by the police officer as to any simulator testing as referenced in S.C. Code Ann. §56-5-2950. The Supreme Court held in Brown that if the attorney for the motorist wished to object to the admission of the breath test result, based upon any deficiencies in the breath testing procedure found at §56-5-2950, then the attorney should have specifically objected to such matters (i.e., the simulator test), when the police officer sought to introduce the breath test result.

In the matter before the Court, the Appellant did not take the breath test. Accordingly, there was no breath test result admitted into evidence. In Appellant's case, Trooper Thornton was only required under S.C. Code Ann. §56-5-2951(F), to present evidence on three issues: (1) whether or the Appellant was lawfully arrested and detained; (2) whether the Appellant was given a written copy of and verbally informed of the rights enumerated in §56-5-2950; and (3) whether or not the Appellant refused to submit to a test pursuant to §56-5-2950. As discussed in the Brief for the Appellant, Trooper Thornton made no reference in his initial testimony, or case-in-chief, to the Appellant being given any implied consent advisement. Unlike the police officer in Brown, Trooper Thornton's limited testimony failed to establish even a

prima facie case. Also, unlike Brown, the Appellant's attorney timely made a motion to dismiss after Trooper Thorton's testimony failed to establish a prima facie case, as opposed to waiting until closing arguments. Assuming *arguendo*, that Trooper Thorton had generally testified that the Appellant was given an implied consent advisement as required by S.C. Code Ann. §56-5-2951(F)(2), then the Appellant, under Brown, would have had to make a specific objection as to any perceived deficiencies in the implied consent advisement the Appellant received as set forth in S.C. Code Ann. §56-5-2950(B). For example, the attorney could ask whether the Appellant was specifically advised about the independent testing provisions stated at S.C. Code Ann. §56-5-2950(B)(3). Because Trooper Thorton failed to establish even a prima facie case as to the implied consent advisement issue, the Appellant was not required to interpose any objection, or to elicit testimony from Trooper Thorton.

The Department further argues that even if Trooper Thornton did not give testimony establishing that which was required by S.C. Code Ann. §56-5-2951(F), that in the absence of any prejudice to the defendant, the failure to establish a prima facie case would be excused pursuant to South Carolina Code §56-5-2950(J). The Appellant would note that the provisions of this statute do not apply to the Appellant's case, because as noted above, in this

case Trooper Thorton failed to establish a prima facie case, and therefore failed to satisfy the burden of proof imposed on the Department by the recently enacted provisions of South Carolina Code §56-5-2951(E). The Department cites Taylor v. South Carolina Department of Motor Vehicles, 382 S.C. 567, 677 S.E.2d 588 (2009) for the proposition that the Appellant must establish prejudice in order to prevail in his case. The Taylor case is distinguishable because in that case the trooper testified at the administrative hearing that he at least verbally advised the motorist of his implied consent rights. By contrast, in this case, Trooper Thorton failed to testify in his initial testimony that any advisement was given to the Appellant. Moreover, the prejudice analysis set forth in Taylor as to hearings conducted pursuant to South Carolina Code §56-5-2951, specifically regarding the implied consent advisement, would seem to be in doubt after the recent amendments to that statute. As the Supreme Court noted in Taylor if the Legislature intended for defect in the advisement process to be fatal it could have provided for such in the statute. The recent amendments to South Carolina Code §56-5-2951 arguably express such legislative intent, where the amended provisions of South Carolina Code §56-5-2951(F)(2) now require evidence that a motorist was "given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950," (emphasis added), and that under

South Carolina Code §56-5-2951(E), the burden of proof is squarely placed upon the Department to present a prima facie case that a proper advisement was given to the motorist.

**3. WHETHER THE PROCEDURE USED BY THE HEARING OFFICER
SHIFTED THE BURDEN OF PROOF TO THE APPELLANT**

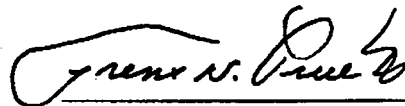
The third part of the Respondent's argument is that the procedure of the hearing officer did not shift the burden of proof to the Appellant. As noted already in the Brief of the Appellant, under the newly enacted statutory provisions of South Carolina Code §56-5-2951(E), the General Assembly has expressly stated that the Department has the burden of proof of establishing those matters set forth in South Carolina Code §56-5-2951(F). The motorist has no burden of proof in these OMVH administrative hearings.

To illustrate the issue before the Court, suppose the totality of a trooper's testimony at an administrative hearing was, "I arrested the defendant and he refused a breath test." If the trooper then rested his case, would it then be incumbent upon the motorist to ferret out the necessary information required to establish a prima facie under South Carolina Code §56-5-2951(F)? Would a procedure that requires a motorist to elicit evidence to establish a mere prima facie for the opposing party not also be burden shifting? This is the essence of the Appellant's appeal.

It is clear from a reading of the record, that Trooper Thornton fell short in his case-in-chief in establishing even a prima facie case. Trooper Thornton's testimony was no better than the hypothetical referenced above, that is, that he arrested the defendant and the defendant refused the breath test. It was only when the hearing officer allowed Trooper Thornton a "second bite at the apple," and to continue testifying after a motion to dismiss was made, that Trooper Thornton was eventually able to set forth facts sufficient to establish a prima facie case. Such a procedure is improper, and also improperly shifts the burden of proof to the Appellant.

CONCLUSION

Based upon the Brief of the Appellant, and this Reply Brief of the Appellant, the Appellant respectfully requests that the Final Order and Decision of the hearing officer be reversed.



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March 18, 2017

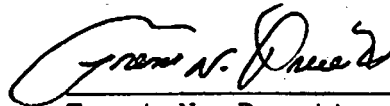
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McClunney,	)	
	)	ALJ Docket No. 16-ALJ-21-0437-AP
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department	)	CERTIFICATE OF SERVICE
of Motor Vehicles,	)	BY MAIL
	)	
Respondent.	)	

I certify that I have served the "Reply Brief of the Appellant" in the above captioned action, by depositing the original or copies in the United States Mail, first class postage prepaid, on March 18, 2017, addressed to the following:

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March 18, 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McClunney,	)	
	)	Docket No. 16-ALJ-21-0437-AP
Appellant,	)	
	)	
vs.	)	
	)	MOTION FOR RECONSIDERATION
South Carolina Department	)	
of Motor Vehicles,	)	
	)	
Respondent.	)	

On May 4, 2017, this Court issued an Order in this case, affirming the Final Order by a hearing officer with the Office of Motor Vehicle Hearings that suspended the Appellant's driving privileges for refusing to submit to testing as provided for by S.C. Code Ann. §56-5-2950. Pursuant to SCALC Rule 40, the Appellant respectfully requests that this Court reconsider its decision in light of the Court's misapplication of South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), and its failure to apply the recently enacted provisions of S.C. Code Ann. §56-5-2951(E).

This Court in its Order correctly states that the issues in South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), are not identical to the issues in the Appellant's case. Indeed, Brown is inapplicable to the Appellant's case, because in Brown the arresting officer at least made out a prima facie case in his initial testimony. In the case before the

Court, the arresting officer initially failed to establish a prima facie case. Also in Brown, the attorney for the motorist failed to make a timely motion to dismiss, waiting until closing arguments. In the case before the Court, the Appellant's attorney timely made a motion to dismiss after the arresting officer had rested his case, and no other evidence was presented. This Court noted that Brown, while not addressing the identical issues in the Appellant's case, nevertheless stands for the broader proposition that "evidentiary rulings should not be used as a trap rather than a tool to discover facts in a DUI suspension hearing." Assuming that rules of evidence and procedure are more relaxed in these administrative hearings, they are not to be altogether abandoned. See South Carolina Department of Motor Vehicles v. McCarson, 391 S.C. 136, 705 S.E.2d 425, 431 (2011) (disallowing hearsay testimony during administrative suspension hearings, because such hearsay evidence "would essentially render meaningless the procedure established by our Legislature in section 56-5-2951.") A procedure that requires a motorist to ferret out the facts necessary for the arresting officer to establish the minimal requirements for a prima facie case eviscerates and defeats the meaning of any burden of proof statutorily imposed upon the arresting officer. Moreover, the Appellant's motion to dismiss his suspension based upon the failure of the Department or arresting officer to establish a prima facie case, can hardly be considered a "trap," where the law in

question has been in place for almost twenty years. In the overwhelming number of contested cases heard by hearing officers, arresting officers come prepared to present their case in order to establish the minimal requirements under the statute necessary to make a prima facie showing. In this case, where the arresting officer was not prepared to present his case, it was not the responsibility or burden of the Appellant to assist the arresting officer in the presentation of his case by eliciting evidence through cross-examination or by any motion.

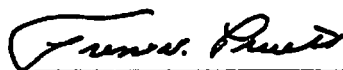
Lastly, the Court in its Order never discussed or referenced the recently enacted provisions of S.C. Code Ann. §56-5-2951(E), which expressly state that the Department and the arresting officer have the burden of proof in a contested case hearing held pursuant to S.C. Code Ann. §56-5-2951. Notably, S.C. Code Ann. §56-5-2951(E) was enacted in 2016, just two years after South Carolina Department of Motor Vehicles v. Brown was decided. Given that it is presumed that the General Assembly is aware of the decisions of the appellate courts of South Carolina interpreting statutes enacted by the General Assembly, the amended provisions of S.C. Code Ann. §56-5-2951 can hardly be considered coincidental. See State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183, 186 (2014) (the General Assembly is presumed to be aware of Supreme Court's interpretation of a statute). When interpreting a statute, courts must presume the legislature did not intend to do a futile

act. State v. Long, 363 S.C. 360, 610 S.E.2d 809, 811 (2005);
State v. Sweat, 379 S.C. 367, 665 S.E.2d 645, 651 (Ct.App. 2008).
Accordingly, in the wake of the Brown decision, which the General
Assembly presumably knew about, the provisions of S.C. Code Ann.
§56-5-2951(E) were enacted for some ostensible purpose. The
Appellant maintains that the purpose of S.C. Code Ann. §56-5-
2951(E) is to unequivocally place the burden of proof on the
Department or arresting officer in the these administrative
hearings, and to require that such burden be satisfied without the
aid, assistance or even presence of the motorist. Such was not
done in the case before the Court.

CONCLUSION

Based upon the reasons set forth in this motion, the
Appellant respectfully requests that the Court reconsider its
Order, and issue an order reversing the hearing officer's
decision, and rescinding the suspension of the Appellant.

Respectfully submitted,



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May 11, 2017

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Corey Arness McClunney,	)	
	)	Docket No. 16-ALJ-21-0437-AP
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department	)	CERTIFICATE OF SERVICE
of Motor Vehicles,	)	BY MAIL
	)	
Respondent.	)	

I certify that I have served the "Motion for Reconsideration" of the Appellant in the above captioned action, by depositing the original or copies in the United States Mail, first class postage prepaid, on May 11, 2017, addressed to the following:

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

Corey Arness McCluney,

Appellant,

v.

South Carolina Department of Motor Vehicles,

Respondent.

Docket No. 16-ALJ-21-0437-AP
SCDL No. 8672372

**RETURN TO MOTION
FOR RECONSIDERATION**

This matter comes before the Administrative Law Court pursuant to a Motion for Reconsideration filed by Appellant. The Respondent South Carolina Department of Motor Vehicles (SCDMV) seeks to have the May 4, 2017 *Order* of this Court affirmed in whole.

The majority of Appellant's Motion to Reconsider simply rehashes the issues already ruled on by this Court in its' May 4, 2017 *Order*. Thus, to the extent necessary and appropriate, Respondent SCDMV relies on and incorporates the Statement of the Issues on Appeal, Statement of the Case, Standard of Review, and Arguments already presented in detail in *Brief of Respondent*, filed on March 9, 2017.

The first issue raised by Appellant in the Motion to Reconsider asserts that this Court's May 4, 2017 *Order* misapplied the *Brown* case.¹ Appellant argues that Trooper Thornton failed to make out a *prima facie* case in his initial testimony, that Appellant in this case made his motion to dismiss during the evidentiary section of the hearing and that both of these facts make this case substantially different from the *Brown* case. As pointed out in the May 4, 2017 *Order*, however, the *Brown* case "stands for the proposition that evidentiary rulings should not be used a

¹ *South Carolina Department of Motor Vehicles v. Brown*, 406 S.C. 626, 753 S.E.2d 524 (2014).

1 

For the reasons set forth above, the reasons discussed in *Brief of Respondent*, and the reasons set forth in this Court's Order dated May 4, 2017, SCDMV asserts this Court's rulings in its' May 4, 2017 *Order* were correct, should be upheld in full, and Appellant's Motion to Reconsider should be denied.

Respectfully submitted,



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May 16, 2017

Blythewood, South Carolina

EXHIBIT A

South Carolina General Assembly
121st Session, 2015-2016

Download [This Bill](#) in Microsoft Word format

A275, R246, S1258

STATUS INFORMATION

General Bill

Sponsors: Finance Committee

Document Path: I:\s-res\hkl\017fee .kmm.hkl.docx

Introduced in the Senate on April 20, 2016

Introduced in the House on April 28, 2016

Last Amended on May 31, 2016

Passed by the General Assembly on June 1, 2016

Governor's Action: June 8, 2016, Signed

Summary: S.C. Transportation Infrastructure Bank

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
4/20/2016	Senate	Introduced, read first time, placed on calendar without reference (<u>Senate Journal-page 3</u>)
4/21/2016		Scrivener's error corrected
4/26/2016	Senate	Read second time (<u>Senate Journal-page 50</u>)
4/27/2016	Senate	Read third time and sent to House (<u>Senate Journal-page 39</u>)
4/27/2016	Senate	Roll call Ayes-34 Nays-4 (<u>Senate Journal-page 39</u>)
4/28/2016	House	Introduced and read first time (<u>House Journal-page 16</u>)
4/28/2016	House	Referred to Committee on Ways and Means (<u>House Journal-page 16</u>)
5/19/2016	House	Committee report: Favorable with amendment Ways and Means (<u>House Journal-page 106</u>)
5/20/2016		Scrivener's error corrected
5/24/2016	House	Amended (<u>House Journal-page 96</u>)
5/24/2016	House	Read second time (<u>House Journal-page 96</u>)
5/24/2016	House	Roll call Yeas-102 Nays-3 (<u>House Journal-page 97</u>)
5/25/2016	House	Returned to Senate with amendments (<u>House Journal-page 20</u>)
5/25/2016	House	Roll call Yeas-72 Nays-2 (<u>House Journal-page 21</u>)
5/25/2016		Scrivener's error corrected
5/31/2016	Senate	House amendment amended (<u>Senate Journal-page 114</u>)
5/31/2016	Senate	Roll call Ayes-31 Nays-10 (<u>Senate Journal-page 114</u>)
5/31/2016	Senate	Returned to House with amendments (<u>Senate Journal-page 114</u>)
6/1/2016	House	Concurred in Senate amendment and enrolled (<u>House Journal-page 55</u>)
6/1/2016	House	Roll call Yeas-109 Nays-2 (<u>House Journal-page 56</u>)
6/2/2016		Ratified R 246
6/8/2016		Signed By Governor
6/21/2016		Effective date See Act for Effective Date
6/21/2016		Act No. 275

EXHIBIT A

View the latest [legislative information](#) at the website

VERSIONS OF THIS BILL4/20/20164/20/2016-A4/21/20165/19/20165/20/20165/24/20165/25/20165/31/2016

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A275, R246, S1258)

AN ACT TO AMEND ARTICLE 3, CHAPTER 1, TITLE 57, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE COMMISSION OF THE DEPARTMENT OF TRANSPORTATION, SO AS TO RESTRUCTURE THE COMMISSION, TO PROVIDE FOR REVIEW OF APPOINTEES TO THE COMMISSION, TO PROVIDE A MAXIMUM NUMBER OF YEARS A COMMISSIONER MAY SERVE, TO PROVIDE FOR REMOVAL OF A COMMISSIONER, AND TO PROVIDE FOR AUDITING PROCEDURES FOR THE DEPARTMENT OF TRANSPORTATION; TO AMEND SECTION 57-1-410, AS AMENDED, RELATING TO THE SECRETARY OF TRANSPORTATION, SO AS TO PROVIDE THAT THE COMMISSION SHALL APPOINT THE SECRETARY AND TO PROVIDE FOR REVIEW BY THE GENERAL ASSEMBLY; TO AMEND SECTIONS 57-1-720, 57-1-730, AND 57-1-750, RELATING TO THE JOINT TRANSPORTATION REVIEW COMMITTEE, SO AS TO MAKE CONFORMING CHANGES; TO AMEND SECTION 57-1-740, AS AMENDED, RELATING TO THE JOINT TRANSPORTATION REVIEW COMMITTEE, SO AS TO DELETE THE LANGUAGE; TO AMEND SECTION 57-1-490, AS AMENDED, RELATING TO ANNUAL AUDITS OF THE GENERAL ASSEMBLY, SO AS TO MAKE CONFORMING CHANGES; TO AMEND SECTION 11-43-150, RELATING TO THE POWERS OF THE SOUTH CAROLINA TRANSPORTATION INFRASTRUCTURE BANK, SO AS TO REQUIRE THE APPROVAL OF THE DEPARTMENT OF TRANSPORTATION COMMISSION BEFORE THE BANK MAY PROVIDE LOANS OR OTHER FINANCIAL ASSISTANCE; TO AMEND SECTION 11-43-180, RELATING TO THE BANK PROVIDING LOANS AND OTHER FINANCIAL ASSISTANCE, SO AS TO REQUIRE THAT THE ELIGIBLE COSTS OF A PROJECT BE AT LEAST TWENTY-FIVE MILLION DOLLARS TO RECEIVE A LOAN OR ASSISTANCE; BY ADDING SECTION 11-43-265 SO AS TO REQUIRE THE BANK TO PRIORITIZE ALL PROJECTS IN ACCORDANCE WITH THE PRIORITIZATION CRITERIA ESTABLISHED IN ACT 114 OF 2007, AND TO PROVIDE AN EXCEPTION; BY ADDING SECTION 11-43-167 SO AS TO DIRECT THE REVENUE FROM CERTAIN FEES AND FINES TO THE STATE HIGHWAY FUND FOR THE RESURFACING PROGRAM AND TRANSFERS TO THE BANK FOR ROAD AND BRIDGE PROJECTS; TO AMEND SECTIONS 12-37-2740, 38-73-470, 56-1-140, AS AMENDED, 56-1-143, AS AMENDED, 56-1-148, AS AMENDED, 56-1-170, AS AMENDED, 56-1-200, AS AMENDED, 56-1-220, 56-1-286, AS AMENDED, 56-1-390, 56-1-395, 56-1-400, AS AMENDED, 56-1-460, AS AMENDED, 56-1-550, 56-1-740, 56-1-746, AS AMENDED, 56-1-1320, AS

collected from the special motor vehicle license plate fee must be disbursed to the American Red Cross."

EXHIBIT A**Fees and fines credited to the State Highway Fund**

SECTION 73. Section 56-5-750(G)(3) of the 1976 Code is amended to read:

"(3) The fee for each special restricted driver's license is one hundred dollars, but no additional fee is due because of changes in the place and hours of employment, education, or residence. Of this fee twenty dollars must be distributed to the general fund and eighty dollars must be placed by the Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

Fees and fines credited to the State Highway Fund

SECTION 74. Section 56-5-2942(J) of the 1976 Code, as last amended by Act 201 of 2008, is further amended to read:

"(J) A fee of fifty dollars must be paid to the department for each motor vehicle that was suspended before any of the suspended registrations and license plates may be registered or before the motor vehicle may be released pursuant to subsection (F). This fee must be placed by the Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

Fees and fines credited to the State Highway Fund

SECTION 75. Section 56-5-2951(B)(1) of the 1976 Code, as last amended by Act 158 of 2014, is further amended to read:

"(1) obtain a temporary alcohol license from the Department of Motor Vehicles. A one hundred dollar fee must be assessed for obtaining a temporary alcohol license. Twenty-five dollars of the fee must be distributed by the Department of Motor Vehicles to the Department of Public Safety for supplying and maintaining all necessary vehicle videotaping equipment. The remaining seventy-five dollars must be placed by the Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167. The temporary alcohol license allows the person to drive without any restrictive conditions pending the outcome of the contested case hearing provided for in subsection (F) or the final decision or disposition of the matter. If the suspension is upheld at the contested case hearing, the temporary alcohol license remains in effect until the Office of Motor Vehicle Hearings issues the hearing officer's decision and the Department of Motor Vehicles sends notice to the person that the person is eligible to receive a restricted license pursuant to subsection (H); and"

Fees and fines credited to the State Highway Fund

SECTION 76. Section 56-5-2951(H)(3) of the 1976 Code, as last amended by Act 158 of 2014, is further amended to read:

"(3) The fee for a restricted license is one hundred dollars, but no additional fee may be charged because of changes in the place and hours of employment, education, or residence. Twenty dollars of this fee must be deposited in the state's general fund, and eighty dollars must be placed by the

Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

EXHIBIT A**Fees and fines credited to the State Highway Fund**

SECTION 77. A. Section 56-9-330 of the 1976 Code is amended to read:

"Section 56-9-330. (1) The Department of Motor Vehicles, upon request and the payment of a fee, shall furnish any person a certified abstract of the operating record of any person subject to the provisions of this chapter, which abstract must also fully designate the motor vehicles, if any, registered in the name of that person, and, if there is no record of any conviction of that person for violating any laws relating to the operation of a motor vehicle or of any injury or damage caused by that person, the department shall so certify. The department, upon request and the payment of a reasonable fee, shall furnish a monthly listing by magnetic or other electronic media of all driver's license numbers that had driving violations posted on their records during the previous month. These abstracts are not admissible as evidence in any action for damages or criminal proceedings arising out of motor vehicle accidents.

(2) The department shall, upon request, and the payment of a fee furnish any person a copy of a vehicle accident report. Revenue generated by the fee imposed pursuant to this section must be placed by the Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

B. If the provisions regarding distribution of the fee authorized in this SECTION conflict with the provisions for distribution contained in Proviso 82.4 included in the Fiscal Year 2016-2017 General Appropriations Act, the provisions contained in this act shall control.

Fees and fines credited to the State Highway Fund

SECTION 78. Section 56-10-240(C) of the 1976 Code is amended to read:

"(C) If the vehicle owner unlawfully refuses to surrender the suspended items as required in this article, the department through its designated agents or by request to a county or municipal law enforcement agency shall take possession of the suspended license plates and registration certificates and may not reissue the registration until proper proof of liability insurance coverage is provided and until the owner has paid a reinstatement fee of two hundred dollars. A person who voluntarily surrenders his license plates and registration certificates before their suspension shall not be charged a reinstatement fee. Revenue generated by the fee imposed pursuant to this section must be placed by the Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

Fees and fines credited to the State Highway Fund

SECTION 79. Section 56-10-245 of the 1976 Code is amended to read:

"Section 56-10-245. Whenever a person furnishes proof of liability insurance, or surrenders or has his registration or license tags confiscated for failure to produce proof of insurance, after the Department of Motor Vehicles receives notice of the lapse or termination of the required liability insurance, the department shall compare the effective date of the lapse or termination with the date of the proof of insurance or the date of the confiscation or surrender. If the department determines there was a lapse in the required coverage, the department shall assess, in addition to other fines or

SECTION 88. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Act constitutes one subject

SECTION 89. The General Assembly finds that the sections presented in this act constitute one subject as required by Section 17, Article III of the South Carolina Constitution, 1895, in particular finding that each change and each topic relates directly to or in conjunction with other sections to the subject of improving the state's transportation infrastructure system as clearly enumerated in the title.

The General Assembly further finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in the act.

Time effective

SECTION 90. (A) This act takes effect July 1, 2016.

(B) The members of the Commission of the Department of Transportation serving on June 30, 2016, shall continue to serve until their current term expires, and until their successor is appointed and confirmed. If a vacancy occurs in the seat of a member serving on June 30, 2016, before the member's term otherwise expires, the vacancy must be filled in the manner specified in Chapter 1, Title 57 of the 1976 Code, as amended by this act, and the member filling the vacancy shall serve until the term expires. The members serving on June 30, 2016, if otherwise eligible, may be reappointed pursuant to Section 57-1-310, as amended by this act.

(C) The Secretary of Transportation serving on June 30, 2016, shall continue to serve at the pleasure of the commission as provided in this act. No further confirmation proceedings are required. Thereafter, any new appointee to the office of Secretary of Transportation must be filled in the manner specified in Chapter 1, Title 57 of the 1976 Code, as amended by this act.

(D) Notwithstanding the effective date provided in subsection (A), SECTION 6 and SECTION 7 take effect upon approval by the Governor. The provisions contained in SECTION 6 and SECTION 7 only apply to projects selected by the bank thereafter.

Ratified the 2nd day of June, 2016.

Approved the 8th day of June, 2016.

This web page was last updated on July 19, 2016 at 9:06 AM

EXHIBIT A

**South Carolina General Assembly
121st Session, 2015-2016**

Download This Version in Microsoft Word format

Bill 1258

~~Indicates Matter Stricken~~

Indicates New Matter

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

~~Indicates Matter Stricken~~

Indicates New Matter

HOUSE AMENDMENTS AMENDED

May 31, 2016

S. 1258

Introduced by Finance Committee

S. Printed 5/31/16--S.

Read the first time April 27, 2016.

A BILL

TO AMEND CHAPTER 43, TITLE 11 OF THE 1976 CODE, RELATING TO THE SOUTH CAROLINA TRANSPORTATION INFRASTRUCTURE BANK, TO PROVIDE FOR THE DISTRIBUTION BY THE DEPARTMENT OF TRANSPORTATION AND THE SOUTH CAROLINA TRANSPORTATION INFRASTRUCTURE BANK OF CERTAIN FEES AND FINES COLLECTED BY THE DEPARTMENT OF MOTOR VEHICLES TRANSFERRED TO THE STATE HIGHWAY FUND; TO AMEND SECTIONS 12-37-2740(D), 38-73-470, 56-1-170(B)(3), 56-1-200, 56-1-286(K)(1), 56-1-390(2), 56-1-400(A), 56-1-460(A)(1)(e)(iii), 56-1-550, 56-1-740(B)(3), 56-1-746(D)(3), 56-1-2080, 56-3-355, 56-3-1335, 56-5-750(G)(3), 56-5-2951(B)(1), 56-5-2951(H)(3), 56-9-330, 56-10-240(C), 56-10-245, 56-10-552, 56-19-420(C), AND 56-19-520(A)(4), ALL OF THE 1976 CODE, ALL RELATING TO FEES OR FINES COLLECTED BY THE DEPARTMENT OF MOTOR VEHICLES, TO PROVIDE THAT ALL OR A PORTION OF THE FEES SHALL BE CREDITED TO THE STATE HIGHWAY FUND, AND TO PROVIDE FOR THE DISTRIBUTION OF THOSE FUNDS BY THE DEPARTMENT OF TRANSPORTATION AND THE SOUTH CAROLINA TRANSPORTATION INFRASTRUCTURE BANK; TO AMEND SECTION 12-36-2647 OF THE 1976 CODE, AS ENACTED IN ACT 98 OF 2013 AND RELATED TO SOURCES OF REVENUE USED FOR HIGHWAY CONSTRUCTION AND MAINTENANCE, TO PROVIDE THAT THE REVENUES OF SALES, USE, AND CASUAL EXCISE TAXES

"(B) From the fees collected pursuant to this article, the Comptroller General shall place into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167, an amount equal to sufficient funds into a special restricted account to be used by the department to defray the expenses associated with producing and administering the distribution of the license plate. The remaining funds collected from the special motor vehicle license fee shall be distributed to the South Carolina Parrot Head Club Council, which shall only use the funds to support the Palmetto Chapter of the Alzheimer's Association and the Upstate South Carolina Chapter of the Alzheimer's Association."

SECTION 72. Section 56-3-13710(B) of the 1976 Code is amended to read:

"(B) Notwithstanding another provision of law, from the fees collected pursuant to this section, the Comptroller General shall place into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167, an amount equal to sufficient funds into a special restricted account to be used by the Department of Motor Vehicles to defray the expenses of the Department of Motor Vehicles in producing and administering the special license plates. The remaining funds collected from the special motor vehicle license plate fee must be disbursed to the American Red Cross."

SECTION 73. Section 56-5-750(G)(3) of the 1976 Code is amended to read:

"(3) The fee for each special restricted driver's license is one hundred dollars, but no additional fee is due because of changes in the place and hours of employment, education, or residence. Of this fee twenty dollars must be distributed to the general fund and eighty dollars must be placed by the Comptroller General into a special restricted account to be used by the Department of Motor Vehicles to defray the expenses of the Department of Motor Vehicles the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

SECTION 74. Section 56-5-2942(J) of the 1976 Code is amended to read:

"(J) A fee of fifty dollars must be paid to the department for each motor vehicle that was suspended before any of the suspended registrations and license plates may be registered or before the motor vehicle may be released pursuant to subsection (F). This fee must be placed by the Comptroller General into a special restricted interest bearing account to be used by the Department of Motor Vehicles to defray the Department of Motor Vehicles' expenses the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

SECTION 75. Section 56-5-2951(B)(1) of the 1976 Code is amended to read:

"(B) Within thirty days of the issuance of the notice of suspension, the person may:

(1) obtain a temporary alcohol license from the Department of Motor Vehicles. A one hundred dollar fee must be assessed for obtaining a temporary alcohol license. Twenty-five dollars of the fee must be distributed by the Department of Motor Vehicles to the Department of Public Safety for supplying and maintaining all necessary vehicle videotaping equipment. The remaining seventy-five dollars must be placed by the Comptroller General into a special restricted account to be used by the Department of Motor Vehicles to defray the Department of Motor Vehicles' expenses the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167. The temporary alcohol license allows the person to drive without any restrictive conditions pending the outcome of the contested case hearing provided for in subsection (F) or the final decision or

disposition of the matter. If the suspension is upheld at the contested case hearing, the temporary alcohol license remains in effect until the Office of Motor Vehicle Hearings issues the hearing officer's decision and the Department of Motor Vehicles sends notice to the person that the person is eligible to receive a restricted license pursuant to subsection (H); and"

SECTION 76. Section 56-5-2951(H)(3) of the 1976 Code is amended to read:

"(3) The fee for a restricted license is one hundred dollars, but no additional fee may be charged because of changes in the place and hours of employment, education, or residence. Twenty dollars of this fee must be deposited in the state's general fund, and eighty dollars must be placed by the Comptroller General into ~~a special restricted account to be used by the Department of Motor Vehicles to defray the Department of Motor Vehicles' expenses~~ the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

SECTION 77. A. Section 56-9-330 of the 1976 Code is amended to read:

"Section 56-9-330. (1) The Department of Motor Vehicles, upon request, and the payment of a fee, shall furnish any person a certified abstract of the operating record of any person subject to the provisions of this chapter, which abstract must also fully designate the motor vehicles, if any, registered in the name of that person, and, if there is no record of any conviction of that person for violating any laws relating to the operation of a motor vehicle or of any injury or damage caused by that person, the department shall so certify. The department, upon request and the payment of a reasonable fee, shall furnish a monthly listing by magnetic or other electronic media of all driver's license numbers that had driving violations posted on their records during the previous month. These abstracts are not admissible as evidence in any action for damages or criminal proceedings arising out of motor vehicle accidents.

(2) The department shall, upon request, and the payment of a fee furnish any person a copy of a vehicle accident report. Revenue generated by the fee imposed pursuant to this section must be placed by the Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

B. If the provisions regarding distribution of the fee authorized in this SECTION conflict with the provisions for distribution contained in Proviso 82.4 included in the Fiscal Year 2016-2017 General Appropriations Act, the provisions contained in this act shall control.

SECTION 78. Section 56-10-240(C) of the 1976 Code is amended to read:

"(C) If the vehicle owner unlawfully refuses to surrender the suspended items as required in this article, the department through its designated agents or by request to a county or municipal law enforcement agency shall take possession of the suspended license plates and registration certificates and may not reissue the registration until proper proof of liability insurance coverage is provided and until the owner has paid a reinstatement fee of two hundred dollars. A person who voluntarily surrenders his license plates and registration certificates before their suspension shall not be charged a reinstatement fee. Revenue generated by the fee imposed pursuant to this section must be placed by the Comptroller General into the State Highway Fund as established by Section 57-11-20, to be distributed as provided in Section 11-43-167."

SECTION 79. Section 56-10-245 of the 1976 Code is amended to read:

the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 89. The General Assembly finds that the sections presented in this act constitute one subject as required by Article III, Section 17 of the South Carolina Constitution, in particular finding that each change and each topic relates directly to or in conjunction with other sections to the subject of improving the State's transportation infrastructure system as clearly enumerated in the title.

The General Assembly further finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in the act.

SECTION 90. (A) This act takes effect July 1, 2016.

(B) The members of the Commission of the Department of Transportation serving on June 30, 2016, shall continue to serve until their current term expires, and until their successor is appointed and confirmed. If a vacancy occurs in the seat of a member serving on June 30, 2016, before the member's term otherwise expires, the vacancy must be filled in the manner specified in Chapter 1, Title 57 of the 1976 Code, as amended by this act, and the member filling the vacancy shall serve until the term expires. The members serving on June 30, 2016, if otherwise eligible, may be reappointed pursuant to Section 57-1-310, as amended by this act.

(C) The Secretary of Transportation serving on June 30, 2016, shall continue to serve at the pleasure of the commission as provided in this act. No further confirmation proceedings are required. Thereafter, any new appointee to the office of Secretary of Transportation must be filled in the manner specified in Chapter 1, Title 57 of the 1976 Code, as amended by this act.

(D) Notwithstanding the effective date provided in subsection (A), SECTION 6 and SECTION 7 take effect upon approval by the Governor. The provisions contained in SECTION 6 and

SECTION 7 only apply to projects selected by the bank thereafter.

---XX---

This web page was last updated on May 31, 2016 at 11:20 PM

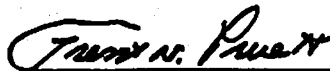
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McClunney,	)	
	)	Docket No. 16-ALJ-21-0437-AP
Appellant,	)	
	)	
vs.	)	REPLY TO RESPONDENT'S RETURN
	)	TO MOTION FOR RECONSIDERATION
South Carolina Department	)	
of Motor Vehicles,	)	
	)	
Respondent.	)	

The Appellant's attorney has received and read the Respondent's "Return to Motion for Reconsideration," dated May 16, 2017. The Appellant's attorney agrees that the Appellant incorrectly referenced the burden of proof provisions stated in S.C. Code Ann. §56-5-2951(F), as being in S.C. Code Ann. §56-5-2951(E); and that such provisions were not enacted in 2016, but rather 2012. Appellant's attorney apologizes for any unnecessary confusion caused by the mistaken statutory references. This being noted, the Appellant would respectfully submit that the substantive arguments advanced by the Appellant are still the same. The Appellant would note that although South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), was not decided by the South Carolina Supreme Court until 2014, the Brown case arose in 2008, with the administrative hearing being held that same year. The Administrative Law Court ruling then occurred, followed by the unpublished opinion of the Court of Appeals in 2011. See South Carolina Department of Motor Vehicles v.

Brown, Op. No. 2011-UP-130 (S.C.Ct.App. Mar. 29, 2011). The amendment in question to subsection (F) occurred the following year in 2012, and therefore would not have applied to Brown as the Respondent suggests in the Department's Return. If anything, the Court of Appeals opinion in 2011 would seem to have been a precursor to the amendment to subsection (F) in 2012.

Respectfully submitted,



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Pruett Law Firm
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Gaffney, South Carolina 29340
(864) 488-0120
pruettlawfirm@bellsouth.net
Attorney for the Appellant

May 17, 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

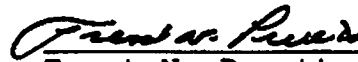
Corey Arness McClunney,	)	
	)	Docket No. 16-ALJ-21-0437-AP
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department	)	CERTIFICATE OF SERVICE
of Motor Vehicles,	)	BY MAIL
	)	
Respondent.	)	

I certify that I have served the "Reply to Respondent's Return to Motion for Reconsideration" of the Appellant in the above captioned action, by depositing the original or copies in the United States Mail, first class postage prepaid, on May 17, 2017, addressed to the following:

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

Honorable Jana E. Cox Shealy
Clerk of Court, S.C. Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

Frank L. Valenta, Jr., Esq.
Brandy A. Duncan, Esq.
Office of General Counsel
S.C. Department of Motor Vehicles
P.O. Box 1498
Blythewood, South Carolina 29016-0020


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Attorney for the Appellant

May 17, 2017

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000002

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

January 11, 2017

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

Re: S.C. Dept of Motor Vehicles
vs
Corey Arness McCluney
DL/Customer #: 008672372

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.

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

Sincerely,

Yolanda P. Williams
Administrative Coordinator, OMVH

Cc: Trent N. Pruett, Appellant
Frank L. Valenta, SCDMV General Counsel

000003

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Corey Arness McCluney,

Appellant,

vs.

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

Respondents.

NOTICE OF ASSIGNMENT
(Appeal)

DOCKET NO. 16-ALJ-21-0437-AP

NOTICE IS GIVEN that a notice of appeal seeking review of a decision of the Office of Motor Vehicle Hearings was filed on November 9, 2016. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2015), the **Honorable Deborah Brooks Durden**, 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 twenty-third day of November, 2016.

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

000004

FILED

NOV 13 2016

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of)
Public Safety,)

Petitioner,)

vs.)

Corey McCluney,)

Respondent.)
-----)

HEARING

August 29, 2016



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

000005

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CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

000006

1 HEARING OFFICER: My name is Tracy Holland and I've
2 been appointed by the Office of Motor Vehicle
3 Hearings and Administrative Law Court -- Law
4 Court to preside over this contested case
5 hearing held in accordance with the
6 Administrative Procedures Act. This hearing is
7 provided by Section of Law 56-5-2950, Code of
8 Laws of South Carolina as amended. For
9 departmental reference, this is docket number
10 16-OMVH-01-2791 in reference -- in reference to
11 the issuance of a notice of suspension to Corey
12 Arnez McCluney for refusing to submit to a
13 chemical test on May 31st, 2016, issued by the
14 South Carolina Department of Public Safety.
15 All parties have been notified of this hearing
16 for today, August 29, 2016, here at the Greer
17 Municipal Court in Greer, South Carolina. Let
18 the record show that the respondent is not
19 present, but is represented by legal counsel,
20 Attorney Trent Pruett. This hearing is tape
21 recorded for departmental reference and it is
22 a matter of public record. The respondent is
23 being afforded this hearing pursuant to his
24 request. If the petitioner will please state
25 your full name and your agency for the record.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

000007

1 TROOPER THORNTON: Robert Bradley Thornton. South
2 Carolina Department of Public Safety.

3 HEARING OFFICER: Please raise your right hand. Do
4 you solemnly swear the testimony you give in
5 this matter will be the truth, the whole truth,
6 and nothing but the truth?

7 TROOPER THORNTON: Yes.

8 HEARING OFFICER: Thank you. The issues for this
9 administrative hearing is provided by Section
10 of Law 56-5-2951(f). Attorney Pruett, what
11 issues will you be contesting?

12 MR. PRUETT: All issues.

13 HEARING OFFICER: Before offering testimony, does
14 either party have an opening statement?
15 Opening for the respondent?

16 MR. PRUETT: (Inaudible)

17 HEARING OFFICER: No opening, thank you. Trooper
18 Thornton, you've been sworn in and all the
19 issues are contested. If you will, prove your
20 case.

21 TROOPER THORNTON - DIRECT TESTIMONY:

22 TROOPER THORNTON: Thank you. On May 23rd of this
23 year here in Spartanburg County, I was called
24 to an accident on 85 Southbound near the 82
25 mile marker. When I arrived on scene, there



1 was a Nissan -- four-door Nissan in the ditch
2 on the shoulder of the road and when I arrived
3 on the scene, Mr. McCluney was standing outside
4 of his vehicle talking with a bystander who had
5 pulled over to check on him to make sure he was
6 okay. He just ran off and was just stuck into
7 the ditch. As I was speaking with him, I could
8 notice an odor of alcohol coming from him as
9 he's speaking to me, so I asked him just to
10 step back to the -- my patrol car so I could
11 speak to him a little further. And due to the
12 closeness of the highway there to the
13 interstate, I didn't want -- I didn't do the
14 normal field sobriety tests because of how
15 close we were to the lane of traffic, so I just
16 did the HGN test on him and observed the clues
17 in his eyes there, nystagmus. And then asked
18 him just to, you know, say the simple just
19 alphabet just so I can just get a feel for
20 that, and he would not. He would say A to Z,
21 but he would not do anything else as far as
22 alphabet E to X is what I normally just ask
23 them where they have to remember to start and
24 stop, and he refused to do that. And just
25 based on him having no reason to wreck on the



1 side of the road and the odor of alcohol and
2 refusing to really comply with other requests,
3 I placed him under arrest there for DUI and
4 transported him to the county jail and offered
5 him a breath test and waited the 20 minutes and
6 he advised that he was not going to -- he was
7 advising from the beginning, but wasn't going
8 to take the test. So I waited the 20 minutes
9 anyway and offered him and he still refused to
10 take the test. Then I was (inaudible) just for
11 a minute.

12 HEARING OFFICER: Okay.

13 TROOPER THORNTON: Just put a note charged with DUI
14 and booked him in there at the County.

15 HEARING OFFICER: Okay. State's resting?

16 TROOPER THORNTON: Yes, ma'am.

17 HEARING OFFICER: Cross-examination?

18 MR. PRUETT: No questions.

19 HEARING OFFICER: Is there anything from the
20 respondent?

21 MOTIONS:

22 MR. PRUETT: I'd move to dismiss the suspension on
23 two or three grounds. One, there's no evidence
24 presented that Mr. McCluney was in fact the
25 driver of the vehicle. The Trooper made a



1 conclusory statement that he was the driver,
2 but there are no statements testified to that
3 Mr. McCluney admitted he was the driver.
4 Secondly, whether or not he was under the
5 influence. I'd submit based upon the testimony
6 presented, there's not probable cause. Said he
7 smelled the odor of alcohol, had a positive HGN
8 test. HGN is not determinative of any blood
9 alcohol level, just that a person has consumed
10 some amount of alcohol at some time in the
11 past. And lastly, there's no testimony
12 presented that Mr. McCluney was advised of his
13 implied consent rights as required by the
14 statute.

15 **HEARING OFFICER:** Is there any -- any rebuttal from
16 the respondent? I will not make a ruling on
17 your dismissal. Now, is -- you're making a
18 motion to dismiss?

19 **MR. PRUETT:** Motion to dismiss based upon the
20 failure to establish what the statute requires
21 at the administrative hearing stage.

22 **HEARING OFFICER:** Okay. And do you have a rebuttal
23 to his motion to dismiss?

24 **TROOPER THORNTON:** The implied consents were given.
25 They were on the -- of course, they were, you



1 know, recorded on the camera there. They were
2 given to him prior to offering -- offering him
3 the test.

4 MR. PRUETT: I would object to that because the
5 record's closed at this point, so he has to
6 argue what's before the Court.

7 HEARING OFFICER: Well, I beg to differ. The record
8 has not been closed. This is a fact-finding
9 administrative hearing. I have not closed the
10 evidence -- testimony and/or evidence.

11 MR. PRUETT: Well, I thought I heard you --

12 HEARING OFFICER: Because you have to make your
13 motion in a timely manner in order for -- if
14 you do not make your motion in a timely manner,
15 then your -- it will be done, because I haven't
16 asked for any closing statement.

17 MR. PRUETT: I thought that's what you were just
18 asking for.

19 HEARING OFFICER: No, sir, I was asking if there's
20 anything coming from the respondent and you
21 make your motion to dismiss.

22 MR. PRUETT: Okay. Well, I -- that would be the
23 record would be closed is if I had no evidence
24 -- well, if I had no evidence to present, then
25 there is nothing else to put into the record at



1 that point.

2 **HEARING OFFICER:** Right, if the respondent has
3 nothing to put into the record.

4 **MR. PRUETT:** Which I didn't.

5 **HEARING OFFICER:** Right. But your motion -- any
6 motions that are made must be made in a timely
7 manner.

8 **MR. PRUETT:** And I was making the motion to dismiss.

9 **HEARING OFFICER:** Exactly, because if you make your
10 -- okay.

11 **MR. PRUETT:** Okay.

12 **HEARING OFFICER:** For -- there's case law in the
13 record that is --

14 **MR. PRUETT:** I understand.

15 **HEARING OFFICER:** -- that if they -- if you make
16 your motion during the closing statement, then
17 you have not made a timely motion and that way
18 that whatever did come into the record, stands
19 into the record until the hearing officer --
20 until I state for the record this ends the
21 testimonial and evidentiary part of the
22 hearing. I'm now ready for a closing
23 statement. I haven't stated that for the
24 record.

25 **MR. PRUETT:** I'm confused because --



1 HEARING OFFICER: It's okay.

2 MR. PRUETT: -- at the end of every trial that I've
3 ever done in the 35 years, at the end of
4 defense case, that is the time to make the
5 motion to dismiss.

6 HEARING OFFICER: Okay. But in these administrative
7 hearings, which is that -- and these are fact-
8 finding cases, I'm only establishing what
9 happened and how did it happen. If it did not
10 happen, then, of course, the case should be
11 dismissed on those grounds. But if something
12 did happen, an incident or whatever the facts
13 are which was the person lawfully arrested,
14 were they advised in writing (inaudible) and
15 did they refuse. Those are the facts --

16 MR. PRUETT: All right.

17 HEARING OFFICER: -- that's what I'm listening for.
18 Either it happened or didn't happen.

19 MR. PRUETT: But the question I'm asking is when is
20 the record closed, because that's when I would
21 make the motion.

22 HEARING OFFICER: When I say it's closed.

23 MR. PRUETT: So even after I -- I don't present any
24 evidence and you asked for motions or
25 statements --



1 HEARING OFFICER: No, sir, I didn't.

2 MR. PRUETT: -- the record's still open?

3 HEARING OFFICER: No, sir. I asked is there
4 anything coming in from the respondent.

5 MR. PRUETT: I said no.

6 HEARING OFFICER: Okay.

7 MR. PRUETT: And then you said --

8 HEARING OFFICER: And then you -- and then you said
9 I make a motion to -- I want to make a -- I
10 move to dismiss.

11 MR. PRUETT: Okay. All right.

12 HEARING OFFICER: Which you have the right to make
13 that motion.

14 MR. PRUETT: Okay. Okay. Thanks.

15 HEARING OFFICER: But we're not going to argue that
16 point.

17 MR. PRUETT: Okay.

18 HEARING OFFICER: I'm just helping you understand
19 that he had a right to rebut your motion and
20 his rebuttal to your motion, which we're still
21 in the fact-finding process because if, in
22 fact, he did advise the person of his implied
23 consent rights, there should not be a
24 rescission because he didn't say it in the
25 hearing.



1 MR. PRUETT: Well, for clarification purposes and to
2 put on the record, I would object to the
3 procedure being followed by the Court --

4 HEARING OFFICER: Okay.

5 MR. PRUETT: -- because at the conclusion of his
6 testimony, if there was no other evidence,
7 there's nothing to rebut. There's only my
8 motion to dismiss, which he can reply to based
9 on the evidence presented. So that's the basis
10 of my objection to that ruling. If the record
11 is to remain open indefinitely, even after the
12 Court hears our motion to dismiss.

13 HEARING OFFICER: And your objection is so noted.

14 MR. PRUETT: Okay.

15 HEARING OFFICER: And to the hearing officer's
16 procedure -- procedures as in to the allowance
17 of evidence and testimony to continue to be put
18 into the record. Your rebuttal -- he's
19 objecting to allowing your rebuttal to come
20 into the record, okay, and then to procedures
21 as in the -- are you objecting -- making two
22 objections or one?

23 MR. PRUETT: I'm objecting to there's nothing to
24 rebut because I haven't put anything in. If I
25 had evidence put in the record, my client was



1 here and he testified, clearly, it would be
2 reply testimony, but where no evidence is
3 presented, there is nothing to reply to. I
4 made a motion to dismiss. That's a legal
5 motion; it's not a factual motion. And based
6 upon my motion, he's got a right to respond to
7 and based upon the record that's been presented
8 to the Court. So at this instance, he had his
9 chance; he testified. I didn't put any
10 testimony in. You asked if I had any motion to
11 make. I made the motion. You can't introduce
12 new evidence at this point in the proceeding.

13 **HEARING OFFICER:** Okay. So ad what I'm ruling is --
14 overruling is that it is not new evidence
15 because the administrative hearing has not
16 adjourned. Only until it's adjourned or until
17 the hearing officer has closed the testimony
18 and/or evidence and then I ask for closing
19 statements. And even a closing statement is
20 just a statement.

21 **MR. PRUETT:** Correct. The only time when I --
22 here's the problem I have. At what point then
23 would I ever be able to make a motion to
24 dismiss if it's just an ongoing open record
25 where I make a motion to dismiss and you say,



1 oh, okay, you can introduce additional
2 testimony. Make another motion to dismiss.
3 Oh, you can just introduce additional
4 testimony. There has to be a juncture where
5 the record is closed and the attorney relying
6 upon the evidence can formulate a motion to
7 dismiss. And I understand that the Court's
8 position is even though I make a motion to
9 dismiss, the hearing is just ongoing as long as
10 you choose to keep it open, correct? Because
11 when you ask me for a closing argument, then
12 it's too late. I have to make a motion to
13 dismiss.

14 HEARING OFFICER: Yes, and that -- and the special
15 thing about it, there's case law --

16 MR. PRUETT: Okay.

17 HEARING OFFICER: -- that has answered all those
18 questions because it has happened where the
19 attorney did not make his motion in a timely
20 manner when testimony was being offered. So
21 then because he chose to make the motion in the
22 closing, and that's been answered.

23 MR. PRUETT: But I'm not making it in the closing --

24 HEARING OFFICER: Right.

25 MR. PRUETT: -- I'm making it before that.



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1 HEARING OFFICER: Exactly. So then he has a right
2 to -- to answer your motion. You're making a
3 motion to me to dismiss based on the grounds
4 that he didn't do something.

5 MR. PRUETT: Didn't present evidence.

6 HEARING OFFICER: He's saying -- right, the
7 evidence.

8 MR. PRUETT: Correct.

9 HEARING OFFICER: But this in these administrative
10 hearings, we are -- we are a fact-finding --
11 trying to find out the answer to these -- these
12 issues that have been laid out in the -- in the
13 -- was the person advised of his implied
14 consent rights; did he refuse; was the person
15 lawfully arrested. We have to answer those
16 questions based on evidence and/or testimony.
17 Well, the process here which I've answered
18 that, but your objection to allowing him to
19 offer more testimony is overruled and your
20 objection is on the record for your sake
21 because then you're going to -- then that's
22 when I was asking you is there another
23 objection from you based on me overruling your
24 objection --

25 MR. PRUETT: Yes, ma'am.



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1 HEARING OFFICER: -- Okay, what's that objection for
2 the record?

3 MR. PRUETT: The objection is that the record I
4 understood was closed. I have made the motion
5 to dismiss and now after the record's been
6 closed as I understood it, then there's no
7 additional evidence that should be offered at
8 this point in time. Because to do so otherwise
9 would put the attorney in the position where he
10 could never preserve an issue for appeal if I
11 have to wait to the closing to make the motion
12 to dismiss.

13 HEARING OFFICER: I know what you're saying.

14 MR. PRUETT: Okay. Thanks. All right. (Inaudible)

15 HEARING OFFICER: Yes, sir.

16 MR. PRUETT: Okay.

17 HEARING OFFICER: But I will thoroughly answer it
18 more so in the order.

19 MR. PRUETT: Okay.

20 HEARING OFFICER: And when I state case law, because
21 I can't from my memories --

22 MR. PRUETT: I understand.

23 HEARING OFFICER: -- state what the case law is. I
24 will in the Order specifically state what that
25 case law -- name the case law, that is. So his



1 objection's overruled in that your -- you may
2 continue. You stated that -- you answered his
3 motion to dismiss that you did advise --
4 implied consents were given prior to and then
5 that's when he made his objection. So I need
6 you to continue whatever you were saying.

7 **MR. PRUETT:** And I think he made an objection as far
8 as McCluney being the driver and he -- I mean,
9 he was the driver. That's why I was talking to
10 him. He was -- you know, said that he crashed
11 his vehicle, being on the side of the road. I
12 don't know if there was any other objections
13 other than the -- the implied consent and the
14 driving of the vehicle.

15 **HEARING OFFICER:** Okay. Any further?

16 **MR. PRUETT:** So is the record still open?

17 **HEARING OFFICER:** It is?

18 **MR. PRUETT:** Well, I make another objection that he
19 stated he advised him of his implied consent,
20 not necessarily what those rights were and
21 whether they were given to him in writing. The
22 other objection I made a few moments ago was
23 just a determination that Mr. McCluney was
24 under the influence. That wasn't answered or
25 responded to.



1 HEARING OFFICER: Any answer or rebuttal to his
2 objection before I make a ruling?

3 TROOPER THORNTON: As far as being under the
4 influence, just with -- just with experience
5 being around people that I've taken to jail for
6 being under the influence before and just his
7 actions, his -- I mean, the smell of alcohol,
8 the refusal to the -- perform the other just
9 simple tests, all that are indicators of
10 someone not wanting to comply because they, in
11 my opinion, they know they're under the
12 influence of alcohol, so they don't want to
13 demonstrate anything that may show that and
14 that's why they'll refuse to do that, as well
15 as the Datamaster test. That would be clearly
16 to show that he had no alcohol in his system
17 enough to impair his driving, but he chose not
18 to give that test or give a sample. So that
19 would be the State's I guess reasoning as far
20 as why he was under the influence.

21 HEARING OFFICER: Okay. Your objection is so noted.
22 And, again, I will answer these objections in
23 the order.

24 MR. PRUETT: Another objection to that?

25 HEARING OFFICER: Yes, sir.



1 MR. PRUETT: (Inaudible)

2 HEARING OFFICER: Yes, sir.

3 MR. PRUETT: -- this is how we do it. My objection
4 would be had a right under the law to refuse
5 any field sobriety tests. He had a right to
6 refuse the Datamaster test. So the fact that
7 those refusals and those instances were not and
8 cannot be a basis to determine probable cause
9 because in the breath test, that's after the
10 fact. That's after the person's been arrested
11 and again he has a right to refuse any field
12 sobriety tests. But I understood he took the
13 HGN and recited his alphabet.

14 HEARING OFFICER: Any -- any rebuttal?

15 TROOPER THORNTON: No.

16 HEARING OFFICER: None, thank you. Okay. No
17 further, this ends the testimonial and
18 evidentiary part of this administrative
19 hearing. We're now ready for closing
20 statement. Closing is a summation as to why
21 (inaudible).

22 MR. PRUETT: (Inaudible)

23 HEARING OFFICER: Yes, sir.

24 MR. PRUETT: Would this be a point to make another
25 motion to dismiss or am I stopped from doing



1 that at this point?

2 **HEARING OFFICER:** No, sir. You still may -- you
3 still in your closing may present why he
4 shouldn't -- why he should -- what is it?

5 **MR. PRUETT:** Why he should have the suspension
6 rescinded?

7 **HEARING OFFICER:** Correct. But it's not time to
8 make a motion because the timeliness of the
9 motion has been ruled that it should be done
10 prior to the closing statements.

11 **MR. PRUETT:** Okay. Okay.

12 **HEARING OFFICER:** But you're presenting your
13 statement as to pointing out facts as to why
14 this suspension should be rescinded.

15 **CLOSING REMARKS:**

16 **MR. PRUETT:** Okay. Well, I would just state for the
17 reasons I originally stated, no testimony was
18 originally presented that he was read his
19 implied consent. There's no testimony that he
20 received -- even now at this point that he
21 received the implied consent in writing. And
22 then there's no testimony that originally that
23 he was the driver. It was supplemented that he
24 was -- he admitted to driving. And the only
25 other evidence we have he was under the



1 influence was that he smelled the alcohol and
2 he maybe didn't say his ABC's the way --
3 constructive. I'm not clear about that because
4 there's no testimony about that, as well.

5 **HEARING OFFICER:** Okay. Normally, you would have
6 had the first closing and then the respondent.
7 But now you have a closing?

8 **TROOPER THORNTON:** Okay. I mean, just basically the
9 same. I believe that the suspension should
10 stay into effect because of the acts that Mr.
11 McCluney was the operator of the vehicle in
12 South Carolina on 85 in Spartanburg County; had
13 the accident; and was, in my opinion, was under
14 the influence of alcohol based on his actions
15 and the smell of the alcohol; and the refusal
16 to -- to recite the letters of the alphabet,
17 how simple they are, just how I asked, he would
18 not do that. I know he doesn't have to, but
19 that's another indicator to me of what he's
20 trying to hide. Implied consents were read to
21 him. It's on the SLED website. It could be
22 viewed. All paperwork was issued to him. He
23 has his copies of them and upon refusal, that's
24 -- and his license -- you know, the form was
25 filled out and booked into the county.



1 HEARING OFFICER: Okay. This administrative hearing
2 is adjourned and both parties will be notified
3 as to the results. 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-two (22) 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 January 6, 2017.

Carenn N. Moore

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

Yolanda Williams

From: Yolanda Williams
Sent: Monday, November 14, 2016 3:42 PM
To: Creel Reporting (contact@creelreporting.com); 'Coral Strickland'
Subject: Transcript Request for Corey McCluney dk# 16-OMVH-01-2791-CC
Attachments: McCluney. Corey d16-2791_20160829-0938_01d201d91d2dfd90.wma
Importance: High

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

Trent N. Pruett
Attorney at Law
202 North Petty Street
Gaffney, SC 29340
864-488-0120

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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November 9, 2016

Tracy G. Holland, Hearing Officer
Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29202

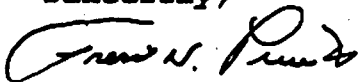
Re: Corey Arness McCluney v. South Carolina Department Of Motor
Vehicles and South Carolina Department of Public Safety
Docket No. 16-OMVH-01-2791-CC

Dear Ms. Holland:

Enclosed with this letter are the Notice of Appeal and other related items. Because Mr. McCluney has initiated an appeal, I am hereby requesting that a transcript be made of the administrative hearing conducted before you on August 29, 2016, at the Greer Municipal Court, located in Greer, South Carolina.

Should you have any questions about my request for the transcript, please do not hesitate to contact my office.

Sincerely,



Trent N. Pruett

Enclosed: Notice of Appeal/Related Documents

c: Honorable Jane E. Cox Shealy
Clerk of Court
S.C. Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

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P.O. Box 1498
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Warren v. Ganjehsani, Esquire
Office of General Counsel
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November 9, 2016

Honorable Jana E. Cox Shealy
Clerk of Court
S.C. Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Corey Arness McCluney v. South Carolina Department Of Motor
Vehicles and South Carolina Department of Public Safety
Docket No. 16-OMVH-01-2791-CC

Dear Ms. Shealy:

Please find enclosed with this letter a Notice of Appeal in the above cited matter, which appeals the "Final Order and Decision" of Hearing Officer Tracy G. Holland, of the Office of Motor Vehicle Hearings. Also enclosed with this letter is the \$150.00 filing fee required for the appeal, certain certificates of service by mail, a copy of the Hearing Officer's "Final Order and Decision," and a copy of the letter requesting a transcript from the Hearing Officer. I believe that the documents referenced herein satisfy the requirements of Rule 33, of the Rules of Procedure for the Administrative Law Court, however, if I need to supplement this appeal with any additional documents, please do not hesitate to contact my office.

Sincerely,

Trent N. Pruett

Enclosed: Notice of Appeal/\$150.00 Filing Fee/Certificate of
Service by Mail/Copy of Hearing Officer's Final
Decision/Copy of Letter Request Transcript

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c: Tracy G. Holland, Hearing Officer
Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29202

Frank L. Valenta, Jr., Esquire
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Warren v. Ganjehsani, Esquire
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P.O. Box 1993
Blythewood, South Carolina 29016-0020

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

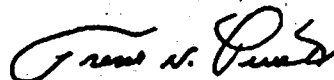
Corey Arness McClunney,	)	
	)	Docket No. 16-OMVH-01-2791-CC
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department	)	NOTICE OF APPEAL
of Motor Vehicles and	)	
South Carolina Department	)	
of Public Safety,	)	
	)	
Respondents.	)	
	)	

Notice is hereby by given that the Appellant, Corey Arness McClunney, does hereby appeal the "Final Order and Decision" of Hearing Officer Tracy G. Holland, of the Office of Motor Vehicle Hearings, dated October 18, 2016, and received by the Appellant on October 18, 2016, which sustained the suspension of the Appellant's driving privileges, pursuant to the provisions of S.C. Code Ann. §§56-5-2950 and 2951. That more specifically, the Appellant states as his grounds for his appeal the following:

1. That the Hearing Officer erred by improperly allowing the witness for the Respondent, South Carolina Department of Public Safety, to testify as to new matters in response to the Appellant's motion to dismiss, after the said witness had concluded his testimony, and that the Hearing Officer erred by not rescinding the Appellant's suspension based upon the initial testimony presented by the said Respondent. That the Hearing Officer's decision prejudiced the substantial rights of the Appellant because the administrative findings, inferences, conclusions or decision were in violation of a statutory provision, or made upon an unlawful procedure, or were arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion as provided for by S.C. Code §1-23-380(5).

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2. That the Hearing Officer erred by improperly shifting the burden of proof to the Appellant as to whether the Appellant's suspension should be sustained, by employing an open ended procedure which never required the Respondent, South Carolina Department of Public Safety, to conclude its case, and effectively required the Appellant to aid and assist the said Respondent in the presentation of its case in order to satisfy the said Respondent's burden of proof. That the Hearing Officer's decision prejudiced the substantial rights of the Appellant because the administrative findings, inferences, conclusions or decision were in violation of a statutory provision, or made upon an unlawful procedure, or were arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion as provided for by S.C. Code §1-23-380(5).



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Attorney for the Appellant

November 9, 2016

Counsel for Respondents:

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Warren V. Ganjehsani, Esquire
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wgajehtsani@scdps.gov

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Corey Arness McClunney,
Appellant,
vs.

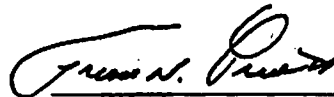
South Carolina Department
of Motor Vehicles and
South Carolina Department
of Public Safety,
Respondents.

Docket No. 16-OMVH-01-2791-CC

**CERTIFICATE OF SERVICE
BY MAIL**

I certify that I have served the Notice of Appeal in the above captioned action, by depositing the original of the Notice of Appeal in the United States Mail, postage prepaid, on November 8, 2016, addressed to the Clerk of Court for the Administrative Law Court, as follows:

Honorable Jana E. Cox Shealy
Clerk of Court
S.C. Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Colimbia, South Carolina 29201



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Attorney for the Appellant

November 9, 2016

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Corey Arness McClunney,	)	
	)	Docket No. 16-OMVH-01-2791-CC
Appellant,	)	
	)	
vs.	)	
	)	
South Carolina Department	)	CERTIFICATE OF SERVICE
of Motor Vehicles and	)	BY MAIL
South Carolina Department	)	
of Public Safety,	)	
	)	
Respondents.	)	

I certify that I have served the Notice of Appeal in the above captioned action, by depositing a copy of the Notice of Appeal in the United States Mail, postage prepaid, on November 8, 2016, addressed to the Respondents as follows:

Frank L. Valenta, Jr., Esquire
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(803) 896-7965
wgajehsani@scdps.gov

Tracy G. Holland, Hearing Officer
Office of Motor Vehicle Hearings
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29202

000036

Trent N. Pruett

Trent N. Pruett, Esquire
Pruett Law Firm
202 North Petty Street
Gaffney, South Carolina 29340
(864) 488-0120
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Attorney for the Appellant

November 9, 2016

000037

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

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

Petitioners,

v.

Corey Arness McCluney,

Respondent.

Docket No. 16-OMVH-01-2791-CC

FINAL ORDER AND DECISION

Appearances:

For the Respondent: Trent Pruett, Esq.

For the Petitioners': (Witness), SCDPS, Trooper R.B. Thornton
and Lt. Adam Roy Green

Other information:

Respondent's Driver's License No.

Type of Hearing: Implied consent (S. C. Code Ann. § 56-5-2950) (Supp. 2015)
[Refusal to take chemical test(s)]

INTRODUCTION

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) upon request by Respondent, Corey Arness McCluney, for a hearing. Respondent was arrested on May 23, 2016 for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon refusal to submit to a breath, blood or urine test, Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 (Supp. 2015). As a result of the refusal, 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 29, 2016 at Greer Municipal Court, S. Main Street in Greer, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege must be sustained.

EXHIBITS

The following exhibits were introduced and made part of the record:

Petitioner: (No documentation was offered as evidence).

Respondent: (No documentation was offered as evidence).

FINDINGS OF FACT

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

1. Notice of the date, time, place and subject matter of the hearing was timely given to the parties - Respondent, Corey Arness McCluney, and the Petitioner's, South Carolina Department, Trooper R.B. Thornton and the South Carolina Department of Motor Vehicles.
2. Respondent's driver's license is
3. On May 23, 2016, Trooper Thornton was called to an accident on I85 near the 82-mile marker. Trooper Thornton arrived on the scene and there was a Nissan 4-door in a ditch on the shoulder of the road. The Respondent was standing outside of his vehicle talking with a bystander, who had pulled over to make sure everything was okay.
4. Respondent stated that he ran into the ditch.
5. Trooper Thornton noticed the odor of alcohol coming from the Respondent as the Respondent was speaking to him. Trooper Thornton asked the Respondent to step to his patrol vehicle.
6. Trooper Thornton administered the HGN (Horizontal Gaze Nystagmus) test to the Respondent. Trooper Thornton observed clues of Nystagmus in the Respondent's eyes.
7. Trooper Thornton did not administer the normal field sobriety test due to being so close to the lanes of traffic on the interstate.
8. Trooper Thornton asked the Respondent to recite the alphabets from E to X. The Respondent refused to recite from E to X but instead recited the alphabets from A to Z.
9. Respondent refused to comply with other request from Trooper Thornton.

10. Trooper Thornton placed the Respondent under arrest for DUI (driving under the influence) and transported him to the County Jail for a DataMaster breath test.
11. At the DataMaster breath test site, Trooper Thornton waited the twenty-minutes and offered the Respondent a breath test.
12. Respondent stated at the start of the test that he was not going to take the breath test. At the end of the twenty-minutes, the Respondent advised he was not going to take the breath test.
13. Respondent was given a copy of the Advisement of Implied Consent Rights prior to refusing to take the breath test.
14. On May 23, 2016, Respondent was given a written Notice of Suspension of his driver's license for refusing to give a breath sample.
15. Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 for refusing to give a breath sample.

The Respondent was not present to offer testimony.

CONCLUSIONS OF LAW

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

General

1. In S. C. Code Ann. §1-23-660 (Supp. 2015), the General Assembly provided for the creation of the South Carolina Department of Motor Vehicle Hearings (DMVH). Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of driver's licenses. Effective October 1, 2008, the General Assembly changed the name to the Office of Motor Vehicle Hearings (OMVH).
2. All hearings presided over by Hearing Officers of OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the South Carolina Office of Motor Vehicle Hearings (SCOMVH).

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

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

Unlawful to drive while under the influence-

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

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

Implied consent to submit to testing

6. S.C. Code Ann. § 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 arrested [the] person....

Furthermore, the breath test must be administered by a person trained and certified by South Carolina Department of Public Safety (SCDPS), pursuant to State Law Enforcement Division (SLED) policies. S.C. Code Ann. §56-5-2950(A)(Supp. 2015).

7. S.C. Code Ann. § 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 S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The hearing officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure, See S.C. Code Ann. § 56-5-2950(J) (Supp.2015).

9. If a person drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950 or as an alcohol concentration of fifteen one-hundredths of one percent or more, Petitioner must suspend the person's driver's license, permit or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer issues a notice of suspension, which is effective beginning on the date of the alleged violation. See S.C. Code Ann. § 56-5-

2951(A) (Supp. 2015)

10. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (Supp.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) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and 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. After reviewing the facts of this case and the applicable law, I find and conclude that the Respondent was lawfully arrested for driving under the influence. On May 23, 2016, the trooper was called to an accident on I85 near the 82-mile marker. The trooper arrived on the accident scene and observed the Respondent standing outside of his vehicle talking with a bystander. The Respondent stated that he ran into the ditch. The trooper noticed the odor of alcohol coming from the Respondent as the Respondent was speaking to him. The trooper asked the Respondent to step over to his patrol vehicle. The trooper did not administer the normal field sobriety tests due to being so close to the lanes of traffic on the interstate. The trooper administered the HGN (Horizontal Gaze Nystagmus) test to the Respondent and observed clues of Nystagmus in the Respondent's eyes. The trooper asked the Respondent to recite the alphabets from E to X and the Respondent refused to recite them from E to X but instead recited them from A to Z. The Respondent refused to comply with other request from the trooper. The trooper placed the Respondent under arrest for DUI (driving under the influence) and transported him to the County Jail for a DataMaster breath test.

12. Further, I conclude that at the DataMaster breath test site, the trooper advised the Respondent of his Advisement of Implied Consent Rights ("Advisement", "Implied Consent Rights") and waited the twenty-minutes and offered the Respondent a breath test. The Respondent stated at the start of the test that he was not going to take the breath test. At the end of the twenty-minutes, the Respondent advised he was not going to take the breath test.

13. During the hearing, after the trooper offered his testimony and no cross-examination was conducted, counsel for the Respondent moved to dismiss the Respondent's suspension based on the following grounds: that there is no evidence that the Respondent was the driver of the vehicle and that there is no probable cause that the Respondent was under the influence, only the smell of alcohol and a positive HGN (Horizontal Gaze Nystagmus) test. Lastly, he argued there was no testimony that the Respondent was advised of his Advisement as required by the statute. The trooper was afforded an opportunity to reply and he stated that the Respondent was given his Implied Consent Rights prior to offering him the test. Thereafter, Counsel objected stating that the trooper cannot offer more testimony once the record is closed.

The Respondent's objection was overruled in that the record was not closed, as well as, the hearing was not adjourned. All parties were afforded the opportunity to respond and present evidence and arguments on all the issues. Once counsel for the Respondent stated he had no cross examination, he made his motion. I had not closed the Petitioners' case. Therefore, I allowed the testimony of the Advisement at that point in the hearing. Nonetheless, the Respondent offered no evidence to the contrary that he was prejudiced in any way, specifically whether the Advisement was or was not given. See Taylor vs. S.C. Dep't of Motor Vehicles, 382 S.C. 567, 677 S.E.2d 588 (2009). Furthermore, I find that the motion to dismiss is denied and Section 56-5-2950 was complied with; therefore, the refusal of the offered breath test was valid.

I therefore conclude as a matter of law that the Petitioner met its burden of proof. Accordingly, the relief requested by the Respondent must be denied.

ORDER

Based upon the above findings of facts and conclusions of law, it is hereby:

ORDERED that the suspension of Respondent, Corey Arness McCluney, driver's license or driving privilege must be sustained.

AND IT IS SO ORDERED.



Tracy G. Holland
OMVH Hearing Officer

October 18, 2016
Greer, South Carolina

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

October 18, 2016
Columbia, South Carolina

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NOTICE

Motion of Reconsideration

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

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

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

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

Appeal

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

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

The notice must be accompanied by proof of service of the notice on all parties and a filing fee in the amount of \$150.00 made payable to the South Carolina Administrative Law Court. See ALC Rules 3(A), 4(B), 31(A), 33 and 71(A). A copy of the notice must also be sent to the OMVH and a copy of the transcript shall be ordered within ten days after service of the notice. The transcript must be ordered by the Appellant and the Appellant is responsible for the cost thereof.

FILED

NOV 09 2016

SCOMVH

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PRUETT LAW FIRM

Trent N. Pruett, Attorney At Law
202 North Petty Street
Gaffney, South Carolina 29340
Phone (864) 488-0120 Fax (864) 488-0808
E-mail pruettlawfirm@bellsouth.net

June 1, 2016

South Carolina Administrative Law Court
Attention: Implied Consent Hearing
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201

Re: Request for Administrative Hearing
Corey McCluney
SCDL:

To Whom It Concerns:

Please find enclosed the official Notice of Suspension Form from the South Carolina Department of Motor Vehicles, and a money order in the amount of \$200.00 for requesting an administrative hearing in the above cited matter. If you have any questions about this letter, please contact my office.

Sincerely,

Trent N. Pruett

Trent N. Pruett

Enclosed: Notice of Suspension Form/Money Order

c: Corey McCluney
123 Grace Street
Gaffney, S.C. 29340

000048

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

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

Petitioner,

vs.

Corey Arness McCluney,
Respondent.

Docket No. 16-OMVH-01-2791-CC
DL# :

NOTICE OF HEARING

On Tuesday, May 31 2016 Respondent was arrested by R. B. Thornton and Respondent's driver's license or privilege was suspended. The Respondent is being represented by Attorney Trent Pruett. This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) pursuant to Respondent's request for a contested case hearing.

IT IS HEREBY NOTICED that a hearing on the merits of this action before Hearing Officer Phillip T. Addington is scheduled to begin at 9:00 AM on Monday, August 29 2016 at Greer Municipal Court 100 S. Main St. Greer SC. All parties are to arrive at least fifteen minutes prior to the time set for the hearing.

1. This hearing will be conducted in accordance with the Rules of Procedure for the South Carolina Office of Motor Vehicle Hearings (OMVH). A copy may be obtained from the Administrative Coordinator of the OMVH or from the OMVH website, www.scomvh.net. The South Carolina Rules of Evidence apply.

2. All parties must bring to the hearing all documents, records, and witnesses needed to present their case. All exhibits moved for introduction at the hearing must be originals. Upon good cause shown at the hearing, copies may be substituted for original exhibits.

3. Subpoenas are available to the parties pursuant to S.C. Code Ann. § 1-23-320(d) (as amended) and the rules of the OMVH, to compel the attendance of witnesses or for the production of documents at the hearing. The parties are responsible for service of subpoenas and any cost involved. Subpoena may be obtained from the OMVH website.

4. A party may represent himself or may be represented by an attorney at the hearing.

5. **FOR GOOD CAUSE SHOWN**, a party may request a continuance no later than two (2) business days prior to the scheduled hearing date. All requests must be made in writing and forwarded to the scheduling assistant listed below for the assigned hearing officer of the OMVH by U.S. Mail, Fax, or email. A copy of your request must be sent to all parties.

6. In case a party settles a case or wishes to withdraw their request for a hearing, they must notify the scheduling assistant of the OMVH as soon as possible. If in the event you cannot reach the scheduling assistant then contact the Administrative Coordinator as soon as possible at (803) 734-3201.

Yolanda P. Williams, Administrative Coordinator, OMVH

By: Frances L Inabinet

Scheduling Assistant

June 6, 2016
Columbia, South Carolina

000049

Frances Inabinet

From: Frances Inabinet
Sent: Monday, June 06, 2016 8:23 AM
To: hpu@scdmv.net; lnblassingame@schp.org; pruettlawfirm@bellsouth.net
Subject: Notice of Hearing, Corey McCluney 8-29-16 dkt# 2791
Attachments: Notice of Hearing, Corey McCluney 8-29-16 dkt# 2791.pdf

Frances L. Inabinet
Scheduling Assistant to Hearing Officers Phil Hayes Robert Harley Phil Addington SC Administrative Law Court Office of
Motor Vehicle Hearings
1205 Pendleton St. Ste.325
Columbia SC 29201
803-734-3209
803-734-3200 (fax)

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View Cash Receipt

Page 1

Cash Receipt

Number: CR1606-0054
Till:
Posted: Yes

Dated: 06-03-2016
Total Paid: \$200.00

Void Information

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

Generate

Checklists (0)

[Go to top](#)

None Available

Invoices (1)

[Go to top](#)

					Show: 40 v
Date	Number	Item Type	Customer	Paid	
06-03-2016	NV1606-0056	Case Filing Fee - \$200	Corey McCluney	\$200.00	

Payments (1)

[Go to top](#)

			Show: 40 v
Payment Method	Reference	Paid	
Money Order	mo 3652743078	\$200.00	

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South Carolina Department of Motor Vehicles

NOTICE OF SUSPENSION

MV-65
(Rev. 1/15)

Driver's Name COREY ANNE MCCLUNEY BP/DL State and Number GAFFNEY SC 29340 Date of Birth 5-22-2011

Address on Driver's License: Street address, Apt. No., City, State, Zip Code
412 E. MONTGOMERY ST. GAFFNEY SC 29340

Special mailing address for notices (if different from driver's license address): Street address, Apt. No., City, State, Zip Code
123 Grace St., Gaffney SC 29340

Vehicle License Plate State and No. 1CW943 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
Date of Test/Refusal 5-22-2011

*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.

COREY MCCLUNEY 5-31-16
Signature of Driver Date Signed

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

<u>5-31-2015</u> Date Signed	<u>R. B. Thornton</u> Signature of Arresting Officer	<u>R. B. Thornton</u> Printed Name of Arresting Officer
<u>SC HP Troop 3 Spartanburg</u> Agency Name	<u>SCA SC SHP 02W</u> Agency Code	<u>804-581-4740</u> Agency Telephone Number
<u>5-31-2015</u> Date Signed	<u>R. B. Thornton</u> Signature of DataMaster Operator	<u>R. B. Thornton</u> Printed Name of DataMaster Operator
<u>SC HP Troop 3 Spartanburg</u> Agency Name	<u>SCSHP 02W</u> Agency Code	<u>804-581-4740</u> Agency Telephone Number

Blue Copy - Driver Yellow Copy - DMV/Driver Records

Green Copy - Officer

White Copy - Office's Agent

HEARING REQUEST:

I am requesting an administrative hearing. I understand that I must file my request with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the Notice of Suspension to have a hearing and to obtain a temporary alcohol restricted license.

5-31-16 Cover McClure 123 Grace St.
Date Signature of Driver Gaffney, SC 29340
Driver's Mailing Address, Phone Number, and Email Address for Notice

Trent N. Pruett 202 N. Petty St. Gaffney SC 29340 864-488-0120
Your Attorney's Name Attorney's Address, Phone Number, and Email Address

If you do not list an attorney above, you must tell your attorney when your hearing is scheduled.

INSTRUCTIONS FOR USING THIS FORM TO REQUEST A HEARING

1. Complete the Hearing Request part of this form, giving the current address, telephone number, and email address where you can be reached.
2. There is a \$200.00 filing fee for a hearing. (Personal checks are not accepted.)
3. Bring or mail your completed form, plus the filing fee, to the SC Office of Motor Vehicle Hearings, 1205 Pendleton St., Suite 325, Columbia, SC 29201. This completed form and the fee must be either hand-delivered or mailed on or before the thirtieth (30th) day of the date on this notice of suspension.

INSTRUCTIONS FOR REQUESTING A HEARING WHEN NOT USING THIS FORM

1. You may use the Official Notice letter you will receive from the DMV to request a hearing. However, the thirty (30) days to file begins at the time the original Notice of Suspension was issued to you. Be sure to include your mailing address, phone number, and email address, along with your attorney's mailing address, phone number, and email address.
2. There is a \$200.00 filing fee for a hearing. (Personal checks are not accepted.)
3. Without either form, you may submit a written request for a hearing. However, be aware the case will not be assigned and the request will not be forwarded to the DMV until the filing fee and either the Notice of Suspension or the Official Notice from the DMV have been received.
4. You must follow the time, delivery, and mailing instructions in the previous section.

INSTRUCTIONS FOR OBTAINING A TEMPORARY ALCOHOL RESTRICTED LICENSE

1. If you met the deadline for requesting a hearing, you may be eligible for a non-commercial temporary alcohol restricted license. Temporary alcohol restricted licenses are not available in Class A, B or C commercial driver licenses.
2. The fee for a temporary alcohol restricted license is \$100.00.
3. After you file your request for a hearing, the SC Department of Motor Vehicles will determine whether you are eligible for a temporary alcohol restricted license. If you are eligible, SC DMV will mail you a letter stating your eligibility.
4. IF YOU ARE SOUTH CAROLINA LICENSED DRIVER, you may take that letter to any SC DMV office in the state, pay the \$100.00 license fee, and have the temporary alcohol restricted license issued.
5. IF YOU ARE LICENSED DRIVER FROM ANOTHER STATE, you may take that letter and the \$100.00 license fee to SC DMV, Specialized Services, 1630 Shop Road, Columbia, SC (two miles North of I-77 Exit 6). That office can issue the temporary alcohol restricted license. You may also mail that letter, a completed Driver's License Application (Form 447, available on the Internet at www.scdmvonline.com), and the \$100.00 license fee to SC DMV, Driver Records, P.O. Box 1498, Blythewood, SC 29016-0028. That office will mail you the temporary alcohol restricted license.

INSTRUCTIONS FOR OBTAINING A ROUTE-RESTRICTED LICENSE

1. If you were suspended after having been arrested for DUI, you may be eligible for a non-commercial route-restricted license. Route-restricted licenses are not available in Class A, B or C commercial driver licenses.
2. A route-restricted license 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.
3. The fee for the route-restricted license is \$100.00. If you are licensed in another state, you must also pre-pay the \$100.00 reinstatement fee.
4. You must enroll in ADSAP before a route-restricted license will be issued.
5. You do not have to request a hearing to be eligible for a route-restricted license.
6. You must apply for a route-restricted license by submitting an application (Form DL-127). This application will be mailed to you with your suspension notice. It is also available on the Internet www.scdmvonline.com.
7. You are advised to complete the application and bring it, with the \$100.00 license fee (and the \$100.00 reinstatement fee if you are licensed in another state), to SC DMV, Specialized Services, 1630 Shop Road, Columbia, SC (two miles North of I-77 Exit 6). Once the application and the route are approved, that office can issue the route-restricted license. You may also mail the application, a completed Driver's License Application (Form 447, available on the Internet at www.scdmvonline.com), the \$100.00 license fee (and the \$100.00 reinstatement fee if you are licensed in another state) to SC DMV, Driver Records, P.O. Box 1498, Blythewood, SC 29016-0028. Upon approval of the application and route, that office will mail you the route-restricted license.

ADSAP is an abbreviation for Alcohol and Drug Safety Action Program, which is operated under the direction of the SC Department of Alcohol and Other Drug Abuse Services (DAODAS). You must go to an ADSAP office to enroll. Numbers for ADSAP are in the County Government Section of most telephone directories. If you reside in another state, you can make arrangements to attend an equivalent program there.

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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 11th day of January 2017

By: Galeet Will

Title: Administrative Coordinator, OMVH

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CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), SCAR, I hereby certify that this Record on Appeal contains all material proposed to be included by any the parties and not any other material.

Respectfully Submitted,



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August 8, 2017

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SC Court of Appeals