

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 2016-000228

RECEIVED
FEB 19 2019
SC Court of Appeals

Bradley Sanders Appellant,

v.

South Carolina Department of Motor Vehicles and
Columbia Police Department Respondents.

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

RETURN TO APPELLANT'S PETITION FOR REHEARING

Pursuant to Rules 240 and 221(a), SCACR, the Respondent South Carolina Department of Motor Vehicles (SCDMV) hereby files the following Return to Appellant's Petition for Rehearing of this matter. The grounds for this Return are:

- 1) ALTHOUGH THIS COURT'S OPINION DID NOT SPECIFICALLY CITE *STATE V. FREY*, THE OPINION DID ADDRESS THE SUBSTANTIVE ISSUES RAISED BY APPELLANT WITH REGARD TO *STATE V. FREY*.

Appellant's Petition for Rehearing raises only one issue: an assertion that this Court's Opinion failed to address the case *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004). While it is true that this Court's Opinion did not specifically cite the *Frey* case, it is clear that this Court's Opinion did discuss the substantive issues raised by Appellant with regard to the *Frey* case. Specifically, this Court's Opinion discussed the

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substantive issues raised by Appellant with regard to the *Frey* case in the following section:

The next clause in the statute provides the focus of this case. It states an officer may request a blood sample "for any other reason considered acceptable by . . . licensed medical personnel." S.C. Code Ann. § 56-5-2950(A) (2018). Officer Desrochers requested a blood sample after Nurse Albright informed him Sanders was physically unable to provide a breath sample.

In *City of Columbia v. Moore*, 318 S.C. 292, 295, 457 S.E.2d 346, 347 (Ct. App. 1995), this court held an officer who was informed by "someone" at the hospital that a motorist suspected of driving under the influence could be in the hospital all night, was not authorized to request a blood sample in lieu of a breath sample. The court reasoned the officer's decision to order a blood sample was not based upon a reason found acceptable by licensed medical personnel as required by the statute. *Id.* at 294, 457 S.E.2d at 347. Over a decade later, this court examined this issue again in *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). Writing for the court, Judge Ralph King Anderson provided, in his illustrious and scholarly style, a comprehensive history of this court's opinions on section 56-5-2950(A). Judge Anderson noted times where this court "explicated," "inculcated," and "elucidated" its thoughts on the requirements of the statute. *Id.* at 601, 654 S.E.2d at 290-91. The *Peake* court determined the suspension of a motorist's license was improper because it was based "only on the unsubstantiated reason considered acceptable" by the arresting officer. *Id.* at 603, 654 S.E.2d at 292. Thus, it is established law that the opinion that a motorist is incapable of giving a breath sample, which opens the door to a blood sample request, cannot come from some mysterious "someone" in a medical facility or from the arresting officer but must be rendered by licensed medical personnel.

This leads to the first key challenge posed by Sanders: Did Officer Desrochers receive information from licensed medical personnel that Sanders was physically unable to provide a breath sample? Sanders argues the ALC erred in finding Officer Desrochers presented a prima facie case that Nurse Albright was licensed medical personnel. Utilizing our standard of review, we find the ALC did not err. Nurse Albright signed a medical collection report indicating she was a registered nurse and wore a nametag that identified her as a nurse. Officer Desrochers also observed Nurse Albright performing medical tasks and treating patients. These activities can only be done by an individual licensed in the medical field. Substantial evidence was presented to support the determination that Nurse Albright was, indeed, licensed medical personnel.

It is clear from the analysis performed in the quoted section that this Court was discussing the substantive issues raised in the *Frey* case and raised in Appellant's Final Brief to this Court. The first paragraph of the section quoted above sets the stage for the discussion by introducing the reader to S.C. Code §56-5-2950(A) and the actions taken by Officer Derochers under that code section. The second paragraph quoted above discusses two of the major cases that set forth the law that a licensed medical personnel is the only type of person that can opine that a motorist is incapable of providing a breath sample. The third paragraph then applies those two cases to Appellant's case and discusses the evidence presented that demonstrated that Nurse Albright was a licensed medical personnel on the date of these events.

In the *Frey* case the Court noted that the only evidence presented regarding whether "Scott Darragh" was a licensed medical personnel was:

- 1) the signed SLED Blood Collection Report form (which did not contain any information regarding what kind of medical personnel license Mr. Darragh held);
and
- 2) Mr. Darragh appearing in the emergency room wearing "hospital like scrubs."

In other words, in the *Frey* case, "Scott Darragh" could have been any hospital staff member that happened to be wearing scrubs and he was not necessarily a licensed medical personnel.¹ Conversely, this Court's Opinion specifically noted the following evidence presented regarding Nurse Albright's medical personnel licensure:

¹ Interestingly, this possibility was even noted by Officer Desrochers during his testimony at the hearing for this case. Officer Desrochers testified, "I understand that in hospitals, even receptionists wear scrubs... [Nurse Albright] did have a name badge indicating she was an RN." R. p. 31, lines 21-25.

- 1) Nurse Albright signed a medical collection report;
- 2) Nurse Albright indicated on this medical collection report that she is a registered nurse;
- 3) Nurse Albright wore a nametag that identified her as a registered nurse; and
- 4) Officer Desrochers observed Nurse Albright performing medical tasks and treating patients at Lexington Medical Center.²

In addition to the evidence noted in this Court's Opinion, the Administrative Law Court's *Amended Final Order* also noted that Nurse Albright was wearing scrubs. Thus, in this case, in addition to the similar evidence presented in the *Frey* case, the following evidence exists that Nurse Albright is a licensed medical personnel:

- 1) Nurse Albright identifies herself as a registered nurse (via her indication on the medical collection report and via her name tag³ that lists her name and identifies her as a registered nurse);⁴ and
- 2) Officer Desrochers observed Nurse Albright performing medical tasks and treating patients in Lexington Medical Center.

These four additional pieces of evidence are very significant in terms of demonstrating

² Lexington Medical Center is one of the main, large hospitals located in the Columbia area and has an Emergency Room Department.

³ S.C. Code §40-33-39 requires licensed nurses to wear a name tag or other adornment that contains their name and type of nursing license held. This name tag or adornment must be legible and at least 1 inch by 3 inches in size.

⁴ S.C. Code §40-33-30 sets out who may identify themselves as a "nurse" or "RN" in South Carolina and makes it unlawful for anyone that is not properly licensed as a nurse in South Carolina to practice nursing in South Carolina. Further, this code section and makes it unlawful for anyone that is not licensed as a nurse in South Carolina to identify themselves as a nurse or RN. Finally, S.C. Code §40-33-200 sets out the criminal penalty for the unauthorized practice of nursing in this State as imprisonment of up to one year or a fine of \$50,000.00 for each violation of practicing nursing in violation of Chapter 33 of Title 40.

that Nurse Albright was a licensed medical personnel on the date of these events. Further, these four additional pieces of evidence are what strongly distinguish this case from the *Frey* case in terms of determining whether Officer Desrochers presented a *prima facie* case that Nurse Albright was a licensed medical personnel on the date of these events.

For these reasons, SCDMV believes this Court's Opinion addresses the substantive issues raised by Appellant with regard to the *Frey* case and rehearing should be denied.



FRANK L. VALENTA, JR., SC Bar # 5682
General Counsel
PHILIP S. PORTER, SC Bar # 4526
Deputy General Counsel
BRANDY A. DUNCAN, SC Bar # 72052
Assistant General Counsel
South Carolina Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016-0020
Telephone: (803) 896-9900
Email: hearingsprocessingunit@scdmv.net
Counsel for the Respondent

February 15, 2019
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

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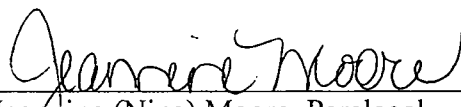
South Carolina Department of Motor Vehicles and
Columbia Police Department Respondents.

Of Whom the South Carolina Department of Motor Vehicles is the Respondent

PROOF OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, February 15, 2019, I served a copy of the Respondent's Return to Appellant's Petition for Rehearing by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Appellant at the address indicated below:

**Heath P. Taylor, Esquire
Taylor Law Firm LLC
3618 Sunset Boulevard, Suite D
West Columbia, South Carolina 29169**



Jeannine (Nina) Moore, Paralegal
Office of General Counsel

Blythewood, South Carolina

Nikki R. Haley
Governor



Kevin A. Shwedo
Director

State of South Carolina
Department of Motor Vehicles

February 15, 2019

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

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RE: *Bradley Sanders v. South Carolina Department of Motor Vehicles*
Appellate Case No: 2016-000228

Dear Ms. Kitchings:

Enclosed for filing please find an original and six (6) copies of Respondent's Return to Appellant's Petition for Rehearing in the above-captioned matter.

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

Thank you for your cooperation in this matter.

In kind regards,

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

Brandy A. Duncan
Assistant General Counsel

Enclosures

cc: Heath P. Taylor, Esquire



MV-17

South Carolina Department of Motor Vehicles

Post Office Box 1498
Blythewood, South Carolina 29016

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South Carolina Department of Motor Vehicles

P.O. Box 1498
Blythewood, S.C. 29016

Form 103

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

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