THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE
LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 2012-213054

Charles Holdorf, Appellant,

v.

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

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

FINAL BRIEF OF APPELLANT

T. Kirk Truslow
Post Office Box 238
North Myrtle Beach, South Carolina 29597
(803) 280-9438
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW JUDGE ERR IN FINDING THAT REASONABLE SUSPICION OF DRUG USE EXISTED TO WARRANT THE REQUEST OF A URINE TEST?

STATEMENT OF THE CASE

On October 28, 2011, Appellant was arrested for the offense of Driving Under the Influence, First Offense. Appellant submitted a breath sample which registered a blood alcohol level of .05. Appellant's driving privileges were subsequently suspended, however, as the arresting officer ("Brigham") alleged that Appellant refused to provide a urine sample.

Appellant timely requested an administrative hearing challenging the refusal suspension. On April 30, 2012, a hearing was convened before Hearing Officer Phil Hayes ("Hayes"), who sustained the suspension in a Final Order and Decision (Hayes Order") dated May 1, 2012.

Appellant timely filed a notice of appeal to the Administrative Law Court on May 14, 2012. Administrative Law Judge S. Phillip Lenski (Lenski) affirmed the suspension in a Final Order dated September 14, 2012 (Lenski Order).

Appellant timely filed the notice of appeal in the present case on October 8, 2012.

FACTS

On October 28, 2011, Brigham conducted a traffic stop of Appellant for not wearing a seatbelt. (R. p. 17, lines 11-19) Brigham noticed a strong odor of alcohol coming from inside the vehicle, and an odor of alcohol coming from Appellant. (R. p. 17, line 21 – p. 18, line 8) Brigham had Appellant perform field sobriety tests, and Appellant gave indicators on two of the divided attention tests, and would not follow instructions on the HGN test. (R. p. 18, lines 15-19) Appellant was placed under arrest for Driving under the Influence. (R. p. 18, lines 24-25) Further, a plastic cup containing liquor was located in Appellant's vehicle. (R. p. 19, lines 3-5)

Appellant was transported to a datamaster facility in North Myrtle Beach.

(R. p. 19, lines 7-13) Brigham provided Appellant with a copy of the Implied Consent Warnings, and requested a breath sample from Appellant. (R. p. 19, lines 19-23). Appellant's breath sample registered a .05 blood alcohol level. (R. p. 20, lines 3-5)

Brigham subsequently testified at the administrative hearing that:

> "Due to my experience and training, I felt that there was other things involved, possibly narcotics." (R. p. 20, lines 7-9)

Brigham then requested Appellant to provide a urine sample, which Appellant refused to provide. (R. p. 20, lines 9-24)

Following the administrative hearing in this matter, Hayes sustained the suspension of Appellant's driver's license. (R. p. 8, lines 10-11) However, the only finding of fact by Hayes regarding whether the request for a urine test was based upon reasonable suspicion was that Brigham determined that narcotics could possibly be involved based on his experience and training. (R. p. 4, lines 20-21)

On appeal to the Administrative Law Court, Lenski affirmed Hayes Final Order. Lenski found that Hayes determination that Brigham reasonable concluded that Appellant could possibly be under the influence of drugs other than alcohol was not clearly erroneous. (R. p. 13, lines 28-30)

ARGUMENT

I. BRIGHAM FAILED TO ARTICULATE REASONABLE SUSPICION OF DRUG USE

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 Respondent asserted the affirmative issue, i.e. the enforcement of a driver's license suspension, and since it was subject to an adverse ruling if no evidence was introduced, Respondent had the burden of proof in the enforcement action. See Alex Sanders and John S. Nichols, Trial Handbook for South Carolina Lawyers, Second Edition, 2001, § 9:3, p. 366.

In order for an arresting officer to request a urine sample, the officer musthave reasonable suspicion that the person is under the influence of drugs other thanalcohol, or is under the influence of a combination of alcohol and drugs. § 56-5-2950(A), Code of Laws of South Carolina, 1976, as amended.

Regarding reasonable suspicion, "The Government must do more than simply label a behavior as 'suspicious', to make it so. The Government must be able to articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some sinister activity than may appear at first glance." U.S. v. Powell, 666 F.3d 180, 186 (4th Cir. 2011)(citing U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011).

The Powell Court's opinion showed a great concern for the erosion of the reasonable suspicion standard. Powell went on to say, "Earlier this year, in U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011), we noted 'our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity.' Twice in the past few months, we reiterated this concern." See United States v. Massenburg, 654 F.3d 480, 482 (4th Cir. 2011; U.S. v. Digiovanni, 650 F.3d 498, 512 (4th Cir. 2011). In all three cases [Foster, Massenburg, and Digiovanni], we held that the government failed to meet its minimal burden of articulating facts sufficient to support a finding of reasonable suspicion. Today, we once again are presented with a case in which the Government has attempted to meet its burden under Terry by cobbling together a set of facts that falls far short of establishing reasonable suspicion." Powell, 666 F.3d at 182-83.

A review of the facts of Foster, Digiovanni, Massenburg, and Powell is helpful in determining the types of Government showings that have fallen far short of establishing reasonable suspicion.

FOSTER

In Foster, decided March 2, 2011, the Government maintained that three factors, taken together, reasonably led to reasonable suspicion:

1. The officer's prior knowledge of Foster's criminal record;

2. Foster's sudden appearance from a crouched position in a parked car, immediately after the driver had apparently said something to him after seeing the detective walking towards them; and
3. Foster's frenzied arm movements, including the movement of his arms down toward the floor of the car. Foster, 634 F.3d at 246.

The Court ruled no reasonable suspicion, and held that the exclusionary rule applied to continue to deter police from engaging in these types of unconstitutional seizures. Foster, 634 F.3d at 249.

DIGIOVANNI

In Digiovanni, decided July 25, 2011, the officer relied upon ten factors to claim reasonable suspicion:

1. the car was rented;
2. the car was coming from a known drug source state (Florida);
3. the car was traveling on I-95, a known drug corridor;
4. the car was clean (claiming that if he were really a traveller he would have evidence of traveling, i.e. garbage);
5. two shirts were hanging in the rear passenger compartment (claiming that if he were really a traveller he would have these shirts packed in a bag);
6. there was a hygiene bag on the back seat (claiming if he were really a traveller the bag would be in the trunk packed away);
7. Digiovanni's hands were trembling when he handed over his driver's license and the rental contract;
8. During the travel history questions, instead of answering the question, "so you're coming from Florida?," with a "yes," Digiovanni replied, "I have property in Florida";
9. Digiovanni's travel itinerary; (claiming one way rental for $438.00 from
10. Florida to Miami implausible)
11. Digiovanni's "oh boy" comment; (Digiovanni stated "oh boy" after officer asked him if any luggage in car and whether everything in car was his)

Digiovanni, 650 F.3d at 512

The Court affirmed the district court's finding of no reasonable suspicion. Digiovanni, 650 at 513.

MASSENBURG

In Massenburg, decided August 15, 2011, the lower court found reasonable suspicion existed based upon six factors:

1. a vague report of shots fired;
2. the four men were encountered roughly two blocks from the location of the reported shooting incident, and were the only people in the area;
3. it was a high-drug, high-crime area;
4. Massenburg was acting nervously, looked down and refused to make eye contact and stood off from the group;
5. Massenburg continued to act strangely by making a series of two furtive movements – that is, he took a step back away from officer, and he then began pantomiming a self pat-down search; and
6. The officers actions were informed by a years worth of practical experience serving as a law enforcement officer.

Massenburg, 654 F.3d at 484

The Fourth Circuit held that the officer lacked reasonable suspicion, and that the district court erred when it failed to suppress the fruits of that unlawful search. Massenburg, 654 F.3d at 496.

POWELL

In Powell, decided on November 14, 2011, law enforcement claimed it had reasonable suspicion to pat down Powell. The Government pointed to two factors in support of reasonable suspicion:

1. caution data regarding Powell;
2. Powell's purported deliberate misrepresentation concerning the validity of his driver's license. Powell, 666 F.3d at 185

Based upon a lack of reasonable suspicion, the Court held the pat-down a violation of the Fourth Amendment, and the evidence should have been suppressed.

Powell, 666 F.3d at 189.

Perhaps the best discussion of reasonable suspicion in a South Carolina State case is found in State v. Taylor, 388 S.C. 101 (Ct.App. 2010). In Taylor, the Court was faced with deciding the issue of whether reasonable suspicion existed. The State argued the following factors supported reasonable suspicion:

1. an anonymous tip;
2. the area being known for drug related incidents;
3. Taylor's close conversation with another individual. The State claimed this was denotative of criminal activity;
4. Taylor's companion's departure toward the woods when the officers approached; and
5. Taylor's getting on his bicycle and pedaling toward the officer like he was not going to stop.

Taylor, 388 S.C. at 107

The Court in Taylor found that no reasonable suspicion of criminal activity existed. Taylor, 388 S.C. at 123. The Court stated that while Taylor was having a close conversation in a high crime area at a late hour, Taylor did not exhibit any behavior suggesting criminal activity.

ANALYSIS OF REASONABLE SUSPICION FACTORS IN THE INSTANT CASE

Brigham's testimony fails to rise to the level of reasonable suspicion of drug use in the instant case. On October 28, 2011, Brigham conducted a traffic stop of Appellant for not wearing a seatbelt. (R. p. 17, lines 11-19) Brigham noticed a strong odor of alcohol coming from inside the vehicle, and an odor of alcohol coming from Appellant. (R. p. 17, line 21 – p. 18, line 8) Brigham had Appellant perform field sobriety tests, and Appellant gave indicators on two of the divided attention tests, and Appellant would not follow instructions on the HGN test. (R. p. 18, lines 15-19) Appellant was placed under arrest for Driving under the Influence. (R. p. 18, lines 24-25) Further, a plastic cup containing liquor was located in Appellant's vehicle. (R. p. 19, lines 3-5)

Appellant was transported to a datamaster facility in North Myrtle Beach.

(R. p. 19, lines 7-13) Brigham provided Appellant with a copy of the Implied Consent Warnings, and requested a breath sample from Appellant. (R. p. 19, lines 19-23). Appellant's breath sample registered a .05 blood alcohol level. (R. p. 20, lines 3-5)

Brigham subsequently testified at the administrative hearing that:

> "Due to my experience and training, I felt that there was other things involved, possibly narcotics." (R. p. 20, lines 7-9)

Everything testified to prior to Brigham's last statement that he felt other things were involved are consistent with a blood alcohol level of .05. The gravamen of this case is the following testimony by Brigham:

> "Due to my experience and training, I felt that there was other things involved, possibly narcotics." (R. p. 20, lines 7-9)

This statement is the classic example of an inchoate and unparticularized suspicion or hunch. Brigham provides absolutely nothing to support a reasonable suspicion of drug use. No drug recognition tests were given. Brigham did not indicate any narcotics odor, nor the presence of any drug paraphernalia. Brigham simply did not provide any evidence as to why he believed "other things were present." Additionally, Brigham only states that narcotics were possible involved.

Once again, "The Government must do more than simply label a behavior as 'suspicious', to make it so. The Government must be able to articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some sinister activity than may appear at first glance." U.S. v. Powell, 666 F.3d 180, 186 (4th Cir. 2011)(citing U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011).

Simply put, based upon the foregoing cases, the doctrine of reasonable suspicion is alive and well. The South Carolina Legislature, in drafting § 56-5-2950(A), Code of Laws of South Carolina, 1976, as amended, clearly chose to impose a reasonable suspicion standard in regards to a request for a urine sample. Brigham failed to articulate reasonable suspicion as to why he believed Appellant may have

been involved in drug use. Based upon a review of the record in this case, Brigham lacked reasonable suspicion to request a urine sample from Appellant. Since Brigham lacked reasonable suspicion to request a urine test, his request was unlawful, and there can be no refusal.

CONCLUSION

Based upon the foregoing reasons, this Court should reverse the judgment of the Administrative Law Court.

Respectfully submitted,

T. Kirk Truslow
P.O. Box 238
North Myrtle Beach, SC 29597
(843) 280-9438
Attorney for Appellant

December 21, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE
LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 2012-213054

Charles Holdorf, Appellant,

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

January 24, 2013

T. Kirk Truslow
Post Office Box 238
North Myrtle Beach, South Carolina 29597
(803) 280-9438
Attorney for Appellant