

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2012-212714

E. Shawn Sorrell.....Appellant,

vs.

South Carolina Department of Public Safety.....Respondent.

APPELLANT'S FINAL BRIEF

John A. O'Leary, S.C. Bar 4274
O'Leary Associates, P.A.
714 Calhoun St.
Columbia, SC 29201
Phone: 803-779-5556
Counsel for Appellant

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. IT WAS ERROR FOR THE FOR THE BOARD AND THE ADMINISTRATIVE LAW COURT TO USE THE SUBSTANTIAL EVIDENCE STANDARD AS THE BASIS FOR A DETERMINATION OF PROBABLE CAUSE, CONTRARY TO THE STANDARD SET IN BECK V. OHIO, 379 U.S. 89 (1964) AND HARLOW V. FITZGERALD, 457 U.S. 800,102 S.Ct.. 2727, 73 L.Ed.2d 396 (1982) OBJECTIVE.
- II. WAS THE DECISION MADE BY THE COMMITTEE REFERENCING A LACK OF PROBABLE CAUSE AND SPECIFICALLY CITING STATE V. PERKINS, 306 S.C. 353; 412 S.E.2D 385 (1991) IN ERROR AND CONTRARY TO S.C. CODE ANN. § 8-17-340(E)(2)(c)(d)?
- III. WAS THE ARREST BY APPELLANT BASED UPON THE LEGAL STANDARD OF PROBABLE CAUSE REQUIRED UNDER BOTH THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE CONSTITUTION FOR THE STATE OF SOUTH CAROLINA?
- IV. WAS IT ERROR AND A VIOLATION OF THE S.C. CONSTITUTION, ARTICLE I, SECTION 22 (DUE PROCESS) AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION FOR THE ATTORNEY FOR THE COMMITTEE TO ESTABLISH A PROTOCOL AND PROCEDURE OF ELECTRONICALLY MAKING AVAILABLE ALL DOCUMENTS TO BE PRESENTED PRIOR TO THE SCHEDULED HEARING TO ALLOW SPECIFIC OBJECTIONS AND A RECORD TO BE MADE? FURTHER, SCHEDULE A TWO DAY HEARING WITH THE APPELLANT HAVING THE BURDEN OF PROOF ON DAY ONE AND SECOND DAY A PRESENTATION BY THE DEFENSE SOME FORTY-THREE (43) DAYS LATER.

STATEMENT OF THE CASE

Mr. E. Shawn Sorrell, Appellant, was employed with the South Carolina Department of Public Safety (SCDPS) as a Bureau of Protective Services (BPS) Officer from 06/02/2000 until his termination effective 07/12/2010. This appeal involves the termination of Appellant's employment for improper conduct, a violation of SCDPS Policy 400.08, Disciplinary Actions. A letter from Director Mark Keel dated 07/09/2010 specifies that Appellant acted improperly on 03/28/2010 at approximately 2:30am by arresting three individuals for disorderly conduct, absent probable cause.

The three defendants consisted of two males and one female with ages ranging from early 20's to 30. Uniform Traffic Tickets D360607, D360608, and D360609 were issued charging a violation of State Public Disorderly Conduct Law reflected in §16-17-530, South Carolina Code of Laws. Section 16-17-530 reads as follows:

Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days. [emphasis added]

Appellant filed grievances with the Department of Public Safety and exhausted all his administrative remedies. This matter came before the State Budget & Control

Board - Employee Grievance Committee (Committee) on 03/22/2011 with Committee attorney Warren Ganjehsani hearing objections to the evidence filed by counsel for Appellant. The formal hearing before the Employee Grievance Committee Chairman Herbert Cooper from the Department of Transportation began on 06/27/2011 with a second day of testimony on 08/08/2011.

A final decision was rendered by the Committee in a document dated 08/26/2011. The decision was based upon State v. Perkins, 306 S.C. 353; 412 S.E.2d 385 (1991). An appeal from that decision was timely filed in the Administrative Law Court. On July 12, 2012, the Honorable Deborah Brooks Durden issued the Administrative Law Court decision affirming Respondent's decision to terminate Appellant's employment. (Order filed 7-12-12) In the Administrative Court decision it found evidence to support the Committee's finding that the arrest was made without probable cause. Appellant filed his Notice of Appeal with the SC Court of Appeals on August 8, 2012. This appeal is timely filed.

BACKGROUND

Kammer v. Murata of AM, Inc., 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006) held that an Appellant Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse where the decisions affected by an error of law. MRI at Belfair, LLC v. SC Dept. of Health & Environmental Control, 379 S.C. 1, 664 S.E.2d 471, (2008). Bursey v. SC Dept. of Health & Environmental Control, 360 S.C. 135, 600 S.E.2d 80, (Ct. App. 2004) Substantial evidence was said to be not a mere scintilla of evidence nor evidence that is blindly from

one side but is evidence which when considered in the record as a whole would allow reasonable minds to reach the conclusion that the agency reached. In the case now before this Court, a review of the record neither allows the Budget & Control Board nor the Administrative Court to find that reasonable minds could have reached the same conclusion that the agency reached. The fact of the matter is, there was an error of law as to the basic understanding as to probable cause and the standard to be applied in determining probable cause.

ARGUMENT

I. IT WAS ERROR FOR THE FOR THE BOARD AND THE ADMINISTRATIVE LAW COURT TO USE THE SUBSTANTIAL EVIDENCE STANDARD AS THE BASIS FOR A DETERMINATION OF PROBABLE CAUSE, CONTRARY TO THE STANDARD SET IN BECK V. OHIO, 379 U.S. 89 (1964) AND HARLOW V. FITZGERALD, 457 U.S. 800,102 S.Ct.. 2727, 73 L.Ed.2d 396 (1982) OBJECTIVE.

Probable cause has been defined as facts and circumstances which would lead a reasonable person to believe that a crime has been committed and this person has committed it. Further the courts have found in cases that there must be objective reasonableness as to the determination. In this case, the Board completely disregards the testimony of the Appellant given at the hearing. As for the specific facts as to the reasons why he made a determination as to probable cause that a crime had been committed specifically, disorderly conduct. Whether to arrest, take into physical custody, issue a courtesy citation or the uniform traffic ticket is left to the discretion of the arresting officer. Testimony of the Appellant states a factual basis upon which the

initial determination of probable cause would have to be evaluated. Testimony given by Appellant Sorrell was corroborated by expert testimony given and provided in the transcript which was totally ignored by the Committee as well as the Administrative Court. The Respondents in this matter testified and readily admitted on the record that Mr. Keith and Ms. Swanson were being loud and boisterous while Mr. Sphat was attempting to assault Ms. Swanson when approached by Officer Sorrell and Mr. Malone. (R. p. 226, line 1 - 7). Appellant Sorrell's report and testimony was totally consistent with Mr. Keith's testimony that they were throwing balloons and that Mr. Keith had just handed Mr. Sphat to throw the last one. Ms. Swanson testified that none of the three individuals ran around during the incident although she can clearly be shown in the video as running back and forth several times. Mr. Keith's testimony confirmed Appellant Sorrell's version of the incident. Mr. Keith's testimony admitted throwing water balloons at Mr. Sphat's feet during the incident. (R. p. 331, line 13) Mr. Keith also confirms Sorrell's testimony that Mr. Sphat was assaulting Ms. Swanson when he testified that "I handed him the last balloon because he hadn't thrown one yet." Keith also stated that he had one in his hand when Officer Sorrell arrived. (R. p. 329, line 25) He then testified that Sphat had a balloon in his hand as Sorrell approached. (R. p. 330, line 5) The testimony alone shows clearly that there was a disorderly act that was taking place and that it was all in the presence of the Appellant Sorrell. Director Keel testified that he made a decision to dismiss this case prior to the completion of the entire investigation. (R. p. 491, line 13) And in compliance with the directive of Mr. Keel, Captain Wise testified that he was ordered to get rid of the tickets prior to the conclusion of the

investigation. (R. p. 491, line 11 - 13) Facts show that a crime had been committed and the ultimate decision as to whether to arrest or to write a courtesy summons is one that is left to the discretion of the officer.

The transcript shows clearly that the only person, other than the three defendants, present at the time of the actual incident were the Appellant Sorrell and a private security officer, Mr. Malone. Malone testified and confirmed Appellant Sorrell's testimony that the kids were loud. (R. p. 226, line 1) Investigator Lee Carter from the Department of Public Safety Office of Professional Responsibility testified that he saw the subjects on the video horsing around and defined horse around as horseplay or frivolous activity. (R. p. 339, line 15) Investigator Carter likewise testified that he agreed with the arrest as they should have been. (R. p. 342, line 8) Investigator Carter further testified that he observed the video and saw no kicking or abuse of Swanson by Officer Sorrell or anything of that nature. (R. p. 361, line 11) Carter agreed as an officer that the incident should have been checked out, and investigated, by Appellant. (R. p. 361, line 20) The video clearly shows that they were horsing around as described by Investigator Carter of LPR DPS. (R. p. 361, line 16)

The totality of the circumstances here show clearly that probable cause, in fact, did exist. The sole basis for the termination of Appellant Sorrell was for making an arrest absent probable cause.

It is not the role of the Committee nor the Courts to second guess an officer's judgment as to the totality of the facts and circumstances surrounding the case and what he observed. The decision to warrant arrest or to simply give a courtesy summons on a

uniform traffic ticket is discretionary with the officer. This is best illustrated in the testimony of Director Keel when asked the question would Appellant have been terminated if he had just issued a citation; and Keel indicated no. (R. p. 504, line 17 - 21) With the basic standard of an arrest or ticket being that of probable cause. Lastly, how is it possible for Director Keel to say a citation was acceptable if there was no probable cause?

The question in this case is simply one of law as the initial determination by the Board totally misinterpreted the decision which they cited in their opinion.

The Committee, as well as the Court, in analyzing the decision of the Budget and Control Committee weighed the testimony of the parties as to the truth or falsity. That is not the issue around probable cause. Probable cause is again the basis upon which the police officer can make an arrest. It is an observation of reasonable facts which would lead an officer to believe that a crime had been committed, not whether the person is guilty of that particular crime. The hearing before the Board should not have been a trial and was not a civil action in which the standard may well be the preponderance of evidence. Substantial evidence in this case clearly shows, based upon the whole record, that there was probable cause, whether the three would have been guilty of that before a jury is a whole separate question and not one for the Board. Substantial evidence should of been from the standard, the officer acted reasonably, he acted based upon his training and he acted upon the facts that he observed in an "objective", reasonable way. For the Board to come in and essentially disregard his testimony totally, and to accept the testimony of Director Keel, who wasn't there, and whose testimony was contrary to the

actual video presented makes a mockery of the laws of arrest and the standard of Beck, *Supra*, and Harlow, *Supra*. The Committee, likewise, recognized conflicting testimony on page 5 of their opinion. There is substantial evidence and that substantial evidence is that there was probable cause which was the sole premise upon which the Appellant in this case was terminated. During the course of the hearing, it was pointed out by counsel for the Appellant a question before the Board is not whether it was a good or bad decision to effect the arrest, but rather whether there was sufficient facts which constituted probable cause under Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) and Beck v. Ohio, 379 U.S. 89 (1964). In this case where there are sufficient facts to constitute probable cause that a crime has been committed and the defendants have committed that crime, the officer has an absolute right to make a determination as to whether he will physically take into custody and arrest the subjects, warn the subjects or issue a courtesy summons.

The decision by the Committee concerning the March 28, 2010 arrest was that it was without probable cause. The decision by the Administrative Law Court affirmed the Committee's decision and found that could only overturn the Committee's factual findings if there was substantial evidence in the record to support them. The record shows that there is more than substantial evidence to support probable cause but more importantly, the Board used an incorrect standard. The correct test was never applied by the board nor the Administrative Law Court for the determination of probable cause. In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) the Courts recognized that probable cause is to be evaluated under an objective standard based

solely upon what a prudent officer would believe under the circumstances. It has never been to reference with probable cause one that required substantial evidence or any other standard. The objective standard set forth in Harlow was recently cited in Merchant vs. Bauer, 677 F.3d 656 (04/26/2012). It remains the standard for not only the Fourth Circuit but the standard required under the Fourth Amendment as well as the South Carolina Constitution.

Appellant's argument that it was an error of law for the Board to apply an incorrect standard for a determination of probable cause since probable cause was the sole basis for the determination. The decision of the Administrative Law Court referencing conflicting testimony and the authority to overturn a Board's decision is misplaced since it was not a trial on the issue of guilt or innocence, but rather the basic determination of probable cause which must be determined under the rules imposed by the courts and by the state and the Federal Constitution. The standard is essentially simple. Probable cause is an objective standard based upon facts and circumstances which would lead a reasonable officer to believe that a crime had been committed. The testimony given at the hearing on its face shows sufficient facts through Director Keels testimony and that of the Office of Professional Responsibility's main investigator, Lee Carter (R. p. 342). To allow the Committee as well as the Administrative Court to change the standard as to the determination of probable cause to a substantial evidence standard is an error of law. Director Keel, determined prior to the conclusion of the investigation by O.P.R., (R. p. 335, line 13) that he made the decision and further likewise testified

that he ordered to "get rid of the tickets" (R. p. 335, line 11). All done prior to the conclusion of the investigation (R. p. 335, line 13).

The decision as to whether an officer would give a "warning", issue a courtesy summons (uniform traffic ticket) or ultimately arrest someone upon viewing an offense is a decision left to the individual officer. This is corroborated in testimony by Rogerson (R. p. 397, line 1-5). Captain Curtis, in his testimony when asked as to whether the actions that were admitted disruptive or boisterous, would it have been possible to write a ticket for that instead of making an arrest. His response on page 455 of the transcript was "you could write a ticket for that, that would be fine." (R. p. 462) The point is that probable cause is the underlying standard, whether it be for a ticket or whether it be for arrest. Ultimately, in his testimony on page 463 the underlying premise of probable cause must be the basis (R. p. 463, line 12). Chief Wise was asked (R. p. 479 - 480) as to the report written by Officer Sorrell. When questioned is the report on its face fine or correct? And the answer was yes and the officer testified it shows probable cause (R. p. 480, line 4). He further corroborated the testimony as to the discretion of an officer where there is probable cause whether to physically make an arrest or to give a warning, or to write a uniform traffic ticket. When asked on page 481, it creates a decision that an officer makes whether they are actually going to physically arrest someone, correct? Answer: Yes. (R. p. 479-480) In testimony on page 480, he admits that the report on its face shows probable cause as did later Chief Keel in his testimony. When asked on cross-examination as to whether Chief Keel's understanding of the report by officer Sorrell on its face would constitute probable cause? His testimony clearly was he didn't

like the tone of the arrest (unfortunately (R. p. 495); however, the video in this case had no sound). Chief Keel was clearly influenced by the fact that one of the three subjects that were arrested was the son of former F.B.I. S.A.C. on foreign assignment. The most telling part of Director Keel's testimony, aside from the fact that there is obvious political overtones as to why the order was given to dismiss the tickets against these three subjects, when he was asked on page 504, line 17, Question: Would we even be here today if he had just written a ticket? Answer: Might not be, it's a possibility. (R. p. 504, line 17) Clearly, there was probable cause and the probable cause was recognized by virtually every officer that testified at the hearing. The Appellant asks this Court to review the standard. The standard is probable cause not sufficiency of evidence. This is not a trial in the sense that it is a civil case where you have to meet a different standard. The standard has been set by law. The standard of probable cause was met, and the officer as reflected in his report the facts and circumstances led him to believe there was probable cause, as well as in his testimony.

The case before the Administrative Law Court pursuant to the provisions set forth on page 2 of the Opinion references the standard used to review decisions from South Carolina Code Ann. §1-23-380(5) (Supp. 2011). This Section provided, "This Court may not substitute its judgement for the judgement 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 (of the Agency) if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) a violation of

Constitutional or Statutory provisions; (b) in excess of Statutory authority of the Agency; (c) made upon unlawful procedure; (d) effected by other error of law; (e) clearly erroneous in view of reliable and probative and substantial evidence on the whole record; or (f) arbitrary and capricious as characterized by abuse of discretion or clearly unwarranted exercise of discretion. On reviewing the facts of this case, the Appellant asserts that it is clearly a violation of provision (a), (c) and (d), specifically that the standard utilized for the determination of probable cause, the basis for which the Appellant was terminated, was incorrectly used. The proper standard is probable cause and probable cause is that which has been referenced above and set forth and defined by the Supreme Court, it is well beyond the power of this Court or the Administrative Hearing Agency to change the underlying premise and standard for the determination of probable cause under the Fourth Amendment as well as the South Carolina State Constitutional provisions. Based upon the testimony provided in the hearing, it is clear that using the standards set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) that the determination must be an objective standard based upon what a prudent officer would have believed under these circumstances. In this case, testimony of multiple officers who testified all, including Director Keel, agreed that there was on the face of the report - probable cause. The standard was ignored by the Board and the Administrative Law Court.

II. WAS THE DECISION MADE BY THE COMMITTEE AND UPHELD BY THE ADMINISTRATIVE LAW COURT REFERENCING A LACK OF PROBABLE CAUSE AND SPECIFICALLY CITING STATE V. PERKINS, 306 S.C. 353; 412 S.E.2D 385 (1991) IN

ERROR AND CONTRARY TO S.C. CODE ANN. § 18-17-340(E)(2)(c)(d)?

Was the committee in error in its decision issued on 08/26/2011 when it found that the actions of the subjects arrested did not constitute disorderly conduct under State v. Perkins, 306 S.C. 353 (1991). The decision of the Committee ultimately hinged upon the determination that the actions of the three subjects did not constitute Disorderly Conduct under the Law... there was no evidence that the individuals were intoxicated or used fighting words when talking with the Appellant. State v. Perkins, 306 S.C. 353. The Committee ignored other provisions of §16-17-530, S.C. Code of Laws.

Perkins was specific and in that case the subjects who were arrested went to the Anderson County Sheriff's Office for an incident report involving an altercation earlier that day. A Sheriff's Office employee told the Appellants that the report was not available and the Appellants then became upset and raised their voices. They were then arrested and charged with Disorderly Conduct. The case stands for the proposition that the subjects in that case were simply exercising their right of free speech. Perkins in no way shows additional conduct that would fall under §16-17-530(a). In the case before this Court, the facts are simply that the subjects were not arrested for what they said, but what they did. In this case, Appellant (Sorrell) observed three subjects at 2:30 in the morning in a business/residential area running on the streets, yelling and throwing what turned out to be water balloons at the buildings. The suspects were arrested for that conduct not for what they said. The decision by the Committee is clearly wrong. At no time has this case involved the issue of free speech. The subjects were arrested under

§16-17-530(a) “or otherwise conducting himself in a disorderly or boisterous manner”, that being the running around, yelling, throwing balloons by adults in a business/residential area at 2:30 in the morning. None of the subjects were arrested for what they said, only what they did. The emphasis under the Criminal Law of Public Disorderly Conduct is “**Conduct**”, not speech. Speech played absolutely no part in their committing the crime of disorderly conduct.

Perkins has absolutely no bearing on what was testified to in this matter. The Statute in question was Disorderly Conduct. A reading of the Statute shows the following: “Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner...” In the case before this Court, the facts were that Appellant, on 03/28/2010, assigned to the South Carolina Lottery Commission building on Main Street in Columbia, observed through a video monitor, three individuals outside the Lottery Commission building on Main Street at 2:30am throwing unidentified objects at the building. The incident report filed by Appellant (R. p. 602) stated: “while responding to the area the RO observed three individuals acting in a loud and boisterous manner, one individual Spaht had a balloon filled with an unknown substance in his right hand. After Spaht was ordered to drop the object, it was determined to be filled with water. During a short investigative detention, it was found that all individuals had participated in the actions observed on camera. Both Spaht and Keith were cooperative while Swanson was uncooperative and refused to comply with RO’s directives. All were arrested, searched, and placed into hand-cuffs. Suspects were transported to and booked

for disorderly conduct and citations were issued, specifically Uniform Traffic Tickets D360607, D360608, and D360609. The subjects were arrested for their conduct not their words as in Perkins.

III. WAS THE ARREST BY APPELLANT BASED UPON THE LEGAL STANDARD OF PROBABLE CAUSE REQUIRED UNDER BOTH THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE CONSTITUTION FOR THE STATE OF SOUTH CAROLINA?

South Carolina Code of Laws §16-17-530 is titled Public Disorderly Conduct reads as follows:

Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days

The relevant portions of the Statute here are subsection (a) *be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner*. The offense of Disorderly Conduct constitutes a misdemeanor and the Law of South Carolina allows an

officer to arrest for a misdemeanor that takes place in his presence - Disorderly Conduct constitutes a misdemeanor. The operative facts which Appellant observed and placed in his report was that it was approximately 2:30 in the morning on 03/28/2010 in a residential/business area on Main Street in Columbia, South Carolina. The area which surrounded the Lottery Commission included condos as well as a commercial motel adjacent to and connected with the building in which the Lottery Commission is housed. Recent acts of vandalism had occurred across the street with windows being broken. In addition, Appellant observed on an in-house security camera, not only the running around, the subjects throwing what turned out to be water balloons, but which were unknown upon his initial investigation. After exiting the building, Appellant heard loud boisterous language with multiple voices and likewise observed the female suspect crouching and yelling for the attack to stop.

After interviewing the subjects, it was determined that they ranged in age from early 20's to 30 plus years of age. The subjects were separated, searched, and Appellant made a determination to arrest all subjects for Public Disorderly Conduct under that portion of the South Carolina Code of Laws §16-17-530, specifically "or otherwise conducting himself in a disorderly or boisterous manner." The facts and conduct observed by Appellant fell well within the parameters of this Statute.

Probable cause is defined as the requirement set forth in the Fourth Amendment to the United States Constitution as well as the Constitution of the State of South Carolina. In Beck v. Ohio, 379 U.S. 89 (1964) the Ohio Supreme Court, when reviewing the validity of the arrest, determined that it is the function of a Court to determine



whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution and the belief that an offense has been committed. The facts set forth on the face of Appellant's report show clearly that there was probable cause to believe that a misdemeanor, specifically Public Disorderly Conduct, had occurred. When a misdemeanor takes place in the presence of an officer, he or she has the ability to either (1) ignore, (2) write a Uniform Traffic Ticket, and/or (3) take into custody those subjects who he observed committing the violations.

In State v. Brannon, 379 S.C. 487 (2008), the Court determines that the lawfulness of an arrest is simply whether probable cause existed to make the arrest. Wortman v. City of Spartanburg, 310 S.C. 1 (1992). Probable cause, the Court stated in Wortman and affirmed in Brannon is "a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinary, prudent, and cautious person under the circumstances to believe likewise.

In Gist v. Berkeley County Sheriff's Department, 336 S.C. 611 and affirmed in State v. Blassingame, 338 S.C. 240 (1999) the Court stated that in determining the presence of probable cause for arrest the probability cannot be technical, but must be factual and practical considerations of everyday life upon which reasonable, prudent, and cautious men, not legal technicians, act. In the case now before this Court, Appellant reported facts and circumstances in his incident report at page 602 which establish probable cause. Testimony given before the Committee by several law enforcement witnesses for the Department admitted that the facts set forth in Sorrell's incident report did constitute probable cause. In his testimony, Lee Carter, Lead Investigator, stated:

three subjects were boisterous and engaged in disorderly conduct and were arrested as they should have been (R. p. 342).

In testimony given by Captain Curtis (R. p. 456) Curtis references that portion of the Statute which says it can be Disorderly Conduct if a person is conducting himself in a disorderly or boisterous manner.

Bureau of Protective Services Chief Zachary Wise testified that the face of the incident report produced by Appellant shows probable cause (R. p. 480). He testified as to the basic principle that ultimately any arrest is a decision to be made by the officer (R. p. 480). The underlying premise for any arrest and/or ticket issued in South Carolina is the concept of probable cause. Here officer Sorrell had probable cause based on the actions observed.

In testimony given by Director Mark Keel (R. p. 501) a question was asked: "Would you say your understanding is that this report on its face would constitute probable cause?" Answer: "Yes."

In further testimony (R. p. 504) Director Keel was asked, "Would we even be here today if he had just written a ticket?" Answer: "Might not be. It's a possibility." The testimony given by Director Keels shows that probable cause had to have existed since probable cause, again, is the basic standard for an arrest and/or for a ticket. The truth of the matter is that Director Keel simply disagreed with the fact that an arrest was made. Testimony shows that one of the subjects was the son of a Retired FBI Agent and politics may well have played a part in the decision of Director Keel to Nolle Prose the ticket. (R. p. 497)

The termination letter provided to Appellant states that he arrested three individuals for Disorderly Conduct where there was no probable cause. (R. p. 581) Based upon the testimony given by the State's witnesses, this simply is not true. Appellant observed a misdemeanor being committed by all three subjects. Officer Sorrell made a decision to arrest and take into custody all three subjects for this offense. The arrest was lawful. Appellant in no way abused his authority. Probable cause existed for either a ticket or arrest and Officer Sorrell made a good faith decision to arrest all 3 subjects.

IV. WAS IT ERROR AND A VIOLATION OF THE S.C. CONSTITUTION, ARTICLE I, SECTION 22 (DUE PROCESS) AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION FOR THE ATTORNEY FOR THE COMMITTEE TO ESTABLISH A PROTOCOL AND PROCEDURE OF ELECTRONICALLY MAKING AVAILABLE ALL DOCUMENTS TO BE PRESENTED PRIOR TO THE SCHEDULED HEARING TO ALLOW SPECIFIC OBJECTIONS AND A RECORD TO BE MADE? FURTHER, SCHEDULE A TWO DAY HEARING WITH THE APPELLANT HAVING THE BURDEN OF PROOF ON DAY ONE AND SECOND DAY A PRESENTATION BY THE DEFENSE SOME FORTY-THREE (43) DAYS LATER.

The procedure of electronic transfer and availability of documents to Committee Members prior to any adjudicatory hearing violates the "Due Process Clause" of Article I, Section 22 of the Constitution of South Carolina. In this hearing on 03/22/2011, Committee Attorney Warren Ganjehsani (R. p. 100) at line 11 states, "the problem is, if the exhibit is already available to them and it's got what you deem to be objectionable documents in it, you can't really un-ring the bell at that point because they are in front of you and they may or may not have already looked at them, the record has already been

compiled.” In essence this summarizes the problem as to the presentation and accessibility/availability of evidence prior to allowing counsel to voice objections at a hearing where a record could be made and evidentiary rulings made. To further complicate the issue, the Committee Attorney states on page 28 that, “un-ring the bell and also it would have been awfully time consuming.” The problem with this approach is simply that it violates the very premise of due process. In Michael Woodward, MD vs. SCLLR, 1999WL439450 (1999) this exact issue as to whether Article I Section 22 of the S.C. Constitution is violated by having board members become exposed to evidence prior to any adjudicatory hearing for an accused and then allowing those board members to sit, participate and vote at an adjudicatory hearing.

The purpose of Article I Section 22 as set forth in Woodward is to insure adjudications are conducted by impartial administrative bodies, see Ross v. Medical University of South Carolina, 328 S.C. 51 (1997). In Michael Antonio Addison, PC vs. SDLLR, State Board of Chiropractic Examiners, Respondent 2000WL246563 (2000)(page 4) the Court concluded that Article I, Section 22, was violated when a board member who had been exposed to the prosecutor’s evidence prior to an adjudicatory hearing was then allowed to sit, participate, and vote at the hearing. A violation of Article I Section 2 is created where a board member who served has an opportunity to form premature opinions, Garris vs. Governing Board of South Carolina Reinsurance Facility, 333 S.C. 432 (1998).

In the case now before the Court, objections were made to the documents that were to be made available electronically to members appointed to the Committee. After

numerous objections to documents with correspondence between the Committee attorney and attorneys for the Department a hearing was held on 03/22/2011. Initially, objections to specific pages and documents were provided by counsel for Appellant followed by detailed descriptions as to the objections. The first opportunity to actually voice the objections and to make a record of the objections came at the 03/22/2011 hearing. At that time, the attorney for the Committee stated that Committee Exhibit #1 was already made available to the Committee and it was impossible to un-ring the bell at that point because the members may have already looked at them since the record has already been compiled (R. p. 31).

The procedure utilized in making documents accessible prior to any opportunity for objection for expediency sake is contrary to a basic concept of due process. Basic fairness requires that the objections be made with an opportunity to argue those objections prior to the submission of any documents or evidence to the triers of fact. Availability of such documents and evidence prior to any ability to argue the rules of evidence and obtain specific rulings as to admissibility causes irreparable damage to the Appellant. There is a basic right to a fair and impartial hearing and to do otherwise is contrary to the South Carolina Constitution Article I, Section 22 (Addison v. SCLLR, *supra*).

Submission of documents prior to allowing the parties an opportunity to be heard and to object under the Rules of Evidence creates in this case a structural defect in the system which effects the entire framework on which a trial or hearing could proceed. The error in this case created by submission of the documents by the Committee

Attorney was more than simply an error at the trial, it is a structural defect which, on its face, denies procedural due process in the basic adjudication of this case. The hearing on June 27, 2011, and following protocol of the Board, the burden of proof is on the Appellant, Mr. Sorrell. Testimony was given and evidence presented. Due to the number of witnesses that were to testify, the case had to be continued to a second day which was scheduled, that being August 8, 2011. The time between their testimony which Mr. Sorrell's evidence is presented and the conclusion of the case with the majority of the evidence on the second day being presented by the state, was a period of some forty-three (43) days. The position of the Appellant is that the rules of the Board require that there be a speedy hearing and the delay of some forty-three (43) days, regardless of the difficulties in scheduling, constitutes irreparable harm to Appellant. Where the case for Appellant and his position being given to the Board with a time lapse of some forty-three (43) days, it's almost impossible to recreate, in a closing argument, evidence heard forty-three (43) days earlier. The position of Appellant is that it is not timely and is contrary to the basic due process and fairness to require the petitioner to present his case, create an extreme time gap, and on the second day of the hearing, to present only that evidence which is presented by the state. This procedure, or lack of procedure, by the state with reference to scheduling back to back dates, if necessary, or even longer, depending on what case they're in, constitutes a violation of basic fairness guaranteed by the State Constitution as well as basic fairness referenced in due process and equal protection clause of the U.S. Constitution.

CONCLUSION

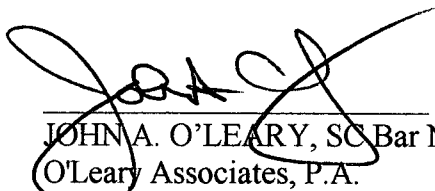
The Appellant in this case was fired by the Department of Public Safety for an arrest made on less than probable cause. The facts set forth before the Committee show clearly that a misdemeanor had taken place in his presence and that he had sufficient facts to warrant probable cause for the arrest of the subjects. The decision to arrest is one that must be based upon a minimum standard of probable cause but the actual determination as to whether to arrest, warn or issue a ticket in a minor offense is left to the officer. In this case, probable cause existed. The standard to determine probable cause ss set forth by the U.S. Supreme Court in Beck v. Ohio, 379 U.S. 89 (1964) and further in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), is "Objective Reasonableness". Whereas the Board and the Administrative Law Court adopted the substantial evidence standard as the test for probable cause. The test for probable cause has been addressed and set by the Supreme Court beginning with Beck v. Ohio, 379 U.S. 89 (1964) and extending to Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Probable cause is evaluated under an objective standard based on what a prudent officer should have believed under the circumstances Merchant vs. Bauer, 677 F.3d 656 (04/26/2012). Here virtually all officers presented testimony that there was probable cause.

Further the decision by the Committee and the Administrative Court was in error and contrary to law. Evidence likewise shows that the procedure established and utilized by the Committee and the Committee attorney is inherently and structurally defective and violates due process. To allow improper evidence to be viewed by the Committee as

trier of fact is clearly improper and violates due process as does a lapse of some forty-three (43) days between the dates of the hearing.

Further we ask that the Committee's decision that was sustained by the Administrative Law Court be reversed and the Appellant reinstated.

Respectfully submitted,



JOHN A. O'LEARY, SC Bar No. 4274
O'Leary Associates, P.A.
714 Calhoun St.
Columbia, SC 29201
Phone: (803) 779-5556
Attorney for Appellant

Columbia, South Carolina
February 5, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2012-212714

E. Shawn Sorrell.....Appellant,

vs.

South Carolina Department of Public Safety.....Respondent.

PROOF OF SERVICE

I, the undersigned employee of O'Leary Associates, P.A., attorneys for Appellant, certify that I have served the foregoing document(s) on the individual(s) listed below on February 5, 2013 by placing a copy of the same in the United States Mail, postage prepaid, and return address clearly affixed to the following address:

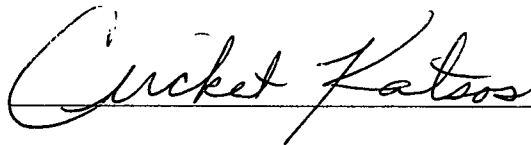
PERSON SERVED:

Vance Bettis, Esquire
Gignilliat Savitz & Bettis, LLP
900 Elmwood Street, Suite 100
Columbia, SC 29201
Counsel for Respondent

DOCUMENTS:

APPELLANT'S FINAL BRIEF

Columbia, South Carolina
February 5, 2013



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CERTIFICATE OF COMPLIANCE WITH RULE 211(B)

I, John A. O'Leary, counsel for Appellant E. Shawn Sorrell, hereby certify that the Final Brief of Appellant in this matter complies with Rule 211(b) of the S. C. Rules of Appellate Procedure.

Respectfully submitted,


JOHN A. O'LEARY, SC Bar No. 4274
O'Leary Associates, P.A.
714 Calhoun St.
Columbia, SC 29201
Phone: (803) 779-5556
Attorney for Appellant

Columbia, South Carolina
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