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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

MAY 06 2014

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley Robinson, Administrative Law Judge
H. Philip Hayes, Jr., OMVH Hearing Officer

Docket No. 11-ALJ-21-0563-AP
Docket No. 10-OMVH-01-3433-CC

Edward Eli Saleeby, III, Appellant,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

Did the ALJC err in affirming the decision to suspend Appellant's driver's licence under S.C. Code Ann. § 56-5-2950?

- A. The ALJC erred in upholding the hearing officer's finding that the arresting officer did not violate Section 56-5-2950 by refusing to assist Appellant with obtaining a blood test because Appellant's request was made prior to the officer offering Appellant a breath or urine test.
- B. The ALJC erred in upholding the hearing officer's finding that the arresting officer did not violate Section 56-5-2950 by refusing to assist Appellant with obtaining a blood test as required by the statute after Appellant submitted to a breath test.
- C. The ALJC erred in upholding the hearing officer's finding that the arresting officer did not violate Section 56-5-2950 by failing to videotape Appellant's alleged refusal to take the urine test.

STATEMENT OF THE CASE

This case involves an administrative suspension of a motor vehicle driver's license under the South Carolina Implied Consent statute. On July 3, 2010, Edward Eli Saleeby, III (Appellant) was operating a pickup truck in Hartsville, South Carolina. Trooper C.D. Brigham pulled Appellant over for following another vehicle too closely. Trooper Brigham eventually charged Appellant with driving under the influence of alcohol or drugs (DUI).

Trooper Brigham transported Appellant to the breathalyzer site. On advice of his father, a lawyer, Appellant requested that a blood test be performed but Trooper Brigham refused. Trooper Brigham then offered Appellant a breath test and Appellant agreed. Trooper Brigham administered the breath test which revealed a blood alcohol content of "0.00." He then offered Appellant a urine test. Appellant agreed to the urine test. At some point Trooper Brigham contends Appellant refused the urine test. Trooper Brigham then cited Appellant for refusing the urine test, triggering the administrative suspension.

Appellant sought administrative review of the suspension before the Office of Motor Vehicle Hearings (OMVH) pursuant to Section 1-23-660 of the South Carolina Code. A hearing was held on October 19, 2011, before a Hearing Officer appointed by the Administrative Law Court. The Hearing Officer entered an order on October 24, 2011 upholding the suspension.

On November 4, 2011, Appellant sought review of the Hearing Officer's order before the Administrative Law Court. Appellant asserted seven separate grounds for the appeal. On August 2, 2013, the ALC entered an order sustaining the suspension.

Appellant moved the ALC for reconsideration and requested a stay of the order. On August 15, 2013, the ALC entered an order staying the suspension pending a ruling on the motion for reconsideration. On August 31, 2013, the ALC entered an order denying the motion for reconsideration.

On September 30, 2013, Appellant moved the ALC to renew the stay of the suspension pending an appeal. The Department of Motor Vehicles and Department of Public Safety (Respondents) advised the Court that it would not proceed on the suspension while this appeal is pending.

FACTS

Trooper Brigham testified that on July 3, 2010, he was on patrol in Darlington County. (R. p. 59, ll. 17-18). He saw a black Chevrolet truck traveling on U.S. Highway 15 within the city limits of Hartsville, South Carolina, and allegedly following too closely to the vehicle in front of the truck. (R. p. 59, ll. 18-23; p. 66, ll. 12-14). Trooper Brigham initiated a traffic stop of the truck. (R. p. 59, l. 25 - p. 60, l. 1). Trooper Brigham approached the vehicle, identified the driver as Appellant, and noticed there were two other occupants in the truck. (R. p. 60, ll. 4-5, 13-14).

Trooper Brigham stated there "was a strong odor of alcohol coming from inside the vehicle." (R. p. 60, ll. 7-8; p. 67, ll. 2-4). He asked Appellant to exit the vehicle and upon speaking with Appellant, Trooper Brigham stated there was no odor of alcohol coming from Appellant. (R. p. 60, ll. 10-18). Trooper Brigham concluded the alcohol present was most likely from the other passengers. (R. p. 67, ll. 5-8).

Trooper Brigham testified, however, that Appellant "appeared to be disoriented." (R. p. 60, ll. 20-21; p. 67, ll. 9-13). Trooper Brigham advised Appellant that his pupils were dilated and Appellant stated he knew. (R. p. 60, l. 23 - p. 61, l. 1; p. 61, ll. 14-16). Trooper Brigham then asked Appellant if he was under any prescription narcotics, and he stated he was on Lorcet. (R. p. 61, ll. 1-3). Appellant had chipped a tooth and had not been able to get to the doctor to have it repaired. (R. p. 68, ll. 1-3). Appellant wanted to check with a passenger about the time he took the Lorcet but Trooper Brigham refused to permit Appellant to do so. (R. p. 68, ll. 8-13). Appellant offered into evidence records demonstrating that on June 18, 2010, Appellant filled a prescription for Hydrocodone and

paid \$1.99. (R. p. 70, ll. 5-15; R. p. 116).

Trooper Brigham then advised Appellant he was going to perform the standardized field sobriety tests on Appellant. (R. p. 61, ll. 7-12). On the HGN test there was “no nystagmus on any of his tests.” (R. p. 61, ll. 13-14). Upon doing a “walk and turn” test, Appellant started before instructions were finished, stepped off line, and took the incorrect number of steps. (R. p. 61, ll. 16-19). On the “one-legged stand” test, Appellant swayed while balancing and used his arms to balance himself, as well as placed his foot down. (R. p. 61, ll. 19-23).

Appellant advised Trooper Brigham that Appellant had difficulty with balance because of a medical condition. (R. p. 68, ll. 14-19; p. 69, ll. 9-17; p. 113, ll. 6-8). Appellant’s medical records reveal that he suffers from “ataxia,” which affects his ability to perform the “walk and turn” because of balance and coordination issues. (R. p. 68, l. 20 - p. 69, l. 7; R. p. 115).

Trooper Brigham searched the truck and found a prescription bottle for Xanax in the center console. (R. p. 62, ll. 19-22). He did not recall finding any Lorcet tablets. (R. p. 67, ll. 14-20; p. 69, ll. 18-21).

Trooper Brigham placed Appellant under arrest for DUI and transported him to the Hartsville Police Department. (R. p. 61, l. 25 - p. 62, l. 2). When they arrived Appellant asked to use the restroom and Trooper Brigham watched while Appellant took a bathroom break to urinate. (R. p. 71, ll. 13-23). It did not concern Trooper Brigham that Appellant may not be able to provide a urine sample later on. (R. p. 73, ll. 14-20).

Upon entering into the Datamaster room, Appellant was advised he was being

video recorded and that Trooper Brigham was requesting a breath test. (R. p. 62, ll. 12-16; p. 62, l. 24 - p. 63, l. 2). Trooper Brigham advised Appellant that the Trooper did not suspect Appellant had alcohol in his system. (R. p. 62, ll. 16-19). The discovery of the Xanax bottle as well as Appellant's admission to taking Lorcet led Trooper Brigham to suspect Appellant had narcotics in his system. (R. p. 62, ll. 19-24).

Appellant advised Trooper Brigham that he wanted a blood test instead of a breath test. (R. p. 63, ll. 3-4; p. 88, ll. 9-12, 17-22). Trooper Brigham told Appellant they had to proceed with the breath test:

... due to the fact that [Appellant] was medically able to provide a breath sample, that he had no mouth injuries and there was no medical reason for him to be transported to the hospital which would expire the two-hour time frame for me to put him on a Datamaster machine, which are the only two elements that are required, mouth injuries or time restraints due to the two hours, would result to an individual providing a blood sample.

(R. p. 63, ll. 6-15). Trooper Brigham advised Appellant of his implied consent rights and supplied Appellant with a written copy of those rights. (R. p. 63, l. 17 - p. 64, l. 1).

Trooper Brigham already assumed Appellant was not under the influence of alcohol and wanted the breath test to confirm that fact. (R. p. 73, ll. 7-13). Trooper Brigham checked Appellant's mouth for foreign objects and permitted the 20-minute observation period to lapse. (R. p. 64, ll. 1-3). Following the lapse of the observation period, Trooper Brigham administered the test and Appellant's Datamaster results read "0.00." (R. p. 64, ll. 3-8; p. 89, ll. 1-2).

Trooper Brigham then requested that Appellant provide a urine sample "due to the narcotics that may have been in his system." (R. p. 64, ll. 11-16; p. 74, ll. 12-18). At that

time Appellant did not refuse to give the sample. (R. p. 74, ll. 19-21; p. 87, ll. 16-20; p. 89, ll. 6-22).

Trooper Brigham stated that during transport to the vehicle to go to Carolina Pines Appellant purportedly refused to submit to a urine sample. (R. p. 64, ll. 16-23; p. 87, ll. 11-12; p. 90, l. 4 - p. 92, l. 3). The refusal, however, is not on video. (R. p. 87, ll. 13-16; p. 92, l. 8 - p. 93, l. 5; Def. Exh. No. 4). Trooper Brigham stated he advised Appellant that the refusal to submit to a urine sample would result in a suspension. (R. p. 65, ll. 1-4). Trooper Brigham then transported Appellant to the Darlington County Detention Center, cited Appellant for refusing to submit to a urine sample and released Appellant. (R. p. 65, ll. 8-10; p. 66, ll. 3-5).

Trooper Brigham stated that a blood sample is only used for alcohol and then only if a suspect cannot give a breath test. (R. p. 75, ll. 4-11). The urine test is what they use if they suspect narcotics. (R. p. 75, ll. 12-17). He agreed that a blood test would show not only the presence of a substance but whether the substance is at a therapeutic or toxic level. (R. p. 76, ll. 11-16). Trooper Brigham stated, "[i]f he would have provided a urine sample, then and he wanted blood, then the State's obligation is to assist him with affirmative assistance." (R. p. 87, ll. 1-4).

Appellant offered into evidence a report prepared by a professor at Duquesne University that shows that blood testing would reveal actual levels of a substance in a person's system. (R. p. 78, l. 5 - p. 79, l. 5; R. p. 117).

Trooper Brigham agreed that Appellant's signature on the implied consent form indicated only that Appellant received a copy of the notice that his license would be

suspended. (R. p. 95, l. 1 - p. 97, l. 4).

When asked why he refused to assist Appellant in obtaining a blood test, Trooper Brigham stated:

I never explained to him he didn't have the right. At that point in time that he requested that a blood sample be provided, he was not advised of his implied consent rights at that point in time, in which he was advised of his implied consent rights, that the South Carolina Highway Patrol at that point in time was requesting a breath sample be provided. In other words, there was no reason for me to ... the State to request a blood sample. In other words, the legislature has approved that the DMT machine is a legitimate cause ... equipment to detect a BAC, a breath alcohol content. Therefore, a blood alcohol content was not warranted due to the fact that he was eligible to provide the breath sample.

(R. p. 97, l. 7 - p. 98, l. 9). Trooper Brigham then stated Appellant never requested assistance for a blood test. (R. p. 98, ll. 19-22). The request came before Appellant was advised of his implied consent rights, which Trooper Brigham considered "premature."

(R. p. 99, l. 12 - p. 100, l. 12).

When asked whether a blood test would show "a much more detailed analysis of toxins in the body than a urine test," Trooper Brigham responded "for alcohol, I would agree. I can't for any other." (R. p. 100, l. 24 - p. 101, l. 7). He stated he was unaware of a blood test that showed the level of narcotics. (R. p. 102, ll. 2-17).

Appellant testified he did not recall following another vehicle too closely the night he was stopped. (R. p. 103, ll. 17-19). When Trooper Brigham offered the field sobriety tests Appellant told him "I had a syndrome from when I was in the hospital and whatnot that affects my legs and the nerves in my legs, but I could not recall the actual name of it." (R. p. 103, l. 20 - p. 104, l. 3).

When they arrived at the Hartsville Police Station, Appellant asked to use the bathroom and Trooper Brigham agreed and watched as Appellant urinated. (R. p. 104, ll. 8-12; p. 105, ll. 18-20). Appellant asked to call his father, who is an attorney, and was allowed to do so. (R. p. 104, ll. 13-14). His father advised him to take the blood test, which is "the gold standard when it comes to alcohol and quantifying of drugs." (R. p. 104, ll. 14-20).

Appellant took the breathalyzer examination. (R. p. 104, ll. 21-24). He never had any intention to refuse any tests for drugs, whether it was by urine or blood. (R. p. 104, l. 25 - p. 105, l. 4; p. 105, l. 25; p. 106, ll. 2-3). Appellant did tell Trooper Brigham that Appellant had taken Lorcet for pain caused by a chipped tooth. (R. p. 105, ll. 8-17).

Appellant denied he refused to take a urine test. (R. p. 106, ll. 12-22). On cross-examination, Trooper Brigham asked Appellant "so at no point in time you looked at me and told me you didn't want to submit to a urine sample?" (R. p. 106, ll. 19-22). Appellant responded, "Not that I recall." (R. p. 106, l. 22).

Appellant agreed that he signed the informed consent sheet, but not as an admission that he refused the urine test. (R. p. 108, ll. 9-19). The bold print on the form stated that Appellant understood that he could not drive until a license had been issued to him. (R. p. 110, ll. 8-12).

HEARING OFFICER DECISION

The Hearing Officer sustained the suspension of Appellant's driving privileges. The Hearing Officer acknowledged the dispute between Trooper Brigham and Appellant

over whether Appellant refused a urine test, but concluded Appellant did verbally refuse to submit to the urine test that Trooper Brigham offered. (R. p. 7, ¶ 12). The Hearing Officer also rejected Appellant's contention that the suspension should be rescinded because Trooper Brigham failed to provide affirmative assistance to Appellant as required by Sections 56-5-2950(D) and (E) of the South Carolina Code. (R. pp. 7-8, ¶ 13). The Hearing Officer held:

Section 56-5-2950(D) and (E) provide that a person tested or giving samples for testing may have a qualified person of his own choosing conduct *additional tests* at his expense. The officer must provide affirmative assistance to the person requiring *additional tests*. Because [Appellant] refused the urine test, there was no initial test and therefore no duty to provide affirmative assistance for *additional tests*. [Appellant] verbally refused to submit to urine testing for drugs and did not give a urine sample for drug testing; therefore, affirmative assistance is not an issue in this case.

(R. p. 8; emphasis in order). Accordingly, the Hearing Officer sustained the suspension of Appellant's driver's license.

ADMINISTRATIVE LAW COURT DECISION

Appellant sought review before the Administrative Law Court (ALC) of the Hearing Officer's decision pursuant to Section 1-23-570 of the South Carolina Code.

Appellant raised the following issues:

1. That the Hearing Officer erred in using the result of the Standard Field Sobriety Tests (SFST) involving balance in Trooper Brigham's probable cause determination when Appellant notified Trooper Brigham of a medically diagnosed condition that greatly affected balance prior to administering the SFST.

2. That the Hearing Officer erred in using Trooper Brigham's testimony about finding the Xanax bottle during the post-arrest search as part of the probable cause determination when the evidence demonstrated Trooper Brigham had already made his probable cause determination prior to finding the prescription bottle.
3. That the Hearing Officer erred in finding Respondents met their burden of proving Appellant refused to submit to a urine test when the evidence established Trooper Brigham had the opportunity and properly working video equipment required by law, but avoided using the best evidence and vitiated the intent of the statute by failing to videotape Appellant's alleged refusal in either the Breathalyzer room or in the patrol car.
4. That the Hearing Officer erred as a matter of law in interpreting Section 56-5-2950 to mean that Appellant was precluded from asserting his statutory right to "affirmative assistance" prior to being read his implied consent rights by Trooper Brigham.
5. That the Hearing Officer erred in determining that "affirmative assistance" required by Section 56-5-2950(D) and (E) was not an issue in the case despite Appellant providing a valid breath test which yielded a result of .00 blood alcohol concentration.
6. That the Hearing Officer erred in ordering the suspension of Appellant's driver's license for allegedly refusing to submit to a urine test (which only shows the presence of narcotics) when the evidence established (a) that Appellant did not refuse to submit to the urine test, and (b) that Appellant requested a blood test

(which provides the “gold standard” of quantitative analysis of amount, if any, of narcotics that may have been in Appellant’s body).

7. That Trooper Brigham’s wrongful advisement to Appellant that “the only thing that would show up in blood is alcohol” thwarted the clear policy objectives of Section 56-5-2950 by materially altering the accuracy or reliability of the test results or the fairness of the testing procedure; if so, what is the proper remedy when Appellant provided a breath sample and the statutory remedy of excluding test results fails to address the alleged urine refusal charge?

(R. pp. 25-27).

The SCDMV filed a brief in opposition, contending the Hearing Officer did not err in finding the Agency met its burden of proof for suspending Appellant’s driver’s license under Section 56-5-2950. (R. p. 47). The Department took the position that Trooper Brigman had probable cause to arrest Appellant, the law did not require the Trooper to offer a blood test because Appellant refused the urine test, and the law did not require the Trooper to videotape the alleged refusal.

On August 2, 2013, the ALJ filed her order affirming OMVH’s decision. The ALJ noted that the refusal was not videotaped, but found the decision was supported by substantial evidence. The ALJ noted the issues were as follows:

1. Did the Hearing Officer err in finding that sufficient evidence had been presented to establish probable cause for Appellant’s arrest?
2. Did the Hearing Officer err by failing to rescind Appellant’s suspension based upon the arresting officer’s failure to videotape Appellant’s refusal?
3. Did the arresting officer err in his advisement to Appellant concerning the

blood test?

4. Did the Hearing Officer err in his determination regarding Appellant's request for "affirmative assistance"?

(R. p. 14). The ALJ found that given the totality of the circumstances the Hearing Officer did not err in concluding Trooper Brigham's testimony established probable cause existed to arrest Appellant for driving under the influence. The ALJ also found there was substantial evidence in the record as a whole to support the Hearing Officer's conclusion that Appellant refused the urine test.

Next, the ALJ held there is no law that requires an officer to videotape the refusal of a urine test, only the refusal of a breath test. The ALJ also found Trooper Brigham did not misinform Appellant of his rights regarding assistance in obtaining a blood test under the statute. Finally, the ALJ agreed with the Hearing Officer that Appellant's request for a blood test did not occur at the correct time (*i.e.*, it was made before the breath test), and because "Appellant had not submitted to any tests...affirmative assistance to receive a blood test was not applicable." The ALJ also held that the only remedy for failing to provide affirmative assistance is suppression of breath test results, but Appellant did not seek that remedy. The ALJ concluded:

Accordingly, the OMVH Hearing Officer did not err in finding that there was probable cause to arrest Appellant for driving under the influence, that Appellant's refusal to submit to urine testing was not required to be videotaped, that the Trooper did not err in his advisement to Appellant regarding the blood test, and that Appellant's suspension will not be rescinded based upon "affirmative assistance." Moreover, the OMVH Final Order and Decision is supported by the substantial evidence in the Record.

(R. p. 19). The ALJ therefore affirmed the Hearing Officer's decision.

Appellant requested the ALJ reconsider her decision. Appellant asserted the following grounds:

- A. Appellant's Fourth Amendment protection against unreasonable search and seizure as well as probable cause requirements were violated because the court engaged in the "totality of the circumstances" analysis without considering (1) Appellant was diagnosed with a medical condition that affects balance; (2) the in-car video records Appellant speaking clearly; (3) the arresting officer admitted the odor of alcohol did not stem from Appellant; and (4) Appellant passed the HGN test.
- B. The OMVH hearing officer's decision, that the arresting officer was correct in advising Appellant that a blood test was only for alcohol, was made in excess of statutory authority, and further creates a qualification to the right of affirmative assistance outlined in S.C. Code Ann. § 56-5-2950(B) which does not exist.
- C. To treat a refusal of the breathalyzer differently than that of a urine test ignores the normal procedural safeguards guaranteed through the Equal Protection Clause of the constitution, and amounts to an "unwarranted exercise of discretion."
- D. The OMVH hearing officer committed an error of law in holding that S.C. Code Ann. § 56-5-2950(A) adds a timing qualification to § 56-5-2950(B) and therefore allows the arresting officer to use the order in which he must proceed with the various implied consent tests as a method of avoiding Appellant's request for a blood test.
- E. Because Appellant submitted to a breath test, he was entitled to assistance in

obtaining a blood test. *State v. Knighton*, 334 S.C. 125, 131, 512 S.E.2d 117, 120 (Ct. App. 1999) (“Clearly, because Knighton submitted to a breathalyzer test, he was entitled to affirmative assistance from the officers in obtaining an independent blood test.”). The arresting officer’s view of the timing of the request circumvents the plain purpose of the statute: To reliably determine what intoxicants are present in a driver’s body. The result in this case amounts to an arbitrary and capricious exercise of discretion:

F. The OMVH Hearing Officer’s decision is clearly erroneous based upon reliable, probative and substantial evidence on the record as a whole when the court considers: (1) the arresting officer ignored Appellant’s medical condition which limited performance on standard field sobriety tests; (2) the arresting officer used an empty and expired prescription bottle as probable cause; (3) the arresting officer refused to confirm Appellant’s alleged refusal through the best evidence of his in-car camera; (4) the arresting officer used SLED procedures as a basis for misadvising Appellant that a blood test was not applicable; and (5) the arresting officer stated an erroneous opinion that the blood test is not the superior test for the presence of intoxicants.

(R. p. 53).

Appellant also separately requested a stay of the driver’s license suspension. The ALJC entered an order on August 15, 2013, granting the motion. On August 30, 2013, the ALJ entered an order denying Appellant’s motion for reconsideration. (R. p. 21).

On September 30, 2013, Appellant moved the ALJC to renew the stay of the

suspension of his driver's license. Appellant also served a notice of appeal to this Court and requested a supersedeas. The ALJC entered an order staying the suspension until this Court renders its decision, and this Court accordingly ruled that it did not need to act on the Petition for Supersedeas. (R. p. 22).

This appeal follows.

ARGUMENTS

DID THE ALJC ERR IN AFFIRMING THE HEARING OFFICER'S DECISION TO SUSPEND APPELLANT'S DRIVER'S LICENCE UNDER S.C. CODE ANN. § 56-5-2950?

The statute that is at the center of this case is Section 56-5-2950, which governs a person's implied consent for testing for alcohol or drugs if that person drives a motor vehicle in South Carolina. The statute provides:

(A) 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 a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. **At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration.** If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. **If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing.** A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest. The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. Before the breath test is administered, an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent. Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

(B) 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 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.

* * *

(D) **The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests** at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

(E) The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests.

Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample **to determine the person's alcohol concentration**, SLED must test the blood sample and provide the result to the person and to the

arresting officer. **Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.**

* * *

(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.

S.C. Code Ann. § 56-5-2950 (Supp. 2013) (bold added). *See Town of Fairfax v. Smith*, 285 S.C. 458, 330 S.E.2d 290 (1985) (the purpose of this statute is to permit an accused person to gather independent evidence to submit in reply to that of the prosecuting authority; this is true whether the State seeks to gather breath or blood samples).

The ALJC affirmed the hearing officer's decision to order the suspension of Appellant's driver's license under the Implied Consent Statute. Appellant contends this was error for three reasons. First, the arresting officer conspicuously failed to videotape Appellant's alleged refusal to submit to a urine test despite videotaping nearly every other step of the arrest. Second, the arresting officer took the position that Appellant's request for assistance in obtaining a blood test (at the direction of his father, a lawyer) came too early, and there is no duty to provide such assistance until after the officer offers another test under the statute – thus, Appellant's failure to repeat the request obviates the need to comply with the statute. Third, because Appellant refused to submit to the urine test, the

officer had no duty to assist Appellant in obtaining a blood test even though Appellant submitted to a breath test. Appellant asserts these rulings were error, and that this Court should reverse the decision upholding the suspension of Appellant's driver's license.

I. THE ALJC ERRED IN UPHOLDING THE HEARING OFFICER'S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY REFUSING TO ASSIST APPELLANT WITH OBTAINING A BLOOD TEST BECAUSE APPELLANT'S REQUEST WAS MADE PRIOR TO THE OFFICER OFFERING APPELLANT A BREATH OR URINE TEST

Trooper Brigham admitted Appellant requested assistance in obtaining a blood test, but stated the request came before Trooper Brigham advised Appellant of his "implied consent rights" so that the request was "premature." (R. p. 97, l. 7 - p. 98, l. 9; p. 99, l. 12, - p. 100, l. 12). The Hearing Officer found Appellant refused the urine test; there was therefore no initial test and therefore "no duty to provide affirmative assistance for *additional tests*." (R. p. 8; emphasis in order). The ALJ agreed with the Hearing Officer that Appellant's request for a blood test did not occur at the correct time (*i.e.*, it was made before the breath test), and because "Appellant had not submitted to any tests...affirmative assistance to receive a blood test was not applicable." (R. p. 19). The Court should reverse these rulings.

As argued in the next portion of this Brief, these rulings ignore the fact that Appellant did submit to a breath test at Officer Brigham's request. Because Trooper Brigham did, in fact, conduct a breath test, the duty to provide Appellant assistance in obtaining a blood test was triggered. The Hearing Officer and the ALJC erred in finding that because there was no "initial test," then no "additional test" was required.

Furthermore, Trooper Brigham stated that he had no duty under the statute to assist Appellant in obtaining a blood test because Appellant's request for assistance was "premature." The ALJC erred in affirming this ruling.

Where a statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Chisolm v. SC Dept. of Motor Vehicles*, 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). The court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Id.*

Section 56-5-2950 provides plainly that because Appellant was tested, he had the right to obtain an "additional" test of his blood, and Trooper Brigham was required to assist him. S.C. Code Ann. §§ 56-5-2950(D), (E). Nothing in the statute requires expressly that Appellant make a request for the assistance at all; rather, the duty to assist is an affirmative one under the statute. The statute is also silent as to the timing of a request, and does not provide that the timing of the offer of a breath test is a prerequisite to the affirmative duty to assist someone who does, in fact, request such assistance.

As noted above, the relevant portions of the statute provide:

(D) The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

S.C. Code Ann. § 56-5-2950(D) (bold-added). This section sets forth the right of a “person tested” to obtain an additional test at the person’s expense. The statute says nothing about an officer first advising the person of their “implied consent rights” before the person may seek a blood test.

The statute adds:

(E) The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests.

Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person’s alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person’s alcohol concentration, SLED must test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.

S.C. Code Ann. § 56-5-2950(E) (bold added). This section creates an affirmative duty on the part of an officer to assist a person who has submitted to a test to obtain the blood test. Again, there is nothing in this statute that relieves this duty if the request for assistance comes before the officer offers a breath or urine test. Instead, the section merely creates the duty to someone who has submitted to a test or provided samples for a test. Here, it is without dispute that Appellant submitted to a breath test. Even though Trooper Brigman expected the test to be negative (and it was), that fact does not erase the fact that Appellant was a “person tested” for purposes of the statute.

The effect of the construction of the statute given by Trooper Brigman, the hearing officer, and the ALJC is to expand the statute to require that the officer first offer a breath test before a person may request assistance, and any pre-offer requests are null

and void. There is no dispute that a request was made here, rather, the request was deemed “premature” and therefore ineffective. That is, even though the Trooper knew he was going to test Appellant’s breath, he just had not gotten around to making that offer before Appellant requested assistance, and thus the Appellant’s request for assistance was not effective. This reading is plainly absurd, and under these facts Appellant should not have been denied his right to assistance to obtain the blood test. *See, e.g., Florence Co. Democratic Party v. Florence Co. Republican Party*, 398 S.E.2d 124, 727 S.E.2d 418 (2012) (statutory language must be construed in light of the intended purpose of the statute; the court will not construe a statute in a way which leads to an absurd result or renders it meaningless); *State v. Allen*, 314 S.C. 539, 431 S.E.2d 563 (1992) (same); *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011) (applying rule in implied consent case).

Furthermore, even if the words of the statute may be read to provide that a person may request assistance only after the officer has explained to the person his “implied consent rights,” such a reading of the statute would be plainly absurd and would defeat the legislature’s intent. *See, e.g., Miller v. Aiken*, 364 S.C. 303, 613 S.E.2d 364 (2005) (however plain the ordinary meaning of words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention). As a penal statute, the provision should be strictly construed against the state and in favor of the defendant. *State v. Blackmon*, 304 S.C. 270; 273, 403 S.E.2d 660, 662 (1991).

Trooper Brigham's misstatement of the statute's requirements is akin to the misstatement of procedure that occurred in *Richardson v. SC Dept. of Motor Veh.*, 12-ALJ-21-0027-AP (2013). In *Richardson*, the Trooper S.W. Tukes arrested Richardson and charged her with DUI. Trooper Tukes offered Richardson a breath test and she attempted to comply. She made seven attempts but Trooper Tukes told her she was not blowing. She repeatedly requested instructions on how to properly take the test but he only said for her to blow into the mouthpiece. After seven attempts Trooper Tukes declared that Richardson was not cooperating and deemed her attempt to be a refusal. Richardson asked to try again, but Trooper Tukes told her SLED policies allowed only one test. Richardson asked for a blood test. Trooper Tukes cited Richardson for violating Section 56-5-2950 for refusing a chemical test of her breath. Richardson was then transported to a medical facility where she paid for and obtained a blood test.

Richardson's license was administratively suspended and she sought review of that decision. The OMVH officer upheld the suspension and Richardson sought ALJC review. The ALJ held:

Moreover, when the Trooper informed the Appellant that she could only have one test, she asked if that was on the implied consent form. A review of the implied consent form reveals nothing to indicate that a law enforcement officer is precluded from giving an individual the test more than once. Further, there is nothing in SLED policies to indicate that an officer is restricted from giving the test twice. To the contrary, the South Carolina Court of Appeals recently explained, "the failure of a driver to supply a registered breath sample does not automatically result in a refusal, as the officer has discretion to determine whether there was a refusal and has the option to conduct a second test." *Chisolm v. S.C. Dep't of Motor Vehicles*, 402 S.C. 593, 601, 741 S.E.2d 42, 47 (Ct. App. 2013).

Richardson, at R. p. 143.

Like the misstatements in *Richardson*, Trooper Brigham misstated the law when he testified that any request for a blood test that precedes the offer of a breath test is “premature” and does not trigger the duty to assist. Trooper Brigham also misrepresented the effectiveness of a blood test in detecting the presence and serum levels of substances in Appellant’s system. These misstatements resulted in a violation of Section 56-5-2950 (D) and (E).

The Court should reverse the rulings below and hold that Appellant’s request for assistance with obtaining a blood test met the intent of Section 56-5-2950(D) and (E), and the officer’s failure to comply with the statute precludes any suspension upon finding Appellant refused to submit to a urine test.

II. THE ALJC ERRED IN UPHOLDING THE HEARING OFFICER’S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY REFUSING TO ASSIST APPELLANT WITH OBTAINING A BLOOD TEST AS REQUIRED BY THE STATUTE AFTER APPELLANT SUBMITTED TO A BREATH TEST

Both the hearing officer and the ALJC found that because Appellant did not submit to the urine test, Trooper Brigham had no obligation to assist Appellant in obtaining a blood test under Section 56-5-2950. The Court should reverse these rulings as plainly in error.

As noted above, Appellant did, in fact, submit to a breath test, which yielded a result of “0.00.” That was all that was required to trigger Trooper’s obligation to assist Appellant in obtaining the blood test Appellant requested. S.C. Code Ann. §§ 56-5-2950 (D), (E). Appellant became a “person tested” once Trooper Brigham administered the

breath test, and nothing in the statute says that an “additional test” may be obtained only if the breath test yields a result other than “0.00.”

Again, the Court should apply the plain language of the statute to give effect to the expressed intent of the Legislature. *State v. Jacobs*, 393 S.C. 584, 713 S.E.2d 621 (2011) (what the legislature says in the text of a statute is considered the best evidence of the legislative intent or will; therefore, the courts are bound to give effect to the expressed intent of the legislature). Further, it is a long settled rule that when a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant. *State v. Graves*, 269 S.C. 356, 237 S.E.2d 584 (1977) (because the DUI statute is penal in nature, the court must approach its interpretation by invoking the rule of strict statutory construction and resolve any uncertainty or ambiguity against the state and in favor of the defendant); *State v. Stephenson*, 18 S.C.L. (2 Bail.) 334 (Ct. App. Law & Equ. 1831) (penal statutes, as contradistinguished from remedial statutes, must be construed strictly as a means of arriving at the legislature’s intent).

Construing this statute strictly against the state and for the Appellant, the statute required Trooper Brigham to honor Appellant’s request for assistance once Appellant submitted to the breath test. This Court should reverse the rulings below and remand the matter with instructions to dismiss the suspension proceeding.

III. THE ALJC ERRED IN UPHOLDING THE HEARING OFFICER’S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY FAILING TO VIDEOTAPE APPELLANT’S ALLEGED REFUSAL TO TAKE THE URINE TEST.

The Hearing Officer and the ALJC held that Trooper Brigham was not required to

videotape the alleged refusal by Appellant to submit to the urine test, and thus denied Appellant's request that the suspension be dismissed. This Court should reverse.

Section 56-5-2950 provides:

(B) 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 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.

S.C. Code Ann. § 56-5-2950(B). This section therefore mandates that the officer videotape any tests administered, samples obtained, and the activities that occur prior to commencement of the testing procedure. One of those activities is a warning that driving privileges will be suspended for refusal to submit to the test. S.C. Code Ann. § 56-5-2950(B)(1). The Department must suspend the driver's license of a person who refuses to submit to a test offered under Section 56-5-2950. S.C. Code Ann. § 56-5-2951(A) (Supp. 2013).

Under Section 56-5-2953, a person arrested for DUI “must have his conduct at ... the breath test site videotaped.” S.C. Code Ann. § 56-5-2953(A) (Supp. 2013); *State v. Elwell*, 403 S.C. 606, 743 S.E.2d 802 (2013). The videotaping at the breath site ... must include the person taking or refusing the breath test....” S.C. Code Ann. § 56-5-2953(A)(2)(c) (Supp. 2013). This same requirement should apply when the officer seeks a urine test in lieu of a breath test because the officer suspects the driver is not under the influence of alcohol but is instead under the influence of drugs. S.C. Code Ann. § 56-5-2950(A) (“If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing.”)

Here, Appellant did not refuse to take the breath test, and Trooper Brigham administered the test. Further, the videotape reveals Appellant’s agreement to a urine test as well as his request for a blood test. What is not shown, however, is the purported refusal by Appellant to submit to the urine test. That is because the refusal allegedly occurred during Trooper Brigham’s “transport” of Appellant from the building to the automobile. Trooper Brigham conspicuously failed to capture the alleged refusal on videotape, either when it supposedly occurred or by a confirming request in a location where the purported refusal could be videotaped. *Compare City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) (failure to produce videotape pursuant to Section 56-5-2953 would be ground for dismissal of the charges unless an exception under the statute applies); *State v. Branham*, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) (the General Assembly intended the word “produce” as used in Section 56-5-2953 to mean “to bring

into existence; to create; to manufacture; or to cause to have existence or to bring forth by mental or physical effort”); *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011) (by requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended compliance with the provisions of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance; dismissal is the appropriate sanction for an officer’s unexcused violation of Section 56-5-2953).

The Court should declare that when a person tested for DUI is then offered a urine test, such an offer and any alleged refusal must be videotaped, and the failure to do so precludes the officer from using an alleged refusal to establish grounds for a driver’s license suspension under Section 56-5-2951(A). *Cf. State v. Hercheck*, 403 S.C. 597, 743 S.E.2d 798 (2013) (videotape requirements under Section 56-5-2953 apply only if a breath test is administered); *State v. Elwell*, 403 S.C. 606, 743 S.E.2d 802 (2013) (the purpose of Section 56-5-2953 is to create direct evidence of a DUI arrest); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011)(same).

While this remedy may seem extreme, the Court has noted that the failure to comply with the videotape statutes requires an appropriate, and perhaps severe, sanction. *See State v. Johnson* (by requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended compliance with the provisions of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance; dismissal is the appropriate sanction for an officer’s unexcused violation of Section 56-5-2953).

Accordingly, this Court should reverse the proceedings below and remand the matter with instructions to dismiss the suspension proceeding against Appellant due to

the failure of Trooper Brigham to videotape Appellant's alleged refusal to submit to a urine test.

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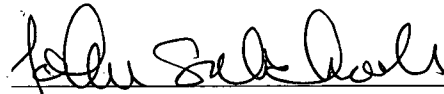
CONCLUSION

SC Court of Appeals

For the reasons stated, this Court should reverse the judgment below, and should remand the matter with instructions that the suspension proceeding against Appellant be dismissed.

Respectfully submitted,

May 2, 2014



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley Robinson, Administrative Law Judge
H. Philip Hayes, Jr., OMVH Hearing Officer

Docket No. 11-ALJ-21-0563-AP
Docket No. 10-OMVH-01-3433-CC

Edward Eli Saleeby, III, Appellant,

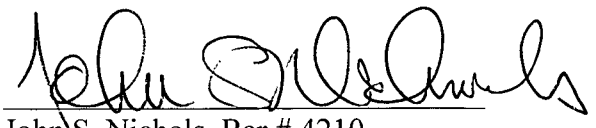
v.

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* complies
with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme
Court Order regarding personal data identifiers.

Respectfully submitted,



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May 6, 2014

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley Robinson, Administrative Law Judge
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Edward Eli Saleeby, III, Appellant,

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PROOF OF SERVICE

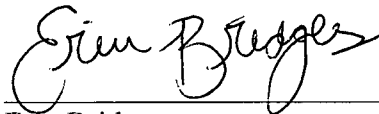
The undersigned hereby certifies that on the date indicated below she served
counsel for the Respondents with a copy of the *Final Brief of Appellant* by mailing copies
of the same by United States Mail with first class postage prepaid to the following
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SC Court of Appeals



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Columbia, South Carolina