THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden

Appellate Case No. 2017-001247

Corey Arness McCluney.....Appellant,

v.

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

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

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

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

STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to the appeal of Corey Arness McCluney, who seeks review of the October 18, 2016 *Final Order & Decision* from the Office of Motor Vehicle Hearings (hereinafter, "OMVH") sustaining the Appellant's implied consent suspension and the Administrative Law Court (hereinafter, "ALC") decisions that sustained that October 18, 2016 decision (R., pp. 110-117; ALC *Order* dated May 4, 2017, R., pp. 3-6; ALC *Order Denying Appellant's Motion for Reconsideration* dated May 17, 2017, R., p. 8). The Respondent South Carolina Department of Motor Vehicles (hereinafter, "SCDMV") seeks to have the OMVH's *Final Order & Decision* affirmed, the ALC's decisions affirmed, and the suspension remain.

The Appellant was arrested on May 23, 2016 for driving under the influence (R., p. 82, l. 3). Upon refusal to submit to a breath sample, Appellant was found to be in violation of S.C. Code Ann. § 56-5-2950, and the arresting officer issued a Notice of Suspension form pursuant to S.C. Code Ann. § 56-5-2951 (R., p. 82, ll. 4-10). Appellant timely requested a contested case hearing which was held, after notice to the parties, on August 29, 2016 (R., pp. 123-125 and 77-99). After reviewing the record and considering all the evidence, the hearing officer issued an order affirming the suspension of the

Appellant's driving license or driving privileges (R., pp. 110-119). Appellant then timely appealed to the ALC, which upheld the OMVH final order.

ARGUMENT

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

In this case, Trooper Thornton testified first (R., pp. 80-82). At the conclusion of Trooper Thornton's initial testimony, the following conversation occurred:

Hearing Officer: Okay. State's resting?

Trooper Thornton: Yes, ma'am.

Hearing Officer: Cross-examination?

Mr. Pruett: No questions.

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

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

(R., p. 82, ll. 15-22). In this section, it is clear the hearing officer was asking Appellant's counsel if Appellant had any evidence to present. Despite this, Appellant's counsel did not answer the hearing officer's question and instead launched into a motion to dismiss this suspension. The hearing officer then clarified her question for Appellant's counsel asking "Is there any - - any rebuttal from the [appellant]?" (R., p. 83, ll. 15-16). Despite this clarification, Appellant's counsel continued to assert that he was making a "Motion to dismiss based upon the failure to establish what the statute requires at the administrative hearing stage." (R., p. 83, ll. 19-21). Since the evidentiary period had not yet been closed by the hearing officer and due to the motion to dismiss that was

interjected in the middle of the evidentiary period of this hearing, the hearing officer then asked Trooper Thornton if he had "a rebuttal to his motion to dismiss?" (R., p. 83, ll. 22-23). Trooper Thornton then went on to provide additional testimony stating, "The implied consents were given. They were on the - - of course, they were, you know, recorded on the camera there. They were given to him prior to offering - - offering him the test." (R., p. 83, l. 24 – p. 84, l. 3). Appellant's counsel objected to this testimony on the basis that "the record's closed at this point." The hearing officer explicitly responded to this objection stating "I have not closed the evidence - - testimony and/or evidence." (R., p. 84, ll. 4-10). Significantly, although at the hearing Appellant's counsel argued that "the record's closed at this point," in *Brief of Appellant*, while listing the various reasons Appellant believes the case *SCDMV v. Brown*, 406, S.C. 626 (2014) is not applicable to this case, Appellant stated "in Brown, the attorney for the motorist failed to make a timely motion to dismiss, waiting until closing arguments." Thus, Appellant now admits that the evidentiary period of this contested case hearing had not closed at the time Appellant's counsel first moved to dismiss this suspension, which occurred just prior to the testimony Appellant now objects to the OMVH relying on. Important in this regard is Rule 15(A), OMVH Rules, which states:

> Parties shall present their evidence **in the order determined by the hearing officer**. Normally, the party with the burden of proof will be the first to present evidence, all other parties being allowed to cross-examine in an orderly fashion. When that party rests, other parties will then be allowed to present their evidence, again allowing for orderly cross examination.

Emphasis added. Thus, it is clear that the hearing officer in OMVH hearings may allow for the presentation of evidence in any order deemed to be appropriate to the hearing officer to ensure the fact finding mission of the hearing is satisfied. For this reason, the

OMVH hearing officers always explicitly state when they have closed the evidentiary portion of the hearing. In this case, Appellant moved to dismiss this suspension during the evidentiary part of the hearing. Thus, as allowed by Rule 15(A), OMVH Rules since the evidentiary period of this hearing had not concluded, the hearing officer allowed Trooper Thornton to present additional testimony to rebut the motion to dismiss. Appellant's counsel objected to this procedure stating, "So even after I - - I don't present any evidence and you asked for motions or statements - - the record's still open" (R., p. 86, l. 23 – p. 87, l. 2). The hearing officer responded to this question stating, "No, sir, I didn't. No, sir, I asked is there anything coming in from the [appellant]." (R., p. 87, ll. 1-4). Appellant's counsel stated that he responded to that question by saying "no." (R., p. 87, l. 5). The transcript of the hearing, however, does not reflect Appellant's counsel answering "no" to the question "Is there anything from the [appellant]?" (R., p. 82, ll. 19-22). Rather, the transcript of the hearing reflects that Appellant's counsel did not answer the hearing officer's question and instead immediately made a motion to dismiss the suspension. *Id.* Thus, it is clear from the record that the evidentiary part of the hearing was not closed, as now admitted by Appellant, and the hearing officer was well within her discretion to allow Trooper Thornton to provide additional testimony regarding advising Appellant of his implied consent rights.

At the close of the evidentiary portion of the hearing, as is done in all OMVH contested case hearings, the hearing officer did state, "this ends the testimonial and evidentiary part of this administrative hearing. We're now ready for closing statement. Closing is a summation as to why (inaudible)." (R., p. 95, ll. 17-21). All parties were then provided an opportunity to give a closing argument.

Appellant also argues that the OMVH and ALC misapplied the *Brown* case. Appellant argues that Trooper Thornton failed to make out a *prima facie* case in his initial testimony, that Appellant in this case made his motion to dismiss during the evidentiary section of the hearing, and that both of these facts make this case substantially different from the *Brown* case. As pointed out in the May 4, 2017 ALC *Order*, however, the *Brown* case "stands for the proposition that evidentiary rulings should not be used a trap rather than a tool to discover the facts in the DUI suspension hearing." (R., p. 5). Appellant appears to want to impose strict rules of procedure to the administrative hearings that take place before the OMVH. This is simply not required by the Administrative Procedures Act or the rules of the OMVH. Rather, as pointed out by the OMVH hearing officer several times during this hearing, the OMVH administrative hearings are fact finding hearings (R., p. 84, ll. 7-10; p. 86, ll. 6-18; p. 87, ll. 18-25; and p. 91, ll. 9-16). Furthermore, the South Carolina Supreme Court has stated that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Stono River Envtl. Prot. Ass'n v. S.C. Dept. of Health & Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (quotation marks and citation omitted). Moreover, "[d]ue process does not require the full gamut of rules and procedures" that some parties have claimed. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008). Based on the holding in the *Brown* case, the overall idea from the *Brown* case that "evidentiary rulings should not be used [as] a trap rather than a tool to discover the facts in the DUI suspension hearing," and the above quotes from the *Stono* and *Kurschner* cases, it is clear that OMVH hearing officers have latitude in how they conduct these hearings to ensure their fact finding goal is met. For

these reasons, ALC's *Order* dated May 4, 2017, properly found that the OMVH hearing officer was within her discretion to allow additional testimony from Trooper Thornton "in order to ascertain the truth of the matters before her." (R., p. 6). Appellant's view of how the *Brown* case should be applied would work the inverse of what the *Brown* case stands for and would bog down the OMVH administrative hearings in strict rules of procedure seriously detrimental to the fact finding goal of these hearings.

Appellant also argues that the 2012 change to section (F) of S.C. Code §56-5-2951[1] changed the burden of proof in these contested case hearings in such a way that the even if the SCDMV and/or arresting officer appear for the hearing and the motorist does not appear in any form or fashion, then the SCDMV and/or arresting officer must still go on the record and present their full case anyway.[2] This argument is in direct contradiction to case law in this area and violates basic logical principles. The case *McGill v. SCDMV and Columbia Police Department*, 2009 WL 1007345 (ALC 2009) is the controlling ALC opinion on this issue.[3] In *McGill*, the ALC stated:

> Appellant essentially contends that the State is required to go forward with its case even in situations where the motorist does not appear at the administrative hearing. The court disagrees. ALC Rule 23 does not contain or reference such a requirement, and Appellant has not cited any legal authority (other than authority regarding the burden of proof in **implied**

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[1] 2012 Act No. 212, §4, effective date June 7, 2012.

[2] Interestingly, Appellant has asserted that "in a contested case proceeding under section 56-5-2951(F), the motorist or his attorney need not appear at all, because the motorist has no burden of proof." *Brief of Appellant*, p. 6, middle of the page. Thus, it is apparent that Appellant is seeking a ruling from this Court that due to these statutory changes a default judgment can never occur against a motorist in any OMVH case held pursuant to S.C. Code §56-5-2951. There is nothing in these statutory changes that indicate such a drastic change was being made by the Legislature. Moreover, such a ruling would make Rule 13, OMVH Rules a nullity.

[3] The undersigned is unaware of this issue ever rising to any Court higher than the ALC. While ALC decisions are not binding on this Court, they can still be considered as persuasive authority.

> **consent** cases) to support his argument. Moreover, while it is true that ALC Rule 29(B) does place the burden of proof on the State in **implied consent** cases, nothing in the ALC Rules suggest that ALC Rule 29(B) was intended to limit a hearing officer's authority under ALC Rule 23 to dismiss a case adverse to a defaulting party.
>
> Furthermore, in light of the fact that the State is not required to present a prima facie case for suspension in situations where the motorist does not request an administrative hearing, the court sees no reason why the State should be required to do so in cases where the motorist does not appear at the hearing. In both situations, it is clear that the motorist is not going to present a defense. Additionally, the motorist's ability to appeal the hearing officer's decision on the merits of the State's case would be severely limited due to the motorist's **failure to appear** and raise issues at the administrative hearing. Thus, imposing such a requirement would undoubtedly result in a waste of judicial resources in many cases.

McGill, at 3 (emphasis in the original, footnotes removed).[4] While the *McGill* case took place prior to the statutory changes discussed by Appellant, the logic of the case still stands. Even the statutory changes cited by Appellant did not go so far as to state that if the motorist does not appear at the hearing the SCDMV and/or arresting officer must still go on the record and present their full case. The change Appellant is referring to is the addition of the specific language:

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

This language was added to section (F) of S.C. Code §56-5-2951 in 2012 via Act No. 212, §4, effective date June 7, 2012. Rather, this statutory change merely placed into

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[4] At the time of the *McGill* case, ALC Rule 29(B) provided that "[i]n matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof."

statute what had already been in place via ALC Rule 29. The only change or clarification that was brought about with this statutory change was the requirement that if "neither the [SCDMV] nor the arresting officer appears at the contested case hearing, the hearing officer shall rescind the suspension,,, regardless of whether the person... or the person's attorney appears at the contested case hearing." In other words, the only change or clarification that this statutory amendment brought about was which party would win the contested case hearing if none of the parties actually appeared at the hearing. Thus, the statutory changes cited by Appellant did not change anything regarding the burden of proof in implied consent cases where the parties appear for the hearing, as they did in this case.

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

Appellant has argued that by allowing Trooper Thornton to provide additional testimony after Appellant's counsel first moved to dismiss this suspension, the hearing officer shifted the burden of proof in this case to Appellant. This is simply not accurate. Trooper Thornton was still required to present evidence to satisfy all the requirements of S.C. Code §56-5-2951(F) and the hearing officer discussed each of these elements in the OMVH's *Final Order and Decision* that was issued on October 18, 2016 (R., pp. 110-117). Please see specifically paragraphs 3-13 of the Findings of Fact and paragraphs 11-13 of the Conclusions of Law of the OMVH's *Final Order and Decision.* For example, after Appellant's counsel stated his objection regarding the implied consent rights, if Trooper Thornton had stated he did not did give Respondent his implied consent rights, there is no evidence that the hearing officer would have sustained this suspension. In fact, the detailed discussion contained in the OMVH *Final Order and Decision* indicates

that the exact opposite would have happened. Such a presumption is evidenced by the fact that the hearing officer had a detailed discussion of each element required to be fulfilled by the State in this case and then discussed the findings of fact that lead her to believe the State had met its evidentiary burden of proof. Nowhere in the OMVH's *Final Order of Decision* does the hearing officer state that Appellant failed to meet his burden of proof or challenge strongly enough an assertion made by the State. For these reasons, the procedure used by the hearing officer did not shift the burden of proof to the Appellant. Rather, this procedure merely allowed the hearing officer to fully develop the facts in this case since the evidentiary period was still open.

CONCLUSION

For the reasons set forth above, the order of the administrative law judge sustaining the order of the OMVH hearing officer should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief is in compliance with SCACR 211(b).

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Blythewood, SC

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02, filed April 15, 2104.

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August 29, 2017
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