STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Melissa Diann McFerrin, Appellant, v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety, Respondents.	Docket No. 19-ALJ-21-0157-AP **ORDER**

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SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed by Melissa Diann McFerrin (Appellant) on May 23, 2019. Appellant seeks review of the Final Order and Decision (Final Order) of the Office of Motor Vehicle Hearings (OMVH) which sustained the suspension of her driver's license and driving privileges pursuant to S.C. Code Ann. § 56-5-2950 (2018).

BACKGROUND

On October 16, 2018, Trooper A.J. Cwynar and two other members of the South Carolina Department of Public Safety conducted a Traffic Safety Checkpoint (Checkpoint) on Milford Springs Road near Wingert Road in Greenwood County, South Carolina. At approximately 9:05 p.m., Trooper Cwynar encountered Appellant at the Checkpoint driving a 2004 Grand Jeep Cherokee. Upon approaching the vehicle, Trooper Cwynar immediately observed two open beer cans in the center console and smelled an odor of alcoholic beverage. Appellant provided a driver's license purporting to identify her as an Amber Smith from Ninety-Six, South Carolina. Trooper Cwynar asked Appellant to exit the vehicle, and Appellant advised him that she had consumed three beers and had smoked marijuana earlier in the day.

Trooper Cwynar asked Appellant to perform three field sobriety tests and determined that Appellant exhibited indicators or 'clues" of impairment on two of the three. On the horizontal gaze nystagmus test, Trooper Cwynar did not observe clues of impairment. During the walk-and-turn test and one-leg stand test, Trooper Cwynar observed multiple clues of impairment. When Trooper Cwynar asked Appellant to recite the alphabet beginning with the letter "E", Appellant began her

recitation with the letter "A". Trooper Cwynar then inspected the open beer containers in the center console of Appellant's vehicle and found one to be three-fourths full and cool to the touch with condensation on the outside. Appellant was placed under arrest for Driving Under the Influence (DUI) and was transported to the Greenwood County jail. During transport, Appellant advised Trooper Cwynar that she was actually Melissa Diann McFerrin and had previously given him a false driver's license at the Checkpoint.

Upon arrival at the DataMaster breath test site, Trooper Cwynar, a certified DataMaster operator, provided Appellant a written copy of her Implied Consent Rights and read the same to her on video. Appellant was offered a breath test; she provided a sample that registered 0.00% at 10:18 p.m. Trooper Cwynar provided Appellant a second written copy of her Implied Consent Rights and read the same on video before he requested a urine test at 10:32 p.m. Appellant verbally refused the urine test and, as a result, was given a written Notice of Suspension of her driver's license and driving privileges pursuant to § 56-5-2950 (Implied Consent Statute). The Department subsequently suspended Appellant's driver's license, and Appellant requested an administrative hearing pursuant to S.C. Code Ann. § 56-5-2951(B)(2) (2018).

The OMVH hearing was convened on December 6, 2018, at which time Trooper Cwynar testified and offered exhibits which were admitted into evidence without objection. Appellant did not testify or offer any other evidence. During closing arguments, Appellant moved to rescind the suspension asserting that Trooper Cwynar' s testimony failed to establish sufficient probable cause for the Checkpoint that led to Appellant's arrest. Additionally, Appellant argued that the language of the Implied Consent Statute establishes that a predicate traffic violation – other than the DUI itself – must occur before the statute is triggered to authorize a law enforcement officer to request a breath or bodily fluid test (also referred to herein as "alcohol test").

On March 28, 2019, OMVH Hearing Officer Tracy Holland issued her Final Order sustaining the suspension. Appellant filed a Motion to Reconsider on April 1, 2019. The OMVH declined to rule on Appellant's Motion and, as a function of OMVH Rule 15(D)(2), the Motion was deemed automatically denied on May 1, 2019. [1] Appellant then timely filed this appeal with the ALC.

STANDARD OF REVIEW

The OMVH is authorized by S.C. Code Ann. § 1-23-660(A) (Supp. 2020) to hear contested

[1] OMVH Rule 15(D)(2) provides "[t]he hearing officer shall act on the motion for reconsideration within thirty (30) days after it is filed, and if no action is taken by the hearing officer within that period, the inaction shall be deemed a denial of the relief sought in the motion."

cases involving the suspension, cancellation, or revocation of driver's licenses by the Department. Pursuant to the Administrative Procedures Act (APA),[2] the ALC has jurisdiction to hear appeals from the OMVH. *See* S.C. Code Ann. § 1-23-660(D) and § 1-23-600(E) (Supp. 2020) (directing administrative law judges to conduct appellate review in the same manner prescribed in S.C. Code Ann. § 1-23-380 (Supp. 2020). Pursuant to the prescribed standard of review, the Court "may not substitute its judgment for the judgment of the agency[3] as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2020). Although the Court may affirm the agency's decision or remand for additional proceedings, the Court's review in determining whether to reverse or modify an agency decision is circumscribed by the following:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> > (a) in violation of constitutional or statutory provisions;
> > (b) in excess of the statutory authority of the agency;
> > (c) made upon unlawful procedure;
> > (d) affected by other error of law;
> > (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> > (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5)(a)-(f).

The Court's review is governed by the substantial evidence standard. *See generally Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 295, 422 S.E.2d 118 (1992) (explaining that under the APA, the Court must sustain an agency decision if there is substantial evidence to support it). The South Carolina Supreme Court has observed that "[s]ubstantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (citation omitted). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res.*

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[2] The APA is found at S.C. Code Ann. §§ 1-23-10 to -680 (2005 & Supp. 2020).

[3] For the purposes of the APA, the OMVH functions as an "agency." *See S.C. Dept. of Motor Vehicles v. Brown*, 406 S.C. 626, 753 S.E.2d 524, 529 (2014) (Beatty, J., dissenting) (quoting *S.C. Dept. of Motor Vehicles v. McCarson*, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011)).

Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. Of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. *See Waters* at 226, 467 S.E.2d at 917. Furthermore, a reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. *See Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995).

Finally, it is axiomatic that the ALC may reverse on errors of law. *See e.g. Olsen v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008). (Thus, this court [South Carolina Court of Appeals] can reverse the ALC if the findings are affected by error of law . . . ."). In this regard, "questions of law are reviewed de novo." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012); *see also Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("Questions of statutory interpretation are questions of law, which this [c]ourt [South Carolina Supreme Court] is free to decide without any deference to the tribunal below.") (citation omitted).

ISSUES ON APPEAL [4]

I. Did the Hearing Officer err in concluding that the "acts" in the phrase contained in S.C. Code Ann. Section 56-5-2950 "if arrested for an offense arising out of acts alleged to have been committed" included the act of driving under the influence when the adverbial clause modifying "committed" specifically contained driving under the influence and therefore such an interpretation would render much of the wording of the statute superfluous?

II. Did the Hearing Officer err in concluding that the officer presented adequate information to establish a factual basis to place the roadblock at the specific location used in this case nor did the officer supply sufficient guidelines and procedures for the roadblock?

[4] The Issues on Appeal are largely set out as the Appellant listed the same in her brief. Nevertheless, they may be restated as follows: I. Did the Hearing Officer err in concluding that the term "acts" contained in S.C. Code Ann. § 56-5-2950(A) includes the act of driving under the influence? and II. Did the Hearing Officer err in concluding that the arresting officer presented adequate information to justify the legality of the roadblock, including a factual basis supporting the chosen location for the roadblock and sufficient guidelines and procedures for the roadblock?

DISCUSSION

I. The Hearing Officer correctly interpreted and applied the Implied Consent Statute.

Appellant contends that the Hearing Officer erred in determining that the word "acts" in the Implied Consent Statute's phrase "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," includes the act or offense of DUI itself. Instead, Appellant maintains that a person must be arrested for an offense other than DUI before the statute's implied consent to alcohol testing is triggered. After consideration, the Court disagrees.

In pertinent part, § 56-5-2950(A) states as follows:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, 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 the person 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.

Appellant agrees that § 56-5-2950(A) specifies that a person arrested for a traffic offense committed "arising out of acts committed while driving under the influence" gives implied consent to alcohol testing. However, she takes issue with what offenses trigger such consent. According to her argument, the operative portion of the statute breaks down into three clauses, an independent clause and two dependent adverbial clauses. The independent clause reads "[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 purposes of determining the presence of alcohol or drugs or the combination of alcohol or drugs..." Appellant asserts that the first adverbial clause – "if arrested for an offense arising out of acts alleged to have been committed..." – limits application of the independent clause

so that only those persons driving motor vehicles who are arrested for some offense can be presumed to have given consent to alcohol testing. Appellant's brief next asserts that the second adverbial clause – "while the person was driving a motor vehicle while under the influence of alcohol" – modifies the word "committed" in the previous clause such that "of the group of drivers who have been stopped and arrested for a traffic offense, the person must also be under the influence of alcohol." (emphasis added) Appellant offers that the import of the General Assembly's placement of these clauses means that the statute should be read to exclude an arrest for DUI from the range of offenses for which a person may be deemed to have consented to alcohol testing upon arrest. Appellant maintains that if DUI is allowed as a triggering offense, the statutory language – "if arrested for an offense arising of acts alleged to have been committed..." becomes superfluous and that the only way to give effect to this language is to require an arrest for an offense other than DUI.[5] Therefore, according to Appellant, to the extent that the she had only committed the offense of DUI at arrest, the implied consent statute was not triggered and thus, Appellant's refusal of the requested urine test should not lead to her license suspension.[6] The Department asserts that Appellant's reading

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[5] Appellant offers in her brief that if DUI is considered to be an offense triggering implied consent, the statute would leave out the phrase "an offense arising out of acts alleged to have been committed while the person was" and essentially read as follows:

> 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 driving under the influence of alcohol, drugs or a combination of alcohol and drugs.

[6] Appellant asserts in her brief that "[t]he hearing officer below correctly found that Melissa Diann McFerrin committed no traffic offense as she approached and stopped at the roadblock in this case." A close examination of the Hearing Officer's Factual Findings and Legal Conclusions, however, reveals no such finding. On the pages to the Record cited by Appellant – which reflect pages in the Hearing Officer's Final Order - the Hearing Officer appears to recount Appellant's arguments during the hearing, not findings of act or conclusions of law:

> In closing, counsel argued that $56-5-2950 states in part that in order to be required to be given a breath test a driver must be arrested for an offense committed while driving under the influence; there is no mention of an offense that the Respondent committed while driving under the influence. The officer said he noticed the Respondent while she was behind another vehicle at the roadblock and she committed no traffic violation and the statute is clear that a person cannot be required to give a breath test or urine test unless a person is apprehended for an offense committed while driving under the influence; and there is no offense committed by the Respondent; therefore, he argued the Petitioner is not authorized to give the Respondent the breath test. The Petitioner replied in closing, that $56-5-2930, the driving under the influence statute, states that the ability to drive must be

of the Implied Consent Statute creates a forced interpretation and that the Hearing Officer rightly construed the statute such that Appellant's arrest for DUI triggered her implied consent for alcohol testing.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n,* 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). In construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *State v. Blackmon,* 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). "We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Unisun, Ins. Co. v. Schmidt,* 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). Moreover, as recited in *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011):

> a "statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." We therefore should not concentrate on isolated phrases within the statute. Id. Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose. (internal citations omitted)

By Appellant's interpretation, a person would have to be under arrest for an offense other than driving under the influence in order to trigger consent for alcohol testing. The Court must reject

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> materially and appreciatively impaired; meaning that there has to be an ability to drive.

Instead of finding that Appellant committed no other traffic violation, the Final Order clearly renders a finding of fact that Appellant had an open container of alcohol in her vehicle: "Trooper Cwynar observed two-(2) beer cans in the center console. Trooper Cwynar smelled an alcoholic beverage emitting from the vehicle...Trooper Cwynar checked the open containers and one was cool to the touch and three fourths full." In the Legal Conclusions section, the Hearing Officer found that Appellant "was lawfully arrested for driving under the influence (DUI)." The Hearing Officer supported that conclusion in part by citing the earlier factual finding regarding the two open beer cans readily apparent in the vehicle's center console, one of which "was cool to the touch and three-fourths full." S.C. Code Ann. § 61-4-110 makes it unlawful for "a person to have in his possession, except in the trunk or luggage compartment, beer or wine in an open container in a motor vehicle of any kind while located upon the public highways or rights of way of this State." Nevertheless, the Court recognizes that the language in the Final Order could be considered ambiguous on this point such that it is appropriate to address Appellant's statutory arguments.

this interpretation. While the Appellant's position would seem to have some merit from a purely grammatical sense, her construction of the operative language is inconsistent with legislative intent. The second sentence of § 56-5-2950(A) states, "[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 or drugs." In S.C. Code Ann. § 56-5-2951(A), the procedure for the suspension of a license for an implied consent violation states, "[t]he arresting officer shall issue a notice of suspension which is effective beginning on the date of the alleged violation of Section 56-5-2930, 56-5-2933, or 56-5-2945." These statutes relate to driving under the influence, driving with an unlawful alcohol concentration, and felony driving under the influence respectively. There is nothing in the statutory scheme that would support Appellant's argument that the person has to be arrested for something other than driving under the influence in order to trigger alcohol testing under the implied consent law.

The Court does not disagree with Appellant's assertion that a person who is arrested for an offense has given consent to testing if the acts that resulted in the offense were committed while the person was driving under the influence. This language is broad enough to trigger implied consent to alcohol testing if a driver is arrested for speeding or a range of other offenses, to include DUI, as long as the offense(s) occurred while a person was driving under the influence.[7] Appellant's conclusion, however, that a person must be under arrest for an offense other than DUI to have impliedly given consent goes too far and is patently inconsistent with legislative intent. Moreover, such an interpretation would lead to the absurd result that an inebriated person arrested only for DUI after having been stopped while driving his or her vehicle would not trigger consent for testing and thus, could not be administratively sanctioned for refusing to submit to an alcohol test. Nevertheless, while the Court does not agree with Appellant's argument that the cited adverbial clauses are to be read to limit the reach of the implied consent statute to such an extent, even if there were some merit to this position, this Court has a duty to avoid absurd results. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994)("However plain the ordinary meaning of the 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…If possible, the court will construe the statute so as to

[7] From a practical standpoint, a person driving a motor vehicle after (or while) drinking to the extent his blood alcohol level exceeds the statutory thresholds for intoxication certainly commits an offense while driving under the influence.

escape the absurdity and carry the intention into effect.") A more reasonable interpretation of the statutory language in question, especially in light of the next sentence of § 56-5-2950(A) as well as § 56-5-2951(A), is that the acts or offenses triggering implied consent to alcohol testing may include driving under the influence. As such, the Court specifically rejects Appellant's argument that interpreting "acts" to include DUI renders language in the Implied Consent Statue to be superfluous.

II. The Checkpoint at issue satisfied federal and state constitutional requirements

Appellant further takes issue with the Hearing Officer's conclusion that that Trooper Cwynar' s testimony and supporting exhibits were sufficient to establish that Appellant was lawfully arrested when the arrest arose out of a stop at the Checkpoint. Appellant argues the Checkpoint was unconstitutional *per se* and violated the Fourth Amendment to the United States Constitution and Article 1, section 10 of the South Carolina Constitution. Additionally, Appellant asserts the Checkpoint at issue was not initiated based upon sufficient empirical data necessary to establish a constitutionally valid roadblock and was not conducted pursuant to the requisite procedure and guidance. The Court disagrees.

Generally, the Fourth Amendment guarantees an individual the right to be secure from unreasonable searches and seizures, including seizures that involve only a brief detention. *See State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); *State v. Pichardo*, 367 S.C. 84, 97, 623 S.E.2d 849, 847 (Ct. App. 2005). "'Stopping a vehicle at a checkpoint constitutes a seizure of a person within the meaning of the Fourth Amendment.'" *State v. Vickery*, 399 S.C. 507, 514-15, 732 S.E.2d 218, 221-22 (Ct. App. 2012) (quoting *United States v. Brugal*, 209 F.3d 353, 356 (4th Cir. 2000)). The Appellant argues that a police roadblock or checkpoint is unconstitutional *per se* under Article I, §10 of the South Carolina Constitution because the right to be free from unreasonable seizures therein is broader than the similar right under the Fourth Amendment to the United States Constitution. In *State v. Counts*, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015), our state Supreme Court acknowledged the breadth of Article I, §10:

> In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10. "The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.''" *Forrester*, 343 S.C. at 643, 541 S.E.2d at 840

> (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." *Id.* "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *Id.* "Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution. *Id.* at 644, 541 S.E.2d at 840.

Despite this, however, the cases decided by South Carolina appellate courts dealing with motorist stops at checkpoints, even where the seizure and resulting search has not been upheld, have not declared motorist checkpoint stops in South Carolina to be unconstitutional *per se* under our State's Constitution and this Court is not willing to do so now.

Appellant next raises issues suggesting that this particular checkpoint was unconstitutional in its inception and operation. Constitutional challenges to checkpoint seizures turn on whether the initial stop at the checkpoint was reasonable.

To determine the reasonableness of a particular checkpoint, South Carolina has adopted the three part balancing test articulated by the U.S. Supreme Court in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.E.2d 357 (1979), which requires an evaluation of: "1) the gravity of the public interest served by the seizure [checkpoint stop]; 2) the degree to which the seizure serves the public interest; and 3) the severity of the interference with individual liberty." *State v. Groome*, 378 S.C. 615, 619, 664 S.E.2d 460, 462 (2008); *see also State v. Vickery*, 399 S.C. 507, 515, 732 S.E.2d 218, 222 (citing *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L.E.2d 412 (1990)). "The United States Supreme Court has applied this balancing analysis and 'upheld the constitutionality of government checkpoints set up to detect drunken drivers . . . and illegal immigrants . . . .'" *Vickery* at 515, 732 S.E.2d at 222.

In *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L.E.2d 412 (1990), the United States Supreme Court, in the context of a constitutional challenge to a DUI checkpoint, provided further development of the *Brown* tests. As to the first prong of the *Brown* test, the *Sitz* Court observed that "[n]one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." This suggests that courts must evaluate the given reason for the checkpoint to determine whether a sufficient public interest is at stake to justify seizures of persons at checkpoints. The next prong of the *Brown* test – "the degree to which the seizure serves the public interest" – requires some evaluation of the effectiveness of the checkpoint

as a law enforcement technique in serving the given public interest:

> In *Delaware v. Prouse*, supra, we disapproved random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles. We observed that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety and said that "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." Id., 440 U.S., at 659–660, 99 S.Ct., at 1399.
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> Unlike *Prouse*, this case involves neither a complete absence of empirical data nor a challenge to random highway stops. During the operation of the Saginaw County checkpoint, the detention of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped. 170 Mich.App., at 441, 429 N.W.2d, at 183. By way of comparison, the record from one of the consolidated cases in Martinez–Fuerte showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint. See 428 U.S., at 554, 96 S.Ct., at 3081. The ratio of illegal aliens detected to vehicles stopped (considering that on occasion two or more illegal aliens were found in a single vehicle) was approximately 0.5 percent. See ibid. We concluded that this "record ... provides a rather complete picture of the effectiveness of the San Clemente checkpoint," ibid., and we sustained its constitutionality. We see no justification for a different conclusion here.

Id., 496 U.S. 454-455.

In *Sitz*, the Court characterized the final *Brown* test – the severity of the interference with individual liberty, "as being slight given the brief nature of a stop at a DUI checkpoint for drivers who are not violating the law. *Id.* at 451-452 ("We see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask.") In weighing the three factors, the Supreme Court reached the following conclusion:

> In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest,

and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.

Id. at 455.

In *Vickery*, the South Carolina Court of Appeals analyzed the evidence necessary to conduct the *Brown v. Texas* balancing test to establish the constitutionality of a checkpoint in South Carolina. 399 S.C. at 507 – 514-521, 732 S.E.2d 221- 225.218 (discussing *State v. Groome*, 378 S.C. 615, 664 S.E.2d 460 (2008); *U.S. v. Galindo-Gonzales*, 142 F.3d 1217, 1221 (10th Cir. 1998); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.E.2d 357 (1979); and *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.E.2d 660 (1979)). As it relates to satisfying the first *Brown* prong, the Court of Appeals observed that "the cases on point do not require pre-existing empirical data to justify setting up the checkpoint. [But] [t]he case law does require some basis for the location of the checkpoint." *Vickery* at 520, 732 S.E.2d at 224. [8] Additionally, to satisfy the second prong of *Brown* – the "effectiveness" requirement – empirical data - generally checkpoint results - must be presented to show that the seizures served the public interest. *Id.* at 520, 732 S.E.2d at 225. While acknowledging that none of the cases specify how much evidence or empirical data is considered enough, the *Vickery* court noted that "[t]he United States Supreme Court, as well as our own supreme court, has stressed that no evidence is not enough." *Id.* The following passage from *Vickery* is significant to the resolution of the instant matter:

> Here, we do have some evidence, lying somewhere between *Prouse* and *Sitz*. The two facts that seem to be lacking to paint the entire picture are how many vehicles came through this stop or all of the stops and how many of the tickets were specific to this stop location. According to *Groome*, the question before us is whether the record supports the trial court's finding that the State's empirical data was insufficient to satisfy the second prong of *Brown*. By showing the stops resulted in a total of forty-eight traffic violations and eight criminal cases including two drug arrests, the State met its burden under the second prong of *Brown* and the trial court erred in determining the State had to put up more evidence to show the checkpoint's effectiveness.
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> The purpose of the empirical data on the effectiveness is to be able to balance

[8] In *Vickery*, the first *Brown* test was found to be satisfied by a combination of testimony concerning public complaints about "speeding and loud music" and review of police reports and traffic tickets at the location. Significantly, although there was evidence that showed there had been "thirty to sixty traffic and criminal offenses cited during previous checkpoints at the location, the Court ruled that "the trial court committed an error of law in requiring the State to present empirical data to justify the authorization and implementation of the checkpoint." *Id.*

> the effectiveness of the checkpoint with the other two prongs set forth in *Brown*, (1) the gravity of the public interest served by the seizure and (3) the severity of the interference with individual liberty. Here, the point of the checkpoint was to prevent traffic offenses and people driving without a license. This serves the public interest in that traffic violations and people driving without a license can cause injury to others. The severity with individual liberty was low in that the stops were marked so drivers could anticipate it and each stop lasted under a minute, if there was no violation. Weighing those two factors with the data provided as to the second factor, effectiveness, the license checkpoint did not violate the Fourth Amendment.

Vickery, at 520-521, 732 S.E.2d at 225.

During the OMVH hearing, Trooper Cwynar offered three exhibits related to the Checkpoint. All three exhibits were standard South Carolina Highway Patrol (SCHP) forms filled out and signed by the Checkpoint on-site supervisor, Sergeant Brown, and were admitted into evidence without objection. Throughout his testimony and cross-examination, Trooper Cwynar repeatedly stated that he did not complete the Checkpoint forms, was not familiar with the empirical data himself, and could only conjecture as to the geographic area referenced in the data compiled by Sergeant Brown. Aside from a general motion to rescind the suspension made during Counsel's closing argument based on a lack of probable cause for the Checkpoint, Appellant presented no evidence or testimony to contradict Trooper Cwynar and no objection was raised or motion made to exclude the exhibits or testimony offered by the Petitioner at the hearing.

Exhibit One, the SCHP Traffic Safety Checkpoint, October 16, 2018, Operations Plan (Operations Plan), provides the date, time, and location of the Checkpoint as well as the stated objective: "to promote highway safety and to enforce laws to curb violations of driving under the influence, alcohol related offenses, driver's and vehicle license violations to include possible immigration laws violations, vehicle insurance violations, and in response to citizen-related complaints." The Operations Plan further provides that the latest empirical data from 2017 indicated that in addition to 7 DUI arrests and 27 collisions in the area, one of which was fatal, a total of 229 citations and 176 warnings were also issued.

Exhibit Two, the SCHP, Pre-Checkpoint Report, October 16, 2018 (Pre-Checkpoint Report), lists the primary safety and enforcement purposes of the checkpoint as DUI, license violations, insurance violations, and vehicle equipment checks. The "number of tickets issued in the area" is checked as the reason for choosing the Checkpoint location. When asked about the attached empirical data corresponding to the number of tickets referenced on the Pre-Checkpoint Report

form, Trooper Cwynar pointed out the 2017 empirical data recited in the Operations Plan, discussed *infra*.

Exhibit Three, the SCHP, Post-Checkpoint Report, October 16, 2018 (Post-Checkpoint Report), lists the officers present during the Checkpoint as well as the number and type of tickets and warnings issued and the arrests made. While the exhibit lists the duration of the Checkpoint as one hour lasting from 8:30 p.m. to 9:30 p.m., Trooper Cwynar testified that the operation actually concluded early once he became occupied with Appellant and another participating trooper was called away, leaving only Sergeant Brown.

In this case, Hearing Officer Holland found that Trooper Cwynar's testimony and the exhibits were sufficient to establish a lawful arrest of Appellant. Specifically, the Final Order notes that the Checkpoint was set up as prepared and signed-off by Sergeant Brown in the Operation Plan. The Pre-Checkpoint Report indicated the purpose of the Checkpoint and the existence of corresponding empirical data. Trooper Cwynar testified that Sergeant Brown posted warning signs at both the entrance and exit of the roadblock and that three officers, including Sergeant Brown, participated in the checkpoint. According to the Post-Checkpoint Report and testimony, Appellant received five of the nine traffic violations issued during the time shortened Checkpoint. Despite the fact that Trooper Cwynar could only testify that it was his supervisor who collected the empirical data, set up the Checkpoint, and had firsthand knowledge of what the empirical data represented, Hearing Officer Holland concluded that the Checkpoint met the requirements set forth in *Groome*.

Finally, Appellant cites two cases from sister jurisdictions, *Blackburn v. State*, 256 Ga. App. 800, 570 S.E.2d 36 (2002) and *Com. v. Amaral*, 398 Mass. 98, 495 N.E. 2d 276 (1986) to support her argument that the checkpoint here did not satisfy constitutional norms. In *Amaral*, the Supreme Judicial Court of Massachusetts ruled that certain deficiencies with the police roadblock – a lack of evidence of "a plan devised by law enforcement supervisory personnel for establishing and conducting the roadblock" and "no evidence of guidelines" regarding the roadblock's operation – rendered the roadblock constitutionally infirm. *Amaral*, 398 Mass. at 100, 495 N.E. 2d at 278. In addition, the testifying officer in *Amaral* was not the supervising officer who decided where to locate the roadblock. *Id.* at 99, 495 N.E.2d at 277. In *Blackburn*, the Georgia Court of Appeals relied on prior case precedent requiring that the decision to implement a roadblock be made by supervisory personnel rather than officers in the field. 256 Ga. App. at 801, 570 S.E.2d at 37. The only testimony provided by the State in *Blackburn* came from the arresting officer; the Georgia court ruled that the

arresting officer's testimony regarding the supervisor's decisions was hearsay and, "even if not objected to," was not "probative evidence that a supervising officer authorized the roadblock for a legitimate purpose [such that] the state has not shown that the roadblock was constitutional." *Id.* at 801, 570 S.E.2d at 38.

The Appellant has not shown, however, that South Carolina has adopted the specific checkpoint requirements found to be significant by the courts in these jurisdictions. Instead, the conditions which prevailed in *Vickery* are more elucidating here. In *Vickery*, the State presented the testimony of a field traffic unit officer who, in addition to providing evidence regarding the purpose and results of the checkpoint stops on the night in question, testified that the locations of the checkpoints were selected by two supervising officers based on complaints from citizens in the area. 399 S.C. at 511, 732 S.E.2d at 219-220. The identified supervising officers did not testify. *Id.* at 512, 731 S.E.2d at 220-221. A second officer testified and presented police incident reports from the area that "included the intersection of New Market and Milwee [checkpoint at issue] or an intersection located two blocks away." *Id.* There is no indication that this second officer had any role in the planning of the disputed checkpoint. *Id.* As outlined in the except from its opinion quoted earlier, the *Vickery* court found the *Brown* tests to be established based on the arresting officer's testimony and the evidence presented. *Id.* at 520-521, 732 S.E.2d at 225. Significantly, the evidence relied upon by the Hearing Officer here – the testimony of a field officer and not the officers who planned the checkpoints, along with documentary evidence going to establish the basis for the checkpoint – is of the same type and quality as that found to be sufficient by the Court of Appeals in *Vickery*. Accordingly, this Court must decline Appellant's invitation to rely upon *Blackburn* and *Amaral* to find that the Hearing Officer erred.

Based on the controlling case law, the Hearing Officer's Final Order is affirmed. The given purposes of the Checkpoint implicate sufficient public interest to justify seizures of persons at checkpoints under *Brown*. Further, evidence in the Record supports the choice of location for the Checkpoint (the "number of tickets issued in the area"). Further, there is nothing in the Record to suggest that for law abiding citizens, stops at the Checkpoint were anything other than brief and non-intrusive, such that the third *Brown* prong was satisfied. Finally, the Hearing Officer evaluated the effectiveness of the Checkpoint – nine (9) citations, along with three (3) warnings were issued during the designated time period. Even though the Appellant's delicts accounted for five of these violations, the Hearing Officer found that the second *Brown* prong was satisfied. While there was no

evidence regarding how many cars went through the Checkpoint during its operation, this Court does not find that the Hearing Officer erred in finding that the second *Brown* prong regarding effectiveness was also satisfied.

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED that the OMVH's Final Order and Decision is **AFFIRMED** and the Department's suspension of Appellant's driver's license is upheld.

AND IT IS SO ORDERED.

September 17, 2021
Columbia, S.C.

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

September 17, 2021
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk