"In Brown South Carolina Supreme Court Offers Guidance for Breath Testing Evidence in DUI/Drunk Driving Cases"

CASE NAME: South Carolina Department of Motor Vehicles vs. Brown (S.C. Sup. Ct. Opinion No. 27346; January 8, 2014)

FACTS/PROCEDURAL HISTORY:

On July 7, 2008, at approximately 1:46 a.m., Officer Scott Wilson of the Columbia Police Department initiated a traffic stop after observing Petitioner's vehicle traveling on Harden Street without the headlights illuminated. During the stop, Officer Wilson smelled alcohol on Petitioner's breath and observed that Petitioner exhibited bloodshot eyes, slurred speech, and "slow and deliberate movements." As a result, Officer Wilson advised Petitioner of his Miranda[2] rights and ordered him to perform four field sobriety tests. After Petitioner "failed" three of the four tests, Officer Wilson arrested him for DUI/drunk driving and transported him to the Columbia Police Department.

At the police department, Petitioner agreed to submit to a DataMaster breathalyzer test after being read the Advisement of Implied Consent rights[3] and his Miranda rights. According to Officer Wilson, Petitioner had a blood alcohol concentration level of 0.17%, more than twice the legal limit of 0.08%. See S.C. Code Ann. § 56-5-2933 (2006). As a result, he issued Petitioner a Notice of Suspension pursuant to section 56-5-2951(A) of the South Carolina Code.[4]

Petitioner filed a timely request for an administrative hearing before the OMVH to challenge the license suspension. On August 26, 2008, the Hearing Officer held a hearing on Petitioner's license suspension in accordance with section 56-5-2951 of the South Carolina Code.[5] At the hearing, Officer Wilson testified as the sole witness for the Department. During his brief testimony, Officer Wilson recounted the arrest and Petitioner's submission to the breathalyzer test, which resulted in the purported "0.17" reading.[6] Officer Wilson attested that he was certified to operate the DataMaster machine and that "[t]he machine was functioning properly at the time" of the test. However, the Department did not offer any documentary evidence concerning the machine's functioning or the actual test results.

It was not until his closing argument that counsel for Petitioner moved to rescind the license suspension on the ground the Department failed to produce evidence that the breathalyzer test was administered in accordance with the procedures set forth in section 56-5-2950, which, in part, requires a simulator test to be performed prior to the actual test to ensure the machine is functioning properly.[7]

In response to Petitioner's belated motion, Officer Wilson referenced his testimony that the machine was functioning properly and explained that the machine "does check itself to make sure it . . . meets all the requirements within the simulator," which include the temperatures and the alcohol level. He added that the machine "will not function if it's past its solution change date." Petitioner objected to Officer

Wilson offering any new testimony. In turn, the Hearing Officer struck the "last statement regarding it will not function, it will not work properly."

Following the hearing, the Hearing Officer issued an order wherein he rescinded the administrative suspension of Petitioner's license.

The Department appealed, and the ALC reversed the decision of the Hearing Officer.[8] As a threshold matter, the ALC found the Hearing Officer erred in discounting Officer Wilson's sworn testimony on whether the DataMaster machine was working properly "simply because the testimony was not corroborated by other evidence." Because this testimony was not contradicted, the ALC determined the Department carried "its burden of proof."

Although the ALC acknowledged that Officer Wilson did not testify regarding the simulator test provision of section 56-5-2950, the court found Petitioner was statutorily required to raise this issue to the Hearing Officer prior to his closing argument.[9] In reaching this conclusion, the ALC found the Department was not required to present evidence regarding the simulator solution "as part of its prima facie case." Instead, the ALC found that pursuant to section 56-5-2950(e), "the provisions under § 56-5-2950 must not be considered by OMVH hearing officers unless a party expressly moves for their consideration." (Emphasis added.) The ALC noted that "even in cases where a violation of the provisions is shown, rescission of the motorist's administrative suspension is not automatic."

The ALC explained that "test results cannot be excluded simply because an arresting officer failed to testify that a specific provision in § 56-5-2950 was followed, unless the motorist makes a motion during the hearing requesting the OMVH hearing officer to review such provision and the hearing officer determines that law enforcement's failure to comply with the provision materially affected the accuracy or reliability of the test[] results or the fairness of the testing procedure." Applying this reasoning, the ALC concluded that Petitioner, by waiting until his closing argument to raise the issue of compliance with the provisions of section 56-5-2950, deprived the Department of a sufficient opportunity to respond. Ultimately, the ALC found Officer Wilson's failure to testify specifically that he performed the simulator test before administering the breathalyzer test did not require rescission of the license suspension, as Petitioner failed to timely raise the issue.

Petitioner appealed. In an unpublished opinion, the court of appeals summarily affirmed the ALC's reinstatement of Petitioner's license suspension. S.C. Dep't of Motor Vehicles v. Brown, No. 2011-UP-130 (S.C. Ct. App. Mar. 29, 2011). In so ruling, the court found Petitioner failed to properly preserve his challenge as to whether the Department presented evidence that law enforcement administered the breath test and obtained the sample in accordance with section 56-5-2950 because he did not contemporaneously object to Officer Wilson's testimony. The court explained that Officer Wilson testified the "machine was working properly in general" and further noted "the test results were admitted without objection."

This Court granted Petitioner's petition for a writ of certiorari to review the decision of the court of appeals.

ISSUE:

In a DUI/drunk driving case, does section 56-5-2950(e) automatically excludes breathalyzer test evidence when the Department does not specifically adduce testimony that law enforcement followed each procedure required by 56-5-2950(a)?

HOLDING:

No, as stated, supra, section 56-5-2950(e) provides:

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 any test[] results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.

S.C. Code Ann. § 56-5-2950(e) (2006) (emphasis added). However, it was not until closing arguments that Petitioner moved to rescind his license suspension, claiming the Department failed to produce evidence that the test was administered in accordance with the procedures set forth in section 56-5-2950(a) due to its failure to perform the simulator test.

We agree with the ALC that, in order for the Hearing Officer to consider the "provisions" of section 56-5-2950, a motion must be made for their consideration. See S.C. Code Ann. § 56-5-2950(e) (2006) ("Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party."); S.C Code Ann. § 56-5-2950(J) (2013) (same). Here, no such motion was made by Petitioner until after the close of evidence in this case. At its heart, this is a question of the reliability of the Department's evidence that Petitioner blew a 0.17% on the breath test. If no motion is made at the appropriate time—when the State seeks to introduce that evidence—then the Petitioner has waived his opportunity to challenge its reliability.

In our opinion, this is the only reading of subsection (e) that gives effect to the language that the failure to follow the provisions of section 56-5-2950 "shall result in the exclusion from evidence" of the test results upon a finding that that the failure to follow the provisions "materially affected the accuracy or reliability of the test results or the fairness of the testing procedure." S.C. Code Ann. § 56-5-2950(e) (2006) (emphasis added); see also S.C. Code Ann. § 56-5-2950(J) (2013). Here, the Department was not provided with the opportunity to meaningfully respond to allegations that its tests results were not reliable.[10]

We therefore agree with the ALC's holding that the "test results cannot be excluded simply because an arresting officer failed to testify that a specific provision in § 56-5-2950 was followed, unless the motorist makes a motion during the hearing requesting the OMVH hearing officer to review such

provision and the hearing officer determines that law enforcement's failure to comply with the provision materially affected the accuracy or reliability of the test[] results or the fairness of the testing procedure."

AFFIRMED.