

12-1273

ENTERED 09-05-12

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

AMANDA DINGESS,  
Petitioner,

v.

Civil Action No. 11-C-218

WEST VIRGINIA DIVISION  
OF MOTOR VEHICLES, JOE MILLER,  
COMMISSIONER,

Respondent.

FINAL ORDER

On October 28, 2011, the petitioner, Amanda Dingess, by counsel, Matthew M. Hatfield, filed her *Petition For Review Of Administrative Order* wherein she appealed, pursuant to W.Va. Code §29A-5-4, an administrative Final Order (the style of the case is as follows: Before The Office Of Administrative Hearings At Logan, Logan County, West Virginia [In The Matter Of Amanda Dingess File No. 318525 B/C]) entered on October 18, 2011 by William F. Cox, Hearing Examiner, and John G. Hackney, Jr., Chief Hearing Examiner. Specifically, the petitioner appealed all findings and conclusions of the Final Order with the exception of those findings and conclusions that the petitioner did not refuse a secondary chemical test. The Final Order concluded the petitioner did not refuse a secondary chemical test and, accordingly, that issue was not appealed and is, therefore, before this Court. Whereupon, the Court has reviewed the pleadings filed herein, the documents and record provided by the Office of Administrative Hearings, *Petitioner's Brief In Support Of Position*, and *Brief Of Division Of Motor Vehicles* and has determined this matter is ripe for a decision. Accordingly, the Court does make the following FINDINGS OF FACT and CONCLUSION OF LAW:

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1. That the petitioner, Amanda Dingess is, and was at all times relevant herein, a resident of Boone County, West Virginia.
2. This Court has jurisdiction over the matters contained herein pursuant to §29-A-5-4 of the West Virginia Code. Further, this appeal is timely filed within the thirty (30) day time frame set forth in §29-A-5-4 of the West Virginia Code. Accordingly, the petitioner complied with the procedural aspects of the relevant portions of the West Virginia Code and the Rules of Administrative Appeals.
3. By way of background, on August 14, 2010, Deputy C. N. Hess of the Boone County Sheriff's Department *responded to an alleged motor vehicle accident in the parking lot of Tudor's Biscuit World in Danville, Boone County, West Virginia* (despite the fact the accident occurred on private property). Officer L. W. Holeston of the Madison City Police Department also responded to this call (despite the fact this alleged incident did not occur within the Madison city limits). Upon arrival Deputy Hess encountered the petitioner in the Tudor's parking lot, however, he did not observe her operate a motor vehicle on the night in question. Also present was Jason McDonald (he was with the petitioner) and Jimmy Mills (the operator of the other vehicle allegedly involved in the accident). The petitioner was allegedly being loud and disruptive and Deputy Hess, accordingly, placed her under arrest for obstructing an officer. After being placed under arrest for obstructing, the defendant was subsequently charged with driving under the influence (which driving under the influence charge was ultimately dismissed by the Boone County Magistrate Court). Deputy Hess did not notice any property damage to either vehicle involved in the alleged accident and, upon information and belief, did not prepare any written documentation concerning this alleged accident. An administrative hearing was held before Hearing

Examiner William Cox at the DMV in Logan, West Virginia on February 17, 2011. Notably, neither Officer Holeston, Jimmy Mills nor Jason McDonald were called to testify at the hearing held at the DMV. Thus, the evidence obtained was essentially one person's word (Deputy Hess) vs. another person's word (Amanda Dingess). A secondary chemical test was not performed upon the defendant (there is no objective evidence that Ms. Dingess had a blood alcohol content over .08%). This Court, however, understands a secondary chemical test is not required to indicate a person is under the influence of alcohol.

4. That Deputy Hess testified, in relevant part, at the administrative hearing that the petitioner failed the standard field sobriety tests (FST). The petitioner, however, testified she had difficulty performing the FST due to a broken toe. No evidence or testimony was adduced at the administrative hearing to rebut the petitioner's claim that she had a broken toe.
5. That Deputy Hess testified, in relevant part, at the administrative hearing that the petitioner admitted to driving on the night of the incident, however, the petitioner denied driving. Notably, Jason McDonald was with the petitioner on the night in question and Deputy Hess did not witness the petitioner driving. Further, neither Officer Holeston nor the operator of the other vehicle in question were witnesses.
6. That the petitioner testified, in relevant part at the administrative hearing that she was not under the influence of alcohol at the time of the incident.
7. That the central issue herein is whether the petitioner drove a motor vehicle in this State while she was under the influence of alcohol. W. Va. Code §17C-5A-1(a). The Division of Motor Vehicles must establish by a preponderance of the evidence at the administrative hearing that the petitioner operated her vehicle while under the influence of alcohol. W. Va. Code §17C-5A-2.

8. This Court is well aware that the West Virginia Supreme Court of Appeals has held in Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (W.Va. 1997), and its progeny, and Cain v. Miller, 225 W.Va. 467, 694 S.E.2d 309 (W.Va. 2010) that a police officer actually see or observe a person move, drive or operate a motor vehicle before a person can be charged with driving under the influence so long as the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person. In Carte the person whom was the subject to license revocation proceeding did not testify, however, the investigating officer testified the person admitted to driving (the person actually provided a statement pursuant to Miranda. Further, the investigating officer observed the person slumped behind the wheel of the car). Thus investigating officer's testimony was not refuted. In Cain, the person whom was the subject of the license revocation proceeding was the passed out in front of his car. No other person was on scene. The Cain Court held this evidence was sufficient and upheld the license revocation proceeding. Both Carte and Cain differ from this case. Specifically, the petitioner herein testified at the administrative hearing that she was not driving. The investigating officer did not observe her drive and thus, there was conflicting testimony on this issue. Further, other individuals were present (particularly, Jason McDonald was present and could have operated the petitioner's vehicle).
9. W.Va. Code §29A-5-4(g) states, in pertinent part, that the circuit court *shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner have been violated because the administrative findings and subsequent revocation order are:*
- (1) *In violation of constitutional or statutory provisions;*

- (2) *In excess of the statutory authority or jurisdiction of the agency;*
- (3) *Made upon unlawful procedures;*
- (4) *Affected by error of law;*
- (5) *Clearly wrong in view of the reliable, probative, and substantial evidence of the whole record; and*
- (6) *Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*

10. Deputy Hess was questioned as follows:

*Q. And you cannot state as you sit there whether or not she was under the influence at the time she was driving because you don't know. Correct?*

*A. That's correct.*

See Tr. at 35. This testimony is dispositive of the issues herein. Obviously, "she" is referring to Ms. Dingess. Ms. Dingess also testified she did not operate motor vehicle while under the influence of alcohol on this date. Thus, Deputy Hess cannot state whether Ms. Dingess operated a motor vehicle while under the influence of alcohol and Ms. Dingess denies operating a motor vehicle while under the influence of alcohol on this date. It is clearly wrong in wrong in view of the reliable, probative, and substantial evidence of the whole record, pursuant to W.Va. Code §29A-5-4(g), to ignore this evidence and testimony (which is precisely what occurred at the administrative level).

11. That based upon the evidence herein, the Office of Administrative Hearings erred by ruling there was sufficient evidence to conclude the petitioner operated a motor vehicle while under the influence of alcohol on August 31, 2010.

Whereupon, the Court does hereby ORDER as follows:

1. The Final Order (the style of the case is as follows: Before The Office Of Administrative Hearings At Logan, Logan County, West Virginia [In The Matter Of Amanda Dingess File No. 318525 B/C]) entered on October 18, 2011 by William F. Cox, Hearing Examiner, and John G. Hackney, Jr., Chief Hearing Examiner, which revoked the petitioner's driving privileges is hereby REVERSED.
2. The petitioner's driving privileges are hereby REINSTATED in this matter.
3. This matter is hereby DISMISSED and STRICKEN from this Court's docket.
4. That the Clerk of this Court is hereby directed to furnish a certified copy of this Order unto all counsel of record and the Commissioner of the West Virginia Division of Motor Vehicles at P. O. Box 17200, Charleston, West Virginia 25317.

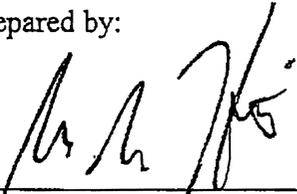
All of which is so ORDERED, ADJUDGED, and DECREED.

ENTERED this the 5<sup>th</sup> day of September, 2012.



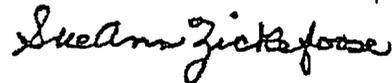
WILLIAM S. THOMPSON, JUDGE

Prepared by:



MATTHEW M. HATFIELD, ESQUIRE  
(WV Bar ID No. 8710)  
221 State Street, Suite 101  
Post Office Box 598  
Madison, West Virginia 25130  
(304) 369-1162  
*Counsel for Petitioner*

A COPY ATTEST



CIRCUIT COURT

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. \_\_\_\_\_

JOE E. MILLER, Commissioner,  
Division of Motor Vehicles,

Respondent below, Petitioner,

v.

AMANDA DINGESS,

Petitioner below, Respondent.

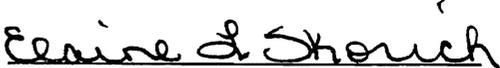
**CERTIFICATE OF SERVICE**

I, Elaine L. Skorich, Assistant Attorney General, and counsel for the Petitioner, do hereby certify that the foregoing *Notice of Appeal* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 4th day of October, 2012, addressed as follows:

Matthew M. Hatfield, Esquire  
221 State Street, Suite 101  
Post Office Box 598  
Madison, WV 25130

The Honorable Sue Ann Zickefoose  
Clerk of the Circuit Court  
Boone County Courthouse  
200 State Street  
Madison, WV 25130

The Honorable William S. Thompson  
Judge of the Circuit Court  
Boone County Courthouse  
200 State Street  
Madison, West Virginia 25130

  
ELAINE L. SKORICH