

13-0761

Jun. 15. 2013 9:15AM

No. 3877 P. 2/4

351404A
F082820

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DONALD OAKLAND,

Petitioner,

v.

**JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

Respondent.

**Civil Action No. 13-CAP-3
The Honorable David W. Hummel, Jr.
OAH File No. 351404A**

ORDER - REVERSING FINAL ORDER OF CHIEF HEARING EXAMINER

Pending before the Court is Petitioner's timely filed *Petition for Judicial Review of a Final Order Revoking Petitioner's Privilege to Drive a Motor Vehicle*. Petitioner, by counsel, also timely filed a *Motion for Stay of Execution* of the six (6) month revocation of his privilege to operate a motor vehicle. The motion for stay was previously denied by this Court after the issue was fully briefed and an evidentiary hearing was conducted. Accordingly, this order only addresses the issues presented in the aforesaid petition for judicial review or as otherwise allowable by in accord with W.Va. Code § 29A-5-4.

In arriving at its' decision, the Court has reviewed the entirety of the record before it (including a true and exact copy of the original and official record of proceedings held before the West Virginia Office of Administrative Hearings); W.Va. Code § 17C-5A-2 and W.Va. Code § 29A-5-4; as well as the additional statutory and case law relied upon by counsel in their respective filings.

The Court's analysis begins and ends with the "principal question" expressly articulated in W.Va. Code § 17C-5A-2(e); to-wit: "whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs." The underlying final order entered by John G. Hackney, Jr., Chief Hearing Examiner, affirmed Erica Tamburin, Hearing Examiner's finding that, "the Petitioner drove a motor vehicle in this State, while under the influence of drugs."

Hearing Examiner Tamburin's material findings and legal conclusions, which were affirmed by Chief Hearing Examiner Hackney, are so fatally flawed that the Court is at a loss to adequately describe same other than to say that such were arbitrary, capricious, an abuse of discretion, and a clearly unwarranted exercise of discretion. Although, Petitioner did not raise the foregoing as a basis for judicial review, the court may consider and decide errors which are not assigned or argued. W.Va. Code § 29A-5-4(e).

The material findings of fact upon which the adverse legal conclusions are based are without any basic foundational support. For example, there is not an iota of testimony or evidence otherwise as to either of the investigating officer's respective education, training, or experience regarding the identification of marijuana by sight and/or scent or how an individual who ingested such might appear if he/she were "under the influence." The same can be said for the education, training, or experience of either officer regarding the administration and interpretation of "series of field sobriety tests" relied upon by the Hearing Examiner. If anything, the testimony on cross-examination evidenced that at least one of the officers was not knowledgeable

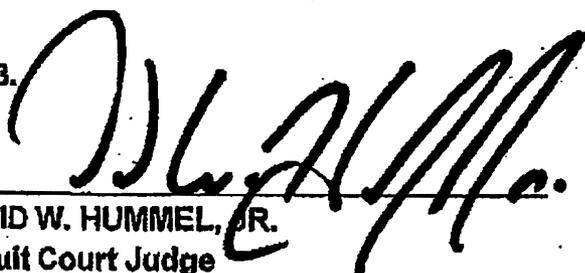
about the proper administration of The Standardized Field Sobriety Test (SFST) developed by the U.S. Department of Transportation. Moreover, there is absolutely no testimony in the underlying record regarding either officer's credentials whatsoever. Accordingly, the findings of fact are both arbitrary and capricious as well as an abuse of discretion and a clearly unwarranted exercise of discretion.

Petitioner presents arguments which hold water; however, the Court need not and does not address same as such would only be superfluous to the foregoing.

Accordingly, it is the **ORDER** of this Court that the *Decision of Hearing Examiner and Final Order of Chief Hearing Examiner* be and hereby is **REVERSED** as same is an unwarranted prejudice of Petitioner's substantial rights.

The Clerk of this Court is hereby **DIRECTED** to transmit certified copies of this Order to **Steven O. Dale**, Acting Commissioner of the West Virginia Division of Motor Vehicles, at his address at the West Virginia Division of Motor Vehicles, Post Office Box 17200, Charleston, West Virginia 25317; to **Elaine L. Skorich**, Assistant Attorney General, at DMV - Office of the Attorney General, Post Office Box 17200, Charleston, West Virginia 25317; and to **J. Thomas Madden**, Esquire, 903 Wheeling Avenue, Glen Dale, West Virginia 26038.

ENTERED: Saturday, June 15, 2013.



DAVID W. HUMMEL, JR.
Circuit Court Judge

SHORT CASE NAME: Dale v. Oakland

CERTIFICATIONS

STATE OF WEST VIRGINIA

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and I have a good faith belief that an appeal is warranted.

July 15, 2013

Date

Clairne L. Shorich
Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

July 15, 2013

Date

Clairne L. Shorich
Counsel of record or unrepresented party

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

Steven O. Dale, Acting Commissioner,
Division of Motor Vehicles,

Respondent below, Petitioner,

v.

Donald Oakland,

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 15th day of July, 2013, addressed as follows:

J. Thomas Madden, Esquire
903 Wheeling Avenue, Suite E
Glen Dale, WV 26038

The Honorable David W. Hummel, Jr.
Judge of the Circuit Court
Marshall County Courthouse
600 Seventh Street, 2nd Floor
Moundsville, WV 26041

The Honorable David R. Ealy
Clerk of the Circuit Court
Marshall County Courthouse
600 7th Street
PO Drawer B
Moundsville, WV 26041


ELAINE L. SKORICH