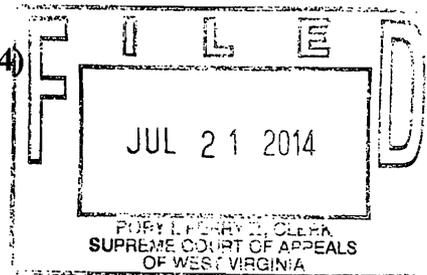


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0372

(Circuit Court Civil Action No. 12-AA-54)



**STEVEN O. DALE, ACTING COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

JAMES PETTIT,

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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Division of Motor Vehicles,**

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I. ASSIGNMENTS OF ERROR

- A. **Through its misinterpretation of this Court's holding in *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009), the circuit court erred in concluding that Mr. Pettit was illegally stopped, and therefore, not lawfully arrested.**
- B. **Assuming, *arguendo*, that the stop of Mr. Pettit's vehicle was invalid, the circuit misinterpreted the parameters of the Commissioner's statutory mandate to revoke a driver's license for driving while intoxicated.**
- C. **Assuming, *arguendo*, that Mr. Pettit's arrest was not lawful, there is still no basis for rescinding his license revocation.**

II. STATEMENT OF THE CASE

On October 16, 2010, the White Sulphur Springs Police Department conducted a scheduled sobriety checkpoint in White Sulphur Springs, Greenbrier County, West Virginia. (App¹. at PP. 79 and 85.) The sobriety checkpoint was announced to be held on October 16, 2010, between 8:00 p.m. and 2:00 a.m. on U.S. Route 60 West in Harts Run, Greenbrier County. (App. at P. 136 and A. Tr. at PP. 12-13.) The location of the checkpoint is chosen after considering the lighting, availability of sufficient space to ensure the safety of motorists and officers, and an alternate route. (App. at PP. 131-132.) A location of an alternate checkpoint site is used if hazardous or otherwise unsafe conditions exist as determined by the supervisor in charge. (App. at P. 132.) The police department moved the sobriety checkpoint to a different location on the same night because they were short-staffed (having five instead of seven officers available for the checkpoint as the guidelines require) and wanted to be closer to the town in case of emergency calls (A. Tr. at PP. 21-22).

Corporal J. W. Hopkins, the investigating officer ("I/O") was assigned to work the checkpoint and came in contact with Mr. Pettit, the Respondent, during the checkpoint. Mr. Pettit

¹App. refers to the Appendix filed contemporaneously with the *Brief of the Division of Motor Vehicles*.

had the odor of alcoholic beverage on his breath, slurred speech, glassy eyes and was unsteady exiting the vehicle. (App. at PP. 80 and 86 and A. Tr. 2 at PP. 21-22.) Mr. Pettit admitted to the I/O that he had consumed alcohol at home and at a bar. *Id.*

The I/O explained the horizontal gaze nystagmus (“HGN”) test to Mr. Pettit and noted that Mr. Pettit demonstrated a lack of smooth pursuit in both eyes as well as a distinct and sustained nystagmus at maximum deviation in both eyes. (App. at P. 80 and A. Tr. 2 at PP. 25-26.) The I/O determined that Mr. Pettit failed the HGN (App. at P. 80 and A. Tr. 2 at P. 26), although the Office of Administrative Hearing’s (“OAH”) hearing examiner failed to consider the HGN. (App. at P. 143.) During the walk-and-turn test, Mr. Pettit missed walking heel-to-toe and made an improper turn, so the I/O determined that Mr. Pettit failed the walk-and-turn test. (App. at P. 80 and A. Tr. 2 at PP. 24-25.) During the one-leg-stand test, Mr. Pettit swayed while balancing and put his foot down during the test, so the I/O determined that Mr. Pettit failed the one-leg-stand test. (App. at P. 81 and A. Tr. 2 at PP. 23-24.) The I/O administered a preliminary breath test (“PBT”) to Mr. Pettit which he failed with a result of .183%. (App. at PP. 81 and 86 and A. Tr. 2 at P. 26.)

As the hearing examiner and the circuit court below correctly found as fact, the I/O had reasonable grounds to believe Mr. Pettit had been driving while under the influence of alcohol. (App. at PP. 4 and 70.) The I/O lawfully arrested Mr. Pettit for driving while under the influence of alcohol and transported him to the Greenbrier County Sheriff’s Office for the purpose of administering the secondary chemical test. (App. at P. 78 and A. Tr. 2 at P. 27.) The I/O read and gave Mr. Pettit a written document containing the penalties for refusing to submit to a designated secondary chemical test, required by W. Va. Code § 17C-5-4 (2010), and the fifteen minute time limit for refusal, specified in W. Va. Code § 17C-5-7 (2010). (App. at P. 82 and A. Tr. 2 at P. 28.)

Mr. Pettit took the secondary chemical test and failed it with a result of .157%. (App. at PP. 78, 82, and 86 and A. Tr. 2 at PP. 28 and 31.)

On November 16, 2010, the Division of Motor Vehicles (“DMV”) issued an Order of Revocation to Mr. Pettit revoking his driving privileges for forty-five (45) days effective December 21, 2010, for driving while under the influence of alcohol with an alcohol content higher than .15% (aggravated DUI.) (App. at P. 87.) Mr. Pettit timely appealed the DMV’s *Order of Revocation* to the OAH (App. at P. 98), and an administrative hearing was held on October 12, 2011. (A. Tr. 1² at P. 1.) On April 19, 2012, the OAH entered its *Final Order* reversing the Commissioner’s *Order of Revocation*. (App. at PP. 141-147.) On May 17, 2012, the DMV filed its *Petition for Judicial Review* with the circuit court (App. at PP. 49-73), and on March 20, 2014, the circuit court entered its *Final Order* upholding the OAH’s reversal of the DMV’s *Order of Revocation*. (App. at PP. 2-6.)

III. SUMMARY OF ARGUMENT

Without providing any meaningful analysis of this Court’s holdings in *Carte v. Cline*, 194 W. Va. 233, 460 S.E.2d 48 (1995) and *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009), the circuit court found the suspicionless seizure of Mr. Pettit’s vehicle unconstitutional and therefore summarily reversed the Commissioner’s *Order of Revocation*. That is clear error. Even if the suspicionless seizure was unconstitutional, the circuit court committed error by misinterpreting the Commissioner’s statutory mandate to revoke and by finding Mr. Pettit’s arrest unlawful. Finally, assuming, *arguendo*, that the suspicionless seizure of Mr. Pettit’s vehicle did not constitute a lawful

² A. Tr. 1 refers to the Administrative Transcript for the administrative hearing held on October 12, 2011. A. Tr. 2 will refer to the transcript for the administrative hearing held on October 26, 2011.

arrest, the circuit court committed error by creating a remedy for a violation W. Va. Code § 17C-5A-4 (2010) which simply are not in the DUI statutes.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure (2010), the DMV requests oral argument because this matter involves issues of first impression and issues of fundamental public importance. Additionally, the parties would benefit from the opportunity to answer questions from the Court.

V. ARGUMENT

A. Standard of Review

Review of the Commissioner's decision is made under the judicial review provisions of the Administrative Procedures Act at W. Va. Code § 29A-5-4 (1998). *Groves v. Cicchirillo*, 225 W. Va. 474, 479, 694 S.E.2d 639, 643 (2010) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Syl. Pt. 2, *Shepherdstown VFD. v. State ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

"The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial

evidence or by a rational basis.” Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). This Court has “made plain that an appellate court is not the appropriate forum for a resolution of the persuasive quality of evidence.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). A court can only interfere with a hearing examiner’s findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.*, 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995).

B. Through its misinterpretation of this Court’s holding in *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009), the circuit court erred in concluding that Mr. Pettit was illegally stopped, and therefore, not lawfully arrested.

In its Final Order, the circuit court below opined,

. . . Rather, the unlawful nature of the check point invalidates the charge of driving under the influence entirely, because lawful arrest was an element of the civil offense at the time Mr. Pettit was charged.

As the West Virginia Supreme Court of Appeals has recently reiterated,
[sic]

[s]uspicionless checkpoint roadblocks are constitutional in West Virginia only when conducted in a random and non-discriminatory manner within predetermined written operation guidelines which minimize the State’s intrusion into the freedom of the individual and which strictly limits the discretion vested in police officers at the scene.

Miller v. Chenoweth, 229 W. Va. 114, 272 S.E.2d. 658 (2012). In this case, it is undisputed that the stop at issue did not take place within “predetermined written operational guidelines.” Thus because Mr. Pettit’s detention grew out of an illegal stop, he was not lawfully arrested as required by W. Va. Code § 17C-5A-2(f).

(App. at. PP. 5-6.)

First, in the *Chenoweth* matter, there was no checkpoint of any kind involved and absolutely no mention whatsoever of the holding relied upon by the circuit court below. Presumably, the circuit court confused the *Chenoweth* holding with Syllabus Pt. 9 in *State v. Sigler*, 224 W. Va. 608, 687

S.E.2d 391 (2009), which reads exactly as that quoted by the circuit court. If Petitioner's presumption is correct, the circuit court still erred in its reliance on the holding in *Sigler*.

This Court in *Sigler* evaluated the constitutionality of "administrative checkpoints" and used this Court's reasoning in *Carte v. Cline*, 194 W. Va. 233, 460 S.E.2d 48 (1995), to determine that the administrative checkpoint is constitutional only when conducted in a random and non-discriminatory manner within predetermined written operation guidelines which minimize the State's intrusion into the freedom of the individual and which strictly limits the discretion vested in police officers at the scene. Syl. Pt. 9, *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009). This holding in *Sigler* mirrors syllabus point 1 in *Carte*, "Sobriety checkpoint roadblocks are constitutional when conducted within predetermined operational guidelines which minimize the intrusion on the individual and mitigate the discretion vested in police officers at the scene."

Even though the *Sigler* matter involved an administrative checkpoint and not a sobriety checkpoint, this Court elaborated on the requirements for evaluating a suspicionless seizure.

6. In evaluating the lawfulness of a suspicionless seizure, a balancing of interests should be considered to determine if such a seizure is permissible under the United States Constitution and the Constitution of West Virginia and, and these factors should be considered: (1) the gravity of the public concern that is being addressed or served by the checkpoint; (2) the degree to which the checkpoint is likely to succeed in serving this public interest; and (3) the severity with which the checkpoint interferes with individual liberty.

7. When evaluating the degree of severity of interference with individual liberty, West Virginia courts must consider not only the subjective intrusion determined by the potential of the checkpoint to generate fear and surprise in motorists, but also the objective intrusion into individual freedom as measured by the duration of the detention at the checkpoint and the intensity of the inspection.

8. The court's obligation in weighing these factors is to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.

Syl. pts. 6, 7, 8, *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009).

Here, neither the OAH nor the circuit court conducted any sort of balancing of interests. Further, there was no showing that Mr. Pettit's individual liberty was unduly intruded upon or that the police acted arbitrarily. Rather, both tribunals reviewed the testimony regarding a few minor inconsistencies with the sobriety checkpoint guidelines of the White Sulphur Springs Police Department and summarily decided that since the guidelines were not followed to the letter, then the arrest must have been unlawful. Then both the OAH and the circuit court ignored the evidence of Mr. Pettit's DUI and reversed the Order of Revocation. Based upon the required analysis in *Sigler*, that is clear error.

The circuit court's analysis fell far short of a meaningful analysis under *Sigler*. The severity with which the checkpoint interferes with individual liberty is the most relevant issue in the instant. Both the *Carte* and *Sigler* decisions address the stopping of motor vehicles for checkpoints as seizures, and both decisions held that such stops are reasonable if conducted pursuant to predetermined guidelines which minimize both the intrusion on the driver and the discretion of the officers.

The White Sulphur Springs Police Department Sobriety Checkpoint Policy and Procedure ("policy") was admitted into evidence at the administrative hearing below. (App. at PP. 131-134.) The policy clearly states that if "traffic conditions permit, each vehicle should be momentarily stopped." [Emphasis in the original.] (App. at P. 133.) Officer Hopkins, the I/O here, testified below that "we stop anyone that comes through the checkpoint. . . basically everybody." (A. Tr. 2 at P. 38.) This testimony comports with the policy and demonstrates that the officers were not arbitrarily stopping some vehicles while not stopping others. Clearly, the suspicionless seizure of

Mr. Pettit's vehicle was not random and followed the stated policy which is to stop every vehicle if conditions permit. Mr. Pettit did not rebut the officer's testimony. Neither the OAH nor the circuit court addressed the method of stopping vehicles at this checkpoint and how or if that method violated the policy or Mr. Pettit's rights.

Next, pursuant to *Sigler*, when evaluating the degree of severity of interference with Mr. Pettit's individual liberty, the court below was required to consider not only the subjective intrusion determined by the potential of the checkpoint to generate fear and surprise in motorists, but also the objective intrusion into individual freedom as measured by the duration of the detention at the checkpoint and the intensity of the inspection. Neither tribunal acknowledged its consideration of this requirement, and no evidence showing such a violation was adduced despite Mr. Pettit's appearance at the hearing which he requested.

At the administrative hearing, James Hylton, Chief of Police for White Sulphur Springs, testified that he was the officer in charge of the sobriety checkpoint at which Mr. Pettit was stopped on October 16, 2010. (A. Tr. 1 at P. 7 and A. Tr. 2 at P. 8.) Regarding the change in location, Mr. Pettit's counsel asked Chief Hylton, "if he [Mr. Pettit] was trying to avoid a DUI checkpoint in Hart's Run based on the notice, he might have traveled through the center of town thinking he was going to avoid it that way. . . Is that right?" (A. Tr. 2 at P. 14.) Chief Hylton answered, "If he was traveling west, yes, sir." (A. Tr. 2 at PP. 14-15.) Chief Hylton denied that any violations to the checkpoint policy resulted in an unlawful arrest. (A. Tr. at P. 15.) Mr. Pettit did not testify regarding whether he, in fact, had been aware of the original location of the checkpoint or whether he was attempting to avoid the Hart's Run location only to inadvertently drive into the checkpoint at a different location. The I/O testified that the signs alerting the public to the DUI checkpoint were

placed where “there was three options, or four even if you wanted to go up Dry Creek.” (A. Tr. 2 at P. 42.) Mr. Pettit did not provide any evidence regarding any fear or surprise which affected him individually.

Chief Hylton testified that due to a manpower shortage, the checkpoint used five officers instead of seven, but the Governor’s Highway Safety Program (“GHSP”) has approved as low as four officers for a checkpoint. (A. Tr. 2 at P. 11.) Even though the GHSP’s change is not reflected in the White Sulphur Springs’ guidelines (*Id.*), Mr. Pettit never testified that because there were only five officers present and not seven, he was fearful that it was not a legitimate law enforcement operation. Additionally, Chief Hylton testified that there were at least four emergency vehicles on scene with at least three of them with their emergency lights on. (A. Tr. 1 at PP. 16-17.) Clearly, the emergency lights on three separate cruisers should alleviate any fear that the checkpoint was not a legitimate law enforcement operation, and Mr. Pettit did not testify otherwise.

There was also no evidence presented below regarding the duration of the detention of the drivers through the checkpoint. The only evidence regarding the intensity of the inspection of the drivers at the checkpoint can be gleaned from the following direct testimony from the I/O: “I asked Mr. Pettit for his information, registration and driver’s license, and he said he didn’t have them with him, but he just lives just down the street. . . I just had asked him for his registration and his information.” (A. Tr. 2 at PP. 20-21.) Here, despite Mr. Pettit’s perfunctory notice to challenge the checkpoint, there was no evidence presented to show that there was any objective intrusion into individual freedom as measured by the duration of the detention at the checkpoint and the intensity of the inspection, and the OAH and the circuit court erred in not conducting a thorough analysis of the evidence pursuant to *Sigler, supra*.

The departures from procedure for this DUI checkpoint did not violate Mr. Pettit's rights. The reason the checkpoint was moved from its original location was due to a shortage of manpower, and Chief Hylton wanted to have the checkpoint closer to town where the majority of emergency calls occur. *Id.* at P. 20. The checkpoint remained on Route 60 but was moved 3.5 or 4 miles from where it was originally planned. *Id.* at P. 22. Chief Hylton admitted that the change in checkpoint location without permission violated the checkpoint policy. (A. Tr. 2 at P. 13.) However, the change in location was based on a legitimate concern to ensure the safety of the public in case an emergency call came in during the checkpoint. Mr. Pettit did not rebut the chief's reasoning or offer any manner in which the change in location affected the reason why he was stopped. The location of the checkpoint simply has no bearing on the criteria for stopping Mr. Pettit's vehicle.

Chief Hylton further testified that even though the policies and procedures for the DUI checkpoint require that the prosecutor of the county be contacted prior to each checkpoint, that did not occur in the instant matter because this checkpoint was set up the same as it had been before. (A. Tr. 2 at P. 9.) Mr. Pettit did not rebut this testimony. Chief Hylton also testified that this particular checkpoint did not have its own independent written standards and procedure that outlined measurements or diagrams with it. (A. Tr. 2 at P. 10.) Mr. Pettit did not show a correlation between the lack of diagram and the criteria used for stopping his vehicle. Quite simply, the circuit court was obligated to weigh these factors to assure that Mr. Pettit's reasonable expectation of privacy was not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. The circuit court failed in its obligation.

This Court has also addressed the validity of sobriety checkpoints in *White v. Miller*, 228 W. Va. 797, 724 S.E.2d 768 (2012). There, even though Mr. White gave timely notice that he was

challenging the legality of the sobriety checkpoint, the officers appeared at the administrative without a copy of the written guidelines for conducting a sobriety checkpoint and failed to provide a copy of the same. This Court held that without “the standardized, predetermined guidelines, such issues cannot be resolved. Therefore, the finding of the Commissioner that Sergeant Williams set up the checkpoint in accordance with standardized guidelines is clearly wrong.” 228 W. Va. 797, 808, 724 S.E.2d 768, 779. This Court remanded the matter for further hearing.

White is distinguishable from the instant matter. Here, the White Sulphur Springs Police Department Sobriety Checkpoint Policy and Procedure was produced at the administrative hearing and made part of the record. Mr. Pettit was afforded every opportunity to cross-examine the officers regarding the policy and the events of the night he was arrested, and he did so. He was also afforded the opportunity to testify and to rebut any evidence presented by the DMV, yet he failed to do so. Accordingly, Mr. Pettit did not fully challenge the sobriety checkpoint regarding whether the intrusion on him was minimized and whether the discretion of the officers was mitigated.

This Court has looked askance at drivers who ostensibly challenge the evidence in the case against them, yet do not make any actual attempt to rebut the evidence. “In the present case, no effort was made to rebut the accuracy of any of the records, including the DUI Information Sheet, Implied Consent Statement or Intoximeter printout which were authenticated by the deputy and admitted into the record at the DMV hearing.” *Groves v. Cicchirillo*, 225 W. Va. 474, 479, 694 S.E.2d 639, 644 (2010); “Ms. Reed did not testify, nor was there any other affirmative evidence, that she was not given a written implied consent statement to contradict the DUI Information Sheet.” *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va. Apr. 10, 2014); “The deficiency in Mr. Veltri’s argument regarding the concept of retrograde extrapolation is that he failed to present any evidence

at trial of the retrograde extrapolation in his individual circumstance.” *Dale v. Veltri*, 230 W. Va. 598, 602, 741 S.E.2d 823, 827 (2013); “In fact, the only evidence of record on this issue was Deputy Lilly’s testimony which clearly demonstrated that the officer gave the Implied Consent form to the appellee. As there was no testimony in conflict with the officer, we see no reason to contradict his testimony.” *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866 (2005); “To the extent that Ms. McCormick believed Trooper Miller did not perform the test in accordance with the law, she was required to question Trooper Miller in this area.” *Dale v. McCormick*, 231 W. Va. 628, 633, 749 S.E.2d 227, 232 (2013); “Pursuant to this Court’s decision in McCormick, if Mr. Oakland had a serious inquiry or challenge to the quality or quantity of Officer Wilhelm’s response about his credentials, the onus was on Mr. Oakland to inquire further.” *Dale v. Oakland*, 13-0761, 2014 WL 2561375 (W. Va. June 6, 2014); “[W]hile Mr. Doyle objected to the admission of the statement of the arresting officer, he did not come forward with any evidence challenging the content of that document. Consequently, there was unrebutted evidence admitted during the administrative hearing that established a valid stop of Mr. Doyle’s vehicle, and the hearing examiner’s finding to the contrary was clearly wrong.” *Dale v. Odum*, No. 12-1403, 2014 WL 641990 (W. Va., Feb. 11, 2014).

There has been no challenge regarding the real issue here – whether the minor infractions of policy which do not relate to the way the vehicles were stopped vitiate Mr. Pettit’s DUI offense. The policy provides the officers discretion to stop every car if traffic conditions permit. That is exactly what occurred here. Mr. Pettit was not randomly singled out for a suspicionless seizure, and he has not shown how he was subject to an arbitrary intrusion into his privacy. The OAH and the circuit court failed to conduct any meaningful analysis regarding the lawfulness of the suspicionless seizure

and completely ignored the “obvious and most critical inquiry in a license revocation proceeding. . . whether the person charged with DUI was actually legally intoxicated.” *Carte v. Cline*, 194 W. Va. 233, 238, 460 S.E.2d 48, 53 (1995). That is clear, reversible error.

C. Assuming, *arguendo*, that the stop of Mr. Pettit’s vehicle was invalid, the circuit misinterpreted the parameters of the Commissioner’s statutory mandate to revoke a driver’s license for driving while intoxicated.

In its *Final Order*, the circuit court opined “because Mr. Pettit’s detention grew out of an illegal stop, he was not lawfully arrested as required by W. Va. Code § 17C-5A-2(f).” (App. at P. 6.) The circuit court summarily dismissed the Commissioner’s statutory mandate, which is to protect the public by revoking a driver’s license if the information provided by the officer shows that the person was driving under the influence (“DUI”) of alcohol or had a BAC level of .08%. Simply put, the Commissioner is required by W. Va. Code § 17C-5A-1(c) (2008) to revoke the person’s driver’s license if his blood alcohol content (“BAC”) is greater than .08%.

“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973). *See also*, syl. pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003). There is no authority in W. Va. Code § 17C-5A-1(c) (2008) for the Commissioner to consider the nature of the stop of the vehicle, and he cannot operate outside his statutorily granted powers.

This Court has upheld the Commissioner’s statutory mandate by holding that “[o]perating a motor vehicle with a concentration of eight hundredths of one percent (.08%) or more of alcohol

in the blood constitutes DUI.” *Dale v. Veltri*, 230 W. Va. 598, 741 S.E.2d 823 (2013) at FN.3. Mr. Pettit’s BAC was .157%. (App. at PP. 78, 82, and 86 and A. Tr. 2 at PP. 28 and 31.) At the administrative hearing, the I/O testified on direct examination about the administration of the secondary chemical test (“SCT”) (A. Tr. 2 at PP. 28-31), yet on cross-examination, Mr. Pettit failed to ask one question about the administration of the SCT. (A. Tr. 2 at PP. 36-43.) Consequently, the results of the SCT did not reveal any deficiencies. Moreover, at no point did Mr. Pettit rebut that his BAC was .157%; therefore, the Commissioner’s statutorily mandated revocation must be upheld.

The I/O was authorized to arrest and compel Mr. Pettit to take a secondary chemical test because he had reasonable grounds to believe that Mr. Pettit was DUI and/or had a BAC level of .08% or higher. *See*, W. Va. Code § 17C-5-4 (2010). Both the OAH and the circuit court found *as fact* that the I/O had such reasonable grounds to believe that Mr. Pettit had been driving while under the influence of alcohol. (App. at PP. 4 and 70.) For the purposes of the administrative license revocation process, the arrest was lawful. The secondary chemical test was administered appropriately, and the answer to the principal question in W. Va. Code § 17C-5A-2(e) (2010) is yes, Mr. Pettit drove with a BAC level of .08% or higher.

The Commissioner’s authority to revoke is not based upon the nature of the stop. While this Court in dicta in *Clower v. W. Va. Dep’t of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), *Dale v. Odum*, No. 12-1403 (2014 WL 641990, W. Va., Feb. 11, 2014) (per curium), and *Dale v. Arthur*, 13-0374, 2014 WL 1272550 (W. Va. March 28, 2014)(memorandum decision) has opined that a lawful arrest is based on the nature of the stop of the vehicle, that proposition is confined to the criminal realm and disqualifications of commercial drivers. The DMV also enforces Chapter 17E, the Uniform Commercial Driver’s License Act, and is required to consider Chapter 17C in its

enforcement of Chapter 17E. Specifically, W. Va. Code § 17E-1-15 (2005) contains the implied consent requirements for commercial motor vehicle drivers and outlines the procedures for disqualification for driving with a blood alcohol concentration of four hundredths of one percent or more, by weight.

The Legislature addressed the stop of a vehicle in W. Va. Code § 17E-1-15(b) (2005):

A test or tests may be administered at the direction of a law-enforcement officer, who after lawfully stopping or detaining the commercial motor vehicle driver, has reasonable cause to believe that driver was driving a commercial motor vehicle while having alcohol in his or her system.

If the Legislature had wanted to provide similar protection to non-commercial drivers, it would have included language about a lawful stop in W. Va. Code § 17C-5A-2(f) (2010) when it amended that statute in 2010. It did not.

The Legislature did, however, tie in the implied consent requirements to the commercial driver statutes, referencing W. Va. Code § 17C-5-4 (2010) in W. Va. Code § 17E-1-15(a) (2005):

A person who drives a commercial motor vehicle within this State is deemed to have given consent, subject to provisions of section four [§ 17C-5-4], article five, chapter seventeen-c of this code, to take a test or tests of that person's blood, breath or urine for the purpose of determining that person's alcohol concentration, or the presence of other drugs.

The commercial driver is under heightened scrutiny because he or she may be subject to license disqualification with a blood alcohol content of only .04% – which is below the .05% limit required to show *prima facie* evidence of intoxication pursuant to W. Va. Code § 17C-5-8(a)(2) (2004) for an operator's license. Therefore, the Legislature has provided commercial drivers with an extra level of protection by including the lawful stop or language in W. Va. Code § 17E-1-15(b) (2005). Again, this language could have been included in Article 5A, but it was not.

Clearly, the Legislature is capable of determining when a lawful stop or a lawful arrest is required. The Legislature placed the “stop” language in Chapter 17E: it did not do so in Chapter 17C. If lawful stop and detention [W. Va. Code § 17E-1-15(b) (2005)] were requisite to lawful arrest [W. Va. Code § 17C-5A-2(f) (2010)], then the Legislature would not have needed to put the lawful stop and detention language in W. Va. Code § 17E-1-15(b) (2005).

“The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended.” Syl. pt. 2, *Hall v. Baylous*, 109 W. Va. 1, 153 S.E. 293 (1930).

Butler v. Rutledge, 174 W. Va. 752, 753, 329 S.E.2d 118, 120 (1985). This Court has not yet analyzed the language in W. Va. Code § 17E-1-15(b) (2005) *in pari materia* with the rest of Chapter 17C.

The DMV’s authority is derived solely from statute, including the revocation language contained in W. Va. Code § 17C-5A-1(c) (2008). The Court, however, has based its interpretation not on the statutes but on grating the principles of criminal law onto administrative law. In violation of its own directive in *Clower, supra*, that the DUI statutes must be read *in pari materia*, the Court has relied upon the lawful arrest language in *Clower* without further analyzing the remaining DUI statutes and their interplay. The Court’s use of the “arresting officer” language in an out-of-date version of W. Va. Code § 17C-5A-1(c) in *Dale v. Oakland, supra*, highlights this Court’s reluctance to read the DUI statutes *in pari materia*. The Commissioner submits that *all* of the DMV’s statutes must read *in pari materia* and that any analysis of the lawful arrest language in W. Va. Code § 17C-5A-2(f) (2010) must not be result oriented but based solely on an *in pari materia* reading of the statutes.

It has been the Court, not the Legislature, which has given extra-statutory meaning to “lawful arrest.” In *Dale v. Ciccone*, 13-0821, 2014 WL 2565575 (W. Va. June 5, 2014), the Court addressed the lawful arrest argument but only scratched the surface of the applicable statutes. The statutory changes in the DUI law are confusing (*see, Harrison v. Commissioner, Div. of Motor Vehicles*, 226 W. Va. 23, 32, 697 S.E.2d 59, 68 (2010) holding, “We fully appreciate that the statutes are far from a model of clarity.”); however, the DMV’s analysis of the DUI statutes includes the statutory changes and addresses *all* drunk drivers – not just those who challenge the lawfulness of their arrest.

A review of the current law demonstrates that an arrest is not a requirement for the revocation of a driver’s license for DUI. Specifically, W. Va. Code § 17C-5-4 (2010), the Implied Consent Statute, states:

Any person who is licensed to operate a motor vehicle in this state and who drives a motor vehicle in this state shall be deemed to have given his or her consent by the operation thereof, subject to the provisions of this article, to the procedure set forth in this article for the determination of whether his or her license to operate a motor vehicle in this state should be revoked because he or she did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, or did refuse to submit to any secondary chemical test required under the provisions of article five of this chapter or did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight.

As can be seen, the issue is whether the driver was DUI – not whether the driver was technically arrested for the offense of DUI. Further, the Legislature clarified the point that an arrest was not a prerequisite for a revocation by the Commissioner in a 2008 amendment that replaced references to arrest in W. Va. Code § 17C-5A-1(b) with variations of the word “investigation.” In 2008, the Legislature removed all mention of the word “arrest” in subsections (b) and (c) of W. Va.

Code § 17C-5A-1. In the amendments of 2008 to subsection (b), the Legislature substituted “investigating” for “arrested,” inserted “of the conclusion of the investigation” and substituted “believed to have committed the offense” for “so arrested.” In subsection (c), the amendments of 2008 replaced “committed” for “was arrested” in two places in the first sentence.

The current version of W. Va. Code § 17C-5A-1(b) (2008) states in pertinent part:

Any law-enforcement officer *investigating* a person for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section shall report to the Commissioner of the Division of Motor Vehicles by written statement within forty-eight hours of the *conclusion of the investigation* the name and address of the person believed to have *committed the offense*. . . [Emphasis added.]

The current version of W. Va. Code § 17C-5A-1(c) (2008) states in pertinent part:

If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner determines that a person *committed* an offense described in section two, article five of this chapter or an offense described in a municipal ordinance which has the same elements as an offense described in said section and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person *committed* the offense he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking or suspending the person's license to operate a motor vehicle in this state. . . [Emphasis added.]

In 2005, this Court found in *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261, that flaws in the criminal arrest procedure do not impact the administrative procedure for the revocation of a driver’s license for DUI, and in 2008, the Legislature removed the arrest language from W. Va. Code § 17C-5-1 (b), W. Va. Code § 17C-5-1 (c), and W. Va. Code § 17C-5A-2(f). In 2009, the Court decided *Clower, supra*, based on the 2004 version of W. Va. Code § 17C-5A-2 holding, “In Mr. Clower's case, *W. Va. Code*, § 17C-5A-2(e) (2004) required that Mr. Clower have been lawfully

arrested—he was not.” 223 W. Va. 535, 544, 678 S.E.2d 41, 50 (2009).

In 2010, the Legislature amended W. Va. Code § 17C-5A-2 and returned the lawful arrest language to the statute. The DMV submits that the 2010 amendment was not a product of the *Clower* decision because if the Legislature had wanted to tie the Commissioner’s authority to revoke a driver’s license for DUI to the lawful arrest language, it would have also needed to amend W. Va. Code § 17C-5A-1(b) (2008) and W. Va. Code § 17C-5A-1(c) (2008). It did not.

Also in 2010, this Court decided *Cain v. W. Va. Div. of Motor Vehicles*, holding,

The standard that the trial court should have applied to determine whether the administrative revocation was proper, as we discussed in *Clower*, is statutorily specified in West Virginia Code § 17C-5A-2(e) (2004). Under that provision, three predicate findings must be established to support a license revocation. Those findings, in pertinent part, require proof that (1) the arresting officer had reasonable grounds to believe that the person drove while under the influence of alcohol; (2) the person was lawfully placed under arrest for a DUI offense; and (3) the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter. *See* W. Va. Code § 17C-5A-2(e) (2004). As set forth in West Virginia Code § 17C-5A-2(f), the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.

225 W. Va. 467, 471-72, 694 S.E.2d 309, 313-14 (2010). The DMV submits that even though it ultimately won the case in *Cain*, the decision was based on an improper analysis: the Court did not focus on the evidence of DUI contained in the DUI Information Sheet but upon the lawful arrest language not being in W. Va. Code § 17C-5A-2 (2008) at the time of Mr. Cain’s DUI arrest. The Court’s findings in *Cain* still related to the implied consent provisions contained in W. Va. Code § 17C-5-4 (2010). It was the right decision but for the wrong reason.

In 2014, the Court issued a *Memorandum Decision* in *Dale v. Arthur*, 13-0374, 2014 WL 1272550 (W. Va. Mar. 28, 2014), which discussed the required findings in W. Va. Code § 17C-5A-

2(f) (2010) holding,

Our decision in this matter is controlled by the statute that requires a specific finding by the hearing examiner of “whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol ... or was lawfully taken into custody for the purpose of administering a secondary test.” W. Va. Code § 17C-5A-2(f) (2010). We acknowledge that the administrative law governing driver's license revocation proceedings is a creature of statute, created by the Legislature. Therefore, the decision to include this requirement is within the prerogative of the Legislature, and it is not to be invaded by this Court. *See generally State ex rel. Beirne v. Smith*, 214 W. Va. 771, 775-76, 591 S.E.2d 329, 333-34 (2003).

This Court did not do an *in pari materia* analysis of the DUI statutes as required by *Clower, supra*, but relied solely on the lawful arrest language from *Clower*.

Also in 2014, the Court purported to address the lawful arrest argument in *Dale v. Ciccone, supra*, (per curiam), but did not fully address the applicable statutes. Specifically, in footnote 6 of *Ciccone*, the Court noted that in *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005), the Nebraska Supreme Court held that the judicial exclusionary rule was inapplicable to administrative license revocation proceedings but acknowledged the application of statutory exclusionary rules, where applicable. In syllabus point 11 of the *Chase v. Neth* matter, the high court of Nebraska held that the “Fourth Amendment exclusionary rule is inapplicable to administrative license revocation proceedings, except as it may apply indirectly through Neb.Rev.Stat. § 60-498.02(4)(a) (Supp.2003).” That statute states,

A person whose operator's license is subject to revocation pursuant to subsection (3) of section 60-498.01 shall have all proceedings dismissed or his or her operator's license immediately reinstated without payment of the reinstatement fee upon receipt of suitable evidence by the director that:

- (I) The prosecuting attorney responsible for the matter declined to file a complaint alleging a violation of section 60-6,196;
- (ii) The defendant, after trial, was found not guilty of violating section 60-6,196 or such charge was dismissed on the merits by the court; or
- (iii) In the **criminal action** on the charge of a violation of section 60-6,196

arising from the same incident, the court held one of the following:

(A) The peace officer did not have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 or a city or village ordinance enacted in conformance with such section; or

(B) The person was not operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of section 60-6,196 or a city or village ordinance enacted in conformance with such section.

[Emphasis added.]

The Nebraska statute requires the Department of Motor Vehicles to dismiss the administrative revocation proceedings if the court in the criminal matter determined that the officer had no probable cause to believe the driver was DUI. That statute is distinguishable from the law in West Virginia as this Court has already determined that “It is the general rule that a judgment of acquittal in a criminal action is not res judicata in a civil proceeding which involves the same facts.” Syllabus, *Steele v. State Road Commission*, 116 W. Va. 227, 179 S.E. 810 (1935). *See also*, syllabus point 3, *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012). Therefore, the criminal court in West Virginia could have applied the criminal exclusionary rule because the officer did not have probable cause to stop the driver and then acquitted the driver of the criminal charge. However, that would have no obviating result on the administrative matter:

When a criminal action for driving while under the influence in violation of West Virginia Code § 17C-5-2 (2008) results in a dismissal or acquittal, such dismissal or acquittal has no preclusive effect on a subsequent proceeding to revoke the driver's license under West Virginia Code § 17C-5A-1 *et seq.* Moreover, in the license revocation proceeding, evidence of the dismissal or acquittal is not admissible to establish the truth of any fact. In so holding, we expressly overrule Syllabus Point 3 of *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001).

Syllabus point 4, *Miller v. Epling*, 229 W. Va. 574, 576, 729 S.E.2d 896, 898 (2012).

In *Ciccone*, without conducting an *in pari materia* analysis of West Virginia's DUI statutes,

the Court referred to *People v. Krueger*, 208 Ill. App. 3d 897, 567 N.E.2d 717 (1991), which held that while the Illinois court agreed that the license revocation proceeding is civil rather than criminal, it reiterated that the issue was not whether the court was to apply a judicially created rule pursuant to its inherent authority but whether the statute should be construed to “condition the Secretary of State’s power to suspend a driver’s license on the presence of a valid arrest.”

Krueger, like *Chase v. Neth*, is also distinguishable here. In *Krueger*, the police received a call about a vehicle striking some mailboxes, and the responding officer located the offending vehicle two blocks away in a hotel parking lot, ran a check of the license plate and went to the driver’s address. A neighbor entered the driver’s home then invited the police to follow. The court in *Krueger* found the warrantless search to be intrusive and reversed the revocation based upon the “arrest” requirement in the administrative hearing statute:

Section 2–118.1(b) of the Illinois Vehicle Code provides, insofar as is relevant here:

“The scope of the hearing shall be limited to the issues of:

1. Whether the person was placed under arrest for an offense as defined in Section 11–501, or a similar provision of a local ordinance, as evidenced by the issuance of a Uniform Traffic Ticket; and
2. Whether the arresting officer had reasonable grounds to believe that such person was driving or in actual physical control of a motor vehicle upon a highway while under the influence of alcohol, other drug, or combination thereof; and

* * * * *

4. Whether the person, after being advised by the arresting officer that the privilege to operate a motor vehicle would be suspended if the person submits to a chemical test, or tests, and such test discloses an alcohol concentration of 0.10 or more * * *.”
- Ill.Rev.Stat.1989, ch. 95 ½, par. 2–118.1(b).

People v. Krueger, 208 Ill. App. 3d 897, 903-04, 567 N.E.2d 717, 721 (1991).

The Illinois court then stated that the statute does not explicitly require that the initial arrest be lawful and although the statute no longer requires the arresting officer to swear that the initial

arrest was lawful, the court would not conclude that this amendment reflects a legislative intent to empower the Secretary of State to suspend a motorist's license where the motorist has not been lawfully arrested for DUI. The court felt that the real question before it was whether the statute affirmatively authorizes the Secretary of State to suspend a motorist's license on the basis of a search which itself is the product of an unauthorized arrest.

First, *Krueger* is inapplicable to the matters in West Virginia because there was no stop of the driver's vehicle like there was in *Clower*, *Arthur*, and *Cicccone*. Since this Court in *Clower* equated the nature of the "stop" with a "lawful arrest," then, under that theory, a stop would be a predicate for a lawful arrest. Without a stop of the driver's vehicle, *Krueger* does not fit into this Court's analysis.

Krueger is similar to this Court's decision in *Clower* because even though the legislature in Illinois specifically removed the "lawful" language from their statute, the court in *Krueger* read into the statute that which was not there. In *Clower*, this Court's requirement that a "lawful arrest" must be predicated on a valid stop also relied on language which is not in the DUI statutes but which was supplied by the Court. As explained above, the only requirement in the West Virginia DUI statutes about a valid stop being a prerequisite for license revocation can be found in the commercial driver's license statutes.

Quite simply, an *in pari materia* reading of all of the DUI statutes cannot be reconciled with the Court's result oriented decision in *Clower* and its progeny. The administrative revocation process statutorily mandates that the Commissioner examine the evidence of drunk driving and revoke the driver's license. The only evidence available to the Commissioner in executing his legislatively-mandated duty is the information contained in the DUI Information Sheet, the

Intoximeter ticket, and the Implied Consent document which the investigating officer has submitted pursuant to his legislatively mandated duty in W. Va. Code § 17C-5A-1(b) (2008).

There is no legislative provision for the Commissioner to consider the nature of the stop of the vehicle (if there even was one) or the lawfulness of an arrest (if there even was one.) In fact, the most heinous of DUI offenses (those involving a death) are most likely to be prosecuted through the criminal information or indictment process rather than via an arrest. Obviously, the Legislature did not intend for drivers who committed felony DUI offenses to get an “free pass” on an administrative revocation because there was no arrest.

The Court should be guided by its opinions in *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984) and *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998), which indicate that a negative “finding” by the administrative tribunal is not dispositive of the principal question. Further, the Court should be mindful of its opinion in *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005), which is that the purpose of the administrative license revocation process is to protect the public by quickly removing “some” drunk drivers from the road.

D. Assuming, *arguendo*, that Mr. Pettit’s arrest was not lawful, there is still no basis for rescinding his license revocation.

Even if Mr. Pettit was not lawfully arrested, the circuit court erred in reversing the Commissioner’s *Order of Revocation* completely instead of applying one of the remedies provided by the Legislature. This Court’s decisions in *Sigler* and *Carte, supra*, determined that sobriety and administrative checkpoints are unconstitutional if not conducted within predetermined operational guidelines; however, this Court did not consider the legality of the arrest pursuant to statute and any possible resulting statutory consequences. The Circuit Court of Virginia has conducted such an

analysis in *Com. v. Coakley*, 56 Va. Cir. 99 (2001), which is instructive here.

An off-duty Virginia Beach police officer observed Mr. Coakley operating a motor vehicle in an extremely erratic manner. The officer observed Mr. Coakley drive onto the sidewalk and the median; cross into oncoming traffic, each time almost causing head-on collisions; fail to stop for red lights; and drive in excess of the speed limit. The officer observed these events from a distance starting in Virginia Beach until Mr. Coakley stopped his vehicle at a service station in the City of Norfolk. While following Mr. Coakley, the officer transmitted his observations via his cellular phone to the Virginia Beach dispatcher, which information was transmitted, among others, to an officer with the Norfolk Police Department. The Norfolk office came on scene at the aforementioned service station, where he observed Mr. Coakley pumping gasoline into his vehicle.

Both officers provided similar accounts of their observations of Mr. Coakley as he was pumping gas – Mr. Coakley was swaying and appeared to be unable to stand without the support of his vehicle. The Norfolk officer approached Mr. Coakley and observed that he had bloodshot eyes and a strong odor of alcohol about his person, and that a one-quarter-full bottle of cooking sherry was on the front seat of his vehicle. The Norfolk officer decided not to perform any sobriety tests because he believed Mr. Coakley was so intoxicated that there would have been a risk of injury. Mr. Coakley was placed under arrest and subsequently refused to provide a blood or breath sample.

On appeal, the circuit court pondered, if Mr. Coakley committed a crime in the Norfolk officer's presence would that permit a warrantless arrest pursuant to Virginia's statutes? Code of Virginia § 19.2-81 provides in pertinent part that an officer "may arrest, without a warrant, any person who commits and crime in the presence of the officer." The Virginia Court opined,

This statute has been interpreted to require that the officer must have "personal

knowledge acquired by his personal senses that an offense was committed in his presence.” *Durant v. City of Suffolk*, 4 Va.App. 445, 447, 358 S.E.2d 732, 733 (1987). The Court of Appeals in *Durant* held that, because the defendant was arrested for a misdemeanor committed outside the arresting officer's presence, his warrantless arrest was unlawful, and as a consequence, the result of the breathalyzer test was inadmissible. *Id.* at 449, 358 S.E.2d at 734. . . The Court of Appeals stated, “Except in those instances specified in Code § 19.2-81, a legal warrantless arrest cannot be effectuated based upon the officer having information from others which leads him to believe an offense is being committed in his presence. The facts constituting probable cause to arrest for an offense committed in his presence must have been obtained by the officer through his own personal senses.” *Id.* at 447, 358 S.E.2d at 733-34. The court held that, because the defendant's warrantless arrest was unlawful, he was not bound under the implied consent law to submit to a breathalyzer test. Therefore, the breathalyzer test result should not have been admitted into evidence, and the court held that this error was not harmless beyond a reasonable doubt, reversing and remanding the defendant's conviction.

The Virginia court concluded that at the time the officer approached Mr. Coakley, Mr. Coakley was not in actual physical control of the vehicle and therefore was not “operating” the vehicle in the arresting officer's presence. Although it could be inferred that the Defendant drove the vehicle into the gas station parking lot, the “presence” requirement of § 19.2-81 was not met, and therefore the Mr. Coakley's warrantless arrest was unlawful, as in violation of that statute.

The Virginia court next considered if Mr. Coakley's arrest was unlawful under statute, what is the appropriate remedy: (1) suppression of evidence gained from the arrest; (2) suppression of the arrest itself, meaning a dismissal of the charge; or (3) suppression of any evidence gained-such as the breathalyzer certificate of analysis or the refusal to take the breathalyzer test-that was obtained under a statute requiring a lawful arrest for the requiring of such consent? This Court opined only the third is the proper result. In the instant case, Mr. Coakley's Fourth Amendment rights were not violated because the arresting officer had probable cause to arrest him. That evidence included both the observations of the off-duty officer as relayed to the Norfolk officer through the police

dispatcher, and the Norfolk officer's personal observations of Mr. Coakley's condition. Therefore the arrest was constitutionally valid.

The court concluded that there is no case law to support the proposition that the *case itself* was the “fruit of the poisonous tree” and should be dismissed. All of the evidence the Commonwealth relied upon to convict Mr. Oakley of driving under the influence was obtained prior to his arrest and therefore the DUI case itself need not be dismissed. The court further opined that the situation was the opposite for the refusal, the action of which only occurred after the unlawful arrest and which, by statute, was only unlawful if refused after a lawful arrest in compliance with Virginia law. Had Mr. Coakley consented to a breathalyzer or blood alcohol test here, the certificate of analysis itself would have been inadmissible because it was not obtained pursuant to a lawful arrest; by analogy, any refusal to take such a test also must be excluded.

The court held that Mr. Coakley's arrest for DUI was unlawful, as in violation of Virginia statutes, because the misdemeanor offense was not committed in the arresting officer's presence, but was not unconstitutional, given that it was supported by probable cause. Thus, the exclusionary rule for an unconstitutional arrest does not apply, and the conviction stands, because the remedy for a statutory violation in Virginia is not suppression of the arrest itself, at least absent prejudice to Mr. Coakley. However, Mr. Coakley was improperly charged with refusing to submit to a breath or blood test because he was not legally under arrest for DUI, since his arrest was in violation of the Virginia Code. Therefore, when he was read his implied consent rights under the implied consent statute, his refusal did not constitute a violation of that statute, which requires that a defendant have been lawfully arrested to be subject to the statute's mandate. Having found sufficient evidence to show a violation of the DUI law, the Court found Mr. Coakley guilty of that violation, but dismissed

the refusal charge.

The same sort of analysis applies to the instant matter. Here, even if the suspicionless seizure was unconstitutional, Mr. Pettit's arrest was still lawful pursuant to W. Va. Code § 17C-5-4 (2010), the Implied Consent Statute, which states,

(a) Any person who drives a motor vehicle in this state is considered to have given his or her consent by the operation of the motor vehicle to a preliminary breath analysis and a secondary chemical test of either his or her blood, breath or urine for the purposes of determining the alcoholic content of his or her blood.

(b) A preliminary breath analysis may be administered in accordance with the provisions of section five [§ 17C-5-5] of this article whenever a law-enforcement officer has reasonable cause to believe a person has committed an offense prohibited by section two [§ 17C-5-2] of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

(c) A secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

Here, the I/O gathered evidence of Mr. Pettit's intoxication (i.e., the odor of alcoholic beverage on his breath, slurred speech, glassy eyes, unsteadiness exiting the vehicle, the admission of consuming alcohol, and the failure of three field sobriety tests) which gave him reasonable cause to believe that Mr. Pettit had been DUI; therefore, the I/O administered the preliminary breath test. After Mr. Pettit failed the PBT with a result of .183% coupled with the other evidence of intoxication, the I/O had reasonable grounds to believe Mr. Pettit had been driving while under the influence of alcohol which both the OAH and the circuit court found as fact. (App. at PP. 4 and 70.) These reasonable grounds to believe that Mr. Pettit was DUI (and not the constitutionality of the stop) are what makes the arrest lawful for purposes of the implied consent statute.

Based upon this Court's holdings in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012)

and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800, 806 (2012), the exclusionary rule for an unconstitutional arrest does not apply in this civil, administrative license revocation proceeding. The only remedies provided by the Legislature for a violation of W. Va. Code § 17C-5-4 (2010) can be found in W. Va. Code § 17C-5-7 (2010) and W. Va. Code § 17C-5-8 (2010). Just like W. Va. Code § 17C-5-4 (2010), W. Va. Code § 17C-5-7 (2010) requires the driver to be under lawful arrest before the administration of the SCT. If the driver is not under lawful arrest at the time the SCT is given, then the driver's refusal to take the SCT cannot result in a revocation.

The only other remedy provided by the Legislature for a violation of W. Va. Code § 17C-5-4 (2010) is found in W. Va. Code § 17C-5-8 (2010) which states in pertinent part:

a) Upon trial for the offense of driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood or breath, is admissible, if the sample or specimen was taken within the time period provided in subsection (g).

(b) The evidence of the concentration of alcohol in the person's blood at the time of the arrest or the acts alleged gives rise to the following presumptions or has the following effect:

(1) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his or her blood, is prima facie evidence that the person was not under the influence of alcohol;

(2) Evidence that there was, at that time, more than five hundredths of one percent and less than eight hundredths of one percent, by weight, of alcohol in the person's blood is relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

(3) Evidence that there was, at that time, eight hundredths of one percent or more, by weight, of alcohol in his or her blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

If the driver was not lawfully arrested as required by the Implied Consent statute, then W. Va. Code § 17C-5-8 (2010) provides that the results of the SCT not be given *prima facie* effect at hearing. A SCT, however, was not required for the OAH and the circuit court to determine that Mr. Pettit was DUI because where there was more than adequate evidence reflecting that the driver, who was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication and had consumed an alcoholic beverage. *Albrecht v. State*, 173 W. Va. 268, 273, 314 S.E.2d 859, 864-865 (1984).

Further, even if the arrest were deemed unlawful pursuant to the statute, the Legislature has provided no remedy in W. Va. Code § 17C-5A-2 (2010) for a violation of W. Va. Code § 17C-5-4 (2010). Therefore, even if the circuit court was correct in finding the suspicionless seizure of Mr. Pettit's vehicle unconstitutional, the circuit court erred in creating a remedy not provided by statute.

VI. CONCLUSION

For the reasons outlined above, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

STEVEN O. DALE, ACTING
COMMISSIONER, WEST VIRGINIA
DIVISION OF MOTOR VEHICLES,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0372
(Circuit Court Civil Action No. 12-AA-54)

STEVEN O. DALE, ACTING COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

JAMES PETTIT,

Respondent.

VII. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 21st day of July, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Michael R. Whitt, Esquire
810 North Jefferson Street, Suite 107
Lewisburg, WV 24901


Elaine L. Skorich