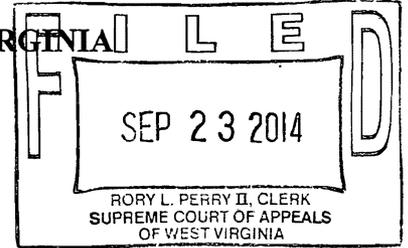


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0372
(Circuit Court Civil Action No. 12-AA-54)



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

Petitioner,

v.

JAMES PETTIT,

Respondent.

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

**STEVEN O. DALE, Acting Commissioner,
Division of Motor Vehicles,**

By Counsel,

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Now comes Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits the *Reply Brief of the Division of Motor Vehicles*.

I. ARGUMENT

A. **Respondent, himself, answered the principal question at hearing.**

In his responsive brief, Respondent stated, “There is no dispute that Respondent was under the influence. He was.” Accordingly, Respondent has himself answered the principal question at an administrative hearing, i.e., whether Respondent drove a motor vehicle while having an alcohol concentration in his blood of eight hundredths of one percent or more, by weight. *See*, W. Va. Code § 17C-5A-2(e) (2010). It is undisputed that on October 16, 2010, Respondent drove his vehicle in this State while under the influence of alcohol (App¹. at PP. 80 and 86 and A. Tr². 2 at PP. 21-22) and that the results of a secondary chemical test indicate that Respondent’s blood alcohol concentration was .157%. (App. at PP. 78, 82 and 86 and A. Tr. 2 at PP. 28 and 31.)

The DMV was mandated by W. Va. Code § 17C-5A-1(c) (2008) to revoke Respondent’s driver’s license for aggravated DUI if his blood alcohol content (“BAC”) was greater than .15%. There is nothing in administrative statutes, rules or procedures which permits the Commissioner to ignore the admitted fact that Respondent had been drinking and driving. “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

¹App. refers to the *Appendix* filed with this Court on July 21, 2014.

² A. Tr. 1 refers to the Administrative Transcript for the administrative hearing held on October 12, 2011, and A. Tr. 2 refers to the transcript for the administrative hearing held on October 26, 2011. Both transcripts were filed with this Court as part of the *Appendix* on July 21, 2014.

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).

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. Respondent’s undisputed BAC was .157%. (App. at PP. 78, 82, and 86 and A. Tr. 2 at PP. 28 and 31.) At the administrative hearing, the Investigating Officer testified on direct examination about the administration of the secondary chemical test (“SCT”) (A. Tr. 2 at PP. 28-31), yet on cross-examination, Respondent 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 Respondent rebut that his BAC was .157%; therefore, the Commissioner’s statutorily mandated revocation must be upheld.

B. Respondent, like the circuit court below, failed to analyze the constitutionality of the checkpoint.

In his responsive brief, Respondent states that “it is not disputed that the checkpoint violated the applicable policies, and thus the law.” To the contrary, Petitioner argued in great detail that the circuit court below provided a “knee jerk” reaction to the *di minimus* infringements of the checkpoint guidelines and completely failed to analyze the subject checkpoint in any way with the requirements outlined in *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009) or *Carte v. Cline*, 194 W. Va. 233, 460 S.E.2d 48 (1995). Instead of responding to Petitioner’s analysis of the checkpoint,

Respondent provided his own “knee jerk” response to the *di minimus* infringements of the checkpoint guidelines and assumed that moving the location of the checkpoint or having five instead of seven officers present at the checkpoint automatically renders the checkpoint unconstitutional.

As explained in Petitioner’s *Brief*, this Court in *Sigler* evaluated the constitutionality of “administrative checkpoints” and used this Court’s reasoning in *Carte* to determine that the 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. Respondent has not demonstrated how the *di minimus* infringements of the checkpoint guidelines were random or discriminatory. The evidence in the record below demonstrates that the subject checkpoint was not random and was not-discriminatory; therefore, the checkpoint was constitutional and valid.

C. This Court’s recent analyses of the “lawful arrest” in W. Va. Code § 17C-5A-2(f) (2010) are flawed.

In his responsive brief, Respondent alleges that

[w]ith the *Toler*³ decision, there is now a perceived disconnect between police misconduct in the criminal context and the totally different way the same misconduct affects the administrative process. The police, prosecutors, the driving public and others are left with the real situation of police misconduct being the predicate for license revocation.

As previously argued in the *Brief of the Division of Motor Vehicles*, the predicate for license revocation as outlined in W. Va. Code § 17C-5A-1(c) (2008) is not a bad stop but the presentation to the DMV of the investigating officer’s written statement and the test results which demonstrate

³ *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012).

that the driver committed a DUI offense. Unlike Respondent's proposition, the statutory prerequisite for license revocation contains no requirement for the consideration of the nature of the stop of the vehicle, if there even was a stop at all.

Although Respondent fails to identify specifically the "lawful arrest" language in W. Va. Code § 17C-5A-2(f) (2010), the tone of his argument relates to this Court's recent decisions which address this section of the Code. There are three critical flaws in the logic of this Court's interpretation of W. Va. Code § 17C-5A-2(f) (2010), and Petitioner will address those below.

First, 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*, 760 S.E.2d 415 (W. Va. 2014) (per curiam), 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, the DMV submits that proposition is confined to the criminal realm and disqualifications of commercial drivers. By inserting a consideration of the nature of the stop into W. Va. Code § 17C-5A-2(f) (2010), this Court has made the requirements of the administrative DUI more stringent than the requirements of the criminal DUI. In the criminal setting, an affirmative defense of a 4th Amendment violation by a police officer making a DUI arrest may result in the exclusion of evidence in a criminal proceeding. Under the Court's interpretation of W. Va. Code § 17C-5A-2 (f) (2010), that same 4th Amendment violation acts as an absolute bar to license revocation in the administrative hearing.

Second, since this Court's decision in *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), was rendered, the Court has interpreted the DUI statutes differently and has added additional requirements for license revocation. Pursuant to this Court, all that is required for an administrative

license revocation is evidence that the driver was operating a motor vehicle in this State⁴ while exhibiting symptoms of intoxication and evidence that the driver had consumed alcoholic beverages.⁵ Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). By adding the additional requirement for the nature of the stop (if there is one) to be analyzed, this Court jeopardizes the sound decision that it made in *Albrecht*. The Court correctly recognized in the *Albrecht* case that the “specific findings” were not dispositive of the principal issues and concluded that a finding in the positive for the administration of a secondary chemical test was not necessary for a license revocation. The language concerning the administration of the secondary chemical tests has not changed, having always been included in the specific findings with the conjunction “and;” however, the Court’s interpretation of “lawful arrest” as a prerequisite for license revocation is in apposite to the logic in *Albrecht* analyzing the same general language.

A consequence of interpreting W. Va. Code § 17C-5A-2(f) (2010) to include a consideration of the nature of the stop is to encourage complex and unnecessary litigation in the administrative DUI process. Because the DMV is not statutorily required to consider the nature of the stop when it revokes a driver’s license, the issue of the stop does not arise until the administrative hearing. Therefore, in order for the process to be fair, the driver would be required to alert the DMV of his or her challenge to the nature of the stop. Then, the administrative tribunal would be required to

⁴ W. Va. Code § 17C-5-2a(a) (1981) specifically defines the phrase “in this state” for purposes of the DUI statutes: “For purposes of this article and article five-a of this chapter, the phrase “in this state” shall mean anywhere within the physical boundaries of this state, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.”

⁵ See also, *Dale v. Oakland*, 13-0761, 2014 WL 2561375 (W. Va. June 6, 2014), applying *Albrecht* to a matter involving drugs and not alcohol.

hold a hearing on the issue of the stop in order to determine if the evidence of DUI which was obtained after the stop would be considered by the tribunal. If the tribunal determines that the stop was invalid and that it will not consider any evidence obtained after the stop of the driver's vehicle, then the DMV should be given the opportunity to obtain evidence of the driver's intoxicated driving from other sources (e.g., a bartender, passengers in the car, a bar tab, a surveillance video, etc.)

Currently, the administrative tribunal does not entertain motions *in limine* or conduct pretrial hearings on such matters – nor should it. “The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.” Syl. Pt. 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005). *See also*, Syl. Pt. 2, *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012). Clearly, the administrative process is supposed be a less litigious and prompt process for removing drunk drivers from the road; however, by this Court adding additional requirements to the plain language of the license revocation statutes, this Court has invited frustration of the intended purpose of the administrative process.

Third, as law currently stands via decision by this Court, the Commissioner is statutorily mandated to revoke the driver's license of all persons who commit DUI offenses while the Office of Administrative Hearings (“OAH”) is mandated to uphold the license revocations of only some of the people who commit DUI (i.e., those who allege that they were not lawfully arrested because of an invalid stop of their vehicles.) This is the logical flaw in this Court's recent decision in *Dale v. Oakland*, 13-0761, 2014 WL 2561375 (W. Va. June 6, 2014).

In *Oakland*, this Court opined,

[w]hile we observe that the Legislature removed the “arrest” language from W. Va.

Code § 17C-5A-1, the code section pertaining to the Commissioner's authority to revoke, in 2008, West Virginia Code § 17C-5A-2(f) (2010), the code section also in effect on the date of Mr. Oakland's incident, made it clear that the following elements were a mandatory prerequisite to the OAH upholding the Commissioner's order of suspension [*sic*]: (1) that there was a lawful "arrest" of the driver; *or* (2) that the driver "*was lawfully taken into custody for the purpose of administering a secondary test[.]*" (emphasis added).

The court's interpretation mandates the absurdity that OAH has to reverse the Commissioner's order when the Commissioner's order was correct. In essence, this Court has told the DMV that it must revoke all drunk drivers while the OAH has to reverse the DUI revocation even though the DMV's revocation was not wrong.

The three flaws in this Court's logic outlined above are perpetuated by this Court's misinterpretation of "lawful custody" in *Oakland, supra*. "Lawful custody" must mean something different than "lawful arrest" lest the Legislature would not have used the same term twice. "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). *See also*, Syl. Pt. 2, *Butler v. Rutledge*, 174 W. Va. 752, 329 S.E.2d 118 (1985). In this matter, however, the Legislature did not remove the "lawful custody" language in 2008 when the "lawful arrest" language was removed from W. Va. Code § 17C-5A-2(f), and the "lawful custody" language remained in the statute when the "lawful arrest" language reappeared in W. Va. Code § 17C-5A-2(f) in 2010. If the Legislature had meant for "lawful custody" to be the same as "lawful arrest," there would have been no need to return "lawful arrest" to the statute in 2010. Accordingly, this Court's equating arrest and custody is unsound from a statutory construction point of view.

This Court's interpretation of lawful custody being the same as lawful arrest creates practical

issues for the law enforcers below. Once an admittedly drunk driver, such as Respondent, is in the custody of the investigating officer, what is the officer to do? Should the officer keep the drunk in custody or let him get back on the road? The driver in *Clower v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), was clearly drunk, so should the officer have kept Clower in custody? Was the officer supposed to let him go because there was an invalid stop? Is the DMV exonerated from its duty to protect the public because of a bad stop by the officer? Undoubtedly, the practical concerns of this Court's interpretations of "lawful arrest" and "lawful custody" need to be addressed.

A review of the Implied Consent laws of this State clearly shows that a "lawful arrest" is a predicate to secondary chemical testing and "lawful custody" is a predicate to secondary chemical testing of a minor, neither is a mandatory prerequisite to license revocation. The analysis to suggest otherwise, started in *Clower* and expanded through *Oakland*, is wrong and corrupts the singular purpose of the administrative license revocation process to protect the public from drunk drivers.

II. CONCLUSION

For the reasons set forth in both the *Brief of the Division of Motor Vehicles* and those set forth above, the decision of the circuit court should be reversed.

Respectfully submitted,

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Commissioner, Division of
Motor Vehicles,

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III. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 23rd day of September, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

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Lewisburg, WV 24901


Elaine L. Skorich