

15-0112

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA,  
DIVISION II

STATE OF WEST VIRGINIA,

v.

CASE NO.: 14-M-AP-11  
JUDGE RUSSELL M. CLAWGES, JR.

MATTHEW FEICHT,

DEFENDANT.

**ORDER AFFIRMING JUDGMENT**

On or about October 17, 2014, the Defendant filed his Petition for Appeal of this criminal proceeding tried before a jury in Magistrate's Court. The Defendant set forth the grounds relied upon and designation of the record. By Order of October 24, 2014, the Court ordered that the Prosecuting Attorney have fifteen (15) days to respond to Defendant's Petition and to designate additional portions of the recording. On November 6, 2014, the State of West Virginia filed its Response to the Defendant's Petition for Appeal.

A hearing was held on November 26, 2014. The Defendant appeared by counsel, Michael D. Simms and the State of West Virginia appeared by Dimas Reyes, Assistant Prosecuting Attorney.

The Defendant contends that the Magistrate erred by improperly denying the Defendant's pre-trial Motions to Suppress and by denying Defendant's request to instruct the jury on the issue of the legality of the traffic stop.

After carefully considering the arguments of the parties and the legal issues of the case, the Court makes the following Findings of Fact and Conclusions of Law.

### Findings of Fact

1. On March 15, 2013, at approximately 2:50 am, law enforcement officers in Monongalia County, West Virginia were dispatched to a domestic battery in the area of the Greenbag Road.
2. Deputy Steven McRobie of the Monongalia County Sheriff's Department talked with the victim. She stated that the perpetrator was on foot and took off in the direction of Apollo Drive/Mountainview School. The perpetrator was described as a white male wearing a black sweatshirt and grey pants.
3. Deputy McRobie and other officers from the West Virginia State Police and Morgantown Police Department drove around the area looking for the suspect. No one was located. Deputy McRobie then spotted a motorist.
4. Deputy McRobie performed a stop of the vehicle with the sole purpose of asking the driver if he or she had seen anyone in the area. The driver was the Defendant, Matthew Feicht. Mr. Feicht was not observed violating any traffic laws before he was pulled over.
5. As Deputy McRobie approached the vehicle with his flashlight shining, he observed that the driver was a white male wearing a black shirt. This was a partial match of the description of the suspect he was searching for. At that time, Deputy McRobie asked the driver for identification.
6. By this time, Deputy McRobie had learned the name of the person involved in the domestic battery that they were looking for. The driver of the vehicle, Defendant Matthew Feicht, was not that person. However, as a matter of routine police policy, Deputy McRobie ran a computer check on Mr. Feicht's driver's license. It was revoked for a previous DUI. At that point, Mr. Feicht was arrested for driving on a revoked license.

7. Deputy Daniel Oziemblowsky took Mr. Feicht to his patrol car for transport and processing. At that point, Deputy Oziemblowsky detected a strong odor of an alcoholic beverage coming from Mr. Feicht. Mr. Feicht was eventually arrested for second offense driving under the influence.
8. Deputy McRobie testified at trial that the officers run all licenses through the computer as matter of policy.
9. Mr. Feicht filed a Motion to Suppress, contending that the traffic stop constituted a warrantless seizure not supported by articulable reasonable suspicion.
10. A hearing was held on November 12, 2013. Neither the State nor the Defendant called any witnesses at the hearing; instead, respective counsel proffered their arguments to the Court.
11. The Magistrate Court failed to create a recording of the November 12, 2013, hearing. Therefore, another hearing was held January 27, 2014. The State called Deputy Daniel Oziemblowsky of the Monongalia County Sheriff's Department as its only witness. After the hearing, the Magistrate denied the Defendant's Motion to Suppress.
12. The Magistrate refused the Defendant's proffered jury instruction on the issue of the legality of the stop.
13. Following the jury trial, Defendant Matthew Feicht was convicted of driving under the influence, 2<sup>nd</sup> offense.

#### **Conclusions of Law**

1. "The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" U.S. Const.

amend. IV. The temporary detention of individuals during the stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment. Whren v. U.S., 517 U.S. 806, 809-810 (1996).

2. “Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 1, State v. Stuart, 192 W.Va. 428 (1994).
3. “When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.” Syl. Pt. 2, Stuart.
4. A traffic stop may be expanded beyond its original purpose if during the initial stop the detaining officer acquires reasonable suspicion of criminal activity, that is to say the officer must acquire a particularized and objective basis for suspecting the particular person stopped of criminal activity. U.S. v. Villa-Chaparro, 115 F.3d 797, 801-02 (10<sup>th</sup> Cir. 1997).
5. Pursuant to a traffic stop, a police officer may request a driver’s license and vehicle registration, and run a computer check. U.S. v. Branch, 537 F.3d 328, 335-36 (4<sup>th</sup> Cir. 2008). Police diligence involves requesting a driver’s license and vehicle registration, and running a computer check to ensure a driver is entitled to operate his vehicle. Branch at 336; U.S. v. Digiovanni, 650 F.3d 498, 507 (4<sup>th</sup> Cir. 2011)
6. “[D]efendants bear the burden of proving that they had a reasonable expectation of privacy in the area searched or the item seized.” Rakas v. Illinois, 439 U.S. 128, 131 n. 1 (1978);

Simmons v. U.S., 390 U.S. 377, 389-390 (1968). The general rule is that “the proponent of a motion to suppress has the burden of establishing that his own Fourth amendment rights were violated by the challenged search and seizure.” United States v. Moore, 22 F.3d 241, 243 (10<sup>th</sup> Cir. 1994).

7. “When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below.” Syl. Pt. 1, State v. Lacy, 196 W.Va. 104 (1996).
8. “If a party moves to suppress evidence obtained as a result of an allegedly unconstitutional search, he or she has the obligation to demonstrate a subjective expectation of privacy that society is prepared to recognize as reasonable. This precept stems from the general rule that the proponent of a motion to suppress has the burden of establishing that his own Fourth amendment rights were violated by the challenged search and seizure.” State v. Lopez, 197 W.Va. 556, 569 (1996) (per curiam, J. Workman, dissenting) (citing Rakas v. Illinois, 439 U.S. 128, 131 n. 1 (1978)).
9. At the point when Deputy McRobie observed that Mr. Feicht matched, in part, the description of the domestic battery suspect, the traffic stop was expanded beyond its initial purpose. The general description of the suspect can be considered a factor supporting reasonable suspicion and in requesting Defendant’s identification.
10. The intrusion was brief, minimal, reasonable as it related to the circumstances justifying it, and limited in scope.
11. The Court FINDS that the initial stop of Defendant’s vehicle was valid, and that in light of the facts and circumstances confronting the officer at the time, the continuation of the stop was reasonable.

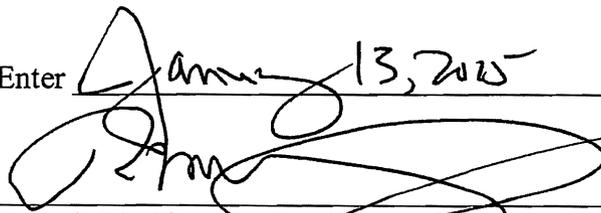
12. The Court further FINDS the request for Mr. Feicht's driver's license reasonable under the totality of the circumstances.
13. The Court FINDS the policy of running a check on all licenses to be legitimate and appropriate, as it assures the officer that the driver is legally operating the vehicle.
14. The Court further FINDS that an objective assessment of the officer's actions during the stop of the Defendant to be justified.

**Order**

Accordingly, it is ADJUDGED, ORDERED and DECREED that the decisions of the Magistrate were in conformance with the law, that the conviction of Defendant Matthew David Feicht be and hereby is **AFFIRMED**.

The Clerk of this Court shall provide a certified copy of this Order to the Probation Office; counsel for the Defendant, Michael D. Simms; and Assistant Prosecuting Attorney, Dimas Reyes.

Enter

  
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Russell M. Clawges, Jr., Judge  
17<sup>th</sup> Judicial Circuit, Division II

**IN THE MAGISTRATE COURT OF MONONGALIA COUNTY, WEST VIRGINIA****STATE OF WEST VIRGINIA****Plaintiff,**

v.

**CASE NO. 13-M31M-1894****MATTHEW DAVID FEICHT,****Defendant.****ORDER FOLLOWING APRIL 25, 2014 MOTIONS HEARING**

1. On April 25, 2014 came the Defendant, Matthew Feicht, in person and with his attorney, Michael Simms, and came the State of West Virginia, through Assistant Prosecuting Attorney Dimas Reycs, for a motions hearing in the above-captioned matter.
2. The Defendant had previously filed a Motion to Prohibit Introduction of Secondary Chemical Test, the Defendant's Objection to State's Motion to Continue and the Defendant's Proposed Jury Instruction Number 6. The State had filed a motion to continue based on the unavailability of its witness for the April 25 motions hearing.
3. After hearing the arguments of counsel, which are more fully set forth on the record, the Court ORDERS as follows:
4. The State has five additional days to provide the Defendant with breath

test discovery in accordance with this Court's previous Orders. If the State fails to provide the Defendant with the additional discovery by or before April 30, 2014, the Defendant's Motion to Prohibit Introduction of Introduction of Secondary Chemical Test will be granted.

5. The Court DENIES the Defendant the ability to use Defendant's Jury Instruction Number 6.

6. The last sentence of State's Instruction No. 1 is hereby modified to read as follows: "If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any or more of these elements of the charge, you shall find the defendant not guilty."

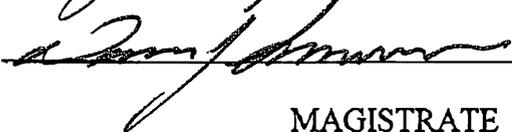
7. The Court DENIES the Defendant the ability to use Defendant's Jury Instructions Numbers 1, 3 and 4, as these are incorporated into the Court's charge to the jury.

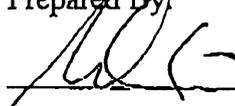
8. The Court DENIES the Defendant the ability to use Defendant's Jury Instruction Number 5.

9. The Court will PERMIT the Defendant to use Defendant's Jury Instruction Number 2.

10. The State's motion to continue and the Defendant's objection to the same is moot, as there was no need for testimony from the State's witness at the subject motions hearing.

A copy of this Order shall be provided by the Clerk of Court to the Office of the Prosecuting Attorney, and to Michael Simms, counsel for the Defendant, at 235 High Street, Suite 722, Morgantown, WV 26505.

ENTERED: June 25, 2014  
  
MAGISTRATE

Prepared By:  


Michael Simms, Esq.

Approved By:  
\_\_\_\_\_

Dimas Reyes, APA

**IN THE MAGISTRATE COURT OF MONONGALIA COUNTY, WEST VIRGINIA****STATE OF WEST VIRGINIA****Plaintiff,****v.****CASE NO. 13-M31M-1894** S**MATTHEW DAVID FEICHT,****Defendant.****ORDER FOLLOWING JANUARY 27, 2014 MOTIONS HEARING**

1. On January 27, 2014 came the Defendant, Matthew Feicht, in person and with his attorney, Michael Simms, and came the State of West Virginia, through Assistant Prosecuting Attorney Dimas Keyes, for a motions hearing in the above-captioned matter.

2. The purpose of the hearing was to create a record with respect to the Defendant's previously filed and argued Motion to Suppress and Dismiss, which was heard by the Court on November 12, 2103, but not recorded.

3. No testimony was given at the November 12 hearing – counsel for the State and counsel for the Defendant simply made their respective arguments to the Court.

4. The Court denied the Defendant's Motion to Suppress and Dismiss on November 12, 2013.

5. The Court granted the Defendant's Motion for Breath Test Discovery on November 12, 2013, as well as the Defendant's Motion to Bifurcate and the Defendant's Motion to Continue.

6. The Court scheduled the January 27, 2014 hearing to create a record, and to hear any additional motions.

7. Prior to the January 27, 2014 hearing, the Defendant filed a Motion to Suppress Preliminary Breath Test and the Defendant's Renewed Motion to Suppress and Dismiss.

8. The Court heard arguments of counsel with respect to both motions. Deputy D. Oziemblowsky of the Monongalia County Sheriff's Department testified with respect to both motions.

9. Although Oziemblowsky was the officer who administered the Preliminary Breath Test to the Defendant, he was not involved in, nor did he observe, the traffic stop on the Defendant's vehicle. Deputy S. McRobie, also of the Monongalia County Sheriff's Department, is the officer who observed the Defendant operating his vehicle, and is also the officer who performed the traffic stop. McRobie did not testify at the January 27, 2014 hearing – he was not present.

10. After hearing the arguments of counsel and Oziemblowsky's testimony,

the Court **DENIED** the Defendant's Motion to Suppress Preliminary Breath Test, and the Defendant's Renewed Motion to Suppress and Dismiss.

11. The Court further **ORDERED** that the matter be scheduled for a jury trial on May 20, 2014, at 8:30 a.m.

12. The Court further **ORDERED** that the breath test discovery be provided to the Defendant's counsel by or prior to April 25, 2014. Motions, jury instructions and witness lists are due on April 25, 2014 as well.

A copy of this Order shall be provided by the Clerk of Court to the Office of the Prosecuting Attorney, and to Michael Simms, counsel for the Defendant, at 235 High Street, Suite 722, Morgantown, WV 26505.

ENTERED: Feb. 14, 2014  
  
MAGISTRATE

Prepared By 

Michael Simms, Esq.

Approved By:

\_\_\_\_\_  
Dimas Reyes, APA

**IN THE MAGISTRATE COURT OF MONONGALIA COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA**

**Plaintiff,**

**v.**

**CASE NO. 13-M31M-1894 5**

**MATTHEW DAVID FEICHT,**

**Defendant.**

**ORDER FOLLOWING MOTIONS HEARING**

On November 12, 2013 came the Defendant, Matthew Feicht, in person and with his attorney, Michael Simms, and came the State of West Virginia, through Assistant Prosecuting Attorney Dimas Rcyys, for a motions hearing in the above-captioned matter.

After hearing the arguments of counsel, the Court does hereby **ORDER** the following:

The Defendant's Motion to Suppress and Dismiss is **DENIED**.

The Defendant's Motion to Bifurcate is **GRANTED**.

The Defendant's Motion to Continue is **GRANTED**.

The Defendant's Motion to Suppress Preliminary Breath Test is hereby filed. A hearing on the Motion will be held at such later date as the Court sees fit.

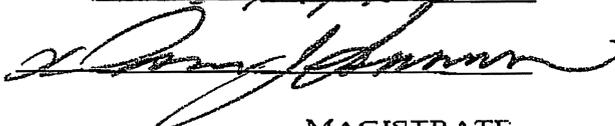
The Defendant's Motion for Breath Test Discovery is **GRANTED**.

Specifically, the State is **ORDERED** to produce the following information regarding Intoximeter EC/IR II, serial number 008332:

1. The download data for the EC/IR II serial number 008332 for the time period of June 15, 2012 through June 15, 2013. The data is to be both in digital and hard copy format with the first row showing headers. Regardless of how the data is provided, all files, including blow data and fuel cell data shall be provided. The fields which denote names and social security numbers may be omitted/obscured, except for any field which shows the Defendant's name and/or social security number.
2. All maintenance and certification records for EC/IR II serial number 008332 for the time period of June 15, 2012 through June 15, 2013.
3. All maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for EC/IR II serial number 008332. This includes documentation for any NIST thermometers that were used in the verification of simulator calibration.
4. All assays for any and all simulator solutions used in the calibration or verification of accuracy for EC/IR II serial number 008332.

5. Identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy for EC/IR II serial number 008332.

A copy of this Order shall be provided by the Clerk of Court to the Office of the Prosecuting Attorney, and to Michael Simms, counsel for the Defendant.

ENTERED: Feb. 14, 2014  
  
MAGISTRATE

Prepared By:   
Michael Simms, Esq.

Approved By:  
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Dimas Reyes, APA