

15-0437

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 3

MATTHEW P. AIKEN,

Petitioner,

v.

Case No. 14-AA-3
Chief Judge Phillip D. Gaujot

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

Respondent.

ORDER

On September 3, 2014, Matthew P. Aiken filed a Petition for Judicial Review of the Final Order of the Office of Administrative Hearings ("OAH"), effective August 18, 2014, which revoked his driver's license. On October 14, 2014, this Court entered an Order granting his Motion for Stay Pending Appeal.¹ The record was designated on October 14, 2014, and following the entry of a briefing schedule, the Petitioner filed his Brief in Support of Appeal on December 30, 2014, and the Respondent filed his brief on February 5, 2015, to which the Petitioner replied on February 23, 2015. A hearing was conducted pursuant to the Petitioner's Motion to Extend Stay Pending Appeal on March 25, 2015, and Matthew P. Aiken appeared with counsel, J. Bryan Edwards. The Respondent, Steven O. Dale, appeared by Senior Assistant Attorney General Janet E. James. At said hearing, the parties were given an additional opportunity for oral argument pursuant to their respective positions concerning the appeal.

This Court has conscientiously reviewed the record made before the OAH and the parties' written submissions, in addition to carefully considering Mr. Aikens' testimony and the

¹ On September 9, 2014, this Court originally entered an Order granting Mr. Aikens' Motion for Stay Pending Appeal, which was set aside by Order subsequently entered on September 24, 2014, to permit a hearing to be conducted on the issue.

oral arguments of counsel. The Court hereby **REVERSES** the decision of the OAH, for the reasons to be discussed *infra*.

STANDARD OF REVIEW

“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 Volunteer Fire Dep’t v. West Virginia 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).”

“Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.” Syl. Pt. 1, *Francis O. Day Co. Inc. v. Dir., Div. Envtl. Prot. Of W. Va.*, 191 W. Va. 134, 443 S.E.2d 602 (1994).

FINDINGS OF FACT

1. During the early morning hours of August 18, 2010, Deputy Jonathan S. Carter was dispatched to respond to a domestic violence situation at Cindy's Bar in Fairmont, West Virginia.
2. The individuals involved were Andrew Snyder and Stephanie Cassady, and they were arguing about Ms. Cassady's keys.
3. Mr. Aikens and Shannon Walker were present at the scene, and though not involved in the domestic disturbance itself, Ms. Walker was tangentially involved in the issue concerning the keys.
4. After making contact with Ms. Walker and Mr. Aikens, and assuming that they were intoxicated, Deputy Carter and Corporal Love asked that they sober up before driving. Deputy Carter failed to articulate why he believed the parties were intoxicated, and he never witnessed Mr. Aikens consume any alcohol while at Cindy's Bar. There is contradicting testimony as to whether the officers gave the driving instructions to Ms. Walker, only, or to both Ms. Walker and Mr. Aikens.
5. Deputy Carter and Corporal Love then took the female involved in the domestic to her residence, about three and a half miles from Cindy's Bar on Interstate 73.
6. On the way back, about a quarter of a mile from Cindy's Bar, Deputy Carter observed a Jeep Cherokee pass him, which he recognized as belonging to Shannon Walker. The record does not indicate that he could see who was driving the vehicle.
7. Deputy Carter then turned around to follow the vehicle and observed it make a wide right turn onto Burns Ridge Road. The vehicle did not cross the center line or run off the road, and no citation was ever issued for the maneuver.
8. After following the vehicle a while longer, Deputy Carter initiated a traffic stop at 2:35 a.m., according to the DUI Information Sheet, admitted into evidence at the July 29, 2011, OAH hearing. This was approximately ten minutes after making his initial contact with Ms. Walker and Mr. Aikens at Cindy's Bar.
9. Mr. Aikens was driving the vehicle, and Deputy Carter testified that he smelled a strong odor of alcohol when he walked up to the vehicle. He asked Mr. Aikens to exit, at which point Deputy Carter allegedly observed that he was unsteady on his feet, his speech was slurred, and his eyes were bloodshot.
10. Mr. Aikens apparently stated that he "only had a couple," and Deputy Carter administered several field sobriety tests.

11. Pursuant to Deputy Carter's testimony and the DUI Information Sheet, Mr. Aikens failed the horizontal gaze nystagmus, the walk and turn,² and the one leg stand tests. There was contradicting testimony as to specifically when Mr. Aikens disclosed a preexisting tendon injury in his left leg during the field sobriety tests.³ Mr. Aikens was cooperative throughout the entire process.
12. Deputy Carter placed Mr. Aikens under arrest for DUI and transported him to the Marion County Sheriff's Department for further processing.
13. Deputy Carter then administered the intoximeter test. All three of Mr. Aikens' attempts rendered an insufficient sample. There is no evidence that Mr. Aikens was intentionally trying to render the sample insufficient.
14. By letter, dated September 8, 2010, Mr. Aikens was notified that his driver's license was revoked, effective October 13, 2010.
15. On September 10, 2010, and October 7, 2010, Mr. Aikens filed a "Written Objection to an Order of Revocation Hearing Request Form," seeking to challenge the secondary chemical test of the blood, breath, or urine, and requesting the presence of the officer who administered said test.⁴
16. On February 26, 2011, following the hearing conducted on February 24, 2011, Magistrate Cathy L. Reed-Vanata granted Mr. Aikens' Motion to Dismiss the criminal complaint against him on the grounds that Deputy Jonathan S. Carter did not have reasonable suspicion to stop his vehicle.
17. An administrative hearing concerning Mr. Aikens' license revocation was conducted on July 29, 2011, before John R. Rundle, OAH Hearing Examiner.
18. The Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner, concluding that Mr. Aikens was driving under the influence of alcohol and affirming his license revocation, were entered on August 18, 2014.
19. On September 3, 2014, Mr. Aikens filed a Petition for Judicial Review of the Final Order of the OAH.

² Deputy Carter counted every time Mr. Aikens missed heel to toe individually, as opposed to counting it as one. OAH H'rg 63-64: 13-5 (July 29, 2011).

³ During the structured interview that occurred at the Marion County Sheriff's Department, Mr. Aikens disclosed said injury. At the OAH hearing, Mr. Aikens testified that he believed he informed Deputy Carter of the injury up front, following the traffic stop.

⁴ The form dated September 10, 2010, was accompanied by a cover letter from Mr. Aikens' attorney, addressed to the DMV, and the form dated October 7, 2010, was accompanied by a cover letter from Mr. Aikens' attorney, addressed to the Office of Administrative Hearing.

CONCLUSIONS OF LAW

1. "In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol . . . the Office of Administrative Hearings shall make specific findings as to . . . whether the person was *lawfully placed under arrest* for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test." W. VA. CODE § 17C-5A-2(f) (2010) (emphasis added).
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, in part, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886, 887 (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, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886, 887 (1994).

DISCUSSION

The OAH improperly revoked Mr. Aiken's license for driving under the influence of alcohol because he was not lawfully placed under arrest pursuant to the requirement of West Virginia Code § 17C-5A-2(f). In proceedings before the OAH in which an individual is accused of driving under the influence of alcohol, the OAH must make specific findings as to whether the individual was lawfully placed under arrest for said offense. W. VA. CODE § 17C-5A-2(f) (2010). In cases of vehicular stops preceding arrest, an investigating officer must have an "articulable reasonable suspicion" to believe that the vehicle is either subject to seizure or that that its occupant has committed, is committing, or is about to commit a crime. Syl. Pt. 1, in part, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886, 887 (1994). Reasonable suspicion exists by virtue of the totality of the circumstances known by the police, in terms of both the quantity and quality of the information. *Id.* at Syl. Pt. 2.

The cases of *O'Dale v. Ciccone*⁵ and *Clower v. West Virginia Dep't of Motor Vehicles*⁶ provide useful guidance as to the operation of the lawful arrest requirement of W. VA. CODE § 17C-5A-2(f).⁷ In order for such an arrest to be proper, the underlying investigatory stop must be valid. *O'Dale*, 233 W. Va. at 659, 760 S.E.2d at 473 (citing *Dale v. Odum*, 233 W. Va. 601, 606, 760 S.E.2d 415, 420 (2014) (*per curiam*) (“[A]bsent a valid investigatory stop, a finding that the ensuing arrest was lawful cannot be made.”)); *see also Terry v. Ohio*, 392 U.S. 1 (1968); U.S. CONST. amend. IV; W. VA. CONST. art. III, § 6. *O'Dale* and *Clower* analyzed whether there was reasonable suspicion to stop the vehicles in those cases, as those stops led to DUI arrests and subsequent license revocations. Both were guided by the standards for evaluating the existence of probable cause as articulated in *State v. Stuart*. Syl. Pt. 1, in part, 192 W. Va. 428, 452 S.E.2d 866 (1994). What these cases make clear is that W. VA. CODE § 17C-5A-2(f) contains a “statutorily-created exclusionary rule for evidence obtained through a non-lawful arrest.” *O'Dale*, 233 W. Va. at 658, 760 S.E.2d at 473.

Just like the Courts in *O'Dale* and *Clower*, this Court will evaluate whether there was reasonable suspicion to stop the Jeep, which led to Mr. Aikens' eventual DUI arrest and license revocation. Though establishing reasonable suspicion requires meeting a fairly low threshold, in this case, when evaluating the quantity and quality of information known to Deputy Carter, it is

⁵ 233 W. Va. 652, 659, 760 S.E.2d 466, 473 (2014) (*per curiam*).

⁶ 223 W. Va. 535, 678 S.E.2d 41 (2009). This case was superseded by statute as stated in *Miller v. Chenoweth*, *Miller v. Smith*, *Dale v. Arthur*, and *Dale v. Barnhouse*. 229 W. Va. 114, 727 S.E.2d 658 (2012) (*per curiam*); 229 W. Va. 478, 729 S.E.2d 800 (2012); No. 13-0374, 2014 WL 1272550 (W. Va. Mar 28, 2014); No. 14-0056, 2014 WL 6607493 (W. Va. Nov 21, 2014). However, the Court's reasonable suspicion analysis in *Clower* remains valid; the case's negative treatment simply concerned which version of the statute was at issue in each subsequent case, in terms of the inclusion of the “lawful arrest” language.

⁷ As *O'Dale* explained, the 2004 version of this statute contained the lawful arrest requirement, the 2008 version omitted it, and the 2010 version again reinstated it. 233 W. Va. 652, 657-658, 760 S.E.2d 466, 471-472 (2014). *O'Dale* applied the 2010 version of the statute, and *Clower* applied the 2004 version. 233 W. Va. 652, 658, 760 S.E.2d 466, 473 (2014); 223 W. Va. 535, 678 S.E.2d 41, 50, n. 7 (2009). The version of the statute in operation at the time of Mr. Aikens' arrest on August 18, 2010, was effective from June 11, 2010, to June 5, 2012.

clear that he did not have an “articulable reasonable suspicion” that the Jeep’s occupant either had committed or were committing a crime. The only reason that Deputy Carter pursued the Jeep in the first place was because he recognized it as being owned by Ms. Walker, and several operative facts surrounding its recognition render his suspicion unreasonable. First, the Jeep belonged to one of the individuals with whom Deputy Carter engaged during his response to the domestic violence incident at Cindy’s Bar, but it was wholly unrelated to Mr. Aikens’ presence there. Said incident did not involve any improper conduct on behalf of Mr. Aikens which may have given Deputy Carter a specialized cause for concern when he saw the vehicle.

Second, when he made contact with Mr. Aikens and Ms. Walker during his response to the domestic violence incident, Deputy Carter testified that he “knew” they were intoxicated. He drew this conclusion despite never witnessing Mr. Aikens consume alcohol and having a very limited interaction with him. The record does not indicate that Deputy Carter had any specific basis for believing that Mr. Aikens was intoxicated, which could have rendered his driving, if he even *was* driving, the Jeep suspicious.

Third, though Deputy Carter testified that he instructed both Ms. Walker and Mr. Aikens not to drive anywhere until they sobered up, Mr. Aikens testified that Deputy Carter only gave this instruction to Ms. Walker. Regardless of to whom the instruction was directed, it is itself entirely subjective. It was given approximately ten minutes prior to Deputy Carter seeing the vehicle, and he did not give a specific time that was required to elapse before driving would be permitted. However, such a time frame would not necessarily be reasonable, or reliable, in the absence of a more scientific basis than the opinions of two laypeople as to when an individual would be sober enough to drive. How could this Court make such a determination? And how long should either Ms. Walker or Mr. Aikens have believed they should wait before driving,

particularly when Mr. Aikens testified that he consumed two beers? Then instruction, and time period, are too subjective to have given Deputy Carter proper cause to believe that someone was driving the vehicle under the influence of alcohol.

Last, and perhaps most importantly, the record does not indicate that Deputy Carter could even see who was driving the Jeep when it went past him. Though he testified that he instructed both Ms. Walker and Mr. Aikens not to drive, Deputy Carter did not indicate that he could see either one of them behind the wheel. The testimony is that he recognized the Jeep simply as *belonging* to Ms. Walker, not even being driven by her, let alone Mr. Aikens.⁸

Deputy Carter similarly did not have reasonable suspicion to stop the vehicle following Mr. Aikens' turn onto Burns Ridge Road. All he observed was a wide right turn; the vehicle was not being driven erratically, it did not cross the center line or run off the road, and no citation was ever issued to Mr. Aikens for his maneuver. Whether the vehicle *could* have crossed over had there been a double yellow demarcation on the road is irrelevant, as there was no such marking.

CONCLUSION

As in *Clower*, this Court similarly concludes that the OAH hearing examiner was "clearly wrong" in finding that Mr. Aikens was lawfully placed under arrest. Though this standard of review is deferential, this Court does not find that the examiner's decision was supported by substantial evidence or a rational basis because the quantity and quality of information available to Deputy Carter did not give him reasonable suspicion to stop the Jeep. Neither simply recognizing a vehicle from a previous incident, particularly when an officer cannot even

⁸ The *Clower* Court discussed the criteria for reasonable suspicion to stop a vehicle, which included the appearance of the vehicle or its occupants. 223 W. Va. at 541, 678 S.E.2d at 47 (citing *Stuart*, 192 W. Va. at 433, 452 S.E.2d at 891, n. 10). However, in our case, there was nothing suspicious about the vehicle; Deputy Carter simply recognized it from as belonging to Ms. Walker. Additionally, no conclusion could be drawn regarding the appearance of its occupants, as the record does not indicate that Deputy Carter could even see who was driving.

ascertain its driver, nor observing a wide right turn that does not violate a traffic law is sufficient to create an "articulable reasonable suspicion" to justify a traffic stop. Though this standard incorporates a "totality of the circumstances" analysis, the additional factors as previously discussed still do not render Deputy Carter's suspicion reasonable, particularly given the subjective nature of his instruction not to drive.

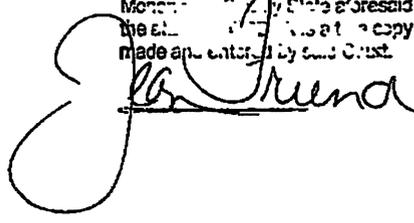
One of the primary arguments advanced by Mr. Aikens is that Magistrate Reed-Vanata's ruling should have precluded the OAH from finding that the stop and subsequent arrest of Mr. Aikens was legal. While the Court has conscientiously reviewed Mr. Aikens' position, and the Commissioner's response, it need not address this argument because its decision is based on other grounds, specifically the lack of reasonable suspicion to stop the Jeep, rendering Mr. Aikens' arrest unlawful.

For the foregoing reasons, the Court **ADJUDGES** and **ORDERS** as follows:

1. The Final Order of the Chief Hearing Examiner of August 18, 2014, is hereby **REVERSED**.
2. The Circuit Clerk is directed to provide copies of this Order to counsel of record and to strike this matter from the Court's docket.

ENTER: April 22, 2015

STATE OF WEST VIRGINIA, SS:
I, Jean Friend, Clerk of the Circuit and Family Courts of
Monroe County, West Virginia do hereby certify that
the attached is a true and correct copy of the original Order
made and entered by said Court.



Circuit Clerk



PHILLIP D. GABJOT, CHIEF JUDGE

ENTERED April 22, 2015

DOCKET LINE #: 27

JEAN FRIEND, CIRCUIT CLERK

NO.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAT REED, COMMISSIONER OF THE
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Petitioner,

v.

MATTHEW P. AIKEN,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Notice of Appeal* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 13th day of May 2015, addressed as follows:

J. Bryan Edwards, Esquire
1200 Dorsey Avenue, Suite II
Morgantown, WV 26501

The Honorable Jean Friend
Clerk of the Circuit Court
Monongalia County Courthouse
243 High Street
Morgantown, WV 26505



Janet E. James