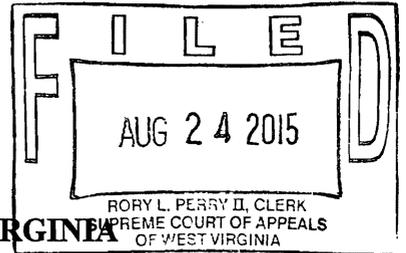


NO. 15-0437



**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.**

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**PETITIONER'S BRIEF**

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## ASSIGNMENT OF ERROR

- I. **THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS NO REASONABLE SUSPICION FOR THE STOP WHEN THE INVESTIGATING OFFICER HAD HAD AN ENCOUNTER WITH THE INDIVIDUALS WHO OWNED AND WERE DRIVING THE JEEP TEN MINUTES EARLIER, AND THE INVESTIGATING OFFICER OBSERVED THE JEEP MAKING A RIGHT TURN AND ALMOST GOING IN TO THE OPPOSITE LANE BEFORE HE STOPPED THE VEHICLE.**

## STATEMENT OF THE CASE

On August 18, 2010, at 2:35 a.m., Deputy Jonathan Carter of the Marion County Sheriff's Department, the Investigating Officer in this matter, and Corporal Love of the same department were dispatched to investigate a domestic violence incident at Cindy's Bar in Marion County, West Virginia. Appendix Record at 156 (hereinafter, "A.R. at \_\_\_"). Dep. Carter is a trained West Virginia police officer. A.R. at 154-5.

Upon arriving at Cindy's Bar, the officers witnessed that Stephanie Cassidy and Andrew Snyder were highly intoxicated and in an argument. Ms. Cassidy wanted her keys, and Mr. Snyder would not give them to her. Shannon M. Walker and the Respondent were outside the bar. They were intoxicated. A.R. at 161. Ms. Walker was screaming for someone to get Ms. Cassidy and Mr. Snyder to stop arguing and return her car keys. A.R. at 160, 218. The police found two sets of keys, one of which belonged to Ms. Walker. A.R. at 158-160.

Dep. Carter got the keys to Ms. Walker's Jeep, and he and Cpl. Love gave the keys to Ms. Walker. Dep. Carter told Ms. Walker and the Respondent to drink water and sit inside Ms. Walker's Jeep until they sobered up. A.R. at 156, 161.

Dep. Carter and Cpl. Love took Ms. Cassidy home, about 3.5 miles to her residence. On their way back to Cindy's Bar, about a quarter-mile from the bar, the Investigating Officer observed Ms.

Walker's Jeep passing him. He recognized it from the bar. A. R. At 162. The Investigating Officer got behind the Jeep and observed that the vehicle made a wide radius turn onto Bunner's Ridge Road off 73 north and almost going into the opposite lane. A.R. at 157, 163. The Investigating Officer observed improper driving. A.R. at 202. The Investigating Officer marked "turning with wide radius" on the DUI Information Sheet. A.R. at 124, 163-164. The Investigating Officer testified that because it was an intersection, there was no double yellow line, but if there had been, the vehicle "would have been in the opposite lane." A. R. at 204.

At 2:35 a.m., the Investigating Officer stopped the vehicle on Bunner's Ridge at the Mom and Pop Mart. A.R. at 124. The stop was made approximately 10 minutes after the Investigating Officer had told Ms. Walker and the Respondent to sit in the car until they sobered up. A.R. at 165, 174. The Investigating Officer observed that the Respondent was driving Ms. Walker's Jeep, and the Respondent testified at the hearing that he was driving the vehicle. A.R. at 217.

Upon contact with the Respondent, the Investigating Officer smelled the odor of an alcoholic beverage on the Respondent's breath. The Respondent stated that he was trying to do Ms. Walker a favor and get her home; however, they were not going in the direction of her home. A.R. at 157, 164. The Investigating Officer observed that his eyes were bloodshot. The Respondent was unsteady while exiting the vehicle and held on to the vehicle. The Respondent was unsteady while walking to the roadside and while standing. The Respondent had slurred speech. The Respondent advised the Investigating Officer, "I only had a couple." A.R. at 125, 165-168.

The Investigating Officer administered the horizontal gaze nystagmus test to Respondent. His eyes showed a lack of smooth pursuit, exhibited onset of nystagmus prior to an angle of 45

degrees, and displayed distinct nystagmus at maximum deviation. The Respondent had a decision point score of six, and he failed this test. A.R. at 125, 168-169.

On the walk-and-turn test, Respondent stopped while walking, missed heel to toe several times and made an improper turn by turning around twice. The Respondent had a decision point score of three, and he failed this test. A.R. at 125, 170-171.

While performing the one-leg-stand test, the Respondent swayed while balancing, and used his arms for balance and put his foot down several times. He denied having any problems that would prevent him from standing on one foot at a time. He failed this test. A.R. at 126, 171-172.

The Investigating Officer had reasonable grounds to believe the Respondent had been driving under the influence of alcohol. A.R. at 182. He transported the Respondent to the Marion County Sheriff's Department, where he read him the Implied Consent Statement, had him sign it and provided him with a copy. A. R. At 127, 174. The Investigating Officer was trained at the West Virginia State Police Academy to administer secondary chemical tests of the breath and has been certified as a test administration by the West Virginia Department of Health since August 24, 2008. A.R. 127, 177. The Investigating Officer attempted three times to administer the secondary chemical test of the breath. The Respondent provided an insufficient sample to register a test result. A.R. at 123, 127, 175.

In a post-arrest interview, the Respondent admitted that he was driving Ms. Walker's vehicle; that he was going to his hotel room; that he had been hanging out for the last three hours; that he had been drinking and consumed two beers; and that he had a tendon tear. He also stated that he was taking Tramadol. When the Respondent was asked what date it was, he replied August 17, 2010

when in fact the date was August 18, 2010. When asked what time it was, the Respondent replied that it was 3:15 a.m., when the correct time was 3:37 a.m. A.R. at 128, 179-181.

An administrative hearing was timely requested and subsequently convened on July 29, 2011. A *Final Order Findings of Fact and Conclusions of Law* was entered by the Office of Administrative Hearings (hereinafter, "OAH") on August 18, 2014 which affirmed the revocation of Respondent's driver's license. A.R. at 267-278.

The Respondent, by counsel, subsequently filed a *Petition for Judicial Review* in the circuit court of Monongalia County.

On April 22, 2015, the circuit court entered an *Order*, by which it reversed the order of the OAH. A.R. at 3-11.

#### **SUMMARY OF ARGUMENT**

The circuit court erred in finding that there was no reasonable suspicion for the stop of the vehicle being driven by the Respondent. In doing so, the lower court mischaracterized and omitted evidence regarding the stop. It ignored the Investigating Officer's knowledge of the intoxication of the Jeep's occupants at the bar; and it explained away, rather than accepting as undisputed fact, that the Respondent made a wide right turn. Contrary to the circuit court's standard of review of an agency order, the court did not find that the conclusions of the factfinder were clearly wrong or patently without basis in the record. Without explanation, the circuit court ignored the OAH's credibility determinations and overturned the factfinder's decision simply because the circuit court would have decided the case differently. The circuit court effectively gave the Respondent a *de novo* hearing, rather than performing its duty to analyze the decision of the agency which made factual and legal determinations after hearing the evidence.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; and that this case involves a result against the weight of the evidence.

### ARGUMENT

#### I. Standard of Review

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code § 29A-5-4(a). The Court reviews questions of law presented *de novo*; and findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Reed v. Hall*, No. 14-0342, 2015 WL 3385462, at \*4 (W. Va. May 22, 2015). "In cases where the circuit court has [reversed] the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

#### II. **The Circuit Court Erred in Finding That the There Was No Reasonable Suspicion for the Stop When the Investigating Officer Had Encountered the Individuals Who Owned and Drove the Jeep Ten Minutes Earlier, and the Investigating Officer Observed the Jeep Making a Right Turn and Almost Going in to the Opposite Lane Before He Stopped the Vehicle.**

The circuit court ignored the facts of the case in finding that the Investigating Officer lacked reasonable suspicion to stop the vehicle being driven by the Petitioner. The OAH's Final Order correctly found as fact that "The Investigating Officer recognized the vehicle as the Jeep that he had just told the occupants not to drive about 10 minutes before," and "The Investigating Officer ...observed it turn with a wide radius onto Bunner's Ridge Road." A.R. at 107. The OAH Hearing

Examiner concluded that there were reasonable grounds for the Investigating Officer to initiate a traffic stop. A.R. at 119.

The circuit court provided no reason for failing to give deference to the findings of the Hearing Examiner. This Court has held, “Our cases have ‘recognized that credibility determinations by the finder of fact in an administrative proceeding are binding unless patently without basis in the record.’ *Webb v. West Virginia Bd. of Medicine*, 212 W.Va. 149, 156, 569 S.E.2d 225, 232 (2002) (internal quotations and citation omitted). That is, ‘[c]redibility determinations made by an administrative law judge are ... entitled to deference.’ Syl. pt. 1, in part, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).” *Dale v. McCormick*, 231 W. Va. 628, 635, 749 S.E.2d 227, 234 (2013). *See also, Plumley v. Miller*, No. 101186, slip op. at 2 (W. Va. Feb. 11, 2011)(Memorandum Decision)(“...findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.’ Syl.Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996)”; Syl. Pt. 6, *Dale v. Veltri*, 230 W. Va. 598, 741 S.E.2d 823 (2013)(“Credibility determinations made by an administrative law judge are ... entitled to deference.” Syl. Pt. 1, in part, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000)).

A court can only interfere with administrative 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). “[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (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. Director, Div. of*

*Envtl. Prot.*, 191 W.Va. 134, 443 S.E.2d 602 (1994).” Syl. Pt. 2, *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014). “This Court has recognized that credibility determinations by the finder of fact in an administrative proceeding are ‘binding unless patently without basis in the record.’” *Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). In other words, an appellate court may only conclude a fact is clearly wrong when it strikes the court as “wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’” *Brown*, 196 W. Va. at 563, 474 S.E.2d at 493 (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir.1993)).

In the *Order*, the circuit court provided no reasons for finding the Final Order was “clearly wrong,” and did not elucidate the reasons for which it found that the OAH’s findings were “patently without basis in the record.” Rather, it appears that the circuit court simply “would have decided the case differently,” and, contrary to *Brown v. Gobble, supra*, it did. This is an improper substitution of judgment in a case in which the circuit court can only reverse the factfinder if there is no basis for the fact finder’s decision.

The *Order* is comprised of the Respondent’s version of the facts and the arguments he made at the administrative hearing and demonstrates that the court had no legitimate bases for reversing the OAH. For example, in the Findings of Fact, the court noted, “There is contradicting testimony as to whether the officers gave the driving instructions to Ms. Walker, only, or to both Ms. Walker and Mr. Aiken.” A.R. at 5. The OAH reconciled this evidence specifically in its order: “In addressing the Petitioner’s testimony that the Investigating Officer did not tell him not to drive, the Hearing Examiner must question why he waited around for ten minutes before driving...the

Petitioner's testimony is self-serving." A.R. at 111. The circuit court gave no reason for overturning the OAH's credibility determination.

The circuit court completely ignored its standard of review. Without stating that the OAH's findings were clearly wrong, the court proceeded to analyze the facts *de novo*: "Just like the Courts in *O'Dale* [sic] and *Clower*, this Court will evaluate whether there was reasonable suspicion to stop the Jeep..." A.R. at 8. A recitation of the Respondent's defenses ensued: the Respondent did not have anything to do with the domestic altercation at the bar; the Investigating Officer stated that he knew the Respondent was drunk even though he did not observe him drinking and did not perform field sobriety tests at the bar; the Investigating Officer only told Ms. Walker, and not Respondent, not to drive (tellingly, posing the question, "How could this Court make such a determination?" (A.R. at 9) when the answer is, it does not need to make that determination; it need only determine whether the OAH's findings and conclusions were clearly wrong); and the Investigating Officer could not see who was driving the Jeep. A.R. at 9-10. At no point did the circuit court recite that which the OAH found, and state why it was clearly wrong. The proceeding in the circuit court was effectively a *de novo* proceeding, like that before the OAH, which the Respondent won.

Both state and federal law support the OAH's finding that the stop in this case was lawful. In *Navarette v. California*, — U.S. —, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014), the United States Supreme Court reiterated established principles regarding investigatory stops: "The Fourth Amendment permits brief investigatory stops ... when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Id.* at 1687 (internal citation omitted). The Court further explained: "The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its

degree of reliability.’ The standard takes into account ‘the totality of the circumstances—the whole picture.’ ” *Id.* (internal citations omitted). A traffic stop is constitutional where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed. “Detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 659, 99 S.Ct. 1391, 1399, 59 L.Ed.2d 660.” *Whren v. United States*, 517 U.S. 806, 806, 116 S. Ct. 1769, 1771, 135 L. Ed. 2d 89 (1996).

This Court has held that under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution, “[p]olice 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. “It is beyond dispute, and dictated by common sense, that a law enforcement officer may investigate illegal activity that he or she personally has observed, so long as the officer’s suspicion of illegal activity is objectively reasonable.” *Miller v. Chenoweth*, 229 W. Va. 114, 120, 727 S.E.2d 658, 664 (2012).

Erratic driving may not only provide reasonable suspicion for a stop; it may also be evidence of driving under the influence. “This evidence of erratic driving does not go just to the issue of whether the traffic stop was justified; it is also evidence that Mr. Hill was driving while under the influence.” *Reed v. Hill*, 770 S.E.2d 501, 511 (W. Va. 2015).

The Investigating Officer’s encounter with the Respondent at the bar, where he observed the vehicle in which he and Ms. Walker had arrived, and observed that they were intoxicated, gave him relevant information to use in his determination to stop the vehicle when he saw it being driven 10

minutes later. More importantly, the Investigating Officer observed erratic driving: the Respondent made a wide right turn which would have been in the opposite lane had the road been marked. There was reasonable suspicion for the stop.

Erratic driving provides reasonable suspicion for the stop of a vehicle. “Weaving across the lane markers into another traffic lane” *State v. Gustafson*, 258 So.2d 1, 2 (Fla.1972), *aff’d* 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973) and an “erratically driven vehicle” *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980), n. 4 have been held to constitute reasonable suspicion. *State v. Flint*, 171 W. Va. 676, 681, 301 S.E.2d 765, 770 (1983). “The criteria for reasonable suspicion to stop a vehicle are very similar to a street stop under *Terry*. Factors such as erratic or evasive driving, the appearance of the vehicle or its occupants, the area where the erratic or evasive driving takes place, and the experience of the police officers are significant in determining reasonable suspicion.” *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518, 526 (1996). In the present case, the totality of the circumstances known by the Investigating Officer gave rise to his reasonable suspicion to stop the vehicle being driven by the Respondent.

The circuit court further erred in finding as fact (No. 16) that the Magistrate dismissed the criminal matter because there was no reasonable suspicion for the stop. Although counsel for the Respondent argued and questioned the Investigating Officer about the determination of the Magistrate, he in fact adduced no evidence of the basis for the outcome of the criminal proceeding. Counsel also attached the finding of the Magistrate to a letter to the Office of Administrative Hearings, and it thereby made it into the Appendix Record (A.R. at 83); however, the Magistrate’s order was never admitted into evidence.

The criminal outcome has no effect on the administrative proceeding: "...when a criminal action for driving while under the influence in violation of W. Va. 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 W. Va. 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." *Miller v. Epling*, 229 W. Va. 574, 581, 729 S.E.2d 896, 903 (2012).

In this case, the revocation of Respondent's driver's license is supported by the record.

### CONCLUSION

WHEREFORE, based upon the foregoing, the Petitioner hereby respectfully requests that the OAH's *Final Order Findings of Fact and Conclusions of Law* be affirmed.

**Respectfully submitted,**

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

**By counsel,**

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**Respondent.**

**CERTIFICATE OF SERVICE**

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing Petitioner's Brief was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 24th day of August, 2015, addressed as follows:

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