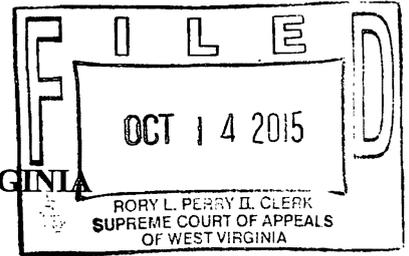


NO. 15-0437

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 REPLY BRIEF**

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**I. THERE IS NO BASIS FOR RECISION OF A LICENSE REVOCATION ON THE BASIS OF COLLATERAL ESTOPPEL.**

There is no basis for rescinding the Respondent's license revocation on the basis of collateral estoppel due to the dismissal of the case by the Marion County Magistrate. The circuit court made one finding of fact (Number 16) that the Magistrate dismissed the charges against the Respondent "on the grounds that Deputy Jonathan S. Carter did not have reasonable suspicion to stop his vehicle." A.R. at 6. No further mention of the dismissal is made throughout the *Order*, therefore it does not appear to be a basis for reversal of the Office of Administrative Hearings' ("OAH") *Final Order Findings of Fact and Conclusions of Law*. Therefore, the Petitioner did not assign this ground as error.

This Court has held that it is improper for a party to raise a new issue on appeal. "The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom. *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W.Va. at 226, 438 S.E.2d at 18." *Barney v. Auvil*, 195 W. Va. 733, 742, 466 S.E.2d 801, 810 (1995). As the Respondent concedes, the Petitioner was not present at the Magistrate Court proceeding. Further, the Division of Motor Vehicles is not "in privity" with police officers. The Respondent is attempting to use the proceedings held before the Magistrate Court as evidence in the present case, when in fact evidence was taken at the administrative hearing and the matter was decided on that evidence. There is no

basis for the OAH to use criminal proceedings to determine an administrative license revocation matter.

The Court extensively analyzed the bases for keeping the criminal and administrative processes for the same offense segregated in *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012), concluding: “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. 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).” 229 W. Va. 581, 729 S.E.2d 903.

The Respondent argues, essentially, that *Epling* is not retroactive and is therefore inapplicable to this case. The *Epling* opinion was silent as to retroactivity. However, perhaps somewhat ironically, the *Choma* decision provides the answer: “...this Court has the opportunity to clarify the prospectivity statement in *Choma*. Based upon the foregoing analysis, we conclude that prospectivity, within the context of the responsibilities imposed upon the commissioner by *Choma*, permits the *Choma* decision to be applied in any judicial determination of administrative license revocation made after the date of *Choma* 's filing, November 28, 2001. This would include a case in which the operative facts occurred prior to November 28, 2001, where (1) the commissioner had not yet rendered a decision; or (2) a direct appeal of that decision is pending. We predicate our holding upon our conclusion that this Court's use of the term “prospective” in *Choma* indicated an intent to apply the requirements enunciated in that opinion to all cases in which administrative

license revocation determinations had not been finalized at the time of *Choma*'s issuance, November 28, 2001.” *Adkins v. Cline*, 216 W. Va. 504, 513, 607 S.E.2d 833, 842 (2004).

Clearly, the OAH’s reliance on *Epling* was proper because the administrative license revocation determination was not finalized at the time of *Epling*’s issuance. “Retroactivity of an overruling decision is designed to provide equality of application to the overruling decision because its new rule has been consciously designed to correct a flawed area of the law.” *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 349, 256 S.E.2d 879, 889 (1979). Interestingly, one of *Bradley*’s criteria for determining retroactivity is whether the new rule was clearly foreshadowed.

In this case, it was:

We observe that Syllabus Point 3 of *Choma* would appear to conflict with this Court's time-honored precedent stating “[i]t 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). In view of our disposition of this issue herein, we need not now consider the continued viability, if any, of Syllabus Point 3, of *Choma*. See also *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978).

*Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010), n. 12. The OAH properly relied on *Epling* to find that the dismissal of the charges against the Petitioner did not warrant rescission of his license revocation.

Finally, even under *Choma v. West Virginia Div. of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001), the Hearing Examiner considered the evidence regarding the criminal proceeding and still found that there was sufficient evidence to show that the Respondent was DUI. A.R. at 274-75.

**II. THE INVESTIGATING OFFICER HAD REASONABLE SUSPICION TO STOP THE VEHICLE DRIVEN BY THE RESPONDENT.**

The record does not reflect the reason for which the Investigating Officer “did not object” to the findings of the Magistrate Court that he had no reasonable suspicion for the stop. Resp. Brf. At 11. As argued *supra*, the Petitioner was not a party to that proceeding and has no transcript or other documentation of that proceeding, and is unfairly compromised by having to respond to the criminal proceedings.

The evidence of record in the present case shows that the Investigating Officer had reasonable suspicion to stop the vehicle being driven by the Respondent. He testified, “...we made contact with the Defendant here and a Shannon Walker there and a few witnesses at the domestic. We knew that they had been intoxicated.” A.R. at 156. After taking someone home, approximately ten minutes later (A.R. at 165, 173-74), “On the way back, about a quarter mile from Cindy’s Bar I observed a Jeep Cherokee pass me, and it was the vehicle that was at Cindy’s Bar. If you will recall, I had told the Defendant and Shannon not to drive away.” A.R. At 157. The Investigating Officer then observed that the Respondent “made a large right turn, a wide radius turn onto Burns Ridge Road.” A.R. at 157.

The fact that the Investigating Officer did not object to the decision made by the Magistrate (A.R. at 188) does not vitiate the evidence adduced in this case. The Investigating Officer testified that the Respondent and Shannon Walker were intoxicated, he saw the car they got into at the bar, and he recognized the car when he saw it on the road ten minutes later. He then observed the Respondent make a wide radius turn. The totality of the circumstances supports that the Investigating Officer had reasonable suspicion to stop the vehicle and to arrest the Respondent for DUI.

**CONCLUSION**

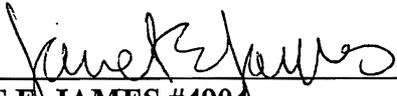
Based upon the foregoing, the Petitioner hereby respectfully requests that the *Order* of the circuit court of Monongalia County be reversed and the license revocation of the Respondent be reinstated.

**Respectfully submitted,**

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

**By counsel,**

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**CERTIFICATE OF SERVICE**

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing Petitioner's Reply 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 14th day of October, 2015, addressed as follows:

J. Bryan Edwards, Esq.  
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JANET E. JAMES