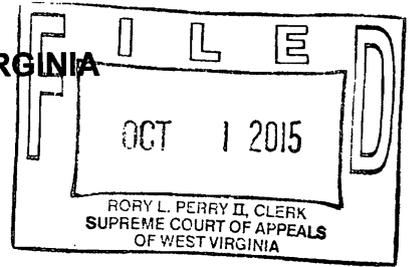


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

**Petitioner,**

**v.**

**NO. 15-0437**

**Response to Petition for  
Appeal from a final order of the  
Circuit Court of Monongalia  
County  
(Civil Action No. 14-AA-3)**

**MATTHEW P. AIKEN,**

**Respondent.**

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**RESPONDENT'S BRIEF**

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**The Petitioner’s appeal should be barred under the principle of collateral estoppel. Even if the appeal is not barred, the circuit court’s reversal of the decision of the Office of Administrative Hearings (OAH) should be affirmed. The circuit court properly exercised its authority under W. Va. Code 29A-5-4 and properly concluded that the arrest of the Respondent was illegal because there was no reasonable suspicion for the vehicular stop.**

- I. The Petitioner’s appeal should be barred under the principle of collateral estoppel because the Marion County Magistrate Court ruled that there was no reasonable suspicion to stop the vehicle driven by the Respondent. ....6**
  
- II. The circuit court properly concluded that the arrest of the Respondent was not lawful because there was no reasonable suspicion for the vehicular stop which rendered the subsequent arrest unlawful and that the OAH was clearly wrong in finding otherwise. ....8**

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## STATEMENT OF THE CASE

In the early morning hours of August 18, 2010, the Respondent was at Cindy's Bar in Marion County, West Virginia with a female companion, Shannon M. Walker. Apparently, Deputy Jonathon S. Carter and Corporal Love of the Marion County Sheriff's Department were called to Cindy's Bar for a domestic dispute between two other individuals (i.e., not involving the Respondent or Ms. Walker). Appendix Record at 156 (hereinafter, "A. R. at 156"). Ms. Walker and the Respondent were outside of Cindy's Bar when the officers arrived.

While the officers were dealing with the domestic incident, Ms. Walker was yelling that someone had taken the keys to her vehicle, a 2002 Jeep. According to his testimony, Deputy Carter talked with Ms. Walker about the situation, however, he had limited contact with the Respondent. In fact, Deputy Carter testified that the Respondent was just sitting there watching what was going on. (A. R. at 190). Deputy Carter testified that while he was at Cindy's Bar he did not see the Respondent consume any alcohol. (A. R. at 190).

Although still dealing with the domestic issue, Deputy Carter was able to locate Ms. Walker's keys and gave them back to her. Deputy Carter did not conduct any field sobriety tests on Ms. Walker or the Respondent. (A. R. at 190). Deputy Carter testified that when he gave the keys back to Ms. Walker, he asked her and the Respondent to sit in Ms. Walker's vehicle and sober up before driving and gave her water to drink. (A. R. at 161).

Deputy Carter claims that he made the statement to both Ms. Walker and the Respondent. However, the Respondent adamantly denies that Deputy Carter made such comment to him. In fact, the Respondent did not recall talking with Deputy Carter.

Sometime thereafter, Deputy Carter decided to take one of the parties who was involved in the domestic issue home. After leaving Cindy's Bar and taking said person home, Deputy Carter observed a Jeep pass him that he believed to be Ms. Walker's. Deputy Carter was unable to see who was driving.

Deputy Carter turned around to follow the Jeep. The record is unclear how long he followed the Jeep. While following, Deputy Carter testified that he observed the vehicle make a wide right turn onto Burns Ridge Road.(A. R. at 188). Where Deputy Carter observed the purported wide turn, there is no line dividing the roadway. (A. R. at 204). The Jeep did not run off the roadway. Id.

Deputy Carter proceeded to follow the Jeep, for approximately another quarter (1/4) mile. *During this time, he saw no inconsistent or improper driving.* (A. R. at 205). *(Emphasis Added)* The Respondent denied any improper driving prior to being stopped by Deputy Carter. (A. R. at 209). Nevertheless, Deputy Carter initiated a traffic stop.

The Respondent was driving the Jeep and Ms. Walker was a passenger. Deputy Carter testified that he smelled a strong odor of alcohol when he walked up to the Jeep and asked the Respondent to exit the vehicle. The Respondent informed Deputy Carter that he only had a couple of beers. Deputy Carter administered the following field sobriety tests: HGN, Walk and Turn, and One Leg Stand.<sup>1</sup>

Regarding the HGN test, the test should not have been considered by Deputy

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<sup>1</sup> The Respondent contends that because he was unlawfully stopped, and evidence including the results of any field sobriety tests must be excluded and should not be considered by any Court. Without waiving any such argument, the Respondent addresses the field sobriety tests because they are referenced in the Petitioner's Brief. The Respondent further maintains that any such evidence is irrelevant considering the circuit court's ruling.

Carter. The medical assessment of the Respondent's eyes indicated resting nystagmus which is an indicator that the Petitioner was not a viable candidate for the test.

Regarding the Walk and Turn test, Deputy Carter incorrectly counted every time the Respondent purportedly missed heel to toe as a decision point. Further, there was no line on the ground for the Respondent to walk on. (A. R. at 197). The Respondent took the correct number of steps and never raised his arms for balance. Id.

Regarding the One Leg Stand, the Respondent did indicate that he had a tendon injury to his left foot. It was the testimony, that he informed Deputy Carter of his injury. According to the DUI Information Sheet and Deputy Carter, no preliminary breath test was offered or given to the Respondent. (A. R. at 198). Notwithstanding the foregoing, the Respondent was placed under arrest for DUI and transported to the Marion County Sheriff's Office for further processing.

At the Office, the Intoximeter was administered. The Respondent blew into the Intoximeter three (3) times but the machine registered insufficient samples. Deputy Carter believed that the Respondent was trying to give a sample, and did not regard the insufficient samples as a refusal. (A. R. at 201). Deputy Carter never did any further investigation or testing on the machine to see if there was a problem with the machine. Id. Throughout the entire process, the Respondent was cooperative and had no problem answering questions. (A. R. at 199 - 200).

Subsequently, the Respondent was charged with the criminal offense of driving under the influence of alcohol. The Respondent was not issued a citation or charged with any other driving offense. (A. R. at 188). The Respondent denies being under the influence of alcohol. (A. R. at 211).

On February 24, 2011, a hearing was held before Magistrate Cathy L. Reed-Vanta on the Respondent's Motion to Dismiss for lack of reasonable suspicion to stop the Jeep. (A. R. at 81-83). At the hearing, the State of West Virginia was represented by its Assistant Prosecuting Attorney, Eric Wildman, and Deputy Carter was also present. Deputy Carter testified regarding the stop. After considering the testimony of Deputy Carter and the arguments of counsel, Magistrate Vanta dismissed the case finding that there was no reasonable suspicion for the stop. (A. R. at 187).

Importantly, at the administrative hearing held in this case, regarding the Respondent's driving privilege, Deputy Carter stated that he did not have any objection to Magistrate Vanata finding that there was no reasonable suspicion for the stop. Deputy Carter testified at the administrative hearing:

**Q As you sit here today, did you have any objection to that finding?**

**A No**

(A. R. at 188).

Despite this testimony and the substantial evidence to the contrary, the OAH found that Deputy Carter had reasonable grounds to initiate a traffic stop, that the Petitioner was lawfully arrested for driving under the influence of alcohol, and affirmed his license revocation. The Final Order was entered on August 18, 2014, **more than four (4) years** from the institution of the proceedings.

On September 3, 2014, the Respondent filed a Petition for Judicial Review of the Final Order of the OAH. The Circuit Court, by order dated April 22, 2015, reversed the

decision of the OAH. (A. R. at 3-11). The West Virginia Department of Motor Vehicles appeals this decision.

### **SUMMARY OF ARGUMENT**

**The Petitioner's appeal should be barred under the principle of collateral estoppel because the Marion County Magistrate Court ruled that there was no reasonable suspicion to stop the Jeep driven by the Respondent.**

**The Circuit Court properly concluded that the arrest of the Respondent was not lawful because there was no reasonable suspicion for the vehicular stop which rendered the subsequent arrest unlawful and that the OAH was clearly wrong in finding otherwise.**

### **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is unnecessary because the dispositive issue has been authoritatively decided by the Legislature and by this Court, by the statutes and decisions cited herein, and because the legal arguments are adequately presented in this brief. Accordingly, the decisional process would not be significantly aided by oral argument, as it is clear that West Virginia law dictates a finding for the Respondent. This case is appropriate for memorandum decision. However, the Respondent welcomes the opportunity to appear for argument if the Court deems it necessary.

## ARGUMENT

- I. **The Petitioner's appeal should be barred under the principle of collateral estoppel because the Marion County Magistrate Court ruled that there was no reasonable suspicion to stop the Jeep driven by the Respondent.**

Collateral estoppel and/or issue preclusion applies when four elements are met: (1) the issue previously decided is identical to the one in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party; and (4) the party against whom the doctrine is raised has a fair opportunity to litigate the issue in the prior action. State v. Miller, 459 S.E.2d 114 (W. Va. 1995). The Respondent asserts that all four elements are established.

Regarding the first element, on February 24, 2011, some four (4) months prior to the administrative hearing in this matter, the Respondent, by counsel, filed a motion to dismiss the criminal case asserting that there was no reasonable suspicion for the stop of the Jeep driven by the Respondent. This is the same issue currently being litigated by the West Virginia Department of Motor Vehicles based upon Deputy Carter's institution of the DUI administrative case. A hearing was held before Magistrate Cathy L. Reed-Vanata in the Magistrate Court of Marion County. The State of West Virginia was represented by Assistant Prosecuting Attorney Wildman. Deputy Carter was present and testified as to the grounds for the stop. Magistrate Vanata, after considering the arguments of counsel and the testimony of Deputy Carter, granted the motion to dismiss and found that Deputy Carter did not have a reasonable suspicion to pull over and detain the Respondent.

Regarding the second element, in light of Magistrate Vanata's finding, an order was

entered dismissing the criminal charge. The State of West Virginia, through the Marion County Prosecuting Attorney, chose not to appeal that Order. Consequently, a final adjudication was made in the case.

Regarding the third element, although the DMV was not present at said hearing, Deputy Carter, whom the DMV is in privity with, was present at the hearing, and had a full opportunity to be heard prior to the judicial determination. Consequently, the third element is satisfied.

Regarding the fourth element, as noted above, the DMV is in privity with Deputy Carter. Deputy Carter had the benefit of the assistant prosecuting attorney to assist in the presentation of his position regarding the legality of the stop. Accordingly, Deputy Carter had the opportunity to fully litigate this issue. Consequently, the fourth element is met.

Considering the foregoing, the principle of collateral estoppel is applicable to this case and bars the instant appeal. This remedy is appropriate to prevent re-litigation of the issue at hand which has been finally decided by a court of competent jurisdiction (i.e., the Magistrate Court of Marion County).<sup>2</sup>

As reflected in the Petitioner's brief, the DMV disregards the preclusive effect of the Magistrate Court's ruling under *Miller v. Epling*, 229 W.Va. 574 (2012). In *Epling*, which was decided after the Petitioner's administrative hearing,<sup>3</sup> stated that a dismissal or acquittal in a criminal proceeding has no weight in a subsequent proceeding to revoke a person's

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<sup>2</sup> It should be noted that the Monongalia County Circuit Court also reached the same conclusion as the Marion County Magistrate Court.

<sup>3</sup> See, *Choma v. West Virginia Div. of Motor Vehicles*, 210 W.Va. 256 (2001)(stating that dismissal or acquittal of a criminal charge is to be given substantial weight in administrative proceedings) overruled by *Epling*.

driver's license. However, the *Epling* decision, was primarily based on the observation that the burden of proof necessary to obtain a criminal conviction is much higher than the burden of proof necessary to prevail in a civil proceeding such as a license revocation.

In this regard, the burden of proof analysis articulated in *Epling* is inapplicable to the issue at hand because the State of West Virginia had a lower burden of proof to show that the Deputy had "reasonable suspicion" for the stop at the pre-trial hearing on the motion to dismiss in the criminal case compared to that required at the OAH hearing. With regard to the pre-trial motion to dismiss in the criminal case, the State was required to establish by a preponderance of the evidence that there was reasonable suspicion for the stop; however, all inferences were required to be considered in the light most favorable to the State. Even with all inferences going in the State's favor, the State of West Virginia and Deputy Carter could not establish that there was a reasonable suspicion for the stop in the criminal proceeding. Since the DMV is not entitled to have all inferences made in its favor, like the State in the criminal case, it is held to a more stringent standard of proof. Accordingly, *Epling* should not be applicable in this case. The Magistrate Court's ruling should collateral estop the DMV from re-litigating this issue.

**II. The Circuit Court properly concluded that the arrest of the Respondent was not lawful because there was no reasonable suspicion for the vehicular stop which rendered the subsequent arrest unlawful and that the OAH was clearly wrong in finding otherwise.**

The Respondent was arrested for driving under the influence of alcohol on August 18, 2010. Under the applicable statute, W. Va. Code §17C-5A-2(f)(2010), it is well established that a person cannot be considered lawfully arrested for DUI, as a

prerequisite to the administrative revocation of the person's driver's license, unless the underlying traffic stop was legally valid. Dale v. Ciccone, 760 S.E.2d 466 (W. Va. 2014); Dale v. Barnhouse, 727 S.E.2d 658 (W. Va. 2012); Clower v. West Virginia Department of Motor Vehicles, 678 S.E.2d 41 (W. Va. 2009)<sup>4</sup>. Moreover, any evidence collected during an unlawful stop is to be excluded and not to be considered by the OAH or the circuit court in appeals involving one's driver's license. Id. Moreover, in order for there to be a lawful stop to investigate, police officers must 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. State v. Stuart, 452 S.E.2d 886 (W. Va. 1994). Reasonable suspicion exists by virtue of the totality of the circumstances known by the police, in terms of both quantity and quality of the information. Id.

Applying the above referenced law, the Circuit Court correctly found that the OAH improperly revoked the Respondent's license for driving under the influence of alcohol because there was no reasonable suspicion for the stop under the totality of the circumstances. The OAH's decision was not supported by substantial evidence or a rational basis and was clearly wrong because the quantity and quality of information available to Deputy Carter did not give him reasonable suspicion for the stop.

Deputy Carter was at Cindy's Bar for a domestic issue that did not involve the Respondent or his female companion, Ms. Walker. By his own admission, Deputy Carter had limited interaction with the Respondent at Cindy's Bar and failed to give any basis for

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<sup>4</sup> This case was superseded by statute. 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.

his claim that he knew the Respondent and his female companion, Ms. Walker, were intoxicated. Moreover, the record does not indicate that Deputy Carter had any specific basis for believing that the Respondent was intoxicated. Although Deputy Carter had some contact with Ms. Walker, he found Ms. Walker's Jeep keys and gave them to her. Deputy Carter did not, at any time, tell Ms. Walker or the Respondent to not drive the Jeep. Instead, Deputy Carter claims that he told Ms. Walker and the Respondent to sit in the Jeep and sober up before she drove. The Respondent denies that Deputy Carter told him this or that he heard this statement to Ms. Walker. Nevertheless, it does not matter. Deputy Carter's act of giving the Jeep keys to Ms. Walker and telling her to stay in her Jeep until she sobers up, is wholly inconsistent with his claim that he knew she and the Respondent were intoxicated. If Deputy Carter truly believed that Ms. Walker or the Respondent was intoxicated and unable to drive, he would not have given her the keys and had her sit in her vehicle. It is only logical to believe that Deputy Carter, if he truly believed that Ms. Walker or the Respondent was intoxicated, would have told them not to drive and find another way home. The Circuit Court correctly saw the irrationality of this situation.

Furthermore, Deputy Carter, after driving one of the parties to the domestic incident home, claims that he passed the Jeep that he believed was Ms. Walker's traveling on the roadway. He could not tell who was driving. Nevertheless, Deputy Carter turned around and followed the Jeep for some distance. During this time, Deputy Carter asserts that he observed the Jeep make a wide right turn onto Burns Ridge Road. The Jeep did not cross a center line or run off the road. Whether the vehicle could have crossed over had there been a double yellow line on the road is irrelevant, as there was no such marking. There was no citation ever issued to the Respondent for the purported wide turn. After observing

the purported wide turn, Deputy Carter followed the Jeep for a quarter mile and observed no erratic driving.

Considering the totality of the circumstances, in both the quantity and quality of the information, it is clear that Deputy Carter did not have an articulable reasonable suspicion that the Jeep's occupants either had committed or were committing a crime.

Additionally, Deputy Carter's testimony at the OAH hearing regarding the dismissal of the criminal charge should be given considerable weight. He testified that even at the time of the hearing, he did not object to the finding of the Magistrate Court that there was no reasonable suspicion for the stop. In practicality, this testimony is evidence that Deputy Carter believes that he did not have reasonable suspicion for the stop.

Altogether, the Circuit Court's reversal of the OAH's revocation of the Respondent's driving privilege should be affirmed because the Circuit Court properly concluded that the OAH was clearly wrong in finding that the stop and arrest of the Respondent was legal.

### **CONCLUSION**

WHEREFORE, based upon the foregoing, and the Respondent's prior pleadings in this matter, the Respondent respectfully requests that the Circuit Court's Order be affirmed and that the OAH's Final Order Findings of Fact and Conclusion of Law be reversed.

Respectfully submitted,

Respondent,

By Counsel.



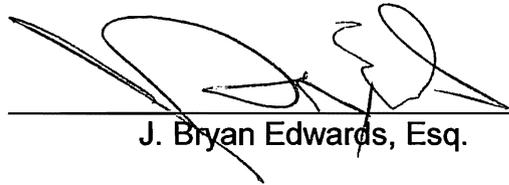
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**CERTIFICATE OF SERVICE**

I, J. Bryan Edwards, do hereby certify that on the 29<sup>th</sup> day of September, 2015, I mailed a true and exact copy of the RESPONDENT'S BRIEF to the following parties of record, via U. S. Mail, postage pre-paid, and addressed as follows:

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