

15-0971

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

PAMELA HAYNES,
Petitioner,

2015 AUG 27 AM 10:30

v.

Civil Action No. 14-AA-96
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
WHM

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

**FINAL ORDER GRANTING THE WRIT OF PROHIBITION EXCLUDING THE
PREVIOUS OFFENSE, AFFIRMING THE DECISION BELOW, AND REMANDING
BACK FOR THE PURPOSE OF RECONSIDERING THE ADMINISTRATIVE
PENALTY**

Before the Court is Petitioner Pamela Haynes's *Petition for Appeal* of the revocation of her driving privileges in the State of West Virginia. The Petitioner is appealing the decision of the Office of Administrative Hearings ("OAH") affirming the Commissioner's Order of Revocation, which revoked Petitioner's driving privileges for driving under the influence ("DUI"). Additionally, Petitioner is appealing the enhancements of her sanctions due to a previous DUI. Petitioner alleges the following errors in the decision below:

1. The DUI checkpoint was improperly conducted, as no notice of the checkpoint was provided on the roadway so that motorists could choose an alternate route to avoid said checkpoint.
2. No proper evidence was introduced to document that the secondary chemical testing device was designated by the City of Charleston or approved in writing for use by the Bureau of Health as required by law.
3. No proper evidence was introduced showing that the officer who performed the secondary chemical test was certified by the Bureau of Health.

4. Petitioner was denied her due process rights in an earlier DUI revocation as notice was mailed to an address form which she had moved. Significantly, all records from that prior arrest document that she had an Ohio driver's license at the time of that arrest.

FACTUAL AND PROCEDURAL HISTORY

A. The second DUI occurring on May 3, 2012

1. On May 3, 2012, Lieutenant T. S. Williams was the Highway Safety Director of the Charleston Police Department and was responsible for setting up, administering, and conducting sobriety checkpoints.
2. Lieutenant Williams testified that the Charleston Police Department Traffic Division Sobriety Checkpoint Operation Plan for the May 3, 2012 sobriety checkpoint was completed by him and at his direction, and led to the arrest of Pamela Haynes, the Petitioner in this matter.
3. The May 3, 2012 sobriety checkpoint was conducted in the 2600 block of Route 21/Sissonville Drive, Charleston, Kanawha County, West Virginia.
4. Lieutenant Williams testified that upon his approval and prior to the sobriety checkpoint briefing, his secretary makes multiple copies of the Sobriety Checkpoint Operation Plan for placement in the DUI booking trailer for the officers to attach to the DUI Information Sheets.
5. The signature list of the officer who participated in the May 3, 2012 sobriety checkpoint was admitted as Respondent's Exhibit No. 2 and includes Corporal Kevin Oldham, the Investigating Officer in this matter.

6. Lieutenant Williams verified that he completed the Charleston Police Department Traffic Division Sobriety Checkpoint Operation Plan and testified that the sobriety checkpoint policy was followed during the May 3, 2012 sobriety checkpoint.
7. Lieutenant Williams testified that it is the Charleston Police Department's practice to stop every vehicle at a sobriety checkpoint.
8. The Investigating Officer testified that when he stopped the Petitioner at the May 3, 2012 sobriety checkpoint he smelled the odor of an alcoholic beverage on the Petitioner's breath.
9. The Investigating Officer testified that he asked the Petitioner to exit her vehicle and he noted the odor of an alcoholic beverage emanating from her person, and when he asked if she consumed any alcohol, she admitted to drinking a twenty-four ounce beer prior to driving.
10. The Investigating Officer noted on the DUI information sheet that the Petitioner was unsteady while exiting the vehicle, while walking to the roadside, and while standing, had glassy eyes, and slurred speech.
11. The Investigating Officer explained, demonstrated, and administered the three standardized field sobriety tests to the Petitioner, including the horizontal gaze nystagmus, the walk-and-turn, and one-leg stand.
12. Prior to administering the horizontal gaze nystagmus test, the Investigating Officer completed a medical assessment of the Petitioner's eyes to ensure the test would render valid results and noted on the DUI Information Sheet that the Petitioner had equal pupils, equal tracking, and did not exhibit resting nystagmus.

13. During administration of the horizontal gaze nystagmus test, the Petitioner's eyes lacked smooth pursuit, showed a distinct and sustained nystagmus at maximum deviation, and displayed an onset of nystagmus prior to 45 degrees.
14. During the instruction stage of the walk-and-turn test, the Petitioner started too soon and had difficulty maintaining her balance. While performing the walk-and-turn test, the Petitioner raised her arms to balance, and took an incorrect number of steps.
15. While performing the one-leg stand test, the Petitioner swayed while balancing, used her arms to balance, and was unable to keep her foot raised off of the ground.
16. The Investigating Officer determined that the Petitioner failed all three (3) of the standardized field sobriety tests administered to her.
17. The Investigating Officer had reasonable grounds to believe the Petitioner had been driving while under the influence of alcohol and asked the Petitioner to submit to a preliminary breath test.
18. The Investigating Officer testified that he received his training at the Charleston Police Department to administer the Alco Sensor preliminary breath test and is certified as an instrument operator.
19. The Investigating Officer testified that he observed the Petitioner and she did not drink alcohol or smoke for at least fifteen minutes prior to the preliminary breath test.
20. The preliminary breath test was administered in accordance with Title 64 Code of State Rules, Series 10.
21. The Investigating Officer testified that the Petitioner failed the preliminary breath test.

22. The Investigating Officer lawfully arrested the Petitioner for driving while under the influence of alcohol.
23. The Investigating Officer testified that he read the Implied Consent Statement to the Petitioner at 7:42 PM and she consented to submit to the secondary chemical breath test.
24. The Investigating Officer received his training at the West Virginia State Police Academy to administer secondary chemical breath tests using the Intoximeter EC/IR-II and received his certification as a test administrator by the West Virginia Bureau for Public Health in March of 2005.
25. The testing instrument used to administer the secondary chemical test, an Intoximeter EC/IR-II, Serial No. 008062, has been approved by the W. Va. Bureau of Public Health for use as a secondary breath testing instrument.
26. The Investigating Officer observed the Petitioner for a period of twenty minutes prior to administration of the secondary chemical test, during which time the Petitioner had no oral intake.
27. The Investigating Officer utilized an individual disposable mouthpiece and followed an operational checklist during administration of the secondary chemical test.
28. Standard checks upon the testing instrument, immediately prior to and after administration of the secondary chemical test showed that it was in proper working order.
29. The results of the secondary chemical test administered to the Petitioner showed that her blood alcohol concentration was one hundred eight thousandths of one percent (.108%), by weight.

30. The Investigating Officer verified that the DUI Information Sheet was a true and accurate copy of the document he completed on May 3, 2012.
31. Mark Douglas Haynes is the husband of the Petitioner and testified on her behalf.
32. The Petitioner submitted as evidence, marked as Petitioner's Exhibit No. 1, the aerial photograph of the area of the sobriety checkpoint.
33. Michael Modath also testified on behalf of the Petitioner. He stated that he did not see any "sobriety checkpoint ahead" signs until after the alternate route.
34. The Petitioner submitted evidence, marked as Petitioner's Exhibit No. 2, that she was arrested on September 23, 2003 for driving under the influence of alcohol and her license was revoked for a period of six (6) months.
35. The Petitioner submitted evidence, marked as Petitioner's Exhibit 3, that she requested the file from the Division of Motor Vehicles.
36. The Petitioner testified that she was not living in West Virginia and had an Ohio driver's license in 2003 and never received notice of her first DUI license revocation.
37. The Petitioner testified that she had worked all day on May 3, 2012 and was travelling home northbound on Route 21/Sissonville Drive. She testified that she did not see any warning signs regarding the sobriety checkpoint until she was stopped.
38. Prior to being stopped the Petitioner stated that she had been working overtime at her job and consumed a twenty-four ounce beer in one hour and a half and that her weight in May 2012 was 120 pounds.
39. The Petitioner was not the only person arrested at the May 3, 2012 sobriety checkpoint.

40. The Investigating Officer testified that one Alco-Sensor preliminary breath testing machine was malfunctioning, but the second machine he used worked properly.
41. The Investigating Officer further testified that if the person taking the test blows too hard or not hard enough the machine cannot get a reading.
42. The Investigating Officer further testified that the same is true for the Intoximeter machine used for the secondary chemical breath test. The machine must have a sufficient breath sample to gauge the level of alcohol in a person's blood.
43. On May 31, 2012, the DMV sent Petitioner an *Order of Revocation* for DUI.
44. On June 28, 2012, Petitioner sent a hearing request to the OAH.
45. An administrative hearing was held on October 24, 2012, and the OAH issued its *Final Order* on September 25, 2014, affirming the revocation for driving under the influence of alcohol.

B. The prior DUI used as a Penalty Enhancement

1. Petitioner was the subject of a prior administrative revocation for a DUI that occurred on September 23, 2003.
2. On September 30, 2003, the DMV sent Petitioner an *Order of Revocation* for DUI which was returned to the DMV with the notation "FOE" (forwarding order expired).
3. Petitioner had an Ohio residence in addition to an Ohio driver's license at the time of her 2003 offense.
4. Petitioner further testified that she had moved from West Virginia to Ohio in 2000, three years prior to the 2003 arrest.
5. The prior revocation was used to enhance the severity of the revocation for the 2012 DUI.

6. Plaintiff's counsel filed a *Petition for Writ of Prohibition* to exclude the prior revocation from enhancing the severity of the 2012 revocation.

STANDARD OF REVIEW

This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4(g) states:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision 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.

Under the pertinent provisions of said Act, the reviewing court lacks authority to reverse or vacate the OAH's Final Order on the grounds of insufficient evidence unless the substantial rights of Petitioner were prejudiced because the Final Order was "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record." W. Va. Code § 29A-5-4(g)(5).

In considering the propriety of the OAH's Final Order, the reviewing court must be careful to avoid substituting its judgment for that of the administrative decision-maker. *CDS, Inc. v. Camper*, 190 W. Va. 390, 393, 438 S.E.2d 570, 573 (1993) (per curiam) (quoting *Morris Nursing Home v. West Virginia Human Rights Comm'n*, 189 W. Va. 314, 431 S.E.2d 353, 355 (1993)).

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, 465 S.E.2d 230 (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).

DISCUSSION

I. First alleged Error

Petitioner alleges that the checkpoint was improperly conducted, as no notice of the checkpoint was provided on the roadway so that motorists could choose an alternate route. In her brief, Petitioner alleges that the lack of notice violates *Carte v. Cline*, 460 S.E.2d 48 (1995). The Plaintiff submits that the signage indicating the checkpoint was required to be placed prior to Falcon Drive which “was the last exit from route 21 to avoid the checkpoint.” Petitioner’s Brief, pg. 4.

The hearing examiner discussed Petitioner’s argument regarding the signs posted at a checkpoint and found that there is no requirement in *Carte v. Cline*, 194 W. Va. 233, 460 S.E.2d 48 (1995) or *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009). *Final Order*, pg. 7. Furthermore, the hearing examiner found that there is no requirement to provide motorists an alternate route in the Charleston Police Department’s checkpoint guidelines. *Id.* Police are only required to notify the public that a sobriety checkpoint will be conducted at a certain location and to provide an alternate route, there is no requirement stating such notice must specifically be given on the roadways. Proof of the required notification was provided at the administrative hearing in the form of the WV Gazette article dated May 2, 2012, indicating that a sobriety checkpoint would be conducted.

II. Second alleged Error

Plaintiff alleged that there was no proper evidence introduced to document that the secondary chemical testing device was designated by City of Charleston or approved in writing for use by the Bureau of Health as required by law. In response to this alleged error, Finding of Fact 26 of the *Final Order*, the OAH found that the testing instrument used to administer the secondary chemical test, an Intoximeter EC/IR-IIJ Serial No. 008062, had been approved by the West Virginia Bureau for Public Health for use as a secondary breath testing instrument. *Final Order*. Given that the designations are public record on file at the Bureau of Public Health, it was proper for the OAH to take judicial notice that the City designated a test of the breath as the secondary chemical test. In fact, every law enforcement agency in the state has designated the breath test, so there was no error by the OAH in considering those designations even though the document itself was not placed into evidence at the administrative hearing.

III. Third alleged Error

Plaintiff alleged that no proper evidence was introduced showing that the officer who performed the secondary chemical test was certified by the Bureau of Health. The facts provided show that the investigating officer checked boxes numbered 10 and 11 under Breath Test Operational Check List on the DUI information sheet. Those statements show that the investigating officer received his training at the West Virginia State Police Academy and that he became certified by the West Virginia Bureau for Public Health in March of 2005.

Additionally, the investigating officer testified to his training on the secondary chemical test at the West Virginia State Police Academy. Even though Petitioner testified at the hearing, she did not rebut the investigating officer's testimony regarding his

qualifications. Therefore, Plaintiff cannot dispute this now just because she did not see a particular piece of paper admitted into evidence. In *White v. Miller*, the West Virginia Supreme Court of Appeals addressed the issue of the burden placed upon the driver if the officer's qualifications to perform a test are challenged:

Furthermore, we hold that upon a challenge by the driver of a motor vehicle to admission in evidence of the results of the horizontal gaze nystagamus test, the police officer who administered the test, if asked should be prepared to give testimony concerning whether he or she was properly trained in conducting the test, and assessing the results, in accordance with the protocol sanctioned by the National Highway Traffic Safety Administration and whether, and in what manner, he or she complied with that training in administering the test to the driver.

White v. Miller, 228 W. Va. 797, 806, 724 S.E.2d 768, 777 (2012). Here, Petitioner did not inquire further into the investigating officer's qualifications to perform the secondary chemical test. The un rebutted evidence that is in the record clearly shows that the officer was trained on the secondary chemical test, and Petitioner cannot affirmatively dispute that information.

IV. Fourth alleged Error

Petitioner has alleged that she was denied her due process rights in an earlier DUI revocation as notice was mailed to an address from which she had moved. Significantly, all records from that prior arrest document that she had an Ohio driver's license at the time of that arrest. Petitioner was the subject of a prior administrative license revocation for a DUI that allegedly occurred in 2003; however, the notice of that proposed revocation was not sent to the proper address. *Petitioner's Exhibit 2*. Said notice was sent the Petitioner's former West Virginia address, from which she had moved three years prior. Although Respondent claims that they were under no obligation to send the notification to the known current

address, which petitioner provided at the time of the arrest and is evidenced in the investigating officer's report, this rationale controverts justice.

RULING

After carefully reviewing the decision below, the Petitioner's brief, the Respondent's brief, the record, and the relevant law, the Court hereby **GRANTS** Petitioner's Writ of Prohibition to exclude the previous action from enhancing the current penalty; **AFFIRMS** the decision of the Board below because the evidence in the record supports the findings of fact and conclusions of law; and **REMANDS** the matter for the purposes of reconsidering the administrative penalty based on excluding the previous DUI from consideration. This case is **DISMISSED** and **STRICKEN** from the docket of the Court.

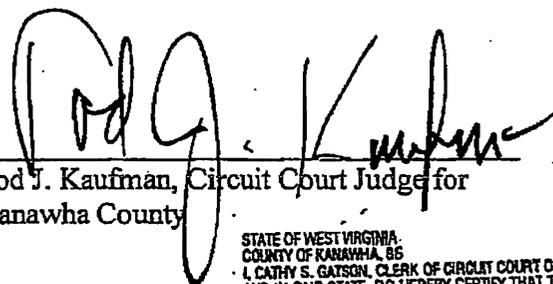
The clerk of the court shall distribute copies of this Order to all Counsel of Record.

Steven O. Dale
Acting Commissioner
West Virginia DMV
PO BOX 17200
Charleston, WV 25317

Elaine L. Skorich, Esq.
Assistant Attorney General
PO BOX 17200
Charleston, WV 25317

W.B. Richardson, Jr. Esq.
PO BOX 266
Parkersburg, WV 26102

Enter this Order the 26th day of August, 2015.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 26th
DAY OF AUGUST 2015
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
UHM

SHORT CASE NAME: Reed v. Haynes

CERTIFICATIONS

STATE OF WEST VIRGINIA

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and I have a good faith belief that an appeal is warranted.

September 24, 2015

Date

Erine L. Shovich
Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

September 24, 2015

Date

Erine L. Shovich
Counsel of record or unrepresented party

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

**PATRICIA S. REED, Commissioner,
Division of Motor Vehicles,**

Petitioner,

v.

PAMELA HAYNES

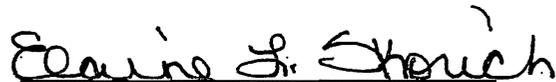
Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that the foregoing *Notice of Appeal* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 25th day of September, 2015, addressed as follows:

William B. Richardson, Jr., Esquire
P. O. Box 266
Parkersburg, WV 26102

The Honorable Cathy Gatson
Clerk of the Circuit Court
Kanawha County Courthouse
111 Court Street, Judicial Annex
Charleston, WV 25301


ELAINE L. SKORICH