

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Eric Plumley,  
Petitioner, Petitioner below**

**vs.) No. 101186** (Raleigh County 09-AA-17-B)

**Joe E. Miller, Commissioner of the  
West Virginia Division of Motor Vehicles  
Respondent, Respondent below**

**FILED**

February 11, 2011  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

This appeal arises from the circuit court’s Final Order affirming the final administrative order of the Commissioner of the West Virginia Division of Motor Vehicles revoking the petitioner’s driver’s license for a period of six months. The appeal was timely filed by counsel with the entire record accompanying the petitioner’s brief. A timely response was filed by the respondent. The petitioner seeks a reversal of the circuit court’s decision and, in turn, a reversal of the final order of revocation.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Upon consideration of the standard of review, as well as the parties’ briefs and the record, the Court finds no substantial question of law nor does the Court disagree with the decision of the lower tribunal as to the question of law. Moreover, the Court finds no prejudicial error. For these reasons, and having reviewed the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On June 20, 2008, a Beckley police officer observed a vehicle with a broken side mirror drifting across the lane boundary multiple times. The officer initiated a traffic stop. The officer noticed the odor of alcohol on the breath of the petitioner, Eric Plumley (“Mr. Plumley”), the driver of the vehicle. He also noticed that Mr. Plumley was unsteady while exiting his vehicle and while walking and standing; that he had slurred speech; and that his eyes were glassy and bloodshot. Mr. Plumley admitted to the officer that he had consumed alcoholic beverages. The officer administered the horizontal gaze nystagmus, the walk-and-turn, and the one leg stand tests, as well as a preliminary breath test, all of which Mr. Plumley failed. Mr.

Plumley was taken into custody and administered a secondary chemical test of the breath that showed his blood alcohol content to be .083. Mr. Plumley was charged with driving under the influence of an intoxicating substance (“DUI”) in violation of West Virginia Code §17C-5-2(d).

Following Mr. Plumley’s arrest, respondent, Joe E. Miller, Commissioner of the Division of Motor Vehicles (“the DMV” or “the Commissioner”), suspended Mr. Plumley’s driving privileges. Mr. Plumley, by counsel, requested an administrative hearing to challenge the revocation. The hearing was held on June 18, 2009, at which time the related criminal DUI charge was still pending. Sometime after the administrative hearing, but prior to the issuance of the final administrative order, Mr. Plumley notified the Hearing Officer that the criminal charge was dismissed on July 24, 2009, on the State’s motion.

On November 16, 2009, the DMV entered a Final Order revoking Mr. Plumley’s license for six months. Mr. Plumley filed an appeal in the circuit court. Following a hearing, the circuit court entered a Final Order on May 18, 2010, that adequately and fairly sets forth its reasons for affirming the DMV’s Final Order. The circuit court found that the Commissioner had properly weighed and considered the conflicting evidence and that the Commissioner’s determination of credibility was not clearly wrong.

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code §29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl.Pt. 1, *Muscattell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Mr. Plumley argues that he was denied his constitutional and statutory rights to due process because of the DMV’s and the circuit court’s incorrect construction of both West Virginia Code §29A-5-2(b), which essentially provides for the DMV’s file to be made part of the record in the administrative proceeding, and West Virginia Code §17C-5A-2(d), which provides that where a party does not request the attendance of the investigating officer, the Commissioner shall consider the written statements, test results, and any other information submitted by the investigating officer. There has not been a denial of due process. Mr. Plumley did **not** request the appearance of the investigating officer at the administrative hearing. Accordingly, under West Virginia Code §17C-5A-2(d), the Commissioner appropriately considered the evidence that was submitted and made a part of the record by the Investigating Officer. *Id.* Further, the Commissioner acknowledged Mr. Plumley’s evidence, as reflected in the Commissioner’s Final Order, but found it to be less convincing than

that of the Investigating Officer. In short, there is substantial evidence in the record that meets the preponderance of the evidence standard required to justify an administrative revocation. *Groves v. Joseph Cicchirillo, Commissioner, West Virginia Division of Motor Vehicles*, 225 W.Va. 474, 694 S.E.2d 639 (2010).

Next, Mr. Plumley argues that the circuit court should have reversed the DMV's Final Order on the basis of the Hearing Officer's lack of impartiality. His argument appears to arise primarily out of the Hearing Officer's acceptance and consideration of the Investigating Officer's file. As previously indicated, the Hearing Officer appropriately considered the written statements, test results, and any other information submitted by the Investigating Officer under West Virginia Code §17C-5A-2(d).

Finally, Mr. Plumley asserts that the circuit court and the Commissioner failed to give substantial weight to the dismissal of the criminal DUI charge against him as required by *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001). As the Court reasoned in *Ullom v. Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles*, No. 34864, 2010 WL 4723265 (W.Va. Nov. 23, 2010), because the dismissal of Mr. Plumley's criminal charge occurred *after* the license revocation hearing, the information could not have been considered during the administrative proceeding, thus, there was nothing to which the Commissioner was required to give substantial weight.

For the foregoing reasons, we find no error in the Final Order of the circuit court affirming the Commissioner's revocation of Mr. Plumley's driving privileges for six months.

Affirmed.

**ISSUED:** February 11, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Thomas E. McHugh

**DISSENTING:**

Justice Menis E. Ketchum