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IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DEBBIE L. ULLOM

Petitioner,

Civil Action No. 06-CAP-24K

vs.

JOSEPH CICCHIRILLO, COMMISSIONER  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Respondent

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ORDER

This matter comes before the Court on a Petition for Judicial Review under the Administrative Procedure Act, West Virginia Code § 25A-5-1, et seq. and § 29A-5-4.

The Petitioner, Debbie L. Ullom, a resident of Marshall County, West Virginia was arrested in Marshall County, West Virginia on the 26<sup>th</sup> day of June 2006, and charged with the misdemeanor offense of driving under the influence of alcohol, approximately 8:39 p.m., June 26, 2006. Trooper R.J. Busick (hereinafter the "Arresting Officer"), of the West Virginia State Police, was on routine patrol approximately one mile from Number 2 Ridge, at the Golden Ridge intersection in Marshall County, West Virginia. At that time, the Arresting Officer observed a white Subaru with the parking lights engaged. The vehicle's engine was not engaged and the vehicle was parked off of the road. The vehicle exhibited no apparent damage and the Petitioner was not observed driving the vehicle.

The Arresting Officer parked his vehicle beside the white Subaru in order to do a road safety check. While asking the Petitioner if she was having any problems, the Arresting Officer observed the Petitioner's eyes appeared bloodshot and glassy. The

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Arresting Officer also noticed her speech sounded slurred. The Arresting Officer further observed the Petitioner exhibited unsteady motor skills, and he detected the odor of an alcoholic beverage on her breath. The Arresting Officer observed the Petitioner was unsteady while walking. The Arresting Officer administered a series of field sobriety tests to the Petitioner, including the horizontal gaze nystagmus, one-leg stand, and walk-and-turn tests; the Petitioner failed all three of these tests. The Arresting Officer arrested the Petitioner for driving under the influence of alcohol at 8:39 p.m. on June 26, 2006, in Marshall County, West Virginia. The Arresting Officer transported the Petitioner to the Marshall County Sheriff's Office.

The secondary chemical test was not administered in accordance with Title 64, Code of State Rules, Series 10. The Arresting 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 administrator by the West Virginia Department of Health since March 30, 2004. The Arresting Officer observed the Petitioner for twenty (20) minutes before administering a secondary chemical test of the breath. Although he observed the Petitioner for 20 minutes, he failed to testify that he observed no oral intake by the Petitioner during that period prior to administration of the secondary chemical test, in accordance with Title 64, Code of State Rules, Series 10.

The Petitioner's driver's license was revoked for a period of six (6) months by a letter from the Division of Motor Vehicles dated July 13, 2006. The effective date of revocation was August 17, 2006. The Petitioner, by counsel, requested a timely hearing from the Division of Motor Vehicles. On September 28, 2006, the Division of Motor Vehicles conducted a hearing on the issue of the Petitioner's driver's license. As a result

of that hearing, the Petitioner's driver's license was revoked for period of six (6) months by Order of the Commissioner dated December 18, 2006. The Petitioner appeals that decision. On September 7, 2007, a hearing on the status of the Petitioner's case was held in this Court.

The Petitioner asserts the decision of the Respondent is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and is erroneous as a matter of law.

Specifically, the Petitioner states several errors of both law and fact exist: (1) the Arresting Officer had no reasonable grounds to believe the Petitioner was driving a motor vehicle in this State while under the influence of alcohol; (2) the Petitioner was unlawfully or improperly placed under arrest for the offense of driving under the influence of alcohol; (3) the proof elicited at the hearing was not sufficient to hold that the petitioner was driving under the influence of alcohol; (4) the Petitioner was precluded from meaningful cross-examination of the Arresting Officer. At the hearing held in this matter, the Petitioner asked one question of the Arresting Officer and was then subjected to intimidation that prevented the Petitioner from any meaningful cross-examination of the Arresting Officer, and further had the effect of preventing her from testifying on her own behalf; (5) the criminal charges against the Petitioner filed by the Arresting Officer in Magistrate Court were dismissed, which should have been considered probative evidence which would tend to prove that the revocation order should be dismissed; and (6) for other reasons apparent on the face of the record.

"Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the

order or decision of the agency or remand the case for further proceedings. The circuit court 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 and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Syllabus Point 2, Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n., 172 W. Va. 627, 309 S.E.2d 342 (1983); Syllabus Point 1, Johnson v. State Dept. of Motor Vehicles, 173 W.Va. 565, 318 S.E.2d 616 (1984); and Syllabus Point 2, Cunningham v. Bechhold, 186 W. Va. 474, 413 S.E.2d 129 (1991).

The issue the Commissioner was asked to resolve was whether the Petitioner operated a motor vehicle under the influence of alcohol. The standard pursuant to West Virginia Code § 17C-5-2(d) is the preponderance of the evidence. The "preponderance of the evidence" means the evidence that has the greater weight and is the most convincing. It is sometimes referred to as sufficient evidence of such quality as to prevail.

The Petitioner alleges the arresting officer did not have reasonable grounds to believe the Petitioner was driving a motor vehicle in this State while under the influence of alcohol.

In the absence of a chemical sobriety test, the State must prove by a preponderance of the evidence that: (1) the driver was operating a motor vehicle on a public street or highway; (2) the driver exhibited signs or symptoms of intoxication; and (3) the driver consumed alcoholic beverages. Syllabus Point 2, Albrecht v. State, 173 W. Va. 268, 314 S.E.2d 859 (1984).

First, however, an officer must have reasonable suspicion to make an investigatory stop of a vehicle. An officer may stop a vehicle to investigate if the officer has an articulable reasonable suspicion that a person driving a vehicle has committed, is committing, or is about to commit a crime. State v. Stuart, 192 W. Va. 428, 452 S.E.2d 886 (1994); Muscateil v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996). The Arresting Officer here testified he observed a vehicle parked off the roadway with its engine turned off, its parking lights properly engaged, no apparent damage on the vehicle, and with no sign of a distress signal from the driver. This evidence is insufficient to support a reasonable suspicion of the Arresting Officer as grounds for an investigatory stop.

Nothing in the West Virginia Code requires an individual to submit to any type of field sobriety test or for an officer to administer tests to those suspected of driving under the influence of alcohol and/or drugs. Albrecht v. State, 173 W. Va. 268, 314 S.E.2d 859 (1984). The field sobriety test is one of several methods used by officers to determine whether an individual may be under the influences of alcohol and/or drugs. There are no provisions regarding how field sobriety tests are to be administered. Further, there are no provisions regarding what, if any, foundation must be laid for the admission of field sobriety test results.

The Improved Sobriety Testing Manual does not restrict law enforcement officers as to what field sobriety tests they can administer. The manual recommends what guidelines should be followed to administer such sobriety test, but does not mandate those guidelines. Moreover, scientific evidence is not required to prove that an individual is operating a motor vehicle under the influence of alcohol.

West Virginia Code § 17C-5A-1a(a) (1994) "does not require that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with a DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person." Syllabus Point 3, Carte v. Cline v. Rover, 488 S.E.2d 437, 200 W.Va. 162 (1997). In the present case, the surrounding circumstances still do not give the officer a reason to have conducted an investigation. The vehicle was parked off of the road, the engine was not running, and there was no evidence of erratic driving or evidence of driving in general. Further, the Petitioner was not requesting assistance, she did not have her emergency flashers on, and no towel, light, or scarf was present to indicate the driver needed assistance. The vehicle was also not illegally parked, it was not damaged or disabled, nor was it interfering with traffic. Thus, the surrounding circumstances show there was no reason for the Arresting Officer to confront the Petitioner and conduct an investigation.

In addition, this Court must give substantial weight to the Petitioner's acquittal of the criminal charges even though the results of the related criminal proceedings were not before the Commission when he rendered the final decision. In Choma v. West Virginia Division of Motor Vehicles, the West Virginia Supreme court held that, "in

administrative proceedings under W. Va. Code § 17C-5A-1 *et seq.*, the commissioner of motor vehicles must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the commissioner, when evidence of such results is presented in the administrative proceeding." Syllabus Point 8, Choma v. West Virginia Division of Motor Vehicles, No. 28890, 2001 WL 1511289, at \*1 (W. Va. Nov. 8, 2001).

After careful and mature consideration, after a review of the record, and after a review of the applicable case law and statutory law, the Court finds that the Arresting Officer did not have reasonable suspicion to make an investigatory stop and make a lawful arrest of the Petitioner for driving under the influence of alcohol. The facts in the instant case and the testimony the Arresting Officer provided indicate that the Petitioner did not commit, was not committing, and was not going to commit a crime pursuant to the requirements for reasonable suspicion as set forth in State v. Stuart, 192 W. Va. 428, 452 S.E.2d 886 (1994). The Arresting Officer observed a white Subaru with the parking lights engaged while he was on routine patrol approximately one mile from Number 2 Ridge, at the Golden Ridge intersection in Marshal County, West Virginia. The vehicle was stopped and parked off the roadway with its engine turned off. The Arresting Officer did not observe the Petitioner driving the vehicle. The Arresting Officer made no observation of erratic driving and there was no evidence of driving presented. The driver was not requesting assistance; there were no flashers on; there was no towel, light, or scarf to indicate the driver needed assistance; and the vehicle was not illegally parked. Moreover, the vehicle was not damaged or disabled, nor was the vehicle interfering with

other traffic. Therefore, there was no reason for the Arresting Officer to confront the Petitioner and conduct an investigation.

Thus, due to the Arresting Officer's testimony and the failure to prove that the Petitioner violated any traffic law, the Court finds there is insufficient evidence to show by a preponderance of the evidence that the Petitioner drove a motor vehicle while under the influence of alcohol.

Accordingly, it is hereby ADJUDGED and ORDERED that the relief prayed for is GRANTED.

It is further ORDERED that the Commissioner's Order is REVERSED.

It is further ORDERED that the Petitioner's driver's license and privilege to operate a motor vehicle are fully restored.

To all rulings of this Court adverse to either party, their objection is noted and exception is saved.

The Clerk is directed to transmit attested copies of this Order to the Petitioner's counsel, the Respondent, and the Office of the Prosecuting Attorney of Marshall County, West Virginia.

There being nothing further, this matter is ORDERED DROPPED from the Docket of this Court.

Dated this 8<sup>th</sup> day of November, 2008.

ENTER:

Mark A. Karl  
Judge Mark A. Karl

A Copy Teste:

David R. [unclear]  
By Dorinda [unclear] [unclear]