

35673

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

EDWARD L. SIMS, II,

Petitioner,

vs.//

Complaint No.: 08-P-51

JOE MILLER (formerly Joseph J. Cicchirillo),
Commissioner of the West Virginia
Division of Motor Vehicles,

Respondent.

CIRCUIT CLERK
NICHOLAS COUNTY, W.V.
2009 DEC 30 AM 11:15

ORDER REVERSING COMMISSIONER'S FINAL ORDER
AND REINSTATING PETITIONER'S DRIVERS' LICENSE

AND DRIVING EXEMPTIONS

On the 7th day of December, 2009 came the Petitioner in person and by counsel, Gregory W. Sproles, and came the Respondent, Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles, by counsel, Ronald Brown, Assistant Attorney General, for Final Hearing upon the Petitioner's Petition for Judicial Review of the Final Order of the Respondent which revoked the Petitioner's drivers' license while driving under the influence of alcohol.

Thereupon, counsel for the Petitioner objected to the Court considering the response from the Respondent because it only had been provided to counsel for the Petitioner shortly before this hearing.

Based upon all matters of record, the arguments of counsel and the applicable law the Court does hereby make the following:

FINDINGS OF FACT

1. The matter was remanded to the Respondent based upon the agreement of the parties that the Respondent did not comply with the mandates of *Muscattell v. Cline*, 196 W.Va. 588, 474 S.E. 2d 518 (1996) and *Choma v. West Virginia DMV*, 210 W.Va. 256, 556 S.E. 2d 310

Received Time. Apr. 30. 3:24PM

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(2001) pursuant to an Order of the Court entered March 24, 2009.

2. After the remand by this Court, the Respondent entered a Remand Final Order, with an effective date of August 3, 2009.

3. The Respondent was not clearly wrong in relying upon portions of the Statement of the Arresting Officer, however, the evidence presented in the Statement of the Arresting Officer was challenged by the Petitioner.

4. W.Va. Code §17C-6-8 requires that a secondary chemical test of the breath be conducted within two (2) hours from and after the time the person allegedly last drove a motor vehicle.

5. The evidence at the administrative hearing established that the Petitioner last drove a motor vehicle no later than 10:30 p.m. on November 23, 2007 and the secondary chemical test of the Petitioner's breath was not conducted until 1:17 a.m., a period of approximately three (3) hours from the time the Petitioner last drove a motor vehicle.

6. The secondary chemical test of the breath should not have been admitted before the Respondent and relied upon by the Respondent to revoke the Petitioner's driver's license because such test was taken more than two (2) hours after the time the Petitioner allegedly last drove a motor vehicle.

7. There was no reason or explanation given by the Arresting Officer to explain why the secondary chemical test of the Petitioner's breath was not given within two (2) hours from and after the time that he last drove a motor vehicle.

8. A blood test performed on the Petitioner at Summersville Memorial Hospital was performed approximately four (4) hours after he last drove a motor vehicle and no foundation was laid for the introduction of such blood test, even though the introduction of such blood test

was properly challenged by the Petitioner.

9. There was evidence that the Petitioner operated a motor vehicle.

10. Although there was evidence that the Petitioner had consumed alcohol there was no evidence presented regarding when the Petitioner consumed alcohol or the amount of alcohol he consumed.

11. This matter remanded by this Court, based upon the agreement of the parties with specific directions that the Respondent provide a proper analysis of the evidence presented as required by Muscatell v. Cline, 196 W.Va. 588, 474 S.E. 2d 518 (1996) and Choma v. West Virginia DMV 210 W.Va. 256 556 S.E. 2d 310 (2001)

12. The Remand Final Order from the Respondent did not comply with the mandates of Muscatell, supra or Choma, supra because there was not a proper analysis of the conflicting testimony of the Petitioner and the Arresting Officer. The Respondent also failed to give substantial weight to the dismissal of the criminal charges of driving under the influence of alcohol against the Petitioner in the Magistrate Court as required by Choma.

13. There was a videotape made of the Petitioner at the site where the secondary chemical test of the breath was conducted and such videotape was not introduced.

14. The failure of the Arresting Officer to introduce the videotape of the Petitioner at the site where he allegedly provided a sample of his breath raises an adverse inference against the testimony of the Arresting Officer.

15. There was conflicting evidence presented by the Arresting Officer and the Petitioner regarding the performance of the Petitioner on the field sobriety tests and the area where such sobriety tests were conducted.

16. It was error for the Respondent to rely upon the secondary chemical test of the

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Petitioner's breath based upon such breath test not complying with the mandates of W.Va. Code §17C-6-8.

17. It was error for the Respondent to rely upon the results of any blood test because there was no foundation laid for the introduction for such blood test at the administrative hearing.

18. There was insufficient evidence presented at the administrative hearing to revoke the Petitioner's drivers' license and driving privileges because of the conflicting evidence presented and the failure of the Respondent to comply with the mandates of *Muscatell, supra* and *Choma, supra* even though this matter was remanded to the Respondent with specific directions to comply with such mandates.

CONCLUSION

Based upon all the foregoing the Court does hereby make the following:

CONCLUSIONS OF LAW

1. The reliance by the Respondent upon any secondary chemical test of the Petitioner's breath was an error and should not have been considered by the Respondent to revoke the Petitioner's drivers' license.
2. It was error for the Respondent to rely upon the results of any blood tests conducted on the Petitioner because no foundation was laid for the introduction of such blood tests.
3. The Petitioner specifically rebutted the evidence presented by the Arresting Officer regarding his performance of field sobriety tests and other evidence relied upon by the Respondent to revoke the Petitioner's drivers' license.
4. There was not sufficient evidence in the record which was unrebutted by the Petitioner to affirm the Respondent's Final Order revoking the Petitioner's drivers' license.
5. The Respondent failed to comply with the requirements of *Muscatell, supra* and

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Choma, supra in his Remand Final Order, even though an Order from the Court specifically directed the Respondent to review the evidence presented and enter an Order which complied with such requirements.

It is therefore, ORDERED and ADJUDGED that the Final Order of the Respondent which revoked the Petitioners drivers' license is hereby REVERSED and the drivers' license and driving privileges of the Petitioner are hereby REINSTATED.

It is further Ordered that the Clerk of this Court forward a certified copy of this Order to the

following:

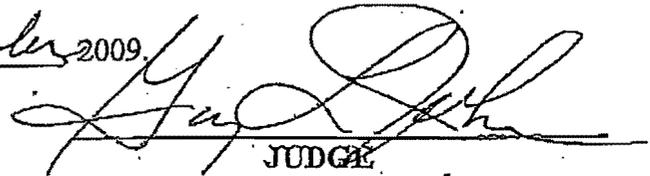
Joe Miller, Director
West Virginia Division of Motor Vehicles
Safety and Enforcement Division
1800 Kanawha Boulevard East
State Capitol Building 3
Charleston WV 25317-0010

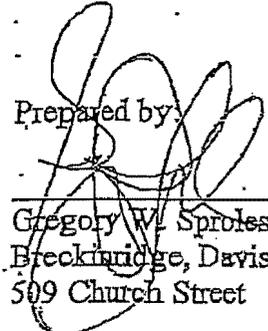
Gregory W. Sproles (WV State Bar ID #3540)
Breckinridge, Davis, Sproles & Chapman, PLLC
509 Church Street
Summersville, WV 26651

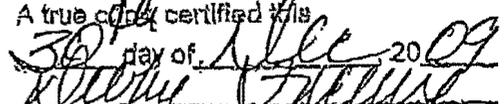
Ronald Brown (W.Va. State Bar ID #581)
Assistant Attorney General
WV State Capital Complex, Building 1, Room W-435
Charleston, WV 25305

To all adverse rulings the parties object and except.

Entered this the 30th day of December 2009.


JUDGE

Prepared by 
Gregory W. Sproles (WV State Bar ID #3540)
Breckinridge, Davis, Sproles & Chapman, PLLC
509 Church Street

A true copy certified this
30th day of December 2009

DEBBIE FACEMIRE CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26651

By _____ Deputy
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Summersville, WV 26651
(304) 872-2271

Approved by:



Ronald Brown (WVSB #501)
Assistant Attorney General
WV State Capital Complex, Building 1, Room W-435
Charleston, WV 25305

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