

NO. 35674

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

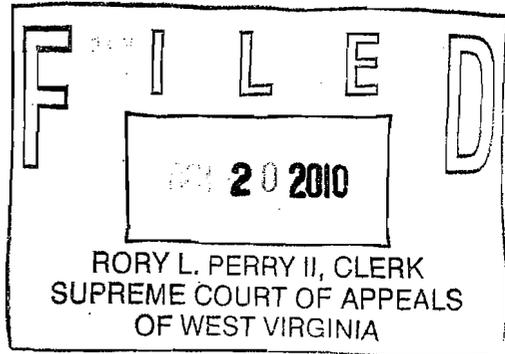
ROBIN D. DAVISSON,

Appellee/Petitioner Below,

v.

JOE MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Appellant/Respondent Below.



BRIEF OF APPELLANT

JOE E. MILLER, COMMISSIONER ,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

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v.

JOE MILLER, COMMISSIONER
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OF MOTOR VEHICLES,

Appellant/Respondent Below.

BRIEF OF APPELLANT

Comes now the Appellant, West Virginia Division of Motor Vehicles, Joe Miller, Commissioner, by counsel, Janet E. James, Assistant Attorney General, and submits this brief in accordance with the order of the Court. Appellant seeks reversal of an order entered on December 30, 2009, by the Honorable Gary Johnson, Judge of the Circuit Court of Nicholas County, in an administrative appeal styled *Robin D. Davisson v. Joe E. Miller, Commissioner, Commissioner of the West Virginia Division of Motor Vehicles*, Civil Action No. 09-AA-1. Through its *Order*, the Circuit Court reversed an administrative driver's license revocation order entered by the Division by which the Appellee's privilege to drive was revoked.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from the administrative order which took effect on August 24, 2009, (hereinafter, "Final Order"), wherein Commissioner Miller revoked Appellee's privilege to drive in West Virginia for a period of six months¹ for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed Commissioner Miller's Final Order upon the grounds that (1) it imposed a heretofore nonexistent negative inference against the DMV because the investigating officer did not place the videotape of the arrest into the record; and (2) because it considered matters that were not before the Hearing Examiner and violated *Choma v. West Virginia Div. of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001).

B. THE ADMINISTRATIVE PROCEEDINGS

Appellee was arrested for DUI on March 29, 2009, in the Mouny Nebo area in Nicholas County, West Virginia, by Deputy B.S. Tucker of the Nicholas County Sheriff's Office. Deputy Tucker apprised the Division of Appellee's arrest by submitting the requisite "Statement of Arresting Officer."²

After reviewing the Statement of Arresting Officer, DMV issued an order dated April 10, 2009, revoking Appellee's privilege to drive in West Virginia³ for six months.

¹The revocation continues in effect after the six month period until Appellee meets all obligations for reinstatement. Final Order at 8.

²Exhibit 1 of the Certified Record as submitted to the Circuit Court of Nicholas County, West Virginia (hereinafter, "Record Exhibit 2").

³Record Exhibit 3.

Thereafter, Appellee, by counsel, requested an administrative hearing to challenge the revocation and the results of the secondary chemical test administered to Appellee pursuant to her arrest and the administrative hearing took place on June 3, 2009. The Final Order was effective on August 24, 2009, and upheld the initial 6-month revocation. It was from said Final Order that Appellee appealed to the Circuit Court.

II.

STATEMENT OF THE FACTS

On March 29, 2009, Deputy B. S. Tucker of the Nicholas County Sheriff's Office was on patrol in the Mount Nebo area of the General Store at the intersection of Route 41 in Nicholas County. West Virginia DUI Information Sheet (hereinafter, "File Exhibit 2"); Transcript of Administrative Hearing held on June 3, 2009 at 4-5 (hereinafter, "Tr. at 4-5"). Deputy Tucker was following a black Ford Escape on Route 41 toward Roanoke. Deputy Tucker observed the vehicle weaving back and forth and driving left of center. When Deputy Tucker found a safe place to stop the Appellee's car, he activated his emergency lights and siren and stopped the car. After approaching the driver of the car, he told Appellee why he had stopped her. He observed that the Appellee's eyes were bloodshot and glassy, and he smelled the odor of an alcoholic beverage on her breath. Tr. At 5. Deputy Tucker asked Appellee if she had been drinking, and she admitted that she had drunk four beers. Tr. At 6.

After the Appellee exited her car, Deputy Tucker explained and demonstrated the horizontal gaze nystagmus test to Appellee. During the test, Appellee had a lack of smooth pursuit, sustained, distinct nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees in both eyes. Tr. At 6.

Deputy Tucker then explained and demonstrated the one-leg stand test to Appellee. Appellee submitted to that test and failed it. She swayed while balancing and used her arms to balance. File Exhibit 2; Tr. At 6.

Deputy Tucker then explained and demonstrated the walk and turn test. Appellee missed heel to toe and stepped off the line and missed the turn. Deputy Tucker deemed that Appellee failed this test. Tr. At 6.

Prior to administering the preliminary breath test (hereinafter, "PBT"), Deputy Tucker contacted dispatch to make sure that he had observed Appellee for a full 15 minutes. Deputy Tucker then placed an individual mouthpiece on the PBT. Appellee failed the PBT. Tr. at 7.

Following the administration of the PBT, Appellee told Deputy Tucker that she thought she should not be driving. Whereupon, Deputy Tucker placed Appellee under arrest. Tr. at 7. He transported Appellee to the Nicholas County Sheriff's Office. At the office, Deputy Tucker placed a disk into the recorder to record the DUI process. Tr. At 8.

Deputy Tucker checked Appellee's mouth and found that she did not have anything in it. He told her that he was obligated to observe her for 20 minutes to make sure she didn't put anything in her mouth. Appellee was handcuffed behind her back during the entire observation time.

Deputy Tucker read Appellee the Implied Consent Statement at 4:07. Appellee signed the form. After the 20-minute observation time, Appellee blew three times on the Intoximeter. However, all three times she gave an insufficient sample. File Exhibit 2; Tr. At 8.

Deputy Tucker read Appellee the *Miranda* rights. Appellee declined to answer any questions. Tr. at 8.

The Division issued an initial Order of Revocation on April 10, 2009. Appellee timely requested a hearing. The administrative hearing was held on June 3, 2009.

On June 29, 2009, Appellee's counsel sent an abstract of judgment from the Magistrate Court of Nicholas County to the Division. The abstract reflected that on June 29, 2009, Appellee plead no contest to reckless driving in relation to the arrest in question.

By Final Order effective August 24, 2009, the Appellee upheld his initial order of revocation.

III.

ASSIGNMENTS OF ERROR

- I. **WHETHER THE CIRCUIT COURT ERRED IN ALLOWING APPELLEE TO ARGUE AN ISSUE NOT RAISED OR PRESERVED BELOW, AND IN FINDING THAT THE FAILURE OF AN INVESTIGATING OFFICER TO INTRODUCE A VIDEOTAPE AT AN ADMINISTRATIVE HEARING GIVES AN ADVERSE INFERENCE THAT SUCH VIDEOTAPE WOULD BE ADVERSE TO THE TESTIMONY OF THE OFFICER.**

- II. **WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO COMPLY WITH THE MANDATES OF *CHOMA V. WEST VIRGINIA DIV. OF MOTOR VEHICLES*, 210 W.VA. 256, 557 S.E.2D 310 (2001).**

IV.

POINTS AND AUTHORITIES

- A. "Our general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999). *See also, Whitlow v. Board of Education*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993). *Noble v. West Virginia Dept. of Motor Vehicles*, 223 W.Va. 818, 821, 679 S.E.2d 650, 653 (2009)

- B. A "video, simply because it existed, had to be introduced into evidence" at an administrative hearing. *Belknap v. Cline*, 190 W.Va. 590, 439 S.E.2d 455 (1993) (per curiam).
- C. "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 3, *Choma v. West Virginia Div. of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001).

V.

STANDARD OF REVIEW

This Court's review of this matter is controlled by the West Virginia Administrative Procedures Act. Review of legal questions is *de novo* (Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)); review of factual questions is guided by whether there is evidence on the record as a whole to support the agency's decision.

VI.

ARGUMENT

- A. **THE CIRCUIT COURT ERRED IN ALLOWING APPELLEE TO ARGUE AN ISSUE NOT RAISED OR PRESERVED BELOW, AND IN FINDING THAT THE FAILURE OF AN INVESTIGATING OFFICER TO INTRODUCE A VIDEOTAPE AT AN ADMINISTRATIVE HEARING GIVES AN ADVERSE INFERENCE THAT SUCH VIDEOTAPE WOULD BE ADVERSE TO THE TESTIMONY OF THE OFFICER.**

Appellee waived the argument that the videotape was improperly not offered by the investigating officer at the hearing. She did not request the video before the hearing, her counsel did not inquire or object when Deputy Tucker testified about the existence of two videotapes at the administrative hearing, and her counsel did not raise the issue in closing. The Commissioner's *Final*

Order, therefore, does not address this issue. In *Noble v. West Virginia Dept. of Motor Vehicles*, 223 W.Va. 818, 821, 679 S.E.2d 650, 653 (2009), this Court was clear that an issue such as the one in the present case cannot be raised for the first time on appeal:

“Our general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered.” *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999). *See also, Whitlow v. Board of Education*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) (“Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.”); *Konchesky v. S.J. Groves & Sons Co., Inc.*, 148 W.Va. 411, 414, 135 S.E.2d 299, 302 (1964) (“[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on appeal.”). Further, if a party fails to properly raise a nonjurisdictional “defense during [an] administrative proceeding, that party waives the defense and may not raise it on appeal.” *Hoover v. West Virginia Bd. of Medicine*, 216 W.Va. 23, 26, 602 S.E.2d 466, 469 (2004), quoting *Fruehauf Trailer Corp. v. W.C.A.B.*, 784 A.2d 874, 877 (Pa.Cmwlth.2001).

223 W.Va. 821, 679 S.E.2d 653.

The first time the matter was raised was in the Appellee’s petition to the circuit court. *See, State v. Adkins* 209 W.Va. 212, 544 S.E.2d 914 (2001); *Miralles v. Snoderly*, 216 W.Va. 91, 99, 602 S.E.2d 534 (2004)(“This issue was raised below but was neither addressed nor resolved by the circuit court in its December 4, 2002 order; therefore, this Court will not address it in this appeal.”). Therefore, it was improperly argued on appeal, and the circuit court erred in relying on that argument in its Order.

The only evidence of the videos in the record in this case was the officer’s testimony at the administrative hearing that once he had transported the Appellee to the Nicholas County Sheriff’s

office for processing, he “placed a disk into the recorder to record the DUI process.” Tr. At 8. Deputy Tucker then testified, “The DUI, DVD that was used for the process, the DUI process, will also be added to the report, and a in-car video will be attached as well with this report.” Tr. At 9. However, no video was entered into the record. The Hearing Examiner did not order the production of the videos.

In *Belknap v. Cline*, 190 W.Va. 590, 439 S.E.2d 455 (1993) (per curiam), this Court expressly rejected the notion that a "video, simply because it existed, had to be introduced into evidence" at an administrative hearing. 190 W. Va. 592, 439 S.E.2d 457. In *Belknap*, this Court remanded a case to the Commissioner for review of a videotape of the driver at the police station during the process of administering the Intoximeter, “if it can be located”. 190 W.Va. 594, 439 S.E.2d 459. Critical to the Court’s opinion in that case, and distinguishing that case from the present case, was that the officer moved the videotape into evidence and asked that the hearing examiner hold the record open so that the video might be considered. The driver, who was *pro se*, stated that he “would like for it to be reviewed....” The hearing examiner then gave the trooper thirty days to produce a copy of the video, designated it as Exhibit Number Four, and explained that “it will be made part of the record and the Commissioner will review that carefully.” The driver further stated that “the events on the tape I think will be helpful to me and, and what he said about, I'd like to see that, I'd like to have, you know, of course, I guess they will be the one to examine it....” The driver was once again assured by the hearing examiner that the video would be reviewed carefully. 190 W.Va. 591, 439 S.E.2d 456. When the video was not produced in the timeframe ordered by the Commissioner’s hearing examiner, the Commissioner held the record open for an additional 30 days. The video was never produced.

In the present case, although Deputy Tucker testified to the existence of two videos (the in-car video and the video made at the station), neither the driver nor his attorney asked for production of the video. Moreover, neither the driver nor his attorney requested or subpoenaed the videos prior to the hearing. Finally, the Hearing Examiner in the present case did not order production of the video, nor did she hold the record open for its admission.

Curiously, in her *Petition for Judicial Review* before the circuit court, Appellee averred, "The Respondent [Commissioner] further erred in considering the testimony of the arresting officer regarding the results of field sobriety testing when a video tape depicting the results of such testing proved that the Petitioner [Appellee herein] did not fail such tests as testified to by the arresting officer." Petition at ¶11. Inasmuch as the video is not in the record, it is implausible that the Appellee could argue that it was exculpatory to her. Moreover, the circuit court found that "The primary, if not exclusive, basis for the finding that the Petitioner [Appellee herein] drove a motor vehicle while under the influence of alcohol was the testimony of the Arresting Officer relating to the Petitioner's [Appellee's herein] performance on such field sobriety tests." Order at ¶ 6. This further indicates the unlikelihood that Appellee knew that the videotapes were exculpatory.

The circuit court erred in establishing a heretofore nonexistent adverse inference based on the investigating officer's failure to introduce the video at the administrative hearing. Judge Johnson is applying this rule in multiple cases requiring law enforcement in his county to produce video evidence that is not requested, would be repetitive or might not add anything at all. Under *Belknap*, there is no requirement in this case to produce the video. The driver did not request it, even after the officer testified as to its existence at the administrative hearing, and the Hearing Examiner did not order its production. The circuit court provided no support in West Virginia law for finding an adverse

inference in an administrative DUI proceeding. The circuit court committed clear error in making such a finding, and in reversing the Final Order on that basis.

West Virginia's caselaw regarding adverse inference is found in cases of spoliation of evidence and failure to call a material witness. *See, McGlone v. Superior Trucking Co., Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987)(missing witness instruction); *Tracy v. Cottrell ex rel. Cottrell*, 206 W.Va. 363, 524 S.E.2d 879 (1999)(spoliation of evidence); *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003)(spoliation of evidence); *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996)(missing witness instruction); *Kominar v. Health Management Associates of West Virginia, Inc.*, 220 W.Va. 542, 648 S.E.2d 48 (2007)(spoliation of evidence).

The circuit court provided no support in West Virginia law for finding an adverse inference in an administrative DUI proceeding. *Noble, supra*, is dispositive of this issue. The circuit court cannot consider a nonjurisdictional question raised for the first time on appeal. The circuit court committed clear error in making such a finding, and in reversing the Final Order on that basis.

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO COMPLY WITH THE MANDATES OF *CHOMA V. WEST VIRGINIA DIV. OF MOTOR VEHICLES*, 210 W .VA. 256, 557 S.E.2D 310 (2001).

In this case, the circuit court erred in finding that the Commissioner failed to comply with the mandates of *Choma v. West Virginia Div. of Motor Vehicles*, 210 W .Va. 256, 557 S.E.2d 310 (2001). Order at 1-2. The circuit court failed to note that there was no evidence of the outcome of the criminal proceeding at the administrative hearing. Indeed, the record shows that the criminal matter

was not resolved until after the hearing; thus, it was impossible for that evidence to be brought forth at the administrative hearing.

Choma specifically provides in Syllabus Point 3 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.*” *Choma* makes clear that (1) it is the DMV Commissioner who must make an initial determination of any criminal case result and (2) that for such consideration, the result must be admitted at the administrative hearing. Here, the circuit court usurped the DMV Commissioner’s role by considering the matter in the first instance.

The administrative hearing in this matter was held on June 3, 2009. No mention was made of the criminal case at the hearing. On June 29, 2009, Appellee’s counsel sent an abstract of conviction and a dismissal order to the DMV. Those documents reflected that Appellee pled no contest to reckless driving, and the case was dismissed on June 29, 2009.

The Final Order was entered effective August 24, 2009, and did not discuss the dismissal of the criminal case. Once again, a non-jurisdictional question was raised for the first time on appeal of this matter. Appellee’s counsel noted in the *Petition for Judicial Review* that Appellee’s DUI charge was dismissed, and he argued in circuit court on December 7, 2009 that the charges had been dismissed.

Whereupon, the circuit court improperly considered the matter itself, relying on *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001). Order at 1-2.

Although the circuit court noted the dismissal and found that the Commissioner had failed to comply with *Choma* as findings of fact, that court did not discuss the issue in its conclusions of law.

As was argued *supra*, it is impermissible for the circuit court to consider a question not raised below. *Noble, supra*. See also, W. Va. Code § 29A-5-4(f) (“The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court.”). In fact, as this Court has explained, to vest the power to develop new evidence *vel non* in a reviewing court runs afoul of the separation of powers doctrine. *Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995). Statements made by counsel in a petition are not evidence and cannot be used to support a trial court’s findings of fact. See, e.g., *Wood ex rel. United States v. American Institute in Taiwan*, 286 F.3d 526, 534 (D.C. Cir. 2002) (“The district court did make several factual findings regarding Institute funding, including some findings based on assertions in the Government’s brief. Statements by counsel, of course, are not evidence.”); *Singh v. I.N.S.*, 213 F.3d 1050, 1054 n.8 (9th Cir. 2000) (“statements in motions are not evidence and are therefore not entitled to evidentiary weight”); *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248, 1249 n.1 (3d Cir. 1970) (“We have repeatedly held that statements by counsel in briefs or in court are not evidence.”).

It is apparent that the circuit court found that the Commissioner erred by not complying with *Choma*; however, the circuit court did not make clear what effect the dismissal should have had on the Commissioner’s deliberation.

The record of a prior criminal proceeding must be before the trier of fact in an administrative license revocation in order to determine whether the criminal disposition was the result of compromise, confusion, mistake, leniency, legally and logically irrelevant factors, legal error, or was

manifestly wrong, unjust, irrational, or unsupported by the evidence. Otherwise, it is probative of nothing. These factors must be considered first by the Commissioner and not by a reviewing court.

“*Choma* requires the *commissioner* only to give ‘consideration’ to the results of any criminal prosecution[,]” *Adkins v. Cline*, 216 W. Va. 504, 513, 607 S.E.2d 833, 842 (2004) (per curiam) (emphasis added), and it would constitute a usurpation of the Commissioner’s duties to have the circuit court consider the criminal proceedings. *Choma* had long since been decided at the time of the administrative hearing in this matter. Appellee was represented by the same lawyer in both the administrative and criminal proceedings. Clearly, her counsel made a tactical decision to proceed with the administrative hearing prior to resolution of the criminal matter. Appellee cannot now complain that the Commissioner erred by failing to consider evidence which did not exist, and which was not admitted, at the time of the administrative hearing.

The circuit court erred in finding that the Commissioner did not comply with the requirements of *Choma*, when such evidence was not before him.

V.

RELIEF REQUESTED

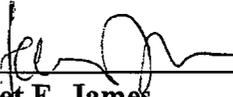
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant prays that this Court reverse the Order entered by the Circuit Court of Nicholas County on December 30, 2009.

Respectfully submitted,

**JOE E. MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

By Counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



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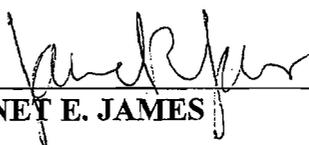
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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, and counsel for respondent, do hereby certify that the foregoing *Brief of Appellant* was served upon Appellee by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 20th day of October, 2010, addressed as follows:

Gregory W. Sproles, Esquire
Breckinridge, Davis, Sproles & Chapman
509 Church Street
Summersville, WV 26651



JANET E. JAMES