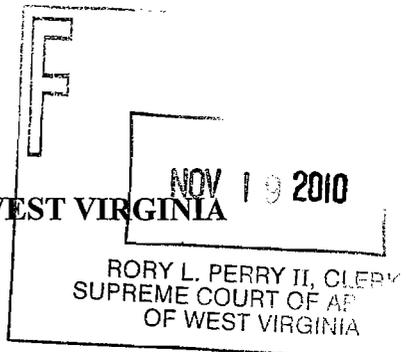


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



ROBIN D. DAVISSON,

Appellee/Petitioner Below,

vs.//

**JOE MILLER, Commissioner of the
West Virginia Division of Motor Vehicles,**

NO.35674

Petitioner/Respondent Below.

**RESPONSE OF APPELLEE/PETITIONER BELOW, ROBIN D. DAVISSON,
TO BRIEF OF APPELLANT/RESPONDENT BELOW**

Comes now the Appellee, Robin D. Davisson, by counsel, Gregory W. Sproles, and submits this Response to Brief of Appellant in accordance with the order of the Court. Appellee seeks this Honorable Court to uphold an order entered on December 30, 2009, by the Honorable Gary L. 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an administrative driver's license revocation order entered by the Division by which the Appellee's privilege to drive was revoked.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. TYPE OF PROCEEDING AND NATURE OF THE RULING BELOW

The Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles, hereinafter referred to as "Petitioner", appeals from the *Final Order Reversing Commissioner's Final Order and Reinstating Petitioner's Drivers' License and Driving Privileges*, hereinafter referred to as "Order", entered on December 30, 2009 by the Honorable Gary L. Johnson, Judge of the Circuit Court of Nicholas County, West Virginia. The Order resulted from the Petition

for Judicial Review by Robin D. Davisson, hereinafter referred to as "Respondent", from the Final Order of the Petitioner, with an effective date of August 24, 2009, which revoked the Petitioner's driver's license for driving under the influence of alcohol, but rescinded the initial Order of Revocation for refusing to take the designated secondary chemical test.

The Respondent contends that Judge Johnson's Order was correct and at least not clearly erroneous and this Honorable Court should affirm this Order.

II. STATEMENT OF 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 Nicholas County, West Virginia.

Deputy Tucker initiated a traffic stop of a black Ford Escape which was traveling on Route 41. According to Deputy Tucker, this vehicle was proceeding toward "Roanoke". (There is no city or incorporated area in Nicholas County known as Roanoke). Deputy Tucker allegedly observed this vehicle weaving back and forth and driving left of center. After Deputy Tucker initiated a traffic stop of this vehicle, he testified that the driver's eyes appeared to be glassy and bloodshot and he could smell alcohol on the driver's breath. Although the Respondent admitted that she had been drinking, Deputy Tucker did not ask the Respondent, nor did she advise him, when she had been drinking and over what period of time. (See, Transcript, pg. 6) Deputy Tucker, at the administrative hearing held in this matter, presented no evidence that he was trained to perform field sobriety tests, but nevertheless testified regarding the administration of several field sobriety tests. Deputy Tucker also testified that he performed a preliminary breath test on the Respondent which she allegedly failed.

Deputy Tucker then arrested the Respondent and transported her to the Nicholas County Sheriff's Office where a secondary chemical test was performed. The Respondent blew three (3)

times on the intoximeter, however, on all three (3) occasions the intoximeter indicated an insufficient sample.

At the administrative hearing, the Respondent testified on her own behalf and presented the testimony of Ralph Kessler who had observed and talked to the Respondent immediately before she was stopped by Deputy Tucker. Mr. Kessler testified that he had observed the Respondent and talked to her for approximately forty five (45) minutes. (See, Transcript, pg. 16) Mr. Kessler was sitting very close to the Respondent. Mr. Kessler testified that the Respondent did not appear to be under the influence of alcohol or slur her speech. (See, Transcript, pg. 17) Mr. Kessler also testified that he had known the Respondent for some time and that had she appeared to have been under the influence of alcohol he would have been able to detect this condition. Mr. Kessler testified that he would never had let the Respondent leave if he did not believe she was sober and he would have driven her home if she appeared to be intoxicated. (See, Transcript, pgs. 19 and 20)

The Respondent also testified at the administrative hearing that she was not under the influence of alcohol on the night in question and did not stagger. (See, Transcript, pg. 21) The Respondent also testified that she did not recall the officer giving her a preliminary breath test (PBT). (See, Transcript, pg. 22) The Respondent also testified that although she told the officer she had drank four (4) beers, these beers were consumed over a period of approximate five (5) hours. (See, Transcript, pgs. 22 and 23) The Respondent also testified that she did not weave while she was driving, but may have crossed the center line one (1) time because the road in question is very curvy. (See, Transcript, pg. 23) The Respondent also testified that she has trouble breathing as a result of asthma and has severe allergies. (See, Transcript, pgs. 23, 25 and 26.) The Respondent testified that she is allergic to forty one (41) out of sixty (60) different substances for which she was tested.

These allergies result in sneezing, itching and watery eyes and make her eyes red and bloodshot. (See, *Transcript*, pgs. 25-26)

The Respondent also testified that during the administration of the secondary chemical test she did not refuse to take this test, but blew on the intoximeter as hard as was possible for her considering her asthma and severe allergies. (See, *Transcript*, pg. 30)

At the administrative hearing, counsel for the Respondent introduced relevant sections of the National Highway Traffic Safety Administration Guidelines (NHTSA) for field sobriety testing, along with a copy of West Virginia Code §60-6-24.

The record at the administrative hearing indicated that a video tape was made of the initial stop of the Respondent and her performance on field sobriety testing. Deputy Tucker did not seek to introduce either this videotape or a videotape made when the Respondent was administered the secondary chemical test at the Sheriff's Office.

After the administrative hearing, counsel for the Respondent provided to the Petitioner an Abstract of Judgment from the Magistrate Court of Nicholas County, West Virginia, which indicated that the charge of driving under the influence of alcohol against the Respondent was dismissed and the Respondent entered a plea of No Contest to reckless driving. This abstract was provided to the Petitioner by correspondence from Respondent's counsel on June 29, 2009. The Petitioner's Final Order was received by counsel for the Respondent on July 15, 2009. This Order did not comment upon the dismissal of the charge of driving under the influence of alcohol.

The Respondent's drivers license was initially revoked not only for driving under the influence of alcohol, but also for refusing to take the designated secondary chemical test. The Petitioner's Final Order accepted the testimony of the Respondent, that because of her asthma and allergies, she was not able to provide a sufficient sample on the secondary chemical test, and

rescinded the initial Order which revoked the Respondent's drivers license for refusing to submit to the designated secondary chemical test. The Petitioner, however, failed to give any weight to the evidence presented by the Respondent that she was not under the influence of alcohol when she drove on March 29, 2009 or the testimony of Ralph Kessler.

After the Petitioner entered its Final Order the Respondent filed a timely Petition for Judicial Review. A final hearing was held on this Petition for Judicial Review on December 7, 2009. After this hearing, Judge Johnson entered the Order from which the Petitioner appeals. At the December 7, 2009 hearing, Judge Johnson found, among other things, that the Petitioner's Final Order did not comply with the provisions of *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E 2d 310 (2001), because it gave no weight to the dismissal of the underlying criminal charge of driving under the influence of alcohol. (See, *Transcript of December 7, 2009, Final Hearing on Petition for Judicial Review, pgs. 16 and 21*) Judge Johnson also found, consistent with all the evidence of record, that a video tape was made by Deputy Tucker of the field sobriety tests which the Respondent performed and such video tape was not introduced by Deputy Tucker. Judge Johnson then found that when an administrative revocation of a person's driver's license for driving under the influence of alcohol is based solely on the observations of the Arresting Officer and there is a video tape of the actions of the Petitioner (Respondent herein) in regard to their performance of field sobriety testing and such video tape is not introduced into evidence at the administrative hearing by the Arresting Officer, an adverse inference arises that the video tape would be detrimental to or contrary to the testimony of the Arresting Officer. This adverse inference arose when the testimony of the Respondent (Petitioner below) and a witness called on her behalf was contrary to the testimony and evidence of the Arresting Officer.

III. ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR IN ALLOWING THE RESPONDENT TO ARGUE AN ISSUE NOT RAISED OR PRESERVED BELOW AND DID NOT ERR IN FINDING THAT THE FAILURE OF AN INVESTIGATING OFFICER TO INTRODUCE A VIDEOTAPE AT AN ADMINISTRATIVE HEARING GIVES RISE TO AN ADVERSE INFERENCE THAT SUCH VIDEOTAPE WOULD BE ADVERSE TO THE TESTIMONY OF THE OFFICER.

In this case, the only evidence upon which the Petitioner had to base the revocation of the Respondent's driver's license was evidence regarding the performance of the Respondent on field sobriety testing, even though there was no evidence introduced by the Arresting Officer that he was trained, qualified or certified to perform field sobriety testing. The Respondent, in this case, disputed portions of the evidence presented by Deputy Tucker regarding her performance on field sobriety testing. There was also evidence presented at the administrative hearing that the Respondent was not under the influence of alcohol and that because of asthma she was unable to breath normally and as a result of severe allergies her eyes often become bloodshot, red and glassy. The Petitioner apparently gave no weight to this undisputed evidence.

Consequently, there was a direct conflict in credible evidence on which the Petitioner acted. The Circuit Court was therefore confronted with a situation of conflicting evidence presented by the parties which would have been avoided if the Arresting Officer had introduced the videotape made of the Respondent after she was stopped and during the administration of the field sobriety testing. The Court therefore properly found that the failure of the Arresting Officer to introduce this videotape created an adverse inference that his testimony would not have been in conformity with this videotape. This finding was entirely proper because of the evidence presented by the Respondent which rebutted the evidence presented by the Arresting Officer. Judge Johnson had

previously commented on several occasions that if such a videotape was made of a person performing field sobriety testing, it should be introduced at the administrative hearing regarding the revocation of a persons driver's license. Because the Petitioner did not comply with Muscatell v. Cline, 196 W.Va. 588, 474 S.E. 2d 518 (1996), by making a reasoned and articulate decision, weighting and explaining the choices made and rendering his decision capable of review by an appellat court when it accepted the testimony of Deputy Tucker and discounted the evidence presented by the Respondent, Judge Johnson was totally justified in making such an adverse inference. This is especially true when there was no evidence presented at the administrative hearing that Deputy Tucker was trained or certified to perform field sobriety testing. During Deputy Tucker's testimony regarding the administration of these field sobriety tests, he did not explain how he instructed the Respondent to perform the subject tests, how he demonstrated these tests were to be performed or whether he otherwise complied with the NHSTA Guidelines. These guidelines set forth the manner in which field sobriety tests must be performed in order to rely on these tests to form a basis to arrest someone for driving under the influence of alcohol or inferring that a person was under the influence of alcohol. One example of Deputy Tucker's deviation from these guidelines was his testimony that instead of standing to the side of the Respondent while performing a one leg stand and walk and turn test, in order to assure the subject was not distracted during this test, he stood in front of the Respondent, contrary to the NHSTA Guidelines. In addition, the Respondent disputed that Deputy Tucker even performed a preliminary breath test. The Respondent's testimony regarding this test was not addressed in the Petitioner's Final Order.

The Petitioner has consistently argued, and this Honorable Court has held, that driver's license revocation proceedings are civil in nature. Thus, the failure of a party, in this case Deputy Tucker, to present relevant and material evidence in a civil proceeding may give rise to an adverse

inference that such failure would have been adverse to the party failing to present such evidence which he had in his possession. In *McGlone v. Superior Trucking Company, Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987), this Honorable Court held that the unjustified failure of a party in a civil case to call an available material witness may, if the trier of the facts so finds, give rise to an inference that the testimony of the "missing" witness would, if he or she had been called, have been adverse to the party failing to call such witness. In the present case, Judge Johnson was totally justified in drawing this adverse inference considering that the evidence presented by Deputy Tucker and the Respondent was, in some respects, directly conflicting. Judge Johnson's finding, in this case, was limited to a situation in which an administrative revocation of a person's drivers license was based solely on the testimony of the Arresting Officer even though there was a videotape of the events in question. Consequently, the Circuit Court was not clearly wrong and did not err in making an adverse inference in this matter and this Honorable Court should affirm this portion of Judge Johnson's Order which reversed the Petitioner's Final Order.

B. THE CIRCUIT COURT DID NOT ERR IN CONSIDERING MATERIAL NOT BEFORE THE HEARING EXAMINER.

As this Court is aware, substantial weight must be given to the dismissal of the Respondent's criminal case based upon *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001). The dismissal of the underlying criminal proceedings was before the Petitioner. This Honorable Court has held that all matters of record before the Petitioner must be considered when making a decision regarding the revocation of a person's drivers license and the loss of a valuable property interest. *Crouch v. West Virginia Division of Motor Vehicles*, 631 S.E.2d. 628 (W. Va. 2006)

Although the underlying criminal case against the Respondent for driving under the influence of alcohol was not disposed of at the time of the administrative hearing, evidence was presented to

the Petitioner that this charge was dismissed before the Petitioner entered his Final Order. Contrary to *Choma*, the Petitioner gave no weight to this dismissal. Although the Petitioner argues that the matter should have been remanded, the Petitioner waived any right to request a remand, or argue that the matter should have been remanded, because no such request was made of the Circuit Court by the Petitioner. (See, Transcript of December 7, 2009 Final Hearing on Petition for Judicial Review)

The Petitioner has often argued that it must consider all matters before it when making a final decision in regard to the revocation of a person's property interest in a driver's license. In this case, the Petitioner had before him the record of the dismissal of the charge of driving under the influence of alcohol, with which the Respondent was initially charged, but chose not to address this issue. The Petitioner could easily have scheduled a second hearing, if additional evidence was needed to determine the basis for this dismissal, but instead chose to ignore this dismissal, even though this evidence was in the hands of the Petitioner prior to the issuance of his Final Order.

The Petitioner argues that the undersigned made a tactical decision to proceed with the administrative hearing before the Petitioner before the disposition of the criminal matter in the Magistrate Court. This is totally incorrect. The undersigned does not control the scheduling of matters before the Petitioner or the Magistrate Court. It has long been the experience of the undersigned that the Petitioner is quite reluctant to reschedule an administrative hearing, except for good cause, which the Petitioner frequently strictly construes. In this case a request to continue the administrative hearing, because the underlying criminal case had not been disposed of, would likely have been a useless action. A request to continue the administrative hearing because the criminal case had not been conducted is not the type of cause which has historically been viewed by the Petitioner to be good cause. Once the criminal case was concluded, the Petitioner was immediately notified of the outcome of the Magistrate Court case. To assert that the undersigned made a tactical

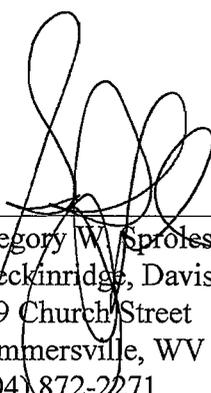
decision to proceed with the administrative hearing first is without a basis and it is completely wrong.

Contrary to the Petitioner's position, evidence of the dismissal of the underlying criminal charge of driving under the influence of alcohol was before the Petitioner prior to his final decision. Consequently, the Circuit Court did not err in considering this evidence. *Adkins v. Cline*, 216 W.Va. 504, 513, 607 S.E. 2d 833, 842 (2004) (per curiam). To ignore this evidence was a clear error by the Petitioner and Judge Johnson was correct in so finding.

IV. CONCLUSION

The Respondent respectfully prays that this Honorable Court review all of the matters of record and at the conclusion of which affirm Judge Johnson's Order which reversed the Petitioner's Final Order. The Respondent further prays for such other and general relief as this Honorable Court may deem proper.

Respectfully submitted,
ROBIN D. DAVISSON
By Counsel,



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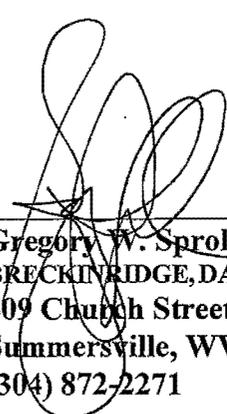
JOE MILLER, Commissioner of the
West Virginia Division of Motor Vehicles,

Petitioner/Respondent Below.

CERTIFICATE OF SERVICE

I, Gregory W. Sproles, counsel for Appellee/Petitioner, Robin D. Davisson, do hereby certify that I have served the foregoing *Response of Appellee/Petitioner Below, Robin D. Davisson, to Brief of Appellant/Respondent Below*, upon the plaintiff by mailing a true copy, by United States Mail, postage prepaid on this the 17th day of November, 2010 and properly addressed as follows:

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