

11-0147

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

DAVID K. SMITH

Petitioner,

CIVIL ACTION NO. 10-AA-77-N

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

Respondent.

OPINION ORDER

This matter comes before the Court upon an appeal from the Final Order entered by Joe E. Miller, Commissioner of West Virginia Division of Motor Vehicles. Said appeal was filed by the Petitioner, David K. Smith, on July 15, 2010. The Respondent filed a Response Brief on December 15, 2010. A hearing was held on December 17, 2010. The Petitioner and his counsel appeared in person. Counsel for the Respondent appeared by telephone.

The Court has considered the Petitioner's Brief, the Respondent's Brief, and the arguments of counsel. After due deliberations and for the reasons set forth below, this Court is of the opinion to, and hereby does, GRANT the Petitioner's Petition for Appeal.

FINDINGS OF FACT

1. Petitioner, David K. Smith, was arrested on July 9, 2009 by Senior Trooper A.D. Wootton of the West Virginia State Police and charged with the crime of Driving Under the Influence.
2. Following Trooper Wootton's submission of the Statement of Arresting Officer to the Division of Motor Vehicles, Petitioner's driving privileges were revoked on September 22, 2009.
3. Petitioner timely contested the revocation.

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4. A hearing was held at the Point Pleasant Division of Motor Vehicles office on March 31, 2010 on the license revocation before Robert L. DeLong, Hearing Examiner.

5. Prior to the administrative hearing, the State of West Virginia dismissed the pending criminal action against the Respondent due to the unconstitutional stop in accordance with Supreme Court of Appeals of West Virginia's holding in State v. Sigler, 697 S.E.2d 391 (W. Va. 2009).

6. In an **undated** decision, the Commissioner of Motor Vehicles ordered Petitioner's driving privileges revoked based upon the results of the hearing of March 31, 2010, effective August 4, 2010.

7. The Commissioner revoked Petitioner's privilege to drive even though he found that a "safety" checkpoint established by Trooper Wootton and Corporal Gilley on July 9, 2009, "clearly did not meet the requirements set forth in Sigler". State v. Sigler, 697 S.E.2d 391 (W. Va. 2009).

8. The Commissioner found that the provisions of W. Va. Code § 17C-5A-2 (2008) "do not require the Division of Motor Vehicles to determine whether a law enforcement officer had a reasonable suspicion to stop or detain a motor vehicle or whether the law-enforcement officer lawfully arrested the driver thereof as a predicate to resolving the principal question of whether the driver of the motor vehicle was driving under the influence of alcohol."

9. The Commissioner found that the administrative license procedure is civil in nature and thus not subject to an exclusionary rule.

10. The Commissioner issued an undated decision that was received by Petitioner's counsel on June 26, 2010 and by the Petitioner on June 27, 2010.

11. The Petitioner and his counsel, Matthew L. Clark, submitted affidavits detailing the receipt of the Commissioner's Order and detailing the customary time in which Petitioner's counsel normally receives mail from Charleston, West Virginia, the site of the Commissioner's offices. The Commissioner has not contested that the Commissioner's Order was rendered subsequent to June 11, 2010. As such, this court **FINDS** that the Commissioner's Order was issued at some date subsequent to June 11, 2010.

12. On March 13, 2010, the West Virginia Legislature passed S.B. 186 of 2010, 79th Legislative Session. The bill was passed on March 13, 2010 and was effective ninety days from the passage thereof, June 11, 2010.

13. S.B. 186 amended and reenacted § 17C-5-2 and §17C-5-7; added a new section, designated § 17C-5-2b; amended and reenacted § 17C-5A-1a, § 17C-5A-2, § 17C-5A-3 and § 17C-5A-3a and added thereto a new **article**, designated § 17C-5C-1, § 17C-5C-2, § 17C-5C-3, § 17C-5C-4 and § 17C-5C-5.

14. In the administrative appeal, Petitioner has alleged that the Commissioner of the Division of Motor Vehicles was divested of jurisdiction to hear and decided matters of administrative licensed revocations by virtue of the enactment of W. Va. Code § 17C-5C-3 that exclusively granted jurisdiction to hear and determine such cases exclusively with the newly created Office of Administrative Hearings.

15. The Respondent Commissioner has asserted that W. Va. Code § 17C-5C-5 provides that the "Secretary of the Department of Transportation may establish interim policies and procedures for the **transfer** of administrative hearings from decisions or orders of the Commissioner of the Division of Motor Vehicles . . . no later than October 1, 2010." To that end, the Respondent Commissioner proffered a letter of May 17, 2010 from Paul A. Mattox, Secretary of Transportation to Joe E. Miller, the

Commissioner of the Division of Motor Vehicles that “appoints Jill C. Dunn as the WV DOT designee to fulfill the Cabinet Secretary’s obligations pursuant to §17C-5-1 et seq.”

16. The Respondent Commissioner also proffered a single page Memorandum dated June 10, 2010, perplexingly noted as REVISED 09/18/2009. In this Memorandum, Jill C. Dunn, interim Chief Hearing Examiner for the Office of Administrative Hearings asserts that the Office of Administrative Hearings “shall have jurisdiction over all administrative revocation hearings for appeals from decisions of orders of the the Commissioner of Motor Vehicles denying, suspending, revoking . . . for violating the provisions of any licensing law contained in Chapters 17A, 17B, 17C, 17D and 17E that have an incident or arrest date that occurs on or after June 11, 2010.”

17. The Respondent has not provided the court with any documentation that the Secretary of Transportation has designated any person to fulfill his statutory duties pursuant to Chapter 17C, Article 5C as the designation of Jill Dunn as Interim Chief Hearing Examiner designates her to fulfill the Secretary’s obligations pursuant to Article 5, Section 1 and those subsequent sections of Article 5. No designation is made as to newly enacted Article 5C.

CONCLUSIONS OF LAW

1. As of June 11, 2010, the legislature conferred the exclusive jurisdiction to hear and **determine** appeals Orders of the Commissioner upon the Office of Administrative Appeals. W. Va. Code 17C-5C-3 provides,

The Office of Administrative Hearings jurisdiction to hear and determine all:

(1) Appeals from an order of the Commissioner of the Division of Motor Vehicles suspending a license pursuant

to section eight, article two-B, chapter seventeen-B of this code;

(2) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles suspending or revoking a license pursuant to sections three-c, six and twelve, article three, chapter seventeen-B of this code;

(3) Appeals from orders of the Commissioner of the Division of Motor Vehicles pursuant to section two, article five-A, of this chapter, revoking or suspending a license under the provisions of section one of this article or section seven, article five of chapter;

(4) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters seventeen-B and seventeen-c that are administered by the Commissioner of the Division of Motor Vehicles; and

(5) Other matters which may be conferred on the office by statute or legislatively approved rules.

2. Effective June 11, 2010, the Commissioner of the Division of Motor Vehicles was divested of its jurisdiction to hold hearings and make determinations of the matters encompassed under the jurisdiction of the Offices of Administrative Hearings. As such, the Respondent was without jurisdiction to render any Final Order, as was issued in this case, subsequent to June 11, 2010.

3. The Respondent's Commissioner's submission of the May 11, 2010 letter from the Secretary of Transportation has no legal effect other than to appoint Jill C. Dunn as Interim Chief Hearing Officer and to appoint Ms. Dunn to fulfill the Cabinet Secretary's statutory obligations pursuant to Chapter 17, Article 5. The court does **HOLD** that the addition of the term *et seq.* does not encompass matters arising pursuant to Chapter 17C Article 5C of the West Virginia Code. As such, the June 10, 2010 Memorandum of Jill C. Dunn, Interim Chief Hearing Office of the Office of Administrative Hearings has no legal effect on this pending matter. Even if the

aforesaid Memorandum had legal effect, the Memorandum provided to this court does not specifically provide that administrative proceedings arising from incident or arrest dates proceeding June 11, 2010 should remain within the jurisdiction of the Commissioner.

4. Were the June 10, 2010 Memorandum to have legal effect arising from the Secretary's designation on May 11, 2010, the Memorandum constitutes an impermissible and unconstitutional usurpation of powers by the Executive Branch of state government in violation of the dictates of the Legislature pursuant to W. Va. Code § 17C-5C-3. W. Va. Code § 17C-5C-5 does permit the Secretary to establish policies and procedures for the *transfer* of administrative hearings as well as "equipment and records." However, the aforesaid section does not provide that the Secretary may establish policies and procedures for *retention* of matters that originated prior to June 11, 2011 as the Commissioner argued. This asserted retention of jurisdiction is expressly contradictory to the applicable law and violates the doctrine of separation of powers.

5. The court does further conclude that amended provisions of W. Va. Code § 17C-5A-2 are retroactive to pending cases including the present case. As such, the 2010 version of the applicable section requires the newly created Office of Administrative Hearings to consider the following:

(f) In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or accused of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the Office of Administrative Hearings shall make specific findings as to: (1) Whether the investigating law-enforcement officer had reasonable grounds to

believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: Provided, That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

6. The court notes that the prior 2008 version of the applicable statute governing hearing procedures did not require the adjudicating body, then the Commissioner, to ascertain whether the arrest or custodial detention of a person accused of driving under the influence was lawful,

(f) In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or accused of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the commissioner shall make specific findings as to: (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight; (2) whether the person committed an offense involving driving

under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (3) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

7. In Cain v. West Virginia Div. of Motor Vehicles., the Supreme Court of Appeals of West Virginia held that the Commissioner need not determine whether an arrest was lawful as the prior version of the statute specifically only required that the investigating law-enforcement officer had “reasonable grounds to believe that the person to have been driving while under the influence.” 697 S.E.2d 309 (W. Va. 2010). The court held that the factual predicate for revocation “is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.”

8. However, in Cain, the court while holding that the circumstances of Mr. Cain’s arrest were not germane to the issue of “reasonable grounds”, cited approvingly the court’s prior holding in Clower v. Dept. of Motor Vehicles, 678 S.E.2d 41 (W. Va. 2009). In Clower, the court affirmed the trial court’s ruling that the arresting office lacked reasonable grounds to effect a motor vehicle stop of Mr. Clower. In doing so, Justice Ketchum addressed the requisite constitutionality of investigatory stops by police officers,

We have previously addressed the standard a law enforcement officer must have before making an investigatory stop. In State v. Stuart, 192 W. Va. 428, 452 S.E.2d 886 (1994), we were asked whether law enforcement officers must have actual probable cause to believe that a crime had been committed before making an investigatory stop of a motor vehicle, or whether the officers could rely on the lesser standard of reasonable suspicion without violating an individual’s Fourth Amendment right against unreasonable search and seizure. We concluded in Stuart, that under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia

Constitution "[p]olice officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime[.]" Syllabus Point 1, in part, State v. Stuart, 192 W. Va. 428, 452 S.E.2d 886. We find no reason to revisit our decision in Stuart. The Commissioner alternately argues that the circuit court abused its discretion in finding that Trooper Kessel did not have an articulable reasonable suspicion to make the traffic stop of Mr. Clower's vehicle. The Commissioner argues that Trooper Kessel's belief that Mr. Clower had committed a misdemeanor traffic offense in his presence constituted a sufficient articulable reasonable suspicion for stopping Mr. Clower's vehicle. In Stuart, we noted that law enforcement officers were constitutionally required to "articulate facts which provide some minimal, objective justification for the stop." State v. Stuart, 192 W. Va. at 433 n. 10, 452 S.E.2d at 891 n. 10, *citing* United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (officer must be able to articulate something more than an "inchoate and unparticularized suspicion or hunch"). We further noted in Stuart, that: The criteria for reasonable suspicion to stop a vehicle are very similar to a street stop under Terry. Factors such as erratic or evasive driving, the appearance of the vehicle or its occupants, the area where the erratic or evasive driving takes place, and the experience of the police officers are significant in determining reasonable suspicion.

State v. Stuart, 192 W. Va. at 433 n. 10, 452 S.E.2d at 891 n. 10. The analysis required by a reviewing court in determining whether a law enforcement officer had sufficient reasonable suspicion to initiate a traffic stop, is that of a totality of the circumstances. "When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police." Syllabus Point 2, Stuart. The evaluation of whether reasonable suspicion existed at the time of a traffic stop or other brief investigatory detentions involves a two-step inquiry. We first consider "whether the officer's action was justified at its inception" and second "whether [the action] was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *See also*, State v. Jones, 193 W. Va. 378, 456 S.E.2d 459 (1995); State v. Joseph, T., 175 W. Va. 598, 336 S.E.2d 728 (1985).

9. Thus, despite the Commissioner's findings and arguments herein to the contrary, the Supreme Court of Appeals of West Virginia has held unequivocally that any traffic stop effected by law enforcement must be constitutionally sound. Thus, the court holds that though δ 17C-5A-2 (2008), argued as applicable to this case by the Commissioner, does not expressly require that a lawful arrest be made, the investigatory stop itself, if one did indeed occur, must be constitutional. In Cain, the police found Mr. Cain asleep on the ground in front of his parked vehicle. The police contact with Mr. Cain was not violative of the constitutional parameters for investigatory traffic stops as no such investigatory traffic stop occurred. The court in reversing the trial court found "[b]ecause Mr. Cain's vehicle was parked at the time the arresting officer encountered Mr. Cain, the standard governing the lawfulness of an investigatory traffic stop is clearly inapplicable to the case before us." As such, Cain is distinguishable from the present case. Petitioner Smith was stopped without the constitutionally required "reasonable suspicion." The Commissioner found that stop of Petitioner Smith's vehicle was violative of the holding of Sigler, and thus unconstitutional, yet failed to apply the holding of Clower that requires that an investigatory stop must fall within constitutional parameters. As such, this court holds and concludes that the investigatory stop was unconstitutional and that Clower unequivocally requires that the Commissioner apply the standards enunciated by the court to all investigatory traffic stops. Clower does not limit this inquiry to criminal cases only. In fact, the Clower case itself arises from an administrative appeal. Therefore, this court holds that the Commissioner was clearly wrong in not considering the import of the unconstitutional stop and interpreted the law without regard to the Supreme Court of Appeals' holding in Clower. Further, the Supreme

Court of Appeals of West Virginia recently again spoke to the issue of the requisite constitutionality of investigatory traffic stops in Ullom v. Miller, Commr. of West Virginia Div. of Motor Vehi., Case No. 34864 (November 23, 2010). In Ullom, in finding the applicability of the “Community Caretaker Doctrine” and finding that no stop occurred, Justice Benjamin recited the requisite constitutionality required on investigative stops. If the issue of whether an investigatory stop met constitutional muster was not relevant to administrative revocations as the Commissioner as argued in the present case, the court would need not have addressed such issues in Ullom or necessarily found that the “Community Caretaker Doctrine” was applicable as an exception to Fourth Amendment requirements. As such, the court reverses the Commissioner’s Final Order revoking Petitioner Smith’s license on the basis that the investigatory stop was in violation of both the State of West Virginia and United States Constitutions.

10. Finally, the court concludes that the 2010 amendments to W. Va. Code § 17C-5A-2 must be retroactively applied to pending cases. The Commissioner argues persuasively that that statutory retroactivity should generally not be extended. However, the Commissioner’s citations and arguments are applicable only to changes in substantive, rather than procedural law. The court notes that Article 5A is titled “Administrative Procedures for Suspension and Revocation of Licenses for Driving Under the Influence of Alcohol, Controlled Substances or Drugs.” The very title of the of Article indicates that the Legislature has delineated the entire article as procedural in nature as it governs the procedure the administrative body must follow in making license revocation determinations. In considering statutory retroactivity, the Supreme Court of Appeals has held that “statutory changes that are purely procedural in nature will be applied retroactively.” Joy v. Chessie Emp. Fed. Credit Union, 411 S.E.2d 261

(W. Va. 1991). As such, the court holds that the hearing procedures set forth in the 2010 amendments to W. Va. Code § 17C-5A-2 must necessarily be applied retroactively to the Petitioner's pending case. The Legislature's express title of the applicable article is indicative that the applicable statute is purely procedural. As such, the court holds that the retroactive application of the statute would require a lawful arrest as is evident from the Commissioner's Final Order did occur due to the unconstitutionality of the stop of the Petitioner's vehicle.

11. For the foregoing reasons set forth herein, this court concludes that Commissioner's Final Order was rendered in absence of jurisdiction, was clearly wrong as to the import of the unconstitutional stop of Petitioner Smith's vehicle and further that the retroactive nature of the 2010 amendment to the statute required the Commissioner to determine whether the Petitioner was lawfully arrested, which in fact was impossible based on the unconstitutional nature of the investigatory stop.

ORDER

The court does hereby Order that the **undated** Final Order of the Commissioner of the Division of Motor Vehicles in Case No. 304124-C and 304124-D that revoked Petitioner's driver's license be reversed for the reasons set forth herein.

The Clerk of this Court shall forward attested copies of this Order to the following: Matthew L. Clark, Counsel for Petitioner; Scott E. Johnson, Assistant Attorney General; and Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles.



Judge David W. Nibert
Judge of the Circuit Court of Mason County,
West Virginia

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