

No. 11-0147

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

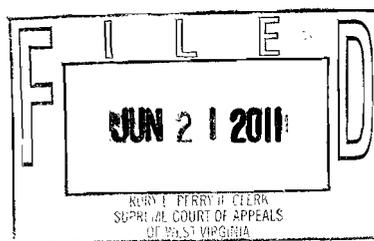
Charleston

RESPONDENT'S APPEAL

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

v.

DAVID K. SMITH,
RESPONDENT BELOW.



FROM THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 10-AA-77

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I. Respondent's Response to Assignments of Error

A. The Commissioner of the Division of Motor Vehicles Lacked Jurisdiction to Render Any Decision on Respondent's Appeal of the Commissioner's Initial Revocation Decision Subsequent to June 11, 2010.

B. The Court Correctly Held that the Commissioner Can Not Administratively Revoke a Driver's License When Such Revocation is Predicated Upon Unconstitutional and Unlawful Police Intrusion.

II. Statement of Relevant Facts and Procedural Background

Respondent, 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. Respondent Smith was arrested after being stopped at what the police officers referred to as a "safety checkpoint".

Following Trooper Wootton's submission of the Statement of Arresting Officer to the Division of Motor Vehicles, Respondent's driving privileges were revoked on September 22, 2009. Respondent timely contested the revocation.

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. 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 δ 17C-5C-1, δ 17C-5C-2, δ 17C-5C-3, δ 17C-5C-4 and δ 17C-5C-5.

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.

Prior to the administrative hearing, the State of West Virginia dismissed the pending criminal action against the Respondent due to the “safety checkpoint” being unconstitutional pursuant to this court’s holding in State v. Sigler, 697 S.E.2d 391 (W. Va. 2009).

In an undated decision, the Commissioner of Motor Vehicles ordered Respondent’s driving privileges revoked based upon the results of the hearing of March 31, 2010, effective August 4, 2010. The Commissioner revoked Respondent’s privilege to drive even though he found that the “safety checkpoint” established by Trooper Wootton and Corporal Gilley on July 9, 2009, “clearly did not meet the requirements set forth in Sigler”. App’x at 18.

Respondent Smith appealed the Commissioner’s decision to the Circuit Court of Mason County, West Virginia. The Respondent and his counsel, Matthew L. Clark, submitted affidavits detailing the receipt of the Commissioner’s Order and detailing the customary time in which Respondent’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.

In the administrative appeal, Respondent alleged that the Commissioner of the Division of Motor Vehicles was divested of jurisdiction to hear and decide matters of administrative license revocations by virtue of the enactment of W. Va. Code § 17C-5C-3 that exclusively granted jurisdiction to hear and determine such cases with the newly created Office of Administrative Hearings. Conversely, the 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.” See App’x at 25-33; App’x 43-46. To that end, the 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 WVDOT designee to fulfill the Cabinet Secretary’s obligations pursuant to § 17C-5-1 et seq.” App’x at 53. The Commissioner also proffered a single page Memorandum dated June 10, 2010, noted as REVISED 09/18/2009. App’x at 54. In this Memorandum, Jill C. Dunn, interim Chief Hearing Examiner for the Office of Administrative Hearings, asserted that the Office of Administrative Hearings “shall have jurisdiction over all administrative revocation hearings for appeals from decisions of orders of 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.” Id. However, the Commissioner did not furnish the court with any documentation that the Secretary of Transportation had 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 designated her to fulfill the Secretary’s obligations pursuant to Article 5, Section 1 and those subsequent sections of Article 5. No designation was made as to newly enacted Article 5C.

The Circuit Court agreed with the Respondent and held that the Commissioner, though having statutory authority to establish interim policies and procedures for the transfer license revocation proceedings until October 1, 2010, did not maintain statutory authority to retain license revocation power having been divested as of June 11, 2010 of that power as a result of the 2010 legislation. App’x at 3-4. The Court further held that the appointment of Jill Dunn and her subsequent assertion of

jurisdiction over license revocation proceedings that originated prior to June 11, 2010 was ineffective as a matter of law as the Secretary's appointment letter failed to extend to matters arising under newly enacted Article 5C, specifically the "transfer" provision of the new legislation and, that even had the Secretary's appointment of Ms. Dunn encompassed matters arising under Article 5C, that the retention of jurisdiction was expressly contradictory to the legislative mandate. App'x at 5-6.

In addition to his unlawful exercise of jurisdiction 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." App'x at 18. The Circuit Court disagreed. The Circuit Court held that Respondent's encounter with the police resulted from unconstitutional intrusion by the police officers in accordance with this court's opinion in Sigler.

The Circuit Court also noted that 2010 statute expressly governed cases pending on appeals from the Commissioner's revocation orders. App'x at 11. As such, the court held that the "lawful arrest" prerequisite to administrative revocation that was not expressly set forth in the 2008 version of the administrative license revocation procedures had been included in the statutory procedures under the 2010 statute. Thus, the Court reasoned, this statutory amendment was retroactive to any cases then pending upon the statute's effective date.

III. Summary of Responsive Argument

A. The Commissioner of the Division of Motor Vehicles Lacked Jurisdiction to Render Any Decision Subsequent to June 11, 2010

The enactment of S.B. 186 in the 2011 legislative session that became effective on June 11, 2011 removed the former jurisdiction of the Commissioner to render decisions in license revocation matters. W. Va. Code § 17C-5C-3(4) granted the newly created Office of Administrative hearings jurisdiction to “hear and determine all . . . [a]ppeals 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.” W. Va. Code § 17C-5C-5 authorized the Secretary of the Department of Transportation “to establish interim policies and procedures for the **transfer** of administrative hearings for appeals from decisions or orders of the Commissioner” (emphasis added). Further, the legislature provided that “[o]n the effective date of this article, all equipment and records necessary to effectuate the purposes of this article shall be transferred from the Division of Motor Vehicle to the Office of Administrative Hearings”. Finally, “[t]hat in order to provide for a smooth transition, the Secretary of Transportation may establish interim policies and procedures, determine the how equipment and records are to be transferred and provide that the transfers provided for in this subsection take effect no later than October 1, 2010.” No statutory authority exists that provides that the “interim policies and procedures” provide for the retention of cases within the breast of the

Commissioner, only that procedures and polices be implemented to ensure a smooth transfer.

Further, the Commissioner's assertion that Secretary's appointment of Jill Dunn as his statutory designee to fulfill his statutory duties pursuant to W. Va. Code § 17C-5-1 et seq. extends to a completely separate article of the West Virginia Code is plainly incorrect. Article 5C concerns the establishment and implementation of the Office of Administrative Hearings for hearings upon appeals from the Commissioner's decisions and orders. Article 5, on the other hand, sets forth certain duties that the Commissioner did enjoy prior to June 11, 2011 and, in fact, still does enjoy after June 11, 2011, the power to issue orders of revocation upon receipt of requisite information from a police officer. The designation relied upon by the Commissioner (App'x. 53) does not however extend to the hearing process by its own terms. Both the 2008 and 2010 versions of W. Va. Code § 17C-5-2 do allow the Commissioner to continue to revoke and suspend licenses from offenses arising under Article 5; the designation allows Ms. Dunn to act in his stead in that regard. However, neither the applicable statute nor the designation empowers the Commissioner to hear appeals or render orders upon appeals beyond June 11, 2010. As such, the Commissioner lacked jurisdiction to render his Final Order decision, pursuant to W. Va. Code § 17C-5A-2 upon Respondent's appeal from the Commissioner's lawful initial order of revocation made pursuant to § 17C-5-2. The Commissioner continues to enjoy the jurisdiction to revoke but his jurisdiction to hear and decide appeals was removed effective June 11, 2010.

B. The Circuit Court Correctly Held that a License Revocation Cannot Arise When Such Revocation is Predicated Upon Unconstitutional and Unlawful Police Intrusion.

As set forth in the Appendix, the Commissioner concedes that Respondent was subjected to an intrusive stop in violation of this court's decision in Sigler, which held that "safety checks" must be compliant with Fourth Amendment principles. The lower court, in reliance upon Clower v. West Virginia Dep't of Motor Vehi., 678 S.E.2d 41 (W. Va. 2009) and Ullom v. Miller, 709 S.E.2d 111 (W. Va. 2010) found that administrative revocations are subject to the dictates of constitutional standards governing search and seizure. Were such standards not applicable in administrative revocations, as contended by the Commissioner, this Court need not have undertaken the comprehensive analysis that it did in either Clower or Ullom, both cases involving appeals of administrative revocations rather than criminal actions. The Court could simply have stated the circumstances of investigatory stops, be they constitutional or not, were simply irrelevant to administrative revocations and not engaged in detailed analysis of the constitutional parameters of the subject stops. This court did not do this. The Circuit Court properly held in accord with established precedent of this court, and thus held that the unconstitutionality of the stop at issue doomed the Commissioner's finding as to revocation.

IV. Statement Regarding Oral Argument and Decision

The Respondent does not object to the Commissioner's request for an oral argument. This court has interpreted neither the parameters of Article 5C of the West Virginia Code nor the amended Article 5A, Section 2 as said Article was enacted and

said Section amended in the 2010 legislative session and became effective on June 11, 2010. However, Respondent notes that the Circuit Court of Raleigh County's decision in Shrader v. Miller, no. 10-AA-26-B (Oct. 20, 2010) is premised upon the Secretary's Transportation of Jill C. Dunn's appointment "as the WVDOT designee to fulfill the Cabinet Secretary's obligations pursuant to δ 17C-5C-1 et seq." App'x. 50. In fact the Secretary's designation only appointed Ms. Dunn "pursuant to δ 17C-5-1 et seq." Appx. 53. Thus, a plain reading of the Secretary's designation reveals that the Circuit Court of Raleigh County misread the parameters of said designation.

V. ARGUMENT

In considering an appeal of a circuit court's review of an administrative decision, both this Court and the Circuit Court below are subject to the same standards, as set forth in the West Virginia Administrative Procedures Act.

The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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 or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Myers v. West Virginia Cons. Pub. Ret. Bd., 704 S.E.2d 738 (W. Va. 2010).

Additionally, the court has held, "[i]n cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit

court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl Pt 2, Muscatell v. Cline, 474 S.E.2d 518 (W. Va. 1996). Further, that "[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syl Pt 1, Francis O. Day Co., Inc. v. Director, Division of Environmental Protection, 443 S.E.2d 602 (W. Va. 1994).

However the present case also requires that this Court review certain Findings of Fact made by the Circuit Court with regard to the designation of Jill C. Dunn as the Commissioner's statutory designee. As such, this Court must review the Circuit Court's Finding of Fact Number 17¹ under the clearly erroneous standard. See Syl. Pt. 1, McCormick v. Allstate Ins. Co., 475 S.E.2d 507 (W. Va. 1996).

A. The Commissioner of the Division of Motor Vehicles Lacked Jurisdiction to Render Any Decision on Respondent's Appeal of the Commissioner's Initial Revocation Decision Subsequent to June 11, 2010.

The Commissioner's subject matter jurisdiction over administrative license revocations and appeals from revocations are creations of statute. The applicable

¹ The Circuit Court made the following Finding of Fact No. 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." App'x. 4. Respondent notes that no designation was made pursuant to Article 5A either.

statutes empower the Commissioner to suspend or revoke drivers licenses upon receipt of the statement of an arresting officer that a licensee has committed an offense under the provisions of W. Va. Code § 17C-5-1. See W. Va. Code § 17C-5A-1. Additionally, the Commissioner is empowered pursuant to W. Va. Code § 17C-5-7 to revoke a drivers license for failure to submit to a secondary chemical test. However, nothing in the statutory scheme of Article 5 empowers the Commissioner to hold hearings upon appeals of the Commissioner's Orders rendered pursuant to the authority granted him by W. Va. Code § 17C-5-7 or W. Va. Code § 17C-5A-1. The authority to hold hearings and render decisions upon appeals was granted to the Commissioner pursuant to W. Va. Code § 17C-5A-2 (2008)² and then amended to vest

² Section 17C-5A-2. Hearing; revocation; review.

(a) Upon the written request of a person whose license to operate a motor vehicle in this state has been revoked or suspended under the provisions of section one of this article or section seven, article five of this chapter, the Commissioner of the Division of Motor Vehicles shall stay the imposition of the period of revocation or suspension and afford the person an opportunity to be heard. The written request must be filed with the commissioner in person or by registered or certified mail, return receipt requested, within thirty calendar days after receipt of a copy of the order of revocation or suspension or no hearing will be granted. The hearing shall be before the commissioner or a hearing examiner retained by the commissioner who shall rule on evidentiary issues and submit proposed findings of fact and conclusions of law for the consideration of the commissioner and all of the pertinent provisions of article five, chapter twenty-nine-a of this code shall apply. The commissioner may reject or modify the hearing examiner's proposed findings of fact and conclusions of law, in writing, and only if:

- (1) There is an error of law;
- (2) They are clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (3) They are arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(b) The hearing shall be held at an office of the division located in or near the county in which the arrest was made in this state or at some other suitable place in the county in which the arrest was made if an office of the division is not available.

(c) Any hearing shall be held within one hundred eighty days after the date upon which the commissioner received the timely written request for a hearing unless there is a postponement or continuance. The commissioner may postpone or continue any hearing on the commissioner's own motion or upon application for each person for good cause shown. The commissioner shall adopt and implement by a procedural rule written policies governing the postponement or continuance of any hearing on the commissioner's own motion or for the benefit of any law-enforcement officer or any person requesting the hearing and the policies shall be enforced and applied to all parties equally. For the purpose of conducting the hearing, the commissioner may issue subpoenas and subpoenas duces tecum in accordance with the provisions of section one, article five, chapter twenty-nine-a of this code: Provided, That the notice of hearing to the appropriate law-enforcement officers by registered or certified mail, return receipt requested, constitutes a subpoena to appear at the hearing without the necessity of payment of fees by the Division of Motor Vehicles.

...

(e) The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or did refuse to submit to the designated secondary chemical test, or did drive 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. . . .

(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;

that authority in the Office of Administrative Hearings pursuant to W. Va. Code § 17C-5A-2 (2010)³. Thus, the Secretary's May 17, 2010 designation is necessarily limited to

(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.

...

(s) If the commissioner finds to the contrary with respect to the above issues the commissioner shall rescind his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter. A copy of the commissioner's order made and entered following the hearing shall be served upon the person by registered or certified mail, return receipt requested. During the pendency of any hearing, the revocation of the person's license to operate a motor vehicle in this state shall be stayed. If the commissioner shall after hearing make and enter an order affirming the commissioner's earlier order of revocation, the person shall be entitled to judicial review as set forth in chapter twenty-nine-a of this code. . . .

...

³ § 17C-5A-2. **Hearing; revocation; review.**

(a) Written objections to an order of revocation or suspension under the provisions of section one of this article or section seven, article five of this chapter shall be filed with the Office of Administrative Hearings. Upon the receipt of an objection, the Office of Administrative Hearings shall notify the Commissioner of the Division of Motor Vehicles, who shall stay the imposition of the period of revocation or suspension and afford the person an opportunity to be heard by the Office of Administrative Hearings. The written objection must be filed with Office of Administrative Hearings in person or by registered or certified mail, return receipt requested, within thirty calendar days after receipt of a copy of the order of revocation or suspension or no hearing will be granted. The hearing shall be before a hearing examiner employed by the Office of Administrative Hearings who shall rule on evidentiary issues. Upon consideration of the designated record, the hearing examiner shall, based on the determination of the facts of the case and applicable law, render a decision affirming, reversing or modifying the action protested. The decision shall contain findings of fact and conclusions of law and shall be provided to all parties by registered or certified mail, return receipt requested.

(b) The hearing shall be held at an office of the Division of Motor Vehicles located in or near the county in which the arrest was made in this state or at some other suitable place in the county in which the arrest was made if an office of the division is not available. The Office of Administrative Hearings shall send a notice of hearing to the person whose license is at issue, the appropriate law-enforcement officers, and the prosecuting attorney.

(c)(1) Any hearing shall be held within one hundred eighty days after the date upon which the Office of Administrative Hearings received the timely written objection unless there is a postponement or continuance.

(2) The Office of Administrative Hearings may postpone or continue any hearing on its own motion or upon application by the party whose license is at issue in that hearing or by the commissioner for good cause shown.

(3) A notice of hearing to the appropriate law-enforcement officers by registered or certified mail, return receipt requested, constitutes a subpoena to appear at the hearing without the necessity of payment of fees by the Division of Motor Vehicles.

...

(e) The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or did refuse to submit to the designated secondary chemical test, or did drive 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.

(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.

...

(q) In the case of a hearing in which a person is accused of refusing to submit to a designated secondary test, the Office of Administrative Hearings shall make specific findings as to:

(1) Whether the arresting law-enforcement officer had reasonable grounds to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs;

(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 relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs;

(4) whether the person refused to submit to the secondary test finally designated in the manner provided in section four, article five of this chapter; and

(5) whether the person had been given a written statement advising the person that the person's license to operate a motor vehicle in this state would be revoked for at least forty-five days and up to life if the person refused to submit to the test finally designated in the manner provided in said section.

(r) If the Office of Administrative Hearings finds by a preponderance of the evidence that:

(1) The investigating officer had reasonable grounds to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs;

the authority to revoke that arises from violations of §§ 17C-5-1 and 17C-5-7, rather than the authority to hold hearings and render decisions on appeals of the Commissioner's revocations. The Secretary may have lawfully appointed Ms. Dunn to act as the Secretary's designee regarding Article 5A or Article 5C. However, any such

(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) the person committed an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs;

(4) the person refused to submit to the secondary test finally designated in the manner provided in section four, article five of this chapter; and

(5) the person had been given a written statement advising the person that the person's license to operate a motor vehicle in this state would be revoked for at least forty-five days and up to life if the person refused to submit to the test finally designated, the commissioner shall revoke the person's license to operate a motor vehicle in this state for the periods specified in section seven, article five of this chapter.

...

(s) If the Office of Administrative Hearings finds to the contrary with respect to the above issues the commissioner shall rescind his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter. A copy of the Office of Administrative Hearings' findings of fact and conclusions of law made and entered following the hearing shall be served upon the person whose license is at issue and the commissioner by registered or certified mail, return receipt requested. During the pendency of any hearing, the revocation of the person's license to operate a motor vehicle in this state shall be stayed. A person whose license is at issue and the commissioner shall be entitled to judicial review as set forth in chapter twenty-nine-a of this code.

...

appointment is proscribed by the dictates of statute. The Secretary simply did not so designate Ms. Dunn.

The statute at issue, W. Va. Code § 17C-5C-3 is plain and unambiguous. Thus, this Court, as the Circuit Court did below, must apply the statute rather than construe the same. Syl. Pt. 2, State v. Elder, 165 S.E.2d 108, 109 (W. Va. 1968). Petitioner asks this Court to read additional terms into this statute. On the effective date of the statute, June 11, 2010, the Office of Administrative Hearings was awarded jurisdiction over appeals of the Commissioner's revocation orders.

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.

W. Va. Code § 17C-5C-3. Despite the Commissioner's arguments, the statute does not restrict the Office of Administrative Hearings hearing jurisdiction to revocations that arise after June 11, 2011.

In an attempt to maintain his jurisdiction over *hearings*, the Commissioner asserts that the provisions of W. Va. Code § 17C-5C-5 allow the Office of Administrative Hearings to cede jurisdiction back to the Commissioner for incidents arising prior to June 11, 2011. Again, this court need only apply the statute rather than construe it.

a) In order to implement an orderly and efficient transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings, the Secretary of the Department of Transportation may establish interim policies and procedures for the transfer of administrative hearings for 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-A, seventeen-B, seventeen-C, seven-teen-D and seventeen-E of this code, currently administered by the Commissioner of the Division of Motor Vehicles, no later than October 1, 2010.

(b) On the effective date of this article, all equipment and records necessary to effectuate the purposes of this article shall be transferred from the Division of Motor Vehicle to the Office of Administrative Hearings: Provided, That in order to provide for a smooth transition, the Secretary of Transportation may establish interim policies and procedures, determine the how equipment and records are to be transferred and provide that the transfers provided for in this subsection take effect no later than October 1, 2010.

W. Va. Code § 17C-5C-5. In applying rather than construing this particular statute, this court need only examine the statutory language ("the Secretary of the Department of Transportation may establish interim policies and procedures for the *transfer* of administrative hearings for appeals"). Id. (emphasis added). The plain text of the

statute authorizes the Commissioner to implement policies necessary to effectuate transfer but does not authorize retention of such matters within the scope of the Commissioner's authority.

The Commissioner relies first on a delegation of authority from the Secretary to Jill Dunn as discussed *infra* that does not encompass the Secretary's authority under W. Va. Code § 17C-5C-5 nor W. Va. Code § 17C-5A-2. App'x at 53. Even assuming *arguendo* that the delegation did sufficiently encompass matters arising under Article 5C and Article 5A, the June 10, 2010 Memorandum neither addresses matters arising prior to June 11, 2011 explicitly, nor does the Memorandum square with the dictates of W. Va. Code § 17C-5C-3 vesting the Office of Administrative Hearings with jurisdiction to "hear and determine all" such appeals. Under the Commissioner's formulation, it may continue to determine any and all appeals even after October 1, 2010 provided the revocation inducing event occurred prior to June 11, 2011.

This court has held,

[a]dministrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.

Syl Pt 4, McDaniel v. West Virginia Div. of Labor, 591 S.E.2d 277 (W. Va. 2003) (*citing* Syl. pt. 3, Mountaineer Disposal Serv., Inc. v. Dyer, 197 S.E.2d 111 (W. Va. 1973).

In the present case, the applicable statute authorizes the Secretary to implement policies and procedures to cause transfers to the newly created Office of Administrative Hearings. The Legislature could have specified that jurisdiction for

appeals could remain with the Commissioner during some interim period. It did not. The Legislature mandated transfer. Rather than transfer, the Secretary has created an artifice to avoid the law, a classic infringement by the Executive branch upon the province of the Legislative branch. As such, the Commissioner lacked jurisdiction to render his Final Order on appeals of his lawful revocations made pursuant to Article 5 beyond the statute's effective date, June 11, 2010. Therefore, the Circuit Court's Order should be affirmed.

B. The Court Correctly Held that the Commissioner Can Not Administratively Revoke a Driver's License When Such Revocation is Predicated Upon on Unconstitutional and Unlawful Police Intrusion.

The Commissioner does not attempt to refute that the stop of the Respondent's automobile was an unconstitutional seizure as enunciated by this court in Sigler but instead characterizes the issue as one of suppression of evidence, thus arguing that the exclusionary rule has no applicability in the administrative license revocation process. State v. Sigler, 687 S.E.2d 391 (W. Va. 2009). The Commissioner's argument fails on this front.

In Sigler, the court comprehensively held that "safety checkpoints" like the one at issue in the instant case were subject to scrutiny under the Fourth Amendment to the Constitution of the United States and W. Va. Constitution, Art. III, Sec. 6. In doing so, the court issued several syllabus points that are applicable to the situation at hand,

4. A stop of a motor vehicle at a police checkpoint is intrusive to private citizens. Such an intrusion is by its nature a constitutional seizure.

5. The essential purpose of the Fourth Amendment is "to impose a standard of 'reasonableness' upon the exercise of discretion" by

officers in order to protect against arbitrary intrusions into the privacy of individuals. Delaware v. Frame, 440 U.S. 648, 653-55, 99 S.Ct 1391, 1395-97, 59 L.Ed.2d 660 (1979).

6. In evaluating the lawfulness of a suspicionless seizure, a balancing of interests should be considered to determine if such a seizure is permissible under the United States Constitution and the Constitution of West Virginia and, and these factors should be considered: (1) the gravity of the public concern that is being addressed or served by the checkpoint; (2) the degree to which the checkpoint is likely to succeed in serving this public interest; and (3) the severity with which the checkpoint interferes with individual liberty.

7. When evaluating the degree of severity of interference with individual liberty, West Virginia courts must consider not only the subjective intrusion determined by the potential of the checkpoint to generate fear and surprise in motorists, but also the objective intrusion into individual freedom as measured by the duration of the detention at the checkpoint and the intensity of the inspection.

8. The court's obligation in weighing these factors is to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.

Sigler, with its focus on the intrusion upon individual liberty, however, concerned the exclusion of evidence in a criminal proceeding. Under the present factual scenario, any evidence derived from the unconstitutional stop of Respondent's vehicle would undoubtedly be suppressed in a criminal matter.

The Commissioner, however, posits that an administrative license revocation is entirely civil in nature and is thus not subject to the exclusionary rule. The Commissioner ignores this court's holdings in the Clower and Ullom decisions. Clower v. Dept. of Motor Vehicles, 678 S.E.2d 41 (W. Va. 2009); Ullom v. Miller, Commr. of West Virginia Div. of Motor Vehi., 709 S.E.2d 111 (W.Va. 2010). Though both cases were decided based on the 2004 version of W. Va. Code § 17C-5A-2 (requiring lawful

arrest as prerequisite to revocation), this court held that that W. Va. Code § 29A-5-4 required the courts to reverse the Commissioner under certain circumstances,

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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;

.....

(emphasis added).

In the present case, the Circuit Court found that the Commissioner's inferences and conclusions, while not violative of the 2008 statute, were in violation of constitutional provisions, specifically the Fourth Amendment to the Constitution of the United States and the West Virginia Constitution. Art. III, Sec. 6.

In Ullom⁴, Justice Benjamin conducted an exhaustive analysis in concluding that the arrest made by the arresting officer was violative of neither the Fourth Amendment to the Constitution of the United States nor the West Virginia Constitution, Art. III, Sec. 6. The court focused entirely upon the circumstances of the initial contact with Mr. Ullom rather than the grounds for arrest itself, ultimately concluding that the initial contact was lawful. In the present case, the initial contact, derived from a stop that was plainly in violation of the state and federal constitutions, was not.

⁴ This case was heard under W. Va. Code 17C-5A-2 (2004) also requiring the Commissioner to consider at hearing the issue of the lawfulness of arrest.

The Commissioner relies upon the holding of the New Mexico Court of Appeals in Glynn v. State of New Mexico Dept. of Tax. and Rev., Motor Vehi. Div. No. 29453 (N.M. Ct. App. Jan 20, 2011). However, the Commissioner ignores that a number of jurisdictions have reached different conclusions. See, e.g., People v. Krueger, 208 Ill. 567 N.E.2d 717 (Ill App. 3d 1991), cert. denied 503 U.S. 919 (1992) ("[W]e are unwilling to conclude that the legislature intended to authorize the suspension of drivers' licenses based on the fruits of illegal arrests"); Olson v. Com'r of Public Safety, 371 N.W.2d 552, 556 (Minn. 1985) (investigatory DUI stops that result in license revocation proceedings must comply with Fourth Amendment standards); See also State v. Lussier, 757 A.2d 1017 (Vt. 2000) (relying on Vermont Constitution; state constitution construed more liberally than Fourth Amendment); Pooler v. MVD, 755 P.2d 701 (Ore. 1988) (en banc) (court refuses to "attribute to the legislature the intent to sanction unconstitutional procedures"; suspension of driver's license under implied consent statute must be based on valid arrest; otherwise, resulting evidence must be excluded); Watford v. Bur. of Motor Vehicles, N.E.2d 776 (Ohio App 3d 1996) ("a lawful arrest, including a constitutional stop," required before refusal to take test triggers license suspension). Gikas v. Zolin, 863 P.2d 745 (Cal. 4th 1993) (en banc) (license suspension requires lawful arrest based on constitutional stop).

Further, in his narrow argument advocating the balancing of social cost against the application of the exclusionary rule in administrative license revocation proceedings, the Commissioner ignores this Court's statement of the close relationship between criminal Driving Under the Influence proceedings and administrative license revocations that arise from the same operative facts.

The Commissioner is correct in pointing out that we have upheld the statutory two-track approach. However, we also must recognize that the separate procedures are connected and intertwined in important ways. For example, criminal arrests for DUI trigger license suspensions, W. Va. Code, 17C-5A-1(b)[1994]; and a criminal conviction for DUI is in itself grounds for license suspension. W. Va. Code, 17C-5A-1(a) (1994).

Choma v. West Virginia Department of Motor Vehicles, 557 S.E.2d 310 (W. Va. 2001).

Additionally, the Commissioner's social cost argument is inapplicable in light of the Legislature's now statutory requirement that the newly created Office of Administrative Hearings examine the circumstances of arrest. W. Va. Code 17C-5A-2(f)(2). It is fundamental that a lawful arrest meet constitutional requirements.

The Commissioner focuses entirely upon the Circuit Court's holding that no exclusionary rule applies to this case as a matter of constitutional law but pays short shrift to the Circuit Court's additional conclusion that appeal findings are governed by W. Va. Code § 17C-5A-2 (2010). A cursory review of the statute reveals that the 2010 statutory amendment reinstated the requirement that the revocation appeals tribunal (now the Office of Administrative Hearings) shall find "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." W. Va. Code § 17C-5A-2(f)(2). However, the Commissioner ignores that in certain cases, such as the instant one, a lawful arrest must be predicated on a lawful stop. This Court has cited the statutory arrest requirement present in the 2004 version of W. Va. Code § 17C-5A-2 that parallels the current 2010 language of the procedure that a hearing tribunal must follow, finding that an arrest predicated on an unlawful stop cannot be grounds for an administrative revocation. As Justice Ketchum opined,

Further, in an administrative revocation proceeding, W. Va. Code, 17C-5A-2(e) (2004) requires the Commissioner's hearing examiner to make three specific findings. First, the hearing examiner must find that the "arresting law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol. . . ." Second, the hearing examiner must make findings "whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol . . . or was lawfully taken into custody for the purpose of administering a secondary test." Third, the hearing examiner must make findings "whether the tests, if any, were administered in accordance with the [relevant law]." As we have found, *supra.*, Trooper Kessel's stopping Mr. Clower's vehicle was not "justified at its inception," Terry v. Ohio, 392 U.S. at 20, 88 S.Ct. 1868. Further, that Trooper Kessel did not have grounds upon which to form an articulable reasonable suspicion to believe that Mr. Clower had committed a misdemeanor traffic offense in violation of W. Va. Code, 17C-8-9. Additionally, Trooper Kessel's own testimony excludes any possibility that Trooper Kessel had any reason, prior to stopping Mr. Clower's vehicle, to believe that Mr. Clower was driving under the influence of alcohol. Based on these facts, the circuit court concluded that Mr. Clower's was not lawfully placed under arrest because Trooper Kessel did not have the requisite articulable reasonable suspicion to initiate a traffic stop of Mr. Clower's vehicle. We agree. The Commissioner's hearing examiner was clearly wrong in concluding that Mr. Clower was lawfully placed under arrest for the reasons we have discussed in this opinion and the circuit court properly followed the Legislative mandate^[fn8] set forth in W. Va. Code, 29A-5-4(g) — a mandate that specifically requires a circuit court to "reverse, vacate or modify" the Commissioner's order where the Commissioner's order was founded upon findings and conclusions that were in violation of constitutional or statutory provisions or made pursuant to unlawful procedure. In Mr. Clower's case, W. Va. Code, § 17C-5A-2(e) (2004) required that Mr. Clower's have been lawfully arrested — he was not.

Clower, 678 S.E.2d 41 (W. Va. 2009). Like in Clower, the Respondent was stopped without reasonable suspicion in violation of both the state and federal constitutions. The Circuit Court, in accordance with the Administrative Procedures Act, reversed the Commissioner on constitutional and statutory grounds. App'x at 9-10. The Commissioner fails to acknowledge that our Legislature has already spoken to the issue of "social cost" in relation to an exclusionary rule in administrative license

revocation appeals. Said 2010 legislation has determined that the “social cost” of requiring a lawful arrest shall not be a superior consideration to intrusion upon an individual’s constitutional sanctity. The Legislature has required the appeal hearing tribunal to find that a person was lawfully placed under arrest. This court has required that any such arrest be predicated on a lawful stop in Clower.

The Circuit Court properly held that W. Va. Code § 17C-5A-2 is a purely procedural statute. It governs the procedures for challenging the Commissioner’s revocations and the procedures that must be followed determining said appeals. This Commissioner, sitting without jurisdiction to rule on appeals post-June 11, 2010, also neglected to make the findings that must be made in accordance with applicable procedure in effect on June 11, 2010. App’x 14-16. Instead, he explained that a former version of the statute did not require any such determination. Id. at 18-20 (citing Cain v. West Virginia Div. of Motor Vehi., 694 S.E.2d 309 (W. Va. 2010)). This court has held that a statute is retroactively applicable where there are “statutory changes that are purely procedural in nature”. Joy v. Chessie Emp. Fed. Credit Union, 411 S.E.2d 261 (W. Va. 1991).

In the present case, no decision had been rendered by the Commissioner on June 11, 2010. The Circuit Court found that the Commissioner’s Order was issued subsequent to that date. App’x at 3. This court has recognized that the provisions of W. Va. Code 17C-5A-2 changed due to “statutory amendments that went into effect on June 11, 2010.” Fn. 10, Miller v. Hare, No. 35560 (W. Va. 4-1-2011). This change is plainly applicable to the **process** in which administrative appeals are heard and

decided. However, the Commissioner does not yield this point despite this court having spoken.

VI. Conclusion

The Circuit Court correctly reversed the decision of the Commissioner of the West Virginia Division of Motor Vehicles. The statutory amendments, effective June 11, 2010, stripped the Commissioner of jurisdiction to hear and decide appeals of administrative license revocations. The Commissioner's assertion of jurisdiction is ineffective as a matter of law with regard to the appeal procedure. This court has already declared that W. Va. Code § 17C-5A-2 (2010) became effective on June 11, 2010. Even if the Commissioner could retain, rather than implement policies and procedures to transfer jurisdiction, the Commissioner failed to make requisite findings of fact consistent with the amended procedural statute in effect at the time of the Commissioner's Order. The Commissioner's refusal to consider the unlawful nature of Respondent's seizure and arrest is contrary to this court's precedent as described herein. An unconstitutional stop that leads to an unlawful arrest cannot provide the basis for the Commissioner or the newly created Office of Administrative Hearings to deny an appeal of an administrative license revocation. The Legislature has legislated that the Commissioner's "social cost" concern is outweighed by an individual's right to be free from intrusion upon his liberty by requiring a lawful arrest. The Circuit Court's Order must be affirmed on both statutory and constitutional grounds.

Respectfully submitted,

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By Counsel.



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No. 11-0147

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Charleston

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

v.

DAVID K. SMITH,
RESPONDENT BELOW.

CERTIFICATE OF SERVICE

I, Matthew L. Clark, Counsel for David K. Smith, do hereby certify that I have served a true and correct copy of the foregoing *RESPONDENT'S APPEAL* upon Scott Johnson, Assistant Attorney General, Counsel for the West Virginia Division of Motor Vehicles, by US mail, postage prepaid on this the 20 day of June, 2011.



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