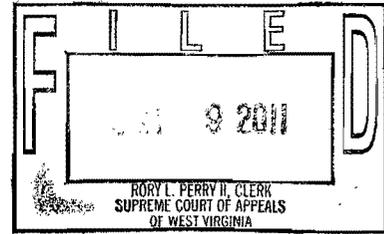


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0148



**JOE E. MILLER, Commissioner,
West Virginia Department of
Transportation, Division of
Motor Vehicles,**

Petitioner/Respondent below,

v.

MICHAEL CHENOWETH,

Respondent/Petitioner below.

**Appeal from a final order
of the Circuit Court of Wood
County (10-P-121)**

RESPONDENT'S BRIEF

Counsel for Respondent, Michael Chenoweth

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COMES NOW the Respondent, Michael Chenoweth, by counsel, George J. Cosenza, and respectfully presents this Respondent's Brief pursuant to the West Virginia Rules of Appellate Procedure.

STATEMENT OF THE CASE

The Respondent, Michael S. Chenoweth, resides at 501 30th Street in Parkersburg, Wood County, West Virginia and is the owner of a 1991 Mercury Grand Marquis. On May 7, 2009, at 12:51 a.m., Mr. Chenoweth was going toward his home operating his vehicle in a southbound direction on Emerson Avenue in Parkersburg. [Appx. 7, 33]. As he approached the intersection of Emerson Avenue and West Virginia Avenue, he put on his turn signal and made a right hand turn onto West Virginia Avenue. [Appx. 8]. Not long after turning onto West Virginia Avenue, Mr. Chenoweth pulled his car over to the curb to check the messages on his cell phone. His vehicle was within one (1) foot of the curb and was not protruding onto the roadway of West Virginia Avenue in any manner. [Appx. 9].

After Mr. Chenoweth pulled to the curb, West Virginia State Trooper J. S. Pauley turned onto West Virginia Avenue. He stopped in the middle of the roadway for ten (10) to fifteen (15) seconds, turned on his emergency lights and pulled in behind Mr. Chenoweth. [Appx. 10, 11]. Trooper Pauley got out of his vehicle and approached the driver's side of Mr. Chenoweth's vehicle. [Appx. 11]. After speaking with Mr. Chenoweth, he asked him to step out of the car and conducted field sobriety tests. [Appx. 34, 35]. Trooper Pauley

maintained that those field sobriety tests were failed and he, therefore, placed Mr. Chenoweth under arrest for driving under the influence of alcohol. Those charges were later dismissed by the Wood County Magistrate Court after a motion was filed by the Respondent to dismiss the charges on the grounds that Trooper Pauley did not have a reasonable articulable suspicion to stop Mr. Chenoweth. Despite the charges being dismissed, Mr. Chenoweth's driving privileges in the State of West Virginia were revoked for a period of forty-five (45) days after an administrative hearing. (A copy of the final order is contained in the Appendix at pages 17 - 31).

Mr. Chenoweth appealed the suspension of his driving privileges to the Wood County Circuit Court. The Wood County Circuit Court reversed the decision of the Division of Motor Vehicles [Appx. (1) 1-4], and reinstated Mr. Chenoweth's driving privileges.

SUMMARY OF ARGUMENT

It is the position of the Respondent, Michael Chenoweth, that the Circuit Court did not commit error in reinstating his driving privileges in the State of West Virginia and that the Court's ruling that Trooper Pauley improperly stopped the Respondent's vehicle without an articulable reasonable suspicion should be upheld.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent concurs with the position of the Petitioner in this matter that oral

argument should be permitted under Rule 19 of the Rev. R.A.P.

ARGUMENT

- A. **THE CIRCUIT COURT DID NOT ERR IN APPLYING THE EXCLUSIONARY RULE.**
- B. **THE CIRCUIT COURT DID NOT ERR BECAUSE THERE WAS NO REASONABLE SUSPICION OR PROBABLE CAUSE FOR THE INITIAL SEIZURE, THE EVIDENCE OF THE RESPONDENT'S INEBRIATION THAT WAS DISCOVERED DURING THE COURSE OF THAT STOP GAVE THE POLICE THE RIGHT TO EXPAND THE STOP TO INCLUDE DRIVING WHILE UNDER THE INFLUENCE.**

On appeal of an administrative order from a circuit court, the West Virginia Supreme Court of Appeals, is bound by the statutory standards contained in West Virginia Code §29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. In cases where the circuit court has [reversed] 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*. *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996), *Sims v. Miller*, _____ W.Va. _____, _____ S.E.2d _____, No. 35673 (2011).

West Virginia Code §17C-5A-2 provides the procedure to be used by the Petitioner to determine whether an individual's driving privileges should be suspended for driving under the influence of alcohol. Said Code section provides, in pertinent part, the following:

(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 hundredth 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 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 by 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.

Despite the reliance of the Petitioner on the foregoing, it is still a requirement under West Virginia law that a person must be properly arrested before his driving privileges can be suspended. The West Virginia Supreme Court of Appeals in *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996) and its progeny ruled that:

“Police 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...” Syl. pt. 1, in part, State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994).

“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.” Syl. pt. 2, State v. Stuart, supra.

In *Cain v. The West Virginia Division of Motor Vehicles*, 225 W.Va. 467, 694 S.E.2d 309, No. 35013 (2010), the West Virginia Supreme Court of Appeals revisited the issues presented in *Muscatell*, supra. The Court did not overrule its decision in *Muscatell*, but refined it for the purposes of administrative hearings before the Division of Motor Vehicles. The Court held that “as set forth in West Virginia Code 17C-5A-2(f), the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances or drugs.”

In the case before the Court, Trooper Pauley did not have reasonable grounds to form the requisite belief. The testimony at the hearing was clear that the Respondent’s actions would not have led any reasonable person to form a belief that he was under the influence of alcohol.

In *Carroll v. Stump*, 619 S.E.2d 261 (W.Va. 2005), this Court stated that a person is charged “with an offense for the purposes of West Virginia Code §17C-5A-1 (1994), when

he or she is **lawfully arrested** by a law enforcement officer having probable cause to suspect the person was driving a motor vehicle under the influence of alcohol, controlled substances or drugs. [Syl Pt. 2]. More significantly, in *Clower v. West Virginia Department of Motor Vehicles*, ____ W.Va. ____, 678 S.E.2d 41 (2009), the Court had an opportunity to consider the similar issue presented by the Respondent's petition. In that case, the defendant was stopped by a police officer for failure to use a turn signal at an intersection. The individual was eventually arrested for driving under the influence of alcohol and his driving privileges suspended. The Court was asked to consider whether the Circuit Court erred in reversing the Commissioner's order suspending the Defendant's driver's license on the grounds that the arresting officer did not have an articulable reasonable suspicion to stop the Defendant's vehicle.

After an analysis of the facts, the Court stated the following:

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 set forth in West Virginia 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.

Accordingly, we conclude that the circuit court did not abuse its discretion in reversing the Commissioner's administrative order suspending Mr. Clower's license to operate a motor vehicle in West Virginia.

In the case before the Court, we have a virtually identical situation. Trooper Pauley had no reason to stop Mr. Chenoweth based upon the evidence that was presented to the hearing examiner. It is noteworthy that Trooper Pauley did not appear at the administrative hearing. The hearing examiner relied upon the D.U.I. Information Sheet that was presented to the Respondent after the arrest of Mr. Chenoweth. While it is permissible for the hearing examiner to consider the D.U.I. Information Sheet in lieu of the officer's appearance at the hearing [See, *Crouch v. West Virginia Division of Motor Vehicles*, 219 W.Va. 70, 671 S.E.2d 629 (2006)], it merely creates a "rebuttable presumption" as to its accuracy and is taken as true unless "evidence is received to the contrary by way of exculpatory evidence. Thus before an Order of Revocation will be reversed by the Division of Motor Vehicles, a meritorious defense must be presented [and] supported by evidence which sufficiently rebuts the Statement of Arresting Officer/D.U.I. Information Sheet or substantive portions thereof." *Crouch*, supra.

In the case before the Court, such evidence was not only offered by Mr. Chenoweth, but justified by the decision of Magistrate Marshall, who heard all the evidence, including the testimony of Trooper Pauley, and dismissed the criminal complaint against Mr. Chenoweth. That evidence should have been accorded substantial weight by this Court pursuant to its

ruling in *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001).

CONCLUSION

Based on the foregoing, the decision of the Wood County Circuit Court reinstating the driving privileges of Mr. Chenoweth should be upheld.

Dated this 08 day of June, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of June, 2011, true and accurate copies of the foregoing **RESPONDENT'S BRIEF** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Scott E. Johnson
Assistant Attorney General
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A handwritten signature in black ink, appearing to read "George J. Cosenza", is written over the printed name and address of the respondent's counsel.

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