

11-0352

NOTED CIVIL DOCKET
JAN 31 2011
JULIE BALL
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

CHRISTOPHER L. TOLER,

Petitioner,

v.

CIVIL ACTION NO. 10-C-488-OA

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

Respondent

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ORDER REVERSING COMMISSIONER'S FINAL ORDER

On the 21st day of December, 2010, this administrative appeal came before the Court upon the Petitioner, Christopher L. Toler appealing the Final Order from the Respondent, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "DMV"), wherein the Petitioner's driving privileges were revoked until all obligations for reinstatement are fulfilled as a result of the Commissioner concluding that the Petitioner committed an offense described in W. Va. Code § 17C-5-2, in that the Petitioner drove a motor vehicle in this state while under the influence of alcohol. There appearing on behalf of the Petitioner, Charles A. Stacy, Esq., and on behalf of the Respondent, John T. Bonham, II, Special Assistant Prosecuting Attorney.

The parties concurred that the only issue to decide in this case is whether the exclusionary rule applies in an administrative proceeding concerning the revocation of the Petitioner's license to drive a motor vehicle. The parties further agree that this issue that has not been directly addressed by the West Virginia Supreme Court of Appeals.

The Petitioner argues that the vehicle equipment check stop implemented in this case by the West Virginia State Police was pre-textual and unconstitutional, and therefore, all evidence of his alleged offense of driving under the influence of alcohol stemming from the stop is inadmissible in the administrative proceeding and that as a result, the Commissioner's order must

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be vacated. The Respondent does not admit or deny the constitutionality of the stop itself, but contends that the stop itself and the exclusionary rule are irrelevant to an administrative proceeding because the only issue to decide in an administrative proceeding for licensing revocation is whether there was reasonable suspicion that the Petitioner was driving under the influence pursuant to the revised West Virginia Code § 17C-5A-2 (2008) applicable in this case.

WHEREUPON, the Court took the matter under advisement for purposes of issuing an Order following deliberations involving the arguments of counsel, a review of the Court file, the pleadings filed therein and the responses thereto, including the exhibits and pertinent legal authority. Based upon consideration of the aforementioned, the Court does hereby conclude that the Final Order of the Commissioner is **REVERSED**. In support thereof, the Court **FINDS** and **CONCLUDES** as follows:

I. Findings of Fact

1. The Commissioner's Final Order provided that the Findings of Fact were established by a preponderance of the evidence that the Petitioner was driving a motor vehicle in this state while under the influence of alcohol and that he did admit he was under the influence of alcohol when interviewed by the investigating trooper.
2. Pursuant to the Findings of Fact in the Final Order, the investigating trooper, Senior Trooper C.N. Workman (hereinafter "Tpr. Workman") was working a traffic stop on State Route 71, near Montcalm in Mercer County, West Virginia.
3. Tpr. Workman and other troopers were checking for driver's licenses, insurance, registration and defective equipment and stopping every vehicle.

4. The checkpoint stop in this matter was not a sobriety checkpoint, it involved a "Vehicle Equipment Check."
5. The Petitioner had properly challenged the stop itself by submitting his challenge, in writing, concerning the "sobriety checkpoint operational guidelines" prior to the administrative hearing.
6. The "Hearing Request Form" issued by the DMV includes blank boxes in which a motorist may check whether he or she wishes to challenge "Sobriety checkpoint operational guidelines."
7. At the administrative hearing, the Vehicle Equipment Check stop was an issue because the Hearing Examiner heard testimony concerning same and issued a ruling on the arrest.
8. Concerning the "Vehicle Equipment Check" stop, the testimonial evidence supplied by Tpr. Workman during the administrative hearing on September 10, 2009 went as follows:
 - a) Tpr. Workman did not recall exactly which troopers were present, or which trooper was the commanding officer of the roadblock (Transcript of Administrative Hearing, September 10, 2009, page 9, lines 4-5);
 - b) There were three or four troopers involved in the roadblock (Trans. page 9, lines 9-13);
 - c) The West Virginia State Police (WVSP) can conduct "Vehicle Equipment Check" stops "at any time" and "any location" and "without any restriction." (Trans. page 12, lines 16-24);
 - d) The WVSP must check "every" vehicle during Vehicle Equipment Check stops (Trans. page 12, line 15);

- e) Items to target for such Vehicle Equipment Check stops are: insurance, license compliance, seatbelts, lights, and registration (Trans. page 12, lines 5-6);
- f) Tpr. Workman was not aware of any guidelines for such stops, or as to location of these stops or the duration for these stops; he was unaware of any department guidelines pertaining to the physical set up of such stops – no flares, just the cruiser blue lights and flashlights. There were no warning signs of a checkpoint; there are no cones or flares. (Trans. page 13, lines 1 – 9); (Trans. page 18, lines 10-24; page 19, lines 7-11);
- g) Tpr. Workman testified that the Vehicle Equipment Check stop was not a “formal checkpoint.” (Trans. page 18, lines 23-24);
- h) The Vehicle Equipment Check stop conducted by the WVSP are unplanned road checks: Tpr. Workman testified, “I mean normally . . . somebody will say, you guys want to do a road check. And then we just jump on board and go do it.” (Trans. page 13, lines 19-24; page 14, lines 1-16);
- i) Concerning the location of the stop in this case, Tpr. Workman provided that, “Sandlick and 71’s kind of a hot spot. There’s a lot of drug activity.” (Trans. page 15, lines 2-6);
- j) Tpr. Workman testified that oncoming motorists at this particular checkpoint did not have an alternate route, or roadway exit, if they wanted to avoid the checkpoint. (Trans. page 19, lines 12-19);
- k) The checkpoint was placed after a curve coming from the Montcalm area – where the Petitioner was stopped (Trans. page 21, lines 20-22);

- l) Tpr. Workman did not see any problems with the Petitioner's license, registration, insurance, brake lights, registration lights or any of the issues subject to or target of this Vehicle Equipment Check. (Trans. page 25, lines 1-8);
 - m) Upon Tpr. Workman's return to the Petitioner's window to retrieve his registration, etc., Trooper Workman noticed the smell of an alcoholic based beverage. (Trans. page 25, lines 8-10);
 - n) The Petitioner admitted to consuming a "couple of beers" that are listed in the official records as being two 40-ounce beers. (Trans. page 26, lines 10-11);
 - o) The Petitioner failed the three sobriety checks. (Trans. page 26, lines 2-3);
 - p) Tpr. Workman administered a preliminary breath test on the Petitioner at the stop, the results being .119. (Trans. page 45, lines 13-16);
 - q) At the Princeton WVSP barracks, after a 20 minute observation period, the Petitioner completed the Intoximeter examination, the results were .113. (Trans. page 50, lines 2-10).
 - r) Besides the Petitioner, there were at least two other motorists who were arrested during the Vehicle Equipment Check. (Trans. page 17, line 1).
9. Under the Commissioner's Final Order Conclusions of Law heading, the Commissioner found that Tpr. Workman had reasonable grounds to believe the Petitioner was driving a motor vehicle under the influence of alcohol.
10. The Commissioner further concluded that the Petitioner was "lawfully arrested" for an offense described in W. Va. Code §17C-5A-2.

II. Standard of Review

The salient portions of W. Va. Code § 29A-5-4, entitled "Judicial review of contested cases" is as follows (emphasis added):

(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, **but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.**

(e) Appeals taken on **questions of law, fact or both**, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded, **but the court may consider and decide errors which are not assigned or argued.** The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

(f) The review shall be conducted by the court without a jury and **shall be upon the record made before the agency**, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

(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; 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.**

(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one, article six of this chapter.

Further, the Court notes that “[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.” Syllabus Point 1, *Francis O. Day Co., Inc. v. Director, Division of Environmental Protection*, 191 W.Va. 134, 443 S.E.2d 602 (1994).

III. Discussion

The issue presented in this matter concerns the application of the exclusionary rule in an administrative proceeding concerning the revocation of a motorist’s license to drive as a result of confirming an investigating officer’s reasonable suspicion that the motorist committed the offense of driving a motor vehicle in this state while under the influence of alcohol. There is no dispute concerning the applicable statute germane to this proceeding underwent a revision in 2008. West Virginia Code § 17C-5A-2(e) provides that the principal question at an administrative hearing concerning revocation of a motorist’s license 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. Indeed, the Supreme Court of Appeals held that the only question to be determined is whether officer has reasonable grounds to believe a motorist was driving under the influence of alcohol or drugs. Syl Pt. 3, *Cain v. WV DMV*, 225 W. Va. 457 (2010). In short, a Hearing Examiner no longer *must* make a finding whether the person was lawfully arrested for an offense involving driving under the influence of alcohol.

However, it appears to this Court that if a Hearing Examiner were to find that a motorist was lawfully arrested, that finding may be discretionary:

West Virginia Code § 17C-5A-2(f) provides: 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, (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.** (emphasis added)

In *State v. Sigler*, 224 W. Va. 608 (2009) the West Virginia Supreme Court of Appeals determined the vehicle safety checkpoint (roadblock) improper where no written guidelines were in place to regulate same; the Supreme Court deemed such checkpoints invasive and violative of 4th Amendment rights. This Court recognizes that the *Sigler* case pertained to a criminal proceeding, however, the violations of the Petitioner's 4th Amendment rights are similar as the violations of the motorist's rights were in *Sigler*. The *Sigler* Court stated in Footnote 7:

[F]inding the motor vehicle checkpoints used herein to have been implemented improperly, we do not conclude that the use of roadblocks are *per se* improper or unconstitutional, nor do we find that the State should be precluded from the use of checkpoints when properly implemented. A motor vehicle checkpoint may be appropriate for any number of reasons and may be used by law enforcement personnel so long as the checkpoint comports with the Fourth and Fourteenth Amendments of the United States Constitution and Article III, Section 6 of the Constitution of West Virginia. As set forth herein, **that procedure requires a balancing of the likelihood that a checkpoint will be effective to address the public concern at issue with the severity with which the checkpoint interferes with the liberty interests and expectations of those present in the vehicles being stopped.** At a minimum, such stops must be conducted randomly, in a non-discriminatory manner, for a predetermined appropriate purpose, **with predetermined written operational guidelines**, and with a minimum of discretion vested in the law enforcement personnel at the scene. We observe that

written operational guidelines and procedures are already used for sobriety checkpoints by a number of police departments and law enforcement detachments throughout the State. (emphasis added)

Further, the *Sigler* Court noted that “[s]uspicionless checkpoint roadblocks are constitutional in West Virginia only when conducted in a random and non-discriminatory manner within predetermined written operation guidelines which minimize the State's intrusion into the freedom of the individual and which strictly limits the discretion vested in police officers at the scene. *Id.* Syl. Pt. 9.

The *Sigler* case involved two criminal matters in which two individuals arrested for DUI as a result of “administrative road blocks.” The road blocks were not pursuant to a written procedure or any guidelines. The *Sigler* case concerned a police officer who had nothing better to do, as there was little police activity in Fayette County, where the police officer unilaterally decided to park his car in the middle of the road, with his blue lights flashing, and stopping oncoming vehicles. The police officer had a flashlight to motion vehicles and was the only law enforcement officer present during these stops. He was not wearing a reflective vest, did not post any signs warning of the roadblock or do anything else to indicate what the stops would have been concerning to oncoming motorists. The facts suggest a spur of the moment roadblock, one without discretion or a preconceived plan.

In the second case discussed in *Sigler* (involving a motorist named Mullens), sheriff deputies decided at the beginning of an afternoon shift to conduct “administrative stops” (to check for insurance, registration, licenses) that evening. During the administrative roadblock, deputies would come and go to handle other emergency calls. Mullens was stopped by two deputies standing in the middle of the road, each carrying flashlights, and not wearing orange

emergency vests. There were no signs warning motorists of the roadblock, and no flares, or anything to indicate that there was going to be police conducted stops that evening.

Both cases involved criminal DUI actions, however, and in both cases, the Supreme Court reversed the convictions, stating that the roadblocks were unconstitutional seizures. There was no discussion concerning the application of this rule with respect to civil proceedings or administrative proceedings. Nevertheless, this Court must affirm, vacate, or reverse a final order issued by the DMV Commissioner if it does not comport with constitutional safeguards to protect private individuals. This Court notes that the holdings in the *Sigler* case(s) indicate that the Supreme Court is sensitive to the fact that the administrative roadblocks were improper stops, resulting in the criminal convictions being set aside. The parallels between what occurred in the Petitioner's case and in the *Sigler* case(s) are striking: The Vehicle Equipment Check stop appeared to have been a decision made on the spur of the moment, yet it had resulted in several arrests. This is the kind of discretion vested in law enforcement the Supreme Court had frowned upon.

Understandably, the DMV encourages this Court to recognize the separation between administrative (civil) proceedings and criminal proceedings and that the two have been recognized as separate and distinct actions. *State ex rel. Stump v. Johnson*, 217 W. Va. 733 (2005). The DMV contends that what is prohibited in a criminal proceeding may not necessarily be the case in an administrative proceeding, as the focus in these administrative proceedings concerns whether the motorist is in fact driving a vehicle under the influence. This Court has already recognized that the applicable statute had undergone revision pertaining to the critical question of whether a motorist had been legally arrested. Interestingly, the statute requiring that a motorist provide written notice of his or her intent to challenge the sobriety checkpoint

guidelines had not been revised. The Hearing Request Form still contains language wherein the motorist may indicate his or her wish to challenge such a checkpoint. Clearly, a *stop* is still a viable issue that comes before hearing examiners in West Virginia, and is an issue requiring evidence, as well as testimony to be considered on the whole, resulting in a ruling. Such was the case here.

The Petitioner had completed a Hearing Request Form and indicated his challenge to the “sobriety” checkpoint; the Form itself indicates that some exclusionary rule may apply (based on lawful arrest at a sobriety checkpoint, despite the 2008 revision to the applicable Code section) during an administrative hearing because the Petitioner clearly challenged the stop in his case as a ground for reversal. Unfortunately, the Form as well as the Code section requiring that he provide notice to challenge his stop only discusses *sobriety* checkpoints, not other types of checkpoints or roadstops.

Despite the changes in administrative hearing procedures wherein a “lawful arrest” is no longer a mandatory finding, the law still requires Petitioner to provide written notice to the DMV to challenge the circumstances of his stop and/or arrest. If such a challenge were made properly, pursuant to the earlier referenced Code section, then the hearing examiner, and ultimately, the Commissioner, may make a ruling on same. What has not been revised is the statutory obligation that this Court “**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 . . . provisions or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record.**” W. Va. Code § 29A-5-4.

Clearly, from the applicable caselaw, and statutory authority, including the Petitioner's challenge to the Vehicle Equipment Check stop, the record before the hearing examiner, as well as the Commissioner's ruling on the Petitioner's "lawful arrest" opens the door to this Court to issue a ruling on that specific finding. As a result, this Court is not persuaded that even in an administrative proceeding that the police may act with unfettered discretion because the results remain the same: Citizens with a constitutional right to privacy are injected into both criminal and civil proceedings, regardless of how those proceedings are ultimately disposed.

IV. Conclusions of Law

1. 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. Prouse*, 440 U.S. 648, 653-55, 99 S.Ct. 1391, 1395-97, 59 L.Ed.2d 660 (1979).
2. 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. Syl Pt. 4, *State v. Sigler*, 224 W. Va. 608 (2009).
3. 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. Syl Pt. 7, *Sigler*.
4. Suspicionless checkpoint roadblocks are constitutional in West Virginia only when conducted in a random and non-discriminatory manner within predetermined written

operation guidelines which minimize the State's intrusion into the freedom of the individual and which strictly limits the discretion vested in police officers at the scene. Syl Pt. 9, *Sigler*.

5. The substantial rights of the Petitioner have been prejudiced because the administrative findings and conclusions concerning the arrest of the Petitioner in the Commissioner's Final Order was clearly wrong in view of the reliable, probative and substantial evidence on the whole record as well as a violation of constitutional provisions.
6. From the evidence submitted and deduced on the record before the hearing examiner, the Commissioner's conclusion of law that the Petitioner's "lawful arrest" is clearly wrong because there was no evidence of a careful balancing of his individual privacy rights with minimal interference by police.
7. The Vehicle Equipment Checkpoint enacted by the WVSP was pre-textual where it was conducted in a high drug area, was conducted without discretion, or oversight, with no written guidelines, with no warnings to motorists of the impending roadblock, with no flares, or reflective vests worn by members of the State Police. This checkpoint was unconstitutional.
8. The Vehicle Equipment Checkpoint, employed as described by Tpr. Workman in this case, simply sidesteps the stricter procedural aspects of sobriety checkpoint guidelines. Assuming that every criminal proceeding stemming from Vehicle Equipment Checkpoints was dismissed based on constitutional violations, serious interference with an individual's rights to privacy due to unduly invasive police activity still remains. Additionally, it circumvents the "sobriety checkpoint guidelines" challengeable ground in

licensure revocation proceedings, rendering such grounds a waste of time for a motorist to argue.

V. Ruling

WHEREFORE, on the basis of the above, the Court does hereby **ORDER, ADJUDGE,** and **DECREE** as follows:

- (1) The decision of the Commissioner of the West Virginia Division of Motor Vehicles, is hereby **REVERSED**;
- (2) That the Petitioner's license to drive is reinstated;
- (3) There being nothing further, this action shall be **DISMISSED** and **STRICKEN** from the docket of this Court.
- (4) The Clerk is directed to forward a certified copy of this Order to all counsel of record.

ENTERED this 31st day of January, 2011.



OMAR J. ABOULHOSN, JUDGE
9th Judicial Circuit of Mercer County

THE FOREGOING IS A TRUE COPY OF A DOCUMENT
ENTERED IN THIS OFFICE ON THE 31st DAY
OF Jan.
DATED THIS 1st DAY OF Feb.
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JULIE BALL, CLERK OF THE
CIRCUIT COURT OF MERCER COUNTY WV
BY Angie S. Fox
HER DEPUTY

MERCER COUNTY CIRCUIT COURT

MERCER COUNTY COURTHOUSE

JULIE BALL, CIRCUIT CLERK

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