

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0352

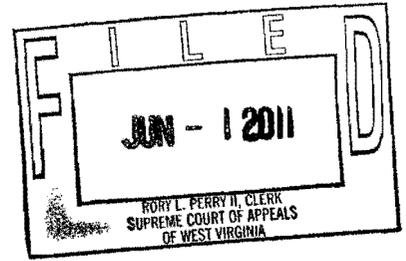
**JOE E. MILLER, Commissioner
of the West Virginia Division
of Motor Vehicles,**

Petitioner Herein/Respondent Below,

v.

CHRISTOPHER L. TOLER,

Respondent Herein/Petitioner Below.



PETITIONER'S BRIEF

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PETITIONER'S BRIEF

(I)

ASSIGNMENTS OF ERROR

- A. The circuit court erred in applying the prophylactic exclusionary rule to exclude all evidence in this case since the judge created exclusionary rule does not apply to civil proceedings.**

- B. The circuit court erred in excluding all evidence in this case since West Virginia Code § 17C-5A-2(f) (2008) creates only a limited exclusionary rule that requires the suppression of secondary breath test evidence in an administrative licence revocation hearing if such a test was administered without lawful custody, but does not otherwise bar the admission of any other evidence.**

(II)

STATEMENT OF THE CASE

In the evening hours of December 28, 2008, Senior Trooper C.N. Workman, and three or four other State Police Officers were conducting a vehicle equipment check, a "Safety Equipment Checkpoint." App'x at 16, 27, 64, 71. During this check, all cars going through the check were stopped and all cars had the same equipment checked. App'x at 2, 67, 70. Mr. Toler's pick-up

approached the checkpoint and Senior Trooper Workman asked for Mr. Toler's license, registration, and insurance and then checked on Mr. Toler's registration, registration, and break lights. App'x at 80. After returning Mr. Toler's licence and registration, Senior Trooper Workman smelled of alcohol. App'x at 80. Mr. Toler had slurred speech, and glossy eyes. App'x at 28. He was unsteady while getting out of his truck, and staggered while walking to the roadside. App'x at 28. Mr. Toler had an unopened can of beer in the car in a bag that Mr. Toler grabbed as he was going through the stop. App'x at 80.¹ Mr. Toler admitted to having consumed a couple of, App'x at 16, 28, 81, forty ounce beers, App'x at 31, and that he was under the influence of alcohol. App'x at 31. Mr. Toler failed the Horizontal Gaze Nystagmus test, the one legged stand test, and the walk and turn test. App'x at 17, 28-29. The Commissioner issued an order of revocation after the administrative hearing, which the circuit court reversed finding that the checkpoint here violated the Fourth Amendment under *State v. Sigler*, 224 W. Va. 608, 687 S.E.2d 391 (2009) and that the exclusionary rule applied and prohibited the Commissioner from considering any evidence of intoxicated driving.

(III)

SUMMARY OF ARGUMENT

- A. The circuit court erred in applying the prophylactic exclusionary rule to exclude all evidence in this case since the judge created exclusionary rule does not apply to civil proceedings.**

The exclusionary rule is not a textual mandate of the Fourth Amendment; it is a judicially crafted prophylactic emanating from Federal common law that prohibit the introduction into

¹The DUI Information Sheet indicated that there were three forty ounce beer bottles located in Mr. Toler's truck. App'x at 28.

evidence of evidence is seized outside the permissible boundaries of the Fourth Amendment—but only when such exclusion will serve to deter illegal police misconduct in the future and when measured against the pernicious effects of the rule on the truth finding function of adjudicatory bodies. It is established by decisions of the United States Supreme Court, this Court, and other courts that the exclusionary rule does not extend to prohibiting the introduction any evidence in civil cases. An Administrative Licence Revocation is a civil proceeding. Consequently, the constitutionally based exclusionary rule does not apply and the circuit court erred in applying it.

B. The circuit court erred in excluding all evidence in this case since West Virginia Code § 17C-5A-2(f) (2008) creates only a limited exclusionary rule that requires the suppression of secondary breath test evidence in an administrative licence revocation hearing if such a test was administered without lawful custody, but does not otherwise bar the admission of any other evidence.

West Virginia Code § 17C-5A-2(d) (2008) creates, at best, a limited statutory exclusionary rule—secondary breath test results cannot be considered if the test was administered when the driver was not lawfully in custody for purposes of administering the test. But, a blood alcohol contest is not required for a licence suspension, if other evidence proves the drivers was driving under the influence of alcohol then the license may be suspended. Here, evidence of the smell of alcohol on Mr. Toler’s breath, his admissions to having drunk beer and being under the influence, of having slurred speech and glossy eyes, of being unsteady in exiting his truck, and of having failed the three standard sobriety tests is more than ample to sow by a preponderance of the evidence that Mr. Toler drove a vehicle while under the influence of alcohol.

(IV)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Commissioner requests a Rule 20 argument in this case. The circuit court applied the exclusionary rule in this case, a result that is at odds with the decision of the Circuit Court of McDowell County in *Blevins v. West Virginia DMV*, No. 11-C-16, slip op. at 4-5 (May 11, 2011), finding that the exclusionary rule does not apply to administrative licence revocation proceedings.

(V)

ARGUMENT

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 71, 464 S.E.2d 589, 590 (1995) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit 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, decisions, 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.”

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of West Virginia Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Groves v. Cicchirillo* 694 S.E.2d 639, 643 (W. Va. 2010) (per curiam)

A. The circuit court erred in applying the prophylactic exclusionary rule to exclude all evidence in this case since the judge created exclusionary rule does not apply to civil proceedings.

Contrary to the arguments made by the Commissioner, App'x at 36-43, the circuit court found that the exclusionary rule applied to civil proceedings.² However, such a conclusion is much at odds with the recognition of the United States Supreme Court that “[i]n the complex and turbulent history of the rule, the [Supreme] Court never has applied it to exclude evidence from a civil proceeding, federal or state.” *United States v. Janis*, 428 U.S. 433, 447, 96 S. Ct. 3021, 3029 (1976). *See also Hudson v. Michigan*, 547 U.S. 586, 611-12, 126 S. Ct. 2159, 2175 (2006) (citations omitted) (“The Court has declined to apply the exclusionary rule only: (1) where there is a specific reason to believe that application of the rule would ‘not result in appreciable deterrence,’ or (2) where admissibility in proceedings other than criminal trials was at issue[.]”). Such is supported by practicalities and precedent.³

²Although the Vehicle Equipment Checkpoint here is in violation of *Sigler*, *Sigler* was not decided until well-after the checkpoint was conducted in this case. Prior to *Sigler*, *State v. Davis*, 195 W. Va. 79, 464 S.E.2d 598 (1995) (per curiam) (which *Sigler* overruled), controlled safety checkpoints and, under *Davis*, the checkpoint would have been valid. Indeed, Senior Trooper Workman testified that he normally stopped every car, a procedure that would have been in compliance with *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401 (1979) (footnote omitted) (dicta) (“This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.”).

³This issue is not just of concern to DMV. Other proceedings, such as child abuse and neglect proceedings and juvenile dependency proceedings, or professional licensing disciplinary cases could be impacted if the exclusionary rule is extended beyond its criminal law tethers. *Cf. In re Corey P.*, 269 Neb. 925, 697 N.W.2d 647, 655 (2005) (holding that the exclusionary rule is inapplicable in juvenile protection proceedings because such application “may lead to an erroneous conclusion that there has been no abuse or neglect, leaving innocent children to remain in unhealthy or compromising circumstances”); *State ex rel. Dep’t of Human Services v. W.L.P.*, 345 Or. 657, 202 P.3d 167 (2009) (exclusionary rule does not apply in juvenile dependency proceeding); *Kerr v. Pennsylvania State Bd. of Dentistry*, 599 Pa. 107, 110, 960 A.2d 427, 429 (2008) (the exclusionary rule associated with the Fourth Amendment does not apply to a civil disciplinary proceeding of the State Board of Dentistry); *People v. Harfmann*, 638 P.2d 745 (Colo.1981)

(continued...)

“Whether the exclusionary sanction is appropriately imposed in a particular case, . . . is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’” *United States v. Leon*, 468 U.S. 897, 906-07, 104 S. Ct. 3405, 3412 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223, 103 S. Ct. 2317, 2324 (1983)). See also *Wolf v. Colorado*, 338 U.S. 25, 28-29, 69 S. Ct. 1359, 1361-62 (1949) (“Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order.”), *overruled on other grounds by Weeks v. United States*, 232 U.S. 283, 34 S. Ct. 341 (1914). Hence, Fourth Amendment cases are governed by a two step sequential process: (1) was the Fourth Amendment violated, and if so, (2) does the exclusionary rule apply?⁴ 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 201-01 (1993).

Neither the Fourth Amendment nor Article III, § 6 “contain[] [any] provision expressly precluding the use of evidence obtained in violation of [their] commands.” *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 1191 (1995).⁵ Unlike the Fifth Amendment’s guarantee against self-

³(...continued)
(rule inapplicable in lawyer disciplinary proceedings).

⁴This sequential process is what distinguishes *Ullom v. Miller*, No. 34864 (Nov. 23, 2010) and renders the circuit court’s reliance on it as misplaced. *Ullom* was solely about whether the Fourth Amendment was satisfied in that case, and this Court held it was. Therefore, there was no reason to address the second issue of exclusionary rule applicability.

⁵There was no exclusionary rule at common law. Justice Story identified:

In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it obtained [T]he evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. . . . In many instances, and especially.

(continued...)

incrimination, there is “no provision expressly precluding the use of evidence obtained in violation of its commands.” *Leon*, 468 U.S. at 906, 104 S. Ct. at 3411; *United States v. Patane*, 542 U.S. 630, 650, 124 S. Ct. 2620, 2628 (2004) (“Unlike the Fourth Amendment’s bar on unreasonable searches, the Self-Incrimination Clause is self-executing.”). As the Supreme Court has “emphasized repeatedly . . . the governments’ use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.” *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 362, 118 S. Ct. 2014, 2019 (1998). In sum, “[t]he exclusionary rule is not required by the Constitution[.]” *Brock v. United States*, 573 F.3d 497, 499 (7th Cir. 2009); *Martin v. Kansas Dep’t of Revenue*, 285 Kan. 625, 640, 176 P.3d 938, 949 (2008) (“Martin’s argument also implies that the exclusionary rule is a constitutional mandate. It is not.”); *United States v. Nielson*, 415 F.3d 1195, 1202 (10th Cir. 2005) (“the exclusionary rule is not mandated by the Fourth Amendment.”); *United States v. Peoples*, 668 F. Supp.2d 1042, 1048 (W.D. Mich. 2009) (“the exclusionary rule is an

⁵(...continued)

on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account ever been dismissed for incompetency.

United States v. La Jeune Eugenie, 26 F. Cas. 832, 843–44 (C.C.D.Mass.1822). Indeed, it took 123 years, from 1791 to 1914 for the United States Supreme Court to adopt the exclusionary rule in *Weeks v. United States*, 232 U.S. 283, 34 S. Ct. 341 (1914), see *People ex rel. Winkle v. Bannan*, 372 Mich. 292, 323, 125 N.W.2d 875, 891 (1964), and another 47 years, from *Weeks* to *Mapp v. Ohio*, 367 U.S. 643 (1961), for the rule to be applied to the States, with an intervening decision in *Wolf v. Colorado*, 338 U.S. 25, 32, 69 S. Ct. 1359, 1364 (1949) overruled in *Weeks* specifically finding the rule does not apply against the States. West Virginia did not have an exclusionary rule until 1922, which this Court based upon *Weeks* and its progeny finding that “inasmuch as the provisions of our constitution cover the same subject and are in the exact language of the federal amendments, they ought to receive harmonious construction when applied to the actions of state officers.” *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257, 260 (1922). (But see *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007)). See *Wolf v. Colorado*, 338 U.S. 25, 37, 69 S. Ct. 1359, 1366 (1949) (observing that in *State v. Wills*, 91 W. Va. 659, 114 S.E. 261 (1922) this Court distinguished prior cases in light of *Weeks*), overruled on other grounds by *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961).

extraordinary remedy not required by the text of the Fourth Amendment.”). “The United States Supreme Court has repeatedly held that the use of evidence obtained in violation of the fourth amendment does not violate the Constitution[.]” *Riche v. Director of Revenue*, 987 S.W.2d 331, 334 (Mo. 1999); *Scott*, 524 U.S. 357 at 362, 118 S. Ct. at 2019 (“We have emphasized repeatedly that the governments’ use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.”), (as opposed to its actual seizure), so that the *introduction* of evidence that was illegally seized is not a constitutional violation., and, as such, cannot run afoul of the APA since the Commissioner’s findings and order are not “[i]n violation of constitutional . . . provisions.”

Notwithstanding this textual absence, the Supreme Court has admittedly judicially crafted an exclusionary rule, *McDonald v. Chicago*, 130 S. Ct. 3020, 3047 (2010), *Stone v. Powell*, 428 U.S. 465, 482, 96 S. Ct. 3037, 3046 (1976), *State v. Rummer*, 189 W. Va. 369, 386, 432 S.E.2d 39, 56 (1993) (Nelly, J., dissenting), which

prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search . . . [and] prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes “so attenuated as to dissipate the taint”

Murray v. United States 487 U.S. 533, 536-37, 108 S. Ct. 2529, 2533 (1988). The exclusionary rule is not an end unto itself, see *United States v. Harvey*, 711 F.2d 144 (9th Cir. 1983) (Anthony Kennedy, quondam Circuit Court Judge, dissenting from denial of rehearing en banc); rather, the rule’s purpose is to deter police misconduct, *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 163 n.10, 451 S.E.2d 721, 729 n.10 (1994) (dicta),⁶ and not to create a personal

⁶*Madden*, of course, dealt with litigation between two private parties, but the case that the Court cited (continued...)

constitutional right. *E.g.*, *United States v. Fogg*, 52 M.J. 144, 151 (C.A.A.F. 1999) (“the exclusionary rule, suppressing evidence from unreasonable searches and seizures, is not a constitutional right”). “[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.” *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974). *See also Kimmelman v. Morrison*, 477 U.S. 365, 396, 106 S.Ct. 2574, 2594 (1986) (Powell, J., concurring) (“We have held repeatedly that such evidence ordinarily is excluded only for deterrence reasons that have no relation to the fairness of the defendant’s trial.”).

“The fact that a Fourth Amendment violation occurred- *i.e.*, that a search or arrest was unreasonable-does not necessarily mean that the exclusionary rule applies.” *Herring v. United States*, 129 S. Ct. 695, 700 (2009). Thus, “[i]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.” *Calandra*, 414 U.S. at 350, 94 S. Ct. at 621. “[T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” *Id.* at 348, 94 S. Ct. at 620. Indeed, the

Fourth Amendment has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons and that when the public interest in presenting all the evidence which is relevant and probative is compelling, and the deterrent function served by exclusion is minimal, the exclusionary rule will not be invoked.

Hughes v. Gwinn, 170 W. Va. 87, 91, 290 S.E.2d 5, 9 (1982). Given that “[i]ndiscriminate application of the exclusionary rule . . . may well ‘generat[e] disrespect for the law and

⁶(...continued)

to support its statement that “the exclusionary rule is not usually extended to civil cases[,]” was *County of Henrico v. Ehlers*, 237 Va. 594, 379 S.E.2d 457 (1989), and a county is a public party *See Garrison v. Deschutes County*, 334 Or. 264, 272, 48 P.3d 807, 812 (2002).

administration of justice[.]” *Leon*, 468 U.S. at 908, 104 S. Ct. at 3412 (citation omitted), “[s]uppression of evidence . . . has always been our last resort, not our first impulse.” *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 2163 (2006). In addressing whether to extend the exclusionary rule to civil cases, the Supreme Court set forth a framework that weighs the likely social benefits of excluding illegally seized evidence, *i.e.* deterring police misconduct, against its likely costs, *i.e.*, the loss of probative evidence and the costs that flow from less accurate and more cumbersome adjudication that therefore occurs. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1041, 104 S. Ct. 3479, 3485 (1984) (citing *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021 (1976)).

Sufficient deterrence is effected on law enforcement through the suppression of evidence in the prosecution’s case in chief in the criminal proceeding, the enforcement of the criminal law being the officers’ primary focus, *Janis*, 428 U.S. at 458, 96 S. Ct. at 3034, and not the obtaining of evidence to be used in an administrative proceeding. *Scott*, 524 U.S. at 368, 118 S. Ct. at 2022. And this point is further buttressed because DMV “is a separate and independent agency from the police department and has no control over the actions of police officers, [so that] imposing the exclusionary rule in license suspension proceedings would add little force to the deterrence of unlawful police action.” *Motor Vehicle Admin. v. Richards*, 356 Md. 356, 375, 739 A.2d 58, 69 (1999). “Imposing the exclusionary rule in civil license revocation and suspension proceedings would have little force in deterring unlawful police action, because the director of revenue has no control over the actions of local police officers[.]” *Riche v. Director of Revenue*, 987 S.W.2d 331, 335 (Mo.1999) (en banc), as evidenced by the fact that police are sometimes wont to ignore issued subpoenas to attend ALR

hearings. *See Miller v. Hare*, No. 35560 (W. Va. Apr. 1, 2011).⁷ The fact that there might be some incremental effect on primary police conduct is not itself sufficient to trigger to exclusionary rule. *Scott*, 524 U.S. at 368, 118 S. Ct. at 2022. (“We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.”); *Calandra*, 124 U.S. at 350, 94 S. Ct. at 621 (“[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.”). Indeed, other means of deterrence, such as the threat civil rights suits, departmental discipline, and professional training, can prove far more valuable than the exclusionary rule. *Hudson v. Michigan*, 547 U.S. 586, 598-99, 126 S. Ct. 2159, 2167-68 (2006);

Against this is measured to social cost of the exclusionary rule. Clearly, application of the exclusionary rule results “substantial social costs,” *Leon*, 468 U.S. at 907, 104 S. Ct. at 3412, which sometimes include setting the guilty free and the dangerous at large, *Hudson*, 547 U.S. at 591, 126 S. Ct. at 2165, by “mak[ing] reliable and probative evidence unavailable; [thus] it imped[ing] the truthfinding process; . . . [and] encouraging disrespect for law by seemingly focusing on procedure rather than the pursuit of truth and justice.” *Madden*, 192 W. Va. at 163 n.10, 451 S.E.2d at 729 n.10. Further, “[t]he purpose of this State’s administrative driver’s license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.” Syl. Pt. 3, *In re McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005). *See also Dixon v. Love*, 431 U.S. 105, 114, 97 S. Ct. 1723, 1728 (1977) (observing “the important public interest in

⁷This Court actually has or had pending some 13 cases dealing with what DMV terms OFTAs, or “Officer Failed to Appear” cases dealing with circumstances where law enforcement officers do not appear in response to administrative subpoenas issued by DMV for officers to appear at ALRs. Pending in front of the circuit courts are or were some 13 of these OFTA cases before the *Hare* decision. While not empirical, this presents strong anecdotal evidence that ALRs are not prime motivators for police officers.

safety on the roads and highways, and in prompt removal of a safety hazard”, i.e., drunk drivers). Applying the exclusionary rule in civil cases such as administrative license revocations would result in a proceeding “intended as an expeditious method of ridding the highways of dangerous drivers and of protecting the public . . . becom[ing] an intolerable burden on the bar and a cumbersome procedure.” *Ferguson v. Gathright*, 485 F.2d 504, 508 (4th Cir. 1973). See Scott 524 U.S. at 366, 118 S. Ct. at 2021 (“The exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded.”). Thus, the United States Supreme Court has never extended the exclusionary rule beyond criminal proceedings, *Hudson*, 547 U.S. at 612, 126 S. Ct. at 2176 (Breyer, J., dissenting), and—as this Court has recognized— “the exclusionary rule is not usually extended to civil cases.” *Madden*, 192 W. Va. at 163 n.10, 451 S.E.2d at 729 n.10. See also 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 207 (1993) (similar) And, of course, not extending the exclusionary rule to civil proceedings has precedential roots in this Court’s jurisprudence for in *Hughes v. Gwinn*, 170 W. Va. 87, 91, 290 S.E.2d 5, 9 (1982), this Court refused to extend the exclusionary rule to probation revocation hearings (admittedly with a limited exception not present here). Cf. *State ex rel. Doe v. Troisi*, 194 W. Va. 28, 34, 459 S.E.2d 139, 145 (1995) (exclusionary rule does not apply to grand jury proceedings).

“The majority of courts in other jurisdictions that have addressed this issue have concluded that the exclusionary rule does not apply in proceedings for the revocation of a driver’s license.”

Glynn, slip op. at 17. In short,

[a]ll of the above cited decisions clearly indicate that any benefits in applying the exclusionary rule to a driver’s license revocation hearing would substantially outweigh the social costs in doing so . . . By allowing drivers to challenge the constitutionality of traffic stops and arrests in a civil proceeding for purposes of applying the exclusionary rule, society’s goal of efficiently removing drunk drivers

from the roads would be drastically undermined.

Custer v. Kansas Dept. of Revenue, No. 97,866, 2007 WL 4374037, at * 1 (Kan. Ct. App. Dec. 14, 2007). The circuit court should be reversed.

B. The circuit court erred in excluding all evidence in this case since West Virginia Code § 17C-5A-2(f) (2008) creates, at best, a limited exclusionary rule applicable solely to Secondary Breath Test evidence.

The pertinent version of the statute under which Mr. Toler's licence was revoked was West Virginia Code § 17C-5A-2 (2008). West Virginia Code § 17C-5A-2(f) specifically provided:

In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol . . . 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, . . . 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 . . . 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.

Assuming arguendo that this is an exclusionary statute, it is in derogation of the common law as, “[a]t common law admissibility of evidence was not affected by the illegality of the means by which it was obtained[.]” *State v. Stone*, 165 W. Va. 266, 269, 268 S.E.2d 50, 53 (1980), *overruled on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991); 8 John Henry Whitmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2183 (3d ed. 1940) (“[I]t has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.”), or, in other words, “[a]t common law, . . . there was no exclusionary rule for illegal searches and

seizures[.]” D. Taylor Tipton, *the Dunkin’ Donuts Gap: Rethinking the Exclusionary Rule as a Remedy in Constitutional Criminal Procedure*, 47 Am. Crim. L. Rev. 1341, 1343 (2010).⁸ Being in derogation of the common law, see, e.g., *State v. Garner*, 331 N.C. 491, 505, 417 S.E.2d 502, 509 (1992), West Virginia Code § 17C-5A-2 must be strictly construed, see Syl., *Kellar v. James*, 63 W. Va. 139, 59 S.E. 939 (1907), that is, “the common law is not to be deemed altered or abrogated by statute unless the Legislature’s intent to do so be plainly manifested.” *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 20, 217 S.E.2d 907, 911 (1975). Similarly, statutes or evidentiary rules that suppress evidence must be read strictly. See, e.g., *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W. Va. 431, 438, 460 S.E.2d 677, 684 (1995) (“As the attorney-client privilege and the work product exception may result in the exclusion of evidence which is otherwise relevant and material and are antagonistic to the notion of the fullest disclosure of the facts, courts are obligated to strictly limit the privilege and exception to the purpose for which they exist.”); *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 41, 454 S.E.2d 77, 86 (1994) (citations omitted) (Cleckley, J., concurring)(“It is well recognized that a privilege may be created by statute. A statute granting a privilege is to be strictly construed so as “to avoid a construction that would suppress otherwise competent evidence.””). Consequently, West Virginia Code § 17C-5A-2(f) must be read only to

⁸Sitting as a Circuit Justice, Joseph Story stated in *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 843-44 (C.C.D.Mass 1822), “[i]n the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained” Justice Story would be the person to make such a conclusion, as he “was the most learned scholar ever to sit on the Supreme Court[.]” Bernard Schwartz, *A History of th Supreme Court* 59 (1993) and Chief Justice John Marshal is reported to have said of Story that he, ““can give us the cases from the Twelve Tables down to the latest reports[.]” (quoted in *id.* at 60). The common law in the United Kingdom developed a sort of exclusionary rule in criminal trials by the mid-twentieth century, allowing that a trial judge always had the discretion to suppress evidence if the strict rules of evidence would operate unfairly, *Kuruma v. The Queen*, A.C. 197, 203 (P.C.) (Kenya), although such a discretion applied only in very exceptional circumstances. *Jeffrey v. Black*, [1978] Q.B. 490, 497-98.

extend as far as its terms explicitly take it and absolutely no further.

The second part West Virginia Code § 17C-5A-2(f) requires a finding of lawful custody— but only for the purpose of administering a secondary breath test. If there is no lawful custody for the secondary breath test, the outcome is, at best, the suppression of any secondary breath tests, nothing more. Thus, an ALR is not rendered still born by a violation.. *Cf. United States v. Blue*, 384 U.S. 251, 255, 86 S. Ct. 1416, 1419 (1966) (“Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether.”).

While a driver cannot lose a driver’s license for a per se violation (i.e., driving with a Blood Alcohol Content .08% or greater) without a SBT, the driver still can be in violation of the drunk driving laws by operating a vehicle while intoxicated. Because “[d]riving under the influence of alcohol and driving with an alcoholic concentration of .[08]% are separate grounds for suspension of a driver’s license[,]” *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984), “[t]he absence of a chemical test does not foreclose proof by other means of intoxication as a ground for license revocation[,]” *Boley v. Cline*, 193 W. Va. 311, 314, 456 S.E.2d 38, 41 (1995); it is sufficient proof to revoke a license “that a driver was operating a motor vehicle upon a public street or highway, [and] exhibited symptoms of intoxication, and had consumed alcoholic beverages[.]” Syl. Pt.1 & Syl. Pt. 2, in part, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). Thus, even where there are no SBT results (either because no test was administered or such tests cannot be considered), the Commissioner must still revoke a driver’s license when the evidence shows that: (1) the driver was operating a motor vehicle on a public street or highway; (2) the driver exhibited signs of intoxication; and, (3) the driver had consumed alcoholic beverage(s), that is, “whether the

person committed an offense involving driving under the influence of alcohol, controlled substances or drugs.” Here, Mr. Toler was driving, smelled of alcohol, had slurred speech and glossy eyes, was unsteady, and failed three field sobriety tests. *See, e.g., Ullom v. Miller*, 705 S.E.2d 111, 124 (W. Va. 2010). The circuit court should be reversed.

(VI)

CONCLUSION

The circuit court should be reversed.

Respectfully submitted,

**JOE E. MILLER, Commissioner,
Division of Motor Vehicles,**

By Counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



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IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

CARL G. BLEVINS,

Petitioner,

v.

**Civil Action No. 11-C-16
Judge Booker T. Stephens**

**WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, WEST VIRGINIA ATTORNEY
GENERAL, and DEPUTY T.E. VINEYARD**

Respondents.

FINAL ORDER

On May 2, 2011, the Petitioner, Carl G. Blevins, appeared at a hearing in this matter in person and by counsel, Charles A. Stacey. The Respondents appeared by counsel Scott E. Johnson, Assistant Attorney General. After hearing the arguments of the parties, reviewing their memorandums of law, and the Court's own independent research, the Court rules as follows.

FINIDINGS OF FACT

1. The Commissioner's Final Order provided that the Findings of Fact were established by a preponderance of the evidence
2. On June 30, 2009, Deputy T.E. Vineyard of the McDowell County Sheriff's Department observed a 1996 Chevrolet truck drive up to a residence in Ritter Hollow and park.
3. It was the belief of Deputy Vineyard that the residence was a known "drug house."

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4. The Petitioner exited the driver's seat, began walking toward the residence, observed Deputy Vineyard, and returned to his vehicle.
5. Deputy Vineyard stopped his cruiser and approached the Petitioner, observing white powder in and around his nostrils.
6. Deputy Vineyard requested that the Petitioner exit the vehicle, and the Petitioner complied with this request.
7. The Petitioner staggered and had difficulty maintaining his balance after exiting the vehicle.
8. The Petitioner informed the officer that the white powder was Xanax, a prescribed drug.
9. Deputy Vineyard administered the horizontal gaze nystagmus field sobriety test, but the Petitioner failed to keep his head still and staggered. The Petitioner's eyes had unequal pupils. After two attempts the officer ceased the test and it was not completed.
10. The Petitioner complained of back and leg problems during the walk-and-turn test. The test was then stopped.
11. Deputy Vineyard arrested the Petitioner for driving while under the influence of drugs on June 30, 2009, in Ritter Hollow, McDowell County, West Virginia.
12. Deputy Vineyard had reasonable grounds to believe the Respondent had been driving under the influence of drugs.
13. A second chemical sobriety test of the Petitioner's breath was administered by Deputy Vineyard at the McDowell County Sheriff's Department.

14. The Petitioner was then transported to Welch Community Hospital where a blood test was administered to the Petitioner.
15. The Petitioner filed a timely written notice of intent to challenge the results of the secondary chemical test and blood test administered to him by the Investigating Officer and the hospital technicians.
16. The secondary chemical test was administered in accordance with Title 64, *Code of State Rules*, Series 10 and the results indicated zero blood alcohol.
17. The results of the blood test administered to the Petitioner were not available at the original hearing in this matter and have never been produced.

DISCUSSION

The Petitioner asserts that the Hearing Examiner made errors of law by finding that 1) probable cause existed for the stop in question and seizure of any evidence, 2) the stop and collection of evidence was constitutional, and 3) by considering improperly presented evidence that a prescription drug was in the Petitioner's system in the absence of any quantitative amount legally established. The DMV argues that 1) the officer had reasonable grounds for the stop, 2) the exclusionary rule does not apply to civil proceedings so the manner in which the evidence was collected did not amount to a constitutional violation, and 3) no secondary chemical sobriety test with quantitatively established amounts is necessary for a revocation in an administrative proceeding.

The first issue is whether Deputy Vineyard's stop of the Petitioner was properly enacted. The Petitioner asserts the officer required probable cause to stop the Petitioner

and that standard was not met. The DMV claims that the officer only required a reasonable suspicion to stop the Petitioner.

The Supreme Court has determined that reasonable suspicion is not as demanding a standard as probable cause, can be established with information different in quantity or content than that required to show probable cause, and can arise from information “less reliable than that required to show probable cause.” *State v. Stuart*, 192 W.Va. 428, 432 (1994) citing *Alabama v. White*, 496 U.S. 325, 330 (1990). The Supreme Court also ruled in *Stuart* that “(p)olice officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 1, *Stuart*.

It is important to note that the officer did not stop the Petitioner until the Petitioner had exited his vehicle and attempted to return to it after becoming aware of Deputy Vineyard’s presence. Since Deputy Vineyard believed this behavior was suspicious and the Petitioner was outside a residence known to the officer as a location used in the drug trade, it is the opinion of this Court that only a reasonable suspicion was required for the stop, and the officer met that standard. The presence of the white powder on the Petitioner’s nose and his intoxicated behavior during the encounter with the officer justify the arrest of the Petitioner.

The Petitioner essentially claims that the exclusionary rule should have barred the Hearing Examiner from considering evidence resulting from Deputy Vineyard’s stop of the Petitioner. The United States Supreme Court has stated the purpose of the exclusionary rule: “(T)he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal

constitutional right of the party aggrieved.” *United States v. Calandra*, 414 U.S. 338, 348 (1974). Also, the West Virginia Supreme Court of Appeals noted that “the exclusionary rule is not usually extended to civil cases.” *State ex rel. State Farm & Cas. Co. v. Madden*, 192 W.Va. 155, 163 Footnote 10. It was also held to be inapplicable in administrative deportation hearings. *Id.* citing *County of Henrico v. Ehlers* 237 Va. 594, 379 S.E.2d 457 (1989).

It has never been established by the West Virginia Supreme Court that the exclusionary rule applies to civil or administrative proceedings. This Court believes it would be inappropriate to extend the exclusionary rule to cover the present matter absent a Supreme Court decision or legislative enactment. The Court is not insensitive to the Petitioner’s argument that evidence could potentially be excluded in a criminal case but deemed admissible in an administrative proceeding arising from the same facts that results in the revocation of a citizen’s driver’s license. However, it seems clear to this Court that the exclusionary rule has not been extended to administrative hearings, and the Hearing Examiner made no error on this issue.

The Petitioner argues that a quantitative standard is necessary for a license revocation for driving under the influence of a controlled substance, but this position is not supported by the law. The Supreme Court has clearly stated that a chemical test is not required to meet the necessary standard in an administrative hearing:

“Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol.” Syl. Pt. 2, *Carte v. Cline*, 200 W.Va. 162 (1997) citing Syl. Pt. 2, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984).

Regardless of whether Deputy Vineyard observed the Petitioner driving erratically or in a way that would lead him to believe he was intoxicated, the officer observed the Petitioner demonstrating such behavior shortly after the Petitioner exited his vehicle. Further, the officer observed white powder on the Petitioner's nose and the Petitioner informed the officer it was Xanax, a prescription medication. It does not matter that the officer did not pull the Petitioner over for driving in an unsafe manner. It is clear that if the Petitioner was behaving in an intoxicated manner moments after stepping out of a vehicle that he had been operating it while under the influence of a chemical substance, in this instance Xanax.

The Petitioner argued at the hearing in this matter that the results of the blood test conducted at Welch Community Hospital were never revealed. Counsel for the DMV stated that the results were never received and that the status of the test was unknown.

The Court understands the Petitioner's concerns that a test was conducted and the results, which would either support the Commissioner's ruling or the vindication of the Petitioner's claim, never materialized. No explanation was given as to what happened to the test results. However, counsel for the DMV is correct in asserting that a secondary chemical sobriety test is not necessary for a revocation in an administrative proceeding under *Albrecht*. The facts of this case support a finding by a preponderance of the evidence that the Petitioner operated a motor vehicle while under the influence of a controlled substance without further support from a chemical test. The test results were not necessary to justify the Commissioner's determination and there are no legal grounds to overturn the Commissioner's ruling on this issue.

CONCLUSIONS OF LAW

1. Deputy Vineyard had reasonable grounds to believe that the Petitioner had driven a motor vehicle while under the influence of a controlled substance or drugs.
2. The Petitioner was lawfully arrested for an offense described in West Virginia Code §17C-5-2.
3. The secondary chemical test was administered in accordance with Title 64, *Code of State Rules*, Series 10.
4. An administrative revocation of a driver's license does not require administration of a secondary chemical sobriety test to prove the motorist was drive while under the influence of alcohol or other drugs. Syl. Pt. 4, *Coll v. Cline*, 202 W.Va. 599 (1998), *Albrecht v. State*, 173 W.Va. 268 (1984).
5. The Supreme Court has held that when "there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." *Albrecht*, at 273.
6. It was demonstrated by a preponderance of the evidence that the Petitioner operated a motor vehicle while under the influence of a controlled substance on June 30, 2009.
7. Pursuant to West Virginia Code §17C-5A-2(i), an individual's license must be revoked for a period of six months if a finding is made that said person did drive a

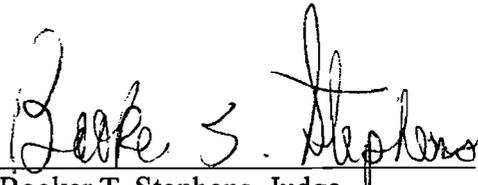
motor vehicle while under the influence of alcohol, controlled substances, or drugs.

8. Pursuant to West Virginia Code §17C-5A-3(b)(2)(A) and West Virginia Code §17B-3-9, when the period of revocation is six months, and license to operate a motor vehicle shall not be reissued until at least ninety days have elapsed from the date of the initial revocation during such time the revocation was actually in effect; the offender has successfully completed the Safety and Treatment Program, all costs of the Program and its administration have been paid, all costs of the revocation hearing have been paid, and until a reinstatement fee has been paid.

Therefore, the ruling of the Final Order of the Commissioner of the Division of Motor Vehicles is AFFIRMED. The objection and exception of the Petitioner is noted.

The Clerk is directed to forward a copy of this Order to all counsel of record.

ENTER this 11th day of May, 2011.


Booker T. Stephens, Judge

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0352

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

Petitioner Herein/Respondent Below,

v.

CHRISTOPHER L. TOLER,

Respondent Herein/Petitioner Below.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for Joe E. Miller, Commissioner of the Division of Motor Vehicles, Petitioner, hereby certify that on the 1st day of June, 2011, I served the foregoing PETITIONER'S BRIEF upon the following by depositing true and correct copies thereof in the United States Mails, First Class Postage Prepaid addressed as follows:

Charles A. Stacy, Esquire
2085 Virginia Avenue
Post Office Box 1025
Bluefield, Virginia 24605



Scott E. Johnson