

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0352

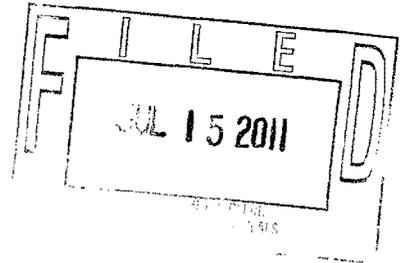
**JOE E. MILLER, Commissioner
of the West Virginia Division
of Motor Vehicles**

Petitioner Herein/Respondent Below,

v.

CHRISTOPHER L. TOLER

Respondent Herein/Petitioner Below.



RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

I. INTRODUCTION

The respondent, Christopher Toler, petitioner below, hereafter “appellee” or “Mr. Toler,” urges this Court to deny relief sought by the Division of Motor Vehicles, hereafter “DMV,” “Commissioner,” or “petitioner” or “appellant,” the respondent below. The circuit court reached the proper conclusions that (1) the petitioner had properly challenged the stop itself by submitting his written challenge concerning the sobriety checkpoint operational guidelines before the administrative hearing and (2) that the stop was pre-textual where it was conducted in a high drug area, without discretion or oversight and with no written guidelines or warnings to oncoming motorists, and with no flares or reflective vests worn by the officers, creating the proper assessment that the checkpoint itself was unconstitutional, and (3) that the unconstitutional vehicle equipment checkpoint was being used by the police in order to circumvent the sobriety checkpoint guidelines,

which are challengeable grounds during license revocation proceedings and the decision of the commissioner was properly reversed and reinstated the license based on statutory requirements mandating that the circuit judge shall reverse in the event of a constitutional violation.

II. STATEMENT OF THE CASE

On December 28, 2008, West Virginia State Senior Trooper C.N. Workman, herein “Trooper Workman”, along with three or four other officers, were conducting what has been referred to as a “Safety Equipment Checkpoint,” but is not considered to be a “formal checkpoint.” *Petitioner’s Appendix at 16, 27, 64, 71.* The area in which the officers agreed to set up their informal equipment checkpoint was described by Trooper Workman as “kind of a hot spot” with “a lot of drug activity.” *Petitioner’s Appendix at 73.* According to Trooper Workman, there are no known guidelines, restrictions, or other requirements that the officers must follow before engaging in this kind of stop of citizens. *Petitioner’s Appendix at 70, 71.* Furthermore, these officers had no warning signs of the impending traffic stop, the officers wore no reflective vests and placed no flares to indicate anything to oncoming vehicles. *Petitioner’s Appendix at 76, 77.* Mr. Toler approached the road check, where all of his vehicle equipment checked out properly, but Trooper Workman decided to detain Mr. Toler due to some suspicious physical attributes. *Petitioner’s Appendix at 83.* Even though this was not a sobriety checkpoint, Trooper Workman initiated, and Mr. Toler failed a sobriety test. *Petitioner’s Appendix at 84.*

Mr. Toler then challenged the propriety of the stop itself before his administrative hearing with the DMV by submitting a written challenge concerning the sobriety checkpoint operational guidelines. *Petitioner’s Appendix at 5.* After the hearing, the Commissioner found that Trooper Workman had reasonable grounds to believe Mr. Toler was driving under the influence and further

concluded that Mr. Toler was “lawfully arrested,” the commissioner ordered a revocation after the administrative hearing. *Petitioner’s Appendix at 4*. The circuit court reversed the commissioner on grounds that the checkpoint was unconstitutional in violating of the Fourth Amendment of the United States Constitution and contrary to the holding of *State v. Sigler*, 224 W.Va. 608, 687 S.E.2d 391 (2009) and lower court, pursuant to the mandatory language of West Virginia Code §29A-5-4(g), reversed the commissioner according to a violation of the United States Constitution.

**III. SUMMARY RESPONSE TO PETITIONER’S
CLAIMS OF ERROR**

A. The circuit court never found the exclusionary rule to apply in either findings of fact or findings of law, and therefore this appeal is baseless.

In a review of the opinion of the circuit court, there is no mention or finding of the exclusion of evidence, remand for further proceedings, or any other similar language suggesting the exclusionary rule was considered or applied. The circuit court was acting pursuant to W. Va. Code §29A-5-4(g) (2011), wherein the statute mandates that upon the finding of a constitutional error the court “shall reverse, vacate or modify the order... if substantial rights... have been prejudiced because the administrative...order...(is) in violation of constitutional or statutory provisions.” (Emphasis added). The circuit judge was following the law as mandated in the West Virginia Code, and therefore should be affirmed.

B. The circuit court’s implicit application of the exclusionary rule to act as both a remedy for the unconstitutional police checkpoint and to be a deterrent to future unconstitutional action by the police who may seeking to use any evidence acquired through unconstitutional means.

The circuit court properly acted within its capabilities when it determined that the appropriate and effective remedy to a constitutional violation would be to exclude evidence stemming therefrom.

Recognizing that the exclusionary rule is by no means exclusively a criminal remedy, the court below applied the rule to the civil proceeding after following framework laid down by the Supreme Court, finding that there had been a violation of Mr. Toler's constitutional rights, and then determining that the best course of action in order to remedy the present conduct and deter future bad conduct is to exclude the resulting evidence from this hearing, ruling that it violated the protection against search and seizures.

While there are several instances where the exclusionary rule has been held inapplicable to particular civil hearings, that was not the case herein, and absent express binding authority to the contrary, the court's implicit application of the exclusionary rule was proper.

C. Petitioner is misreading the statute in mistakenly attempting to craft a limited exclusionary rule especially when the statute opens the door for the commissioner to address the issue of the propriety of the underlying traffic stop, and accordingly allows the circuit court to review such determinations for unconstitutional errors as presented here.

The statute at issue throughout these proceedings is West Virginia Code §17C-5A-2(f) (2008, 2010), and it has undergone several amendments throughout the years, each instance clarifying the legislative intent and administrative duties created by this statute. The legislative history does not suggest that this statute was ever intended to act as exclusionary statute, and quite to the contrary, it seems that the legislature has left open the proverbial door for the courts to decide this matter of their own accord as the facts of each scenario become available.

The validation of evidence obtained through unconstitutional measures cannot be tolerated by this justice system, and rewarding officers for unconstitutional conduct seems hardly conducive to creating a place where respect for the law is little more than a wishful truism. Respect for the law, and for the United States Constitution, must be present in our officers and disrespect and disregard

must be dealt with severely.

IV. ARGUMENT

On appeal of an administrative order from a circuit court, the statutory standards of review are contained in W.Va.Code § 29A-5-4(a) whereby this Court 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. *Sims v. Miller*, 709 S.E.2d 750, 2011 W. Va. LEXIS 31 (W. Va. 2011) citing syl. pt. 1 *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (W. Va. 1996).

A. The circuit court never found the exclusionary rule to apply in either findings of fact or findings of law, and therefore this appeal is baseless.

The circuit court made no finding regarding the exclusionary rule, or any other remedial measure. The lower court followed the law. West Virginia Code §29A-5-4(g) states expressly that “shall reverse, vacate or modify the order... if substantial rights... have been prejudiced because the administrative...order...(is) in violation of constitutional or statutory provisions.” The lower court found that there was a constitutional violation according to the holding of *State v. Sigler* and pursuant to the statutory language reversed the commissioner. *Sigler*, 224 W.Va. 608, 687 S.E.2d 391 (2009). Petitioner’s appeal stated that there was a finding that the exclusionary rule applied under question seventeen (17) on the Notice of Appeal, however there is no such finding anywhere within the circuit court’s opinion. Petitioner’s claim is baseless and therefore without merit. Accordingly the lower court should be affirmed.

B. The circuit court properly applied the exclusionary rule to act as both a remedy for the unconstitutional police checkpoint and to be a deterrent to future unconstitutional action by the police who may seeking to use any evidence acquired through unconstitutional means.

Alternatively, assuming arguendo that the lower court did find that the exclusionary rule applied, the exclusionary rule was properly applied to a civil hearing where a police officer without following any official protocol or procedures unconstitutionally stopped and seized a traveling motorist because there would be no alternative remedy for the unconstitutional actions of the officer and the potential deterrent effect is sufficient to merit application of the rule.

Petitioner agency is attempting to use evidence, or the fruits of evidence, obtained in violation of the U.S. and West Virginia Constitutional safeguards in order to accomplish its mission. Petitioner has never been given such broad legislative authority during its promulgation or at any point thereafter which would authorize it to usurp constitutional safeguards. Without such express authorization, petitioner is acting beyond the scope of its authority.

The exclusionary rule is applied to prohibit introduction into evidence of tangible materials seized during an unlawful search, *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341 (1914), and of testimony concerning knowledge acquired during an unlawful search, *Silverman v. United States*, 365 U.S. 505, 81 S. Ct. 679 (1961). Beyond that, the exclusionary rule also 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. See *Wong Sun v. United States*, 371 U.S. 471, 485-485, 83 S. Ct. 407 (1963), *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613 (1974). Petitioner does not contest the finding of a constitutional violation under *State v. Sigler*, 224 W. Va. 608, 619 (2009), and agrees that *Sigler* was properly applied, and acknowledges that the prior controlling case was expressly overruled by *Sigler*.. Accordingly, there was a violation of Mr. Toler's Fourth Amendment protections.

The application of the rule is weighed against potential social costs including the possibility

of allowing the allegedly guilty walk away freely. *United States v. Leon*, 468 U.S. 897, 907, 104 S. Ct. 3405(1984). In this matter the potential for an adequate deterrent effect on the police and the use of unconstitutional road stops as defined in *State v. Sigler*, is significantly greater due to the fact that the exclusion of evidence garnered from unconstitutional searches and seizures would effectively eliminate an alternative venue for the police to still . *Sigler*, 224 W.Va. 608, 687 S.E.2d 391 (2009).

In *State v. Sigler*, a joined appeal, both petitioners were led into traffic stops where officers stood in the road with flashlights, and wore no reflective vests, nor were any road signs indicating that there was called an administrative police checkpoint ahead. *Sigler* at 613-614. A stoppage of a vehicle at a police checkpoint is highly intrusive to private citizens, raising to the level of a constitutional seizure. *United States v. Martinize-Fuerte*, 428 U.S. 543, 556, 96 S. Ct. 3074 (1976). The minimal guidelines associated with such an administrative checkpoint were arguably on thinner ice than the actual sobriety checkpoints. *Sigler* at 619. There, the Court determined that suspicionless checkpoints were improper in these cases, and any evidence derived should have been suppressed.

Sigler and the present case are almost identical, particularly with the Mullens aspect described above. The officers decided to do an ‘administrative’ checkpoint and began stopping every car that came there way. *Sigler* at 613-614, 396-397. They followed no procedures, no regulations, only their own arbitrary judgment as to where and how, furthermore, the officers wore no reflective gear, had no signs notifying of the imminent checkpoint, and had no flares on the road. *Id.* at 614,397. Following with the precedent set forth in *Sigler*, the evidence was suppressed by the circuit court.

Contrary to petitioner's initial assertions, there is significant persuasive case law in support of applying the exclusionary rule to civil hearings, specifically in administrative license revocations. *See generally* 105 A.L.R.5th 1; 23 A.L.R.5th 108. While Petitioner is correct that the Supreme Court has never expressly applied the exclusionary rule to civil hearings, it has certainly never expressly determined that the exclusionary rule should not apply to any civil matters. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479 (1984). Indeed, there are specific instances where the Court has determined that application of the rule would be improper under the circumstances or that the evidence itself would be too attenuated from the illegal conduct for the rule to achieve its intended purpose. *Id.* at 1041. A hearing on the administrative license revocation is not one of these cases, and has no such binding precedent.

The application of the exclusionary rule to civil proceedings has occurred throughout the country in various forms of proceedings including: proceedings to suspend or revoke a professional or commercial license (*Board of License Comm'rs v. Pastore*, 1983 R.I. LEXIS 1019, 463 A.2d 161 (R.I. 1983), *Angelini v. United States*, 322 F. Supp. 698, 1970 U.S. Dist. LEXIS 9839 (N.D. Ill. 1970)); forfeiture proceedings (*One 1958 Plymouth Sedan v. Pa.*, 380 U.S. 693, 85 S. Ct. 1246 (U.S. 1965)); administrative disciplinary or discharge proceedings (*Pike v. Gallagher*, 829 F. Supp. 1254, 1993 U.S. Dist. LEXIS 11024 (D.N.M. 1993), *McPherson v. New York City Housing Authority*, 47 A.D.2d 828, 365 N.Y.S.2d 862 (N.Y. App. Div. 1st Dep't 1975), *Minnesota State Patrol Troopers Ass'n on behalf of Pince v. State, Dep't of Public Safety*, 437 N.W.2d 670, 1989 Minn. App. LEXIS 356 (Minn. Ct. App. 1989); eviction proceedings (*Tejada v. Christian*, 422 N.Y.S.2d 957, 71 A.D.2d 527 (N.Y. App. Div. 1st Dep't 1979)); customs or tariff proceedings (*Rogers v. United States*, 97 97 F.2d 691, 1938 U.S. App. LEXIS 4758 (1st Cir. R.I. 1938)); divorce or other marital actions

(*Williams v. Williams*, 8 Ohio Misc. 156, 221 N.E.2d 622 (Ohio C.P. 1966)); personal injury or wrongful death actions (*Tanuvasa v. Honolulu*, 2 Haw. App. 102, 626 P.2d 1175 (Haw. Ct. App. 1981), *State ex rel. State Farm Fire & Casualty Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (W. Va. 1994)); actions for an injunction or to abate a nuisance (*Carson v. State*, 221 Ga. 299, 144 S.E.2d 384 (Ga. 1965), *State v. Spoke Comm., Univ. Ctr.*, 270 N.W.2d 339, 1978 N.D. LEXIS 143 (N.D. 1978), *Carlisle v. State*, 276 Ala. 436, 163 So. 2d 596 (Ala. 1964)); and most on point, administrative driver's license revocation hearings (*Williams v. Ohio Bureau of Motor Vehicles*, 62 Ohio Misc. 2d 741, 610 N.E.2d 1229 (Ohio Mun. Ct. 1992), *Vernon v. Dir. of Revenue* 2004 Mo. App. LEXIS 1103, 142 S.W.3d 905 (Mo. Ct. App. 2004). Clearly, the exclusionary rule is still an option in order to address constitutional violations in civil matters.

Aside from the actual utility of the exclusionary rule, petitioner is frustrated over the court's application of the rule and its results. The rule is not an end in itself, but rather a means to an end, presently, that goal is the deterrence of future wrongdoings and illegal behaviors by police officers. See *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613 (1974). However, following the evaluation between the present case and *Sigler*, it seems that given the similarities in the circumstances, and the similarities in the unconstitutional acts giving rise to the eventual application of the exclusionary rule, it follows precedent that the exclusionary rule be applied when the factual situations are so similar. *Sigler*, 224 W.Va. at 618-620.

As already mentioned, the primary purpose of the exclusionary rule is to deter future police misconduct. Petitioner suggests that the threat of civil rights suits, departmental discipline, and professional training, *Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159, (2006), may prove a sufficient alternative to the utilization of the exclusionary rule to deter police officers from engaging

in activities that they should not even be involved in, and then preventing any evidence from such illegal activities from being used in their favor in a venue where the typical burden on the administrative actors is significantly less. It seems that it would be a far more effective deterrent to exclude unconstitutionally obtained evidence, thereby removing any venue wherein such unconstitutional acts could be validated.

Without a meaningful deterrent in place, police will continue to have an outlet for the results of their illegal and unconstitutional actions through the administrative proceedings of the Division of Motor Vehicles. Therefore it is appropriate and proper for the exclusionary rule to remain a viable remedy in order to close this venue and act as a deterrent on the police from acting with unfettered discretion wherein they may violate the constitutional rights of citizens; regardless of the form of proceedings. The circuit court should be affirmed.

C. Petitioner is misreading the statute in mistakenly attempting to craft a limited exclusionary rule especially when the statute opens the door for the commissioner to address the issue of the propriety of the underlying traffic stop, and accordingly allows the circuit court to review such determinations for unconstitutional errors as presented here.

Petitioner is mistakenly attempting to craft a statutory exclusionary rule from West Virginia Code §17C-5A-2(f) (2008). Looking at the language utilized by the legislature in its revision of the statute, subpart two (2) states that “ the commissioner shall make specific findings as to... 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.” (Emphasis added). The inclusion of the conjunction “or” between the two clauses should be viewed as an creating two alternatives under one heading. Here, it presents the options of whether an individual committed the offense, or whether they were taken into custody in order to be tested.

This analysis is further supported by the 2010 amendment to the same section which further elaborates on the first of the alternatives by going so far as to say:

“Office of Administrative Hearings shall make specific findings as to... 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.”

W. Va. Code §17C-5A-2(f) (2010). A finding of lawful arrest is no longer required, however it is still an option that the commissioner may make, and in this instance did erroneously make such a finding. The statute provides no express language creating an exclusionary provision, nor does it provide for any implied limitation on the constitutional remedy.

The best way to deter and discourage the unconstitutional actions would be to exclude evidence acquired solely through such odious methods. If evidence obtained by unconstitutional means would cease to be of any probative value due to the inevitable exclusion of it, then it would properly remove another venue for the validation of unconstitutional acts by police officers.

The taint of the unconstitutional search and seizure by the police officers pervades throughout the facts here, accordingly, the exclusionary rule was properly applied in both extent of evidence that was excluded, and the capacity of the circuit court to utilize the rule over an administrative appeal. Accordingly, the circuit court should be affirmed.

V. CONCLUSION

Mr. Toler was the victim of unfettered police discretion, disregard for the United States Constitution, disregard for the West Virginia Constitution, and a blatant violation of any citizen's

rights. Several police officers arbitrarily decided they would conduct a road check without following any standing procedures or protocols, without taking any recommended safety precautions, and without placing any kind of advanced warning to oncoming motorists. Such unfettered discretion is unconstitutional, and the best way to deter any future wrongdoings is to render such violations impotent in any judicial setting, be it civil or criminal. Violations of constitutional protections should not be rewarded by our legal system. Accordingly, the circuit court should be affirmed in its application of the exclusionary rule to this matter.

Respectfully submitted,

CHRISTOPHER TOLER

By Counsel,

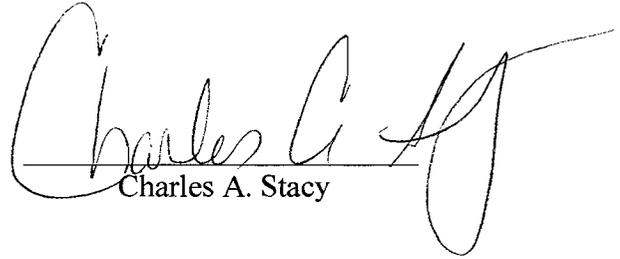
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Certificate of Service

The undersigned does hereby certify that a copy of the above captioned "Respondent's Brief" was sent to the following by US Mail:

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On this the 14th day of July, 2011.



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