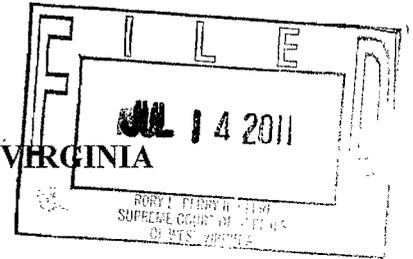


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0353



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

**Petitioner Herein/Respondent Below,**

**v.**

**JOHN B. EPLING,**

**Respondent Herein/Petitioner Below.**

---

**RESPONDENT'S BRIEF**

---

**GREGORY W. SPROLES, ESQUIRE (WV State Bar#3540)**  
Gregory W. Sproles, PLLC  
509 Church Street  
Summersville, WV 26651  
304-872-2271

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0353

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

**Petitioner Herein/Respondent Below,**

**v.**

**JOHN B. EPLING,**

**Respondent Herein/Petitioner Below.**

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS .....	1
THE COMMISSIONER’S ORDER .....	4
THE CIRCUIT COURT ORDER .....	6
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	6
ARGUMENT .....	7
REQUEST FOR RELIEF .....	13
CERTIFICATE OF SERVICE .....	.14

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0353

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

**Petitioner Herein/Respondent Below,**

v.

**JOHN B. EPLING,**

**Respondent Herein/Petitioner Below.**

**AUTHORITIES RELIED UPON**

	<u>PAGE</u>
1. Muscatell v. Cline, 196 W.Va. 548, 474 S.E.2d 518(1996).....	6, 9
2. Choma v. West Virginia Division of Motor Vehicles, 210 W.Va. 256, 557 S.E.2d 310 (2000) .....	6, 7, 8
3. W.Va. Code §17C-5C-3.....	11, 12
4. Sims v. Miller, 709 S.E.2d 750 (W.Va. 2011).....	7
5. W.Va. Code §17C-5C-1.....	11
6. W.Va. Code §17C-5A-2.....	12
7. CSR §64-10-7.2.....	4

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0353

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

**Petitioner Herein/Respondent Below,**

v.

**JOHN B. EPLING,**

**Respondent Herein/Petitioner Below.**

**RESPONDENT'S BRIEF**

**STATEMENT OF FACTS**

On August 29, 2009, Deputy Ryan Hicks of the Nicholas County Sheriff's Office alleged that he saw a vehicle traveling on Church Street in Summersville, Nicholas County, West Virginia, at a high rate of speed. However, during cross examination, Deputy Hicks testified that he could not say that the vehicle he observed exceeded the speed limit of twenty-five (25) miles per hour. (App'x at 38) <sup>1</sup> The testimony of Deputy Hicks regarding the speed this vehicle was traveling was specifically contradicted and rebutted by Alex Ashby, a witness called on behalf of the Respondent and by the Respondent. (App'x at 45 and 50) Deputy Hicks was the only witness to testify, other than witnesses called on behalf of the Respondent. Mr. Ashby and the Respondent also testified that this vehicle was not being driven erratically or in an improper manner. (App'x at 45 and 50) Deputy Hicks also testified, during cross examination, that this vehicle was not being driven erratically in

---

<sup>1</sup>For the purpose of this brief the Respondent will refer to the Appendix as numbered by the Petitioner in its Appendix.

any manner and the only basis for stopping this vehicle was its speed. (App'x at 39)

A traffic stop was initiated by another Deputy Sheriff. When Deputy Hicks arrived at the scene, the Respondent was not in the vehicle. (App'x. at s 46 and 51) Deputy Hicks then spoke with the Respondent and determined that his speech was clear and that his walking and standing were normal. (App'x at 33) Deputy Hicks then testified that he smelled alcohol.

Deputy Hicks then administered three (3) standardized field sobriety tests. The Respondent passed the one (1) leg stand test. (App'x at 54-57) Although Deputy Hicks testified that the Respondent failed the horizontal gaze nystagmus (HGN) test, his testimony was specifically disputed and rebutted by the Respondent. (App'x at 54-59) Deputy Hicks did not testify to the basis or any facts upon which the Petitioner could find that the Respondent failed this test. Deputy Hicks merely testified that the Respondent failed this test. (App'x at 29) Deputy Hicks testified this was only the second or third time he had administered field sobriety tests. (App'x at 34 and 36) The Respondent is a medical student who was familiar with the HGN test. The Respondent specifically testified that this test was not performed in a proper manner in that the stimulus which the Respondent was to follow with his eyes was moved more than forty-five (45) degrees to the side, the stimulus was not moved a sufficient number of times to make a determination of the condition of the Respondent's eyes and the stimulus was not held at maximum deviation for a minimum of four (4) seconds. (App'x at 56-57) The failure of Deputy Hicks to perform this test in a proper manner renders any result of this test to be invalid. (See, Respondent's Appendix, National Highway Traffic Administration (NHTSA) Guidelines)<sup>2</sup> The Respondent also rebutted the evidence presented by

---

<sup>2</sup>These documents were introduced at the administrative hearing, but were not attached as part of the Petitioner's Appendix. The Respondent has filed a Motion to Supplement the Appendix.

Deputy Hicks regarding a walk and turn test. The Respondent specifically testified that he performed this test exactly as he was instructed and that he performed this test without shoes, because he was wearing sandals and removed them to perform this test, and there was no line for him to walk on. (App'x at 52 and 53) The Petitioner did not reconcile the conflicts in the evidence between the testimony of the Respondent and the testimony of Deputy Hicks regarding the result of this test in his Final Order which revoked the Respondents's driver's license. (App'x at 6)

Mr. Ashby, a long time friend of the Respondent, also testified that because of his familiarity with the Respondent, and his observations of the Respondent during the evening, he would have been able to tell if the Respondent was under the influence to alcohol. Mr. Ashby responded that based upon his knowledge and observations of the Respondent, he was not under the influence of alcohol on the night he was arrested. (App'x at 43-33 and 51) The Respondent testified that he was not under the influence of alcohol. (App'x at 50) The Respondent testified that he drank only four (4) beers over a four (4) hour period and he was not under the influence of alcohol on the night in question. (App'x at 61)

Deputy Hicks did not testify that he observed the Respondent driving. The Respondent and Mr. Ashby both testified that at the time Deputy Hicks and the other officer arrived at the scene all of the occupants of this vehicle were out of the vehicle. (App'x at 46 and 51) The Respondent did not advise Deputy Hicks or any person that he was the driver of this vehicle. There was no other evidence presented at the administrative hearing that the Respondent was the driver of the vehicle in question.

Deputy Hicks then arrested the Respondent and transported him to an area where a secondary chemical test was administered. The Respondent testified that Deputy Hicks did not watch him for

twenty (20) minutes prior to the administration of a secondary chemical test, a requirement for the introductions of the result of this test. (App'x at 57-60) A twenty (20) minute observation period is required before the secondary chemical test is administered. *CSR §64-10-7.2* Deputy Hicks did not testify that he watched the Respondent for twenty (20) minutes prior to the administration of the test, that he used an individual disposable mouthpiece to test the Respondent, that the instrument was working properly, that he was certified to perform this test, or that the breath test is a designated secondary chemical test for the Nicholas County Sheriff's Department. (App'x at 30) Despite the lack of an evidentiary foundation for the introduction of the secondary chemical test, the Petitioner admitted the test result over the objection of counsel for the Respondent. The Petitioner, in his Final Order, did not resolve the conflict in the evidence presented by the Respondent that Deputy Hicks did not watch him for twenty (20) minutes prior to the breath test with the lack of any testimony by Deputy Hicks that he observed the Respondent for twenty (20) minutes prior to the administration of a secondary chemical test other than to indicate that there was more than a twenty (20) minute period between the time of arrest and the administration of this test.

The criminal complaint which charged the Respondent with driving under the influence of alcohol was dismissed by the Assistant Prosecuting Attorney for Nicholas County, West Virginia. The Respondent did not plead to any offense relating to the events of the evening in question. (App'x at 62)

#### **THE COMMISSIONER'S ORDER**

The Petitioner upheld the revocation of the Respondent's driver's license despite the lack of a basis to stop the vehicle in question, the lack of probable cause or a reasonable suspicion to arrest the Respondent, based upon a totality of the evidence, and the lack of an evidentiary foundation for

the introduction of the test result of the secondary chemical test.

The Petitioner found, under Finding of Fact No. 1 of his Final Order, that Deputy Hicks and Deputy Caprio observed a vehicle traveling at a high rate of speed on Church Street in Summersville, Nicholas County, West Virginia. (App'x at 4) This finding was made without Deputy Caprio testifying, despite the testimony of Deputy Hicks that he was not able to confirm that the vehicle was traveling more than twenty-five (25) miles per hour and contrary to the testimony of the Respondent and a witness. The Petitioner referred to the basis for stopping this vehicle in his Discussion Section, but did not reconcile the testimony of Deputy Hicks with the evidence presented by the Respondent and his witness.

The Petitioner also found that the Respondent was the driver of the vehicle in question without any testimony to support this finding. (App'x at 4, Finding of Fact No. 2)

The Petitioner ignored the testimony presented by the Respondent regarding the HGN test by merely finding that the training which Deputy Hicks may have received may not been the same training as that of the Respondent. (App'x at 9) The Petitioner also gave no weight to the testimony of the Respondent's witness, Alex Ashby, regarding his observations of the Respondent by incorrectly finding that the only basis for Mr. Ashby's conclusion that the Respondent was not under the influence of alcohol was that he had known him for most of his life. The Petitioner also ignored the testimony of the Respondent regarding the other field sobriety test which was administered and the Respondent's testimony that he was not under the influence of alcohol. The Petitioner then gave no weight to the dismissal of the criminal charges against the Respondent by finding that no basis was set forth for such dismissal.

**THE CIRCUIT COURT ORDER**

The Respondent filed a timely Petition for Judicial Review asserting among other things, that there was no evidence that the Petitioner was driving a vehicle on the night that he was arrested, the lack of an evidentiary foundation or reasonable basis to have arrested the Respondent, and the lack of an evidentiary foundation for the introduction the secondary chemical test.

A hearing was held on the Petitioner's Petition for Judicial Review on January 24, 2011. The Circuit Court then, based upon a variety of factors, including the lack of testimony or evidence that the Respondent was driving a motor vehicle, the failure of the Petitioner to properly reconcile the disputed evidence according to *Muscatell v. Cline*, 196 W.Va. 548, 474 S.E.2d 518(1996) and the failure of the Petitioner to give proper weight to the dismissal of the criminal charges of DUI against the Respondent under *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2000) remanded this case to the Office of Administrative Hearings ("OAH") for a full evidentiary hearing.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent does not believe that Rule 20 oral argument is necessary in this case because the Petitioner has not set forth a sufficient basis for this Honorable Court to reverse a prior decision. The Respondent does therefore not request oral argument. The Respondent believes that the matter is suitable for Memorandum Decision.

## ARGUMENT

### **A. This Honorable should not overrule *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 W.E.2d 310 (2000).**

This Honorable Court in *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2000) correctly found that substantial weight should be given to the results of the underlying criminal charge in the administrative proceedings relating to the revocation of a person's driver's license for driving under the influence of alcohol. This Honorable Court did not find the dismissal of the underlying criminal charge to be dispositive of the administrative revocation of a person's driver's license. This holding recognized the differences in the burden of proof in administrative proceedings as opposed to criminal proceedings. The Respondent respectfully asserts that this was a correct holding by this Honorable Court and should continue to be the applicable law in this and other cases involving the revocation of the important property right in one's driver's license.

While *Choma* was a well reasoned decision which required that the administrative decision maker give substantial weight to the disposition of the underlying criminal charges when the charges involved the same issues, neither the Petitioner nor the newly created Office of Administrative Hearings ("OHA") are bound to dismiss the administrative revocation of a driver's license when the underlying criminal charges have been dismissed. The administrative decision maker must merely consider these matters and give substantial weight to these results in the appropriate case.

This Honorable Court, in *Sims v. Miller*, 709 S.E.2d 750 (W.Va. 2011), has now placed the burden on the driver in the administrative proceeding seeking to revoke his driver's license to set forth a basis for the dismissal of the underlying criminal charge in order for the underlying dismissal

of a criminal charge to be given substantial weight. As a result of the driver now being required to set forth a specific basis for the dismissal of the underlying criminal charge, the administrative decision maker, in order to give the proper weight required to be given to a dismissal of the underlying criminal charge, will have a clear basis to analyze the grounds and basis for any dismissal and give it appropriate weight. The decision makers in administrative proceedings are not always attorneys and may not understand the legal requirements necessary to prove that a person was driving under the influence of alcohol. For example, if a criminal case was dismissed by a circuit court, especially if the issues to be decided were legal issues as opposed to factual issues involving credibility, the administrative decision maker should be required to give this decision substantial weight in making the ultimate decision regarding the loss of a person's valuable property right.

The Petitioner's argument regarding the differences between acquittals and convictions does not and should not have any effect on this Court's decision in regard to *Choma*. This Court has explicitly found that the dismissal of a criminal case is not dispositive. The Respondent agrees that the dismissal of a criminal case should not be dispositive because of, among other things, the differing burdens of proof. However, to ignore the disposition of a criminal matter in which the same parties are involved and the same issues are decided could, and often does, result in inconsistent results relating to the same parties, facts and issues.

The Petitioner's argument or reference to other groups which may be affected by the Court's holding in *Choma* provides no basis for this Court to overturn a decision which is grounded in logic and recognizes the due process rights of all the parties to an administrative proceeding.

Consequently, this Court should not overrule *Choma* and should continue to require the Petitioner to give substantial weight to the disposition of the underlying criminal case when a

person's valuable property interest relating to his driver's license is involved.

**B. The Circuit Court did not err in finding that the Commissioner did not perform a proper analysis under *Muscatell v. Cline*, 196 W.Va. 548, 474 S.E.2d 518 (1996).**

The Court properly remanded this matter for a full evidentiary hearing to the Office of Administrative Hearings.

The Respondent argued and the Court found that there were serious issues regarding the proper analysis of the evidence under *Muscatell v. Cline*, 196 W.Va. 548, 474 S.E.2d 518 (1996). The Court specifically referred to page 7 of the Petitioner's Order where the Petitioner failed to make any reasoned analysis which is capable of proper judicial review relating to the testimony presented by the arresting officer and the Respondent regarding field sobriety testing and various other issues, including who was actually driving the vehicle in question.

The Petitioner summarily dismissed the Respondent's argument regarding the lack of evidence of who was driving the vehicle in question by merely finding that the Respondent was driving. There was absolutely no evidence presented at the administrative hearing that the Respondent was driving this motor vehicle. Both the Respondent and a witness called on his behalf specifically and precisely testified that at the time any law enforcement officer arrived where this vehicle was located, all of the occupants were out of the vehicle. This evidence was not rebutted by the arresting officer or any evidence in the record. The failure of the Petitioner to even address this issue, even though the Respondent specifically moved at the administrative hearing to dismiss the proceeding on the basis of a lack of proof that the Respondent was driving, clearly justifies the Circuit Court's remand based upon the failure of the Petitioner to address the fundamental issue of

whether there was proof, in any form, that the Respondent was the driver of a vehicle on the night he was arrested.

The Petitioner also failed to properly consider the testimony of the Respondent regarding the administration of the horizontal gaze nystagmus (HGN) test and the walk and turn test. The Respondent specifically rebutted the evidence of the arresting officer that he failed a HGN test when he testified that the test was improperly conducted. The NHTSA Guidelines require that this test, and all other field sobriety tests, be conducted in a precise and standardized manner, otherwise the results are not a reliable indicator of a person's condition relating to alcohol consumption. The Respondent's analysis of this evidence was to find, without evidence being presented, that Deputy Hicks performed this test in the manner in which he had been trained. However, there was no evidence presented that Deputy Hicks had even been trained to perform this test. In fact, this was only the second or third encounter by Deputy Hicks with a person suspected of driving under the influence of alcohol. The Petitioner then totally ignored the Respondent's testimony that he performed the walk and turn test exactly as he had been instructed and did not address the conflict between the Respondent's testimony and the conclusionary statement of Deputy Hicks that the Respondent failed this test.

The Respondent also ignored the undisputed evidence that the Respondent's walking was normal and that his speech was clear. This evidence was not even mentioned or referred to by the Petitioner in his Final Order.

The Petitioner also failed to address the issue of whether the investigating officer had reasonable grounds to stop and then arrest the Respondent. The Petitioner merely concluded that reasonable grounds existed to stop and then arrest the Respondent without even attempting to

resolve the conflicting evidence of the basis to stop the vehicle occupied by the Respondent. The testimony presented by Deputy Hicks regarding the basis to stop the vehicle in question was its alleged speed. However, Deputy Hicks admitted on cross examination that this vehicle was not exceeding the twenty-five (25) mile an hour speed limit and the only basis to stop this vehicle was its alleged excessive speed. Consequently, there was no basis to even initiate a traffic stop in this case. The Petitioner, however, concluded that there were reasonable grounds to stop this vehicle. (App'x at 9)

The Petitioner also found that there was probable cause to arrest the Respondent, but did not properly reconcile the substantial conflicts in the record which justify this conclusion as set forth above.

The Circuit Court, when it remanded this case to the OAH, properly noted that the Petitioner failed to make any credibility determination in order to justify his final Order. This is critically important because of the substantial conflict of the evidence presented at the administrative hearing. Consequently, the Circuit Court was therefore entirely correct in remanding this matter for a full evidentiary hearing to the Office of Administrative Hearings.

**C. The Circuit Court properly remanded this matter to the Office of Administrative Hearings because the Petitioner no longer has jurisdiction to decide this matter.**

W.Va. Code §17C-5C-1 et.seq. creates the Office of Administrative Hearings. W.Va. Code §17C-5C-3 specifically provides that the Office of Administrative Hearings (“OAH”) has jurisdiction to hear and determine all appeals from orders or decisions of the Commissioner of the Division of Motor Vehicles which suspends or revokes a person’s driver’s license pursuant to W.Va.

Code §17C-5A-2. On June 11, 2010, W.Va. Code §17C-5C-3 became effective. The OAH is an office created under the Department of Transportation and not the Division of Motor Vehicles. From and after June 11, 2010 the Petitioner no longer has jurisdiction to hear, conduct hearings or decide matters relating to the revocation of a person's driver's license. The statutes which were in effect at the time of the initial revocation of the Respondent's driver's license relating to the entity which decides the issues no longer have any validity and, in fact, no longer exist for the purpose of the Petitioner continuing to hear matters relating to the revocation of the driver's license of the Petitioner or any other person. If the Legislature had intended to require or allow the Petitioner to conduct hearings for offenses which occurred prior to June 11, 2010 it could have done so. By conferring jurisdiction only on the OAH, the Legislature clearly intended that this Office have exclusive jurisdiction to decide all contested cases after the enactment of W.Va. Code §17C-5C-3.

The only basis set forth by the Petitioner to assert that the Petitioner continues to have jurisdiction is a May 17, 2010 letter which appoints Jill C. Dunn as the WVDOT designee to fulfill the Cabinet Secretary's obligations under W.Va. Code §17C-5-1 et seq. and a June 10, 2010 Memorandum which, without proper legislative approval, sought to confer jurisdiction upon the Petitioner to conduct administrative revocation hearings in which an incident date or arrest date occurred on or before June 11, 2010. These documents were not introduced before the Petitioner at the administrative hearing or before the Circuit Court at the hearing when the case was remanded to the OAH.

Neither of these documents is a properly promulgated rule or regulation of the Department of Transportation and these documents have not been the subject of any legislative review. Consequently, neither of these documents has any force or legally binding effect, especially to

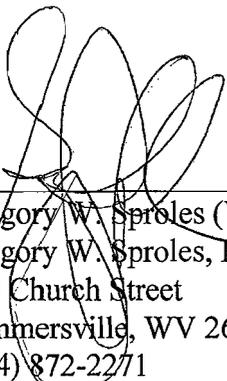
confer jurisdiction on an agency or individual which clearly lacks such jurisdiction. These documents should therefore be summarily disregarded by this Honorable Court.

In any event, Ms. Dunn had no power or jurisdiction to confer jurisdiction or the power to conduct administrative hearings and issue decisions relating to the revocation of a driver's license to the Petitioner or any other agency, entity or person. The legislature specifically created the OAH and conferred exclusive jurisdiction to it to conduct administrative hearings relating to the revocation of a person's driver's license after the Petitioner takes initial action.

Consequently, because the Petitioner clearly has no jurisdiction to hear this matter on remand, the Circuit Court was entirely correct in remanding this matter to the Office of Administrative Hearings.

**REQUEST FOR RELIEF**

The Respondent therefore respectfully requests that the Honorable Court affirm the Order of the Circuit Court and require that a full evidentiary hearing be held before the Office of Administrative Hearings.



---

Gregory W. Sproles (WV State Bar ID #3540)  
Gregory W. Sproles, PLLC  
509 Church Street  
Summersville, WV 26651  
(304) 872-2271

**JOHN B. EPLING**  
**By counsel,**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0353

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

**Petitioner Herein/Respondent Below,**

**v.**

**JOHN B. EPLING,**

**Respondent Herein/Petitioner Below.**

**CERTIFICATE OF SERVICE**

I, Gregory W. Sproles, the undersigned counsel, do hereby certify that I have served the attached **Respondent's Brief**, by depositing a true copy thereof in the United States mail, first class postage prepaid on this the 13<sup>th</sup> day of **July, 2011**, addressed as indicated below:

Scott E. Johnson, Assistant Attorney General  
State of West Virginia  
DMV - Office of Attorney General  
P.O. Box 17200  
Charleston, WV 25317

---

Gregory W. Sproles (WV State Bar ID #3540)  
Gregory W. Sproles, PLLC  
509 Church Street  
Summersville, WV 26651  
(304) 872-2271