

11-0148

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

MICHAEL CHENOWETH,
Petitioner,

vs.

CASE NO.: 10-P-121

JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF MOTOR VEHICLES,
Respondent.

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ORDER

Presently pending before the Court is a Petition for Review filed by the Petitioner, Michael Chenoweth, by counsel, George J. Cosenza, on July 16, 2010. The Petitioner moved to stay enforcement of the Final Order which was granted by the Court by Order entered August 13, 2010. Thereafter, a briefing schedule in this case was established by the entry of a Briefing Schedule Order entered August 13, 2010, with the final of three briefs being due on or before October 28, 2010. As of entry of this Order, the Court is in receipt of the Petitioner's Brief and Respondent's Brief of the West Virginia Division of Motor Vehicles, Joe E. Miller, Commissioner filed by counsel, Ronald R. Brown, Assistant Attorney General.

The Court acknowledges receipt of the Petition for Review, Petitioner's Brief, the Respondent's Brief, and the certified copy of the entire record with all accompanying documents.

Whereupon, the Court reviewed the Petition for Review, the briefs, the record, and applicable law.

The Court reviews petitions for appeal from orders or decisions of the Respondent based on the record made before the agency, West Virginia Code § 29A-5-4(f), and pursuant to the standard set forth in subsection (g) of that section:

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CAROLE JONES
CLERK CIRCUIT COURT

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. Further, “(e) Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued.” *Id.*

The Petitioner’s primary ground for appeal stems from whether the Respondent properly determined that the arresting officer made a valid stop of the Petitioner. In support of this ground the Petitioner asserts that the Respondent disregarded the testimony of the Petitioner and suspended his driving privileges on the strength of the DUI Information Sheet alone, that the magistrate in the related criminal matter determined that the stop was in violation of the law, and that the arresting officer did not have an articulable reasonable suspicion to stop the Petitioner’s vehicle. The Respondent primarily argues that the arresting officer did not make a stop of the Petitioner’s vehicle and, alternatively, argues that even if the stop is improper the exclusionary rule does not apply to DMV cases.

The Court has reviewed the whole record in this case including the Final Order as well as the transcript of the proceeding below. Based upon that review, the Court believes that the Final Order should be reversed and vacated.

The facts in this case indicate that at the time that the arresting officer approached the Petitioner's vehicle, the Petitioner had pulled over to the side of the road and was checking the messages on his cell phone. Additionally, the Petitioner testified that he was properly pulled to the side of the road for this purpose and he testified that from the time that he drove past the arresting officer to the time the officer's emergency lights were activated a period of time of only about one minute. The DUI Information Sheet was the only evidence presented at the hearing that indicated a reason why the officer approached the Petitioner's vehicle, that reason being that the car was "protruding" into the roadway. Based upon the above facts, it appears to the Court that the officer's actions were clearly a stop of the Petitioner's vehicle particularly with regard to the fact that the time period between when the officer first saw the Petitioner's vehicle and when he activated the emergency lights. Additionally, the record is empty with regard to the any articulable reasonable suspicion to justify a stop because the only stated reason for the officer's contact with the Petitioner was that the Petitioner's car was protruding into the roadway, which is a reason that did not occur until the Petitioner had stopped his car.

Based upon the foregoing, the Court finds and concludes that the Respondent inappropriately determined that either that there was no stop, that the officer did not need an articulable reasonable suspicion for the stop, or that there was sufficient articulable reasonable suspicion for the stop. The Court finds and concludes that the officer improperly stopped the Petitioner's vehicle without an articulable reasonable suspicion.

Additionally, the Respondent argues essentially that the exclusionary rule relating to improper and/or illegal stops should not be applied to DMV cases to exclude the evidence obtained after the potentially unlawful stop of the Petitioner. The basis for the Respondent's position on this issue relates to previous decisions of the Supreme Court of Appeals finding that

the exclusionary rule is inapplicable to civil cases. See *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994). The Court acknowledges that DMV cases, such as the present case, are civil proceedings, however, the Court declines to extend the inapplicability of the exclusionary rule in civil cases to this case particularly in light of the West Virginia Supreme Court of Appeals decision in *Clower v. W. Va. Dept. of Motor Vehicles*, 223 W.Va. 535, 678 S.E.2d 41 (2009), and W.Va. Code § 17C-5A-2(f) which require the Respondent to make a finding that a person was lawfully placed under arrest.

After careful review of the Petition for Review, the whole record, and applicable statutory and case law, the Court finds that the decision of the Respondent prejudices the substantial rights of the Petitioner and is in violation of constitutional or statutory provisions, made upon unlawful procedures, and arbitrary and capricious. Therefore, the Final Order of the Respondent revoking the Petitioner's driving privileges at issue in this case is **REVERSED** and **VACATED**.

Accordingly, the Court **ORDERS**:

1. The Final Order of the Respondent is **REVERSED** and **VACATED**;
2. This is a final order disposing of Case Number 10-P-121 and it shall be removed from the active docket of this Court; and
3. The Clerk of this Court is hereby directed to forward copies to the parties or their respective counsel of record.

ENTERED this 23rd day of December 2010:


J.D. Beane, Judge

STATE OF WEST VIRGINIA
COUNTY OF WOOD TOMIT

I, CAROLLE JAMES, Clerk of the District Court of Wood County, West Virginia, hereby certify that the foregoing is a true and correct copy of the original as filed in the Court on 23rd day of Dec 2010.

30th Dec 2010
Carolle James
Clerk of the District Court of Wood County, West Virginia

Y. H. Mullen