

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DR. JOE J. WHITE, JR.,

Petitioner,

v.

NO. 11-0171

**JOE MILLER, Commissioner,
West Virginia Department of
Motor Vehicles,**

Respondent.

RESPONDENT'S BRIEF

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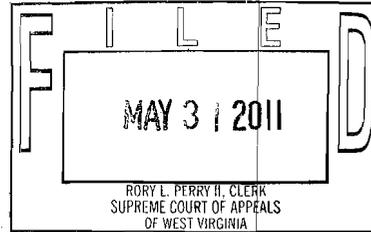


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W. Va. Code § 17-5A-1 12

W. Va. Code § 29A-5-4(a) 2

MISCELLANEOUS:

1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure I-156* (1993) 9

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Comes now the Respondent, Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles, by counsel, Janet E. James, Senior Assistant Attorney General, and submits this brief in accordance with the Court's *Scheduling Order*.

SUMMARY OF ARGUMENT

Petitioner's assignments of error do not contain specificity as to the error alleged by the Petitioner; therefore, the Respondent has set forth five argument headings refuting the Petitioner's attempts to suppress observational (including field sobriety tests) and chemical evidence of the Petitioner's driving under the influence. The Commissioner properly found that that the arresting officer had reasonable grounds to stop and probable cause to arrest the Petitioner. Further, the Commissioner properly found that there was sufficient evidence to show that Petitioner drove a vehicle while under the influence of alcohol. The circuit court's Final Order affirming the Commissioner's order must be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the basis that this case involves assignments of error in the application of settled law.

ARGUMENT

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va.Code § 29A-5-4(a) and 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.” Syllabus Point 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). “In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.” Syllabus point 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

I. THE SOBRIETY CHECKPOINT OPERATION WAS CONDUCTED WITHIN THE PREDETERMINED OPERATIONAL GUIDELINES.

Sergeant Shawn Williams (hereinafter, “Sgt. Williams”), of the Charleston Police Department, followed all guidelines in setting up the sobriety checkpoint at which Petitioner was arrested. Sgt. Williams is the supervisor in the Traffic Division and serves as the highway safety director for the Charleston Police Department. Part of Sgt. Williams’ duties is to plan and coordinate

sobriety checkpoints throughout Charleston. Transcript of Administrative Hearing¹, April 23, 2008, at page 11 (hereinafter, "Tr. at 11").

After determining a checkpoint was needed in the 900 block of MacCorkle Avenue, due to a high volume of traffic, DUI arrests and accidents, Sgt. Williams contacted the Kanawha County Prosecutor. Tr. at 11-12. The location is inspected to make sure there is maximum safety and visibility for both the motorists and officers that participate in the checkpoint. Tr. at 12. Street lamps in the area provided adequate lighting, along with a DUI trailer that provided lighting, cones and barricades, and signs that were needed to make the checkpoint visible to the public. Tr. at 12-13. There was ample parking for police cars and any vehicle that was asked to pull over. Tr. at 13. The alternative route was assigned as the 1500 block of Kanawha Boulevard, East. Tr. at 13. Sgt. Williams advised the media via a mass e-mail of the checkpoint, including the televised media and the radio stations throughout the Kanawha, Boone, Logan and Clay County areas. *Id.* Approximately seventeen or eighteen officers were assigned to work the checkpoint. *Id.* The checkpoint was well marked with patrol vehicles with their lights on. Tr. at 13-14. All officers are provided an operational plan and are briefed as to which specific vehicles will be stopped. Tr. at 14. Every vehicle was to be stopped unless the traffic backed up, then traffic would be waved through until it clears up. *Id.*

This constitutes sufficient evidence to show that the guidelines were met. The Petitioner's complaints were addressed in the Commissioner's Final Order, which stated: "[t]he record will reflect that Sergeant Shawn Williams gave detailed testimony as to the DUI Sobriety Checkpoint

¹Although the entirety of the transcript of the administrative hearing is included in the Appendix, the pages therein are not enumerated pursuant to Rev.R.App.Proc. Rule 7(b). Therefore, Respondent will make references to the transcript pages as they exist in the transcript.

being set up in accordance with the predetermined guidelines. Counsel for the [Petitioner] was provided a checklist of what was utilized at the checkpoint.” App’x. at 12. The Final Order was correct in finding that the sobriety checkpoint was properly established and conducted with the predetermined guidelines. App’x. at 12. The circuit court’s Final Order also addressed the sobriety checkpoint in great detail, and concluded that the checkpoint was established and conducted in accordance with predetermined guidelines. App’x. at 67. The checkpoint comported with the criteria set forth in *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997).

II. THE FIELD SOBRIETY TESTS WERE PROPERLY ADMINISTERED TO THE PETITIONER.

Case law in West Virginia presently permits evidence of field sobriety tests to be used to prove intoxication, not merely to establish probable cause. National Highway Transportation Safety Administration (hereinafter, “NHTSA”) studies are a guide for optimum administration of field sobriety tests (including optimum field conditions, which rarely exist). Police officers are trained in administration of field sobriety tests and how to judge the results thereof, but they are not expert witnesses. In case law to date, revocations have been upheld on officers’ testimony regarding the results of the tests, as a purely factual matter. *Cunningham v. Bechtold*, 186 W. Va. 474, 413 S.E.2d 129 (1991) (per curiam); *Hill v. Cline*, 193 W. Va. 436, 457 S.E.2d 113 (1995); *Hinerman v. West Virginia Dept. of Motor Vehicles*, 189 W.Va. 353, 431 S.E.2d 692 (1993) (per curiam); *Simon v. West Virginia Dept. of Motor Vehicles*, 181 W. Va. 267, 382 S.E.2d 320 (1989); *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

The uncontroverted, un rebutted testimony of the arresting officer, Brian Lightner (hereinafter, “Ofc. Lightner”) of the Charleston Police Department established that Petitioner performed poorly

on the field sobriety tests. That evidence was given the weight it deserved by the Commissioner in the Final Order, and was affirmed by the circuit court in its *Final Order*.

As the record reflects, Petitioner failed the horizontal gaze nystagmus (hereinafter, "HGN") test, the one-leg stand test, and the walk-and-turn test. Petitioner also failed the preliminary breath test (App'x. at 97). Before administering the tests, Ofc. Lightner asked Petitioner if he had any medical conditions that would prevent him from doing the tests, and Petitioner stated no.

On the HGN test, Ofc. Lightner explained the test to Petitioner and Petitioner stated that he understood the test. Petitioner's eyes lacked smooth pursuit, showed an onset of nystagmus before a forty-five-degree angle, and there was distinct nystagmus at maximum deviation. Tr. at 27; App'x at 96. Petitioner, a medical doctor familiar with nystagmus, testified that there were blue strobe lights around him during the HGN test, and that since it was dusk, his circadian rhythms were present. This fails to overcome the results of the test as shown in the DUI Information Sheet and the testimony of Officer Lightner. The Commissioner properly relied on the HGN evidence.

On the walk-and-turn test, Ofc. Lightner explained and demonstrated the test to Petitioner and Petitioner stated that he understood the test. Ofc. Lightner advised Petitioner to place his left foot on the line and have his right foot in front of his left foot with his right heel touching his left toe and to hold that position. Petitioner started the test prior to being told to start. Ofc. Lightner had Petitioner stop the test and put him back in the starting position. Ofc. Lightner then demonstrated the test again and asked Petitioner if he understood, and Petitioner stated that he did understand. On the walk-and-turn test, Petitioner missed heel to toe and raised his arms on the first nine steps and the second nine steps; stepped off the line and took seven steps instead of nine steps on the first nine steps. Tr. at 28.

On the one-leg stand test, Ofc. Lightner explained and demonstrated the test to Petitioner and Petitioner stated that he understood the test. Petitioner swayed while balancing, used his arms for balance and put his foot down prior to Ofc. Lightner telling him to stop. Tr. at 29.

In sum, the evidence of the Petitioner's performance on the walk-and-turn, the one-leg stand and HGN tests was properly relied upon by the Commissioner to show that there was probable cause for the arrest and a preponderance of evidence to show that Petitioner was DUI on July 6, 2007.

In *State v. Dilliner*, 212 W. Va. 135, 569 S.E.2d 211 (2002), which is cited by Petitioner, Justice Starcher wrote a concurrence on the HGN test which vastly expanded the scope of the majority opinion. Inasmuch as this was a criminal case, in which the majority holding concerned an accuracy inspection report, the precedential value of the off-topic concurrence is questionable. In his concurrence, he concluded that HGN evidence in the form of officers' testimony may only be used to establish probable cause, and not as substantive evidence of intoxication. According to the concurring opinion, expert testimony, which police officers cannot provide, would be required to establish the reliability of the HGN evidence, which would be required to use that evidence to prove intoxication.

In fact, this Court has affirmed the use of the HGN test as evidence of intoxication. It has approved the admission of testimony from a police officer "regarding the results of the HGN test as a field sobriety test." *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996). The results can be used as an indication of intoxication as long as the officer does not attempt to testify to a specific blood alcohol level on the basis of the nystagmus test. Further, the officer could not give "the HGN test any greater value than any of the other field sobriety tests." *Id.* There is no indication in the present record that Ofc. Lightner, or the Commissioner, gave any undue weight to

the HGN test. The testimony thereon was weighed along with the evidence of the other two tests, and weighed accordingly. The circuit court appropriately found that the results of the HGN test were given the proper weight. App'x. at 68.

Routinely, as was the case herein, arresting officers appear *pro se* at administrative hearings, without the benefit of counsel to guide them through direct examination. The Commissioner must then take the evidence entered and determine the weight it is to be given. Officers, who are fact witnesses, are not expert witnesses. They are trained using the NHTSA guidelines, but rarely have the optimum conditions discussed therein. Field sobriety tests are standardized, systematic and easy to score, so as to minimize the subjectivity of the administration of the test and the observations of their results.

Field sobriety tests are only part of the totality of the evidence in this case which led Ofc. Lightner to have probable cause to arrest Petitioner, and which allowed the Commissioner to find, by a preponderance of the evidence, that Petitioner was DUI.

III. THE ARRESTING OFFICER HAD PROBABLE CAUSE TO ARREST PETITIONER FOR DRIVING UNDER THE INFLUENCE.

The Commissioner properly found that the Petitioner was lawfully arrested for DUI. App'x. at 13, ¶ 2. The sobriety checkpoint at which Petitioner was stopped meets the constitutional requirements for the legitimate stopping of a vehicle; it is not necessary that Ofc. Lightner have witnessed a moving violation. Once stopped, Ofc. Lightner developed probable cause to arrest the Petitioner for DUI.

Ofc. Lightner was working the DUI checkpoint on July 6, 2007, at the 900 block of MacCorkle Avenue. Tr. at 26. Ofc. Lightner stopped Petitioner's vehicle and began speaking to

Petitioner. While speaking to Petitioner, Ofc. Lightner noticed an odor of an alcoholic beverage coming from Petitioner and that Petitioner had glassy eyes. Ofc. Lightner asked Petitioner if he been drinking and Petitioner stated that he had drank "four beers earlier." Tr. at 26. Ofc. Lightner had Petitioner to pull over to the side of the road into the safety zone that was set up at the checkpoint. Tr. at 27. Petitioner was unsteady exiting his vehicle. *Id.* Ofc. Lightner observed two cans of Bud Light beer sitting in the driver's seat. *Id.*

Petitioner failed the preliminary breath test administered to him by Officer Lightner. Tr. at 29; App'x. at 97. Petitioner notes that although the legislative rules pertaining to administration of the preliminary breath test require that the officer ensure that the driver does not smoke or drink alcohol in the 15 minutes before the test, Petitioner did not offer evidence that he drank or smoked in the four minutes that are unaccounted for between the initial encounter (at 8:22 p.m.) and the time of the preliminary breath test (8:33 p.m.). The Commissioner noted the Petitioner's failure of the preliminary breath test; however, there is no indication that the test was used for other than its intended purpose: to assist the arresting officer in determining whether there was probable cause to arrest the Petitioner for DUI. There is no error in the Commissioner's Final Order in regard to the preliminary breath test.

Petitioner then failed three field sobriety tests. The legality of such warrantless arrest is evaluated on the basis of the knowledge of the arresting officer at the time the arrest was made. As explained by Justice Cleckley,

[a]n arrest without a warrant is not valid unless a warrant for arrest could properly have been issued on the facts known at the time the arrest was made. In other words, there must be probable cause. *State v. Runner*, 310 S.E.2d 481 (W. Va. 1983); *State v. Craft*, 272 S. E.2d 46 (W. Va. 1980).

1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure I-156* (1993). The West Virginia Supreme Court has stated that “probable cause to arrest without a warrant exists ‘when the facts and the circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed.’” *State v. Cheek*, 199 W. Va. 21, 26, 483 S.E.2d 21, 26 (1996) (per curiam) (quoting Syl. pt. 1, *State v. Plantz*, 155 W. Va. 24, 180 S.E.2d 614 (1971)).² “Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence.” Syl. pt., *Simon v. West Virginia Dept. of Motor Vehicles*, 181 W. Va. 267, 382 S.E.2d 320 (1989).

Ofc. Lightner had knowledge sufficient to warrant a prudent man in believing that Petitioner had committed the offense of DUI. Under the definition set forth in *Cheek*, this constitutes probable cause and supports the arrest. Therefore, the Commissioner was correct in concluding that the "Arresting Officer had reasonable grounds to stop and probable cause to arrest the [Petitioner]." App'x. at 13, ¶ 1.

The evidence adduced at the administrative hearing clearly established that there was probable cause to arrest, and a preponderance of the evidence that Petitioner was driving while under the influence. The circuit court's *Final Order* must be affirmed.

IV. THE COMMISSIONER CONSIDERED AND WEIGHED THE MEDICAL EVIDENCE PROVIDED BY THE PETITIONER AT THE HEARING.

²*Plantz* was overruled in part on other grounds by *State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981).

Petitioner complains that the Commissioner ignored or failed to reconcile medical evidence regarding the Petitioner's limp. Petitioner offered an undated doctor's excuse at the administrative hearing which was not accepted, and subsequently submitted an excuse dated five weeks after the arrest, to show that his left leg is ½ inch shorter than his right leg and "may affect his center of gravity and gait." App'x. at 70. Although Petitioner did not apprise Officer Lightner of his limp when asked prior to the field sobriety tests, he now attributes his poor performance on the walk-and-turn test and the one leg stand test to his limp. The Commissioner noted in the Final Order that:

The [Petitioner] presented testimony that he has a limp, but failed to advise the Arresting Officer prior to performing the field sobriety test. The record will reflect that the [Petitioner] voluntarily performed the test. However, there are no provisions in the West Virginia Code, or in any other binding legal authority, regarding any foundation that must be laid prior to the admission into evidence of the results of any field sobriety test. The field sobriety test is one of several methods utilized by law enforcement officers to determine whether or not an individual may be under the influence of alcohol. Unlike a secondary chemical test, there is nothing in the West Virginia Code, or the Code of State Rules, regarding the administration of field sobriety tests, what tests should be given, if any, or in what manner the tests are to be administered. In summary, the totality of the Arresting Officer's observations regarding the [Petitioner], including the non-structured detection clues and structured field sobriety tests, prove by a preponderance of the evidence that he operated a motor vehicle while under the influence of alcohol.

Final Order at 5.

Petitioner relies on *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) to complain that the Commissioner ignored Petitioner's evidence. However, *Muscatell* is distinguishable from the present case in an important way: in *Muscatell*, the testimony of the arresting officer was conflicting in itself ("under direct examination the trooper testified that he did observe appellee's vehicle briefly straddling or crossing the centerline. Upon cross examination, however, the trooper

appears to have testified that the information upon which he relied at the time of the stop was limited to the information contained in the anonymous phone call.” 196 W. Va. 598, 474 S.E.2d 528.) This, however, is not the case. Findings of Fact ¶ 23 provides, in part, that the Petitioner told the arresting officer that he had a limp. App’x. at 11. The arresting officer testified at the administrative hearing that Petitioner “stated he did not have any kind of physical defects. But during the do you limp question he did state he did limp. I did not observe any limp prior to that but he did state that he did.” Tr. at 31. The Petitioner testified that he did not inform Ofc. Lightner of his medical condition when asked to perform the field sobriety tests because he “didn’t think it was a serious medical condition. I didn’t really know what I was going to be doing to impact on things.” Tr. at 64. Notwithstanding his medical problems Petitioner agreed to submit to the field sobriety tests.

A careful examination of the reasons for Petitioner’s failure of the walk-and-turn and one-leg stand tests due to his limp falls short of credibility. On the walk-and-turn test, Petitioner started too soon, raised his arms for balance, and took the incorrect number of steps. The only criteria which may have been caused by his limp are missing heel-to-toe and stepping off the line. Petitioner failed the test with a score of seven, where a score of two is failing. Petitioner does not elaborate on the way in which his limp affected his performance on the one-leg stand test, and it is difficult to imagine how it would affect him. On the one-leg stand test, Petitioner swayed while balancing, used his arms to balance, and put his foot down. A one-half-inch differential in the lengths of his legs does not explain away these observations.

Significantly, the Petitioner failed to tell the arresting officer that he had any physical problems or impairments that would prevent him from performing the field sobriety tests. Tr. at 27. The Commissioner properly considered and weighed the evidence of Petitioner’s medical condition,

and found that the officer's observations of Petitioner on the field sobriety tests were entitled to significant weight. There is no error in this regard, as the record supports the Commissioner's conclusions.

V. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT THE HEARING TO SUSTAIN REVOCATION OF THE PETITIONER'S LICENSE.

In West Virginia, if the record shows that if there is a preponderance of the evidence, based upon the totality of the circumstances, and with or without results of a secondary chemical test (*see, Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998)) to show that a person has driven a motor vehicle in this state while under the influence of alcohol, the Commissioner must revoke his license. W. Va. Code § 17-5A-1. The burden of proof in administrative license revocation matters is well-established, and was recently reiterated by the Supreme Court in *Lilly v. Stump*, 217 W. Va. 313, 617 S.E.2d 860 (2005) (per curiam):

In this case, the appellee refused most of the field sobriety tests, three separate secondary chemical tests, reeked of alcohol, slurred his words, and stumbled when he walked. In Syllabus Point 4 of *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996), we held that: "'Substantial evidence' requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive." We find that there was substantial evidence for the revocation of the appellee's driver's license and conclude that the DMV's findings were not clearly wrong in light of all of the probative and reliable evidence in the record. We therefore reverse the circuit court's decision.

217 W. Va. 319, 617 S.E.2d 866.

Petitioner notes the absence of a number of clues which may indicate intoxication, such as that there is no evidence that Petitioner had slurred speech, bloodshot eyes, flushed complexion or

fumbled for his license; however, these matters are not proved in the negative: the question is whether there is a preponderance of the evidence to show that Petitioner was DUI.

In the present case, there is substantial evidence in the record which meets the preponderance of the evidence standard enunciated in *Albrecht*: “We believe that these facts are sufficient to establish by a preponderance of the evidence that the appellant had been driving under the influence of alcohol. A preponderance of the evidence is all that is required to justify administrative revocation.” *Albrecht v. State*, 173 W. Va. 268, 273, 314 S.E.2d 859, 864 (1984).

The testimony of Ofc. Lightner established that Petitioner admitted drinking, had the odor of alcohol of his breath, was unsteady exiting his vehicle, and failed three field sobriety tests. The Intoximeter result proves consumption of alcohol. The DUI Information Sheet reflects that Petitioner failed the preliminary breath test. App’x. at 97. Petitioner’s conduct clearly fell within the *Albrecht* criteria. Thus, the Commissioner was correct in concluding that “[s]ufficient evidence was presented to show that the [Petitioner] drove a motor vehicle in this state while under the influence of alcohol on July 6, 2007.” App’x. at 13, ¶ 6.

This Court has stated that, in administrative appeals,

a reviewing court must evaluate the record of the agency’s proceedings to determine whether there is evidence on the record as a whole to support the agency’s decision. The evaluation is to be conducted pursuant to the administrative body’s findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts.

Donahue, 190 W. Va. 102, 437 S.E.2d 266. Here, the record supports the conclusions drawn by the Commissioner in the Final Order, and the circuit court’s affirmance of the Commissioner’s Final Order.

CONCLUSION

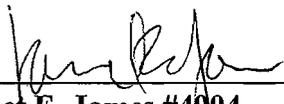
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests the *Final Order* entered by the Circuit Court of Kanawha County on December 13, 2010 be affirmed by this Court.

Respectfully submitted,

**JOE MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

By counsel,

**DARRELL V. McGRAW, JR.
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CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing *Respondent's Brief* were served upon the opposing party by depositing true copies thereof, postage prepaid, in the regular course of the United States mail, this 31st day of May, 2011, addressed as follows:

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JANET E. JAMES