

11-1292

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

ALBERTO VELTRI,

Petitioner

vs

CIVIL ACTION NO. 10-AA-1

JOE E. MILLER,
Commissioner, West
Virginia Department
Of Motor Vehicles,

Respondent

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ORDER REVERSING COMMISSIONER MILLER'S FINAL ORDER

This matter is before the Court on the Petition of Alberto Veltri for Review of a Final Order of Joe E. Miller, Commissioner of the West Virginia Division of Motor vehicles, which revoked Mr. Veltri's privilege to drive a motor vehicle following Mr. Veltri's arrest for driving under the influence of alcohol. Petitioner seeks to reverse the Final Order or for such other relief as the Court deems appropriate.

The Petitioner asserts that the Commissioner erred in:

1. failing to conclude that the arresting officer did not have reasonable grounds to stop and probable cause to arrest Mr. Veltri;
2. failing to conclude that Mr. Veltri was not lawfully arrested for an offense described in West Virginia Code §17C-5-2;
3. finding evidence that Mr. Veltri exhibited symptoms of intoxication;
4. finding evidence

that Mr. Veltri was operating a motor vehicle upon the public streets or highways under the influence of alcohol; 5. finding that sufficient evidence was presented to show that Mr. Veltri drove a motor vehicle while under the influence of alcohol on the subject date.

I. FACTUAL AND PROCEDURAL HISTORY

On the 4th day of March, 2010, a hearing was held to address whether Mr. Veltri's license to operate a motor vehicle for a period of six (6) months should be enforced. The Petitioner appeared by counsel, John J. Pizzuti, Esq, but the arresting officer and the officer who administered the Intoximeter did not appear at the hearing to offer any testimony. The Hearing Officer accepted into evidence all documents in the file pursuant to West Virginia Code §29A-5-2(b). The only testimony presented at the hearing was of Mr. Veltri.

The facts relevant to the Courts' rulings are as follows:

1. Sergeant Falbo of the Weirton Police Department, the investigating and arresting officer, did not attend the hearing. Mr. Veltri did appear at the hearing and in his testimony he denied driving improperly.

2. Mr. Veltri testified that he did not smell of alcohol, his speech was not slurred, he did not have bloodshot eyes and that he was not slow to respond to questions. The hearing officer agreed with Mr. Veltri's counsel that Mr. Veltri's mannerism in responding to the questions posed at the hearing could be interpreted as being slow.

3. The secondary chemical test administered to Mr. Veltri resulted in a blood alcohol content (BAC) of .095% by weight. Mr. Veltri admitted that he told the officer he drank a small glass of wine approximately 45 minutes before driving his car. Argument was made that according to the amount of alcohol Mr. Veltri asserted that he drank and the time frame for the administration of the test that Mr. Veltri's BAC would have been on the upswing and that at the time he was driving it is likely that his BAC was below the .08 BAC limit for intoxication in the state of West Virginia.

4. Mr. Veltri denied at the hearing that he was unsteady.

5. The hearing officer did not consider the results of the Horizontal Gaze Nystagmus test because Mr. Veltri's eyes "did not exhibit equal tracking." Mr. Veltri

testified that he believed he performed the walk and turn test properly. Mr. Veltri again testified that he did not believe that he make any mistakes on the one legged stand test.

6. Although Mr. Veltri took the Preliminary Breath Test the result was not considered by the Hearing Examiner because Mr. Veltri had not been observed for fifteen minutes prior to the administration of the test.

7. There were no findings concerning the absence of Sergeant Falbo from the hearing. In the discussion section of the "Final Order" the Hearing Examiner states that "The investigating officer was not subpoenaed to be at the hearing."

8. There was no finding concerning Mr. Veltri's testimony other than Mr. Veltri's admission that he drank a "little bit" of wine before driving." The hearing officer and the Commissioner accepted as fact every statement made by Sergeant Falbo "in the Investigating Officer's DUI Information Sheet...." That was wrong. There was a conflict in what the officer said and what Mr. Veltri said. The Commissioner is required to address credibility issues by providing "a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision

capable of review by an appellate court" Syl. pt. 6, in part, *Muscatell*, 196 W.Va. 588, 474 S.E.2d 518. The *Muscatell* court clarified that

[t]he purpose of these rules is not to burden an administrative agency with proving or recording the obvious. The purpose is to allow a reviewing court (and the public) to ascertain that the critical issues before the agency have indeed been considered and weighed and not overlooked or concealed. Indeed, a reviewing court cannot accord to agency findings the deference to which they are entitled unless such attention is given to at least the critical facts upon which the agency has acted.

196 W.Va. at 598, 474 S.E.2d at 528.

9. Other than the conclusion of law that concluded that the secondary chemical test was administered in accordance with Title 64, Code of State Rules, Series 10, there is no comment by the Hearing Examiner or the Commissioner about the weight that was given to the secondary chemical test. If that was considered critical evidence by the Commissioner, he had to say that and he also had to address Mr. Veltri's argument about how the time that had elapsed had affected his blood alcohol reading. Other than a comment - not a finding- that "The respondent refuted the Investigating Officer's allegation made in reference to his matter of driving and his level of intoxication. However, the Respondent only stated that he

did not do what the Investigating Officer stated, offering no other explanation of his manner of driving or why he was not intoxicated even though his blood alcohol concentration was ninety-five thousandths of one percent."

Not only is that not true, it does not qualify as a *Muscatell* "reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court." Mr. Veltri did offer explanations that were contradictory to what was in the investigating officer's report. He did, through his counsel, offer a reason for his blood alcohol concentration reading. The Hearing Examiner had to state why he chose to believe what the officer wrote in his report as opposed to what Mr. Veltri testified, under oath, at the hearing

10. In addition to not complying with *Muscatell*, there is another reason for reversing the Commissioner's Order. The arresting officer failed to appear at the scheduled DUI hearing. 91 C.S.R. §1-3.7 outlines the consequences of the failure of interested parties to appear. 91 C.S.R. §1-3.7.2 states: "In a DUI hearing, the Division shall dismiss the revocation or suspension if the arresting officer fails to appear without obtaining a continuance pursuant to Subsection 3.8 of this

rule." (emphasis added) See also *McDonald v. Cline*, 193 W.Va. 189, 192 455 S.E.2d 558, 561 (1995) (acknowledging Appellant driver's argument "that if the arresting officer does not appear to testify at the administrative hearing, the revocation proceeding is dismissed.") See also, *Nichols v. State*, 213 W.Va. 585 584 S.E.2d 220 (2003) (holding, in pertinent part, that "the plain language of 91 C.S.R. §5-14-4 itself indicates the due process rules and hearing procedures of 91 C.S.R. §1 apply to DUI hearing. Furthermore, 91 C.S.R. §1-2.3 directs that 91 C.S.R. §1 "takes precedence over all administrative due process rules or hearing procedures found in Title 91[.]" (Emphasis added) Accordingly the instant appeal and, in particular, the impact of [the Deputy's] failure to appear at the DUI hearing... is governed by the rules set forth in 91 C.S.R. §1, including 91 C.S.R. §1-3.7.").

CONCLUSIONS OF LAW

11. A circuit court can reverse, vacate or modify the order or decision of the Commissioner only if the substantial rights of the petitioner 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. 1, Johnson v. State Dep't of Motor Vehicles, 173 W.Va. 565, 318 S.E.2d 616 (1984).

12. This court's limited scope of review in an Administrative License Hearing gives deference to the Hearing Commissioner's purely factual determinations and provides for a de novo review to legal determinations. "Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syllabus Point 1, Francis O. Day Co., Inc. v. Director, Div. of Env'tl. Prot., 191 W.Va. 134, 443 S.E.2d 602 (1994). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.' Syllabus Point 3, In re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996)." Syllabus Point 2, Webb v. West Virginia Bd. of Medicine, 212 W.Va. 149, 569 S.E.2d 225 (2002). A court is

not to substitute its judgment for that of the hearing examiner.

13. Under Syllabus Point 2, Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997) to sustain a revocation based upon driving under the influence of alcohol, the State must show, by a preponderance of the evidence, that a driver operated a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and consumed alcoholic beverages.

14. Pursuant to West Virginia Code §29A-5-2-(b) the documentary evidence of the arrest of Mr. Veltri completed by Sergeant Falbo was admitted as part of the evidence of the case and the admission of these documents into evidence merely created a rebuttable presumption as to their accuracy. See, Crouch v. West Virginia Division of Motor Vehicles, 219 W.Va. 70, 631 S.E.2d 628 (2006). The Petitioner rebutted the accuracy of the records by asserting that the officers notes were incorrect and rebutted the accuracy of the Secondary Chemical test itself by questioning whether it accurately reflected the BAC of Mr. Veltri at the time he was actually operating his vehicle.

15. There was a conflict in what the officer wrote and what Mr. Veltri said and therefore, the Commissioner was required to address credibility issues. The statements contained in the Hearing Examiner and Commissioner's Final Order does not qualify as a "reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court," and, are not factually correct. See Syl. pt. 6, *Muscatell*

16. 91 C.S.R. §1-3.7.2 states: "In a DUI hearing, the Division shall dismiss the revocation or suspension of the arresting officer fails to appear without obtaining a continuance pursuant to Subsection 3.8 of this rule."

The Court, after carefully reviewing the pleadings, files and records in the case, concludes that the Petition must be granted. There was insufficient evidence to warrant the administrative revocation of Mr. Veltri's driver's license for driving under the influence of alcohol. The Commissioner's conclusions and findings were insufficient in view of the reliable, probative and substantial evidence on the whole record. The Commissioner's conclusions and findings that rely solely upon the written documents of the

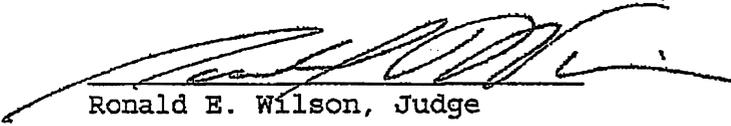
arresting officer and do not consider his failure to appear at the Administrative Hearing is arbitrary and capricious and constitutes an abuse of discretion.

For these reasons the Order of the Division of Motor Vehicles is reversed and the suspension of the driving privileges of Mr. Veltri is vacated. and it is further

The Clerk is ORDERED to remove this matter from this Court's active docket.

This Order has been mailed to Robert G. McCoid, Esq., 56-58th Street, PO Box 151, Wheeling, WV 26003 and Ronald R. Brown, Esq., State Capitol Complex, Bldg. 1, Room E-26, Charleston, WV 25305.

ENTER this 7 day of September, 2011:


Ronald E. Wilson, Judge