FILED
FEB 21 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Respondent below/Petitioner,

v. Sup. Ct. Case No. 12-1273
(Boone Co. Civil Action No. 11-C-218)

AMANDA DINGESS,

Petitioner below/Respondent.

RESPONDENT'S SUMMARY RESPONSE IN OPPOSITION TO THE
BRIEF OF THE DIVISION OF MOTOR VEHICLES

NOW COMES Amanda Dingess (Respondent), by counsel, Matthew M. Hatfield and the law firm of Hatfield & Hatfield, P.L.L.C., and hereby submits her summary response, pursuant to Rule 16(h) of the Revised Rules of Appellate Procedure, to the *Brief of the Division Of Motor Vehicles*. The Boone County Circuit Court did not abuse it's discretion by reversing the administrative Final Order entered on October 18, 2011 by William F. Cox, Hearing Examiner, and John G. Hackney, Jr., Chief Hearing Examiner, which concluded the Respondent operated a motor vehicle in this State on August 14, 2010 while under the influence of alcohol. The petitioner does not point to any one reason as to how the Circuit Court abused it's discretion but, rather, takes a "shot gun" approach by stating a a litany of reasons hoping one convinces this Court to reverse the lower court's ruling. The petitioner misconstrues the Circuit Court's ruling and reasoning in an effort to persuade this Court to uphold the administrative ruling which revoked the Respondent's driving privileges. In particular, the Circuit Court reversed the Final Order because, in part, the petitioner's substantial rights were violated as the administrative

finding and subsequent license revocation were clearly wrong in view of the reliable, probative, and substantial evidence of the whole record. *See* W.Va. Code §29A-5-4(g). For the reasons set forth below, the Circuit Court did not err and, accordingly, this Court should affirm it's ruling which reversed the Final Order[1].

Factual Background

Final Order (File No. 318525B/C) issued by John G. Hackney, Jr., Chief Hearing Examiner, on October 18, 2011, held that sufficient evidence was presented to show the petitioner drove a motor vehicle in this State while under the influence of alcohol on August 14, 2010.

On August 14, 2010, Deputy C. N. Hess of the Boone County Sheriff's Department responded to an alleged motor vehicle accident in the parking lot of Tudor's Biscuit World in Danville, Boone County, West Virginia. (A. R. Tr. 8-9). Officer L. W. Holeston of the Madison City Police Department also responded to this call despite the fact this alleged accident did not occur within the Madison city limits. (A. R. Tr. 20-21). Upon arrival Deputy Hess encountered the Respondent in the Tudor's parking lot, however, he did not observe her operate a motor vehicle on the night in question. (A. R. Tr. 9). Further, Deputy Hess was unaware as to the time of the alleged accident and unaware as to when the plaintiff allegedly operated a motor vehicle.

---

[1] The undersigned notes the administrative Final Order and the petitioner discredit any and all evidence that favors the Respondent as being "unsupported" and any all evidence that favors the arresting officer as being uncontroverted. Further, the administrative Final Order concludes the Respondent did not introduce any testimony or evidence which compromised the information set forth in the DUI Information Sheet or Deputy Hess' direct testimony. This is incorrect. It is very difficult, if not impossible, for a respondent to prevail upon at an administrative license revocation proceeding. The matter is seemingly decided once it is determined the arresting officer properly executed the DUI Information Sheet.

(A. R. Tr. 38). Indeed, Deputy Hess never observed the Respondent behind the wheel of an automobile. (A. R. Tr. 16). Jason McDonald (he was with the petitioner) and Jimmy Mills (the operator of the other vehicle allegedly involved in the accident) were also at the scene, however, Deputy Hess did not take a statements from either. (A. R. Tr. 16, 47 and 22-24).

The Respondent was initially arrested for obstructing an officer because she would not answer the officers' questions and was cursing at the scene, despite being under no obligation to speak with law enforcement. (A. R. Tr. 18-19). After the arrest for obstructing, Deputy Hess required the Respondent undergo three field sobriety tests, namely; the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-legged stand test. (A. R. Tr. 11). A video camera was available at the scene of this incident, however, Deputy Hess chose not to record the Respondent's performance on the said field sobriety tests. (A. R. Tr. 33). According to Deputy Hess, the Respondent failed the field sobriety tests (A. R. Tr. 11). Deputy Hess does, however, readily admit that nystagmus can be caused by certain conditions (medical) that are not due to the consumption of alcohol and that a nystagmus is not conclusive that a person is under the influence. (A. R. Tr. 24). Deputy Hess also concedes that a person who suffers from a leg, back or foot injury (the Respondent suffered from a broken toe), would have difficulty performing the walk-and-turn and one-legged stand test. (A. R. Tr. 28-30 and 40-41). Obviously, the field sobriety tests are not conclusive as to whether a person is under the influence of alcohol. (A. R. Tr. 29 and 32). The Respondent timely objected to the introduction of the said field sobriety tests at the administrative level, however, the OAH allowed such evidence to be introduced and afforded great weight to the same without requiring a foundation be laid. (A. R. at 75-78).

On September 8, 2010, the Petitioner provided the Respondent with Order of Revocation for driving under the influence and for refusing a secondary chemical test. (A. R. at 66). This revocation was to become effective on October 13, 2010. *Id.* The Respondent timely filed a request for an administrative hearing, which request automatically stayed the revocation of the Respondent's driving privileges. (A. R. at 67). An administrative hearing was held on February 17, 2011 before the Office of Administrative Hearings (OAH). (A. R. Tr. 1). The OAH, by Final Order of October 18, 2011, upheld the DMV's Order of Revocation for driving under the influence, but reversed the DMV's finding that the Respondent refused to submit to a secondary chemical test. (A. R. at 8-16). The Respondent timely appealed the OAH's ruling to the Boone County Circuit Court. (A. R. at 2). The Boone County Circuit Court ultimately reversed the OAH's Final Order which concluded the DMV established by a preponderance of the evidence that the Respondent operated a motor vehicle in this State while under the influence of alcohol on August 14, 2010. (A. R. at 2-7). Indeed, the OAH ignored reliable, probative, and substantial evidence (such as no person testified the Respondent was under the influence of alcohol at the time she operated a motor vehicle) and, accordingly, the Circuit Court did not err. *See* W.Va. Code §29A-5-4(g).

Argument

The Administrative Procedures Act sets forth the scope and manner in which a Circuit Court reviews an administrative order. Specifically, W.Va. Code §29A-5-4(g) states, in pertinent part, that the circuit court *shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner have been violated because the administrative findings and subsequent revocation order are:*

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedures;

(4) Affected by error of law;

(5) Clearly wrong in view of the reliable, probative, and substantial evidence of the whole record; and

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"In cases where the circuit court has reversed the result before the administrative agency, this Court 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". Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (W.Va. 1996) at Syl. Pt. 2. Here, the Circuit Court held, in part, the administrative Final Order was clearly wrong in view of reliable, probative and substantial evidence of the whole record. Specifically, the administrative Final Order blatantly ignored the fact no testimony was adduced that the Respondent operated a motor vehicle at the time in question while under the influence of alcohol. The administrative Final Order also made findings of fact which were not part of the record (i.e., Officer Holeston advised Deputy Hess the Dodge truck struck the rear of another vehicle); gave weight to field sobriety tests without a proper foundation being laid for the introduction of the same; etc. (A. R. at 9 and 75-78). Thus, this Court should not reverse the Circuit Court's ruling herein as the Circuit Court correctly concluded the administrative Final Order was clearly wrong in view of the reliable, probative, and substantial evidence of the whole record and that the OAH abused it's discretion. W.Va. Code §29A-5-4(g).

I. The Circuit Court did not commit reversible error by concluding the evidence presented at the administrative hearing did not establish the Respondent operated a motor vehicle while under the influence of alcohol on August 14, 2010

The principal question at a license revocation proceeding is whether the person operated a motor vehicle is this State while under the influence of alcohol, controlled substances, or drugs. *See* W.Va. Code §17C-5A-2(e). Based upon the above, Deputy Hess was specifically questioned as follows:

> *Q. You can't state she was under the influence when she was driving because you didn't see her. Is that right?*
>
> *A. That's correct. I did not see her.*

(A. R. Tr. 18)

> *Q. And you cannot state as you sit there whether or not she was under the influence at the time she was driving because you don't know. Correct?*
>
> *A. That's correct.*

(A. R. Tr. at 35). Obviously, "she" is referring to the Respondent. The administrative Final Order fails to mention the above testimony, let alone provide an explanation as to why it did not consider the said testimony.

The DMV argues the above-referenced testimony is not dispositive as Deputy Hess is not required to actually observe the Respondent operate a motor vehicle. In support of this argument, the DMV states the Respondent admitted to Deputy Hess she was driving. This argument is flawed. First, Deputy Hess did not observe the Respondent behind the wheel of a vehicle on the night in question. (A. R. Tr. 16). Second, Deputy Hess cannot state the time (when) the Respondent drove a motor vehicle or the place (where) the Respondent drove a motor vehicle. (A. R. Tr. 35 and 38). Third, the Respondent expressly denies making such a statement

to Deputy Hess. (A. R. Tr. 41 and 42). Thus, it truly is one person's word (Deputy Hess) vs. another person's word (the Respondent) as to whether Ms. Dingess was driving at the time of the incident (while intoxicated). In other words, the DMV cannot establish by a preponderance of the evidence the Respondent operated a motor vehicle on the night in question while under the influence.

This Court has previously held in Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (W.Va. 1997); and it's progeny, that *"W.Va. Code §17C-5-1a(a) does not require that a police officer actually see or observe a person move, drive or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person."* Carte at Syl. Pt. 3[2]. Deputy Hess testified that he did not see the Respondent drive or operate a motor vehicle on the night in question. (A. R. Tr. 16). Accordingly, this Court must then determine whether all the surrounding circumstances indicate the Respondent's vehicle could not otherwise be located Tudor's Biscuit parking lot unless it was driven there by the Respondent. In this case, all the surrounding circumstances do not indicate the Respondent's vehicle could otherwise be located in the Tudor's Biscuit parking lot if she did not drive the same to that location. Both Carte and Cain provide guidance on this issue.

---

[2] The Circuit Court Final Order erroneously states the officer is required to observe a person operate motor vehicle while in their presence. This is merely a typographical error. (A. R. at 5). This typographical error, certainly, does not warrant this Court reversing the Circuit Court's decision as the Circuit Court correctly interpreted and applied the clear intent set forth in Carte and Cain. Further, the DMV seemingly acknowledges the same is typographical error.

In Carte this Court was required to determine whether sufficient evidence established Mark Carte was driving a motor vehicle in this State while under the influence of alcohol. The Carte Court noted the investigating officer responded to a 911 call concerning a person who was sitting behind the wheel of a vehicle passed out at an intersection. Upon arrival the officer observed the reported vehicle with Mark Carte slumped behind the wheel with the engine running, the transmission in drive, and his foot on the brake. Mr. Carte also, after being advised of his *Miranda* rights, admitted he was driving and that he had consumed ten or twelve beers. Further, only the investigating officer testified at the administrative level and defense counsel asked only one question on cross examination. The Carte Court ultimately concluded sufficient evidence was presented to establish Mr. Carte operated a vehicle in this State while under the influence of alcohol as all the surrounding circumstances indicate the his vehicle could not have been found at the intersection unless driven there by Mr. Carte. This case is substantially different from Carte.

In Cain v. Miller[3], 225 W.Va. 467, 694 S.E.2d 309 (W.Va. 2010), this Court was again required to determine whether sufficient evidence was presented to establish Eric Cain drove a motor vehicle in this State while under the influence of alcohol. The Cain Court noted the investigating officer responded to a call concerning a person laying in front of a vehicle which was situate on the side of the road. Upon arrival, the officer observed Mr. Cain laying on the

---

[3] In Groves v. Cicchirillo, 225 W.Va. 474, 694 S.E.2d 639 (W.Va. 2010), the arresting officer responded to a motor vehicle accident. The arresting officer observed Mr. Groves walking on the side of the road and his vehicle (which he owned) over the hill. This Court concluded the evidence presented established Mr. Groves was operating a motor vehicle while intoxicated as no other person was located at the scene; the arresting officer was not cross-examined at the administrative hearing; that Mr. Groves did not present any evidence or testimony to the rebut the contention he was driving, etc. For the reasons set forth herein, Groves is different from this case.

ground in front of his vehicle. Mr. Cain was awakened and stated *"I was just trying to get home"*. Mr. Cain was arrested and charged with driving under the influence of alcohol (his BAC was .157%). The Cain Court ultimately concluded sufficient evidence was presented which established Mr. Cain was operating a motor vehicle while under the influence of alcohol. In reaching the conclusion, this Court noted the investigating officer drove past the area where Mr. Cain was located thirty (30) minutes prior to the call and neither Mr. Cain nor a vehicle were present in the pull off area; that Mr. Cain admitted to driving; and that Mr. Cain did not refute the evidence adduced at the administrative hearing (only the investigating officer testified). Thus, all the surrounding circumstances indicate Mr. Cain's vehicle could not have been situate on the side of the road unless he drove it to that location.

This case differs from both Carte and Cain. Indeed, all the surrounding circumstances do not indicate the Respondent's vehicle could not otherwise be located in the Tudor's Biscuit parking lot if she did not drive the same to that location. It is undisputed that Jason MacDonaldson was with the Respondent on the night in question and, accordingly, could have driven the subject vehicle. (A. R. Tr. 47). Further, the Respondent never signed a statement indicating she was driving and, further, denies telling Deputy Hess she was driving the subject vehicle. (A. R. Tr. 41). Moreover, in Carte and Cain, the only person(s) found at the scene of the incident were the accused. In this case, however, the Respondent was not the only person at the scene (Jason MacDonaldson was also present). The DMV argues that Mr. MacDonaldson was not driving as he advised Deputy Hess of the same. The DMV is relying upon hearsay. Specifically, the undersigned objected at the administrative hearing to what Mr. MacDonaldson allegedly stated at the scene of the incident. This objection was sustained and, therefore, the

DMV should not be allowed to rely upon such evidence in it's brief. (A. R. Tr. 39-40). The Circuit Court did not, accordingly, err in concluding insufficient evidence was presented to establish the Respondent was operating a motor vehicle on the night in question.

The DMV suggests the Circuit Court erred by noting the alleged incident occurred on private property. The undersigned certainly understands it is also illegal to operate a motor vehicle while under the influence upon private property. The fact this alleged incident occurred on the Tudor's Biscuit parking lot and that the investigating officer responded to an alleged incident on private property in no way amounts to reversible error. The Circuit Court simply noted facts contained within the record in this case.

II. The Circuit Court did not commit reversible error by concluding the DMV did not establish the Respondent was under the influence of alcohol based upon her the Field Sobriety Tests

Field Sobriety Tests (FST) typically consist of the horizontal gaze nystagmus test (HGN); the walk-and-turn test; and the one-legged stand test which are administered "in the field" to determine whether probable cause to arrest a person for driving under the influence. In this case, the OAH committed numerous errors in regard to the interpretation of the FST and, accordingly, the Circuit Court did not err. The DMV suggests in it's brief that the Respondent did not object to the results of the FST. This is incorrect. (A. R. 75-78). First, the OAH should not have considered the results of the HGN test because no foundation was laid by Deputy Hess concerning. White v. Miller, 228 W. Va. 797, 724 S.E.2d 768 (W.Va. 2012) at Syl. Pt. 2. Further, the DMV offered no evidence to demonstrate the relaibility of the HGN test or the scientific principle upon which it is based (i.e., alcohol causing an involuntary jerking of the eye, etc.). State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (W.Va. 1988). The Circuit Court did not,

therefore, err by giving the weight it deemed warranted to the results of the HGN. Second, the Respondent testified that she had recently broken her toe and, accordingly, this injury made it difficult to perform the walk-and-turn test and the one-legged stand test. (A. R. Tr. 40-41). The administrative Final Order discredits the Respondent's testimony concerning her broken toe by stating the Respondent did not produce any testimony or evidence to corroborate her claim. (A. R. 12). The undersigned is aware the DMV argues the Respondent advised Deputy Hess she did not have any injuries (the Respondent denies this assertion). Again, the OAH discredits testimony and evidence provided by the Respondent and favors testimony and evidence provided by the arresting officer (see Footnote 1 above). *"Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court"*. Muscatell at Syl. Pt. 6. This is, however, what occurred herein at the administrative level. Thus, the Circuit Court did not err in regard to the weight and consideration given the FST.

III. The Circuit Court did not otherwise commit reversible error

The DMV argues the Circuit Court gave preference to testimonial evidence as opposed to documentary evidence (the DUI information sheet). This argument is without merit. Again, the DMV suggests the Respondent's testimony that she was not driving is "self-serving" and the Circuit Court should conclude, as the OAH concluded, the DUI information sheet is dispositive of the issues herein. The undersigned is curious as to how the Respondent's testimony in this regard is "self-serving", but the arresting officer's testimony is not. Interestingly, the arresting

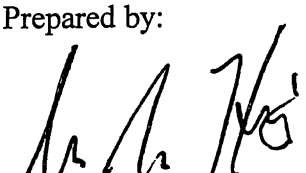
officer did not take a written statement from the Respondent; the DMV did not call any witnesses at the administrative level to corroborate this alleged admission statement; and the Respondent specifically denied making such an admission. Thus, the Circuit Court did not prefer testimonial evidence over documentary evidence, nor did the Circuit Court substitute it's judgement for that of the hearing examiner.

Relief Requested

For the reasons set forth above, the Boone County Circuit Court's ruling which reversed the suspension of the Respondent's driving privileges should be affirmed.

AMANDA DINGESS,
By counsel

Prepared by:



MATTHEW M. HATFIELD, ESQUIRE
(WV Bar ID No. 8710)
221 State Street, Suite 101
Post Office Box 598
Madison, West Virginia 25130
(304) 369-1162
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Respondent below/Petitioner,

v.

Sup. Ct. Case No. 12-1273
(Boone Co. Civil Action No. 11-C-218)

AMANDA DINGESS,

Petitioner below/Respondent.

CERTIFICATE OF SERVICE

I, Matthew M. Hatfield, counsel for Amanda Dingess, do hereby certify that the foregoing *Respondent's Summary Response In Opposition To The Brief Of The Division Of Motor Vehicles* has served upon the below counsel by hand-delivery on this the 21st day of February, 2013.

Elaine Skorich, Asst. Atty. Gen. (WVSB #8097)
DMV – Office of the Attorney General
P. O. Box 17220
Charleston, West Virginia 25317-0010
Counsel for Petitioner

MATTHEW M. HATFIELD, ESQUIRE
(WV Bar No. 8710)
221 State Street, Suite 101
Post Office Box 598
Madison, West Virginia 25130
(304) 369-1162
Counsel for Respondent