

5. Trooper Miller testified that the reason for the arrest was that Petitioner had stopped improperly at the intersection of WV Rt 3 and Sugartree Rd.
6. Trooper Miller testified that he was assisted by Trooper Perdue.
7. Subsequent to the traffic stop, the officer noted an odor of alcoholic beverage "on the breath" of Petitioner.
8. Petitioner was taken into custody and arrested for DUI after field sobriety tests were conducted.
9. Petitioner was never given the opportunity take the field sobriety tests as promulgated by the West Virginia State Police Academy and in accordance to the NHTSA standards.
10. Petitioner was taken for processing and given the Intoximeter test, being the secondary chemical test for the WV State Police and petitioner tested a .105 BAC.
11. Trooper Miller testified that he could have left the building and room where the Intoximeter ECIRII was located, thus prohibiting his from conducting the necessary 20 minute observation period prior to administering the test to Petitioner.
12. As a result of the administrative hearing, the Petitioner's right to operate a motor vehicle in the State of West Virginia was suspended for a period of six months.
13. The Respondent Department of Motor Vehicles notified the Petitioner via certified mail that the final judgment would be entered and become effective on the April 24, 2008.

14. Petitioner appeals the final decision of the Respondent Department of Motor Vehicles based on error of fact and error of law.

15. Respondent Department of Motor Vehicles has the burden of establishing by preponderance that Petitioner committed the act of operating a motor vehicle while under the influence of alcohol.

16. Under cross-examination, Trooper Miller testified that he was the arresting officer and that he had submitted the documents to the Respondent DMV.

17. Trooper Miller also testified that he could have possibly left the location where the intoximeter was located at the time the test was operated.

18. Therefore, there was not sufficient evidence to sustain the results of the intoximeter test results.

19. Pursuant to Bias v. Cline, the officer must administer the field sobriety tests according to the methods and procedures instructed at the West Virginia State Police Academy and in accordance with the National Highway Traffic Safety Administration, or NHTSA.

20. According to Bias, the Court has "determined that in order to use field sobriety tests to determine whether there is probable cause to arrest a driver, they must be administered in strict compliance with the procedures prescribed by the NHTSA."

21. Trooper Miller failed to establish the elements of DUI, by failing to prove the fact that petitioner was operating a motor vehicle on the night in question while under the influence of alcohol. Further, Trooper Miller had no reason to hold petitioner by probable cause, due to the fact that, he never administered

the intoximeter tests that would have supported petitioner being charged with DUI.

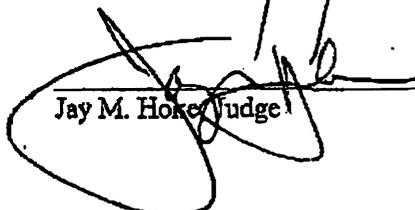
22. "Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or orders 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. *Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983)." , *Johnson v. State Dep't of Motor Vehicles*, 173 W.Va. 565, 318 S.E.2d 616 (1984).

23. Respondent was in error in reaching the conclusions listed in the Order, pursuant to the hearing, by providing findings of fact and conclusions of law in a bias, and prejudicial, preconceived manner.

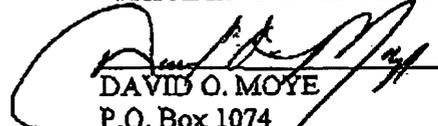
24. After considering all of the evidence, the Respondent is in error as a matter of law by stating in the final order that a preponderance of the evidence burden had been reached. With no PROPER scientific evidence of the breathalyzer, no *proper* field sobriety tests, and urine tests, according to State v. Taft 143 W.Va.365 (1958), and Bias v. Cline, Id. preponderance cannot be met by Respondent that Petitioner was operating a motor vehicle while under the influence of alcohol.

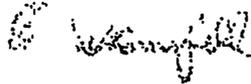
It is therefore ORDERED, ADJUGED AND DECREED, that the decision of the Respondent Department of Motor Vehicles be reversed, and further dismissed, and that petitioner's driving privileges be re-instated.

Entered: 01/06/12


Jay M. Hoke Judge

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 Clerk