

NO. 12-0153

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

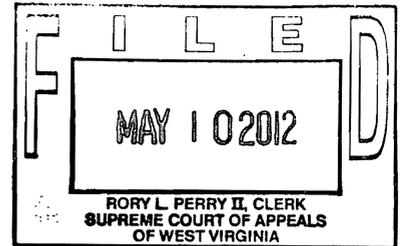
**JOE E. MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

Petitioner,

v.

DONNA L. MCCORMICK,

Respondent.



PETITIONER'S BRIEF

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PETITIONER'S BRIEF

Now comes Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Senior Assistant Attorney General, and submits this brief in the above-captioned case pursuant to the Court's *Scheduling Order*. Petitioner seeks reversal of the *Order* (hereinafter, "Order") entered by the circuit court of Lincoln County on January 6, 2012 A.D.

ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED IN FINDING THAT THE FIELD SOBRIETY TESTS WERE IMPROPERLY RELIED ON.**
- B. THE CIRCUIT COURT ERRED IN FINDING THAT THE INTOXIMETER RESULTS WERE IMPROPERLY RELIED ON.**
- C. THE CIRCUIT COURT'S FINDING THAT THE FINDINGS AND CONCLUSIONS OF THE PETITIONER IN THE AMENDED FINAL ORDER WERE REACHED IN A BIASED, PREJUDICED AND PRECONCEIVED MANNER, AND THE COURT ITSELF IGNORED EVIDENCE AND APPLIED THE WRONG STANDARD OF REVIEW.**

STATEMENT OF THE CASE

Petitioner Joe E. Miller, the Commissioner of the West Virginia Division of Motor Vehicles (“Commissioner”) seeks relief from the January 6, 2012 Order of the Circuit Court of Lincoln County (App’x. At 90-94), which reversed the Amended Final Order (App’x. At 56-67) resulting in revocation of Respondent’s driver’s license. The circuit court erroneously excluded the field sobriety tests and the Intoximeter results as evidence, ignored the other evidence, and concluded, without support, that the Petitioner had made a Final Order that was reached in a biased, prejudiced and preconceived manner.

On January 6, 2007, Trooper D.J. Miller of the West Virginia State Police was traveling on patrol at 12:30 a.m. on W. Va. Route 3 in Griffithsville, Lincoln County, West Virginia, when he came upon and observed a Chevrolet couple that was traveling toward him on W. Va. Route 3. App’x. At 2, 12.

Trooper Miller observed the car swerving and crossing the centerline, after which it made an illegal U-turn from W. Va. Route 3 onto Sugar Tree Road, after which the driver came to a stop in a parking lot, with half of the car still protruding into the road. App’x. At 12, 18, 22.

Trooper Miller approached the vehicle and identified its driver as Donna L. McCormick, Respondent herein. App’x. At 12.

At the time of Trooper Miller’s initial encounter with the Respondent, the odor of an alcoholic beverage was present on her breath; her eyes were glassy; her speech was slightly slurred; she was unsteady and staggering while walking to the roadside and was unsteady while standing; she admitted to having consumed two alcoholic beverages; and she had an alcoholic beverage in her possession, which she poured out the window of the car. App’x. At 3, 12-14. Respondent admitted

to Trooper Miller that she was drinking as she drove down the road. App'x. At 14. At the administrative hearing, Respondent admitted that she had consumed two mixed drinks. App'x. At 40.

Trooper Miller proceeded to administer the horizontal gaze nystagmus test (hereinafter, "HGN") to Respondent. He checked the Respondent's eyes to see if they exhibited unequal tracking or unequal pupil size. The Trooper's pre-test screening revealed that the Respondent's eyes had both equal tracking and equal pupil size. App'x. At 3.

Trooper Miller demonstrated and explained the field sobriety tests to the Respondent. On the HGN test, Respondent's eyes lacked smooth pursuit, had distinct nystagmus at maximum deviation, and had an onset of nystagmus prior to a forty-five degree angle. App'x. At 3, 13, 16.

Prior to the administration of the walk-and-turn test and the one-leg stand test, Respondent advised that she did not suffer from any physical defects that would affect her ability to perform the tests. App'x. At 17. Respondent also advised Trooper Miller that she was not taking any medication. App'x. At 23. At the administrative hearing, Respondent testified that she told Trooper Miller that she had broken her foot eight years ago, her foot is deformed, and she has trouble walking. App'x. At 36. Respondent did not testify that this impeded her performance on the field sobriety tests. App'x. at 62-63. The Respondent was wearing slip-on shoes, the weather was clear, lighting was the cruiser headlights and the surface was asphalt. App'x. At 4, 19.

Trooper Miller demonstrated and explained the walk-and-turn test to Respondent. On the walk-and-turn test, Respondent did not touch heel-to-toe, stepped off the line, raised her arms, almost fell while making the turn, and was unable to finish the test. App'x. At 3, 13. Trooper Miller testified that due to safety concerns, he did not wish to place Respondent in the roadway, so

Respondent walked an imaginary line on the asphalt. App'x. At 20. He further testified that he told Respondent to walk a straight line "and she in no way walked a straight line." App'x. At 21.

On the one-leg stand test, the Petitioner swayed while balancing, hopped, used her arms for balance, and put her foot down. App'x. At 4, 13.

Trooper Miller arrested the Petitioner for DUI and transported her to the Hamlin Town Hall in Lincoln County, where he administered a secondary chemical test of the breath to Petitioner. App'x. At 5, 7, 15.

The testing instrument used to administer the secondary chemical test, an Intoximeter EC/IR-II, Serial No. 008102, is the designated secondary chemical test of the West Virginia State Police. App'x. at 9-10.

Trooper Miller was trained at the West Virginia State Police Academy to administer secondary chemical tests of the breath while utilizing the Intoximeter EC/IR-II, and he has been certified as a test administrator by the West Virginia Department of Health since April 13, 2006. App'x. At 5, 9.

Trooper Miller read the Implied Consent Statement to the Respondent. App'x. At 5, 29, 37. He observed the Respondent for 20 minutes prior to administering the Intoximeter test to her. When cross-examined about the dispatch log for that evening, Trooper Miller testified that Trooper Perdue went to a call noted on the log; he then testified that he "could have" left, but that he didn't remember leaving and Trooper Perdue might have taken his call. App'x. At 30-33. After the Respondent testified that Trooper Miller had left to assist Troopers Baker and Brinegar at the call (App'x. at 37), Trooper Miller testified that "Baker was not working. Trooper Brinegar was not

working that night for us to leave to assist them, they wasn't working. I didn't leave. I know that I didn't." App'x. At 39.

Simulator tests were performed on the Intoximeter and the results of the simulator solution test were .084 and .083; the Respondent's breath sample was one hundred and five thousandths of one percent, or .105, by weight, well over the limit. App'x. at 5, 7, 15.

Trooper Miller utilized an individual disposable mouthpiece for his administration of the secondary chemical test to the Respondent. App'x. At 5.

Following a lengthy hearing following which the circuit court remanded the case to the Petitioner for consideration of certain legal issues, the Petitioner issued his Amended Final Order on April 8, 2009. App'x. At 56-67. In said Amended Final Order, the Petitioner affirmed the initial order of revocation, and revoked Petitioner's privilege to drive for six months and until all obligations for reinstatement are met.

Respondent filed a timely Petition for Administrative Appeal of Amended Order on March 26, 2009, the Petitioner filed its Response thereto on September 15, 2009, and issue was joined. A hearing on the merits of the case was held on August 11, 2010. App'x. At 68-89. The circuit court entered its Order on January 6, 2012. App'x. At 90-94. It is from this Order that the Petitioner appeals.

SUMMARY OF ARGUMENT

The circuit court erred in excluding the evidence adduced from the field sobriety tests and the Intoximeter test. The circuit court noted that the Respondent "was never given the opportunity to take the field sobriety tests as promulgated by the West Virginia State Police Academy and in accordance to the NHTSA standards." App'x. at 91.

The circuit court failed to weigh the totality of the evidence in the record pertaining to whether the arresting officer left the room during the 20-minute observation period preceding the Intoximeter test. App'x. at 91-92. The court did not acknowledge the reconciliation of this evidence in the Petitioner's Amended Final Order, and the Petitioner's finding that the arresting officer was more credible than the Petitioner. App'x. At 62-64. Inexplicably, the circuit court held, "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." App'x. At 92-93.

The circuit court further erred in finding that the Amended Final Order of the Petitioner was in error because its findings and conclusions were made in a biased, prejudicial and preconceived manner. This holding is utterly without support. The Amended Final Order is, in fact, perfectly supported by the record in the case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

ARGUMENT

The primary standard of review in this matter is found in *Muscatell v. Cline, Comm'r*, 196 W.Va. 588, 474 S.E.2d 518 (1996), a driver's administrative license revocation case, syllabus point 1 of which holds:

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) [concerning contested cases under the West Virginia Administrative Procedures Act] 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.

In accord, Syl. pt. 1, *Ullom v. Miller, Comm'r*, 227 W.Va. 1, 705 S.E.2d 111 (2010)(brackets in original). Moreover, W.Va.Code § 29A-5-4(g) of the Administrative Procedures Act provides that a reversal is warranted, *inter alia*, where the administrative decision is arbitrary and capricious.

Also worth noting is the underlying preponderance of the evidence standard pertaining to administrative revocation proceedings. That standard is set forth in *Albrecht v. Department of Motor Vehicles*, 173 W.Va. 268, 314 S.E.2d 859 (1984), syllabus point 2 of which holds:

Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol.

In accord, Syl. pt. 3, *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010). In that regard, the rules of evidence, as applied in civil actions in the circuit courts of this State, are to be followed in administrative license revocation hearings conducted by the Division of Motor Vehicles. W.Va.Code § 29A-5-2(a); Code of State Rules § 91-1-3.9.2.

A. The Circuit Court Erred in Finding That the Field Sobriety Tests Were Improperly Administered and in Not Giving the Results of Those Tests Their Deserved Weight.

The DUI Information Sheet and the testimony of Trooper Miller provided sufficient evidence to affirm the Amended Final Order; and there is no basis upon which the circuit court could conclude that the Hearing Examiner's credibility determinations and findings of fact were "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record." W. Va. Code § 29A-5-4.

The Petitioner properly relied on the evidence of Respondent's performance on the field sobriety tests to determine that she was DUI. Following the stop of Respondent's car, Trooper Miller developed probable cause for the warrantless, misdemeanor arrest of Respondent for DUI. During the course of the traffic stop, Trooper Miller smelled the odor of an alcoholic beverage coming from Respondent's vehicle. Respondent admitted consuming two mixed drinks and pouring out the window a mixed drink that she had been drinking while driving down the road. Respondent's eyes were glassy and she was unsteady in exiting her vehicle. Respondent was also unsteady and staggering while walking to the roadside and was unsteady while standing; her speech was slightly slurred; and there was an odor of alcoholic beverage on her breath.

Trooper Miller proceeded to administer the HGN test to Respondent. He checked the Respondent's eyes to see if they exhibited unequal tracking or unequal pupil size. The Trooper's pre-test screening revealed that the Respondent's eyes had both equal tracking and equal pupil size. App'x. At 3.

Trooper Miller demonstrated and explained the field sobriety tests to the Respondent. On the HGN test, Respondent's eyes lacked smooth pursuit, had distinct nystagmus at maximum deviation, and had an onset of nystagmus prior to a forty-five degree angle. App'x. At 3, 13, 16.

Prior to the administration of the walk-and-turn test and the one-leg stand test, Respondent advised that she did not suffer from any physical defects that would affect her ability to perform the tests. App'x. At 17. The Respondent was wearing slip-on shoes, the weather was clear, lighting was the cruiser headlights and the surface was asphalt. App'x. At 4, 19. Respondent also advised Trooper Miller that she was not taking any medication. App'x. At 23. Respondent testified that she told Trooper Miller that she had broken her foot eight years ago, her foot is deformed, and she has trouble walking. App'x. At 36. Respondent did not testify that this impeded her performance on the field sobriety tests. Further, the Hearing Examiner found the Respondent not credible. App'x. At 62. Nonetheless, the Petitioner gave the walk-and-turn test less weight than the other tests, in reliance on the Respondent's testimony of her foot condition. App'x. At 63.

Trooper Miller demonstrated and explained the walk-and-turn test to Respondent. On the walk-and-turn test, Respondent did not touch heel-to-toe, stepped off the line, raised her arms, almost fell while making the turn, and was unable to finish the test. App'x. At 3, 13. Trooper Miller testified that due to safety concerns, he did not wish to place Respondent in the roadway, so Respondent walked an imaginary line on the asphalt. App'x. At 20. He further testified that he told Respondent to walk a straight line "and she in no way walked a straight line." App'x. At 21.

On the one-leg stand test, the Petitioner swayed while balancing, hopped, used her arms for balance, and put her foot down. App'x. At 4, 13.

Yet the circuit court summarily dismissed all of this evidence with the finding that the tests were not performed in accordance with National Highway Transportation Safety Administration (“NHTSA”) standards.

There is nothing in statutory or case law in West Virginia that mandates a particular standard for laying a proper foundation for admission of results of field sobriety tests into evidence. There is no requirement of a specific foundation when an officer testifies regarding field sobriety tests. This Court has recognized that field sobriety test results can establish probable cause for an arrest, and requisite proof to demonstrate driving under the influence of alcohol. *Hill v. Cline*, 193 W. Va. 436, 457 S.E.2d 113 (1995); *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995) (per curiam). According to the *Boley* Court, a driver’s “failure to satisfactorily complete field sobriety tests, including the horizontal gaze nystagmus test, sufficiently warranted a police officer ‘in believing that the appellant was driving under the influence of alcohol.’” *Boley*, 193 W. Va. at 314, 456 S.E.2d at 41 (quoting *Cunningham v. Bechtold*, 186 W. Va. 474, 478, 413 S.E.2d 129, 133 (1991) (per curiam)). In *Boley*, the West Virginia Supreme Court upheld a revocation on the strength of weaving while driving, the odor of beer coming from the driver, and the results of a horizontal gaze nystagmus test of the driver’s one good eye. In *West Virginia Division of Motor Vehicles v. Cline*, 188 W. Va. 273, 423 S.E.2d 882 (1992) (per curiam), the Court upheld the revocation upon the arresting officer’s testimony that upon stopping the appellee, he smelled alcohol and the appellee flunked two sobriety field tests.

In case law to date, revocations have been upheld on officers’ testimony regarding the results of the tests, as a purely factual matter. *Cunningham, supra; Hill, supra; 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).

This Court's recent affirmance of the use of HGN as a valid tool for detection of DUI supports the Petitioner's argument that this evidence should not have been disregarded wholesale by the circuit court.

Moreover, the HGN evidence was not an isolated factor in the administrative revocation of White's license. As in *Dean* and *Boley*, *supra*, other factors were present, such as, in this case, the other field sobriety tests and the admission of White that he had consumed an alcoholic beverage.

White v. Miller, 2012 WL 1085579, 8 (W.Va.,2012).

As in *White*, there is an abundance of evidence in addition to the HGN results to support the finding that Respondent was DUI.

As a member of the West Virginia State Police, Trooper Miller is a professionally trained police officer. He was trained to detect whether an individual is DUI by noting such things as whether there is an odor of alcohol, slurred speech, glassy eyes, unsteadiness and swaying, and whether the driver can perform the field sobriety tests. He had made several DUI arrests in the nine months since his graduation from the police academy, and was certain that Respondent was DUI. App'x. At 22.

In West Virginia, there is no requirement that evidence of field sobriety tests be excluded if there is not strict adherence to NHTSA guidelines. NHTSA standards are a guide for optimum administration of field sobriety tests (including optimum field conditions, which rarely exist). There is nothing in statutory or case law in West Virginia that mandates a circumscribed standard for laying

a proper foundation for admission of results of field sobriety tests into evidence. NHTSA studies are a guide, and troopers and other officers are trained in administration of field sobriety tests and how to judge the results thereof, and in case law to date revocations have been upheld on officers' testimony regarding the results of the tests.

The DUI Information Sheet was offered and accepted as part of the record by the hearing examiner, pursuant to West Virginia Code § 29A-5-2 and 91 C.S.R. 1, § 3.9.4.b. App'x. At 9. Trooper Miller's signature on the DUI Information constitutes an affirmation of the veracity of the information therein, and he authenticated the documents at the administrative hearing. App'x. At 11. The DUI Information Sheet was required to be offered and accepted into evidence by the Division. *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006); *Cain v. West Virginia Department of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010); *Groves v. Cicchirillo*, 225 W.Va. 474, 695 S.E.2d 639 (2010).

Yet the circuit court simply gave no weight to the field sobriety tests, ignoring the documentary and testimonial evidence. As this Court noted in *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010),

...the lower court's view of the evidence revealed a preference for testimonial evidence over documentary evidence. Our law recognizes no such distinction in the context of drivers' license revocation proceedings.

225 W.Va. 481, 694 S.E.2d 646.

Trooper Miller's testimony, even independent of the DUI Information Sheet, was sufficient to support the Hearing Examiner's findings of fact and conclusions of law. In this regard, the

Hearing Examiner specifically found Trooper Miller's testimony to be credible and the Respondent's testimony, in relevant part, not to be credible.

Discrediting the field sobriety tests *in toto* was in error. The results thereof should be considered and given proper weight, as was done in the Amended Final Order.

B. The Circuit Court Erred in Finding That the Intoximeter Results Were Improperly Relied On.

The circuit court extricated one diversion in the testimony of the arresting officer and used it to discard the results of the Intoximeter test. App'x. At 91-92. The circuit court failed to weigh the totality of the evidence in the record pertaining to whether the arresting officer left the room during the 20-minute observation period preceding the Intoximeter test. *No other reason was given for the exclusion of the Intoximeter results.*

The DUI Information Sheet reflects that Trooper Miller observed the Respondent for 20 minutes prior to administering the test. App'x. At 5. In the administrative hearing, Trooper Miller affirmed that he observed her for 20 minutes. App'x. At 29-33.

To be clear for the Court, the only evidence of Trooper Miller wavering on the issue of the 20 minute observation is the following. Trooper Miller testified: "I think Trooper Perdue left and went to the high school I stayed if I remember right." And "...I may be mistaken but I remember, I thought I stayed there and I thought Trooper Perdue may have took my car there." And "Whether I went or he went, one of us stayed, so, she was observed regardless." App'x. At 30-33. Respondent then testified that Trooper Miller left the room to go to the fight. App'x. At 38.

All of the foregoing testimony by Trooper Miller on cross examination was interspersed with his testimony that he did not leave. Indeed, Trooper Miller was ultimately certain that he did not leave (App'x. At 39). The Hearing Examiner adjudged Respondent's credibility to be in question, and resolved the credibility question in favor of Trooper Miller. App'x. At 62, 64. Further, Respondent's testimony that Troopers Baker and Brinegar were at the school was contradicted by Trooper Miller, who vehemently denied that they were working that night. App'x. At 39. Trooper Miller had testified previously, "And when there's only two troopers in the whole county, it kind of makes it difficult at that time." App'x. At 33. We know from the record that the other trooper was Perdue, who was with Miller.

And yet the circuit court threw out the Intoximeter evidence because it disregarded, without explanation, the Hearing Examiner's credibility determinations, and seized on Trooper Miller's testimony that "he could have possible [sic] left the location where the Intoximeter was located at the time the test was operated." App'x. At 92. Not only is this holding nonsensical, as it is the observation period and not the administration of the test which was the given reason for the exclusion of this evidence, but it is apparent that defense counsel simply drafted his theory of the case into his proposed order, which was entered by the circuit court. The Order certainly does not reflect that a review of the record was undertaken.

The circuit court did not acknowledge the reconciliation of this evidence in the Petitioner's Amended Final Order, and the Petitioner's finding that the arresting officer was more credible than the Respondent. App'x. At 64-64. It is well-established that great deference is owed to the credibility determinations of the fact-finder:

This Court has recognized that credibility determinations by the finder of fact in an administrative proceeding are “binding unless patently without basis in the record.” *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). Moreover, we have consistently emphasized that “[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.” *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997); *accord Gum v. Dudley*, 202 W.Va. 477, 484, 505 S.E.2d 391, 398 (1997).

Webb v. West Virginia Bd. of Medicine 212 W.Va. 149, 156, 569 S.E.2d 225, 232 (2002).

Rather, inexplicably, the circuit court held, “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.” App’x. At 92-93. Exclusion of the results of the Intoximeter test, which proved conclusively that Respondent was DUI, was wholly without basis in the record.

In addition to disregarding the facts concerning the observation period, the Circuit Court misapplies the relevant legislative rule. 64 C.S.R. 10, § 7.2(a) provides as follows:

(a) The law enforcement officer shall keep the person being tested under constant observation for a period of twenty minutes before the test is administered **to insure that the person has nothing in his or her mouth at the time of the test and that he or she has had no food or drink or foreign matter in his or her mouth the observation period.** Emphasis added.

There was no credible evidence that Respondent had anything in her mouth at the time of the test, much less any food, drink or foreign matter that would effect the Intoximeter results. The Order must be reversed.

C. The Circuit Court's Holding That the Findings and Conclusions of the Petitioner in the Amended Final Order Were Reached in a Biased, Prejudiced and Preconceived Manner Is in Error, and the Court Itself Disregarded Evidence and Applied the Wrong Standard to Evaluation of the Evidence.

The circuit court's finding that "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 [sic], and prejudicial, preconceived manner." App'x. At 93. Nowhere in the Order is there any language supporting this finding. The evidence of record is clear, and both parties have advocated their positions on the proper interpretation of the evidence; nothing was mentioned at the August, 2010 hearing on this issue, and nothing in the record substantiated that the findings and conclusion in the Amended Final Order reflect bias, prejudice or preconception.

Rather, as it is apparent that the circuit court simply entered the order submitted by Respondent's counsel, it is clear that the Petitioner must appeal this Order because it is utterly unsupported by the record in this matter. Even if the field sobriety tests and the Intoximeter evidence were thrown out, there is still enough evidence to sustain revocation of Respondent's license.

At 12:30 a.m., Trooper Miller observed the Respondent's car swerving and crossing the centerline, after which it made an illegal U-turn from W. Va. Route 3 onto Sugar Tree Road, after which the Respondent came to a stop in a parking lot, with half of the car still protruding into the road. App'x. At 12, 18, 22.

At the time of Trooper Miller's initial encounter with the Respondent, the odor of an alcoholic beverage was present on her breath; her eyes were glassy; her speech was slightly slurred; she was unsteady and staggering while walking to the roadside and was unsteady while standing; she admitted to having consumed two alcoholic beverages; and she had an alcoholic beverage in her

possession, which she poured out the window of the car. App'x. At 3, 12-14. Respondent admitted to Trooper Miller that she was drinking as she drove down the road. App'x. At 14. At the administrative hearing, Respondent admitted that she had consumed two mixed drinks. App'x. At 40.

This evidence in itself is sufficient to support the revocation, and is not discarded by the circuit court in its Order.

Trooper Miller testified, "I was completely sure this Ms. McCormick was DUI." App'x. At 22. To be consistent with the recent holdings of this Court, and the record in this case, the Court must reverse the Order. In *Groves v. Cicchirillo*, 694 S.E.2d 639 (2010) this Court held:

What we have consistently held is that

[w]here there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol. Syllabus Point 2, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984). Syllabus 4 Point 2, *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997).

Syl. Pt., *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008).

The Court was also clear about the bases for revocation in *Cain v. West Virginia Div. of Motor Vehicles*, 694 S.E.2d 309 (2010):

All that is required to seek a license revocation under West Virginia Code § 17C-5A-2 is that the arresting officer have "reasonable grounds to believe" that the defendant committed the offense of DUI. Rather than requiring an arresting officer to witness a motor vehicle in the process of being driven, the statute requires only that the observations of the arresting officer establish a reasonable basis for

concluding that the defendant *had* operated a motor vehicle upon a public street in an intoxicated state.

694 S.E.2d 313.

In the present case, the Respondent was driving, and was under the influence of alcohol, even under the remaining evidence that was not improperly eviscerated by the circuit court in the Order. This Court must reverse the Order.

CONCLUSION

WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests the *Order* entered by the circuit court of Lincoln County on January 6, 2012 A.D. be reversed by this Court.

Respectfully submitted,

**JOE E. MILLER, Commissioner
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By counsel,

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NO.12-0153

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOE E. MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

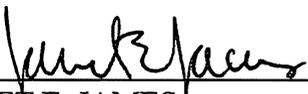
DONNA L. MCCORMICK,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing "Petitioner's Brief" was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 10th day of May, 2012, addressed as follows:

David O. Moye, Esquire
Post Office Box 1074
Hurricane, WV 25526



JANET E. JAMES