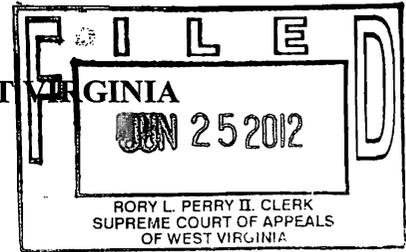


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner,

v.

Case No.: 12-0153

DONNA L. MCCORMICK,

Respondent.

FROM THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

APPELLEE'S RESPONSE TO BRIEF OF APPELLANT

Submitted by:

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I. STATEMENT OF THE CASE

Appellant’s statement of the case is accurate as far as it goes and is adopted herein and incorporated by reference. The omissions will be addressed in Appellee’s argument.

II. APPELLANT ERRORS

A. THE CIRCUIT COURT DID NOT ERR IN FINDING THE FIELD SOBRIETY TESTS CONDUCTED BY THE OFFICER AND RELIED UPON BY THE ADMINISTRATIVE COURT WERE FLAWED.

B. THE CIRCUIT COURT REASONABLY CONCLUDED THAT THE PROCEDURAL REQUIREMENTS FOR OPERATING THE INTOXIMETER WERE NOT FOLLOWED AND THEREFORE WERE IMPROPERLY RELIED UPON BY THE HEARING EXAMINER.

C. THE CIRCUIT COURT APPLIED THE CORRECT STANDARD OF REVIEW WHEN FINDING THE ADMINISTRATIVE COURT REACHED THE WRONG CONCLUSION IN LIGHT OF THE EVIDENCE PRESENTED.

III. POINTS AND AUTHORITIES

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V. ARGUMENT

A. THE FIELD SOBRIETY TESTS GIVEN WERE INCORRECTLY APPLIED, THEREFORE IMPROPER AND SHOULD BE GIVEN NO WEIGHT FOR RELIABILITY

The arresting officer, Trooper Miller documented in his “DUI Information Sheet”, that upon contact with Appellee, McCormick, that he had administered the three standard field sobriety tests prior to conducting an arrest. App’x. At 2-4. Trooper Miller further testified that he had given the three standard field sobriety tests, giving his opinion as to whether McCormick had passed or failed. App’x at 13 Also, the “DUI Information Sheet”, as well as testimony from Tpr. Miller, established that a Preliminary Breath Test Unit was NOT used as part of the field sobriety tests. A proper foundation for the field sobriety tests had not been established on the record. Further, counsel objected to the admission of the Horizontal Gaze Nystagmus in particular due to the fact that a foundation with scientific evidence was not placed on the record as required by *State v. Barker*, 179 W.Va. 194 (1988) App’x at 14 Pursuant to the National Highway Traffic Safety Administration test standards, there is a structured procedure for each of

the three field sobriety tests. App'x at 100-109 The Trooper failed to administer the tests in accordance with the procedures.

First, the Horizontal Gaze Nystagmus should not be admissible due to the objection under *State v. Barker, Id.* Barker specifically states, "In order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle which underlies the test." Appellant failed to place on the record the requirements of *Barker*, therefore, the test should be excluded. But even viewed procedurally, the requirements of the HGN as promulgated by the NHTSA were not met. App'x at 100-102

Second, the walk and turn test was administered in direct contravention of the NHTSA standards. According to NHTSA, the officer is required to ask the person conducting the test if there are any medications and/or injuries that would prevent the person from taking the test. App'x at 100 McCormick specifically rebutted the testimony of Tpr. Miller at the administrative hearing, stating that she had informed him that she had a deformed foot that had been broken at one time and had a pin inserted into the foot. App'x at 36 At the hearing, McCormick showed the deformity of her foot to the hearing examiner. She stated that she informed the Trooper that she "had a hard time walking anytime" while at the scene. App'x At 36. Common sense would dictate that if the officer is required to *ask* of any possible injuries that would prevent the person from conducting the test, and if the person had a substantial injury which deformed her foot, that she would have disclosed the injury prior to the test. It is then inconceivable to believe that the question was asked of McCormick at the scene as indicated by the officer, thus making the test invalid .

Third, the one-legged-stand test should not have been administered and given weight by

the officer at the scene. The instructions for the one-legged-stand as provided by NHTSA state that the person can choose either foot they wish to stand on, while holding the other foot off of the ground. App'x at 105 Giving the subject performing the test the option, implies that there is a foot which every person will pick that they can "better" stand on if given the choice.

Obviously, if McCormick could not exercise the option, the test would be invalid if she were forced to stand on the non-deformed foot. Much like a person being either right handed, or left handed, there is a preference with every person as to which foot is more suitable to stand on for a prolonged period, otherwise the NHTSA rules would not give the option, and would require which foot a person should stand on while taking the test.

Appellee McCormick argues that in order for the field sobriety tests to be valid and reliable, there must be strict compliance with the administering procedures. The Trooper testified that he was trained at the West Virginia State Police Academy where the "testing" procedures are taught. It is clear that the three standard field sobriety tests, the HGN, the one-legged-stand, and the walk-and-turn, are the three tests utilized in this case, and are the tests taught at the WV State Police Academy. According to the NHTSA manual, there are guidelines and requirements necessary in order to administer such tests in order to achieve **reliable** results.

I. The Reliability of the Field Sobriety Tests Approved by NHTSA

In 1984, the National Highway Traffic Safety Administration published a document entitled *Improved Sobriety Testing*. App'x At 100 This publication has been the basis for instructional material in certain states, including West Virginia. App'x At 14. The NHTSA test procedures were also described in publications published in 1992 , specifically *DWI Detection and Standardized Field Sobriety Testing, Student Manual (NHTSA Student Manual) and Instructor's*

Manual.

The manual indicates that, based on tests conducted in the laboratory under controlled conditions and administered in accordance with the methods prescribed therein, the walk and turn test will allow a police officer to correctly classify a suspect's blood alcohol content as more than or less than .10% about 68% of the time. The one-legged-stand test will result in proper classification about 66% of the time. And the horizontal gaze nystagmus test will result in proper classification about 77% of the time. . When the results of the walk and turn test and the horizontal gaze nystagmus tests are considered together, they will result in proper classification about 80% of the time. App'x At 102 The accuracy of the field sobriety tests is such that, even when they are in the laboratory under controlled conditions and in accordance with the methods prescribed by the manual, they will be accurate only about 65-80% of the time. Stated differently, even under the best of circumstances, reliance solely on field sobriety tests would result in intoxicated individuals being classified as non intoxicated or non-intoxicated individuals being classified as intoxicated about 20-35% of the time. App'x At 102

The Trooper testified that he administered the three tests determined to be reliable by the NHTSA. For each test, the manual describes the physical surroundings in which the test should be administered, if applicable; sets forth instructions that are required to be given to the suspect prior to and during administration of the test; requires that the suspect understand the instructions; establishes the procedures for performing the test and prescribes certain actions of the officer while the suspect is performing the test, including demonstrations by the officer respecting certain aspects of the tests; establishes a method for scoring the results of each test; and emphasizes that the officer should take detailed field notes. As noted above, the police.

officer had the duty of showing that the results of the field sobriety tests are accurate and reliable.

This can be done only by showing that the tests were administered in accordance with the methods prescribed by the manual.

II. Necessity of Compliance With Standard Procedures

In assessing the reliability of the field sobriety tests, as set forth above, the NHTSA emphasized the importance of strict compliance with the standardized procedures for administering the tests. Specifically, the NHTSA found:

If the standardized testing and scoring procedures presented in this Manual are not followed, the decision making guidelines will not be accurate.
App'x At 102

Clearly, the NHTSA has determined that a failure to exactly adhere to the prescribed methods only has the effect of reducing the reliability of the test results, thereby increasing a margin of error which is already in the 20-35% range.

One state 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. In *State v. Homan*, 89 Ohio St. 3d 421, 732 N.E.2d 952 (2000), the Supreme Court of Ohio held that field sobriety tests could not be used to establish probable cause to arrest a driver for driving under the influence when they were not administered in strict compliance with the standardized procedures. In so holding, it noted that, "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.* at 424, 732 N.E.2d at 955. "The small margins of error that characterize field sobriety tests make strict compliance critical." *Id.* at 425, 732 N.E.2d at 956. It further noted that experts in the area appear to agree that the reliability of

field sobriety tests turns upon the degree to which police comply with the standardized testing procedures. *Id.* The Court held that, in light of the testimony of the police officer that he did not comply with standardized test procedures, the results of field sobriety tests could not be used to establish probable cause to arrest the defendant.

Given the purpose for which the tests were designed and their substantial margin of error when administered under ideal conditions, it stands to reason that, at the very least, strict compliance with the guidelines is necessary to keep the margin of error to a minimum. This consideration should be of paramount importance when field sobriety tests are not used merely to establish probable cause to arrest which is intended to be checked by a chemical test, but instead, are used for the purpose of proving intoxication, the ultimate issue in this case.

Consistent with the decision of the Ohio Supreme Court in *Homan* and the requirements of the NHTSA, it is abundantly clear that if the tests are not administered in accordance with the guidelines and procedures established by the NHTSA, their reliability, which is at best 80% accurate in the first place, is called into question. If field sobriety tests are going to be used to show that a driver was operating a motor vehicle while under the influence of alcohol, they must be administered in strict compliance with NHTSA guidelines.

In the Final Order; the commissioner held that, “Unlike a secondary chemical test, there are no predetermined guidelines set forth in the West Virginia Code, Code of State Rules, or any other binding legal authority regarding the administration of field sobriety tests, what tests should be administered, if any, or in what manner the tests are to be determined. Secondly, the procedures and standards set forth by NHTSA concerning field sobriety testing are not legally binding in this state.” App’x At 62 The commissioner continues, saying, “Although they do

provide a good guide for officers to follow, the procedures and standards set forth or recommended by NHTSA are not required procedures and standards for officers to follow...”

App’x At 62 There is no legal or logical basis for the conclusions reached by the commissioner. It is abundantly clear that accepted testing procedures must be followed, and that there must be evidence that they were followed. *See State v. Barker*, 179 W.Va. 194, 366 S.E.2d 642 (1988); and *State v. Clawson*, 165 W.Va. 588, 270 S.E 2d 659 (1980) The Court in *Homan, supra*, requires that all field sobriety tests be performed in accordance with the instructions, or that evidence of their results be disregarded in its entirety.

When an officer administers field sobriety tests, he either fully complies with the NHTSA guidelines, or he doesn’t. The significance to be given the results will depend upon whether or not the officer fully complied with NHTSA guidelines. When the arresting officer testifies that he administered field sobriety tests and relies on them as a basis for his determination that the driver was intoxicated, and where the proper administration of field sobriety tests is raised by the driver, the commissioner must determine whether or not the tests were performed in conformity with the NHTSA guidelines.

Determining whether the tests were performed in accordance with NHTSA guidelines requires evidence that, with respect to each field sobriety test administered, each and every step of each field sobriety test was performed, and performed correctly. Otherwise as noted by the NHTSA and as held in *Homan*, the results of the field sobriety tests are not valid. Because the arresting officer has the burden of proving that the driver was intoxicated, it is necessary for the officer to also present evidence to show that the field sobriety tests were administered in compliance with the NHTSA guidelines. The most likely proof is the officer’s own testimony.

If the evidence presented demonstrates that the field sobriety tests were performed in accordance with the NHTSA guidelines, then it is appropriate for the arresting officer to testify to their results. It should be noted that the NHTSA guidelines do not speak in terms of a subject “passing” or “failing” a test. Instead, they speak in terms of the number of clues that the subject presents on each of the tests as indicating potential blood alcohol content above the legal limit. At the very least, the testimony of the arresting officer should be presented in these terms.

If the evidence demonstrates that the field sobriety tests were not administered in accordance with the NHTSA guidelines, it does not mean that all testimony respecting their administration is inadmissible. However, in the absence of evidence showing compliance with the NHTSA procedures, these actions should not be counted against the subject because there is no evidence to show that the subject was properly instructed and any necessary demonstrations given. It is simply not appropriate to find that a driver has failed a field sobriety test for failure to follow instructions or to comply with technical requirements of the test, where there is not evidence that he or she was given the instructions with which he or she is supposed to comply, or was instructed as to the technical requirements.

III: Horizontal Gaze Nystagmus Test

In *State v. Barker*, 179 W.Va. 194 (1988), the Supreme Court held that in order for the results of the horizontal gaze nystagmus test to be admissible, there must be some evidence respecting the methodology of the test, its scientific reliability and its results. It also held that there must be evidence of whether accepted testing procedures were followed by qualified personnel in the particular case. It noted that evidence of scientific reliability should include both testimony by expert witnesses and relevant articles and scientific publications. *Id.* at 198.

Clearly, the record shows that there was an *absence* of testimony and/or evidence that provided a sufficient foundation for the HGN test to be admissible in this case. The State did not produce a witness or evidence to show that there was a correlation between the scientific test performed and possible consumption of alcohol.

B. THE INTOXIMETER ECIR/II WAS IMPROPERLY ADMINISTERED AND SHOULD BE EXCLUDED AS EVIDENCE

Trooper Miller testified that following the arrest of McCormick, he transported her to Hamlin for the purpose of processing her and conducting the Secondary Chemical test to obtain McCormick's blood alcohol content. Trooper Miller testified that, "Then we performed a secondary chemical test with the Intoximeter." Counsel objected to the testimony based on the lack of foundation for the Intoximeter ECIR/II. App'x At 15. The hearing examiner then attempted to substantiate the testimony by stating that the DUI information sheet contained the information, and that, "...he did authenticate and affirm that all of the information contained in his Statement of Arresting Officer was true and accurate." App'x at 15

Later, during cross examination, counsel provided evidence to the officer which indicated that he had left the Town Hall where the Intoximeter and McCormick were located. The evidence indicated that he had left to take a call at the Lincoln County High School. This was proffered to the Trooper by presenting 911 dispatch records that showed that Trooper Miller's unit number was used during the call at the High School, and also that the mileage on Trooper

Miller's vehicle indicated that there was three miles additional when he left Town Hall to go to the jail, versus when he had originally marked out with McCormick at Town Hall. App'x at 27-33

When presented with the discrepancies, Tpr. Miller stated that "Whether I went or he went, one of us stayed so, she was observed regardless." App'x at 33 Later, Tpr. Miller stated that he did not leave and that he didn't remember leaving, even though the unit number used at the school was his and the cruiser he was using had three additional miles on it.

According to W.Va. Code of State Rules, §64CSR10-7.2(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 during the observation period." If the Trooper was unsure as to whether he had left, or his partner had left, then the mandatory observation period was invalidated, and therefore should be given NO weight or credit.

The commissioner stated in the Final Order, that, "...the record in this case fully reflects that a more than adequate foundation has been laid for the introduction of the results of the secondary chemical test into evidence." App'x at 63. The hearing examiner completely disregards the testimony of Tpr. Miller and the rebuttal of the observation period. Unlike what Appellant argues about strict versus substantial compliance with the field sobriety tests, the requirement and/or rule of the *constant* observation of the suspect before administering the test is *mandatory*. Clearly the Hearing Examiner is attempting to "rehabilitate" the testimony and

evidence presented at the hearing in order to achieve a result in conformity with what is a preconceived notion of intoxication.

C. THE CIRCUIT COURT PROPERLY APPLIED THE STANDARD OF REVIEW

"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).

The Court found that the Hearing Examiner was clearly wrong in applying the law to the evidence received during the hearing. The examiner completely disregarded the testimony of McCormick when she stated that she had advised the officer that she had a deformed foot and couldn't walk correctly. The examiner found that "...the Respondent advised the Arresting Officer that she did not suffer from any physical defects that would inhibit her ability to perform the walk-

and-turn test.” App’x at 59 The findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

Further, the hearing examiner made a finding that stated “Unequal tracking and unequal pupil size are indicia that a pathological disorder may be present within an individual, and that such disorders can affect an individual’s performance of the horizontal gaze nystagmus test.” App’x at 58 There was absolutely NO evidence presented, testimony and/or documents, which could provide the finding as provided by the hearing examiner. The fabrication and embellishment inserted into the Order by the hearing examiner is clear evidence that his decision was arbitrary and capricious, and was based on no evidence gleaned from the hearing.

The commissioner issued the second “Amended Order” after remand issued by the Circuit Court of Lincoln County. The remand order found that “During the Circuit Court’s entertainment of the evidentiary hearing on the issue of alleged ‘procedural irregularities’, there was clear evidence that while attending the 2007 training and education seminar, from their supervisor’ instruction the Hearing Examiners ‘...were told (to) overrule all objections, not give an explanation so that the record can be sorted out later so that when the final order is prepared, no evidence was excluded at the hearing and could possibly be used.’” App’x at 51 Such directives from the commissioner’s office constituted clear abuse of discretion and tainted any future rulings from the commissioner regarding the meritorious issues in this case. The Court found that , “When such an approach is taken in the issuance of a decision, even by an administrative agency, the decision appears on its face to be arbitrary and capricious, a result of improper procedures, an unconstitutional denial of due process, etc. in violation of the applicable standard of review...” App’x at 52

The Court in remand ordered the commissioner to address the issues and to support the decisions by evidence and law. As evident from the “Amended Order”, the commissioner justified the decisions of the examiner by glazing over the issues such as stating it was credibility of the officer, because he testified that he was of “...sound sober, and rational mind’ on the date in question.” App’x 83 The finding in the Order was not from testimony as was placed in the Order, but from fabrication of the hearing examiner to attempt to discredit Ms. McCormick.

As another example of the “Amended Order” not addressing the issues as directed by the Court, is the results of the Intoximeter ECIR/II. The “Amended Order” found that, “The secondary chemical test was administered in accordance with Title 64, Code of State Rules, Series 10.” App’x at 61 Then the Order went further in the discussion to “justify” the admission by stating that the results were admitted due to the DUI Information Sheet being placed into the record at the beginning of the hearing. (without cross-examination) Further, the Order generalized and stated that, “...a more than adequate foundation has been laid for the introduction of the results of the secondary chemical test into evidence.” App’x at 63 Then the commissioner proceeds to discuss the training of the officer, without addressing the challenge of counsel that the 20 minutes was interrupted or not, and whether the observation period was valid due to evidence that the officer left the building during the observation period.

Such examples of the content of the “Amended Order” is evident that even under remand, the commissioner’s order was clearly wrong in light of the probative evidence of the **whole** record, and was definitely arbitrary and capricious, from obvious efforts of the commissioner to ignore the evidence and even fabricate evidence to justify the ruling.

VI. CONCLUSION

For the foregoing reasons, the Appellee respectfully requests this honorable court to affirm the decision of the court below.

Appellee requests oral argument in this case.

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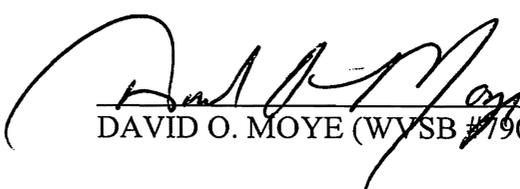
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CERTIFICATE OF SERVICE

I, David O. Moye-counsel for Respondent, do hereby certify that on the 25th day of June, 2012, I served a true and exact copy of: (a) Appellee's Response to Brief of Appellant (b) the contents of this Appendix are true and accurate copies of items contained in the record in the lower tribunal; and (c) I have conferred in good faith with all parties to this appeal in order to determine the contents of this Appendix, upon the following persons and address by depositing the same in the United States Mail, postage prepaid:

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