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OAH
by DMV

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOE E. MILLER, Commissioner,
West Virginia Division of
Motor Vehicles,

Petitioner,

v.

Civil Action No. 12-AA-12
Judge Louis H. Bloom

JAMES A. ODUM,

Respondent.

FILED
2012 OCT 25 PM 10:19
KAWAHA COUNTY CLERK COURT

FINAL ORDER
DENYING PETITION FOR JUDICIAL REVIEW

Pending before this Court is a "Petition for Judicial Review" ("Petition") filed on January 23, 2012, by the Petitioner, Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles ("Petitioner"), by counsel, Elaine L. Skorich. Said Petition requests this Court to reverse a "Final Order Findings of Fact and Conclusions of Law" ("Final Order") entered by the Office of Administrative Hearings ("OAH") on December 21, 2011, following an administrative hearing on the matter held on July 27, 2011. The Final Order reversed the Petitioner's "Order of Revocation" entered on October 13, 2010, which revoked James A. Odum's ("Mr. Odum") driver's license effective November 17, 2010, for the offense of driving a motor vehicle while under the influence of alcohol ("DUI") and refusing to submit to a secondary chemical test to determine the alcohol content of the blood.

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Upon review of the record, the memoranda of the parties, and the applicable law, the Court is of the opinion that the Final Order of the OAH should be affirmed based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In the early morning of September 15, 2010, Mr. Odum was operating a motor vehicle southbound on Robert C. Byrd Drive in the jurisdictional limits of the City of Beckley, Raleigh County, West Virginia. Admin. Hr'g Tr. 41:13, July 27, 2011.

2. Patrolman Nicholas M. Manning ("Patrolman Manning") of the Sophia Police Department was traveling northbound on Robert C. Byrd Drive in the jurisdictional limits of the City of Beckley, Raleigh County, West Virginia. *Id.* at 40:19–20.

3. Patrolman Manning testified that while stopped at the intersection of Prince Street and Robert C. Byrd Drive, he observed Mr. Odum's vehicle turn southbound onto Robert C. Byrd Drive from Prince Street. *Id.* at 41:6–7. He testified that while making this turn, Mr. Odum ran a red light and drove into the oncoming traffic lane almost striking Patrolman Manning's vehicle. *Id.* at 40:10–14.

4. Patrolman Manning further testified that he then turned around, stopped the vehicle, and approached the vehicle. *Id.* at 41:24–42:1. After observing Mr. Odum, Patrolman Manning testified that he immediately contacted the Beckley Police Department by calling 911, the Emergency Operations Center. *Id.* at 43:3–12.

5. Patrolman Manning testified that he believed a mutual aid agreement existed between the Sophia Police Department and the Beckley Police Department giving him the authority to make a traffic stop within the city limits of Beckley. *Id.* at 42:7–19.

6. The Emergency Operations Center dispatched Corporal Steven Whitt (“Corporal Whitt”) with the Beckley Police Department to the scene. *Id.* at 11:3–4. Corporal Whitt testified that when he arrived on the scene, he observed Mr. Odum’s vehicle pulled over in the southbound lane on Robert C. Byrd Drive by Patrolman Manning in the city limits of Beckley. *Id.* at 11:7–13. According to Patrolman Manning, he relayed the reason he stopped Mr. Odum’s vehicle to Corporal Whitt. *Id.* at 44:16–19.

7. After speaking with Patrolman Manning, Corporal Whitt testified that he approached the vehicle and spoke with Mr. Odum. *Id.* at 11:17–19. According to Corporal Whitt, he smelled the distinct odor of an alcoholic beverage coming from the inside of Mr. Odum’s vehicle, and Mr. Odum indicated that he had been drinking. *Id.* at 11:18–23. After asking Mr. Odum to exit the vehicle to participate in some field sobriety tests, Corporal Whitt testified that Mr. Odum’s speech appeared to be slow and slurred and his eyes were glassy and looked bloodshot. *Id.* at 13:1–2; DUI Information Sheet, File Ex. 2.

8. Corporal Whitt testified that Mr. Odum failed the field sobriety tests, as well as the Preliminary Breath Test, which showed a .168 blood alcohol level. Admin. Hr’g Tr. 14–20; DUI Information Sheet, File Ex. 2. At this point, Corporal Whitt took Mr. Odum into custody for driving under the influence. Corporal Whitt transported Mr. Odum to the Beckley Police Department. Admin. Hr’g Tr. 20:3–8. While at the Police Department, Mr. Odum refused to sign the implied consent statement and refused to submit to the secondary chemical test twice. *Id.* at 22:1–2.¹

¹ There is discrepancy as to whether Corporal Whitt waited the requisite twenty minute period before attempting to get Mr. Odum to consent to a secondary breath test. Admin. Hr’g Tr. 25:12–24, 26:1–9.

9. Corporal Whitt completed the DUI Information Sheet while at the Beckley police Department. *Id.* at 22:23–24, 23:1. Using the information provided to him by Patrolman Manning, Corporal Whitt recorded the reason for stopping Mr. Odum’s vehicle as “straddling center line.” File Ex. 2.

10. On October 13, 2010, the Petitioner entered an “Order of Revocation,” revoking Mr. Odum’s driver’s license for driving under the influence and for refusing the secondary chemical test. File Ex. 3.

11. An administrative hearing, timely requested by Mr. Odum, was held on July 27, 2011. The only evidence proffered at said hearing was the testimony of Corporal Whitt, Patrolman Manning, and the DUI Information Sheet completed by Corporal Whitt as a result of the incident.

12. On December 21, 2011, the OAH entered a Final Order reversing the Petitioner’s revocation of Mr. Odum’s driver’s license. In the Final Order, the OAH Hearing Examiner specifically found that Patrolman Manning “was in a Sophia Police Cruiser while dressed in a Sophia Police uniform at the time of the stop—which was made well outside the jurisdictional limits of Sophia.” Final Order 2. The Hearing Examiner also found that the recorded information indicating the reason for the stop was materially inconsistent with Patrolman Manning’s testimony regarding his initial encounter with Mr. Odum’s vehicle. *Id.* at 3. Additionally, the Hearing Examiner found Patrolman Manning’s testimony regarding a mutual aid agreement between the Sophia Police Department and the Beckley Police Department was flatly contradicted by a letter from the Beckley Chief of Police.² *Id.* at 4–5. Due to the existence of this material conflicting

² A letter from the Beckley Chief of Police, Timothy P. Deems, stating that no mutual aid agreement existed was used as evidence of lack of a mutual aid agreement by the Hearing Examiner. This letter was

evidence, the Hearing Examiner concluded that it could not be reasonably concluded that the investigating officer, Corporal Whitt, had reasonable grounds to believe Mr. Odum had been driving under the influence nor that Mr. Odum was lawfully arrested for the offence. *Id.* at 6.

13. On January 23, 2012, the Petitioner, by counsel, filed a "Petition for Judicial Review" ("Petition") with this Court. A hearing was held on the matter on May 24, 2012.

STANDARD OF REVIEW

The Court reviews the DMV's Final Order pursuant to the West Virginia Administrative Procedures Act, which states as follows:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision 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.

W. Va. Code § 29A-5-4(g). Furthermore, on appeal a circuit court reviews questions of law presented *de novo* and findings of fact by the administrative officer are accorded deference unless the court believes the findings to be clearly wrong. *See* Syl. pt. 1,

received into evidence after the hearing with no objection. The Petitioner argued before this Court that this was error on the part of the OAH; however, this error was not assigned in the Petition. Therefore, it is waived. *See* Admin. Appeal Hr'g Tr. 4:5-24, 5:1-7, May 24, 2012.

Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996); see also Syl. Pt. 4, *Clower v. W. Va. Dept. of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009).

DISCUSSION

1. The Petitioner argues that the OAH was clearly wrong in finding that Patrolman Manning failed to make a valid stop, and even if he failed to make a good stop, it is irrelevant because Corporal Whitt's arrest of Mr. Odum was valid. Pet. ¶ III.A-B. Additionally, the Petitioner argues that the OAH erred in concluding there was a conflict in material evidence, and even if the conflict in evidence was material the OAH failed to properly analyze the evidence. *Id.* at ¶ III.C. Finally, the Petitioner argues that by erroneously disregarding all evidence presented at the hearing, the OAH improperly excluded or ignored all relevant evidence that Mr. Odum was driving under the influence of alcohol. *Id.* at ¶ III.D.

2. When conducting a hearing to review the revocation of a driver's license because that person has been accused of driving a motor vehicle under the influence of alcohol, the OAH

shall make specific findings as to: (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided*, That this element shall be waived in cases where no arrest

occurred due to driver incapacitation; (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

W. Va. Code § 17C-5A-2(f) (2012) (emphasis in original).

3. The statute has been amended several times in recent history. First, it was amended in 2008 to remove the previously existing requirement that a finding must be made that the person was placed under lawful arrest.³ See W. Va. Code § 17C-5A-2(f) (2008). In the 2008 version of the statute, which applies to revocations prior to June 11, 2010, see *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800, 806 (2012), only three specific findings were required: (1) whether the investigating officer had reasonable grounds to believe the person to have been driving under the influence, (2) whether the person committed an offense involving driving under the influence, and (3) whether the sobriety tests were administered properly. See W. Va. Code § 17C-5A-2(f) (2008). In 2010, the legislature amended the statute again to add back into the statute the requirement of a finding that the person was lawfully placed under arrest for the offense of driving under the influence. See W. Va. Code § 17C-5A-2(f) (2012).⁴

4. “The inclusion of the requirement for a ‘lawful arrest’ in the 2010 statute constitutes a substantive alteration because it represents a change in the rights and obligations of the parties.” *Smith*, 229 W. Va. 478, 729 S.E.2d at 806. Additionally, weight must be given to the inclusion of this requirement because “[a] cardinal rule of

³ The 2004 version of the statute required three specific findings, including whether the person was lawfully placed under arrest. See *Clower*, 223 W. Va. 535, 544, 678 S.E.2d 41, 50.

⁴ The statute was amended again in 2012 adding two new sections W. Va. Code § 17C-5C-4a and W. Va. Code § 17C-5C-4b, which are not applicable here.

statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999).

5. Recently, the Supreme Court of Appeals of West Virginia determined that the exclusionary rule is not applicable in a civil, administrative driver’s license revocation proceeding. Syl. Pt. 3, *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012); *see also* Syl. Pt. 7, *Smith*, 229 W. Va. 478, 729 S.E.2d 800. In doing so, however, the Court had “no occasion to elaborate upon what the lawful arrest language in the 2010 statute would have required” because it found the 2008 version of the statute applicable to that particular case. *Smith*, 229 W. Va. at n.8, 729 S.E.2d at 806 n.8.

6. In interpreting the previous 2004 version of the statute, which required a lawful arrest finding, the Court has ruled that a lawful arrest for the offense of driving under the influence requires a valid stop of the vehicle. *See, e.g., Clower*, 223 W. Va. 535, 544, 678 S.E.2d 41, 50. Specifically, the Court in *Smith* stated that Mr. Smith’s reliance on *Clower* for “the proposition that the validity of an administrative license revocation is dependent upon the legality of the initial traffic stop” was misplaced because “that decision was premised upon a 2004 version of the West Virginia Code § 17C-5A-2 which included language indicating that a lawful arrest was necessary.” 229 W. Va. 478, 729 S.E.2d 800, 806. The current version of the statute, like the 2004 version of the statute, includes language indicating that a lawful arrest is a necessary finding. This language must be given weight, and as the Court has previously ruled, a lawful arrest is dependent upon the legality of the initial traffic stop. *See Clower*, 223 W. Va. 535, 544, 678 S.E.2d 41, 50 (“Based on these facts, the circuit court concluded that Mr. Clower was not lawfully

placed under arrest because Trooper Kessel did not have the requisite articulable reasonable suspicion to initiate a traffic stop of Mr. Clower's vehicle. We agree.”).

7. The appropriate standard by which to judge the legality of the initial traffic stop is the reasonable suspicion standard. *See id.*; *see also Muscatell*, 196 W.Va. 588, 596, 474 S.E.2d 518, 526 (citing *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994)). “Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 4, *Clower*, 223 W. Va. 535, 544, 678 S.E.2d 41 (quoting Syl. Pt. 1, *Stuart*, 192 W. Va. 428, 452 S.E.2d 886). “When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.” Syl. Pt. 4, *Muscatell*, 1996 W. Va. 588, 474 S.E.2d 518 (quoting Syl. Pt. 2, *Stuart*, 192 W.Va. 428, 452 S.E.2d 886).

Valid Stop and Arrest

8. The Petitioner argues that Patrolman Manning's stop of Mr. Odum was valid even though no mutual aid agreement existed between the Sophia and Beckley Police Departments because Patrolman Manning had the authority to make a citizen's arrest pursuant to *State v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999). Additionally, the Petitioner argues that even if this Court finds that Patrolman Manning failed to validly stop Mr. Odum, such a finding is irrelevant here because Corporal Whitt validly arrested Mr. Odum.

9. This Court finds that the OAH was not clearly wrong in determining that material discrepancies in the evidence presented, including the testimony of Patrolman Manning

and Corporal Whitt, tainted the proof regarding Patrolman Manning's justification for the initial stop of Mr. Odum. The OAH was not clearly wrong in determining that based on conflicting evidence it could not reasonably conclude that Patrolman Manning had an articulable reasonable suspicion to stop Mr. Odum's vehicle and that Corporal Whitt had a reasonable grounds to believe Mr. Odum had been driving while under the influence of alcohol. Because the Court finds that the OAH was not clearly wrong in its evidentiary findings, it has no cause to reach the issue presented in *Gustke*.

10. The Court also finds that the OAH made no error in determining that without a finding that the legitimacy for the initial traffic stop existed, there was insufficient evidence to find Corporal Whitt's arrest of Mr. Odum was lawful as required by W. Va. Code § 17C-5A-2(f). As more fully stated above, an arrest for the offense of driving under the influence of alcohol is not lawful without a valid stop of the vehicle. This proposition is not reached by use of the exclusionary rule, but through specific requirements in the statutory language which require a lawful arrest and the Supreme Court of Appeals of West Virginia's prior precedent interpreting such language.

Conflict of Material Evidence

11. Next, the Petitioner argues that the OAH failed to properly analyze the material conflict in evidence as required by *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). In *Muscatell*, the Supreme Court of Appeals of West Virginia ruled that "[w]here 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.” *Id.* at Syl. Pt. 6.

12. The Court in *Muscatell* concluded that the agency failed to make an adequate analysis of the facts from which it or the circuit court could determine whether the stopping of the vehicle was lawful under the proper standard—the reasonable suspicion standard. *Id.* at 595–596, 525–526. To the Court, the observations of a police officer immediately before making the stop are critical to the legality of the stop. *Id.* at 598, 528.

13. The Court finds no merit in this assignment of error. The OAH issued a reasoned and articulate decision, which weighed and explained its choices made in rendering its decision, thus, making the decision capable of review.

14. The Court further finds that unlike *Muscatell*, the OAH make an adequate analysis of the facts from which it can determine whether the stopping of the vehicle was lawful under the proper standard—the reasonable suspicion standard. In doing so, the OAH stated, “Patrolman Manning’s testimony that he observed [Mr. Odum’s] vehicle fail to stop at a red light and nearly strike his cruiser is troublesome. This is so in considering that he stated that he informed the Investigating Officer[, Corporal Whitt,] the reason for the traffic stop and that Officer recorded a materially distinct version of events concerning the stop.” OAH Final Order 4. The Court finds no error in the OAH’s determination that this conflicting evidence was incompetent to show that a reasonable suspicion existed to stop Mr. Odum’s vehicle.

Relevant Evidence Ignored

15. Finally, the Petitioner argues that the OAH ignored evidence regarding the prime issue in a driver’s license revocation hearing pursuant to W. Va. Code § 17C-5A-2(e):

whether or not Mr. Odum had driven under the influence of alcohol on September 15, 2010.

16. The Court also finds no merit in this assignment of error. As discussed above, in answering the question of whether Mr. Odum drove under the influence of alcohol, the OAH is required to make specific findings. *See* W. Va. Code 17C-5A-2(f). Here the OAH was unable to make such findings because of conflicting and incompetent evidence on material matters. The Court finds that the OAH was not clearly wrong in such evidentiary determinations.

CONCLUSIONS OF LAW

Based on the foregoing, the Court concludes that the OAH did not error as a matter of law in reversing the Petitioner's "Order of Revocation" entered on October 13, 2010. The OAH was not clearly wrong in concluding that conflicting evidence upon material matters precluded a legal conclusion that Corporal Whitt had reasonable grounds to believe Mr. Odum had been driving under the influence. Additionally, the OAH was not clearly wrong in concluding that incompetent, and thus, insufficient evidence was presented to show that a reasonable suspicion existed to stop Mr. Odum's vehicle, and therefore, a finding that Mr. Odum was lawfully placed under arrest could not be made.

DECISION

Accordingly, the Court does hereby **ORDER** that the Petitioner's Petition for Judicial Review is **DENIED** and that the OAH's "Final Order Findings of Fact and Conclusions of Law" dated December 21, 2011, is **AFFIRMED**. There being nothing further, the Court does further **ORDER** that the above-styled action be **DISMISSED** and

STRICKEN from the docket of this Court. The objections of any party aggrieved by this Order are noted and preserved.

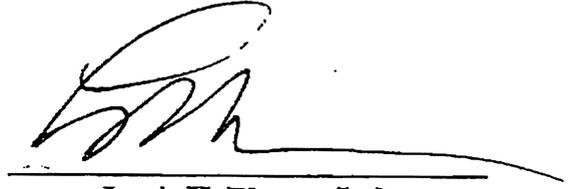
The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record and to Joe E. Miller, Commissioner of the Division of Motor Vehicles at the following addresses:

Randy D. Hoover
P.O. Box 5521
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Elaine L. Skorich
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Joe E. Miller, Commissioner
WV Division of Motor Vehicles
1800 Kanawha Blvd., E., Building 3
Charleston, WV 25317

ENTERED this 24 day of October 2012.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COUNTY THIS
DAY OF October 2012.
Cathy S. Gatson
CLERK
Circuit Court of Kanawha County, West Virginia

10/25/12
Date: 10/25/12
Certified copies sent to:
___ counsel of record
___ parties
___ other
By: R. Hoover
E. Skorich
J. Miller
C. Gatson

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

JOE E. MILLER, Commissioner,
Division of Motor Vehicles,

Respondent below, Petitioner,

v.

JAMES A. ODUM,

Petitioner below, Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, and counsel for the respondents, do hereby certify that the foregoing *Notice of Appeal* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 9th day of November, 2012, addressed as follows:

Randy D. Hoover, Esquire
Post Office Box 5521
Beckley, WV 25801

The Honorable Cathy Gatson
Clerk of the Circuit Court
Kanawha County Courthouse
111 Court Street, Judicial Annex
Charleston, WV 25301


ELAINE L. SKORICH