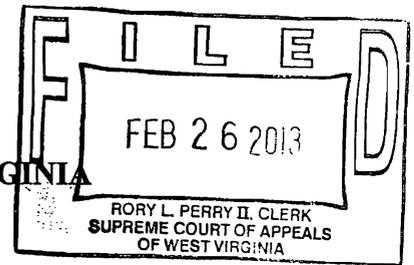


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-1403
(Circuit Court Civil Action No. 12-AA-12)



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

Respondent below/Petitioner

v.

JAMES A. ODUM,

Petitioner below/Respondent.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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I. ASSIGNMENTS OF ERROR

- A. The circuit court erred in conflating a lawful stop with a lawful arrest - the latter of which is a factor in determining the admissibility of the secondary chemical test.**
- B. The circuit court erred in ignoring W. Va. Code § 17C-5A-2(e) and in effect applying the exclusionary rule to the instant civil, administrative license revocation proceeding in violation of this Court's recent decisions in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, —W. Va. —, 729 S.E.2d. 137 (2012).**
- C. This Court should reconcile its holding in *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009) regarding a valid stop with its holdings in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, —W. Va. —, 729 S.E.2d. 137 (2012) which state that the exclusionary rule does not apply to civil, administrative license revocation proceedings.**

II. STATEMENT OF THE CASE

On September 15, 2010, Patrolman N. Manning of the Sophia Police Department observed Respondent's vehicle drive through a red traffic light and come close to striking the police cruiser while on Robert C. Byrd Drive in the jurisdictional limits of the City of Beckley, Raleigh County, West Virginia. (A. Tx.¹ at P. 40.) As a result of observing Respondent run the red light and almost strike the police cruiser, Patrolman Manning initiated a traffic stop of Respondent. (A. Tx. at P. 41-42.) Patrolman Manning then contacted the Emergency Operations Center to contact the Beckley Police Department to take over the investigation. (A. Tx. at P. 42, 43.)

At the time of the stop, Patrolman Manning believed that the Sophia Police Department participated in mutual aid with the Beckley Police Department. (A. Tx. at P. 42.) As a result of Patrolman Manning's call for assistance, Corporal Whitt of the Beckley Police Department arrived on the scene and proceeded as the Investigating Officer. (A. Tx. at P. 9, 10.) Corporal Whitt

¹ A. Tx. refers to the Administrative Transcript of the hearing held on July 27, 2011.

initiated an investigation into whether Mr. Odum was driving while under the influence of alcohol (“DUI”); completed the DUI Information Sheet; and indicated that Respondent’s vehicle had been straddling the center line. (A. R.² at P. 162.)

Corporal Whitt also clearly indicated that Respondent had the odor of alcoholic beverage on his breath; was unsteady exiting the vehicle; staggered walking to the roadside; was unsteady while standing; had slurred speech; had glassy and bloodshot eyes; admitted to “drinking at Fosters;” failed the horizontal gaze nystagmus test; failed the walk-and-turn test; and failed the one-leg stand test. (A. R. at P. 162-163 and A. Tx. at P. 12-17.) Respondent failed the preliminary breath test with a result of .168%, and Respondent refused a secondary chemical test after he was arrested for DUI and taken to the Beckley Police Department. (A. R. at P. 164-165 and A. Tx. at P. 18, 20-22.)

On September 27, 2010, Respondent prematurely filed an administrative hearing request. (A. R. at P. 138-140.) On October 13, 2010, Petitioner sent Respondent an Order of Revocation for DUI and for refusing to submit to the secondary chemical test: the revocation was to become effective on November 11, 2010. (A. R. at P. 160.) On November 9, 2010, Respondent timely filed a request for an administrative hearing (A. R. at P. 135), which was conducted on July 27, 2011, before the Office of Administrative Hearings (“OAH.”) (A. R. at P. 117.) Patrolman Manning’s belief about mutual aid between the Sophia and Beckley Police Departments was disputed via documentary evidence presented after the administrative hearing. (A. R. at P. 90-94.) Patrolman Manning and Corporal Whitt testified at the hearing below. (A. Tx. P. 2.) Respondent failed to testify and, therefore, failed to rebut the testimony of the two police officers. *Id.*

The OAH Final Order was entered on December 21, 2011, reversing *in toto* the

² A. R. refers to the Administrative Record.

Commissioner's Order of Revocation. (A. R. at P. 77-84.) Petitioner filed its *Petition for Judicial Review* with the circuit court on January 23, 2012. (A. R. at P. 69.) On May 24, 2012, the circuit court heard oral argument on the merits (C. Tx³. at P. 1), and entered its *Final Order Denying Petition for Judicial Review* on October 24, 2012. (A. R. at P. 2.)

Pursuant to W. Va. Code § 29A-5, *et seq*, this case is an appeal from the *Final Order Denying Petition for Judicial Review* of the Circuit Court of Kanawha County, which affirmed the decision of the OAH that reversed the Commissioner's order revoking Respondent's driver's license for driving under the influence of alcohol and for refusing to submit to the secondary chemical test. Petitioner prays the *Final Order Denying Petition for Judicial Review* of the Circuit Court of Kanawha County be overturned, the decision of the OAH reversed, and the revocation ordered by the Commissioner be reinstated.

III. SUMMARY OF ARGUMENT

The circuit court below found that W. Va. Code § 17C-5A-2 requires a finding that a lawful arrest was made, and the circuit court determined that based upon this Court's previous decision in *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), a lawful arrest is dependent upon the legality of the initial traffic stop. When the circuit court misapplied *Clower*, it also applied the criminal exclusionary rule and ignored all evidence of DUI in contravention to this Court's holdings in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, —W. Va. —, 729 S.E.2d. 137 (2012).

³ C. Tx. refers to the circuit court transcript of the hearing held on May 24, 2012.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Commissioner requests a Rule 20 argument in this case. There are issues of first impression alleged herein, and Petitioner submits that this matter warrants further inquiry by this Court.

V. ARGUMENT

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 71, 464 S.E.2d 589, 590 (1995) (per curiam).

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 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.”

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of West Virginia Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Groves v. Cicchirillo*, — *W. Va.* —, 694 S.E.2d 639, 643 (2010) (per curiam).

A. The circuit court erred in conflating a lawful stop with a lawful arrest - the latter of which is a factor in determining the admissibility of the secondary chemical test.

The administrative revocation process for DUI was created by the Legislature as a mandatory process. Pursuant to W. Va. Code § 17C-5A-1(b), a law enforcement officer who investigates a person for DUI **must** submit his/her written investigation report (i.e., the DUI Information Sheet)

to the Commissioner within forty-eight (48) hours. Pursuant to W. Va. Code § 17C-5A-1(c), once the Commissioner reviews the DUI Information Sheet and determines that a person has committed a DUI offense, then the Commissioner “shall make and enter an order revoking or suspending the person’s license...” West Virginia Code § 17C-5A-1(c) makes no mention of a stop, an arrest (lawful or otherwise) or any other requirement for the Commissioner to consider. Quite simply, the administrative revocation process statutorily mandates that the Commissioner examine the evidence of drunk driving submitted by the investigating officer (the DUI Information Sheet and the Informed Consent document) and revoke the driver’s license.

In DUI administrative hearings, W. Va. Code § 17C-5A-2(f)(2010) charges the OAH to 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 eight 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 chemical test; and
- (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five [§§ 17C-5-1 et seq.] of this chapter.

It is important to remind the Court that the language in § 17C-5A-2(f)(2) above is identical to the language present in the Code in 2008 and 2005; is wholly unrelated to the stop; and is gleaned from W. Va. Code § 17C-5-4(c) which states:

A secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

For clarification purposes, W. Va. Code § 17C-5-4(c) merely gives the investigating officer direction regarding administration of the secondary chemical test, while, in comparison, W. Va. Code § 17C-5-4(b) gives the officer direction regarding the administration of the preliminary breath test:

A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has reasonable cause to believe a person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

The lawful arrest language in W. Va. Code § 17C-5-4(c) relates only to the admissibility of the secondary chemical test. Secondary breath test results cannot be considered if the test was administered when the driver was not lawfully arrested meaning that the officer had not gathered enough evidence to have a reasonable suspicion to believe that the driver had been driving while under the influence of alcohol, drugs or controlled substances. Any definition of lawful arrest contained in W. Va. Code § 17C-5A-2 that disregards its limited use in W. Va. Code § 17C-5-4 is overreaching.

The phrase “[a] secondary test of blood, breath or urine shall be incidental to a lawful arrest” means that the results of a chemical test are not admissible unless it was done in connection with, or “incidental” to, a lawful arrest. This is the construction we placed on this statutory language in *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), where we found a blood test to be inadmissible because it was not taken incident to a lawful arrest.

Albrecht v. State, 173 W. Va. 268, 272, 314 S.E.2d 859, 863 (1984).

Therefore, even though the circuit court determined that Mr. Odum was not lawfully arrested,

only the secondary chemical test, if Mr. Odum had submitted to one, could be ignored. However, a secondary chemical test was not required for the OAH to determine that Mr. Odum was DUI because where there was more than adequate evidence reflecting that Mr. Odum, who was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication and had consumed an alcoholic beverage. *Albrecht v. State*, 173 W. Va. 268, 273, 314 S.E.2d 859, 864-865 (1984).

Simply put, the Commissioner submits that "lawful arrest" is limited to the arrest itself while the circuit court below determined that "lawful arrest" must include the "legality of the initial traffic stop." (A. R. at P. 9.) However, the stop and the arrest are two separate and distinct functions of the investigating officer.

In the instant case, the arrest occurred after Corporal Whitt came on scene to investigate Mr. Odum almost hitting Patrolman Manning's patrol car. At that point, Mr. Odum had ceased driving, and was arrested only after there were reasonable grounds for the investigating officer to believe that Mr. Odum was DUI. The arrest was lawful not because of the nature of how the investigating officer came to encounter Mr. Odum but because Mr. Odum had the odor of an alcoholic beverage on his breath, was unsteady while exiting his vehicle and standing, staggered while walking to the roadside, had slurred speech, had glassy and bloodshot eyes, admitted to drinking "at Fosters," failed three field sobriety tests and failed the preliminary breath test with a result more than twice the legal limit. Once Corporal Whitt gathered the evidence of DUI, he was justified in arresting Mr. Odum and compelling him to take a secondary chemical test pursuant to the provisions of W. Va. Code § 17C-5-4. The circuit court's conclusion ignores W. Va. Code § 17C-5-4 and W. Va. Code § 17C-5A-1 in favor of a contrived interpretation of a lawful arrest in order to preserve application of the criminal

exclusionary rule in administrative license revocation proceedings.

In *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005), Justice Davis cautioned against exceeding the parameters of W. Va. Code § 17C-5A-2, which provides that if a person was arrested for DUI, and the results of the secondary chemical test show that the person had a blood alcohol content in excess of eight hundredths of one percent, the Commissioner of the DMV shall revoke the license. No more than that should be read into the statute.

Thus, in describing when the commissioner shall order revocation of a driver's license based upon the written statement of the arresting officer, the Legislature has mandated that the commissioner examine the document to determine that "a person *was arrested*." W. Va. Code § 17C-5A-1(c) (emphasis added). "In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984). *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 27, 488 S.E.2d 20, 27 (1997). There is nothing in this statute to indicate that the commissioner must confirm that the individual was actually criminally charged with DUI, through a criminal complaint or otherwise, as a prerequisite to revoking a driver's license.

"[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted*." ... Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."

Perito v. County of Brooke, 215 W. Va. 178, 184, 597 S.E.2d 311, 317 (2004) (additional internal quotations, and citations, omitted).

217 W. Va. 748, 760, 619 S.E.2d 261, 273 (2005).

Likewise, there is no requirement of a valid stop to support the lawful arrest and subsequent license revocation of a driver who has driven while under the influence of drugs or alcohol. The

appropriate grounds for review of the legitimacy of a final order of revocation from the Commissioner were also set forth in *Cain v. W. Va. Div. of Motor Vehicles*, — W. Va. —, 694 S.E.2d 309 (2010) and *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010). In *Cain*, this Court held:

As set forth in W. Va. Code § 17C-5A-2(f) (2008), the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.

Syl. Pt. 3, *Cain, supra*.

In *Groves, supra*, this Court held, "[t]he principal determination to be made at a DMV hearing regarding revocation of a driver's license for DUI is 'whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs.' W. Va. Code § 17C-5A-2(e)." 225 W. Va. 478, 694 S.E.2d 643. This Court in *Groves* further reasoned,

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 Point 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008).

225 W. Va. 480, 694 S.E.2d 645.

These holdings reflect the circumscription of W. Va. Code § 17C-5A-2 about which Justice

Davis spoke in her concurrence in *Carroll, supra*. Based upon the reasons set forth above, the evidence obtained by the investigating officer in his investigation supported the lawfulness of Mr. Odum's arrest, and the circuit court's order denying the Commissioner's Petition for Appeal should be reversed.

This Court has always drawn a bright line between the criminal DUI procedures and the civil, administrative license revocation procedures: "It is also well established that a proceeding to revoke a driver's license is a civil not a criminal action." *Shumate v. W. Va. Dept of Motor Vehicles*, 182 W. Va. 810, 813, 392 S.E.2D 701, 704 (1990), cited at FN9 of *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012). The circuit court's inclusion of the nature of the stop in its interpretation of lawful arrest superimposes in this civil, administrative process the state of the law in the criminal process.

Since the Commissioner's sole authority in W. Va. Code § 17C-5A-1(c) is to revoke all drunk drivers who have committed a DUI offense, the circuit court's order now suggests that the Legislature had intended to create two classes of drunk drivers: those where the officers may not have followed the criminal procedure exactly regarding the nature of the stop and those where there was either no stop at all or one which the circuit court would deem "lawful." At the time that the Commissioner must act to revoke, that information is not readily available for the Commissioner's consideration - nor is it even relevant given the Commissioner's limited authority to revoke *all* drunk drivers. "The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible." Syl. Pt. 3, *In re petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005). If the Commissioner were required to consider the nature of the stop during its review for revocation, then

the purpose of the administrative license revocation procedures would be greatly frustrated.

B. The circuit court erred in ignoring W. Va. Code § 17C-5A-2(e) and in effect applying the exclusionary rule to the instant civil, administrative license revocation proceeding in violation of this Court's recent decisions in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, —W. Va. —, 729 S.E.2d. 137 (2012).

Only once the administrative process goes to a hearing before the Office of Administrative Hearings does the civil, administrative matter somehow bastardize into a quasi-criminal proceeding where all evidence of whether a person was DUI can be excluded. If all evidence of intoxication is ignored, then the criminal exclusionary rule has been applied meaning that the OAH (and subsequently the circuit court on review) ignored the statutory requirement in W. Va. Code § 17C-5A-2(e) which states that “the principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol...”

Instead of making a determination that Mr. Odum was or was not DUI based upon the evidence of intoxication, the circuit court below simply ignored all of that evidence and concluded that he was not lawfully arrested. In fact, the closest that the circuit court came to making a finding about whether or not Mr. Odum drove while under the influence of alcohol was its conclusion that “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.” (A. R. at P. 11.) Regardless of the circuit court’s denial of the application of the criminal exclusionary rule, its total disregard for the evidence of DUI obtained by the investigating officer while focusing solely on the nature of the stop, is, indeed, the application of the exclusionary rule.

This Court has made quite clear that the exclusionary rule does not apply to civil license

revocation proceedings. See, *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, —W. Va. —, 729 S.E.2d. 137 (2012). If the exclusionary rule does not apply to the proceedings, then the authority of the Commissioner to consider the nature of a stop is irrelevant because the evidence would be admitted regardless of the validity of the stop. *Miller v. Toler*, — W. Va. —, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012). If the exclusionary rule is not applied to the instant matter, then the following evidence of Mr. Odum's intoxication must be admitted and considered: the odor of an alcoholic beverage on his breath, was unsteady while exiting his vehicle and standing, staggered while walking to the roadside, had slurred speech, had glassy and bloodshot eyes, admitted to drinking "at Fosters," failed three field sobriety tests and failed the preliminary breath test with a result of .168%. Such evidence was not considered by the OAH or the circuit court below.

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. In *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), this Court, relying on the statutory language pertaining to DUI offenses, determined that an arrest is lawful if the arresting officer has "reasonable grounds" to believe the offense was committed. In *Byers*, this Court concluded that the "evidence reflecting symptoms of intoxication and consumption of an alcoholic beverage was sufficient to justify submission of the case to the jury." 159 W. Va. 609, 224 S.E.2d 734. More importantly, this Court recognized that it is only the evidence of intoxication and consumption which is truly relevant to the question of whether a person was DUI. *Id.*

Here, both the DUI Information Sheet completed by Corporal Whitt and his unrebutted testimony clearly indicated that Mr. Odum had the odor of alcoholic beverage on his breath; was

unsteady exiting the vehicle; staggered walking to the roadside; was unsteady while standing; had slurred speech; had glassy and bloodshot eyes; admitted to “drinking at Fosters;” failed the horizontal gaze nystagmus test; failed the walk and turn test; failed the one leg stand; and blew a .168% on the preliminary breath test. Additionally, Corporal Whitt’s uncontroverted testimony revealed that Mr. Odum admitted that he had been driving the subject vehicle.

“A police officer may arrest a person if he has probable cause to believe that person committed a crime.” *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Under Syllabus Point 1 of *State v. Plantz*, 155 W. Va. 24, 180 S.E.2d 614 (1971), *overruled in part on other grounds*, *State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981), probable cause to arrest without a warrant exists “when the facts and the circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed.”

The fact that Corporal Whitt failed to witness Mr. Odum driving the vehicle is irrelevant here as well. This Court has held that

“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.” Syllabus Point 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984).

W. Va. Code § 17C-5A-1a (a) (1994) 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.

Syllabus Pts. 1 and 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

It is without question that the DMV proved that Corporal Whitt had a reasonable and

articulable suspicion that Mr. Odum had been driving under the influence of alcohol; therefore, the OAH and the circuit court erred when they ignored all evidence of DUI and failed to answer the principal question at hearing.

C. This Court should reconcile its holding in *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009) regarding a valid stop with its holdings in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, —W. Va. —, 729 S.E.2d. 137 (2012) which state that the exclusionary rule does not apply to civil, administrative license revocation proceedings.

The circuit court below found that in “interpreting the previous 2004 version of the statute, which required a lawful arrest finding, the [Supreme] 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...*” (A. R. at P. 9.) *Clower* simply is inapplicable to the instant matter and necessitates retrospection by this Court.

First, even though the criminal exclusionary rule was not applied by name, indeed it was applied by this Court in *Clower*. There, the driver and the officer were the only vehicles on the road late at night, and the driver was pulled over solely for not using his turn signal to make a turn. After *Clower* was stopped, the officer noticed that *Clower* had slurred speech, bloodshot and glassy eyes, and the odor of alcohol on his breath; therefore, the officer began an investigation into a possible violation for DUI. After conducting field sobriety tests and gathering other evidence of DUI, the officer arrested *Clower*, and the Commissioner revoked his driver's license which *Clower* appealed. At the administrative hearing, *Clower* argued that under W. Va. Code § 17C-8-8(a), a driver is only required to use a turn signal when “other traffic may be affected by [the turn].” Because the officer was “approximately two city blocks” behind *Clower's* vehicle at the time of the turn, and that there were no other cars on the roadway at the time, *Clower* argued that the officer did not have a

reasonable, articulable suspicion to stop Clower.

The revocation was upheld at the administrative level, so Clower appealed to the circuit court. There, the circuit court reversed the revocation finding, *inter alia*, that under the circumstances of the case, Clower was not required by W. Va. Code § 17C-8-8(a) or §17C-8-9 to have used a turn signal because “no traffic whatsoever could be affected by Clower's failure to signal” and that the officer did not have the requisite reasonable suspicion to stop Clower's vehicle. The Commissioner appealed the decision of the circuit court.

In its opinion, this Court determined that “[t]he circuit court therefore properly concluded that ‘no traffic whatsoever could be affected by [Mr. Clower's] failure to signal’ and that Trooper Kessel did not have the requisite reasonable suspicion to stop Mr. Clower's vehicle.” 223 W. Va. 535, 543, 678 S.E.2d 41, 49 (2009). This Court then went on to discuss whether the circuit court erred in reversing the Commissioner's revocation.

As we have found, *supra*, Trooper Kessel's stopping Mr. Clower's vehicle was not “justified at its inception,” *Terry v. Ohio*, 392 U.S. at 20, 88 S.Ct. 1868. Further, that Trooper Kessel did not have grounds upon which to form an articulable reasonable suspicion to believe that Mr. Clower had committed a misdemeanor traffic offense in violation of W. Va. Code, 17C-8-9. Additionally, Trooper Kessel's own testimony excludes any possibility that Trooper Kessel had any reason, prior to stopping Mr. Clower's vehicle, to believe that Mr. Clower was driving under the influence of alcohol.

Based on these facts, the circuit court concluded that Mr. Clower's 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. The Commissioner's hearing examiner was clearly wrong in concluding that Mr. Clower was lawfully placed under arrest for the reasons we have discussed in this opinion and the circuit court properly followed the Legislative mandate set forth in W. Va. Code, 29A-5-4(g)—a mandate that specifically requires a circuit court to “reverse, vacate or modify” the Commissioner's order where the Commissioner's order was

founded upon findings and conclusions that were in violation of constitutional or statutory provisions or made pursuant to unlawful procedure. In Mr. Clower's case, W. Va. Code, § 17C-5A-2(e) (2004) required that Mr. Clower's have been lawfully arrested—he was not.

223 W. Va. 535, 544, 678 S.E.2d 41, 50 (2009).

After discussing the issue of reasonable suspicion for the stop, this Court completely disregarded all evidence of Clower's DUI (odor of alcohol, bloodshot and glassy eyes, slurred speech, failure of three field sobriety tests, failure of the preliminary breath test, and a secondary chemical test resulting in a .182% blood alcohol content). That is *exactly* the application of the exclusionary rule regardless of whether this Court labeled it so. Even though this Court did not specifically overrule its holding in *Clower* last year in *Miller v. Toler*, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012), it did hold that the criminal exclusionary rule is inapplicable in civil, administrative license revocation proceedings. Based upon this Court's decisions in *Toler* and *Smith*, it necessarily follows that this Court needs to revisit its decision in *Clower* and its application of the exclusionary rule in that matter.

Additionally, this Court in *Clower* did not consider that W. Va. Code § 17C-5A-1(c) does not require the Commissioner to analyze the nature of an arrest before revocation, and it did not consider that previously the Legislature, at the Commissioner's request, specifically removed the arrest language from that section so that an arrest would not be misconstrued as a predicate to revocation. Specifically, W. Va. Code § 17C-5A-1(c) states in pertinent part that,

If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner determines that a person committed an offense described in section two, article five of this chapter or an offense described in a municipal ordinance which has the same elements as an offense described in said section and that the results of any secondary test or tests

indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person committed the offense he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking or suspending the person's license to operate a motor vehicle in this state...

Therefore, as the Legislature plainly said, the Commissioner revokes a driver's license when the DUI Information sheet is received and, based upon the information contained therein, the Commissioner determines that the driver was either DUI or that the secondary chemical test was .08% or above. There are no other requirements placed upon the Commissioner for administrative revocation - no review of the validity stop, no review of the arrest, no review of any other factors. Neither Mr. Odum, nor the OAH, nor the circuit court can add revocation requirements to that which has already been decided by the Legislature.

Clower is further inapplicable here because *Clower* never considered the language in W. Va. Code § 17C-5-4(c) which provides:

[a] secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

"Lawful arrest" is only a predicate for secondary chemical testing, and one must consider the grounds the officer relied upon to make the arrest to determine whether it was lawful. If the arrest is not considered lawful (i.e., the officer could not show why he reasonably believed the driver was DUI), then only the evidence of the secondary chemical test can be ignored - not all of the other evidence of DUI because that would be the application of the criminal exclusionary rule.

A stop is not an arrest, and *Clower* conflated the two just as the OAH and the circuit court did in the matter now before this Court. As the DMV outlined above, the stop and the arrest are two separate and distinct functions of the investigating officer. In *Clower*, this Court determined that the officer's stopping Clower's vehicle was not "justified at its inception" and that the officer did not have grounds upon which to form an articulable reasonable suspicion to believe that Clower had committed a misdemeanor traffic offense in violation of W. Va. Code § 17C-8-9. *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 543, 678 S.E.2d 41, 49 (2009).

In the instant case, the reason that Mr. Odum was *stopped* was because he took a turn too sharply and almost hit a police officer in his cruiser. The reason Mr. Odum was *arrested* was that he exhibited indicia of intoxication. The arrest occurred after Mr. Odum ceased driving and only after there were reasonable grounds for the investigating officer to believe that Mr. Odum was DUI. The arrest was lawful not because of the nature of how the investigating officer came to encounter Mr. Odum but because Mr. Odum had the odor of alcoholic beverage on his breath; was unsteady exiting the vehicle; staggered walking to the roadside; was unsteady while standing; had slurred speech; had glassy and bloodshot eyes; admitted to "drinking at Fosters;" failed the horizontal gaze nystagmus test; failed the walk and turn test; failed the one leg stand; and failed preliminary breath test with a result which was more than two times the legal limit.

The Legislature would be required to say something more than just to repeat "lawful arrest" from W. Va. Code § 17C-5-4 in §17C-5A-2 in order to make the exclusionary rule apply here and to prove an escape mechanism from protecting the innocent public from drunk drivers. *Clower* made bad law in order to preserve a bad practice of applying the exclusionary rule to administrative

hearings. This Court cleaned up that bad practice in *Smith* and *Toler* by making the exclusionary rule inapplicable to administrative license revocations.

If the members of the Legislature had wanted to require the Commissioner to evaluate the stop and then disregard the evidence of DUI, then they would have put that language in the statutes in 2010 when the DUI defense attorneys wrote the bill for them. That did not happen, and this Court cannot read language into the statute which simply is not there. Anecdotally, in 2010, the Legislature never discussed the bill as a requirement to analyze the stop or to apply the exclusionary rule.

Finally, if the this Court were to determine that a drunk driver can avoid an administrative license revocation simply because not all of the sobriety checkpoint witnesses were at the administrative hearing, then this Court also needs to give the Commissioner the authority to ignore drunk drivers at the initial revocation stage instead of enforcing a "hearing only" rule for the benefit of DUI defense attorneys.

VI. CONCLUSION

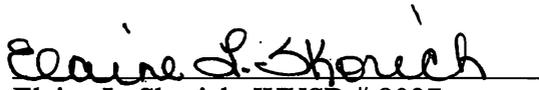
For the above-listed reasons, the Final Order of the circuit court should be reversed.

Respectfully submitted,

STEVEN O. DALE, Acting Commissioner,
Division of Motor Vehicles,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-1403
(Circuit Court Civil Action No. 12-AA-12)

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

Respondent below/Petitioner

v.

JAMES A. ODUM,

Petitioner below/Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 26th day of February, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Randy Hoover, Esquire
P. O. Box 5521
Beckley, WV 26801


Elaine L. Skorich