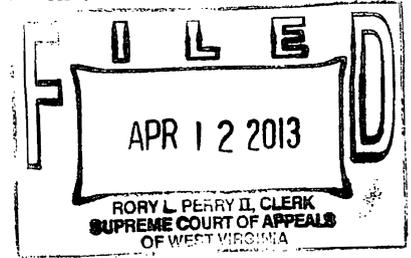


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-1403
(Circuit Court Civil Action No. 12-AA-12)**



**JOE E. MILLER, COMMISSIONER
OF THE 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

RESPONDENTS BRIEF

Respectfully submitted,

JAMES A. ODUM,

By Counsel,

**RANDY D. HOOVER #1782
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Beckley, WV 25801
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TABLE OF CONTENTS

I. PETITIONER'S ASSIGNMENTS OF ERROR..... 1

 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€ and in
 effect applying the exclusionary rule to the instant civil, administrative
 license revocation proceeding in violation of the Court's recent decision
 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..... 1

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION..... 4

IV. ARGUMENT..... 4

V. CONCLUSION..... 5

VI. CERTIFICATE OF SERVICE..... 6

TABLE OF AUTHORITIES

STATE CASES:	Page
<i>State ex rel. Cooper v. Caperton</i> , 196 W. Va. 208, 470 S.E.2d 162 (1996).....	4
<i>In re Michael Ray T</i> , 206 W. Va. 434, 525, S.E. 2d 315 (1999).....	4

STATUTES:	Page
W. Va. Code § 17C-5A-1.....	2
W. Va. Code § 17C-5A-2.....	2, 3

I. PETITIONER'S 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 the 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, Respondent was operating a motor vehicle on Robert C. Byrd Drive within the jurisdictional limits of the City of Beckley, Raleigh County, West Virginia. (Administrative Hearing Transcript at p. 41). Patrolman Manning of the Sophia Police Department observed Respondents vehicle drive through a red light and come close to striking the police cruiser. (Transcript at p. 40). As a result Patrolman Manning initiated a traffic stop of Respondent (Tr. at p. 41-42). After observing the Respondent, Patrolman Manning testified that he immediately contacted the Beckley City Police Department by calling 911, the Emergency Operations Center (Tr. at p .43).

Patrolman Manning testified that he believed a mutual aid agreement existed between the Sophia Police Department and the Beckley City Police Department giving

him the authority to make a traffic stop within the city limits of Beckley (Tr. p.42).

The Emergency Operations Center dispatched Corporal Steven Whitt with the Beckley Police Department to the scene. (Tr. at p.11). According to Patrolman Manning, he relayed the reason he stopped Respondent to Corporal Whitt. (Tr. at p. 44). Later, Corporal Whitt completed the DUI Information Sheet while at the Beckley Police Department. (Tr. at p.22). Using the information provided to him by Patrolman Manning, Corporal Whitt recorded the reason for stopping Respondent's vehicle as "straddling center line" (Administrative Record at p.162, hereinafter A.R.)

After speaking with Patrolman Manning, Corporal Whitt approached the vehicle and spoke with Respondent. After smelling the odor of an alcoholic beverage and observing the usual indications of intoxication Corporal Whitt conducted some field sobriety tests which Respondent failed. (Tr. at p.11-17 and A.R. at p. 162-163). Respondent failed the Preliminary Breath Test at the scene and after being taken into custody for DUI Corporal Whitt transported Respondent to the Beckley Police Department where Respondent refused to submit to the secondary chemical test. (Tr. at p.18, 20-22 and A.R. at p. 164-165).

On October 13, 2010 Petitioner issued an Order of Revocation, pursuant to W.Va. Code § 17C-5A-1, revoking Respondent's drivers license for DUI and for refusing the secondary chemical test. (A.R. at p. 160). Pursuant to W.Va. Code § 17C-5A-2, an administrative hearing, timely requested by Respondent, was held on July 27, 2011 before the Office of Administrative Hearings (OAH). After the hearing, and without objection, OAH received a letter from the Beckley Chief of Police, Timothy P. Deems, stating that no mutual aid agreement existed between the City

Of Beckley and the Town of Sophia police departments. (A.R. at p. 90-94).

On December 21, 2011 the OAH entered a Final Order reversing the revocation of Respondents license. In the Final Order, the OAH Hearing Examiner 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.” (A.R. at p.80). The Hearing Examiner also found that the information recorded by Corporal Whitt indicating the reason for the stop of Respondent vehicle was materially inconsistent with Patrolman Manning’s testimony regarding the reason for the stop.(A.R. at p.79). Additionally, the Hearing Examiner found that Patrolman Mannings testimony regarding a mutual aid agreement was flatly contradicted by the letter from the Beckley Chief of Police. (A.R. at 80-81). Due to the existence of this material conflicting evidence, the Hearing Examiner concluded that it could not be reasonably concluded that the Investigating officer, Corporal Whitt, had no reasonable grounds to believe Respondent had been driving under the influence nor that Respondent was lawfully arrested for the offense, a necessary element under W.Va. Code § 17C-5A-2 (A.R. at p.82).

Petitioner filed a Petition for Judicial Review with the Circuit Court on January 23, 2012. (A.R. at p.69).

On October 24, 2012 the Circuit Court entered its Final Order Denying Petition for Judicial Review affirming the decision of the OAH that reversed the Commissioner’s order revoking Respondents drivers license for DUI and for refusing to submit to the secondary chemical test. This case now before this Court on appeal from that decision by the Division of Motor Vehicles.

III. STATEMENT REGARDING ORAL ARGUMENT

Due to financial constraint Petitioner requests the case be decided on review of the entire record and submitted briefs.

IV. ARGUMENT

After a review of the transcript of the Administrative Hearing (A.R.) the Final Order of the OAH (A.R. at p.77), the entire Petition for Judicial Review, below, (A.R.at p. 47) and in particular the Petitioner's Assignment of Error relied upon an Appeal, below, (A.R. at p.49) none of the alleged errors raised on this appeal before this Court were properly preserved below. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a Circuit Court to the nature of the claimed defect." Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E. 2d 162 (1996); see also Syl. Pt. 6, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E. 2d 315 (1999) (stating that "[t]he responsibility and burden of designating the record is on the parties, and appellate review must be limited to those issues which appear in the record presented to this Court."). Accordingly, this Court should decline to address issues not properly raised nor preserved as error below.

The circuit court, below, properly addressed the issues raised by Petitioner and properly affirmed the decision of the OAH. Respondent contends that the decision of the Circuit Court below, is supported by substantial evidence and a proper application of the law.

VI. CONCLUSION

For the above-listed reasons, the Final Order of the Circuit Court should be affirmed.

Respectfully submitted,

JAMES A. ODUM,

By Counsel,

RANDY D. HOOVER
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Beckley, WV 25801
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JOE E. MILLER, COMMISSIONER OF
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MOTOR VEHICLES,

Respondent below/Petitioner

v.

JAMES A. ODUM,

Petitioner below/Respondent.

CERTIFICATE OF SERVICE

I, Randy D. Hoover, Attorney for Respondent, does certify that I served a true and correct copy of the forgoing **RESPONDENT'S BRIEF** on this 12th day of April, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Elaine L. Skorich
Assistant Attorney General
DMV-Office of the Attorney General
P.O. Box 17200
Charleston, WV 25317-0010



RANDY D. HOOVER