

12-1509

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-6
Judge Louis H. Bloom

CHAD DOYLE,

Respondent.

FINAL ORDER
DENYING PETITION FOR JUDICIAL REVIEW

Pending before this Court is a "Petition for Appeal" ("Petition") filed on January 17, 2012, by the Petitioner, Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles ("Petitioner"), by counsel, Janet E. James. 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 16, 2011, following an administrative hearing on the matter held on March 31, 2011. The Final Order reversed the Petitioner's "Order of Revocation" entered on December 21, 2010, which revoked the driving privileges of Chad A. Doyle ("Mr. Doyle") for the offense of driving a motor vehicle while under the influence of alcohol ("DUI") with a blood alcohol concentration level of eight hundredths of one percent (.08) or more, but less than fifteen hundredths of one percent (.15) by weight.

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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. On November 5, 2010, Martin Glende, a Trooper First Class for the West Virginia State Police ("Trooper Glende"), arrested Mr. Doyle for the offense of driving under the influence of alcohol in Charles Town, West Virginia. Admin. File Ex. 7.

2. On December 21, 2010, the Petitioner entered an "Order of Revocation," revoking Mr. Doyle's driver's license for driving under the influence. Admin. File Ex. 2.

3. An administrative hearing, timely requested by Mr. Doyle, was held on March 31, 2011. The only evidence presented by the Petitioner at said hearing was the testimony of Trooper Glende and the exhibits and case file entered into evidence. Final Order 3. As stated in the Final Order, "The exhibits in the case file in this matter were received into evidence, over [Mr. Doyle's] timely objection, on the Hearing Examiner's own motion, pursuant to the policy of the [OAH] in effect at that time." Final Order 3.

4. At the administrative hearing before the OAH, Trooper Glende testified that at approximately 3:20 a.m. on the morning of November 5, 2010, he was contacted by a Charles Town Police Patrolman, Benjamin Anderson ("Patrolman Anderson"), regarding a possible intoxicated driver. Admin. Hr'g Tr. 9:1-15, March 31, 2011. Trooper Glende testified that Patrolman Anderson relayed that he had made a traffic stop on a vehicle on State Route 51 near the intersection of Jefferson Avenue in the city limits of Charles Town, West Virginia, and suspected that the driver, Mr. Doyle, was intoxicated. Admin. Hr'g Tr. 9:17-19; *see also* Final Order 2.

5. Mr. Doyle's counsel timely objected to Trooper Glende's testimony regarding his conversation with Patrolman Anderson as hearsay. Admin. Hr'g Tr. 9:20-24, 10:1-6. The parties stipulated that the hearsay testimony was only offered to show why Trooper Glende acted the way he did and not for the truth of the matter asserted. Admin. Hr'g Tr. 10:7-14.

6. Trooper Glende continued testifying that he pulled up behind Mr. Doyle's vehicle and approached Mr. Doyle. Admin. Hr'g Tr. 11:3-10. According to Trooper Glende, Mr. Doyle advised him that he was coming from the race track and had consumed approximately five beers. *Id.* Trooper Glende testified that he observed Mr. Doyle as having a strong odor of alcoholic beverage from his breath, and his eyes were bloodshot. *Id.*

7. According to Trooper Glende, it was at that point, he instructed Mr. Doyle to exit his vehicle for field sobriety tests. Admin. Hr'g Tr. 10:13-15. Trooper Glende testified that Mr. Doyle failed the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. Admin. Hr'g Tr. 12:23-24, 13:1. Trooper Glende further testified that he then administered a preliminary breath test, which Mr. Doyle failed as well. Admin. Hr'g Tr. 14:21-24.

8. After administering a preliminary breath test, Trooper Glende testified that he arrested Mr. Doyle for the offense of driving under the influence and took him to the Charles Town Police Department for processing. Admin. Hr'g Tr. 19:1-7. Once at the police station, Trooper Glende testified that he performed a secondary chemical test on Mr. Doyle, with his consent. Admin. Hr'g Tr. 20:6-16. Trooper Glende testified that the

results of that test indicated that Mr. Doyle had a blood alcohol level of 0.107%. Admin. Hr'g Tr. 20:14–23; *see also* DUI Information Sheet, Admin. File Ex. 7.

9. On December 16, 2011, the OAH entered a Final Order reversing the Petitioner's revocation of Mr. Doyle's driver's license. In the Final Order, the OAH Hearing Examiner specifically found that the investigating officer, Trooper Glende, did not observe Mr. Doyle operating a motor vehicle, nor did he observe any intentional movement of the motor vehicle by Mr. Doyle. Final Order 4. Further, the OAH found that Patrolman Anderson, the officer who initiated the traffic stop of Mr. Doyle, "did not appear at the administrative hearing to offer testimony regarding his articulable suspicion to initiate an investigative stop of [Mr. Doyle's] motor vehicle." *Id.* Based on these findings, the OAH concluded that "the record is absent any credible testimony regarding the articulable reasonable suspicion for the traffic stop of [Mr. Doyle's] vehicle." *Id.* The OAH also determined that no evidence in the record established that the officer responsible for the initial stop, Patrolman Anderson, had probable cause to believe that Mr. Doyle had been driving under the influence. *Id.* Therefore, the OAH concluded that the criteria required to prove by a preponderance of the evidence that Mr. Doyle drove under the influence on November 5, 2010, was not met. *Id.*

10. On January 17, 2012, the Petitioner, by counsel, filed a "Petition for Appeal" ("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, *Muscattell 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 (1) did not properly weigh the evidence in this matter according to the appropriate standard, (2) excluded improperly the evidence of Mr. Doyle's intoxication obtained after the stop of the vehicle, and (3) disregarded evidence which clearly showed that Mr. Doyle drove a motor vehicle while under the influence of alcohol. Pet. 3.

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.¹ *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

¹ 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.

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).²

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 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

² 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.

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).

8. The crux of the Petitioner’s argument is that the OAH applied the wrong standard in evaluating Mr. Doyle’s license revocation, and the OAH, through application of the

exclusionary rule, improperly excluded evidence from its decision. The Court finds no merit in these assignments of error.

9. First, when making the argument that the OAH used the wrong standard, the Petitioner relies on the incorrect version of the applicable license revocation statute. *See* Pet. 5 (quoting W. Va. Code § 17C-5A-2(f) (2008)). The Petitioner relies on the 2008 version of the statute, which does not require the OAH to make a specific finding that Mr. Doyle was lawfully placed under arrest. As discussed above, however, the applicable version of the statute to Mr. Doyle's arrest is the current version of the statute, which requires the finding of a lawful arrest. *See* W. Va. Code § 17C-5A-2(f) (2012).

10. Second, the Petitioner relies on cases that are distinguishable from the facts of the instant case for the proposition that Trooper Glende did not have to observe Mr. Doyle drive in order to arrest him for the offense of driving under the influence. *See* Pet 6 (quoting *Cain v. West Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010); *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997); and *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam)). The cases relied on by the Petitioner, however, did not involve an investigatory stop like the instant case.

11. In *Cain*, the arresting officer "discovered Mr. Cain asleep on the ground in front of his vehicle." 225 W. Va. at 469, 694 S.E.2d at 311. In *Carte*, the arresting officer, responding to an emergency call, came upon the driver slumped behind the wheel of his vehicle at a stop light. 200 W. Va. at 163, 488 S.E.2d at 438. The driver "appeared to be passed out with the engine running, the transmission in drive, and his foot on the brake." *Id.* at 163-164, 438-39. In *Groves*, the arresting officer came upon the scene of an

accident where the driver's car had "skidded over the guardrail." 225 W. Va. at 476, 694 S.E.2d at 641.

12. The instant case is of an entirely different character. Trooper Glende did not just happen upon Mr. Doyle asleep on the ground in front of his vehicle, passed out behind the wheel of his vehicle at an intersection, or at the scene of an accident. Mr. Doyle was stopped by another officer, Patrolman Anderson. Admin. Hr'g Tr. 9:17-19. As discussed above, in answering the question of whether Mr. Doyle had driven under the influence of alcohol, the OAH is required to make specific findings, including whether the arrest of Mr. Doyle was lawful. *See* W. Va. Code 17C-5A-2(f). Where there is an investigatory stop, like the one performed on Mr. Doyle by Patrolman Anderson, the stop must be valid in order to have a lawful arrest. Here, the OAH was unable to make such a finding because no evidence was presented on the validity of the stop of Mr. Doyle's vehicle. The OAH found that no credible evidence was presented regarding Patrolman Anderson's articulable reasonable suspicion for the traffic stop of Mr. Doyle's vehicle. Final Order 4. The Court finds that the OAH was not clearly wrong in such evidentiary determination, and the OAH used the appropriate standard for which to judge the legality Mr. Doyle's arrest.

13. Third, the Petitioner argues that evidence presented at the administrative hearing was sufficient to affirm the revocation of Mr. Doyle's driving privileges because the exhibits and case file were admitted into evidence pursuant to W. Va. Code § 29A-5-2 and 91 C.S.R. 1, § 3.9.4.b and were authenticated by Trooper Glende. Pet. 4. (citing *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 7631 S.E.2d 6287 (2006); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008); and *Groves*, 225 W.

Va. 474, 694 S.E.2d 639). Essentially, the Petitioner argues that the DUI Information Sheet, the criminal complaint, and Trooper Glende's written statement contain evidence of Patrolman's Anderson's reasons for making the investigatory stop of Mr. Doyle's vehicle. *See* Pet. 5; Appeal Hr'g Tr. 4:19-24, May 24, 2012; Admin. File Ex. 7. However, these documents were completed by Trooper Glende, and his "knowledge of the situation was the result of his communication with [Patrolman] Anderson and his own investigation." Pet. 5.

14. In *Crouch*, the West Virginia Supreme Court of Appeals held that in an administrative hearing, a statement of an arresting officer is admissible pursuant to W. Va. Code § 29A-5-2(b). 219 W. Va. at 76, 631 S.E.2d at 634. The Court went further to say, however, "that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy." *Id.* at n.12.

15. Here, the contents of the document were clearly challenged at the administrative hearing. Mr. Doyle's counsel timely objected to the hearsay statements reported by Trooper Glende in regards to his communication with Patrolman Anderson. Admin. Hr'g Tr. 9:20-24, 10:1-6. In the hearing, the Petitioner agreed to the stipulation that Trooper Glende's statements about his conversation with Patrolman Anderson were offered to show why Trooper Glende "did what he did rather than for the specific truth of the conversation between them." Admin. Hr'g Tr. 10:7-11. Patrolman Anderson did not testify nor was any document written by him admitted into evidence. *See* Appeal Hr'g Tr. 3:1-24. Therefore, the Court finds the OAH was not clearly wrong in its evidentiary

determination that no credible evidence was presented regarding Patrolman Anderson's articulable reasonable suspicion for the traffic stop of Mr. Doyle's vehicle.

16. Lastly, the Petitioner argues that the OAH erred by improperly excluding evidence of Mr. Doyle's intoxication obtained after the stop of his vehicle through the use of the exclusionary rule. The Court also finds no merit in this assignment of error. As discussed above, the OAH is required by statute to make specific findings. *See* W. Va. Code § 17C-5A-2(f) (2012). One of those findings being that Mr. Doyle was lawful placed under arrest. *See id.* 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 Trooper Glende's arrest of Mr. Doyle 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 requiring a lawful arrest and the Supreme Court of Appeals of West Virginia's prior precedent interpreting such language.

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 December 21, 2010. The OAH was not clearly wrong in concluding that no credible evidence was presented to show that a reasonable suspicion existed to stop Mr. Doyle's vehicle, and therefore, a finding that Mr. Doyle was lawfully placed under arrest could not be made.

NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

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CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Notice of Appeal* was served upon the following by depositing true copies thereof, postage prepaid, in the regular course of the United States mail, this 14th day of December, 2012, addressed as follows:

The Honorable Cathy Gatson
Kanawha County Circuit Court
111 Court Street
Charleston, WV 25301

James T. Kratovil, Esquire
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Charles Town, WV 25414



JANET E. JAMES