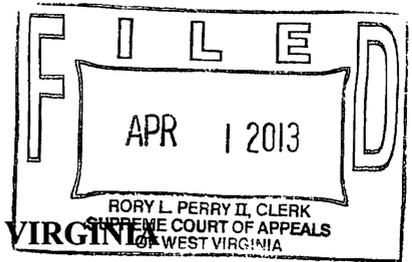


NO. 12-1509



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner Below, Petitioner,

v.

CHAD DOYLE

Respondent Below/Respondent.

SUMMARY RESPONSE

**CHAD A. DOYLE
RESPONDENT
BY COUNSEL
JAMES T. KRATOVIL
KRATOVIL LAW OFFICES PLLC
211 W. WASHINGTON STREET
CHARLES TOWN, WV 25414
(304) 728-7718**

Pursuant to Rule 10(e) of the West Virginia Rules of Appellate Procedure the Respondent submits his summary response to the Petitioner's Assignment of Error

ASSIGNMENT OF ERROR A:

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.

Petitioner is completely wrong when it asserts that “the circuit court excluded evidence showing that Patrolman Anderson stopped the vehicle for failure to obey a traffic signal . . .”

In this case the circuit court merely affirmed the decision of the Office of Hearing on Appeal (hereafter OAH). The circuit court made no evidentiary findings at all.

The ruling of OAH was that the Petitioner, who was represented by counsel, failed to present competent evidence (“the record in this matter does not established sufficient evidence to corroborate that the law enforcement officer had reasonable grounds to initiate an investigative stop of the motor vehicle driven by the Petitioner nor that probable cause existed to believe that the Petitioner had been driving a motor vehicle in this state under the influence of alcohol on the date of the stated offense.. .”) OAH at pg.. 5

The Petitioner fails to recognize that *W. Va. Code 17C-5A-2(f)* mandates specific findings that must be made by the Hearing Examiner when reaching a decision regarding whether the administrative revocation of an individual’s driving privileges for driving under the influence should be upheld. In this instant case, the record is absent any credible testimony regarding the articulable reasonable suspicion for the traffic stop of the Petitioner’s motor vehicle. Further, there was no evidence entered into the record which would establish that the law enforcement officer responsible for the initial investigative stop of the Petitioner’s vehicle had probable cause to believe that the Petitioner had been driving a motor vehicle in this State while under the influence of alcohol on the date of the stated offense.

The Circuit Court, in its findings of fact #9 states that the Hearing Examinder reviewed the case and found:

“On December 9, 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 Examinder 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 Patrolman Anderson, the officer who initiated the stop of Mr. Doyle, “did not appear at the administrative hearing to offer testimony regarding his

articulable suspicion for the traffic stop of [Mr. Doyle's] vehicle.” *Id.*

The Circuit Court went on to conclude that the Petitioner used the wrong statute in making its original argument.

Looking at the applicable statute the Hearing Examiner is required to find that there was a lawful arrest. *W. Va. Code §17C-5A 2(f)*.

In making the decision if there was a lawful arrest the Hearing Examiner is required to determine if the investigatory stop was valid.

Here the Hearing Examiner was unable to make the required finding because there was no competent evidence on whether Mr. Doyle was driving or not.

The Petitioner contends that the Hearing Examiner should ignore the Petitioner's own stipulation at trial and consider the information contained in the DUI Information Sheet even though it was not supported by live testimony.

The Petitioner tries to show that the requirements of §17C-5A 2(f) only relates to the secondary chemical test and that there is no requirement that the arresting officer show that there was a lawful stop and the “requisite articulable reasonable suspicion to initiate a traffic stop . . .”

Clower v. West Virginia Division of Motor Vehicles, 223 *W. Va.* 535, 678 *S. E. 2d* 41(2009).

That flies in the face of established West Virginia law. *Muscatell v. Cline*, 196 *W. Va.* 588, 474 *S. E. 2d* 516(1996); *State v. Stuart*, 192 *W. Va.* 425, 452 *S. E. 2d* 886(1994). *Clower*, *Muscatell* and *Stuart* all require that there must be an articulable reasonable suspicion to support a traffic stop and without one there is no lawful arrest.

To say that the lawful arrest only goes to the secondary chemical test defies a plain reading of the statute. *W. Va. Code 17C-5A 2(f)(2)* requires that the Petitioner to prove that the

driver was lawfully placed under arrest, the second part of that sections states “or” taking into custody for purposes of administering the secondary chemical test.

In this case Trooper Glende testified that he placed Mr. Doyle “under arrest.” Transcript p. 19.

Finally by stipulation the Petitioner agreed that the testimony of Trooper Glende with regard to the statements made by Officer Anderson were hearsay and that they agreed that they would not be admitted for their truthfulness.

Consequently there was no evidence adduced at the hearing that the Hearing Examiner could have used to make a finding.

B. The circuit court erred in 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) *Miller v. Toler*, 229 W. Va. 302, 729 S.E. 2d 137 (2012).

In this case there ws no application of the exclusionary rule. The judge did not exclude anything.

Intoxication in and of itself, is not illegal. You may get drunk at home as often as you like. You can sit by the side of th road and drink alcohol and it is not illegal.

What is illegal is driving a motor vehicle while under the influence of alcohol.

The legislature has made the rule that prior to the officer being allowed to stop an individual they must have a reasonable articulable suspicion of illegal conduct before making a stop.

It is impossible to know in this case from the record what conduct formed the basis of the stop.

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*, 229 W. Va. 302, 729 S.E. 2d 800 (2012) which state that the exclusionary rule does not apply to civil, administrative license revocation proceedings.

Again this case does not implicate the exclusionary rule. This is a case where the Hearing Examiner could not make one of the requisite findings because the Petitioner failed to introduce competent evidence of the purpose of the stop and any driving.

What the Petitioner asks is to morph this case into an exclusionary rule case from what is an essentially a lack of evidence case.

Everybody understands in West Virginia that hearsay is not admissible. Petitioner understood it at the hearing and entered into a stipulation. Now it appears Petitioner has forgotten the rule.

Wherefore your Respondent prays that the Court uphold the decision of the OAH and the Circuit Court of Kanawha County.

Respectfully submitted,

**Chad A. Doyle
Respondent,
By Counsel.**



James T. Kratovil MD #2103
KRATOVIL LAW OFFICES PLLC
211 W. Washington Street
Charles Town, WV 25414
(304) 728-7718

NO. 12-1509

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner Below, Petitioner,

v.

CHAD DOYLE

Respondent Below/Respondent.

CERTIFICATE OF SERVICE

I, James T. Kratovil do hereby certify that the foregoing Summary *Response* was served upon the following by depositing a true copy thereof, postage prepaid by certified mail in the regular course of the United States mail on this the 27th day of March, 2013 addressed as follows:

Jane E. James
Senior Assistant Attorney General
West Virginia State Bar No. 4904
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

Office of Administrative Hearings
Kanawha Valley Building
330 Capitol Street, 10th Floor
Charleston, WV 25301



James T. Kratovil