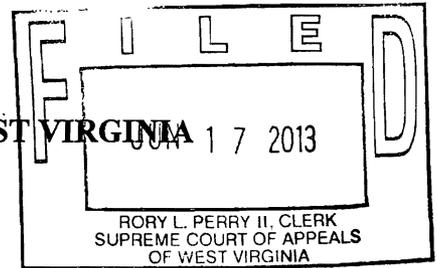


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



RICKY REYNOLDS,

Respondent/Petitioner Below,

v.

No. 13-0266

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

Petitioner/Respondent Below.

BRIEF OF PETITIONER

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICKY REYNOLDS,

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v.

No. 13-0266

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

Petitioner/Respondent Below.

BRIEF OF PETITIONER

Now comes Steven O. Dale, Acting Commissioner and successor to Joe E. Miller, Commissioner of the Division of Motor Vehicles, by and through the undersigned counsel, and hereby submits his brief pursuant to the order of the Court.

Petitioner seeks reversal of the *Final Order*, (hereinafter, "Order") entered by the circuit court of Kanawha County on February 15, 2013. A.R. At 1.

ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED IN FINDING THAT THE PETITIONER DID NOT MEET ITS BURDEN OF PROVING THAT RESPONDENT DROVE WHILE UNDER THE INFLUENCE OF ALCOHOL.**

- II. THE CIRCUIT COURT ERRED IN FINDING THAT THE INVESTIGATING OFFICER'S ABSENCE FROM THE HEARING CREATED A DEFICIT IN THE EVIDENCE.**

STATEMENT OF THE CASE

On June 29, 2010, Deputy C. S. Tusing of the Putnam County Sheriffs Office (Dep. Tusing), the Investigating Officer in this matter, came into contact with the Respondent after being called to assist medics in the parking lot of the Kroger store at 302 Great Teays Boulevard, Scott Depot, West Virginia. Medics had been called to assist a man passed out in his vehicle with the engine running, lights on, and not parked in a parking spot. When the medics woke Respondent up, he started to drive off but the medics stopped him. A. R. At 51, 55. When Dep. Tusing arrived, the Respondent's vehicle was running, and the lights were on. A.R. at 51. The medics banged on the window on Respondent's vehicle and the Respondent finally woke up. A.R. at 51, 126. When he woke up, he was belligerent with the medics. A.R. at 51. Respondent admitted to the medics that he was "drinking beer and vodka this evening". A. R. At 126. Respondent admitted to Dep. Tusing that he had a pint of vodka mixed with water, that he had been at the Scott Depot Park and Ride and he later moved to the Kroger parking lot. A.R. at 51. Dep. Tusing noted on the DUI Information Sheet that Respondent admitted in the post-arrest interview that he "probably moved from time medics made first contact and I [Dep. Tusing] arrived on scene." A. R. At 59. Dep. Tusing found an 8 ounce cup half full of vodka in Respondent's car. A. R. At 56.

Dep. Tusing went to Respondent's truck and spoke to Respondent. At that time he noticed a strong odor of alcohol coming from his mouth. A. R. At 51, 56. Dep. Tusing asked Respondent to get out of the vehicle and identified the driver as Ricky Reynolds from his drivers license. A. R. At 51.

The Respondent staggered while exiting the vehicle, while walking to the roadside, and while standing. The Respondent had bloodshot eyes. The Respondent had slurred speech. A. R. At 56.

The Investigating Officer administered a series of field sobriety tests to the Respondent, including the horizontal gaze nystagmus, walk-and-turn, and one-leg stand. During administration of the horizontal gaze nystagmus test, the Respondent's eyes showed lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and onset of nystagmus prior to 45 degrees. Respondent's eyes had equal pupils and equal tracking. There was no resting nystagmus. A. R. At 56.

During the walk-and-turn test, the Respondent missed heel-to-toe, stepped off the line, made an improper turn and raised his arms to balance. A. R. At 56.

While performing the one-leg stand test, the Respondent swayed while balancing, used his arms to balance, hopped and put his foot down. A. R. at 57.

The Investigating Officer had reasonable grounds to believe the Respondent had been driving while under the influence of alcohol and asked the Respondent to submit to a preliminary breath test. Dep. Tusing was trained to administer the Alco Sensor FST preliminary breath test and is a certified instrument operator. Dep. Tusing used an individual disposable mouthpiece while administering the preliminary breath test. A. R. At 57.

The results of the preliminary breath test administered to the Respondent showed that his blood alcohol concentration was .206. Respondent failed this test. A. R. At 57.

The Investigating Officer lawfully arrested the Respondent for driving while under the influence of alcohol at 11:46 p.m., and Respondent was transported to the Hurricane Police Department by Dep. Tusing for the purpose of administering a secondary chemical test of the breath. A. R. At 51, 58.

Dep. Tusing was trained at the West Virginia State Police Academy to administer secondary chemical tests of the breath and has been certified as a test administrator by the West Virginia Department of Health since April 14, 2004. A. R. At 48, 58.

Dep. Tusing observed the Petitioner for a period of twenty minutes prior to administration of the secondary chemical test, during which time the Respondent had no oral intake. Dep. Tusing utilized an individual disposable mouthpiece and followed an operational checklist during administration of the secondary chemical test. A. R. At 58.

Standard checks upon the testing instrument, immediately prior to and after administration of the secondary chemical test, showed that it was in proper working order. A. R. At 58.

The secondary chemical test was administered in accordance with all applicable statutory provisions. A. R. At 58.

The results of the secondary chemical test administered to the Respondent showed that his blood alcohol concentration level was .207, by weight. A. R. At 58.

The Division sent Respondent an *Order of Revocation* dated July 21, 2010. By that order, his privilege to drive was revoked for driving under the influence with a blood alcohol content in excess of .15.

Respondent timely requested an administrative hearing on the revocation. A hearing was held before the Office of Administrative Hearings (“OAH”) on April 5, 2012. A.R. 173. Respondent did not appear in person but through counsel, David O. Moye, Esq. Dep. Tusing did not appear; however, counsel for the Respondent waived the subpoena for his attendance. A. R. At 178. The *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* (“OAH Order”) was entered on July 22, 2012. A. R. At 163.

Petitioner herein filed an appeal of the OAH Order in the circuit court of Kanawha County on August 22, 2012. A. R. At 144-171. The circuit court's Order affirming the OAH Order was entered on February 15, 2013. A.R. At 1-5.

SUMMARY OF ARGUMENT

The circuit court erred in finding that there was insufficient evidence in the record to show that Respondent drove while under the influence of alcohol. The evidence establishes that Respondent drove while under the influence, and even if it did not, circumstantial evidence is sufficient to establish the element of driving. Further, the circuit court erred in implicitly determining that the lack of testimony by the investigating officer diminished the documentary evidence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

ARGUMENT

This Court has previously established the standards for review of a circuit court's order deciding an administrative appeal as follows:

On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings

of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

I. ALTHOUGH THE EVIDENCE ESTABLISHED THAT RESPONDENT DROVE WHILE UNDER THE INFLUENCE OF ALCOHOL, EVEN IN THE ABSENCE OF SUCH EVIDENCE THERE IS A SUFFICIENT BASIS FOR REVOCATION.

The evidence in this record shows that Respondent drove while under the influence. Respondent admitted that he had been drinking at the Park and Ride, and then he drove to Kroger. After the medics woke him up in the parking lot, he attempted to drive off. “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).

The OAH Order provides, as a basis for reversal of the revocation, that (1) the DUI Information Sheet states that Respondent told Dep. Tusing that he was not driving; and (2) the criminal complaint entered into evidence states that Respondent started to drink at the Scott Depot Park and Ride, then went to the Kroger parking lot to drink. The circuit court echoed these two grounds, and added that paramedic James Ballard’s statement noted that Respondent was unconscious when he arrived, and that neither Dep. Tusing nor the Respondent were present at the hearing. A.R. at 4-5.

To allow the Respondent in this matter to escape revocation for DUI on these grounds defies this State’s public policy to quickly remove drink drivers from the roads. In a factually similar case, *Montgomery v. State Police*, 215 W.Va. 511, 600 S.E.2d 223 (2004), this Court held, “The evidence

presented [at the grievance hearing] established that the Grievant had been drinking the night before the morning of October 29, 1998, that he was present in an intoxicated condition, within the *prima facie* limits established by the provisions of *W.Va.Code* § 17C-5-2(d), at or about 7:05 A.M. on October 29, 1998, in a WVSP cruiser assigned for his use while that vehicle was in a parking lot at WVSP headquarters, parked, with engine running, lights on, and the Grievant in the driver[']s seat. Although there is no observation of record that the Grievant was seen driving the said vehicle, all surrounding circumstances indicate, by a preponderance of the evidence, that the Grievant drove the said vehicle to locate it in the location in which it was found on October 29, 1998, the said circumstances indicating that the said vehicle could not otherwise be located at that location unless it was driven there by the Grievant.” 215 W.Va. 516, 600 S.E.2d 228. This Court found:

By adopting a standard that permits reliance upon circumstantial evidence to charge an individual with DUI, this Court implicitly approved prosecutions for the offense of driving while under the influence where affirmative proof as to the issue of driving while under the influence is absent. Moreover, as the State Police observes, Appellant failed to introduce any evidence to refute the circumstantial indication that he drove the car to the State Police headquarters before falling asleep in the vehicle, with the lights on and the engine still running.

215 W.Va. 517, 600 S.E.2d 229.

This Court concluded that the Appellant had driven under the influence of alcohol.

The DUI Information Sheet reflects that Respondent admitted that he probably moved his car between the time the medics arrived and when the Investigating Officer arrived. This is confirmed by the medic, as set forth in the Criminal Complaint admitted at the administrative hearing. A. R. At 51. Thus, the Respondent verified the statement made by the medic to the Investigating Officer that the Respondent was passed out, they woke him up, and he attempted to drive off, but the medics stopped

him. That Respondent was under the influence of alcohol is not in question. The Respondent offered no evidence to show that anyone else drove the car to the spot in which it was found.

Even if the medics stopped Respondent from actually driving, this Court has held in numerous cases that circumstantial proof is sufficient to support a charge of DUI, and the revocation of a license. In *Montgomery, supra*, a factually analogous case, this Court found that, pursuant to *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997), there need not be affirmative evidence to show that Respondent was driving. *See also, Hill v. Cline*, 193 W. Va. 436, 457 S.E.2d 113 (1995); *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008); *Miller v. Chenoweth*, 229 W. Va. 114, 727 S.E.2d 658 (2012); *Cain v. DMV*, 225 W. Va. 467, 694 S.E.2d 309 (2010).

This Court has also held that when an officer encountered a sole driver pulled fully off the road and parked in front of a chain gate blocking what appeared to be a dirt road leading to a field with the parking lights on, and the engine turned off (once again, a case which is manifestly factually analogous to the present case), the officer was entitled to investigate pursuant to the “community caretaker” doctrine. When the officer developed an articulable reasonable suspicion to believe the driver was intoxicated, he was justified in continuing his investigation.

Once Trooper Buskirk was assured that Ms. Ullom was not in actual need of emergency aid, his caretaking duties were over and any further detention of Ms. Ullom by Trooper Buskirk would have constituted an unreasonable seizure *unless* Trooper Buskirk had a warrant or some other specific exception to the warrant requirement, such as an articulable, reasonable suspicion that Ms. Ullom had committed, was committing, or was about to commit criminal activity pursuant to *Terry* and *Stuart*. Here, we believe there is a sufficient objective basis to conclude that Trooper Buskirk's continued detention of Ms. Ullom, after his initial encounter with her under the community caretaker doctrine, was permissible under *Terry* and *Stuart*. Trooper Buskirk testified that Ms. Ullom was behind the wheel of the vehicle

with the keys in the ignition, there was a strong odor of alcohol, Ms. Ullom's eyes were glassy and bloodshot, she was speaking with slurred speech and her motor skills were unsteady. We therefore conclude that the remainder of Trooper Buskirk's seizure of Ms. Ullom was reasonable as a legitimate *Terry* and *Stuart* investigatory stop.

We find that the circuit court committed error when it reversed the order of the Commissioner suspending the driving privileges of Ms. Ullom on the basis that there was no probable cause for a warrantless seizure herein.

Ullom v. Miller 227 W.Va. 1, 13-14, 705 S.E.2d 111, 123 - 124 (2010).

Thus, Dep. Tusing's actions in arresting Respondent for DUI are also justifiable under the "community caretaker" doctrine. The evidence he obtained in his investigation supports revocation for aggravated DUI.

The circuit court erred in excluding the evidence of Respondent's intoxication, which was uncontradicted. Syl. Pt. 3, *Miller v. Toler*, 229 W. Va. 302, 729S.E.2d 137 (2012); *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012).

In the present case, the Respondent unquestionably drove the vehicle: he drove from the Park and Ride, where he was admittedly drinking, to Kroger, where he was indisputably drunk. Add to that the evidence that he tried to drive away from the medics in the Kroger parking lot, and the "driving" element is established. A. R. At 51, 55.

In an administrative license revocation hearing, W. Va. Code § 17C-5A-2 [2010] requires the OAH to find, among other things:

Whether the investigating law-enforcement officer had **reasonable grounds** to believe the person to have been driving while under the influence of alcohol... or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight...

[Emphasis added.]

Where the Respondent was clearly under the influence of alcohol, and he operated a motor vehicle while under the influence, it is impossible to justify the circuit court's finding that the revocation must be reversed.

II. THE INVESTIGATING OFFICER'S ABSENCE FROM THE ADMINISTRATIVE HEARING DOES NOT NEGATE THE EVIDENCE IN THE RECORD SHOWING THAT RESPONDENT DROVE WHILE UNDER THE INFLUENCE.

In its discussion of the reasons for finding that the Petitioner did not meet its burden of proof, the circuit court noted, "Neither Respondent nor the Deputy were present at the hearing." A.R. at 5. This has no bearing on the whether the evidence of record was sufficient to show that Respondent drove while under the influence. It is not necessary to have testimony in order for the Petitioner's burden of proof to be met. And, as this Court noted in *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010),

...the lower court's view of the evidence revealed a preference for testimonial evidence over documentary evidence. Our law recognizes no such distinction in the context of drivers' license revocation proceedings.

225 W.Va. 481, 694 S.E.2d 646.

West Virginia Code § 17C-5A-2 provides:

In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or accused of 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, the Office of Administrative Hearings 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. (Emphasis added).

The record is replete with evidence regarding the only issue before the OAH: whether Respondent drove a motor vehicle in the State of West Virginia while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having a blood alcohol concentration of eight hundredths of one percent (0.08%) or more, by weight. A revocation decision must be affirmed if supported by substantial evidence.¹ Substantial evidence is less than a preponderance of the evidence.²

“Substantial evidence” requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If the Commission’s factual finding is supported by substantial evidence, it is conclusive. Neither this Court nor the circuit court may supplant a factual finding of the

¹ *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866, 617 S.E.2d 860 (2005) (“We find that there was substantial evidence for the revocation of the appellee’s driver’s license and conclude that the DMV’s findings were not clearly wrong in light of all of the probative and reliable evidence in the record.”)

² *Gino’s Pizza v. West Virginia Human Rights Comm’n*, 187 W. Va. 312, 317 n.9, 418 S.E.2d 758, 763 n.9 (1992).

Commission merely by identifying an alternative conclusion that could be supported by substantial evidence.³

The documentary evidence in the record shows that Respondent was drinking at the Scott Depot Park and Ride, then he drove to the Kroger to continue drinking, and that once he was awakened by medics, attempted to drive away; that Respondent had an odor of an alcoholic beverage on his breath; that he was unsteady while exiting his truck, walking and standing; that his speech was slurred and his eyes were blood shot; that he admitted drinking a pint of vodka; that he failed the HGN Test, Walk and Turn Test, and the One Leg Stand Test; that he failed the preliminary breath test; that he took the Intoximeter test which showed a BAC of .207.

In the instant case, there is sufficient evidence, which was not challenged by Respondent, to show that Dep. Tusing had reasonable grounds to believe that Respondent was driving a motor vehicle in this state while under the influence of alcohol while having a blood alcohol concentration of .15 or more, by weight. The lack of testimony by either party does not provide a basis for exclusion of this evidence. The Order should be reversed and the license revocation imposed.

³ *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487, 473 S.E.2d 483 (1996).

CONCLUSION

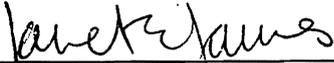
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests that the *Order* be reversed by this Court.

Respectfully submitted,

**STEVEN O. DALE, ACTING
COMMISSIONER OF THE
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,**

By counsel,

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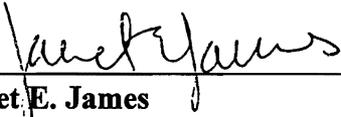
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OF MOTOR VEHICLES,**

Petitioner/Respondent Below.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Brief of Petitioner* 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, this 17th day of June 2013, addressed as follows:

Ricky Reynolds
98 Rolling Meadows
Scott Depot, West Virginia 25560



Janet E. James