

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

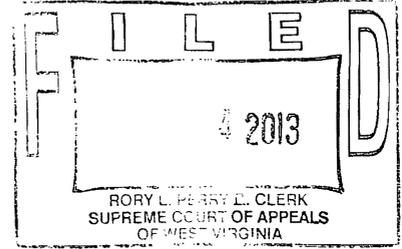
JOE E. MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.
RICKY REYNOLDS,

Respondent.

Case No.: 12-AA-95



13-0266

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLEE'S SUMMARY RESPONSE TO BRIEF OF APPELLANT

Submitted by:

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I. STATEMENT OF THE CASE

Appellant's statement of the case is accurate as far as it goes and is adopted herein and incorporated by reference. The omissions will be addressed in Appellee's argument.

II. APPELLANT ALLEGED ERRORS

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

B. THERE IS NO BASIS FOR EXCLUDING ALL OF THE EVIDENCE OBTAINED SUBSEQUENT TO THE INVESTIGATING OFFICER'S ENCOUNTER WITH THE RESPONDENT

III. POINTS AND AUTHORITIES

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<i>State v. Taft</i> , 143 W. Va. 365,	3
S.E.2d 152, 1958 W. Va.	

IV. STATUTES

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§17C-5-2	3

V. SUMMARY ARGUMENT

A. APPELLANT CANNOT PRODUCE EVIDENCE OF OPERATING A VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

The arresting officer stated in the DUI informational checklist sheet used as an affidavit, under the vehicle in motion section, that Respondent was "Parked in parking lot passed out, when Medics woke him up, he started to drive off, but medics stopped him". Further, in the criminal complaint, Deputy Tusing stated that he spoke with the medics when he arrived on scene, and that the medics were already on scene prior to his arrival. Tusing states that "...they banged on the window and the male finally woke up". He further states in the criminal complaint that Respondent told him that he "started to drink" at the Scott Depot Park and Ride, but that he "then went up to the Kroger where he sits when he does this." Obviously, even in the statement made by the officer, Respondent consumed the alcohol while he was on the Kroger parking lot.

The section of the Affidavit for "Vehicle in Motion" is there for a reason. According to W.Va. Code §17C-5-2, a "DUI" charge must result from a person being under the influence *while* he is operating a motor vehicle. All of the evidence relied upon by the arresting officer to establish Respondent satisfied the code was mere conjecture and speculation. The affidavit submitted and relied upon by Petitioner DMV is void of any content that would prove by preponderance that Respondent operated the vehicle at the same time he was under the influence of alcohol.

In fact, the evidence actually shows that Respondent had chosen to sit in a vehicle, while parked, and consume alcohol, which is not a violation of W.Va. Code §17C-5-2.

According to *State v. Taft*, 143 W. Va. 365, 102 S.E.2d 152, 1958 W. Va. "If a vehicle is moved by some power beyond the control of the driver, or by accident, it is not such an affirmative or positive action on the part of the driver as will constitute a driving of a vehicle within the meaning of the statute." In this case, the arresting officer admitted that there was NO movement of the vehicle at all. He stated that the medics prevented any movement, and that prior to that, the Respondent was asleep inside the

vehicle and had to be woke up.

Therefore, if the officer had to assume that Respondent had driven the vehicle, he also had to assume that he was moving or operating the vehicle while he was under the influence as well. Again, there is no evidence of when the Respondent operated the vehicle, if at all, and also no evidence that if he had operated the vehicle, that he was under the influence at the time of operation.

W.Va. Code Chapter 17C-5-2 requires that any person who operates a motor vehicle in the State of West Virginia while under the influence of alcohol is guilty of DUI. Criminally, the elements have to be proven by "beyond a reasonable doubt". Civilly, the elements have to be proven by "preponderance". In this case, it is clear that the administrative hearing is a civil hearing. Therefore, the burden of preponderance is required to prove the elements, from the evidence received by the Hearing Examiner.

In the Final Order, the Hearing examiner, who is the trier of fact and who places weight and credibility on evidence, makes the determination that there was "... some surrounding circumstances..." that indicated the vehicle was driven by Respondent. But according to the Hearing Examiner, the evidence that lacked credibility or appearance at all was the evidence that would show that Respondent operated the vehicle while he was under the influence of alcohol. The evidence referred to by the Hearing Examiner was that, based on the statement of the arresting officer, the Respondent, "...started drink (sic) at the Scott Depot Park and Ride, but then decided to sit and drink in the Kroger parking lot instead. Thus, the

Respondent (now Petitioner) did not meet its burden of proof regarding whether the Petitioner drove while under the influence and the Petitioner (now Respondent) successfully rebutted the evidence submitted by the Respondent (now Petitioner)."

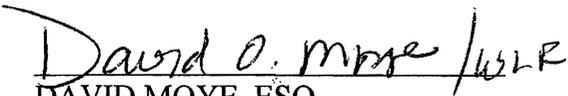
The decision of the Hearing Examiner is not based on an issue of Law that is being challenged. The issue presented is one of a credibility and fact which the Hearing Examiner applied. In the opinion of the Hearing Examiner, as stated in the Final Order, the evidence presented by Petitioner was NOT SUFFICIENT to rise to the level of preponderance that Respondent had committed the elements necessary to prove that he drove under the influence of alcohol. And as frequently stated by the W.Va. Supreme Court, the issues of fact are left to the sound discretion of the court and should not be disturbed.

VI. CONCLUSION

For the foregoing reasons, the Appellee respectfully requests this honorable court to affirm the decision of the court below.

Appellee requests oral argument in this case.

Ricky Reynolds
By Counsel


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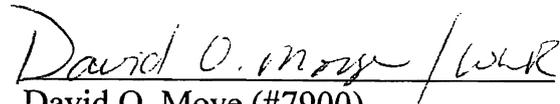
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CERTIFICATE OF SERVICE

I, David O. Moye, hereby certify that I have served a copy of the foregoing Appellee's Summary Response to Brief of Appellant to the attorneys for all parties, or if such parties are not represented by an attorney, to the parties themselves, by depositing an exact copy in the United States Mail, Certified, and postage pre-paid:

Done this 14th day of November, 2013

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