

13-0429

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2013 MAR 18 AM 10:49
CATHY L. HARRIS
KANAWHA COUNTY CIRCUIT COURT

JOE E. MILLER, Commissioner,
West Virginia Department of Motor Vehicles,
Petitioner/Respondent below,

v.

Civil Action No.: 12-AA-130
Honorable Tod J. Kaufman

TAMMY REED,
Respondent/Petitioner below.

FINAL ORDER

Before the Court is Petitioner's Petition for Appeal filed on October 29, 2012. The Petitioner is appealing the order of the Office of Administrative Hearings (hereinafter "OAH"), which affirmed the Respondent's driver's license revocation for driving under the influence (hereinafter "DUI") but dismissed the revocation for refusal to submit to the secondary chemical test.

Factual and Procedural Background

1. On September 4, 2010, Deputy G.C. Paitsel of the Mercer County Sheriff's Department, the Investigating Officer (hereinafter "IO") in this case, was traveling on State Route 460, in Green Valley, Mercer County, West Virginia, at approximately 12:41 a.m.
2. The IO testified that as he was attempting to exit his car to enter into a Go-Mart Store, unidentified employees of the store informed him that the female driver of a motor vehicle leaving the parking lot appeared to be intoxicated.
3. The IO turned and observed a 2005 Volvo leaving the parking lot and began to follow it to investigate the complaint.
4. The IO followed the motor vehicle as it made a left turn onto Maple Acres Road without

signaling and made another left turn into a car wash, again without signaling.

5. Following the Respondent's second turn without using her signal, the IO decided to initiate a traffic stop. The Respondent drove around the front entrance of the carwash to the exit of the automatic wash bay and pulled her vehicle into the exit of the automatic wash bay.
6. As the IO exited his motor vehicle, the Respondent exited her vehicle and attempted to remove money from her purse. She approached the car wash's vending device as if she was going to wash her vehicle.
7. As the Respondent exited her motor vehicle, the IO observed that the Respondent made an unsteady exit from her vehicle and staggered as she walked.
8. Upon approaching the Respondent, the IO observed that the Respondent had bloodshot eyes, had an odor of an alcoholic beverage emanating from her breath and slurred speech as she spoke.
9. The IO testified that the Respondent became verbally rude, upset, and defiant.
10. The IO testified that he observed containers of alcohol in the Respondent's floor of her motor vehicle as the IO spoke with the Respondent.
11. Although the IO testified that he performed field sobriety tests at the scene, on cross examination, he admitted that he was mistake and had actually performed these tests at the Bluefield police station after having arrested the Respondent.
12. On cross examination, the IO testified that he arrested the Respondent due to his observations of her driving, the Respondent's condition upon exiting the vehicle, the Respondent's condition during the IO's discussion with the Respondent at the scene, and for the safety of both the Respondent and himself.
13. The IO had reasonable grounds to believe that the Respondent may have been driving

while under the influence of alcohol.

14. The IO transported the Respondent to the Bluefield City Police Department, where, *pursuant to the IO's testimony*, he read to the Respondent a written document containing the penalties for refusing to submit to a designated secondary chemical test, required by West Virginia Code § 17C-5-4, and the fifteen-minute time limit for refusal, specified in West Virginia Code § 17C-5-7.
15. The Respondent agreed to perform field sobriety tests to determine if she was under the influence of alcohol.
16. The IO administered a series of field sobriety tests to the Respondent, including the horizontal gaze nystagmus, walk-and-turn, and one-leg stand.
17. Prior to administering the horizontal gaze nystagmus, the IO completed a medical assessment of the Respondent's eyes to ensure the test would render valid results and noted on the DUI Information Sheet that the Respondent's pupils did not track equally. Therefore, this test is inadmissible and will be give no evidentiary weight.
18. During the walk-and-turn test, the Respondent never touched heel-to-toe, stepped off the line of travel, stopped walking, used her arms to balance, and took the incorrect number of steps during the first nine steps.
19. While performing the one-leg stand test, the Respondent swayed, used her arms to balance, and was not able to keep her foot raised off of the ground.
20. The Respondent was unable to adequately perform the two field sobriety tests administered by the IO.
21. The secondary chemical test designated by the Mercer County Sheriff's Department is a secondary chemical test of the breath.

22. The IO asked the Respondent to submit to a secondary chemical test of her breath.
23. The Respondent advised the IO that she would not submit to a secondary chemical test of the breath.
24. After fifteen (15) minutes, the IO again asked the Respondent to submit to a secondary chemical test of the breath.
25. Respondent again refused.

Standard of Review

This Court's review is governed by the West Virginia Administrative Procedures Act, W.Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states:

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 or petitioners 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.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W.Va. 1996).

Discussion

According to the Petitioner, the OAH ignored the requirements of the Administrative Procedures Act (hereinafter "APA") because the OAH rescinded the refusal portion of the

Respondent's license revocation because the Implied Consent Statement was not included in the agency file and because the officer could not recall whether Respondent acknowledged that she understood what was read to her.

West Virginia Code § 17C-5-7(a) states that the IO must do the following:

(4) the person was given a written statement advising him or her that his or her license to operate a motor vehicle in this state would be revoked for a period of at least forty-five days and up to life if he or she refused to submit to the secondary test finally designated in the manner provided in section four of this article. The signing of the statement required to be signed by this section constitutes an oath or affirmation by the person signing the statement that the statements contained in the statement are true and that any copy filed is a true copy. The statement shall contain upon its face a warning to the officer signing that to willfully sign a statement containing false information concerning any matter or thing, material or not material, is false swearing and is a misdemeanor. Upon receiving the statement the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state for the period prescribed by this section.

The Petitioner points to the DUI Information Sheet in order to show that the IO did comply with West Virginia Code § 17C-5-7 because the box is checked indicating that "Implied Consent Read and Copy Provided to Subject."

According to the IO's testimony he read the Implied Consent Form to the Respondent. The record reflects that the IO did not testify that he gave the Respondent the written consent, as the IO testified, "I read her the implied consent and then asked her if she wished to take the breathalyzer." *Hearing Transcript p. 13, line 20-22.* Furthermore, the IO could not recall whether or not the Respondent acknowledged that she understood the implied consent law. Thus, even though the DUI Information Sheet indicates that the implied consent form was read and given to the Respondent, the IO testified that he read the implied consent and he could not recall that the Respondent acknowledged any understanding of the implied consent law. Therefore, this Court cannot find that the OAH

clearly erred as a matter of law.

Ruling

After carefully reviewing the decision below, the Petitioner's brief, the Respondent's brief, the record, and the relevant law, the Court hereby AFFIRMS the decision of the Board below because the evidence in the record supports the findings of fact and conclusions of law. This case is DISMISSED and STRICKEN from the docket of the Court.

The clerk of the court shall distribute copies of this Order to all counsel of record:

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Senior Assistant Attorney General
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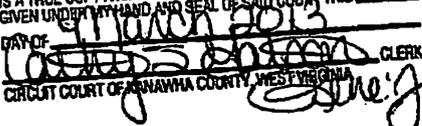
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Office of Administrative Hearings
Kanawha Valley Building
300 Capitol Street, 10th Floor
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Enter this Order the 16th day of March, 2013



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 16th
DAY OF March 2013

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA