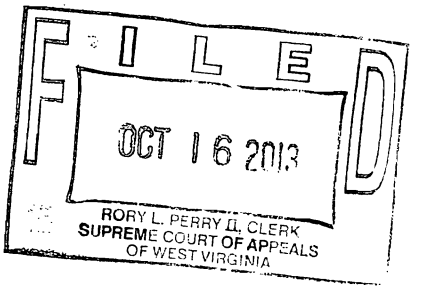
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0761
(Circuit Court Civil Action No. 13-CAP-3)

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



Respondent below/Petitioner herein,

v.

DONALD OAKLAND,

Petitioner below/Respondent herein.

FROM THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

STEVEN O. DALE, Acting Commissioner,
Division of Motor Vehicles,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich, WVSB # 8097
Assistant Attorney General
DMV - Attorney General's Office
P.O. Box 17200
Charleston, WV 25317-0010
elaine.l.skorich@wv.gov
Telephone: (304) 926-3874

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I. ASSIGNMENT OF ERROR

The circuit court erred in ignoring all evidence of Mr. Oakland's driving while under the influence of controlled substances to which Mr. Oakland neither objected nor rebutted.

II. STATEMENT OF THE CASE

On October 12, 2010, Officer Sean Wilhelm of the Moundsville Police Department, the Investigating Officer ("I/O") in this matter, observed a blue colored 2001 Ford Mustang which failed to stop at a stop sign located at Grant Avenue and 3rd Street in Moundsville, Marshall County, West Virginia. (App[1]. at PP. 195, 215, and 253.) The I/O initiated a traffic stop of the motor vehicle and identified Donald Oakland, Respondent herein, as the driver of the motor vehicle. (App. at PP. 195 and 253.) The I/O detected a strong odor which he identified as marijuana emanating from within Mr. Oakland's vehicle as soon as he got behind the vehicle even before he activated the emergency lights. (App. at P. 195.)

The I/O immediately placed Mr. Oakland in handcuffs, patted him down, and put him in the back of the police cruiser. (App. at P. 197.) The I/O observed that Mr. Oakland's eyes appeared glassy. (App. at P. 254.) Subsequently, Officer Steve Oliver of the Moundsville Police Department arrived at the scene of the traffic stop to provide assistance. (App. at PP. 197 and 223.) The I/O noted that Mr. Oakland appeared steady as he exited the vehicle and as he walked to the roadside. (App. at PP. 209 and 256.)

Mr. Oakland admitted to the I/O that he had a joint (App. at PP. 211 and 218) and that he smoked marijuana in the car while driving around Moundsville. (App. at PP. 211, 220, and 225.) The I/O administered a series of field sobriety tests to Mr. Oakland, including the horizontal gaze nystagmus ("HGN") test, the walk-and-turn, and the one-leg stand tests. (App. at P. 200.) Mr.

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[1] App. refers to the Appendix filed herewith.

Oakland passed the HGN. *Id.* Mr. Oakland failed the walk-and turn test because during the instruction phase of the walk-and-turn test, he stepped off the line of walk, missed walking in a heel-to-toe manner as instructed, raised his arms for balance, and completed an improper turn. (App. at PP. 220 and 254.) Mr. Oakland failed the one-leg stand test because he used his arms for balance and was unable to keep his foot raised off of the ground. (App. at PP. 200, 211, and 255.) After searching Mr. Oakland's car, the officers located a rolled "joint" containing a green leafy substance that they deemed to be marijuana, a partially burnt "joint" and an Altoids tin with a green leafy substance inside. (App. at P. 197.)

The I/O admittedly did not arrest Mr. Oakland for driving while under the influence ("DUI") of controlled substances or drugs, however, he handcuffed Mr. Oakland and transported him to the hospital for the administration of a blood test. (App. at P. 201.) The I/O was waiting for the results of the blood test before placing Mr. Oakland under arrest for a criminal offense. *Id.*

On November 9, 2010, the DMV sent Mr. Oakland an Order of Revocation for DUI. (App. at P. 260.) On December 2, 2010, Mr. Oakland asked the Office of Administrative Hearings ("OAH") for an administrative hearing. (App. at P. 261.) On January 7, 2011, Mr. Oakland appeared at the administrative hearing which he requested and was represented by counsel; however, Mr. Oakland did not testify at the administrative hearing. (App. at P. 64.) At the time of the administrative hearing, the I/O had not received the results of the blood test. (App. at P. 208.) The OAH upheld the DUI of controlled substances. (App. at P. 70.) Mr. Oakland appealed to the Circuit Court of Marshall County (App. at P. 54) which reversed the decision of the OAH finding that "the material findings of fact upon which the adverse legal conclusions are based are without any basic foundational support." (App. at PP. 2-4.) The circuit court erred.

III. SUMMARY OF ARGUMENT

The Administrative Procedures Act makes plain the standard of review for appeals of administrative hearings. See, W. Va. Code § 29A-5-4(g) (1964). The reviewing circuit court may not disturb the decision of the OAH unless it finds that the final order of the administrative agency violates the Respondent's rights for one (or more) of six enumerated reasons. Here, the circuit court, without a demonstrated basis from the record and in violation of case law, substituted its judgment for that of the fact finder and ignored all other evidence that Mr. Oakland was driving under the influence of controlled substances.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to W. Va. Rev. R. App. Pro. 20 (2010), the Commissioner requests oral argument in this case. Because the issues argued herein are heavily fact specific, the Commissioner believes that the Court may benefit from further inquiry in this matter.

V. ARGUMENT

A. Standard of Review

Review of the Commissioner's decision is made under the judicial review provisions of the Administrative Procedures Act at W. Va. Code § 29A-5A-4 (1964). *Groves v. Cicchirillo,* 694 S.E.2d 639, 643 (W. Va. 2010) (per curiam).

> Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court 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, decisions 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."

Syl. Pt. 2, *Shepherdstown VFD. v. State ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

"The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996). This Court has "made plain that an appellate court is not the appropriate forum for a resolution of the persuasive quality of evidence." *Brown v. Gobble,* 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996).

A court can only interfere with a hearing examiner's findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.,* 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995). "This rule is of appreciable importance to the parties because clear-error review ordinarily heralds a rocky road for an appellant. Under this standard, appellate courts cannot presume to decide factual issues anew. Our precedent ordains that deference be paid to the trier's assessment of the evidence." *FOP v. Fairmont,* 196 W. Va. 97, 101 n.4, 468 S.E.2d 712, 716 n.4 (1996). "[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently." 196 W. Va. 559, 565, 474 S.E.2d 489, 495.

B. The circuit court erred in ignoring all evidence of Mr. Oakland's driving while under the influence of controlled substances to which Mr. Oakland neither objected nor rebutted.

Without making any findings of fact itself, the circuit court below reversed the decision of the OAH, holding,

> The **material** findings of fact upon which the adverse legal conclusions are based are **without any basic** foundational support. For example, there is not an iota of testimony or evidence otherwise as to either of the investigating officer's respective education, training, or experience regarding the identification of marijuana by sight and/or scent or how an individual who ingested such might appear if he/she were "under the influence." The same can be said for the education, training, or experience of either officer regarding the administration and interpretation of "series of field sobriety tests' relied upon by the Hearing Examiner. If anything, the testimony on cross-examination evidenced that at least one of the officers was not knowledgeable about the proper administration of The Standardized Field Sobriety Test (SFST) developed by the U. S. Department of Transportation. Moreover, there is absolutely no testimony in the underlying record regarding either officer's credentials whatsoever. Accordingly, the findings of fact are both arbitrary and capricious as well as an abuse of discretion and a clearly unwarranted exercise of discretion.

(App. at P.) [Emphasis in original.]

First, regardless of whether or not the green leafy substance was field or lab tested and regardless of whether or not the officers testified about their education, training, or experience regarding identification of marijuana by sight, Mr. Oakland admitted to the I/O that he had a joint (App. at PP. 218 and 254) and that he smoked marijuana in the car while driving around Moundsville. (App. at P. 220 and 254.) The hearing examiner addressed this issue in the Final Order:

> Finally, the Petitioner's Counsel asserted that the Officers failed to establish that the green leafy substance found in the motor vehicle was marijuana, and that the Petitioner had smoked the marijuana prior to operating the motor vehicle on the date of the stated offense. However, the Investigating Officer testified that he detected the odor of marijuana emitting from the vehicle, a partially burned marijuana cigarette was located within the motor vehicle and most significantly, the Petitioner admitted to the Officers while at the scene that he had smoked marijuana.

(App. at P. 68.)

As stated above, a court can only interfere with a hearing examiner's findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.,* 195 W. Va. 230, 239, 465 S.E.2d 230,

239 (1995). "[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently." *Brown v. Gobble,* 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). Clearly, the hearing examiner did not need the results of field or lab tests to make a determination, based on the totality of the evidence, that the green leafy substance was marijuana and that Mr. Oakland had ingested the same while driving around Moundsville: Mr. Oakland admitted to both. Moreover, Mr. Oakland did not testify at the very hearing which he requested; therefore, the officers' testimony remains wholly unrebutted regarding Mr. Oakland's admissions of possession and ingestion. The issue of any field or lab testing is therefore irrelevant.

Next, contrary to the circuit court's holding, there was sufficient evidence in the record for the hearing examiner to make the findings of fact which supported the Commissioner's Order of Revocation. The hearing examiner found that the "Investigating Officer detected a strong odor which he identified as marijuana emanating from within the Petitioner's vehicle." (App. at P. 63.) This finding is supported by the I/O's testimony that

> As soon as I got behind the vehicle, before I even activated my lights, I could smell the odor of marijuana. I walked up to the vehicle, asked the Defendant [Mr. Oakland] for his license, registration, and insurance. His window was down on the driver's side. At that time I detected a strong odor of burned marijuana.

(App. at P. 195.) Mr. Oakland's counsel did not object to this particular testimony. *Id.*

> Timely and specific objections are required under Rule 103(a)[2] of the West Virginia Rules of Evidence, and Rule 46 of the West Virginia Rules of Civil Procedure. In

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[2] Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and... [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context...

> addition, we have repeatedly held that "[w]here objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syl. pt. 1, *State Road Comm'n v. Ferguson,* 148 W. Va. 742, 137 S.E.2d 206 (1964). *See also* Syl. pt. 2, *Maples v. West Virginia Dep't of Commerce,* 197 W. Va. 318, 475 S.E.2d 410 (1996) (quoting Syl. pt. 1, *Ferguson*). Elaborating on this principal, we have explained that an objection to evidence must be timely and specific in order to give the trial court an opportunity to address the issue at a time when corrective action may be taken.

Coleman v. Sopher, 201 W. Va. 588, 601, 499 S.E.2d 592, 605 (1997). Further, Mr. Oakland did not testify at the administrative hearing; therefore, all of the I/O's testimony remains unrebutted.

The hearing examiner also found as fact that the "Petitioner admitted to the Officers that he smoked marijuana." (App. at P. 63.) This finding is substantiated by the I/O's testimony:

> A. I asked Mr. Oakland if he had any marijuana in the car, and he replied yeah. He said, "I had a joint."
> Q. So when you asked him about marijuana, he replied that he did have a joint?
> A. Yes.
> Q. Did he make any statements as to whether he had consumed—
> A. Not at that point.
> Q. Not at that point. At any time did he though?
> A. Yes.

(App. at P. 196.) Again, Mr. Oakland's counsel did not object to this particular testimony, and Mr. Oakland did not rebut the I/O's testimony. *Id.*

The hearing examiner further found as fact that the officers conducted a search of "Petitioner's motor vehicle and located a rolled 'joint' containing a green leafy substance that they deemed to be marijuana." (App. at P. 64.) The hearing examiner additionally found as fact that the officers found a "partially burnt 'joint' containing a green leafy substance that they believed to be marijuana." *Id.* The OAH also found that the officers "located an Altoids tin which contained a green leafy substance that they concluded was marijuana." *Id.* These findings are supported by the I/O's testimony:

Q. What was found?
A. A [*sic*] approximately 4-inch rolled joint, unburned, as well as a burned joint approximately a quarter inch long, and an Altoids can that had a green leafy substance in it, had the odor of marijuana coming from it.
Q. You referred to I believe a burned joint and an unburned joint. In your experience, what was the substance within the joint?
A. I believed it to be marijuana....
Q. What did you believe that green leafy substance to be within the Altoids can?
A. Also marijuana.

(App. at PP. 197-198.) Once again, Mr. Oakland's counsel did not object to this particular testimony, and Mr. Oakland did not rebut the I/O's testimony. *Id.*

Additionally, the circuit court also concluded that there is not an "iota of evidence" regarding either officer's education, training, or experience of either officer regarding the administration (App. at P. 3) and interpretation of the field sobriety tests and that there is "absolutely no testimony in the underlying record regarding either officer's credentials whatsoever." (App. at P. 4.) These conclusions by the circuit court are not supported by the record.

This Court has addressed the admissibility of the HGN test results in administrative license revocation cases. In syllabus point 2 of *White v. Miller,* 228 W. Va. 797, 724 S.E.2d 768 (2012), this Court held that

> Upon a challenge by the driver of a motor vehicle to the admission in evidence of the results of the horizontal gaze nystagmus test, the police officer who administered the test, ***if asked***, should be prepared to give testimony concerning whether he or she was properly trained in conducting the test, and assessing the results, in accordance with the protocol sanctioned by the National Highway Traffic Safety Administration and whether, and in what manner, he or she complied with that training in administering the test to the driver.

[Emphasis added.] This Court has recently revisited the administration of field sobriety tests in *Dale v. McCormick*, 2013 WL 5433542, No. 12-0153 (Sept. 26, 2013) (per curiam), holding that,

> Under the principles set out in *White,* Trooper Miller properly admitted evidence of his administration of the horizontal gaze nystagmus test to Ms. McCormick and her failure to pass the same. To the extent that Ms. McCormick believed Trooper Miller did not perform the test in accordance with the law, **she was required to question** Trooper Miller in this area. Moreover, even if Trooper Miller failed to satisfy some requirement for administering the horizontal gaze nystagmus test, such failure "went to the weight of the evidence, not its admissibility." *In re Flood Litigation Coal River Watershed,* 222 W. Va. 574, 582, 668 S.E.2d 203, 211 (2008).

[Emphasis added.] In *McCormick*, instead of permitting a driver to remain silent at hearing regarding the officer's credentials and administration of the field sobriety test then later object to their absence or admissibility, this Court required the driver to take an active role in questioning the officer about the administration of those tests and credentials.

Here, on cross-examination, Mr. Oakland's counsel asked the I/O, "Where did you learn the field sobriety tests? Who taught them to you?" (App. at 213.) The I/O replied, "At the West Virginia State Police Academy." *Id.* Pursuant to this Court's decision in *McCormick*, if Mr. Oakland had a serious inquiry or challenge to the quality or quantity of the I/O's response about his credentials, the onus was on Mr. Oakland to inquire further. Accordingly, the circuit court erred in concluding that there was "absolutely no testimony in the underlying record regarding either officers' credentials whatsoever."

Likewise, Mr. Oakland's counsel cross-examined the I/O on the field sobriety tests. Mr. Oakland's counsel cross-examined the I/O about the administration of the one-leg stand to which the I/O explained that Mr. Oakland used his arms for balance during the test. (App. at P. 213.) The I/O also testified that Mr. Oakland put his foot down on count 21 of 30 on the one leg stand test. (App. at P. 214.)

Finally, even if the I/O failed to satisfy some requirement for optimum administration of the horizontal gaze nystagmus test, such failure "went to the weight of the evidence, not its admissibility." *In re Flood Litigation Coal River Watershed,* 222 W. Va. 574, 582, 668 S.E.2d 203, 211 (2008). *See also, McCormick, supra.* The OAH hearing examiner addressed Mr. Oakland's argument about the admissibility of the field sobriety tests and the weight which the hearing examiner gave the tests:

> Although the Petitioner's Counsel attempted to argue that the results of the field sobriety tests should not be considered in this matter since these test [*sic*] were designed to be used by law enforcement officers as a guide to determine whether a driver is under the influence of alcohol, and not controlled substances or drugs, these tests are indicators of impairment. The battery of standardized field sobriety tests, which were developed by the National Highway Traffic Safety Administration after extensive research, are "divided attention" tests that are easily performed by most unimpaired people. They merely require a suspect to listen and follow instructions while performing simple physical movements. Impaired persons have difficulty with tasks requiring their attention to be divided between simple mental and physical exercises.

(App. at P. 66.)

" 'The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.' Syllabus Point 3, *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996)." Syllabus Point 2, *Webb v. W. Va. Bd. of Medicine,* 212 W. Va. 149, 569 S.E.2d 225 (2002). *See also,* syllabus pt. 3, *Lowe v. Cicchirillo*, 223 W. Va. 175, 177, 672 S.E.2d 311, 313 (2008). The hearing examiner's decision was supported by the substantial evidence presented, and the circuit court erred in substituting its judgment for that of the fact finder below.

Assuming, *arguendo*, that the failing results of the field sobriety tests should have been

deemed inadmissible altogether, there was still sufficient evidence to find that Mr. Oakland drove a motor vehicle in this State while under the influence of controlled substances.

It is unrebutted that Mr. Oakland was operating his motor vehicle on the streets of Moundsville, West Virginia. (App. at P. 253.) It is also unrebutted that Mr. Oakland admitted to the I/O that he had smoked marijuana while driving around Moundsville. (App. at P. 254.) Further, it is unrebutted that Mr. Oakland ignored stopping at a stop sign and had glassy eyes. (App. at PP. 253-254.) The circuit court failed to address the other indicia of impairment and the application of the *Albrecht* test. Therefore, it was clear error for the circuit court to reverse the decision of the hearing examiner.

> " '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)." Syllabus Point 2, *Carte v. Cline,* 200 W. Va. 162, 488 S.E.2d 437 (1997).

Syllabus point 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 177, 672 S.E.2d 311, 313 (2008).

VI. CONCLUSION

For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

STEVEN O. DALE, ACTING
COMMISSIONER, DIVISION OF
MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich, WVSB # 8097
Assistant Attorney General
DMV - Office of the Attorney General
P.O. Box 17200
Charleston, WV 25317-0010
elaine.l.skorich@wv.gov
(304) 926-3874

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Respondent below/Petitioner herein,

v.

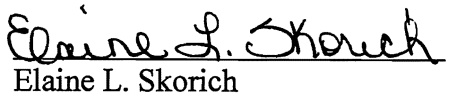
DONALD OAKLAND,

Petitioner below/Respondent herein.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 16th day of October, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit:*

J. Thomas Madden, Esquire
903 Wheeling Avenue, Suite E
Glen Dale, WV 26038


Elaine L. Skorich