

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

NO. 13-0821

ANTHONY CICCONE, RESPONDENT BELOW,

Respondent.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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I. ASSIGNMENTS OF ERROR

- A. **The circuit court erred in conflating a lawful stop with a lawful arrest - the latter of which is an element of W. Va. Code § 17C-5A-2(f) (2010).**
- B. **The circuit court erred in ignoring W. Va. Code § 17C-5A-2(e) (2010) and in effect applying the exclusionary rule to the instant, civil administrative license revocation proceeding in violation of this Court's decisions in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012).**
- C. **The circuit court erred in ignoring all evidence of Respondent Ciccone's driving while under the influence of alcohol or driving with a blood alcohol concentration of .08% or more.**

II. STATEMENT OF THE CASE

On November 4, 2010, Sergeant J. I. Davis of the Grafton City Police Department received a telephone call from Sharon Marks reporting that a motor vehicle, displaying a Delaware registration, was being driven in an erratic manner while traveling south on Route 9 North. (App¹. at P. 90 and A. Tr.². at PP 10-11 and 14.) Sgt. Davis responded to the intersection of U.S. Route 50 East and Route 119 North in Grafton, Taylor County, West Virginia. (A. Tr. at P. 14.) Sgt. Davis observed the described vehicle approach the intersection and proceed to execute a left turn from U. S. Route 50 East onto Route 119 North. *Id.* Sgt. Davis initiated a traffic stop of the motor vehicle on Route 119 North in Taylor County, West Virginia based upon the allegations of Ms. Marks. *Id.*

Officer T. R. Rutherford of the Grafton City Police Department, the Investigating Officer ("I/O") in this matter, responded to the scene of the traffic stop. (App. at P. 94 and A. Tr. at P. 16.) Both the I/O and Sgt. Davis observed that Respondent had the odor of alcoholic beverage on his

¹ App. refers to the Appendix filed contemporaneously with this Brief.

² A. Tr. refers to the Administrative Transcript contained in the Appendix filed contemporaneously with this Brief.

breath, had slurred speech, and had bloodshot and glassy eyes. (App. at PP. 91-92 and A. Tr. at P. 15.) The I/O explained and administered the horizontal gaze nystagmus (“HGN”) test to Respondent who had equal pupils, equal tracking and no resting nystagmus. (App. at P. 91 and A. Tr. at P. 34.) The results of the HGN were that Respondent lacked smooth pursuit in both eyes and had a distinct and sustained nystagmus at maximum deviation in both eyes. (App. at P. 91 and A. Tr. at P. 35.) Respondent failed the HGN. (App. at P. 91.)

Next, the I/O explained, demonstrated and administered the walk and turn test. (App. at P. 91 and A. Tr. at PP. 36-37.) Respondent could not keep his balance, stopped while walking and made an improper turn. (App. at P. 91.) Respondent “simply turned around; did not perform as instructed.” (App. at P. 91 and A. Tr. at PP. 37-39.) Respondent failed the walk and turn test. (App. at P. 91 and A. Tr. at P. 39.) The I/O then explained, demonstrated and administered the one leg stand test which Respondent passed. (App. at P. 92 and A. Tr. at PP. 39-40.) The I/O administered a preliminary breath test (“PBT”) of Respondent’s breath, which test indicated a blood alcohol concentration of .116%. (App. at P. 92 and A. Tr. at P. 41.) Respondent failed the PBT with a result of .116%. *Id.*

The I/O arrested Respondent for driving a motor vehicle while under the influence of alcohol (A. Tr. at P. 41), and transported Respondent to the Grafton Police Department for the purpose of administering a secondary chemical test (“SCT.”) (App. at PP. 89 and 93 and A. Tr. at PP. 41-42.) The results of the SCT indicated that Respondent’s blood alcohol concentration was .104%. (App. at P. 89 and 93 and A. Tr. at P. 45.) Respondent failed the SCT. (App. at P. 89 and A. Tr. at P. 42.) Respondent admitted to the officers that he had drunk four (4) bottles of beer and that he had operated a motor vehicle prior to his traffic stop. (App. at P. 92 and 94 and A. Tr. at P. 47.)

On December 9, 2010, Petitioner, the Division of Motor Vehicles (“DMV”) sent Respondent an *Order of Revocation* revoking his driving privileges for driving while under the influence (“DUI”) of alcohol. (App. at P. 99.) On December 14, 2010, the Office of Administrative Hearings, (“OAH”) received Respondent’s request for a hearing. (App. at P. 102), and conducted an administrative hearing on March 24, 2011. (App. at P. 108.) Respondent appeared at the administrative hearing which he requested but offered no testimony regarding this matter. (App. at P. 158, FOF 6.) On October 25, 2012, the OAH entered its *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* reversing the Petitioner’s *Order of Revocation*. (App. at P. 163.) Petitioner filed an appeal with the Circuit Court of Kanawha County on November 26, 2012. (App. at PP. 52-84.) On April 11, 2013, the circuit court held a final hearing (App. at PP. 17-27) and entered its *Final Order Denying Petition for Appeal* on July 29, 2013. (App. at PP. 2-16.) On August 12, 2013, the DMV filed its appeal with this Court.

III. SUMMARY OF ARGUMENT

The OAH and the circuit court were clearly wrong to ignore or exclude the substantial evidence of DUI which was admitted at the administrative hearing. Such implicit application of the criminal exclusionary rule is in contravention to this Court’s holdings in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure (2010), the Commissioner requests oral argument in this case as the matter is both factually and legally complex and because the parties would benefit from the opportunity to answer questions from the Court.

V. ARGUMENT

Standard of Review

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (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 Volunteer Fire Dep't v. SER, State of W. Va. Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong, and conclusions of law are reviewed *de novo*. *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam).

A. The circuit court erred in conflating a lawful stop with a lawful arrest - the latter of which is an element of W. Va. Code § 17C-5A-2(f) (2010).

The circuit court below erred in concluding that

Contrary to the Petitioner's argument, the Court finds that where there is an investigatory stop, like the one performed on Mr. Ciccone by Sgt. Davis, the stop must be valid in order to have a lawful arrest. Here, the OAH was unable to make such a finding because subsequent police work by Sgt. Davis or other facts to support its reliability did not sufficiently corroborate the tip by Ms. Marks to justify the investigatory stop of the vehicle under the reasonable suspicion standard. *See* Syl. Pt. 4, *Stuart*, 194 W. Va. 428, 452 S.E.2d 886.

(App. at P. 12.)

First, the investigating officer had reasonable suspicion to investigate further into Mrs. Marks' complaint, and the OAH and the circuit court improperly relied on *State v. Stuart, supra*, which held that "a police officer may rely upon an *anonymous* call if subsequent police work or other facts support its reliability and, thereby, it is sufficiently corroborated to justify an investigatory stop under the reasonable suspicion standard." [Emphasis added.] The OAH recognized that the tip given the investigating officer came from a witness named Sharon Marks thus making the tip not anonymous. However, the OAH failed to read the *Stuart* case more carefully. In *Stuart*, this Court, (citing *Alabama v. White*) considered the following in its analysis:

The [U. S.] Supreme Court then went on to state that when evaluating whether or not particular facts establish reasonable suspicion, one must examine the "totality of the circumstances," which includes both the "quantity and quality" of the information known by the police. 496 U.S. at 330, 110 S.Ct. at 2416, 110 L.Ed.2d at 309, quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d at 621, 629 (1981). "Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." 496 U.S. at 330, 110 S.Ct. at 2416, 110 L.Ed.2d at 309.

194 W. Va. 432, 452 S.E.2d 890.

Both the U. S. Supreme Court and this Court recognize that one must look at the totality of the circumstances with regards to the tip given the officer. Unlike the anonymous tip given the officer in *Stuart*, it is undisputed that the tip here came from Sharon Marks, a known entity who clearly provided the officer with reliable information: the location of and a detailed description of the motor vehicle which displayed a Delaware registration. The information given by Ms. Marks is more than an anonymous tip that merely says something such as "a blue car" or "red Toyota pick up truck." Ms. Marks gave the officer credible information which directly pinpointed Respondent's

location and vehicle. Accordingly, *Stuart*, is inapplicable here, and the OAH and the circuit court erred in so finding.

Next, in DUI administrative hearings, W. Va. Code § 17C-5A-2(f)(2010) charges the OAH to 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...; 2) whether the person was lawfully placed under arrest for an offense involving DUI...; 3) whether the person committed an offense involving DUI...; and 4) whether the tests, if any, were administered in accordance with the provisions of W. Va. Code § 17C-5-1 *et seq.*

W. Va. Code § 17C-5A-2(f) (2010) should be read *in pari materia* with the remainder of Chapter 17C of the Code, and the circuit court failed to do so. This Court has previously held that “[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syllabus Point 3, *Smith v. State Workmen’s Compensation Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). *See also*, *Clower v. W. Va. Dep’t of Motor Vehicles*, 223 W. Va. 535, 539, 678 S.E.2d 41, 45 (2009).

A review of Chapter 17C of the W. Va. Code reveals that the entire Chapter pertains to “Traffic Regulations and Laws of the Road.” In its review of administrative license revocation proceedings, this Court regularly analyzes both Article 5, “Serious Traffic Offenses,” and Article 5A, “Administrative Procedures for Suspension and Revocation of Licenses for Driving Under the Influence of Alcohol, Controlled Substances or Drugs.” For instance, W. Va. Code § 17C-5-8 (2004) addresses “Interpretation and Use of Chemical Test,” and this Court has found that “W. Va. Code § 17C-5-8(a) (2004) (Repl.Vol.2009) allows the admission of evidence of a chemical analysis performed on a specimen that was collected within two hours of either the acts alleged or the time

of the arrest.” Syl. Pt. 5, *Sims v. Miller*, 227 W. Va. 395, 709 S.E.2d 750 (2011). *See also*, Syl. Pt. 4, *Dale v. Veltri*, 741 S.E.2d 823 (2013).

Further, in Syl. Pt. 1 of *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987), this Court found that W. Va. Code § 17C-5-9 (1983) does not require blood tests of drivers arrested for DUI of alcohol and law enforcement officers are under no duty to inform DUI suspects of their right to blood tests in addition to the designated chemical test for intoxication; however, W. Va. Code § 17C-5-9 (1983) accords a driver arrested for DUI of alcohol a right to demand and receive a blood test within two hours of his arrest. *Sims*, *Veltri* and *Moczek* were all appeals of administrative license revocations wherein this Court interpreted Article 5 as part of its review of Article 5A.

This review makes clear, therefore, that the various Articles of Chapter 17C of the West Virginia Code “relate to the same persons or things” and “have a common purpose” capable of being “regarded *in pari materia* to assure recognition and implementation of the legislative intent.” Syllabus Point 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). *See also*, *Clower v. W. Va. Dep’t of Motor Vehicles*, *supra* at 540, 678 S.E.2d 46. As a result, Article 17C-5 must be read *in pari materia* with Article 17C-5A.

The “lawful arrest” language in W. Va. Code § 17C-5A-2(f)(2)(2010) is identical to the language which was present in the Code in 2005. In 2008, the Legislature removed the subsection requiring a finding of a lawful arrest but amended the language back into the Code in 2010. However, lawful arrest language is wholly unrelated to the stop and is gleaned from W. Va. Code § 17C-5-4(c) (2010) which states:

A secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by

section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

W. Va. Code § 17C-5-4(c) (2010) gives the investigating officer direction regarding administration of the secondary chemical test, while W. Va. Code § 17C-5-4(b) (2010) gives the officer direction regarding the administration of the preliminary breath test:

A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has reasonable cause to believe a person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

The lawful arrest language in W. Va. Code § 17C-5-4(c) (2010) relates only to the admissibility of the secondary chemical test. Secondary breath test results cannot be considered if the test was administered when the driver was not lawfully arrested, meaning that the officer had not gathered enough evidence to have a reasonable suspicion to believe that the driver had been driving while under the influence of alcohol, drugs or controlled substances. Any definition of lawful arrest contained in W. Va. Code § 17C-5A-2 (2010) that disregards its limited use in W. Va. Code § 17C-5-4(c) (2010) is overreaching.

The phrase “[a] secondary test of blood, breath or urine shall be incidental to a lawful arrest” means that the results of a chemical test are not admissible unless it was done in connection with, or “incidental” to, a lawful arrest. This is the construction we placed on this statutory language in *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), where we found a blood test to be inadmissible because it was not taken incident to a lawful arrest.

Albrecht v. State, 173 W. Va. 272, 412 S.E.2d 863 (1984).

West Virginia Code § 17C-5-4 (2010)³ sets forth criteria for administration of preliminary breath tests (“PBT”s) and secondary chemical tests (“SCT”s). Subsection (a) is a statement about

³ For purposes of this analysis, subsections d-j are not relevant.

every driver's implied consent to submit to a PBT and a SCT of the blood, breath or urine. Subsection (b) requires the law enforcement officer to have reasonable cause to believe that the driver is DUI before the officer can ask the driver to submit to a PBT. That means that the officer cannot just hand the driver a PBT instrument without the officer first acquiring some sort of evidence that makes him/her believe that the person is under the influence of drugs or alcohol. Subsection (c) gives an officer direction about when the SCT can be administered. The officer must have gathered enough evidence to have reasonable grounds to believe that the driver is DUI, then he or she can lawfully arrest the driver and transport him or her (if necessary) for the purposes of submitting to the SCT. Reasonable grounds can be established by a PBT result, field sobriety tests, or cumulative non-structured indicia of DUI.

West Virginia Code § 17C-5-4(c) (2010) does not include language about the stop of the vehicle. The circuit court's theory suggests that there is an invisible step between sections (b) and (c) for the officer to evaluate the nature of the stop. Clearly, this is not what the Legislature intended.

The record is replete with an abundance of evidence regarding the only issue that was 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. The circuit court erred in ignoring this evidence.

Since the criminal exclusionary rule cannot properly be applied to the instant matter⁴, then the following evidence of Respondent's intoxication, which was admitted into evidence but ignored

⁴ See subsection B below.

by the OAH and the circuit court below, must be considered: the odor of alcoholic beverage on his breath; his bloodshot and glassy eyes; his slurred speech; his failure on the HGN test, walk-and-turn test, and the PBT with a result twice the legal limit; and his admission to Sgt. Davis of drinking and operating the motor vehicle prior to the traffic stop. All of that evidence – not the nature of the stop – is what forms the basis for the lawful arrest. The circuit court concluded that the lawful arrest requires a valid stop. It does not.

B. The circuit court erred in ignoring W. Va. Code § 17C-5A-2(e) (2010) and in effect applying the exclusionary rule to the instant, civil administrative license revocation proceeding in violation of this Court’s decisions in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012).

West Virginia Code § 17C-5A-2(e) clearly states that

The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or did refuse to submit to the designated secondary chemical test, or did drive 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.

Further, the validity of the stop is irrelevant in this civil, administrative license revocation proceeding. *See, Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012). Since the nature of the stop is irrelevant here, both the OAH and the circuit court erred by ignoring the principal question thus applying the criminal exclusionary rule to this matter.

The administrative revocation process for DUI was set up by the Legislature as a mandatory process. Pursuant to W. Va. Code § 17C-5A-1(b) (2008), a law enforcement officer who investigates a person for DUI **must** submit his/her written investigation report (i.e., the DUI Information Sheet or “DUIIS”) to the Commissioner within forty-eight (48) hours. Pursuant to W.

Va. Code § 17C-5A-1(c) (2008), once the Commissioner reviews the DUIIS and determines that a person has committed a DUI offense, then the Commissioner “**shall** make and enter an order revoking or suspending the person’s license...” [Emphasis added.] The evidence available to the Commissioner in executing his legislatively-mandated duty is the information submitted by the I/O, usually consisting of the DUIIS, the Implied Consent document, the intoximeter ticket, and an officer’s narrative statement.

If all evidence of intoxication is ignored through the application of the criminal exclusionary rule, then the OAH has ignored the statutory requirement in W. Va. Code § 17C-5A-2(e) (2010) which states that “the principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol...”

It has been made quite clear by this Court that the judicially created exclusionary rule does not apply to civil license revocation proceedings. Syl. Pt. 3, *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012) and Syl. Pt. 7, *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012). If the exclusionary rule does not apply to the proceedings, then the legality of a stop is irrelevant because the evidence would be admitted regardless of the legality of the stop. *Smith, supra*. The crux of this case, and many others of which the Court is aware, is whether this Court’s rationale in *Smith* and *Toler* extends beyond cases arising after the 2010 amendments to W. Va. Code § 17C-5A-2(f) (2010).

C. The circuit court erred in ignoring all evidence of Respondent Ciccone’s driving while under the influence of alcohol or driving with a blood alcohol concentration of .08% or more.

First, the required findings of the OAH as outlined in W. Va. Code § 17C-5A-2(f) (2010) are not dispositive of the Commissioner’s authority to revoke. They are predicates to the administration

of the secondary chemical test. Pursuant to W. Va. Code § 17C-5A-2(e) (2010), “the principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol...” The OAH failed to meet its statutory obligation to answer that question here, and the circuit court erred in not recognizing the OAH’s failure.

Quite simply, Respondent failed the SCT with a result of .104%, yet the OAH and the circuit court ignored that fact completely. “Evidence that there was, at that time, eight hundredths of one percent or more, by weight, of alcohol in his or her blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.” W. Va. Code § 17C-5-8(a)(3) (2004). *See also, Dale v. Veltri, supra.* Further, “[o]perating a motor vehicle with a concentration of eight hundredths of one percent (.08%) or more of alcohol in the blood constitutes DUI.” *Id.* at FN.3. It is clear error for the OAH and the circuit court to completely ignore the fact that Respondent’s blood alcohol content was .104%, which is clearly more than the legal limit of .08%.

In this case, however, a blood alcohol content was not required for a license suspension. If other evidence proves the driver was driving under the influence of alcohol, then the license may be suspended. It is well established law that “[w]here 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, supra.* *See also,* syllabus Point 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997). Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008).

Here, the evidence shows that Respondent had the odor of alcoholic beverage on his breath, had slurred speech, and had bloodshot and glassy eyes. (App. at PP. 91-92 and A. Tr. at P. 15.) Respondent failed the HGN because he lacked smooth pursuit in both eyes and had a distinct and sustained nystagmus at maximum deviation in both eyes. (App. at P. 91 and A. Tr. at P. 35.) Respondent failed the walk-and-turn test because he could not keep his balance, stopped while walking and made an improper turn (App. at P. 91), and he “simply turned around; did not perform as instructed.” (App. at P. 91 and A. Tr. at PP. 37-39.) Respondent also failed the PBT, which test indicated a blood alcohol concentration of .116% or twice the legal limit. (App. at P. 92 and A. Tr. at P. 41.) It is un rebutted that Respondent admitted to Sgt. Davis that he had been drinking and operating the motor vehicle prior to the traffic stop. (App. at P. 92.) Therefore, even without considering the evidence of the SCT, the DMV presented more than sufficient evidence to show by a preponderance of the evidence that Respondent drove a motor vehicle in this state while under the influence of alcohol.

A revocation decision must be affirmed if supported by substantial evidence. “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.” *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866, 617 S.E.2d 860 (2005).

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

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

Here there was sufficient evidence reflecting that Respondent was operating a motor vehicle on a public street, exhibited symptoms of intoxication and had consumed alcoholic beverages. Accordingly, the circuit court erred in concluding that “the OAH did not error [sic] as a matter of law in reversing the Petitioner’s ‘Order of Revocation’ entered on December 9, 2010.” (App. at P. 13.)

VI. CONCLUSION

This Court has been loathe to frustrate the administrative process of removing drunk drivers promptly from the roads.

This Court has previously held that “[t]he purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.” Syl. Pt. 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005). This purpose behind the administrative sanctions for driving under the influence set forth in West Virginia Code §§ 17-5A-1 to -4 (2009) would be thwarted if the exclusionary rule was applied in an administrative license revocation or suspension proceeding at a substantial cost to society. Other courts, likewise, have acknowledged this substantial cost of applying the exclusionary rule in a license revocation or suspension proceeding. For instance, in *Powell v. Secretary of State*, 614 A.2d 1303 (1992), the Supreme Judicial Court of Maine stated:

“Because the evidence has already been excluded from the criminal proceeding, there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner. The costs to society resulting from excluding the evidence, on the other hand, would be substantial. The purpose of administrative license suspensions is to protect the public. *Thompson v. Edgar*, 259 A.2d 27, 30 (Me.1969). *Because of the great danger posed by persons operating motor vehicles while intoxicated, it is very much in the public interest that such persons be removed from our highways.*”

614 A.2d at 1306-07 (emphasis added).

Toler, supra at 141-142. Even in his dissent in *Toler*, Justice Benjamin recognized the compelling public interest of having drunk drivers removed from West Virginia's roadways:

I want to emphasize that in no way through this dissent do I intent to lessen the gravity of the great harm and danger drunk drivers pose to the people of West Virginia. I firmly believe that there is a "very valid public policy concern to rid our highways of drunken drivers" and that the government has a strong interest in doing just that. *Fishbein v. Koslowski*, 252 Conn. 38, 743 A.2d 1110, 1126 (1999) (Norcott, J., dissenting).

229 W. Va. 313, 729 S.E.2d 148.

The logic applied in *Smith* and *Toler* continues to apply despite the amendments to W. Va. Code § 17C-5A-2(f) in 2010. West Virginia law does not permit exclusion of the evidence of intoxication in an administrative proceeding on the basis of an invalid stop, thus, the circuit court erred in applying the criminal exclusionary rule in contravention of this Court's holdings in *Smith* and *Toler*. The circuit court improperly ignored all evidence of DUI including the un rebutted result of .104% on the secondary chemical test.

Further, the circuit court's decision to reinstate Respondent's license on the basis of the stop of his vehicle frustrates the DMV's statutory mandate to remove drunk drivers from the roadways as quickly as possible. The circuit court's rationale would create a non-existent requirement for the DMV to consider the nature of the stop of drunk drivers' vehicles, effectively necessitating the return of some drunk drivers to the roadways while keeping those drunk drivers without questionable stops from driving. The remedial nature of license revocation system does not differentiate between drunk drivers, and the DMV enforces all of its statutes for the same reason: to save lives of the innocent motoring public. For the above-reasons, the *Final Order Denying Petition for Appeal* of the circuit court should be reversed.

Respectfully submitted,

STEVEN O. DALE, ACTING
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By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

NO. 13-0821

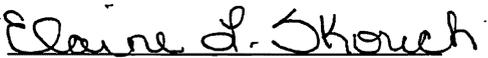
ANTHONY CICCONE, RESPONDENT BELOW,

Respondent.

VII. 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 26th day of November, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Anthony Ciccone, *pro se*
226 Southern Valley Court
Mars, PA 16046


Elaine L. Skorich