

13-0889

FILED  
2013 JUL 19 AM 11:20  
KAWAHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOE E. MILLER, Commissioner,  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Petitioner/Appellant,

v.

CIVIL ACTION NO. 12-AA-26  
Judge Paul Zakaib, Jr.

CRAIG RAY,

Respondent/Appellee.

**FINAL ORDER**

This is a Petition for appeal pursuant to W. Va. Code § 29A-5-4 of the Administrative Procedures Act from the final decision of the Office of Administrative Hearings ("OAH") which reversed a decision of Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), revoking Craig Ray's operator's license for the offense of driving under the influence of alcohol.

The Court has considered the pleadings of the parties, the Petitioner's Petition for Appeal, the Response thereto, the Petitioner's Brief and the Response thereto, and the Commissioner's Final Order of February 17, 2012. Based upon all of the same, the Court hereby makes the following Findings of Fact and Conclusions of Law:

1. On November 24, 2010, the Commissioner of the DMV entered an Order of Revocation revoking Craig Ray's operator's license for a period of one (1) year for driving a

motor vehicle in this State while under the influence of alcohol, controlled substances or drugs.

2. Craig Ray timely requested an administrative hearing regarding the revocation of his license, and a hearing was scheduled for February 2, 2011.

3. At the administrative hearing, Cowen Police Officer K. D. Cutlip ("Officer Cutlip") testified that on September 19, 2010, he observed Craig Ray driving a motor vehicle while Officer Cutlip was parked in a parking lot across from Craig Ray's residence. Although Officer Cutlip's testimony is conflicting at various points, at some point thereafter, he initiated a traffic stop of Craig Ray in Mr. Ray's driveway in Webster County, West Virginia, for driving under the influence of alcohol. Craig Ray was exiting his vehicle when Officer Cutlip approached him.

4. Officer Cutlip indicated that Craig Ray made a wide turn while exiting his driveway onto West Virginia State Route 20, and then when he returned, he straddled the center line.

5. Officer Cutlip testified he was stopped from initially pursuing Mr. Ray by someone whom he did not know while he was parked in the parking lot. Craig Ray later identified that person at the administrative hearing as his stepdaughter. Officer Cutlip testified she approached him in the parking lot and informed him that Craig Ray "was a drunk" and was "always drinking."

6. Although Officer Cutlip testified that he was engaged in conversation with Mr. Ray's stepdaughter and because of this was prevented from observing Mr. Ray driving, he further testified he was continually observing Mr. Ray driving and was concerned by it.

7. Officer Cutlip testified Craig Ray failed three field sobriety tests conducted in Mr. Ray's front yard. Officer Cutlip then placed Mr. Ray under arrest and transported him to the

Webster County Sheriff's office. Mr. Ray was given a breathalyzer test which he failed with the result of .12.

8. Craig Ray testified he consumed three (3) beers prior to being stopped and consumed another beer after being stopped while the officer was involved in an exchange at the scene with Roger Ray, Craig Ray's brother.

9. The hearing examiner found the testimony of Officer Cutlip to be "inconsistent and unreliable" and therefore found the officer had no basis for initiating a traffic stop of Craig Ray. Additionally, because of Officer Cutlip's conflicting testimony, the Hearing Examiner determined the exclusive basis for Officer Cutlip's traffic stop of Craig Ray was the statement made to him by Mr. Ray's stepdaughter.

10. Based upon the lack of creditable evidence, the hearing examiner found the DMV "failed to demonstrate sufficient evidence regarding the circumstances surrounding the reasonable suspicion to initiate an investigate stop of the motor vehicle driven by (Craig Ray) and as a result any evidence offered to demonstrate that (Craig Ray) had been driving a motor vehicle in this State while under the influence of alcohol on September 19, 2010, cannot be considered."

11. On February 17, 2012, the OAH entered a Final Order reversing the decision of the DMV to revoke the driving privileges of Craig Ray for a period of one (1) year.

12. The DMV argues that the testimony of Officer Cutlip demonstrated a sufficient basis for initiating a stop of Craig Ray, and that the results of the field sobriety tests and the breathalyzer demonstrate that Craig Ray was driving under the influence of alcohol.

13. Craig Ray argues reasonable grounds to believe he was driving under the influence of alcohol were not present, and that he was not lawfully placed under arrest for that offense.

**Conclusion and Court's Orders**

14. The Court finds the decision of the OAH should be affirmed for the following reasons:

A. The hearing examiner for the OAH found the arresting officer's testimony lacked credibility, a finding which this Court does not have substantial evidence to disprove.

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

B. W.Va. Code § 17C-5A-2 provides that the OAH should determine:

(1) whether or not there is reasonable grounds to believe someone has been driving under the influence of alcohol.

(2) whether or not someone was lawfully placed under arrest for that offense or was lawfully taken into custody for purposes of administering a secondary chemical test.

(3) whether or not a person committed the offense of driving under the influence, or was lawfully taken into custody for purposes of administering a secondary chemical test.

C. The OAH determined there were no reasonable grounds for the officer to believe Craig Ray was driving under the influence of alcohol because the Hearing Examiner found the arresting officer's testimony in support of his basis for initiating the stop of Craig Ray in Mr. Ray's driveway not to be

credible. Further, the OAH found Mr. Ray was not lawfully placed under arrest because the testimony of the officer was inconsistent and unreliable.

15. Therefore, the OAH properly found there was no reasonable evidence to determine Craig Ray was in fact operating a motor vehicle while under the influence of alcohol.

Accordingly, the Court concludes as a matter of law that the Final Order of the OAH should be, and the same is, hereby **AFFIRMED**.

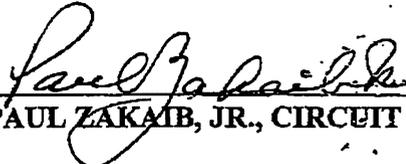
An objection and exception is saved to all parties aggrieved by this ruling.

It is **FURTHER ORDERED** that a certified copy of this Final Order be sent to:

(1) Elaine L. Skorich, Esq., Assistant Attorney General, DMV - Office of the Attorney General, P.O. Box 17200, Charleston, WV 25317; and

(2) Howard J. Blyler, Esq., P.O. Box 217, Cowen, WV 26206.

Enter this 18<sup>th</sup> day of July, 2013.

  
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PAUL ZAKAIT, JR., CIRCUIT JUDGE

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 19  
DAY OF JULY 2013  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SHORT CASE NAME: Dale v. Ray

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**CERTIFICATIONS**

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**STATE OF WEST VIRGINIA**

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and I have a good faith belief that an appeal is warranted.

August 12, 2013

Date

Ernie L. Shorck  
Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

August 12, 2013

Date

Ernie L. Shorck  
Counsel of record or unrepresented party

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. \_\_\_\_\_

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

Respondent below, Petitioner,

v.

CRAIG RAY,

Petitioner below, Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, and counsel for the respondents, do hereby certify that the foregoing *Notice of Appeal* was served upon the opposing party by depositing a true copy thereof, postage prepaid, certified mail, in the regular course of the United States mail, this 12th day of August, 2013, addressed as follows:

Howard J. Blyler, Esquire  
Post Office Box 217  
Cowen, WV 26206-0217

The Honorable Cathy Gatson  
Clerk of the Circuit Court  
Kanawha County Courthouse  
111 Court Street, Judicial Annex  
Charleston, WV 25301

  
ELAINE L. SKORICH