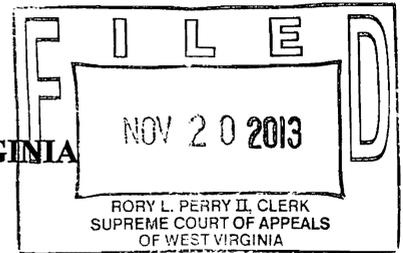


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner,

v.

NO. 13-0889

CRAIG RAY, RESPONDENT BELOW,

Respondent.

FROM THE CIRCUIT COURT OF KANAWHA 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, WWSB # 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**

Table of Contents

I.	ASSIGNMENT OF ERROR	1
II.	STATEMENT OF THE CASE	1
III.	SUMMARY OF ARGUMENT	4
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION	4
V.	ARGUMENT	4
	A. Standard of Review.	4
	B. After finding as fact that the results of Mr. Ray's secondary chemical test were .12 percent, the circuit court ignored W. Va. Code § 17C-5A-2(e) and in effect applied the exclusionary rule to the instant civil, administrative license revocation proceeding in violation of this Court's recent decisions in <i>Miller v. Smith</i> , 229 W. Va. 478, 729 S.E.2d. 800 (2012) and <i>Miller v. Toler</i> , 229 W. Va. 302, 729 S.E.2d. 137 (2012). This is clear error.....	5
VI.	CONCLUSION	16
VII.	CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

CASES:	Page
<i>Albrecht v. State</i> , 173 W. Va. 268, 412 S.E.2d 859 (1984)	7, 13
<i>Carte v. Cline</i> , 200 W. Va. 162, 488 S.E.2d 437 (1997)	7
<i>Clower v. W. Va. Dep't of Motor Vehicles</i> , 223 W. Va. 535, 678 S.E.2d 41 (2009)	10, 11
<i>Dale v. Veltri</i> , 741 S.E.2d 823 (W. Va., 2013)	6, 11
<i>Dean v. West Virginia Dep't of Motor Vehicles</i> , 195 W. Va. 70, 464 S.E.2d 589 (1995)	4
<i>Fruehauf Corp. v. Huntington Moving & Storage Co.</i> , 159 W. Va. 14, 217 S.E.2d 907 (1975)	11
<i>Groves v. Cicchirillo</i> , 225 W. Va. 474, 694 S.E.2d 639 (2010)	5
<i>In re Petition of McKinney</i> , 218 W. Va. 557, 625 S.E.2d 319 (2005)	16
<i>In re Queen</i> , 196 W. Va. 442, 473 S.E.2d 483 (1996)	8
<i>Lilly v. Stump</i> , 217 W. Va. 313, 617 S.E.2d 860 (2005)	7
<i>Lowe v. Cicchirillo</i> , 223 W. Va. 175, 672 S.E.2d 311 (2008)	7
<i>Miller v. Smith</i> , 229 W. Va. 478, 729 S.E.2d 800 (2012)	i, 1, 4, 5, 6, 8, 9, 10, 16
<i>Miller v. Toler</i> , 229 W. Va. 302, 729 S.E.2d 137 (2012)	i, 1, 4, 5, 6, 9, 10, 16

<i>Moczek v. Bechtold</i> , 178 W. Va. 553, 363 S.E.2d 238 (1987)	11
<i>Muscatell v. Cline</i> , 196 W. Va. 588, 474 S.E.2d 518 (1996)	13
<i>Powell v. Secretary of State</i> , 614 A.2d 1303 (1992)	16
<i>Shepherdstown Volunteer Fire Dep't v. SER, State of W. Va. Human Rts. Comm'n</i> , 172 W. Va. 627, 309 S.E.2d 342 (1983)	5
<i>Sims v. Miller</i> , 227 W. Va. 395, 709 S.E.2d 750 (2011)	11
<i>Smith v. State Workmen's Compensation Comm'r</i> , 159 W. Va. 108, 219 S.E.2d 361 (1975)	10
<i>State v. Byers</i> , 159 W. Va. 596, 224 S.E.2d 726 (1976)	13
<i>State v. Stuart</i> , 192 W. Va. 428, 452 SE.2d. 886 (1994)	13
<i>Thompson v. Edgar</i> , 259 A.2d 27 (Me.1969)	16
STATUTES:	
W. Va. Code § 17C-5-4(a) (2010)	14
W. Va. Code § 17C-5-4(b) (2010)	12, 14
W. Va. Code § 17C-5-4(c) (2010)	12, 14, 15
W. Va. Code § 17C-5-8 (2004)	11
W. Va. Code § 17C-5-8(a) (2004) (Repl. Vol. 2009)	11
W. Va. Code § 17C-5-8(a)(3) (2004)	6
W. Va. Code § 17C-5-9 (1983)	11

W. Va. Code § 17C-5A-1(b) (2008)	9
W. Va. Code § 17C-5A-1(c) (2008)	9
W. Va. Code § 17C-5A-2 (2010)	12
W. Va. Code § 17C-5A-2(e) (2010)	i, 1, 5, 6, 9
W. Va. Code § 17C-5A-2(f) (2010)	6, 10, 16
W. Va. Code § 17C-5A-2(f)(2) (2010)	12
W. Va. Code § 29A-5-4(g) (1964)	4
RULES:	
W. Va. Rev. R. App. Pro. 20 (2010)	4

I. ASSIGNMENT OF ERROR

After finding as fact that the results of Mr. Ray's secondary chemical test were .12 percent, the circuit court ignored W. Va. Code § 17C-5A-2(e) and in effect applied the exclusionary rule to the instant civil, administrative license revocation proceeding in violation of this Court's recent decisions in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d. 137 (2012). This is clear error.

II. STATEMENT OF THE CASE

In the early hours of September 19, 2010, Patrolman Kevin D. Cutlip of the Cowen Police Department (hereinafter "I/O") observed a Ford F150 turning onto Route 20. (App¹. at P. 93 and A. Tr². at P 8.) The vehicle turned with a wide radius and straddled the center line. (A. Tr. at P. 8.) The Investigating Officer attempted to pursue the vehicle but was stopped by Mr. Ray's step-daughter who informed the I/O that Mr. Ray was a drunk and that she knew "he's drinking." *Id.* at 9. The I/O lost track of the suspect vehicle at which point he returned to the lot at Dave's Bar to watch for speeders. *Id.* At or about 12:30 a.m., the I/O observed the same truck as noted earlier weaving and straddling the center line. (A. Tr. at P. 9 and App. at P. 93.) The I/O then pulled out with his lights on and stopped Mr. Ray's vehicle in Mr. Ray's driveway. (A. Tr. at P. 9.) Upon exiting the vehicle, the I/O observed Mr. Ray was unsteady, and upon walking to the roadside, the I/O observed Mr. Ray was normal. (App. at P. 94.)

The I/O testified that Mr. Ray was unsteady while standing and that Mr. Ray's speech was slurred and his eyes were bloodshot and glassy. (A. Tr. at P. 10.) Mr. Ray admitted during the initial personal contact with the I/O that he had been drinking and had consumed three beers. (App. at P. 94.) The I/O administered a series of field sobriety tests to Mr. Ray, including the horizontal gaze

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.

nystagmus, walk-and-turn, and one-leg stand. (App. at PP. 94-95 and A. Tr. at P. 10.) Roger Ray, Craig Ray's brother, continually interrupted the field sobriety tests, and Craig Ray repeatedly requested that his brother stop interrupting. (A. Tr. at P. 10.) The I/O ultimately had to hand cuff Roger Ray. *Id.* at 11. Craig Ray testified that during the altercation between Roger Ray and the I/O, he went inside to put his ice cream away and drank another beer. (A. Tr. at P. 85 and PP. 90-91.) The I/O testified that Craig Ray gave money and ice cream to one of Mr. Ray's family members. *Id.* at 94.

The I/O explained the horizontal gaze nystagmus test to Mr. Ray and noted that he had equal pupils but did not have equal tracking. (A. Tr. at PP. 12-13 and App. at P. 94.) The I/O also indicated that the Mr. Ray's eyes had a vertical nystagmus. (A. Tr. at P. 61 and App. at P. 94.) During administration of the horizontal gaze nystagmus test, the I/O testified that the Mr. Ray's eyes showed a lack of smooth pursuit in both the left and right eyes; distinct and sustained nystagmus at maximum deviation in both the left and right eyes; and an onset of nystagmus prior to forty-five degrees (45°). (A. Tr. at PP. 13-14 and App. at P. 94.) The I/O explained and demonstrated the walk and turn test to Mr. Ray. (A. Tr. at P. 14 and App. at P. 94.) During the walk and turn test, Mr. Ray stopped while walking, missed heel-to-toe, and raised his arms to balance. (A. Tr. at P. 15 and App. at P. 94.)

The I/O explained and demonstrated the one leg stand test to Mr. Ray. (A. Tr. at P. 15 and App. at P. 95.) During the administration of the one leg stand, Mr. Ray swayed while balancing, used his arms to balance, and put his foot down. (A. Tr. at P. 16 and App. at P. 95.) The I/O testified that he did not have a preliminary breath test in his vehicle and mistakenly recorded the results of the secondary chemical test on the DUI Information Sheet in the preliminary breath test

area of the form. (A. Tr. at P. 16.) The I/O lawfully arrested Mr. Ray for driving while under the influence of alcohol and transported him to the Webster County Sheriff's Department for the purpose of administering the secondary chemical test. (A. Tr. at PP. 17-18.)

The I/O read and gave Mr. Ray 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. (A. Tr. at P. 21.) Mr. Ray testified that he smoked in the police cruiser (A. Tr. at PP. 99), and the I/O disputed that Mr. Ray smoked at any time other than after the administration of the secondary chemical test. (A. Tr. at PP. 94-95.) The results of the secondary chemical test administered to Mr. Ray showed that his blood alcohol concentration was twelve hundredths of one percent (0.12%) by weight. (A. Tr. at P. 23 and App. at P. 96.) During a post-arrest interview, Mr. Ray admitted that he had drunk three (3) beers and had been operating a motor vehicle. (A. Tr. at PP. 22-23 and App. at P. 97.) Mr. Ray signed the DUI Information Sheet acknowledging the answers that he gave to the I/O during the post-arrest interview. (App. at P. 97.)

On November 24, 2010, the Division of Motor Vehicles ("DMV") sent Mr. Ray an Order of Revocation for DUI. (App. at P. 91.) On December 9, 2010, Mr. Ray sent a Written Objection to the Order of Revocation and Hearing Request Form to the Office of Administrative Hearings ("OAH.") (App. at PP. 78-79.) On February 2, 2011, the OAH conducted an administrative hearing (App. at P. 162), and on February 17, 2012, the OAH entered a Final Order reversing the DMV's Order of Revocation. (App. at PP. 166-173.)

On March 8, 2012, the DMV filed an administrative appeal with the Circuit Court of Kanawha County. (App. at PP. 49-74.) On July 5, 2012, the DMV filed its *Brief of the DMV* with

the Circuit Court of Kanawha County. (App. at PP. 35-48.) On July 17, 2012, Mr. Ray filed his *Response of Respondent to Brief of Petitioner*. (App. at PP. 31-34.) On August 21, 2012, the DMV filed the *Reply Brief of the DMV* with the Circuit Court of Kanawha County. (App. at PP. 14-30.) On July 19, 2013, the circuit court entered its *Final Order* denying the DMV's *Petition for Judicial Review*. (App. at PP. 2-7.) On August 12, 2013, the DMV filed its appeal with this Court.

III. SUMMARY OF ARGUMENT

The circuit court was clearly wrong to ignore or exclude the 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

A. 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).

B. After finding as fact that the results of Mr. Ray's secondary chemical test were .12 percent, the circuit court ignored W. Va. Code § 17C-5A-2(e) and in effect applied the exclusionary rule to the instant civil, administrative license revocation proceeding in violation of this Court's recent decisions in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d. 137 (2012). This is clear error.

The circuit court erred in concluding that “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.” (App. at P. 6.) The circuit court further erred in sustaining the OAH’s limited credibility assessment:

The OAH determined that there was no reasonable grounds for the officer to believe that the Respondent had been driving under the influence of alcohol because his testimony supporting his basis for initiating his blue lights and stopping the Respondent in his driveway was found by the hearing examiner to be uncredible [*sic.*]

(App. at P. 11.) Also, in its Final Order the OAH opined and the circuit court reiterated that the

failure to establish the legitimacy of the initial investigative stop of the motor vehicle driven by the Respondent on the date of the alleged offense, precludes the consideration of evidence, if any, obtained incidental to that stop. Such evidence is crucial to support a determination that the Investigating Officer had reasonable grounds to believe that the Respondent had been driving a motor vehicle in this State while under the influence of alcohol and that the Respondent was lawfully arrested for the offense.

(App. at PP. 10 and 171.) This is clear error.

Although the OAH completely failed to include the evidence of driving while under the influence (“DUI”) in its *Final Order*, the circuit court did find as fact in its *Final Order* that “Mr. Ray was given a breathalyzer test which he failed with a result of .12.” (App. at P. 4.) Even though the results of the secondary chemical test are undisputed, the circuit court ignored those results via its tacit application of the criminal exclusionary rule in contravention to this Court’s holdings in *Smith, supra*, and *Toler, supra*.

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, Mr. Ray failed the SCT with a result of .12%, 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*, 741 S.E.2d 823 (2013). 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 to completely ignore the fact that Mr. Ray’s blood alcohol content was .12%, 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*, 173 W. Va. 268, 412 S.E.2d 859 (1984). *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 Mr. Ray had the odor of alcoholic beverage on his breath and blurry eyes. (App. at P. 94.) Mr. Ray was unsteady exiting his vehicle and while standing. *Id.* He admitted to I/O that he had consumed three beers. *Id.* Further, Mr. Ray failed the walk-and-turn test because he could not keep his balance during the instruction stage, stopped while walking, missed heel-to-toe, and raised his arms to balance. *Id.* He also failed the one-leg stand test because he swayed while balancing, used his arms to balance, and put his foot down. *Id.* It is un rebutted that Mr. Ray was driving the subject vehicle. Therefore, even without considering the evidence of the secondary chemical test, the DMV presented more than sufficient evidence to show by a preponderance of the evidence that Mr. Ray 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 Mr. Ray 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 properly found there was no reasonable evidence to determine Craig Ray was in fact operating a motor vehicle while under the influence of alcohol." (App. at P. 6.)

In its credibility assessment, the OAH only considered the I/O's testimony about nature of the stop. Indeed, the circuit court sustained the OAH's limited credibility assessment:

The OAH determined that there was no reasonable grounds for the officer to believe that the Respondent had been driving under the influence of alcohol because his testimony supporting his basis for initiating his blue lights and stopping the Respondent in his driveway was found by the hearing examiner to be uncreditable [*sic.*]

(App. at P. 11.) Both the circuit court and the OAH focused heavily on the hearing examiner's credibility assessment of the investigating officer based on the stop of the vehicle and effectively discredited all of the officer's testimony regarding his subsequent investigation (i.e., the indicia of intoxication, Mr. Ray's performance on the field sobriety tests, etc.)

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, the credibility assessment regarding the stop should not result in exclusion

of subsequently obtained evidence. It is clear that the OAH and the circuit court conflated the stop of Mr. Ray's vehicle with requirements to arrest Mr. Ray for DUI:

the failure to establish the legitimacy of the initial investigative stop of the motor vehicle driven by the Respondent on the date of the alleged offense, precludes the consideration of evidence, if any, obtained incidental to that stop. Such evidence is crucial to support a determination that the Investigating Officer had reasonable grounds to believe that the Respondent had been driving a motor vehicle in this State while under the influence of alcohol and that the Respondent was lawfully arrested for the offense.

(App. at PP. 171 and 10.)

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).

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. 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*, *supra*.

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, *supra* at 272, 314 S.E.2d 863.

Although the circuit court failed to provide any case law justifying its conflation of the stop with the arrest in its *Final Order*, the OAH relied on syllabus point 4 in *State v. Stuart*, 192 W. Va. 428, 452 SE.2d. 886 (1994): “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 in the *Final Order*.] (App. at P. 170.)

The OAH’s reasoning erroneously supposes that because Mr. Ray’s step-daughter informed the I/O that Mr. Ray was a drunk and was always drinking, and the officer formed his reasonable belief that Mr. Ray was DUI prior to his vehicle stopping and an investigation being conducted. That is an illogical sequence. Instead, like any other investigation, the officer formed his belief that the law was violated after he gathered evidence to support his suspicion. The reason for the arrest and the reason for the stop are the not the same event and should not be conflated.

Moreover, the I/O independently developed reasonable suspicion for the stop. He observed Mr. Ray’s truck weaving and straddling the center line when Mr. Ray returned home. (A. Tr. at P. 9 and App. at P. 93.) The I/O’s observation of unlawful driving combined with the information from Mr. Ray’s step-daughter undoubtedly satisfies this Court’s holding in syllabus point 5 of *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996),

For a police officer to make an investigatory stop of a vehicle the officer must have an articulable reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. In making such an evaluation, 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 the investigatory stop under the reasonable-suspicion standard.

Assuming *arguendo* that the step-daughter had told the I/O to pull over a neighbor instead of Mr. Ray and the officer pulled over Mr. Ray instead, the evidence of Mr. Ray's DUI still could not be ignored. The investigating officer is the one who effects the arrest, and it is only his belief that Mr. Ray was DUI that should be considered. Even if the wrong vehicle had been stopped, the I/O could not have ignored the evidence of DUI that he observed after the stop. It would have been unlawful for the officer to gather so much evidence of DUI and NOT arrest Mr. Ray.

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 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

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

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 Mr. Ray 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 matter, then the following evidence of Mr. Ray's intoxication, which was admitted into evidence but ignored by the OAH and the circuit court below, must be considered: the odor of alcoholic beverage on his breath; his blurry eyes; his unsteadiness while exiting his vehicle and standing; his failure on two field sobriety tests; his admission to the I/O that he had drunk three beers. 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. In any event, the exclusionary rule should not have been applied in this case. Finally, the I/O independently observed bad driving by the Respondent. Therefore, the circuit court order must be reversed on factual and legal grounds.

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. 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

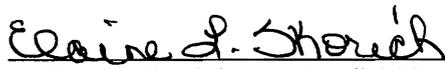
unrebutted result of .12% on the secondary chemical test. For the above-reasons, the *Final Order* of the circuit court should be reversed.

Respectfully submitted,

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

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Elaine L. Skorich, WWSB # 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

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. 13-0889

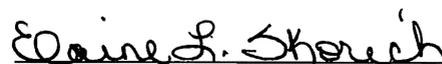
CRAIG RAY, RESPONDENT BELOW,

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 20th day of November, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Howard J. Blyler, Esquire
P. O. Box 217
Cowen, WV 26206-0217


Elaine L. Skorich