

**BRIEF FILED
WITH MOTION**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

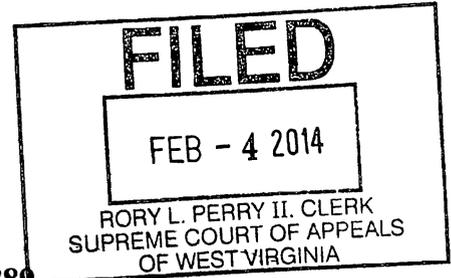
Petitioner,

vs.

CRAIG RAY,

Respondent.

NO. 13-0889



FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF RESPONDENT CRAIG RAY

Respectfully submitted,

CRAIG RAY,

By Counsel,

**Howard J. Blyler, WVSB #375
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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,

vs.

NO. 13-0889

CRAIG RAY,

Respondent.

CERTIFICATION

I, Howard J. Blyler, certify that (a) the contents of this Brief are true and accurate copies of items contained in the record in the lower tribunal; and (b) I have conferred in good faith with all parties to this appeal in order to determine the content of the Brief.

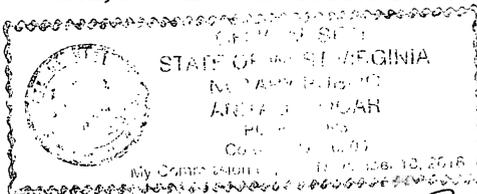
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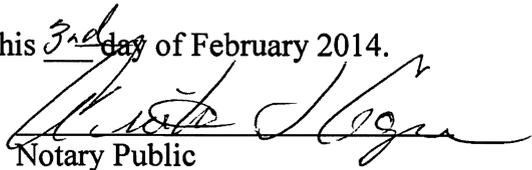


HOWARD J. BLYLER

STATE OF WEST VIRGINIA,
COUNTY OF WEBSTER, to-wit:

Taken, sworn to and subscribed before me this 3rd day of February 2014.





Notary Public

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(1) ASSIGNMENT OF ERROR

The Petitioner assigns the following 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 decision 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.

(2) STATEMENT OF THE CASE

At approximately 8:30 p.m. on the evening of September 19, 2010, Kevin D. Cutlip, a City Officer for the Town of Cowen in Webster County, West Virginia, observed the Respondent's vehicle turn right from his driveway on to State Route 20.

The vehicle turned right with a wide radius and either crossed or straddled the center line. However, the Officer admitted that it was physically impossible to make a right hand turn from the Respondent's driveway on to State Route 20 without crossing the center line, as was also shown in the Respondent's Exhibit 1A. (Tr. At Page 27.) The Officer then stated that a vehicle pulled up next to him and advised him that the individual driving that vehicle was under the influence of alcohol. The Officer clearly admitted that he did not know who was in the vehicle and that he could not say whether or not that individual was credible. (Tr. at Page 28.)

The Officer indicated that he attempted to follow the Respondent but upon reaching the Municipal Building he could not locate the Respondent and returned to the area where he had been sitting.

The Officer thereafter testified that he observed the Respondent return and he crossed the center line slightly and then proceeded up his driveway to his residence. (Tr. at Page 9.)

The Officer further admitted that he executed and swore to a signed criminal complaint indicating that the Respondent had returned up the hill weaving "but not crossing the centerline." (Tr. at Page 33.)

Thereafter the Officer initiated a traffic stop of the Respondent in his driveway and upon approaching the Respondent the first thing the Officer said was "Have you been

drinking” and “I got a call that you have been drinking”. Thereafter the Officer immediately stuck his face in the Respondent’s face to smell his breathe. (Tr. at page 82.)

At some point the Officer attempted to initiate a series of field sobriety tests but became in an altercation with the Respondent’s brother Roger Ray and a number of those tests were not completed, at least the walk and turn. (Tr. at Page 83.)

The Respondent was placed under arrest for DUI and transported to Webster Springs for processing and a breathalyzer.

The acting Commissioner issued a notice of revocation; the Respondent requested a hearing, which was thereafter held by the Office of Administrative Hearings.

The Office of Administrative Hearings ruled in favor of the Respondent and set aside the notice of revocation, to which the Department of Motor Vehicles appealed to the Circuit Court of Kanawha County.

The hearing examiner did not get to the point of giving any credibility to the field sobriety test based upon the ruling that there was no probable cause to initiate a traffic stop based upon the non-credibility of the Officer’s testimony. However, the testimony clearly indicates that the horizontal gaze nystagmus test was insufficient because the Respondent did not pass the medical assessment. (Tr. at Page 59-60.)

The hearing examiner’s decision found that the Officer “offered bolstered and conflicting testimony regarding the circumstances surrounding the traffic stop in order to establish corroborating evidence to justify an investigatory stop and to otherwise encounter the Respondent on the date of the alleged offense”. . . As a result, “the hearing examiner finds that the investigatory Officer’s testimony is inconsistent and unreliable and as a result, the record is absent any credible testimony to establish the articulable reasonable suspicion for the traffic stop of the Respondent’s motor vehicle”...

Therefore, the hearing examiner did not go into the credibility of any of the testimony involving the sobriety tests, whether or not the breathalyzer was properly conducted, or whether or not any of the other testimony of the Officer was credible stating that based upon the original conclusion that his testimony was not credible as to the stop of the Respondent that “precludes the consideration of evidence, if any, obtained incidental to that stop.”

The Department of Motor Vehicles filed an administrative appeal with the Circuit Court of Kanawha County and the Circuit Court of Kanawha County issued the attached order correctly affirming the decision of the Office of Administrative Hearings.

(3) SUMMARY OF ARGUMENT

The Circuit Court was clearly correct in affirming the decision of the Office of Administrative Hearings for the reason that the court concluded that it “does not have substantial evidence to disprove” the finding by the Office of Administrative Hearings that “the arresting officer’s testimony lacked credibility.”

(4) STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of the Appellate Procedure, the Respondent requests oral argument in this case.

(5) ARGUMENT

A. Standard of Review

The standard of review in an appeal from the Circuit Court of a Department of Motor Vehicle proceeding is the same standard of review that is applied by the Circuit Court to the Department of Motor Vehicle’s administrative decision. That is, “giving deference to the Department of Motor Vehicle’s purely factual determination and giving de novo review to legal determinations.” *Chumma v. W. Va. Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310, (2001). In order to ignore the findings of fact by the Office of Administrative Hearings, the reviewing court must believe the findings to be “clearly wrong” and there must be substantial evidence to that fact. *Muscattelle v. Cline* 196 W. Va. 588, 474 S.E.2d 518 (1996), *In re Queen* 196 W. Va. 442, 473 S.E.2d 483 (1996).

B. Argument

The acting Commissioner argues that the Circuit Court should ignore the findings by the Office of Administrative Hearings that Officer Cutlip's testimony was not credible, and find that because he blew a .12 his license should be suspended citing W. Va. Code § 17C-5A-2(e). The acting Commissioner has totally ignored the fact that there is no judicial finding of fact in the record that Mr. Ray failed any field sobriety tests, or that the Office of Administrative Hearings found that he blew a .12. The acting Commissioner argues that because the officer testified to those facts and because there was a DUI information sheet that sets forth those facts that they are automatically to be determined as judicial findings of fact. That of course is not the case. By the same token, the evidence by Mr. Ray is that he did not complete the field sobriety tests nor was the breathalyzer properly administered because he had been smoking cigarettes. In essence, the acting Commissioner is asking this Court to do the same thing that it asked the Circuit Court to do, and that is make judicial findings of fact above and beyond what were found by the Office of Administrative Hearings.

In fact, the Office of Administrative Hearings found that the Officer's testimony was so incredible that it was not required to even consider the evidence of intoxication.

There isn't any question that the primary purpose of the DUI administrative procedures statute is to determine whether or not an individual drove a motor vehicle while under the influence of alcohol and then apply certain administrative sanctions therefore.

However, the acting Commissioner ignores the requirements of 17C-5A-2(1)(2)(3). The West Virginia legislature has provided certain conditions that must be met before one's license may be administratively revoked. "(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 the person committed the offense of driving under the influence or was lawfully taken into custody for purposes of administering a secondary chemical test."

In analyzing the evidence and the testimony of Officer Cutlip, the Office of Administrative Hearings correctly determined that there was absolutely no need to go beyond the point of the arrest because the officer's testimony clearly lacked credibility for establishing a lawful arrest. A review of the transcript shows a lengthy examination by the hearing examiner, not only on the basis of the stop, but also with regards to the procedures he followed in the field sobriety tests as a basis for the arrest.

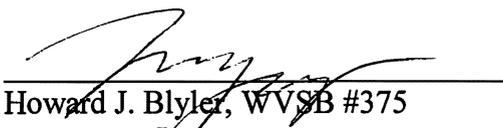
The acting Commissioner has gone to great lengths citing moral and legal reasons why the validity of the arrest should have been ignored by the Office of the Administrative Hearings, the Circuit Court of Kanawha County and this Court. However, the acting Commissioner has failed to produce a valid basis for ignoring the lack of competent testimony and the incompetent testimony of the officer.

(6) CONCLUSION

While there is clearly a different standard of proof and a different standard of considering the evidence between a criminal proceeding and a Department of Motor Vehicles administrative proceeding, and while the burden is substantially less in an administrative proceeding, the requirements for the competence of police work should be no less regardless. In this case, the officer failed to meet even the minimal standard of credibility to be considered by the Office of Administrative Hearings and therefore there was not substantial credible evidence for the Circuit Court to consider reversing the decision. By the same standard, this Court cannot find that there is substantial evidence to dispute the non-credibility of the arresting officer in this case. Therefore, for the above reasons the final order of the Circuit Court should be upheld.

Respectfully submitted.

CRAIG RAY,
By Counsel,



Howard J. Blyler, WVSB #375
Attorney at Law
PO Box 217
Cowen, WV 26206

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Petitioner,

vs.

NO. 13-0889

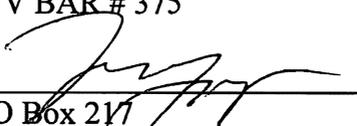
CRAIG RAY,

Respondent.

(7) CERTIFICATE OF SERVICE

I, Howard J. Blyler, do hereby certify that I served the foregoing BRIEF OF RESPONDENT CRAIG RAY on this the 3rd day of February 2014, upon the Petitioner, by sending a true copy thereof to Elaine L. Skorich, Assistant Attorney General at PO Box 17200, Charleston, West Virginia 25317.

HOWARD J. BLYLER
WV BAR # 375



PO Box 217
Cowen, WV 26206-0217

JOE E. MILLER, COMMISSIONER, W vs. CRAIG RAY

LINE	DATE	ACTION
1	03/08/12	# BILLED STATE; CASE INFO SHEET; PETITION W/ATTACH'S; DOCKETING
2		# STATEMENT; DESIGN OF RECORD W/COS
3	03/22/12	MA PMT ON FILING FEE; \$155.00; ST OF WV
4	05/07/12	" RECORD FROM WV DEPT. OF TRANSPORTATION
5	05/31/12	SM LET FR JUDGE ZAKAIB TO CNSL AND/OR PARTIES DTD 5/30/12
6	07/05/12	# BRIEF OF DMV W/COS; FAX COV LET
7	07/24/12	# RESP OF RESPONDENT TO BRIEF OF PETITIONER W/COS
8	08/21/12	# REPLY BRIEF OF DMV W/COS; FAX COV LET
9	11/26/12	SM LET FR JUDGE ZAKAIB TO CNSL AND/OR PARTIES DTD 5/30/12
10	11/26/12	SM LET FR JUDGE ZAKAIB TO CNSL DTD 11/26/12
11	07/19/13	O:MLD TO E.SKORICH, H.BLYLER, 07/19/13 IL
12	07/19/13	FINAL ORDER ENTERED
13	08/13/13	# NOT OF APPEAL TO WVSCA W/ATTACH & COS

A TRUE COPYTESTE: *Cathy S. Dator*
CIRCUIT COURT KANAWHA COUNTY, W.VA. /ca
CLERK

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2013 JUL 19 AM 11:20
KANAWHA COUNTY CIRCUIT COURT

**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**.

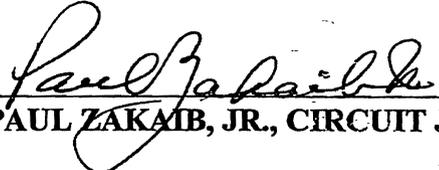
An objection and exception is saved to all parties aggrieved by this ruling.

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

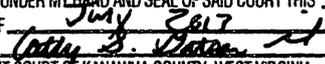
(1) Elaine L. Skorich, Esq., Assistant Attorney General, DMV - Office of the Attorney General, P.O. Box 17200, Charleston, WV 25317; and

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

Enter this 18th day of July, 2013.



PAUL ZAKAIB, JR., CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, GATHY 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