

14-0372

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES PETTIT,

Respondent/Petitioner below,

v.

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

Petitioner/Respondent below.

Civil Action No.: 12-AA-54
Honorable Carrie L. Webster
DMV File No.: 351463A

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FINAL ORDER

Pending before this Court is the Petition for Judicial Review ("the Petition") filed by the Commissioner of the Division of Motor Vehicles ("the Commissioner") seeking reversal of the Final Order of the Division of Motor Vehicles reinstating the driving privileges of James Pettit ("Mr. Pettit"). The Court has before it all filings of record together with the Memoranda of Law submitted by the parties. For the reasons stated herein, the Petition is DENIED.

I. STANDARD OF REVIEW

The applicable standard of review in resolving contested cases pursuant to the Administrative Procedures Act is found in West Virginia Code Section 29A-5-4. In order to establish entitlement to an Order granting judicial review of the Final Order of the Division of Motor Vehicles, the Commissioner bares the burden of proof and must comply with the above-cited statutory provision.

II. RELEVANT FACTS

1. On October 16, 2010, the White Sulphur Springs Police Department had a scheduled sobriety check point in White Sulphur Springs, Greenbrier County, West Virginia.
2. The sobriety checkpoint was announced to be held on October 16, 2010 between

8:00pm and 2:00am on US Route 60 west of Hartsrun, Greenbrier County, West Virginia.

3. The sobriety checkpoint was moved on October 16, 2010 to US Route 60 East in White Sulphur Springs near City Hall.
4. The Chief of Police did not have the prosecuting attorney approve the sobriety checkpoint.
5. The Policies and Procedures Manual written for the White Sulphur Springs Police Department requires six (6) Officers to work a sobriety checkpoint plus one Officer in charge for a total of seven Officers working the checkpoint. Only four (4) Officers and one Officer in charge actually worked the checkpoint.
6. Corporal J. W. Hopkins, the investigating officer in this matter, was assigned to work at the sobriety checkpoint.
7. The investigating officer came in to contact with a motor vehicle driven by Mr. Pettit.
8. The investigating officer spoke with Mr. Pettit and observed that his speech was slurred and his eyes were glassy.
9. The investigating officer asked Mr. Pettit if he had been drinking and he stated that he had consumed alcohol at home and at a bar.
10. The investigating officer requested that Mr. Pettit exit his vehicle and observed that he was unsteady while doing so.
11. The investigating officer explained, demonstrated and administered three (3) field sobriety tests including the horizontal gaze nystagmus, walk and turn and one leg stand test.

12. The investigating officer did not perform a medical assessment prior to the administration of the horizontal gaze nystagmus test and, therefore, that fact test was not considered at the underlying hearing. Mr. Pettit failed the other tests.

13. The investigating officer administered a preliminary breath test to Mr. Pettit which he failed.

14. The investigating officer arrested Mr. Pettit for driving under the influence of alcohol on October 16, 2010 in White Sulphur Springs, Greenbrier County, West Virginia.

15. The investigating officer had reasonable grounds to believe Mr. Pettit had been driving under the influence of alcohol.

16. The investigating officer transported Mr. Pettit to the Greenbrier County Sheriff's Department where he administered a secondary chemical test of Mr. Pettit's breath. The investigating officer was properly trained in the administration of such a test and had been appropriately certified since 2004. The result of the test was that Mr. Pettit's blood alcohol content ("BAC") was .157.

17. Witnesses who testified at the underlying hearing confirmed that the City of White Sulphur Springs Police Department violated its policies and procedures by having an insufficient number of officers working the checkpoint and by moving the checkpoint without notice. Based upon these violations, the hearing examiner concluded that the sobriety checkpoint was not properly established and, therefore, any evidence stemming from the checkpoint could not be considered. Accordingly, the Order revoking Mr. Pettit's driving privileges was reversed. It is from that Final Order that the Commissioner seeks judicial review.

I. DISCUSSION

Finding that the traffic stop that resulted in Mr. Pettit's detention had not been legally

conducted, the Office of Administrative Hearings found the results of his secondary breath test inadmissible, and therefore reversed the order revoking Mr. Pettit's driving privileges. In support of his claim for judicial review, the Commissioner relies on a recent holding of the West Virginia Supreme Court of Appeals declaring that the exclusionary rule is inapplicable license revocation proceedings. *See Miller v. Toler*, 229 W.Va. 302, 729 S.E.2d 137 (2012).

Mr. Pettit counters that argument by asserting that although the exclusionary rule has been deemed to be inapplicable in license revocation cases, that the impropriety of the checkpoint from a constitutional standpoint invalidates the results of the secondary breath test administered to Mr. Pettit. The secondary breath test can only be administered to someone in lawful custody. Because the checkpoint was not lawful, Mr. Pettit was not in lawful custody, and therefore, could not legally have been subject to the secondary breath test. Therefore, Mr. Pettit argues, the results thereof are inadmissible.

This argument would seem to simply boil down to an application of the exclusionary rule slightly restated. However, it is unnecessary to decide the issue, because both the Commissioner and Mr. Pettit's arguments miss the mark. Contrary to both arguments, this case does not hinge on the application of the exclusionary rule. Rather, the unlawful nature of the check point invalidates the charge of driving under the influence entirely, because lawful arrest was an element of the civil offense at the time Mr. Pettit was charged.¹

As the West Virginia Supreme Court of Appeals has recently reiterated,

[s]uspicionless checkpoint roadblocks are constitutional in West Virginia only when conducted in a random and non-discriminatory manner within predetermined written operation guidelines which minimize the State's intrusion into the freedom of the individual and which strictly limits the discretion vested in police officers at the scene.

¹As the Court in *Chenoweth* noted, although the West Virginia Legislature deleted language requiring lawful arrest or custody from W.Va. Code §17C-5A-2(f) in 2008, it restored that requirement in 2010. *Id.* 229 W.Va. 114, 272 S.E.2d, 658, fn 5.

Miller v. Chenoweth, 229 W.Va. 114, 272 S.E.2d, 658 (2012). In this case, it is undisputed that the stop at issue did not take place within "predetermined written operational guidelines." Thus, because Mr. Pettit's detention grew out of an illegal stop, he was not lawfully arrested as required by W.Va. Code §17C-5A-2(f). Accordingly, the Order revoking Mr. Pettit's driving privileges was properly reversed. Therefore, for the reasons stated herein, the Petition for Judicial Review filed by the Commissioner is denied.

The Clerk of this Court is directed to forward attested copies of this Order to all counsel of record.

Entered this 20 day of March, 2014.

Carrie L. Webster

Carrie L. Webster, *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 21st
DAY OF MAY 2014.
GATHY S. GATSON
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SHORT CASE NAME: Dale v. Pettit

CERTIFICATIONS

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.

April 17, 2014

Date

Elaine L. Skerch
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.

April 17, 2014

Date

Elaine L. Skerch
Counsel of record or unrepresented party