

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 14-0372**

**(Circuit Court Civil Action No. 12-AA-54)**

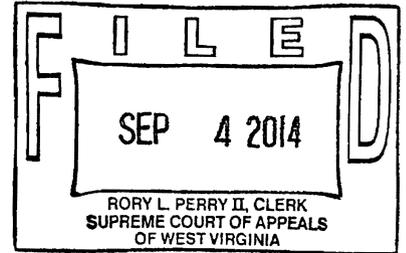
**STEVEN O. DALE, ACTING COMMISSIONER,  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,**

**Petitioner,**

**v.**

**JAMES PETTIT,**

**Respondent.**



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**RESPONDENT'S ~~REPLY~~ BRIEF**

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**Respectfully submitted,**

**JAMES PETTIT,**

**By Counsel,**

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## **I. Statement of the Case and Procedural History**

This case is before this Court upon an appeal taken by the West Virginia Division of Motor Vehicles ("DMV"). For the reasons stated herein, the Order of the Circuit Court from which the appeal is taken must be affirmed.

The facts of the case are fairly simple and essentially undisputed. The City of White Sulphur Springs, West Virginia had but did not follow written policies and procedures for conducting sobriety checkpoints. The checkpoint at issue was published as required and then moved without any notice. Further, less than the required number of officers worked the checkpoint.

Although the checkpoint violated the written policies in place, Respondent was stopped, field tested for intoxication, arrested and later subjected to chemical testing. There is no dispute that Respondent was under the influence. He was. The issue is whether the fact that Respondent was caught by the unlawful checkpoint justifies the checkpoint and renders its admitted unlawfulness of no consequence in the administrative context.

After his arrest, Respondent received a notice concerning the DMV's intent to revoke his driver's license for DUI. Respondent requested and subsequently prevailed at an administrative hearing regarding this case. The administrative Order was affirmed by the Circuit Court. This appeal followed.

The issue in this case has never been Respondent's sobriety while driving. Rather, the issue is what affect, if any, the unlawful checkpoint has on the administrative hearing process.

Under the DMV's view of this case, the answer is that the unlawfulness of the checkpoint means nothing at all. Respondent disagrees.

## **II. Statement Concerning Oral Argument**

Respondent agrees with petitioner that oral argument would assist the Court in resolving this case.

## **III. Argument**

Essentially, the DMV is asking this Court to sanction unlawful police conduct as the unlawful conduct relates to administrative license revocation cases. It is not disputed that the checkpoint violated the applicable policies, and thus the law. The issue for consideration here is whether the unlawful police conduct will be sanctioned and condoned by this Court.

In *Miller v. Toler*, this Court held that the exclusionary rule did not apply in administrative license revocation cases. However, the majority in *Toler* took pains to conclude that the conduct of the police at that time was lawful because the holding of *State v. Davis* was still "good law" and had not yet been reversed by the later holding of this Court in *State v. Sigler*. *Toler* is distinguishable then from this case because there is no question that the police conduct was improper and unlawful.

Additionally, Respondent relies on the logic of the dissenting Justices in *Toler*. With the *Toler* decision, there is now a perceived disconnect between police misconduct in the criminal context and the totally different way the same misconduct affects the administrative process. The

police, prosecutors, the driving public and others are left with the real situation of police misconduct being the predicate for license revocation.

If petitioner gets its way here, the "ends" will truly justify the means. There will be no procedural impediment to the police in conducting totally suspicionless stops of motorists for slight reason or no reason at all.

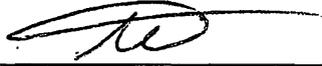
Respondent, therefore, requests that this Court reverse Toler or, at a minimum, carve out an exception for admitted and clear police violations of the law. It would be different if the argument here was whether, or to what extent, the police violated their own guidelines. In this case, that has been acknowledged, yet, the DMV wants this violation to be immunized by this court. In short, the DMV is saying here that it wants the authority from this Court to do anything it wants so long as drunks are removed from the road. Surely, this Court will not sanction conduct by the police that clearly violates law and policy. There must be a clearer standard for West Virginia.

#### IV. Conclusion

For the reasons stated herein, the Order of the Circuit Court must be affirmed.

Respectfully submitted,

**JAMES PETTIT,**  
**By counsel,**



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**Michael R. Whitt**      **WVSB 6099**  
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**V. CERTIFICATE OF SERVICE**

I, Michael R. Whitt, counsel for Respondent, do hereby certify that I served a true and correct copy of the foregoing "**Respondent's Reply Brief**" on this 3<sup>rd</sup> day of September, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed tp the following:

Elaine L. Skorich  
Assistant Attorney General  
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**Michael R. Whitt**