

14-0040

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2013 DEC 16 PM 3:33

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

CATHY S. GARDNER, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Petitioner,

v.

Civil Action No. 13-AA-82  
Judge James C. Stucky

DAVID S. LITTLETON,

Respondent.

FINAL ORDER

This matter comes before this Court on Petitioner Joe E. Miller's<sup>1</sup>, Commissioner of the West Virginia Division of Motor Vehicles (*hereinafter* "Petitioner"), "Petition for Appeal" filed June 27, 2013, from a final decision of the Chief Hearing Examiner of the Office of Administrative Hearings (*hereinafter* "Examiner"). After reviewing the Petition, the entire record, and the applicable legal authority, this Court **AFFIRMS** the decision of the Examiner.

STANDARD OF REVIEW

This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* W. Va. Code § 29A-5-4(g) states the following:

The Court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision 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

<sup>1</sup> Steven O. Dale is the current Acting Commissioner.

- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and review those findings under a clearly wrong standard. Further, the Court applies a de novo standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996).

“The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008) (per curiam) (quoting Syl. pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)).

#### FACTS AND PROCEDURAL HISTORY

On August 6, 2010, at approximately 11:55 p.m., West Virginia State Trooper M. J. Glende (*hereinafter* “Trooper”), the investigating officer in this matter, was conducting patrol on West Virginia State Route 115 in Ranson, Jefferson County, West Virginia. (Ex. Decision, p. 2).

The Trooper testified that he observed a silver-colored 2007 Chrysler 300 weaving in its traffic lane, with a defective registration light. (Hg. Tran., p. 38). The Trooper then initiated a traffic stop of the vehicle and identified the driver as the Petitioner. During the traffic stop, the Trooper determined that Patricia Ann Painter (*hereinafter* “Mrs. Painter”), a passenger in the Chrysler, was the registered owner of the Vehicle.

The Trooper administered a series of field sobriety tests to the Petitioner. Following the tests, the Trooper arrested the Petitioner for driving while under the influence of alcohol and transported him to detachment to administer a secondary chemical test.

The Petitioner was licensed and qualified to operate a commercial vehicle on the date of the alleged offense (Ex. Decision, p. 3).

During the hearing, Petitioner did not testify. Mrs. Painter testified on Petitioner's behalf and provided that the Petitioner was operating the Vehicle in a safe manner, he did not appear to be intoxicated, and the registration light on the Vehicle was functioning properly (Hg. Tran., p. 79). Mrs. Painter further provided that they were traveling east on West Virginia Route 115, and the Trooper was parked beside the roadway facing westbound (*Id.* at 77).

The Examiner reversed the Commissioner's Order of Revocation, finding that the Petitioner did not commit an offense described in West Virginia Code § 17C-5-2, in that the Petitioner, while the holder of a commercial driver's license, did not driver a motor vehicle in this State while under the influence of alcohol on August 6, 2010.

### DISCUSSION

As a preliminary issue, the Court must first consider whether there was an illegal seizure. The West Virginia Supreme Court of Appeals has previously examined this issue:

[t]he Fourth Amendment to the United States Constitution and Article III, Section 6 of the Constitution of West Virginia protect the public from unreasonable searches and seizures by governmental officials. These protections come into play when a citizen is "seized" by a government actor such as a police officer. A person has been "seized" within the meaning of our "search and seizure" jurisprudence when, in view of the context of all the circumstances surrounding the incident, a reasonable person would believe that he is not free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565, 572 (1988) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980) (opinion of Stewart, Rehnquist, J.J.)); see also *State v. Todd Andrew H.*, 196 W.Va. 615, 619-20, 474 S.E.2d 545, 549-50 (1996) (applying Chesternut standard to Article III, Section 6 of the Constitution of West Virginia).

*Ullom v. Miller*, 227 W. Va. 1, 7-8, 705 S.E.2d 111, 117-18 (2010) (footnotes omitted).

The court further explained that not all contact between a citizen and a police officer will rise to

the level to afford constitutional protections. Where an encounter rises to the level of a "search" or "seizure," the constitutional protections require the search or seizure to be reasonable and that the governmental actor have probable cause and, absent a recognized exception, a validly issued warrant. *Id.* at 8.

"Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime. . ." *Muscatell* at Syl. pt. 3 quoting Syl. pt. 1, in part, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).<sup>2</sup> When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police. *State v. Stuart*, supra, at Syl. pt. 2.

In this case, Ms. Painter's testimony directed conflicted with the Trooper's testimony. The West Virginia Supreme Court has held that "where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court." *Muscatell*, supra, at Syl. pt. 6.

In this case, the Examiner recognized that the conflict in testimony required a credibility determination. (Hg. Trans., p. 6). During the hearing, the Examiner determined that the Trooper's testimony regarding the traffic stop was indecisive and questionable. The record provides that the Trooper's testimony about the events preceding the traffic stop, particularly his

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<sup>2</sup> Petitioner argues that the Examiner was clearly wrong to determine that the Trooper had no articulable suspicion to stop the vehicle because the testimony provided that the vehicle was already stopped. The record provides that both Ms. Painter and the Trooper testified that the car was pulled over during a traffic stop. (Hg. Tran., p. 38, 77). Therefore, this argument is without merit.

location, is ambiguous and indecisive. However, the Examiner found, as the record provides, that Ms. Painter provided consistent, detailed testimony regarding the events.

Next, the Court must consider whether the Examiner erred in reversing the Petitioner's driver's license suspension order. West Virginia Code § 17C-5A-2(f) provides that specific findings must be made by the Examiner when reaching a decision regarding whether the administrative revocation of a person's driving privileges for driving under the influence of alcohol. West Virginia Code § 17C-5A-2(f) provides the following:

(f) In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or accused of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the Office of Administrative Hearings shall 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, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent, by weight; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: Provided, That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

[Emphasis added].

In *Clower v. West Virginia Dep't of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), the West Virginia Supreme Court of Appeals affirmed an order reversing the Commissioner's administrative order suspending Mr. Clower's license to operate a motor vehicle in West Virginia. The Supreme Court held that Mr. Clower was not lawfully placed

under arrest because the arresting officer did not have the requisite reasonable suspicion to initiate a traffic stop of Mr. Clower's vehicle. The Supreme Court applied the 2004 version of W. Va. Code § 17C-5A-2, concluding that the statute required a specific finding of "whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol or was lawfully taken into custody for the purpose of administering a secondary test." W. Va. Code § 17C-5A-2(e) (2004) (Repl. Vol. 2004). Similarly, in this matter, the applicable version of the statute required the Examiner to make a specific finding that Petitioner was lawfully placed under arrest.<sup>3</sup>

This Court has reviewed the entire record and applicable legal authority. Accordingly, this Court concludes that the Petitioner was not lawfully placed under arrest because the Trooper did not have the requisite reasonable suspicion to initiate a traffic stop of the motor vehicle. Therefore, this Court does not find that the Examiner was clearly wrong in concluding that Petitioner did not commit an offense as described in West Virginia Code § 17C-5-2.

#### RULING

Accordingly, this Court orders the following: the decision of the Examiner is **AFFIRMED**. This matter is **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk of the Court shall send copies of this Order to

David S. Littleton  
116 Ranson Estates Circle  
Ranson, West Virginia 25438

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<sup>3</sup> In *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012), the West Virginia Supreme Court discussed the application of the exclusionary rule in civil, administrative license revocation proceedings. The Supreme Court acknowledged that the validity of an administrative license revocation is dependent upon the legality of the initial traffic stop as premised upon the 2004 version of W. Va. Code § 17C-5A-2. Similar to the applicable version of the statute in this matter, W. Va. Code § 17C-5A-2(e) (2004) required that the person was lawfully placed under arrest. *Id.* at 484.

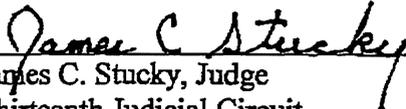
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Enter this Order the 16<sup>th</sup> day of December, 2013.

  
James C. Stucky, Judge  
Thirteenth Judicial Circuit

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  
DAY OF December 2013  
  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA