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KAWAHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Petitioner/Respondent below,

v.

**CIVIL ACTION NO. 12-AA-24
Judge Paul Zakaib, Jr.**

JOHN L. FULLER, JR.,

Respondent/Petitioner below.

**FINAL ORDER REVERSING FINAL DECISION OF OFFICE OF
ADMINISTRATIVE HEARINGS**

Pursuant to W. Va. Code § 29A-5, *et seq*, this case is an appeal from the decision of the Office of Administrative Hearings (“OAH”) that reversed a decision of Joe E. Miller¹, former Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), revoking Mr. Fuller’s operator’s license for driving under the influence of alcohol.

FINDINGS OF FACT

1. On July 6, 2010, Corporal J. A. Bailes of the South Charleston Police Department (formerly of the Dunbar Police Department) (“Assisting Officer” or “A/O”) responded to a radio transmission from Corporal D. A. Hammonds (“Investigating Officer” or “I/O”) formerly of the Dunbar Police Department (and now with the Putnam County Sheriff’s Department).

2. The Investigating Officer’s radio transmission to the Assisting Officer was that an individual driving a Honda tried to evade him.

¹ The current Acting Commissioner is Steven O. Dale.

3. The A/O observed the vehicle exit one parking lot, turn left and then enter the parking lot of the Pour House Bar on West Washington Street in Dunbar, Kanawha County, West Virginia.

4. The A/O approached Mr. Fuller's stopped vehicle, remained on scene for the arrival of the I/O, and was present during the DUI investigation.

5. The A/O observed that Mr. Fuller was unsteady on his feet and had slurred speech.

6. On July 6, 2010, while on routine patrol, the I/O was traveling on West Washington Street and followed behind a Honda Accord for one-half mile.

7. The I/O approached close to the rear of the vehicle (two to three car lengths), and the vehicle decelerated and entered the parking lot of a closed business establishment, the Cold Spot.

8. The I/O passed the Honda and continued traveling down the 2900 block of Dunbar Avenue until he could make a U-turn to double back.

9. The I/O passed the A/O and another officer in his police cruiser and radioed that a Honda had just "shot" into the parking lot.

10. The I/O initiated contact with the vehicle and identified the driver as Mr. Fuller.

11. While speaking with Mr. Fuller, the I/O detected the odor of an alcoholic beverage on Mr. Fuller's breath; observed that Mr. Fuller had bloodshot eyes; and noted that Mr. Fuller was unsteady on his feet.

12. The I/O administered three standard field sobriety tests to Mr. Fuller.

13. Mr. Fuller failed the horizontal gaze nystagmus; the walk-and-turn; and the one-legged stand.

14. The I/O concluded that Mr. Fuller had been driving while under the influence of alcohol and transported Mr. Fuller to the Dunbar Police Department for the purpose of administering a secondary chemical test of Mr. Fuller's breath.

15. The results of the secondary chemical test revealed a blood alcohol content of .227%.

CONCLUSIONS OF LAW

1. The OAH's conclusion that the investigating officer lacked evidence of reasonable suspicion to believe that the driver was DUI before effecting a stop is in error.

2. In an administrative license revocation hearing, W. Va. Code § 17C-5A-2 (2010) requires the OAH to find, among other things:

Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol... or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight...

3. The language in § 17C-5A-2 above is identical to the language present in the Code in 2008 and 2005; is wholly unrelated to the stop; and is gleaned from W. Va. Code § 17C-5-4(c) 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.

4. West Virginia Code § 17C-5-4(c) gives the investigating officer direction regarding administration of the secondary chemical test, while, in comparison, W. Va. Code § 17C-5-4(b) gives the officer direction regarding the administration of the preliminary breath test.

5. Once the OAH erroneously created a requirement for reasonable suspicion, it made a monumental leap to apply the criminal exclusionary rule to the administrative proceeding at hand instead of considering all of the evidence and making a finding that Mr. Fuller drove a motor vehicle in the state of West Virginia while under the influence of alcohol.

6. On June 6, 2012, the West Virginia Supreme Court of Appeals held that “the judicially-created exclusionary rule is not applicable in a civil, administrative driver’s license revocation or suspension proceeding.” *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012).

7. The Court reasoned: “When this minimal deterrent benefit [of police misconduct] is compared to the societal cost of applying the exclusionary rule in a civil, administrative driver’s license revocation or suspension proceeding that was designed to protect innocent persons, the cost to society outweighs any benefit of extending the exclusionary rule to the civil proceeding.” *Id.* at 13.

8. The next day, the Supreme Court entered its order in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012), holding,

“The lower court applied the exclusionary rule concept to invalidate the civil administrative license revocation based upon the existence of the improper traffic stop. In syllabus point three of *Toler v. Miller*, ___ W. Va. ___, ___ S.E.2d ___ (No 11-0352, June 6, 2012), this Court held that ‘[t]he judicially-created exclusionary rule is not applicable in a civil, administrative driver’s license revocation or suspension proceeding.’ [footnote omitted] Thus, the validity of an underlying traffic stop is relevant to a determination of criminal punishment, rather than to civil administrative license revocation.”

9. The *Smith* Court concluded: “The New Mexico court in *Glynn*², like this Court in *Toler*, found that the exclusionary rule does not apply to civil license revocation proceedings and

² *Glynn v. New Mexico*, 252 P.3d 742, 747 (N.M. App. 2011).

explained that “[i]f the exclusionary rule does not apply to the proceedings, then the authority of the [Motor Vehicle Division] to consider the legality of a stop is irrelevant because the evidence would be admitted regardless of the legality of the stop.”

10. Because the OAH excluded all evidence obtained after Mr. Fuller was stopped, its decision is clearly erroneous.

11. The record is replete with an abundance of evidence regarding the only issue before the OAH: whether Mr. Fuller 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.

12. To use the criminal exclusionary rule to discard all of the evidence that proves the only issue in the administrative hearing below is an unfounded abuse of discretion.

13. A revocation decision must be affirmed if supported by substantial evidence. *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866, 617 S.E.2d 860 (2005) (“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.”)

14. Pursuant to *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487, 473 S.E.2d 483 (1996),

“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.

15. 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). 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).

16. There is myriad evidence reflecting that Mr. Fuller was operating a motor vehicle on a public street, exhibited symptoms of intoxication and had consumed alcoholic beverages in the instant case, yet the OAH erroneously applied the exclusionary rule and improperly ignored all evidence of Mr. Fuller’s intoxicated driving.

17. Further, the OAH confuses a lawful arrest with a lawful stop.

18. Pursuant to *State v. Byers*, 159 W. Va. 596, 603, 224 S.E.2d 726, 732 (1976),

W. Va. Code § 17C-5A-1, *as amended*, specifically provides that a lawful arrest may be effected and a test for alcohol may be administered incident thereto at the direction of the "arresting law-enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle . . . while under the influence of intoxicating liquor." In the instant case, therefore, the officers, "having reasonable grounds to believe" that the defendant committed the offense, could have made a lawful warrantless arrest either at the scene of the accident or at the hospital.

19. Here, the investigating officer clearly had enough evidence before him to have reasonable grounds to believe that Mr. Fuller was DUI. Mr. Fuller had the odor of alcoholic beverage on his breath; was unsteady exiting the vehicle; staggered walking to the roadside; staggered while standing; had slurred speech; was slow to answer questions; had glassy and red eyes; admitted to drinking a bottle of tequila; failed the horizontal gaze nystagmus test; failed the walk and

turn test; and failed the one leg stand. Finally, Mr. Fuller admitted to having consumed alcoholic beverages prior to his driving that night, and he has not offered any other direct evidence whatsoever to support an argument that he was indeed sober on the subject night.

20. In its analysis, the OAH determined that the officer did not have reasonable grounds to believe that Mr. Fuller was DUI; however, in its *Conclusions of Law*, the OAH determined that the officer lacked reasonable suspicion to stop. Clearly, the OAH confuses the law and its definitive terms. The officer had no choice but to arrest Mr. Fuller based upon his reasonable belief that Mr. Fuller was DUI, and the OAH was wrong in applying an evidentiary rule as a measure as to whether the officer had reasonable grounds to believe that Mr. Fuller was under the influence of alcohol.

21. Further, as explained above, the lawful arrest language in W. Va. Code § 17C-5-4(c) relates 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.

22. Pursuant to *Albrecht v. State*, 173 W. Va. 268, 272, 314 S.E.2d 859, 863 (1984),

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.

23. Therefore, even if the OAH determined that Mr. Fuller was not lawfully arrested, only the secondary chemical test could be ignored.

24. However, a secondary chemical test was not required for the OAH to determine that Mr. Fuller was DUI because where there was more than adequate evidence reflecting that Mr. Fuller, who was operating a motor vehicle upon a public street or highway, exhibited symptoms of

intoxication and had consumed an alcoholic beverage. *Albrecht v. State*, 173 W. Va. 268, 273, 314 S.E.2d 859, 864-865 (1984).

25. Notably, the Supreme Court in both *Toler, supra*, and *Smith, supra*, reviewed the reasonable grounds language that is at issue here because that language is in both the 2008 and 2010 versions of West Virginia Code § 17C-5A-2. In both cases, the Court found that the nature of the stop is irrelevant to an administrative license revocation; therefore, the reasonable suspicion language used by the OAH is clear error.

26. In its discussion of the case below, the OAH stated that the I/O testified he followed the vehicle for about one-half mile traveling around twenty-five miles per hour and that the vehicle decelerated and turned into the parking lot of the Cold Spot Bar, a closed business establishment. The OAH further stated that on cross-examination, Mr. Fuller's counsel asked the I/O if Mr. Fuller was driving inappropriately and whether Mr. Fuller used his turn signal before entering the parking lot. The I/O stated that Mr. Fuller had used his turn signal and that he did not observe Mr. Fuller drive in any way to be charged with a moving violation but that he observed Mr. Fuller accelerate and decelerate rapidly without cause and considered the abrupt turn into the parking lot as being suspicious. Counsel for Mr. Fuller asked the I/O why he did not turn into the parking lot directly behind Mr. Fuller, and the I/O stated that he passed Mr. Fuller and continued traveling down the 2100 block of Dunbar Avenue to make a U-turn to come back to see if Mr. Fuller was using a cell phone and to find out the reason why he had entered the parking lot. Then, the OAH erroneously *speculated* that "it would seem more than likely if the Investigating Officer deemed the Petitioner's maneuver as suspicious, he would have turned immediately into the parking lot to perform an investigative stop."

27. Any conflict in material evidence presented by the investigative officer relates solely to the nature of the investigative stop. The "issue of whether the initial traffic stop was legally deficient in some regard is relevant only in the criminal context." *Miller v. Smith, supra*.

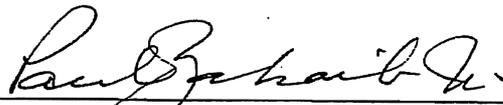
28. There was no conflict in the material evidence regarding whether Mr. Fuller was DUI. On that topic, evidence presented was quite clear and unrebutted: Mr. Fuller had the odor of alcoholic beverage on his breath; was unsteady exiting the vehicle; staggered walking to the roadside; staggered while standing; had slurred speech; was slow to answer questions; had glassy and red eyes; admitted to drinking a bottle of tequila; failed the horizontal gaze nystagmus test; failed the walk and turn test; and failed the one leg stand. Accordingly, the OAH erred in determining there was a conflict in the material evidence presented.

DISPOSITION

For the above reasons, the *Final Order* of the OAH is **REVERSED** and the *Final Order* of the Commissioner revoking the operator's license of Petitioner is hereby **UPHELD**. An objection and exception is saved to the Petitioner to this Final Order.

It is **FURTHER ORDERED** that this matter is **DISMISSED** and **STRICKEN** from the docket of the Court, and the Clerk of this Court is hereby **DIRECTED** to transmit certified copies of this Order to: (1) Elaine L. Skorich, Esq., Assistant Attorney General, DMV - Office of the Attorney General, P. O. Box 17200, Charleston, WV 25317; and (2) David Pence, Esquire, Carter Zerbe & Associates, PLLC, P. O. Box 3667, Charleston, WV 25336.

ENTERED this 19th day of Dec, 2013.


PAUL ZAKAB, JR., CIRCUIT JUDGE

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 30
DAY OF December, 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

I, David Pence, counsel for Respondent, do hereby certify that I have served a true and exact copy of the foregoing NOTICE OF APPEAL by depositing a true copy thereof by certified mail in the United States Mail, postage prepaid, in an envelope addressed to:

Joe Miller, Commissioner
West Virginia Division of Motor Vehicles
P. O. Box 17300
Charleston, WV 25317

Elaine Skorich, Asst. Attorney General
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

Kanawha County Circuit Clerk
Kanawha County Judicial Annex
111 Court Street
Charleston, WV 25301

on this 7th day of January 2014.



David Pence