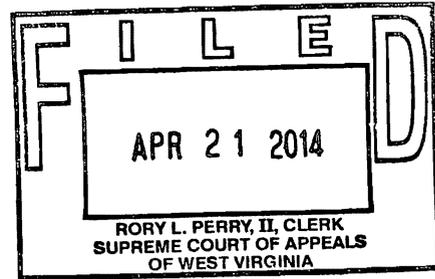


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0043

JOHN FULLER,

Petitioner,



v.

Civil Action No. Below: 12-AA-24

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

Respondent.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITION FOR APPEAL AND WRIT OF ERROR

Brief of Petitioner

Respectfully submitted:

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TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENT OF ERROR	1
II. STATEMENT OF THE CASE	1-2
III. SUMMARY OF ARGUMENT.....	2-3
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION. . .	3
V. STANDARD OF REVIEW.....	3-4
VI. ARGUMENT.....	4-7
VII. CONCLUSION.....	7

TABLE OF AUTHORITIES

<u>OPINIONS</u>	<u>Page</u>
<i>Dale v. Arthur</i> , No. 13-0374 (W.Va. Supreme Court March 28, 2014)..... (memorandum decision)	3, 4
<i>Delaware v. Prouse</i> , 440 U.S. 648, 99 S.Ct. 1391 (1979).....	3, 5
<i>Miller v. Smith</i> , 229 W.Va. 478, 729 S.E.2d 800 (2012).....	4
<i>Miller v. Toler</i> , 229 W.Va. 302, 729 S.E.2d 137 (2012).....	4
<i>Muscatell v. Cline</i> , 196 W.Va. 588, 474 S.E.2d 518 (1996).....	5, 7
<i>State v. Stuart</i> , 192 W.Va. 428, 452 S.E.2d 886 (1994).....	3, 5
<i>West Virginia Institute of Technology v. West Virginia Human Rights</i> <i>Comm'n</i> , 181 W.Va. 525, 533, 383 S.E.2d 490, 498 (1989)	7

STATUTES

West Virginia Code §17C-5A-2.....	3, 4
W.Va. Code §17C-5A-2(f) (2010).....	4
West Virginia Code §29A-5-4(g) (2007).....	3

OTHER

Rule 18(a)(3) of the Revised Rules of Appellate Procedure (2010).....	3
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I. ASSIGNMENT OF ERROR

- A. The circuit court abused its discretion in concluding that a lawful arrest does not include the required showing that the underlying traffic stop was legal.**
- B. The OAH correctly ruled that the underlying traffic stop in this case was not supported by a reasonable suspicion of criminal activity.**

II. STATEMENT OF THE CASE

A. THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL

This proceeding is an appeal from a final order from Judge Paul Zakaib, Jr. of the Circuit Court of Kanawha County entered December 19, 2013 reversing an order previously entered by the Office of Administrative Hearings (OAH) dated February 2, 2012. In its February 2, 2012 decision, the OAH ruled that the Respondent had failed to establish at the July 16, 2011 administrative license revocation hearing that the Petitioner was lawfully arrested. Thus, the OAH reversed the Respondent's initial order of revocation which had revoked Petitioner's drivers license based upon his arrest for driving while under the influence on July 6, 2010.

At the administrative hearing, Corporal D.A. Hammonds, then with the Dunbar Police Department (Hereinafter "Ofc. Hammonds"), testified that while driving behind Petitioner for approximately one half mile at approximately 2:30 a.m. on West Washington Street, he observed Respondent decelerate and turn into the Cold Spot parking lot on July 6, 2010. (Ar.Tr. 26-27, 46) Ofc. Hammonds traveled approximately three car lengths behind Petitioner during that time and did not observe any moving violations. (Ar.Tr. 27, 48-50, 56)

Ofc. Hammonds conceded that while following Respondent, he never triggered his blue lights or attempted a traffic stop. (Ar. Tr. 49) He also testified that in his opinion the Respondent's action

of pulling into the Cold Spot was not illegal. (Ar. Tr. 49) Ofc. Hammonds continued upon West Washington Street after Petitioner pulled into the Cold Spot. (Ar. Tr 50)

Acting on a hunch, Ofc. Hammonds radioed Corporal J.A. Bailes, who at the time was employed by the Dunbar Police Department (Hereinafter “Cpl. Bailes”), and informed him that Petitioner’s vehicle had tried to avoid him at the Cold Spot. (Ar. Tr 15)

Cpl. Bailes caught up with Petitioner’s vehicle as he was exiting the parking lot of the Cold Spot toward the adjacent lot of the Pour House. (Ar. Tr. 17) Petitioner drove his vehicle to the back of the parking lot of the Pour House as Cpl. Bailes closed in and initiated his blue lights. (Ar. Tr. 17) Cpl. Bailes testified that Petitioner had “turned in the lot and went to the back of the lot and stopped, and we caught up with him and stopped him” and “[i]t didn’t actually seem that long to observe him doing anything other than pulling in the lot and stopping.” (Ar. Tr. 17, 20)

Based upon the observations following the traffic stop in this case, the Petitioner was arrested and charged with driving under the influence. The Respondent issued an initial order of revocation entered July 23, 2010. Petitioner timely and appropriately requested an administrative hearing, which was ultimately conducted on June 16, 2011 at the Office of Administrative Hearings.

After hearing evidence and arguments by both parties, on February 2, 2012 the Office of Administrative Hearings issued a Final Order reversing the initial order of revocation and reinstating Respondent’s license. Respondent filed a Petition for Judicial Review at the Kanawha County Circuit Court on or about March 7, 2012. (Ar. 114) Petitioner timely filed a *Notice of Appeal* with the West Virginia Supreme Court and an Amended Notice of Appeal on or about January 7, 2014.

III. SUMMARY OF ARGUMENT

The lower court erroneously reversed the final order of the OAH exclusively on its misguided

finding that the legality of the traffic stop is not an issue in an administrative license revocation proceeding contrary to this Court's recent decision in *Dale v. Arthur*, No. 13-0374 (W.Va. Supreme Court March 28, 2014) (memorandum decision). The lower court was clearly wrong in finding that the legality of the traffic stop is not an element that must be proven when the applicable version of West Virginia Code §17C-5A-2 requires a finding that the driver was "lawfully placed under arrest," which is the case herein.

The OAH correctly concluded that the underlying traffic stop was not supported by an articulable reasonable suspicion of criminal activity. The sole basis for the traffic stop was because the investigating officer arbitrarily felt that Petitioner's act of lawfully pulling into the parking lot of a closed business was somehow suspicious. The investigating officers conceded that Petitioner did not commit a moving violation or violate any other law while driving, thus establishing that no lawful basis existed to conduct a traffic stop contrary to *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979) and *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

The lower court chose to end its analysis after concluding that a lawful arrest does not require a lawful traffic stop and never addressed the legality of the underlying traffic stop.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary pursuant to Rule 18(a)(3) of the Revised Rules of Appellate Procedure (2010) because the issues contained herein have been authoritatively decided.

V. STANDARD OF REVIEW

Pursuant to West Virginia Code §29A-5-4(g) (2007) of the State Administrative Procedures Act the Appellate Court,

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

VI. ARGUMENT

A. The circuit court abused its discretion in concluding that a lawful arrest does not include the required showing that the underlying traffic stop was legal.

Recently, this Court affirmatively announced that a “lawful arrest” within the meaning of W.Va. Code §17C-5A-2(f) (2010) requires a finding that the underlying traffic stop was legal. *Dale v. Arthur*, No. 13-0374 (W.Va. Supreme Court March 28, 2014) (memorandum decision).

This Court in *Arthur* recognized that the administrative law governing license revocation proceedings was created by the Legislature and is governed by statute. *Id.* Thus, because the relevant version of W.Va. Code §17C-5A-2(f) herein requires a finding that the driver be “lawfully arrested,” proof that the initial traffic stop was legal is required in order to sustain a license revocation.

Consequently, the lower court was clearly wrong and abused its discretion in its analysis. Relying upon *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), the lower court erroneously concluded that the legality of the traffic stop is irrelevant in an administrative license revocation proceeding.¹

¹ In both *Smith* and *Toler*, the applicable version of W.Va. Code §17C-5A-2 did not include the required showing that a driver be lawfully placed under arrest.

Therefore, the circuit court's decision must be reversed .

B. The OAH correctly ruled that the underlying traffic stop in this case was not supported by a reasonable suspicion of criminal activity.

The OAH hearing examiner correctly concluded that the State failed to establish that the officers involved in this case maintained the required suspicion required to initiate a traffic stop. In order for a stop to be lawful, the investigating officer must have “articulable and reasonable suspicion that a motorist is, or has been violating the law.” *State v. Stuart*, 452 S.E.2d 886 (1994) Officers must show some *objective justification* for making a stop. *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). 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 information known by the police. *Id.* In this instance, both officers concede that they never observed any illegal conduct while Respondent operated his vehicle. (Ar. Tr. 46,49) The stop in this case amounts to nothing more than a mere hunch of criminal activity, which is insufficient to justify a traffic stop. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979).

For example, Ofc. Hammonds agreed that during the during the distance of one-half mile that he observed Respondent driving, he did not observe any moving violations. (Ar. Tr. 48) Ofc. Hammonds also conceded that while following directly behind Respondent for approximately one-half mile, he never triggered his blue lights or attempted a traffic stop. (Ar. Tr. 46,49) Tellingly, Ofc. Hammond testified that in his opinion the Respondent's action of pulling into the Cold Spot that evening was not illegal. (Ar. Tr. 49)

Even though Petitioner did not engage in any criminal activity or violate any law in operating his motor vehicle, Ofc. Hammonds nonetheless, on a mere hunch, concluded that Petitioner's driving was “suspicious” and communicated to Ofc. Bailes to initiate a traffic stop. (Ar. Tr. 49) Ofc.

Hammonds never articulated any justifiable reason as to why he believed the driving to be suspicious, other than his unsubstantiated belief that Petitioner “tried to avoid him.” (Ar. Tr.15) Nothing in the record suggests that Petitioner attempted to avoid Ofc. Hammonds. Had Petitioner tried to avoid him, he would have sped up, made a sharp turn or pulled behind a structure to hide. Ofc. Hammonds never triggered his blue lights or signaled Petitioner to stop, thus, Ofc. Hammonds paranoia that Petitioner attempted to avoid him is unfounded.

Moreover, there exists nothing on the record to suggest that Ofc. Hammonds training or experience would lead him to conclude that Petitioner was subject to search and seizure based upon the lawful act of pulling into a parking lot of a closed business.² To authorize law enforcement officers to search and seize motorists who, having not otherwise violated the law, turn off the road shortly after encountering an officer would completely vitiate the protections afforded by the Fourth Amendment of the United States Constitution and Section 6 of the West Virginia Constitution.

With regard to Ofc. Bailes, he testified that “I don’t recall anything about driving the vehicle. It didn’t actually seem that long to observe him doing anything other than pulling in the lot and stopping.”³ (Ar. Tr. 20) In reality, the sole basis for Ofc. Bailes traffic stop was because Ofc. Hammonds had radioed him and informed him that a motorist had tried to avoid him. (Ar. Tr. 15) Like Ofc. Hammonds, Ofc. Bailes did not observe any illegal driving.

² During cross examination, Ofc. Hammonds conceded that other alternative scenarios exist which would rationally explain Petitioner’s lawful conduct, such as pulling into a parking lot only to learn after the fact that the establishment was closed. (Ar. Tr. 51-51)

³ Earlier, Ofc. Bailes had testified that when he caught up to Petitioner’s vehicle it was “exiting the parking lot at a high rate of speed . . .” (Ar. Tr. 16) However, Ofc. Bailes never articulated how fast Petitioner was traveling, whether he was speeding, whether traffic was impacted, whether Petitioner’s driving was illegal or, most importantly, whether that, instead of the order by Ofc. Hammonds, was the reason for the traffic stop.

In this case, after hearing the evidence presented, the hearing examiner correctly concluded that the State failed to establish the requisite reasonable suspicion to stop Petitioner's vehicle. Certainly, the Petitioner has not met its burden of proof under W.Va. Code §29A-5-4(g) (2007) which requires a showing of excess of statutory authority or jurisdiction, unlawful procedures, clear error of law, clearly wrong or arbitrary and capricious/abuse of discretion. "The reviewing court is not entitled to reverse the finding of the trier of the facts simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of the facts." *West Virginia Institute of Technology v. West Virginia Human Rights Comm'n*, 181 W.Va. 525, 533, 383 S.E.2d 490, 498 (1989). "Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

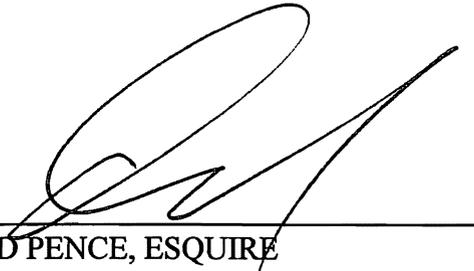
Because the lower court never addressed the issue of the legality of the traffic stop in its order, the only finding available for this Court to review is that of the OAH, which correctly concluded that the traffic stop in this matter was not lawful.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner prays that this Honorable Court reverse the decision of the Circuit Court of Kanawha County and affirm the order by OAH reversing the final order of Respondent Commissioner, Steven O. Dale, which revoked Petitioner's driver's license. Petitioner also prays that this court order the Commissioner to immediately restore to Petitioner a valid, permanent driver's license or for whatever alternative relief this court deems appropriate.

JOHN FULLER

By Counsel

A handwritten signature in black ink, appearing to read 'D. Pence', is written over a horizontal line.

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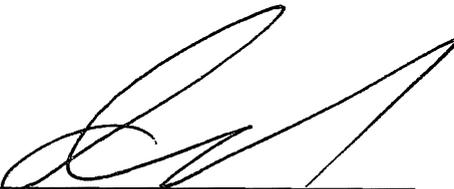
CERTIFICATE OF SERVICE

I, David Pence, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **PETITION FOR APPEAL AND WRIT OF ERROR** by depositing a true copy thereof in the United States Mail

Elaine Skorich, Asst. Attorney General
DMV - Attorney General's Office
P. O. Box 17200
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Kanawha County Circuit Court
Judicial Annex
111 Court St.
Charleston, WV 25301

on this 21st day of April 2014.



David Pence