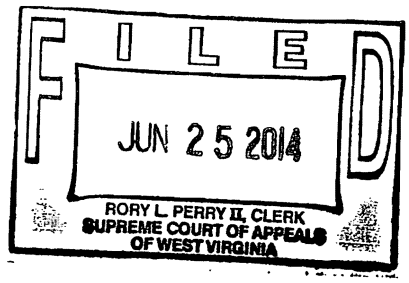
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0043



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.

REPLY BRIEF FOR PETITIONER JOHN FULLER

Respectfully submitted:

JOHN FULLER

By Counsel,

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TABLE OF CONTENTS

Page

I. ARGUMENT. 1

II. CONCLUSION. 5

III. CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

OPINIONS **Page**

Carte v. Cline, 194 W.Va. 233, 236 460 S.E.2d 48, 51 (1995).....4

Clower v. W.Va. Dep't of Motor Vehicles, 223 W.Va. 535, 678 S.E.2d 41 (2009)...1

Dale v. Arthur, No. 13-0374 (W.Va. Supreme Court March 28, 2014).....1

Dale v. Ciccone, No. 13-0821 (W.Va. Supreme Court June 5, 2014) (per curium).....1

Dale v. Odum, No. 12-1403 (February 11, 2014) (per curium).....1

Fields v. Indiana, 2011 Ind. App. Unpub. LEXIS 1718, 959 N.E.2d 402 (2011) (unpublished memorandum decision).....3

State v. Frazier, 1999 Tenn. Crim. App. LEXIS 1329 (Tenn. Crim. App. Dec. 28, 1999).....3

Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....2

STATUTES

W.Va. Code §17C-5-2 (2010)..... 1

OTHER

The Constitutionality of Sobriety Checkpoints, 43 Wash. & Lee L.Rev. 1469-70 (1986)..... 4

I. ARGUMENT

A. A lawful arrest includes the required finding that the underlying traffic stop was legal in an administrative drivers' license revocation proceeding.

Recently, this Court unequivocally ruled that the underlying traffic stop in an administrative license revocation proceeding must be lawful in order to effectuate a lawful arrest as set forth in W.Va. Code §17C-5A-2 (2010). *Dale v. Ciccone*, No. 13-0821 (W.Va. Supreme Court June 5, 2014) (per curium). As stated in *Ciccone*,

> "Consequently, in cases in which the applicable version of West Virginia Code §17C-5A-2 has included the requirement for a lawful arrest, as it does in the case sub judice and did in Clower, an individual cannot be considered lawfully arrested for DUI where law enforcement did not have the requisite articulable reasonable suspicion to initiate the underlying traffic stop." *Id.*

This Court's holding in *Ciccone* slams the door on Respondent's attempt to re-litigate the Court's prior holding in *Clower v. W.Va. Dep't of Motor Vehicles*, 223 W.Va. 535, 678 S.E.2d 41 (2009), *Dale v. Odum*, No. 12-1403 (February 11, 2014) (per curium) and *Dale v. Arthur*, No. 13-0374 (W.Va. Supreme Court March 28, 2014).

The Office of Administrative Hearings (OAH) correctly ended its analysis after determining that the Respondent failed to establish a lawful traffic stop of Respondent's vehicle the evening of his arrest. Contrary to Respondent's claim, absent proof of a lawful arrest, the analysis under W.Va. Code §17C-5-2 (2010) ends and no further findings are required. In this case, the OAH correctly concluded that the Respondent failed to prove the required element of its case that Petitioner was lawfully arrested. The circuit count, absent the benefit of this Court's holding in *Odum, Arthur* and *Ciccone*, erroneously concluded that the legality of the traffic stop is irrelevant in an administrative license revocation proceeding.

B. The underlying traffic stop in this case was not legal.

The Respondent fails to identify facts and legal authority sufficient overrule the OAH's original finding that the underlying traffic stop was not legal in this instance. At no time does Respondent indicate which, if any, municipal, state or federal law Petitioner is alleged to have violated prior to the traffic stop.

Instead, Respondent suggests that the traffic stop was legal because Petitioner tried to evade Cpl. Hammonds by lawfully pulling into a commercial parking lot and later exiting the parking lot at what was generally described as a high rate of speed. With regard to the speculative allegation that Petitioner somehow tried to evade Cpl. Hammond, Respondent offers no legal authority to suggest that a motorist lawfully pulling off of a roadway while being followed by law enforcement is illegal. Officer's are precluded from stopping motorists on the basis of "nothing more substantial than inarticulate hunches . . ." *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In fact, even Cpl. Hammonds testified that in his opinion the Respondent's action of pulling into the Cold Spot that evening was not illegal. (Ar. Tr. 49) He also agreed that during the distance of one-half mile that he observed Respondent driving, he did not observe any moving violations. (Ar. Tr. 48) Thus, the allegation that Petitioner tried to evade Cpl. Hammond, thus supporting a traffic stop, is baseless and unsubstantiated.

With regard to the allegation that Petitioner exited the parking lot at a high rate of speed, no evidence exists to suggest that Petitioner drove in excess of the posted speed limit. No evidence was introduced to suggest that Petitioner almost struck another vehicle or failed to use due care. Instead, Ofc. Bailes offhandedly testified that Petitioner exited the parking lot at a high

rate of speed. A high rate of speed compared to what? Petitioner was not cited for a moving violation other than driving under the influence. No evidence was offered to suggest that he squealed his tires, nearly struck a vehicle or impacted traffic in any way. No evidence was introduced to suggest it was raining or that the weather was otherwise adverse. By his own admission, Ofc. Bailes did not observe Petitioner operate a motor vehicle for any significant length of time and could not recall anything about Petitioner's driving. (Ar. Tr. 20)

In an analogous case, the Tennessee Court of Criminal Appeals, Western Section, analyzed the legality of a motorist driving at a slow rate of speed in a closed business establishment in a high crime area. *State v. Frazier*, 1999 Tenn. Crim. App. LEXIS 1329 (Tenn. Crim. App. Dec. 28, 1999). Finding that driving slow in a parking lot of a closed business insufficient to justify a traffic stop, the Court found:

> "Similarly, the mere fact that the defendant was driving in a parking lot slowly is insufficient to justify suspicion of criminal activity, despite the trial court's finding that 'there would be no reason to be there.' Deputy Davidson admitted during the suppression hearing that driving fast may have been suspicious also. Indeed, following the trail court's reasoning, even innocuous behavior such as turning around in one's vehicle, or stopping to check a road map in the unsecured parking lot of a closed business would be sufficient to warrant a stop by police. The parking lot was open to the public, and was located next to a state highway. We are not prepared to subject every person who drives through the open parking lot of a closed business next to a state highway to a police intrusion. Thus, we conclude that the initial stop of the defendant was invalid, and all evidence flowing therefrom should have been suppressed." *Id.*

Along those lines, The Indiana Court of Appeals examined a motorist who pulled into a parking lot and while making a u-turn, slid sideways and nearly struck a snow mound around a light pole. *Fields v. Indiana*, 2011 Ind. App. Unpub. LEXIS 1718, 959 N.E.2d 402 (2011)

(unpublished memorandum decision). According to the officers, the driver in *Fields* was driving "too fast for the road conditions." *Id.* Pointing out that the State failed to elicit testimony or present argument that the driver was suspected of violating a particular traffic code section, the Indiana Court found that the officer's testimony that the driver in *Fields* was traveling "too fast" in a parking lot, without more, was insufficient to justify a traffic stop. *Id.* at 8.

Moreover, the OAH correctly weighed the testimony of both witnesses and concluded that the basis for the traffic stop was because Ofc. Hammond, without any objective evidence, concluded that Petitioner somehow tried to evade him and called for assistance. (Ar. 81) The OAH correctly found that the traffic stop was not a result of Petitioner traveling in a parking lot at a high rate of speed. (A.R. 81) Instead, the OAH considered the totality of the circumstances and correctly concluded that the basis for the stop was due to the unsupportable claim by Cpl. Hammond that Petitioner evaded him while driving. (Ar. 81)

In an effort to shift the burden of proof, the Respondent suggests that Petitioner was somehow obligated to prove that the traffic stop was unlawful by providing rebuttal testimony. No supporting authority is cited by Respondent to justify such a gross deviation from settled law. The burden of proving the constitutionality of a warrantless search and seizure rests solely upon the State. As the Court has found in the past,

> "Under the fourth amendment, a search and seizure is presumptively unreasonable, and the government has the burden of proving the legitimacy of the seizure." *Carte v. Cline*, 194 W.Va. 233, 236 460 S.E.2d 48, 51 (1995) (quoting *The Constitutionality of Sobriety Checkpoints*, 43 Wash. & Lee L.Rev. 1469-70 (1986)).

Petitioner was under no obligation to testify or provide rebuttal evidence. Absent a showing by the Respondent that the initial traffic stop was reasonable, the underlying evidence

gathered as a result of the seizure is inadmissible.

Along those lines, the Respondent also suggests that Petitioner's prior counsel was somehow dilatory in failing to further question the arresting officer regarding the basis for the traffic stop. Because the State had failed to carry its burden of proof regarding a lawful traffic stop, Petitioner's counsel would have been remiss to continue exploring the issue on cross examination.

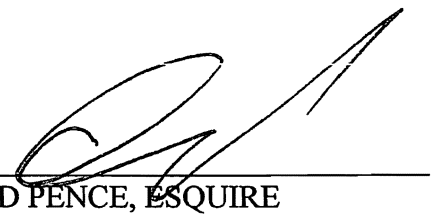
Moreover, Respondent's counsel had ample opportunity to elicit additional testimony from both officers regarding the basis for the traffic stop. Had additional or sufficient grounds existed to initiate a traffic stop, such as speeding, almost striking a vehicle or other violation of the law, Respondent's counsel surely would have brought that evidence to light. He did not.

II. 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



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JOHN FULLER,

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v.

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

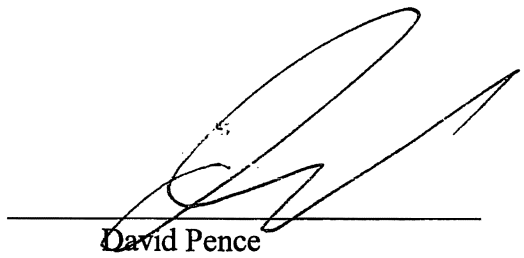
Respondent.

III. CERTIFICATE OF SERVICE

I, David Pence, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **REPLY BRIEF FOR PETITIONER JOHN FULLER** 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
Charleston, WV 25317

on this 25th day of June 2014.



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