

No. 33731 – *Steven T. Lowe v. Joseph Cicchirillo, Commissioner of the West Virginia Division of Motor Vehicles*

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December 30,
2008

Starcher, J., dissenting:

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I dissent because the majority opinion ignores our holding in *Choma v. West Virginia Div. of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001), where we stated at Syllabus Point 3:

In administrative proceedings under *W.Va. Code*, 17C-5A-1 *et seq.*, the commissioner of motor vehicles must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the commissioner, when evidence of such results is presented in the administrative proceeding.

Both the DMV and the majority opinion ignored this Court’s clear holding in *Choma*, and failed to give “substantial weight” to the appellee’s acquittal on DUI charges. By sidestepping the clear holding of *Choma* to engineer the result in the instant case, the majority encourages the DMV to hold our cases in contempt.

I also question the use of the results of the appellee’s blood test before the DMV. I recognize that a test of a suspect’s blood alcohol level might be compelling evidence of whether the suspect was intoxicated or not. But in this case, there is nothing in the record showing that the blood test (a) was authenticated as actually being the appellee’s; (b) was accurately taken, processed and recorded; or (c) was interpreted by an expert as

showing that the appellee was intoxicated. Instead, the only evidence we have of the blood test's reliability is the majority's determination that it was stapled to the "Statement of Arresting Officer" by Deputy Fleming – and the majority opinion goes on to conclude that the blood test was "part of the DMV's records and therefore was properly admitted in the record at the outset of the hearing." As a teetotaler, I certainly know that drunk drivers are a menace on our highways and I do not approve of drinking and driving. But that doesn't allow this Court to throw to the wind rules of evidence dedicated to allowing only reliable, authenticated evidence to be considered.

I therefore respectfully dissent.