

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**James F. Cain,
Petitioner, Petitioner below**

vs.) No. 101166 (Kanawha County 09-AA-133)

**West Virginia Division of Motor Vehicles
Respondent, Respondent below**

FILED

February 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the circuit court’s order affirming the final administrative order of the West Virginia Division of Motor Vehicles, revoking the petitioner’s driver’s license for a period of six months. The appeal was timely filed by the petitioner, an attorney representing himself, with the entire record accompanying the petitioner’s brief. A timely response was filed by the respondent. The petitioner seeks a reversal of the circuit court’s decision and a reversal of the final order of revocation.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Upon consideration of the standard of review, as well as the parties’ briefs and the record, the Court finds no substantial question of law nor does the Court disagree with the decision of the lower tribunal as to the question of law. Moreover, the Court finds no prejudicial error. For these reasons, and having reviewed the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The petitioner, James Cain (“Mr. Cain”), asserts that there was no valid arrest of him for driving under the influence of an intoxicating substance (“DUI”) on April 26, 2008, and that he was not taken into custody nor informed of any constitutional rights when questioned by police officers. Mr. Cain states that Elkins Police Officer Bradley Sharp was not the investigating officer, yet he submitted a D.U.I. Information Sheet to the respondent, the West Virginia Division of Motor Vehicles (“DMV”). An initial order of revocation was sent to Mr. Cain by the DMV on May 15, 2008.

Mr. Cain contested the revocation. Administrative hearings were held on October 30, 2008, and February 18, 2009. The evidence at the administrative hearings, including the DMV's file, established that on April 26, 2008, Officer Sharp responded to the scene of a two-vehicle accident in Elkins. Mr. Cain had driven out of the Elkins Motor Lodge, failed to stop, ran across a lane of traffic, and collided with a truck. (*Oct. 30, 2008, Hr. Tr. I, pp. 4-5.*) Officer Sharp noticed an odor of alcohol coming from Mr. Cain's breath, that his speech was slurred, his eyes were glassy and bloodshot, and he was unsteady while walking, standing, and exiting his vehicle. (*Hr. Tr. I, p. 5.*) Officer Sharp stated that Mr. Cain would forget that he was talking to him and turn around and begin walking off, including walking down the road. (*Hr. Tr. I, p. 5.*) Due to safety issues, Officer Sharp did not conduct field sobriety testing and placed Mr. Cain in his cruiser. (*Hr. Tr. I, p. 5.*) Mr. Cain failed the preliminary breath test. (*Hr. Tr. I, p. 5.*) Mr. Cain admitted to Officer Sharp, as well as during the administrative hearing, that he had consumed a drink of vodka at a grave site and then consumed two more drinks at the Elkins Motor Lodge. (*Hr. Tr. I, p. 28.*)

Officer Sharp placed Mr. Cain under arrest. He observed Mr. Cain for 20 minutes and then administered a secondary chemical test of the breath. Notwithstanding Mr. Cain's arguments to the contrary, and as the circuit court found, the test was conducted in accordance with West Virginia law and resulted in a blood alcohol content of 0.11. (*Hr. Tr. I, p. 5.*)

Following the hearing, the DMV entered a final order effective August 20, 2009, affirming the initial order of revocation. Mr. Cain filed an appeal in the circuit court. On December 3, 2009, the circuit court entered a "Final Order Denying Petition for Appeal." The circuit court found that Officer Sharp had reasonable grounds to investigate the vehicular accident; that he had probable cause to arrest Mr. Cain based upon his observations of Mr. Cain and Mr. Cain's failure of the preliminary breath test; that the evidence in the record met the preponderance of the evidence standard and demonstrated that Mr. Cain was driving under the influence; that the secondary chemical test was properly administered and was evidence that Mr. Cain was driving under the influence; and that the DMV Commissioner properly determined that Mr. Cain was driving under the influence.

Mr. Cain filed a petition for reconsideration. On June 1, 2010, the circuit court entered an "Order Denying Petitioner's Motion for Reconsideration."

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code §29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are

accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl.Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Mr. Cain’s argument that he was not placed under arrest is contradicted by the D.U.I. Information Sheet, which reflects that he was arrested, as well as testimony at the administrative hearing. Further, Officer Sharp had knowledge that was sufficient to warrant a prudent person to believe that Mr. Cain was DUI, thus, there was probable cause to arrest Mr. Cain for DUI. The totality of circumstances proved by a preponderance of the evidence that Mr. Cain was driving under the influence. Accordingly, the Commissioner was correct in concluding that the arresting officer had both reasonable grounds to investigate and probable cause to arrest Mr. Cain. The record supports the circuit court’s conclusion that Mr. Cain was arrested for DUI on April 26, 2008.

Notwithstanding Mr. Cain’s arguments to the contrary, the record reflects that he was afforded the procedural due process safeguards discussed in *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978), and was able to confront his accusers and present evidence on his own behalf before an unbiased tribunal.

Evidence was presented at the administrative hearing that the criminal DUI charges against Mr. Cain were dismissed in municipal court in exchange for his guilty plea to failure to yield. The Commissioner gave proper weight to the dismissal of the DUI charge in accordance with *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001). In the final administrative order, the Commissioner discussed the dismissal of the criminal charges. The Commissioner noted that there was no case law cited by Mr. Cain that requires the officer with the most seniority to be the “arresting officer.”¹ The Commissioner noted in his final order that the municipal court elected not to consider the fact that Mr. Cain’s eyes were glassy and bloodshot; that his speech was slurred; that he had an odor of alcoholic beverage on his breath; that he admitted he had consumed alcoholic beverages; that he was unsteady while walking, standing, and upon exiting his

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Mr. Cain argues in his Petition that the “chief investigating officer” was Officer William Rowe, who told him that both the criminal and administrative DUI charges would be dismissed, and that Officer Sharp heard this instructions. The Commissioner noted in his final administrative order that the arresting officer (Officer Sharp) did not appear at the municipal court hearing, and that the recommendation to reduce the criminal DUI charge was that of Officer Rowe, who assisted the arresting officer.

vehicle; and that he had failed a secondary chemical test with a blood alcohol content of 0.11.

The evidence at the administrative hearing was sufficient to show by a preponderance of the evidence that Mr. Cain was driving under the influence and that there was probable cause for his arrest. *Lowe v. Joseph Cicchirillo, Commissioner, West Virginia Division of Motor Vehicles*, 223 W.Va. 175, 672 S.E.2d 311 (2008) (“ . . . from the smell of an alcoholic beverage on the appellee, . . . observations that he had bloodshot and glassy eyes, slurred speech, and the fact that he was unsteady on his feet . . . it is clear to us that even without the blood test results, there remained a preponderance of the evidence to uphold the revocation of the appellee’s license.”) The secondary chemical test showed that Mr. Cain’s blood alcohol content was .110, which is *prima facie* evidence of intoxication. W.Va. Code §17C-5-8. In short, the record supports both the Commissioner’s and the circuit court’s decisions.

Lastly, Mr. Cain argues that the dismissal of the criminal proceedings before the municipal court precluded the administrative proceedings before the DMV, which were in contravention of West Virginia law and the Constitution. There are significant and well-recognized distinctions, however, between an administrative license revocation and a criminal prosecution, and the dismissal of the criminal charge does not preclude the administrative license revocation.

For the foregoing reasons, we find no error in the Final Order of the circuit court affirming the Commissioner’s revocation of Mr. Cain’s driving privileges for six months.

Affirmed.

ISSUED: February 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh