IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

STEVE BRISCOE,

Petitioner,

v.

Civil Action No. 21-AA-1
Judge Phillip M. Stowers

EVERETT J. FRAZIER, Commissioner
West Virginia Division of Motor Vehicles,

Respondent.

FINAL ORDER

This matter came before the Court for oral argument on August 30, 2021. Petitioner Steve Briscoe was present with counsel, Shawn Bayliss, and the Division of Motor Vehicles was present through counsel, Elaine Skorich. After careful consideration of the arguments and record below, the Court REVERSES the decision of the Office of Administrative Hearings for reasons explained *infra*.

I. FACTS AND PROCEDURAL BACKGROUND

The facts in this case are simple and unrefuted. On November 28, 2019, Deputy Joshua Warner was dispatched to the home of Lora Swann in Hurricane, West Virginia on a domestic complaint. Ms. Swann advised the Deputy that the Petitioner, Steve Briscoe, left her residence and was allegedly driving drunk. The Deputy observed a mark on Ms. Swann's chest area. She advised that Mr. Briscoe left in a black car and was possibly heading to his house.

The Deputy went to Steve Briscoe's home in Scott Depot, West Virginia. Mr. Briscoe's car was parked in his driveway. Mr. Briscoe was inside his home. The Deputy knocked on the door and Mr. Briscoe opened the door. The Deputy indicated he smelled alcohol on Mr.

Briscoe's breath and observed slurred speech. The Deputy asked Mr. Briscoe if he had been drinking at the residence and Mr. Briscoe replied that he had not. Based solely on the uncorroborated domestic complaint[1], the Deputy arrested Mr. Briscoe and took him to the Putnam County Courthouse to perform three standard field sobriety tests.

First, the Deputy administered the horizontal gaze nystagmus. Mr. Briscoe began to perform the Walk and Turn Test and had difficulty. He then refused to proceed with any more sobriety tests and refused the preliminary breath test and secondary chemical breath test.

The Department of Motor Vehicles issued an *Order of Revocation* on December 11, 2019. The Petitioner requested a hearing before the Office of Administrative Hearings, held on August 7, 2020. During the hearing, counsel for the Appellant, Mr. Bayliss, repeatedly objected to the admission of the sobriety tests and refusal thereto due to the arrest being unconstitutional. [2]

The hearing examiner found that the Deputy had reasonable grounds to believe that the Petitioner was driving or attempting to drive a motor vehicle while under the influence of alcohol or drugs. Specifically, the hearing examiner relied upon a reasonable suspicion standard and held that:

> a warrantless arrest of any person for a DUI offense, which is punishable as a misdemeanor, is lawful whenever the Investigating Officer who has reasonable grounds to believe that a DUI offense has been committed effects actual restraint by taking the arrested person immediately before a magistrate or court within the county in which the offense charged is alleged to have been committed.

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[1] Ms. Swann refused to give a written statement to the Deputy. (*Administrative Record* at Page 131).

[2] This Court notes, as Petitioner's counsel does, that the Petitioner's criminal DUI charge in magistrate court was dismissed. Under the new DUI law, this would be dispositive. However, S.B. 130, signed into law, limits the administrative jurisdiction of Division of Motor Vehicles and Office of Administrative Hearings to offenses occurring on or before June 30, 2020. This offense occurred in 2019.

Following the conclusion that reasonable suspicion was present, the Hearing Examiner admitted Mr. Briscoe's refusal of the PBT and secondary chemical test and further based the revocation on the refusals to submit.

Mr. Briscoe timely appealed the decision of the Hearing Examiner and argues one assignment of error: that the "decision of the hearing examiner is an abuse of discretion and in clear error." Within this argument is that the hearing examiner failed to recognize that because Mr. Briscoe was inside his home and no one observed him driving, his warrantless arrest was unconstitutional. Petitioner's argument follows that "there is no stop, no detention, just an unlawful arrest of an individual inside the sanctity of their own home" and any evidence obtained through this process should not have been admitted below.[3]

Petitioner filed a motion for stay shortly after filing this petition for appeal. On May 20, 2021, this Court heard Petitioner's *Motion to Stay*.[4] At the hearing, Mr. Bayliss wished to proffer the irreparable harm that Mr. Briscoe would suffer from suspension of his license. Ms. Skorich, however, stated that she would call Mr. Briscoe to testify if his own counsel did not call him, so that she could conduct "cross examination" (Tr. 7).[5] Mr. Bayliss therefore called his client to testify. Mr. Briscoe testified that he was a delivery driver at Husson's Pizza and that his job, and his livelihood, depended upon his ability to drive. Ms. Skorich also elicited testimony that Mr.

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[3] Petitioner also argues that the hearing examiner abused her discretion by placing more weight on the officer's affidavit and the hearsay statement of Ms. Swann, but the Court will not disturb the Hearing Examiner's judgment on the credibility of witnesses, especially in this case where the admission of the evidence itself is the central challenge.

[4] Petitioner carried the burden to show the two prongs required for the court to issue a stay: that he would suffer irreparable harm absent a stay and that he had a substantial likelihood of prevailing on the merits of his appeal. *See, e.g, Syllabus Point 2, Smith v. Bechtold,* 190 W. Va. 315 (1993).

[5] Ms. Skorich mischaracterizes the nature of her inquiry because, if she calls Mr. Briscoe, it would be a direct examination albeit adverse, but not a cross-examination as characterized.

Briscoe may have driven[6] since the April 23rd revocation of his license. Based on the testimony presented, the Court found that there would be irreparable harm.

After finding that Mr. Briscoe satisfied the irreparable harm prong of the two-part test, the Court found that there was a substantial likelihood that he would succeed on the merits of his appeal relating to an unconstitutional arrest. The Court believed then, as it does now, that the remedy for a warrantless unconstitutional arrest should include global protection from the unconstitutional state action.

To effectuate this global relief, on the same day[7] of the hearing, the Court entered an order granting a stay for no more than 150 days, relating back to the date of the original suspension on April 9, 2021. Ms. Skorich filed a Motion to Amend that order, which the Court denied. The Court held a hearing on the merits on August 30, 2021 where it ruled that the Hearing Examiner's decision is reversed. The written reflection of that decision is elucidated herein.

II. STANDARD OF REVIEW

Review of the OAH's decision is made pursuant to the provisions of the Administrative Procedures Act. *Groves v. Cicchirillo*, 694 S.E.2d 639, 643 (W. Va. 2010) (per curiam). The Act sets forth the standard of review for appeals from administrative decisions:

> Upon judicial review of a contested case under the West Virginia Administrative Procedures Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the

[6] Mr. Briscoe did not testify to driving on any specific day in the State of West Virginia.

[7] The Court acknowledges the DMV did not review the order before it was entered, but because of the allegations raised during the hearing, the Court deemed that an expeditious order needed to be entered as soon as possible, noting the DMV's objection.

petitioner or petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decision or order are:

1. In violation of constitutional or statutory provisions; or
2. In excess of the statutory 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.

W. Va. Code § 29A-5-4(g).

"The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 473 S.E.2d 483 (W. Va. 1996). A court can only interfere with a hearing examiner's findings of fact when such findings are clearly wrong. *See Modi v. W. Va. Bd. of Med.*, 465 S.E.2d 230, 239 (W. Va. 1995).

Additionally, "credibility determinations by the trier of fact in an administrative proceeding are 'binding unless patently without basis in the record.'" *Webb v. West Virginia Bd. of Med.*, 569 S.E.2d 225, 232 (W. Va. 2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 465 S.E.2d 399, 406 (W. Va. 1995)).

III. DISCUSSION

The dispositive issue in this case is whether the Hearing Examiner erred in determining Mr. Briscoe was lawfully placed under arrest. Under W.Va. Code § 17-C-5-2(e), in effect at the time of this revocation, the hearing examiner is required to make a finding that "the person was *lawfully* placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was *lawfully* taken into custody for the purpose of

administering a secondary test." (emphasis added). *See also Dale v. Ciccone*, 233 W. Va. 652, 659 (2014) (holding that the 2010 amendments to the code require an inquiry into the constitutionality of a DUI arrest). The Court believes that any arguments the DMV presents outside this key question of lawful arrest are not determinative in this case.

Throughout these proceedings, the DMV has argued that although no one—neither the arresting officer nor any witnesses—saw the Petitioner driving, that officers had reasonable suspicion to believe Mr. Briscoe had driven under the influence. Petitioner argues that a warrantless arrest in the defendant's home is a unique fact that distinguishes this case from nearly all other typical DUI stops.

A. The Relevant Standard

The Court holds that the arrest of Mr. Briscoe was not based on sufficient probable cause and that the Hearing Examiner erroneously relied on the reasonable suspicion standard. This is primarily because the arrest was effectuated in Mr. Briscoe's home. In that sense, the instant case is unique from most license suspension cases. "Most of our case law dealing with driving under the influence does not involve arresting someone in their home." *State v. Cheek*, 199 W. Va. 21, 25 (1996). Most cases establishing the reasonable suspicion standard for license revocations involve a person either actively driving or behind the wheel of a vehicle while intoxicated , *see e.g, Carte v. Cline*, 200 W.Va. 162 (defendant was slumped over the wheel with the car running and on the street), or a person behind the wheel of a stopped car, *see Cain v. West Virginia Div. of Motor Vehicles*, 225 W.Va. 476 (2010) (where the accused was found sleeping at the wheel on the side of a rural stretch of highway), or a person nearby a vehicle away from their home which could only have gotten there with the defendant driving it, *see Dale v. Reynolds*, 2014 WL

1407375 (where the accused was found in a Kroger parking lot unresponsive behind the wheel), or even outside the home in the driveway *see State v. Davisson*, 209 W. Va. 303, 308 (2001) ("Appellant presented himself to the officer in the Appellant's driveway, rather than in his home or any enclosed area related to the home"). None of these cases involves a defendant resting in the sanctity of his home.

Beyond a reasonable suspicion standard, then, a warrantless arrest for a misdemeanor must be justified by probable cause and by exigent circumstances. Syllabus Point 2, *State v. Mullins*, 177 W. Va. 531 (1987) (holding that "a warrantless arrest in the home must be justified *not only by probable cause, but by exigent circumstances* which make an immediate arrest imperative.") (emphasis added). Therefore, the Division of Motor Vehicles must show that the arresting officer 1) had probable cause and 2) exigent circumstances to effectuate the arrest of Mr. Briscoe.

B. The Officer Did Not Have Probable Cause For a Warrantless Arrest

The first issue is whether the officer had probable cause to make a warrantless arrest in the home. From the outset, this Court was concerned that an officer, on nothing more than bold assertion, effectuated a DUI arrest on a defendant, in his home, whom no one witnessed driving under the influence. The circumstances in this case are analogous—if not more lacking—to those in *State v. Cheek*, 199 W.Va. 21 (1996).

In *Cheek*, a road was blocked off to accommodate a church related "block party" of about 150 people. A witness called the police to complain that defendant drove his car through the barricade and through the crowd of people, refused to stop, parked his car in front of his home, and, as one complainant put it, "staggered" inside. Officers arrived on foot and questioned

members of the crowd. The officers knocked on the door and Mr. Cheek took a long time to come to the door, with an object in hand. Concerned for officer safety, the officers pulled Mr. Cheek out of the home and immediately smelled alcohol on his breath. Officers performed field sobriety tests, which he failed. He was charged with DUI second offense.

Two points are significant in *Cheek's* holding. First, the West Virginia Supreme Court applied a probable cause standard to the warrantless arrest from the home, Syllabus Pt. 2, *State v. Cheek*, 199 W. Va. 21, 22 (1996). Second, the Court held that despite having multiple eyewitnesses, even in the light most favorable to the state, too many uncertainties plagued the case to meet probable cause. *Cheek*, 199 W.Va. at 26 ("given the time spent by Mr. Cheek alone in his home, there is a question as to when the alcohol was consumed.").

In the present case, Deputy Warner lacked the necessary probable cause for a warrantless arrest for even more reasons than in *Cheek*. There were no witnesses to confirm how Mr. Briscoe walked to and from the car. There was no evidence to confirm or believe that he drove under the influence of alcohol. There was no evidence to support the idea that Mr. Briscoe drank before, rather than after, driving. In fact, except for a complaining domestic partner, there was no evidence that Mr. Briscoe drove at all.[8]

It follows that the DMV cannot meet its burden by claiming that this police interaction was a Knock-and-Talk[9], a generally accepted practice where officers go to a home and speak to residents, often regarding complaints of drugs or contraband. *See, e.g, State v. Lusk*, 2014 WL 6607447 (2014); *State v. Dorsey*, 234 W.Va. 15 (2014). Unlike the use of illegal drugs, drinking alcohol at home is a legal activity for adults over the age of twenty-one. Therefore even if the

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[8] *See* footnote one.
[9] The Court only addresses Knock-and-Talk because the DMV raised it at oral argument.

officer smelled alcohol on Mr. Briscoe's breath, it does not establish that he drank before he drove, or whether he drove at all. Even in *Cheek* the smell of alcohol did not formulate probable cause sufficient for a warrantless arrest in the home and it is not sufficient here to formulate the standard of probable cause for the warrantless arrest of Mr. Briscoe.

The DMV would distinguish this case from *Cheek* because in that case defendant was "yanked" from inside of his home and in the present case the defendant did not resist his arrest and complied with the officer's demands. Yet the result is still the same. An unlawful arrest effectuated through brute force and an unlawful arrest effectuated through the coercive power of the state upon a compliant defendant are equally repugnant to the Constitution. For these reasons, the Court finds no probable cause existed and would dispose of the case on this prong.

C. The State Has Not Shown Exigent Circumstances

Though this Court finds the lack of probable cause dispositive, it will address the issue of exigent circumstances as well. "The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe." Syllabus Point 2, *State v. Canby*, 162 W.Va. 666 (1979).

In 2013, the U.S. Supreme Court held that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth

Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. *Missouri v. McNeely*, 569 U.S. 141, 145 (2013).

The Court further explained:

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See *McDonald v. United States*, 335 U.S. 451 (1948) ("We cannot ... excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative").

In other words, the *totality of the circumstances* must indicate exigency because metabolization itself is not an exigency.

In *Cheek*, the Court held that "officers did not have reasonable grounds based on their investigation before the arrest to use the metabolism of alcohol as an exigent circumstance. Because Mr. Cheek was in his home, he was not liable to flee, destroy evidence or endanger the safety or property of others; especially with the two officers outside." (also cited by *State v. Davisson*, 209 W. Va. 303, 307 (2001).

In the present case, the officer did not testify below to any exigent circumstances. Quite the opposite, the Deputy stated that had he not smelled alcohol on Petitioner's breath, he would have simply applied for a warrant for the alleged domestic offenses, indicating that the Deputy, in his analysis at the time of arrest, believed that it was safe to wait for the approval of an arrest warrant. Because the Court has not been presented with necessary exigent circumstances, the warrantless arrest fails on exigency as well.

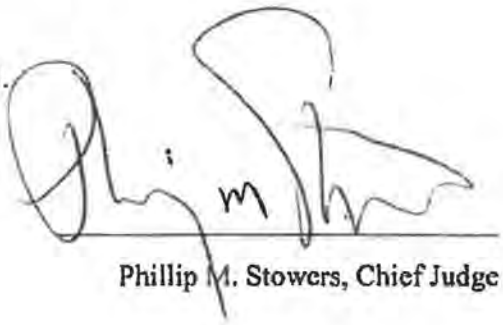
IV. ORDER

Based upon the foregoing and the legal analysis above, the Court **REVERSES** the *Final Order* of the Office of Administrative Hearings and fully reinstates the licensure of the Petitioner, Steve Briscoe. This matter is **DISMISSED** and **STRICKEN** from the docket.

The Court notes the objection of the Division of Motor Vehicles.

The Clerk is directed to provide copies of this order to the following parties: Shawn Bayliss at 3728 Teays Valley Road, Hurricane, WV 25526; Elaine Skorich at P.O. Box 17200, Charleston, WV 25317.

ENTERED this 8 day of November, 2021.



Phillip M. Stowers, Chief Judge