STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Patricia S. Reed, Commissioner
of the West Virginia Department of Motor Vehicles,
Petitioner

vs) No. 15-0437 (Monongalia County, Civil Action No. 14-AA-3)

Matthew P. Aiken,
Respondent

MEMORANDUM DECISION

Petitioner Patricia S. Reed, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), appeals the April 22, 2015, order of the Circuit Court of Monongalia County that reversed the August 18, 2014, order of the Office of Administrative Hearings ("OAH"). The OAH's order affirmed the DMV's revocation of Respondent Matthew P. Aiken's driver's license for driving under the influence of alcohol ("DUI").

In this appeal, the DMV, by counsel Janet E. James, argues that the OAH's revocation order was not "clearly wrong" and should have been affirmed by the circuit court. Mr. Aiken, by counsel J. Bryan Edwards, urges this Court to affirm the circuit court's order. After review, we conclude that the circuit court erred by reversing the OAH's August 18, 2014, revocation order. We therefore reinstate the OAH's order revoking Mr. Aiken's driver's license. Because this case presents no new or substantial questions of law, it satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure for disposition by memorandum decision.

On August 18, 2010, Deputy Johnathan Carter ("Deputy Carter") of the Marion County Sherriff's Department arrested Mr. Aiken for DUI subsequent to an investigatory traffic stop. Thereafter, the DMV ordered the revocation of Mr. Aiken's driver's license by letter dated September 8, 2010. Mr. Aiken timely requested a hearing before the OAH to contest the revocation. The OAH held a hearing on July 29, 2011. Two witnesses testified during the OAH hearing—Deputy Carter and Mr. Aiken.

During his testimony at the OAH hearing, Deputy Carter stated that on August 18, 2010, he was responding to a domestic dispute at Cindy's Bar in Fairmont, West Virginia. Mr. Aiken and his friend Shannon Walker were at Cindy's Bar and were

witnesses to the domestic dispute. Deputy Carter described his interaction with Mr. Aiken at Cindy's Bar as follows:

> We made contact with the Defendant [Mr. Aiken] and a Shannon Walker there . . . at the domestic. We knew that they had been intoxicated. We asked them to sit in their vehicle and sober up, not to be going anywhere. We gave them some water from inside the bar. Myself and Corporal Love took the female that was involved in the domestic, Stephanie, back on north about three-and-a-half miles to her residence. On the way back, about a quarter mile from Cindy's Bar, I observed a Jeep Cherokee pass me, and it was the vehicle that was at Cindy's Bar. If you will recall, I had told the Defendant [Mr. Aiken] and Shannon not to drive away.
>
> I then got behind the vehicle. The Defendant [Mr. Aiken] was the driver. He made a large right turn, a wide radius turn onto Burns Ridge Road off of 73 north. I made a stop on his vehicle at the Mom & Pops Mart. That's where I made contact with the Defendant [Mr. Aiken].

Deputy Carter stated that there was no double yellow line at the intersection where he observed Mr. Aiken making a "wide radius turn." Further, he testified that "[i]f there had been a yellow double line there, yes, [the Jeep Mr. Aiken was driving] would have been in the opposite lane, but there's no double yellow line right there." Deputy Carter testified that he initiated this stop approximately ten minutes after speaking with Mr. Aiken at Cindy's Bar.

After stopping Mr. Aiken, Deputy Carter testified that he smelled a strong odor of alcohol as he approached the vehicle. He stated that Mr. Aiken was unsteady on his feet, had slurred speech, and bloodshot eyes. Deputy Carter testified that Mr. Aiken admitted that he had been drinking, but stated "I only had a couple." Deputy Carter then administered several field sobriety tests which Mr. Aiken failed. Following these failed tests, Deputy Carter placed Mr. Aiken under arrest for DUI and took him to the Marion County Sherriff's Department.[1]

[1]While at the sheriff's department, Deputy Carter performed an Intoximeter chemical test of Mr. Aiken's breath. Mr. Aiken made three attempts but each one rendered an insufficient sample, according to Deputy Carter, to get a reading from the Intoximeter. Deputy Carter testified that Mr. Aiken was not intentionally trying to render an insufficient sample.

By contrast, Mr. Aiken testified at the OAH hearing that he had no interaction with Deputy Carter at Cindy's Bar. Mr. Aiken stated that Deputy Carter told his friend, Shannon Walker, not to drive, but that Deputy Carter did not tell Mr. Aiken not to drive. Further, Mr. Aiken testified that he did not recall doing any improper driving prior to being pulled over. He also testified that he had a tendon injury that affected his balance, and that he was on Tramadol, a prescription medication he described as "a non-narcotic, basically high strength acetaminophen." Mr. Aiken admitted that he had been drinking prior to being stopped by Deputy Carter, but testified that he was not intoxicated and stated, "I had two beers." During cross-examination, Mr. Aiken stated that his tendon injury had occurred approximately one year prior to the night he was stopped by Deputy Carter.

The OAH upheld the DMV's revocation of Mr. Aiken's license by order entered on August 18, 2014. The OAH concluded that Mr. Aiken "was lawfully arrested for an offense described in W.Va. Code § 17C-5-2[2] [Driving under influence of alcohol, controlled substances or drugs]." The OAH ruled that Deputy Carter had "reasonable grounds to initiate a traffic stop . . . and probable cause to believe that [Mr. Aiken] had been driving a motor vehicle . . . under the influence of alcohol on August 18, 2010." The OAH cited the following reasons in support of its conclusion: 1) Mr. Aiken drove after being told not to do so at Cindy's Bar by Deputy Carter; 2) Deputy Carter observed Mr. Aiken's vehicle make a wide radius turn; 3) Mr. Aiken had a strong odor of alcohol on his breath; 4) Mr. Aiken's speech was slurred; 5) Mr. Aiken's eyes were bloodshot; and 6) Mr. Aiken failed multiple sobriety field tests. The OAH's order also noted that

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[2]The 2010 version of W.Va. Code § 17C-5-2 was in effect at the time of Mr. Aiken's arrest. This Court addressed the various changes to this statute in *Dale v. Arthur*, 2014 WL 1272550, at *n. 2 (W.Va. Mar. 28, 2014) (memorandum decision), as follows:

> Our decision in *Clower v. West Virginia Department of Motor Vehicles*, 223 W.Va. 535, 544, 678 S.E.2d 41, 50 (2009), applied the 2004 version of West Virginia Code § 17C-5A-2(e) which required a specific finding of "whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol . . . or was lawfully taken into custody for the purpose of administering a secondary test." The 2008 version of the statute did not contain this language. *Miller v. Chenoweth*, 229 W.Va. 114, 117 n. 5, 727 S.E.2d 658, 661 n. 5 (2012). However, the Legislature amended the statute in 2010, and restored the language requiring a finding that the person was either lawfully arrested or lawfully taken into custody.

Deputy Carter and Mr. Aiken offered conflicting testimony on whether Deputy Carter spoke to Mr. Aiken at Cindy's Bar, a conflict which the OAH resolved in Deputy Carter's favor. The OAH's order explains:

> In addressing [Mr. Aiken's] testimony that [Deputy Carter] did not tell him not to drive, the Hearing Examiner must question why [Mr. Aiken] waited around for ten minutes before driving. It seems that [Mr. Aiken] would have simply driven away when [Deputy Carter] was present. The Hearing Examiner finds [Mr. Aiken's] testimony to be self-serving and finds [Deputy Carter's] testimony to be credible.

Mr. Aiken appealed the OAH's order to the circuit court. The circuit court reversed the OAH's order, concluding that Deputy Carter did not have "an articulable reasonable suspicion that the Jeep's occupant either had committed or were [sic] committing a crime." The circuit court concluded that the OAH was "clearly wrong" in finding that Mr. Aiken was lawfully placed under arrest. The circuit court's order sets forth the following reasons for this conclusion: 1) Deputy Carter did not witness Mr. Aiken consume alcohol; 2) Deputy Carter could not see who was driving the Jeep when it went past him; and 3) Deputy Carter did not have reasonable suspicion to stop the vehicle because he only observed it make a wide right turn. The circuit court explained, "Whether the vehicle could have crossed over had there been a double yellow demarcation on the road is irrelevant, as there was no such marking." Similarly, the circuit court's order notes that "observing a wide right turn that does not violate a traffic law" is not "sufficient to create an articulable reasonable suspicion to justify a traffic stop." Following entry of the circuit court's order, the DMV filed the present appeal.

This Court has previously established the standards for our review of a circuit court's order deciding an administrative appeal:

> 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.

Syllabus Point 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). Syllabus Point 2 of *Muscatell* provides: "In cases where the circuit court has [reversed] the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." With these standards as guidance, we consider the parties' arguments.

The issue in this appeal is whether the circuit court erred by ruling that the OAH was "clearly wrong" in its determination that Deputy Carter had an articulable reasonable suspicion to stop Mr. Aiken's vehicle. The DMV argues that the circuit court "ignored the facts of the case in finding that [Deputy Carter] lacked reasonable suspicion to stop the vehicle being driven by [Mr. Aiken]." By contrast, Mr. Aiken asserts that the circuit court correctly determined that "there was no reasonable suspicion for the stop under the totality of the circumstances. The OAH's decision was not supported by substantial evidence or a rational basis and was clearly wrong because the quantity and quality of information available to Deputy Carter did not give him reasonable suspicion for the stop." Thus, our inquiry is whether Deputy Carter had an articulable reasonable suspicion to stop the vehicle Mr. Aiken was driving.

This Court has held that "[p]olice officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime." Syllabus Point 1, in part, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994); *see also Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 676 (2000) ("[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."). "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 the information known by the police." Syllabus Point 2, *Stuart*, supra. In *Navarette v. California*, 572 U.S. ___, 134 S.Ct. 1683, 1687 (2014), the United States Supreme Court explained:

> The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *see also Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). The standard takes into account "the totality of the circumstances—the whole picture." *Cortez*, *supra*, at 417, 101 S.Ct. 690. Although a mere "hunch" does not create reasonable suspicion, *Terry*, *supra*, at 27, 88 S.Ct. 1868, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for

> probable cause, *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

Further, the Supreme Court has stated that whether a police officer had an articulable reasonable suspicion to conduct an investigatory stop depends on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id*., 134 S.Ct. at 1690 (internal quotation and citation omitted). "Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2783(1985) (citation omitted) (internal quotation marks omitted).

Upon our review of the record we agree with the OAH and conclude that under the totality of the circumstances, Deputy Carter had an articulable reasonable suspicion justifying the investigatory stop. Our conclusion is based on two main factors. First, the OAH found that Deputy Carter observed Mr. Aiken at Cindy's Bar, noticed that he was intoxicated, and told him not to drive. While there was conflicting testimony on whether Deputy Carter told Mr. Aiken not to drive, the OAH resolved this conflict in Deputy Carter's favor.

> This Court has recognized that credibility determinations by the finder of fact in an administrative proceeding are binding unless patently without basis in the record. Moreover, we have consistently emphasized that a reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.

Webb v. W.Va. Bd. of Med., 212 W.Va. 149, 156, 569 S.E.2d 225, 232 (2002) (internal citation and quotation marks omitted). Applying this standard, we find no reason to second guess the credibility determination made by the OAH regarding the conflicting testimony of Deputy Carter and Mr. Aiken.

Next, we find that Deputy Carter had an articulable reasonable suspicion to make the investigatory stop based on his observation of Mr. Aiken's vehicle making a wide radius turn. Deputy Carter testified that Mr. Aiken made a wide right turn and stated that "[i]f there had been a yellow double line there, yes, [the Jeep Mr. Aiken was driving] would have been in the opposite lane[.]" The circuit court concluded that Mr. Aiken's wide right turn did not violate a traffic law, and thus, did not give Deputy Carter an articulable reasonable suspicion to make the traffic stop. While Mr. Aiken was not

given a traffic citation, the wide radius turn Deputy Carter described is a misdemeanor pursuant to W.Va. Code § 17C-8-2 [1999]. It states,

> (a) Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.
>
> (b) Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars; upon a second conviction within one year thereafter, shall be fined not more than two hundred dollars; and upon a third or subsequent conviction, shall be fined not more than five hundred dollars.

Based on the totality of the circumstances, including Deputy Carter's description of Mr. Aiken's wide radius turn that constituted a potential violation of W.Va. Code § 17C-8-2, we find that the OAH was not "clearly wrong" in ruling that Deputy Carter had an articulable reasonable suspicion to make the investigatory stop. The OAH entered a detailed order setting forth its reasons for concluding that Deputy Carter had an articulable reasonable suspicion to stop the vehicle Mr. Aiken was driving, and the circuit court failed to demonstrate that these reasons were "clearly wrong." We therefore reverse the April 22, 2015, order of the circuit court and reinstate the OAH's August 18, 2014, order upholding the DMV's revocation of Mr. Aiken's driver's license.[3]

Reversed.

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[3]Mr. Aiken also argued that the DMV's appeal "should be barred under the principle of collateral estoppel because the Marion County Magistrate Court ruled that there was no reasonable suspicion to stop the Jeep driven by [Mr. Aiken]." We find no merit to this argument. This Court addressed this issue in Syllabus Point 4 of *Miller v. Epling*, 229 W.Va. 574, 729 S.E.2d 896 (2012), stating:

> When a criminal action for driving while under the influence in violation of West Virginia Code § 17C-5-2 (2008) results in a dismissal or acquittal, such dismissal or acquittal has no preclusive effect on a subsequent proceeding to revoke the driver's license under West Virginia Code § 17C-5A-1 *et seq*. Moreover, in the license revocation proceeding, evidence of the dismissal or acquittal is not admissible to establish the truth of any fact. In so holding, we expressly overrule Syllabus Point 3 of *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001).

ISSUED: April 14, 2016

CONCURRED IN BY:
Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Allen H. Loughry II