

FILED

June 26, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Maynard, Justice, dissenting:

I believe the majority has reversed a perfectly valid jury verdict. According to the majority, the defendant was prejudiced because the jury heard evidence that his license had previously been revoked. The majority reasons first that the jury probably surmised that the defendant's license revocation was the result of a prior DUI conviction. The majority then assumes that the jury's speculation in that regard was the basis for its verdict. In other words, the majority concludes that the jury determined that the defendant was previously convicted of DUI, and therefore, must have been guilty of DUI in this instance. I simply do not believe the record supports that conclusion.

During the defendant's trial, the arresting officer testified that he first noticed the defendant in his vehicle traveling left of center, swerving, and then abruptly turning off the roadway. The arresting officer further testified that when he approached the defendant's vehicle, he smelled a strong alcoholic odor. He observed a twelve-pack of beer sitting on the passenger seat with at least one can opened. He said the defendant's eyes were bloodshot, his speech was slurred, and his motor skills were slow.

According to the arresting officer, when the defendant exited his vehicle, he almost fell into traffic. The arresting officer continued to smell a strong odor of alcohol coming from the defendant. The defendant refused the officer's request to perform a horizontal gaze nystagmus test and the one-legged stand test. He attempted the walk and turn test, but failed it. The arresting officer then took the defendant to the police station for a breathalyser screening, which he also refused.

In light of the above, the only reasonable conclusion that can be made in this case is that the jury reached its verdict based on the testimony of the arresting officer. The majority's determination that the jury verdict was a result of speculation arising out the defendant's stipulation that his license had been previously revoked is unfounded. As I see it, the only speculation that has occurred in this case has been on the part of the majority.

This case illustrates once again the majority's distrust of juries. *See State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999) (Maynard, J., dissenting); *State v. Dews*, 209 W.Va. 500, 549 S.E.2d 694 (2001) (Maynard, J., dissenting). Unlike the majority, I have confidence in our juries, and I believe that the guilty verdict reached in this case was based on the evidence presented at trial, in particular, the arresting officer's testimony, and not any type of speculation. Therefore, I would not have found that the defendant was unfairly prejudiced by the disclosure of the prior revocation of his license. Instead, I would have found that the introduction of this evidence was at most harmless error. Consequently, I

would have affirmed the defendant's conviction of third offense DUI.

Accordingly, for the reasons set forth above, I respectfully dissent.