No. 11-0171 – Dr. Joe J. White, Jr. v. Joe E. Miller, Commissioner, West Virignia Division of Motor Vehicles

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OF WEST VIRGINIA

Workman, Justice, concurring, in part, and dissenting, in part:

I concur with the majority's new syllabus points with respect to the admissibility of and commensurate evidentiary limitations on the horizontal gaze nystagmus test as well as its remand of this matter on the issue of the validity of the sobriety checkpoint. However, I dissent to the majority's opinion for its failure to address the inadequacy of the Commissioner's Final Order as pertains to resolution of conflicts in the evidence. More specifically, I find that the Commissioner's wholesale adoption of the overwhelmingly subjective evidence supporting the State's case, without meaningful analysis of the countervailing evidence, to be arbitrary and capricious.

In this case, petitioner White made two assignments of error with regard to the circuit court's affirmation of the Commissioner's Final Order revoking his drivers' license. White asserted that (1) the State failed to prove that he was driving under the influence of alcohol by a preponderance of evidence; and (2) by failing to resolve conflicting evidence, the Commissioner's decision was arbitrary and capricious. The majority's opinion focuses

solely on the admissibility of one field sobriety test and the validity of the sobriety checkpoint. With respect to the assignments of error, the majority opinion merely begs the question by stating, without further analysis of the evidence, that "questions of fact concerning whether White drove a motor vehicle while under the influence of alcohol were left to be resolved by the Commissioner."

In that regard, we have stated that "[t]he obvious and most critical inquiry in a license revocation proceeding is whether the person charged with DUI was actually legally intoxicated." *Carte v. Cline,* 194 W. Va. 233, 460 S.E.2d 48 (1995). Moreover, it is well-settled that

> Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.

Syllabus Point 6, *Muscatell v. Cline,* 196 W. Va. 588, 474 S.E.2d 518 (1996). Further,

> Evidence such as driving error, consumption of alcohol, and poor performance on a field sobriety test *may be* sufficient under a preponderance standard to support an administrative finding by the commissioner of driving while intoxicated. *But where other evidence strongly weighs against such a finding . . . the Commissioner's decision cannot arbitrarily disregard that contradictory evidence.*

Choma v. W. Va. Div. Of Motor Vehicles, 210 W. Va. 256, 557 S.E.2d 310 (2001)(citations

omitted)(emphasis added).

In the case *sub judice*, petitioner White elicited evidence from the arresting officer that during his stop at the sobriety checkpoint, he spoke normally, stood normally, walked normally, and was "calm," cooperative and forthright. His eyes were not red, his face was not flushed, and he provided his license and registration to the officer without difficulty. He was stopped as a result of the checkpoint and not as the result of any erratic driving. He denied being under the influence of alcohol and, critically, his blood alcohol content was *below the legal limit* as per the secondary chemical test.

The arresting officer testified that petitioner White failed all three field sobriety tests–the walk and turn, the one leg stand, and the horizontal gaze nystagmus (HGN) test. The arresting officer conceded that two of the three tests–the walk and turn and the one leg stand–have only a 68% and 65% accuracy rate, respectively. As counsel noted during cross-examination, this obviously means that one-third of all those tested will have an inaccurate result. Petitioner duly and correctly notes that one's performance of the field sobriety tests is also highly dependent upon the precise instructions given by the officer, evidence of which was not elicited by the State at the administrative hearing. Most importantly as to two of the three field sobriety tests, petitioner White introduced medical evidence that one of his legs is one-half an inch shorter than the other. These two tests–the walk and turn and one leg

stand–are entirely balance and gait oriented. The arresting officer agreed that the training manual warns that a person with a leg injury will have difficulty completing these tests. Petitioner White explained that his shorter leg affects his center of gravity. The Commissioner dismissed this considerable attack on the reliability of these tests by stating that the petitioner did not advise the officer of his impairment until after the tests were performed. It is difficult to surmise how the timing of when petitioner advised the officer of his impairment has any bearing on whether or not these tests are fair and reliable indicators of this particular petitioner's sobriety. It is entirely reasonable, as the petitioner testified, that he did not anticipate the effect his shorter leg may have on the tests he was to perform until after he performed them. To the extent the Commissioner was suggesting that this explanation was not credible, he certainly did not indicate as much in his Order. As in *Muscatell,* "[w]e have no separate evaluation of the evidence by the hearing examiner who observed the demeanor of the witness on this critical issue before us." 196 W. Va. at 598, 474 S.E.2d at 528.

With respect to the horizontal gaze nystagmus test, the arresting officer conceded that nystagmus can be caused by a variety of other conditions, including but not limited to fatigue. Petitioner White testified that he had worked a "pretty tough" ten-hour day. Moreover, training materials on administration of the HGN test indicate that strobe lights and traffic passing in close proximity can interfere with the performance of the test.

Petitioner White testified that he was facing police cruisers with operating rotating lights on either side of him. The Commissioner made absolutely no mention of this competing evidence.

The above discussion is merely illustrative of the fact that all three field sobriety tests are subjective observance tests, the accuracy of which (even at their most accurate) is subject entirely to the perception and observational skills or shortcomings of the arresting officer. More importantly as pertains to Petitioner White, he presented cogent and substantial evidence undermining the accuracy of each test. Certainly, any one of these counter-arguments to the State's evidence, in isolation, may not be sufficient to overcome the preponderance standard. However, in the face of an *objective* secondary chemical test demonstrating a blood alcohol content *under the legal limit*, it sufficiently calls into question the Commissioner's finding. Where, as here, the Commissioner engages in essentially no analysis of these countervailing arguments, it renders his decision as having the appearance of one that is "so selective and one-sided as to rise to the level of arbitrariness and capriciousness." *Choma* at 259, 313. This Court's requirement that an agency resolve conflicting issues of fact is not mere window dressing for discussions of more substantive legal issues:

> The purpose is to allow a reviewing court (and the public) to ascertain that the critical issues before the agency have indeed been considered and weighed and not overlooked or concealed. Indeed, a reviewing court cannot accord to agency findings the

> deference to which they are entitled unless such attention is given to at least the critical facts upon which the agency has acted.

Muscatell at 598, 528.

While I am certainly mindful that "[t]here are no provisions in either W. Va. Code, 17C-5-1 (1981), *et seq*., or W. Va. Code, 17C-5A-1 (1981), *et seq*., that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for purposes of making an administrative revocation of his driver's license," this Court has also noted that "where a test has been administered, the Commissioner must consider the results of that test in making his or her revocation decision." Syllabus Point 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662, (1998); *Id.* at 610, 673. I am likewise aware that W. Va. Code §17C-5-8(a)(2) provides that "[e]vidence that there was, at that time, more than five hundredths of one percent and less than eight hundredths of one percent, by weight, of alcohol in the person's blood is relevant evidence[.]" Deeming this blood alcohol content as "relevant," however, does not require that a blood alcohol content between .05 and .08 to be construed *against* the petitioner. As Justice Neely noted in *State v. Ball*, 164 W. Va. 588, 264 S.E.2d 844 (1980), "W. Va. Code, §17C-5A-5(c)[1] is, in effect, a definition of intoxication. . . . In effect, we may say that the logical connection between the

[1]At the time *Ball* was decided, W. Va. Code §17C-5A-5(c) contained the statutory presumption for intoxication now codified in W. Va. Code §17C-5-8(a)(3).

proven fact of requisite blood-alcohol content and the presumed fact of intoxication is that the first demonstrates the second." *Id.* at 592-93, 846-47. If so, then the converse is equally true–a blood alcohol content below the legal limit *does not* presumptively "demonstrate" intoxication and the State must introduce a reliable preponderance of evidence to prove that petitioner was, in fact, under the influence of alcohol. The existence of the presumption that blood alcohol under .05 demonstrates the absence of being under the influence, makes it even more imperative that where a motorist objectively falls in the "grey area" between .05 and .08, the evidence presented by the State should be reliable and compelling, as fully reasoned and articulated by the Commissioner in his Order.

By no means do I suggest that in *any* case where the petitioner's blood alcohol is less than .08, or even in absence of a chemical blood alcohol test, that the State cannot prove that a motorist was under the influence of alcohol. It is, rather, my opinion that the objective evidence in this case failed to demonstrate that petitioner White was driving under the influence and that, based upon the bare record before us (devoid of credibility determinations or other meaningful resolution of the conflicts in the evidence), the subjective evidence was unreliable as presented. To the extent that the Commissioner did not find the petitioner's attacks on the subjective evidence persuasive or credible, he was obligated under our caselaw to offer a "reasoned and articulate" resolution of those issues and explain the choices he made with respect to the evidence. Syllabus Point 6, *Muscatell.* I find that he did

not do so and therefore, the circuit court erred in affirming the Commissioner's license revocation.

Accordingly, I concur, in part, and dissent, in part.