STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Joe E. Miller, Commissioner of the Division of Motor Vehicles, Respondent Below, Petitioner

vs) No. 11-0330 (Wyoming County 10-C-149)

Randall Eugene Bennett, Petitioner Below, Respondent

FILED
March 30, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Commissioner of the Division of Motor Vehicles ("DMV") by counsel, Janet E. James, appeals the circuit court's order reversing the DMV's order that revoked respondent's driver's license for six months for DUI. Respondent Randall Eugene Bennett, by counsel Randy D. Hoover, filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Respondent was arrested for DUI at a police station where he had allegedly followed another man with whom he had a "road rage" incident.[1] The arresting officer admitted that he did not see respondent drive his vehicle. The DMV revoked respondent's license for six months. Respondent sought a hearing as to the revocation. The hearing examiner concluded that the DMV's revocation was proper. Respondent appealed to the circuit court which reversed the DMV's revocation of respondent's license. Central to the circuit court's decision to reverse was the issue of whether the DMV had proven that respondent had been driving his vehicle. When the parked vehicle was located by police, there was another man in the front seat named Ernest Bennett. The circuit court concluded that there was insufficient proof that respondent was the driver.

[1] The criminal DUI charge against respondent was dismissed pursuant to respondent's plea agreement regarding another charge.

"'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)." Syl. Pt. 1, *Cain v. West Virginia Div. of Motor Vehicles*, 225 W.Va. 467, 694 S.E.2d 309 (2010).

The dispositive issue in this appeal is whether there was sufficient evidence to conclude that the respondent drove his vehicle as alleged. "As set forth in West Virginia Code § 17C-5A-2(f) (2008), the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs." Syl. Pt. 3, *Cain*, 225 W.Va. 467, 694 S.E.2d 309. In the case-at-bar, the arresting officer admitted that he did not see the respondent drive his car. As set forth above, respondent was arrested in a police station where it was alleged he had driven in pursuit of another man. The arresting officer was called to the police station and ultimately arrested respondent for DUI. Respondent's car was found parked in the vicinity of the police station with an intoxicated man named Ernest Bennett in the front passenger seat.

We have previously recognized that "'W.Va. Code § 17C-5A-1a(a) (1994) does not require that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person.' Syl. Pt. 3, *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997)." Syl. Pt. 2, *Cain*, 225 W.Va. 467, 694 S.E.2d 309.

Applying this standard to the case-at-bar, the circuit court in reversing the revocation of the driver's license noted that "nothing in the record indicates whether Ernest Bennett was questioned at all with respect to how the car came to be parked where Officer McCormick found it. At the instant hearing, the State was unable to elucidate upon any involvement of Ernest Bennett, or why he was not considered as a possible driver of the vehicle." The circuit court recognized that "it is abundantly clear that either of the Bennett gentlemen could have been responsible for driving to the vicinity." The circuit court concluded that the DMV's "utter disregard of the alternative explanation for how Bennett's vehicle came to be located near the Beckley Police Department, in light of the complete absence of any evidence demonstrating that any witness observed [respondent] driving, constituted an arbitrary and capricious exercise of discretion." Under the facts and circumstances of this particular case, the Court does not find error in the circuit court's determination.

The Court does not address the remaining issues raised in this appeal as the central issue of whether the respondent was shown to have been driving is dispositive.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 30, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis
Justice Brent D. Benjamin