

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

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

FILED

December 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0594 (Ohio County 10-CAP-20)

**Richard McKeever,
Petitioner Below, Respondent**

MEMORANDUM DECISION

Petitioner Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (“Commissioner”), appeals the circuit court’s order reversing the Commissioner’s order, which revoked Respondent Richard McKeever’s driving privileges for forty-five days for driving under the influence of alcohol. This appeal was timely perfected by counsel, with petitioner’s appendix accompanying the petition. Respondent McKeever has filed a response.

This Court has considered the parties’ briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. 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.

Respondent McKeever was pulled over by police officers after he was found driving at approximately 12:25 a.m. without his headlights on. He was observed by the arresting officer to be unsteady on his feet, and failed both the stand on one leg test and the horizontal nystagmus test. He later pled no contest to reckless driving, but requested an administrative Division of Motor Vehicles hearing. The arresting officer did not appear at the hearing, and all of the evidence against respondent was obtained from the driving under the influence (“DUI”) information sheet. Respondent testified that he did not have bloodshot eyes; was not unsteady on his feet; and was not impaired, although he admitted to drinking that night. This testimony was contrary to the DUI information sheet. Respondent further testified that he was wearing cowboy boots at the time of the incident, which negatively affected his

standing test, and that the horizontal nystagmus test was performed improperly. The hearing examiner found that respondent had driven under the influence of alcohol and revoked his license for forty-five days. Respondent appealed to the circuit court, who then reversed the hearing examiner's order, finding that the Commissioner failed to address "significant pieces of evidence" in the order, including respondent's un rebutted testimony that he was not unsteady when standing, that his eyes were not bloodshot, his explanation as to why his lights were off and his testimony that he was not impaired. The court also found that "the DUI information sheet created a rebuttable presumption as to its accuracy" but that respondent's testimony was sufficient to rebut this presumption.

On appeal, the Commissioner argues that the circuit court erred in holding that the final order did not comport with the requirements of *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996), and in failing to give deference to the Commissioner's findings and conclusions. "'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)." Syl. Pt. 1, *Carpenter v. Cicchirillo*, 222 W.Va. 66, 662 S.E.2d 508 (2008).

The Court has carefully considered the merits of each of the petitioner's arguments as set forth in the petition for appeal. Finding no error in the reversal of the Commissioner's order, the Court fully incorporates and adopts the circuit court's detailed and well-reasoned "Order," dated March 4, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: December 2, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh