IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0411

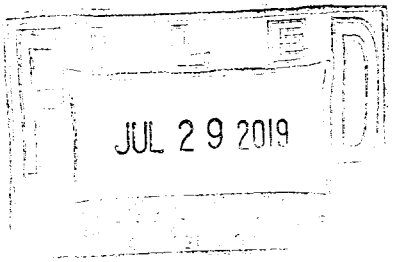
ADAM HOLLEY, ACTING COMMISSIONER OF
THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

JERRY W. STIRE,

Respondent.



Honorable James Matish, Judge
Circuit Court of Harrison County
Civil Action No. 18-P-103-3

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

On June 12, 2014, at 12:40 a.m., Patrolman John S. Billie of the Shinnston Police Department ("Investigating Officer") had pulled in to the Subway parking lot in Shinnston, Harrison County, West Virginia, and was watching traffic with his window down. A.R. at 156[1]. Subway is on the border within the Investigating Officer's jurisdiction. A.R. at 159, 195. There was a 7-Eleven store next door to the Subway, outside the Investigating Officer's jurisdiction. A.R. at 160.

The Investigating Officer heard a car door open at the 7-Eleven and saw a small blue car. He saw a man get out of the driver's seat of the car and shut the door. There was no one else in the car. A.R. at 161, 197. The Investigating Officer observed the man walk and run to the back of his

[1]References are to the Appendix record.

car, stumbling into his car. The man then pawed at the air. The man then started walking toward the 7-Eleven and staggered. The man went into the 7-Eleven. A.R. at 92, 93, 156, 157, 169, 196, 197.

The Investigating Officer got out of his car; went into the 7-Eleven; and made contact with the man, whom he identified as the Respondent herein. A.R. at 157. The Respondent was talking with the night clerk. The Investigating Officer approached the Respondent and greeted him. The Investigating Officer observed that the Respondent's eyes were glassy and bloodshot, and he smelled like alcohol. The Investigating Officer asked the Respondent if he had been drinking, and said, "I just seen you get out of the car and run into the back of your car, and, I seen you stagger twice. You okay?" A.R. at 93, 157. The Respondent responded that the Investigating Officer had not seen him driving and that the Investigating Officer was out of his jurisdiction. A.R. at 157. The Respondent's speech was slurred. A.R. at 93.The Respondent admitted having consumed alcohol. A.R. at 93, 197.

The Investigating Officer asked the Respondent if he would perform field sobriety tests. The Respondent agreed. The Investigating Officer administered field sobriety tests in the store. A.R. at 157, 158. The Investigating Officer has been trained to administer field sobriety tests. A.R. at 163, 174.

The Investigating Officer explained the horizontal gaze nystagmus test to Respondent. During the medical assessment portion of the horizontal gaze nystagmus test, Respondent had equal pupils, no resting nystagmus, and equal tracking, thus rendering him a viable candidate for the test. A.R. at 161-162. While performing said test, Respondent displayed lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and onset of nystagmus prior to 45 degrees in both eyes. A.R. at 93. The Investigating Officer deemed that the Respondent failed this test. A.R. at 162, 179, 180.

The Investigating Officer explained and demonstrated the walk-and-turn test. The Respondent started the test too soon, stepped off the line and missed heel-to-toe. A.R. at 93, 181-186, 198. The Investigating Officer deemed that the Respondent failed this test. A.R. at 192.

On the one-leg stand test, the Respondent swayed while balancing. A.R. at 94, 187, 188.

The Investigating Officer offered the preliminary breath test to the Respondent, but the Respondent refused to take it. A.R. at 94, 158.

The Investigating Officer placed the Respondent under arrest at 1:15 a.m. for driving under the influence of alcohol ("DUI") and took him to perform the Intoximeter test. The Shinnston Police Department has designated the Intoximeter EC/IR-II as the secondary chemical test. The Investigating Officer was trained at the West Virginia State Police Academy to administer the Intoximeter EC/IR-II and was certified as a test administrator by the West Virginia Department of Health on July 12, 2013. A.R. at 95, 163.

The Investigating Officer read the West Virginia Implied Consent Statement to Respondent at 1:29 a.m. and provided a copy of the statement to Respondent. The Respondent signed the statement. A.R. at 97. The Investigating Officer observed the Respondent for 20 minutes to ensure that he did not ingest anything into his mouth. The Investigating Officer ran the Intoximeter machine and asked the Respondent to blow into the device. The machine was operating properly. SMON Doc. 9. The Respondent refused to submit to the test. A.R. at 95, 158. The Investigating Officer waited 15 minutes to see if the Respondent changed his mind about taking the test, and the Respondent did not change his mind. A.R. at 159.

The Investigating Officer next completed a post-arrest interview with Respondent in which the Respondent denied that he had been drinking; however, the Respondent refused to sign the

interview. A.R. at 96, 164.

The Investigating Officer then transported the Respondent to the North Central Regional Jail. A.R. at 166.

On July 1, 2014, the Division of Motor Vehicles ("DMV") revoked Respondent's driving privileges for driving under the influence of alcohol, controlled substances or drugs and for refusing to submit to the designated secondary chemical test of the breath ("refusal"). A.R. at 102. The Respondent timely requested an administrative hearing from the Office of Administrative Hearings ("OAH"). The administrative hearing in this matter was held on March 24, 2015. A.R. at 151.

The OAH entered a *Final Order* on May 31, 2018, which upheld the DMV's orders of revocation for DUI and refusal. A.R. at 134-140.

The Respondent appealed the matter to the circuit court of Harrison County. That court reversed the OAH's *Final Order* by *Order Granting Petition for Appeal and Reversing Final Order* entered March 27, 2019. A.R. at 3-13.

SUMMARY OF ARGUMENT

For purposes of administrative DUI revocation, a lawful arrest is not premised on an officer's encounter with a driver. Both West Virginia code and caselaw support that a lawful arrest is one in which an officer has reasonable grounds to believe that a person has driven while under the influence. W. Va. Code §§17C-5A-2, 17C-5-4(b) and (c), 17C-5A-1(b) and (c); *Jordan v. Roberts*, 161 W. Va. 750, 757–58, 246 S.E.2d 259, 263 (1978).

In the present case, the circuit court failed to address whether the Investigating Officer had reasonable grounds to believe that the Respondent was DUI.

Aside from the period from 2008-2010, when the "lawful arrest" language was omitted from

W. Va. Code §17C-5A-2, in cases in which there was a vehicular stop this Court has premised its rulings on whether there was a lawful arrest solely on the basis of whether vehicle traffic stops were valid. However, in cases which do not involve a vehicular stop, the Court has found arrests to be lawful. "Lawful arrest" is limited to the arrest itself, not the initial encounter. A lawful arrest is one in which the officer develops probable cause to believe that a person has committed the offense of DUI. "To be lawful, an arrest must be supported by probable cause." *Reed v. Hill*, 235 W. Va. 1, 9, 770 S.E.2d 501, 509 (2015). The encounter and the arrest are two separate and distinct functions of the Investigating Officer. The determination of whether an arrest is lawful does not concern the validity of the traffic stop.

The circuit court erred in finding that the Investigating Officer improperly inferred that the Respondent drove to the 7-Eleven. The circuit court substituted its judgment for the Office of Administrative Hearings by finding, "Petitioner did not say that he was going somewhere or that he had been driving, nor did he say how long he had been at the 7-Eleven. There is no evidence in the record that the vehicle was running or that the keys were in the ignition, or that the vehicle had recently arrived." The circuit court surmised about evidence not in the record and erred in failing to give deference to the factfinder.

The circuit court erred in finding that the Investigating Officer's initial encounter with the Respondent was unjustified under the "community caretaker" doctrine.

The circuit court erred in finding that *State ex rel. State v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999) is inapplicable to this case on the basis that the Investigating Officer in this matter did not see the Respondent driving. The circuit court distinguished this case from *Gutske* on the basis that the Respondent's vehicle was parked and had been turned off for four or five minutes, and the Investigating Officer did not see him driving. The Respondent offered no evidence to dispute that he drove the vehicle to the 7-Eleven. *Gutske* permits an officer out of his jurisdiction to arrest an

individual who is committing a misdemeanor in his presence.

The circuit court erred in dismissing the argument that the Investigating Officer made a reasonable mistake of law simply because the court's opinion was that the officer's belief was not reasonable. The court provided no analysis of its opinion. The Investigating Officer reasonably believed that he could arrest someone committing a DUI in his presence even if he was out of his jurisdiction as a municipal officer. Even if he was mistaken as to the law, his mistake was reasonable and does not justify suppression of the evidence he obtained. *Heien v. North Carolina*, 135 S. Ct. 530, 535, 190 L. Ed. 2d 475 (U.S. 2014); *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)." 135 S. Ct. 536, 190 L. Ed. 2d 475; *Illinois v. Rodriguez,* 497 U.S. 177, 183–186, 110 S.Ct. 2793, 111 L.Ed.2d 148. This Court has not yet analyzed *Heien* and this matter supports a finding that an officer's reasonable mistake of law is not a basis for excluding subsequently-obtained evidence.

The circuit court declined to uphold the revocation for refusal on the basis that there was no lawful arrest in this matter. As set forth *supra*, there was a lawful arrest in this case, and the revocation for refusal must be upheld. Refusal to submit to the secondary chemical test is a basis for revocation independent of the revocation for DUI. *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). The Respondent did not challenge his refusal on appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

ARGUMENT

A. Standard of Review

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code § 29A–5–4(a)(1964). The Court reviews questions of law presented *de novo*; and findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). "In cases where the circuit court has amended 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." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

B. The circuit court erred in finding that there was not a lawful arrest when the Investigating Officer had reasonable grounds to believe that the Respondent had committed the offense of DUI.

For purposes of administrative DUI revocation, a lawful arrest is not premised on an officer's encounter with a driver. Both West Virginia code and caselaw support that a lawful arrest is one in which an officer has reasonable grounds to believe that a person has driven while under the influence. W. Va. Code §§17C-5A-2, 17C-5-4(b) and (c), 17C-5A-1(b) and (c); *Jordan v. Roberts*, 161 W. Va. 750, 757–58, 246 S.E.2d 259, 263 (1978). To date this Court has premised a "lawful arrest," as required by W. Va. Code §17C-5A-2, upon the validity of the vehicle stop, although it has found that in cases where there is no vehicle stop, the arrest was valid.

In the present case, the circuit court failed to address whether the Investigating Officer had reasonable grounds to believe that the Respondent was DUI. The court simply found that there was not a lawful arrest. "A showing that the arresting officer had reasonable grounds to believe the

licensee was driving while under the influence of intoxicating liquor is comparable to proof by a preponderance of evidence of the fact he was driving under the influence of intoxicating liquor. The general rule, unless altered by statute, is that in an administrative proceeding the required degree of proof is a preponderance of the evidence. 2 Am.Jur.2d Administrative Law s 392; *Cf., Harper v. State Workmen's Compensation Commissioner*, W.Va., 234 S.E.2d 779 (1977)." *Jordan, supra* at 161 W. Va. 755, 246 S.E.2d 262.

The Investigating Officer had reasonable grounds to believe the Respondent was DUI. He observed the Respondent getting out of his car, pawing the air and stumbling into his car. There was no evidence that anyone but the Respondent drove the Respondent's car to the 7-Eleven. Upon encountering the Respondent in the store, the Investigating Officer's observations, the Respondent's admissions and the results of the field sobriety tests established that the Investigating Officer had reasonable grounds to believe the Respondent was DUI.

In cases involving vehicular stops, this Court has premised its rulings on whether there was a lawful arrest solely on the basis of whether vehicle traffic stops were valid. "Under this Court's precedent, a person cannot be considered lawfully arrested for DUI, as a prerequisite to the administrative revocation of the person's driver's license, unless the underlying traffic stop was legally valid." *Reed v. Pettit*, 235 W. Va. 447, 451, 774 S.E.2d 528, 532 (2015). *See also*, *Dale v. Ciccone*, 233 W.Va. 652, 760 S.E.2d 466 (2014); *Dale v. Odum,* 233 W.Va. 601, 760 S.E.2d 415, 2014 WL 641990 (W.Va. Feb. 11, 2014) (memorandum decision); *Dale v. Arthur,* 2014 WL 1272550 (W.Va. March 28, 2014) (memorandum decision); *Clower v. West Virginia Department of Motor Vehicles,* 223 W.Va. 535, 678 S.E.2d 41 (2009); *Dale v. Barnhouse*, No. 14–0056, 2014 WL 6607493 (W.Va. Nov. 21, 2014) (memorandum decision); *Dale v. Haynes,* No. 13–1327, 2014 WL 6676546 (W.Va. Nov. 21, 2014) (memorandum decision).

This Court's focus on equating a valid stop of a vehicle with the lawfulness of the arrest is clear from the cases the Court decided during and after the two-year period from 2008-2010 in which the "lawful arrest" requirement was removed from W. Va. Code §17C-5A-2."In the present case, this Court's evaluation is guided by the 2010 version of the statute in which the lawful arrest language is once again included [footnote omitted]. Consequently this Court must proceed with an evaluation similar to that in *Clower,* and the validity of the underlying traffic stop is relevant to our determination." *Dale v. Ciccone*, 233 W. Va. 652, 658–59, 760 S.E.2d 466, 472–73 (2014).

However, in a case decided upon the 2008 statute, this Court held, "The New Mexico court in *Glynn*, like this Court in *Toler* [*Miller v. Toler,* 229 W.Va. 302, 729 S.E.2d 137 (2012)], found that the exclusionary rule does not apply to civil license revocation proceedings and explained that '[i]f the exclusionary rule does not apply to the proceedings, then the authority of the [Motor Vehicle Division] to consider the legality of a stop is irrelevant because the evidence would be admitted regardless of the legality of the stop.' *Id.* Likewise, this Court finds that the issue of whether the initial traffic stop was legally deficient in some regard is relevant only in the criminal context. The civil license revocation in this case is to be premised upon the factors specifically identified in West Virginia Code 17C–5A–2 (2008), including whether the investigating officer had reasonable grounds to believe that the individual was driving under the influence; whether the person committed an offense involving driving under the influence; and whether the tests, if any, were administered properly." *Miller v. Smith*, 229 W. Va. 478, 485, 729 S.E.2d 800, 807 (2012). In *Miller*, the Court concluded, "This Court has been attentive to the concept that the two avenues of inquiry resulting from a DUI incident must remain separate and distinct. The *civil* license revocation is to be carefully differentiated from the determination of *criminal* guilt or innocence. The exclusionary rule is only applicable in the criminal context and 'excludes evidence of the illegal stop from the *criminal* DWI proceeding, thereby preventing the loss of the driver's liberty interest and deterring future police

misconduct.' *Glynn,* 252 P.3d at 750 (emphasis supplied). Within the separate *civil* context, however, the 'driver nonetheless loses his or her driver's license in order to temporarily remove the driver from the roads of the state if the police officer had reasonable grounds to believe the driver was [DUI] and if the other elements necessary for revocation are met.' *Id.* No inconsistency exists in that dual approach to processing a driver under these circumstances." *Id.*

This Court has consistently held that the standard of proof in criminal proceedings is distinct from that in administrative proceedings. "This result arises by virtue of the difference in issues and levels of proof required between the administrative and criminal proceeding. In the former, the key issues are the *reasonable grounds to believe the licensee was driving while under the influence of intoxicating liquor* and whether he *refused the test*. A preponderance of evidence is sufficient for proof of these issues at the administrative hearing. In the criminal trial, the key issue is whether he was driving while under the influence of intoxicating liquor. Because of the possibility of fines and imprisonment, proof beyond a reasonable doubt is required." *Jordan v. Roberts*, 161 W. Va. 750, 757–58, 246 S.E.2d 259, 263 (1978)(emphasis added)[2].

There is ample precedent providing that in cases in which there is no stop of a vehicle, as in the present case, an arrest may be lawful. "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

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[2]The circuit court noted that the criminal charges against the Respondent were dismissed, but apparently, and correctly, did not assign any weight to that fact. "Administrative license revocation proceedings for driving a motor vehicle under the influence of alcohol, controlled substances or drugs which are initiated pursuant to Chapter 17C of the West Virginia Code are proceedings separate and distinct from criminal proceedings arising from driving a motor vehicle under the influence of alcohol, controlled substances or drugs. The presentation of a sworn complaint before a magistrate and the magistrate's finding of probable cause and issuance of a warrant are not jurisdictional prerequisites to the commencement of administrative license revocation proceedings pursuant to Chapter 17C of the West Virginia Code." *Carroll v. Stump*, 217 W. Va. 748, 749, 619 S.E.2d 261, 262 (2005).

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). *See also, Montgomery v. West Virginia State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (per curiam). "With particular reference to the offense of drunk driving, this Court acknowledged in *Carte v. Cline,* 200 W.Va. 162, 488 S.E.2d 437 (1997) that " 'an officer having reasonable grounds to believe that a person has been driving while drunk may make a warrantless arrest for that offense even though the offense is not committed in his presence.' " *Id.* at 167, 488 S.E.2d at 442 (quoting *Bennett v. Coffman,* 178 W. Va. 500, 361 S.E.2d 465, 467 (1987))." *State v. Davisson*, 209 W. Va. 303, 308, 547 S.E.2d 241, 246 (2001). "Although the law enforcement officers did not observe the respondent operating the vehicle, this Court has previously held that an officer does not have to personally observe an individual operating the motor vehicle while under the influence in order to arrest that individual for DUI."*Dale v. Ciccone*, 233 W. Va. 652, 661, 760 S.E.2d 466, 475 (2014). "Moreover, an officer having reasonable grounds to believe that a person has been driving while drunk may make a warrantless arrest for that offense even though the offense is not committed in his presence. *State v. Byers,* 159 W.Va. 156, 224 S.E.2d 726 (1976)." *Bennett v. Coffman,* 178 W. Va. 500, 502, 361 S.E.2d 465, 467 (1987)(overruled in part on other grounds, *State v. Chase Securities, Inc.,* 188 W.Va. 356, 424 S.E.2d 591 (1992)). "[T]here need not be affirmative evidence to show that an individual charged with DUI was operating a vehicle." *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375, at *4 (W. Va. Apr. 10, 2014)(memorandum decision). "Rather than requiring an arresting officer to witness a motor vehicle in the process of being driven, the statute requires only that the observations of the arresting officer establish a reasonable basis for concluding that the defendant *had* operated a motor vehicle upon a public street in an intoxicated state." *Cain v. W. Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 471, 694 S.E.2d 309, 313 (2010).

In the present case, the Respondent's car could not have been located where it was without being driven there by the Respondent. No other explanation was given by the Respondent; therefore, the evidence of Respondent's driving is unrebutted. "In the instant case, while Mr. Doyle objected to the admission of the statement of the arresting officer, he did not come forward with any evidence challenging the content of that document. Consequently, there was unrebutted evidence admitted during the administrative hearing that established a valid stop of Mr. Doyle's vehicle, and the hearing examiner's finding to the contrary was clearly wrong." *Dale v. Odum*, 233 W. Va. 601, 609, 760 S.E.2d 415, 423 (2014). The Respondent never denied that he drove the car to the 7-Eleven.

The standard for lawful arrest for DUI is not premised on the validity of the vehicle stop. It is whether the officer had reasonable grounds to believe that the person was driving while under the influence. W. Va. Code § 17C-5A-2(f). "Lawful arrest" is limited to the arrest itself, not the initial encounter. A lawful arrest is one in which the officer develops probable cause to believe that a person has committed the offense of DUI. "To be lawful, an arrest must be supported by probable cause." *Reed v. Hill*, 235 W. Va. 1, 9, 770 S.E.2d 501, 509 (2015). "Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence."*Simon v. West Virginia Dep't of Motor Vehicles,* 181 W.Va. 267, 382 S.E.2d 320 (1989). "Further, the United States Supreme Court has explained: " '[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) (citations omitted). Additionally, the United States Supreme Court has noted that "[t]he probable-cause standard is incapable of precise definition or quantification into percentages because it deals with

probabilities and depends **on the totality of the circumstances**." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) (emphasis added). Indeed, the Supreme Court has emphasized that our probable cause standard is a 'practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Id.*, 540 U.S. at 370, 124 S.Ct. 795." *Reed v. Winesburg*, No. 17-0834, 2019 WL 1104619, at *7 (W. Va. Mar. 6, 2019).

The encounter and the arrest are two separate and distinct functions of the Investigating Officer. In the instant case, the arrest occurred after the Respondent had ceased driving and only after there were reasonable grounds for the Investigating Officer to believe that the Respondent was DUI. The Investigating Officer formed his belief that the law was violated after he gathered evidence to support his suspicion. The officer's belief that the driver was DUI supported the arrest, and the reason for the encounter and the reason for the stop are the not the same event and should not be conflated. The arrest was lawful not because of the nature of how the Investigating Officer came to encounter the Respondent but because the Investigating Officer reasonably believed that the Respondent had driven while under the influence.

Here, the Investigating Officer had reasonable grounds to believe that the Respondent had driven under the influence of alcohol, and he developed probable cause to believe the Respondent was DUI. The standards for a valid vehicle stop are inapplicable here. "Because Mr. Cain's vehicle was parked at the time the arresting officer encountered Mr. Cain, the standard governing the lawfulness of an investigatory traffic stop is clearly inapplicable to the case before us." *Cain v. W. Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 471, 694 S.E.2d 309, 313 (2010).

Therefore, the arrest was lawful. The Respondent emerged from the driver's seat of a car which had no passengers. It was 12:40 a.m., and the Investigating Officer testified that it was "pretty quiet outside," and that if another car drove up, he would have noticed it. A.R. 198. The

Investigating Officer's subsequent investigation, during which the Respondent admitted that he had been drinking, the Investigating Officer observed that the Respondent's eyes were glassy and bloodshot, the Respondent had the odor of alcohol, the Respondent had slurred speech, and the Respondent failed the horizontal gaze nystagmus test, the one-leg stand test and the walk and turn test, supported his reasonable belief that the Respondent was DUI, and gave him probable cause to lawfully arrest the Respondent.

Yet the circuit court substituted its judgment for the OAH by finding, "Petitioner did not say that he was going somewhere or that he had been driving, nor did he say how long he had been at the 7-Eleven. There is no evidence in the record that the vehicle was running or that the keys were in the ignition, or that the vehicle had recently arrived." A.R. at 9. The circuit court erred in failing to give deference to the factfinder. "This Court has made clear that "[s]ince a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations." Syllabus Point 1, in part, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000)." *Winesburg*, *supra*, at *8. Its speculation about evidence not in the record cannot overcome the evidence presented by the DMV, which shows that the Investigating Officer observed the Respondent getting out of the car with no other cars around.

W. Va. Code § 17C-5A-2(f) sets forth the required findings to support revocation for DUI, and do not include any provisions relating to the stop of the vehicle. "In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, ... the Office of Administrative Hearings shall make specific findings as to: (1) Whether the investigating law-enforcement officer had *reasonable grounds to believe the person to have been driving while under the influence of alcohol...*; (2) whether the person was *lawfully placed under arrest* for an offense involving driving under the influence of alcohol, controlled substances

or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: ... (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter." (emphasis added).

The DMV derives its authority to revoke driver's licenses for DUI from W. Va. Code § 17C-5A-1(c). "If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner determines that a person committed an offense described in section two, article five of this chapter or an offense described in a municipal ordinance which has the same elements as an offense described in said section and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person committed the offense he or she was under the influence of alcohol, controlled substances or drugs, the *commissioner shall make and enter an order revoking* or suspending the person's license to operate a motor vehicle in this state. ..." (emphasis added).

In this case, the Investigating Officer submitted a DUI Information Sheet to the Commissioner pursuant to W. Va. Code § 17C-5A-1(b): "Any law-enforcement officer *investigating* a person for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section *shall report* to the Commissioner of the Division of Motor Vehicles by written statement within forty-eight hours of the *conclusion of the investigation* the name and address of the person believed to have committed the offense. The report shall include the specific offense with which the person is charged and, if applicable, a copy of the results of any secondary tests of blood, breath or urine. The signing of the statement required to be signed by this subsection constitutes an oath or affirmation by the person signing the statement that the statements contained in the statement are true

and that any copy filed is a true copy. The statement shall contain upon its face a warning to the officer signing that to willfully sign a statement containing false information concerning any matter or thing, material or not material, is false swearing and is a misdemeanor." (emphasis added).

The standard for lawful arrest provides that an officer have reasonable grounds to believe that an offense has been committed, regardless of whether there was a vehicular stop. Here, the Investigating Officer reasonably believed that the Respondent had driven the car to the 7-Eleven, and his investigation gave him reasonable grounds to believe the Respondent was DUI. The arrest was lawful.

C. The circuit court erred in finding that the Investigating Officer's initial encounter with the Respondent was unjustified under the "community caretaker" doctrine.

The circuit court erred in finding that the Investigating Officer's initial encounter with the Respondent was unjustified under the "community caretaker" doctrine. "The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance." *Ullom v. Miller*, 227 W. Va. 1, 10, 705 S.E.2d 111, 120 (2010).

The circuit court, once again surmising about evidence not in the record, held that "Officer Billie did not testify that he thought Petitioner was in immediate peril or having a medical emergency..." A. R. At 11. The Investigating Officer had observed the Respondent stumbling into his car, pawing the air, and stumbling into the 7-Eleven. He testified, "Whenever I seen him get out of the car and I observed the things, I felt like I needed to approach the gentleman at that point in time." He had a duty to investigate and ensure that neither the Respondent nor the public was in

danger. The community caretaker doctrine dictates that the Investigating Officer's encounter with the Respondent was justified.

D. The circuit court erred in finding that *State ex rel. State v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999) does not support a finding that the arrest in this matter was lawful.

The circuit court erred in finding that *State ex rel. State v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999) is inapplicable to this case on the basis that the Investigating Officer in this matter did not see the Respondent driving. This Court held in *Gutske* that a private citizen is authorized to arrest another who commits a misdemeanor in his or her presence when that misdemeanor constitutes a breach of the peace, and that driving while under the influence of alcohol, a controlled substance or drugs constitutes a breach of the peace. The circuit court distinguished this case from *Gutske* on the basis that the Respondent's vehicle was parked and had been turned off for four or five minutes, and the Investigating Officer did not see him driving. This factual distinction does not alter the fact that the Investigating Officer had a reasonable basis to believe the Respondent had driven the car to the 7-Eleven. The Respondent offered no evidence to dispute that he drove the vehicle to the 7-Eleven. *Gutske* permits an officer out of his jurisdiction to arrest an individual who is committing a misdemeanor in his presence.

In *Gutske*, this Court held, "[a] law enforcement officer acting outside of his or her territorial jurisdiction has the same authority to arrest as does a private citizen and may make an extraterritorial arrest under those circumstances in which a private citizen would be authorized to make an arrest." Syl. Pt 2. "Under the common law, a private citizen is authorized to arrest another who commits a misdemeanor in his or her presence when the misdemeanor constitutes a breach of the peace." Syl. Pt. 3. The Court held that a private citizen is authorized to arrest another who commits a misdemeanor in his or her presence when that misdemeanor constitutes a breach of the peace, and

that driving while under the influence of alcohol, a controlled substance or drugs constitutes a breach of the peace. Likewise, in *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014), this Court found that an officer's extraterritorial stop of a vehicle was a valid common law citizen's arrest.

The DMV's enabling statutes provide that an arrest is lawful if the officer has reasonable grounds to believe that the offense of DUI has been committed. Caselaw is clear that an officer need not observe driving. Pursuant to *Gutske*, *supra*, the arrest in this matter was a valid citizen's arrest. "It has often been recognized that a police officer who is without *official* authority to make an arrest may nevertheless make the arrest if the circumstances are such that a private citizen would have the right to arrest either under the common law or by virtue of statutory law." *Id.*, 205 W. Va. 78, 516 S.E.2d 289.

While *Gustke* centered around an off-duty officer acting outside of his jurisdiction, the case did not make a distinction between an on and off-duty officer and his ability to make a valid citizen's arrest. Syllabus point 2. specifically states that a law enforcement officer acting outside of his or her jurisdiction has the same authority to arrest as a private citizen.

The Investigating Officer had probable cause to believe that Mr. Stire was DUI. His observations gave him the authority to effectuate a common law citizen's arrest because DUI constitutes a breach of the peace.

E. The circuit court erred in finding that the if the Investigating Officer made a mistake of law that it was not justified.

The circuit court erred in dismissing the argument that the Investigating Officer made a reasonable mistake of law simply because the court's opinion was that the officer's belief was not reasonable. The court provided no analysis of its opinion; and simply held, "However, the Court is not persuaded that it was reasonable for a municipal police officer to believe he was authorized to make arrests anywhere in the state." A. R. at 9.

The Investigating Officer reasonably believed that he could arrest someone committing a DUI in his presence even if he was out of his jurisdiction as a municipal officer. In response to the Respondent's comments that the Investigating Officer did not see him drive and that the Investigating Officer was out of jurisdiction, the Investigating Officer responded, "Well, sir, according to 17C Article 5 and 2, I said, I can approach you or I said I can–it says anywhere in the state of West Virginia, anybody who drives in the state." A.R. at 157. This exchange indicates that the officer knew that the 7-Eleven was outside corporate limits but that he understood the law to allow him to arrest for DUI because he responded by citing W. Va. Code §17C-5-2, which prohibits driving under the influence anywhere in the state. The Investigating Officer clearly believed that he had an obligation to investigate a possible DUI anywhere in the state. Even if he was mistaken as to the law, his mistake was reasonable and does not justify suppression of the evidence he obtained. *Heien v. North Carolina*, 135 S. Ct. 530, 535, 190 L. Ed. 2d 475 (U.S. 2014); *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)." 135 S. Ct. 536, 190 L. Ed. 2d 475; *Illinois v. Rodriguez,* 497 U.S. 177, 183–186, 110 S.Ct. 2793, 111 L.Ed.2d 148.

This Court has not yet analyzed *Heien, supra*[3], and this matter supports a finding that an officer's reasonable mistake of law is not a basis for excluding subsequently-obtained evidence.

Even if the Investigating Officer made a mistake of law, his mistake was reasonable and does not justify suppression of the evidence he obtained. In *Heien v. North Carolina*, 135 S. Ct. 530, 535, 190 L. Ed. 2d 475 (U.S. 2014), the United States Supreme Court found that an officer's mistake of law was reasonable. The officer had stopped a car because it had only one working taillight. The

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[3]"The parties also have submitted supplemental briefs in this case regarding the recent United States Supreme Court case of *Heien v. North Carolina,* —— U.S. ——, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). Because the arresting officer neither charged nor arrested Mr. Noel with a violation of a vehicle safety statute, we do not find this case to be instructive to our resolution of the instant appeal." Fn. 5, *State v. Noel*, 236 W. Va. 335,779 S.E.2d 877 (2015).

officer thought this was a traffic violation; however, driving with only one working brake light was not actually a violation of North Carolina law. "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)." 135 S. Ct. 536, 190 L. Ed. 2d 475. The Supreme Court concluded that objectively reasonable mistakes of law do not rise to the level of a constitutional violation. "The Fourth Amendment requires government officials to act reasonably, not perfectly, and gives those officials 'fair leeway for enforcing the law,' *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879. Searches and seizures based on mistakes of fact may be reasonable. See, *e.g., Illinois v. Rodriguez,* 497 U.S. 177, 183–186, 110 S.Ct. 2793, 111 L.Ed.2d 148. The limiting factor is that 'the mistakes must be those of reasonable men.' *Brinegar, supra,* at 176, 69 S.Ct. 1302. Mistakes of law are no less compatible with the concept of reasonable suspicion, which arises from an understanding of both the facts and the relevant law." 135 S. Ct. 532, 190 L. Ed. 2d 475.

The Investigating Officer clearly believed that he was obligated to arrest for DUI anywhere in the state, and this was objectively reasonable. The Investigating Officer testified, "And at that point once, you know, I said, Hey, listen, this is why I'm talking to you because of what I've seen. At that point he seemed to understand why I was talking to him, and, I mean, after that he was compliant." A.R. at 173-74. "In reviewing these facts and circumstances, we decide only whether it was objectively reasonable for an officer to conclude that Marshall's actions probably violated the ordinance, not whether Marshall's conduct would have supported a conviction for disorderly conduct under a reasonable doubt standard." *United States v. Marshall*, 747 F. App'x 139, 144 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1214 (2019). "Officers are not required to be 'legal technicians' when evaluating whether a suspect's conduct satisfies the language of an ordinance, particularly when the

officer must make that determination in a rapidly deteriorating and potentially dangerous situation." *Id.*

Heien, supra has been cited approvingly in other circuits. *United States v. Scott*, 693 Fed. Appx. 835, 836 (11th Cir. 2017) ("Courts apply a reasonableness standard to Fourth Amendment issues which allows for some mistakes of both fact and law on the part of government officials."); *United States v. Lawrence*, 675 Fed. Appx. 1, 3 (1st Circuit 2017)(citing to Justice Kagan's concurring opinion in *Heien*: "When the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view", then the mistake by the officer was reasonable.); *United States v. Diaz*, 854 F.3d 197, 204 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 981, 200 L. Ed. 2d 261 (2018)("We think that Officer Aybar's belief that the apartment-building stairwell qualified as a 'public place' within the meaning of the open-container law was an objectively reasonable prediction of the scope of the law when it was made.")

The Investigating Officer reasonably believed that his observations of DUI warranted an arrest of the Respondent.

F. The circuit court erred in finding that there was not a lawful arrest and therefore erred in finding that Respondent's refusal to submit to the secondary chemical test is not an independent basis for revocation.

The circuit court declined to uphold the revocation for refusal on the basis that there was no lawful arrest in this matter. As set forth *supra*, there was a lawful arrest in this case, and the revocation for refusal must be upheld. Refusal to submit to the secondary chemical test is a basis for revocation independent of the revocation for DUI. *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). "'A person's driver's license may be suspended under W. Va. Code, 17C-5-7(a) [1983] for refusal to take a designated breathalyzer test.'" Syllabus Point 2, *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987)." Syllabus Point 7, *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66

(2018).

The Respondent did not challenge his refusal on appeal, and he did not testify at the administrative hearing. Indeed, his lawyer did not ask the Investigating Officer any questions pertaining to the refusal at the administrative hearing.

"The statute is obviously designed to achieve one primary goal, which is to enable the State to obtain a scientific test to determine if a motorist is operating his vehicle while under the influence of intoxicating liquor. There is no question that this is a legitimate exercise of the police power of the State." *Jordan v. Roberts*, *supra*, 161 W. Va. 758, 246 S.E.2d 264.

In *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015), this Court reversed a DUI revocation but upheld the revocation for refusal to submit to the secondary chemical test of the breath: "Based upon the foregoing, this Court finds that Mr. Hall's license revocations for refusal to submit to the secondary breath test were proper, but his license revocations for DUI were erroneous." 235 W. Va. 333, 773 S.E.2d 677. In *Hall*, the DUI revocation was rescinded because the Investigating Officer failed to have the driver's blood sample tested. However, "A person's driver's license may be suspended under W.Va.Code, 17C–5–7(a) [1983] for refusal to take a designated breathalyzer test." Syl. Pt. 2, *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987).[4]

"This is consistent with the underlying principles of implied consent laws, which historically have been 'viewed as an effort on the part of the state to decrease the damage to persons and property arising from drivers operating motor vehicles while under the influence of intoxicating liquor.' *Jordan v. Roberts*, 161 W. Va. 750, 754, 246 S.E.2d 259, 262 (1978)." *State v. Stone,* 229 W. Va. 271, 283–84, 728 S.E.2d 155, 167–68 (2012); *see also People v. Jordan,* 75 Cal.App.3d Supp. 1,

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[4]In *Moczek*, the refusal was determinative of the revocation, even if there had been an exculpatory blood test: "It is clear now that a person who refuses to take the designated breathalyzer or urine test will have his license revoked, even if he takes an alternative blood test that conclusively proves that he was not intoxicated." 178 W. Va. 555, 363 S.E.2d 240.

142 Cal.Rptr. 401, 408 (1977) (stating that "while the immediate purpose of the implied consent law is to obtain the best evidence of blood-alcohol content, the long range purpose is to inhibit intoxicated persons from driving upon the highways and thus reduce the carnage and slaughter on the highways.")." *Reed v. Hall*, *supra*, 235 W. Va. 327, 773 S.E.2d 671.

The refusal is a basis for revocation independent of the revocation for DUI. "Mr. Hall's administrative license revocation is properly premised upon his refusal of the breathalyzer test." *Reed v. Hall*, *supra*, 773 S.E.2d 675. "Thus, by the refusal, Mr. Hall had subjected himself to the license revocation later imposed by the DMV." *Id.* at 773 S.E.2d 674. The revocation on the basis of refusal must be upheld.

CONCLUSION

The circuit court order must be reversed.

Respectfully submitted,

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