

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

EVERETT FRAZIER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,



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CIRCUIT COURT CLERK
KANAWHA COUNTY WEST VIRGINIA

v.

DAVID GAITHER, JR.,

Respondent.

FINAL ORDER

This case is an appeal from the *Final Order* (SOMON¹ 24) of the Office of Administrative Hearings ("OAH") entered November 25, 2019, which reversed the revocation by the Commissioner of the West Virginia Division of Motor Vehicles ("DMV") revoking the Respondent's driver's license for driving a motor vehicle in this State while under the influence ("DUI") of alcohol, controlled substances and/or drugs (SOMON 6 pages 25 and 41). Having reviewed the record, the pleadings and the applicable law and heard the arguments of counsel, the Court finds and concludes as follows:

FINDINGS OF FACT

1. Officer Brian McCusker, (hereafter, the Investigating Officer) of the Jefferson County Sheriff's Department responded to a reported vehicle crash in Jefferson County at approximately 3:26 p.m. on July 17, 2017 (SOMON 29 page 19). He arrived on scene and discovered a wrecked vehicle: a black Chevy S-10 which was registered to the Respondent (SOMON 6 page 27).

¹ SOMON refers to the *Statement of Matters Officially Noted* provided by the Office of Administrative Hearings and filed with this Court on January 28, 2020.

2. The Investigating Officer encountered a witness at the scene who had stopped to assist at the accident (SOMON 6 page 34). That witness, James Stahler, gave the officer a description of the driver and told him that the driver was disoriented, injured, and smelled of alcohol. He described what the driver was wearing. He also informed the officer that the driver had walked away from the scene of the accident (Id).

3. The Officer received a call from dispatch at 5:33 p.m. giving him the current location of the driver. Over two hours after arriving on scene of the accident, the driver was located and identified as David Gaither, Jr., the owner of the wrecked vehicle (Id). He was covered in blood and had lacerations on his head and body. SOMON Doc 29 at 14.

4. The Officer interviewed Mr. Gaither. Mr Gaither's story was inconsistent, changing several times. He admitted driving the vehicle into a tree (Id).

5. The driver had bloodshot eyes, was slurring his words, and had alcohol on his breath (SOMON 6 page 28).

6. EMS was called, and Mr. Gaither refused treatment (SOMON 6 page 34).

7. There were no field sobriety tests administered. A Preliminary Breath Test was given to Mr. Gaither only five minutes after the encounter began. It showed the presence of alcohol (0.12%) (SOMON 6 page 30).

8. The Officer released the driver to another officer who took him home (SOMON 29 page 22).

9. After consulting with his supervisor, the Officer obtained and executed a warrant on July 20, 2017 (Id).

10. The OAH held an evidentiary hearing on October 19, 2018. SOMOM Doc. 29.

11. The OAH entered a Final Order rescinding the revocation on November 25, 2019.
SOMOM Doc. 24.

CONCLUSIONS OF LAW

1. A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W. Va. Code §29A-5-4 (1998).

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

1. In violation of constitutional or statutory provisions; or
2. In excess of the statutory authority or jurisdiction of the agency; or
3. Made upon unlawful procedures; or
4. Affected by other error of law; or
5. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code §29A-5-4 (1998).

2. "In reviewing the judgment of the lower court, this Court does not accord special weight to the lower court's conclusions of law and will reverse the judgment below when it is based on an incorrect conclusion of law." Syl. Pt. 4 *State ex rel. Miller v Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1998).

3. "Findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscattell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

4. West Virginia Code §17C-5A-2 states:

(f) 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, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight;

(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: Provided, That this element shall be waived in cases where no arrest occurred due to driver incapacitation;

(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.

(s) If the Office of Administrative Hearings finds to the contrary with respect to the above issues, it shall rescind or modify the commissioner's order . . .

5. The West Virginia Code of State Rules §64-10-5.2(a) states:

The preliminary alcohol breath analysis shall be administered after the law enforcement officer has a reasonable belief that the person has been driving while under the influence of alcohol. The law enforcement officer shall prohibit the person from drinking alcohol or smoking for at least fifteen minutes before conducting the test.

7. In the case at hand, it is undisputed that the Preliminary Breath Test was not administered in accordance with West Virginia Code of State Rules §64-10-5.2(a).

8. The most analogous case is *Reed v. Hill*, 235 W. Va. 1, 8, 770 S.E.2d 501, 508 (2015). There, the OAH found that the Investigating Officer only observed the driver for eight minutes prior to administering the PBT. The Supreme Court of Appeals of West Virginia reasoned:

The West Virginia Bureau for Public Health has promulgated a legislative rule providing that “[t]he law enforcement officer shall prohibit the person from drinking alcohol or smoking for at least fifteen minutes before conducting the [PBT] test.” W.Va.C.S.R. § 64-10-5.2(a) (2005). West Virginia Code § 17C-5-5 (1983) directs that a PBT “must be administered with a device and in a manner approved by the Department of Health for that purpose.” Undoubtedly, the purpose of this legislative rule is to promote accuracy and reliability in the test result . . . Because the deputy did not comply with C.S.R. § 64-10-5.2(a) by prohibiting Mr. Hill from drinking alcohol and smoking for at least fifteen minutes before the PBT was administered, the OAH was not clearly wrong to exclude this test result.

Reed v. Hill, 235 W. Va. 1, 8, 770 S.E.2d 501, 508 (2015).

9. Here, the Investigating Officer only observed Respondent for approximately five minutes before administering the PBT. The failure of the Investigating Officer to observe the Respondent for the required fifteen minutes to ensure that Respondent did not drink alcohol or smoke during that time negates the accuracy and reliability of the test result. Accordingly, the OAH was right to assign no weight to the Preliminary Breath Test that was not administered according to the applicable standards.

10. Further, there were no field sobriety tests or secondary chemical test performed in this matter. Regarding the Investigating Officer’s testimony, the Officer did not speak with the Respondent until *at least* two hours after Respondent drove his vehicle. The Investigating Officer noted that the Respondent’s eyes were bloodshot, he was slurring his words, and smelled of alcohol. It is important to note that the Investigating Officer’s observation of Respondent in such condition was after Respondent struck a tree with his vehicle and sustained visible injuries to his head. Given the condition of Respondent, the slurring of his words and blood shot eyes are not clearly symptoms of intoxication. Further, simply smelling like alcohol is not enough to establish that Respondent consumed alcohol prior to the operation of his motor vehicle or was intoxicated while operating his motor vehicle under these circumstances.

11. The only evidence of DUI put forth by the DMV that Respondent consumed alcohol prior to the operation of his motor vehicle is the unsworn hearsay statement of the alleged witness on the scene of the crash contained in the Investigating Officer's narrative attached to the criminal complaint. However, even putting aside the questionable reliability of such a statement, there is nothing in the testimony below or the documentary evidence that establishes when the accident took place or how long after the accident that the witness observed the Respondent and noticed the scent of alcohol coming from Respondent's person. Again, simply smelling like alcohol is not enough to establish that Respondent drove a vehicle in this state while impaired.

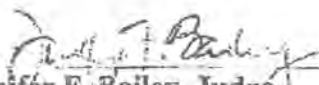
12. Accordingly, after considering the totality of the circumstances, the OAH did not err in concluding that the DMV did not prove by a preponderance of the evidence that the Respondent drove a motor vehicle in this State while under the influence of alcohol, controlled substances and/or drugs on the date in question.

WHEREFORE, the Court concludes that the *Final Order* of the OAH must be **AFFIRMED**. The petition for appeal is **DENIED**, and this matter is **DISMISSED** and **STRICKEN** from the docket of this Court. The Clerk is directed to send certified copies of this order to each of the parties.

The objections and exceptions of the Respondent to this ruling are hereby noted and preserved.

ENTERED this the 10th day of December, 2021.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. BATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF December 10, 2021.
Cathy S. Batson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


Jennifer F. Bailey, Judge