

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

**ROBIN D. DAVISSON,
Petitioner Below, Appellee**

v.) No. 35674 (Nicholas County, No. 09-AA-1)

**JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, Respondent Below, Appellant**

**FILED
May 13, 2011**

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

MEMORANDUM DECISION

Appellant Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter referred to as “Commissioner Miller”), appeals an order of the Circuit Court of Nicholas County that reversed Commissioner Miller’s Final Order of August 24, 2009. Commissioner Miller’s order revoked the driver’s license of Robin D. Davisson (hereinafter referred to as “Ms. Davisson”), petitioner below and appellee, following her arrest for driving under the influence of alcohol (hereinafter referred to as “DUI”). The circuit court reversed the order and reinstated Ms. Davisson’s driver’s license, concluding that Commissioner Miller erred in failing to apply an adverse inference to the arresting officer’s testimony because he failed to admit into evidence a certain videotape. In addition, the circuit court concluded that Commissioner Miller’s order violated *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001), by failing to give substantial weight to the dismissal of the DUI charge against Ms. Davisson. On appeal, Commissioner Miller argues that the circuit court erred in addressing the issue involving the video tape insofar as that issue was not raised or preserved during the administrative hearing. In addition, Commissioner Miller contends that the circuit court erred in finding that his final order violated *Choma*. After a careful review of the briefs submitted by the parties, the record submitted for appeal, the oral arguments presented to this Court, and the applicable case law, we conclude that the circuit court erred in addressing the failure of the arresting officer to introduce a videotape during the administrative hearing in this matter, and in finding that *Choma* was violated. We therefore reverse and remand this case for reinstatement of Commissioner Miller’s “Final Order.” This Court further finds that this case presents no new or significant questions of law. Accordingly, this case will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

On March 29, 2009, Deputy B. S. Tucker of the Nicholas County Sheriff’s Office (hereinafter referred to as “Deputy Tucker”) was on patrol in the Mount Nebo area of

Nicholas County, West Virginia, when he observed a black Ford Escape motor vehicle weaving back and forth and driving left of center. Consequently, Deputy Tucker initiated a traffic stop. Deputy Tucker approached the vehicle, and, upon speaking with the driver of the car, Ms. Davisson, he observed that her eyes were bloodshot and glassy and smelled the odor of alcohol on her breath. Deputy Tucker asked Ms. Davisson if she had been drinking, and she confessed that she had consumed four beers.

Deputy Tucker then conducted three field sobriety tests, the Horizontal Gaze Nystagmus Test, the One-Leg Stand Test, and the Walk and Turn Test. Deputy Tucker's cruiser was equipped with an in-car video recorder that recorded Ms. Davisson's attempts to perform the field sobriety tests. Ms. Davisson failed all three tests. Deputy Tucker then conducted a Preliminary Breath Test, which Ms. Davisson also failed. Ms. Davisson then commented that she thought she should not be driving. Deputy Tucker placed Ms. Davisson under arrest for DUI and transported her to the Nicholas County Sheriff's Office. At the Sheriff's Office, Deputy Tucker observed Ms. Davisson for twenty-minutes and then conducted a secondary chemical test of the breath using an Intoximeter. Ms. Davisson blew three times into the Intoximeter, but all three times she gave an insufficient sample.¹ Deputy Tucker then advised Ms. Davisson of her *Miranda* rights,² and she declined to answer any questions. The DUI process that occurred at the Sheriff's Office was video recorded.

Thereafter, Deputy Tucker submitted a "Statement of Arresting Officer" to the West Virginia Division of Motor Vehicles (hereinafter referred to as "the Division"). In response, Commissioner Miller issued an order dated April 10, 2009, revoking Ms. Davisson's driving privileges for a period of six months. Ms. Davisson, by counsel, requested an administrative hearing to challenge the revocation. Following the administrative hearing, which was conducted on June 3, 2009, the revocation was upheld by final order of Commissioner Miller dated August 24, 2009. Ms. Davisson then appealed the decision to the Circuit Court of Nicholas County. By order entered December 30, 2009, the circuit court reversed the revocation and reinstated Ms. Davisson's driver's license. It is from this order that Commissioner Miller now appeals.

¹Ms. Davisson's license initially was revoked not only for DUI, but also for refusing to take the designated secondary chemical test. However, the Commissioner accepted her explanation that she was not able to provide a sufficient sample on the secondary chemical test due to her allergies and asthma, and rescinded that part of the initial order that revoked Ms. Davisson's license for refusing to submit to the designated secondary chemical test.

²*See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Our standard of review for this appeal was set out in Syllabus point 1 of *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996), wherein we held that,

[o]n 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.

The *Muscatell* Court further held that, “[i]n cases where the circuit court has [reversed] 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, 196 W. Va. 588, 474 S.E.2d 518.

In the instant appeal, Commissioner Miller first argues that the circuit court erred in allowing Ms. Davisson to argue that an adverse inference should be applied to the testimony of the arresting officer due to his failure to introduce into evidence a video of Ms. Davisson that was recorded while she attempted to perform field sobriety tests on the night of her arrest for DUI. Commissioner Miller asserts that Ms. Davisson waived this issue, because she did not request the video prior to the administrative hearing; because her counsel failed to inquire or object during Deputy Tucker’s testimony referring to the existence of two videotapes; and because her counsel did not raise the issue during the administrative hearing or in his closing. Consequently, Commissioner Miller’s final order did not address the issue. Accordingly, the Commissioner argues, it was an improper issue to be raised on appeal.

Ms. Davisson argues that the circuit court did not err in finding that the failure of the arresting officer to introduce a video tape at an administrative hearing raises an inference that such video tape would be adverse to the testimony of the officer; however, Ms. Davisson fails to provide any argument to show that this issue was properly preserved.

It is well established that “[o]ur general rule is that nonjurisdictional questions. . . raised for the first time on appeal, will not be considered.” *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999). This rule also has been applied to administrative proceedings. *See, e.g., Hoover v. West Virginia Bd. of Med.*, 216 W. Va. 23, 26, 602 S.E.2d 466, 469 (2004) (“[I]f a party fails to properly raise a nonjurisdictional ‘defense during [an] administrative proceeding, that party waives the defense and may not raise it on appeal.’” (quoting *Fruehauf Trailer Corp. v. W.C.A.B.*, 784 A.2d 874, 877 (Pa. Cmwlth. 2001))). Indeed, this Court has explained this principle thusly:

In administrative proceedings . . . , the circuit court is sitting in the capacity of an appellate court. In such circumstances, it is improper for that court to consider an issue that was not initially raised below. In fact, the West Virginia Administrative Procedures Act specifically directs that a circuit court's review of an administrative proceeding

shall be conducted by the court without a jury *and shall be upon the record made before the agency*, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs. W. Va. Code § 29A-5-4(f) (1998) (Repl. Vol. [2007]).

Hoover v. West Virginia Bd. of Medicine, 216 W. Va. at 27, 602 S.E.2d at 470 (emphasis added) (quotations omitted) (quoting *West Virginia Bd. of Med. v. Shafer*, 207 W. Va. 636, 639, 535 S.E.2d 480, 483 (2000) (Davis, J., dissenting)).

Because the issue of Deputy Tucker's failure to introduce the video tape was not raised in the administrative hearing, the circuit court erred in addressing the issue and in using the same as a basis for reversing Commissioner Miller's final order.³

Commissioner Miller next argues that the circuit court erred in finding that *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001), requires the Commissioner to give substantial weight to the dismissal of the criminal charges against Ms. Davisson. Commissioner Miller contends that there was no evidence of the

³In addition, we note that, in an opinion being released simultaneously with this memorandum decision, we have concluded that the appellant

could have obtained a copy of the video, and, if the video was in fact favorable to him, could have attempted to present the same during the administrative hearing. However, in the instant case, Mr. Sims did not request or subpoena the video, nor did the Hearing Examiner order production of the video or hold the record open for its admission. Under these circumstance, no adverse inference was warranted.

Sims v. Miller, No. 35673, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 20-21 (May 13, 2011).

outcome of the criminal proceeding at the administrative hearing because the criminal matter was not resolved until after the administrative hearing.

Ms. Davisson argues that, although the underlying criminal case against her was not disposed of at the time of the administrative hearing, evidence was presented to Commissioner Miller that the charge had been dismissed *before his final order was entered*. Thus, argues Ms. Davisson, the evidence was part of the administrative record.

We disagree with Ms. Davisson's position that evidence of the dismissal of the DUI charge against her was properly submitted as part of the administrative proceeding. As Commissioner Miller correctly points out, in Syllabus point 3 of *Choma*, this Court held that,

[i]n administrative proceedings under W. Va. Code, 17C-5A-1 *et seq.*, the commissioner of motor vehicles must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the commissioner, *when evidence of such results is presented in the administrative proceeding*.

210 W. Va. 256, 557 S.E.2d 310 (emphasis added).

For purposes of presenting evidence in an administrative hearing conducted by the Division, such evidence must be presented to the trier of fact, *i.e.*, the hearing examiner. In this case, it appears that, sometime after the administrative hearing had been concluded, Ms. Davisson submitted evidence of her related criminal proceedings to the Division. However, if Ms. Davisson wished to have this evidence considered, she should have filed a motion before the hearing examiner to re-open the evidence in order to receive the same. She did not do so. Instead, Ms. Davisson presented this evidence to the circuit court. Insofar as this evidence was not considered by the hearing examiner, the circuit court was without authority to consider the evidence pursuant to W. Va. Code § 29A-5-4(f) (1998) (Repl. Vol. 2007). *See, Hoover v. West Virginia Bd. of Med.*, 216 W. Va. at 27, 602 S.E.2d at 470 (“In administrative proceedings . . . , the circuit court is sitting in the capacity of an appellate court. In such circumstances, it is improper for that court to consider an issue that was not initially raised below. . . .” (quoting *West Virginia Bd. of Med. v. Shafer*, 207 W. Va. 636, 639, 535 S.E.2d 480, 483 (2000) (Davis, J., dissenting))). *See also* W. Va. Code § 29A-5-4(f) (1998) (Repl. Vol. 2007) (“The review shall be conducted by the court without a jury *and shall be upon the record made before the agency*” (emphasis added))). Accordingly, the circuit court erred in relying on the evidence of Ms. Davisson's related criminal case as grounds for reversing Commissioner Miller's final order revoking Ms. Davisson's driver's license.

Because we find the circuit court was without grounds to reverse Commissioner Miller's revocation of Ms. Davisson's driver's license, the order of the Circuit Court of Nicholas County, dated December 30, 2009, is reversed, and this case is remanded for reinstatement of Commissioner Miller's "Final Order," dated August 24, 2009, revoking Ms. Davisson's license to drive a motor vehicle in this state.

Reversed and Remanded.

ISSUED: May 13, 2011

CONCURRED IN BY:

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