

NO. 34328

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

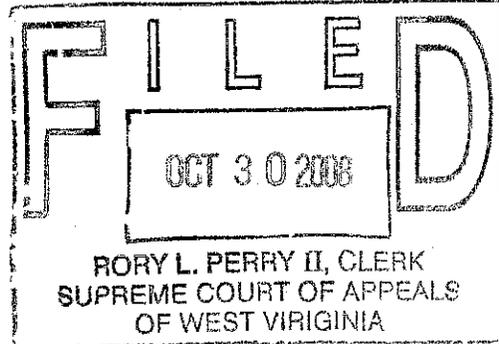
SHARON G. NOBLE,

Appellee/Petitioner Below,

v.

DEPARTMENT OF TRANSPORTATION,
DIVISION OF MOTOR VEHICLES AND
COMMISSIONER JOSEPH CICCHIRILLO,

Appellants/Respondents Below.



FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF APPELLANTS

JOSEPH CICCHIRILLO, COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,
DEPARTMENT OF TRANSPORTATION,

By counsel,

JANET JAMES
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 4904
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2522

TABLE OF CONTENTS

	<u>Page</u>
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
A. THE ADMINISTRATIVE APPEAL	2
B. THE ADMINISTRATIVE PROCEEDINGS	2
II. STATEMENT OF THE FACTS	3
III. ASSIGNMENTS OF ERROR	5
A. THE APPELLEE/DRIVER'S FAILURE TO RAISE THE ISSUE OF VIOLATION OF A MUNICIPAL ORDINANCE AT THE ADMINISTRATIVE HEARING CONSTITUTES A WAIVER OF THAT ISSUE	5
B. A LICENSE REVOCATION MAY NOT PROPERLY BE REVERSED ON THE BASIS THAT THE DIVISION DID NOT ASCERTAIN WHETHER THE MUNICIPAL DUI ORDINANCE HAD THE SAME ELEMENTS AS W. VA. CODE §17C-5-2	5
IV. POINTS AND AUTHORITIES	5
A. 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... the commissioner shall make and enter an order revoking or suspending the person's license to operate a motor vehicle in this state. W. Va. Code §17C-5A-1(c)	5
B. The review shall be conducted by the court without a jury and shall be upon the record made before the agency. W. Va. Code § 29A-5-4(f)	5
C. (a) Notwithstanding the provisions of section five, article twelve, chapter eight of this Code, on and after the first day of September, one thousand nine	

hundred eighty-three, each and every municipal ordinance defining a misdemeanor offense of or relating to driving under the influence of alcohol or driving under the influence of intoxicating liquor or otherwise prohibiting conduct made unlawful by this article shall be null and void and of no effect unless such ordinance defines such an offense in substantially similar terms as an offense defined under the provisions of this article and such offense contains the same elements as an offense defined herein.

(b) Notwithstanding the provisions of section one, article eleven, chapter eight of this Code, on and after the first day of August, one thousand nine hundred eighty-three, each and every municipal ordinance defining a misdemeanor offense of or relating to driving under the influence of alcohol or driving under the influence of intoxicating liquor or otherwise prohibiting conduct made unlawful by this article shall prescribe the same penalty for such offense as is prescribed for an offense under this article containing the same elements.

W. Va. Code § 17C-5-11 6

D. [T]he focal point for judicial review should be the administrative record already in existence.

Frymier-Halloran v. Paige, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995) . . 6

V. STANDARD OF REVIEW 6

VI. ARGUMENT 7

A. THE APPELLEE/DRIVER'S FAILURE TO RAISE THE ISSUE OF VIOLATION OF A MUNICIPAL ORDINANCE AT THE ADMINISTRATIVE HEARING CONSTITUTES A WAIVER OF THAT ISSUE. 7

B. THE QUESTION OF RECONCILIATION OF A MUNICIPAL DUI ORDINANCE WITH W. VA. CODE §17C-5-2 DOES NOT CONSTITUTE A BASIS FOR REVERSAL OF THE FINAL ORDER 8

VII. PRAYER FOR RELIEF 10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Carroll v. Stump</i> , 217 W. Va. 748, 619 S.E.2d 261 (2005)	8
<i>Chrystal R.M. v. Charlie A.L.</i> , , 194 W. Va. 138, 459 S.E.2d 415 (1995)	6
<i>Frymier-Halloran v. Paige</i> , 193 W. Va. 687, 458 S.E.2d 780 (1995)	6, 7
<i>State ex rel. Stump v. Johnson</i> , 217 W. Va. 733, 619 S.E.2d 246 (2005)	8
<u>STATUTES:</u>	
W. Va. Code § 17C-5-2	passim
W. Va. Code § 17C-5-11	6, 9
W. Va. Code § 17C-5A-1	9
W. Va. Code § 17C-5A-1(b)	8
W. Va. Code § 17C-5A-1(c)	5
W. Va. Code § 17C-5A-4	9
W. Va. Code § 29A-5-4	6
W. Va. Code § 29A-5-4(f)	5, 7

NO. 34328

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SHARON G. NOBLE,

Appellee/Petitioner Below,

v.

DEPARTMENT OF TRANSPORTATION,
DIVISION OF MOTOR VEHICLES AND
COMMISSIONER JOSEPH CICCHIRILLO,

Appellants/Respondents Below.

BRIEF OF APPELLANTS

Come now the Appellants, Department of Transportation, Division of Motor Vehicles (hereinafter, "DMV"), and Commissioner Joseph Cicchirillo, by counsel, Janet E. James, Assistant Attorney General, and submit this brief pursuant to an Order received from this Honorable Court on September 30, 2008, in the above-cited matter.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellants seek reversal of the *Final Order* entered on November 16, 2007, by the Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County (hereinafter, "*Order*"), in an administrative appeal styled *Sharon G. Noble v. Department of Transportation, Division of Motor Vehicles and Commissioner Joseph Cicchirillo*, Civil Action No. 07-AA-92. Through its *Order*, the Circuit Court reversed an administrative driver's license revocation order entered by Joseph Cicchirillo, Commissioner of the DMV, by which Sharon G. Noble's (hereinafter, "Appellee") privilege to drive was revoked on July 5, 2007.

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from the administrative order which took effect on July 5, 2007, (hereinafter, "*Final Order*"), wherein Commissioner Cicchirillo revoked Appellee's privilege to drive in West Virginia for a period of six months for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court remanded the matter to the hearing examiner "to require written supplemental findings based on the testimony at the hearing and factually state what evidence he objectively relied upon in concluding that Ms. Noble was lawfully arrested for an offense described in W. Va. Code § 17C-5-2." *Order Remanding for Additional Findings* at 3. A *Remand Final Order* was issued by the DMV and submitted to the Circuit Court on November 6, 2007. A *Final Order* was entered by Judge Kaufman on November 16, 2007, which reversed the Order of the DMV and reinstated the driving privileges of the Appellee. The Circuit Court reversed the *Final Order* on the basis that "the statement submitted by the arresting officer said nothing regarding the municipal ordinance under which she was arrested. Furthermore, there was no evidence of such ordinance presented at the administrative hearing. There would be no way for the Commissioner to ascertain whether or not the municipal ordinance under which Ms. Noble was arrested has the same elements as the offense of driving under the influence as set out in W. Va Code §17C-5-2" *Order* at 2.

B. THE ADMINISTRATIVE PROCEEDINGS

Appellee was arrested for driving under the influence of alcohol on January 12, 2007. Patrolman Hopkins apprised the Division of Appellee's arrest by submitting the requisite "*West Virginia D.U.I. Information Sheet*."¹ After reviewing the *D.U.I. Information Sheet*, the DMV issued

¹Exhibit 1a-1f of the administrative record (hereinafter, "Record Exhibit 1a-1f").

an initial *Order of Revocation*², dated January 25, 2007, revoking Appellee's privilege to drive in West Virginia for six months, with eligibility in ninety days, accompanied by completion of the Safety and Treatment Program, and payment of the pertinent costs and fees.

Appellee timely requested an administrative hearing. On February 15, 2007, the DMV issued a notice of hearing to Appellee by which the administrative hearing was set for March 27, 2007. The *Final Order* of the Commissioner was issued on July 5, 2007³, reinstating the initial revocation for a period of six months.

Appellee filed her *Petition of Appeal* on or about June 21, 2007. An *Order Remanding for Additional Findings* was entered by Judge Kaufman on October 16, 2007. The DMV issued a *Remand Final Order* to Judge Kaufman on November 6, 2007. On November 16, 2007, Judge Kaufman entered a *Final Order* reinstating the driving privileges of the Appellee, from which the DMV now appeals.

II.

STATEMENT OF THE FACTS

On January 12, 2007, Patrolman J. Hopkins (hereinafter, "Ptlm. Hopkins") of the Ronceverte Police Department pulled over a vehicle in Ronceverte that was being driven with "tires on center or line marker," "slow response to traffic signals" and with a "defective taillight." Record Exhibit 1a. The Appellee, Sharon Noble, was the driver of the vehicle. *Id.* Ptlm. Hopkins detected the smell of an alcoholic beverage on Appellee, and Appellee admitted to drinking beer. Transcript of Administrative Hearing held on March 27, 2007, at the DMV office in Greenbrier County,

²Record Exhibit 2.

³Record Exhibit 6.

Lewisburg, West Virginia at 3 (hereinafter, "Tr. at 3")⁴; Record Exhibit 1b. Appellee was unsteady exiting her vehicle, unsteady and staggering while walking to the roadside, and swaying while standing. *Id.* Appellee's eyes were glassy and her speech was slurred. *Id.*

PtIm. Hopkins asked Appellee to perform a field sobriety test. On the horizontal gaze nystagmus test, Appellee's eyes lacked smooth pursuit, had distinct nystagmus at maximum deviation and onset of nystagmus prior to forty-five degrees. Record Exhibit 1b. Due to the location of the stop, PtIm. Hopkins thought it was unsafe for Appellee to perform the walk-and-turn test and the one-leg stand test. Record Exhibit 1b-1c. Appellee failed a preliminary breath test. Record Exhibit 1c.

PtIm. Hopkins placed Appellee under arrest and transported her to the station for processing. Appellee was read the Implied Consent Statement, which she signed at 21:25. Record Exhibit 1d. PtIm. Hopkins observed Appellee for twenty minutes to make sure she had not ingested food, drink or other foreign matter in her mouth, and began the process on the Intox EC/IR-II. *Id.* The Intox EC/IR-II printer was online and no errors were indicated. *Id.* The instrument read "press enter to start" and PtIm. Hopkins entered data as prompted. *Id.* Instrument displayed "please blow" and PtIm. Hopkins placed an individual disposable mouthpiece into the breath tube and had Appellee blow into the mouthpiece. *Id.* The gas reference standards were run on the Intox EC/IR-II and the results indicated that the instrument was working properly, with results of the reference standard of .082 and .081. *Id.* PtIm. Hopkins was certified by the West Virginia Bureau for Public Health on 02/01/90 and as a test administrator on the EC/IR-II on 9/22/04. Record Exhibit 1d; Tr. at 2. The breath test is the designated secondary chemical test of the Ronceverte Police Department. Tr. at

⁴Record Exhibit 10.

1. The results of the Intox test showed Appellee's blood alcohol concentration level was .099.

Record Exhibit 1d.

III.

ASSIGNMENTS OF ERROR

- A. **THE APPELLEE/DRIVER'S FAILURE TO RAISE THE ISSUE OF VIOLATION OF A MUNICIPAL ORDINANCE AT THE ADMINISTRATIVE HEARING CONSTITUTES A WAIVER OF THAT ISSUE.**
- B. **A LICENSE REVOCATION MAY NOT PROPERLY BE REVERSED ON THE BASIS THAT THE DIVISION DID NOT ASCERTAIN WHETHER THE MUNICIPAL DUI ORDINANCE HAD THE SAME ELEMENTS AS W. VA. CODE § 17C-5-2.**

IV.

POINTS AND AUTHORITIES

- A. 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 . . . the commissioner shall make and enter an order revoking or suspending the person's license to operate a motor vehicle in this state.

W. Va. Code § 17C-5A-1(c).

- B. The review shall be conducted by the court without a jury and shall be upon the record made before the agency.

W. Va. Code § 29A-5-4(f).

- C. (a) Notwithstanding the provisions of section five, article twelve, chapter eight of this Code, on and after the first day of September, one thousand nine hundred eighty-three, each and every municipal ordinance defining a misdemeanor offense of or relating to driving under the influence of alcohol or driving under the influence of

intoxicating liquor or otherwise prohibiting conduct made unlawful by this article shall be null and void and of no effect unless such ordinance defines such an offense in substantially similar terms as an offense defined under the provisions of this article and such offense contains the same elements as an offense defined herein.

(b) Notwithstanding the provisions of section one, article eleven, chapter eight of this Code, on and after the first day of August, one thousand nine hundred eighty-three, each and every municipal ordinance defining a misdemeanor offense of or relating to driving under the influence of alcohol or driving under the influence of intoxicating liquor or otherwise prohibiting conduct made unlawful by this article shall prescribe the same penalty for such offense as is prescribed for an offense under this article containing the same elements.

W. Va. Code § 17C-5-11.

D. [T]he focal point for judicial review should be the administrative record already in existence.

Frymier-Halloran v. Paige, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995).

V.

STANDARD OF REVIEW

This Court's review of this matter is controlled by the West Virginia Administrative Procedures Act. Review of questions of law is *de novo* (Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)); review of factual questions is guided by whether there is evidence on the record as a whole to support the agency's decision. This Court may reverse, modify or vacate the Order of the circuit court. W. Va. Code § 29A-5-4.

VI.

ARGUMENT

A. THE APPELLEE/DRIVER'S FAILURE TO RAISE THE ISSUE OF VIOLATION OF A MUNICIPAL ORDINANCE AT THE ADMINISTRATIVE HEARING CONSTITUTES A WAIVER OF THAT ISSUE.

The statement submitted by the arresting officer provides, "With reasonable grounds, I lawfully arrested or lawfully took into custody the below named driver and/or vehicle owner for violating Code section 17C-5-2." At the administrative hearing, not a word was said with regard to the Ronceverte Municipal Code. *See* Record Exhibit 10, the transcript of the administrative hearing. Nor was any evidence presented by the driver to refute the copious evidence that she was DUI.

In her petition for appeal and in oral argument to the circuit court, counsel for the Appellee advised the judge that Appellee had been arrested pursuant to a Ronceverte municipal ordinance, and that no evidence was adduced at the administrative hearing which would show one way or another that the municipal ordinance was valid.

It was completely improper for the Appellee to bring up the municipal ordinance on appeal. W. Va. Code § 29A-5-4(f) clearly provides that review of an administrative decision is made only upon the record made before the agency. *See Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995). The circuit court improperly based its order of reversal on the argument that the Appellee was arrested pursuant to a municipal ordinance, when there was no evidence of same in the record below, and when it is clear from the record that Appellee was arrested pursuant to the West Virginia Code.

**B. THE QUESTION OF RECONCILIATION OF A MUNICIPAL
DUI ORDINANCE WITH W. VA. CODE § 17C-5-2 DOES NOT
CONSTITUTE A BASIS FOR REVERSAL OF THE FINAL
ORDER.**

There is no evidence in the record of this case that the revocation of Appellee's license was based on a municipal ordinance.

The circuit court even erroneously noted at oral argument that there is a presumption of innocence of the driver in this matter. That is simply not the correct standard to be applied in an administrative license revocation matter. The driver who requests an administrative hearing is already lawfully revoked.

Even if the Appellee was criminally charged under the municipal ordinance, it has no bearing on the license revocation, which, from the beginning, was made pursuant to W. Va. Code § 17C-5-2. The criminal charging process is separate and distinct from the administrative revocation process.

Carroll v. Stump, 217 W. Va. 748, 619 S.E.2d 261(2005):

A law-enforcement officer arresting a person for DUI has two distinct and separate duties to perform. The first is to file a report or Statement of Arresting Officer with the Commissioner as required by W. Va. Code § 17C-5A-1(b) (1994), initiating an administrative proceeding for the revocation of the arrested person's driver's license. The other is to take the arrested person before a magistrate, present a sworn criminal complaint and initiate a criminal proceeding against the person arrested. Any default by the arresting officer in fulfilling the second of these two duties should not affect the validity of the arresting officer's fulfillment of the first. Since the first and the second set of duties of the arresting officer are separate and distinct and initiate two separate proceedings, one administrative, the other criminal, *any default by the arresting officer in fulfilling either of them should not prejudice the other proceeding.*

217 W. Va. 756, 619 S.E.2d 269 (emphasis added). *See also, State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005).

Further, the West Virginia Legislature has enacted legislation designed to ensure that there is no disparate treatment of drivers arrested for DUI based upon the ordinance or code pursuant to which they are arrested. W. Va. Code § 17C-5-11 requires municipalities to have municipal ordinances for DUI that define the elements of the offense in substantially similar terms as W. Va. Code § 17C-5-2. Under criminal law, W. Va. Code § 17C-5-11 ensures that the offense of drunk driving is treated the same regardless of where you are arrested in West Virginia. If a person is revoked pursuant to a municipal code, there may be a defense that the municipal code upon which the revocation is based is inconsistent with the West Virginia Code. In the present case, however, the municipal code is irrelevant, and it was not asserted as a defense until the appeal.

The Legislature maintained a similar uniformity in the administrative process by amending W. Va. Code §§ 17C-5A-1 and 4. If the officer's statement cites a municipal ordinance, the ordinance must have substantially the same elements as W. Va. Code § 17C-5-2. Although it is irrelevant to the case at hand, on remand from the circuit court the Appellants did the work of obtaining the Ronceverte Municipal Code and determining that, in fact, its elements are substantially those of W. Va. Code § 17C-5-2. The circuit court's apparent concern that "the citizen cannot confront the specific, lawful elements of the city ordinance under which she is charged" (*Order at 2*) is pure error inasmuch as she was not revoked pursuant to municipal ordinance, and because any elements of the municipal ordinance which she would confront would be substantially similar to those in W. Va. Code § 17C-5-2. She "confronted" neither at her administrative hearing.

The Legislature's intent to treat all persons who drive under the influence in the same manner is clear. The notion that the Legislature intended to create a jurisdictional bar to administrative license revocation proceedings is wrong. The officer's statement in this case clearly shows that she

was arrested pursuant to W. Va. Code § 17C-5-2, and the unrefuted evidence shows that indeed Appellee was driving while intoxicated. To allow reversal of the revocation of a drunk driver based upon a belated argument regarding a municipal ordinance is absurd. When the proper evidentiary standards are applied and proper procedure is followed, it is clear that the revocation in this matter must be affirmed.

VII.

PRAYER FOR RELIEF

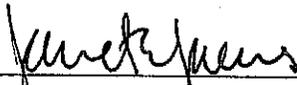
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellants hereby pray that the *Order* entered by the Circuit Court of Kanawha County on November 16, 2007, reversing the *Final Order* of the Commissioner be reversed and vacated, and remanded with directions to affirm the *Final Order*.

Respectfully submitted,

**JOSEPH CICCHIRILLO, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, DEPARTMENT OF
TRANSPORTATION,**

By counsel,

**DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL**



Janet E. James
Assistant Attorney General
West Virginia State Bar #4904
Office of the Attorney General
Building 1, Room W-435
Charleston, West Virginia 25305
(304) 558-2522

NO. 34328

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SHARON G. NOBLE,

Appellee/Petitioner Below,

v.

DEPARTMENT OF TRANSPORTATION,
DIVISION OF MOTOR VEHICLES AND
COMMISSIONER JOSEPH CICCHIRILLO,

Appellants/Respondents Below.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Brief of Appellants* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 30th day of October, 2008, addressed as follows:

Paul S. Detch, Esquire
201 N. Court Street
Lewisburg, WV 24901



JANET E. JAMES