

NO. 34329

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

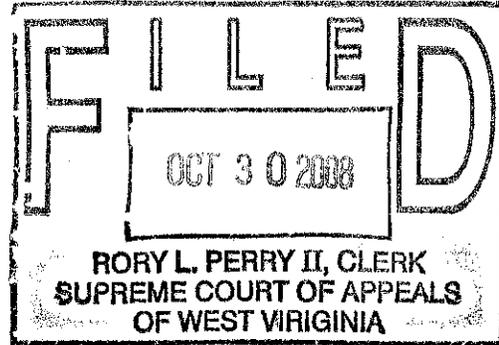
CHAD R. CLOWER,

Appellee/Petitioner Below,

v.

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

Appellant/ Respondent Below.



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FROM THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA

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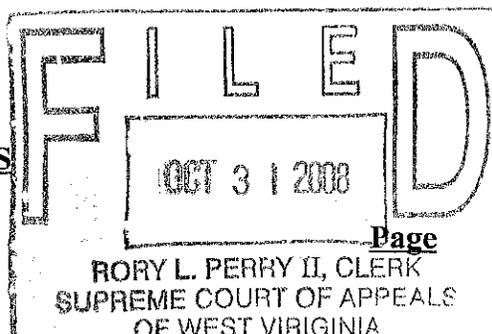
BRIEF OF APPELLANT

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

By counsel,

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**Appellee/Petitioner Below,**

v.

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MOTOR VEHICLES, JOSEPH CICCHIRILLO,  
COMMISSIONER,**

**Appellant/Respondent Below.**

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**BRIEF OF APPELLANT**

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Comes now the Appellant, West Virginia Division of Motor Vehicles, Joseph J. Cicchirillo, Commissioner, by counsel, Janet E. James, Assistant Attorney General, and submits this brief in accordance with the order of the Court. Appellant seeks reversal of an order entered on November 15, 2007, by the Honorable Donald H. Cookman, Judge of the Circuit Court of Hampshire County (hereinafter, "Order"), in an administrative appeal styled *Chad R. Clower v. West Virginia Department of Motor Vehicles, Joseph Cicchirillo, Commissioner*, Civil Action No. 07-AA-04. Through its Order, the Circuit Court reversed an administrative driver's license revocation order entered by Commissioner Cicchirillo by which the Appellee's privilege to drive was revoked on July 2, 2007.

I.

**KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

**A. THE ADMINISTRATIVE APPEAL**

In the underlying administrative appeal, Appellee sought relief from the administrative order which took effect on July 2, 2007, (hereinafter, "Final Order"), wherein Commissioner Cicchirillo revoked Appellee's privilege to drive in West Virginia for a period of six months<sup>1</sup> for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed Commissioner Cicchirillo's Final Order upon the grounds that the arresting officer did not have the requisite reasonable suspicion to stop Appellee's car on the night of his arrest for DUI.

**B. THE ADMINISTRATIVE PROCEEDINGS**

Appellee was arrested for DUI on June 25, 2006, in Romney, Hampshire County, West Virginia, by Trooper C.T. Kessel of the West Virginia State Police. Tpr. Kessel apprised the Division of Appellee's arrest by submitting the requisite "Statement of Arresting Officer."<sup>2</sup>

After reviewing the Statement of Arresting Officer, DMV issued an order dated July 13, 2006, revoking Appellee's privilege to drive in West Virginia<sup>3</sup> for six months.

Thereafter, Appellee, by counsel, requested an administrative hearing to challenge the revocation and the results of the secondary chemical test administered to Appellee pursuant to his arrest. After several continuances, the administrative hearing took place on December 5, 2006. The

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<sup>1</sup>The revocation continues in effect after the six month period until Appellee meets all obligations for reinstatement. Final Order at 9.

<sup>2</sup>Exhibit 1 of the Certified Record as submitted to the Circuit Court of Hampshire County, West Virginia (hereinafter, "Record Exhibit 1").

<sup>3</sup>Record Exhibit 2.

Final Order was effective on July 2, 2007, and upheld the initial 6-month revocation. It was from said Final Order that Appellee appealed to the Circuit Court.

## II.

### STATEMENT OF THE FACTS

Appellee was arrested for DUI on June 25, 2006, in Romney, Hampshire County, West Virginia, by Trooper C.T. Kessel of the West Virginia State Police. Tpr. Kessel observed Appellee's vehicle traveling west on U.S. Route 50 and make a turn from U.S. Route 50, westbound north onto Bolton Street without signaling.

While speaking to Appellee, Tpr. Kessel detected the odor of an alcoholic beverage. His left eye was glassy and bloodshot, and his speech was slurred. Appellee was unsteady exiting his vehicle and swayed while standing. Tpr. Kessel asked Appellee to perform field sobriety tests.

Tpr. Kessel demonstrated and explained the field sobriety tests to Appellee. Appellee has a glass eye in his right eye, so the horizontal gaze nystagmus test was only administered to the left eye. On the HGN test, Appellee's left eye had a lack of smooth pursuit, had distinct nystagmus at maximum deviation, and had an onset of nystagmus prior to a forty-five degree angle. Appellee kept moving his head during the test after being told to keep his head straight towards Tpr. Kessel. Appellee advised Tpr. Kessel that he did not suffer from any medical conditions which would interfere with his ability to perform the walk-and-turn test and the one-leg stand test. On the walk-and-turn test, Appellee did not touch heel-to-toe, and stepped off of the line. On the one-leg stand test, Appellee used his arms for balance, hopped, and put his foot down. Appellee failed the preliminary breath test.

Tpr. Kessel placed Appellee under arrest for DUI and he was taken to the Romney Detachment for processing, where he agreed to take the Intoximeter test. The results of the Intoximeter test showed that Appellee had a blood alcohol content of .182.

### III.

#### ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED IN FINDING THAT REASONABLE SUSPICION FOR A STOP IS A REQUISITE TO A DETERMINATION THAT APPELLEE WAS DRIVING UNDER THE INFLUENCE.
- II. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER ON THE BASIS THAT THERE WAS NO REASONABLE SUSPICION FOR THE STOP OF APPELLEE'S VEHICLE.

### IV.

#### POINTS AND AUTHORITIES

- A. Review of legal questions is *de novo*.  
*Syl. Pt. 1, Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).
- B. The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights . . ."  
*U.S. v. Calandra*, 414 U.S. 338, 348 (1974)
- C. "The purpose was to preclude use of information gained by illegal or unethical activities. However, the exclusionary rule is not usually extended to civil cases."  
*State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994).
- D. Administrative license revocation proceedings and criminal DUI proceedings are two separate and distinct proceedings.

*Mullen v. State, Division of Motor Vehicles*, 216 W. Va. 731, 613 S.E.2d 98 (2005); *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005).

- E. There is no requirement of showing of reasonable suspicion for the stop as a prerequisite for the administrative suspension of a DUI arrestee's license.

*Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 54 P.3d 355 (Ariz. App. Div.2 2002).

- F. Application of the exclusionary rule will hamper legitimate efforts to keep drunk drivers off the roads and complicate the administration of license revocations while adding minimal deterrence to unlawful police action.

*Nevers v. State, Dept. of Admin.*, 123 P.3d 958 (Alaska 2005).

- G. [W]here, as here, there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol.

*Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984).

- H. "The evidence reflecting symptoms of intoxication and consumption of an alcoholic beverage was sufficient to justify submission of the case to the jury."

*State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976).

- I. The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight.

W. Va. Code § 17C-5A-2.

V.

**STANDARD OF REVIEW**

This Court's review of this matter is controlled by the West Virginia Administrative Procedures Act. Review of legal questions 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.

VI.

**ARGUMENT**

**I. THE CIRCUIT COURT ERRED IN APPLYING THE EXCLUSIONARY RULE IN THIS ADMINISTRATIVE DRIVERS LICENSE REVOCATION PROCEEDING.**

In this matter, the circuit court reversed the Final Order of the Commissioner on the basis that the arresting officer did not have reasonable suspicion to stop the Petitioner's car. As the circuit court noted, "[T]his matter is about whether or not the Petitioner was required, by law, to use his turn signal on June 25, 2006. Such a determination is inevitably crucial as the Petitioner's failure to use his turn signal, if required to do so, would have provided Trooper Kessel with the requisite reasonable suspicion to make a traffic stop of Petitioner's vehicle." Order at 3. Judge Cookman alluded to the United States Constitution's Fourth Amendment exclusionary rule in the Order in which he held that individuals have a constitutional right to be free from search and seizure. Order at 4-5.

The exclusionary rule is a “judicially created remedy designed to safeguard Fourth Amendment rights . . .” *U.S. v. Calandra*, 414 U.S. 338, 348 (1974)<sup>4</sup>. This Court has previously found that the exclusionary rule is inapplicable to civil cases. *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994): “The purpose was to preclude use of information gained by illegal or unethical activities. However, the exclusionary rule is not usually extended to civil cases.” 192 W.Va. 163, 451 S.E.2d 729. Exclusionary rule protections must remain in their intended context of criminal proceedings. “As a means of enforcing this right by removing the incentive of government agents to disregard it, as well as to preserve the courts' integrity by keeping them from becoming parties to abuse, the United States Supreme Court developed the rule that evidence obtained through a search or seizure in violation of the Fourth Amendment is not admissible in federal or state criminal proceedings. [*Mapp v. Ohio*, 367 U.S. 643 (1961), *reh denied*, 368 U.S. 871 (1961)]. However, there is wide disagreement as to when, if ever, the constitutional exclusionary rule governs in noncriminal proceedings.” 23 A.L.R.5th 108.

In *Calandra*, the United States Supreme Court declined to extend the exclusionary rule to grand juries. *Calandra* noted that a primary basis for applying the exclusionary rule is deterrence of unlawful police conduct: “the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.” 414 U.S. 348. The Supreme Court reasoned:

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to

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<sup>4</sup>West Virginia Constitution Article 3, § 6 is substantially similar to the Fourth Amendment of the United States Constitution.

those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search.

*Id.*

Nothing in the Fourth Amendment to the U. S. Constitution, the West Virginia Constitution, or any other authority dictates that the exclusionary rule was ever extended to drivers license revocation or other civil proceedings in West Virginia. Drivers license revocation proceedings and criminal DUI proceedings are separate and distinct. *Mullen v. State, Division of Motor Vehicles*, 216 W. Va. 731, 613 S.E.2d 98 (2005); *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005). Indeed, although the Appellant has acquiesced in past years in requiring a showing of reasonable suspicion with regard to the stop of a vehicle, it was under no obligation to do so. The protections of the Fourth Amendment were never extended to driver's license revocation proceedings.

The applicable statutory framework for license revocation for DUI is found, *inter alia*, at W. Va. Code §17C-5A-2(e)(2004):

the commissioner shall make specific findings as to: (1) Whether the arresting 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; and (3) whether the tests, if any, were administered

in accordance with the provisions of this article and article five of this chapter.

That section does not contemplate that a valid stop is a prerequisite to a DUI revocation. Appellee suggests that the “lawful arrest” language implies a valid stop, but offers no support for this proposition. An arrest is lawful if the officer has probable cause to believe the person drove under the influence. A stop is a distinct event from an arrest. The language of the statute concerns the arrest. The three enumerated findings in W. Va. Code §17C-5A-2(e)(2004), which are in the conjunctive, are the requisites for relying on the secondary chemical test. As the Court knows, it is not necessary to have results of a secondary chemical test in order to revoke for DUI. *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984).

This statute mirrors the language of W. Va. Code §17C-5-4, the implied consent statute. That section provides for administration of the preliminary breath test for “reasonable cause”. If the officer gathers sufficient evidence to find that the person was DUI, he then has reasonable grounds to lawfully arrest. Whereupon, he may administer a secondary chemical test. All of the necessary findings pertain to chemical testing, not the stop of the vehicle.

W. Va. Code § 17C-5A-2 was amended effective June 7, 2008, and the equivalent language is found at subsection (f):

the commissioner 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 committed 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; and (3) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

There is no support for application of the exclusionary rule to the present case. According to W. Va. Code § 17C-5A-2(d)(2004), the principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight. Judge Cookman found that all of these criteria were met. “[T]he evidence shows the Petitioner in this case was actually driving under the influence”. Order at 4-5.

In *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), this Court noted that the emphasis should be on the evidence of intoxication.

Much the same argument was advanced in *Byers* [*State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976)], which involved a similar factual situation, although it was a criminal prosecution where the standard of proof is much higher. We summarized the law in Syllabus Point 7:

“Where there is adequate evidence reflecting that a defendant, who was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication and had consumed an alcoholic beverage, a trial court may submit for jury determination the question of whether the defendant committed the offense of driving a motor vehicle while under the influence of intoxicating liquor.”

Accordingly, we believe that where, as here, there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative

revocation of his driver's license for driving under the influence of alcohol.

173 W.Va. 273, 314 S.E.2d 864 - 65.

In *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), this Court, relying on the statutory language pertaining to DUI offenses, determined that an arrest is lawful if the arresting officer has “reasonable grounds” to believe the offense was committed. The *Byers* Court concluded that “The evidence reflecting symptoms of intoxication and consumption of an alcoholic beverage was sufficient to justify submission of the case to the jury.” 159 W.Va. 609, 224 S.E.2d 734. More importantly, the *Byers* Court recognized that it is only the evidence of intoxication and consumption which is truly relevant to the question of whether a person was DUI.

Since *Calandra*, the majority of states which have decided the issue have declined to apply the exclusionary rule in drivers license revocation proceedings. Reasoning that in administrative proceedings to suspend a driver’s license, the social costs of excluding unlawfully obtained but relevant evidence concerning a driver's dangerous or illegal conduct outweigh the marginal effect of such exclusion in deterring police misconduct, the majority of courts have held or recognized that the rule barring admission of evidence derived from an unlawful stop, arrest, search, or seizure, applicable in criminal trials under the Fourth Amendment to the United States Constitution, does not generally apply in motor vehicle license suspension proceedings.

Alaska is in line with the states which hold that the exclusionary rule is inapplicable in license revocation proceedings. In *Nevers v. State, Dept. of Admin.*, 123 P.3d 958 (2005), that state’s supreme court concluded:

In sum, application of the exclusionary rule will hamper legitimate efforts to keep drunk drivers off the roads and complicate the

administration of license revocations while adding minimal deterrence to unlawful police action. In addition, consideration of evidence obtained in violation of the Fourth Amendment does not undermine the procedural fairness of revocation hearings. For these reasons, we affirm the hearing officer's determination that the exclusionary rule is inapplicable to license revocation proceedings.

123 P.3d 966.

*Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 54 P.3d 355 (2002) is illustrative of the theory that the exclusionary rule should not apply to license revocation proceedings. In that case, the Court of Appeals of Arizona held:

§ 28-1321(K)<sup>5</sup> does not expressly require “a showing of reasonable suspicion for the stop” as a prerequisite for administrative suspension of a DUI arrestee's license. To judicially engraft that requirement into the statute, in our view, would be appropriate only if the Constitution compels us to do so.

....

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<sup>5</sup>Hearings requested under this section shall be conducted in the same manner and under the same conditions as provided in § 28-3306. For the purposes of this section, the scope of the hearing shall include only the issues of whether:

1. A law enforcement officer had reasonable grounds to believe that the person was driving or was in actual physical control of a motor vehicle in this state either:
  - (a) While under the influence of intoxicating liquor or drugs.
  - (b) If the person is under twenty-one years of age, with spirituous liquor in the person's body.
2. The person was placed under arrest.
3. The person refused to submit to the test.
4. The person was informed of the consequences of refusal.

A.R.S. § 28-1321(K).

[A]ssuming arguendo that TAAP lacked reasonable suspicion under the Fourth Amendment to justify their stop of Tornabene's vehicle . . . suspension of her license under § 28-1321(K) would not necessarily be invalid on that basis unless the exclusionary rule were applied to the civil license suspension proceeding. Neither the United States Supreme Court nor any Arizona court has applied the exclusionary rule in a purely civil proceeding as a remedy for violation of the Fourth Amendment.

54 P.3d 363-64 (footnote omitted).

The statute at issue in *Tornabene* is substantially similar to W. Va. Code §17C-5A-2 (2004), and the reasoning of that court should be adopted by this Court to establish this point of law in West Virginia:

[E]xclusion of evidence from the license suspension hearing would have little deterrent value as compared to the benefit of having otherwise reliable evidence that a motorist has been driving while intoxicated available to the ALJ. Moreover, applying the exclusionary rule in the administrative license suspension context would “unnecessarily complicate and burden” the proceeding, which is designed primarily to focus on the issue of whether the motorist was operating a vehicle under the influence of intoxicants. *Powell*, 614 A.2d at 1307; *see also Riche*, 987 S.W.2d at 334; *Owen*, 170 Ariz. at 513, 826 P.2d at 810. Based on our evaluation of the relevant policies and our weighing of the relative benefits and detriments, we hold that the exclusionary rule, although required to preserve and protect Fourth Amendment rights in the criminal context, should not be applied to civil license suspension hearings under § 28-1321(K).

54 P.3d 365.

Other cases in which the respective courts have found that the exclusionary rule should not be applied in driver's license revocation proceedings are listed in Appendix 1 hereto.

Under the statutory scheme in place for DUI revocations in West Virginia, this Court can easily reconcile the deterrent effect to police and the cost to the public of excluding the evidence.

Police are deterred from illegal searches because the evidence will be excluded at trial (thereby also preserving judicial integrity). Of course, other checks on police misconduct are the likelihood of state or federal actions for false arrest, false imprisonment, pattern and practice of police supervisors, failure to train, and actions pursuant to 42 U.S.C. §1983. Additionally, use by the Commissioner of the relevant and reliable evidence obtained following the stop may be used to achieve this Court's oft-cited goal of quick removal of drink drivers from the roads.

*See Jordan v. Roberts*, 161 W. Va. 750, 758, 246 S.E.2d 259, 264 (1978) (noting “[i]n *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977), the Court emphasized ‘the important public interest in safety on the roads and highways, and in prompt removal of a safety hazard’ in sustaining an Illinois statute authorizing revocation of a driver's license for repeated traffic violations.”); *Stalnakar v. Roberts*, 168 W. Va. 593, 599, 287 S.E.2d 166, 169 (1981) (finding “[t]he intent of the West Virginia traffic laws which provide that the commissioner of motor vehicles revoke the licenses of dangerous drivers is protection for the innocent public”); *State ex rel. Ruddlesden v. Roberts*, 175 W. Va. 161, 164, 332 S.E.2d 122, 126 (1985) (recognizing “[t]he drunk driving laws of this State are hardly remedial in nature. They are regulatory and protective, designed to remove violat[or]s from the public highways as quickly as possible.”); *Shell v. Bechtold*, 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (internal citations omitted) (stating “[t]he purpose of the administrative sanction of license revocation is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways. . . . The revocation provisions are not penal in nature, and should be read in accord with the general intent of our traffic laws to protect the innocent public.”); *Johnson v. Commissioner, Dept. of Motor Vehicles*, 178 W. Va. 675, 677, 363 S.E.2d 752, 754 (1987) (“The administrative sanctions of license revocation is intended to protect the public from persons who drive under the influence of alcohol”); and *State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 97, 502 S.E.2d 190, 194 (1998) (“The purpose of the administrative sanction of license revocation, as we stated in *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985), ‘is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways.’ *Id.* at 796, 338 S.E.2d at 396. This objective of removing substance-affected drivers from our roads in the interest of promoting safety and saving lives is consistent ‘with the general intent of our traffic laws to protect the innocent public’ ”).

*State ex rel. Stump v. Johnson*, 217 W. Va. 733, 743 n.7, 619 S.E.2d 246, 256 n.7 (2005). See also,

*In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005).

A minority of jurisdictions has found that the exclusionary rule applies to civil drivers license revocation proceedings. In *State v. Lussier*, 757 A.2d 1017 (2000), *reargument denied* (Jun 12, 2000), the Supreme Court of Vermont found to the contrary, although there were two extensive dissents from the five-Justice court. The majority did not accept the “deterrence” theory discussed in *Calandra, supra*. Rather, that court held that there was a need to “protect Vermont motorists from unwarranted governmental intrusions that are not based on articulable suspicion.” 757 A.2d 1023. That court also assumed that its legislature intended that a constitutional stop was necessary to revocation: “Nothing in the language of § 1205 or the purpose behind the statute suggests that the Legislature intended otherwise.” 757 A.2d 1020.

Other cases in which it has been held that the exclusionary rule applies are listed in Appendix 2.

This Court has expressly stated that administrative license revocation proceedings are civil in nature, and that a “revocation is an administrative sanction rather than a criminal penalty.” *State ex rel. Dep’t of Motor Vehicles v. Sanders*, 184 W. Va. 55, 58, 399 S. E.2d 455, 458 (1990) (per curiam). *See also, Shumate v. West Virginia Department of Motor Vehicles*, 182 W. Va. 810, 814, 392 S.E.2d 701, 705 (1990) (“The statutory remedy with which the Department of Motor Vehicles is provided . . . is administrative, and therefore, proceedings which take place pursuant to such statutory enactment are civil proceedings.”) Accordingly, there should be no application of the exclusionary rule to license revocation proceedings.

**II. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER ON THE BASIS THAT THERE WAS NO REASONABLE SUSPICION FOR THE STOP OF APPELLEE’S VEHICLE.**

Alternatively, Appellant seeks reversal of the circuit court's Order on the basis that there was reasonable suspicion for the stop of the Appellee's vehicle. Judge Cookman clearly believed that the Appellee was driving under the influence when he held: "the evidence shows the Petitioner in this case was actually driving under the influence", and ordered that the reversal of the Commissioner's Final Order was based on a "procedural flaw". Order at 4-5. The circuit court's sole basis for reversal was that "no other traffic was affected" by Appellee's failure to signal. This is not supported by the evidence.

Tpr. Kessel observed Appellee's vehicle traveling west on U.S. Route 50 and make a turn from U.S. Route 50, westbound north onto Bolton Street without signaling. Tpr. Kessel testified: "When he executed a right turn, I had to slow my vehicle because at that time, he had slowed down which, where I was traveling I closed the distance between my vehicle and his vehicle" and "Yes, he needed to signal, however, I would have been affected." Tr. at 26, 37. The West Virginia Code creates a misdemeanor offense for failure to give an appropriate signal before turning:

(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in sections two, three, four or five of this article, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.

W. Va. Code §17C-8-8. By implication in the circuit court's order, Tpr. Kessel's car did not constitute "other traffic". However, the evidence shows that Tpr. Kessel was "affected by such movement" when the Appellee failed to use his turn signal. Tpr. Kessel's testimony clearly

indicates that he was affected by the Appellee's driving. The circuit court erred by stretching the interpretation of W. Va. Code §17C-8-8 to conclude that Tpr. Kessel's car did not constitute "any other traffic." The Appellee's failure to signal provided sufficient reasonable suspicion for Tpr. Kessel to make the stop.

**VII.**

**RELIEF REQUESTED**

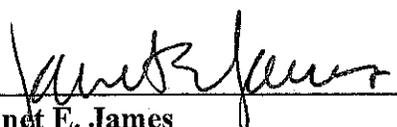
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant prays that this Court reverse the Order entered by the Circuit Court of Hampshire County on November 15, 2007.

**Respectfully submitted,**

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

**By Counsel,**

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

  
\_\_\_\_\_  
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Appendix 1.

*Westendorf v. Iowa Dept. of Transp., Motor Vehicle Div.*, 400 N.W.2d 553 (Iowa 1987)

*Diehl v. Iowa Beer and Liquor Control Dept. Hearing Bd.*, 422 N.W.2d 480 (Iowa 1988)  
(recognizing rule)

*Manders v. Iowa Dept. of Transp., Motor Vehicle Div.*, 454 N.W.2d 364 (Iowa 1990)

*Brownsberger v. Dept. of Transp., Motor Vehicle Div.*, 460 N.W.2d 449 (Iowa 1990)

*Krueger v. Iowa Dept. of Transp.*, 493 N.W.2d 844 (Iowa 1992)

*Morgan v. Iowa Dept. of Transp., Motor Vehicle Div.*, 428 N.W.2d 675 (Iowa App. 1988)

*Powell v. Secretary of State*, 614 A.2d 1303, 23 ALR5th 878 (Me. 1992)

*Green v. Director of Revenue*, 745 S.W.2d 818 (Mo. App. 1988)

*James v. Director of Revenue*, 767 S.W.2d 604 (Mo. App. S.D. 1989) (by implication)

*Kimber v. Director of Revenue*, 817 S.W.2d 627 (Mo. App. W.D. 1991)

*Sulls v. Director of Revenue, State of Mo.*, 819 S.W.2d 782 (Mo. App. S.D. 1991)

*Merrifield v. Motor Vehicles Div.*, 807 P.2d 329 (Or. App. 1991) (where valid arrest is not a statutory prerequisite to license revocation based on particular offense).

Other cases in accord are:

*Ascher v. Commissioner of Public Safety*, 527 N.W.2d 122 (Minn. App. 1995). (Exclusionary rule did not preclude administrative agency from considering evidence of driver's alcohol consumption obtained at sobriety checkpoint subsequently found to have been unconstitutional; applying rule to exclude evidence that driver, having violated condition of his licensure by consuming alcohol, was inimical to public safety would not deter future unlawful police conduct to any significant degree.)

*Riche v. Director of Revenue*, 987 S.W.2d 331 (Mo. 1999). (Exclusionary rule did not apply in administrative license revocation and suspension proceeding for driving while intoxicated (DWI) to exclude evidence of intoxication gathered from driver over age 21, after an initial stop for which there was no probable cause.)

*Kinder v. Director of Revenue*, 198 S.W.3d 202 (Mo. App. E.D. 2006) (To uphold a driver's license suspension action, an arresting officer's initial stop of motorist does not require probable cause belief that motorist was intoxicated.)

*Murphy v. Director of Revenue*, 170 S.W.3d 507 (Mo. App. W.D. 2005), *reh'g and/or transfer denied* (Aug. 2, 2005), *transfer denied* (Sept. 20, 2005). (Neither the Fourth Amendment nor the Missouri Constitution requires that the exclusionary rule be applied to proceedings to revoke or suspend driver's license for driving while intoxicated (DWI).)

*Garriott v. Director of Revenue, State of Mo.*, 130 S.W.3d 613 (Mo. App. W.D. 2004), *reh'g and/or transfer denied* (Mar. 2, 2004), *transfer denied* (Apr. 27, 2004). (Exclusionary rule prohibiting admission of evidence obtained pursuant to illegal arrest did not apply to civil and administrative proceeding to suspend motorist's license for refusal to take breath test, regardless of whether traffic stop was legal.)

*Frick v. Director of Revenue*, 133 S.W.3d 66 (Mo. App. E.D. 2003). (Probable cause to arrest a person for driving while intoxicated may be developed after the driver has been stopped, and there is no requirement in the statute governing suspensions of driver's licenses for driving while intoxicated that the Director of Revenue demonstrate that the stop was lawful or based on probable cause.)

*Siehndel v. Russell-Fischer*, 114 S.W.3d 449 (Mo. App. W.D. 2003). (Whether or not a police officer had probable cause to stop a motorist is irrelevant in an administrative proceeding to revoke of the motorist's driver's license for driving while intoxicated; probable cause to arrest may be developed after the traffic stop.)

*Barlow v. Fischer*, 103 S.W.3d 901 (Mo. App. W.D. 2003). (Exclusionary rule did not apply in driver's license revocation cases, and thus, trial court erroneously applied the law in reversing Director of Revenue's suspension of motorist's driver's license on basis that police officer's initial stop of motorist was unlawful or not done in good faith.)

*Whitworth v. Director of Revenue, State of Mo.*, 990 S.W.2d 115 (Mo. App. W.D. 1999). (Exclusionary rule did not apply in driver's license revocation cases, and thus, trial court erroneously applied the law in reinstating motorist's privileges, which were revoked after his arrest for driving while intoxicated (DWI), on the basis of alleged violation of that rule; although probable cause was required for law enforcement officers to arrest motorist, probable cause was not required for law enforcement officers to stop motorist.)

*Lunsford v. Director of Revenue, State of Mo.*, 969 S.W.2d 833 (Mo. App. S.D. 1998). (Evidence obtained in an illegal manner, such as a result of an illegal traffic stop, is not inadmissible in a civil proceeding, such as an administrative license suspension.)

*Gordon v. Director of Revenue, State of Mo.*, 896 S.W.2d 737 (Mo. App. E.D. 1995) (even if stop of motorist was illegal or not based on probable cause, Director of Revenue is permitted to revoke license based upon showing that motorist was arrested upon probable cause that he or she was driving in violation of alcohol related offense, and that driver had been driving at time when his blood alcohol level exceeded legal limit; alleged illegality of stop does not affect admissibility of observations stemming from stop in civil revocation proceeding.)

*Sullins v. Director of Revenue, State of Mo.*, 893 S.W.2d 848 (Mo. App. S.D. 1995)

*Kimber v. Director of Revenue*, 817 S.W.2d 627, 632 (Mo. App. W.D. 1991)

*Jacobs v. Director, N.H. Div. of Motor Vehicles*, 823 A.2d 752 (N.H. 2003). (Lawfulness of traffic stop was irrelevant in civil proceedings for suspension of driver license for refusal to submit to field sobriety tests.)

*State v. Brabson*, 976 S.W.2d 182 (Tex. Crim. App. 1998). (Exclusionary rule does not apply to administrative proceeding to revoke driver's license.)

*Martin v. Kansas Dept. of Revenue*, 176 P.3d 938 (Kan. 2008)

*Quick v. North Carolina Div. of Motor Vehicles*, 479 S.E.2d 226 (N.C. App. 1997)

*Motor Vehicle Admin. v. Richards*, 739 A.2d 58 (Md. 1999)

*Banner v. Commonwealth, Dept. of Transp., Bureau of Driver Licensing*, 737 A.2d 1203 (Pa. 1999)

*Chase v. Neth*, 697 N.W.2d 675 (Neb. 2005)

*Fishbein v. Kozlowski*, 743 A.2d 1110 (Conn. 1999)

*Powell v. Secretary of State*, 614 A.2d 1303 (Me. 1992)

*Gikas v. Zolin*, 863 P.2d 745 (Cal. 1993)

Appendix 2.

*Pooler v. Motor Vehicles Div.*, 755 P.2d 701, 703 (Or. 1988)

*People v. Krueger*, 567 N.E.2d 717 (Ill. App. 2 Dist. 1991), *appeal denied*, 580 N.E.2d 126 (Ill. 1991), *cert denied*, 503 U.S. 919 (1992)

*People v. Collins*, 506 N.E.2d 963 (Ill. App. 3 Dist 1987) (*criticized on other grounds by Village of Lincolnshire v. DiSpirito*, 552 N.E.2d 1238 (Ill. App. 2 Dist. 1990)

*Olson v. Commissioner of Public Safety*, 371 N.W.2d 552 (Minn. 1985)

*Schwartz v. Commissioner of Public Safety*, 422 N.W.2d 761 (Minn. App. 1988)

*Williams v. Ohio Bureau of Motor Vehicles*, 610 N.E.2d 1229 (Ohio Mun. 1992)

*Vernon v. Director of Revenue*, 142 S.W.3d 905 (Mo. App. S.D. 2004), *reh'g and/or transfer denied* (Aug. 20, 2004), *transfer denied* (Sept. 28, 2004)

*Reckner v. Fischer*, 121 S.W.3d 296 (Mo. App. W.D. 2003)

NO. 34329

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHAD R. CLOWER,

Appellee/Petitioner Below,

v.

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

Appellant/ Respondent Below.

CERTIFICATE OF SERVICE

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

Carter Zerbe, Esquire  
Post Office Box 3667  
Charleston, WV 25335

  
\_\_\_\_\_  
JANET E. JAMES