

IN THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA

CHAD R. CLOWER,

Appellant,

Filed
Date 11/15/07
SKE/PA
Clerk

v.

Civil Action No. 07-AA-04

WEST VIRGINIA DEPARTMENT OF
MOTOR VEHICLES, Joseph Cicchirillo,
Commissioner,

Appelle.

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ATTORNEY GENERAL'S OFFICE
TAX DIVISION

ORDER

This matter came before the Court for consideration on Petitioner's petition for *Appeal from Administrative Decision* filed pursuant to the Administrative Procedures Act. The appeal petition asks this Court to reverse the Respondent's final order revoking the Petitioner's privileges to drive a motor vehicle. While oral argument was heard on the Stay Order relating to this matter, Petitioner's petition for appeal was considered by the Court on briefs. The Petitioner was represented by V. Alan Riley; the Respondent by Janet E. James, Assistant Attorney General.

After carefully reviewing the petition, the Respondent's objection thereto, the decision of the Hearing Examiner for the Department of Motor Vehicles, all papers of record, and pertinent legal authorities, this Court has concluded the Petitioner has established a basis for reversing, vacating, or modifying the Respondent's final order. Consequently, the Court now **grants** Petitioner's appeal, as detailed herein.

On June 25, 2006, the Petitioner was arrested and charged with driving under the influence of alcohol [DUI] by Trooper C.T. Kessel of the West Virginia State Police. See W.Va. Code § 17C-5A-2(i). After two continuances, a driver's license revocation hearing was held on December 5, 2006, before Ronald See, Hearing Examiner, where Trooper Kessel testified. After that hearing the Examiner found by a preponderance of the evidence that the Petitioner had driven under the influence of alcohol. The Commissioner for the West Virginia Department of Motor Vehicles adopted those findings, and affirmed the initial Order of Revocation by Final Order, effective May 21, 2007. It is from this hearing and order that Petitioner appeals, pursuant to those provisions allowing for such under the Administrative Procedures Act, W.Va. Code § 29A-5-4 [1998].

This Court reviews administrative decisions under a specified standard, such that it cannot reverse factual determinations. This Court may reverse, vacate or modify the Commissioner's orders if Petitioner's "substantial rights...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(g). Further, this Court reviews administrative findings of fact under the following standards:

"Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syl. Pt. 1, Francis O. Day Co., Inc. v. Director, Div. of Environmental Protection of West Virginia Dept. of Commerce, Labor and Environmental Resources, 191 W.Va. 134, 443 S.E.2d 602 (1994).

"[F]indings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." Syl. Pt. 1, West Virginia Human Rights Comm'n v. United Transp. Union, Local no. 655, 167 W.Va. 282, 280 S.E.2d 653 (1981).

The record reflects that Trooper Kessel did not have the requisite reasonable suspicion to stop the Petitioner's vehicle. As required by W.Va. Code § 17C-8-8(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.

Essentially, as evidenced by the revocation hearing transcript, this 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 the Petitioner's vehicle. "Under correct constitutional analysis a traffic stop is valid if the stop is based on an observed traffic violation or if the police officer has reasonable suspicion to believe that the drive of the vehicle is involved in criminal activity." Muscatell v. Cline, 196 W.Va. 588, 601, 474 S.E.2d 518 (1996). However if the Petitioner was not required to use his turn signal,

Trooper Kessel did not have the requisite finding to make the traffic stop as no traffic violation would have been committed.

The Petitioner cites a Florida case, State v. Riley, 638 So.2d 507 (Fla. 1994), which held that the failure to use a turn signal, when no traffic would be adversely affected, was not a violation of the Florida statute pertaining to turn signals.¹ While the Hearing Examiner did not find such reasoning persuasive, this Court agrees with the Florida court's reasoning.

Trooper Kessel stopped the Petitioner's vehicle for a violation of W.Va. Code § 17C-8-9, which states, "[a]ny stop or turn signal *when required herein* shall be given either by means of the hand and arm or by a signal lamp or lamps or mechanical signal device..." (Emphasis added.) W.Va. Code § 17C-8-8(a) indicates a turn signal is required *in the event any other traffic may be affected by such movement*. The evidence presented at the revocation hearing indicates that no other traffic was affected by the Petitioner's failure to signal before turning.² Consequently, Trooper Kessel did not have the requisite reasonable suspicion to stop the Petitioner's vehicle.

The Court would further note that the Petitioner's appeal is herein granted purely due to a procedural flaw. While not disregarding the importance of each

¹ "No person may turn a vehicle from a direct course or move right or left upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided, in the event any other vehicle may be affected by the movement." F.S.A. § 316.155(a).

² The Court also finds the Petitioner's decision to turn right, instead of left, is of some importance. Making a right hand turn does not require a motorist to cut through the path of oncoming traffic, whereas a left handed turn does. This distinction is of no consequence as Trooper Kessel testified that "my vehicle and his vehicle was the only vehicles I noticed in that course of roadway at that time," thus indicating no traffic whatsoever could be affected by the Petitioner's failure to signal.

individuals constitutional right to be free from search and seizure, the evidence shows the Petitioner in this case was actually driving under the influence. In addition to the obvious impairments observed by Trooper Kessel, the Petitioner failed the sobriety tests administered at the time of the traffic stop, and the results of the Petitioner's secondary chemical test showed that his blood alcohol concentration level was one hundred eighty-two thousandths of one percent (.182), by weight. Because no other traffic was affected by the Petitioner's failure to signal is the only reason this Court is granting the Petitioner's appeal; otherwise, based on the substantial evidence that the Petitioner was in fact driving under the influence, the Court would affirm the Commissioner's decision to revoke the Petitioner's license.

WHEREFORE, in consideration of the foregoing, this Court does hereby ADJUDGE and ORDER that Petitioner's petition for *Appeal from Administrative Decision* is GRANTED.

- ❖ The Circuit Clerk shall mail true copies of this Order to all counsel of record.
- ❖ This is a final order, and as nothing further is remaining to be done in this matter, the Circuit Clerk shall remove this action from the docket and place it among the matters ended.

ENTERED this 10th day of November, 2007.


DONALD H. COOKMAN, JUDGE

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