

FIN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA

RYAN STRICK,

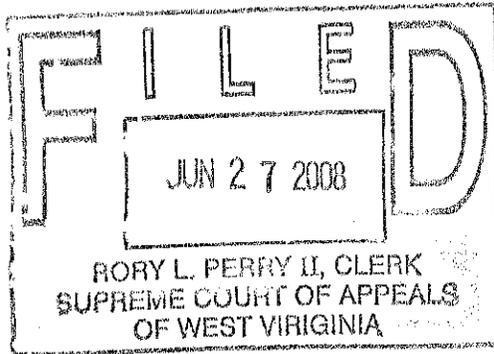
Petitioner,

Petition No. 34135
Civil Action No. Below: 07-AA-45
(Circuit Court of Kanawha County)

THE STATE OF WEST VIRGINIA, AND
JOSEPH CICCHIRILLO, COMMISSIONER;
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

Respondent.

PETITIONER'S BRIEF



Submitted by:

Carter Zerbe and David Pence
Counsel for Petitioner
WV State Bar #4191 and #9983

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INTRODUCTION

The Commissioner's decision is arbitrary and capricious and contains clear errors of law. The sole basis for the initial traffic stop the evening of Strick's arrest was based on the uncontroverted evidence that one of Strick's two rear tail lamps was expired. Operating a motor vehicle in West Virginia with only one rear tail lamp is not prohibited by law, and as a result, the Commissioner created error by not dismissing the charges based on Forth Amendment implications.

THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER
TRIBUNAL

This proceeding is an appeal from a final order of the Circuit Court of Kanawha County filed October 25, 2007 affirming the final order of Respondent, Commissioner Joseph Cicchirillo, revoking Petitioner's privilege to drive a motor vehicle in West Virginia. Both parties filed briefs before the Circuit Court.

On appeal, the Honorable Circuit Judge James Stucky (hereinafter "Judge Stucky") summarily ruled on October 24, 2007 that a reasonable ground for a traffic stop existed that evening without providing any analysis or explanation for his ruling or addressing the challenges raised by Petitioner.

STATEMENT OF FACTS

1. Strick was stopped and later arrested the evening of November 18, 2005 near Watts Street and Washington Street in Charleston, West Virginia for first offense driving under the influence of alcohol by Officer Rider of the Charleston Police Department (hereinafter Ofc. Rider). (Tr. 5, 9) The sole basis for the initial traffic stop was because the driver's side rear tail lamp of his vehicle was not illuminated. (Tr. 10)

2. All other equipment on Strick's vehicle that evening was in proper working order. (Tr. 13-14) Ofc. Rider testified that the light illuminating Strick's license plate was working properly, and the brake light on the rear above the spare tire on the inside of the vehicle was working properly. (Tr. 13-14) He also testified that the brake lights on both rear sides were in proper working order and that the white light on the rear passenger side of the vehicle was working properly when Strick was stopped. (Tr. 13-14)

3. Ofc. Rider testified that he observed symptoms of intoxication that evening. (Tr. 5)

4. Based on his roadside observations, Ofc. Rider arrested Strick for first offense driving under the influence of alcohol.

5. An administrative hearing took place on September 20, 2006 at the DMV in Kanawha City.

6. A Final Order revoking Strick's license for one year was issued on April 30, 2007.

7. A timely appeal was filed with the Circuit Court in Kanawha County and assigned to Circuit Judge James Stucky.

8. An Order affirming the Commissioner's Order was issued by Circuit Court Judge Stucky on October 24, 2007.

THE COMMISSIONER'S FINAL ORDER

The Commissioner rejected Petitioner's argument that the arresting officer lacked a reasonable suspicion of criminal activity prior to initiating a traffic stop. The Commissioner properly found that the sole basis for the stop was that the driver's side tail lamp of Petitioner's vehicle was not illuminated. The Commissioner cited and relied upon the general statutory provisions found in *W. Va. Code* §17C-15-1(a) (2008) and *W. Va. Code* §17C-15-5(c) (2008) in support of his finding, yet completely ignored *W. Va. Code* §17C-15-5(a) (2008), which deals directly with tail lamps.

STANDARD OF REVIEW

Pursuant to 29A-5-4(g) (2007) of the State Administrative Procedures Act the Appellate Court,

“ . . . 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.”

With respect to the substantial evidence aspect of the appeal criteria, it is significant that the more specific statute, W. Va. Code §17C-5A-2(I) (2007), requires the revocation to be based on a “preponderance of the evidence.” As the more specific statute takes precedent over the general statute, the decision of the Commissioner must be reversed if not supported by a preponderance of evidence, a higher standard than substantial evidence.

A preponderance of evidence simply means that if the evidence in favor of one party outweighs that of the other, “even in the slightest degree,” then that party prevails. *McCullough v. Clark*, 88 W. Va. 22, 106 S. E. 61, (1921). If the evidence in favor of the driver outweighs the evidence of the state, then the plaintiff prevails. If the evidence is equal, then the party who bares the burden of proof—in this case the state—fails. *John A. Sheppard, Adm'r. v. Peabody Ins. Co.*, 21 W. Va. 368, (W. Va. 1883). See also, *Jackson v. State Farm Mutual Automobile Ins. Co.*, 215

W. Va. 634, 600 S. E. 2d 346 (2004).

Although a preponderance of evidence is the applicable standard, as explained below, a classic case discussing the meaning of substantial evidence underscores the deficiency in the Commissioner's decision. Fifty-three years ago, discussing the meaning of substantial evidence, Justice Frankfurter in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S. Ct. 456 (1951), stressed the fact that even though the evidence supporting the agency's position was "substantial," when considered by itself, substantial evidence could not be viewed in isolation. It meant substantial when evaluated in the context of the whole record. In other words, the weight of the countervailing evidence must be considered. Justice Frankfurter also emphasized that the facts relied upon by an agency must be supported by "adequate evidence" including "all findings of fact, including inferences and conclusions of fact upon the whole record." *Id.*, at 462. A hearing examiner "cannot 'pick and choose' only the evidence that supports the agency's position." *Switzer v. Heckler*, 742 F. 2d 382, 385 (7th Cir. 1984) (holding that "the attempt to use only the portions favorable to [one party's] position, while ignoring other parts, is improper").

ASSIGNMENT OF ERRORS

A. THE ARRESTING OFFICER LACKED THE REQUIRED SUSPICION NECESSARY TO INITIATE A TRAFFIC STOP THE EVENING OF STRICK'S ARREST.

POINTS AND AUTHORITIES

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STATUTES

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<i>W. Va. Code</i> §29A-5-4(g) (2008).	

ARGUMENT

A. THE ARRESTING OFFICER LACKED THE REQUIRED SUSPICION NECESSARY TO INITIATE A TRAFFIC STOP THE EVENING OF STRICK'S ARREST.

Ofc. Rider lacked a reasonable suspicion to stop Strick the night of his arrest because Strick was not operating his vehicle in violation of West Virginia law. Embodied in our freedoms from unreasonable search and seizure is the principle that law enforcement officers may not arbitrarily stop a motor vehicle. "Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime. *Hill v. Cline*, 193 W. Va. 436, 457 S.E.2d 113 (1995). In Syllabus Point 4 of *Muscatell v. Cline*, 196 W. Va. 588, 474 S. E. 2d 518 (1996), the court said: "When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police." Here, both the quantity and quality was insufficient.

It must be emphasized that Strick was not operating his vehicle contrary to any law in West Virginia. In fact, the sole basis for the initial stop resulted from Strick driving a vehicle with an expired rear tail lamp on the driver's side. Strick's driving was not impacted in any way, as he did not almost strike another vehicle or create a safety hazard.

It is not illegal to operate a vehicle with an expired rear tail lamp.¹ The *W. Va. Code* §17C-15-5(a) states that "Every motor vehicle, trailer or semitrailer, and any other vehicle which

¹ In *State v. Cline*, 206 W. Va. 445, 525 S.E.2d 326 (1999) this Court recognized that an issue exists regarding the legality of a traffic stop based solely on a vehicle having only one functional tail lamp. However, because the issue was not preserved below, the Court in *Cline* held that the Appellant waived the argument for review.

is being drawn at the end of a train of vehicles, shall be equipped with at least one tail lamp mounted on the rear.” [emphasis added] Likewise, W. Va. Code §17C-15-18 (2008) states that “a stop lamp on the rear which shall emit a red or yellow light and which shall be actuated upon application of the service (foot) brake and which may but need not be incorporated with a tail lamp.” [emphasis added] Nowhere in the *W. Va. Code* does it require an automobile be equipped with two functional tail lamps. All that is required is one functional tail lamp. The Officer Rider testified that Strick had a fully functional rear passenger tail lamp and that all other lamps were in proper working order. Therefore, the defendant’s act of driving a vehicle with a burnt tail lamp was not in violation of the West Virginia Code.

The Commissioner relies on *W. Va. Code* §17C-15-5(c) to justify the officer’s initial stop, which states “any tail lamp or tail lamps, together with any separate lamp for illuminating the rear registration plate, shall be wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.” This section of the code places no additional requirements with regards to equipment. It simply mandates that the vehicle be wired in a manner that the rear lights activate simultaneously with the front lights. In other words, a vehicle cannot have two switches, one for head lamps and one for tail lamps. A vehicle must have a single switch that, when activated, illuminates the required lamps outlined in *W. Va. Code* §17C-15-5.

The Commissioner also manufactures an argument that *W. Va. Code* §17C-15-1(a) provides additional requirements than those set forth in *W. Va. Code* §17C-15-5(a). However, this argument too is misplaced. Like *W. Va. Code* §17C-15-5(c), *W. Va. Code* §17C-15-1(a) provides no additional requirements other than those outlined in *W. Va. Code* §17C-15-5(a), which requires only one functional tail lamp. *W. Va. Code* §17C-15-1(a) consists of introductory

code language outlining that it is a misdemeanor offense to operate a motor vehicle in a condition that does not comply with the requirements set forth in Section 15 of Article 17 of the *West Virginia Code*. No additional requirements are set forth in *W. Va. Code §17C-15-1(a)*.

In an effort to lend support to his improper finding of reasonable suspicion, the Commissioner includes in the Final Order what amounts to his interpretation of the legislative intent behind Article 17, stating that "Clearly, the intent behind this statute is to make mandatory that whenever a vehicle is equipped with multiple tail lamps or lights, and when so required by the time of day, such tail lamps must be in proper functioning order." (Final Order P. 5) This general interpretation of Article 17 is overbroad and directly contradicts the language of the West Virginia Code.

As outlined above, Article 17, Section 5 is a very specific statute. Our legislature took special precautions to list separately and distinctly the requirements for tail lamps on a motor vehicle in *W. Va. Code §17C-15-5(a)*, entitled "Tail Lamps." The Commissioner ignores this very specific language outlining the requirements for motor vehicle in *W. Va. Code §17C-15-5(a)* and instead relies on what he perceives as the legislature's intent behind that Code section. If the Commissioner is seeking the legislature's intent, he need look no farther than the specific language of the statute. Had the legislature wanted to require all equipped tail lamps to function properly at all times, it surely would have included that in the Code.

Thus, the Commissioner improperly relies upon the language *W. Va. Code §17C-15-1(a)* and *W. Va. Code §17C-15-5(c)* to justify the initial stop. The failure of the State to establish reasonable suspicion to support the initial stop results in an unconstitutional search and seizure, and all evidence gathered as a result cannot be used to establish guilt. *Wong v. U.S.*, 371 U.S.

471, 83 S. Ct. 407 (1963).

Indeed, under both the criminal law and DMV administrative revocation proceeding for DUI, there must be a lawful arrest. *W. Va. Code* §17C-5A-2 (2008) specifically requires the Commissioner to “make specific findings” as to “whether the person was lawfully placed under arrest for an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances, or drugs . . .” Absent a finding of a lawful arrest in accordance with the Fourth Amendment, the Commissioner cannot satisfy a critical element of the offense outlined in *W. Va. Code* §17C-5A-2 (2008) and is therefore without jurisdiction to revoke a motorist’s license.

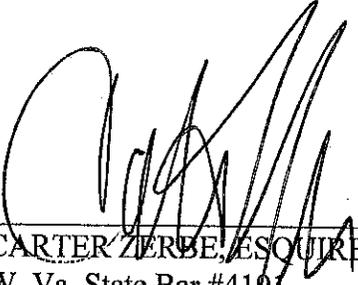
The Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution require the presence of articulate facts which provide some minimal, objective justification for the stop.” *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994). Because the Commissioner improperly ruled that the arresting officer had reasonable suspicion to initiate a traffic stop, the revocation must be dismissed.

PRAYER FOR RELIEF

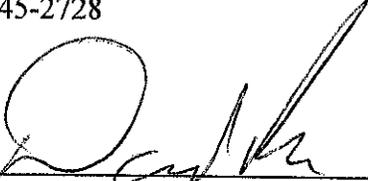
WHEREFORE, the Petitioner prays that this Honorable Court grant a stay of the revocation of Petitioner's driver's license pending final resolution of this matter and to reverse the decision of the Circuit Court of Kanawha County and the final order of Respondent Commissioner, Joseph Cicchirillo, revoking Petitioner's driver's license and to order the Commissioner to immediately restore to Petitioner a valid, permanent driver's license or for whatever alternative relief this court deems appropriate.

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CERTIFICATE OF SERVICE

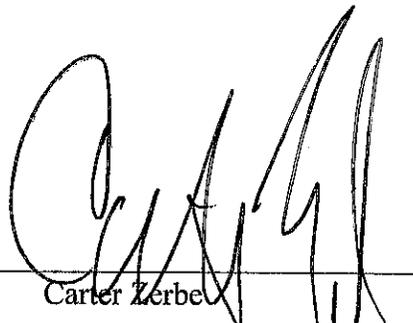
I, Carter Zerbe and David Pence,, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing PETITIONER'S BRIEF by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Joseph Cicchirillo, Commissioner
West Virginia Department of Motor Vehicles
1800 Kanawha Blvd., East
Bldg. 3, Room 319
Charleston, WV 25317

and

Janet James, Asst. Attorney General
Office of the Attorney General
State Capitol Complex
Bldg. 1 Room W435
1900 Kanawha Boulevard, East
Charleston, WV 25305

on this 26th day of June 2008



Carter Zerbe



David Pence