

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

RYAN STRICK,

Petitioner,

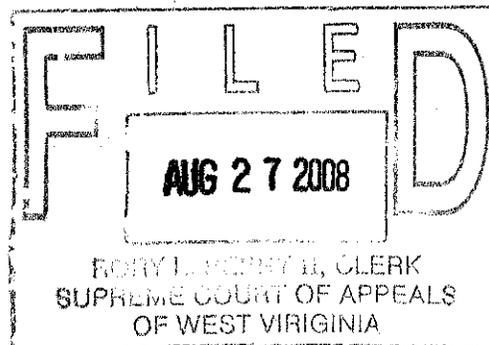
vs.

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 REPLY TO RESPONDENT'S BRIEF



Submitted by:

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

POINTS AND AUTHORITIES

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<i>Williams v. Ohio Bureau of Motor Vehicles</i> , 62 Ohio Misc.2d 741, 610 N.E.2d 1229 (1992)	5

STATUTES

Neb. Rev. Stat. §60-6, 206(4) (Reissue 1998)	6
<i>West Virginia Code §17C-5-2 (2007)</i>	3, 13
<i>West Virginia Code §17C-5A-2 (2007)</i>	3, 12
<i>West Virginia Code §17C-5-4 (2008)</i>	3, 13

ARGUMENT

A. APPLICATION OF THE SEARCH AND SEIZURE PROTECTIONS OF THE WEST VIRGINIA AND UNITED STATES CONSTITUTION TO ADMINISTRATIVE LICENCE REVOCATION HEARINGS IS REQUIRED UNDER WEST VIRGINIA LAW

The Commissioner gives the game away in the first paragraph of his argument. Citing *West Virginia Code §17C-5A-2(d)* (2007) he notes that

“[t]he principal question at the [administrative] 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.”

West Virginia Code §17C-5A-2(d).

“Therefore,” the Commissioner concludes, “the ‘reasonable suspicion’ standard, by which the validity of a stop is judged in a criminal contest, has no applicability to the present case.”

For obvious reasons the Commissioner ignores *West Virginia Code §17C-5A-2(e)* (2007) which requires the Commissioner to “make specific findings” as to:

- 2) whether the person was **lawfully placed under arrest** for an offense involving driving under the influence of alcohol, controlled in substances or drugs, or was **lawfully taken into custody** . . .

(Emphasis supplied)

With regard to the secondary chemical test, the legislature requires:

“[a] secondary test of blood, breath or urine is incidental to a **lawful arrest** and is to be administered at the discretion of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by [17C-5-2] . . .”

West Virginia Code §17C-5-4 (2007). (Emphasis supplied).

The above statutory language emphasizes the legislatures intent to apply Fourth Amendment protection to administrative hearings. What else can “lawful arrest” or “lawfully taken into custody”¹ mean other than a legislative intent to apply the Fourth Amendment to DUI license revocation hearings?

B. OUT OF STATE AUTHORITY SUPPORTS THE APPLICATION OF THE FOURTH AMENDMENT.

The Commissioner claims that the majority of states with statutes similar to West Virginia’s have concluded that the Fourth Amendment does not apply to licensee revocation hearings. Untrue. Indeed, *none* of the cases cited by Appellee has the lawful arrest or lawfully taken into custody language. Moreover, many states that do not have that language apply constitutional search and seizure protection to DUI license revocation hearings.

For example, the Supreme Court of Oregon in *Pooler v. Motor Vehicles Division*, 306 Ore. 47, 755 P.2d 701 (1988) ruled that the legislature intended a valid arrest when it required a person be “under arrest” prior to the administration of a secondary chemical test.

Likewise, in *Illinois v. Krueger*, 208 Ill. App. 3d 897, 567 N. E.2d 717 (1991) the court ruled that the requirement that a person be “under arrest” was sufficient to warrant the application of Fourth Amendment protection. The Court reasoned that failure to require a lawful arrest in an implied consent case would essentially statutorily authorize unconstitutional arrests. *Id.* at 905. “To hold that motorists waive their right to be free of unconstitutional arrests and searches as a condition of operating motor vehicles would do violence to the principle of implied consent.” *Id.*

¹. . .the detainer of a man’s person by virtue of lawful process or authority. *Black’s Law Dictionary*, Revised Fourth Edition, West Publishing Co. (1968).

The court also noted that:

“Although the state characterizes the issue in this case as to whether to apply the exclusionary rule to a civil suspension proceeding, we believe that the real question before us is whether the statute affirmatively authorizes the Secretary of State to suspend a motorist’s license on the basis of a search which is the product of an unauthorized arrest. The Secretary’s power to impose a summary license suspension is derived from the statute and we decline to read the statute as, in effect, authorization, unconstitutional arrest, searches, and the imposition of new deprivations on those unconstitutional arrest or searches.”

Krueger, at 904-905.

Lower courts in Ohio also apply the exclusionary rule to administrative hearings. See *Williams v. Ohio Bureau of Motor Vehicles*, 62 Ohio Misc.2d 741, 610 N.E.2d 1229 (1992); *Watford v. Bureau of Motor Vehicles*, 110 Ohio App.3d 499, 674 N.E.2d 776 (1996).

As far as we can determine, there isn’t *any* state with a statute like West Virginia’s that doesn’t apply search and seizure protection to license revocation hearings. The lawful arrest language is so self evident that the issue is not even being litigated. Here, the Commissioner has adopted a rogue and extreme position. It’s also an untenable one.

The Appellee cites numerous out of state cases in support of its position. However, of those states, none require the person to be “lawfully taken into custody” or “lawfully arrested.” The critical inquiry in states that disfavor application of search and seizure protection to administrative cases is whether the legislature intended that doctrine to apply. In each of the cases relied upon by the Appellee, the Supreme Court of each state analyzed the specific statute which provides the applicable DMV jurisdiction. Because those states do *not* have the requirement that the custody or arrest be lawful, each court cited by Appellee that support its

position ultimately concluded that the legislature did not intend to extend such protection to license revocation hearings.

For example, Appellee relies heavily on the Supreme Court of Arizona's decision in *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 54 P.3d 355 (Ariz App. Div. 2 2002) in its analysis. The Arizona Supreme Court expressly noted in that case that "[r]ather, the legislature apparently intended such hearings to narrowly focus, inter alia, on whether the law enforcement officer 'had reasonable grounds to believe' that the motorist had been driving while under the influence of alcohol or drugs, regardless of the circumstances of the underlying stop." *Id.* at 333. The Court also noted the importance of the statutory language in stating, "[a]s MVD points out, this court stated in *Owen*: 'There is no requirement under the implied consent statute that the arrest be a valid arrest or that [the arrestee] be convicted for the offense.'" *Id.* at 333 citing *Owen v. Creedon*, 170 Ariz. 511, 826 P2d. 808 (App.1992).

Contrary to what appellee claims, the statutory framework in *Tornabene* is not substantially similar to West Virginia. West Virginia, unlike Arizona and *all* states cited by Appellee for that matter, requires that the individual be "lawfully taken into custody," "lawfully arrested," or "placed under arrest."

Appellee also improperly cites Nebraska, Iowa and Minnesota in support of its case. In fact, Nebraska and Iowa *support* the application of search and seizure protection to administrative hearings, despite the absence of statutory language requiring each state to do so.

For instance, Nebraska's legislature elected to apply the exclusionary rule indirectly to administrative hearings by making an administrative sanction for DUI contingent upon successful criminal prosecution for DUI. See Neb. Rev. Stat. §60-6, 206(4) (Reissue 1998). So,

if a person successfully defends their criminal sanction for DUI in Nebraska, the Commissioner “shall have all proceedings dismissed or his or her operator’s license immediately reinstated . . . upon receipt of suitable evidence by the director that . . . b) the charge was dismissed, or c) the defendant, at trial, was found not guilty of violating such law.” *Id.* Although the Commissioner does not directly apply the exclusionary rule in Nebraska in administrative hearings, illegally obtained evidence will be completely barred via the statutory framework cited above.

“Ultimately, the risk of erroneous deprivation is minimized by the fact that any legitimately dispositive Fourth Amendment argument will ultimately be validated in the criminal proceeding and result in the dismissal of the ALR proceeding or reinstatement of the driver’s license.” *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

Likewise, Iowa maintains a similar statute which requires the DOT to reinstate a driver’s privileges to operate a motor vehicle upon a finding by a criminal court that the arrest was unlawful. The Iowa Supreme Court in *Brownsberger v. DOT*, 460 N.W.2d 449 (1990) held that Iowa Code section 321J13(4) (1989), which requires reinstatement under certain circumstances, effectively operates as a statutory exclusionary rule. Appellee cites *Manders v. Iowa DOT*, 454 N.W.2d 364 (1990) in its support, claiming that the exclusionary rule is not an issue to be considered by the DOT. However, in *Manders*, no criminal adjudication had yet occurred, and the safeguard statute cited above which bars evidence illegally seized was never triggered!

Finally, Minnesota, which like West Virginia requires the adjudicator to find that the person was “lawfully placed under arrest,” applies the exclusionary rule to license revocation hearings. *Ascher v. Commissioner of Public Safety*, 527 N. W. 2d 122 (Minn. 1995). How the Commissioner could conclude otherwise is unfathomable.

Moreover, Appellee claims that only three states: Vermont, Oregon, and Illinois, apply the exclusionary rule to civil license revocation hearings. Untrue.

Some of the other states that apply Fourth Amendment protection to administrative license revocation hearings include: Kentucky, Texas, Utah, Indiana, Idaho, Wisconsin, and Hawaii.

Thus, even taking into account the states that do not have the lawful arrest or custody language, Appellee's assertions that West Virginia currently operates under the minority view in applying the exclusionary rule to administrative DMV hearings is simply erroneous. West Virginia is in the majority.

C. WEST VIRGINIA PRECEDENT FAVORS APPLICATION OF THE EXCLUSIONARY RULE TO ADMINISTRATIVE LICENSE REVOCATION HEARINGS

This Court in *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) set precedent and applied the exclusionary rule to a civil administrative license revocation proceedings. In applying the Fourth Amendment and the exclusionary rule to the legality of the traffic stop, the Court emphasized that “[i]t must be determined that the stop is not justified by mere pretext that would mock the constitutional protections to which all citizens are entitled.” *Id.* at 598. The Court went on to apply a “reasonable suspicion” standard and not a “probable cause” standard for determining the legality of the initial traffic stop. In so ruling, the Court affirmed that a traffic stop must comply with Fourth Amendment safeguards in civil license revocation hearings. See also *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005) (Court relied upon lower court’s finding that the arrest was lawful to address Appellee’s Constitutional arguments.)

The Appellee now asks this court to revisit this longstanding rule of law in West Virginia.

The Court took special precautions in *Muscatell* to specifically outline and explain the proper standard for the Commissioner to apply in his Constitutional analysis. The Court discussed at length the requirement that the Commissioner must find that a law enforcement officer maintain a “reasonable suspicion” that the vehicle is lawfully subject to seizure in order to sustain a drivers license revocation. Appellee’s argument that the court in *Muscatell* never specifically addressed the applicability of the exclusionary rule is unfounded, and consequently, precedential value must be accorded to that decision.

The Respondent implies that West Virginia has found that the exclusionary rule inapplicable to civil cases through its holding in *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994), a decision delivered by this Court two years prior to *Muscatell*. The holding in *Madden* is limited to circumstances where “once a witness chooses to testify and raises an issue that contradicts the illegally obtained evidence, the illegally obtained evidence may then be admitted for impeachment purposes only.” *Id.* at 163. The court in *Madden* went on to emphasize that “we decline to rule on a general question concerning the applicability of the exclusionary sanction outside the criminal context.” *Id.*

D. PUBLIC POLICY FAVORS APPLICATION OF THE FOURTH AMENDMENT

The exclusionary rule, a logical extension of the Fourth Amendment, is a “judicially created remedy designed to safeguard Fourth Amendment rights . . .” *U. S. v. Calandra*, 414 U.S. 338, 348 (1974). The exclusionary rules acts as the teeth to the Fourth Amendment, ensuring that evidence gathered as a result of unlawful police conduct cannot be used for any reason where Fourth Amendment protection applies.

The rational for application of the exclusionary rule to civil license revocation

proceedings is centered around protecting citizen's Fourth Amendment rights so as to deter unlawful police conduct. The concern for official misconduct is tantamount. Removal of the exclusionary rule would permit law enforcement officer's to establish illegal checkpoints and roadblocks in hopes of charging driver's with DUI license suspensions. It would also provide incentive to law enforcement officer's to conduct random, arbitrary stops for license revocation purposes. Allowing unlawfully obtained evidence into administrative hearings would encourage disregard for the Constitutional limits of a legal stop.

The Appellee argues that the deterrent effect is sufficiently strong in the criminal context so as to relieve the necessity for application of the exclusionary rule to civil hearings. However, as stated by the Court in *State v. Lussier*, 171 Vt. 19, 757 A.2d 1017 (2000), "in both the civil and criminal cases, license revocation is often the most longstanding and significant sanction imposed on the defendants. "A driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the WV Constitution. *Abshire v. Cline*, 103 W. Va. 180, 455 S.E.2d 549 (1995) Law enforcement would still have incentive, despite a criminal dismissal, to illegally stop drivers for a variety of reasons.

Racial profiling is one.

DUI overtime grants are another. Under such grants, if officers do not make a sufficient amount of arrests, they are removed from the program. The appearance rate of officers at DMV hearings is also a consideration in awarding grants. Similarly, a law enforcement agency as a whole, must make a sufficient number of DUI stops in order to continue to receive DUI overtime grants. Many sobriety checkpoints are financed through DUI overtime grants.

In other words, both individual officers and law enforcement agencies will have a

financial incentive to ignore the Fourth Amendment. Stops based on pretext will increase substantially.

Consider the fact that law officers routinely stake out local bars. Regardless of whether or not this is a good practice, under the above circumstances, arbitrary or suspicionless stops are almost certain to increase.

In addition, prestige and promotion in law enforcement agencies are, at least in part, based on the number of DUI stops and license revocations. Thus, there will be an additional incentive for both individual officers and law enforcement agencies to pad their arrest and revocation rates through suspicionless or arbitrary stops.

Moreover, the exclusionary rule is applicable in such a small amount of cases that its application would allow few, if any, impaired drivers to return to the roads after an arrest. In fact, if law enforcement operates within the minimum boundaries of the Fourth Amendment, the exclusionary rule will have no adverse impact on public safety. Indeed, the Appellee has offered no evidence to suggest that removing the exclusionary rule from administrative hearings would have a deterrent effect on drunk driving.

Instead, the Appellee argues that application of the exclusionary rule will unnecessarily complicate and lengthen the proceeding. No evidence has been offered to suggest or establish how application of the exclusionary rule burdens or delays the system.² The Supreme Court in

²The Division of Motor Vehicles currently conducts administrative hearings in such a fashion that application of the Fourth Amendment in no way complicates or burdens the hearing. Administrative hearings are routinely scheduled to last less than one hour in duration and hearing officers will almost never allow them to exceed that time. Prior to any testimony offered, all documents supporting the officer's case are swiftly admitted into evidence absent any foundation and made part of the record. These documents include the DUI Information Sheet, which contains all of the officer's hearsay observations regarding his investigation, including breath test

Vermont noted “[o]f all the issues litigated in civil suspension proceedings, perhaps the easiest and least time consuming is whether the stop was based on reasonable suspicion of unlawful activity.” *Lussier* at 12.

Even if application of the Fourth Amendment had some minimal impact on the length of the hearing, application of the Fourth Amendment is a small price to pay to protect citizens from unlawful government conduct. As stated in *Lussier*, “we conclude that it is appropriate to apply the exclusionary rule in civil license revocation suspension proceedings to protect the core value of privacy embraced in Article 11, to promote the public’s trust in the judicial system, and to assure that unlawful police conduct is not encouraged.” 171 Vt. 29

In sum, in creating administrative hearings, the legislature never intended to abrogate an individual’s Constitutional rights. As outlined above, *West Virginia Code* §17C-5A-2 specifically requires the Commissioner to make specific findings as to whether the “officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol,” whether the person was lawfully arrested, and whether he was lawfully taken into custody. Likewise, the admission of secondary chemical test results is contingent on the showing of a “lawful arrest” by an officer “having reasonable grounds to believe the person has

results and field sobriety test scores. All defense objections are overruled. The testimony of expert witnesses are routinely ignored. The hearing examiner next takes judicial notice that the officer was trained to administer the preliminary and secondary breath test and asks the officer if he has anything to add to all the evidence previously submitted. Hearing examiners are provided a list of twelve questions that they must ask the officer prior to the conclusion of the hearing if not offered either in the documents submitted or through testimony, one of which is whether reasonable grounds existed for the traffic stop. Mirroring the language of the statute, question number three requires the hearing examiner to ask the officer, “[w]hether there was a lawful reason for the officer to stop or otherwise encounter the person.” (See DUI Hearing Information Sheet included herein as an exhibit.) Indeed, the nature of the DMV’s telescoped hearings already raises serious questions of due process and fundamental fairness.

committed an offense prohibited by [17C-5-2]" as outlined in *West Virginia Code* §17C-5-4.

E. APPLICATION OF THE FOURTH AMENDMENT IS CRITICAL TO PROTECT AGAINST POLICE MISCONDUCT.

Lastly, Appellee urges this court to circumvent the legislature's intent in requiring that an arrest be "lawful" and the person be "lawfully taken into custody" by applying a balancing test to determine the deterrent effect as opposed to cost to public safety. For the reasons set forth above, such a test is not required, nor authorized, by our legislature. Even if a balancing test were utilized, the Appellee has offered no evidence to suggest that precluding the requirement that an arrest be lawful would somehow protect the public.

However, as noted above, the potential for government abuse is immense. Law enforcement could set up illegal government checkpoints in poor, rural areas, notoriously populated by minorities, with the goal of revoking the driving privileges of those stopped without sanction. Law enforcement could also legally target social gatherings, restaurants, or bars in an effort to initiate traffic stops on drivers for no other reason than to harass its patrons with the threat of a loss of license.

If police simply abide by the minimal requirements of the Fourth Amendment, the public will be at no greater threat with the inclusion of the exclusionary rule to administrative hearings. Failure to require a person be lawfully arrested opens the door for grave abuse of government power. As Benjamin Franklin once noted, "those who would give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

F. THERE WAS NO REASONABLE SUSPICION FOR THE STOP OF PETITIONER'S VEHICLE.

Aside from a general discussion of the meaning of reasonable suspicion, with which the

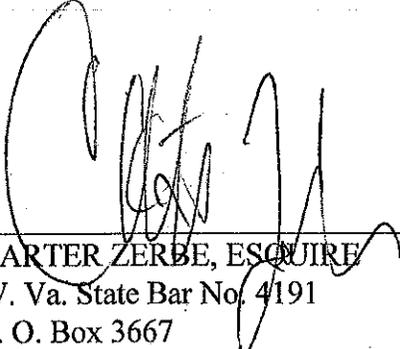
Petitioner agrees, the Commissioner does not address *any* of Petitioner's points and reasoning with respect to the specific statutes at issue herein. In other words, Appellee concedes the validity of Petitioner's position. In short, the Commissioner concedes that the stop of the Petitioner's automobile was *not* based on reasonable suspicion.

G. CONCLUSION

For the foregoing reasons, Petitioner respectfully request this honorable court to reverse the Commissioner's decision and order the Commissioner to rescind the revocation of Petitioner's driver's license

RYAN STRICK

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DUI HEARING INFORMATION SHEET

WHAT IS EXPECTED OF THE PARTIES AT A DUI HEARING?

All parties should be prepared to present, respond and/or stipulate to evidence on the following issues:

1. Whether the person whose license was revoked is the same person named in the arresting officer's statement;
2. Whether the person was driving a motor vehicle in this State;
3. Whether there was a lawful reason for the officer to stop or otherwise encounter the person;
4. Whether there was evidence that the person consumed alcohol, drugs or controlled substances;
5. Whether the person exhibited any indicators of sobriety or insobriety;
6. How the person performed on field sobriety tests, if any;
7. Whether the person suffers from any pertinent medical conditions;
8. Whether the preliminary breath test (PBT), if any, was administered in accordance with statute and legislative rule;
9. If challenged prior to the hearing, whether any secondary chemical test was administered in accordance with statute and legislative rule;
10. Whether the person refused to submit to a designated secondary chemical test;
11. Whether the person was read and given a written statement advising that the person's license would be revoked at least one year and up to life for refusing to submit to a designated secondary chemical test, and;
12. Any other substantive issue(s) relevant to the Order of Revocation such as, but not limited to, age of the driver or passenger, injury or death of another, compliance with sobriety checkpoints, involvement of a commercial vehicle, or whether a person knowingly permitted the person's vehicle to be driven by another person under the influence.

The evidence may be in the form of documents or testimony. In addition, the Hearing Examiner may take judicial notice of certain facts in accordance with West Virginia Code §29A-5-2. The information received on the issues by the Hearing Examiner will enable the Division of Motor Vehicles to make specific findings required by West Virginia Code §17C-5A-2 and §17C-5-7. The parties may want to become familiar with the DUI laws found in West Virginia Code §17C-5 and §17C-5A, administrative law found at West Virginia Code §29A-5, and legislative rules found at Title 91, Series 1 and Title 64, Series 10 of the Code of State Rules.

WHAT SHOULD YOU EXPECT FROM THE HEARING EXAMINER?

The Hearing Examiner will conduct the administrative hearing in an impartial manner. The Hearing Examiner will swear-in and question witnesses, make evidentiary rulings, and generally regulate the course of the hearing. The Hearing Examiner will exclude any person who engages in conduct intended to disrupt the hearing or willfully violates instructions issued by the hearing examiner.

CERTIFICATE OF SERVICE

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

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 the 27th day of August 2008.



Carter Zerbe