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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2007 OCT 25 11:24 AM
CLERK
KANAWHA CO. CIRCUIT COURT

RYAN STRICK,

Petitioner,

v.

Civil Action: 07-AA-45
Circuit Judge: Stucky

JOSEPH CICCIRILLO, Commissioner
West Virginia Division of Motor Vehicles,

Respondent,

ORDER

This matter came before this Court on Ryan Strick's Petition for Judicial Review of the West Virginia Division of Motor Vehicles' Final Order. The Petition asks this Court to reverse the West Virginia Division of Motor Vehicles' Final Order dated April 30, 2007 (hereinafter "Final Order"). The matter was considered by the Court on briefs, and no oral argument was held.

The Court has studied the briefs, the pleadings, the record, and has reviewed pertinent legal authorities. The Court, hereby, concludes that the Commissioner of West Virginia Division of Motor Vehicles (hereinafter "Commissioner") committed an error of law in not entertaining the Petitioner's "lack of foundation" objection to the arresting officer's testimony at the Final Administrative Hearing held on September 25th, 2006 (hereinafter "administrative hearing").

During the administrative hearing, Petitioner's counsel made a "lack of foundation" objection to the arresting officer's testimony regarding his administration of the horizontal gaze nystagmus (hereinafter HGN) test to the Petitioner. In the Final Order, the Commissioner concludes that Petitioner's "lack of foundation" objection was improper in that Petitioner did not

provide a more specific objection when so requested by the hearing examiner. This was a clear error of law.

The Supreme Court of Appeals of West Virginia has held that HGN evidence is scientific evidence. *State v. Barker*, 179 W.Va. 194, 366 S.E.2d 642 (1988); see also *State v. Dilliner*, 212 W.Va. 135, 569 S.E.2d 211 (2002). As such, before HGN evidence may be admitted, a proper foundation must be laid, namely, expert testimony "to demonstrate the scientific reliability of either the HGN test or the scientific principle upon which the HGN test is based[.]" *Id* at 197, 645. It was the duty of the hearing examiner (as he was acting in a judicial capacity) to know that HGN evidence is scientific in nature and what foundations must be laid prior to its admission. In the instant case, the hearing examiner was also acting as the primary direct examiner of the arresting officer. It was fair for Petitioner's counsel to assume that had he specified which foundations were lacking, the hearing examiner would have asked the questions needed to, if possible, rehabilitate the arresting officer's testimony. In this situation, requiring Petitioner's counsel to outline the specific deficiencies in the officer's testimony is akin to asking a condemned man to provide the rope for his own noose. The Court, therefore, concludes that Commissioner should have entertained and sustained Petitioner's objection to the HGN testimony.

The Court takes notice that Petitioner objected to the arresting officer's testimony regarding the walk-and-turn and one-leg stand field sobriety tests on the basis of "lack of foundation". While the Court finds that the objection was proper and the Commissioner should have entertained the objection, overruling the objection would have been proper. Neither of these tests are scientific in nature and scientific expert testimony was not necessary. The Commissioner did not abuse his discretion in giving weight to the arresting officer's testimony regarding these

field sobriety tests.

Furthermore, the Court upholds the Commissioner's conclusions that there were reasonable grounds to stop and probable cause to arrest the Petitioner, that the Petitioner refused to submit to a designated secondary chemical test as required by West Virginia Code § 17C-5-7 and that sufficient evidence was presented to show that the Petitioner drove a motor vehicle in this state while under the influence of alcohol on November 18, 2005. In addition, the Court upholds the Commissioner's revocation of Petitioner's privilege to drive a motor vehicle for a period of one year for refusing to submit to a designated secondary chemical test, and a concurrent period of six months for driving a motor vehicle in this state while under the influence of alcohol.

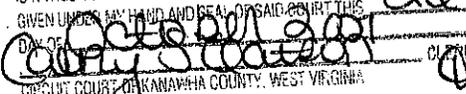
The Court notes the objection and exception of the Petitioner to this ruling.

This is a Final Order.

The Court ORDERS the Circuit Clerk of Kanawha County to strike this matter from the docket and to send a certified copy of this Order to all counsel of record.

Enter this Order the 24 day of Oct., 2007.


Hon. James C. Stucky, 13th Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA
CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 26th
DAY OF October 2007

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA