NO. 35013

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ERIC R. CAIN,

Petitioner Below/Appellee,

v.

THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES, and JOSEPH CICCHIRILLO, COMMISSIONER,

Respondent Below/Appellants.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

BRIEF OF APPELLANTS

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WEST VIRGINIA DIVISION
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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.

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H. 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.

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I. It is without question that the "STATEMENT OF ARRESTING OFFICER" at issue in this case is among the materials identified in W. Va. Code § 29A-5-2(b). Specifically, it is a "document[ ] in the possession of the agency, of which it desires to avail itself ...." W. Va. Code § 29A-5-2(b).

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Respondent Below/Appellants.

BRIEF OF APPELLANTS

Come now the Appellants, the West Virginia Division of Motor Vehicles (hereinafter, "DMV") and Joe E. Miller, successor to Joseph Cicchirillo as Commissioner, by counsel, Janet E. James, Assistant Attorney General, and submit this brief pursuant to an Order received from this Honorable Court on July 23, 2009, in the above-cited matter.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This matter comes before this Honorable Court, pursuant to West Virginia Code § 29A-6-1, to review and reverse an order entered on December 23, 2008, by the Honorable David R. Janes, Judge of the Circuit Court of Marion County (hereinafter, "Order"), in an administrative appeal styled *Eric R. Cain v. The West Virginia Division of Motor Vehicles, and Joseph Cicchirillo, Commissioner*, Civil Action No. 08-AA-3. Through its Order, the Circuit Court reversed an administrative driver's license revocation order entered by the DMV by which the Appellee's privilege to drive was revoked on April 9, 2008.

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from the administrative order which took effect on April 9, 2008 (hereinafter, "Final Order"), wherein the DMV revoked Appellee's privilege to drive in West Virginia for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed the DMV's Final Order upon the grounds that the arresting officer did not have sufficient information to conclude that the Appellee drove a motor vehicle while under the influence of alcohol and that the Appellants improperly shifted the burden of proof.

B. THE ADMINISTRATIVE PROCEEDINGS

Appellee was arrested for DUI on June 2, 2007, in Marion County, West Virginia, by Corporal Todd Cole of the Marion County Sheriff's Department (hereinafter, "Cpl. Cole"). Cpl. Cole apprised the DMV of Appellee's arrest by submitting the requisite "D.U.I. Information Sheet."[1]

After reviewing the D.U.I. Information Sheet, DMV issued an order,[2] dated June 8, 2007, revoking Appellee's privilege to drive in West Virginia for one year, accompanied by successful completion of the mandatory Alcohol Test and Lock Program, completion of the Safety and Treatment Program, and payment of all fees. Appellee had a prior DUI offense date of December 17, 2001.

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. The administrative hearing took place on September 21, 2007. The Final Order was effective

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[1]Exhibit 1 of the Certified Record as submitted to the Circuit Court of Marion County, West Virginia (hereinafter, "Record Exhibit 1").

[2]Record Exhibit 3.

on April 9, 2008, and upheld the initial one year 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 2, 2007, in Marion County, West Virginia, by Cpl. Cole. Cpl. Cole received a complaint from a motorist that there was a person lying in front of a vehicle on Route 19 in Marion County just outside of Fairmont. Cpl. Cole drove to the area and found Appellee lying in front of his vehicle passed out. Cpl. Cole woke Appellee up and got him to his feet.

Cpl. Cole testified that Appellee said that he was just trying to get home. The D.U.I. Information Sheet reflects that Appellee admitted that he was driving. Appellee had trouble standing and walking, his eyes were glassy and bloodshot, and he had a strong odor of an alcoholic beverage on his breath. Cpl. Cole asked Appellee to perform field sobriety tests consisting of the horizontal gaze nystagmus test, the walk-and-turn test and the one-legged stand test. Appellee failed all three tests.

Cpl. Cole placed Appellee under arrest for DUI and he was taken to the Marion County Sheriff's Department for processing, where he agreed to take the Intoximeter test. Appellee admitted to drinking five or six beers and admitted to being under the influence of alcohol. The results of the Intoximeter test showed that Appellee had a blood alcohol content of .157.

III.

ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER OF THE COMMISSIONER ON THE BASIS THAT SUFFICIENT EVIDENCE WAS NOT PRESENTED TO SHOW THAT APPELLEE HAD DRIVEN THE VEHICLE.

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE DMV SHIFTED THE BURDEN OF PROOF TO THE APPELLEE.

IV.

POINTS AND AUTHORITIES

A. Review of legal questions is *de novo*; review of factual questions is guided by whether there is evidence on the record as a whole to support the agency's decision.

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. "[T]he 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. There is no requirement of showing of reasonable suspicion for the stop as a prerequisite for the administrative suspicion of a DUI arrestee's license.

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

E. 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).

F. It is not necessary that the arresting officer observe the Respondent operating a motor vehicle if the surrounding circumstances indicate that he was the driver of the vehicle.

Syl. pt. 3, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

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 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.

I. It is without question that the "STATEMENT OF ARRESTING OFFICER" at issue in this case is among the materials identified in W. Va. Code § 29A-5-2(b). Specifically, it is a "document[ ] in the possession of the agency, of which it desires to avail itself...." W. Va. Code § 29A-5-2(b).

Crouch v. West Virginia Div. of Motor Vehicles, 219 W.Va. 70, 76, 631 S.E.2d 628, 634 (2006).

J. Hearing Examiners are authorized to "question witnesses."

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K. "The court may interrogate witnesses, whether called by itself or by a party, but in jury trials the court's interrogation shall be impartial so as not to prejudice the parties."

West Virginia Rules of Evidence 614(b).

L. "A judge may ask questions for the purpose of clearing up points that seem obscure, and supplying omissions which the interest of justice demands, but it is not proper that he conduct an extended examination of any witness."

Nash v. Fidelity-Phenix Fire Ins. Co., 106 W. Va. 672, 679, 146 S.E. 726, 728 (1929).

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. This Court may reverse, modify or vacate the Order of the circuit court. W. Va. Code § 29A-5-4.

VI.

ARGUMENT

A. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER OF THE COMMISSIONER ON THE BASIS THAT THE OFFICER DID NOT PROVE THAT APPELLEE HAD DRIVEN THE VEHICLE.

1. The Exclusionary Rule Should Not Be Applied in Drivers License Revocation Proceedings.

The West Virginia Code does not require that all evidence resulting from a questionable encounter[3] between the police and the citizenry be excluded in a license revocation case. "The 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." W. Va. Code § 17C-5A-2(d). In the present case, the officer's investigation of a report that Appellee was lying on the ground in front of his car gave the officer every reason to investigate. The circuit court erred in basing its decision on whether the officer established whether the Appellee had driven the vehicle. The court further erred in reasoning that the officer must be able to identify specific facts and evidence giving rise to reasonable suspicion that a crime has been committed. Obviously concluding that the arrest in this case was illegal, the court then specifically found that if an arrest is illegal, all evidence obtained as a result of the arrest must be suppressed.

Under the law in effect at the time of Appellant's arrest (W. Va. Code §17C-5A-2 (2004)), a lawful arrest was required in order to effectuate a valid revocation for DUI. The error in this case arose in the circuit court's finding that the officer had to present evidence that the Appellee was driving in order for there to be a lawful arrest. As will be argued below, there is evidence that the Appellee was driving. However, even without the officer's presenting proof that Appellee was driving, the officer developed probable cause to believe that Appellee had driven while under the

[3]The Appellant does NOT concede that the officer's encounter with the Appellee was in any way improper.

influence, and therefore the arrest was lawful. Moreover, the evidence obtained by Cpl. Cole following his first sighting of the Appellee on the ground in front of his car should not be suppressed.

The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights . . ."*U.S. v. Calandra,* 414 U.S. 338, 348 (1974)[4]. 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; *Hughes v. Gwinn,* 170 W.Va. 87, 290 S.E.2d 5 (1982).

The exclusionary rule is often used in the criminal context to suppress evidence obtained from an illegal search. 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 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

[4]West Virginia Constitution Article 3, § 6 is substantially similar to the Fourth Amendment of the United States Constitution.

> situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search.

Id.

A recent United States Supreme Court case illustrates that the exclusionary rule should not be applied over-broadly: "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free–something that 'offends basic concepts of the criminal justice system.'" *Herring v. United States*, 129 S.Ct. 695, 701 (2009) quoting *United States v. Leon*, 468 U.S. 897, 908 (1984).

The deterrent effect on unlawful police conduct is sufficiently strong in the criminal context that the rule need not be carried into the civil context to the detriment of the public. Police will be sufficiently deterred from making unlawful stops and searches because the evidence will be excluded in the criminal trial that the public safety need not be jeopardized by the forced exclusion of reliable and relevant evidence at the administrative hearing. Neither the Fourth Amendment nor West Virginia Constitution Article 3, § 6 dictates that the exclusionary rule must be extended to drivers license revocation proceedings in West Virginia, where 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).

Since *Calandra*, the majority of states which have decided the issue have declined to apply the exclusionary rule in drivers license revocation proceedings. The majority of states which have ruled on this issue follow *Calandra*. In *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 54 P.3d 355 (Ariz. App. Div.2 2002), the Court of Appeals of Arizona held:

> § 28-1321(K) 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.
>
> . . . .
>
> [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, 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.

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 (Alaska 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. *See also Martin v. Kansas Dept. of Revenue*, 176 P.3d 938 (Kan. 2008); *Riche v. Director of Revenue*, 987 S.W.2d 331 (Mo. 1999); *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); *Ascher v. Commissioner of Public Safety*, 527 N.W.2d 122 (Minn. App. 1995); *Powell v. Secretary of State*, 614 A.2d 1303 (Me. 1992); *Gikas v. Zolin*, 863 P.2d 745 (Cal. 1993); *Manders v. Iowa Dept. of Transp., Motor Vehicle Div.*, 454 N.W.2d 364 (Iowa 1990).

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

> Much the same argument was advanced in [*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 *Byers*, 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.

Under the statutory scheme in place for DUI revocations in West Virginia, this Court can easily reconcile the balancing test between deterrent effect and cost to the public by excluding the evidence. Police are deterred from illegal searches because the evidence will be excluded at trial (thereby also preserving judicial integrity); while 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."); *Stalnaker 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) (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.") (internal citations omitted); *Johnson v. Commissioner*, 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, 562, 625 S.E.2d 319, 324 (2005).

Three states have affirmatively held that the exclusionary rule applies in administrative proceedings. In *State v. Lussier*, 757 A.2d 1017 (Vt. 2000), *reargument denied* (Jun 12, 2000), 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. Oregon and Illinois have also held that the exclusionary rule applies. *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).

The criminal proceedings which stem from the same arrest provide a sufficient deterrent to unlawful stops by police. Furthermore, no inferences as to the Legislature's intent in the drafting of W. Va. Code §§ 17C-5A-1 *et seq.* should be drawn. The statutes contain no requirement of a valid stop in order to find that there were reasonable grounds to believe the person was DUI.

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."). Where 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). Therefore, there

should be no exclusion of evidence of driving while under the influence of alcohol on the basis of the validity of the stop.

A police officer may, consistent with the Fourth Amendment, engage in legitimate and justifiable conduct that has nothing to do with investigating criminal conduct.

In *Wagner v. Hedrick*, 181 W. Va. 482, 489, 383 S.E.2d 286, 293 (1989), this Court observed

> The more typical Fourth Amendment case involves a search that is initiated for the purposes of obtaining evidence of criminal activity. Certainly, however, we recognize that there are numerous instances in which the nature of a police officer's duty requires that he engage in searches for reasons other than obtaining evidence of criminal activity.
>
> The policeman, as a jack-of-all-emergencies, has "complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses;" by default or design he is also expected to "aid individuals who are in danger of physical harm," "assist those who cannot care for themselves," and "provide other services on an emergency basis." If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court.

Id., 181 W. Va. 489, 383 S.E.2d at 293 (quoting 2 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.4(c) at 525 (2d ed. 1987) (footnotes omitted.)). This "community caretaker function" was discussed by the United States Supreme Court in *Cady v. Dombrowski,* 413 U.S. 433, (1973):

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and

> engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady, 413 U.S. 441. *See Wagner*, 181 W. Va. 489 n.9, 383 S.E.2d 293 n.9 (discussing *Cady*). A police officer may, therefore, stop a vehicle even if no crime or offense has occurred where the stop is to advance the safety of the driver or the public under the "caretaker function rule."

"A reviewing court may affirm a lower tribunal's decision on any grounds. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir.1999) ('if the administrative order reaches the correct result and can be sustained as a matter of law, we may affirm on the legal ground even though the agency relied on a different rationale')." *U.S. Steel Min. Co., LLC v. Helton*, 219 W. Va. 1, 3 n.3, 631 S.E.2d 559, 561 n.3 (2005).

The constitutional measure of an officer's conduct under the Fourth Amendment is based upon *objective* rather than *subjective* factors. *Muscatell v. Cline*, 196 W. Va. 588, 600 n.9, 474 S.E.2d 518, 530 n.9 (1996) (Workman, J., dissenting) *(citing Whren v. United States,* 517 U.S. 806 (1996); *State v. Todd Andrew H.*, 196 W. Va. 615, 621 n. 9, 474 S.E.2d 545, 551 n. 9 (1996)).

Because the subjective motivations of an officer are not relevant in the Fourth Amendment analysis, since reasonableness is measured by an objective standard, as long as the stop otherwise falls within the caretaker function, the stop is reasonable notwithstanding the arresting officer's subjective reason for the stop. "Our cases have repeatedly rejected th[e subjective evaluation] approach. An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.' The officer's subjective motivation is irrelevant." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006)

(citation omitted) (under emergency entry exception to Fourth Amendment's warrant requirement subjective motivation of officers as to protecting life or making an arrest not relevant). *See Robinson v. Commonwealth*, 639 S.E.2d 217 (Va. 2007) (*Stuart* applies beyond emergency entry exception). *Cf. Devenpeck v. Alford*, 543 U.S. 146 (2004) (as long as facts known to officer at the time of arrest would constitute a probable cause to believe any crime was committed, the arrest is lawful even if the officer arrested the defendant for the wrong offense).

In *State v. Mitchell*, 498 N.W.2d 691 (Iowa 1993), a police officer pulled a driver over for having only one tail light. Although not a criminal violation, it was a violation of Administrative Rules of the State Police that adopted federal law which required two tail lights. In finding the stop justified, the Court said, "[h]ere, the trooper had a legitimate public safety responsibility, arising from the burned-out taillight, to stop Mitchell even though no violation of the law had occurred. When evidence is discovered in the course of performing legitimate community caretaking or public safety functions, the exclusionary rule is simply not applicable." *Id.* at 694. (The court did find that the stop was not pretextual).

In this case, Cpl. Cole received a complaint from a passer-by that there was a person lying in front of a vehicle on Route 19. Cpl. Cole drove to the area and found the Appellee lying in front of his vehicle, curled up and passed out. The vehicle was pulled off the road with its lights and engine off, at approximately 2:34 in the morning. This provided a justification for Cpl. Cole (if not imposing upon him the duty) to stop and determine if anyone was in need of assistance. Thus, even if "[n]o criminal activity was apparent . . . given the isolated location and nighttime hour, it was reasonable for [Cpl. Cole] as a community caretaker, to at least approach the driver and ask what the problem was." *State v. Kiesecker*, No. 19173-7-III, 2001 WL 695526, at * 3 (Wash. Ct. App. June

21, 2001). *See also Commonwealth v. Evans*, 742 N.E.2d 86, 88 (Mass. Ct. App. 2001) ("Here, acting under an established policy, the trooper, after observing a vehicle parked in the breakdown lane on an unlit portion of an isolated section of a highway, late at night, with a directional light blinking, stopped behind the parked car and approached it. That action, by itself, did not intrude impermissibly on the motorist's constitutional rights."); *People v. Ciesler*, 710 N.E.2d 1270, 1275 (Ill. Ct. App. 1999) ("It is undisputed that when Officer Berry initially approached defendant she did not suspect that defendant was committing an offense. Rather, she approached defendant no differently than any other citizen might have approached him to inquire if he needed assistance. As Officer Berry approached defendant to inquire if he needed assistance, she smelled the odor of alcohol through the open window of the truck in which defendant was sitting. Officer Berry asked defendant how he was doing and observed that defendant's eyes were extremely bloodshot and that his speech was mumbled and thick-tongued. These are indicia of possible intoxication and were sufficient to provide Officer Berry with articulable suspicion that defendant had committed the offense of DUI..").

The circuit court erred in finding that only reasonable suspicion can provide a justification for police-citizen interaction. Here, the actions of Cpl. Cole fell well-within the parameters of both the United States and West Virginia Constitutions. Therefore, the decision of the circuit court should be reversed.

2. The officer had reasonable grounds to believe that Appellee had driven while under the influence of alcohol.

Alternatively, the circuit court's Order must be reversed on the basis that the arrest in this matter was proper. Cpl. Cole testified that Appellee was lying in front of his vehicle when he arrived

on the scene. The Appellee told him that he was trying to get home. The D.U.I. Information Sheet reflects that the Appellee told Cpl. Cole that he was driving. Appellee did not testify, nor did he provide any evidence which would indicate that he did not drive his car to the place where it was found.

It is not necessary that the arresting officer observe the Appellee operating a motor vehicle if the surrounding circumstances indicate that he was the driver of the vehicle. Syl. pt. 3, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997). The evidence supports that Appellee was driving the vehicle.

Cpl. Cole would have been remiss in his duty if he had ignored the situation and failed to investigate. The propriety of Cpl. Cole's actions in effecting the stop are supported under the reasonable suspicion standard set forth in Syl. pt. 4, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994). In *Stuart*, this Court held that reasonable suspicion is

> "a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." [*Alabama v. White*,] 496 U.S. at 330, 110 S. Ct. at 2416, 110 L. Ed. 2d at 309.

Stuart, 192 W. Va. at 432, 452 S.E.2d at 890. This Court concluded:

> Thus, 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."

192 W. Va. 431-32, 452 S.E.2d 889-90 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). *See Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). In determining whether the

reasonable suspicion standard has been met, the reviewing court must look at the totality of the circumstances including the information in the officer's possession at the time of the stop. *Muscatell*, 196 W. Va. at 596, 474 S.E.2d at 526; *Stuart*, 192 W. Va. at 432, 452 S.E.2d at 890 (citing *White*, 496 U.S. at 330).

In *Muscatell*, this Court discussed *Stuart,* and showed clearly the "minimal level of objective justification" required in West Virginia for the officer to make a stop:

> In reaching its conclusion, the *Stuart* Court also defined the test for evaluating the facts in the application of the "reasonable suspicion" standard:
>
> > 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.
>
> Syl. pt. 2, *State v. Stuart, supra.*
>
> In *Stuart*, this Court offered further guidance on the constitutional parameters of a "reasonable suspicion" stop, as follows:
>
> > Although "[reasonable] suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence," *see United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1, 10 (1989), the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution nevertheless require that the police articulate facts which provide some minimal, objective justification for the stop. Specifically, in *Sokolow,* the Court stated: "The officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch"'. . . . The Fourth Amendment requires 'some minimal level of objective justification' for making the stop." 490 U.S. at 7, 109 S.Ct. at 1585, 104 L.Ed.2d at 10. (Citations omitted). The criteria

> for reasonable suspicion to stop a vehicle are very similar to a street stop under Terry. Factors such as erratic or evasive driving, the appearance of the vehicle or its occupants, the area where the erratic or evasive driving takes place, and the experience of the police officers are significant in determining reasonable suspicion.
>
> *State v. Stuart*, 192 W. Va. at 433 n.10, 452 S.E.2d at 891 n.10.

Muscatell v. Cline, 196 W. Va. 596, 474 S.E.2d 526. The Court must consider the totality of the circumstances in making its determination in this case, therefore, it must consider the officer's experience, the time of day, and the location of the vehicle and the Appellee. The *Stuart* Court's "totality of the circumstances" test was met in this case.

3. The Circuit Court erred in concluding that an investigation is justifiable only when a police officer can identify facts and evidence that a crime has been committed.

The circuit court concluded that "the officer must be able to identify specific facts and evidence giving rise to a reasonable suspicion that a crime has been committed." Opinion/Final Order at 4. However, a police officer may, consistent with the Fourth Amendment, engage in legitimate and justifiable conduct that has nothing to do with investigating criminal conduct.

In *Wagner v. Hedrick,* 181 W.Va. 482, 489, 383 S.E.2d 286, 293 (1989), this Court observed "The more typical Fourth Amendment case involves a search that is initiated for the purposes of obtaining evidence of criminal activity. Certainly, however, we recognize that there are numerous instances in which the nature of a police officer's duty requires that he engage in searches for reasons other than obtaining evidence of criminal activity." "The policeman, as a jack-of-all-emergencies, has 'complex and multiple tasks to perform in addition to identifying and apprehending persons

committing serious criminal offenses;'" by default or design he is also expected to 'aid individuals who are in danger of physical harm,' 'assist those who cannot care for themselves,' and 'provide other services on an emergency basis.' If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court." *Id.*, 383 S.E.2d at 293 (quoting 2 LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 5.4(c) at 525 (2d ed. 1987) (footnotes omitted.)). This "community caretaker function" was discussed by the United States Supreme Court in *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973):

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

In this case, an individual stopped in a parking lot in Monongah and told Corporal Cole that there was a person lying in front of a car. Tr. at 6. At 2:34 a.m., Corporal Cole found Appellee lying in front of his car, curled up, on Route 19 South just outside of Fairmont. Tr. at 4-5. This provided a justification for Corporal Cole (if not imposing upon him the duty) to stop and determine if anyone was in need of assistance. Thus, even if "[n]o criminal activity was apparent . . . given the isolated location and nighttime hour, it was reasonable for [Corporal Cole] as a community caretaker, to at least approach the driver and ask what the problem was." *State v. Kiesecker,* No. 19173-7-III, 2001

WL 695526, at * 3 (Wash. Ct. App. June 21, 2001). *See also Commonwealth v. Evans*, 742 N.E.2d 86, 88 (Mass. Ct. App. 2001) ("Here, acting under an established policy, the trooper, after observing a vehicle parked in the breakdown lane on an unlit portion of an isolated section of a highway, late at night, with a directional light blinking, stopped behind the parked car and approached it. That action, by itself, did not intrude impermissibly on the motorist's constitutional rights."); *People v. Ciesler*, 710 N.E.2d 1270, 1275 (Ill. Ct. App. 1999) ("It is undisputed that when Officer Berry initially approached defendant she did not suspect that defendant was committing an offense. Rather, she approached defendant no differently than any other citizen might have approached him to inquire if he needed assistance. As Officer Berry approached defendant to inquire if he needed assistance, she smelled the odor of alcohol through the open window of the truck in which defendant was sitting. Officer Berry asked defendant how he was doing and observed that defendant's eyes were extremely bloodshot and that his speech was mumbled and thick-tongued. These are indicia of possible intoxication and were sufficient to provide Officer Berry with articulable suspicion that defendant had committed the offense of DUI..").

The circuit court erred in finding that only reasonable suspicion that a crime has been committed can provide a justification for police-citizen interaction. Here, the actions of Corporal Cole fell well-within the parameters of bot the United States and West Virginia Constitutions. Therefore, the decision of the circuit court should be reversed.

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT SHIFTED THE BURDEN OF PROOF TO THE APPELLEE.

The circuit court is factually in error in finding that "The hearing examiner's insistence on testimony from the Petitioner in the present case was misplaced and constitutes an erroneous shifting

of the burden of proof." Opinion/ Final Order at 4,¶ 7. The Petitioner (Appellee herein) did not testify at the hearing. Assuming arguendo that the circuit court meant that the Hearing Examiner's questioning of the arresting officer constituted a shifting of the burden of proof, the circuit court is still in error. The questions asked by the Hearing Examiner of the arresting officer (Tr. at pages 9-11) consist of clarification of the location of the car and the Appellee. Counsel for Appellee was invited to follow up with questions after the Hearing Examiner questioned the officer on this completely relevant subject, and counsel availed himself of that opportunity. The scope of the Hearing Examiner's questions was completely proper, and a reading of the transcript will show that nothing adduced during that exchange could possibly be construed to mean that the Hearing Examiner shifted the burden of proof. It established that the car was three or four feet off the road, and the Appellee was about 10 feet off of the road.

Hearing Examiners are legally entitled to question witnesses. The questions defining the scope of the hearing on the D.U.I. Information Sheet, provided to both parties before the hearing, and the questioning by Hearing Examiners, ensures establishment of the most complete record possible. Pursuant to legislative rule, Hearing Examiners are authorized to "question witnesses." 91 C.S.R. 1, § 3.9.3. There is no secret about what the issues are at a hearing, and the Hearing Examiner confined herself completely to the scope of the questions. His questions were not improperly leading, but rather were designed to clarify the record and complete the record. Hearing Examiners, as designees of the Commissioner, are impartial gatherers of evidence to determine whether an individual was DUI.

West Virginia Rules of Evidence 614(b) provides "[t]he court may interrogate witnesses, whether called by itself or by a party, but in jury trials the court's interrogation shall be impartial so

as not to prejudice the parties." In *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 599, 396 S.E.2d 766, 780 (1990), the Court recognized Rule 614(b) and found no error by the trial court where it "interrupt[ed] on both sides and the information sought by the trial court's questioning did not involve any attempt to prejudice either side, but rather was more for clarification purposes." "A judge may ask questions for the purpose of clearing up points that seem obscure, and supplying omissions which the interest of justice demands, but it is not proper that he conduct an extended examination of any witness." *Nash v. Fidelity-Phenix Fire Ins. Co.*, 106 W. Va. 672, 679, 146 S.E. 726, 728 (1929).

The Fourth Circuit has explained that a judge "has the duty to participate in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by counsel." *U.S. v. Ostendorff*, 371 F.2d 729, 732 (4th Cir. 1967). A judge "should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other." *Id.* (internal quotations and citations omitted).

Further, the Final Order of the Commissioner properly relied on the documents from the Appellant's file which came into the record pursuant to W. Va. Code § 29A-5-2, and the testimony of the arrestig officer. Citing *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006), the Commissioner properly noted that these documents created a rebuttable presumption as to their accuracy. The State carried its burden in this case. Other than cross-examining the officer, Appellee offered no evidence to refute that which came into evidence through the agency's files and the testimony of the arresting officer.

The D.U.I. Information Sheet was offered and accepted as part of the record by the hearing examiner, pursuant to W. Va. Code § 29A-5-2, 91 C.S.R. 1, § 3.9.4.b and *Crouch, supra.* Cpl. Cole

provided foundational testimony supporting the admission of this document into evidence. Tr. at 3. The documentary evidence, along with Cpl. Cole's testimony, constituted sufficient evidence to revoke Appellee's license. All of the foregoing evidence was subject to rebuttal. As this Court noted at footnote 12 in *Crouch v. West Virginia Div. of Motor Vehicles,* 219 W.Va. 70, 7631 S.E.2d 628 (2006):

> We point out that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy. . . .

The crux of *Crouch* is an affirmation of W. Va. Code § 29A-5-2(b), which has long provided that "All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. . . ." *Crouch* resoundingly affirms that the DMV has a *duty* to admit all evidence of which it desires to avail itself. All of the evidence so admitted is subject to challenge by the driver. In this case, the Appellee did challenge the evidence by cross examining Cpl. Cole.

The notion that there is a shifting of the DMV's burden of proof by this procedure is erroneous. The Commissioner did not, as erroneously held in the circuit court's order, "[fail] to apply the proper standard when weighing the evidence in this matter" and did not "[prejudice] the petitioner." Opinion/Final Order at 4. The reference by the Commissioner to the Appellee's need to provide a "meritorious defense" is simply a statement of the law that he must rebut the evidence in the record which shows that he was DUI. In the present case, the Appellee appeared at the hearing and had the opportunity to challenge the evidence placed into the record. Although his lawyer cross-

examined the arresting officer, that was insufficient to overcome the preponderance of evidence in the record which showed that Appellee was DUI. The Commissioner's reasoning at pages 6-7 of the Final Order, that the driver must rebut the evidence in the record with exculpatory evidence, is an accurate statement of the law. There was no shifting of the burden of proof.

The fact that the documents in the DMV's files may establish sufficient evidence to uphold the revocation does not constitute a shifting of the burden of proof. Code and caselaw clearly show that admission of these documents is required. The documents themselves may carry the State's burden of proof, especially when the revokee fails to rebut or refute the evidence in the record.

VII.

PRAYER FOR RELIEF

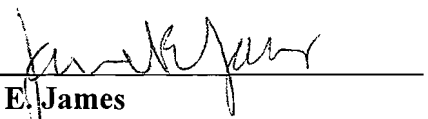
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellants hereby pray that the *Opinion/Final Order* entered by the Marion County Circuit Court on December 23, 2008, be reversed and vacated, and remanded with directions to affirm the Appellants' *Final Order*.

Respectfully submitted,

WEST VIRGINIA DIVISION OF MOTOR VEHICLES, JOE E. MILLER, COMMISSIONER,

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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NO. 35013

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ERIC R. CAIN,

Petitioner Below/Appellee,

v.

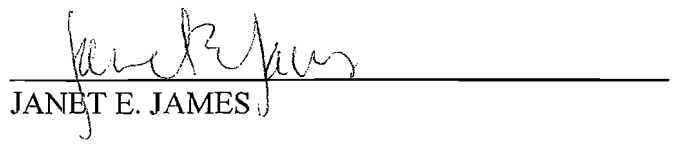
THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES, and JOSEPH CICCHIRILLO, Commissioner,

Respondents Below/Appellants.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, and counsel for Appellants, do hereby certify that the foregoing *Brief of Appellants* was served upon Appellee by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 24th day of August, 2009, addressed as follows:

Charles E. Anderson, Esquire
200 Adams Street
Fairmont, West Virginia 26554



JANET E. JAMES