

3/30  
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ERIC R. CAIN,**

**Petitioner Below/Appellee**

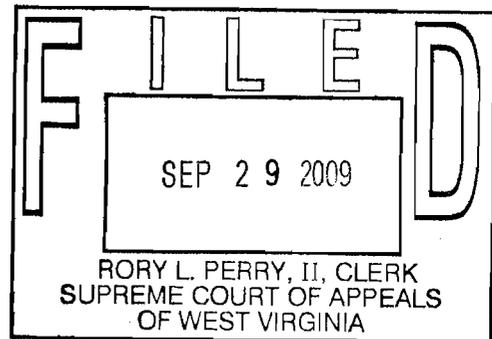
**v. No. 35013**

**THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,  
And JOSEPH CICCHIRILLO, COMMISSIONER**

**Respondent Below/Appellants.**

**FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA**

**ERIC R. CAIN  
By Counsel**



**CHARLES E. ANDERSON, WV BAR #130  
ATTORNEY AT LAW  
200 ADAMS STREET,  
FAIRMONT, WV 26554  
(304)-366-8803**

## TABLE OF CONTENTS

I.	KIND OF PROCEEDING AND NATURE OF RULING BELOW	1
II.	STATEMENT OF FACTS	2
III.	ASSIGNMENTS OF ERROR	3
IV.	STANDARD OF REVIEW	3
V.	ARGUMENT	3
VI.	PRAAYER	9

## TABLE OF AUTHORITIES

### CASES:

<i>Walker v. West Virginia Ethics Comm'n</i> , 201 W. Va. 109, 492 S.E. 2d, 297 (1997)	3
<i>Muscatel v. Cline</i> , 196, W. Va. 588, 474 S.E. 2d 518 (1996)	3
<i>State ex rel. White v. Mohn</i> , 168 W. Va. 211, 283 S. E. 2d 914 (1981)	4
<i>State v. Worley</i> , 179 W. VA. 403, 412, 369 W.E. 2d 706, 715 (1988)	4
<i>Clower v. Dept. of Motor Vehicles</i> , 678 S.E. 2d 71 (2009)	6
<i>Crouch v. West Virginia Div. of Motor Vehicles</i> , 219 W. Va. 70, 631 S.e. 2d 628 (2006)	8

### STATUTES:

W. Va. Code 17C-5A-2(e)	3
-------------------------	---

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ERIC R. CAIN,**

**Petitioner Below/Appellee**

v.     **No. 35013**

**THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,  
And JOSEPH CICCHIRILLO, COMMISSIONER**

**Respondent Below/Appellants.**

**BRIEF OF APPELLEE**

Comes now the Appellee, Eric R. Cain, by counsel, Charles E. Anderson, and submits 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 an Administrative Appeal filed in the Circuit Court of Marion County, West Virginia, before the Honorable Judge David R. Janes, Case No. 08-AA-3, under West Virginia Code 29A-6-1.

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 vehicle while under the influence of alcohol and that the DMV had improperly shifted the burden of proof from the DMV to the Appellee.

Through its Order, the Circuit Court of Marion County, reversed the revocation of the Appellee's license by the Division of Motor Vehicles, which was to take effect on April 9, 2008.

## II

### STATEMENT OF FACTS

The Appellee was arrested by Cpl. Cole of the Marion County Sheriff's Department, following an investigation, based upon a call from a concerned citizen, that a person was lying in front of a vehicle, off the road, in a pull off area, the vehicle was not running, and the keys were not in the vehicle. The record reflects that there was no danger to the public from the manner in which the vehicle was pulled off the road and that the Appellee when approached by the Officer was asleep.

Cpl. Cole, following the administration of field sobriety tests, arrested the Appellee for DUI. The Appellee was arrested, taken to the Marion County Sheriff's Office where he was administered an Intoximeter test. The results of the test showed that the Appellee had a BAC of 0.157.

At the time of the DMV hearing for the suspension of the Appellee's license, Cpl. Cole on cross-examination, stated that he did not see the Appellee operate the vehicle (Tr. Page 7, Line 19/20), nor could he determine with any certainty when the Appellee had last driven the vehicle (Tr. Page 8, Line 22/23). Cpl. Cole also testified that he could not determine how long the Appellee had been lying in front of the vehicle (Tr. Page 9, Line 5/8) and that he could not determine when the Appellee had last consumed alcohol (Tr. Page 9, line 9/11).

### 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 THE APPELLEE HAD DRIVEN THE VEHICLE.**

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

### IV

#### STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review. *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 109, 492 S.E. 2d 297 (1997). *Muscatel v. Cline*, 196 W. Va. 588, 474 S.E. 2d 518 (1996)

## V.

### ARGUMENT

A. In an administrative revocation proceeding, *W. Va. Code*, 17C-5A-2(e) (2004) requires the Commissioner's hearing examiner to make three specific findings. First, the hearing examiner must find that the "arresting law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol. . . ." Second, the hearing examiner must make findings "whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol . . . or was lawfully taken into custody for the purpose of administering a secondary test." Third, the hearing examiner must make findings "whether the tests, if any, were administered in accordance with the [relevant law]."

The central issue presented in this case is whether Appellee's warrantless arrest was valid. Mr. Cain was arrested for the misdemeanor offense of driving under the influence of alcohol, second offense; however, the alleged offense was committed outside the presence of the arresting officer. The State maintains that they had probable cause but, Mr. Cain argues that the arresting officer lacked probable cause.

In this case, Mr. Cain was arrested when the officers woke him from being asleep in front of his vehicle in the pull off area, had him perform FST's, which he failed, and placed him under arrest. The issue is what did the officer know about the driving under the influence offense when Mr. Cain was arrested. This Court has held in *State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981), that probable cause to arrest without a warrant exists "when the facts and the circumstances within the knowledge of

the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed." *See State v. Worley*, 179 W. Va. 403, 412, 369 S.E.2d 706, 715, *cert. denied*, 488 U.S. 895, 109 S.Ct. 236, 102 L.Ed.2d 226 (1988).

In this case, the evidence shows that there was no unlawful activity by the Appellee, at the time of the initial investigation. The police officer was following up on a report of a person lying in front of his vehicle, in a pull off area of a state highway. There was no evidence presented as to why the Appellee was there and out of his car. The officer upon arriving on the scene, found the vehicle to be properly off the road, not running, no keys in the vehicle, no passengers in the vehicle, no driver in the vehicle, finding, only that the Appellee was lying on the grass asleep.

The police officer, wakes up the Appellee, and finds that the Appellee exhibits signs of being intoxicated. Based upon these signs, the Officer has the Appellee perform field sobriety tests, which according to the officer, the Appellee fails, and arrests the Appellee for DUI. He then takes him to Headquarters, where the Appellee fails a BAC test.

When the evidence of what the officers knew when they awakened Appellee is dispassionately reviewed, the lack of probable cause is apparent. The requirement of a warrant for arrest requires such a review by an uninvolved party at an early stage, thereby relieving the problem of determining when various knowledge was acquired.

The police officer testifies to all of these facts at the DMV hearing for the revocation of the Appellee's license. The police officer, further testifies at the DMV hearing, that he did not see the Appellee actually drive the vehicle, that he could not determine to any degree of certainty when the Appellee had last drove the vehicle; could

not determine to any degree of certainty how long the Appellee had been lying in front of the car asleep and could not determine with any degree of certainty when the Appellee had last consumed alcohol.

When we look at the first issue, that the hearing examiner must determine, what facts can the officer rely on to make his determination that the Appellee drove a vehicle while he was under the influence of alcohol. The simple answer to this question is NONE. If the officer cannot say when the Appellee last drove the vehicle, how can he say the Appellee was under the influence when he drove; and, if the officer cannot say when the Appellee last consumed alcohol, how can he say the Appellee was under the influence when he drove and if the officer cannot say how long the Appellee had been asleep on the ground, how can he say the Appellee was under the influence when he last drove..

This Court recently held that in “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.” Syllabus Point 5, *Clower v. Dept. of Motor Vehciles*, 678 S.E. 2d, 41 (2009)

When we review the facts known to the police officer, based upon his testimony at the DMV hearing, it is apparent that the police officer only knew that the vehicle had been driven to the pull off area by someone at some time in the past.. It is, of course, a natural assumption that the Appellee, being the only person present with the vehicle, was in fact the driver. This evidence is clearly supported by the record. The officer, upon awakening the Appellee, then observes indications of alcohol consumption, and requests that the Appellee perform field sobriety tests. Again this is a natural assumption based upon the facts known to the officer at this time. This information, however, does not arise

to the level required of an “articulable suspicion of DUI, since the officer clearly did not know when the Appellee, last drove the vehicle, how long the Appellee had been asleep in front of the vehicle, or when the Appellee had last consumed alcohol.

When looking at the quantity and quality of the information known by the police officer, it is without doubt that the officer did not have an articulable suspicion or reasonable grounds to believe that the Appellee had been driving while under the influence of alcohol. .

Under the law in effect at the time of Appellee’s arrest a lawful arrest was required in order to effectuate a valid revocation of Appellee’s license for DUI. The lower Court correctly found that although the Officer could assume that based upon all the evidence known to him, the Appellee had driven the vehicle to the location where it was found, the Court also found that the Officer did not have sufficient evidence to support his assumption that the Appellee was driving that vehicle while under the influence, and the arrest was therefore an unlawful arrest.

B. In the final order entered by the DMV, the DMV takes the position that the Statement of Arresting Officer /DUI Information Sheet, creates a rebuttable presumption as to its accuracy; that appropriate evidentiary weight can be assigned to the facts contained therein; everything contained therein is taken as true unless evidence is received to the contrary by way of exculpatory evidence and a meritorious defense must be presented, supported by evidence which sufficiently rebuts the Statement of Arresting Officer/DUI Information Sheet or substantantive portions thereof. (See DMV Final Order, page 7)

The hearing examiner, in this case, has taken the position, that unless the Appellee testified and presented a meritorious defense, that everything in the Statement of Arresting Officer is taken as true. The examiner does not appear to accept the fact that a party can present a meritorious defense based only upon cross examination of the officer.

As this Court is well aware, there are more than one way to present a meritorious defense, and in most criminal cases, this is usually by the cross examination of witnesses to show the flaws in their testimony. In this matter, although the DMV may take the evidence as contained in the Statement as true, when on cross examination, those matters assumed to be true are questioned and shown to be without sufficient reliability, the Appellee has presented a meritorious defense.

The Appellant relies upon the case of *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E. 2d 628 (2006) for the admission of the Statement of Arresting Officer/DUI Information Sheet, and argues that it contained sufficient evidence for the DMV to find that the Appellee was driving while under the influence of alcohol. Although the Crouch case does make the Statement admissible, the Court pointed 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. In the instant case, evidence pertaining to the Officer's determination that the Appellee was under the influence while driving was challenged. Based upon this challenge, the Officer was not able to articulate any basis upon which to reach his conclusion that the Appellee was under the influence while driving, since he could not

say when the Appellee last drove or last used alcohol. The presumption of the Statement's accuracy was rebutted and the Officer then had the burden to supply sufficient additional evidence, which he could not and did not.

Despite this presentation of a meritorious defense by the use of cross examination of the arresting officer, the hearing examiner still states that since the Appellee "chose not to testify, therefore he did not deny that he was driving, and did not present any testimony or evidence that he consumed alcohol after he stopped his vehicle" and that the Arresting Officer's testimony was sufficient. The Commissioner's reasoning at pages 6-7 of the Final Order, that the driver must rebut the evidence in the record clearly does not take into consideration the testimony of the arresting officer on cross examination, that he could not determine when the Appellee last drove, last consumed alcohol or how long he had been out of the vehicle.

The fact that the documents in the DMV's files create a rebuttable presumption, does not relieve the DMV from carrying its burden of proof, when as in this case, the Appellee has challenged the basis of the arrest and shown a lack of pertinent information by the Officer in making his determination of probable cause for the arrest.

When the evidence of what the officers knew when they awakened the Appellee, is dispassionately reviewed, it is apparent that the Commissioner has shifted the burden to the Appellee to present evidence by either testifying himself or bringing in additional evidence of an exculpatory nature in order to prevail. This clearly is not what is required by statute, and amounts to a misinterpretation of the requirements for presenting a meritorious defense.

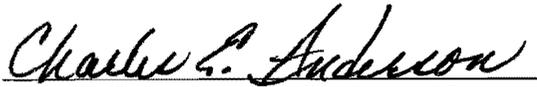
VI

**PRAYER FOR RELIEF**

Wherefore, based upon the forgoing and fro such other reasons as may appear to the Court, Appellee hereby prays that the Opinion/Final Order entered by the Circuit Court of Marion County, West Virginia, on December 23, 2008, be affirmed.

Respectfully submitted,

Eric R. Cain  
By Counsel



Charles E. Anderson, WV Bar #130  
Attorney  
200 Adams Street  
Fairmont, WV 26554  
304-366-8803

## CERTIFICATE OF SERVICE

I, Charles E. Anderson, counsel for Appellee, do hereby certify that the foregoing Brief of Appellee was wseved upon the Appellant by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this the 28<sup>th</sup> day of September, 2009, addressed as follows:

Janet E. James  
Assistant Attorney General  
Office of the Attorney General  
State Capitol Complex  
Building 1, Room W-435  
Charleston, West Virginia 25305

  
Charles E. Anderson, WV Bar #130