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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

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JAN - 5 2009

ERIC R. CAIN,

PETITIONER,

vs.

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

RESPONDENTS.

CASE NO. 08-A-13

Attorney General Office
Tax Division

2008 DEC 23

BARBARA A. SRE
CIRCUIT CLERK

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FINAL ORDER

OPINION/FINAL ORDER

This case came before the Court for hearing on October 20, 2008. The petitioner, Eric Cain, appeared in person and was represented by Charles E. Anderson, Esquire. The respondents, the West Virginia Division of Motor Vehicles and Joseph Cicchirillo, Commissioner, did not appear in person, but were represented Janet E. James, Esquire, Assistant Attorney General. After due consideration of the arguments of the parties, and after reviewing the administrative court history and fully researching the legal issues presented, the Court is of the opinion that the final order of the West Virginia Division of Motor Vehicles should be reversed. In support of this decision, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. On June 2, 2007, Corporal Todd Cole of the Marion County Sheriff's Department was called to investigate a report of an individual laying in front of a vehicle on U.S. Route 19, between Fairmont and Monongah, in Marion County, West Virginia.

2. Corporal Cole observed a 2004 Saturn Ion entirely off the road in a pull-off area. The petitioner was asleep on the ground. The vehicle was not running and the keys were not in the ignition.

3. Corporal Cole did not see the petitioner operate the vehicle (Tr. Page 7, Line 19/20), nor could he determine to any degree of certainty when the petitioner last drove the vehicle. (Tr. Page 8, Line 22/23)

4. From his investigation, Corporal Cole could not determine how long the petitioner was laying in front of the vehicle. (Tr. Page 9, Line 5/8)

5. Corporal Cole also could not determine when the petitioner last consumed alcohol. (Tr. Page 9, Line 9/11)

6. In his final order, Commissioner Cicchirillo states that the Statement of Arresting Officer/D.U.I. Information Sheet creates a rebuttable presumption as to its accuracy. As a result, the information conveyed in said document is taken as true unless evidence is received to the contrary by way of exculpatory evidence. Furthermore, the order states that before an Order of Revocation will be reversed by the Division of Motor Vehicles, a meritorious defense must be presented which is supported by evidence sufficient to rebut the Statement of Arresting Officer/D.U.I. Information Sheet.

7. The petitioner has provided evidence of a meritorious defense which sufficiently rebuts the Statement of Arresting Officer/D.U.I. Information Sheet through Corporal Cole's testimony that the petitioner was not in the vehicle, that the vehicle was not running, that he had not seen the petitioner operate the vehicle and that he could not determine when the petitioner last drove the vehicle. Therefore, the evidence does not

support the commissioner's finding that the petitioner was driving under the influence of alcohol.

8. The petitioner was a resident of Marion County on the date of his arrest.

Conclusions of Law

1. "Any party adversely affected by a final order or decision in a[n administrative] case is entitled to judicial review thereof . . ." See W.Va. Code 29A-5-4(a) (1998). Venue for judicial review of administrative decisions shall lie "in either the circuit court of Kanawha County, West Virginia or in the circuit court of the county in which the petitioner resides . . ." Id. at (b)

2. Jurisdiction to hear the petitioner's administrative appeal properly lies with this Court because the commissioner's decision was an administrative decision and the petitioner resides in Marion County.

3. This Court conducts this review under the following guidelines: "the Court may affirm the order or decision of the [Commissioner] or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the [commissioner] if the substantial rights of the petitioner . . . have been prejudiced because of the administrative findings, inferences, conclusions, decision or order are: (1) in violation of constitutional or statutory provisions; or (2) in excess of the statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedures; or (4) affected by other error of law; or (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of

discretion or clearly unwarranted exercise of discretion”.

See W.Va. Code 29A-5-4(g) (1) - (6) (2007).

4. The arrest of the petitioner was made by Corporal Cole without any factual basis because Corporal Cole did not establish with any degree of certainty when, or if, the petitioner had driven the vehicle. Therefore, sufficient evidence was not presented to show that the drove a motor vehicle in this state while under the influence of alcohol on June 5, 2007.

5. In order to support a finding that the petitioner was driving under the influence of alcohol, the officer must be able to identify specific facts and evidence giving rise to a reasonable suspicion that a crime has been committed. Here, the officer did not have sufficient information to conclude that the petitioner drove a motor vehicle while under the influence of alcohol.

6. An illegal arrest constitutes an unreasonable seizure under the Fourth Amendment, the evidence obtained as arrest of the arrest is inadmissible against the person arrested under the exclusionary rule as set forth in Mapp v. Ohio, 367 U.S. 643, (1961) and the “fruits of the poisonous tree doctrine set forth in Wong Sun v. United States, 372 U.S. 471 (1963). If an arrest is found to be illegal, all evidence obtained as a result of the arrest may be suppressed.

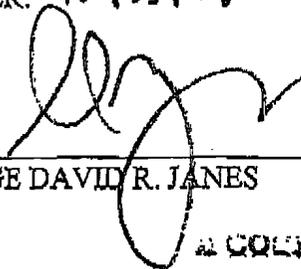
7. The hearing examiner’s insistence on testimony from the petitioner in the present case was misplaced and constitutes an erroneous shift in the burden of proof. The commissioner’s failure to apply the proper standard when weighing the evidence in this matter prejudiced the petitioner. Therefore, a review of the record in this matter makes it abundantly clear that the West Virginia Division of Motor Vehicles denied the petitioner

due process and potentially violated the Administrative Procedures Act by illegally shifting the burden of proof to the petitioner at the administrative hearing.

Accordingly, for the reasons set forth in the foregoing Opinion/Final Order, the Court is of the opinion to, and does, hereby **ORDER** that the West Virginia Division of Motor Vehicle's final order be **REVERSED**, and that the petitioner's license be reinstated.

The Circuit Clerk of Marion County is directed to provide certified copies of this "Opinion/Final Order" to Charles E. Anderson, counsel for the petitioner, at his address: 200 Adams Street, Fairmont, West Virginia 26554; and to Janet E. James, Assistant Attorney General, at her address: Office of the Attorney General, State Capitol Room W-435, Charleston, West Virginia, 25303. The Circuit Clerk is further directed to remove this case from the Court's docket.

ENTER: 12 1231 08



JUDGE DAVID R. JAMES

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ISSUE


CLERK OF THE CIRCUIT CLERK
MARION COUNTY, WEST VIRGINIA