

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

**NO. 35132**

**JAMES L. GROVES, III,**

**Petitioner Below/Appellee,**

**v.**

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

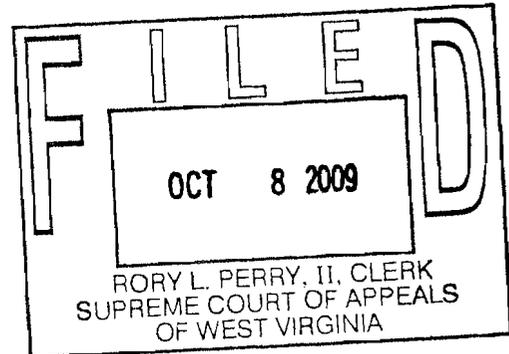
**Respondent Below/Appellant.**

**BRIEF OF APPELLANT**

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

**By counsel,**

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Petitioner Below/Appellee,

v.

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DIVISION OF MOTOR VEHICLES,

Respondent Below/Appellant.

**BRIEF OF APPELLANT**

Comes now the Appellant, Joe E. Miller, successor to Joseph Cicchirillo as Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division" or "Appellant"), by counsel, Janet E. James, Assistant Attorney General, and submits this brief pursuant to the Order received from this Honorable Court on September 8, 2009.

**I.**

**KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

Appellant seeks reversal of the *Order* entered on February 12, 2009, by the Honorable Mark A. Karl, Judge of the Circuit Court of Marshall County (hereinafter, "*Order*"), in an administrative appeal styled *James L. Groves v. Joseph Cicchirillo, Commissioner of the West Virginia Division of Motor Vehicles*, Civil Action No. 08-CAP-9K. Through its *Order*, the Circuit Court reversed an administrative driver's license revocation order entered by the Division, by which James L. Groves' (hereinafter, "Appellee") privilege to drive was revoked.

**A. THE ADMINISTRATIVE APPEAL**

In the underlying administrative appeal, Appellee sought relief from the administrative order which took effect on September 22, 2008, (hereinafter, "*Final Order*"), wherein Commissioner Cicchirillo revoked Appellee's privilege to drive in West Virginia for a period of one year, followed by two years installation of the Interlock system, for his second offense of driving under the influence of alcohol (hereinafter, "DUI") in a ten year period. The Circuit Court reversed the Final Order on the bases that 1) the "arresting officer offered no testimony concerning the intoximeter test;" 2) the "officer did not lay a foundation to prove that the intoximeter test was admissible;" 3) the "officer did not testify that the [Appellee] was observed for twenty minutes prior to the test, nor that a sterile disposable mouthpiece with sputum trap was utilized in the taking of the test, nor did the arresting officer testify as to the BAC reading that resulted from the test, nor that the [Appellee] even failed the test;" 4) the arresting officer did not testify about how the [Appellee] performed on the horizontal gaze nystagmus and one-leg stand tests; 5) the arresting officer did not testify that he observed any characteristics of the [Appellee] which would lead a reasonable person to believe that [Appellee] had been drinking; and 6) the officer did not testify that [Appellee] was driving. Order at 1-2. The court also concluded that the Appellee's timely challenge to the intoximeter test prevented the "automatic admission" of the results into evidence.

**B. THE ADMINISTRATIVE PROCEEDINGS**

Appellee was arrested for driving under the influence of alcohol on February 19, 2008. Deputy R.B. Mobley of the Marshall County Sheriff's Department apprised the Division of Appellee's arrest by submitting a D.U.I. Information Sheet, an Implied Consent Statement, and an

Intoximeter printout ticket.<sup>1</sup> After reviewing the documents in Record Exhibit 2, the Division issued an initial order<sup>2</sup>, dated March 4, 2008, revoking Appellee's privilege to drive in West Virginia for one year, and thereafter accompanied by successful completion of the Interlock program and pending completion of the safety and treatment program and payment of the pertinent costs and fees.

Appellee timely requested an administrative hearing. On May 28, 2008, the hearing was held. The Final Order of the Commissioner was issued effective September 22, 2008, reinstating the initial revocation.

Appellee filed a *Petition for Judicial Review* on or about September 11, 2008. On February 12, 2009, the circuit court entered both an *Order Granting Renew of Stay of Execution*, by which the revocation of Appellee's privilege to drive was stayed for 150 days, and the *Order* reversing the *Final Order*, from which the Division seeks appeal.

## II.

### STATEMENT OF THE FACTS

Appellee crashed his vehicle at 12:25 a.m. on February 19, 2008, on Roberts Ridge, Marshall County. Transcript of Administrative Hearing held on May 28, 2008, at the DMV Regional Office in Marshall County, Moundsville, West Virginia at 4<sup>3</sup> (hereinafter, "Tr. at 4"). Deputy Mobley of the Marshall County Sheriff's Department responded to the scene of the accident. He noticed that a car had skidded over the guardrail on the other side of the road. He made contact with Appellee, and asked him if he had been drinking. Appellee replied that he had been drinking coffee. *Id.*

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<sup>1</sup>Exhibit 2 of the administrative record (hereinafter, "Record Exhibit 2").

<sup>2</sup>Record Exhibit 3.

<sup>3</sup>Record Exhibit 17.

Deputy Mobley detected that Appellee had bloodshot and glassy eyes, slurred speech, and was unsteady walking to the roadside. Appellee admitted that “Sir I done drank too much.” Record Exhibit 2. Deputy Mobley performed a horizontal gaze nystagmus test on the Appellee, which Appellee failed. Tr. at 4; Record Exhibit 2. Appellee was placed under arrest at 12:57 a.m. on February 19, 2008. Record Exhibit 2. Due to the road conditions, Deputy Mobley transported Appellee back to the Marshall County Sheriff’s office, where the Appellee performed the one-leg stand test. Appellee failed that test. Tr. at 5; Record Exhibit 2.

Deputy Mobley then asked Appellee to submit to the breath test. Tr. at 5. The breath test is the designated secondary chemical test of the Marshall County Sheriff’s Department. Tr. at 2-3. Deputy Mobley was certified as a test administrator of the EC/IR Intoximeter II on June 10, 2004. Tr. at 2-3; Record Exhibit 2. Deputy Mobley submitted the printout showing the results of the EC/IR Intoximeter II to the Division along with the D.U.I. Information Sheet. Tr. at 3; Record Exhibit 2. Deputy Mobley read the Implied Consent Statement to Appellee and provided him with a copy thereof. Appellee signed the Implied Consent Statement. Record Exhibit 2. The test was administered at 1:30 a.m. on February 19, 2008. Record Exhibit 2.

Deputy Mobley observed the Appellee for 20 minutes prior to collection of the breath specimen to ensure that Appellee did not ingest any food, drink or other matter into his mouth. The Intoximeter printer was online and there were no errors indicated in the display. The instrument was turned on and the display read, “Press Enter to Start.” Deputy Mobley entered data as prompted by the machine. The Intoximeter displayed the instruction “Please Blow,” and Deputy Mobley placed an individual disposable mouthpiece into the breath tube. Appellee blew into the mouthpiece. A gas reference standard was run on the Intoximeter and the results indicated that the instrument was

working properly. The results of the reference standard were .08 and .08. When the display read, "Test Complete," Deputy Mobley waited for the printout. The printout ticket reflects that Appellee had a blood alcohol content of .218. Record Exhibit 2.

### III.

#### ASSIGNMENT OF ERROR

**THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER ON THE BASIS THAT THE TESTIMONY AT THE ADMINISTRATIVE HEARING DID NOT COMPORT WITH THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE FINAL ORDER.**

### IV.

#### POINTS AND AUTHORITIES

- A. If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner shall determine that a person was arrested for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section two of article five, and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person was arrested he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state.

W. Va. Code § 17C-5A-1(c).

- B. 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.

W. Va. Code § 17C-5A-2(d).

- C. Without a doubt, the Legislature enacted W. Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an

administrative hearing “[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself . . . .” W. Va. Code § 29A-5-2(b). Indeed, admission of the type of materials identified in the statute is mandatory, as evidenced by the use of the language “*shall* be offered and made a part of the record in the case . . . .” *Id.*

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

D. Moreover, as we noted in *Crouch*,

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.

*Lowe v. Cicchirillo*, 223 W. Va. 175, \_\_\_, 672 S.E.2d 311, 317 (2008).

E. [T]here are no provisions in either W. Va. Code, 17C-5-1, *et seq.*, or W. Va. Code, 17C-5A-1, *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol, controlled substances or drugs for purposes of making an administrative revocation of his or her driver's license.

*Coll v. Cline*, 202 W. Va. 599, 609, 505 S.E.2d 662, 672 (1998).

F. W. Va. Code § 17C-5A-1a(a) (1994) does not require that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person.

*Lowe v. Cicchirillo*, 223 W. Va. 175, \_\_\_, 672 S.E.2d 311, 318 (2008) citing Syl. pt. 3, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

## V.

### STANDARD OF REVIEW

This matter involves revocation of the Appellee's driver's license. This Court must apply the same standard of review that the circuit court applied to the Appellant's administrative decision, *i.e.*, giving deference to the Appellant's purely factual determinations and giving *de novo* review to legal determinations. *See Choma v. West Virginia Div. of Motor Vehicles*, 210 W. Va. 256, 258, 557 S.E.2d 310, 312 (2001). In Syllabus Point 2 of *Choma*, this Court held that: “‘On appeal of an administrative [decision] . . . findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.’ Syllabus Point 2 (in part), *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).” Likewise, “[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.” Syllabus Point 1, *Francis O. Day Co., Inc. v. Director, Div. of Environmental Protection of West Virginia Dept. of Commerce, Labor and Environmental Resources*, 191 W. Va. 134, 443 S.E.2d 602 (1994). Moreover, as this Court explained in *Modi v. West Virginia Bd. of Medicine*, 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995), “findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference. Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal.” (Citation omitted). *See also Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995) (explaining that “[w]e must uphold any of the [administrative agency's] factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts”). In addition, “[t]he “clearly

wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.’ Syllabus Point 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).” Syllabus Point 2, *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002). Thus, “[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner.” *Martin*, 195 W. Va. at 304, 465 S.E.2d at 406.

## VI.

### ARGUMENT

#### **THE EVIDENCE OF THE APPELLEE’S DRIVING, HIS CONDITION, THE RESULTS OF THE HORIZONTAL GAZE NYSTAGMUS AND ONE-LEG STAND TESTS, AND THE RESULTS OF THE INTOXIMETER TEST, WHICH WAS CONTAINED IN THE DIVISION’S FILE, WAS PROPERLY RELIED UPON BY THE COMMISSIONER.**

The crux of this matter is that the D.U.I. Information Sheet, Implied Consent Statement, and the Intoximeter printout (Record Exhibit 2) were properly admitted into evidence at the hearing, and relied upon by the Commissioner in the Final Order. The circuit court erred in finding that the only permissible evidence is the testimony of the arresting officer. This flies in the face of the Administrative Procedures Act as interpreted by *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) and *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008). In *Crouch*, this Court found:

Without a doubt, the Legislature enacted W.Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an administrative hearing “[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself . . . .” W. Va. Code §

29A-5-2(b). Indeed, admission of the type of materials identified in the statute is mandatory, as evidenced by the use of the language “*shall* be offered and made a part of the record in the case . . . .” *Id.*

219 W. Va. 76, 631 S.E.2d 634. In *Lowe*, the Court relied upon *Crouch* to find that the DMV Commissioner properly admitted and relied on unchallenged blood test results:

In this case, the circuit court did not discuss *Crouch* in its order reversing the DMV. Nonetheless, *Crouch* also explained that,

Although W. Va. Code § 29A-5-2(a) has made the rules of evidence applicable to DMV proceedings generally, W. Va. Code § 29A-5-2(b) has carved out an exception to that general rule in order to permit the admission of certain types of evidence in administrative hearings that may or may not be admissible under the Rules of Evidence. Moreover, inasmuch as we view W. Va. Code § 29A-5-2(a) as a statute pertaining to the application of the Rules of Evidence to administrative proceedings generally, while W. Va. Code § 29A-5-2(b) specifically addresses the admission of particular types of evidence, W. Va. Code § 29A-5-2(b) would be the governing provision.

Moreover, as we noted in *Crouch*,

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.

219 W. Va. at 76, n.12, 631 S.E.2d at 634, n.12. As such, with regard to the case at hand, there was no evidence offered by the appellee to undermine the authenticity of the blood test results once they were admitted during the administrative hearing. To the extent that the appellee failed to rebut the accuracy of the blood test results in any way, the DMV properly gave them weight. In further support of the DMV's reliance on the blood test results, *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 36, 454 S.E.2d 77, 81 (1994), provided:

The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C-5-4, and the hospital records evidencing the blood results are not subject to exclusion based upon any regulatory scheme for the handling of hospital records. We conclude that medical records containing the results of blood alcohol tests ordered by medical personnel for diagnostic purposes are subject to subpoena and shall not be deemed inadmissible by virtue of the provisions of West Virginia Code § 57-5-4d.

In consideration of all of the above, the DMV was required to admit the blood test results into the record at the administrative hearing pursuant to W.Va.Code § 29A-5-2(b). Without any challenge to their accuracy, the DMV properly considered the test results, along with the testimony by Deputy Fleming regarding the smell of an alcoholic beverage on the appellee, his observations that he had bloodshot and glassy eyes, slurred speech, and the fact that he was unsteady on his feet, in its decision to revoke the appellee's driver's license. Thus, it is clear to us that even without the blood test results, there remained a preponderance of the evidence to uphold the revocation of the appellee's license.

223 W. Va. \_\_\_, 672 S.E.2d 316-317.

In the present case, the Intoximeter result was a document “in the possession of the agency, of which it desires to avail itself . . . .” W. Va. Code § 29A-5-2. It was authenticated and admitted at the administrative hearing. Tr. at 2. Further, Appellee presented no evidence to challenge the results. The Commissioner properly gave the results weight as evidence in the Final Order.

The circuit court committed further error in finding that because the Appellee had timely challenged the Intoximeter results prior to the administrative hearing, the results could not be “automatically admitted.” Order at 2. This is as close as the circuit court comes to admitting that its

Order is based on the premise that the Commissioner cannot rely on evidence in the Commissioner's file. The circuit court's finding is a flawed interpretation of 91 C.S.R. 1 § 3.4, which provides simply that if a person fails to notify the Commissioner that he intends to challenge the results of the secondary chemical test, the results thereof will be admissible as though admissibility was stipulated. The circuit court's interpretation improperly twists this rule to find that if the results are timely challenged, the Commissioner cannot rely on the evidence in his file. This is simply not the case.

Even without the secondary chemical test results, there remains a preponderance of the evidence to uphold the revocation of Appellee's license. In Syllabus point 4 of *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998), this Court held, "There are no provisions in either W. Va. Code, 17C-5-1, *et seq.*, or W. Va. Code, 17C-5A-1, *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol, controlled substances or drugs for purposes of making an administrative revocation of his or her driver's license." Thus, even if the secondary chemical test results were improperly relied upon by the Commissioner, which they were not, that is not a valid basis for reversing the Final Order.

The circuit court propagated its flawed interpretation of the law in finding that the Commissioner improperly relied on the D.U.I. Information Sheet to make his findings of fact regarding administration of the horizontal gaze nystagmus and one-leg stand tests. Order at 2. Once again, the circuit court found that there was "no testimony or evidence presented by the arresting officer in order to support such findings . . . ." Order at 2. The Commissioner's findings in the Final Order are fully supported by the evidence contained in the D.U.I. Information Sheet. And, as with all of the other evidence adduced and relied upon by the Commissioner in this case, this evidence was uncontradicted by the Appellee.

Finally, the circuit court committed error in finding that there was no evidence that the Appellee was driving and no testimony “that [Deputy Mobley] observed any characteristics exhibited by the [Appellee] that would lead a reasonable person to believe the [Appellee] had been drinking.” Order at 2. It is apparent from the record that Deputy Mobley did not see the Appellee driving; the accident had already occurred by the time he was involved. However, there is no requirement that the officer see the person drive in order to show that he has committed the offense of DUI. When addressing similar facts in *Lowe, supra*, this Court, relying heavily on *Carte v. Cline*, found:

In reviewing the record below, we recognize that it is undisputed that neither officer saw the appellee driving a vehicle on the night in question. We believe that it is equally clear that a reasonable suspicion for investigation arose from the accident based upon the surrounding circumstances.

223 W. Va. \_\_\_, 672 S.E.2d 317.

It is not necessary that an arresting officer observe a driver operating a motor vehicle if the surrounding circumstances indicate that he was the driver of the vehicle. This Court has noted that it is not necessary

that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI . . . so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person.

Syl. pt. 3, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997). In *Carte*, the driver was found passed out behind the steering wheel of a car which was sitting in an access driveway to a shopping center. The car was at a stop light with the engine running. The transmission was in drive but the driver had his foot on the brake. *Carte*, 200 W. Va. at 163-64, 488 S.E.2d at 438-39. The police officer never saw the car move. Nonetheless, the circumstances satisfied the requirement that the

arresting officer establish by a preponderance of the evidence that the driver was operating a motor vehicle in this State while under the influence of alcohol. *Carte*, 200 W. Va. at 167, 488 S.E.2d at 442.

There is no dispute in this case that on the night of the accident, the Appellee was driving a vehicle after drinking. Deputy Mobley's testimony and the documents in Record Exhibit 2 demonstrate that Appellee was the driver and the owner of the vehicle which was crashed. Significantly, these facts were not contested at the administrative hearing.

In Syl. pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), this Court found:

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.

In the present case, the evidence shows that Appellee drove on the night of the accident, admitted that he drank alcohol, had bloodshot and glassy eyes, slurred speech, and was unsteady walking to the roadside. Appellee also failed the horizontal gaze nystagmus and one-leg stand tests. This evidence fully meets the requirements of *Albrecht, supra*. That evidence, in addition to the valid evidence that Appellee had a blood alcohol content of .218, provides more than a preponderance of the evidence to show that Appellee was DUI on the night in question. The Commissioner's Final Order was reversed in error.

VII.

**PRAYER FOR RELIEF**

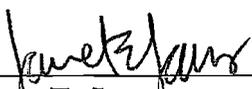
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant hereby prays that the *Order* entered by the Circuit Court of Marshall County on February 12, 2009, be reversed and vacated, and remanded with directions to affirm the *Revocation Order*.

Respectfully submitted,

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

By counsel,

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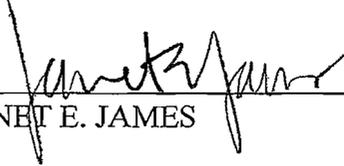
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DIVISION OF MOTOR VEHICLES,

Respondent Below/Appellant.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Brief of Appellant* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 8<sup>th</sup> day of October, 2009, addressed as follows:

J. Thomas Madden, Esquire  
903 Wheeling Avenue, Suite E  
Glen Dale, WV 26038

  
\_\_\_\_\_  
JANET E. JAMES