

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 35132

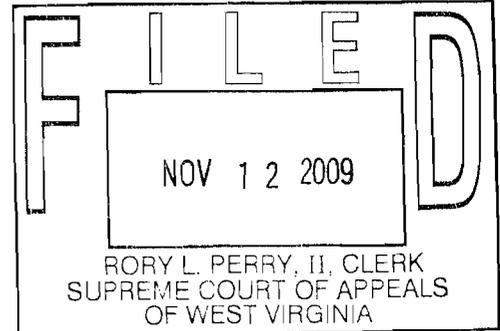
JAMES L. GROVES, III,

*Petitioner Below/Appellee,*

v.

JOSEPH CICCHIRILLO, COMMISSIONER  
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

*Respondent Below/Appellant.*



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BRIEF OF APPELLEE

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JAMES L. GROVES, III  
*by counsel,*

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BRIEF OF APPELLEE

*Comes now your Appellee, James L. Groves, III, by J. Thomas Madden, his counsel, who submits herein his brief in response to the brief of Appellant, heretofore filed.*

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

*Appellee agrees that Appellant seeks the reversal of an order entered on February 12, 2009, by Mark A. Karl, Judge of the Circuit Court of Marshall County ("Order") in the administrative appeal of James L. Groves v. Joseph Cicchirillo, Commissioner of the West Virginia Division of Motor Vehicles, Civil Action No. 08-CAP-9K and that Judge Karl's Order reversed the revocation order entered by then-Commissioner Cicchirillo, Appellant's predecessor, on September 22, 2008 ("DMV final order").*

A. THE ADMINISTRATIVE APPEAL

*The Appellee sought relief from the Appellant's DMV final order revoking the Appellee's driver's license for the offense of driving under the influence of alcohol. The Circuit Court of Marshall County reversed the DMV's final order by its order dated December 5, 2008.*

*The Appellant, in his brief, recites a number of the findings set forth by Judge Karl in his decision to reverse the DMV's final order. However, the Appellant does not cite the first substantive sentence of that order, from which the rest of the order springs. On page of his order, Judge Karl writes "that the findings of fact and conclusions of law set out in the respondent's (DMV's) final order do not comport with the testimony and evidence abduced at the petitioners' (Groves) final hearing."*

**B. THE ADMINISTRATIVE PROCEEDINGS**

*The Appellee concurs and agrees with the Appellant as to the chronology and result of the administrative proceedings as more particularly set forth on pages 2 and 3 of the Appellant's Brief.*

II

**STATEMENT OF THE FACTS**

*Often an innocuous portion of a brief, the statement of facts in the case before the Court is the crux of the case at bar. At the administrative license revocation hearing held on May 28, 2008, before the Appellant's hearing examiner, officer R. B. Mobley offered direct testimony in an effort to prove his case against the Appellee, Mr. Groves. The officer's testimony lasted between sixty and ninety seconds. The officer's testimony, in its entirety, as it appears on part of page 4 and 5 of the transcript of the administrative hearing (Record Exhibit 17) is as follows:*

*"I received a complaint of a vehicle that had crashed on Roberts Ridge. I actually drove by once. I didn't see it. The ambulance saw it before I did. I came back by. At that time I noticed that a vehicle had went over, that skidded over the guardrail on the other side. I got out and made contact with Mr. Groves. I asked him if he had been drinking. He said coffee is what he answered. I assumed that he might be drinking (inaudible) the accident. I performed the horizontal gaze nystagmus test on the scene right there. Due*

*to the weather conditions and the road way conditions and such, I went ahead and transported him back to Marshall County Sheriff's Office to finish the tests. I recall that I might have given him the nine step walk-and-turn test. I don't recall if I did or not due to the area. There's a line through it, so apparently I didn't. (Inaudible) at the office, I can't have someone walk there. I did however perform the one-legged stand test. Based on that I felt he failed this test and I had him submit to the EC/IR test. I gave him a citation and he was released. He was further processed, fingerprinted and photographed."*

*With no substantive testimony being given at the administrative hearing, the Appellant, in both his DMV final order and his recitation of the statement of facts in the Appellant's brief to this Court, relies almost entirely on the charging document filed by Deputy Mobley in the case, the DUI information sheet, sometimes referred to as the statement of arresting officer (Record Exhibit 2), in order to rule against the Appellee.*

*The Appellant, in his statement of facts, as he did in the DMV's final order, rehabilitates the arresting officer's threadbare presentation by reciting language contained in the charging document, the DUI information sheet (Record Exhibit 2) as if it were adduced from testimony.*

*The Appellant, in his statement of facts, as he did in his final order, finds that the officer "detected that the Appellee had bloodshot and glassy eyes, slurred speech and was unsteady walking to the roadside". That he admitted "Sir, I done drank too much". That the Appellee failed the horizontal gaze nystagmus test. That the Appellee was placed under arrest at 12:57 a.m. on February 19, 2008. That the arresting officer read the implied consent statement to the Appellee and gave him a copy. That the Appellee signed the implied consent statement. That an intoximeter test was administered at 1:30 a.m. on February 19, 2008. The Appellant then goes into great detail as to the facts necessary for*

*the admission of the Intoxilyzer results into evidence, such as a 20 minute observation of the Appellee, the use of an individual disposable mouth piece, and all of the other foundational prerequisites for the admission of this test.*

*Similarly, the Appellant cites, as a statement of fact, that the Appellee was driving a motor vehicle and crashed it. This is, of course, an essential element of the case against Mr. Groves. Nowhere in the officer's testimony does he state or even suggest that Mr. Groves was driving, nor does he prove that Mr. Groves was driving through the use of circumstantial or other nondirect evidence, such as an admission by Mr. Groves that he was driving, testimony that Mr. Groves was behind the wheel of the vehicle or that there were no other individuals in the area that might have been in the vehicle with Mr. Groves, or any other such nondirect evidence that would tend to prove that Mr. Groves was driving. Likewise, the statement of arresting officer merely recites that Mr. Groves was the driver of the vehicle with nothing more. It is that conclusory statement in the charging document that the Appellant relies upon to make a finding that the Appellee was driving a motor vehicle.*

*The officer did not offer any testimony as to any of these events, the Appellant, through his trier of fact, the hearing examiner, has apparently perused the charging document filed by the officer (the DUI Information Sheet, Record Exhibit 2) and crafted findings of fact that help support the officer's case, after the Appellee's hearing had concluded.*

*In short, there is no sworn testimony to support the findings made by the Appellant, no testimony to corroborate the findings of fact that the Appellant has culled from the charging document.*

III

APPELLANT'S ASSIGNMENT OF ERROR

The Appellant contends that the Circuit Court erred in reversing the final order of the Division of Motor Vehicles. The Appellee asserts that not only did the Circuit Court have the authority to reverse the Appellant's final order, but had the Circuit Court upheld the DMV final order, it would have shifted the burden of proof from the officer to the respondent driver by virtue of the officer's mere filing of his charging document, i.e. the statement of arresting officer.

IV.

POINTS AND AUTHORITIES

	<u>PAGE</u>
<u>Cunningham vs. Bechthold</u> , 186 W.Va. 474, 413 S.E.2d 129 (1991)	6
<u>Johnson vs. State Department of Motor Vehicles</u> , 173 W.Va. 565, 318 S.E.2d 616 (1984);	6
<u>Jordon vs. Roberts</u> 161 W.Va. 750, 246 S.E.2d 259 (1978)	7
<u>Lowe vs. Chicchirillo</u> 223 W.Va.175, 672 S.E.2d 311 (2008)	8
<u>Ours vs. West Virginia Department of Motor Vehicles</u> 173 W.Va. 376, 315 S.E.2d 634 (1984)	8
<u>State of West Virginia, ex rel. Harry Ellis vs. Hubert A. Kelly, et al.</u> 145 W.Va. 70, 112 S.E.2d 641 (1960)	7
<u>Shepherdstown VFD vs. West Virginia HRC</u> 172 W.Va. 627, 309 S.E.2d 342 (1983)	6
Code of State Rules; 91 C.S.R. §3.4.2	9
West Virginia Code§ 17C-5-2	9
West Virginia Code §29A-5-2	8

V.

STANDARD OF REVIEW

*The Circuit Court, when issuing its Order dated December 5, 2008 and entered February 12, 2009, recognized therein the burden that the Appellee had to overcome and the standard that the Circuit Court was required to apply when the Court wrote: "Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4 (g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because 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 and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion" Syllabus Point 2, Shepherdstown Volunteer Fire Dept. vs. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983); Syllabus Point 1, Johnson vs. State Department of Motor Vehicles, 173 W.Va. 565, 318 S.E.2d 616 (1984); and Syllabus Point 2, Cunningham vs. Bechthold, 186 W.Va. 474, 413 S.E.2d 129 (1991).*

VI.

ARGUMENT

*The Appellant is attempting to revoke the Appellee's driver's license. A driver's license is a property interest that requires due process be given before it can be taken or suspended by the State. See Jordon vs. Roberts 161 W.Va. 750, 246 S.E.2d 259 (1978). Due process extends to an administrative hearing. State of West Virginia, ex rel. Harry Ellis vs. Hubert A. Kelly, et al. 145 W.Va. 70, 112 S.E.2d 641 (1960), states that ". . . . due process requires that a trial or hearing must be fair, unbiased and by an impartial tribunal, whether the tribunal be administrative or judicial . . . ." Ellis at page 644.*

*The question was then put before the Circuit Court: was it fair, unbiased and impartial for a hearing examiner, as a trier of fact, to receive an officer's threadbare testimony that made no mention of alcohol, save the officer's assumption that the Appellee might have been drinking, no testimony to indicate or suggest that the Appellee had been driving, no testimony that the Appellee was ever arrested, no testimony to show that an intoximeter test had been given and then, after the hearing, to peruse the charging document filed by the officer and craft findings of fact and conclusions of law to uphold the officer's case?*

*Surely, the officer's testimony taken fully and completely offers next to nothing. One would be hard-pressed to say that the officer's testimony in his case-in-chief proves any of the essential elements of his case. His testimony doe not prove that the Appellee was either drinking or driving. There is no testimony that the officer arrested Mr. Groves, as was an essential element at the time of Mr. Groves' arrest on February 19, 2008.*

*With the officer giving no testimony whatsoever concerning any of the essential elements of the case, the Appellant relies upon the charging document itself (the statement of arresting officer) in order to uphold the suspension of the Appellee's driver's license. In the case of Ours vs. West Virginia Department of Motor Vehicles 173 W.Va. 376, 315 S.E.2d 634 (1984) this issue was discussed. This Court in Ours held that while reports and similar documents are admissible under West Virginia Code §29A-5-2, that such reports cannot be the only basis for a ruling against a respondent. In Ours, Chief Justice McHugh wrote for the Court at page 639, "We, therefore, hold that reports prepared by a police officer investigating an automobile accident and reports prepared by persons not involved in such accident may not be the sole evidence upon which the Commissioner of the Department [now Division] of Motor Vehicles bases a determination after a suspension hearing conducted pursuant to West Virginia Code §17D-3-15 (1972), that there is a 'reasonable possibility of judgment' against a driver or owner of a vehicle involved in the accident and from whom security for that accident had been required under the provision of Chapter 17D, Article 3 of the West Virginia Code." While this case involved the issue of mandatory insurance, or financial responsibility, the principal is precisely the same.*

*Appellant relies, in part on Lowe vs. Chicchirillo 223 W.Va.175, 672 S.E.2d 311 (2008), wherein some findings were taken from the statement of arresting officer. Lowe is distinguishable. In Lowe, the arresting officer offered testimonial evidence, including testimony that he had obtained a confession by the respondent driver that he was driving a motor vehicle; a critical issue in the case. In the case at bar, we are presented with no such testimony, only the Appellant crafting findings of fact and conclusions of law based only upon the charging document filed by the officer.*

*In addition, the Circuit Court of Marshall County was correct in ruling that the intoximeter test results, having been properly challenged by the Appellee, are not admitted as if by stipulation, but the officer is put to his proof. The Appellant's own legislative rules state at 91 C.S.R. 1 §3.4.2 that if a driver does not challenge the results of the secondary chemical test, in compliance with subsection 3.4.1 of the same rule, that "the results of the test, if any, will be admissible as though the person and the Commissioner had stipulated the admissibility."*

*Surely, a proper challenge to the results of the intoximeter test prevents the admission of the results as if stipulated. Inasmuch as the officer presented no evidence concerning the intoximeter test, the results of that test should not be admitted into evidence against the Appellee. The Appellee, by properly challenging the results of the intoximeter test, prevented the admission of the results into evidence as if stipulated. If properly challenging the results of the intoximeter test prevents the admission of those results only until the beginning of the administrative hearing when the Appellant's hearing examiner accepts those results into evidence prior to the taking of testimony, then §§3.4.1 and 3.4.2 are meaningless rules.*

*The Circuit Court proper recognized that the standard of proof in order for the Appellant to revoke the Appellee's driver's license is "the preponderance of the evidence". West Virginia Code §17C-5-2 is replete with that directive. The Court was also correct in holding that the Appellant's final DMV order must comport in some wise with the testimony and evidence adduced at the administrative hearing. With no substantive testimony at the administrative hearing, the Appellant constructed a final DMV order suspending the Appellee's driver's license from the document used by the officer to initiate the revocation*

proceeding against the Appellee. The Circuit Court recognized this improper shifting of the burden of proof by reversing the Appellant's final DMV order.

VII

PRAYER

For the reasons stating above and for all others as they may so appear, the Appellee prays that this Court affirm the aforesaid Order of the Circuit Court of Marshall County of February 12, 2009.

Respectfully Submitted,  
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