

Joyce  
Reversed

35132 283617 B  
E646004

FILED

Madden/Kan

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

2009 FEB 12 PM 4:14

JAMES L. GROVES, III,

Petitioner,

DAVID R. EALY

vs.

Civil Action No. 08-CAP-9K

JOSEPH CICCHIRILLO, COMMISSIONER  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Respondent.

DAVID R. EALY

2009 JUN 12 PM 2:24

Deleted  
Access

ORDER

to  
Tracking

This 5<sup>th</sup> day of December, 2008, came the petitioner, James L. Groves, III, by J. Thomas Madden, his attorney, and as well came Joseph Cicchirillo, Commissioner of the West Virginia Division of Motor Vehicles, by Jeffery D. Cramer, Esq., Prosecuting Attorney for Marshall County, West Virginia, his attorney, the matter having been set for final argument upon the petition for judicial review heretofore filed by petitioner James L. Groves, III.

WHEREUPON, the Court upon hearing the argument of counsel and the review of the record therein the Court does find,

That the findings of fact and conclusion of law set out in the respondent's final order do not comport with the testimony and evidence adduced at the petitioner's final hearing. The arresting officer offered no testimony concerning the intoximeter test, apart from the fact that the petitioner had taken the test. The officer did not lay a foundation to prove that the intoximeter test was admissible. The officer did not testify that the respondent 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

respondent had even failed the test. The petitioner timely challenged the results of the intoximeter test, thereby preventing the automatic admission of the results into evidence. In the respondent's final order, findings of fact numbered 13 through 22, inclusive, detail findings that outline the process of the administration of the intoximeter test, but do not comport with the testimony given by the arresting officer. The secondary chemical test, in this case the intoximeter test, was not administered in accordance with Title 64, Code of State Rules, Series 10.

The arresting officer testified that he performed the horizontal gaze nystagmus test upon the petitioner, but gave no testimony concerning how the petitioner performed, nor whether he passed or failed that test. The respondent's findings of fact number 7 and 8 describe in detail the arresting officer's administration of the horizontal gaze nystagmus test and one leg stand test, with no testimony or evidence presented by the arresting officer in order to support such findings; while paragraphs 3 through 5, inclusive, in the respondent's findings of fact, describe matters that the arresting officer did not discuss at all in his testimony.

The arresting officer did not testify that he observed any characteristics exhibited by the petitioner that would lead a reasonable person to believe the petitioner had been drinking. The arresting officer only stated that he assumed that the defendant might be drinking. The arresting officer did not testify that he observed the petitioner drive a motor vehicle that evening. Neither did the arresting officer testify using circumstantial evidence to prove that the petitioner was operating a motor vehicle. Nevertheless, the respondent in paragraph two of his findings of fact, makes the specific finding that Mr. Groves was driving a motor vehicle, despite no testimony to support this element of the offense.

"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; (2) 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).

The issue the Commissioner was asked to resolve was whether the petitioner operated a motor vehicle under the influence of alcohol. The standard pursuant to West Virginia Code §17C-5-2(d) is the preponderance of the evidence. The "preponderance of the evidence" means the evidence that has the greater weight and is the most convincing. It is sometimes referred to as sufficient evidence of such quality as to prevail.

This Court finds that after a review of the record, including, but not limited to the transcript of the final administrative hearing and the arresting officer's testimony, that the arresting officer did not provide sufficient evidence to prove by a preponderance of that the petitioner drove a motor vehicle while under the influence of alcohol.

Accordingly, it is hereby ADJUDGED and ORDERED that the relief prayed for is GRANTED.

It is further ORDERED that the Commissioner's Order is REVERSED.

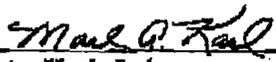
It is further ORDERED that the Petitioner's driver's license and privilege to operate a motor vehicle are fully restored.

To all rulings of this Court adverse to either party, their objection is noted and exception is saved.

The Clerk is directed to transmit attested copies of this Order to the Petitioner's counsel, the Respondent, and the Office of the Prosecuting Attorney of Marshall County, West Virginia.

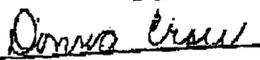
There being nothing further, this matter is ORDERED to be dropped from the docket of this Court.

ENTER:

  
\_\_\_\_\_  
Mark A. Karl, Judge

A Copy Teste:

David R. Ealy, Clerk

By  Deputy