

11-0171

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOE J. WHITE, JR.,

Petitioner,

v.

CIVIL ACTION NO. 09-AA-59  
JUDGE ZAKAIB

JOE MILLER, Commissioner,  
West Virginia Department of  
Motor Vehicles,

Respondent.

**FINAL ORDER**

Petitioner herein challenges the revocation by the Respondent of his privilege to drive, following its issuance of a Final Order, effective May 11, 2009. Upon review of the record in this matter, the pleadings filed herein, and the applicable law, the Court is of the opinion to deny the Petitioner's request for relief, and finds and concludes as follows:

**FINDINGS OF FACT**

1. On July 6, 2007, Sergeant Shawn Williams of the Charleston Police Department established a sobriety checkpoint in the 900 block of MacCorkle Avenue, Charleston, Kanawha County, West Virginia, due to a high volume of traffic, DUI arrests and accidents.

2. Sgt. Williams advised the media via a mass e-mail of the checkpoint, including the televised media and the radio stations throughout the Kanawha, Boone, Logan and Clay County areas.

3. Street lights in the area provided adequate lighting, along with a DUI trailer that provided lighting, cones and barricades, and signs that were needed to make the checkpoint visible to the public. There was ample parking for police cars and any vehicle that was asked to pull over. Approximately seventeen or eighteen officers were working the checkpoint. The checkpoint was

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well marked with patrol vehicles with their lights on. All officers were provided an operational plan and were briefed as to which specific vehicles would be stopped. The alternative route was assigned as the 1500 block of Kanawha Boulevard, East, for people who chose not to travel through the checkpoint. Every vehicle was stopped and if it was suspected that the driver had been drinking, then the driver was asked to pull over and step out of the vehicle.

4. Officer Brian Lightner of the Charleston Police Department was working the DUI checkpoint on July 6, 2007, at the 900 block of MacCorkle Avenue. Ofc. Lightner stopped Petitioner's vehicle and while speaking to Petitioner, Ofc. Lightner noticed an odor of an alcoholic beverage coming from Petitioner and that Petitioner had glassy eyes. Ofc. Lightner asked Petitioner if he been drinking and Petitioner stated that he had drank "four beers earlier." Tr. at 26. Ofc. Lightner had Petitioner to pull over to the side of the road into the safety zone that was set up at the checkpoint. Petitioner was unsteady exiting his vehicle. Ofc. Lightner observed two cans of Bud Light beer sitting in the driver's seat.

5. Petitioner then failed three field sobriety tests. Ofc. Lightner explained the horizontal gaze nystagmus test, the walk-and-turn test and the one-leg stand test to Petitioner. On the horizontal gaze nystagmus test, Petitioner's eyes lacked smooth pursuit, had onset of nystagmus prior to a forty-five-degree angle, and had distinct nystagmus at maximum deviation. After Ofc. Lightner explained and demonstrated the walk-and-turn test, Petitioner started the test too soon, did not touch heel-to-toe, stepped off the line, raised his arms to balance himself, and took an incorrect number of steps. Ofc. Lightner then explained and demonstrated the one-leg stand test to Petitioner. Petitioner swayed while balancing, used his arms to balance and put his foot down prior to Ofc. Lightner telling him to stop.

6. Petitioner was placed under arrest at 8:35 p.m. on July 6, 2007.

### CONCLUSIONS OF LAW

1. A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act. W. Va. Code § 29A-5-4. Under the pertinent provisions of said Act, the reviewing court lacks authority to reverse or vacate the Commissioner's Final Order on the grounds of insufficient evidence unless the substantial rights of Petitioner were prejudiced because the Final Order was "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record." W. Va. Code § 29A-5-4(g)(5).

2. The West Virginia Supreme Court has stated that, in administrative appeals, "a reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts." *Donahue v. Cline*, 190 W. Va. 98, 102, 437 S.E.2d 262,266 (1993).

3. The Charleston Police Department followed all procedures in conducting the checkpoint on July 6, 2007, at 900 MacCorkle Avenue. The Final Order was correct in finding that the sobriety checkpoint was properly established and conducted with the predetermined guidelines.

4. In case law to date, revocations have been upheld on officers' testimony regarding the results of field sobriety tests, as a purely factual matter. *Cunningham v. Bechtold*, 186 W. Va. 474, 413 S.E.2d 129 (1991) (per curiam); *Hill v. Cline*, 193 W. Va. 436, 457 S.E.2d 113 (1995); *Hinerman v. West Virginia Dept. of Motor Vehicles*, 189 W. Va. 353, 431 S.E.2d 692 (1993) (per

curiam); *Simon v. West Virginia Dept. of Motor Vehicles*, 181 W. Va. 267, 382 S.E.2d 320 (1989); *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

5. The West Virginia Supreme Court has approved the admission of testimony from a police officer "regarding the results of the HGN test as a field sobriety test." *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996). The results can be used as an indication of intoxication as long as the officer does not attempt to testify to a specific blood alcohol level on the basis of the nystagmus test. Further, the officer could not give "the HGN test any greater value than any of the other field sobriety tests." *Id.*

6. The record also reflects that there was probable cause to arrest the Petitioner for DUI. "Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence." Syl. pt., *Simon v. West Virginia Dept. of Motor Vehicles*, 181 W. Va. 267, 382 S.E.2d 320 (1989).

7. There was sufficient evidence presented at the hearing to sustain revocation of the Petitioner's license. In West Virginia, if the record shows that if there is a preponderance of the evidence, based upon the totality of the circumstances, and with or without results of a secondary chemical test (*see Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998)) to show that a person has driven a motor vehicle in this state while under the influence of alcohol, the Commissioner must revoke his license. W. Va. Code § 17-5A-1. "A preponderance of the evidence is all that is required to justify administrative revocation." *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984).

8. The testimony of Ofc. Lightner established that Petitioner admitted drinking, had the odor of alcohol of his breath, had glassy eyes, was unsteady exiting his vehicle, and failed three field sobriety tests. Petitioner's conduct clearly fell within the *Albrecht* criteria.

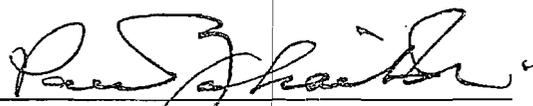
9. There is no error in the *Final Order* of the Commissioner.

**WHEREFORE**, the Court does hereby **ORDER** that the *Final Order* of the Commissioner effective May 11, 2009, affirming the initial revocation of Petitioner's privilege to drive, is hereby **AFFIRMED**. It is further **ORDERED** that the above-styled action is **DISMISSED** and **STRICKEN** from the docket of this Court.

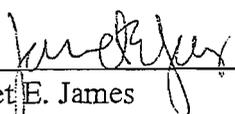
Further, the Clerk of this Court is hereby **DIRECTED** to transmit certified copies of this Order to Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles, at his address at the West Virginia Division of Motor Vehicles, Capitol Complex, Building 3, Charleston, West Virginia 25317, and to all counsel of record.

The objections and exceptions of the Petitioner to this ruling are hereby noted and preserved.

ENTERED this 10<sup>th</sup> day of Dec 2009.

  
PAUL ZAKAIB, JUDGE

Prepared by:

  
Janet E. James  
Assistant Attorney General  
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(304) 558-2522

CLERK OF COURT OF SAID COUNTY  
DECEMBER 15<sup>th</sup> 2009  
Cathy S. Sutton TR

12-13-10  
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CERTIFICATE OF SERVICE

I, Carter Zerbe, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing MOTION TO FILE NOTICE OF APPEAL OUT OF TIME and NOTICE OF APPEAL by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Joe Miller, Commissioner  
West Virginia Division of Motor Vehicles  
P. O. Box 17300  
Charleston, WV 25317

Janet James, Asst. Attorney General  
DMV - Office of the Attorney General  
P. O. Box 17200  
Charleston, WV 25317

on this 25th day of January 2011.

  
Carter Zerbe

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9<sup>th</sup> of November 2011, the following order was made and entered:

Dr. Joe J. White, Jr., Petitioner Below,  
Petitioner

vs.) No. 11-0171

Joe E. Miller, Commissioner, West Virginia  
Division of Motor Vehicles, Respondent Below,  
Respondent

On a former day, to-wit, March 24, 2011, came the petitioner, Dr. Joe J. White, Jr., by Carter Zerbe and David Pence, his attorneys, and perfected his appeal from a judgement of the Circuit Court of Kanawha County (No. 09-AA-59), rendered on December 13, 2010, with the filing of his petitioner's brief and appendix.

Thereafter, on May 31, 2011, came the respondent, Joe Miller, Commissioner, by Janet E. James, Senior Assistant Attorney General, and presented to the Court his respondent's brief.

Finally, on June 21, 2011, came the petitioner, by counsel, and presented to the Court his reply brief.

Upon consideration, the Court is of the opinion that this matter be scheduled for oral argument under Rule 20 of the Revised Rules of Appellate Procedure. The Clerk will, at a later date, furnish the parties and counsel of record with a Notice of Argument pursuant to Revised Rule 20(b), which will contain additional information regarding the time for argument.

It is further ordered that supplemental briefing is needed in this matter addressing the following: (1) West Virginia's adoption of the National Highway Transportation Safety Administration's (NHTSA) standards for field sobriety tests; (2) discussion of any peer-reviewed articles regarding the foundation, administration, and *Daubert* considerations of the horizontal gaze nystagmus test; and (3) discussion of cases from other states on issues regarding the admissibility of the horizontal gaze nystagmus test.

It is therefore ordered that the petitioner file an original and ten copies of a supplemental brief within thirty days of receipt of this order; the respondent to file a like number of briefs within thirty days of receipt of the petitioner's brief. Any reply brief deemed necessary may be filed within fifteen days of receipt of respondent's brief.

Justice Benjamin disqualified.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court

