

15-1147

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 3

BENJAMIN C. MCGRATH,

Petitioner,

v.

Case No. 14-AA-1

Chief Judge Phillip D. Gaujot

**STEVEN O. DALE, ACTING COMMISSIONER
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,**

Respondent.

ORDER REVERSING ADMINISTRATIVE DECISION

On October 6, 2015, the parties appeared before the Court on Benjamin C. McGrath's *Petition for Judicial Review of Final Order*. Mr. McGrath ("Petitioner") appeared by counsel, Raymond H. Yackel; the Respondent, Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles ("WVDMV"), appeared by counsel, Janet E. James. In the present matter, Petitioner seeks reversal of the Office of Administrative Hearings' ("OAH") *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* ("Final Order") revoking his license to drive a motor vehicle. After a thorough review of the record and contemplative consideration of the parties' oral arguments, the Court finds that the OAH was clearly wrong when revoking Petitioner's license. For the reasons detailed below, the Court hereby **REVERSES** the OAH's Final Order.

FINDINGS OF FACT

1. On September 23, 2010, Deputy D.G. Logie ("Dep. Logie") of the Monongalia County Sheriff's Office was dispatched on a domestic dispute call to 980 Maple Drive in Morgantown, West Virginia. *OAH Hearing Transcript*, 9:17-20.
2. Dep. Logie mistakenly arrived at 984 Maple Drive.

3. Upon arrival at 984 Maple Drive, Dep. Logie encountered Petitioner and engaged him in conversation. *Id.* 11:4-13.

4. Dep. Logie testified that Petitioner appeared intoxicated, smelled of alcohol, and had bloodshot eyes. *Id.*

5. Dep. Logie testified that, during their conversation, Petitioner stated he and his girlfriend were in a verbal altercation and that Petitioner attempted to leave the home after the altercation. *Id.* 11:14-21.

6. Dep. Logie testified that, during their conversation, Petitioner stated that he operated a motor vehicle when attempting to leave the premises. *Id.* 12:19-21.

7. Petitioner testified that he told Dep. Logie that he backed his truck up four (4) or five (5) feet in order to collect tools and nails he accidentally spilled underneath it. *Id.* 49:10-15.

8. Witness Jacob Madison testified that all Petitioner did was "back up in his own parking space." *Id.* 41:1-2.

9. Dep. Logie testified that Petitioner failed the horizontal gaze nystagmus, the walk and turn, and the one leg stand tests. *Id.* 12;13;14.

10. Dep. Logie testified that a breathalyzer test was administered three times, but Petitioner was ultimately unable to provide a sufficient sample. *Id.* 14:8-17.

11. Dep. Logie arrested Petitioner for driving under the influence and transported him to the Monongalia County Sheriff's Office. *Id.* 14:14-17.

12. By Order dated November 8, 2010, Mr. McGrath was notified that his driver's license was revoked.

13. Mr. McGrath requested a hearing from the OAH, which was held on June 8, 2011.

14. On June 9, 2013, following a hearing, the Magistrate Court granted Mr. McGrath's Motion to Dismiss the criminal complaint against him on the grounds that Dep. Logie did not have reasonable suspicion.

15. On February 5, 2014, the West Virginia Office of Administrative Hearings ("OAH") entered a Final Order revoking Petitioner's license to drive a motor vehicle.

16. On February 18, 2014, Petitioner, by counsel, Raymond H. Yackel, filed: (1) a *Petition for Judicial Review* of the Final Order suspending his driver's license; (2) a *Motion for Stay* of the Final Order; and (3) a *Notice of Hearing for Automatic Stay*.

17. By Order dated February 21, 2014, the Court granted Petitioner a stay of the Final Order, reinstating Petitioner's driving privileges indefinitely.

18. On February 27, 2014, Respondent Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by counsel, Janet E. James, filed *Motions to Dismiss Petition for Judicial Review and to Vacate Ex Parte Order* wherein Respondent sought to vacate the Order of stay.

19. By Order dated June 10, 2014, the Circuit Court limited the stay of the Final Order to a period not to exceed one hundred fifty (150) days.

20. On April 15, 2015, Petitioner filed *Petitioner's Memorandum of Law* in support of his Petition for Judicial Review.

21. On May 13, 2015, *Respondent's Brief* on the matter was filed.

STANDARD OF REVIEW

1. 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. Syl. Pt. 2, *Shepherdstown*

Volunteer Fire Dep't v. West Virginia Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983).

2. 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, decisions 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.' Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

3. The '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. Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)."

4. Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong. Syl. Pt. 1, *Francis O. Day Co. Inc. v. Dir., Div. Env'tl. Prot. Of W. Va.*, 191 W. Va. 134, 443 S.E.2d 602 (1994).

CONCLUSIONS OF LAW

1. "In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol . . . the Office of Administrative Hearings shall make specific findings as to . . . whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully

taken into custody for the purpose of administering a secondary test.” W. Va. Code § 17C-5A-2(f) (2010).

2. “Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 1, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).

3. “When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.” Syl. Pt. 2, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).

4. “[A]n individual cannot be considered lawfully arrested for DUI where law enforcement did not have the requisite articulable reasonable suspicion to initiate the underlying traffic stop.” Syl. Pt. 3, *Dale v. Ciccone*, 233 W.Va. 652, 659, 760 S.E.2d 466, 473 (2014).

5. Under W. Va. Code § 17C-5A-2(f), evidence of driving while intoxicated obtained incident to an unlawful arrest resulting from an unlawful stop should not be considered by the OAH or the circuit court in appeals involving driver’s license revocations.

OPINION

- I. **Because Dep. Logie did not have reasonable suspicion to believe the Petitioner had been driving a motor vehicle while under the influence of alcohol, Petitioner was unlawfully stopped for violating W. Va. Code § 17C-5A-2. Therefore, the OAH erred when considering evidence obtained as a result of the unlawful stop, and was clearly wrong when revoking Petitioner's license.**

Pursuant to W. Va. Code § 17C-5A-2(f)¹, in administrative proceedings where an individual is accused of driving under the influence of alcohol, the OAH is required to make specific findings as to whether the arrest itself was lawful:

(f) In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol . . . *the Office of Administrative Hearings shall make specific findings as to: (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol . . . ; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol[.]*

Id. (emphasis added); *see, e.g., Dale v. Barnhouse*, No. 14-0056, 2014 WL 6607493, at 3 (W. Va. Nov. 21, 2014) (unreported decision where the Supreme Court of Appeals addressed, first and foremost, whether an alleged DUI offender was lawfully placed under arrest); *see also, Dale v. Haynes*, No. 13-1327, 2014 WL 6676546 (W. Va. Nov. 21, 2014) (unreported decision holding that “[where] the investigating officer did not see respondent driving her car . . . the finding required by W. Va. Code § 17C-5A-2(f), “whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol,” could [] not be made.”). In order for an arrest to be considered lawful, the underlying investigatory stop must be valid. *See Dale v. Odum*, 233 W.Va. 601, 760 S.E.2d 415 (2014) (“[A]bsent a valid investigatory stop,

¹ The alterations to this statute over the prior decade have created some degree of confusion surrounding the requirement of lawful arrest in context of DUI. The 2004 version included the lawful arrest requirement; the 2008 version omitted the lawful arrest requirement; and the 2010 version restored the lawful arrest requirement. Our State's highest authority has mandated that “the decision to include [a lawful arrest requirement] is within the prerogative of the Legislature, and it is not to be invaded by [the courts].” *Dale v. Arthur*, 2014 WL 1272550 (W. Va. March 28, 2014)(memorandum decision). Therefore, this Court will apply the 2010 version of the statute and all prior cases in which the applicable version of [this statute] included the requirement for a lawful stop/arrest.

a finding that the ensuing arrest was lawful cannot be made.”); *see also Dale v. Ciccone*, 233 W.Va. at 659, 760 S.E.2d at 473. An investigatory stop is valid if the police officer had an “articulable reasonable suspicion that . . . a person in the vehicle has committed, is committing, or is about to commit a crime[.]” Syl. Pt. 1, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994); *accord*, Syl. Pt. 3, *Dale v. Ciccone*, 233 W.Va. 652, 760 S.E.2d 466 (2014); *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, “*an individual cannot be considered lawfully arrested for DUI where law enforcement did not have the requisite articulable reasonable suspicion to initiate the underlying traffic stop.*” *Ciccone*, 233 W.Va. at 659, 760 S.E.2d at 473 (emphasis added). In order to properly evaluate the Final Order of the OAH, this Court must first examine whether Dep. Logie had the requisite reasonable articulable suspicion to stop and investigate Petitioner.

A. Requirement of Reasonable Articulable Suspicion.

When analyzing whether or not the particular facts establish a reasonable articulable suspicion, “one must examine the totality of the circumstances, [including] both the quantity and quality of the information known by the police.” *Id.* at Syl. Pt. 4, 760 S.E.2d 466; *accord*, *Stuart*, 192 W.Va. at 428, 452 S.E.2d at 886, Syl. Pt. 2. In particular, when an officer’s investigatory stop is based solely on an informant’s tip, the tip must be sufficiently specific, detailed, and reliable to justify a reasonable and articulable suspicion. *Id.* at 474, 660 (“[A]n informant’s tip, even in the absence of police corroboration, may be sufficient if it is detailed enough to warrant the officer’s articulable reasonable suspicion of unlawful activity.”); *accord*, *Navarette v. California*, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (U.S. Supreme Court case where tip established reasonable suspicion for stop because informant “described the truck by model name, brand name, . . . license plate number, . . . [and the informant’s] allegations of the specific conduct of running her car off the highway”).

For example, in *Ciccone*, the Supreme Court of Appeals of West Virginia evaluated whether an informant's tip constituted sufficient reasonable suspicion to make a traffic stop for suspected DUI where no suspicious behavior was actually observed by the officer. 233 W.Va. at 659. The informant's tip provided a detailed description of the suspect vehicle, its location, that it was weaving and swerving, and that the driver could possibly be intoxicated. *Id.* at 660. Based upon this information, the officer sought out the described vehicle and made an investigative stop despite not actually observing any suspicious behavior. *Id.* at 656. The Supreme Court of Appeals held that this tip was sufficiently detailed and reliable to justify a reasonable suspicion for making a lawful investigatory stop. *Id.* at 661. Under these standards, the Court finds that quantity and quality of information available to Dep. Logie did not establish the required reasonable suspicion to stop and investigate the Petitioner.

In the matter at hand, the circumstances known to Dep. Logie when he stopped the Petitioner were the following: (1) the police received a tip that a domestic dispute was taking place at 980 Maple Drive; (2) Dep. Logie was dispatched to 980 Maple Drive for a domestic dispute; (3) Dep. Logie mistakenly arrived at the wrong address; (4) Dep. Logie did not make an underlying traffic stop; (5) Petitioner's vehicle was off, vacant, and parked in his private driveway when Dep. Logie arrived on the scene; (6) Dep. Logie did not see the Petitioner operate his vehicle at any time; and (7) Dep. Logie testified that the Petitioner stated he drove his vehicle minimally prior to the initial investigatory stop.² *See, generally, OAH Hearing Transcript.* Unlike the tip in *Ciccone*, the tip given to Dep. Logie did not concern the Petitioner or his operation of a motor vehicle whatsoever. Based solely on this information, and without actual

² Petitioner testified, under oath, that he backed his truck up four (4) or five (5) feet in his gravel driveway for the purpose of picking up several nails he had accidentally spilled underneath his truck. *OAH Hearing Transcript*, 48:8-22; 49:1-15.

observation of suspicious activity. Dep. Logie entered Petitioner's private property and initiated an investigatory stop.

Dep. Logie's purpose for being on Petitioner's property was to investigate a domestic dispute. *OAH Hearing Transcript*, 9:15-22. Hence, any reasonable suspicion of criminal activity possessed by Dep. Logie when he arrived at 984 Maple Drive was derived from a third-party's reporting of a domestic problem, not suspicious DUI-related behavior. *Id.* Further, the suspected criminal activity for which Dep. Logie was originally dispatched *did not even involve the Petitioner*. It is incontrovertible that Dep. Logie *mistakenly* arrived at Petitioner's address while attempting to respond to an *entirely separate matter*.³ Consequently, based on the tip as reported by the informant, Dep. Logie *could not have had any reasonable suspicion to perform an investigatory stop on Petitioner*. Thus, Dep. Logie's suspicions of criminal activity were not only misguided, in that they did not concern driving under the influence, but they were also misplaced on the Petitioner. While this Court appreciates that a mistake in fact does not *per se* make an investigatory stop and/or a corresponding arrest invalid, there must be *some* reasonable suspicion to *initiate* the investigatory stop. Here, it is axiomatic that Dep. Logie had no reasonable suspicion to enter Petitioner's private property and initiate an investigatory stop.

Furthermore, it seems incongruous to this Court that a reasonable articulable suspicion for stopping and questioning a suspected drunk driver could exist in the absence of actual, observed, operation or occupancy of a motor vehicle. The entire premise of an investigatory stop for DUI is that an officer has observed suspicious behavior while a suspect is operating or occupying a motor vehicle. Such a suspicion cannot reasonably exist, nor can it be articulated, if the suspect was not observed by an officer actually operating or occupying a motor vehicle in

³ Dep. Logie stopped at Petitioner's address, 984 Maple Drive, instead of the intended 980 Maple Drive. *OAH Hearing Transcript*, 9:15-22.

some capacity.⁴ In the matter at hand, Dep. Logie simply entered Petitioner's private property without legitimate premise, started questioning him, and arrested him for driving under the influence without ever observing Petitioner occupy or operate his vehicle. Considering the totality of these circumstances, it is self-evident that Dep. Logie could not have had, and did not have, the requisite reasonable articulable suspicion to initiate an investigatory stop of Petitioner. Therefore, the Court finds that Dep. Logie's investigatory stop was unlawful.

B. Exclusion of Evidence Obtained Incident to Unlawful Investigatory Stop.

Having determined that the initial investigatory traffic stop was unlawful in the present case, the Court must now address the issue of excluding the evidence obtained therefrom. The Supreme Court of Appeals of West Virginia has consistently held that under W. Va. Code § 17C-5A-2(f), evidence of driving while intoxicated obtained incident to an unlawful arrest resulting from an unlawful stop should not be considered by the OAH or the circuit court in appeals involving driver's license revocations.⁵ Because Dep. Logie did not have a reasonable articulable suspicion to believe the Petitioner had been driving a motor vehicle under the influence of alcohol, the evidence obtained as result of Dep. Logie's unlawful stop should not

⁴ The holdings of *Carte v. Cline* and *Lowe v. Cicchirillo* that a police officer need not actually observe a person operating a motor vehicle before that person can be charged with driving under the influence are distinguishable from the instant case because neither involved an initial investigatory stop. 200 W. Va. 162, 488 S.E.2d 437 (1997) (driver passed out in parked vehicle); 223 W. Va. 175, 672 S.E.2d 311 (2008) (driver in ambulance after accident). The Court believes these cases only apply where W. Va. Code § 17C-5A-2(f)'s requirement of a lawful underlying investigatory stop and arrest is immaterial. In the matter at hand, the key issue is the sufficiency of the Dep. Logie's investigatory stop of Petitioner. Hence, *Carte* and *Lowe* are clearly distinguishable.

⁵ *Dale v. Arthur*, No. 13-0374, 2014 WL 1272550 (W. Va. Mar. 28, 2014) (memorandum decision where the Supreme Court of Appeals determined that the exclusion of evidence collected during an unlawful stop was proper under W. Va. Code § 17C-5A-2(f)); *Clower v. West Virginia Department of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009) (Supreme Court of Appeals decision where the revocation of a driver's license was improper and did not consider evidence that the motorist had slurred speech, smelled of alcohol, failed field sobriety tests, and had a blood alcohol content above the legal limit because this evidence was collected during an unlawful stop); *Dale v. Barnhouse*, *supra* (finding that OAH and circuit court properly excluded evidence of driving while intoxicated where the evidence was collected during an unlawful stop); *Dale v. Judy*, No. 14-0216, 2014 WL 6607609 (W. Va. Nov. 21, 2014) (memorandum decision where the Supreme Court of Appeals concluded that neither the OAH nor the circuit court erred in excluding evidence obtained as a result of an invalid stop); *see also, Dale v. Haynes*, No. 13-1327, 2014 WL 6676546 (W. Va. Nov. 21, 2014) ("... the circuit court found that the Commissioner's failure to present sufficient evidence precluded it from making the findings required by W. Va. Code § 17C-5A-2(f), which – in turn – precluded the admission of evidence showing that respondent was DUI. As such, we find no error.").

have been considered by the OAH and must not be considered by this Court. Accordingly, the Court cannot consider Dep. Logie's testimony that Petitioner appeared intoxicated, nor can we consider evidence that Petitioner failed a series of field sobriety tests and tested above permissible blood-alcohol content. All this Court may consider is that Dep. Logie: (1) fallaciously arrived at Petitioner's address to investigate a domestic issue; (2) did not observe the Petitioner operating or occupying a motor vehicle at any time; and (3) arrested Petitioner for driving while intoxicated. Based upon this evidence, the Court is not satisfied that Petitioner is guilty of driving under the influence of alcohol in violation of W. Va. Code Chapter 17C.

II. CONCLUSION

Considering all of the foregoing, the Court finds as follows: (1) Dep. Logie did not have reasonable suspicion to stop the Petitioner; (2) Petitioner's investigatory stop and arrest were both unlawful; (3) the OAH erred when it considered evidence obtained incident to an unlawful stop/arrest; (4) OAH was clearly wrong in revoking Petitioner's driver's license and failing to consider these issues and make these findings.⁶ For these reasons, the Court hereby **REVERSES** the OAH's Final Order.

The Clerk of this Court is authorized and requested to provide copies of this Order, upon entry, to all counsel of record.

ENTERED Oct 30, 2015

DOCKET LINE #: 27

JEAN FRIEND, CIRCUIT CLERK

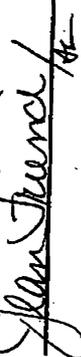
ENTER: October 30, 2015



PHILLIP D. GAUJOT, CHIEF JUDGE

⁶ This conclusion is reached without consideration of whether or not the initial tip regarding the domestic assault was even reliable. See, *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) ("In determining whether an informant has provided sufficiently reliable information to justify a reasonable and articulable suspicion, 'an informant's 'veracity,' 'reliability,' and 'basis of knowledge' [are] 'highly relevant in determining the veracity of his report.'").

STATE OF WEST VIRGINIA, SS:
I, Jean Friend, Clerk of the Circuit and Family Courts of
Monongalia County, do hereby certify that
this attached ORDER is a true copy of the original Order
made and entered by said Court.



Circuit Clerk