



**NO. 15-1147**

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

**PAT REED, COMMISSIONER  
OF THE WEST VIRGINIA DIVISION  
OF MOTOR VEHICLES,**

**Petitioner,**

**v.**

**BENJAMIN C. MCGRATH,**

**Respondent.**

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**PETITIONER'S BRIEF**

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## ASSIGNMENT OF ERROR

**The circuit court erred in using an inappropriate standard, i.e. reasonable suspicion for the stop of a vehicle, to decide an appeal in which the investigating officer did not see the Respondent driving.**

### STATEMENT OF THE CASE

At 11:03 p.m. on September 23, 2010, Deputy D. G. Logie of the Monongalia County Sheriff's Office ("Investigating Officer") responded to a call for a domestic dispute at 984 Maple Drive in Morgantown, West Virginia. A.R. at 127,144<sup>1</sup>. Upon arrival, the Investigating Officer believed he was responding to 984 Maple Drive. A.R. at 127, 166. He testified that he received "a call for service initially for a domestic dispute at 984 Maple Drive. I was in the area, so I responded." A.R. at 144. He came into contact with the Respondent, whom he identified by his driver's license, standing in his driveway at 980 Maple Drive. A.R. at 146, 190, 191. The Investigating Officer testified that he "came in contact with a male subject whom was later identified as Mr. McGrath from a West Virginia driver's license he provided me....I then began to speak with Mr. McGrath to try to ascertain the details which happened prior to our arrival in which he advised he had a verbal altercation between himself and his girlfriend, at which point during this altercation he also advised that he did attempt to leave and operate a vehicle and backed out of the driveway." A.R. at 146. The Respondent appeared intoxicated, and his eyes were bloodshot and glassy. A.R. at 128, 146. The Investigating Officer smelled the odor of an alcoholic beverage on the Respondent's breath. A.R. at 128, 146. The Respondent told the Investigating Officer that he had been drinking beer. A.R. at 152-53.

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<sup>1</sup>Reference is to the Appendix Record.

Both the Respondent and his girlfriend, Jennifer Shultz, told the Investigating Officer that they had been in an argument, during which he attempted to leave in his truck. A.R. at 146-47, 188. The Respondent testified, "She just had arrived home, and I was outside working on the truck, and she was upset with me, you know, which led me to be upset with her. We exchanged some words, you know..." A.R. at 182-83. The Respondent had hit his toolbox with his truck. A.R. at 151, 164,180. The Respondent testified, "I backed the truck so I could see all the nails in the gravel and pick them up." The Respondent confirmed that without question he backed his car up about four or five feet. A.R. at 183-84.

Even the Respondent's witness, Jacob Madison, admitted that the Respondent moved his truck. Mr. Madison testified that he did not see the Respondent's truck leave his driveway or go on any public road that night (A.R. at 173); "...all he done was back up in his own parking space." A.R. at 176. Mr. Madison also testified, "From what I could hear, and he has a loud truck, he couldn't have gone far." A.R. at 179. "He had already pulled the truck up and was picking up tools when I came out." A.R. at 178. Mr. Madison reiterated, "He moved it in his own parking space...in his own parking lot, yes." A.R. at 179. Mr. Madison testified that the Respondent "...just said that he had clipped the toolbox and was picking up his tools." A.R. at 180. Mr. Madison also confirmed that the Respondent was in a fight with his girlfriend that night: "He had gotten into an argument with his girlfriend and they had raised their voices." A.R. at 177.

The Respondent was unsteady while standing. His speech was slow and slurred, and he had a defiant, aggressive attitude. His eyes were bloodshot and glassy. A. R. at 128.

The Investigating Officer administered a series of field sobriety tests to the Petitioner, including the horizontal gaze nystagmus ("HGN"), walk-and-turn, and one-leg stand tests. The

Investigating Officer explained the HGN test to the Respondent. During administration of the horizontal gaze nystagmus test, the Petitioner's eyes displayed a lack of smooth pursuit, and distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees. A.R. at 128-29, 148-49.

The Investigating Officer explained and demonstrated the walk-and-turn test to the Respondent. During the walk-and-turn test, the Respondent missed heel to toe, stepped off the line and took an incorrect number of steps. A.R. at 128, 148-49.

The Investigating Officer explained and demonstrated the one-leg stand test to the Respondent. While performing the one-leg stand test, the Respondent swayed while balancing and put his foot down. A.R. at 129, 149.

The Investigating Officer had a reasonable belief that the Respondent had driven while under the influence of alcohol, and asked the Respondent to submit to a preliminary breath test ("PBT"). The Investigating Officer was trained to administer the PBT and is a certified instrument operator. A.R. at 143. The Respondent was unable to provide a sufficient breath sample on the PBT. A.R. at 149.

The Investigating Officer placed the Respondent under arrest at 11:30 p.m. and transported him to the Monongalia County Sheriff's Office. A.R. at 127, 149. The Investigating Officer read and gave the Respondent a copy of the Implied Consent Statement. A.R. at 130, 149. The Investigating Officer observed the Respondent for 20 minutes prior to collection of the Respondent's breath sample to ensure that he did not ingest food, drink or foreign matter. A.R. at 130, 150. The Intoximeter EC/IR-II printer was online and no errors were indicated in the display. The instrument read "press enter to start" and the Investigating Officer entered data as prompted. The instrument

displayed “please blow” and the Investigating Officer placed an individual, disposable mouthpiece into the breath tube and asked Respondent to blow into the mouthpiece. The gas reference standards were .087 and .086. The Intoximeter read “Test Complete.” A.R. at 126, 130, 150. The Investigating Officer had been trained and certified to administer the Intoximeter EC/IR II. The Respondent’s blood alcohol content was .150 g/210L. A.R. at 126, 143, 158.

The Petitioner issued an order of revocation on November 4, 2010, revoking the Respondent’s license for aggravated DUI. A.R. at 57. The Respondent requested a hearing from the Office of Administrative Hearings (hereinafter, “OAH”), which was held on June 8, 2011. A.R. 136-195. The OAH entered its *Decision of the Hearing Examiner and Final Order of Chief Hearing Examiner* (hereinafter, “Final Order”) upholding the revocation of the Petitioner’s license revocation on February 5, 2014. A.R. at 96-108.

The circuit court entered its *Order Reversing Administrative Decision* (hereinafter, “Order”) on October 30, 2015. The present appeal ensued.

### SUMMARY OF ARGUMENT

The circuit court erred in reversing the Final Order of the OAH based on a lack of articulable reasonable suspicion for the stop of the Respondent’s truck. It is undisputed that the Investigating Officer responded to a domestic violence call to 984 Maple Drive, and approached the Respondent standing in his driveway at 980 Maple Drive. It is also undisputed that the Respondent had moved his truck a few feet in his driveway during an argument with his girlfriend, that he was intoxicated, and that the Investigating Officer did not see the Respondent drive.

The circuit court was concerned with the lack of a nexus between the call to which the Investigating Officer responded and his encounter with the Respondent. However, the circuit court’s

rationale in the Order was that the Investigating Officer had no basis on which to initiate a stop of the Respondent. There was no stop of the Respondent's vehicle, therefore the rationale in the Order is fallacious, irrelevant and based upon a mistake of fact.

Finally, the circuit court failed to give proper deference to the finder of fact. The Order does not explain in what ways the Final Order was clearly wrong. W. Va. Code § 29A-5-4(g). The Final Order specifically notes that "...the Investigating Officer's testimony would be considered only to establish justification for the Investigating Officer presence at the location of his initial contact with the Petitioner." A.R. at 102. Clearly, the OAH believed that the Investigating Officer lawfully investigated the Respondent. Yet, with no analysis of the ways in which the OAH was in error in finding that the Investigating Officer properly conducted an investigation of the Respondent and ultimately arrested him for DUI, the Order merely provides: "OAH was clearly wrong in revoking Petitioner's driver's license and failing to consider these issues and make these findings." A.R. at 11.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

### **ARGUMENT**

#### **I. Standard of Review**

This Court has a deferential standard of review of an order from an administrative agency.

“We have previously concluded that 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. *Billings v. Civil Service Commission*, 154 W.Va. 688, 178 S.E.2d 801 (1971). Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal. *West Virginia Human Rights Commission v. United Transportation Union*, 167 W.Va. 282, 280 S.E.2d 653 (1981); *Bloss & Dillard, Inc. v. West Virginia Human Rights Commission*, 183 W.Va. 702, 398 S.E.2d 528 (1990).” *Modi v. W. Virginia Bd. of Med.*, 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995).

**II. The Order Contains Mistake of Fact: There Was No “Stop” of the Respondent’s Vehicle by the Investigating Officer; it Contains an Improper Analysis of the Investigating Officer’s Investigation of the Respondent; and it Fails to Give Deference to the Agency Which Heard the Evidence.**

The circuit court violated the foregoing standard of review by reversing an administrative order which was supported by the facts of the case and contained no error of law. The circuit court reversed the revocation because the Investigating Officer “entered the [Respondent’s] private property and initiated an investigatory stop.” A.R. at 9. The circuit court was quite concerned with the Investigating Officer’s approaching the Respondent (“It is incontrovertible that Dep. Logie *mistakenly* arrived at Petitioner’s address while attempting to respond to an *entirely separate matter*.” A.R. at 9); even making a personal hypothetical to make its point: “If the officer doesn’t have any reason to be at Mr. McGrath’s home, and the call was for 984, then—if that officer came to my house and asked me my name, I’d tell him that it’s not his business what my name is.... Why does a police officer have any right to go to any citizen and ask their name unless the officer had probable

cause to believe that that person violated any law?” A.R. at 214. In the Order, the circuit court noted, “Unlike the tip in *Ciccone*, the tip given to Dep. Logie did not concern the Petitioner or his operation of a motor vehicle whatsoever.” A.R. at 8<sup>2</sup>.

The Order is based on a mistake of fact: there was not a stop of Respondent’s vehicle. The record is clear that the Investigating Officer did not observe the Respondent driving; yet throughout the Order the circuit court bases its findings on the “stop” of the Respondent. “[T]his Court must first examine whether Dep. Logie had the requisite reasonable suspicion to stop and investigate Petitioner.” (A.R. at 7); “Dep. Logie entered Petitioner’s private property and initiated an investigatory stop.” (A.R. at 9); “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.” (A.R. at 9); “Dep. Logie’s investigatory stop was unlawful.” A.R. at 10.

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<sup>2</sup>The issue of whether the Respondent drove in this state was at issue through briefing and oral argument in the circuit court, but this was not used as an explicit basis for rescission of the Respondent’s revocation. The Respondent violated W. Va. Code §17C-5-2(e)[2010], which provides, “[A]ny person who drives a vehicle *in this state* while he or she has an alcohol concentration in his or her blood of fifteen hundredths of one percent or more, by weight, is guilty of a misdemeanor...” (Emphasis added). *See also*, W.Va. Code §17C-5-2a(a).

At oral argument, the circuit court stated, “and that’s not even getting to the other issue of whether moving a vehicle a few feet—whether that is consistent with the purpose or the intent of the law.” A.R. at 219. Whereupon, the court told undersigned counsel, “I’ll get you a copy [of W. Va. Code § 17C-5-2a] so you can educate yourself properly with it.” A.R. at 220. The court then read the statute thus: “Well, but if you read it that way, the phrase ‘in this state shall mean anywhere within the physical boundaries of this state open to the use of the public for purposes of vehicular travel.’” (A.R. at 221), **omitting** the intervening critical language: “...including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless...” W. Va. Code § 17C-5-2a(a).

Therefore, the circuit court's entire rationale for reversing the Final Order is fallacious. ("We disagree with the Commissioner's claim that *Lowe* and *Carte* are applicable to the instant case because there was no traffic stop at issue in either case....in the instant case, the key issue is the sufficiency of the evidence regarding respondent's traffic stop. Hence, *Lowe* and *Carte* are clearly distinguishable." *Dale v. Haynes*, 2014 WL 6676546, at \*5 (W. Va. 2014)(memorandum decision)). See also, *Cain v. West Virginia Div. of Motor Vehicles*, 225 W.Va. 467, 471, 694 S.E.2d 309, 313 (2010) (stating in dicta that, "[b]ecause Mr. Cain's vehicle was parked at the time the arresting officer encountered Mr. Cain, the standard governing the lawfulness of an investigatory traffic stop is clearly inapplicable to the case before us").

There are a plethora of cases in which, absent the stop of a vehicle, a person's license has been revoked. In *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375, at \*2 (W. Va. 2014)(memorandum decision), this Court determined that Mr. Reynolds had been drinking at Scott Depot and drove to Kroger, where he was found drunk. ("... it was reasonable to believe he drove the vehicle while intoxicated." 2014 WL 1407375, at \*4). See also, *Montgomery v. West Virginia State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (per curiam); *Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010).

The appropriate analysis is "whether the administrative revocation was proper, ... [as] statutorily specified in West Virginia Code § 17C-5A-2(e) (2004).[footnote omitted]. Under that provision, three predicate findings must be established to support a license revocation. Those findings, in pertinent part, require proof that (1) the arresting officer had reasonable grounds to believe that the person drove while under the influence of alcohol; (2) the person was lawfully placed under arrest for a DUI offense;[footnote omitted] and (3) the tests, if any, were administered in

accordance with the provisions of this article and article five of this chapter.” *Cain v. W. Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 471, 694 S.E.2d 309, 313 (2010). In *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), this Court, relying on the statutory language pertaining to DUI offenses, determined that an arrest is lawful if the arresting officer has “reasonable grounds” to believe the offense was committed. 159 W. Va. 609, 224 S.E.2d 734. “In *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), this Court stated that driving under the influence of intoxicating liquor does not have to be committed in the presence of the officer to justify an arrest. ‘W. Va. Code, 17C-5A-1, as amended, specifically provides that a lawful arrest may be effected ... at the direction of the ‘arresting law-enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle ... while under the influence of intoxicating liquor.’” *Byers* at 603, 224 S.E.2d at 731-32. We reiterated in *Bennett v. Coffman*, 178 W. Va. 500, 502, 361 S.E.2d 465, 467 (1987), that ‘an officer having reasonable grounds to believe that a person has been driving while drunk may make a warrantless arrest for that offense even though the offense is not committed in his presence.’” *Carte v. Cline*, 200 W. Va. 162, 167, 488 S.E.2d 437, 442 (1997).

A fair reading of the record shows that the Investigating Officer had reasonable grounds to believe that the Respondent drove while under the influence of alcohol. The Investigating Officer responded to the area, he approached the Respondent and others in Respondent’s driveway, he noticed that the Respondent was intoxicated, and the Respondent voluntarily told him that he had moved his truck. Respondent’s witness Jacob Madison’s presence at the scene when the Investigating Officer approached the Respondent indicates that the time frame in which Respondent was intoxicated, got into a fight with his girlfriend, and drove his truck was a short one. Mr. Madison testified, “I was actually standing next to him when the law enforcement officers showed up.” (A.R. at 172), but he had not come out until he heard the toolbox spill. A.R. at 178. Mr. Madison admitted that the Respondent moved his truck. Mr. Madison testified that he did not see

the Respondent's truck leave his driveway or go on any public road that night (A.R. at 173); "...all he done was back up in his own parking space." A.R. at 176. Mr. Madison also testified, "He had already pulled the truck up and was picking up tools when I came out." A.R. at 178. Mr. Madison reiterated, "He moved it in his own parking space...in his own parking lot, yes." A.R. at 179. Mr. Madison testified that the Respondent "...just said that he had clipped the toolbox and was picking up his tools." A.R. at 180. Mr. Madison also confirmed that the Respondent was in a fight with his girlfriend that night: "He had gotten into an argument with his girlfriend and they had raised their voices." A.R. at 177.

The encounter between the Investigating Officer and the Respondent was consensual and legitimate. "Not all contact between a police officer and a citizen rises to the level wherein constitutional protections are implicated. A 'consensual' encounter may occur where a citizen agrees to speak to law enforcement personnel. Such a contact may be initiated by law enforcement without the need of any objective articulable level of suspicion and does not, without more, amount to a 'seizure' raising constitutional protections." *Ullom v. Miller*, 227 W. Va. 1, 8, 705 S.E.2d 111, 118 (2010); "If the police merely question a suspect on the street without detaining him against his will, Section 6 of Article III of the West Virginia Constitution is not implicated and no justification for the officer's conduct need be shown." Syl. Pt. 2, in part, *State v. Jones*, 193 W. Va. 378, 456 S.E.2d 459 (1995). In *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008), the Investigating Officer met with the appellee at his home to take his statement and further investigate the matter nearly six weeks after the date of the incident. This Court held, "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. As such, it was upon interviewing the appellee several weeks later by Deputy Fleming that the appellee admitted in a signed statement that he had been drinking and driving on

the night in question. Likewise, when this testimony was presented during the hearing, it was not refuted in any way by the appellee.” 223 W. Va. 181, 672 S.E.2d 317.

The circuit court erroneously believed that the officer was circumscribed to an investigation of an altercation at 984 Maple Drive, and could not approach anyone else. At oral argument the circuit court queried, “Why does a police officer have any right to go to any citizen and ask their name unless the officer has probable cause to believe that the person violated any law?” (A.R. at 214) and “Are you saying if I’m standing in the driveway with my wife and you come to my house—you’re an officer and you come to my house by mistake, first of all—and the officer has a right to talk to us, of course, But does the officer have the right to ask any question that may cause you to incriminate yourself?” A.R. at 217-18. As set forth above, the encounter in this case was consensual, voluntary and legitimate.

The Order analyzed this matter under the wrong standard, assumed facts not in evidence, *i.e.* that there was a stop of the Respondent’s vehicle by the Investigating Officer, and erroneously concluded that the Investigating Officer had no basis on which to approach the Respondent on the night in question. The Order failed to clearly state on what basis the Final Order was clearly erroneous, thereby violating the deferential standard to be applied in these matters. The Order must be reversed.

### **CONCLUSION**

For the above reasons, this Court should reverse the Order of the circuit court.

**Respectfully submitted,**

**PAT REED, COMMISSIONER OF  
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Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, and counsel for respondent, do hereby certify that the foregoing *Petitioner's Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 2nd day of March, 2016, addressed as follows:

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