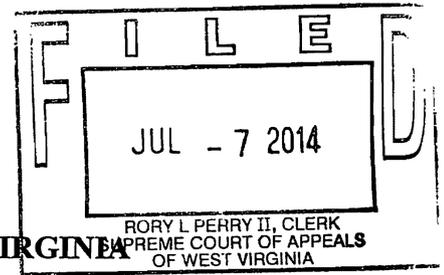


NO. 14-0342

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner Below, Petitioner,

v.

DUSTIN HALL,

Respondent.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. **The Circuit Court Erred in Rescinding Both the Revocation and Disqualification for DUI and Refusal on the Basis That the Investigating Officer Did Not Have the Blood Sample Analyzed.**
- II. **The Circuit Court Erred in Finding That the Respondent Was Lead to Believe He Had a Choice Between a Breath Test and a Blood Test, and in Reversing the Revocation for Refusing to Submit to the Designated Secondary Test.**
- III. **The Officer Had No Obligation to Have the Blood Sample Tested, and the Failure to Have the Sample Tested Is Not a Basis for Rescission of the License Revocation.**

STATEMENT OF THE CASE

On February 3, 2011, Officer N. W. Harden of the South Charleston Police Department, the Investigating Officer, was assisting two other officers of the South Charleston Police Department with a traffic stop along Montrose Drive at the westbound entrance ramp to Interstate 64 in South Charleston, West Virginia, and overheard a radio call from the Kanawha County 911 Center advising officers that the Center had received a complaint that a car was being driven the wrong way on MacCorkle Avenue approaching Montrose. The Investigating Officer observed Respondent's vehicle traveling south in the northbound lanes of Montrose Drive. The Investigating Officer stopped Respondent's vehicle on the eastbound ramp to I-64. Appendix Record at 66, 305-306, 317 (hereinafter, "A.R. at __").

The Respondent is licensed to drive commercial motor vehicles. A. R. At 66.

The Respondent had difficulty locating his driver's license upon the officer's request. He seemed disoriented and confused. A.R. at 308. The Investigating Officer asked the Respondent to get out of the truck and to walk to the rear of the truck. Respondent was unsteady walking to the roadside and while standing. A. R. At 67.

The Respondent told Officer A.J. Davis, who was on the scene, that he had consumed

alcoholic beverages earlier. Officer Davis testified that Respondent told him he had been drinking with his boss. A. R. At 67, 342.

The Investigating Officer explained and administered the horizontal gaze nystagmus test to the Respondent. He has been trained to administer the test at the West Virginia State Police Academy. A. R. At 309-310.

During administration of the horizontal gaze nystagmus test, the Respondent's pupils were equal; he did not have resting nystagmus; he had equal tracking; his eyes displayed lack of smooth pursuit and distinct and sustained nystagmus at maximum deviation; and he had onset of nystagmus prior to 45 degrees in both eyes. A. R. At 67, 308-311.

Although the Investigating Officer explained and demonstrated the walk-and-turn and one-leg stand tests, the Respondent refused to perform them. Respondent stated that the tests were a "runaround." A.R. 67-68, 311.

The Investigating Officer had reasonable grounds to believe the Respondent had been driving while under the influence of alcohol ("DUI"). Respondent was placed under arrest at 3:17 a.m. in Kanawha County, West Virginia. A. R. At 66.

The Investigating Officer transferred custody of the Respondent to Officer J. D. Keeney of the South Charleston Police Department, who transported Respondent to the police department's headquarters. A. R. at 312.

At the South Charleston police station, Officer J. A. Bailes of the South Charleston Police Department read and gave to Respondent a copy of the West Virginia Implied Consent Statement, advising the Respondent of the penalties for refusal of the test. The Respondent signed the form. A.R. at 291, 336-338.

The Respondent advised Officer Bailes that he did not wish to submit to the secondary chemical test of the breath. After Officer Bailes gave Respondent a 15 minute period in which to change his mind, Respondent once again stated that he would not take the test. A.R. at 185, 187, 338-39.

Subsequently, the Investigating Officer was told that Respondent refused the Intoximeter test, and he wished to have blood drawn. The Investigating Officer testified, "By the time ...I had gotten back to our headquarters, I was informed that Mr. Hall didn't want to take the breathalyzer, but wished to have blood drawn. So right before we left, I asked him again for the 15 minutes if he wanted to take it or have blood drawn. He would have rather had blood drawn." A. R. At 312-13.

The Investigating Officer transported Respondent to Thomas Memorial Hospital in South Charleston, West Virginia where Andrea Gray withdrew blood from the Respondent at 4:26 a.m., and gave the specimen to the Investigating Officer. A. R. at 69, 313.

Officer Keeney then took Respondent back to the South Charleston Police Department for arraignment. A. R. at 313. Officer Keeney then transported Respondent to the South Central Regional Jail. A. R. at 314. Meanwhile, the Investigating Officer took the blood sample to the police station and placed the sample in Evidence Locker 5 for submission to the State Police Laboratory. A. R. at 314.

Subsequently, the Investigating Officer spoke with a technician at the South Charleston Police Department about the sample. The technician informed the officer that the West Virginia State Police laboratory was not accepting blood specimens at that time, so the sample was not submitted for analysis. The Investigating Officer testified that the sample is still in his department. A. R. at 314-315.

The Respondent's driver's license was revoked by the Division for DUI and refusal to submit to the designated chemical test effective March 16, 2011, and his commercial driver's license was disqualified on the same grounds as of that date. A. R. At 74, 75. He timely requested an administrative hearing from the Office of Administrative Hearings (hereinafter, "OAH"). Hearings were convened on June 27, 2012 and October 17, 2012. Respondent appeared but did not provide testimony. On July 29, 2013 the OAH entered a *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner*. A.R. at 112-126.

Following briefing to the circuit court, the court entered a *Final Order* on March 6, 2014,

upholding the OAH's order rescinding the revocation and disqualification of Respondent's licenses.
A. R. At 1-8.

SUMMARY OF ARGUMENT

The circuit court noted that the principal determination to be made at an administrative hearing is "whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs." W. Va. Code 17C-5A-2(e). There is no dispute in the record that the Respondent did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, and that he refused to submit to the Intoximeter test. Yet the revocations and disqualifications for DUI and refusing to submit to the designated chemical test were rescinded.

The evidence does not support the circuit court's finding that the Respondent thought he had a choice between the breath and blood tests. The evidence shows that Officer J. A. Bailes of the South Charleston Police Department read and gave to Respondent a West Virginia Implied Consent Statement. The Respondent twice refused the breath test and asked for a blood test. Investigating Officer Harden's query to the Respondent is redundant: Patrolman Bailes twice asked Respondent to take the test, and he refused. Patrolman Bailes testified clearly that Respondent refused the breath test by telling him he did not want to take it. Respondent told Patrolman Bailes at least twice that he did not want to take the test. Bailes testified: "I specifically asked him twice, once he had a 15-minute period to change his mind." By the time Investigating Officer Harden returned to the station, the refusal was complete. The circuit court's finding that the testimony provided is suggestive of the Respondent having a choice between the two tests is not supported by the evidence. Even if Respondent thought he had a choice in tests, he still refused the designated test of the breath. He could have testified regarding this issue, but did not. *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987) dictates that the Respondent's licenses be revoked and disqualified on the basis of his refusal, with or without a blood test:

...it is clear that even though Mr. Moczek had a right to a blood test

in addition to the secondary chemical test designated by the state police under *W.Va.Code*, 17C-5-4 [1983], in this case the breathalyzer, the fact that he refused to take the designated breathalyzer automatically subjected him to administrative suspension of his driver's license.

178 W. Va. 554, 363 S.E.2d 239.

The circuit court also erred in finding that it was the investigating officer's obligation to have the blood sample tested. "...the requirement that a driver arrested for DUI must be given a blood test on request does *not* include a requirement that the arresting officer obtain and furnish the results of the requested blood test." (Emphasis added). *In re: Burks*, 206 W. Va. 429, 433, 525 S.E.2d 310. Further, the Respondent, who requested the test in the first place, did *nothing* in the months between the arrest and the hearing to get the sample analyzed. There is *no* evidence that the Respondent asked for the sample to have it analyzed, or inquired whether an analysis had taken place. Respondent had the opportunity to so testify or inquire of the officer on cross-examination, but he did not do so. Respondent's lack of enthusiasm for actually obtaining the blood test results indicates that his motivation for requesting the test was not to produce exculpatory evidence. *Burks* held that when the test is requested by the driver, the officer has no duty to obtain the result: "Placing such a requirement on the arresting officer can only be fairly read into the statutory scheme, if the blood test is the officer's 'designated' test-and not a test that is requested by the driver." 206 W. Va. 433, 525 S.E.2d 314.

Nothing in W. Va. Code § 17C-5-9 provides for any consequence when a chemical test of the blood is not made.

"[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted.*" ... Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."

Perito v. County of Brooke, 215 W. Va. 178, 184, 597 S.E.2d 311, 317 (2004) (additional internal quotations and citations omitted). This Court should decline to amend the statutory scheme.

The Respondent's refusal to submit to the Intoximeter test is determinative of his revocation/disqualification. On the issue of his DUI, there is no requirement that there be a secondary chemical test.

There are no provisions in either W.Va.Code, 17C-5-1 (1981), *et seq.*, or W.Va.Code, 17C-5A-1 (1981), *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for purposes of making an administrative revocation of his driver's license.

Syl. Pt. 1, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). There is no basis on which to rescind the revocation for DUI.

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 previously established the standards for our review of a circuit court's order deciding an administrative appeal as follows: On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va.Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

In addition,

[i]n cases where the circuit court has [reversed] the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.

Id., Syl. Pt. 2.

Miller v. Epling, 229 W. Va. 574, 577, 729 S.E.2d 896, 899 (2012).

II. The Circuit Court Erred in Rescinding Both the Revocation and Disqualification for DUI and Refusal on the Basis That the Investigating Officer Did Not Have the Blood Sample Analyzed.

As will be discussed below, the circuit court erred factually and legally in finding that the officer's failure to get the blood sample tested was a basis for rescinding the revocation and disqualification. It is also important to look at the facts that the Respondent committed the offense of DUI, and that he refused to submit to the designated secondary chemical test. In Syllabus Point 1 of *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), this Court held, "There are no provisions in either W.Va.Code, 17C-5-1 (1981), *et seq.*, or W.Va.Code, 17C-5A-1 (1981), *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for purposes of making an administrative revocation of his driver's license." Thus, the revocation/disqualification for DUI should stand, as there is sufficient evidence to show that Respondent was DUI.

Further, there is ample evidence of Respondent's refusal to take the designated breath test. As we know from *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987), requests for blood tests do not negate the effects of refusal. Therefore, the revocation/disqualification for refusal should stand.

The circuit court noted that the principal determination to be made at an administrative hearing is "whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs." W. Va. Code §17C-5A-2(e). A. R. at 7. Yet despite ample evidence that Respondent was DUI and refused the designated test, the circuit court rescinded the revocation/disqualification.

III. The Circuit Court Erred in Finding That the Respondent Was Led to Believe He Had a Choice Between a Breath Test and a Blood Test, and in Reversing the Revocation for Refusing to Submit to the Designated Secondary Test.

The circuit court held, “In fact, the testimony provided is suggestive of the Respondent having a choice between the tests.” A. R. At 6. The evidence does not support the circuit court’s finding that the Respondent thought he had a choice between the breath and blood tests. Inasmuch as the circuit court did not provide any precedent for its finding, it erred as to the facts in concluding that this was a basis for rescission of the license revocation.

The evidence shows that Respondent was properly informed of the penalty for refusal to submit to the breath test, and he twice refused the breath test. Patrolman Bailes testified clearly that the Respondent refused the breath test by telling him he did not want to take it. Respondent told Patrolman Bailes at least twice that he did not want to take the test. Bailes testified: “I specifically asked him twice, once he had a 15-minute period to change his mind.” A. R. at 338.

By the time Officer Harden returned to the station, the refusal was complete. Officer Harden testified: “By the time...I had gotten back to our headquarters, I was informed that Mr. Hall didn’t want to take the breathalyzer, but wished to have blood drawn. So right before we left, I asked him again for the 15 minutes if he wanted to take it or have blood drawn. He would have rather had blood drawn.” A. R. At 312-13. Officer Harden’s conversation with the Respondent, which the circuit court interpreted as suggesting that Respondent had a choice of secondary chemical tests, is superfluous: the Respondent had already refused the designated test. Yet the circuit court found, “The record is devoid of any evidence that the Respondent was advised that the secondary chemical test of the breath is the Department’s designated test...” and “[T]he testimony provided is suggestive of the Respondent having a choice between the tests.” A. R. At 6. This is not supported by the record.

West Virginia law is clear that when the breath test is the designated secondary chemical test, a refusal to submit to that test is not mitigated by a request to have a blood test. In *Moczek v.*

Bechtold, 178 W. Va. 553, 363 S.E.2d 238 (1987), this Court held:

In Mr. Moczek's case, the Circuit Court held that the results of the blood test would have been irrelevant to the outcome of the narrow issue of whether Mr. Moczek's license should be suspended because appellant's refusal to take the designated breathalyzer test immediately after his arrest made the present case one of administrative revocation. Mr. Moczek's driver's license was suspended because he refused to take the breathalyzer test, and not because he was driving while under the influence of alcohol. In this regard we affirm the holding of the lower court.

178 W. Va. 555, 363 S.E.2d 240. The conclusion of the circuit court is not supported by the evidence, and *Moczek, supra* dictates that the Respondent's licenses be revoked and disqualified on the basis of his refusal. Respondent's refusal automatically subjects him to license revocation, with or without a blood test:

...it is clear that even though Mr. Moczek had a right to a blood test in addition to the secondary chemical test designated by the state police under *W.Va.Code, 17C-5-4* [1983], in this case the breathalyzer, the fact that he refused to take the designated breathalyzer automatically subjected him to administrative suspension of his driver's license.

178 W. Va. 554, 363 S.E.2d. 239. Even if Respondent thought he had a choice, it would not have changed the facts that he was properly advised of the penalties for refusal to take the designated breath test, and he refused to take the test.

In West Virginia, there is a statutory right to request a blood test. *W. Va. Code § 17C-5-9; State v. York*, 175 W. Va. 740, 338 S.E.2d 219 (1985); *Moczek v. Bechtold*, 178 W.Va. 553, 363 S.E.2d 238 (1987); *In re: Burks*, 206 W. Va. 429, 525 S.E.2d 310 (1999). However, in *York, supra*, the Court noted:

But from a driver's right to ask for a blood test in addition to the breathalyzer test, we cannot infer a duty on the part of law-enforcement officers to administer a blood test in every case in which they arrest someone for driving while intoxicated. *W. Va. Code 17C-5-9* [1983] clearly does not *require* blood tests.

175 W.Va. 741, 338 S.E.2d 221. Justice Neely did not elaborate on this point, and the court in *York*

found, as a factual matter, that the defendant did not request a blood test. The Court in *Burks, supra*, subsequently found that a person who requests and is entitled to a blood test must be given that opportunity. In this case, the test was requested by the Respondent, and was provided to the Respondent.

IV. The Officer Had No Obligation to Have the Blood Sample Tested, and the Failure to Have the Sample Tested Is Not a Basis for Rescission of the License Revocation.

The circuit court found that the Investigating Officer failed to comply with W. Va. Code 17C-5-9 in that "...the Investigating Officer did not make certain '...that a chemical test thereof be made.'" A. R. At 7. *Burks, supra*, is dispositive of the issue of whether the Investigating Officer had a duty to obtain an analysis of the Respondent's blood: "...the requirement that a driver arrested for DUI must be given a blood test on request does *not* include a requirement that the arresting officer obtain and furnish the results of the requested blood test." (Emphasis added). 206 W. Va. 433. The circuit court erroneously imposed a non-existent duty on the Investigating Officer to obtain analysis of Respondent's blood specimen.

As this record shows, it was the Respondent who requested the blood test. He was provided with a blood test. Subsequently, the Investigating Officer contacted the State Police to have the sample analyzed, and was informed that the State Police were not performing such analyses. Importantly, the Respondent, who requested the test in the first place, did *nothing* in the months between the arrest and the hearing to get the sample analyzed. There is *no* evidence that the Respondent asked for the sample to have it analyzed, or inquired whether an analysis had taken place. Respondent had the opportunity to so testify or inquire of the officer on cross-examination, but he did not do so. In *Burks*, the driver was taken to task for failing to obtain the information he sought: "Burks did not show at the DMV hearing that he had requested the results or other information about the test from the hospital, or that the hospital had refused to provide the results or information, or that the results or information would have been favorable to Burks." 206 W. Va. 433-34, 525 S.E.2d 314-15. Respondent's lack of enthusiasm for actually obtaining the blood test

results indicates that his motivation for requesting the test was not to produce exculpatory evidence. This Court should prevent sandbagging in the present case as it did in *Burks*.

In *Koenig v. North Dakota Dept. of Transp.*, 810 N.W.2d 333 (N.D.,2012), the Supreme Court of North Dakota dealt with the blood test issue in the administrative context. In that case, a blood test was requested by the driver. Although the police did not interfere with Koenig's ability to get a blood test, he failed to get a test. That court found that the officers did not have a duty to transport Koenig to get a blood test. The revocation of Koenig's license was affirmed.

Nothing in W. Va. Code § 17C-5-9 provides for any consequence when a chemical test is not made.

"[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted.*" ... Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."

Perito v. County of Brooke, 215 W. Va. 178, 184, 597 S.E.2d 311, 317 (2004) (additional internal quotations and citations omitted).

In the present case, the Respondent asked for and received a blood test: it was a request for an independent, not a law-enforcement-directed, test. *Burks* held that when the test is requested by the driver, the officer has no duty to obtain the result: "Placing such a requirement on the arresting officer can only be fairly read into the statutory scheme, if the blood test is the officer's 'designated' test-and not a test that is requested by the driver." 206 W. Va. 433, 525 S.E.2d 314. Officer Harden took Respondent to get the blood test. There is no evidence that the test failed to meet the requirements of W. Va. Code §17C-5-6. This Court should decline to amend the statutory scheme by reversing the Order, and entering an order affirming the revocation and disqualification of Respondent's licenses.

CONCLUSION

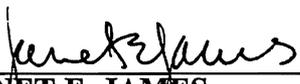
For the above reasons, this Court should reverse the Order of the circuit court.

Respectfully submitted,

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NO. 14-0342

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEVEN O. DALE, ACTING COMMISSIONER OF THE
WEST VIRGINIA DIVISION OF MOTOR VEHICLES, AND
SUCCESSOR TO JOE E. MILLER, AS COMMISSIONER,

Petitioner Below, Petitioner,

v.

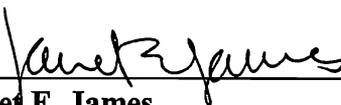
DUSTIN HALL,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of 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 7th day of July 2014, addressed as follows:

William C. Forbes, Esquire
1118 Kanawha Blvd., East
Charleston, WV 25301



Janet E. James