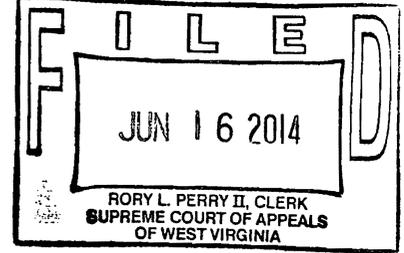


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0103



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

Petitioner Below, Petitioner,

v.

JEFFREY HILL,

Respondent Below, Respondent.

BRIEF OF RESPONDENT

JEFFREY HILL,

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RESPONDENT'S BRIEF

I. STATEMENT OF THE CASE

1. On or about October 24, 2010, Dep. Delgado was on his way home after an evening of patrol in Taylor County, West Virginia. En route to his home, while on Middlevale Road, a narrow, unlined road that has “just barely enough room for both vehicles”, (Tr. 14) Delgado testified that he was almost run off the road by an oncoming vehicle later determined to be driven by Jeffrey Hill. Delgado testified that the area where the vehicles passed one another was near a rise in the roadway where the line of sight was partially blocked, but that he could see Hill’s vehicle coming the other direction. Nonetheless, Delgado testified that he had to take quick evasive action to avoid a collision. Delgado estimated that Hill was traveling in excess of the 55 mile per hour posted speed limit and estimated Hill’s speed at 60 to 70 miles per hour, (Tr. 15, 42) though he did not use radar to make that determination as the radar unit did not lock on. (Tr. 42) Delgado testified that he was “on the edge” of the road (Tr. 40) as he approached the rise in the road. However, in a seeming contradiction, when questioned by the hearing examiner Delgado testified that as the vehicles passed,

he swerved to the side to avoid the collision. (Tr. 61) Hill, to the contrary, testified that while he was not right at the right side roadway edge, he more to the right of center than coming straight down the middle of the road as Delgado testified Hill had done.

2. After the vehicles passed, Delgado turned his cruiser and pursued, catching up to the vehicle after it had turned onto Smith Road. Upon catching up, Delgado initiated a traffic stop and Hill responded appropriately and timely, bringing the vehicle to a stop. Delgado had Hill exit the vehicle, which he determined around this time to belong to the mother of one of Hill's passengers, Jared Dearth. Delgado testified that he had smelled an odor of an alcoholic beverage from the car and that he still smelled it on Hill after he exited. He asserted that Hill admitted to drinking four light beers that evening.

3. Delgado noted that Hill was very cooperative although he did note that Hill was "excited" in the sense of appearing nervous because of the investigation being conducted. Hill exited his vehicle normally and appeared to be normal while walking to rear of his car with Delgado, though Delgado indicated that he felt Hill displayed a "slight sway" while standing and speaking with him. (Tr. 45, 46) Delgado noted that Hill was continually talking to him in an apparent effort to persuade Delgado to just let them go and not make an arrest. Delgado testified that due to Hill's nonstop efforts to persuade him to release them and stated, "To be honest with you, it did get a little irritating after a while . . ." (Tr. 34) Delgado did not in any way appear to take this as a negative reflection on Hill and did not take action against Hill, but did ask him to stop talking and simply follow the instructions he was being given.

4. After his initial personal contact with Hill at 2:07 a.m. and having him exit the vehicle, Delgado subjected Hill to field sobriety testing. Delgado first administered the Horizontal

Gaze Nystagmus (HGN) test and admitted that he did not check for equal tracking prior to the test. Delgado also did not conduct 7 passes with the stimulus in administering this test to Hill. In the end, while Delgado noted 4 clues on this test on the DUI Information Sheet, he testified that he felt Hill had passed the HGN. Only upon extensive direct examination by counsel for the respondent did Delgado concede that the observation of 4 clues is interpreted as an indicator that a person may have a BAC of .08 or more. However, he remained firm that the results he saw, alone, did not indicate that Hill was impaired. (Tr. 26, 28) Delgado also administered the Walk and Turn (WAT) and One Leg Stand (OLS) tests to Hill. After initially testifying that Hill did not perform either test, Delgado then retracted that testimony and admitted that Hill did, in fact, submit to and pass both tests (Tr. 31), showing no clues of impairment on either test. Upon completion of the field sobriety tests, Delgado had Hill submit to the PBT at 2:15 a.m. according to the DUI Information Sheet, just 8 minutes after making his initial contact with Hill. It is important to note that Delgado testified that Hill had continued to talk during the entire process, explaining what he had been doing that evening and continuing in his efforts to convince Delgado to release him and his passengers. All of this continually occurred during the time that Delgado was explaining and administering the field sobriety tests to Hill. Those tests are referred to as “divided attention tests” by NHTSA because they involve both physical and mental components, requiring test subjects to accurately listen and interpret verbal instructions while maintaining a particular stance and to then perform physical actions consistent with the verbal instructions that were given. Hill’s own actions in injection discussion into the process are reasonably seen to have complicated his ability to accurately perform the tests, yet he did so nonetheless, displaying no clues of impairment on either the WAT or OLS per the DUI Information Sheet. Also of great interest is that Delgado testified he administered the

same three field sobriety tests to Hill back at the jail facility and, although not recorded anywhere, Hill achieved the same exact results as Delgado had observed at the roadside. (Tr. 118) In fact, Delgado testified that he was actually surprised at the BAC readings obtained on both the PBT and EC/IR II because of how well Hill had done on the field tests. (Tr. 118, 127) He further testified that if it were not for the results of those tests, the HGN alone, compared to the overall situation, would not have led him to arrest Hill for DUI.

5. After being placed under arrest for DUI, Hill was eventually transported to the jail at the Taylor County Sheriff's Department in Grafton. Delgado testified that the first thing he did upon arrival was have Hill execute the WV Implied Consent Statement, which was done at 3:54 a.m. (Tr. 37, 54) Delgado then got the EC/IR II ready for testing and Hill submitted his breath sample at 4:11 a.m., just 17 minutes later. (Tr. 55) Hill's parents arrived a short while later and he was released to their custody. Hill's father, Rick Hill, testified that he picked his son up probably no more than an hour after first being notified of the arrest and that, aside from being obviously nervous and upset about the situation, Hill did not appear to be in any different mental or physical state than he was at the time of the hearing. Rick Hill's feeling was that his son was not at all impaired by alcohol and that he felt he would readily know if Hill had been drunk because he has actively raised Hill, along with his wife, for Hill's entire life. He testified that he and his son are very close and that Hill is "probably my best friend." Rick Hill was very clear that just an hour after from first being notified of his son's arrest, he detected absolutely no signs of impairment when he spoke with his son along with Delgado at the Taylor County Sheriff's Office in Grafton. Had Hill been intoxicated, Rick Hill certainly would have been able to observe some signs of odd behavior in his son, but that was simply not the case.

6. Jared Dearth, one of the passengers in the car and the son of the owner of the car, was with Hill all evening. He testified that he didn't have much recall about the later part of the evening because he ended up drinking an estimated 16 beers that night, but that he did recall Hill was drinking much more slowly and that he did not recall Hill being intoxicated. (Tr. 71, 72)

II. SUMMARY OF ARGUMENT

The circuit court was correct in upholding OAH's decision to reverse the initial order of revocation issued by DMV revoking Hill's drivers license because the Petitioner failed to prove at the hearing that Hill was "lawfully placed under arrest" as required by West Virginia Code § 17C-5A-2(f) (2010). The overwhelming testimony and evidence regarding the roadside investigation leads to a conclusion that the arresting officer lacked sufficient grounds on which to premise a finding of probable cause to arrest Hill. Further, the testimony and evidence adduced at the administrative hearing show that the administration of the preliminary and secondary chemical tests were not in compliance with the regulations regarding administration and use of same and, therefore, the results are inadmissible. Contrary to Petitioner's assertions, this case is one in which the things that were actually done correctly by the arresting officer undermine the lawfulness of Hill's arrest and mitigate in Hill's favor in the context of determining the sufficiency of the evidence of a violation of our State's impaired driving statute.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the issues raised have been authoritatively decided and because the facts and legal arguments are adequately presented in the briefs and record for appeal.

IV. ARGUMENT

A. Exclusion of the Results of the Preliminary Breath Test Was Proper

Petitioner is incorrect in his argument on the issue of the preliminary breath test. The actual regulation which acted to exclude evidence of the PBT is 64 C.S.R. 10-5.1, which states:

The use of the approved instrument shall adhere to the manufacturer's specifications for operation and shall include any maintenance specified by the manufacturer.

W.Va. C.S.R. (2013). This rule triggers the officer's obligation to follow the manufacturer's standards for operating the breath testing device. In this case, the device used was the CMI, Inc. SD-5. Its manual requires that officers take steps to avoid contamination of the test results due to mouth alcohol. The manual states:

To prevent this, wherever possible, insure that a delay of about 20 minutes has elapsed since the subject took anything by mouth - even medicines which may contain alcohol.

CMI, Inc., *Intoxilyzer S-D5 Operator's Manual*, 5 (2002). Delgado was clear that nothing that night prevented him from waiting the prescribed time period. This regulation places an affirmative burden on the investigating officer to administer the preliminary breath test in the manner the manufacturer intended that it be administered. The manufacturer's standards for operation do not require a suspect to disclose his or her oral intake to make the test valid. Petitioner's stance on this issue is absurd. He essentially asks this Court to abrogate any duty of the investigating officer to follow the manufacturer's specifications for use of the device, allowing him to do so in any manner he chooses and then cry foul because a suspect didn't say if had oral intake in the preceding fifteen minutes. This is clearly not the intent of the rules addressing use of a preliminary breath test. Rather, the rules are in place to ensure that a DUI investigation - which by its very nature is only performed by a

police officer - is conducted in a manner that safeguards the results through ensuring the officer does his job in a manner which eliminates every interference that can reasonably be eliminated. Because of the investigating officer's deviation from the CSR requirements and the manufacturer's specifications for use, the results of the PBT were properly suppressed and that finding should be upheld.

B. Exclusion of the Results of the Secondary Chemical Test Was Proper

Before the result of a Breathalyzer test for blood alcohol administered pursuant to Code, 17C-5A-1, et seq., as amended, is admissible into evidence in a trial for the offense of operating a motor vehicle while under the influence of intoxicating liquor, a proper foundation must be laid for the admission of such evidence.

Syl. Pt. 1, State v. Hood, 155 W. Va. 337; 184 S.E.2d 334 (1971). See also, generally, *State ex rel. Games-Neely v. Overington*, 230 W. Va. 739; 742 S.E.2d 427 (2013). Similarly,

In the trial of a person charged with driving a motor vehicle on the public streets or highways of the state while under the influence of intoxicating liquor, a chemical analysis of the accused person's blood, breath or urine, in order to be admissible in evidence in compliance with provisions of W. Va. Code, 17C-5A-5, "must be performed in accordance with methods and standards approved by the state department of health." When the results of a breathalyzer test, not shown by the record to have been so performed or administered, are received in the trial evidence on which the accused is convicted, the admission of such evidence is prejudicial error and the conviction will be reversed.

Syl. Pt. 4, State v. Dyer, 160 W. Va. 166; 233 S.E.2d 309 (1977). While these cases involve matters of criminal law, the guidance set forth by this Court is no less binding here - an improperly performed breath test may not be admitted into evidence. Shortcomings with the administrative procedure, such as those present in the case against Mr. Hill, are not magically cured or overlooked just because this is an administrative proceeding.

With respect to the secondary test administered using the Intoximeters, Inc., EC/IR II, § 64-10-7.3(a) of the rules of the West Virginia Bureau of Public Health requires:

The individual being tested shall be under constant observation for a period of twenty minutes before the test is administered to insure that the individual has nothing in his or her mouth at the time of the test and that he or she has no food or drink or foreign matter in his or her mouth during the observation period.

Delgado did not constantly observe Hill for a period of 20 minutes prior to administering the secondary breath test. The most reliable evidence of the start of the observation period is generally the time of execution of the West Virginia Implied Consent warning. In reviewing this document executed by Delgado and Hill on the night of Hill's arrest, it is seen the Implied Consent form was executed at 3:54 a.m. The printer ticket from the secondary chemical test indicates that Hill's breath sample was provided at 4:11 a.m., a total of 17 minutes later. This documentation, all made part of the evidence in this matter at the administrative hearing, clearly indicates the arresting officer did not observe Hill for the full twenty minutes required under the aforementioned rule.

The Merriam-Webster online dictionary defines "constant" as continually occurring or recurring: regular. It is synonymous with unchanging and unvarying. The point is that the state rule on observation calls for that observation to be nonstop. Instead, the arresting officer conducted what is clearly a shortened observation period which he then also compromised by beginning the breath test sequence at 4:06 a.m. per the printer ticket, preparing the machine for use and inputting data into it. It is absolutely impossible from a purely common sense standpoint for the arresting officer to have constantly observed Hill while he was engaged in these other tasks beginning at least at 4:06, or just twelve minutes after starting the observation. As such, the twenty minute period of constant observation was clearly not met. The burden to prove compliance remains with the DMV at all times

because the results are being asserted as evidence against Hill. The arresting officer's failure to properly observe Hill calls the entire breath test process into question and leads to only one conclusion, that being the suppression of the breath test results.

Petitioner attempts to dodge this issue by arguing cases from other jurisdictions which state, generally, that observation does not need to be eye-to-eye for the entire period. That isn't the issue being argued in this case. The issue centers on the fact that an officer conducting a secondary chemical test of the breath is required, by our rule, to keep the individual being tested under constant observation for the twenty minutes immediately prior to the suspect providing a breath sample. That did not happen in this case. The arresting officer was in close proximity to Hill since approximately 2:07 a.m., but the entire time period, including the final twenty minutes prior to Hill blowing into the machine, was laced with other distractions, including report preparation and setting up the breath machine, which includes typing numerous items of information into the machine as the operator is prompted to do so. This divided attention is not the sort of constant observation that our rule calls for and the petitioner's argument that it was good enough begs one to ask if the phrase "for government work" shouldn't be tacked on to the end of his argument.

While West Virginia has no authority directly on this point of constant observation, many states have addressed the sufficiency of observation periods in their caselaw. In an effort to ensure that a breath sample collected from an individual is, in fact, an accurate reflection of his blood-alcohol content, a vast majority of states require that an individual suspected of driving under the influence be observed for a designated amount of time prior to offering a sample of his breath. The purpose of this so-called "observation period" is to ensure that "no foreign matter is present in the defendant's mouth that could retain alcohol and potentially influence the results of the [breath] test."

See, e.g., *State v. Cook*, 9 S.W.3d 98, 100-101 (Tenn. 1999). Also from Tennessee, *State v. Deloit*, 964 S.W.2d 909, 915 (Tenn. Crim. App., 1997), tells us that a defendant is not being observed while the arresting officer is writing an arrest report. This guidance is exactly what this Court needs to consider to resolve the issue as presented. The arresting officer in the case sub judice was not conducting a constant observation of Hill during the lengthy time prior to the breath test - he was engaged in a myriad of activities that divided his attention among those various tasks which included trying to constantly observe Hill for the twenty minutes immediately prior to his breath sample.

Other states have similar provisions like West Virginia's. South Dakota's "Intoxilyzer Operational Check List" requires, among other things, "constant observation of the subject for twenty minutes prior to the test so that there is 'no oral intake of any material.'" *State v. Richards*, 378 N.W.2d 259, 261 (S.D.,1985). Illinois' Department of Public Health demands "[c]ontinuous observation of the subject for at least twenty (20) minutes prior to collection of the breath specimen, during which period the subject must not have ingested alcohol, food, drink, regurgitated, vomited, or smoked." 77 Ill. Admin. Code, Ch. I, § 510.60. Pennsylvania's breath test procedure codifies its observation period rule in stating, "The person to be tested with breath test equipment shall be kept under observation by a police officer or certified breath test operator for at least 20 consecutive minutes immediately prior to administration of the first alcohol breath test." 67 Pa. Code § 77.24(a).

Many states go to great lengths to explain exactly what an observation period entails. In Arizona, for example, case law distinguishes between an observation period and a deprivation period. For at least twenty minutes prior to offering his first breath sample, an individual must be observed closely to ensure that there he is not eating, drinking, smoking, belching, vomiting, regurgitating, or placing foreign objects in his mouth. *Richard v. Arizona Department of*

Transportation, 931 P.2d 1143, 1147 (Ariz. App. Div. 1, 1997). This is very similar to what is required in West Virginia's Code of State Rules as discussed above. Along these lines, see also *State v. Richards, supra* (the twenty-minute period of observation must be nothing short of "constant."); *State v. Utz*, 125 Idaho 127 (Ct. App., 1993) (breath test results inadmissible because the administering officer did not "closely observe" the defendant for the requisite fifteen minute period); *State v. Smith*, 547 A.2d 69, 73 (Conn. App., 1988) (a defendant must be under "continuous observation" for the observation period requirements to be met); *State v. Kemper*, 905 P.2d 77, 80 (Hawaii, 1995) (the defendant shall be "continuously observed for not less than fifteen minutes prior to collection of the breath sample."). Clearly, this partial sampling of a wide range of states shows that the observation period is not intended as a time for officer's to engage in multiple tasks, but rather is a time for them to be focused on one critical element of the breath test and its admissibility - observing the defendant. Even more directly on point with this case is a Tennessee decision that held the twenty-minute observation period cannot take place while the observing officer is driving a police cruiser with the defendant in the back of the vehicle. In *State v. McCaslin*, 894 S.W.2d 310 (Tenn.App.1994), the Court ruled that the defendant could not be observed effectively while being transported in the rear seat of a police vehicle and held that the requirements for the mandated observation period were not met. Interestingly, Tennessee also uses the Intoximeters, Inc., EC/IR II breath testing machine. Along this same line of rationale regarding observation in the rear seat of a police cruiser, see also *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999) and *Jones v. State ex rel. Wyoming Department of Transportation*, 991 P.2d 1251, 1255 (Wyo. 1999). The state of Colorado has made the prohibition against observation in a police cruiser part of its rules for collection of evidential breath tests. The Department of Public Health and Environment mandates

in 5 CCR 1005-2, Rules Pertaining to Testing for Alcohol and Other Drugs, that “The observation period must not be conducted in the patrol car while driving to the approved EBAT facility.” § 4.3.1.5.5.

Under this analysis of the available evidence in the instant case contrasted against the wide-ranging case law and rules from a number of states, it is clear that the secondary breath test occurred before the required twenty minute observation period had elapsed and that the time between the Implied Consent warning and the breath test was riddled with other distractions that prevented the arresting officer from conducting a constant period of observation. As such, petitioner cannot prove the necessary compliance with the administrative rules for admissibility of the test results and those results were, therefore, properly excluded. While it may be argued that Hill had been in Delgado’s presence since 2:07 a.m., slightly more than two hours from the time Hill provided a breath sample, the fact remains that Hill was not under constant observation that whole time. Per Delgado’s testimony, he was engaged in a wide variety of actions during that time period, including handling two other individuals who were in the car with Hill, making stops to transfer those individuals to their parents, and driving to Grafton from just outside of Bridgeport.

In light of the foregoing analysis, the secondary breath test results in this case were properly excluded.

C. The Evidence to Uphold Revocation of Hill’s Driving Privilege Was Insufficient

The commissioner’s astonishment notwithstanding, the final order is not vague in its logic that led to the decision to rescind the original order of revocation. While the commissioner is accustomed to often winning these types of administrative hearings - 87% in 2012 according to statistics offered to this Court as a side matter in proceedings in the matter of *Dale v. Veltri*, 230 W.

Va. 598; 741 S.E.2d 823 (2013) - his record is not, nor should it be, .1000. Just sometimes, a driver does actually win a case on the merits and the opinion in this matter appears to be well reasoned and thorough even if it does not square with the commissioner's most optimistic wishes.

Delgado's credibility was brought into question throughout the entirety of the proceeding and the final order reflects that finding. Such a finding by the hearing examiner is a very protected matter as the hearing examiner alone is best suited to make such determinations. See, generally, *Syl. Pt. 1, in part, Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000); *Gum v. Dudley*, 202 W. Va. 477, 484, 505 S.E.2d 391, 398 (1997). In spite of the commissioner's protestations, the facts relied upon in his brief - an odor of alcohol, an admission of consuming four beers over the course of many hours, etc - do not automatically lead to the conclusion that a person is intoxicated or impaired. Each of those points was addressed in the final order and reasoning was offered as to why those points were not compelling enough to lead to a suspension of Mr. Hill's license.

The arresting officer botched the administration and scoring of the field sobriety tests. This apparent misunderstanding of the tests continued in his testimony during the administrative hearing as evidenced by his confusion and self-contradicting testimony over the proper administration techniques and scoring standards. Improper tests cannot form the basis for a conclusion that Mr. Hill demonstrated clues of impairment. The field sobriety test manual used at the WV State Police Academy makes it clear that proper administration is critical to reliability and validity. The hearing examiner found that proper administration did not occur. While *White v. Miller*, 724 S.E.2d 768 (2012) had not been decided at the time this case was first presented, its logic reflects the view taken by our Supreme Court as it applies to field sobriety testing and that logic should be no less relevant

to this Court as it reviews the underlying case. The evidence presented by the arresting officer in this case did not support admissibility of the test results and the commissioner's complaint here is unfounded and contrary to the current law of this state.

The fact of Mr. Hill's driving is of limited value. Our state is replete with narrow, unlined roads. Common sense experience of anyone who has driven them tells us that vehicles often do have close calls but that fact alone is not evidence of alcohol impairment. The speed alleged was unverified and in spite of the circumstances, a collision did not occur on the narrow roadway nor did Mr. Hill demonstrate impairment through loss of control of his vehicle. All driving issues were addressed in OAH's final order and grounds for its decision were set forth.

As to Mr. Hill's age, the argument regarding a .02 BAC is irrelevant because Mr. Hill was charged as an adult under the adult statute, not the minor DUI statute. The commissioner would have this Court overlook that fact and make a different decision on the case simply based on that fact. DMV elected to propose suspension of Mr. Hill's license privileges based on the adult statute and cannot now complain that a different standard applies. Mr. Hill was charged with an adult level DUI, prosecuted on same and had same dismissed through the defense of the case, and he proceeded to an administrative hearing on the adult DUI. West Virginia's statutes relating to imposition of administrative license suspensions do not currently provide for reduction to the next lower level of offense if the charged offense is unfounded. In this case, OAH did not find that DMV had proven its case to the required level. DMV is improperly trying to convict Mr. Hill of a lesser driving offense on what appears to be almost a theory of strict liability.

Ultimately, the commissioner is now relying on cases which hold that evidence that a driver was operating a motor vehicle while exhibiting symptoms of intoxication to save the day for the case

he lost. The trouble with this argument is that OAH addressed those symptoms and either excluded them as improperly obtained or as not being supported by the overall body of evidence. If the evidence of those alleged signs of impairment is excluded, the commissioner may not then rely on cases which mandate the presence of such evidence. The accusation levied in the commissioner's brief essentially says that we need to automatically believe all of these symptoms were present and were valid just because they were asserted. If that is the case, then we can eliminate many aspects of the criminal justice system as well as the administrative law system because an accusation carries the same weight as a finding of guilt. The commissioner's argument is flawed and must be rejected.

The OAH final order evaluated the evidence presented by the commissioner and ultimately found that all of the pre-arrest information was insufficient to justify the suspension of Mr. Hill's license. Insufficient probable cause existed to find a lawful arrest in the underlying case and, since a lawful arrest is a component of the statute applicable to this case, the determination is a fair one. The only evidence remaining after OAH parsed through the problematic investigation was an odor of alcohol and an admission of limited consumption over a very lengthy period of time. Mr. Hill passed the two field tests addressing his agility and coordination. The only one he was deemed to have failed was excluded from consideration due to having been administered, scored, and interpreted so poorly by the arresting officer. The PBT was excluded for the reasons set forth in the OAH Final Order and for the reasons set forth herein. The only surviving evidence relevant to a DUI investigation was an odor of alcohol and a candid admission of consuming a limited amount of beer over a long period of time. "In the criminal context, the odor of intoxicants alone is unquestionably insufficient for a finding of guilt beyond a reasonable doubt in alcohol-related offenses." *Footnote 2, Federoff v. Rutledge*, 175 W. Va. 389; 332 S.E.2d 855 (1985)(Citations omitted).

Having found that there was not a lawful arrest for DUI, OAH was not under any obligation to address the results of the secondary breath test on the EC/IR II other than to do so for a purely academic exercise. Like this Court, and the Circuit Court, OAH does not have the time to engage in such pursuits. Having concluded that the information gathered by the arresting officer did not justify a lawful arrest, OAH reached the only proper conclusion and issued an order rescinding the original order of revocation. That decision is not clearly wrong or violative of any legal standard and must, therefore, be upheld.

D. The Lawfulness of the Traffic Stop is Not at Issue

Hill concedes that the arresting officer provided testimony to sufficiently support a proper traffic stop and is not sure why this issue is even raised by petitioner. Petitioner raised the issue in the first appellate proceeding below and Hill addressed it in his brief. The Court appears to have merely given brief attention to the argument and it sided with Hill's interpretation of the law on the issue. However, the Circuit Court's Order does not appear to strike down the traffic stop and Hill does not take a contrary position on the issue.

V. CONCLUSION

WHEREFORE, based upon the foregoing, the respondent hereby respectfully requests that the order of the Circuit Court be affirmed.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0103

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

Petitioner Below, Petitioner,

v.

JEFFREY HILL,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

Service of the foregoing **Respondent's Brief** was had upon the Petitioner via US Mail, first class postage prepaid, to counsel for the Petitioner at counsel's last known address this date, June 16, 2014, as follows:

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