

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-1180

**STEVEN O. DALE, Acting Commissioner,
Division of Motor Vehicles,**

Petitioner,

v.

ROBIN J. RINER,

Respondent.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

**STEVEN O. DALE, Acting Commissioner,
Division of Motor Vehicles,**

By Counsel,

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I. ASSIGNMENT OF ERROR

The Circuit Court of Kanawha County and the Office of Administrative Hearings erred in by creating a nonexistent requirement for compliance with W. Va. Code § 17C-5-7(a) (2010): there is no requirement for an “adequate oral warning” in the implied consent statute.

II. STATEMENT OF THE CASE

On June 23, 2011, Corporal J. Jones of the Berkeley County Sheriff’s Office was on road patrol in Berkeley County, West Virginia when he observed a motor vehicle cross over the center line on two occasions. (A. Tr¹. at 9-10 and App². at 119.) Corporal Jones initiated a traffic stop of the subject motor vehicle and identified the driver as Mr. Riner, Respondent herein. (A. Tr. at 10.) Corporal Jones detected the odor of an alcoholic beverage emitting from within the vehicle, and Ms. Riner advised Corporal Jones that she had consumed one beer. (A. Tr. at 10-11.) Corporal Jones called for another police officer to assist him, and Deputy A. T. Burns of the Berkeley County Sheriff’s Office, the Investigating Officer (“I/O”) in this matter, arrived on scene. (A. Tr. at 11.)

The I/O detected the odor of an alcoholic beverage on Ms. Riner’s breath. (A. Tr. at 21 and App. at 120.) The I/O detected that Ms. Riner’s eyes were bloodshot and noted that Ms. Riner’s speech was fast. *Id.* Initially, Ms. Riner advised the I/O that she had consumed one beer. (A. Tr. at 22 and App. at 120.) The I/O administered a series of field sobriety tests to Ms. Riner, which she failed. (A. Tr. at 21, 33-34 and App. at 120-121.) After administration of the field sobriety tests, Ms. Riner admitted that she previously had two mixed drinks and a beer. (A. Tr. at 22 and App. at 120.) The I/O administered a preliminary breath test (“PBT”) to Ms. Riner which she failed with

¹ A. Tr. refers to the transcript from the administrative hearing in this matter. The administrative transcript is the last exhibit in the Appendix filed contemporaneously with this brief, and the original page numbers of the transcript are used.

² App. refers to the sequentially numbered Appendix filed contemporaneously with this brief.

a result of .157%. (A. Tr. at 35 and App. at 121.) The I/O arrested Ms. Riner for DUI on June 23, 2011 in Berkeley County, West Virginia. *Id.*

The I/O transported Ms. Riner to the Berkeley County Sheriff's Office where he read and provided Ms. Riner with a written document containing the penalties for refusing to submit to a designated secondary chemical test ("SCT"), required by W. Va. Code § 17C-5-4, and the fifteen minute time limit for refusal, specified in W. Va. Code § 17C-5-7. (A. Tr. at 36 and App. at 72, 122, and 124.) The testing instrument used to administer the SCT - in Intoximeter EC/IR, Serial No. 008084 - has been approved by the West Virginia Bureau for Public Health for use as a secondary breath testing instrument. (App. at 72 and 118.) The I/O asked Ms. Riner to submit to a SCT of the breath. (A. Tr. at 36-37 and App. at 72 and 122.) Ms. Riner declined to submit a sample of her breath into the Intoximeter EC/IR-II. (A. Tr. at 37-38, 45 and App. at 124.)

On July 14, 2011, the DMV sent Ms. Riner an Order of Revocation for DUI and refusing to submit to the secondary chemical test. (App. at 127.) Ms. Riner timely appealed the Order of Revocation to the Office of Administrative Hearings ("OAH"), and the OAH conducted an administrative hearing on March 1, 2012. (App. at 131-134.) At the administrative hearing, Ms. Riner testified that, prior to being asked to submit a breath sample, the I/O advised her three times, "You don't have to take this," (A. Tr. at 45) and "I almost felt like he was telling me not to do it." (A. Tr. at 46.) The OAH entered its *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* on May 16, 2013. (App. at 69.) The OAH affirmed the revocation for DUI but reversed the revocation for refusing to submit to the secondary chemical test. *Id.* On June 12, 2013, the DMV filed a petition for judicial review with the Circuit Court of Kanawha County appealing the part of the OAH order reversing Ms. Riner's revocation for refusing to submit to the SCT. (App.

at 31.) On October 23, 2013, the circuit court entered its final order affirming the decision of the OAH. (App. at 2.)

III. SUMMARY OF ARGUMENT

Both the OAH and the Kanawha County Circuit Court found as fact that the I/O read Ms. Riner the implied consent statement which contained the penalties for refusing to submit to a designated SCT as required by W. Va. Code § 17C-5-4, and the fifteen-minute time limit for refusal specified in W. Va. Code § 17C-5-7. After both the OAH and circuit court determined that the I/O completed the requirements of W. Va. Code § 17C-5-4 and W. Va. Code § 17C-5-7, both created an additional requirement in W. Va. Code § 17C-5-7(a): an *adequate* oral warning. Such a requirement was not placed in the statute by the Legislature. Further, the circuit court erred turning the I/O's statements to Ms. Riner into credibility issue when there was no factual issue in dispute here.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to W. Va. Rev. R. App. Pro. 19 (2010), the Commissioner requests oral argument in this case because this matter involves a narrow issue of law.

V. ARGUMENT

A. Standard of Review

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam).

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. 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 orders 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. SER, State of W. Va. Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong, and conclusions of law are reviewed *de novo*. *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam).

B. The Circuit Court of Kanawha County and the Office of Administrative Hearings erred in by creating a nonexistent requirement for compliance with W. Va. Code § 17C-5-7(a) (2010): there is no requirement for an “adequate oral warning” in the implied consent statute.

In its Final Order, the OAH found as fact that the I/O transported Ms. Riner to the Berkeley County Sheriff's Office where he read and provided Ms. Riner with a written document containing the penalties for refusing to submit to a designated SCT, required by W. Va. Code § 17C-5-4 (2010), and the fifteen minute time limit for refusal, specified in W. Va. Code § 17C-5-7 (2010). (App. at 72, FOF 19.) The circuit court below also found as fact that the I/O read Ms. Riner a written document containing the penalties for refusing to submit to a designated secondary chemical test, required by West Virginia Code § 17C-5-4 and the fifteen-minute time limit for refusal, specified in West Virginia Code § 17C-5-7. (App. at 4, FOF 18.) Inexplicably, however, the OAH concluded that the “Investigating Officer failed to give the petitioner an adequate oral warning of the consequences for refusing to submit to the secondary test as required by as required West Virginia Code § 17C-5-7(a).” [*sic*] Even though the circuit court found as fact that the I/O had read the implied consent form to Ms. Riner, it upheld the OAH's erroneous conclusion.

The circuit court reasoned that

According to the IO's testimony and the findings of the hearing examiner, the IO read and provided the Respondent with the Implied Consent Form. However, the hearing examiner concluded that the IO failed to give the Respondent an adequate oral warning because the Respondent testified that the IO told her she did not have to take the secondary chemical test.

Additionally, the IO testified that he always advises people that "It's their choice. That they don't have to if they don't want to." In doing so, the hearing examiner was within his discretion to hear the testimony from both the Respondent and the IO and to determine credibility of the witnesses. Thus the Court cannot find that the hearing examiner clearly erred or abused his discretion by exceeding his statutory authority.

(App. at 6.)

It is clear the circuit court erroneously relied on evidence extraneous to that which the statute requires. This was not a credibility determination as the circuit court found. After finding that the statutory requirements of reading and providing the implied consent requirements were met, the court went on to rely on the I/O's testimony that "it's their choice" to reverse Ms. Riner's revocation for refusing to submit to the SCT. The I/O was not incorrect in telling Ms. Riner that it was her choice to take the SCT; drivers simply cannot be forced to submit to SCTs in this state. Therefore, not only was the I/O correct in what he told Ms. Riner, but the circuit court erroneously added the requirement that there be an "adequate oral warning." The court affirmed the OAH's finding that the officer's comments eroded his credibility. There was no question of fact here: the officer was correct in his statement to the driver, and the OAH hearing examiner abused his discretion by exceeding his statutory authority.

West Virginia Code § 17C-5-4 (2010) states in pertinent part:

(e) Any person to whom a preliminary breath test is administered who is then arrested shall be given a written statement advising him or her that his or her refusal to submit to the secondary chemical test pursuant to subsection (d) of this section, will result

in the revocation of his or her license to operate a motor vehicle in this state for a period of at least one year and up to life.

West Virginia Code § 17C-5-7(a) states in pertinent part:

If any person under arrest as specified in section four of this article refuses to submit to any secondary chemical test, the tests shall not be given: *Provided*, That prior to the refusal, **the person is given an oral warning and a written statement advising him or her that his or her refusal to submit to the secondary test finally designated will result in the revocation of his or her license to operate a motor vehicle in this state for a period of at least forty-five days and up to life; and that after fifteen minutes following the warnings the refusal is considered final.** The arresting officer after that period of time expires has no further duty to provide the person with an opportunity to take the secondary test.

[Emphasis added.]

The West Virginia Implied Consent Statement, which the OAH and the circuit court found as fact that the I/O read and gave to Ms. Riner and which she refused to sign, states in pertinent part:

Pursuant to state law (Chapter 17C, Article 5, Section 7) I am now directing you to take an approved secondary chemical test of your breath for the purpose of determining the alcoholic content of your blood.

If you refuse to submit to this test, your privilege to operate a motor vehicle in this state will be revoked for a period of at least 45 days and up to life.

If you refuse you will have fifteen minutes in which to change your mind after which time your refusal will be deemed final and the arresting officer will have no further duty to offer you this approved secondary chemical test.

(App. at 124.)

As shown above, the implied consent statute only requires that the investigating officer read the implied consent statement to the driver (i.e., give the oral warning) and provide the driver with a copy of the same. Here, the I/O complied with the statute, and the OAH and the circuit court specifically found that the I/O read the statement and provided a copy to Ms. Riner. (App. at 72, FOF 19 and App. at 4, FOF 18.) The statute, however, contains no requirement that the driver

understand what was read to her - a task almost impossible to enforce with intoxicated drivers. The statute also does not contain a qualifier such as “adequate” oral warning.

The facts of this case are greatly similar to those in *Jordan v. Roberts*, 161 W. Va. 740, 246 S.E.2d 259 (1978). There, the officer testified, “I further explained to Mr. Jordan that if he refused the breathalyzer test, that his license would automatically be revoked for six months. I asked him if, if he uh understood this, he said yes that he did. I then asked Mr. Jordan if he wanted the breath test and he said no that he did not want it . . . ” 161 W. Va. 740, 758-759, 246 S.E.2d 259, 264 (1978). As might be expected, Mr. Jordan’s version of the incident differed, “he [the officer] said ‘well it’s up to you’ and I said ‘well, do I have to’, and he says ‘no that’s up to you’, and that’s all he said about it.” 161 W. Va. 740, 759, 246 S.E.2d 259, 264 (1978). This Court held that while

appellant specifically denied being advised that the refusal to take the test would result in a suspension of his license, and this was directly controverted by the arresting officer, we cannot conclude that the Commissioner was clearly wrong in holding that a preponderance of the evidence favored the officer’s testimony.

161 W. Va. 740, 760, 246 S.E.2d 259, 265 (1978).

In the case at bar, the I/O testified that

As far as the Implied Consent Statement, I have never once told someone they did not have to do that. I have read it to them. I’ve explained it. I explained it, I answer any question that they have and tell them it’s their choice, that they don’t have to if they don’t want to. I’m not going to grab their head and force them onto the machine. That’s entirely up to them, but I’ve never once told someone, “You don’t have to do it.” I do it the same way every time. I administer it uniformly. That way I can make sure that I’m not (inaudible) required to do it.

(A. Tr. at 62.) West Virginia Code § 17C-5-7(a) (2010) makes it clear that if any person under arrest refuses to submit to any SCT, the test shall not be given. Even if Ms. Riner's description of the I/O's comments were true, it cannot be construed to be anything other than advising her that if she refused

the test, the test was not be given. This is exactly what the statute says, and that is exactly what happened here.

It is clear that the I/O did not tell Ms. Riner that she did not have to take the test but that it is his practice to always advise test subjects, “that it’s their choice. They don’t have to if they don’t want to.” The I/O’s statement comports with West Virginia state law. “Our statute, unlike some, precludes forcibly administering the test against the will of the driver.” *Jordan v. Roberts*, 161 W. Va. 740, 757, 246 S.E.2d 259, 263 (1978). Unlike in *Jordan*, the OAH hearing examiner and the circuit court both found as fact that the investigating officer read and provided Ms. Riner with a written document containing the penalties for refusing to submit to a designated SCT, required by W. Va. Code § 17C-5-4, and the fifteen minute time limit for refusal, specified in W. Va. Code § 17C-5-7. Clearly, even by the OAH’s and the circuit court’s own findings of fact, the I/O met the requirements of the implied consent statute.

Neither Ms. Riner’s interpretation of the I/O’s comments (all of which comported with the statute, e.g., that he could not force her to take the test) nor her feigned ignorance of the statute vitiate the statute’s effect: by driving a vehicle, she accepted the obligation to submit to the SCT. West Virginia Code § 17C-5-4(a) (2010) makes it quite clear that

[a]ny person who drives a motor vehicle in this state is considered to have given his or her consent by the operation of the motor vehicle to a preliminary breath analysis and a secondary chemical test of either his or her blood, breath or urine for the purposes of determining the alcoholic content of his or her blood.

This Court has previously addressed the issue of refusing to submit to the SCT. In syllabus point 1 of *In re Matherly*, 177 W. Va. 507, 354 S.E.2d 603 (1987), this Court held that

[w]hen the requirements of *W. Va. Code*, 17C-5-7 [1983] have been otherwise met, and a driver refuses to or fails otherwise to respond either affirmatively or negatively

to an officer's request that he submit to a blood alcohol content test, the driver's refusal or failure to respond is a refusal to submit within the meaning of *W. Va. Code*, 17C-5-7 [1983].

This Court revisited the same issue in *Gibbs v. Bechtold*, opining that, “[w]e refused in *Matherly* to engraft a specific intent requirement by holding that it must be proved that the refusal to take the test was knowingly made.” 180 W. Va. 216, 218, 376 S.E.2d 110, 112 (1988). Here, both the OAH and the circuit court found that the officer read and provided Ms. Riner a copy of the implied consent statement, and Ms. Riner still refused to take submit to the SCT in contravention to the statute and case law.

The OAH has no power to create its own statutory language or to create additional statutory requirements. *W. Va. Code* § 17C-5C-1 (2010), *et seq.* By concluding that the I/O failed to give Ms. Riner an “*adequate* oral warning of the consequences for refusing to submit to the secondary chemical test” as required by *W. Va. Code* § 17C-5-7(a) (2010), the OAH exceeded its authority and attempted to legislate a heretofore nonexistent requirement. The circuit court compounded that error by upholding the OAH's decision.

VI. CONCLUSION

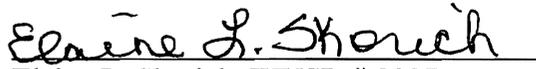
For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

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COMMISSIONER, DIVISION OF
MOTOR VEHICLES,

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CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 24th day of February, 2014 by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Harley O. Wagner, Esquire
The Wagner Law Firm
55 Meridian Parkway, Suite 102
Martinsburg, WV 25404


Elaine L. Skorich