

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

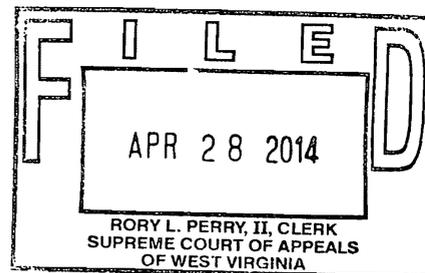
**STEVEN O. DALE, ACTING COMMISSIONER OF
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

ROBIN J. RINER,

Respondent.



NO. 13-1180

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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

By Counsel,

**PATRICK MORRISEY
ATTORNEY GENERAL**

**Elaine L. Skorich, WWSB # 8097
Assistant Attorney General
DMV - Attorney General's Office
P.O. Box 17200
Charleston, WV 25317-0010
elaine.l.skorich@wv.gov
Telephone: (304) 926-3874**

Table of Contents

I. ARGUMENT 1

II. CONCLUSION 3

III. CERTIFICATE OF SERVICE 5

TABLE OF AUTHORITIES

CASES:	Page
<i>Gibbs v. Bechtold</i> , 180 W. Va. 216, 376 S.E.2d 110 (1988)	3
<i>In re Matherly</i> , 177 W. Va. 507, 354 S.E.2d 603 (1987)	2, 3

STATUTES:	Page
W. Va. Code § 17C-5-4 (2010)	1
W. Va. Code § 17C-5-7 (1983)	2
W. Va. Code § 17C-5-7 (2010)	1
W. Va. Code § 17C-5-7(a) (2010)	2

RULES:	Page
W. Va. R. Evid. 608(a) (1994)	1
W. Va. Rev. R. App. Pro. 10(g) (2010)	1

Now comes Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles (“DMV”) and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure, hereby submits the *Reply Brief of the Division of Motor Vehicles*.

I. ARGUMENT

In her responsive brief, Ms. Riner argues that the hearing examiner for the Office of Administrative Hearings (“OAH”) made a credibility determination regarding the Investigating Officer’s testimony and that the circuit court correctly upheld that credibility determination. The circuit court and Ms. Riner all place their eggs in the wrong basket when they rely upon the OAH’s “credibility determination.” Rule 608(a) (1994) of the West Virginia Rules of Evidence states that

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Here, there is absolutely no dispute about the truthfulness of the officer. It is undisputed that the officer 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 (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 even found as fact that the officer had done so. (App. at 4, FOF 18.) There is also no dispute that the officer told Mr. Riner that he could not force her to take the SCT. (A. Tr.¹ at P. 62.) There is not a credibility determination here as the circuit court found.

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. There was no question of fact here: the

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.

officer was correct in his statement to the driver. Accordingly, the OAH abused its discretion by creating a credibility issue where there is none, and the circuit court erred in sanctioning the OAH's error.

Further, Ms. Riner's responsive brief does not provide any statute or case law which gives the OAH authority to modify statutory language. As the DMV stated in its brief, W. Va. Code § 17C-5-7(a) (2010) 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 implied consent statute requires only that the 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. The statute also does not contain a qualifier such as "adequate" oral warning. Neither the OAH nor the circuit court are authorized to include additional requirements in a statute. Ms. Riner has failed to furnish any legal justification for the same.

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 submit to the SCT in contravention to the statute and case law.

In sum, it is nonsensical for the OAH to determine that the officer’s testimony was incredible based solely on the fact that a drunk driver misunderstood what the officer told her. It is possible that a drunken driver had a difficult time understanding that a voluntary refusal results in a mandatory revocation; however, the misunderstanding of a person under the influence of alcohol does not relate to the credibility of the officer. For the OAH and the circuit court to determine that the credibility of the officer is determined by the level of understanding of a drunk driver is absurd. The fact that the OAH merged the driver’s drunken misunderstanding with the officer’s credibility demonstrates that the OAH is misguided in ascertaining the very definition of credibility. Here, the officer’s testimony as well as the information that he recorded on the DUI Information Sheet was unassailable and not in conflict. The fact that the drunk driver did not understand that her choice to refuse the SCT relates to whether her choice was knowingly made, but her drunken confusion is wholly unrelated to the officer’s credibility. The OAH and the circuit court both erred as a matter of law.

II. CONCLUSION

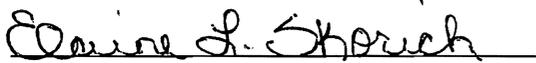
For the reasons set forth above as well as in the *Brief of the Division of Motor Vehicles*, the decision of the circuit court should be reversed.

Respectfully submitted,

STEVEN O. DALE, ACTING
COMMISSIONER, DIVISION OF
MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Elaine L. Skorich, WWSB # 8097

Assistant Attorney General

DMV - Office of the Attorney General

P.O. Box 17200

Charleston, WV 25317-0010

elaine.l.skorich@wv.gov

(304) 926-3874

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

NO. 13-1180

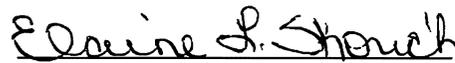
ROBIN J. RINER,

Respondent.

III. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 28th day of April, 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