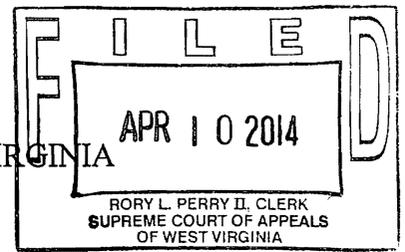


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

V.

Docket No. 13-1180

ROBIN J. RINER,
Respondent

RESPONDENT'S BRIEF

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TABLE OF AUTHORITIES:

CASES:

Muscatell v. Cline
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195 W.Va. 230, 239, 465 S.E.2d 230, 239 (1995).....1, 2, 4

STATUTES:

W.Va. Code 17C-5-4(3).....1, 2

W.Va. Code 17C-5-7(a).....1, 2, 3

W.Va. Code 29A-5-4(a).....2

W.Va. Code 17C-5-2.....3

RULES:

West Virginia Revised Rules of Appellate Procedure 19 (2010).....1

I. ASSIGNMENT OF ERROR

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

II. STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case.

III. SUMMARY OF ARGUMENT

In this matter, the administrative law judge heard sworn testimony by both the arresting officer (Deputy Burns) and that of the Respondent and found that the arresting officer engaged in misleading and confusing information in regards to the Implied Consent reading to Respondent, going outside of the plain reading of said form and engaging in verbal interaction and commentary that ultimately did not conclude in a knowledgeable, voluntary refusal of the secondary chemical test by Respondent. All verbal instruction by the arresting officer contradicted the implied consent form which was misleading to the Respondent and led to her refusal. See West Virginia Code 17C-5-4(3) and West Virginia Code 17C-5-7(a).

There is nothing in the sworn testimony / transcript offered by any of the testifying parties, or that of legal justification or foundation that calls for the overturning of the Final Order in this matter. See *Modi v. West Virginia Board of Medicine*, 195 W.Va. 230, 239, 465 S.E.2d 230, 239 (1995).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Revised Rules of Appellate Procedure 19, the Respondent does not request oral argument as this narrow issue of law can be determined solely on the sworn testimony / transcript of the applicable witness, the Final Order of the Office of Administrative Hearings and records associated as collectively applied to governing case law.

1V. ARGUMENT

A. *Standard of Review*

The Standard of Review on administrative appeals of this nature is well entrenched in *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996):

"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 question 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."

Moreover, as the West Virginia Supreme Court of Appeals opined in *Modi v. West Virginia Board of Medicine*, 195 W.Va. 230, 239, 465 S.E.2d 230, 239 (1995),

"..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. Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal."

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

The Circuit Court of Kanawha County nor the OAH erred in their decisions in this matter.

The OAH found that the arresting officer provided the Respondent with written documentation setting forth the penalties for refusing to submit to the designated secondary chemical test as required in West Virginia Code 17C-5-4 and the fifteen-minute time limit for refusal as required in West Virginia Code 17C-5-7. (Appendix page 72, Findings of Fact 19). However, prior to asking the Respondent to submit to the sample, the arresting officer advised her three (3) times, "You don't have to take this," and "I almost felt like he was telling me not to

do it.” (Appendix page 72, Findings of Fact 22). The arresting officer testified that he did not advise the Respondent 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. That they don’t have to if they don’t want to.” (Appendix page 73, Findings of Fact 23). At that point the Respondent declined to submit to the breath sample. (Appendix page 73, Findings of Fact 24). Due to the above, the hearing examiner found that the arresting officer failed to give the Respondent an adequate oral warning of the consequences for refusing to submit to the test as required in West Virginia Code 17C-5-7(a). Appendix page 76, Conclusions of Law 6). As such, the hearing examiner concluded that the Respondent did not commit an offense described in West Virginia Code 17C-5-2, in that the Respondent did not refuse to submit to the secondary chemical test. (Appendix page 77, Decision of Hearing Examiner).

The Circuit Court of Kanawha County also found in favor of the Respondent and upheld the OAH’s final order in this matter. The Petitioner contends that the hearing examiner exceeded his statutory authority when he rescinded the refusal portion of the Respondent’s license revocation because the Respondent’s testimony that the arresting officer told her she did not have to take the secondary chemical test. (Appendix page 5, Discussion). According to the arresting officer’s testimony and the finding of the hearing examiner, the arresting officer read and provided the Respondent with the implied consent form. However, the hearing examiner concluded that the arresting officer failed to give the Respondent an adequate oral warning because the Respondent testified that the arresting officer told her she did not have to take the secondary chemical test. (Appendix page 6). Additionally, the arresting officer 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 arresting officer to determine credibility of the witness. Thus, the Court cannot find that the hearing examiner clearly erred or abused his discretion by exceeding his statutory authority. (Appendix page 6).

Accordingly, pursuant to *Modi v. West Virginia Board of Medicine*, 195 W.Va. 230, 239, 465 S.E.2d 230, 239 (1995),

"..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. Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal."

IV. CONCLUSION

For the above reasons, the Circuit Court decision should be upheld.

Respectfully Submitted,

RESPONDENT
BY COUNSEL



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CERTIFICATE OF SERVICE

I, Harley O. Wagner, hereby certify that I have served an original plus ten of the attached **RESPONDENT'S BRIEF** upon Rory L. Perry, II Clerk of the Court as well as a copy of same upon the following individuals at their respective mailing addresses this 9th day of April, 2014.

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