NO. 35673

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

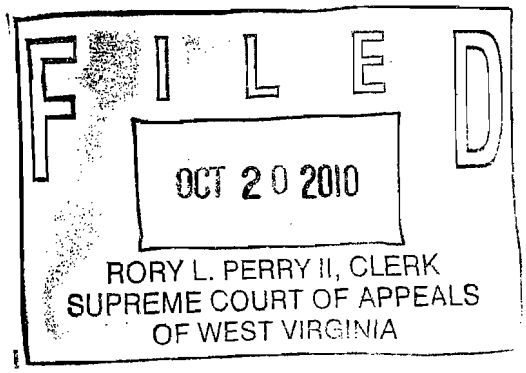
EDWARD L. SIMS, II,

Appellee/Petitioner Below,

v.

JOE E. MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Appellant/Respondent Below.



BRIEF OF APPELLANT

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WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

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BRIEF OF APPELLANT

Comes now the Appellant, West Virginia Division of Motor Vehicles, Joe Miller, Commissioner, by counsel, Janet E. James, Assistant Attorney General, and submits this brief in accordance with the order of the Court. Appellant seeks reversal of an order entered on December 30, 2009, by the Honorable Gary Johnson, Judge of the Circuit Court of Nicholas County, in an administrative appeal styled *Edward. L. Sims, II v. Joe E. Miller (formerly Joseph J. Cicchirillo), Commissioner, Commissioner of the West Virginia Division of Motor Vehicles,* Civil Action No. 08-P-51. Through its *Order*, the circuit court reversed an administrative driver's license revocation order entered by the Division by which the Appellee's privilege to drive was revoked. The circuit court's order was clearly erroneous as a matter of law because: (1) it misstated the requirements for administration of the Intoximeter test; (2) it misstated the requirements for admission of the results of a blood test; (3) it erred in finding that the testimonies of the officer and the driver were not reconciled; (4) it erred in finding that the Commissioner was required to give substantial weight to the results of the criminal matter; and (5) it imposed a heretofore nonexistent negative inference

against the DMV because the investigating officer did not place the videotape of the arrest into the record.

I. STATEMENT OF FACTS

On November 23, 2007, Deputy J. B. Bailey of the Nicholas County Sheriff's Office responded to a single vehicle accident on Levisay Road in Nettie, Nicholas County, West Virginia. Deputy Bailey observed a vehicle on its top in front of a residence. As Deputy Bailey looked around the vehicle, Appellee came out of the residence. As Deputy Bailey spoke with the Appellee, he noticed the odor of alcohol on Appellee's breath. He also observed that Appellee staggered while walking, was unsteady while standing, had slow, slurred speech, and had glassy eyes.

Deputy Bailey then administered three field sobriety tests to Appellee. During administration of the horizontal gaze nystagmus test, Appellee's eyes exhibited equal tracking and equal pupils, lacked smooth pursuit, exhibited distinct nystagmus at maximum deviation, and had onset of nystagmus prior to 45 degrees in both eyes.

During the walk and turn test, Appellee could not keep his balance, stopped walking, missed heel to toe, stepped off the line, raised his arms for balance, took too many steps, and missed the turn.

On the one-leg stand test, Appellee swayed while balancing, used his arms for balance, hopped, put his foot down and attempted to perform the test four times.

Deputy Bailey waited for another officer to bring a preliminary breath device. Appellee submitted to the test and failed it.

Deputy Bailey placed Appellee under arrest at 12:19 a.m. on November 24, 2007. He transported Appellee to the Nicholas County Courthouse, where he administered a secondary chemical test of the breath to Appellee. Deputy Bailey read the Implied Consent Statement to

Appellee and gave him a copy. He observed the Appellee for 20 minutes prior to administration of the test, during which time Appellee had no oral intake. Deputy Bailey used an individual disposable mouthpiece and followed an operational checklist during administration of the secondary chemical test. The results of the test showed that Appellee had a blood alcohol content of .091.

After Deputy Bailey completed the DUI Information Sheet, he transported Appellee to Summersville Memorial Hospital for a blood, test, which Appellee requested. He then transported the Appellee to the Central Regional Jail.

The Division issued an initial Order of Revocation on December 18, 2007. Appellee timely requested a hearing. The administrative hearing was held on August 6, 2008. At the hearing, Appellee presented a certified copy of the dismissal of the Respondent's DUI case in Nicholas County Magistrate Court.

By Final Order effective November 10, 2008, the Appellant upheld his initial order of revocation. On appeal to the Nicholas County Circuit Court, that court entered an *Order Remanding this Action to the Respondent and Order Granting a Stay of the Revocation of the Petitioner's Driver's License* on March 23, 2009. The circuit court ordered that the Appellant consider the evidence presented and to issue an order which complies with *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) and *Choma v. WV Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E. 2d (2001).

Appellant's *Remand Final Order* was entered effective August 3, 2009. That order was appealed to the Circuit Court of Nicholas County. On December 30, 2009, the circuit court entered the *Order* presently being appealed by the Appellant.

II. STANDARD OF REVIEW

"The Commissioner is appealing a circuit court order reversing its revocation of Ms. Noble's driver's license. This Court applies the same standard of review that the circuit court applied to the Commissioner's administrative decision, *i.e.*, we give deference to the Commissioner's purely factual determinations but give a *de novo* review to legal determinations." *Noble v. West Virginia Dept. of Motor Vehicles,* 223 W.Va. 818, 821, 679 S.E.2d 650, 653 (2009).

III. ARGUMENT

A. THE APPELLANT PROPERLY RELIED ON THE RESULTS OF THE INTOXIMETER TEST.

The circuit court erred in finding that the Appellant erred in relying on the results of the Intoximeter test on the basis that the test must be given "within two (2) hours from and after the time the person allegedly last drove a motor vehicle." Order at ¶ 4. The hearing examiner properly considered the results of the secondary chemical test of the Appellee's breath even though it was taken more than two hours after the accident because it was taken within two hours of the time of Appellee's arrest.

The record reflects that Appellee was placed under arrest for DUI at 12:19 a.m., and the secondary chemical test of his breath was administered at1:17 a.m. W.Va. Code § 17C-5-8(a) provides that when the secondary chemical test of the breath is given within two hours from and after the time of arrest *or* of the acts alleged, and the result of the test shows a BAC of .08 or greater, it constitutes *prima facie* evidence that the person was driving under the influence of alcohol.

West Virginia Code § 17C-5-8(a) provides in pertinent part as follows:

a) Upon trial for the offense of driving a motor vehicle in this state

> while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood, breath or urine, is admissible, if the sample, or specimen was taken within two hours from and after the time of arrest or the acts alleged.

Based upon the clear meaning of the statute, the chemical analysis of Appellee's breath was admissible because the sample or specimen was taken within two hours from and after the time of arrest. It would naturally follow that because the test result of the chemical analysis of Appellee's breath shows that he had a BAC level of .09 by weight, it is at the very minimum relevant evidence that he was driving under the influence of alcohol on the date and time in question. Arguably, it would constitute *prima facie* evidence of DUI.

Conducting a secondary chemical test more than two hours after the acts alleged or the arrest does not require exclusion of the tests results. In *State v. Dyer*, 355 S.E.2d 356, 362 (1987), this Court determined that the results of a secondary chemical test conducted outside the two-hour time period were admissible to show that an individual had consumed alcoholic beverages earlier and was relevant evidence of a probative fact. Consequently, at most, the weight of the test results would only need to be reduced from *prima facie* evidence to relevant evidence, not excluded entirely.

In *Dyer*, *supra,* the defendant was on trial in the circuit court for causing death while driving under the influence of alcohol. The defendant was convicted and on appeal contended that the trial court erred in allowing the State to introduce into evidence the results of the blood alcohol tests performed at the hospital with defendant's consent. At the pretrial hearings, the defendant sought to suppress the tests results on the grounds that the blood sample was not drawn within two hours of his

arrest or of the alleged defense as required by W. Va. Code § 17C-5-8. "The trial court found that the specimen had not, in fact, been taken within the two-hour time period, but concluded that the results were admissible as long as they were not used as *prima facie* evidence of intoxication." This Court noted that the test results were relied upon at trial to show that the appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact.

As the Commissioner found in the *Remand Final Order* in this case, the results of the secondary chemical test of Appellee's breath were properly received into evidence at the administrative hearing and were properly considered by the Commissioner as one of the several factors in determining that Appellee did drive a motor vehicle in this State while under the influence of alcohol. This would be true even though the test results would not be considered *prima facie* evidence of the DUI but only relevant evidence to show that the Appellee had substantial amounts of alcohol in his blood at the time of the accident and to verify the officer's observation of symptoms of intoxication exhibited by Appellee during the deputy's observation of Appellee before, during and after Appellee's arrest.

B. EVIDENCE OF THE APPELLEE'S BLOOD TEST RESULTS WAS PROPERLY ADMITTED INTO EVIDENCE AND RELIED UPON BY THE COMMISSIONER.

The circuit court erred in finding that "It was error for the Respondent to rely upon the results of any blood test because there was no foundation laid for the introduction for such blood test at the administrative hearing." Order at ¶17. The Appellant subpoenaed the Custodian of the Records at Summersville Memorial Hospital to bring the forensic report of Appellee's blood test to the

administrative hearing. At the hearing, Susie Vessels appeared and testified that she was the records custodian, and she produced the results of Appellee's blood test. Tr. At 5. That document was marked Exhibit 17 and entered into the record by the Hearing Examiner. The document was required to be admitted into the record, subject to rebuttal by the Appellee. This action comports with the requirements of *Lowe v. Cicchirillo,* 223 W.Va. 175, 672 S.E.2d 311 (2008). Citing *Crouch v. West Virginia Div. of Motor Vehicles,* 219 W.Va. 70, 76, 631 S.E.2d 628, 634 (2006), this Court further found:

> Moreover, as we held in *Crouch v. West Virginia Div. of Motor Vehicles,* 219 W.Va. 70, 76, 631 S.E.2d 628, 634 (2006), admission of this type of information is mandatory on behalf of the agency. We explained:
>
> Without a doubt, the Legislature enacted W.Va.Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an administrative hearing "[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself...." W. Va.Code § 29A-5-2(b). Indeed, admission of the type of materials identified in the statute is mandatory, as evidenced by the use of the language "shall be offered and made a part of the record in the case ...." *Id.* This Court has long recognized the mandatory meaning attached to the word "shall." " 'It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' " *Retail Designs, Inc. v. West Virginia Div. of Highways,* 213 W.Va. 494, 500, 583 S.E.2d 449, 455 (2003) (quoting Syl. pt. 1, *Nelson v. West Virginia Pub. Employees Ins. Bd.,* 171 W.Va. 445, 300 S.E.2d 86 (1982)).
>
> 219 W.Va. at 76, 631 S.E.2d at 634.

In this case, the circuit court did not discuss *Crouch* in its order reversing the DMV. Nonetheless, *Crouch* also explained that,

> Although W. Va.Code § 29A-5-2(a) has made the rules of evidence applicable to DMV proceedings generally, W. Va.Code § 29A-5-2(b) has carved out an exception to that general rule in order to permit the admission of certain types of evidence in administrative hearings that may or may not be admissible under the Rules of Evidence. Moreover, inasmuch as we view W. Va.Code § 29A-5-2(a) as a statute pertaining to the application of the Rules of Evidence to administrative proceedings

> generally, while W. Va.Code § 29A-5-2(b) specifically addresses the admission of particular types of evidence, W. Va.Code § 29A-5-2(b) would be the governing provision.
>
> Moreover, as we noted in *Crouch,*
>
> We point out that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy.
>
> 219W.Va. at 76, n. 12, 631 S.E.2d at 634, n. 12. As such, with regard to the case at hand, there was no evidence offered by the appellee to undermine the authenticity of th blood test results once they were admitted during the administrative hearing. To the extent that the appellee failed to rebut the accuracy of the blood test results in any way, the DMV properly gave them weight.
>
> 223 W.Va. 180-181, 672 S.E.2d 316 - 317.

The hospital record which was properly admitted at the hearing was part of the Division's records. The circuit court addressed neither *Crouch* nor W.Va. Code § 29A-5-2(b) in its Order.

The Commissioner properly considered the results of the blood test. No evidence was offered by the Appellee to undermine the authenticity of the document once it was admitted. The results are admissible pursuant to W. V. Rules of Evidence 803(6) as a document made in the ordinary course of business. The Commissioner properly gave the results weight as evidence offered on behalf of the Division.

Even if the blood test results were improperly relied upon by the Commissioner, there remains a preponderance of the evidence to uphold the revocation of his license. In Syllabus point 4. of *Coll v. Cline*, 202 W.Va. 599, 505 S.E.2d 662 (1998), this Court held, "There are no provisions in either W.Va. Code, 17C-5-1, et seq., or W.Va.Code, 17C-5A-1, 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, controlled substances or drugs for purposes of making an administrative revocation of his or her

driver's license." 505 S.E.2d 664- 665. Thus, even if the blood test results were improperly relied upon by the Commissioner, that is not a valid basis for reversing the Final Order.

C. THE CIRCUIT COURT ERRED IN FINDING THAT THE TESTIMONIES OF THE OFFICER AND THE DRIVER WERE NOT RECONCILED.

The circuit court erred in finding that "The Remand Final Order from the Respondent did not comply with the mandates of *Muscatell, supra*, or *Choma, supra* because there was not a proper analysis of the conflicting testimony of the Petitioner and the Arresting Officer." Order at ¶12. The "Discussion" portion of the Remand Final Order goes to great length to detail the evidence in the case, including the testimonies of the Appellee and Deputy Bailey. A review of pages 6-8 of the *Remand Final Order* will show that the Commissioner complied fully with the requirements of *Muscatell, supra.*

D. THE CIRCUIT COURT ERRED IN FINDING THAT THE COMMISSIONER WAS REQUIRED TO GIVE SUBSTANTIAL WEIGHT TO THE RESULTS OF THE CRIMINAL MATTER.

The circuit court further erred in finding that *Choma v. West Virginia Div. of Motor Vehicles,* 210 W .Va. 256, 557 S.E.2d 310 (2001) requires that the Appellant give substantial weight to the dismissal of the criminal charges against the Appellee. Order at ¶ 12.

In the Remand Final Order, the Commissioner noted, "The Respondent submitted evidence that the criminal case in this matter had been dismissed. The criminal matter was dismissed based on a plea agreement to plead guilty to separate charges. Evidence was not presented by the Respondent regarding the charges to which he agreed to plead guilty in exchange for the DUI charges to be dismissed." Remand Final Order at 7.

"This Court has previously recognized that administrative license revocation proceedings and criminal DUI proceedings are two separate and distinct proceedings[,]" *Carroll v. Stump,* 217 W. Va. 748, 755, 619 S.E.2d 261, 268 (2005), that license revocations are civil in nature, *Shumate v. West Virginia Dep't of Motor Vehicles,* 182 W. Va. 810, 813, 392 S.E.2d 701, 704 (1990), and that the burden on the Commissioner is only a preponderance. *Lowe,* ___ W. Va. at ___, 672 S.E.2d at 318.

The dismissal of the criminal matter, without adjudication of the DUI charge, does not provide a basis for reversal of the order of revocation in this matter. The Commissioner duly noted the dismissal, and properly found that this did not constitute outweigh the evidence presented. "The overwhelming weight of the evidence presented proves by a preponderance of the evidence that the Respondent was operating a motor vehicle while under the influence of alcohol." Remand Final Order at 8.

E. THE CIRCUIT COURT ERRED IN FINDING THAT THE FAILURE OF AN INVESTIGATING OFFICER TO INTRODUCE A VIDEOTAPE AT AN ADMINISTRATIVE HEARING GIVES AN ADVERSE INFERENCE THAT SUCH VIDEOTAPE WOULD BE ADVERSE TO THE TESTIMONY OF THE OFFICER.

The circuit court erred in finding that the failure of the officer to introduce the videotape of the administration of the breath test to Appellee raises an adverse inference against the testimony of the arresting officer. Order at ¶ 14. There was no testimony at the hearing of the existence of a videotape. There was no objection raised by the Appellee that a video was not introduced: Moreover, neither the driver nor his attorney requested or subpoenaed any videos prior to the hearing. Finally, the Hearing Examiner in the present case did not order production of the video, nor did she hold the record open for its admission. In fact, the only evidence of a video is a box on the DUI Information

Sheet which is checked: "Detachment/Station Video Tape/DVD Yes". The circuit court's remand order did not mention the videotape. It merely required theat the Appellant re-examine the existing evidence, without taking new evidence, in accordance with *Muscatell* and *Choma*. If the circuit court were going to find that the failure of the officer to introduce a videotape was a basis for reversal, the court could have reversed and dismissed without remand. The videotape was not in evidence.

In *Belknap v. Cline,* 190 W.Va. 590, 439 S.E.2d 455 (1993) (per curiam), this Court expressly rejected the notion that a "video, simply because it existed, had to be introduced into evidence" at an administrative hearing. 190 W. Va. 592, 439 S.E.2d 457. In *Belknap*, this Court remanded a case to the Commissioner for review of a videotape of the driver at the police station during the process of administering the Intoximeter, "if it can be located". 190 W.Va. 594, 439 S.E.2d 459. Critical to the Court's opinion in that case, and distinguishing that case from the present case, was that the officer moved the videotape into evidence and asked that the hearing examiner hold the record open so that the video might be considered. The driver, who was *pro se*, stated that he "would like for it to be reviewed...." The hearing examiner then gave the trooper thirty days to produce a copy of the video, designated it as Exhibit Number Four, and explained that "it will be made part of the record and the Commissioner will review that carefully." The driver further stated that "the events on the tape I think will be helpful to me and, and what he said about, I'd like to see that, I'd like to have, you know, of course, I guess they will be the one to examine it...." The driver was once again assured by the hearing examiner that the video would be reviewed carefully. 190 W.Va. 591, 439 S.E.2d 456. When the video was not produced in the timeframe ordered by the Commissioner's hearing examiner, the Commissioner held the record open for an additional 30 days. The video was never produced.

The circuit court erred in establishing a heretofore nonexistent adverse inference based on the

investigating officer's failure to introduce the video at the administrative hearing. Under *Belknap*, there is no requirement in this case to produce the video. The driver did not request it, there was no testimony about a video at the hearing, and the Hearing Examiner did not order its production.

West Virginia's caselaw regarding adverse inference is found in cases of spoilation of evidence and failure to call a material witness. *See, McGlone v. Superior Trucking Co., Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987)(missing witness instruction); *Tracy v. Cottrell ex rel. Cottrell*, 206 W.Va. 363, 524 S.E.2d 879 (1999)(spoilation of evidence); *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003)(spoilation of evidence); *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996)(missing witness instruction); *Kominar v. Health Management Associates of West Virginia, Inc.*, 220 W.Va. 542, 648 S.E.2d 48 (2007)(spoilation of evidence). The circuit court provided no support in West Virginia law for finding an adverse inference in an administrative DUI proceeding. The circuit court committed clear error in making such a finding, and in reversing the Final Order on that basis.

IV.
CONCLUSION

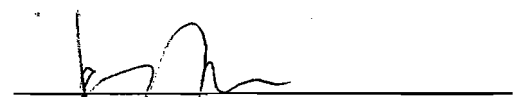
For the above reasons, Appellant prays that this Court reverse the Order entered by the Circuit Court of Nicholas County on December 30, 2009.

Respectfully submitted,

JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, and counsel for respondent, do hereby certify that the foregoing *Brief of Appellant* was served upon petitioner by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 20th day of October, 2010, addressed as follows:

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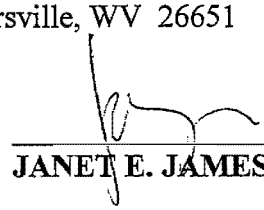

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