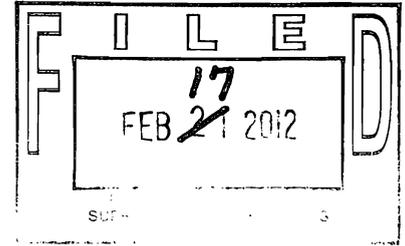


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1292



**JOE MILLER,**

**Commissioner,  
Division of Motor Vehicles,**

**Petitioner,**

**v.**

**COPY**

**ALBERTO VELTRI,**

**Respondent.**

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**SUMMARY RESPONSE OF RESPONDENT**

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Appeal from the Circuit Court of Hancock County, West Virginia,  
Honorable Ronald E. Wilson, Judge  
Circuit Court Case No. 10-AA-1

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Robert G. McCoid, Esq.  
West Virginia Bar I.D. No. 6714  
**McCAMIC, SACCO,  
& McCOID, P.L.L.C.**  
56-58 Fourteenth Street  
Post Office Box 151  
Wheeling, WV 26003  
(304) 232-6750  
(304) 232-3548 (telefax)  
[rmccoid@mस्पmlaw.com](mailto:rmccoid@mस्पmlaw.com)  
*Of Counsel to Respondent*

## **I. INTRODUCTION**

This Summary Response is filed on behalf of Respondent, Alberto Veltri, pursuant to Rule 10(e), W. Va. Rev. R. App. P.<sup>1</sup> The Commissioner's assignments of error are addressed in turn.

## **II. ARGUMENT**

### **1). Retrograde extrapolation.**

The commissioner first assigns as error the circuit court's consideration of Mr. Veltri's argument that his purported breath alcohol content ("BrAC") was in excess of eight hundredths of one percent, by weight, as proscribed by W. Va. Code § 17C-5A-2(j) (2009). The commissioner argues that the circuit court improperly imposed on the DMV an obligation to present evidence of retrograde extrapolation of blood alcohol.

Mr. Veltri acknowledges that the commissioner bears no duty to present such evidence. However, the fact remains that blood alcohol continues to rise over time following the last alcoholic drink an individual consumes, and the DMV, itself, has recognized this fact. Portions of the 1998 driver's handbook published by the DMV attest to this fact, and documentary proof demonstrating the concept of retrograde extrapolation was admitted into evidence by Mr. Veltri without objection. Appendix at pp. 32-34, 79-79. Based upon the documentary evidence published by DMV, itself, it was error for the commissioner to have ignored this evidence, and the conclusion reached by the circuit court, *i.e.*, that Mr. Veltri's BrAC at the time of the 1:57 a.m. stop

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<sup>1</sup> Respondent, Alberto Veltri, cannot financially afford the services of undersigned counsel in responding to the commissioner's appeal. Undersigned counsel files this response without compensation from Mr. Veltri because of both his perception that reversing the circuit court's decision would constitute an injustice and, as well, out of respect for this tribunal.

was plausibly below .08 based upon a test time of 2:31 a.m. and a reading of .095 certainly was a reasonable and reasoned conclusion.

However, the commissioner's argument raises a false premise: that the circuit court imposed on the DMV the burden of proving retrograde extrapolation. That argument is inaccurate. The circuit court regarded Mr. Veltri's argument as affirmatively overcoming the prima facie evidence accorded to the secondary chemical test and faulted the commissioner, not for proving his BrAC by retrograde extrapolation, but for failing to make a reasoned and articulate decision to sustain a finding as required by *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518. Appendix at p. 6. Stated otherwise, the circuit court faulted the commissioner for effectively ignoring Mr. Veltri's argument and arriving at his decision in conclusory fashion.

Summarily, the circuit court committed no error in reversing the commissioner's order based upon a lack of reasoning employed in reaching his conclusions.

2). Crediting the DUI Information Sheet over Mr. Veltri's in-court testimony.

The Commissioner next complains that the circuit below erred by reversing the commissioner's decision to credit the sterile, DUI Information Sheet over the live, in-court testimony of Mr. Veltri, who systematically refuted every contention contained within the SAO.<sup>2</sup> Irrespective of whether Mr. Veltri "refuted" the SAO or "rebutted" it, a

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<sup>2</sup> West Virginia Code § 17C-5A-2(d) (2008), enacted by the Legislature at the urging and behest of the commissioner and the DMV general counsel's office, constitutes a unilateral expansion of this Court's decision in *Crouch v. West Virginia Division of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006). In *Crouch*, the arresting officer neglected to testify as to the venue of the matter, and, on appeal, this Court relieved the Commissioner from the obligation of having to prove the same with in-court testimony because the Statement of Arresting Officer ("SAO") was submitted under oath and contained a statement reflecting venue. Opportunistically seizing on this narrow

distinction that the Commissioner apparently finds to be of colossal importance, the immutable fact remains that Mr. Veltri contradicted everything alleged on the piece of paper submitted by Officer Falbo to substantiate that he was under the influence.<sup>3</sup> This testimonial refutation certainly overcame the words on paper in the SAO, and the circuit court below properly found that the commissioner failed to credit this testimony to a greater extent than the SAO. *See Miller v. McKeever*, No. 11-0594 (W. Va. Supreme Court, December 2, 2011) (memorandum decision) (mandate issued February, 2012).

The commissioner pounces on Mr. Veltri's statement that he was "a little bit" under the influence and concludes that this fact, coupled with a concession that he had consumed alcohol and operated a motor vehicle, is sufficient without more to sustain the order or revocation. However, the commissioner fails to take note of the fact that the term "under the influence" is not defined in any manner in the SAO or, for that matter, in any form save a statutory definition that relates to BrAC, which explicitly equates a presumption of being under the influence with a quantification of BrAC. *See* W. Va. Code § 17C-5-8(a). It is a nuanced term, and, although it had been previously been generally equated with the term "intoxication," *see State v. Michael*, 141 W.Va. 1, 87 S.E.2d 595 (1955), no evidence exists to suggest that Mr. Veltri, an Italian immigrant

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holding, DMV thereafter radically changed the SAO from a one page document containing barebones details concerning an arrest for driving under the influence of ("DUI") alcohol to the entire DUI Information Sheet. The Legislature sanctified this practice by enacting W. Va. Code § 17C-5A-2(d). Thereafter, the SAO stands unchallenged merely because it is submitted in affidavit form, a practice that no real court in this State, including municipal courts, magistrate courts or circuit courts, would even remotely permit as a substitute for live testimony. If the respondent driver wishes to challenge the SAO affidavit, he can summon the arresting officer, which, in addition to implicitly shifting the burden of proof in a license revocation proceeding onto the driver, is akin to asking a man to bring the rope to his own hanging.

<sup>3</sup> Certainly, the talismanic significance placed on the SAO by the commissioner is somewhat misplaced, as Officer Falbo is evidently fallible; for example, he improperly administered the preliminary breath test, which was excluded from evidence.

whose second language is English, was ever supplied with a definition of the statutory term before being asked whether he was “under the influence.” Certainly, the commissioner cannot believe that Mr. Veltri, in being posed the question, had the means of responding to the question based upon any notion of what his BrAC was. In the absence of any definition supplied to Mr. Veltri by Officer Falbo, the evidentiary weight accorded to his statement that he was a “little bit” under the influence was properly minimized by the circuit court in reversing the commissioner’s decision.<sup>4</sup>

Summarily, the circuit court below did not err in concluding that the commissioner improperly failed to credit the live testimony of the driver over the SAO.

3). Application of statutory provisions and case law no longer applicable.

Mr. Veltri acknowledges that the statutory and regulatory provisions applied by the circuit court to the extent of requiring the presence of the arresting officer at the subject revocation hearing were antiquated by the time of Mr. Veltri’s arrest. Nevertheless, this conclusion does not obviate the fact that the commissioner improperly credited the SAO paper over the live testimony of Mr. Veltri, failed to meaningfully credit his testimony, and exhibited a lack of reasoning in reaching his legal conclusions sustaining the order of revocation.

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<sup>4</sup> If one consumes an alcoholic beverage such as a twelve (12) ounce beer, one necessarily feels differently, however marginally, than one did before consuming the same, yet by no means is one necessarily “under the influence” within the meaning of the statutory definition. However, this marginal change in feeling could easily be construed to mean that one is a “little bit” under the influence yet not amount at all to a concession of being intoxicated, drunk, or “under the influence” within the meaning of W. Va. Code § 17C-5-8(a).

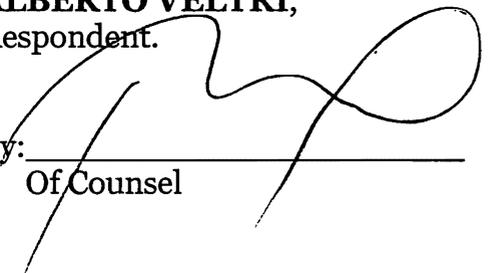
**III. CONCLUSION**

For the foregoing reasons and any others that may be apparent to this Court, your respondent, Alberto Veltri, respectfully prays that this Court affirm the Circuit Court of Hancock County.<sup>5</sup>

Respectfully submitted,

**ALBERTO VELTRI,**  
Respondent.

By: \_\_\_\_\_  
Of Counsel



Robert G. McCoid, Esq.  
West Virginia Bar I.D. No. 6714  
**McCAMIC, SACCO,  
& McCOID, P.L.L.C.**  
56-58 Fourteenth Street  
Post Office Box 151  
Wheeling, WV 26003  
(304) 232-6750  
(304) 232-3548 (telefax)  
[rmccoid@mspmlaw.com](mailto:rmccoid@mspmlaw.com)  
*Of Counsel to Respondent*

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<sup>5</sup> Although implicit in filing a summary response pursuant to Rule 10(e), W. Va. Rev. R. App. P., Mr. Veltri contends that, consistent with the provisions of Rule 10(c)(6) and (d), W. Va. Rev. R. App. P., and in light of the criteria in Rule 18(a)(4), W. Va. Rev. R. App. P., no oral argument on the issues raised herein is warranted or necessary.

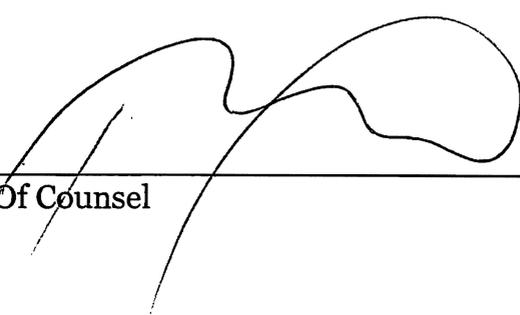
**CERTIFICATE OF SERVICE**

Service of the foregoing **Summary Response of Respondent** was had by delivering true and correct copies thereof to the following persons via First Class U.S. Mail, postage prepaid, to their last known address this 16th day of February, 2012.

Honorable Darrel V. McGraw  
Elaine L. Skorich, Esq., Assistant Attorney General  
**OFFICE OF THE ATTORNEY GENERAL**  
Post Office Box 17200  
Charleston, WV 25317-0010

By: \_\_\_\_\_

Of Counsel

A handwritten signature in black ink, appearing to be "Elaine L. Skorich", written over a horizontal line. The signature is fluid and cursive.