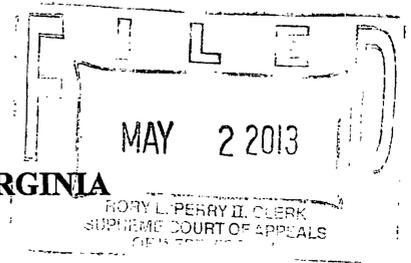


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-1403
(Circuit Court Civil Action No. 12-AA-12)**



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

Respondent below/Petitioner herein,

v.

JAMES A. ODUM,

Petitioner below/Respondent herein.

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**

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I. ARGUMENT

The sum and substance of Respondent's brief to this Court is an argument that "none of the errors raised on the appeal before this Court were properly preserved below." Petitioner submits that the errors raised before this Court arise from the final order of the circuit court below. Said Final Order is part of the record presented to this Court; therefore, Petitioner's reliance on *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996) and *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999) is misplaced. The issues raised before the circuit court were substantially similar; however, Petitioner must appeal to this Court the errors in the circuit court's order - not just reiterate the appealable issues from the final order of the Office of Administrative Hearings.

Respondent's position regarding the issues raised before this Court is nonsensical. Petitioner could not have anticipated the holdings in the circuit court's final order so that those could have been "pre-argued" below. For example, at the time that the petition for judicial review was filed before the circuit court, the decisions by this Court in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d. 137 (2012) had not yet been determined. Although the application of the exclusionary rule was raised in the petition for judicial review, the misapplication of this Court's holdings in *Toler* and *Smith* was not appealable until after the circuit court's final order was issued. Accordingly, the issues raised by Petitioner were asserted timely after the final order of the circuit court was entered, and this matter is properly before this Court.

Furthermore, Petitioner submits that because Respondent's Brief does not address the merits of the issues raised, Respondent has waived any argument on the merits.

This Court consistently has held that "silence may operate as a waiver of objections to error and irregularities[.]" *State v. Grimmer*, 162 W. Va. 588, 595, 251 S.E.2d 780, 785 (1979), *overruled on other grounds by State v. Petry*, 166 W. Va. 153, 273

S.E.2d 346 (1980).

Not only does Respondent not address the merits in his brief, he does not deny that he was driving while under the influence of alcohol on the night he was arrested.

II. CONCLUSION

For the reasons outlined in Petitioner's brief as well as those listed above, the Final Order of the circuit court should be reversed.

Respectfully submitted,

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

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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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 **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 2nd day of May, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Randy Hoover, Esquire
P. O. Box 5521
Beckley, WV 26801


Elaine L. Skorich