

**BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 13-0429**

**STEVEN O. DALE, ACTING COMMISSIONER,**

**Petitioner Below/Petitioner,**

**v.**

**(Civil Action No. 12-AA-130)**

**TAMMY REED,**

**Respondent Below/Respondent.**

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**BRIEF OF PETITIONER, STEVEN O. DALE, ACTING COMMISSIONER**

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## ASSIGNMENTS OF ERROR

- I. **THE CIRCUIT COURT ERRED IN FAILING TO GIVE EVIDENTIARY VALUE TO THE DOCUMENTARY EVIDENCE WHICH SHOWED THAT THE REQUIREMENTS FOR “IMPLIED CONSENT” WERE MET.**
- II. **THE CIRCUIT COURT ERRED IN IMPOSING A NON-EXISTENT DUTY TO PROVE THAT THE DRIVER UNDERSTOOD THE IMPLIED CONSENT LAW.**

## STATEMENT OF THE CASE

At 12:41 a.m., on September 4, 2010, Deputy G. C. Paitsel of the Mercer County Sheriff's Department, the Investigating Officer in this matter, came into contact with the Respondent after employees of a Go-Mart store informed him that a female driver appeared to be intoxicated. A. R. At 26, 115. Dep. Paitsel observed Respondent's vehicle making a left turn without signaling, then turned into a car wash without signaling. A. R. At 26, 116. Respondent turned the wrong direction into the car wash. Respondent got out of her car and approached the vending machine to wash her car. A. R. at 116. Dep. Paitsel observed that Respondent was unsteady exiting her car and staggered as she walked. A. R. At 27.

Upon approaching the Respondent, Dep. Paitsel observed that she had bloodshot eyes, odor of alcohol on her breath, and slurred speech. A. R. At 27. Respondent became verbally rude, upset and defiant. A. R. At 117, 121. Dep. Paitsel observed containers of alcohol in Respondent's car. A. R. At 27, 130.

The Investigating Officer had reasonable grounds to believe the Respondent had been driving while under the influence of alcohol. A. R. At 117. Dep. Paitsel placed Respondent under arrest and transported her to the Bluefield City Police Department. A. R. At 120. He administered field sobriety tests to the Respondent, including the horizontal gaze nystagmus, walk-and-turn, and one-

leg stand. During administration of the horizontal gaze nystagmus test, the Respondent's eyes showed lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and onset of nystagmus prior to 45 degrees. A. R. at 27, 118-119.

During the walk-and-turn test, the Respondent stopped walking, missed heel to toe, started too soon, couldn't keep her balance and stepped off the line. A. R. at 27, 119.

While performing the one-leg stand test, the Respondent swayed while balancing, used her arms to balance and put her foot down. A. R. at 28, 119-120.

The DUI Information Sheet reflects that Dep. Paitsel read the Implied Consent Statement to the Respondent and gave her a copy. A. R. At 29. Respondent refused to submit to the Intoximeter test. After 15 minutes, Respondent once again refused to submit to the test. A. R. At 29, 121.

By order dated September 29, 2010, the Division of Motor Vehicles notified Respondent that her license would be revoked for driving under the influence of alcohol ("DUI") and refusal to submit to the secondary chemical test (also referred to herein as "implied consent"). A. R. 34. Respondent requested an administrative hearing, (A. R. 42-45) which was held on April 21, 2011.

In its *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* ("Order"), entered on September 28, 2012, by John G. Hackney, Chief Hearing Examiner for the Office of Administrative Hearings ("OAH") in an administrative appeal styled *Tammy T. Reed v. Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles*, Case No. 350885AB, the OAH upheld the DUI and reversed the "Implied Consent" portion of the revocation. A. R. At 64-71.

Petitioner appealed the Order to the circuit court of Kanawha County in the matter styled *Joe E. Miller, Commissioner v. Tammy Reed*, Civil Action No. 12-AA-130. By its *Final Order*, the circuit court affirmed the Order. A. R. 1-6.

Petitioner herein seeks reversal of the circuit court's *Final Order*, entered March 18, 2013.

### **SUMMARY OF ARGUMENT**

Of critical importance in this matter is the circuit court's refusal to acknowledge and accept that the Division of Motor Vehicles' ("Division") file documents, including the DUI Information Sheet (A. R. 24-30), was in evidence in this case. That document proved, without contradiction, that the investigating officer read and gave the Respondent the Implied Consent Statement.

The circuit court committed further error in finding, as a basis for affirming rescission of the "implied consent" revocation of Respondent's license, that there was no evidence that she understood what was in the statement. This is simply not a requisite for revocation on the basis of refusal to submit to the secondary chemical test.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

### **ARGUMENT**

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 71, 464 S.E.2d 589, 590 (1995) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions, or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory

authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of West Virginia Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010) (per curiam).

**A. THE CIRCUIT COURT ERRED IN FAILING TO GIVE EVIDENTIARY VALUE TO THE DOCUMENTARY EVIDENCE WHICH SHOWED THAT THE REQUIREMENTS FOR “IMPLIED CONSENT” WERE MET.**

In the *Final Order*, the circuit court notes the officer’s testimony that he read the Implied Consent Statement to the Respondent. It also notes that the officer could not recall whether the Respondent acknowledged that she understood the Implied Consent Statement. A.R. at 5. The circuit court concluded, “Thus, even though the DUI Information Sheet indicates that the implied consent form was read and given to the Respondent, the IO [investigating officer] testified that he read the implied consent statement and he could not recall that the Respondent acknowledged any understanding of implied consent law.” *Id.* The circuit court ignored the evidence that the officer gave the Respondent a copy of the form, and added the requirement that Respondent manifest an understanding of the statement.

The totality of the evidence establishes that the officer read and gave Respondent a copy of the Implied Consent Statement. This is noted in the DUI Information Sheet (A. R. at 29), and is not refuted. The officer’s testimony at the hearing affirms that he read the statement; it does not reiterate that he gave her a copy of the statement, and he testifies that he does not recall that she manifested understanding of the statement. The circuit court’s reasoning was based on the latter two factors. However, that he gave her the document is established in the DUI Information Sheet (A.R. at 29); and there is no requirement that the officer ascertain whether the person understood the document.

It is also manifestly clear that the Respondent refused to take the test. Dep. Paitsel testified: "I read her the implied consent and then asked her if she wished to take the breathalyzer....She emphatically refused to take the intoxilyzer." He is then asked, "I believe you reported that she simply refused, flat out refused to take the intoximeter testing?", to which he answered, "Yes." A. R. At 120-121.

The lack of an Implied Consent Statement in the record is not fatal to the revocation for refusal to submit to the secondary test. The record is clear that whether or not the Statement was in the record, Respondent would not have submitted to the test. Moreover, this Court has held that it is not necessary that the Implied Consent Statement be entered into evidence in order for a finding to be made that the form was read and given to the driver:

Ms. Gibbs also asserts that the record does not support the administrative decision because the Implied Consent form was never offered or admitted into evidence during the administrative hearing. We find no merit in this argument. The record contained sufficient probative evidence from which the Commissioner could conclude that the form had been read to Ms. Gibbs.

*Gibbs v. Bechtold*, 180 W.Va. 216, 219, 376 S.E.2d 110, 113 (1988). And in *Lilly v. Stump*, 217 W.Va. 313, 617 S.E.2d 860 (2005), the Court found that the testimonial evidence was sufficient for the Court to make a finding that the driver was read and given the implied consent statement:

In fact, the only evidence of record on this issue was Deputy Lilly's testimony which clearly demonstrated that the officer gave the Implied Consent form to the appellee. As there was no testimony in conflict with the officer, we see no reason to contradict his testimony.

217 W.Va. 319, 617 S.E.2d 866. Once again, the Implied Consent Statement itself was not in evidence. In the present case, it is the documentary, not testimonial, evidence which shows that the driver was both read and given the statement, yet the circuit court refused to accept this evidence. And, as in *Lilly*, this evidence was not contradicted.

The circuit court erred in not relying on the evidence in the DUI Information Sheet which reflected that the officer read and gave a copy of the Implied Consent Statement to the Respondent. A. R. At 29. That evidence came into the record pursuant to the Administrative Procedures Act (“APA”). “A hearing before the office shall be heard de novo and conducted pursuant to the provisions of the contested case procedure set forth in article five, chapter twenty-nine-a of this code to the extent not inconsistent with the provisions of chapters seventeen-B and seventeen-c of this code. In case of conflict, the provisions of chapters seventeen-b and seventeen-c of this code shall govern.” W. Va. Code § 17C-5C-4. *See also*, W. Va. Code R. §§ 105-1-3.4 and 105-1-15.1.

The APA requires that “All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case.” W. Va. Code § 29A-5-2(b).

When the OAH assumed the Division’s former duties with regard to holding administrative hearings, the statute was amended to read, “*Upon consideration of the designated record*, the hearing examiner shall, based on the determination of the facts of the case and applicable law, render a decision affirming, reversing or modifying the action protested.” W. Va. Code § 17C-5A-2(a)[2010](emphasis added). The “designated record” language can only be interpreted to mean the records held by the Division, which continues to be the agency which initially revokes the license based upon the officer’s submission of the DUI Information Sheet. The Division is in possession of, *inter alia*, the DUI Information Sheet, the certified records of secondary chemical test designations, and the West Virginia Bureau of Public Health records pertaining to officers’ training. The only authority conferred on the OAH is to hold hearings and rule upon the evidence; the Division remains the agency which holds the records and controls license revocations (subject to the rulings of the OAH). Therefore, the OAH does not have “papers, records, agency staff memoranda and

documents in the possession of the agency”: that language necessarily refers to the Division.

The “papers, records, agency staff memoranda and documents in the possession of the agency” are required to be admitted into evidence at the hearing. In Syllabus Point 2 of *Crouch v. West Virginia DMV*, 219 W. Va. 70, 631 S.E.2d 628 (2006), this Court held, “In an administrative hearing conducted by the Division of Motor Vehicles, a statement of an arresting officer, as described in W. Va. Code § 17C-5A-1(b) (2004) (Repl. Vol.2004), that is in the possession of the Division and is offered into evidence on behalf of the Division, is admissible pursuant to W. Va. Code § 29A-5-2(b) (1964) (Repl. Vol.2002).” Indeed, in *Crouch*, the Court observed that “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.” *Crouch*, 219 W. Va. at 75, 631 S.E.2d at 631. W. Va. Code § 29A-5-2(b) *requires* the admission (i.e., “shall be offered and made a part of the record in the case”) of “*all* evidence . . . of which [the agency] desires to avail itself.” 82 C.J.S. Statutes § 446 (“the term ‘all’ is a wide-ranging word that does not admit of exception, addition, or exclusion.”); 73 Am. Jur.2d Statutes § 159 (same). *See, e.g., State v. Tate*, 22 S.E.2d 868, 869 (W. Va. 1942) (citations omitted) (“The statute says that a bill of exceptions ‘shall be made a part of the record in the case’, Code, 56-6-35. This provision, by a long succession of cases . . . has been held to be absolutely mandatory.”). And in *Plumley v. Miller*, No. 101186, slip op. at 2-3 (W. Va. Feb. 11, 2011) (Memorandum Decision), this Court concluded:

Mr. Plumley argues that he was denied his constitutional and statutory rights to due process because of the DMV’s and the circuit court’s incorrect construction of both West Virginia Code §29A-5-2(b), which essentially provides for the DMV’s file to be made part of the record in the administrative proceeding, and West Virginia Code §17C-5A-2(d), which provides that where a party does not request the attendance of the investigating officer, the Commissioner shall consider the written statements, test results, and any other information submitted by the investigating officer. There has not been a denial of due process. Mr. Plumley did **not** request the appearance of the

investigating officer at the administrative hearing. Accordingly, under West Virginia Code §17C-5A-2(d), the Commissioner appropriately considered the evidence that was submitted and made a part of the record by the Investigating Officer. *Id.*

The OAH's legislative rules also provide that the Rules of Evidence apply in administrative hearings, which provides yet another avenue for admission of the DUI Information Sheet into evidence. W. Va. Code R. § 105-1-15.2. In judicial dicta in *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 75 n.10, 631 S.E.2d 628, 633 n.10 (2006), the Court noted that the "Statement of Arresting Officer" would fall within West Virginia Rule of Evidence 802(8)(c), and, consequently, so would the DUI Information Sheet as "[r]eports of police officers conducting criminal investigations have been admitted into civil proceedings through Rule 803(8)(c)." *JVC America, Inc. v. Guardsmark*, No. 1:05-CV-0681-JOF, 2006 WL 2443735, 13 (N.D. Aug. 22, 2006). Evidence admitted under Rule 803 is substantive evidence, *Firemen's Fund Ins. Co. v. Thien*, 8 F.3d 1307, 1311 n.10 (8<sup>th</sup> Cir. (1993)); *United States v. Check*, 582 F.2d 668, 681 (2d Cir. 1978); *United States v. Palacios*, 556 F.2d 1359, 1363 n.7 (5<sup>th</sup> Cir. 1977); it can be relied on as proof of a fact in issue. *See also Smith v. Spina*, 477 F.2d 1140, 1146 (3d Cir. 1973) (written police report of appellant's arrest admissible under Rule 803(8)); *Brewton v. City of New York*, 550 F. Supp.2d 355, 361 n.5 (E.D.N.Y. 2008) ("To the extent that the police report contains Detective Hovington's personal observations, the report itself is admissible as a public record pursuant to Fed. R. Evid. 803(8)."); *State Farm Mut. Auto. Ins. Co. v. Brown*, 767 F. Supp. 1151, 1153 (S.D. Fla. 1991) (police report admissible by the terms of Rule 803(8)(c)); *Urbanique Production v. City of Montgomery*, 428 F. Supp.2d 1193, 1220 n.22 (M.D. Ala. 2006) ("The court notes that the M[ontgomery] P[olice] D[e]partment offense report is admissible pursuant to Rule 803(8)(c) of the Federal Rules of Evidence which expressly excludes from the hearsay definition public records and reports "resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(C). Because police officers are charged with a legal duty to conduct criminal investigations

in their respective jurisdictions, an officer's report summarizing his or her law enforcement activities is one type of report the reliability of which is presumed and, is, thus, admissible under Rule 803(8)(c)."); *Flanagan v. Grant*, 897 F. Supp. 637, 640 (D. Mass. 1995) ("A police report setting forth factual findings from an investigation is admissible under Rule 803(8), Fed. R. Evid..").

This is not to say that the information sheet is conclusive, it is merely to say that the sheet is to be treated as any other evidence. As the Court noted at footnote 12 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. . . .

*See also, Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008) and *Groves v. Cicchirillo*, 694 S.E.2d 639, 644 (2010)("In the present case, no effort was made to rebut the accuracy of *any* of the records, including the DUI Information Sheet, Implied Consent Statement or Intoximeter printout which were authenticated by the deputy and admitted into the record at the DMV hearing."). In the present case, the Respondent failed to rebut any of the evidence regarding the Implied Consent Statement.

Thus, while "it goes without saying that the admission of a report containing 'conclusions' is subject to the ultimate safeguard-the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions[,]" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988), as with all admitted evidence, "the weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact." *In re Munyan*, 143 F.R.D. 560, 564 (D.N.J. 1992). *See also Rosario v. Amalgamated Ladies Garment Cutters' Union*, 605 F.2d 1228, 1251 (2d Cir.1979) ("The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact."); *Crompton-Richmond Co. Inc., Factors v. Briggs*, 560 F.2d 1195, 1202 n. 12 (5th Cir.1977)

“Of course, the weight accorded to such records is within the domain of the trier of fact.”); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 461 (E.D.N.Y.1990) (citation omitted) (“The credibility of a government report and the weight attached to it are matters to be decided by the trier of fact.”).

Further, the DUI Information Sheet would be authenticated under West Virginia Rule of Evidence 901(b)(7), since 901(b)(7) provides that following are authenticated:

[A] writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

*See also* W. Va. Code § 17C-5A-1(b) (“Any law-enforcement officer investigating a person for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section shall report to the Commissioner of the Division of Motor Vehicles by written statement within forty-eight hours of the conclusion of the investigation the name and address of the person believed to have committed the offense. The report shall include the specific offense with which the person is charged and, if applicable, a copy of the results of any secondary tests of blood, breath or urine.”).

Here, Dep. Paitsel authenticated the DUI Information Sheet, which provided that he read and gave a copy of the Implied Consent Statement to the Respondent, and he testified that he read the Implied Consent Statement to the Respondent. However, the circuit court disregarded the evidence in the DUI Information Sheet that the officer gave Respondent a copy of the Implied Consent Statement.

This Court has admonished a circuit court for failure to properly consider the DUI Information Sheet:

...the lower court's view of the evidence revealed a preference for testimonial evidence over documentary evidence. Our law recognizes no such distinction in the context of drivers' license revocation proceedings.

*Groves v. Cicchirillo*, 225 W.Va. 474, 481, 694 S.E.2d 639, 646 (2010).

The circuit court failed to properly consider the DUI Information Sheet, which provided that the officer gave Respondent a copy of the Implied Consent Statement, and erred in affirming the decision of the revocation for refusal to submit to the secondary chemical test.

**B. THE CIRCUIT COURT ERRED IN IMPOSING A NON-EXISTENT DUTY ON THE PETITIONER TO PROVE THAT THE DRIVER UNDERSTOOD THE IMPLIED CONSENT LAW.**

The circuit court found that the Respondent should not be revoked for refusing the breath test because the Investigating Officer “could not recall that the Respondent acknowledged any understanding of the implied consent law.” A.R. at 5. This is not a requirement under West Virginia law. W. Va. Code § 17C-5-7(a) [2010] provides:

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.

Nothing in the statute requires that the individual manifest an understanding of the Implied Consent Statement. Indeed, in *Gibbs, supra*, this Court made clear that a defense of lack of understanding, when refusal is manifested, is not sufficient to overcome evidence that the driver was read and given a copy of the Implied Consent Statement: “We 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. 218, 376 S.E.2d 112.

The circuit court erred in basing its decision to uphold the OAH Order in part on the basis that the Respondent did not understand the Implied Consent Statement. That is not a requirement under West Virginia law.

**CONCLUSION**

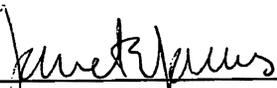
For the above reasons, this circuit court should reverse the March 18, 2013 *Final Order* of the Kanawha County Circuit Court which rescinded the revocation of Respondent's license for refusal to submit to the secondary chemical test.

**Respectfully submitted,**

**STEVEN O. DALE,  
ACTING COMMISSIONER  
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NO. 13-0429

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Petitioner Below/Petitioner,

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(Civil Action No. 12-AA-130)

TAMMY REED,

Respondent Below/Respondent.

**CERTIFICATE OF SERVICE**

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Brief of Petitioner, Steven O. Dale, Acting Commissioner* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 19th day of July, 2013, addressed as follows:

R. Thomas Czarnik, Esquire  
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Princeton, WV 24740

  
\_\_\_\_\_  
JANET E. JAMES