

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0761
(Circuit Court Civil Action No. 13-CAP-3)

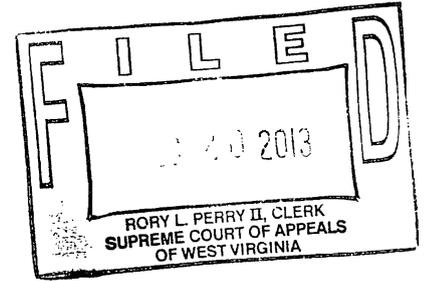
STEVEN O. DALE, ACTING COMMISSIONER OF
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

DONALD OAKLAND,

Respondent.



FROM THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

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

Elaine L. Skorich, WWSB # 8097
Assistant Attorney General
DMV - Attorney General's Office
P.O. Box 17200
Charleston, WV 25317-0010
elaine.l.skorich@wv.gov
Telephone: (304) 926-3874

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Now comes Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles, and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits his reply to the *Brief of Donald Oakland*.

I. ARGUMENT

A. **Why Respondent is Wrong in his *Counterstatement [sic] of Facts of the Case***

1. **No other improper driving was required.**

The investigating officer in this matter stopped Respondent's vehicle for what Respondent calls "roll-stopping through a stop sign." (*Brief of Donald Oakland*, p. 1.) On the next page of his *Brief*, Respondent states that, "In the universe of potential detection clues for determining clues for determining whether a motorist is engaging in a DUI-related offense...no other improper driving was detected..." Respondent's suggestion that the investigating officer required more evidence of bad driving in order to stop Respondent's vehicle is baseless.

Although the circuit court below found that the "material findings and legal conclusions" of the hearing examiner at the Office of Administrative Hearings ("OAH") are "fatally flawed..." (App. at p. 3), the circuit court made no finding that the stop of Respondent's vehicle was improper. In *Boley v. Cline*, 193 W. Va. 311, 314, 456 S.E.2d 38, 41 (1995), this Court found a stop valid when the driver was "weaving in the road going north." In *Boley*, this Court considered the nature of stops from other states:

Also to be considered was the fact that the vehicle driven by the appellant was seen weaving upon the highway. *Baran v. State*, 639 N.E.2d 642 (Ind.1994), investigatory stop appropriate where motorist was weaving from lane to lane on interstate highway; *People v. Christie*, 206 Mich.App. 304, 520 N.W.2d 647, 649 (1994) ("[E]rratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer."); *People v. Loucks*, 135 Ill.App.3d 530, 90 Ill.Dec. 286, 287, 481 N.E.2d 1086, 1087 (1985) ("Weaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop of a motor vehicle[.]")

Boley at 314, 456 S.E.2d 38. Not only was Respondent's "roll-stop" alone a valid reason for the stop, but this Court has recently determined that the validity of the traffic stop is irrelevant to a civil administrative license revocation. *See, Miller v. Smith*, 229 W. Va. 478, ___, 729 S.E.2d 800, 806 (2012). Accordingly, Respondent's suggestion that the investigating officer needed to witness more than Petitioner's stop sign violation is a red herring.

2. Respondent mischaracterizes the amount of marijuana which he smoked.

On page two of his *Brief*, Respondent alleges that Officer Wilhelm conceded that Respondent appeared to have smoked a small amount of marijuana. Later on page 4 of his *Brief*, Respondent alleges that the "indicia of the substance he smoked as seized by officers (a partially burned joint) was characterized by the police as being a small amount." However, at the administrative hearing, Respondent's counsel asked Officer Wilhelm, "Did you ask him how much weed he had smoked?" (App. at p. 218.) Officer Wilhelm responded, "No, sir." *Id.* Next, Respondent's counsel asked the officer, "You don't know whether then – if it was in fact marijuana, which we do not concede, you do not know whether it was a de minimis amount. By de minimus, I mean a small amount." (App. at pp. 218-219.) Officer Wilhelm answered, "It was a small amount." (App. at p. 219.)

Based upon the cross-examination of Officer Wilhelm by Respondent's counsel, it is clear that Officer Wilhelm was not present when Respondent was earlier smoking marijuana while "driving around Moundsville" (App. at p. 219) and that Respondent did not tell Officer Wilhelm how much marijuana he had smoked. However, the next question asked of Officer Wilhelm was no clear as to whether Respondent's counsel was referring to the amount of marijuana smoked by Respondent or the amount of marijuana found by the officers in the vehicle. Since Officer Wilhelm was not in the car with Respondent while he was smoking marijuana and because Respondent did

not admit to the amount smoked, it is very likely that Officer Wilhelm's answer to the poorly worded question was in reference to the amount found in the car. It is possible that Respondent had smoked a cigar sized joint (a.k.a., a "blunt") before he smoked most of the small one whose remains were found in the car. It is also possible that Respondent had smoked two or three other small joints and threw the butts of those out the window before he was stopped. Respondent simply cannot take an answer to his vague question as an admission that the amount of marijuana consumed by Respondent was small.

More relevant to this matter is the fact that Respondent acknowledged in his *Brief* that the circuit court erred. On page 4 of his *Brief*, Respondent states, "He admitted to smoking marijuana." In its final order, however, the circuit court made absolutely no findings of fact (not even about Respondent's admission) and merely stated that the "**material** findings of fact upon which the adverse legal conclusions are based **are without any basic** foundational support." (App. at p. 3.) Respondent's admission to smoking marijuana is clearly a material fact which Petitioner need not have proved as alleged by Respondent.

Finally, Respondent conveniently forgets that the possession of marijuana in any amount is still a crime in West Virginia pursuant to W. Va. Code § 60A-4-401 (2011). Respondent has not pointed to any authority to demonstrate what the legal limit of marijuana is for DUI purposes, and since marijuana is an illegal drug in this State, the DMV submits that there is no legal limit of consumption for this illegal drug.

3. Respondent makes much ado about the alteration in the implied consent form.

On page 3 of the Brief of Donald Oakland, Respondent avers that "Apparently laboring under the erroneous belief created through the unlawful actions of Officer Wilhelm that he would risk

suspension...” if he did not take a blood test. Whether or not the implied consent form was altered and Respondent submitted to a test of his blood, the results of the blood test were never revealed to anyone. Accordingly, Respondent’s submission to the test may be considered harmless error, but in any event, it is irrelevant to this civil, administrative license revocation proceeding.

Pursuant to syllabus point 1 of *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), there “are no provisions in either W. Va. Code, 17C-5-1 (1981), *et seq.*, or W. Va. Code, 17C-5A-1 (1981), *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 or drugs for purposes of making an administrative revocation of his driver's license.”

4. An admission of impairment is not a required finding.

On page 4 of his *Brief*, Respondent minimizes his admission of smoking the illegal drug of marijuana and suggests that an admission of impairment is also required. West Virginia Code § 17C-5A-2(f) (2010) contains the requirements which an administrative hearing examiner must find, namely:

In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or accused of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the Office of Administrative Hearings shall make specific findings as to: (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight; (2) whether the person was lawfully placed under arrest for an offense involving

driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided*, That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

As part of the officer's reasonable grounds to believe the person was driving while under the influence of alcohol, controlled substances or drugs, the officer may use an admission of consumption; however, it is not necessary in order to conclude that the driver was DUI. In syllabus point 2 of *Albrecht*, supra, this Court held that "[w]here there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol."

Here, it is un rebutted that Respondent was driving around Moundsville when Officer Wilhelm stopped his car. It is also un rebutted that Respondent admitted to smoking marijuana, an illegal drug, while driving around Moundsville. Further, Officer Wilhelm noted that Respondent had the following symptoms of impairment: Respondent failed to stop at a stop sign (App. at. p. 19); Respondent had glassy eyes (*Id.* at 20); and Respondent failed the walk-and-turn test (*Id.*) and the one leg stand test (*Id.* at 21.) Corporal Steve Kosek and Private First Class Steve Oliver also witnessed Respondent's impairment. (*Id.*) Accordingly, Respondent was not required to admit impairment, and the OAH did not err in upholding the DMV's *Order of Revocation* for DUI.

5. Respondent's mention of his arrest history is irrelevant.

On page 4 of his *Brief*, Respondent highlights that "Respondent was not then, nor has he ever

been since, arrested for DUI of drugs or any other offense.” Petitioner submits that a criminal arrest record is irrelevant in this civil administrative proceeding because such a history is not a required finding of the hearing examiner under W. Va. Code § 17C-5A-2(f) (2010). Pursuant to W. Va. Code § 17C-5A-1a (2010), a criminal conviction (including a guilty plea) for DUI would be relevant because the driver would not be entitled to an administrative hearing for a revocation stemming from the same offense for which the conviction was entered. Similarly, a prior DUI revocation for drugs (or alcohol) would also be irrelevant at an administrative hearing. Prior revocations would, however, be relevant for enhancement purposes under W. Va. Code § 17C-5A-3a (2010).

B. Why the Respondent is Wrong about the Circuit Court’s Order

1. Respondent admitted to smoking marijuana and driving around Moundsville.

On page 7 of his *Brief*, Respondent alleges that there was no factual evidence presented as to whether the substance in issue was actually marijuana. Oddly, Respondent skims over his admission to Officer Wilhelm that “he had been smoking it [marijuana] in the car driving around Moundsville.” (App. at p. 199.) Officer Wilhelm further testified that “his [Respondent’s] reply is he was driving around Moundsville smoking it [marijuana.]” *Id.* Officer Wilhelm’s testimony remained consistent on cross-examination when Respondent’s counsel asked, “And you advised or at least based on your written statement, Mr. Oakland made an admission to you that he had been smoking weed and driving around Moundsville? Is that correct?” (App. at pp. 217-218.) Officer Wilhelm further reiterated Respondent’s admission in response to a question by the hearing examiner, “He said that he was smoking it around town, driving around Moundsville.” (App. at p. 219.) On the day of Respondent’s traffic stop, Officer Wilhelm noted Respondent’s admission to “smoking weed and driving around Moundsville.” (App. at p. 84.)

Officer Oliver, who assisted Officer Wilhelm during Respondent's traffic stop, also testified that, "...Mr. Oakland was very forward with us and said that he had just finished smoking a joint." (App. at p. 225.) Curiously, Respondent, who asked for an administrative hearing, never testified to rebut any of the documentary or testimonial evidence. Clearly, there is sufficient, unrebutted evidence that Respondent was smoking marijuana, an illegal drug, before his traffic stop on October 12, 2010.

Further, Petitioner submits that since Respondent admitted that he had smoked marijuana while driving around and admitted that he had a joint in his car (App. at pp. 84 and 218), and since Respondent never rebutted those admissions, he cannot now challenge the fact that the green, leafy substance was, in fact, marijuana. Respondent seems to forget that an administrative license revocation proceeding is a civil, not criminal, action wherein the burden of proof is a preponderance of the evidence. This Court has made plain that a "statement made by a party to a civil action which constitutes an admission against his interest, and which tends to establish or to disprove any material fact in the case, is competent evidence against him." Syllabus Pt. 2, *Thornsbury v. Thornsbury*, 147 W. Va. 771, 131 S.E.2d 713, 714 (1963). Accordingly, Respondent's unrebutted admissions are competent evidence that the substance at issue herein was, indeed, the illegal drug of marijuana.

2. The circuit court substituted its judgment for that of the fact finder regarding the standard field sobriety tests ("SFSTs")

On Page 7 of his *Brief*, Respondent avers that the circuit court correctly noted that no evidence was offered substantiating how the administration of the SFSTs proved Respondent was under the influence. However, the hearing examiner clearly found that during the instruction phase of the walk-and-turn test, Respondent began the test before the instructions were completed. (App.

at p. 139.) The fact finder also found that while performing the walk-and-turn test, Respondent stepped off the line of walk, missed walking in a heel-to-toe manner as instructed, raised his arms for balance, and completed an improper turn. *Id.* The hearing examiner also found that while performing the one-leg stand test, Respondent used his arms for balance and was unable to keep his foot raised off of the ground. *Id.*

Next, the hearing examiner took judicial notice of part of the U. S. Department of Transportation, National Highway Traffic Safety Administration manual:

The battery of standardized field sobriety test, which were developed by the National Highway Traffic Safety Administration after extensive research, are “divided attention” tests that are easily performed by most unimpaired people. They merely require a suspect to listen and follow instructions while performing simple physical movements. Impaired persons have difficulty with tasks requiring their attention to be divided between simple mental and physical exercises.

(App. at p. 141.) Clearly, the *Decision of Hearing Examiner and Final Order of Chief Hearing Examiner* demonstrated the nexus between the SFSTs and Respondent’s impairment, and the circuit court erred in ignoring that demonstration.

3. Failure of one field sobriety test is still evidence of impairment.

On page 8 of his *Brief*, Respondent alleges that failing a single field sobriety test does not translate into a finding of impairment. Respondent failed more than one field sobriety test: Officer Wilhelm determined, and the OAH found that Respondent failed both the walk-and-turn and the one leg stand tests. Moreover, Respondent demonstrated additional indicia of impairment by his failure to stop at the stop sign and by his glassy eyes.

Assuming *arguendo* that this Court agrees that Respondent failed a single SFST, that is still sufficient evidence of impairment to uphold a revocation for DUI. In *Dean v. W. Va. Dept. of Motor*

Vehicles, 195 W. Va. 70, 464 S.E.2d 589 (1995), the driver was administered only one field sobriety test. There, this Court found that the one SFST, the odor of alcoholic beverage, and Dean's crossing the center line and crashing into another car to be sufficient evidence to uphold his license revocation for DUI. In *Boley, supra*, although three field sobriety tests were administered, the results of two of the tests and all other evidence of DUI was excluded below, yet this Court still found that one SFST and the odor of alcoholic beverage was sufficient evidence to uphold the revocation.

Assuming Respondent did not fail the one leg stand test, he still admitted to smoking marijuana while driving around Moundsville. He had glassy eyes and failed to stop at a stop sign. He failed the walk-and-turn test. Pursuant to this Court's decisions in *Dean, supra*, and *Boley, supra*, Petitioner presented sufficient evidence of Respondent's impairment to uphold the DMV's *Order of Revocation*, and the circuit court erred in not so finding.

C. Why the Respondent is Wrong about Petitioner's Jurisdiction to Revoke Respondent's Driver's License

1. Respondent has misinformed this Court as to the contents of W. Va. Code § 17C-5A-1(c) (2008).

On page 11 of his *Brief*, Respondent alleges that the DMV was without authority to revoke Respondent's driver's license because W. Va. Code § 17C-5A-1(c) (2008) contains a requirement that person being charged must have been placed under arrest. That is an incorrect statement of the law, and the DMV was required to revoke Respondent's driver's license.

Contrary to Respondent's assertions, the contents of W. Va. Code § 17C-5A-1(b) (2008) contains no requirement about the person being charged having been placed under arrest. Instead, W. Va. Code § 17C-5A-1(b) (2008), the law in effect on October 12, 2010, states:

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. The signing of the statement required to be signed by this subsection constitutes an oath or affirmation by the person signing the statement that the statements contained in the statement are true and that any copy filed is a true copy. The statement shall contain upon its face a warning to the officer signing that to willfully sign a statement containing false information concerning any matter or thing, material or not material, is false swearing and is a misdemeanor.

The DUI Information Sheet clearly shows that Respondent was stopped for a stop sign violation (App. at P. 19.) It further shows that the investigating officer had reasonable grounds to believe that Respondent had violated 17C-5-2, 17C-5-7, 17C-5A-2 or 17E-1-1 *et seq.*, by driving under the influence of controlled substances/drugs. *Id.* Further, the DUI Information Sheet shows that Respondent had glassy eyes, admitted to having a joint, admitted to smoking weed and driving around Moundsville, and had a rolled unburnt cigarette containing a green leafy substance and a burnt cigarette containing a green leafy substances. (*Id.* at 20.) The DUI Information Sheet also indicated that Respondent failed the walk-and-turn test (*Id.*) and the one-leg stand test (*Id.* at 21.) The sheet further showed that two other officers witnessed Respondent and believed that he was impaired. *Id.*

Pursuant to W. Va. Code § 17C-5A-1(c) (2008), upon receipt and examination of the DUI Information Sheet from the officer, if the DMV determined that Respondent committed an offense described in W. Va. Code § 17C-5-2 (driving while under the influence of controlled substances or

drugs), the DMV not only had the authority to but was statutorily required to revoke his driver's license.

2. Respondent was lawfully arrested.

On page 12 of his *Brief*, Respondent alleges that W. Va. Code §17C-5A-2(f) requires that the driver be lawfully arrested, and since Respondent was not read his Miranda rights, there was no "lawful arrest." Clearly, Respondent is confusing his criminal law and his administrative law here.

At the administrative hearing, Officer Wilhelm, admitted that he did not arrest Respondent for driving while under the influence of controlled substances or drugs; however, he handcuffed Respondent and transported him to the hospital for the administration of a blood test. (App. at p. 201.) Administrative actions and criminal sanctions are independent lines of inquiry which must not be confused or integrated. *See, Shingleton v. City of Romney*, 181 W. Va. 227, 229, 382 S.E.2d 64, 66 (1989). Further when a criminal action for driving while under the influence in violation of W. Va. Code § 17C-5-2 (2008) results in a dismissal or acquittal, such dismissal or acquittal has no preclusive effect on a subsequent proceeding to revoke the driver's license under W. Va. Code § 17C-5A-1 *et seq.* Moreover, in the license revocation proceeding, evidence of the dismissal or acquittal is not admissible to establish the truth of any fact. *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012). Therefore, the failure to charge an individual criminally should not be admissible to establish any fact in the administrative proceeding.

This Court has already determined that a criminal arrest is not a prerequisite for an administrative license revocation. In *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005), the officer failed to sign a criminal complaint against Carroll before the magistrate, but he did prepare and file with the DMV a written statement relating to Carroll's arrest, as required by W. Va. Code

§ 17C-5A-1(b)(1994). After reviewing officer's statement, the DMV issued an initial order revoking Carroll's driving privilege. In syllabus point 3 of *Carroll, supra*, this Court determined:

Administrative license revocation proceedings for driving a motor vehicle under the influence of alcohol, controlled substances or drugs which are initiated pursuant to Chapter 17C of the West Virginia Code are proceedings separate and distinct from criminal proceedings arising from driving a motor vehicle under the influence of alcohol, controlled substances or drugs. The presentation of a sworn complaint before a magistrate and the magistrate's finding of probable cause and issuance of a warrant are not jurisdictional prerequisites to the commencement of administrative license revocation proceedings pursuant to Chapter 17C of the West Virginia Code.

Furthermore, Respondent indeed was arrested. While Officer Wilhelm testified that he did not arrest Petitioner for driving while under the influence of controlled substances or drugs, he handcuffed Petitioner and transported him to the hospital for the administration of a blood test. (App. at p. 201.)

An arrest is the taking, seizing or detaining of the person of another (1) by touching or putting hands on him; (2) by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.

Syllabus point 2, *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976). See also, *State v. Shugars*, 180 W. Va. 280, 283, 376 S.E.2d 174, 177 (1988).

Clearly, by handcuffing Respondent and putting him in the police cruiser to be transported to the hospital, Officer Wilhelm put his hands on Respondent thereby effecting an arrest. At no point did Respondent testify that he believed he was not under arrest or that he believed that he was free to leave the custody and control of the officer.

Moreover, Respondent misconstrues the meaning of a "lawful arrest" for purposes of W. Va. Code § 17C-5A-2(f) (2010). In DUI administrative hearings, W. Va. Code § 17C-5A-2(f)(2010)

charges the OAH to make specific findings as to 1) whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol...; 2) whether the person was lawfully placed under arrest for an offense involving DUI...; 3) whether the person committed an offense involving DUI...; and 4) whether the tests, if any, were administered in accordance with the provisions of W. Va. Code § 17C-5-1 *et seq.*

West Virginia Code § 17C-5A-2(f) (2010) should be read *in pari materia* with the remainder of Chapter 17C of the Code, and Respondent fails to do so in his *Brief*. This Court has previously held that “[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syllabus Point 3, *Smith v. State Workmen’s Compensation Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). *See also, Clower v. W. Va. Dep’t of Motor Vehicles*, 223 W. Va. 535, 539, 678 S.E.2d 41, 45 (2009).

A review of Chapter 17C of the W. Va. Code reveals that the entire Chapter pertains to “Traffic Regulations and Laws of the Road.” In its review of administrative license revocation proceedings, this Court regularly analyzes both Article 5, “Serious Traffic Offenses,” and Article 5A, “Administrative Procedures for Suspension and Revocation of Licenses for Driving Under the Influence of Alcohol, Controlled Substances or Drugs.” For instance, W. Va. Code § 17C-5-8 (2004) addresses “Interpretation and Use of Chemical Test,” and this Court has found that “W. Va. Code § 17C-5-8(a) (2004) (Repl.Vol.2009) allows the admission of evidence of a chemical analysis performed on a specimen that was collected within two hours of either the acts alleged or the time of the arrest.” Syl. Pt. 5, *Sims v. Miller*, 227 W. Va. 395, 709 S.E.2d 750 (2011). *See also*, Syl. Pt. 4, *Dale v. Veltri*, 741 S.E.2d 823 (2013).

Further, in Syl. Pt. 1 of *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987), this Court found that W. Va. Code § 17C-5-9 (1983) does not require blood tests of drivers arrested for DUI of alcohol and law enforcement officers are under no duty to inform DUI suspects of their right to blood tests in addition to the designated chemical test for intoxication; however, W. Va. Code § 17C-5-9 (1983) accords a driver arrested for DUI of alcohol a right to demand and receive a blood test within two hours of his arrest. *Sims, Veltri* and *Moczek* were all appeals of administrative license revocations wherein this Court interpreted Article 5 as part of its review of Article 5A.

This review makes clear, therefore, that the various Articles of Chapter 17C of the West Virginia Code “relate to the same persons or things” and “have a common purpose” capable of being “regarded *in pari materia* to assure recognition and implementation of the legislative intent.” Syllabus Point 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). *See also, Clower v. W. Va. Dep’t of Motor Vehicles, supra* at 540, 678 S.E.2d 46. As a result, Article 17C-5 must be read *in pari materia* with Article 17C-5A.

The “lawful arrest” language in W. Va. Code § 17C-5A-2(f)(2)(2010) is identical to the language which was present in the Code in 2005. In 2008, the Legislature removed the subsection requiring a finding of a lawful arrest but amended the language back into the Code in 2010. However, lawful arrest language is wholly unrelated to the stop and is gleaned from W. Va. Code § 17C-5-4(c) (2010) which states:

A secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

W. Va. Code § 17C-5-4(c) (2010) gives the investigating officer direction regarding administration of the secondary chemical test, while W. Va. Code § 17C-5-4(b) (2010) gives the officer direction regarding the administration of the preliminary breath test:

A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has reasonable cause to believe a person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

The lawful arrest language in W. Va. Code § 17C-5-4(c) (2010) relates only to the admissibility of the secondary chemical test. Secondary breath test results cannot be considered if the test was administered when the driver was not lawfully arrested, meaning that the officer had not gathered enough evidence to have a reasonable suspicion to believe that the driver had been driving while under the influence of alcohol, drugs or controlled substances. Any definition of lawful arrest contained in W. Va. Code § 17C-5A-2 (2010) that disregards its limited use in W. Va. Code § 17C-5-4(c) (2010) is overreaching.

The phrase “[a] secondary test of blood, breath or urine shall be incidental to a lawful arrest” means that the results of a chemical test are not admissible unless it was done in connection with, or “incidental” to, a lawful arrest. This is the construction we placed on this statutory language in *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), where we found a blood test to be inadmissible because it was not taken incident to a lawful arrest.

Albrecht v. State, 173 W. Va. 272, 412 S.E.2d 863 (1984). This Court further opined in *Albrecht* that “As *Byers* demonstrates, the lawfulness of an arrest is independently determined in light of general arrest principles. If the arrest is unlawful, then the results of a test are inadmissible.” *Id.*

West Virginia Code § 17C-5-4 (2010)¹ sets forth criteria for administration of preliminary breath tests (“PBT”s) and secondary chemical tests (“SCT”s). Subsection (a) is a statement about every driver’s implied consent to submit to a PBT and a SCT of the blood, breath or urine. Subsection (b) requires the law enforcement officer to have reasonable cause to believe that the driver is DUI before the officer can ask the driver to submit to a PBT. That means that the officer cannot just hand the driver a PBT instrument without the officer first acquiring some sort of evidence that makes him/her believe that the person is under the influence of drugs or alcohol. Subsection (c) gives an officer direction about when the SCT can be administered. The officer must have gathered enough evidence to have reasonable grounds to believe that the driver is DUI, then he or she can lawfully arrest the driver and transport him or her (if necessary) for the purposes of submitting to the SCT. Reasonable grounds can be established by a PBT result, field sobriety tests, or cumulative non-structured indicia of DUI.

Even if this Court were to determine that Respondent was not lawfully arrested, then only the results of a secondary chemical test would not be considered. In this case, however, there was no secondary chemical test; therefore, Respondent’s “lawful arrest” argument is moot.

D. *Albrecht v. State*, 173 W. Va 268, 314 S.E.2d 859 (1984) is clearly applicable to this matter.

In footnote 2 at the bottom of page 9 of his *Brief*, Respondent alleges that “nothing in *Albrecht* or the other authorities cited addressed marijuana, only alcohol.” Petitioner concedes that this Court has not previously addressed administrative license revocations for driving while under

¹ For purposes of this analysis, subsections d-j are not relevant.

the influence of controlled substances or drugs; however, this Court in *Albrecht* did not limit that decision to revocations involving alcohol.

Pursuant to syllabus point 1 of *Albrecht, supra*, there “are no provisions in either W. Va. Code, 17C-5-1 (1981), *et seq.*, or W. Va. Code, 17C-5A-1 (1981), *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 **or drugs** for purposes of making an administrative revocation of his driver's license.” [Emphasis added.] Even though in the test outlined in syllabus point 2 of *Albrecht* specifically mentions alcohol and not drugs, this Court’s analysis throughout the remainder of its decision includes discussion of revocations for DUI of drugs or controlled substances. For example, this Court stated that

We are reinforced in this conclusion by W. Va. Code, 17C-5-8, which discusses the admissibility and evidentiary value of chemical tests. The last sentence of that provision clearly indicates that other evidence can be used to establish intoxication: “The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, **controlled substances or drugs.**”

[Emphasis added.] *Id.* at 271, 314 S.E.2d 862.

This Court further contemplated DUI revocations for drugs elsewhere in its analysis in *Albrecht*:

W. Va. Code, 17C-5-4 (1981), deals with the State’s right to require a motorist to undergo a chemical test for determining the alcoholic content of his blood. It does not mandate testing in all cases involving an arrest for driving under the influence of alcohol **or drugs**. We find no language in this section that can be read to mean that chemical tests must be administered in every case.

[Emphasis added.] *Id.* at 272, 314 S.E.2d 863. Clearly, in developing the test outlined in syllabus point 2 of *Albrecht*, this Court contemplated that the test would also apply to revocations for DUI of drugs or controlled substances as well as alcohol.

II. CONCLUSION

For the above-reasons, the decision of the circuit court should be reversed.

Respectfully submitted,

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

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Elaine L. Skorich, WVSB # 8097

Assistant Attorney General

DMV - Office of the Attorney General

P.O. Box 17200

Charleston, WV 25317-0010

elaine.l.skorich@wv.gov

(304) 926-3874

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0761
(Circuit Court Civil Action No. 13-CAP-3)**

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

Respondent below/Petitioner herein,

v.

DONALD OAKLAND,

Petitioner below/Respondent herein.

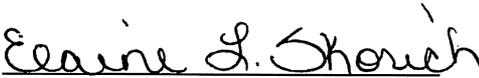
CERTIFICATE OF SERVICE

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 20th day of December, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

J. Thomas Madden, Esquire
903 Wheeling Avenue, Suite E
Glen Dale, WV 26038

and

Robert G. McCoid, Esquire
McCAMIC, SACCO & McCOID, P.L.L.C.
P. O. Box 151
Wheeling, WV 26003


Elaine L. Skorich