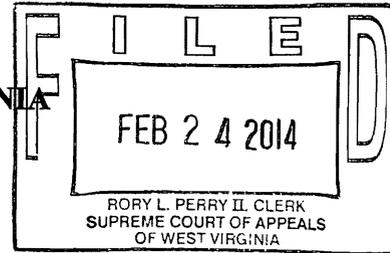


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner,

v.

NO. 13-0889

CRAIG RAY, RESPONDENT BELOW,

Respondent.

FROM THE CIRCUIT COURT OF KANAWHA 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
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Now comes Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits his reply to the *Brief of Respondent Craig Ray*.

I. ARGUMENT

A. **Mr. Ray’s mistake about facts admitted into evidence at the administrative hearing.**

In his *Brief*, Mr. Ray argues that the DMV has “totally ignored the fact that there is no judicial finding of fact in the record that Mr. Ray failed any field sobriety tests...or that he blew a .12.” Mr. Ray further argues that just because there was a DUI Information Sheet (“DUIIS”) that sets forth those facts, they are not automatically to be determined as judicial findings of fact. Mr. Ray has clearly ignored both statutory law and this Court’s prior holdings regarding the admissibility of evidence at administrative license revocation proceedings. Mr. Ray’s averments sum up the DMV’s assignments of error regarding the OAH and the circuit court ignoring the tremendous amount of evidence of driving while under the influence (“DUI.”)

Pursuant to W. Va. § 29A-5-2; *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008); *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010); and *Dale v. Odum*, No. 12-1403 (W. Va., Feb. 11, 2014) (per curium), the DUIIS and all of the other documents in the DMV file were admitted into evidence, subject to rebuttal. At the beginning of the administrative hearing below, the Office of Administrative Hearings’ (“OAH”) hearing examiner stated, “Now the court pursuant to Chapter 29A, Article 5, Section 2(b) of said code, I offer and accept as evidence in this blended hearing all documents contained in the file exhibits marked 1 through 6.” (A. Tr. at P. 4.) Exhibit 2 contained, among other things, the DUIIS. (App. at P. 135.) Mr. Ray did not object to the admission of the DUIIS or its contents. (A. Tr. P. 4.)

Mr. Ray testified at the administrative hearing below (A. Tr. at PP. 71-99); however, at no point in his testimony did Mr. Ray rebut the information on the DUIIS (App. at PP. 152-153) that he had the odor of alcoholic beverage on his breath; that he was unsteady exiting the vehicle; that he was unsteady while standing; that his speech was slurred; that his eyes were blurry; or that he admitted to drinking three beers. (A. Tr. PP. 71-99.) Further, Mr. Ray never rebutted the results of the horizontal gaze nystagmus (“HGN”) test. The only time that Mr. Ray even mentioned the HGN was to testify that he recalled the officer showing him a pen and that the officer had it in front of his eyes. (A. Tr. at P. 82.) The content of Mr. Ray’s testimony about the HGN clearly does not rise to the level of rebuttal testimony as required by *Crouch, Lowe, Groves, and Odum, supra*.

When discussing the administration of the walk-and-turn test, Mr. Ray testified that he started the test but did not get to finish it. (A. Tr. at P. 83.) Mr. Ray also offered that he had problems with his right leg “every now and then” but never testified that during the administration of the walk-and-turn test he had difficulties with that leg. *Id.* The most that Mr. Ray offered in the way of possible rebuttal regarding the walk-and-turn test is that he did not complete the test. *Id.* at 83-84. However, Mr. Ray did not rebut that he could not keep his balance during the instruction stage of the test; that he stopped while walking; that he missed heel-to-toe; or that he raised his arms to balance. Regardless of whether or not he finished the walk-and-turn test, the officer clearly documented enough decision points to determine that Mr. Ray failed the walk-and-turn test, and Mr. Ray did not successfully rebut that evidence which was already admitted into the record.

Mr. Ray next testified about the one-leg stand test stating that the officer showed him how to do the test and demonstrated the test but that when he was “getting ready” to take the test, his brother, Roger, interrupted the officer. *Id.* at 84. Mr. Ray, however, did not rebut the evidence

recorded on the DUIIS that he swayed while balancing, used his arms to balance and put his foot down. (App. at P. 154.) Mr. Ray also did not testify in any way about taking the preliminary breath test; the administration of the same; or his failing result of .120%. Accordingly, this evidence, admitted without objection into the record at the administrative hearing below, remains totally un rebutted.

Regarding the administration of the secondary chemical test, Mr. Ray testified that he smoked periodically over the course of an hour while at the police station (A. Tr. at P. 88), but when asked specifically if he smoked right before the breath test was administered, he stated that he “really can’t remember, but I would say.” *Id.* Mr. Ray’s testimony clearly does not rebut the proper administration of or the result (.120%) of the secondary chemical test. Mr. Ray testified that he does not remember if he smoked prior to the administration of the secondary chemical test then speculated that it might have happened. At best, Mr. Ray’s testimony is self-serving; at worst, his testimony is conflicting - either he remembers or he does not - but it does not rise to the level of rebuttal testimony regarding the results of the secondary chemical test. Nothing in the evidence shows that the secondary chemical test result was invalid.

Because all of the evidence of the indicia of intoxication, the administration and results of the field sobriety tests, and the administration and results of the preliminary breath test and the secondary chemical test was admitted without objection and was un rebutted, it was error for the OAH not to make specific findings of fact regarding the same. It was also clear error for the OAH to ignore such un rebutted evidence, which was admitted without objection, when it reversed the DMV’s *Order of Revocation*.

B. Mr. Ray's mistake about the application of W. Va. Code § 17C-5A-2 (2010).

In his *Brief*, Mr. Ray concedes that the primary purpose of the DUI administrative procedures statute is to determine whether or not an individual drove a motor vehicle while under the influence of alcohol, then misinterprets W. Va. Code § 17C-5A-2 (2010) to attempt to negate the fact that he drove a motor vehicle in this state while under the influence of alcohol. Specifically, Mr. Ray argues that the "West Virginia Legislature has provided certain conditions that must be met *before one's license may be administratively revoked*" [emphasis added] then cites subsections 1, 2 and 3 of W. Va. Code § 17C-5A-2(f) as those conditions for revocation. This simply is a misstatement of the law.

Contrary to Mr. Ray's assertions, *before* a driver's license may be administratively revoked, the law enforcement officer investigating a person for driving under the influence of alcohol must complete a DUIIS form and submit it to the DMV within 48 hours of the completion of the officer's investigation. W. Va. Code § 17C-5A-1(b) (2008). Next, if upon examination of the DUIIS and the results of the secondary chemical test, the DMV determines that the person committed the offense outlined by the officer, then the DMV must enter an order revoking that person's license. W. Va. Code § 17C-5A-1(c) (2008). The two Code sections cited above are the only requirements to be met *before* a driver's license may be administratively revoked.

It is only once the DMV has revoked the driver's license pursuant to W. Va. Code § 17C-5A-1(c) (2008) and the driver timely requests an administrative hearing pursuant to W. Va. Code § 17C-5A-2(a) (2010) that W. Va. Code § 17C-5A-2(f) (2010) comes into play. As noted in the DMV's *Brief* previously filed with this Court, the required findings of the OAH as outlined in W. Va. Code § 17C-5A-2(f) (2010) need not be answered, in toto, in the affirmative.

In his *Brief*, Mr. Ray further argues that the DMV ignored the “requirements of 17C-5A-2(1)(2)(3).” [*Sic.*] The DMV presumes Mr. Ray is referring to the four required findings of the OAH as outlined in W. Va. Code § 17C-5A-2(f) (2010):

- (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.

The DMV submits that it has not ignored the OAH’s required findings but that Mr. Ray misinterprets W. Va. Code § 17C-5A-2(f) (2010) and attempts to create some sort of remedy if any of those required findings are in the negative. The Legislature did not include such a remedy, and Mr. Ray’s overreaching interpretation is contrary to that which is included in the administrative sections of the Code.

The first finding that the OAH must make is whether the investigating officer had reasonable grounds to believe that the driver was DUI. The officer’s reasonable grounds are based upon his or her investigation, i.e., whether the driver exhibited the indicia of intoxication and failed the field sobriety tests. This finding relates to W. Va. Code § 17C-5-4(b) (2010) which 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.

[Emphasis added.]

If the OAH finds that the officer did not gather evidence of the indicia of intoxication or conduct any field sobriety test but instead just handed the driver the preliminary breath test, then the OAH should make the required finding in the negative and not consider the results of the preliminary breath test. However, there is nothing in the Code stating that a negative finding by the OAH negates any of the other evidence of DUI; therefore, the OAH can still uphold a revocation for DUI based upon the results of the other required findings.

Pursuant to W. Va. Code § 17C-5A-2(f) (2010), the second required finding for the OAH is whether the person was lawfully placed under arrest for DUI for the purpose of administering a secondary test. This finding also contains a caveat that “this element shall be waived in cases where no arrest occurred due to driver incapacitation.” Therefore, it is possible that the OAH would not need to address the issue of the driver’s arrest if, for instance, the driver was in an accident and taken to the hospital and, therefore, could not be placed under arrest by the officer.

This second finding regarding the arrest contains no required finding about the nature of the stop of the vehicle (if there even was a stop by the officer) and relates to the lawful arrest language in W. Va. Code § 17C-5-4(c) (2010) regarding 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 (the OAH's first required finding in W. Va. Code § 17C-5A-2(f).) 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. 268, 272, 412 S.E.2d 859, 863 (1984).

The third required finding for the OAH to make pursuant to W. Va. Code § 17C-5A-2(f) is whether the driver committed an offense involving DUI of alcohol, controlled substances or drugs. For this finding, the OAH can find in the affirmative if “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.” Syllabus Point 2, *Albrecht v. State*, 173 W. Va. 268, 412 S.E.2d 859 (1984). *See also*, syllabus Point 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997). Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008). Therefore, it is possible to have a negative finding for subsection (f)(2) because there was no arrest at all but still have a positive finding for subsection (f)(3) if the requirements of the *Albrecht* test are met.

Here, the evidence shows that Mr. Ray had the odor of alcoholic beverage on his breath and blurry eyes. (App. at P. 94.) Mr. Ray was unsteady exiting his vehicle and while standing. *Id.* He admitted to I/O that he had consumed three beers. *Id.* Further, Mr. Ray failed the walk-and-turn test because he could not keep his balance during the instruction stage, stopped while walking, missed

heel-to-toe, and raised his arms to balance. *Id.* He also failed the one-leg stand test because he swayed while balancing, used his arms to balance, and put his foot down. *Id.* It is un rebutted that Mr. Ray was driving the subject vehicle. Therefore, even without considering the evidence of the secondary chemical test, the DMV presented more than sufficient evidence to show by a preponderance of the evidence that Mr. Ray drove a motor vehicle in this state while under the influence of alcohol.

The fourth and last finding which the OAH must make pursuant to W. Va. Code § 17C-5A-2(f) is whether the “tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.” If the driver refuses to submit to the secondary chemical test, then the OAH does not have to make the fourth finding. It is also possible that the driver went to the hospital as a result of an accident and could not be given the secondary chemical test, so the OAH would not be able to make the fourth finding in that case. As shown above, it is possible that the OAH need not make a positive finding for all four subsections of W. Va. Code § 17C-5A-2(f) in order to uphold the DMV’s order of revocation. This Court’s previous holding in *Albrecht* supports that conclusion.

If Mr. Ray’s supposition that all of the required findings of W. Va. Code § 17C-5A-2(f) need to be made in the positive is to be adopted, then what would be the result? If the OAH found that the officer did not have reasonable grounds to believe that the driver was DUI before administering the preliminary breath test, then only the results of the preliminary breath test should be ignored. If the OAH found that the driver was not lawfully placed under arrest, then only the results of the secondary chemical test should be ignored. There is absolutely no remedy anywhere in W. Va. Code §§ 17C-5 or 17C-5A which requires that the other evidence of DUI (e.g., odor of alcoholic beverage,

slurred speech, glassy eyes, failure of the field sobriety test, etc.) be excluded. For the OAH and the circuit court to determine otherwise is contrary to law and tantamount to legislating from the bench.

Finally, as argued in the *Brief of the Division of Motor Vehicles*, this Court must read the required findings in W. Va. Code § 17C-5A-2(f) *in pari materia* with the remainder of Chapter 17 of the Code. 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.” 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.

This Court must also read W. Va. Code § 17C-5A-2(f) *in pari materia* with Chapter 17E of the Code. The DMV also enforces Chapter 17E, the Uniform Commercial Driver’s License Act, and

is required to consider Chapter 17C in its enforcement of Chapter 17E. Specifically, W. Va. Code § 17E-1-15 (2005) contains the implied consent requirements for commercial motor vehicle drivers and outlines the procedures for disqualification for driving with a blood alcohol concentration of four hundredths of one percent or more, by weight.

While this Court in dicta in *Clower* and *Odum, supra*, has opined that a lawful arrest is based on the nature of the stop of the vehicle, such a proposition is not contained anywhere in statute. The only place in the administrative proceedings where the Legislature addresses the stop of a vehicle is in W. Va. Code § 17E-1-15(b) (2005):

A test or tests may be administered at the direction of a law-enforcement officer, who after lawfully stopping or detaining the commercial motor vehicle driver, has reasonable cause to believe that driver was driving a commercial motor vehicle while having alcohol in his or her system.

If the Legislature had wanted to provide similar protection to non-commercial drivers, it would have included language about a lawful stop in W. Va. Code § 17C-5A-2(f) (2010). It did not. The Legislature did, however, reference the applicability of W. Va. Code § 17C-5-4 (2010) in W. Va. Code § 17E-1-15(a) (2005):

A person who drives a commercial motor vehicle within this State is deemed to have given consent, subject to provisions of section four [§ 17C-5-4], article five, chapter seventeen-c of this code, to take a test or tests of that person's blood, breath or urine for the purpose of determining that person's alcohol concentration, or the presence of other drugs.

The commercial driver is under heightened scrutiny because he or she may be subject to license disqualification with a blood alcohol content of only .04% – which is below the .05% required to show *prima facie* evidence of intoxication pursuant to W. Va. Code § 17C-5-8(a)(2) (2004) for an operator's license. Therefore, the Legislature has provided commercial drivers with

an extra level of protection by including the lawful stop or detention language in W. Va. Code § 17E-1-15(b) (2005).

Clearly, the Legislature is capable of determining when a lawful stop or a lawful arrest is required. The Legislature placed the “stop” language in Chapter 17E: it did not do so in Chapter 17C. If lawful stop and detention [W. Va. Code § 17E-1-15(b) (2005)] meant the same as lawful arrest [W. Va. Code § 17C-5A-2(f) (2010)], then the Legislature would not have needed to put the lawful stop and detention language in W. Va. Code § 17E-1-15(b) (2005) because W. Va. Code § 17E-1-15(a) (2005) references W. Va. Code § 17C-5-4 (2010).

“The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended.” Syl. pt. 2, *Hall v. Baylous*, 109 W. Va. 1, 153 S.E. 293 (1930).

Butler v. Rutledge, 174 W. Va. 752, 753, 329 S.E.2d 118, 120 (1985). In *Clower and Odum, supra*, this Court gave no meaning to the language in W. Va. Code § 17E-1-15(b) (2005), and this Court must read all of Chapter 17 *in pari materia*.

II. CONCLUSION

For the reasons outlined above and in the *Brief of the Division of Motor Vehicles*, the final order of the circuit court must be reversed.

Respectfully submitted,

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COMMISSIONER, DIVISION
OF MOTOR VEHICLES,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

NO. 13-0889

CRAIG RAY, RESPONDENT BELOW,

Respondent.

III. 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 24th day of February, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

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Cowen, WV 26206-0217


Elaine L. Skorich