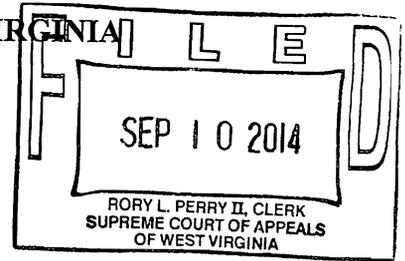


NO. 14-0342

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

**Petitioner Below, Petitioner,**

**v.**

**DUSTIN HALL,**

**Respondent.**

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**REPLY BRIEF**

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**I. The Investigating Officer Had No Duty to Obtain Analysis of the Blood Sample Obtained at the Respondent's Request.**

The record below reflects that the Respondent did not request the blood sample to have it analyzed; did not ask whether there were any blood test results; did not provide any testimony; and did not ask Investigating Officer Harden one question on cross-examination (Appendix Record at 318 (hereinafter, "A.R. at 318")). Although unsolicited by the Respondent, the Office of Administrative Hearings ("OAH") did Respondent the courtesy of inventing a non-existent duty on the part on the officer to obtain an analysis of the blood, and misinterpreting the evidence to find that the Respondent believed he had a choice in secondary tests, which is neither factually nor legally correct. Whereupon, the circuit court affirmed.

The Respondent had an independent, not law enforcement-directed, test: "The person tested may, at his or her own expense, have a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his or her employment, of his or her own choosing, administer a chemical test in addition to the test administered at the direction of the law-enforcement officer." W. Va. Code §17C-5-6. Officer Harden took the Respondent to get the blood test. However, Respondent did not do anything further to obtain an analysis of the blood, and "...the requirement that a driver arrested for DUI must be given a blood test on request does *not* include a requirement that the arresting officer obtain and furnish the results of the requested blood test." (Emphasis added). *In re Burks*, 206 W. Va. 429, 433, 525 S.E.2d 310, 314 (1999).

Nothing required the Investigating Officer in this case to obtain an analysis of the blood sample. The Respondent, who requested the test, did not request the sample or in any way attempt to have the sample analyzed. The OAH and the circuit court grafted a requirement onto W. Va. Code

§ 17C-5-9 that it is the duty of the officer to obtain an analysis of the blood. However, that statute simply provides that an arrestee may demand that a sample be taken and that a chemical test be made. The driver himself may therefore obtain the sample and have a chemical test made.

Respondent argues, “Ptlm. Harden’s failure to have Respondent’ [sic] analyzed or tested for alcohol concentration within 2 hours may have rendered the same worthless as evidence in his defense...” Resp. Brf. at 20. W. Va. Code § 17C-5-8 only requires that the sample be taken within two hours from the time of arrest or acts alleged. It does not require that the sample be analyzed within that time.

The circuit court erred in finding that it was the investigating officer’s obligation to have the blood sample tested. *State v. York*, 175 W. Va. 740, 338 S.E.2d 219 (1985) affirms that the rights afforded in the statutes do not create a duty on the part of law enforcement:

Historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. To deny this right would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense.

175 W. Va. 741, 338 S.E.2d 221. Further, the Respondent, who requested the test in the first place, did *nothing* in the months between the arrest and the hearing to get the sample analyzed. There is *no* evidence that the Respondent asked for the sample to have it analyzed, or inquired whether an analysis had taken place. Respondent had the opportunity to so testify himself or inquire of the officer on cross-examination, but he did neither. *Burks* held that when the test is requested by the driver, the officer has no duty to obtain the result: “Placing such a requirement on the arresting officer can only be fairly read into the statutory scheme, if the blood test is the officer’s ‘designated’ test-and not a test that is requested by the driver.” 206 W. Va. 433, 525 S.E.2d 314. In this case, the

blood test is neither the designated test nor was it performed at the direction of the officer.

Counsel for the Respondent checked the box on the Hearing Request Form that he wished to cross examine the individual or individuals who either administered the blood test or who performed the chemical analysis of the test. A.R. at 16. However, this case was heard by the OAH, not the DMV. *Miller v. Smith*, 229 W.Va. 478, 729 S.E.2d 800 (2012); *Miller v. Epling*, 229 W. Va. 584, 729 S.E.2d 906 (2012). The OAH was still using the Hearing Request Form which the DMV had used. It was not, therefore, the DMV's obligation to issue a subpoena. Further, there was no protest by the Respondent at the administrative hearings regarding the lack of such a subpoena. Obviously no test of the blood was made, and Respondent did nothing to obtain the specimen and have it examined himself. Respondent's argument that the Petitioner did not issue a subpoena to the person who performed the test, and that his demand to cross-examine that person was not met, is without basis.

The Respondent posits that the OAH "determined that the appropriate remedy for this statutory violation was to rescind the DMV's orders of revocation and disqualification." Resp. Brf. at 22-23. This shows that the OAH and circuit courts' actions are not supported in the law. They created a remedy which does not exist legislatively for a purported offense which also does not exist legislatively, *i.e.* the purported duty of the officer to obtain analysis of the blood sample. Remedies are determined by statute and should not be created by the unsolicited overreaching of the OAH. *State ex rel. King v. MacQueen*, 182 W. Va. 162, 386 S.E.2d 819 (1986) is factually distinguishable from this case inasmuch as the Respondent therein was denied a blood test. It is further distinguishable in that the circuit judge was ordered to make a ruling in the criminal proceeding on the question of a remedy when a blood test has been denied. Judge MacQueen had already reversed

the DMV's order. Here, the Respondent demanded and received a blood test. Therefore, a sample existed which the Respondent could have had analyzed. The right created in W. Va. Code § 17C-5-9 does not create an affirmative duty on the part of the officer to obtain an analysis. Under *Burks*, the officer must assist a driver to obtain a blood test: *i.e.*, to get a sample obtained within two hours of the acts alleged or the arrest. However, once that crucial time period for obtaining a sample has passed, nothing obligates the officer to have the sample analyzed. The right granted in the statute must be exercised by the driver.

**II. The Respondent Was Read and Given a Copy of the Implied Consent Statement, and He Refused to Take the Designated Secondary Chemical Test of the Breath.**

At the South Charleston police station, Officer J. A. Bailes of the South Charleston Police Department read and gave to Respondent a copy of the West Virginia Implied Consent Statement, advising the Respondent of the penalties for refusal of the test. The Respondent signed the form. A.R. at 185, 291, 336-338. The evidence shows that Respondent was properly informed of the penalty for refusal to submit to the breath test, and he twice refused the breath test. Patrolman Bailes testified clearly that the Respondent refused the breath test by telling him he did not want to take it. Bailes testified: "I specifically asked him twice, once he had a 15-minute period to change his mind." A. R. at 338. The Respondent did not testify or present any evidence to the contrary.

Respondent complains that he was not provided with a copy of the Implied Consent Statement prior to the hearing. (It was offered and admitted into evidence at the hearing. A. R. at 291). However, this Court has held that even in the absence of the Implied Consent Statement itself from the record, the requirements of reading and providing a copy of such Statement may be shown through other documentary or testimonial evidence. 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. *See also, Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va., Apr. 10, 2014)(memorandum decision).

Respondent argues that there is a conflict in Investigating Officer Harden's representations about the Implied Consent Statement in the DUI Information Sheet. He even cites W. Va. Code § 17C-5A-1(b), which provides 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." Resp. Brf. at 20. However, the record does not support that the Investigating Officer is a liar, as the Respondent would have this Court believe. Neither the OAH nor the circuit court impugned Investigating Officer Harden's credibility.

Investigating Officer Harden recorded the facts of his investigation on the DUI Information Sheet and testified that Officer Bailes conducted the secondary chemical test, including reading and providing the Respondent with a copy of the Implied Consent form. Officer Bailes, who himself testified about his participation in the investigation, is simply a part of the investigation and reporting by Investigating Officer Harden. Investigating Officer Harden never stated that it was he who read and provided a copy of the Implied Consent Statement. Even a cursory review of the record will show that there is no credibility issue and no conflict in the evidence despite Respondent's attempts to manufacture the same.

Respondent argues that W. Va. Code § 17C-5-4, when read in conjunction with W. Va. Code § 17C-5-9, indicates that a driver has a choice between blood or breath tests. Resp. Brf. at 19. The South Charleston Police Department has, as has every other law enforcement entity in the State, designated the breath test as the secondary chemical test. A. R. at 65; W. Va. Code § 17C-5-4(d). Blood tests are additional tests which do not negate the requirement to submit to a breath test. *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987). Moreover, this Court has held that a refusal is a refusal:

We therefore hold that, when the requirements of *W. Va. Code* 17C-5-7 [1983] have otherwise been met, and a driver refuses to or fails otherwise to respond either affirmatively or negatively to an officer's request that he submit to a chemical analysis test, the driver's refusal or failure to respond is a refusal to submit within the meaning of *W. Va. Code* 17C-5-7 [1983].

*In re Matherly*, 177 W. Va. 507, 509, 354 S.E.2d 603, 605 (1987). Further, the Court's discarding of the "too drunk to understand" defense negates Respondent's argument that he was "lead to believe" that he had a choice between tests. Resp. Brf. at 19.

First, *W. Va. Code* 17C-5-7 [1983] makes no provision for such a defense. Nor does the statute require that the refusal be intelligently, knowingly and willingly made. The statute requires only that the driver refuse to take the test. We will not engraft onto the statute a specific intent requirement where it is apparent that none was intended by the legislature.

*Id.* At 177 W. Va. 509, 354 S.E.2d 605.

**III. The Respondent Did Nothing to Show That He Attempted to Obtain an Analysis of the Blood or That it Would Have Exculpated Him.**

Respondent had the opportunity to testify or inquire of the officer on cross-examination to show that he attempted to obtain an analysis of the blood or that it would exculpate him, but he did not do so. In *Burks*, the driver was taken to task for failing to obtain the information he sought: “Burks did not show at the DMV hearing that he had requested the results or other information about the test from the hospital, or that the hospital had refused to provide the results or information, or that the results or information would have been favorable to Burks.” 206 W. Va. 433-34, 525 S.E.2d 314-15. In *Dale v. McCormick*, 231 W. Va. 628, 749 S.E.2d 227 (2013), this Court clarified that if a driver raises general objections about an aspect of a DUI investigation, it is incumbent on the driver to bring forth this evidence:

To the extent that Ms. McCormick believed Trooper Miller did not perform the test in accordance with the law, she was required to question Trooper Miller in this area. Moreover, even if Trooper Miller failed to satisfy some requirement for administering the horizontal gaze nystagmus test, such failure “went to the weight of the evidence, not its admissibility.”

231 W. Va. 633, 749 S.E.2d 232. Of course, given the Respondent’s lack of initiative in obtaining an analysis of the blood, testifying at the hearings or even cross-examining the Investigating Officer, it is clear that the OAH and the circuit court simply opened a door and the Respondent walked through it. Neither the evidence nor the law supports the unsolicited conclusions of the lower tribunals.

**CONCLUSION**

For the reasons stated in *Petitioner's Brief* and in the present *Reply Brief*, this Court should reverse the Final Order of the circuit court.

**Respectfully submitted,**

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

**By counsel,**

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STEVEN O. DALE, ACTING COMMISSIONER OF THE  
WEST VIRGINIA DIVISION OF MOTOR VEHICLES, AND  
SUCCESSOR TO JOE E. MILLER, AS COMMISSIONER,

Petitioner Below, Petitioner,

v.

DUSTIN HALL,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Reply Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 10th day of September 2014, addressed as follows:

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\_\_\_\_\_  
Janet E. James