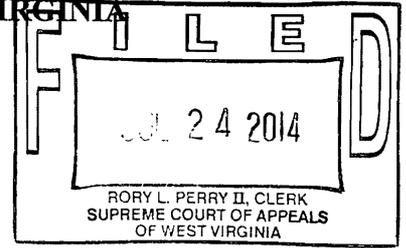


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0138



RONNIE MEADOWS,

Petitioner,

v.

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

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On August 21, 2008 Petitioner was arrested for driving under the combined influence of alcohol and a controlled substance or drug in Charleston, Kanawha County, West Virginia. Investigating Officer J. D. Matheny of the Charleston Police Department apprised the Respondent of Petitioner's arrest by submitting a DUI Information Sheet, an Implied Consent Statement, and an Intoximeter printout ticket pursuant to W. Va. Code § 17C-5A-1. (A.R. at 62-69.) After reviewing these documents, the Respondent Division of Motor Vehicles ("DMV") issued an initial order, dated September 17, 2008, revoking Petitioner's privilege to drive in West Virginia for second-offense driving under the influence. (A.R. at 61.)

Petitioner timely requested an administrative hearing and requested the officer's attendance. (A.R. at 55.) On September 12, 2008, Patrolman Matheny advised the Respondent that he would be on active military duty from October 8, 2008 through March 8, 2009, and April 1-19, 2009. He also indicated that he would be out of the country beginning May 19, 2009 for 12-17 months. (A.R. at 60.) On September 18, 2008, Patrolman Matheny advised the DMV that he would be unavailable from October 7, 2008 to April 20, 2009. (A. R. at 59.) On September 22, 2008, the Division of Motor Vehicles' Director of Legal Services notified the Charleston Police Department and Carter Zerbe, counsel for the Petitioner, that the administrative hearing could not be scheduled at that time because Patrolman Matheny was on active military duty. (A.R. at 50-51.)

Patrolman Matheny was terminated from his job at the Charleston Police Department on October 15, 2010. The Charleston Police Department notified the DMV of this fact in a letter dated January 27, 2011. (A.R. at 46.)

A hearing was scheduled for May 4, 2011. The investigating officer was subpoenaed to attend. (A.R. at 47.) That hearing was continued at the request of the Office of Administrative Hearings. The Petitioner generally objected to the continuance. (A.R. at 39.)

A hearing was then set for November 14, 2011. (A.R. at 35.) That hearing was continued at the request of counsel for the Division of Motor Vehicles, without objection from the Petitioner. (A.R. at 31.)

The hearing was then rescheduled for February 27, 2012. That hearing was continued due to the illness of the Hearing Examiner. (A.R. at 23.)

Patrolman Matheny died on April 26, 2012.

The hearing was rescheduled for July 9, 2012. (A.R. at 21.) On that date, the Petitioner appeared, along with counsel, and the Respondent appeared by counsel.

At the hearing, the Examiner offered and accepted as admissible evidence the documents in the Respondent's file, including the DUI Information Sheet, Implied Consent Statement, and the Intoximeter ticket. (A.R. Tr. at 2.) The Petitioner testified.

The Division's evidence in the record shows that on August 21, 2008, at 9:05 p.m., the investigating officer observed Petitioner's car accelerating or decelerating rapidly on Glenwood Avenue in Kanawha County, West Virginia. Following a stop of the car, the investigating officer observed that Petitioner had the odor of alcoholic beverage on his breath, that he was unsteady while exiting the vehicle and walking to the roadside and while standing. His speech was slurred, and his eyes were bloodshot. Petitioner admitted to the investigating officer that he had drunk two 22-ounce beers and was on medication. Petitioner failed the horizontal gaze nystagmus, walk-and-turn, and one-leg stand tests. The investigating officer placed Petitioner under arrest and transported him to

the Charleston Police Department, where he properly administered a secondary chemical test of the breath. The result of the test shows that Petitioner's blood alcohol content was .071%. (A.R. at 62-68.)

The Petitioner testified that he made a break to cross the road at the corner of Glenwood and Central because he could not see oncoming traffic. At that point Investigating Officer Matheny turned on his lights. He testified that Investigating Officer Matheny told him he had run a red light, that he protested and that he said it was a stop sign. After five minutes, Investigating Officer Matheny asked Petitioner to get out of the car. Petitioner testified that he did not have difficulty getting out of the car. He further testified that he walked normally. When asked by his counsel whether his balance and coordination were impacted by the alcohol in his system, Petitioner initially responded, "I think so, yes," then upon requestioning by counsel, changed his answer to "I don't, I don't think that, I don't think the alcohol, I don't think I was affected." (A.R. Tr. at 12-15.) Petitioner denied that alcohol made him unsteady or impaired his balance and coordination and that he was unsteady getting out of the car or standing or walking. Petitioner denied slurring his speech. He attributed his bloodshot eyes to allergies. Petitioner admitted in testimony that he drank beer from 5:00 p.m. to 7:30 p.m. (A.R. Tr. at 15-17.)

The parties agreed the horizontal gaze nystagmus test should not be given weight. As to the walk-and-turn test, Petitioner testified that "there was no line," therefore, he did not step off the line. (A.R. Tr. at 20). Petitioner further denied missing heel-to-toe. (A.R. Tr. at 21.) As to the one-leg-stand test, Petitioner testified that he sways naturally. (A. R. Tr. at 21.) Petitioner testified on cross examination that he takes blood pressure medication.

A Final Order was issued effective July 23, 2013, upholding the revocation. The circuit court entered its Dismissal Order on February 6, 2014, upholding the DMV's Final Order.

SUMMARY OF ARGUMENT

The Petitioner has failed to show that he suffered actual prejudice as a result of the delay in holding the administrative rehearing in this case. At the hearing, he appeared and testified. The delay is not a basis for rescinding the Petitioner's license revocation for DUI.

The DMV properly admitted and weighed the documentary evidence in this case, and heard and weighed the Petitioner's testimony. This was affirmed by the circuit court. All of the evidence was reconciled in the DMV's Final Order revoking the Petitioner's license.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the basis that this case involves assignments of error in the application of settled law.

ARGUMENT

I. The Delay in Holding the Hearing Is Not a Basis for Reversal of the Final Order Because Petitioner Did Not Prove That He Suffered Actual Prejudice by the Delay.

Petitioner complains that the delay in holding a hearing in this matter is the basis for reversal of the circuit court's Dismissal Order. However, the Petitioner has failed to show that he suffered actual prejudice by the delay. As he well knows, to prevail on his argument that the delay in holding the hearing violated his due process rights, he must prove actual prejudice¹ (defined as the

¹Presumptive prejudice has no application in these proceedings. In *Moredock, supra*, this Court expressly ruled that "this Court's subsequent decision in *Facemire* [*State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E. 2d 847 (2009)] **precludes** the use of presumptive prejudice to establish a due process violation based on delay, expressly overruling *Hey* and its progeny." (Emphasis in original) 229 W. Va. 71, 726 S.E.2d 39.

impairment of his ability to prepare or defend his case as a result of the delay in the hearing (Fn. 8, *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011)) in an evidentiary hearing before the circuit court:

On appeal to the circuit court from an order revoking a party's license to operate a motor vehicle in this State, when the party asserts that his constitutional right to due process has been violated by a delay in the issuance of the revocation order by the Commissioner of the Division of Motor Vehicles, he must demonstrate that he has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.

Syl. Pt. 5, *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011). No such hearing was had.

In order to make a finding of actual prejudice, “a hearing will be necessary to determine whether Petitioner can demonstrate that actual prejudice has resulted from the delay.” *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 603, 678 S.E.2d 847, 856 (2009). Petitioner has failed to show any prejudice, including the ability to defend himself, in this matter, as this Court required in *Knotts*:

As the Fourth Circuit held in *Jones [v. Angelone]*, 94 F.3d 900 (4th Cir.1996), a defendant is required to introduce evidence of “actual substantial prejudice” to establish that his case has been prejudiced by preindictment delay.

This is a heavy burden because it requires not only that a defendant show actual prejudice, as opposed to mere speculative prejudice, ... but also that he show that any actual prejudice was *substantial*-that he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected.
94 F.3d at 907 (emphasis in original).

223 W. Va. 603, 678 S.E.2d 856. “[T]he mere passage of time in rendering an administrative determination will not, standing alone, justify its annulment. Instead, a party must demonstrate actual and substantial prejudice as a result of the delay.” *Board of Ed. v. Donaldson*, 839 N.Y.S.2d 558, 561 (N.Y.A.D. 3 Dept. 2007) (citations omitted).

Even if actual prejudice were found, it must be balanced against the government’s justification for the delay. “Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.” 229 W. Va. 72, 726 S.E.2d 40. *See also, Holland v. Comm’r of W. Virginia Div. of Motor Vehicles*, 13-0924, 2014 WL 2682277 (W. Va. June 13, 2014)(memorandum decision) (“An evidentiary hearing was conducted following remand. By order entered July 30, 2013, the circuit court determined that the DMV had shown good cause for granting the continuances of the hearings in this case and that the delays were neither unreasonable nor excessive.”) However, no hearing was convened at which such findings could be made in this matter.

Nevertheless, an administrative hearing was held at which all due process requirements were met.

When we apply *North [v. W. Virginia Board of Regents*, W. Va., 160 W. Va. 248, 233 S.E.2d 411 (1977)] standards to the administrative suspension order, we find they are met. The preliminary order of suspension under W.Va.Code, 17C-5A-4, based on the statutory grounds, must be sent to the licensee and constitutes the notice of suspension. Thereafter, the licensee can request a hearing which must be held before the Commissioner or his authorized deputy or agent. The provisions of the Administrative Procedures Act, W. Va. Code, 29A-5-1, et seq., are expressly made applicable to the hearing. Once the hearing procedures are invoked the suspension order is stayed pending the final resolution of the issues. Consequently, there is no prehearing deprivation. W. Va. Code, 17C-5A-4.

Jordan v. Roberts, 161 W. Va. 750, 756, 246 S.E.2d 259, 263 (1978). (A.R.Tr. at 1-25.)

Thus, there has been no showing that the delay in the Respondent's holding a hearing in this matter constitutes a valid basis for reversal of the Dismissal Order. The Petitioner's license revocation was stayed during the pendency of the hearing, and he has failed to show actual prejudice by the delay.

Reversal of the revocation order in this matter on the basis of delay would also ignore the applicable standard for review in administrative license revocation matters. This Court has affirmed the applicable standard for review of administrative license revocation cases in *Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010):

As set forth in West Virginia Code § 17C-5A-2(f), [footnote omitted] the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.

and in *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010):

In instances of administrative license revocation, our decisions have clearly stated that there is no statutory requirement that proof of a motorist driving under the influence of alcohol be established by secondary chemical test results. *See* Syl. Pt. 1, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 4, *Coll v. Cline*. What we have consistently held is 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. Syllabus Point 2, *Albrecht v. State*, 173 W. Va. 268,

314 S.E.2d 859 (1984). 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). The reversal of a revocation order on the basis of delay is insupportable on its face, as well as an alarming departure from the question of whether the person was driving a vehicle while under the influence of alcohol. Thus, reversal on the merits is not warranted and, as set forth above, neither is reversal on the basis of delay.

II. The File Documents Were Properly Admitted and Relied Upon, and the Evidence Was Properly Weighed by the DMV in its Final Order.

At the administrative hearing, the Hearing Examiner properly allowed the file documents, including the DUI Information Sheet, the Implied Consent Statement and the Intoximeter ticket, into evidence. They are admissible and are subject to challenge. W. Va. Code § 29A-5-2; *Crouch v. West Virginia Division of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006), *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, 13-0501, 2014 WL 1272540 (W. Va., Mar. 28, 2014)(memorandum decision), *Dale v. Odum*, 12-1403, 2014 WL 641990 (W. Va., Feb. 11, 2014) (per curiam), *Cain v. W. Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010), *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam), *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam), *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va., Apr. 10, 2014)(memorandum decision), *Dale v. Reynolds*, 13-0266, 2014 WL 1407375 (W. Va., Apr. 10, 2014)(memorandum decision), *Davis v. Miller*, 11-1189, 2012 WL 6097655 (W. Va., Dec. 7, 2012)(memorandum decision), and *Miller v. Chenoweth*, 229 W. Va. 114, 727 S.E.2d 658 (2012)(per curiam).

In addition to admitting and giving weight to the evidence continued in the agency's file, the DMV expressly considered and weighed the testimonial evidence offered by the Petitioner. (A.R. at 87-88.) The Commissioner properly found that there was sufficient evidence presented to uphold the revocation. The evidence showed that Petitioner had consumed alcohol; that he took blood pressure medication; that he drove with excessive speed; and that he exhibited indicia of intoxication once stopped. Petitioner testified that he could not perform the field sobriety tests well because of his balance and coordination issues, denied slurring his speech, and testified that he was not unsteady getting out of the car, walking or standing. Testimonial evidence is given no preference over documentary evidence "in the context of driver's license revocation proceedings." *Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010). The DMV weighed the documentary evidence *and* the Petitioner's testimony, reconciled the evidence and concluded that the revocation should be upheld.

The principal issue before the DMV was whether the Petitioner operated his motor vehicle while under the influence ("DUI.") W. Va. Code § 17C-5A-2(e). The obvious and most critical inquiry in a license revocation proceeding is whether the person charged with DUI is actually intoxicated. *Carte v. Cline*, 194 W. Va. 233, 460 S.E.2d 48 (1995). Regarding the issue of intoxication, there is no requirement that a chemical sobriety test be administered in order to prove that a motorist was driving under the influence of alcohol or drugs for the purpose of an administrative revocation of a driver's license. *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); although, as the Commissioner pointed out in the Final Order, evidence that there was more than .05% and less than .08% blood alcohol content is relevant evidence pursuant to W. Va. Code §17C-5-8(a)(2). (A.R. at 88.) Where 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, supra*.

Although they were not included in the *Amended Appendix*, and therefore should not be considered by the Court, the Petitioner appends to his Brief emails showing that Kathy Holland, the Hearing Examiner who heard the case, reviewed and approved the DMV's Final Order in this case. Ms. Holland approved the Final Order as it was issued, and the Commissioner entered the Final Order.

A court can only interfere with administrative findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.*, 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995). “[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). “This Court has recognized that credibility determinations by the finder of fact in an administrative proceeding are ‘binding unless patently without basis in the record.’” *Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). In other words, an appellate court may only conclude a fact is clearly wrong when it strikes the court as “wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’” *Brown*, 196 W. Va. at 563, 474 S.E.2d at 493 (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir.1993)). The Commissioner's weighing of the Petitioner's self-serving testimony against the documentary evidence which was made contemporaneously with the arrest cannot be found to be clearly wrong.

There is no “law requiring the ALJ to use particular words or to write a minimum number of sentences or paragraphs.” *Francis v. Astrue*, 3:09-cv-01826 VLB, 2011 WL 344087, at 4 (D. Conn. Feb. 1, 2011). Indeed, an ALJ is not required to make “‘explicit credibility findings’ as to each bit of conflicting testimony, so long as his factual findings as a whole show that he ‘implicitly resolve[d]’ such conflicts.” *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (quoting *N.L.R.B. v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir.1982)). Accord *N.L.R.B. v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2^d Cir.1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his “treatment of the evidence is supported by the record as a whole.”) See also *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) (emphasis added) (“The ALJ, who *apparently* disbelieved the plaintiff’s recollection of the circumstances leading up to the continuance, did not exceed permissible bounds in accepting testimony of the defendant’s witnesses about this exchange.”)

When, as is the case here, a trial court fails to render express findings on credibility but makes a ruling that depends upon an implicit determination that credits one witness’s testimony as being truthful, or implicitly discredits another’s, such determinations are entitled to the same presumption of correctness that they would have been accorded had they been made explicitly.

Lavernia v. Lynaugh, 845 F.2d 493, 500 (5th Cir. 1988). In short, “[a]n appellate court may not set aside the factfinder’s resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents.” *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995). Here, the Hearing Examiner weighed the evidence and found that there was sufficient evidence to uphold the revocation, even in light of the Petitioner’s testimony.

CONCLUSION

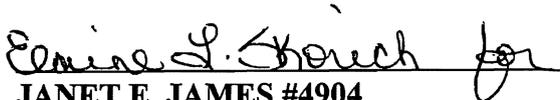
WHEREFORE, based upon the foregoing, the Respondent hereby respectfully requests that the Dismissal Order be affirmed.

Respectfully submitted,

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

By counsel,

**PATRICK MORRISEY
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Handwritten signature of Emina L. Storch in cursive script, followed by a horizontal line and the word "for".

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STEVEN O. DALE, ACTING COMMISSIONER
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Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing *Respondent's Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 24th day of July, 2014, addressed as follows:

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