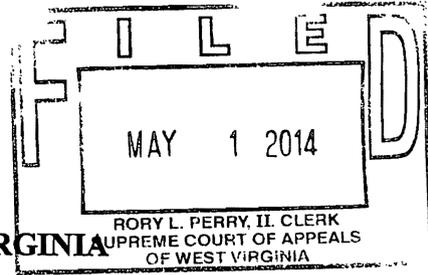


NO. 14-0103



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

**Petitioner Below, Petitioner,**

**v.**

**JEFFREY HILL,**

**Respondent.**

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**BRIEF OF PETITIONER**

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**TABLE OF CONTENTS**

	Page
<b>ASSIGNMENTS OF ERROR</b> .....	2
<b>I. THE CIRCUIT COURT ERRED IN ERRED IN EXCLUDING THE RESULTS OF THE PRELIMINARY BREATH TEST.</b> .....	2
<b>II. THE CIRCUIT COURT ERRED IN EXCLUDING THE RESULTS OF THE SECONDARY CHEMICAL TEST.</b> .....	2
<b>III. THE CIRCUIT COURT ERRED IN FINDING THAT THE STOP OF RESPONDENT’S VEHICLE WAS ILLEGAL.</b> .....	2
<b>IV. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT RESPONDENT WAS DRIVING UNDER THE INFLUENCE OF ALCOHOL.</b> .....	2
<b>STATEMENT OF THE CASE</b> .....	2
<b>SUMMARY OF ARGUMENT</b> .....	7
<b>STATEMENT REGARDING ORAL ARGUMENT AND DECISION</b> .....	7
<b>ARGUMENT</b> .....	8
<b>I. STANDARD OF REVIEW.</b> .....	8
<b>II. THE CIRCUIT COURT ERRED IN ERRED IN EXCLUDING THE RESULTS OF THE PRELIMINARY BREATH TEST.</b> .....	8
<b>III. THE CIRCUIT COURT ERRED IN EXCLUDING THE RESULTS OF THE SECONDARY CHEMICAL TEST.</b> .....	9
<b>IV. THE CIRCUIT COURT ERRED IN FINDING THAT THE STOP OF RESPONDENT’S CAR WAS ILLEGAL.</b> .....	14
<b>V. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT RESPONDENT WAS DRIVING UNDER THE INFLUENCE OF ALCOHOL.</b> .....	15
<b>CONCLUSION</b> .....	19

## TABLE OF AUTHORITIES

### Cases

<i>Albrecht v. State</i> , 173 W. Va. 268, 412 S.E.2d 859 (1984) .....	18
<i>Carte v. Cline</i> , 200 W.Va. 162, 488 S.E.2d 437 .....	18
<i>Dale v. Veltri</i> , 230 W. Va. 598, 741 S.E.2d 823 (2013). .....	14
<i>Groves v. Cicchirillo</i> , 694 S.E.2d 639 (2010) .....	17
<i>Huffman v. Goals Coal Co.</i> , 223 W.Va. 724, 679 S.E.2d 323 (2009) .....	13
<i>Lowe v. Cicchirillo</i> , 223 W.Va. 175, 672 S.E.2d 311 (2008). .....	18
<i>Manriquez v. Gourley</i> , 105 Cal. App. 4 <sup>th</sup> 1227, 130 Cal. Rptr. 209 (2003) .....	12
<i>Muscatell v. Cline</i> , 196 W.Va. 588, 474 S.E.2d 518 (1996). .....	8
<i>Peterson v. Wyoming Dept. Of Transp., Driver's License Div.</i> , 2007 WY 90, 158 P.3d 706 (Wyo. 2007) .....	12
<i>Sims v. Miller</i> , 227 W.Va. 395, 709 S.E.2d 750 (2011) .....	13
<i>State v. Elder</i> , 152 W.Va. 571, 165 S.E.2d 108 (1968) .....	13
<i>State v. Cash</i> , 3 Neb. App. 319, 526 N.W.2d 447 (1995) .....	13
<i>State v. Dyer</i> , 177 W.Va. 567, 355 S.E.2d 356 (1987) .....	13
<i>State v. Elder</i> , 152 W.Va. 571, 165 S.E.2d 108 (1968) .....	13
<i>State v. Remsburg</i> , 126 Idaho 338, 882 P.2d 993 (Ct. App. 1994) .....	12
<i>State v. Stuart</i> , 192 W.Va. 428, 452 S.E.2d 886 (1994) .....	14
<i>Webb-Buckingham v. State</i> , 2009 WL 147020 (Del. Super. Jan. 22, 2009) .....	12

### Statutory Provisions

W. Va. Code § 17C-5A-2(f) .....	18
W. Va. Code § 17C-5A-2(n). .....	17

**Rules**

Rev. R.A.P Rule 19 ..... 7

64 C.S.R. 10-5.2 ..... 8

64 C.S.R. 10-7.2(a) ..... 10,11

## ASSIGNMENTS OF ERROR

- I. **THE CIRCUIT COURT ERRED IN ERRED IN EXCLUDING THE RESULTS OF THE PRELIMINARY BREATH TEST.**
- II. **THE CIRCUIT COURT ERRED IN EXCLUDING THE RESULTS OF THE SECONDARY CHEMICAL TEST.**
- III. **THE CIRCUIT COURT ERRED IN FINDING THAT THE STOP OF RESPONDENT'S VEHICLE WAS ILLEGAL.**
- IV. **THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT RESPONDENT WAS DRIVING UNDER THE INFLUENCE OF ALCOHOL.**

## STATEMENT OF THE CASE

At 2:07 a.m. on October 24, 2010, Deputy Edwin Delgado of the Taylor County Sheriff's Department (Dep. Delgado), the Investigating Officer in this matter, came into contact with the Respondent after observing Respondent straddling the center line, almost striking Dep. Delgado's car, and going almost 70 miles per hour in a 55 mile per hour zone. A.R. Tr. at 13-15<sup>1</sup>. Respondent was 18 years old at the time. On the DUI Information Sheet (A. R. at 32<sup>2</sup>), Dep. Delgado noted: "Almost had a head-on collision w/undersigned officer; collission [sic] not avoided by subject's evasive driving (lack-of). No reaction from subject." A. R. at 33.

After Respondent was stopped, Dep. Delgado noticed that Respondent had gum in his mouth and asked Respondent to spit it out. Respondent complied. A.R. Tr. At 106, 118. Dep. Delgado noticed an odor of alcohol on Respondent's breath. Respondent admitted to consuming beer. A.R.

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<sup>1</sup>Reference is to the transcript of the administrative hearing, contained in the Appendix Record.

<sup>2</sup>Reference is to the Appendix Record page.

Tr. at 16, 18. Respondent was unsteady while standing. A.R. at 34; A.R. Tr. At 22. The Respondent had bloodshot and glassy eyes. A. R. at 34. The Respondent had excited, slightly slurred speech. A. R. At 34. Dep. Delgado noted on the DUI Information Sheet that Respondent was “nervous, slightly dismissive of situation but cooperative,” and he testified that this was due to Respondent’s nervousness and impairment from the alcohol. A. R. At 34; A.R. Tr. At 22-23. Respondent stated that he had some beers, but that he thought it more prudent that he drive, because he was more sober than the other occupants of the car. A. R. At 34; A.R. Tr. At 19.

The Investigating Officer explained and administered a series of field sobriety tests to the Respondent, including the horizontal gaze nystagmus (“HGN”), walk-and-turn, and one-leg stand. A. R. at 34-35; A.R. Tr. At 118-119. Prior to the HGN test, Dep. Delgado ascertained that there was no vertical nystagmus, and Respondent had equal tracking during the test. A. R. At 34; A.R. Tr. At 24. Respondent also had equal pupils. A. R. At 34; A.R. Tr. At 25. During administration of the HGN test, Dep. Delgado used his pen and asked Respondent to follow the tip of the pen with his eyes. The Respondent’s eyes were “choppy as both eyes were pulsing to and fro in the process of trying to follow the tip of the pen.” A.R. Tr. At 24. The Respondent’s eyes showed lack of smooth pursuit and distinct and sustained nystagmus at maximum deviation. Respondent’s eyes had equal pupils and equal tracking. There was no resting nystagmus. A. R. At 34; A.R. Tr. At 24. Based on Dep. Delgado’s interpretation that Respondent had only two points on the test, Dep. Delgado deemed that Respondent passed the HGN test. A.R. Tr. At 26. However, Dep. Delgado subsequently testified that because he observed detection clues in both eyes, the result was four points. A.R. Tr. At 32, 43. Four points is deemed a failure of the HGN.

Respondent passed the walk-and-turn and one-leg stand tests. A. R. At 34-35; A.R. Tr. At 31. At the administrative hearing, Respondent testified that he did not do the field sobriety tests in the field, but only at the police station. A.R. Tr. At 106, 114. Dep. Delgado testified that he administered the sobriety tests at the scene of the stop and once again at the station, as a courtesy to the Respondent, who insisted that he was not under the influence. The Respondent passed the one-leg stand and walk-and-turn tests as he had at the roadside, but, Dep. Delgado testified, Respondent still had nystagmus. A.R. Tr. At 118–121.

At the scene of the stop, Dep. Delgado asked the Respondent to submit to a preliminary breath test (“PBT”). Dep. Delgado is trained and certified to perform the PBT. A. R. At 35; A.R. Tr. At 63. He used an individual disposable mouthpiece. A. R. at 35. Respondent failed this test at 2:15 a.m. A.R. Tr. At 32. The blood alcohol content reflected on the PBT was .114. A. R. At 35. Dep. Delgado testified that the PBT reflected that Respondent’s blood alcohol content was “well over the legal amount of .08 which is cause for the arrest.” A.R. Tr. At 32-33, 51-52. The PBT machine is self-calibrated, and has an automated warm-up period. It will not work if it is not ready. A.R. Tr. At 52.

The owner of the car, Jared Paul Dearth, was seated in the passenger seat and was intoxicated with a .206 blood alcohol content. A. R. At 35; A.R. Tr. At 17.

The Investigating Officer lawfully arrested the Respondent (A.R. Tr. At 33) for driving while under the influence of alcohol at 2:25 a.m. Dep. Delgado handcuffed Respondent and placed him in his car. A.R. Tr. At 33-34. Dep. Delgado then tested the two other individuals in the car and contacted their parents. A.R. Tr. At 33. Passenger Jared Dearth’s parents arrived on the scene and left with their car and Mr. Dearth. A. R. Tr. At 35. Dep. Delgado then drove, with Respondent and the female passenger, to Pub Two on U.S. Route 50 and transferred custody of the girl to her parents.

A. R. Tr. At 36. Respondent was then transported to the Taylor County Jail for the purpose of administering a secondary chemical test of the breath. A.R. Tr. At 35-36.

Dep. Delgado was trained by the West Virginia State Police to administer field sobriety tests, and secondary chemical tests of the breath and has been certified as a test administrator by the West Virginia Department of Health since May 6, 2004. A. R. At 36; A.R. Tr. At 12.

Dep. Delgado read the Implied Consent Statement to Respondent and provided him with a copy at 3:54 a.m. A.R. at 36; A.R. Tr. At 37, 54. He observed the Respondent for a period of twenty minutes prior to administration of the secondary chemical test, during which time the Respondent had no oral intake. A. R. At 36; A.R. Tr. At 37, 59-60. The Intox EC/IR-II printer was online and no errors were indicated. The instrument read “press enter to start” and Dep. Delgado entered data as prompted. Instrument displayed “please blow” and Dep. Delgado placed an individual disposable mouthpiece into the breath tube and had Respondent blow into the mouthpiece. The gas reference standard run on the Intoximeter indicated that the machine was working properly. The results of the reference standard were .085 and .084. The results of the secondary chemical test administered to the Respondent showed that his blood alcohol concentration level was .108, by weight. A. R. At 32, 36; A.R. Tr. At 37-38. The result was obtained at 4:11 a.m. A. R. At 32, 36; A.R. Tr. At 54.

Dep. Delgado read Respondent the “Miranda” warning. A.R at 36; A.R. Tr. At 37. Thereafter, during the post-arrest interview, Respondent admitted that in the prior three hours, he was at an outside pavilion with friends listening to country music and drinking beer. Respondent admitted drinking four 12-ounce Miller Lite beers. When asked whether he was under the influence of alcohol, controlled substances or drugs, Respondent replied, “Just alcohol.” A. R. At 37. Respondent stated that he found himself in a situation where he thought it was better off that he drive, but that he found

this to be untrue. Respondent stated that he had four beers in an hour and figured he would be sober enough to drive. He stated that he regretted risking everyone's lives. Respondent signed the post-arrest interview at 4:37 a.m. A.R. At 37; A.R. Tr. At 57-59.

At the administrative hearing, Respondent denied that he was under the influence. A.R. Tr. At 93, 98.

Rick Hill, Respondent's father, testified that he arrived at the jail, and spoke with an officer for 30-45 minutes before seeing Respondent. A.R. Tr. At 85. When he saw Respondent, Respondent was fully functional. A.R. Tr. At 86. Mr. Hill testified that he spends a lot of time with his son, and his son is "probably one of my best friends." A.R. Tr. At 89.

The Petitioner issued an initial Order of Revocation on January 28, 2011. A. R. At 41. Respondent timely requested a hearing from the Office of Administrative Hearings (hereinafter, "OAH"). The administrative hearing was held on November 7, 2011. A.R. at 113.

By *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* entered November 13, 2012, the OAH rescinded the Respondent's initial order of revocation on the basis that "the record is absent any credible evidence to establish that on the 24<sup>th</sup> day of October, 2010, the Investigating Officer had reasonable grounds to believe that the Petitioner was driving a motor vehicle while under the influence of alcohol, and that the Petitioner was lawfully arrested for the offense." A. R. At 134-35.

The Petitioner appealed the matter to the circuit court of Kanawha County. A.R. at 146-176. On December 30, 2013, the circuit court entered a *Final Order* (hereinafter, "Order"), which affirmed the decision of the OAH. A. R. At 2-17.

## **SUMMARY OF ARGUMENT**

The circuit court erroneously found that there was insufficient evidence to show that Respondent was lawfully arrested and that he committed the offense of driving while under the influence. The court made errors of fact, and ignored critical pieces of the evidence.

In this matter, the Investigating Officer stopped the Respondent after the Respondent was speeding and nearly ran the officer off the road. Respondent exhibited indicia of intoxication, and had two drunk passengers in his car. Respondent then failed the PBT. Respondent was placed under arrest and was given the secondary chemical test within two hours of the arrest. The secondary chemical test showed that Respondent was under the influence of alcohol.

Yet the circuit court made implicit credibility determinations that the Investigating Officer's testimony was less credible than the Respondent's. It found that the stop of the vehicle was invalid, ignored the evidence of Respondent's intoxication at the scene, went to great lengths to explain why the field sobriety tests were not a basis for revocation when the Respondent passed them, and improperly excluded the evidence of the PBT and Intoximeter tests.

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

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

## ARGUMENT

### I. STANDARD OF REVIEW

This Court has established the standard for review of a circuit court's order deciding an administrative appeal as follows:

On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

### II. THE CIRCUIT COURT ERRED IN ERRED IN EXCLUDING THE RESULTS OF THE PRELIMINARY BREATH TEST.

The circuit court excluded the PBT evidence because the manual for the PBT device suggests waiting 20 minutes before administering the test. The Order provides that the Code of State Rules requires that officers adhere to the manufacturer's specifications. A. R. at 12. It is undisputed that the result of the PBT was eight minutes after the time of the stop. 64 C.S.R. 10-5.2 provides: "The law enforcement officer shall prohibit the person from drinking alcohol or smoking for at least fifteen minutes before conducting the test." After Respondent was stopped, Dep. Delgado noticed that Respondent had gum in his mouth and asked Respondent to spit it out. Respondent complied. A.R. Tr. At 106, 118. Nothing in the Rule places the burden of proof on the investigating officer to show that the subject had not smoked or drunk alcohol in the previous 15 minutes, and there is no evidence that Respondent consumed alcohol or smoked in the 15 minutes prior to his arrest. The Respondent testified at the hearing, and could have refuted the PBT evidence if he had consumed alcohol or cigarettes in the prior 15 minutes, but he did not.

The wait period does not affect the functionality of the device. Dep. Delgado testified that the PBT device has an automated warmup period. He stated: “It tells you when it’s clear. As a matter of fact, and this just happened to me a couple days ago, it will not register low. It won’t actually—it won’t receive any air intake whatsoever to try and give you a reading if it’s within a time that it’s not ready.” A.R. Tr. At 52.

The circuit court also erred in finding that Dep. Delgado was not certified to administer the PBT. The DUI Information Sheet shows that he was trained and certified (A. R. at 35), and Dep. Delgado testified that he became certified on the SD-5 PBT on January 25, 2009. A.R. Tr. At 63.

There is nothing in the record to show that the result of the PBT was invalid. There was no basis on which to exclude the evidence of the PBT result.

### **III. THE CIRCUIT COURT ERRED IN EXCLUDING THE RESULTS OF THE SECONDARY CHEMICAL TEST.**

The circuit court improperly excluded the results of the secondary chemical test (evidence which was *completely* ignored by the OAH) because it found that Dep. Delgado did not observe Respondent for 20 minutes prior to administration of the test. A. R. At 13. The circuit court relied solely on the DUI Information Sheet, which reflects that the Implied Consent Statement was signed by the Respondent at 3:54 a.m. (A.R. at 38), and the result of the secondary chemical test, which was at 4:11 a.m. A. R. at 32.

Incidentally, the circuit court mis-stated the applicable rule. A.R. at 12. The circuit court cited the rule as § 64-10-7.3(a) (it is 64 C.S.R. 10-7.2 (a)) and quoted the rule thus:

The individual being tested shall be under constant observation for a period of twenty minutes before the test is administered to insure that the individual has nothing in his or her mouth at the time of the test

and that he or she has no food or drink or foreign matter in his or her mouth during the observation period.

64 C.S.R. 10-7.2(a) provides:

The law enforcement officer shall keep the person being tested under constant observation for a period of twenty minutes before the test is administered to insure that the person has nothing in his or her mouth at the time of the test and that he or she has had no food or drink or foreign matter in his or her mouth during the observation period.

The circuit court failed to consider the totality of the evidence regarding the secondary chemical test. Dep. Delgado testified that once the Respondent was arrested and placed in handcuffs in the Deputy's cruiser, passenger Jared Dearth's parents came and collected him and the car Respondent was driving. Dep. Delgado then took the female passenger along with the Respondent, and met the female passenger's parents on Route 50. He then proceeded to take Respondent to the Taylor County jail in Grafton. A.R. Tr. At 34-37. Dep. Delgado testified that his observations of Respondent began at the scene. He testified:

I just ensured that he had nothing in his mouth at the scene while he was in the vehicle with me, and also after arriving at the Taylor County Jail there was nothing in his mouth for a period well longer than 20 minutes, which is the required observation time.

A.R. Tr. At 37. With regard to Dep. Delgado's transport of the female passenger to meet her parents, he testified:

As a matter of fact, the [girl's] father met me at the vehicle, so I was within—they were within my purview the entirety of the time, and by "they" I do mean Mr. Hill and the female passenger, until the parents showed up at the vehicle.

A.R. Tr. At 50. When asked, "...while there was only 17 minutes I think we said that elapsed between the implied consent and the actual administration of the secondary chemical test, he was in your

presence and within your view at least 20 minutes. Correct?" he answered, "Yes, Ma'am." A.R. Tr. At 59-60.

The circuit court's view of the secondary chemical test evidence, which was ignored by the OAH (the OAH did not even mention the secondary chemical test in its *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* A.R. at 124-137) was circumscribed and biased against the officer. The Order provides: "The point is that the state rule on observation calls for that observation to be nonstop. Instead, the arresting officer conducted what is clearly a shortened observation period which he then also compromised by beginning the breath test sequence at 4:06 a.m. per the printer ticket, preparing the machine for use and inputting data into it. It is absolutely impossible from a purely common sense standpoint for the arresting officer to have constantly observed Hill while he was engaged in these other tasks beginning at least at 4:06..." A. R. at 13. The task he began at 4:06 a.m. necessarily places him in the proximity of, and with a clear view of, the Respondent. Contrary to the circuit court's view, preparing the machine is not a distraction; it is an assurance that the officer and the Respondent are in close proximity. The circuit court also took Dep. Delgado to task for engaging in a "wide variety" of tasks while Respondent was in his custody. A. R. At 16. However, it is the 20 minutes prior to the Intoximeter test which is in question here, not whether he was staring at Respondent as he dropped off the female passenger with her parents. Dep. Delgado testified, "The only time he was allowed to leave my sight was after the test was completed." A. R. Tr. At 60.

The provisions of 64 C.S.R. 10-7.2(a) do not require that there be 20 minutes of uninterrupted face-to-face observation: its purpose is to ensure that there is no ingestion. Events such as the observing officer coughing, sneezing, or even blinking would be sufficient to render the observation

period nugatory, even though these types of events would not result in the underlying justification for the 20-minute observation rule being vitiated, that is, to prevent the driver from having anything in his or her mouth. *Manriquez v. Gourley*, 105 Cal. App. 4<sup>th</sup> 1227, 1236, 130 Cal. Rptr. 209, 216 (2003)(“the regulation should be interpreted with reference to its purpose, which is to determine whether the test subject has smoked, ingested food or drink, or suffered physical symptoms that would adversely affect the test results.”) Importantly, the Respondent did not provide any evidence that he ingested anything in the 20 minutes prior to administration of the secondary chemical test.

Dep. Delgado’s observation of the Respondent for the 20 minutes prior to the administration of the Intoximeter test was sufficient to produce a reliable secondary chemical test result. “Compliance with observation rules does not require an officer to fix his stare on the subject.” *Peterson v. Wyoming Dept. Of Transp., Driver’s License Div.*, 2007 WY 90, 158 P.3d 706, 711 (Wyo. 2007). *See also, Webb-Buckingham v. State*, 2009 WL 147020 (Del. Super. Jan. 22, 2009)(“numerous other jurisdictions have held that an officer need not “stare fixedly” at a suspect or satisfy an “eyeball-to-eyeball” rule throughout the observation period preceding an intoxilyzer or similar alcohol concentration breath test.”); *State v. Remsburg*, 126 Idaho 338, 341, 882 P.2d 993, 996 (Ct. App. 1994)(“Other states with regulations similar to those in Idaho have refused to hold that an officer is required to stare fixedly at the subject for the mandatory time period.”); *Manriquez*, 105 Cal. App. 4<sup>th</sup> 1227, 1236, 130 Cal. Rptr. 2d 209 (2003)(“Observation is not limited to perception by sight; an officer may perceive a subject has eaten, drank, smoked, vomited or regurgitated<sup>[footnote omitted]</sup> by sound or smell and the perception by senses other than sight can be sufficient to comply with the regulation. Further, the regulation should be interpreted with reference to its purpose, which is to determine whether the test subject has smoked, ingested food or drink, or suffered physical symptoms that would

adversely affect the test results....[U]ninterrupted eye contact is not necessary (and may not always be sufficient by itself) to determine whether the proscribed events have occurred, so long as the officer remains present with the subject and able by the use of all his or her senses to make that determination. Our conclusion is consistent with a workable interpretation of the continuous observation rule, and also with the conclusions of other jurisdictions that have addressed this issue under similar regulations.”); *State v. Cash*, 3 Neb. App. 319, 324, 526 N.W.2d 447, 451 (1995)(“Other jurisdictions have come to the same conclusion that when an officer is required to observe a person before administering a test, the officer need not stare fixedly at the person being tested for the specified period of time in order to satisfy the observation requirement, but must remain in the person's presence and be aware of the person's conduct.”). That was the case here.

The Respondent’s blood alcohol level of .108, as reflected on the Intoximeter ticket (A.R. at 32) is *prima facie* evidence of his intoxication.

The DMV contends that West Virginia Code § 17C-5-8 unambiguously creates the presumption that a BAC of .08% or more *up to two hours after* an arrest or the acts alleged is *prima facie* evidence of such BAC at the time of driving. The opinions of this Court support this assertion. In *State v. Dyer*, 177 W.Va. 567, 355 S.E.2d 356 (1987), for instance, this Court applied that statutory presumption and held that evidence of BAC was not admissible if taken outside the statutory two-hour time limit.<sup>[footnote omitted]</sup> Syllabus point five of *Sims v. Miller*, 227 W.Va. 395, 709 S.E.2d 750 (2011), concisely addressed this issue, stating as follows: “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.” The *Sims* Court evaluated the statute and reasoned as follows: We find this language to be clear, and therefore not subject to our interpretation. “ ‘Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.’ ” *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 729, 679 S.E.2d 323, 328 (2009) (quoting Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)). The above-quoted language

plainly allows the admission of evidence resulting from a chemical analysis of blood, breath, or urine, so long as the sample or specimen tested was taken within two hours of the time of arrest or of the acts alleged. 227 W.Va. at 400, 709 S.E.2d at 755.

*Dale v. Veltri*, 230 W. Va. 598, 601-02, 741 S.E.2d 823, 826-27 (2013).

The testimony of Dep. Delgado shows that the Respondent was in his presence, and under observation by Dep. Delgado, for at least the 20 minutes preceding the administration of the Intoximeter. The circuit court's rationale presumes that the observation started at the signing of the Implied Consent Statement, and that is not consistent with the evidence or even logical. Further, there is no evidence that Respondent ingested anything in the 20 minutes before he submitted to the test. The Respondent was under constant observation for the requisite time period, and the results of the test should not be excluded.

#### **IV. THE CIRCUIT COURT ERRED IN FINDING THAT THE STOP OF RESPONDENT'S CAR WAS ILLEGAL.**

Although the Order is fairly inscrutable, the circuit court found that there was an illegal stop in this case, but it "did not trigger the exclusionary rule" A.R. at 6. Instead, the circuit court managed to ignore or improperly discredit the evidence of Respondent's intoxication.

The notion that there was not a basis for the stop of the Respondent's vehicle in this case is absurd. The evidence shows that Respondent was driving almost 70 miles per hour in a 55 mile per hour zone, and that he was toward the center of the road sufficiently to cause Dep. Delgado to swerve to miss hitting him. Dep. Delgado testified, "If you're inquiring as to the reason for the stop, it was significant. He was well over the middle of the road. If there would have been center lines, he would have been well over the center lines....So that in conjunction with the speed is the cause for the stop." A.R. Tr. At 40-41. The stop in this matter meets the "reasonable suspicion" standard set forth in *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994), and the stop in this case was valid.

**V. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT RESPONDENT WAS DRIVING UNDER THE INFLUENCE OF ALCOHOL.**

It defies credulity that the circuit court found that “there was insufficient evidence to show that Hill operated a motor vehicle while he was under the influence of alcohol or that he was lawfully arrested for such an offense.” A.R. at 17. While the Order does not make explicit credibility determinations, the court noted the self-serving testimonies of Jared Dearth and Rick Hill (A. R. At 5-6), seemingly in its quest for support for the “strong evidence of sobriety” (A.R. at 11) which the court seemed determined to find.

Moreover, the Order implicitly discredits Dep. Delgado’s evidence on several occasions. The circuit court noted that Dep. Delgado testified that he was “hugging the edge of the road” as he approached the rise in the road, yet when questioned by the Hearing Examiner he testified that he swerved to avoid collision. The court noted that Respondent testified that he was more to the right of center in the road than coming down the middle of the road, as Dep. Delgado had testified. A. R. At 3. In fact, Dep. Delgado testified, “I swerved to get out of the way of the vehicle” A. R. Tr. At 13. He testified that Respondent was “traveling down the middle of the road.” A.R. Tr. At 14-15. On cross-examination, Dep. Delgado testified, “He was well over the middle of the road. If there would have been center lines, he would have been well over the center line” A.R. Tr. At 40. Upon examination by the Hearing Examiner, Dep. Delgado testified, “I swerved to the side and got out of his way...” A.R. Tr. At 61. On re-cross-examination, Dep. Delgado was asked “you said you were already hugging the right edge of the road when you were approaching the other.” A. R. Tr. At 122. Dep. Delgado answered, “I was in my lane. I wasn’t necessarily hugging and off the road.” A. R. Tr. At 123. Dep. Delgado specifically *denied* saying that he was hugging the edge of the road. Dep.

Delgado further testified, "I was in my lane on my side of the road." And "I just went off the road slightly enough to where both my tires on the right-hand side of the vehicle went off the road, just enough to clear his path." A. R. Tr. At 124-25. Respondent's testimony was, "I can't argue that I wasn't you know, sort of in the middle of the lane, but I don't feel like I was completely in his lane by any means. I mean, I might have been right center..." A.R. Tr. At 104. The circuit court found that there was a "seeming contradiction" in the testimonies of the two men, to the implicit detriment of Dep. Delgado. However, the circuit court has misinterpreted the evidence and has erroneously found that there were contradictions in the evidence. The evidence shows that Dep. Delgado was on the right side of the road as he approached the Respondent, at which point he swerved slightly off the road to avoid collision. The Respondent admits that he was not on the edge of the road but more toward the middle of the road. Moreover, the court ignored the testimony of Respondent, who could not even remember performing the field sobriety tests at the scene, who stated that the two actually met in a turn whose speed limit is 25 and he was going 40 miles per hour. A.R. Tr. At 103-04. The Deputy testified that "I was traveling at around 50, 55 miles per hour, and it was going considerably faster than I was." A.R. Tr. at 15.

The circuit court found that Dep. Delgado "became agitated" at the Respondent's persistent requests to be given a break. A.R. at 4. There is no such evidence in this record. Respondent was talkative and excited, and Dep. Delgado testified: "...I was considerate enough to hear his explanation several times. Aside from that, I was just doing my job." A. R. Tr. At 47. The circuit court also found, "Delgado never attributed this "excitement" on Hill's part to intoxication" (A.R. at 4): again, completely in error. Dep. Delgado noted on the DUI Information Sheet that Respondent was

“nervous, slightly dismissive of situation but cooperative,” and he testified that this was due to Respondent’s nervousness and *impairment from the alcohol*. A. R. At 34; A.R. Tr. At 22-23.

The circuit court found that “Delgado’s testimony regarding the HGN was contradicted by the DUI Information Sheet” A.R. at 10. Based on Dep. Delgado’s interpretation that Respondent had only two points on the test, Dep. Delgado deemed that Respondent passed the HGN test. A.R. Tr. At 26. However, Dep. Delgado subsequently testified that because he observed detection clues in both eyes, the result was four points. A.R. Tr. At 32, 43. Four points is deemed a failure of the HGN. Dep. Delgado’s testimony was that despite the four factors he observed for nystagmus, as noted on the DUI Information Sheet, he did not consider that the HGN test resulted in a basis for concluding that Respondent was drunk. A.R. Tr. At 26.

The circuit court ignored the facts that the Respondent was 18 years old at the time of his arrest, and that he had a result of .108 on the Intoximeter. An 18-year old person may have his license revoked for having a blood alcohol content in excess of .02.

If the Office of Administrative Hearings finds by a preponderance of the evidence that the person did drive 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 commissioner shall suspend the person's license for a period of sixty days...

W. Va. Code § 17C-5A-2(n).

Here, because Respondent’s blood alcohol content was over the limit even for an adult, he was revoked for DUI as an adult would be. However, the fact that he was a juvenile should not have been ignored, because of the egregious nature of the offense.

In *Groves v. Cicchirillo*, 694 S.E.2d 639 (2010) this Court held:

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 4 Point 2, *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997).

Syl. Pt., *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008).  
694 S.E.2d 645.

In an administrative license revocation hearing, W. Va. Code § 17C-5A-2(f) (2010) requires the OAH to find, among other things:

Whether the investigating law-enforcement officer had **reasonable grounds** to believe the person to have been driving while under the influence of alcohol... or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight...

[Emphasis added.] Dep. Delgado had reasonable grounds to believe Respondent was driving under the influence from his near head-on collision with Dep. Delgado, his admission of drinking four beers, the odor of alcohol on his breath, bloodshot and glassy eyes, unsteadiness while standing, and excited and slightly slurred speech. This was a sufficient basis for Dep. Delgado to administer the PBT. Once Respondent failed that test, Dep. Delgado had reasonable grounds to believe that Respondent was under the influence, and Respondent was lawfully arrested. As argued above, the results of the secondary chemical test proved that Respondent was under the influence.

There was sufficient evidence in the record to uphold the order of revocation. The circuit court made errors of fact and law, and ignored and erroneously excluded valid evidence which showed conclusively that the Respondent drove under the influence on October 24, 2010.

**CONCLUSION**

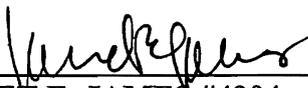
For the above reasons, this Court should reverse the Order of the circuit court.

**Respectfully submitted,**

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COMMISSIONER, WEST VIRGINIA  
DIVISION OF MOTOR VEHICLES,**

**By counsel,**

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NO. 14-0103

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.

JEFFREY HILL,

Respondent Below/Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Brief of Petitioner* was served upon the following by depositing a true copy thereof, postage prepaid, by certified mail, in the regular course of the United States mail, this 1st day of May 2014, addressed as follows:

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Janet E. James