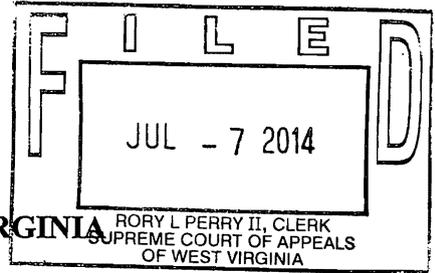


NO. 14-0103



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

**Petitioner,**

v.

**JEFFREY HILL,**

**Respondent.**

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**REPLY BRIEF**

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**I. The Preliminary Breath Test Result Should Be Considered as Evidence Supporting the Investigating Officer's Probable Cause to Arrest.**

With regard to the preliminary breath test, ("PBT"), there is no evidence that the results of the test were compromised. The operator's manual, cited by the Respondent, simply suggests that there be a delay of "about 20 minutes" since the last ingestion of anything by mouth. The legislative rule provides that the officer shall prohibit the person from drinking alcohol or smoking for at least 15 minutes before the test. 64 Code R. 10-5.2(a). The statute provides, "Such breath analysis must be administered as soon as possible after the law-enforcement officer has a reasonable belief that the person has been driving while under the influence of alcohol..." W. Va. Code §17C-5-5. Eight minutes after the stop of Respondent's car, the Investigating Officer had reasonable grounds to believe that Respondent was driving under the influence of alcohol ("DUI"). Thereupon, he administered the test.

Respondent's challenge to the PBT on the basis of suggested timeframes which are inconsistent with statute would be better spent on showing that indeed he had orally ingested something shortly prior to the test, or that the test was in some other way compromised. He did not do so. There is no evidence that Respondent ingested tobacco, alcohol, or anything else within the 20 minutes prior to the test. The results of the PBT should be considered as supporting the Investigating Officer's probable cause to arrest.

**II. Even Without the PBT Result, There Was Sufficient Evidence for the Investigating Officer to Arrest Respondent for DUI and for this Court to Find That There Is Sufficient Evidence to Uphold the Revocation of His License.**

The Investigating Officer correctly relied on the PBT to develop probable cause to arrest the Respondent for DUI. Even without the PBT, 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. Although the circuit court worked diligently to discredit every piece of evidence, these facts remain. This Court has upheld a revocation where “the appellee refused most of the field sobriety tests, three separate secondary chemical tests, reeked of alcohol, slurred his words, and stumbled when he walked.” *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866 (2005). This Court often affirms the holding in Syllabus Point 2 in *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984):

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.

E.g., *Dale v. Ciccone*, --- W. Va. ---, --- S.E.2d ---, 2014 WL 2565575 (June 5, 2014). Pursuant to *Albrecht*, the license revocation in this matter must be reinstated, and the circuit court reversed.

### **III. The Secondary Chemical Test Results Must Be Considered Because There Is No Basis for Excluding the Results.**

As to the secondary chemical test of the breath (“SCT”), the circuit court’s finding that the 20-minute observation period begins with the signing of the Implied Consent statement is unfounded. It must be tempting to take the time from the Implied Consent Statement and the time from the Intoximeter ticket, both of which are recorded in writing, to assess the 20-minute observation period. However, the inquiry must be broader than that. The DUI Information Sheet and the Investigating Officer’s testimony show that the Respondent was observed by the Investigating Officer for 20 minutes prior to the test, A. R. At 36, A.R. Tr. At 59-60, and the

Respondent did not refute this. The SCT result was *prima facie* evidence of Respondent's intoxication.

### CONCLUSION

For the reasons set forth in the *Brief of Petitioner* and in the present *Reply Brief*, this Court should reverse the Order of the circuit court.

Respectfully submitted,

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

By counsel,

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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 7th day of July 2014, addressed as follows:

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Janet E. James