

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA **FILED**

**PATRICIA S. REED, COMMISSIONER,  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,  
Petitioner,**

2019 MAY -6 A 10:53  
CATHY S. GATSON, CLERK: *RC*  
KANAWHA COUNTY CIRCUIT COURT

v.

**Civil Action No. 19-AA-1  
The Honorable Louis H. Bloom  
OAH File No. 373497B**

**GARY L. BRAGG,  
Respondent.**

**FINAL ORDER DENYING PETITION FOR JUDICIAL REVIEW**

Pending before this Court is a *Petition for Appeal* filed on January 2, 2019, by the Petitioner, Patricia S. Reed, Commissioner of the West Virginia Division of Motor Vehicles, by counsel, Janet E. James. The *Petition* seeks reversal of the *Corrected Final Order* entered on December 4, 2018, by the Office of Administrative Hearings (“OAH”). The *Final Order* reversed the *Order of Revocation* dated March 17, 2015. Upon reviewing the record, applicable law, and pleadings, this Court finds and concludes as follows.

**STANDARD OF REVIEW**

Pursuant to W. Va. Code § 29A-5-4(g), a circuit court reviewing an administrative agency’s decision

May affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or



(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1998). The reviewing court “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.”<sup>1</sup>

### FINDINGS OF FACT

1. On January 16, 2015, West Virginia Senior State Trooper M. J. Miller was on patrol in the Williamson area of Mingo County, West Virginia.<sup>2</sup> Trooper Miller performed a traffic stop of a vehicle driven by the Respondent, Gary Bragg, on the grounds that Respondent was not wearing a seatbelt and failed to signal when turning; the vehicle also lacked a side mirror.<sup>3</sup>
2. Trooper Miller testified that Respondent had watery eyes, slurred speech, and breath that smelled of alcohol.<sup>4</sup> Trooper Miller observed open alcohol containers in the vehicle’s floorboard.<sup>5</sup> Respondent told Trooper Miller that he had been “taking Suboxone and drinking.”<sup>6</sup> Respondent failed a horizontal gaze nystagmus test and informed Trooper Miller that due to a medical condition, he could not perform either a walk and turn test or a one leg stand test.<sup>7</sup> Trooper Miller further noted Respondent as being “unsteady.”<sup>8</sup>
3. Another officer, Trooper D. M. Williamson, took Respondent to Williamson Memorial Hospital for a blood draw.<sup>9</sup> Trooper Miller testified that either himself or Trooper Williamson asked Respondent to consent to a blood draw, which Respondent did.<sup>10</sup>

<sup>1</sup> Syl. pt. 1, *Muscattell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996).

<sup>2</sup> *Transcript of Proceedings*, Statement of Matters Officially Noted (“SOMON”) #29, p. 12, lines 20-22.

<sup>3</sup> *Id.* at pp. 12-13.

<sup>4</sup> *Id.* at p. 13, lines 3-5.

<sup>5</sup> *Id.* at lines 5-8.

<sup>6</sup> *Id.* at lines 8-10.

<sup>7</sup> *Id.* at lines 10-15.

<sup>8</sup> *Id.* at p. 14, line 2.

<sup>9</sup> *Id.* at p. 15, lines 15-16.

<sup>10</sup> *Id.* at p. 16, lines 1-2.

4. Trooper Williamson left his position as a State Trooper shortly after Respondent's arrest.<sup>11</sup> The West Virginia State Police Lab cannot locate any record of ever receiving Respondent's blood sample, and thus cannot produce results of any testing performed upon Respondent's blood sample<sup>12</sup> nor make the blood sample available to Respondent for independent testing.

#### APPLICABLE LAW

5. W. Va. Code § 17C-5-9 provides that

Any person lawfully arrested for driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his or her blood or breath to determine the alcohol concentration of his or her blood be taken within two hours from and after the time of arrest and a sample or specimen of his or her blood or breath to determine the controlled substance or drug content of his or her blood, be taken within four hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand.

6. In its *In re Burks*<sup>13</sup> decision, the Supreme Court of Appeals of West Virginia held that "a person who is arrested for driving under the influence who requests and is entitled to a blood test, pursuant to W. Va. Code, § 17C-5-9, must be given the opportunity, with the assistance and if necessary the direction of the arresting law enforcement entity, to have a blood test that insofar as possible meets the evidentiary standards of 17C-5-6."<sup>14</sup>
7. In *Reed v. Hall*, the driver arrested on suspicion of Driving Under the Influence ("DUI") requested a blood test.<sup>15</sup> The blood draw was performed but the blood sample was never submitted for testing.<sup>16</sup> The Court held that the driver "was denied the statutory and due process

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<sup>11</sup> *Id.* at lines 3-16.

<sup>12</sup> *Id.* pp. 16-17.

<sup>13</sup> 206 W. Va. 429, 433, 525 S.E.2d 310, 314 (1999).

<sup>14</sup> *In re Burks* was decided on the issue of whether police were required to furnish the results of a completed test to the driver. While no test was completed here, the Court's interpretation of § 17C-5-9 nonetheless applies.

<sup>15</sup> 235 W. Va. 322, 325, 773 S.E.2d 666, 669 (2015).

<sup>16</sup> *Id.*

rights, under West Virginia Code § 17C-5-9, to have his blood tested independently.”<sup>17</sup> The Court thus affirmed the circuit court in reversing the license revocation.<sup>18</sup>

8. In *Reed v. Divita*, the driver was arrested for DUI of a controlled substance; both the driver and arresting officer requested a blood test.<sup>19</sup> The blood sample was submitted to the West Virginia State Police Lab where it was tested only for alcohol and returned to the officer with instructions that it may be resubmitted for further testing if necessary.<sup>20</sup> Rather than resubmitting the sample or preserving it for the license revocation hearing, the officer destroyed the sample at the conclusion of the criminal matter.<sup>21</sup> Citing *Hall*, the Court held that the “respondent was denied her statutory and due process rights under West Virginia Code § 17C-5-9” because she was denied the ability to have her blood sample independently tested.<sup>22</sup>

#### ANALYSIS

9. Petitioner Reed argues that Respondent’s statutory and due process rights are not implicated by the loss of his blood sample because either Trooper Miller or Trooper Williamson, not Respondent, asked Respondent to submit to a blood draw and Respondent simply acquiesced to that request. However, the West Virginia Supreme Court did not limit its holding in *Divita* to a mere determination regarding who requested the blood test. Instead, the driver was “denied her statutory and due process rights under West Virginia Code § 17C-5-9” because she was “unable to receive the results of any toxicological analysis from the West Virginia State Police Lab [and] was also prevented from securing her own independent test of the blood sample.”<sup>23</sup>

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<sup>17</sup> *Id.* at 332-33, 676-77.

<sup>18</sup> The driver’s license was nonetheless revoked because he refused to perform a secondary breath test pursuant to W. Va. Code § 17C-5-4. The Court affirmed that portion of the revocation and reversed the blood test portion.

<sup>19</sup> No. 14-11018, 2015 WL 5514209, at \*1 (W. Va. Sept. 18, 2015).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at \*3.

<sup>23</sup> *Reed v. Divita*, 2015 WL 5514209 at \*3.

10. Moreover, under Petitioner's reasoning, a driver's due process and statutory rights to have one's blood tested following an arrest for DUI cannot be violated as long as the officer requests the blood draw, not the driver. This would assumedly remain true in instances of bad faith on the arresting officer's part, including if the officer intentionally destroys the sample.
11. Regardless, in situations where the arresting officer requests the blood draw, the impetus upon the driver to also request a blood draw is removed, as the driver has been assured by the officer that a blood draw will occur if they acquiesce. To say that the driver loses constitutional and statutory protections by trusting that the officer will do as they say is unfounded and inconsistent with the Supreme Court of Appeals of West Virginia's precedent. This Court declines to hold that drivers' due process rights are contingent upon a race between the driver and the police officer to first request a blood draw and/or analysis thereof.
12. Petitioner argues that the OAH erred by deciding the case on the basis of the blood draw analysis, or lack thereof, because Respondent did not raise that issue during the OAH hearing below. However, the Supreme Court of Appeals of West Virginia has long held that "[t]he court should strive . . . to ensure that the diligent *pro se* party does not forfeit any substantial rights by inadvertent omission or mistake. Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not."<sup>24</sup> Here, Respondent appeared *pro se* at the OAH hearing. To say that Respondent waived his due process rights by failing to argue the same below is an unnecessarily harsh sanction in response to Respondent's probable lack of knowledge regarding the statutory scheme. Instead, this Court **FINDS** that proper resolution of this matter involves consideration of Respondent's due process rights irrespective of whether he argued the same below.

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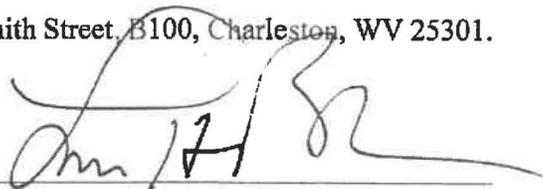
<sup>24</sup> *Blair v. Maynard*, 174 W. Va. 247, 253, 324 S.E.2d 391, 396 (1984).

13. This Court **FINDS** that Respondent's due process and statutory rights were violated because Trooper Williamson violated Respondent's right to have his blood sample independently tested by losing the same. Respondent's failure to request a blood test is completely rational in light of being told by at least one – and possibly two – West Virginia State Troopers that a blood draw would be performed and his blood sample tested for alcohol. This test never occurred, nor was the sample preserved to be made available to Respondent for independent testing.
14. Petitioner further argues that the OAH both violated its statutory duties and acted arbitrarily and capriciously by applying the law in this manner and reversing the *Order of Revocation*. Because this Court finds that the OAH properly adjudicated this matter and accurately applied the relevant law, Petitioner's arguments on these grounds are denied.
15. Petitioner also argues that the *Hall* and *Divita* decisions are "in error in granting an equitable solution (reversal of the revocation) when no such solution is provided for in statute." This Court agrees with both decisions and nonetheless lacks the authority to modify any decision of the Supreme Court of Appeals of West Virginia. Petitioner's argument here is denied.

### DECISION

Accordingly, the Court **ORDERS** the *Petition for Appeal* **DENIED** and the *Corrected Final Order* of the OAH **AFFIRMED**. Likewise, the Court **ORDERS** the *Motion to Strike* filed by Petitioner **DENIED**. There being nothing further, this Court does **ORDER** that the above-styled appeal be **DISMISSED** and **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to all parties and counsel of record, as well as the Office of Administrative Hearings at 1124 Smith Street, B100, Charleston, WV 25301.

ENTERED this 3 day of May 2019.



Louis H. Bloom

STATE OF WEST VIRGINIA  
 COUNTY OF KANAWHA, SS  
 I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
 AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
 IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 6th  
 DAY OF MAY 2019  
Cathy S. Gatson CLERK  
 CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA