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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0990
(Putnam County Circuit Court Civil Action No.: 21-AA-2)

EVERETT J. FRAZIER, COMMISSIONER,
WV DIVISION OF MOTOR VEHICLES,
Petitioner,

v.

STEVE BRISCOE,
Respondent.

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RESPONDENT'S SUMMARY BRIEF

This Summary Response is filed on behalf of Respondent, Steve Briscoe, pursuant to Rule 16 (h), W. Va. Rev. R. App. P. The Petitioner's assignments of error are addressed in turn.

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I. STATEMENT OF THE CASE

Petitioner's statement regarding the kind of proceeding, nature of ruling and the statement of facts herein is by and large accurate except for the inferences drawn therefrom. The DMV states on page 2 of its' Brief that the Mr. Briscoe has been driving his car as part of his employment as a pizza delivery person. However, there was no such testimony adduced at the

May 20, 2021, hearing to that effect such that the DMV's case fails on its face in the absence of basic jurisdictional elements. (App at Page 126).

II. APPELLANT ERRORS

A. THE CIRCUIT COURT OF PUTNAM COUNTY DID NOT ERR IN REVERSING THE ADMINSTRATIVE APPEAL.

B. THE CIRCUIT COURT OF PUTNAM COUNTY DID NOT ERR IN DETERMING THAT THE RESPONDENT'S LICENSE SUSPENSION WAS MOOT.

III. POINTS AND AUTHORITIES

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V. ARGUMENT

A. THE CIRCUIT COURT OF PUTNAM COUNTY DID NOT ERR IN REVERSING THE ADMINISTRATIVE APPEAL.

The Circuit Court of Putnam County properly applied the standard of review set forth in the West Virginia Administrative Procedures Act, *West Virginia Code* § 29A-5-4, when it reversed and dismissed the DMV's case against the Respondent as moot.

"Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court 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, decisions or orders 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. *Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983)." , *Johnson v. State Dep't of Motor Vehicles*, 173 W.Va. 565, 318 S.E.2d 616 (1984).

What cannot be lost herein is Putnam County Circuit Court's reasonable findings set forth in its' Order Denying Motion to Amend and Staying Suspension from which the DMV now seeks a reversal. (App pages 43-49). The Putnam County Circuit Court found in the original hearing that the relief necessary for the Respondent's warrantless, unconstitutional arrest was and should be to

offer a global protection unto the Respondent directly linked to the consequences thereof. As noted in the matter of *Reed v. Winesburg*, 241 W.Va. 325 (2019), the OAH must make a finding that an arrest for DUI was lawful.

As such it is a strange juxtaposition wherein the DMV, who acted to further suspend the Respondent's licensure in the absence of any evidence of the same, now decries that it has been deprived of due process where the Putnam Court has already found that the second revocation was counter to the Court's ruling in issuing its' stay of the prior revocation. Accordingly, the DMV cannot now indirectly do what it could not do directly as there was no evidence to support the same.

The DMV bases its petition for appeal on the testimony adduced at the May 20, 2021, hearing before the Circuit Court of Putnam County, West Virginia, wherein it is purported that Mr. Briscoe drove a motor vehicle in contravention of what was eventually its vacated suspension as follows:

Attorney Skorich:

Q. Mr. Briscoe, your license has been revoked since April 23rd of this year. What have you been doing for employment?

Mr. Briscoe:

A. Working at Husson's Pizza.

Attorney Skorich:

Q. Delivering Pizza?

Mr. Briscoe:

A. Yes, ma'am.

Attorney Skorich:

Q. You've been driving since April 23rd of this year?

Mr. Briscoe:

A. ...yes.

Accordingly, the testimony of Mr. Briscoe does not support the necessary elements of the alleged offense for which the DMV revoked his license. The Putnam County Circuit Court viewed the matter the same way finding in its Dismissal Order that Mr. Briscoe did not testify to driving on any specific day, and no evidence that he drove on May 20, 2022. (App page 45). Further, there is no evidence that Mr. Briscoe drove a motor vehicle on the road or on private property. There is no evidence that Mr. Briscoe drove a vehicle period. No evidence that Husson's Pizza is located in the State of West Virginia. All of the DMV's finding are based upon inferences and not any factual finding that was established by testimony or evidence before the Court. As such, the evidence was insufficient to support the DMV's revocation under West Virginia Code § 17B-3-6 and was thus in clear error.

The DMV now takes umbrage with the Putnam Court when it correctly acknowledged its own findings in the original, underlying case as referenced above and thereby dismissed the administrative appeal as the same was moot. (App at 43-48) The Putnam Court has already found that there was neither a jurisdictional basis for the DMV's original suspension of the Respondent's licensure given his unconstitutional, unlawful arrest, and entered its order of stay related to the same nunc pro tunc. Moreover, as reiterated above herein, there was no testimony that the Respondent had driven a vehicle upon the roads of West Virginia, etc.

Accordingly, the Putnam County Circuit Court was correct in reversing the OAH order as no hearing was necessary given the testimony and evidence it has already received on the issues therein.

B. THE CIRCUIT COURT OF PUTNAM COUNTY DID NOT ERR IN DETERMINING THAT THE RESPONDENT'S LICENSE SUSPENSION WAS MOOT.

A reviewing court is severely limited in its ability to overturn factual determinations made by a hearing examiner, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 180, 539 S.E.2d 437, 440 (2000). The West Virginia Supreme Court of Appeals has described a finding as clearly erroneous when:

Although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. Syllabus Point 1, In the *Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

As previously stated herein, the Putnam County Circuit Court found in the original May 20, 2021, hearing that the relief necessary for the Respondent's warrantless, unconstitutional arrest was and should be to offer a global protection unto the Respondent directly linked to the consequences thereof. This is important as the OAH must make a finding that an arrest for DUI was lawful; a task the DMV cannot do. *Reed v. Winesburg*, 241 W.Va. 325 (2019),

Further, the Putnam Court has ruled that any evidence used against Mr. Briscoe derived from his unlawful arrest was inadmissible as fruit of the poisonous tree. As this Court is aware, the fruit of the poisonous tree doctrine provides that, "evidence which is located by the police as a result of information and leads obtained from illegal conduct, constitutes the fruit of the poisonous tree, and is inadmissible as evidence. *State v. Stone*, 165 W.Va. 266 (1980) 268 S.E.2d 50 (1980). The inadmissibility of that which is improperly found is only meaningful if the exclusion of such evidence shields the Respondent from both the direct and indirect consequences that flow therefrom.

Accordingly, the Putnam County Circuit Court's properly found that the DMV's improper suspension of Respondent's license for driving while revoked was moot, as they cannot willingly ignore the protections afforded the Respondent by the Constitution.

VI. CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this honorable court to affirm the decision of the Putnam County Circuit Court below herein.

STEVE BRISCOE,
By Counsel



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CERTIFICATE OF SERVICE

I, Shawn D. Bayliss, counsel for the Respondent, Steve Briscoe, do hereby certify that I have this 5th day of June, 2022, served a true copy of the foregoing, RESPONSE BRIEF, to the following counsel by depositing a true and exact copy of the same in the United States Mail, postage prepaid, to the following addresses:

Elaine L. Skorich
DMV-Legal Division
P.O. Box 17200
Charleston, West Virginia 25317


Shawn D. Bayliss