FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0991
(Putnam County Circuit Court Civil Action No. 21-AA-1)

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

DO NOT REMOVE
FROM FILE

v.

STEVE BRISCOE,

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

EVERETT J. FRAZIER, Commissioner,
Division of Motor Vehicles,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich, WVSB # 8097
Assistant Attorney General
DMV - Legal Division
P.O. Box 17200
Charleston, WV 25317-0010
elaine.l.skorich@wv.gov
Telephone: (304) 558-2522

Table of Contents

CASES **Page**

CASES **Page**

CASES **Page**

CASES **Page**

STATUTES **Page**

STATUTES **Page**

RULES **Page**

MISCELLANEOUS **Page**

Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by and through his undersigned counsel, and hereby submits the *Brief of the Division of Motor Vehicles* pursuant to this Court's *Scheduling Order* dated December 9, 2021.

ASSIGNMENTS OF ERROR

1. The circuit court erred in entering a supersedeas order of the Respondent's license revocation which relates back to the date that the final order of the Office of Administrative Hearings was entered.

2. To reach its conclusion that the Investigating Officer did not have probable cause for a warrantless arrest, the circuit court erred in ignoring the unrebutted documentary evidence that the Respondent had driven while under the influence of alcohol.

STATEMENT OF THE CASE

On November 28, 2019, Deputy Joshua Warner of the Putnam County Sheriff's Department, the Investigating Officer herein, was dispatched to a residence on Eldorado Circle in Hurricane, Putnam County, West Virginia in response to a domestic battery complaint. (App[1]. at PP. 304, 305, 377, 378.) At the home on Eldorado Circle, the complainant, Lora Swann, informed the Investigating Officer that she and her boyfriend, the Respondent herein, had been drinking and got into an argument which became physical. (App. at PP. 305, 379.) Ms. Swann further advised the Investigating Officer that after the Respondent assaulted her, he left her residence in a black car, was "driving drunk" and was possibly going to his house. (App. at PP. 305, 379, 400.)

A short time later, the Respondent's vehicle was located at 122 Meadow Lane, Scott Depot, Putnam County, West Virginia, and the Investigating Officer went to that location. (App. at PP. 305, 380, 397.) The Investigating Officer made initial contact at 10:22 a.m. (App. at PP. 288, 381.) The

[1] App. refers to the Appendix filed contemporaneously with the instant brief.

Investigating Officer knocked on the Petitioner's door, and the Petitioner voluntarily answered the door and spoke with the Investigating Officer. (App. at P. 397.)

There is no evidence in the record that the Respondent refused to answer the officer's questions or that he told the Investigating Officer to return with a warrant. The Investigating Officer testified that if the Respondent had not answered the door, the officer would have "got [*sic*] a warrant on him for domestic battery." (App. at P. 397.) As the Investigating Officer spoke to the Respondent about the domestic violence incident, the officer could smell the strong odor of an alcoholic beverage. (App. at PP. 289, 305, 381.) The Respondent also had slurred speech, had bloodshot, watery eyes, and was unsteady while standing. (App. at PP. 289, 305, 381.) The Investigating Officer asked the Respondent if he had been drinking while he was at 122 Meadow Lane, and the Respondent said no. (App. at PP. 305, 382, 398.) The Respondent never recanted that he had not drunk alcohol since arriving at his home. (App. at P. 391.)

The probable cause for placing the Respondent under arrest was based on an alleged domestic offense, and the Investigating Officer arrested the Respondent at 11:02:29 hours for domestic battery (App. at PP. 288, 303, 389, 397, 398.) The Investigating Officer transported the Respondent to the Putnam County Courthouse/Sheriff's Department for processing. (App. at PP. 305, 397-398.) The Respondent was already under arrest when the Investigating Officer engaged him regarding the driving while under the influence ("DUI") of alcohol offense. (App. at P. 398.)

The Investigating Officer explained the Horizontal Gaze Nystagmus Test to the Respondent, and the Respondent verbally indicated that he understood the instructions. (App. at PP. 290, 305.) Prior to administering the test, the Investigating Officer conducted a medical assessment of the Respondent's eyes. (App. at PP. 290, 305, 384.) The Respondent had equal pupils, no resting

nystagmus, and equal tracking of his eyes which indicated that was a viable candidate for the test. (App. at PP. 290, 305, 385.) During the test, the Respondent exhibited indicia of impairment because he had lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees in both eyes. (App. at PP. 290, 305, 384.)

The Investigating Officer explained and demonstrated the Walk-and-Turn Test to the Respondent, and the Respondent verbally indicated that he understood the instructions. (App. at PP. 290, 385.) During the instruction stage of the test, the Respondent could not maintain his balance and after the instruction stage, the Respondent refused any further testing and asked for a lawyer. (App. at PP. 290, 305-306, 385-386.)

At 11:20 a.m., the Investigating Officer read the Respondent a Miranda Warning, which the Respondent signed (App. at P. 292), and at 11:24 a.m., the Investigating Officer read the West Virginia Implied Consent Statement to the Respondent and offered him the Statement to read for himself. (App. at P. 291, 306, 389.) The Respondent sign ed the Implied Consent Statement but refused to take the designated secondary chemical test. (App. at PP. 294, 306, 389.) After the Investigating Officer waited 15 minutes, the Respondent again refused to take the designated secondary chemical test, and the Investigating Officer deemed the Respondent's refusal as final. (App. at PP. 291, 306, 389-390.) The Investigating Officer began the post-arrest Interview questions on the DUI Information Sheet, and the Respondent admitted that he was operating a vehicle in Scott Depot. (App. at PP. 292, 387.) The Respondent refused to answer the remainder of the questions on the Interview form. (App. at P. 292.)

Pursuant to W. Va. Code § 17C-5A-1(b) (2008), the Investigating Officer sent a copy of the West Virginia DUI Information Sheet, a criminal complaint, a narrative statement, a Court

Disposition Reporting form, the West Virginia Implied Consent Statement, a Case Log, a copy of the Domestic Violence forms completed by Ms. Swann, the Putnam County 911 Command Log, a Vehicle Registration Query, and the West Virginia State Police Criminal History Record to the DMV. (App. at PP. 288-319, 387-388.)

On December 11, 2019, the DMV sent the Respondent an *Order of Revocation* for DUI and an *Order of Revocation* for refusing to submit to the designated secondary chemical test (a.k.a. "refusal.") (App. at PP. 196-197.) On December 26, 2019, the Respondent through counsel, sent the OAH a request for an administrative hearing. (App. at P. 182.) On August 7, 2020, the OAH conducted a civil, administrative hearing. (App. at P. 368.) The Respondent did not testify or present other evidence. (App. at P. 370.) On April 9, 2021, the OAH entered a *Final Order* affirming the Commissioner's *Order*[s] *of Revocation* for DUI and refusal. (App. at PP. 331-338.) The *Final Order* became "effective after the passage of ten (10) business days from the date of entry" of the *Final Order.* (App. at P. 338.) The license revocation became effective on April 23, 2021, which was 10 business days after the OAH entered its *Final Order*. (App. at P. 126.)

On April 14, 2021, the Respondent filed a *Petition for Administrative Appeal* with the Circuit Court of Putnam County. (App. at PP. 1, 164-173.) The Respondent also filed a *Motion for Stay of Execution* of the *Order*[s] *of Revocation.* (App. at PP. 162-163.) The matter was set for hearing on May 20, 2021. (App. at P. 161.) On May 17, 2021, the DMV filed its *Response to Petition for Administrative Appeal.* (App. at PP. 142-160.)

On May 20, 2021, the circuit court conducted a hearing on the Respondent's request to supersede[2] the Commissioner's orders of revocation for DUI and refusal which were already in effect

[2] Because the license revocation was already in effect at the time of the hearing on the *Motion for Stay of Execution*, the circuit court could "supersede" the *Order of Revocation. See*, W. Va. Code § 17C-

at the time of the hearing. At the supersedeas hearing, the Respondent testified under oath that he works as a delivery person for Husson's Pizza and that to maintain his employment, he had been driving his car, upon advice of counsel, since April 23, 2021 (the date that his license revocation went into effect):

> Q. Mr. Briscoe, your license has been revoked since April 23rd of this year. What have you been doing for employment?
> A. Working at Husson's Pizza.
> Q. Delivering pizza?
> A. Yes, ma'am.
> Q. You've been driving since April 23rd of this year?
> A. I was under the impression that until we had this motion hearing – that's what Mr. Bayliss had told me – I have been, yes. I –
>
> . . .
>
> Mr. BAYLISS: I believe we've established the process of what's happened here. We filed our appeal timely, our motion for stay, and here we are. And if it's an error, blame it on me.

(App. at PP. 126-127.)

From the bench, the circuit court granted the Respondent's request to stay [supersede] his license revocation and limited the supersedeas to 150 days as required by W. Va. Code § 17C-5A-2(s) (2015). (App. at PP. 137-138.) Later that same day, the circuit court entered an order stating that the court "does hereby GRANT the Petitioner's Motion to Stay the Execution of the April 9, 2021[3], Order of Revocation herein, and does hereby ORDER and ADJUDGE that [Mr. Briscoe]'s revocation is hereby stayed from said date for a period of 150 days." (App. at P. 115.)

Also on May 20, 2021, the DMV filed its *Objection to and Motion to Amend Order Granting*

5A-2(s) (2015).

[3] April 9, 2021 is the date that the OAH entered its *Final Order* (App. at P. 338), and the license revocation became effective on April 23, 2021. (App. at P. 126.)

Stay of Execution. (App. at PP. 106-111.) The DMV argued, *inter alia*, that the circuit court lacked authority to make its *supersedeas* order retroactive to the date that the OAH entered its *Final Order*. On June 24, 2021, based upon receipt of the transcript from the May 20th supersedeas hearing and the Respondent's testimony therein, the DMV sent the Respondent an *Order of Suspension*[4] for driving while revoked. (App. at PP. 86-92.)

On July 8, 2021, the Respondent filed his *Response to Motion to Amend Order* (App. at PP. 102-105), and on the same day, the circuit court heard the DMV's motion. (App. at PP. 82-101.) At the hearing, the circuit court clarified that it "didn't backdate an order. What I did was I referenced that – the order back to the date of the initial revocation. I want the record to reflect I didn't re-date an order for the hearing." (App. at PP. 92-93.)

On July 9, 2021, the circuit court entered its *Order Denying Motion to Amend and Staying Suspension*. (App. at PP. 78-81.) The circuit court denied the DMV's request to amend the supersedeas order which was dated retrospectively to April 9, 2021, the date that the OAH entered its *Final Order*. In addition, although the driving revoked suspension was not part of the DUI appeal, the circuit court ordered that the "Department [*sic*] of Motor Vehicles[5] has attempted to indirectly [*sic*] what the Court prevented it from doing directly. The Court today prevents the Department [*sic*] of Motor Vehicle's [*sic*] powerful crusade to strip a pizza delivery driver of a license to earn a living

---

[4] The Respondent appealed the *Order of Suspension* to the Circuit Court of Putnam County in Civil Action No. 21-AA-2. After the circuit court entered its *Dismissal Order* in that matter, the DMV filed a *Protective Notice of Appeal* with this Court in Docket No. 21-0990 and a *Petition for Judicial Review* with the Circuit Court of Kanawha County in Civil Action No. 21-AA-75. While the driving revoked matter is not on appeal in the instant case, there is reference to the same in the transcripts and orders made part of the Appendix, and for clarity's sake, it will be discussed herein.

[5] The agency which issues and regulates drivers licenses in West Virginia is the Division of Motor Vehicles operating under the direction of the Department of Transportation.

pending resolution of this proceeding. It is hereby **ORDERED** that the Department [*sic*] of Motor Vehicles is prohibited from instituting any suspension against Steve Briscoe arising from this case or controversy, 21-AA-1 and any matters arising from 21-AA-2." (App. at P. 81.) The circuit court added a footnote stating that "21-AA-2 is a recently filed administrative appeal on the second revocation. The Court has entered a separate order staying that proceeding on an even date with this order." *Id.*

On August 6, 2021, the DMV filed its *Brief of the Division of Motor Vehicles* with the circuit court. (App. at PP. 54-76.) The circuit court heard argument at a final hearing in this matter on August 30, 2021. (App. at PP. 15-51.) On November 8, 2021, the circuit court entered its *Final Order* in which it determined that the Investigating Officer did not have probable cause for a warrantless arrest and that the State has not shown exigent circumstances. (App. at PP. 3-14.) The DMV appealed the matter to this Court on December 8, 2021.

SUMMARY OF ARGUMENT

In violation of the clear, unambiguous prospective language in W. Va. Code § 17C-5A-2(s) (2015), the Circuit Court of Putnam County entered a supersedeas order which related back to the date that the OAH entered its *Final Order*. Because the Respondent testified under oath that he had been driving while his license was revoked for DUI and refusal, the effect of the circuit court's order was to protect the Respondent from the consequences of driving while revoked.

In its *Final Order*, the circuit court improperly characterized as hearsay the unrebutted evidence contained in the Investigating Officer's narrative statement. Further, the court erroneously determined that the Investigating Officer did not lawfully arrest the Respondent after the Respondent voluntarily opened his door for the officer and willingly answered the officer's questions for 40

minutes because the officer did not see the Respondent driving drunk and did not have exigent circumstances to effectuate a warrantless arrest.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Rules of Appellate Procedure (2010), the DMV requests oral argument on the bases that this case involves issues of first impression and fundamental public importance.

ARGUMENT

A. Standard of Review

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam).

> 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.

Syl. Pt. 2, *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021).

" '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)." Syl. Pt. 1, *Frazier v. Talbert, supra.*

B. The circuit court erred in entering a supersedeas order of the Respondent's license revocation which relates back to the date that the final order of the OAH was entered.

In its *Order Granting Stay of Execution*, the circuit court found that the Respondent "would suffer irreparable economic harm should[6] his license be suspended[7] [*sic*] as he is employed as a delivery driver, and has no other source of income." (App. at PP. 114-115.) Although the license revocation was already in effect for approximately one month when the circuit court held the supersedeas hearing on May 20, 2021, in its *Order Granting Stay of Execution*, the circuit court granted the Respondent's "Motion to Stay the Execution of the April 9, 2021, Order of Revocation herein, and does hereby ORDER and ADJUDGE that the [Respondent]'s revocation is hereby stayed from said date for a period of 150 days." (App. at P. 115.) In its *Final Order*, the court explained that when it entered its supersedeas of the license revocation, it did so by "relating back to the date of the original suspension [*sic*] on April 9, 2021."[8] (App. at P. 7.) The circuit court did not have authority to issue its order retrospectively. By doing so, the circuit court effectively created a legal impossibility for the Respondent to have driven while his license was validly revoked.

West Virginia Code § 17C-5A-2(s) (2015) provides in pertinent part, "[n]either the commissioner nor the Office of Administrative Hearings may stay enforcement of the order. The

---

[6] The DMV already had revoked the Respondent's driving privileges on April 23, 2021, which was 10 business days after the OAH entered its *Final Order* on April 9, 2021.

[7] A license revocation indicates an interruption in driving privileges until set of requirements to reinstate the license are fulfilled. For example, for DUI offenses, W. Va. Code § 17C-5A-2 requires a period of no driving (oftentimes including successful completion of a period in the Test and Lock Program) coupled with completion of a Safety and Treatment Program and payment of reinstatement fees. License suspension indicates reinstatement upon only an interruption in driving privileges and payment of reinstatement fees. *See, e.g.,* W. Va. Code § 17B-3-6, which includes suspensions for driving while revoked.

[8] Again, the OAH entered its *Final Order* on April 9, 2021, and the license revocation for DUI went into effect 10 business days later, which was on April 23, 2021.

court may grant a stay or supersedeas of the order only upon motion and hearing, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits and the appellant **will** suffer irreparable harm if the order is not stayed: Provided, That in no event shall the stay or supersedeas of the order exceed one hundred fifty days." [Emphasis added.]

This Court has made clear that "[b]efore any stay may be granted in an appeal from a decision of the Commissioner of the Department of Motor Vehicles revoking a driver's license, the circuit court must conduct a hearing where evidence is adduced and, 'upon the evidence presented,' must make a finding that there is a substantial probability that the appellant will prevail upon the merits and that he ***will*** suffer irreparable harm if a stay is not granted. Syllabus Point 2, *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993)." Syllabus Point 2, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013) (emphasis added). There is no provision in the statute to grant *ex parte* stays. *See State ex rel. Frazier v. Thompson*, 243 W. Va. 46, 842 S.E.2d 250 (2020) (holding that *ex parte* stay of revocation failed to comply with statutory requirements of hearing and findings by court upon evidence presented). Moreover, there is no authority in W. Va. Code § 17C-5A-2(s) (2015) for any circuit court to grant a stay/supersedeas retroactive to the date that the revocation became effective (or, in this case, to the date that the tribunal entered its *Final Order*.)

"The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syllabus Point 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). However, "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Banker v. Banker*, 196

W. Va. 535, 546–47, 474 S.E.2d 465, 476–77 (1996) (*citing Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994)). *See also, State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994) ("Courts are not free to read into the language what is not there, but rather should apply the statute as written."). Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate Div. v. Pub. Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

The clear language in the stay/supersedeas statute and the case law discusses the prospective application of an order – not retrospective application: ". . . ***will*** suffer irreparable harm if a stay is not granted." W. Va. Code § 17C-5A-2(s) (2015); Syl. Pt. 2, *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993); Syl. Pt. 2, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013); Syl. Pt. 6, *State ex rel. Frazier v. Thompson*, 243 W. Va. 46, 842 S.E.2d 250 (2020). The Legislature's clear and unambiguous language requires a circuit court to consider whether a drunk driver ***will be*** harmed if a stay is not granted from that point forward, not whether the driver was harmed by a valid revocation already in effect at the time of the stay/supersedeas hearing. The Legislature specifically contemplated that a license revocation could go into effect prior to a circuit court holding a hearing on a driver's request to stay/supersede the license revocation and did not provide retrospective relief for the same. The granting of a stay/supersedeas is certainly not automatic. The burden is clearly on the driver to show substantial probability of success on the merits of the DUI appeal and that he will suffer irreparable harm if the order is not stayed/superseded.

West Virginia Code § 17C-5A-2(s)(2015) specifically permits granting ***a supersedeas***: "[n]either the commissioner nor the Office of Administrative Hearings may stay enforcement of the order. The court may grant a stay or **supersedeas** of the order only upon motion and hearing, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits and the appellant will suffer irreparable harm if the order is not stayed: Provided, That in no event shall the stay or **supersedeas** of the order exceed one hundred fifty days." [Emphasis added.]

"What is a supersedeas? It is a writ issued to a ministerial officer, commanding him to supersede or desist from proceeding under another writ previously or subsequently issued to him. (*Abbott's Law Dict.*, word Supersedeas; *Burrill's Law Dict.*, same word.)" *Tyler v. Superior Court of Sonoma Cnty.*, 72 Cal. 290, 291, 13 P. 856 (1887). Pursuant to *Hovey v. McDonald,* 109 U.S. 150, 159 (1883),

> A supersedeas, properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, an execution has been lawfully issued, a writ of supersedeas, directed to the officer holding it, will be necessary; but if the writ of execution has been, not only lawfully issued, but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded.

It was not only possible but very likely that a license revocation would become effective during the thirty-day appeal process governed by W. Va. Code § 29A-5-4(b) (1998) and W. Va. Code § 17C-5A-2(s) (2015). By the inclusion of the word "supersedeas" in W. Va. Code § 17C-5A-2(s) (2015), the West Virginia Legislature clearly anticipated that license revocations may go into effect prior to a stay hearing being conducted and that the order of revocation could be "superseded"

by the circuit court. Accordingly, the Legislature did not provide authority for a circuit court to suspend all applicable statutes, rules and case law in order to protect a driver who has driven while his license was revoked but before a court could take evidence and supersede the already effective revocation order.

The Respondent's dilemma in this matter is similar to that of the driver in this Court's recent decision in *Frazier v. Braley,* No. 20-0726, 2022 WL 633848 (W. Va. Mar. 4, 2022) (memorandum decision). In accepting a promotion which required driving, Mr. Braley detrimentally relied on the representations of his counsel that the OAH likely would not issue a final decision for approximately three years. Thus, although Mr. Braley knew at the time that he accepted the courier position that the OAH could issue a decision upholding his license revocation at any time, he nevertheless relied on such representations to accept the new employment position. *Id.* at *3. Here, the Respondent detrimentally relied on the representations of his counsel that he was permitted to drive before the circuit court held a stay/supersedeas hearing and issued a decision on the same. Instead of addressing the Respondent's action of driving while revoked, the Circuit Court of Putnam County focused on the DMV's mandatory suspension.

In its *Order Denying Motion to Amend and Staying Suspension*, the circuit court held that

> [t]he Court reaffirms today what it held in its May 20th order. Courts frequently apply Fourth Amendment decisions retroactively, including civil cases. *Teague v. Lane*, 489 U.S. 288 (1989); *Adkins v. Cline*, 216 W. Va. 504 (2004); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). This Court today merely enforces well-established Fourth Amendment protections. There is no new rule being sprung upon the parties. The Court holds that the stay of revocation was intended to be, and remains, applicable from the April 9, 2021 OAH final order, for 150 days therefrom.
>
> During the July 9th hearing, this Court learned that the DMV entered a second revocation [*sic*] order that would be effective July 15, 2021 based solely on the [Respondent]'s testimony at the May 20th hearing alleging that he drove on a revoked license.

. . .

> While the Department [*sic*] of Motor Vehicles is certainly empowered to protect the public from drunk drivers, it is not permitted to act contrary to the plenary authority of the circuit court.

(App. at PP. 79-80.)

"'Plenary power' is commonly defined as: 'Authority and power as broad as is required in a given case.' *Black's Law Dictionary*, p. 1039 (5th ed. 1979)." *Ellison v. City of Parkersburg*, 168 W. Va. 468, 472, 284 S.E.2d 903, 906 (1981). While "[t]he general powers of the legislature, within constitutional limits, are almost plenary[,]" *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 597, 425 S.E.2d 551, 552 (1992), a circuit court's review of a contested case under the Administrative Procedures Act is limited by statute. Circuit courts may affirm the order or decision or remand the case for further proceedings. W. Va. Code § 29A-5-4(g) (1998). They are also authorized by statute to reverse, vacate, or modify the decision of the administrative agency. *Id.* Similarly, as outlined above, circuit courts only have authority to supersede the already active revocation from the date of the hearing pursuant to W. Va. Code § 17C-5A-2(s) (2015). Here, the circuit court's order permitting the Respondent to avoid a license suspension for driving while revoked by "relating back to the date of the original suspension" has no basis in statute or case law.

Further, in its *Final Order*, the circuit court addressed its previous order granting a stay/supersedeas of the Respondent's license revocation: "The Court believed then, as it does now, that the remedy for a warrantless unconstitutional arrest should include global protection from the unconstitutional state action." (App. at P. 7.) Although the circuit court determined at the supersedeas hearing that the Respondent "is likely to be successful in his appeal based upon the Court's review of the applicable law and the circumstances regarding the warrantless arrest of the

[Respondent] herein" (App. at P. 115), at the time that the DMV revoked the Respondent's license after the OAH entered its order, the OAH's *Final Order* was valid, and the DMV's revocation action was valid. Therefore, it was improper to provide the Respondent "global protection" from a mandatory license suspension for driving while revoked when the revocation was valid.

Pursuant to the Administrative Procedures Act, the filing of the petition does not stay enforcement of the OAH's *Final Order*. W. Va. Code § 29A-5-4(c) (1998). *See also*, W. Va. R. Pro. Admin. App. 3(a) (2008). Further, the circuit court's review of the OAH's *Final Order* shall be upon the record made before the agency, and it may reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner have been prejudiced because the order is in violation of constitutional or statutory provisions. W. Va. Code §§ 29A-5-4(f), (g) (1998). "A court having jurisdiction of the parties and colorable jurisdiction of the subject matter may issue an injunction which must be obeyed regardless of whether it is ultimately determined to have been erroneously or improvidently awarded." Syl. Pt. 2, *E. Associated Coal Corp. v. Doe*, 159 W. Va. 200, 220 S.E.2d 672 (1975). "The rule that unconstitutional court orders must nevertheless be obeyed until set aside presupposes that the court issuing the injunction enjoys both jurisdiction over the persons and colorable jurisdiction over the subject matter; that adequate and effective remedies are available for orderly and prompt review of the challenged rulings; and, that the court order and subsequent conduct does not require an irretrievable surrender of constitutional guarantees." *Id.* at syl. pt. 5.

The OAH's decision was valid ***until*** the circuit court reviewed the administrative record and made a final decision to reverse the OAH's *Final Order*. Because the OAH's *Final Order* was valid until reversed by the Circuit Court of Putnam County, the DMV's revocation of the Respondent's license 10 business days after the OAH entered its order was also valid. Regardless of whether the

circuit court ultimately determined that the Respondent's arrest was unconstitutional, the Respondent's license revocation was valid at the time that he drove while his license was revoked for DUI and refusal, and the circuit court erred in relating its supersedeas order back to the date that the OAH entered its *Final Order*.

C. To reach its conclusion that the Investigating Officer did not have probable cause for a warrantless arrest, the circuit court erred in ignoring the unrebutted documentary evidence that the Respondent had driven while under the influence of alcohol.

In its *Final Order*, the circuit court held "that the arrest of Mr. Briscoe was not based on sufficient probable cause and that the Hearing Examiner erroneously relied on the reasonable suspicion standard. This is primarily because the arrest was effectuated in Mr. Briscoe's home." (App. at P. 9.) The court opined that the "first issue is whether the officer had probable cause to make a warrantless arrest in the home. From the outset, this Court was concerned that an officer, on nothing more than bold assertion, effectuated a DUI arrest on a defendant, in his home, ***whom no one witnessed driving under the influence*** (emphasis added)." (App. at P. 10.) In making its determination that the Investigating Officer lacked probable cause for a warrantless arrest, the circuit court relied on this Court's opinion in *State v. Cheek*, 199 W. Va. 21, 483 S.E.2d 21 (1996) (per curiam):

> Two points are significant in *Cheek's* holding. First, the West Virginia Supreme Court applied a probable cause standard to the warrantless arrest from the home, Syllabus Pt. 2, *State v. Cheek*, 199 W. Va. 21, 22 (1996). Second, the Court held that despite having multiple eyewitnesses, even in the light most favorable to the state, too many uncertainties plages the case to meet probable cause. *Cheek*, 199 W. Va. at 26 ("given the time spent by Mr. Cheek alone in his home, there is a question as to when the alcohol was consumed.").
>
> In the present case, Deputy Warner lacked the necessary probable cause for a warrantless arrest for even more reasons than in *Cheek.* There were no witnesses to confirm how Mr. Briscoe walked to and from the car. There was ***no evidence*** to confirm or believe that he drove under the influence of alcohol. There was ***no***

> ***evidence*** to support the idea that Mr. Briscoe drank before, rather than after, driving. In fact, except for a complaining domestic partner, there was no evidence that Mr. Briscoe drove at all.

[Emphasis added.] (App. at P. 11.)

"In an administrative hearing conducted by the Division of Motor Vehicles, a statement of an arresting officer, as described in W. Va. Code § 17C-5A-1(b) (2004) (Repl. Vol. 2004), that is in the possession of the Division and is offered into evidence on behalf of the Division, is admissible pursuant to W. Va. Code § 29A-5-2(b) (1964) (Repl. Vol. 2002). Syl. Pt. 3, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006)." Syl. pt. 3, *Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020). "We point out that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy." FN 12, *Crouch, supra; Fouch*, 244 W. Va. 347, 853 S.E.2d 593.

The OAH was required to admit the documents contained in the DMV's file, and those documents were presumed accurate subject to rebuttal. In the Investigating Officer's narrative statement admitted into evidence at the administrative hearing, the officer wrote,

> I arrived on scene at and spoke to Lora Swann. Lora advised her boyfriend; Steve Briscoe had just left her residence and was driving "drunk". Lora advised Steve left in a black car and was possible going to his house on Rocky Step Road.
>
> Lora advised Steve and she had been drinking and got in an argument.
>
> . . .
>
> A short time later Steve Briscoe's vehicle was located at 122 Meadow Drive, Scott Depot, WV. While speaking to Steve I could smell a strong odor of alcohol. I also observed Steve to have slurred speech. I asked Steve if he had been drinking while he was at this location and he stated no.

(App. at P. 305).

In the instant matter, no one rebutted the DMV's documentary evidence that Ms. Swann witnessed the Respondent drinking at her house and that he was driving under the influence; therefore, the OAH did not err on relying on the officer's narrative statement when determining if the Respondent's arrest was lawful. The circuit court, however, opined that "this Court was concerned that an officer, on nothing more than bold assertion, effectuated a DUI arrest on a defendant, in his home, ***whom no one witnessed driving under the influence*** (emphasis added)." (App. at P. 10.) The circuit court characterized Ms. Swann's statement as hearsay. (App. at P. 6, FN3.)

This Court has concluded in judicial dicta that even if W. Va. Code § 29A-5-2(b) (1998) did not require the Commissioner's file to be admitted into evidence, the officer's statement falls within a hearsay exception outlined in W. Va. R. Evid. 803(8)(C), thus finding that it is reliable.

> Assuming arguendo that the West Virginia Rules of Evidence were to apply to this issue, the "STATEMENT OF ARRESTING OFFICER" would nevertheless be admissible. West Virginia Rule of Evidence 803(8)(C) provides an exception to the hearsay rule for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (C) in civil actions ..., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Subsection (C) would apply to the extent that this Court has characterized administrative revocation hearings as civil in nature. See *Carte v. Cline*, 200 W. Va. 162, 167, 488 S.E.2d 437, 442 (1997) ("Administrative revocation hearings are civil in nature ...."). Accordingly, as a statement that sets forth "factual findings resulting from an investigation made pursuant to authority granted by law" as outlined in West Virginia Rule of Evidence 803(8)(c), the "STATEMENT OF ARRESTING OFFICER" would be admissible under that rule.

Crouch v. W. Va. Div. of Motor Vehicles, 219 W. Va. 70, 75 n.10, 631 S.E.2d 628, 633 n.10 (2006).

West Virginia R. Evid. 803(8) provides that the following are not excluded from evidence even though they are hearsay:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Evidence admitted under Rule 803 is substantive evidence, *Firemen's Fund Ins. Co. v. Thien,* 8 F.3d 1307, 1311 n.10 (8th Cir. 1993); *United States v. Check*, 582 F.2d 668, 681 (2d Cir. 1978); *United States v. Palacios*, 556 F.2d 1359, 1363 n.7 (5th Cir. 1977),[9] it can be relied on as proof of a fact in issue. The Investigating Officer's narrative statement falls under "[r]eports of police officers conducting criminal investigations have been admitted into civil proceedings through Rule 803(8)(c)." *JVC America, Inc. v. Guardsmark,*, No. 1:05-CV-0681-JOF, 2006 WL 2443735, 13 (N.D. Aug. 22, 2006).

In the instant matter, the circuit court improperly demonstrated a preference for testimonial evidence over documentary evidence when it ignored Ms. Swann's statement as hearsay to determine that "no one witnessed driving under the influence" (App. at P. 10); that "there was no evidence to confirm or believe that he drove under the influence of alcohol" (App. at P. 11); and that "there was no evidence to support the idea that Mr. Briscoe drank before, rather than after, driving." *Id.* "The lower court's view of the evidence revealed a preference for testimonial evidence over documentary evidence. Our law recognizes no such distinction in the context of drivers' license revocation proceedings." *Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010). As this Court

---

[9]Although federal court interpretations of the Federal Rules of Evidence are not binding on the courts of West Virginia, they do provide persuasive authority, Syl. Pt. 3, *Brooks v. Isinghood,* 213 W. Va. 675, 584 S.E.2d 531, 534 (2003), and are entitled to "substantial weight." *Id.* at 682, 584 S.E.2d at 539.

has previously held, it was proper for the Investigating Officer and the OAH to rely on Ms. Swann's unrebutted statement that the Respondent had driven drunk.

After the circuit court determined that Ms. Swann's statement was hearsay and could not be relied upon, the circuit court concluded

> that the DMV cannot meet its burden by claiming that this police interaction was a Knock-and-Talk, a generally accepted practice where officers go to a home and speak to residents, often regarding complaints of drugs or contraband. *See, e.g., State v. Lusk*, 2014 WL 6607447(2014); *State v. Dorsey*, 234 W. Va. 15 (2014). Unlike the use of illegal drugs, drinking alcohol at home is a legal activity for adults over the age of twenty-one. Therefore even if the officer smelled alcohol on Mr. Briscoe's breath, it does not establish that he drank before he drove, or whether he drove at all. Even in *Cheek* the smell of alcohol did not formulate probable cause sufficient for a warrantless arrest in the home and it is not sufficient here to formulate the standard of probable cause for the warrantless arrest of Mr. Briscoe.

(App. at PP. 11-12.)

The Investigating Officer's sworn testimony is that he went to the Respondent's house to ask questions about an unrelated matter [the domestic battery situation] but also because it had been related to him that the Respondent had been operating a motor vehicle while impaired. (App. at P. 378.) The Investigating Officer did not need a search warrant to ask questions of the Respondent, and because the Respondent failed to testify at the hearing which he requested, there is no evidence in the record that the Respondent did not voluntarily answer his door and speak to the Investigating Officer. Similarly, there is no evidence in the record that the Respondent told the officer to leave his property or to get a warrant. The Investigating Officer's conduct – knocking on the door and asking the Respondent to answer questions – was entirely consistent with the Fourth Amendment. There is no evidence in the record that the officer made any sort of demand to enter the home which would violate the Fourth Amendment. Moreover, there is unrebutted evidence in the record that had the

Respondent not answered the door, the Investigating Officer would have "got [*sic*] a warrant on him for domestic battery." (App. at P. 397.)

A "knock and talk" is ". . .a procedure used by police officers to investigate a complaint where there is no probable cause for a search warrant. The police officers knock on the door, try to make contact with persons inside, and talk to them about the subject of the complaints. *Murphy v. State*, 898 So.2d 1031, 1032 n. 4 (Fla.Dist.Ct.App.2005)." *State v. Dorsey*, 234 W. Va. 15, 19, 762 S.E.2d 584, 588 (2014).

> There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired. Without attempting to provide a comprehensive list of these reasons, we note a few.
>
> First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also "may result in considerably less inconvenience" and embarrassment to the occupants than a search conducted pursuant to a warrant. *Ibid.* Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application. Fourth, prosecutors may wish to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available. And finally, in many cases, law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme.

Kentucky v. King, 563 U.S. 452, 466–67 (2011). *See also* FN 10, *Gable v. Gable*, 245 W. Va. 213, 858 S.E.2d 838 (2021) ("Called the 'knock and talk' rule, courts hold that any individual, including a law enforcement officer without a warrant, has an implicit license to approach the front door of a residence to knock and make inquiries.")

In *Kentucky v. King*, the U. S. Supreme Court held,

> [w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. *Cf. Florida v. Royer*, 460 U.S. 491, 497–498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) ("[H]e may decline to listen to the questions at all and may go on his way"). When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." *Chambers*, 395 F.3d, at 577 (Sutton, J., dissenting). And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

563 U.S. 452, 469–70.

Here, it is unrebutted that the Investigating Officer knocked on the door to investigate a domestic battery complaint[10] and a possible DUI event. (App. at P. 378.) It is also unrebutted that the Respondent voluntarily opened the door and answered questions. There is no evidence that the Respondent refused the Investigating Officer entry into the home or refused to answers the officer's questions. Based upon the Respondent's strong odor of an alcoholic beverage and slurred speech coupled with the witness's statement that the Respondent had been drinking and driving, the Investigating Officer began a DUI investigation separate from the domestic battery complaint. The Respondent admitted that he had not been drinking while he was at his house (App. at PP. 305, 382),[11] and the Investigating Officer observed the Respondent's slurred speech, bloodshot and watery

---

[10] Pursuant to W. Va. Code § 48-27-1002 (2010), a law enforcement officer has authority to arrest a person for domestic violence of a family or household member without a warrant. West Virginia Code § 48-27-204 (2002) defines a family or household member as, *inter alia*, persons who are sexual or intimate partners or those who are or were dating.

[11] A fact which the Respondent did not recant either to the Investigating Officer or at the administrative hearing.

eyes, and unsteadiness while standing. (App. at PP. 289, 305, 381.) The Investigating Officer arrested the Respondent for domestic battery (App. at PP. 288, 303, 397, 398) and transported him to the Sheriff's Department for processing, the administration of standardized field sobriety tests, and the administration of the designated secondary chemical test. After the Respondent refused to take the secondary chemical test, the Investigating Officer Mirandized the Respondent.

Contrary to the circuit court's determination that "except for a complaining domestic partner, there was no evidence that Mr. Briscoe drove at all" (App. at P. 11), during the post-arrest interview, the Respondent admitted that he had been operating a motor vehicle.[12] (App. at P. 292.) The DUI Information Sheet remains unrebutted and presumed accurate. It is important to note that when the Respondent was arrested for domestic battery, he had not yet made an admission to driving; however, Ms. Swann had reported to the Investigating Officer that the Respondent had fled her house in his car and was most likely on his way home, which is where he was located. The Investigating Officer developed probable cause while he was talking to the Respondent.

A lawful arrest is one supported by probable cause. *See, e.g., Hill v. Cline,* 193 W. Va. 436, 440 n.6, 457 S.E.2d 113, 117 n.6 (1995); *Cunningham v. Bechtold,* 186 W. Va. 474, 480, 413 S.E.2d 129, 135 (1991). "Hearsay evidence may be considered in determining probable cause[.]" 1 FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE 177 (2d ed. 1993). "'It is well settled that an arrest may be made upon hearsay evidence; and indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties.'" *Draper v. United States,* 358 U.S. 307, 312 n.4 (1959); *Lewis v. Kei,* 281 Va.

[12] A fact which the Respondent did not recant either to the Investigating Officer or at the administrative hearing.

715, 723, 708 S.E.2d 884, 890 (Va. 2011) ("Police may rely on the statement of a reported eyewitness as establishing probable cause to seek an arrest.").

Further, the Investigating Officer did not have to see the Respondent driving his car to make a warrantless arrest for DUI. In *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1975), this Court held that despite the usual or possible misdemeanor character of a DUI offense, this particular offense does not have to be committed in the presence of the Investigating Officer to justify a warrantless arrest. *Id.* at 603, 224 S.E.2d 726, 731. West Virginia Code § 17C-5A-1 specifically provides that a "lawful arrest may be effected and a test for alcohol may be administered incident thereto at the direction of the 'arresting law-enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle . . . while under the influence of intoxicating liquor.'" *Id.* at 603, 224 S.E.2d 726, 731-732. *See also*, *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375, at *4 (W. Va. Apr. 10, 2014) (memorandum decision) (holding "there need not be affirmative evidence to show that an individual charged with DUI was operating a vehicle.")

Here, based upon the facts gathered in his investigation, his observations, and the Respondent's admissions, the Investigating Officer had reasonable grounds to believe that the Respondent had driven his motor vehicle while under the influence of alcohol. For the purposes of W. Va. Code § 17C-5A-1, the administrative license revocation statute, that is sufficient to arrest or to take the Respondent into custody to administer a secondary chemical test.

This Court also discussed

> a warrantless misdemeanor arrest in *Simon v. West Virginia Department of Motor Vehicles*, 181 W. Va. 267, 382 S.E.2d 320 (1989), and held as follows in the syllabus: "Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence." With particular reference to the offense of drunk driving,

> this Court acknowledged in *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997) that " 'an officer having reasonable grounds to believe that a person has been driving while drunk may make a warrantless arrest for that offense even though the offense is not committed in his presence.' " *Id.* at 167, 488 S.E.2d at 442 (quoting *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465, 467 (1987)). Syllabus point three of *Carte* instructs: "W. Va. Code § 17C–5A–1a (a) (1994) does not require that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person."

State v. Davisson, 209 W. Va. 303, 308, 547 S.E.2d 241, 246 (2001).

In *Davisson*, the officer received information from witnesses to an accident regarding Davisson's status as the driver of a wrecked automobile and his possible intoxication. Davisson presented himself to the officer in his driveway, and the officer made observations justifying the administration of field sobriety tests. This Court determined that the officer had probable cause to arrest Davisson based upon those witness statements, personal observations, and test results. Because there was no evidence that the officer entered Davisson's home, this Court did not find that exigent circumstances were necessary to justify the arrest and upheld the lower court's conclusion that the arrest was conducted in an appropriate manner. *State v. Davisson* at 308, 547 S.E.2d 241, 246.

In the instant matter, the circuit court determined that "[b]ecause the Court has not been presented with necessary exigent circumstances, the warrantless arrest fails on exigency as well." (App. at P. 13.) However, in this case, exigent circumstances were not required because the Respondent willingly opened the door and voluntarily spent 40 minutes answering the Investigating Officer's questions without telling the officer to leave and return with a warrant. (App. at P. 389.) *Cf. State v. Cheek*, 199 W. Va. 21, 483 S.E.2d 21 (1996) (refusing to validate a DUI arrest when the officers went to Mr. Cheek's house; he opened his door; and the officers forcibly pulled Mr. Cheek from his home and onto the porch because they believed they saw an object in his hand.)

The evidence obtained during the Respondent's voluntary participation in the Investigating Officer's investigation of this matter lead to the lawful arrest of the Respondent and justified the officer's administration of the secondary chemical test. "A secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article." W. Va. Code § 17C-5-4(c) (2013). It is unrebutted that Ms. Swann advised the Investigating Officer that after the Respondent assaulted her, he left her residence and was "driving drunk"; that he had the strong odor of an alcoholic beverage on his breath; that he admitted that he had not drunk alcohol since arriving home from Ms. Swann's; and that he had slurred speech, had bloodshot, watery eyes, and was unsteady while standing.

Pursuant to W. Va. Code § 17C-5A-2(f) (2015), the OAH was required to make the following findings:

> (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs. . .; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, **or** was lawfully taken into custody for the purpose of administering a secondary test: *Provided,* That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

(Emphasis added.)

Here, the Investigating Officer had reasonable grounds to believe that the Respondent was DUI or had a blood alcohol content of .08% or more by weight because of the unrebutted evidence that the Respondent was "driving drunk"; had the strong odor of an alcoholic beverage on his breath; admitted that he had not drunk alcohol since arriving home; had slurred speech; had bloodshot, watery eyes; and was unsteady while standing. Once the Investigating Officer interacted with the Respondent and gathered evidence which gave him reasonable grounds to believe that the Respondent was DUI, the Investigating Officer lawfully arrested him for domestic battery and took him into custody for the purposes of administering the secondary chemical test.[13]

The OAH found that the Respondent committed the offense of DUI and that the Petitioner failed to rebut the same. (App. at P. 333.) The Petitioner was not administered a secondary chemical test of the breath because he refused to take one. *Id.* The unrebutted evidence of DUI and refusal submitted by the DMV was more than sufficient under a preponderance of the evidence standard for the OAH uphold the revocations for DUI and refusal.

Finally, in this civil, administrative matter, because the Respondent failed to testify at the very hearing which he requested, he did not assert or controvert the issue of driving impaired, and there is no serious basis in law or fact or good faith argument for extending, modifying, or reversing the case law upon which the OAH relied. The Respondent's arrest was lawful; therefore, the OAH did not err in concluding that he was lawfully arrested and that totality of the ***unrebutted evidence*** of record proves by a preponderance of the evidence that he drove a motor vehicle in this State while under the influence of alcohol, controlled substances and/or drugs and that the refused the designated

---

[13] It would have been unlawful for the Investigating Officer to gather so much evidence of intoxicated driving and NOT take the Petitioner into custody for purposes of administering the secondary chemical test.

secondary chemical test.

CONCLUSION

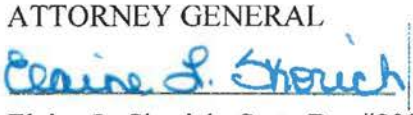
For the foregoing reasons, the *Final Order* of the Circuit Court of Putnam County must be reversed.

Respectfully submitted,

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Elaine L. Skorich, State Bar #8097, AAG
DMV - Legal Division
Post Office Box 17200
Charleston, West Virginia 25317
Telephone: (304) 558-2522
Counsel for the DMV
Elaine.L.Skorich@wv.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0991
(Putnam County Circuit Court Civil Action No. 21-AA-1)

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

STEVE BRISCOE,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General and counsel for Everett J. Frazier, certify that on the 7th day of March 2022, I served the foregoing *Brief of the Division of Motor Vehicles* upon the following by depositing true and correct copies via U.S. Mail, first-class postage prepaid to:

Anthony Shawn D. Bayliss, Esquire
3728 Teays Valley Road
Hurricane, WV 25526

Elaine L. Skorich
Elaine L. Skorich