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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.

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RESPONDENT'S 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. However, Petitioner ignores the primary foundational fact that the Respondent was unlawfully

arrested in violation of his basic Constitutional rights. In the absence of a lawful arrest, all criminal charges herein were dismissed. Accordingly, the DMV's case should likewise fail on its face in the absence of basic jurisdictional elements.

On November 28, 2019, Thanksgiving morning, Deputy J. A. Warner effectuated a "stop" of the automobile previously operated by Steve Christopher Briscoe which was related to a complaint by a third party. At the time of the alleged "stop", Mr. Briscoe's vehicle was parked in the driveway at his residence located in Scott Depot, Putnam County, West Virginia. It is undisputed that Mr. Briscoe was inside his home when Deputy J.A. Warner knocked on the door.

Accordingly, Deputy Warner did not have any independent knowledge of Mr. Briscoe's vehicle being operated in an unlawful manner, nor had he witnessed him operate said vehicle. In fact, there is no evidence of any kind that Mr. Briscoe operated his vehicle while under the influence of alcohol or any other intoxicating substance.

Petitioner, through prior notice to DMV, challenged all aspects of the evidence by written objection and hearing request dated December 26, 2019.

At the August 7, 2020, Administrative Hearing, Deputy J. Warner appeared and offered incredible testimony regarding his unlawful arrest of Steve C. Briscoe, to-wit:

- a. The criminal complaint alleges that the "stop" of the automobile previously operated by Steve Christopher Briscoe was related to a complaint by a third party and was done in violation of his rights;
- b. At the time of the alleged "stop" Steve Briscoe's vehicle was parked in the driveway at his residence located in Scott Depot, Putnam County, West Virginia.

Moreover, Mr. Briscoe was inside his home when Deputy J.A. Warner came to his home and knocked on the door;

c. Accordingly, Deputy Warner did not have any independent knowledge of said vehicle being operated by Mr. Briscoe in an unlawful manner, nor had he witnessed the Mr. Briscoe operate his vehicle;

d. In fact, there is no evidence of any kind that the Petitioner operated his vehicle while under the influence of alcohol or any other intoxicating substance;

e. Moreover, Mr. Briscoe asserts that Deputy Warner's reason for his arrest is predicated on the false statement of a third party who was angry at Mr. Briscoe, such that the Deputy was wrongly motivated when he made contact with the Defendant; *that case was also dismissed in the Putnam County Magistrate Court*;

f. As such, the alleged "stop" was not based on any empirical or independent knowledge/observation of compromised operation of said vehicle by Deputy Warner, but was due only to a false, third-party allegation, and thus violated the requirement under the Fourth Amendment to the United States Constitution and the West Virginia Constitution that the stop and detention of the driver and passengers of an automobile must be based upon reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *State v. Legg*, 536 S.E.2d 110 (W.Va. 2000);

g. Finally, no evidence of the crime for which he was arrested (a DUI) could be adduced herein as Deputy Warner did not observe the Petitioner operating, nor attempting to operate his vehicle (App pages 355-403);

As previously stated, Petitioner Steve C. Briscoe was inside his home when Deputy J.A. Warner came to his home and knocked on the door, without a warrant. Thereafter, Deputy Warner transported Mr. Briscoe from his home in Scott Depot to the Putnam County Sheriff's Department in Winfield, West Virginia. Mr. Briscoe did not contest the field sobriety tests, and in fact refused the same.

Petitioner acknowledges that he did not provide a breath sample in violation of the West Virginia Implied Consent Statement, pursuant to *West Virginia Code* § 17C-5-4. However, as his arrest was unlawful, there can be no lawful basis by which he may be compelled to provide a breath sample.

The Office of Administrative Hearing conducted an administrative hearing on August 7, 2020, which was presided over by hearing examiner Melissa Carte; Petitioner was ultimately improperly revoked by Final Order from the OAH entered April 9, 2021 (App pages 355-403).

On April 14, 2021, Mr. Briscoe filed a Petition for Administrative Appeal in the Circuit Court of Putnam County, along with his Motion for Stay of Execution of the Order of Revocation (App pages 106-111). On May 20, 2021, the Putnam County Circuit Court conducted a hearing on Mr. Briscoe's administrative appeal (App pages 355-403). On November 8, 2021, the Circuit Court entered a Final Order in which it properly determined that Mr. Briscoe's warrantless arrest was unlawful, reversing the Final Order from the OAH and affirming its stay of the Respondent's revocation of his licensure (App 355-403).

II. POINTS AND AUTHORITIES

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IV. STANDARD OF REVIEW

Respondent acknowledges and agrees with both the standard of review applicable to a circuit court's review of decisions of an administrative agency and the standard of review that applies to the Supreme Court's review of the Putnam County Circuit Court's reversal of an administrative final order as set forth by Petitioner on page 8 of her Brief. *Reed v. Hill*, 235 W. Va. 322, 773 S.E.2d 666 (2015), and Syl.Pt. 2, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

V. APPELLANT'S ASSIGNMENT OF ERRORS

A. THE CIRCUIT COURT ERRED IN ENTERED A SUPERSEDEAS ORDER OF THE RESPONDENT'S LICENSE REVOCATION WHICH RELATED BACK TO THE DATE OF THE FINAL ORDER OF THE OFFICE OF ADMINISTRATIVE HEARING'S WAS ENTERED.

B. 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.

VI. ARGUMENT

It cannot be lost that the entirety of this matter and the resolution thereof is based upon the Respondent's unlawful arrest in violation of his Constitutional Rights, and thus the Petitioner's arguments will be addressed in reverse order.

UNLAWFUL ARREST

The Putnam County Circuit Court found in the November 8, 2021, Final Order (APP pages 3-14), 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.

Petitioner chooses to ignore the unlawful nature of the Respondent's warrantless arrest as if it should have no bearing under *West Virginia Code* § 17C-5A-2(f). However, both the Respondent and the Circuit Court of Putnam view the absence of such lawful arrest as being dispositive of all issues herein.

At the August 7, 2020, administrative hearing, (App at Page 368) and in its' Final Order of Revocation, (App. Pages 331-338) the hearing examiner wrongly found that the Respondent was lawfully placed under arrest. Pursuant to the aforementioned *West Virginia Code* § 17C-5A-2(5), the hearing examiner is required to make a specific finding that:

"(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..."
Dale v. Ciccone, 233 W.Va. 652, 760 S.E.2d 466 (W. Va. 2014)

This, the validity of the underlying traffic stop is relevant to any determination related to the Respondent's arrest and license revocation. As this Court has noted, the lawful arrest issue is resolved by direct reference to the requirements set forth in the West Virginia Code § 17C-5A-2(f), and the inquiry must therefore include "whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol...." W.Va. Code § 17C-5A-2(f)(2).⁸ As this Court stated in *Dale v. Odum*, — W.Va. —, 760 S.E.2d 415, 2014 WL 641990 (W.Va. Feb. 11, 2014) (memorandum decision), "absent a valid investigatory stop, a finding that the ensuing arrest was lawful cannot be made." *Id.* 420, 2014 WL 641990 at *5.

Dale v. Ciccone, 233 W.Va. 652, 760 S.E.2d 466 (W. Va. 2014).

Consequently, Mr. Briscoe cannot be considered lawfully arrested for DUI where law enforcement did not have the requisite articulable reasonable suspicion to initiate the underlying traffic stop. See *Dale v. Ciccone*, 233 W.Va. 652, 760 S.E.2d 466 (W. Va. 2014).

Given the underlying factual scenario herein (Mr. Briscoe was inside his home), it is clear that the unlawful arrest of Mr. Briscoe was not based upon sufficient probable cause, and that the OAH hearing examiner errantly applied the reasonable suspicion standard to said arrest. Respondent acknowledges that an officer may effectuate an arrest where he/she did not observe the individual operating a motor vehicle as in *State v. Davisson*, 209 W.Va. 303, 547 S.E.2d 241 (2001), where witnesses saw the car leave the road and strike a tree, and there were alcohol containers in the car, or in the matter of *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997) where the driver was slumped over behind the wheel of the car. In those instances, the Court found 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. In the instant matter, no one saw Mr. Briscoe driving errantly, not one observed his operation of his vehicle to be erratic, etc., and no alcohol containers were found in his car.

In the absence of reasonable suspicion, a warrantless arrest for a misdemeanor must be justified by (a) probable cause and (b) by exigent circumstances. The Putnam County Circuit Court correctly referenced Syllabus Pt. 2 of *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987) which held that both probable cause and exigent circumstances are required where the arrest occurs in the home stating that "A warrantless arrest in the home must be justified not only

by probable cause, but by exigent circumstances which make an immediate arrest imperative."

(a) No Probable Cause

The facts of this case, yield that Mr. Briscoe was inside his home at the time of his arrest and thus prohibit a warrantless arrest for a misdemeanor, under the constitutional protections against unreasonable searches and seizures found in article III, section 6 of the West Virginia Constitution. There can be no greater expectation of privacy that should be afforded the Respondent to be free from such an unlawful, warrantless arrest as the one herein

The *Mullins* Court referenced in footnote 5, the United States Supreme Court decisions on the scope of Fourth Amendment protections indicate that it is the presence in the home which prompts the additional requirement of exigent circumstances. See *Payton v. New York*, 445 U.S. 573, 576, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (holding that "the Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest"); *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) (finding that while standing in the doorway of her house, the defendant was in a public place for purposes of the Fourth Amendment, since "[s]he was not in an area where she had any expectation of privacy").

The closest applicable case previously before this Court is the matter of *State v. Cheek*, 199 W.Va. 21 (1996), in which the issue presented was the warrantless arrest of Mr. Cheek in his home which the Court determines to be invalid. In *Cheek* the defendant was arrested for the misdemeanor offense of driving under the influence of alcohol which occurred outside the presence of the arresting officer. The Court found that that the arresting officer therein lacked probable cause and that there were not exigent circumstances that would justify a warrantless

arrest such that the was unlawful. *State v. Cheek*, 483 S.E.2d 21, 199 W.Va. 21 (W. Va. 1996)

The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe. Syl. Pt. 2, *State v. Canby*, 162 W.Va. 666, 252 S.E.2d 164 (1979)." Syllabus Point 3, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987).

Regarding Mr. Briscoe's arrest, the deputy lacked the necessary probable cause for a warrantless arrest as there were no articulable factors that would support the same. There were no witnesses regarding Mr. Briscoe's operation of his vehicle, his demeanor in and around his vehicle and home, etc. The entirety of the factual "evidence" herein is based upon the unreliable statement of a disgruntled paramour that he left on Thanksgiving morning, who never appeared at Court and whose case was appropriately dismissed.

Accordingly, 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 finding that the Briscoe facts were not at all like a Knock-and -Talk, as the consumption of alcohol in home is not illegal such that even if the Deputy professed to have smelled alcohol on Mr. Briscoe's breath, "it does not establish that he drank before he drove, or whether he drove at all." (App Pages 3-14). As in *Cheek*, where the smell of alcohol upon the Defendant's breath did not give rise to probable

cause sufficient for a warrantless arrest in his home, the same cannot be sufficient to establish probable for the warrantless arrest of Mr. Briscoe. Accordingly, there can be no finding that probable cause existed for the warrantless arrest of Mr. Briscoe herein.

(b) No exigent circumstances

As there is no probable cause for Deputy Warren's unlawful arrest of Mr. Briscoe, the arrest analysis doesn't reach the *conjunctive* second factor, which is the presence of exigent circumstances.

As a review, both the Constitution of the United States and the Constitution of West Virginia protect citizens from unreasonable arrests, searches, and seizures, U. S. Const. Amend. IV; W. Va. Const. art. III, § 6, and that the general method for implementing that protection is to require a warrant based on a showing of probable cause be obtained from a neutral magistrate before an arrest may be initiated., *State v. Canby*, 252 S.E.2d 164, 162 W.Va. 666 (W. Va. 1979). The *Canby* Court reaffirmed the long-held proposition that, "affirm our longstanding rule that warrantless arrests, searches and seizures are generally unreasonable, *State v. McNeal*, --- W.Va. ---, 251 S.E.2d 484 (1978); *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973) ..." *State v. Canby*, 252 S.E.2d 164, 162 W.Va. 666 (W. Va. 1979).

"A warrantless arrest in the home must be justified not only by probable cause, but by exigent circumstances which make an immediate arrest imperative.' Syl. Pt. 2, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987)." *State v. Kendall*, 639 S.E.2d 778, 219 W.Va. 686 (W. Va. 2006). The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be

able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe.' Syl. Pt. 2, *State v. Canby*, 162 W.Va. 666, 252 S.E.2d 164 (1979)." Syl. Pt. 3, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987). *State v. Kendall*, 639 S.E.2d 778, 219 W.Va. 686 (W. Va. 2006);

"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." Syllabus, *Simon v. Department of Motor Vehicles*, 181 W. Va. 267, 382 S.E.2d 320 (1989). The *Simon* court followed the holding in syllabus point 3 of *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974), that "[a] municipal police officer has no authority, at common law or by statute, to make a warrantless arrest for a misdemeanor of a person who does not commit such an offense in his presence."

"An offense can be said to be committed in the presence of an officer only when he sees it with his own eyes or sees one or more of a series of acts constituting [the] offense and is aided by his other senses or by information as to the others, when it may be said the offense was committed in his presence." Syl. pt. 9, *State v. Lutz*, 85 W. Va. 330, 101 S.E. 434 (1919).

The DMV cannot build its house on the sand-based foundation of an alleged domestic matter as the foundations for exigent circumstance necessary to sanitize Mr. Briscoe's unlawful arrest. In the instant matter, there is no evidence that the Mr. Briscoe committed any offense in the presence of Deputy Warren as he was peaceably inside his own home.

As in *Cheek*, the arrest herein cannot be sanitized by a concern that Mr. Briscoe may possibly metabolize alcohol as an exigent circumstance. Mr. Briscoe was inside his home, was not likely to flee, there was no evidence to destroy and there was no persons or property endangered. In the administrative hearing, Deputy Warren did not testify to any exigent circumstances. (App pages 355-403). The absence of exigent concern is amplified by the Deputies acknowledgement that but for smelling what he believed was alcohol on the Respondent's breath, he would have chosen the proper course of action and applied for a warrant for the alleged domestic action. As there are no exigent circumstances, there can be no warrantless arrest herein.

Accordingly, the Putnam County Circuit Court was correct in reversing the Office of Administrative Hearings Final Order and fully reinstating Mr. Briscoe's licensure back to the date of his arrest herein.

STAY/SUPERSEDEAS

As previously stated herein, The Putnam County Circuit Court found 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. The DMV now takes umbrage that the Putnam Court committed error when it correctly acknowledged its own findings as referenced above-herein, and thereby reinstated the Respondent's licensure in full. The Putnam Court had already found that there was neither a jurisdictional basis for the DMV's suspension of the Respondent's licensure given his unconstitutional arrest and the proper granting of his motion for stay of the enforcement of its errant order.

Petitioner's bootstrapping of the reversal and invalidation of the OAH Final Order, is set forth herein to prop up a companion appeal of what it believes will be a subsequent revocation. This it ignores all relevant common sense related to Mr. Briscoe's unlawful arrest to find any means of punishing him for having to earn a living.

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)

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. There is no valid reason in law or equity that justifies a second punishment based upon an unlawful first punishment, and the DMV should not be rewarded for the same. Rather, this Court should affirm that the Putnam County Circuit Court's properly found that the DMV's improper suspension of Respondent's license should not be "validated" for the purpose of punishing Mr. Briscoe in any subsequent offense.

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.

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

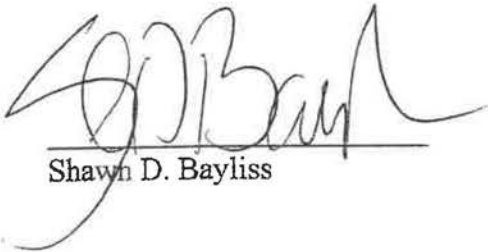


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CERTIFICATE OF SERVICE

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