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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Everett Frazier, Commissioner,
West Virginia Division of Motor Vehicles,
Respondent Below, Petitioner

vs.) No. 20-0412 (Raleigh County 19-AA-1)

Michael A. Kelly,
Petitioner Below, Respondent

MEMORANDUM DECISION

Petitioner Everett Frazier, Commissioner, West Virginia Division of Motor Vehicles (the "Commissioner"), by counsel Patrick Morrisey and Elaine L. Skorich, appeals the Circuit Court of Raleigh County's May 20, 2020, order reversing the February 22, 2019, decision of the Office of Administrative Hearings ("OAH"), which concluded that respondent committed the offense of driving a motor vehicle under the influence of alcohol and affirmed the Commissioner's orders of revocation entered on August 28, 2013. Respondent Michael A. Kelly, by counsel David Pence, filed a response. The Commissioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion. For the reasons expressed below, the decision of the circuit court is reversed, and this case is remanded to the circuit court for entry of an order consistent with this decision.

On the snowy evening of December 29, 2012, respondent watched a football game and drank beer with a colleague at a restaurant. After the game, respondent drove to the colleague's home so the two could continue their visit before respondent drove home. On his way home, West Virginia State Trooper C.L. Mollohan initiated a stop of respondent's vehicle and, ultimately, arrested respondent for driving under the influence of alcohol ("DUI").[1] The Division of Motor Vehicles ("DMV") issued Orders of Revocation on August 28, 2013, revoking respondent's driver's license for one year for his DUI and his failure to submit to the secondary chemical test. Respondent submitted a request for a hearing on the revocation.

[1] Trooper B.R. Moore was driving the cruiser in which Trooper Mollohan rode, but Trooper Moore did not interact with respondent.

The parties appeared before the Office of Administrative Hearings ("OAH") on April 13, 2018, and November 30, 2018. Trooper Mollohan and respondent testified. In addition, Dr. Lance Platt, a former police officer who currently consults in drug and alcohol cases and is a National Highway Traffic Safety Administration ("NHTSA")-certified trainer, offered expert testimony on respondent's behalf.

Trooper Mollohan testified that he initiated the stop of respondent's vehicle, an SUV, due to his "[e]rratic driving, weaving." The D.U.I. Information Sheet and Criminal Complaint completed by the officer and admitted at the hearing likewise indicate, respectively, that respondent was "weaving" and "swerving erratically." In addition, dash camera footage from the vehicle in which Trooper Mollohan was riding was admitted, which the officer testified showed, "[R]ight here, there's a big deviation in him moving back and forth. You can tell where the lines in the road are, as far as where vehicles had been traveling because it's snow-covered and he's drifting left and right."

Trooper Mollohan elaborated on the driving conditions at the time of the traffic stop and respondent's driving that precipitated the traffic stop, testifying that

> [w]hen following behind a vehicle, if it's moving side to side, if you're a cognizant individual who's not intoxicated, then it's easy to see whether there are lines on the road or not. But yes, it was snow-covered and yes, you could tell that he was weaving while he was in front of us. . . . So yes, I did say that you could see the lines on the road where the previous traffic had traveled and that he moved in those lines. . . . But you can tell when a vehicle is weaving in front of you. You don't have to have a line to base it off of.

Trooper Mollohan said that he "couldn't tell you" whether respondent was weaving in his lane, but he said that, in any event, he has been trained that weaving within one's own lane is an appropriate basis to stop a vehicle because

> [w]eaving in your lane of traffic would mean that I need to pull you over and see if you have anything going on. It could be a number of things. It could be elderly. It could be sensitivity to light. It could be in the night. It could be low blood sugar. It could be a number of things. It's not strictly pulling someone over with the intent of finding a DUI.

After stopping respondent's vehicle, Trooper Mollohan asked respondent for his driver's license, registration card, and proof of insurance. The officer documented that respondent "attempted to comply but had a difficult time locating his information." Also, the officer testified that, as respondent was searching for this information, respondent "reaches me a firearm without saying anything about it. It is in a pocket holder, that he reaches me a firearm, just grabs it out of the door and hands it to me for whatever reason." Trooper Mollohan noted on the D.U.I. Information Sheet that respondent had the odor of alcohol on his breath, was unsteady exiting the vehicle, staggered while walking to the roadside, and was unsteady standing. Trooper Mollohan also found respondent's speech to be slurred and his eyes bloodshot and glassy. After respondent stepped outside of his vehicle, Trooper Mollohan described that he

> moved him from the side of the roadway. I instructed him several times, had to move him. He's still unable to find any of his information. That's why we're trying to find his wallet, something, his identification, insurance, registration, all those types of things. And naturally, officer safety after he hands me a pistol without saying I have a weapon in the vehicle.

Respondent acknowledged that he had "difficulty" driving on the evening of his arrest. He described the road as "snow-packed in parts. . . . [I]n some sections of Section 19, the lanes were obscured, the lines were obscured. And in some places, people were driving literally down the center of the road." He also confirmed that he had some difficulty locating his proof of insurance and registration, but he denied handing his gun to the officer unprompted or muzzle first. Respondent also said that he was "[a]bsolutely not" impaired on the night in question. He claimed he had approximately three light beers while watching the football game at the restaurant and nothing more when he spent time at his colleague's home following the game.

Dr. Platt, who had seen the dash camera footage, observed that it "seemed to be snowing and ic[y]." Dr. Platt noted that the police report indicated that respondent was "swerving erratically," and based on Dr. Platt's viewing of the dash camera footage, he acknowledged that respondent "very well may have gone outside the lanes," and he "did see movement in the lane." Dr. Platt also acknowledged that "weaving is one of the clues that law enforcement officers are taught to observe for a clue of impaired driving." The expert denied that respondent had difficulty getting out of his vehicle, though, because "being unsteady coming out of a car, in my opinion, that's normal." Dr. Platt saw no out-of-the-ordinary movement, such as staggering, on respondent's part. Rather, Dr. Platt "saw a person walking on snow and ice that didn't fall over"; however, Dr. Platt did recall seeing Trooper Mollohan assist respondent by his arm after he exited his vehicle. Dr. Platt discounted Trooper Mollohan's detection of the odor of alcohol on respondent's person, testifying that "the odor of alcohol does not correlate with impairment." Likewise, Dr. Platt discounted the usefulness of bloodshot eyes in detecting impairment, noting that "too many variables . . . could cause a person's eyes to be red and bloodshot."

Regarding the administration of the field sobriety tests, most of which was captured by the dash camera, Trooper Mollohan documented that respondent had equal pupils, no resting nystagmus, and no equal tracking on the D.U.I. Information Sheet in the section related to the horizontal gaze nystagmus ("HGN") test. Trooper Mollohan explained that he marked "no equal tracking" because respondent "didn't track so I couldn't say anything." Instead of tracking the officer's pen with his eyes, respondent "[l]ooked [s]traight ahead." Trooper Mollohan tried to administer the test several times before he ultimately ended it because,

> [i]f I ask you to perform a test and I explain it to you, and then I attempt to perform it and you just stare at my face you don't even attempt to follow the pen no matter how many times I move it in front of your face, then I re-address you and say without moving your head, using only your eyes, follow the tip of my pen with your eyes and your eyes only. Do you understand this? And then attempt it again you still just stare at me. That is telling me that you're not willing to follow those instructions.

Respondent, however, testified that he complained to the officer because the officer was holding his flashlight above respondent's eyes, and the test was difficult to perform because of the wind and snow. Respondent also claimed that he recalled telling Trooper Mollohan that he was having trouble hearing him during a subsequent attempt at administering the HGN test, which "seemed to anger" the officer.

Dr. Platt was critical of Trooper Mollohan's administration of the HGN test. Dr. Platt claimed that once the officer noted that respondent exhibited "no equal tracking," he should have ended the test. "[I]f a person doesn't exhibit equal tracking of the eyes, there may be a neurological problem that could disqualify them from any type of balance test." Moreover, Dr. Platt testified that the "environment was not conducive to a good test" because the flashing lights from the cruiser "can create what's called an optokinetic effect," which can "bias the results." Dr. Platt agreed, though, that "it's bad procedure to cut [lights]. I'm not telling anyone to cut their emergency lights off on the scene. That's ridiculous. I would never, ever, ever say that. But I also would never teach a police officer to conduct a test that may have biased results."

With respect to the one-leg-stand test, Trooper Mollohan testified that he asked respondent whether he had any issues with his legs, knees, ankles, or feet. The officer did not indicate that respondent reported any issues, but respondent claimed that he informed the officer that he had "a broken ankle from when I was in the military and that I hobble most days. I don't have a joint replacement yet, but they're talking about that, but it's been going on for I guess 40 years, so—but I told him that." When respondent attempted to complete the test, he was observed to sway while balancing, use his arms to balance, and put his foot down.

The officer further documented that respondent refused the walk-and-turn test and a preliminary breath test. Respondent did not recall the walk-and-turn test and testified that he was "[a]bsolutely not" offered a preliminary breath test.

Dr. Platt acknowledged having a difficult time viewing the administration of the one-leg-stand test due to Trooper Mollohan and respondent moving outside the frame of the video, but he testified that he likely would not have performed the test because it has only been "validated . . . on smooth, flat surfaces," not icy surfaces, and Dr. Platt would have been concerned that respondent would "fall[] . . . over and hurt[] himself." Dr. Platt testified that in developing the standardized field sobriety tests, "all these clues and cues that we talk about, the assumption is that there is no snow on the roadway. The roadways are dry. . . . In this particular case, the roadway was not dry. There was snow and ice on it." Therefore, he questioned the reliability of the tests performed by respondent. "[C]ommon sense would tell you that standing on ice and snow is difficult. Standing on pavement that's not ice and snow make it easier to do. So that's my concern is the actual scoring of the tests."

After respondent was arrested, he was transported to the West Virginia State Police detachment. There, Trooper Mollohan read the West Virginia Implied Consent Statement form to respondent, which, according to the officer, respondent refused to sign. The officer testified that respondent also refused to submit to the secondary chemical test of his breath and demanded a blood test. Upon arriving at the hospital for that blood draw, however, respondent began complaining of chest pain and "refuse[d] all blood except for cardiac." Trooper Mollohan

"recall[ed] [respondent] pretending to fall down and me having to drag him by his coat into the ER, at which time they loaded him on a gurney, and he said I refuse any bloodwork and started to demand medication." Trooper Mollohan testified that respondent's treating emergency room physician informed the officer that "[t]here was nothing in correlation with any type of heart trouble, but [respondent] was saying all the right things to be committed [sic], so they were committing [sic] him at that time." Trooper Mollohan left the hospital, interpreting respondent's admission to the hospital to mean that he would be kept there overnight. But once the officer returned to the detachment, the hospital informed him that respondent checked himself out of the hospital and left.

Respondent denied refusing the secondary chemical test, stating that he was feeling "unwell" and wanted the officer to call an ambulance or transport him to the hospital. Respondent explained that he had a heart catherization performed in 2004 and felt "the same pressure in his chest as he had felt prior to having the 'heart cath.'" Given respondent's purported concern over his chest pain, he told Trooper Mollohan that he would allow his blood to be drawn at the hospital or "come back [to the detachment] at a later date" for a secondary chemical test. Respondent also explained that he did not sign the implied consent statement because he did not have his glasses.

The OAH issued its "Final Order" on February 22, 2019, affirming the revocation orders. In resolving the conflicting testimony, the OAH found that Trooper Mollohan "offered credible testimony regarding the lawful reason for his initial contact with" respondent. Specifically, the officer "credibly testified that . . . he observed [respondent] driving erratically and weaving," and the OAH found that

> [i]t is obvious from the [dash camera] video [of respondent's traffic stop] that the [respondent's] vehicle was traveling in and out of the tracks made by other vehicles in the snow. Although the video shows that there is snow on the ground and that it was lightly snowing during the stop, the lines delineating the lanes were clearly visible.

The OAH further found that respondent "had the odor of an alcoholic beverage emanating from his breath . . . had bloodshot, glassy eyes and slurred speech"; and, "[w]hile attempting to provide [Trooper Mollohan] with his driver's license, registration and insurance information, [respondent] was disoriented and unable to locate the documents." Respondent was also found to be "unsteady while exiting the vehicle, unsteady while standing and staggered while walking to the road side." Thus, the OAH found that Trooper Mollohan had "reasonable grounds to believe that [respondent] was driving or attempting to drive a motor vehicle while under the influence or impaired by alcohol."

Concerning the field sobriety tests, the OAH found that Trooper Mollohan attempted to administer the HGN test but was "required to stop . . . because [respondent] would not track the stimuli . . . and simply looked straight ahead," that respondent "refused the walk-and-turn test," and that respondent "swayed while balancing, raised his arms for balance, and put his foot down after the count of two" during administration of the one-leg-stand test. The OAH noted that "no score was given on the DUI Information Sheet" for the one-leg-stand test but that respondent "had a total score of three where the decision point is two." The OAH also found that Trooper Mollohan

explained the one-leg-stand test to respondent and confirmed that respondent "had no issues with his knees, ankles or legs."

The OAH further found that Trooper Mollohan read the West Virginia Implied Consent Statement to respondent and observed him for the required twenty minutes, but respondent refused to sign the statement or submit to a secondary chemical test of his breath, voicing his preference for a blood draw instead. The OAH found that respondent "pretended to fall" at the hospital after being taken there for the blood draw and that the officer was "required to 'drag him into the emergency room,' where he continued to complain of chest pains and immediately told the emergency room staff that he refused all blood work, other than 'cardiac,' during which time he began asking for medication." The OAH also accepted that respondent's treating physician told Trooper Mollohan that the tests administered to respondent showed "no sign of a cardiac event; however, on the word of the treating physician, [respondent] was 'saying all the right things,' to cause the hospital to admit him" and that respondent checked himself out of the hospital after Trooper Mollohan left.

The OAH found Dr. Platt's testimony to be credible but that it "did little to help" respondent as it "simply confirmed what was seen while viewing" the video evidence and "the detection clues used by the [i]nvestigating [o]fficer when determining whether to stop [respondent's] vehicle." The OAH described Dr. Platt's testimony as confirming that the stop of respondent's vehicle "was appropriate," as he agreed that respondent "was seen weaving and crossing the white lines of the road on the [dash camera] video." The OAH also stated that

> while Dr. Platt found fault [with the investigating officer] for using the standardized field sobriety tests in conditions where snow and ice are present, because they have only been validated in California and Florida, the fact remains that those tests are the tests developed through NHTSA and taught to law enforcement officers throughout the country.

In contrast to its assessment of the other witnesses' testimony, the OAH found respondent's testimony to be "less than credible on several points, including the amount of alcohol he had consumed" on the night of his arrest. Regarding how respondent handed his gun to Trooper Mollohan, the OAH found that it would "defy logic for the [i]nvestigating [o]fficer to falsely testify about how [respondent] handed him a weapon because it would add nothing to support a DUI case." Further,

> [w]hile [respondent] testified that he had problems driving because of the weather on December 29, 2012, the video shows that the lane lines on Route 19 could easily be seen, and no evidence was presented to suggest that anything other than impairment caused [respondent] to weave in his lane. Indeed, even Dr. Platt, [respondent's] own expert, testified that he could see the lines in the video admitted.

The OAH noted that respondent "has been an emergency room doctor since 1981" and found that "[l]ogic, common sense, and [respondent's] own testimony confirm that he is well aware of the protocols for an emergency room to draw blood from a patient at the request of law enforcement." The OAH found that respondent refused to submit to a secondary chemical test of the breath while at the police detachment, and he only complained of chest pain after arriving at

the hospital. Although respondent told the officer he would return later for a secondary chemical test, the OAH determined that "it is without question that [respondent] would know how long it would likely take the body to metabolize alcohol and that unless collected within hours, any evidence collected would be substantially degraded or completely lost." The OAH found that had respondent believed he was not intoxicated or that he was suffering a cardiac event, he would have remained at the hospital and demanded a blood draw instead of checking himself out. The OAH also observed that "although [respondent] repeatedly testified that he recalled his arrest 'as if it were yesterday,' he only specifically recalled those things he thought might help him." As an example, the OAH highlighted that respondent initially could not recall what time he arrived at the restaurant where he watched the football game prior to his DUI, how long he was there, what time he left, or how much alcohol he consumed that night, but he later recalled being at the restaurant for three and a half hours and consuming three "light" beers.

The OAH therefore concluded that Trooper Mollohan had reasonable grounds to believe that respondent was DUI, that respondent was lawfully arrested for DUI, that sufficient evidence was presented to prove that respondent drove under the influence of alcohol on December 29, 2012, and that respondent refused to submit to a secondary chemical test of the breath.

Respondent filed a petition for judicial review. The circuit court reversed the OAH's decision, deeming the OAH's "findings to be clearly wrong." The court found that "the adverse weather conditions at the time of the event rationally precluded a reliance upon weaving within the traffic lane as a legitimate reason to justify such stop." The court stated that the heavy snowfall and ice on the roadway "would likely be the cause of any weaving and sliding within a driver's own traffic lane," and, in any event, "weaving within one's own lane of the road is not *per se* an infraction of the rules of the road." Thus, the court found that the evidence did not support the officer's characterization of respondent's driving as "reckless" and concluded that "there was insufficient evidence, even under the reasonable-suspicion standard, to support the stopping of [respondent's] vehicle in this case."

The court went on to find that "the administration of field sobriety tests is wholly suspect in this case." Because it found the testing to have been performed incorrectly, it concluded that the testing "could not provide an indicia of credibility as to any alleged impairment of the driver." The court believed that the officer's frustration with respondent "tainted both his actions and judgment in this matter." The court found that the one-leg-stand test was not properly administered due to the adverse weather conditions and respondent's preexisting broken ankle injury. Further, the court found that the walk-and-turn test may not have been attempted. The court also found it curious that the preliminary breath test—which the court found could be used to corroborate the field sobriety tests to determine whether to arrest a driver—was administered after respondent was arrested. Therefore, the court concluded that the Commissioner failed to prove by a preponderance of the evidence that respondent was DUI on the evening in question and that

> [b]ecause there was no legitimate ground for an investigatory traffic stop of the [respondent's] vehicle, his subsequent arrest for [DUI] was not lawful and the [implied] consent law does not apply. Furthermore, because there is so much controversy here over the application of the field sobriety tests and the meaningless attempt to employ the use of a preliminary breath test, the [DMV] failed to prove

> that there was probable cause to arrest the [respondent] for [DUI] on December 29, 2012.

This appeal followed.

> 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, *Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020) (citation omitted). Additionally, "where the circuit court has [reversed] the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." *Id.* at --, 853 S.E.2d at 587, Syl. Pt. 2, in part (citation omitted).

On appeal, the Commissioner claims that the circuit court erred in reversing the OAH's decision because the court substituted its judgment for that of the factfinder regarding the validity of the traffic stop and the administration of the field sobriety tests. The Commissioner argues that the OAH determined that, based upon the dash camera footage, it was "obvious" that respondent was "traveling in and out of the tracks made by other vehicles in the snow," so the officer had reasonable suspicion to make an investigatory stop. The circuit court, however, determined that these findings were clearly wrong without showing that the OAH's findings were "patently without basis in the record."

The Commissioner argues that the circuit court's determination that the administration of the field sobriety tests was "wholly suspect" was likewise predicated on the court's improper witness credibility assessments. The OAH, having heard Trooper Mollohan's testimony on that subject and having viewed the dash camera footage, was in the best position to judge the officer's credibility regarding his administration of the tests and the results obtained.

We agree that the circuit court erred in determining that the stop of respondent's vehicle was unlawful. "Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime." Syl. Pt. 4, in part, *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66 (2018) (citation omitted). And when evaluating whether facts give rise to reasonable suspicion, "one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police." *Id.* at 257, 810 S.E.2d at 69, Syl. Pt. 5 (citation omitted). Trooper Mollohan credibly testified that he initiated the stop of respondent's vehicle because respondent was weaving and driving erratically. The officer called attention to the portion of the dash camera footage showing "a big deviation in [respondent] moving back and forth" on the road, and, in reviewing that footage, the OAH also found it "obvious" that respondent was "traveling in and out of the tracks made by other vehicles in the snow." Dr. Platt agreed that respondent may have traveled outside the lanes, and he testified that officers are taught that weaving is one sign of impaired driving. Indeed, this Court has previously stated that "weaving upon the highway" is a proper basis for an investigatory stop. *Boley v. Cline*, 193 W. Va. 311, 314,

456 S.E.2d 38, 41 (1995). Further, in *Boley*, we also cited approvingly *People v. Loucks*, 481 N.E.2d 1086 (Ill. App. Ct. 1985), which held that "[w]eaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop of a motor vehicle." *Boley*, 193 W. Va. at 314, 456 S.E.2d at 41 (citing *Loucks*, 481 N.E.2d at 1087).

The circuit court's contrary conclusion was predicated on its assertion that the weather precluded reliance on weaving as an indicator of impairment. Although respondent claimed that the weather made driving difficult, the OAH found his testimony to lack credibility and found no evidence that anything other than respondent's impairment caused his weaving. In addition, the video evidence showed the lane lines clearly demarcated, the (straight, not weaving) tracks in the snow left by other drivers, and the fact that respondent was weaving in and out of those tracks. Thus, for the circuit court to have made this assumption about the weather and the supposed hazards it posed, it would have had to credit respondent's testimony over that given by Trooper Mollohan and the video evidence. Reviewing courts can only disregard a credibility determination, however, when it is "patently without basis in the record"; otherwise, the credibility determination is "binding." *Pompeo*, 240 W. Va. at 260-61, 810 S.E.2d at 71-72 (citations omitted). And,

> if the [lower tribunal's] account of the evidence is plausible in light of the record viewed in its entirety, [a reviewing court] may not reverse it, even though [the reviewing court is] convinced that had [it] been sitting as the trier of fact, [it] would have weighed the evidence differently.

Brown v. Gobble, 196 W. Va. 559, 563, 474 S.E.2d 489, 493 (1996); *see also Frazier v. S.P.*, 242 W. Va. 657, 664, 838 S.E.2d 741, 748 (2020) (citation omitted) ("[A reviewing court] must defer to the ALJ's credibility determinations and inferences from the evidence, despite [the reviewing court's] perception of other, more reasonable conclusions from the evidence."). The OAH's account of the evidence and inferences made from that evidence were plausible. The circuit court was not permitted to reverse the OAH simply because it would have given greater weight to the weather. For these reasons, the court erred in determining that there was no legitimate ground for Trooper Mollohan's stop of respondent's vehicle.

For these same reasons, we agree that the circuit court erred in concluding that there was no probable cause to arrest respondent for DUI. The court's determination that the administration of the field sobriety tests was "wholly suspect" and that the officer's frustration tainted his administration and judgment of these tests again credited respondent's and Dr. Platt's testimony over Trooper Mollohan's credible testimony.[2] The OAH's findings that, in accord with the officer's testimony, Trooper Mollohan attempted to administer the HGN test but respondent obstinately failed to track the stimulus, that Trooper Mollohan explained the one-leg-stand test and confirmed that respondent had no issues that would affect his performance of that test, that respondent failed the one-leg-stand test, and that respondent outright "refused to perform the standardized field sobriety test" constitute a plausible account of the evidence. Dr. Platt's criticism of Trooper Mollohan's administration of the field sobriety tests in the snow was accorded little weight by the OAH because those tests are used by officers throughout the country. The circuit

[2] Although the OAH did find Dr. Platt's testimony to be credible, it accorded little weight to it due to its failure to help respondent's case and the fact that it merely confirmed what was reflected on the dash camera footage.

court was not permitted to reverse the OAH simply because it would have weighed this evidence differently. *Brown*, 196 W. Va. at 563, 474 S.E.2d at 493.

Furthermore, we have held that

> [w]here there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol.

Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). Respondent weaved while operating his vehicle on the road. Once Trooper Mollohan stopped respondent's vehicle, he smelled the odor of alcohol and observed respondent's eyes to be glassy and bloodshot. Respondent fumbled for his information, was unsteady and staggered after exiting his vehicle, and his speech was slurred. Respondent confirmed that he consumed alcohol on the night of his arrest, and he failed or refused field sobriety tests. There was clearly sufficient evidence to warrant the administrative revocation of his license for DUI.

Finally, respondent's refusal to submit to a secondary chemical test of the breath provides an independent basis upon which the revocation order should be affirmed. "A person's driver's license may be suspended under *W.Va.Code*, 17C-5-7(a) [1983] for refusal to take a designated breathalyzer test." Syl. Pt. 2, *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987); *See also Corra v. Reed*, No. 17-0732, 2018 WL 3005956 (W. Va. June 15, 2018)(memorandum decision) (finding that the driver's refusal to submit to a secondary chemical test provided a basis for revocation "independent of" his revocation for DUI). Respondent does not dispute that this would provide an independent basis for revocation. But, he argues, because "[a] lawful arrest is a prerequisite for a refusal charge," and because he maintains that he was not lawfully arrested, he argues that the DMV "failed to satisfy its burden of proof on the charge of refusing a secondary breath test." In light of our findings that the investigatory stop and respondent's subsequent arrest were lawful, we find that respondent's license was also properly revoked for his refusal to submit to a secondary chemical test.

For the foregoing reasons, we reverse and remand this case to the circuit court to enter an order affirming the decision of the OAH and reinstating the Commissioner's revocation order. To facilitate the commencement and conclusion of the remand proceedings, we direct the Clerk of this Court to issue the mandate of this Court contemporaneously with the issuance of this decision.

Reversed and remanded.

ISSUED: January 12, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins

DISQUALIFIED:

Justice William R. Wooton