IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0519

ADAM HOLLEY, ACTING COMMISSIONER OF
THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

GARY L. BRAGG,

Respondent.

Honorable Louis H. Bloom, Judge
Circuit Court of Kanawha County
Civil Action No. Civil Action No. 19-AA-1

PETITIONER'S REPLY BRIEF

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A. The Plain Reading of the Statute Excludes Those Who Do Not Request a Blood Test.

The Respondent's attempt to equate one who agrees to a blood test with those who request it must fail. Under the plain reading of the statute, W. Va. Code §17C-5-9 is inapplicable to this case because the Respondent did not request a blood test. The subsequent statutory requirement, that a "chemical test thereof be made," (W. Va. Code §17C-5-9) is contingent on the driver demanding a blood test. That is not the factual scenario in this case.

The Respondent accuses the DMV of asking this Court to "recognize an additional requirement...that the motorist must request the blood test" (Resp. Brf. at 6) but then asks the Court to find that no distinction exists between "a driver pro-actively requesting a blood test versus consenting to one upon request." *Id.* The language in the statute is "a right to demand": this is not "an additional requirement." Conversely, there is nothing in the statute invoking due process rights when a driver simply acquiesces to an officer's request. This Court has never conflated the two.

There is no "race" to request a blood test, as the Respondent avers. Even if an officer asks a driver to take a blood test, the driver may also request a test.

The Respondent misrepresents the facts when he states, "In this case, the request for a blood test was made to the Investigating Officer ..." Resp. Brf. at 7. As the Petitioner has unflaggingly argued, the Investigating Officer asked the Respondent to submit to a blood test. This is not disputed. App. 119, 200-01, 212. The Respondent also states, "By losing or destroying Respondent's blood sample or blood test results, Investigating Officer, Trooper D.M. Williamson [Senior Trooper M. J. Miller was the Investigating Officer and testified at the administrative hearing] clearly imposed an impediment to Respondent's ability to obtain 'the results of and information about the test.'" Resp.

Brf. at 7. The record is unclear regarding the disposition of the blood sample. It is not shown that Tpr. Williamson lost or destroyed the sample. Also absent from the record is any evidence that the Respondent attempted to obtain any results of the blood test.

B. The Respondent Is Not Entitled to Costs for Interlock Removal or for Bringing this appeal.

In his Conclusion, the Respondent complains that he had to have the interlock device removed from his vehicle due to the present appeal. This case presently before the Court is the "B" file, relating to his January 16, 2015 arrest. The Respondent has been arrested for DUI three times: on August 17, 2013 (resulting in the "A" file), January 16, 2015 (resulting in the "B" file) and April 5, 2015 (resulting in a "C/D file because the Respondent refused to submit to the Intoximeter test). On December 11, 2018, the Respondent applied for Interlock as a result of his revocation on the "D" file. He was approved to serve 24 months on Interlock. On March 14, 2019, the Respondent was notified that because his "B" file was in appeal status, he was required to have the Interlock device removed from his vehicle. "16.2.f. Final Revocation -- Means a license suspension or revocation which has run the full course of administrative and or judicial review. In the context of this section, a person may not participate in the program if the person has any action pending on the offense either criminally or administratively. The revocation must be final." 91 C.S.R 5-16-2-f. "An applicant is not eligible for participation in the Program if his or her license is revoked or suspended for any other reason or has any other active suspensions or revocations in any jurisdiction unless the applicant provides evidence that the active revocation or suspension in the other jurisdiction is for the same events resulting in application to participate in the Program. The applicant can not operate a motor vehicle in the other jurisdiction until authorized by the other jurisdiction." 91 C.S.R. 5-16.3.f.

The Respondent has one driver's license and multiple offenses. The intent of the law is to allow a driver who has substantively resolved his offenses by final order to be on Interlock. This intent is defeated if a driver can drive with Interlock with a pending, unresolved offense. As a matter of public safety, the Interlock program is intended to be a remedial effort to ensure that drivers do not drive under the influence. This cannot be accomplished with a driver who has an an unresolved offense.

As to the Respondent's accusation that the DMV is intransigent and should be punished for its temerity in attempting to overturn established law, the Petitioner stands on his arguments that the law is not settled and the volume of cases putting drivers back on the road because of a flawed interpretation of the law surrounding blood tests is a good faith effort to ask this Court to examine this case.

CONCLUSION

The *Final Order Denying Petition for Judicial Review* must be reversed.

Respectfully submitted,

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