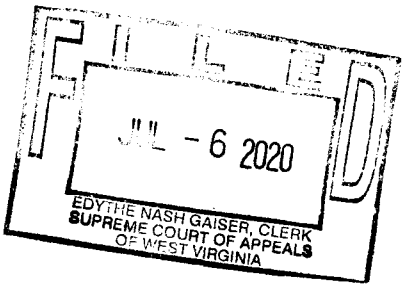
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0127



EVERETT FRAZIER, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

PETITIONER,

vs.

GARLAND HARLESS,

RESPONDENT.

The Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 19-AA-47

RESPONDENT'S BRIEF

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OVERVIEW

This case is about the denial of a private citizen's Constitutional Due Process right to confront his accusers in an administrative driver's license proceeding. The arresting officer failed to appear for a hearing despite being under subpoena. In response, the OAH and the Respondent proceeded with a hearing and resolution on the matter thereby denying Petitioner his opportunity to confront his accusers and dispossessing him of one of the most effective means of challenging the accuracy of the documents prepared by his accusers– cross examination.

STATEMENT OF FACTS

Petitioner is employed as a commercial driver and operates a commercial vehicle for a living. A.R. 298. On July 8, 2012 Petitioner was stopped by Patrolman M.A. Simms (hereinafter "Instigating Officer") of the South Charleston Police Department and arrested for driving under the influence of alcohol. A.R. 277.

Thereafter, Patrolman Simms transmitted the D.U.I. Information Sheet to the West Virginia Division of Motor Vehicles (hereinafter "DMV"). A.R. 73. The Commissioner of the DMV issued an *Order of Revocation* and O*rder of Disqualification* on July 27, 2012. A.R. 34-35. On August 14, 2012, Petitioner timely requested an administrative license revocation hearing to challenge the evidence against him and retained counsel. A.R. 39. In his hearing request form, Petitioner specifically challenged the results of the secondary chemical test of the breath pursuant to West Virginia Code §17C-5A-2. A.R. 32.

The administrative hearing was initially scheduled for November 30, 2012. A.R. 42. However, after several continuances initiated by both parties and the OAH, a hearing was

eventually held on April 27, 2017. A.R. 264. Prior to the hearing, on June 15, 2016 the DMV filed a *Motion for Evidentiary Submission* requesting the pre-admission of the DMV Commissioner's file. A.R. 155.

The Petitioner produced no live witnesses at the April 27, 2017 hearing. The only individual to testify in this matter was Petitioner. A.R. 276. Neither the arresting officer nor any witness for the DMV appeared at the hearing to testify and the DMV rested its case entirely on the Commissioner's file. A.R. 275. Patrolman Simms was under a valid subpoena by the Petitioner but was deployed overseas with the United States Military. A.R. 6. The Respondent objected the hearing moving forward without the presence of the Investigating Officer and to the admission of the Commissioner's file in his absence. A.R. 270.

Despite there being no witness to authenticate and identify the reports offered by the DMV, the hearing examiner nonetheless allowed those documents into evidence and proceeded with the administrative hearing. *Id.* There being no witness to cross examine, Petitioner was left with no means in which to challenge the written evidence introduced by the Respondent. Stripped of his constitutional right to confront his accusers, the Petitioner took the stand and refuted the allegations contained in the Investigating Officer's reports. A.R. 277. Unlike the arresting officer, Petitioner subjected himself to cross examination and his testimony was subject to scrutiny.

Petitioner testified that he had been visiting friends on their boat at the levee in Charleston, West Virginia. A.R. 279. Petitioner testified that he had consumed two (2) beers at 10:00 p.m. *Id.* Petitioner was then travelling home on his Harley-Davidson motorcycle when he was stopped by the Investigating Officer. A.R. 277. However, as was pointed out during the

hearing, the D.U.I. Information Sheet identified Petitioner's motorcycle as a Honda rather than Harley Davidson Motorcycle. A.R. 277-278. Petitioner further testified that he was wearing work boots during the field sobriety test and that he had back surgery six (6) months prior to the traffic stop. A.R. 280-289.

Moreover, Petitioner testified that he had smokeless tobacco in his mouth at the time Patrolman Simms conducted the preliminary breath test and that Patrolman Simms did not check Petitioners mouth prior to the test. *Id.* at 283-285. It was also brought up at the hearing that portions of the D.U.I. Information Sheet was handwritten and other portions were typed, inferring that the form was completed at separate intervals. A.R. 312.

Additionally, it was argued by Petitioner's counsel that based upon the Investigating Officer's notations in the medical assessment portion of the D.U.I. information Sheet, the Petitioner should not have been subject to the field sobriety test as it would be unreliable considering the Petitioner's medical assessment. A.R. 313. Finally, Petitioner's counsel argued that the Investigating Officer failed to note Petitioner's score on the one-leg stand. A.R. 315.Therefore, it is indeterminable if Petitioner passed or failed the test as the most crucial element is missing - the result.

The OAH's Final Order was issued April 26, 2019, upholding the DMV's *Order of Revocation and Order of Disqualification.* A.R. 224. In the OAH's *Final Order* the hearing examiner discredited Petitioner's testimony and found that the Investigating Officer's reports more credible than the live testimony. The hearing examiner found Petitioner less credible than the Investigating Officer even though the Investigating Officer was not present to "explain this notation . . . of the very document he prepared" and further explained that ". . . the only

evidence in this case indicates that Petitioner failed the medical assessment, meaning the Investigating Officer should never have proceeded to administer the Horizontal Gaze Nystagmus test." A.R. 225. Additionally, the hearing examiner noted that there was "no officer narrative of any type or in any format" included in the Commissioner's file. *Id.*

Thereafter, Petitioner timely appealed that decision to the Circuit Court of Kanawha County. Kanawha County Circuit Jennifer F. Bailey entered a Final Order on January 17, 2020 reversing the OAH decision and reinstated Respondent's driving privileges. A.R. 1.

II. SUMMARY OF ARGUMENT

The circuit court was correct to reverse the *Final Order* by the OAH revoking Respondent's drivers' license because the OAH unlawfully admitted into evidence the Petitioner's file in violation of the Rules of Evidence and Respondent's right to confront his accusers. The Investigating Officer failed to appear at the administrative hearing despite being under subpoena. In response, the OAH and the DMV proceeded with the hearing and resolution on the matter thereby denying Respondent his opportunity to confront his accuser over his objection.

The Petitioner argues that it should prevail in a contested administrative hearing before the OAH without having to present any live witness testimony and without having to authenticate documents before their admission into evidence as required under the West Virginia Rules of Evidence, which are applicable to contested hearings before the OAH under the West Virginia Administrative Procedures Act. Petitioner advocates for a system which shields his witnesses from cross examination and impeachment.

The lower court correctly interpreted the holding in *Jordan v. Roberts*, 161 W. Va. 750,

755, 246 S.E.2d 259, 262 (1978) (quoting *North v. Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)) to include the requirement that a driver be entitled "to confront his accusers." The Petitioner urges this Court to limit that holding in the *North* case by suggesting that the mere opportunity to testify satisfies Due Process of law.

When the Petitioner is relieved of having to follow the West Virginia Rules of Evidence, drivers are forced to cross-examine an empty chair and are dispossessed of any effective means to challenge the contents of the documents being submitted by the Petitioner. The driver is thus saddled with what has proven to be the nearly impossible burden of disproving an officer's sworn statement without the benefit of cross examination.

This case is substantially similar to the matter pending before this Court in *Frazier v. Fouch* (No. 19-0350). The *Frazier v. Fouch* matter is scheduled for oral argument in the Fall term of Court.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate under Rev. R.A.P. Rule 19 because the issues raised herein involve assignments of error in the application of settled law.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a circuit court's order in an administrative appeal is made pursuant to West Virginia Code 29A-6-1. The Court reviews questions of law presented *de novo* and findings of fact by the administrative officer are accorded deference "unless the reviewing court believed the findings to be clearly wrong." Syl. Pt. 1, *Reed v. Hall*, 235 W.Va. 322, 773 S.E.2d 666 (2015). "In cases where the circuit court has amended 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*." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

B. THE LOWER COURT CORRECTLY DETERMINED THE MANDATORY ADMISSION OF THE COMMISSIONER'S FILE WAS UNLAWFUL.

In an effort to justify the deprivation of Respondent's Due Process right of confrontation, the Petitioner conflates the definition of "agency" and "party" in the West Virginia Administrative Procedures Act (APA) to reach the unintended result that the Petitioner is both the "agency" and the "party" to the litigation. Wearing both hats, the Petitioner asks this Court to authorize it to both prosecute a case and sidestep the Rules of Evidence.

West Virginia Code § 29A–5–2(b) (1964) states:

> "All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference."

Relying on the holding set forth in *Dale v. Odum/Doyle*, 233 W.Va. 601, 760 S.E.2d 415 (2014) and West Virginia Code §29A-5-2(b), the Petitioner advocates for the admission of his file into evidence absent compliance with the West Virginia Rules of Evidence or production of the author of those documents for cross-examination.

The Legislature did not include language in West Virginia Code §29A-5-2(b) that states once evidence from the agency file is offered that it must be admitted and considered as evidence or exempted from the admissibility requirements set forth in Rules of Evidence. The reason why

West Virginia Code §29A-5-2(b) states the agency's file "shall be offered and made part of the record in the case . . ." is to ensure that parties have an opportunity to review information within the Agency's file to prepare a defence and avoid ambush. Noticeably absent from West Virginia Code §29A-5-2(b) is any requirement that the evidence be admissible as evidence. Instead, the Legislature specifically chose the words "made part of the record."

Looking closely at West Virginia Code §29A-5-2(a), the Legislature specifically included one exception of the Rules of Evidence in situations where a party offers evidence not otherwise admissible under the Rules of Evidence:

> "When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonable prudent men in the conduct of their affairs. (Emphasis supplied)

The reason the Legislature included the qualifying factors set forth above is to ensure evidence is evaluated under the West Virginia Rules of Evidence and not automatically admitted as occurred herein. For evidence to be admissible when it is not otherwise admissible under the Rules of Evidence, it must be shown that the evidence is the type commonly relied upon by reasonable and prudent men and not reasonably susceptible of proof. Subjective reports completed by an adversarial investigating officer certainly do not fit that description.

The Petitioner cites several cases in support of his effort to side-step the Rules of Evidence and protect his witnesses from cross-examination. In both *Odum* and *Doyle*, the officer who completed the D.U.I. Information Sheet appeared at the administrative hearing, testified, and subjected himself to cross examination. The same is true for *Crouch v. W.Va. Div. of Motor Vehicles, 219 W.Va. 70, 631 S.E.2d 628* (2006). In *Crouch*, the DMV was the agency and the

arresting officer was the party during a time before the OAH was created in 2010. The *Crouch* decision allowed the DMV to move its entire file into evidence if it chose to do prior to the creation of the OAH. Again, however, the arresting officer appeared and testified in *Crouch*. Neither *Crouch*, *Odum* or *Doyle* contemplated the DMV proving its case via an empty chair.

Odum and *Doyle* are unique because it is the first set of cases after the OAH was created wherein the Court suggests that the agency file is admissible if it chooses to avail itself of the file. However, the Petitioner's interpretation of *Odum* and *Doyle* turns on the definition of "agency" and "party" in the State Administrative Procedures Act.

Looking closer at the West Virginia APA, the "agency" is defined as "any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches." W. Va. Code § 29A-1-2(a) (2015). Historically, the West Virginia Division of Motor Vehicles was the "agency" in administrative license revocation proceedings. However, in 2010 the Legislature created the Office of Administrative Hearings as a separate operating agency within the Department of Transportation to make rules and adjudicatecontested cases. W. Va. Code § 17C-5C-1(a) (2010).[1]

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[11] West Virginia Code § 17C-5C-3 (2010) states, in full:

The Office of Administrative Hearings jurisdiction to hear and determine all:

(1) Appeals from an order of the Commissioner of the Division of Motor Vehicles suspending a license pursuant to section eight, article two-B, chapter seventeen-B of this code;

(2) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles suspending or revoking a license pursuant to sections three-c, six and twelve, article three, chapter seventeen-B of this code;

(3) Appeals from orders of the Commissioner of the Division of Motor Vehicles pursuant to section two, article five-A, of this chapter, revoking or suspending a license under the provisions of section one of this article or section seven, article five of chapter;

(4) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying,

Thus, after 2010, the "agency" for administrative license revocation proceedings is the Office of Administrative Hearings, not the Respondent.

Not long after the Legislature created the OAH in 2010, the Legislature approved the W.Va Code R. §105-1-1 to govern administrative license revocation hearings. Leaving no doubt, the West Virginia Code of State Rules defines "party" and "parties" as "the petitioner and the respondent." W.Va. Code R. §105-1-3. Further, Petitioner is defined as "the person contesting an order or decision of the Commissioner" and the Respondent means "the Commissioner." *Id.*

Thus, for purposes of the State Administrative Procedures Act, the OAH is the agency contemplated as hearing and determining contested cases between the DMV and licensee. Therefore, all references to the "agency" in Chapter 29A refer to the OAH and the OAH only. The DMV is a party to the contested case the same as the licensee. At no point in time after the creation of the OAH does the DMV ever possess the record in an administrative license revocation hearing.

The above distinction is critical because the DMV and OAH's argument that the DMV's file is automatically admissible wholesale because the DMV is the "agency" is irreconcilable with the West Virginia APA for the reasons set forth above. The moment a licensee challenges an enforcement action by the DMV Commissioner, the matter becomes a contested case and the DMV is no longer the agency but rather becomes a party to the proceeding.

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suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters seventeen-B and seventeen-c that are administered by the Commissioner of the Division of Motor Vehicles; and

(5) Other matters which may be conferred on the office by statute or legislatively approved rules.

It is the above rational which has resulted in private citizens being forced to litigate against an empty chair and being denied their constitutional right to confront their accusers. The OAH is not obligated to introduce all evidence contained in the Commissioner's file. It certainly can allow evidence into its file, but it is not obligated to do so according to its interpretation of *Crouch*, *Odum* and *Doyle*. In this case, admitting those documents is erroneous because they lack authentication and doing so would violate the Petitioner's right to Due Process of law.

The OAH has broad discretion to admit or deny evidence under the West Virginia Rules of Evidence. Nevertheless, the OAH is bound by the West Virginia Rules of Evidence when making a ruling on the relevance and admissibility of evidence presented by either side at revocation hearings. When either party to the revocation hearing presents evidence without establishing the proper foundation or authentication, that evidence should not be admitted by the hearing examiner. Assessing probative value of proffered evidence and weighing any factors counseling against admissibility, such as the danger of unfair prejudice, is a matter for the hearing examiner's sound judgment.

However, under Petitioner's interpretation of the law, the hearing examiner is robbed of that discretion when he is directed to both accept the documents in the DMV's possession and accept them as accurate without having them authenticated for reliability subject to cross examination. There is no precedent for the admission of the Respondent's file over objection of counsel when absolutely *no* witnesses appears at the administrative hearing and the sole evidence against the driver was the "faceless, voiceless documents containing written statements of the arresting officer." *Meadows v. Reed*, No. 14-0138, 2015 WL 1588462, at *4. (Memorandum Decision)

Courts have a duty to avoid construing a statute that may lead to absurd, unjust, and unreasonable results. *See State v. Kerns*, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990) (recognizing "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results"); *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 321, 305 S.E.2d 268, 277 (1983).

"Except as otherwise provided by this code or legislative rules, the Commissioner of Motor Vehicles has the burden of proof." W. Va. Code § 17C-5C-4 (2012). The DMV bears the burden of proof by a preponderance of evidence. The DMV should not be able to introduce documents as the sole evidence against a licensee without authenticating those documents under the West Virginia Rules of Evidence and meet their statutory burden of proof. If the DMV fails to produce the arresting officer at the OAH hearing when a driver asserts his right of confrontation, or at the very least an officer who may testify to DUI Information Sheet meets an exception to the Rules of Evidence prohibiting hearsay, then the licensee should prevail as the Petitioner has failed to meet their burden under the law. The licensee, who bears no burden under the law, should not be required to secure adverse witnesses who will testify against them.

Premature or post-hearing evidence may be excluded at the discretion of the OAH unless specifically permitted by order." W. Va. Code R. § 105-1-15.3 (2016). In this case, the circuit court was correct to conclude that the contents of the testimonial reports of the Investigating Officer may not be admitted and used to satisfy the Commissioner's burden of proof when a driver asserts his right to confrontation unless the author of those documents subjects himself to cross examination.

The Petitioner cites various cases dating back to 2014 in an effort to support the

automatic, pre-hearing admission of the Commissioner's file in administrative license revocation proceedings. At the time this Court decided *Dale v. Doyle,* 223 W. Va 601, 760 S.E.2d 415 fundamental legislative change had occurred in contested license revocation hearings, namely the enactment of West Virginia Code §17C-5c-1 *et seq.* in 2010 which created the OAH. The Court in *Doyle* recognized that counsel must assert his right to confront his accusers in administrative license revocation hearings in order to avail himself of that right. For example, no evidence exists in *Doyle* to suggest that counsel sought an opportunity to cross examine Officer Anderson, who initially stopped Mr. Doyle's vehicle.

Instead, hoping to benefit from Officer Anderson's absence, the driver in *Doyle* stipulated that the evidence of Officer Anderson contained in the D.U.I. Information Sheet was hearsay and took no further action to assert his right of confrontation. *Id.* at 605, 409. Likewise, the driver in *Doyle* elected not to present any testimony or witness. *Id.* See also *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540 (W.Va. Mar. 28, 2014)(Memorandum Decision).

Similarly, in FN. 3, *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W.Va. Apr. 10, 2014)(Memorandum Decision) the driver waived the presence of the Investigating Officer at the hearing and hoped to benefit from his absence. In *Dale v. Reed*, No. 13-0266, 2014 WL 1407375 (W.Va. Apr. 10, 2014)(Memorandum Decision), the officer appeared and subjected herself to cross examination. The same is true in *Dale v. Haynes*, No. 13-1327, 2014 WL 6676545 (W.Va. Nov. 21, 2014)(Memorandum Decision) and *Reed v. Lemley*, No. 17-0797, 2018 WL 4944553 (W.Va. Oct. 12, 2018)(Memorandum Decision).

In *Dale v. Judy*, No. 14-0216, 2014 WL 6607609 (W.Va. Nov. 21, 2014)(Memorandum

Decision), the officer that initiated the traffic stop failed to appear at the administrative hearing. The driver appeared, testified, rebutted the evidence in the D.U.I. Information Sheet and asserted his right to confront his accusers. *Id.* at 2. The Court recognized the driver in *Judy* was denied his ability to confront his accuser and affirmed the OAH decision reinstating his driver's license. *Id.* at 3.

In *Reed v. Craig*, No. 14-0346, 2015 WL 3387982 (W.Va. May 15, 2015) the officer failed to appear numerous times at a time when the Commissioner was obligated to secure the investigating officer's attendance. After numerous unexplained failures of the Commissioner to secure the attendance of the investigating officer, the order of revocation was reversed by the OAH. *Id.* at 2. The Court remanded the case on appeal with instructions for the OAH to conduct a hearing to allow the driver an opportunity to confront the officer regarding the documents contained in the Commissioner's file. *Id.* at 4.

In *Reed v. Zipf*, 239 W.Va. 752, 806 S.E.2d 183 (2017), the officers that administered the DUI checkpoint appeared and testified but the initial officer which encountered the driver did not appear. Counsel for the driver in *Zipf* did not challenge the checkpoint guidelines or the correctness of the officer that testified. *Id.* at 756, 187.

In the above cases, the driver either failed to present evidence or failed to assert his right of confrontation. That is not case herein. The Respondent unequivocally asserted his right to cross examine the Investigating Officer, testified

Lastly, Petitioner alleges that administrative agencies across the country allow the government to introduce adverse testimonial documents otherwise inadmissible under the Rules of Evidence and in violation of a party's right of confrontation to satisfy their burden of proof.

Petitioner looks to Ohio for support of this proposition. However, in Ohio the Rules of Evidence are not statutorily applicable to the administrative license revocation process. Moreover, Ohio does not maintain the due process right to confront one's accusers in the administrative process as set forth in the *Jordan v. Roberts*, 161 W. Va. 750, 755, 246 S.E.2d 259, 262. Similarly, the Petitioner's comparison to the West Virginia Public Employees Grievance Board hearings is likewise misplaced because the West Virginia Rules of Evidence to not apply to those hearings.

The evidence offered by Respondent far outweighs any evidence offered by the Petitioner in this case. The Respondent's testimony that he only consumed a small amount of alcohol, did not feel impaired and aside from recovering from recent back surgery, was otherwise normal on the roadside. The Respondent established that he had a tobacco in his mouth during the administration of the secondary breath test, thus invalidating the results. Under a preponderance of the evidence standard, Respondent must prevail.

V. CONCLUSION

WHEREFORE, based upon the foregoing, the Respondent hereby respectfully requests that the order of the circuit court be affirmed.

Respectfully submitted,

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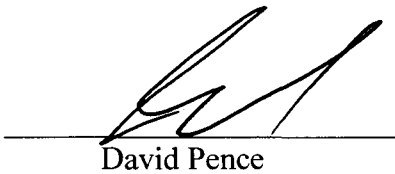
CERTIFICATE OF SERVICE

I, David Pence, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **RESPONDENT'S BRIEF** by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Janet James, Asst. Attorney General
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

on this 6th day of July 2020.



David Pence