STATE OF WEST VIRGINIA
DMV - OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 17200
CHARLESTON, WV 25317

PATRICK MORRISEY
ATTORNEY GENERAL

(304) 558-2522
FAX (304) 558-2525

June 11, 2020

The Honorable Edythe Nash Gaiser
Clerk of the WV Supreme Court
State Capitol Complex
Building 1, Room E-317
Charleston, West Virginia 25305

Re: *Frazier v. Talbert*, No. 20-0134

Dear Ms. Gaiser:

Enclosed for filing in the above-referenced action, please find an original and 10 copies of the *Brief of the Division of Motor Vehicles.*

Thank you for your attention to this matter.

Very truly yours,

Elaine L. Skorich

Elaine L. Skorich
Assistant Attorney General

Enclosure
pc: Gregory Sproles, Esquire
John T. Bonham, II, DMV Assistant General Counsel

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 20–0134

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

Petitioner,

v.

NATHAN TALBERT,

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich #8097
Assistant Attorney General
DMV Legal Division
Post Office Box 17200
Charleston, West Virginia 25317
Telephone: (304)558-2522
Telefax: (304) 558-2525
Elaine.L.Skorich@wv.gov

Table of Contents

TABLE OF AUTHORITIES

CASES: **Page**

CASES: **Page**

CASES: **Page**

CASES: **Page**

CASES: **Page**

STATUTES **Page**

RULES **Page**

ASSIGNMENT OF ERROR

This court's judicially created remedy for violations of W. Va. Code § 17C-5-9 (2013) in *Reed v. Hall* and *Reed v. Divita* should be reversed because it thwarts the purpose of the administrative sanctions for DUI and lets impaired drivers avoid license revocations by excluding all relevant evidence of DUI.

STATEMENT OF THE CASE

On June 20, 2015, at approximately 12:59 a.m., J. D. Ellison of the Nicholas County Sheriff's Department, the Investigating Officer in this matter, observed a black GMC Sierra driving with its tires on the line marking, almost striking an object or vehicle, weaving, and swerving on Route 19 in Summersville, West Virginia. (App[1]. at PP. 176, 250.) The Investigating Officer stopped the Sierra and identified the driver as Nathan Talbert, the Respondent herein. *Id.* Mr. Talbert had the odor of an alcoholic beverage on his breath, had bloodshot and glassy eyes, was normal exiting his vehicle, was normal while walking to the roadside, and was unsteady while standing. (App. at PP. 177, 250, 270-271.) Mr. Talbert admitted to drinking "a few" at the bar. (App at PP. 177, 251.)

The Investigating Officer explained and administered the Horizontal Gaze Nystagmus Test to Mr. Talbert. (App. at PP. 177, 271-272.) Prior to administering the test, the Investigating Officer conducted a medical assessment of Mr. Talbert's eyes which indicated that Mr. Talbert was a viable candidate for the test because he had equal pupils, no resting nystagmus, and equal tracking in both eyes. (App. at PP. 177, 272-273.) During the test, Mr. Talbert exhibited lack of smooth pursuit, distinct and sustained nystagmus, and the onset of nystagmus prior to an angle of 45 degrees in both eyes. (App. at P. 177.)

The Investigating Officer explained and demonstrated the Walk-and-Turn Test to Mr. Talbert. (App. at PP. 177, 273-274.) During the instruction stage, Mr. Talbert could not keep his

---

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

balance, and during the test, Mr. Talbert exhibited impairment clues by stepping off the line, missing heel-to-toe, and raising his arms to balance. (App. at PP. 177, 274.)

The Investigating Officer explained and demonstrated the One Leg Stand Test to Mr. Talbert. (App. at P. 178.) Mr. Talbert again exhibited impairment clues by swaying while balancing, using his arms to balance, and putting his foot down. (App. at PP. 178, 275, 279-280.)

The Investigating Officer was trained and certified to administer the preliminary breath test ("PBT") using the Alco-Sensor FST. (App. at PP. 178, 249.) He observed Mr. Talbert for at least fifteen minutes prior to the PBT to ensure that Mr. Talbert did not smoke or consume alcoholic beverages. (App. at PP. 178, 255.) The Investigating Officer administered the PBT at 1:19 a.m. (App. at PP. 178, 256.) The result of the PBT was that Mr. Talbert had a breath alcohol concentration of .205%. (App. at PP. 178, 257.)

The Investigating Officer had reasonable grounds to believe that Mr. Talbert was DUI, arrested him, and transported him to the Nicholas County Sheriff's Department for processing and to administer the designated secondary chemical test ("SCT") of the breath. (App. at PP. 175, 179, 255.) The Nicholas County Sheriff's Department has designated the test of the breath as the SCT. (App. at P. 249.) The Investigating Officer was trained at the West Virginia State Police Academy to operate the Intoximeter EC/IR-II and was certified by the Bureau of Public Health on April 20, 2012, to administer the SCT. (App. at P. 179, 246, 249.)

At 1:55 a.m., the Investigating Officer read and provided Mr. Talbert with a copy of the West Virginia Implied Consent Statement, which he signed. (App. at PP. 181, 257-258.) The Investigating Officer completed all steps of the Breath Test Operational Checklist, and Mr. Talbert gave a breath sample. (App at PP. 175, 179, 259.) The instrument read "Test Complete" and printed out the test

results which indicated that Mr. Talbert's blood alcohol concentration ("BAC") was .159%. (App. at PP. 175, 179, 260.)

On July 2, 2015, the Division of Motor Vehicles ("DMV") sent Mr. Talbert an *Order of Revocation* for operating a motor vehicle in this State while having a BAC greater than .150% ("aggravated DUI") (App. at P. 94.) On July 13, 2015, Mr. Talbert appealed the *Order of Revocation* to the Office of Administrative Hearings ("OAH") (App. at PP. 96-98) challenging the "stop and arrest" as well as "the results of the secondary chemical test of the blood, breath or urine." (App. at PP. 100-102.) He did not allege that he was denied a request for an additional test of the breath or blood pursuant to W. Va. Code § 17C-5-9 (2013). *Id.*

On February 25, 2016, the OAH conducted an administrative hearing. (App. at P. 238.) Video from the Intoximeter room from the night of Mr. Talbert's arrest was presented at the administrative hearing and indicated that Mr. Talbert asked the Investigating Officer about a blood test on three separate occasions. (App. at PP. 160, 264.) The Investigating Officer admitted that Mr. Talbert requested a blood test. (App. at PP. 262, 264, 282.) However, the Investigating Officer did not take Mr. Talbert for a blood test because the officer believed that per departmental policy, blood tests were only administered when the driver was under the suspicion of being under the influence of controlled substances. (App. at PP. 262, 279.) The Investigating Officer testified that he was unaware that West Virginia law states that if a driver demands a blood test, he was mandated to take the driver for a blood test. (App. at P. 283.) Mr. Talbert did not rebut that his BAC was .159%. (App. at PP. 284-302.)

On August 5, 2019, the OAH entered a *Final Order* reversing the Commissioner's *Order of Revocation* for aggravated DUI because "[p]ursuant to *Reed v. Divita*, No. 14-1018 [*sic*] (Kanawha

County 14-AA-45) (September 2015)(memorandum decision) denial of the driver's due process rights under West Virginia Code § 17C-5-9 is grounds for reversal of the Respondent's Order of Revocation." (App. at PP. 191-196.)

The DMV filed an appeal in the circuit court of Kanawha County on September 4, 2019. (App. at PP. 205-233.) On January 22, 2020, the circuit court entered its Final Order denying the DMV's appeal. (App. at PP. 2-6.) The court upheld the OAH's order concluding that the "statutory right to a blood test for one suspected of driving under the influence of alcohol has existed since at least 1983, and the State Supreme Court has held since 1985 that denial of the right implicates due process." (App. at P. 7.) The circuit court also found "that the right to a blood test for individuals suspected of Driving under the Influence is a well-established right in West Virginia. Additionally, the Court **FINDS** that officers do not commit objectively reasonable mistakes of law when denying this right. Instead, as repeatedly held by the State Supreme Court, this denial implicates the driver's due process rights and thus mandates reversal of the *Order of Revocation*." *Id.* (emphasis in original).

On February 21, 2020, the DMV filed the instant appeal with this Court.

SUMMARY OF ARGUMENT

Mr. Talbert's .159% BAC is *prima facie* evidence that he was under the influence of alcohol pursuant to W. Va. Code § 17C-5-8(b)(3) (2013), but the OAH and the circuit court ignored the evidence of aggravated DUI and effectively applied an exclusionary rule to the evidence that Mr. Talbert committed the offense of aggravated DUI. Although the OAH and the circuit court relied on precedent requiring this result, this Court should revisit those cases. The remedy applied by the OAH and the circuit court was not provided by the Legislature, and the rescission of the license revocation solely on the basis that Mr. Talbert did not receive a blood analysis thwarts the purpose of the

administrative license revocation proceeding when the undisputed evidence proves that he committed the offense of aggravated DUI.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to West Virginia Rule of Appellate Procedure 20 is appropriate on the basis that this case involves a matter of fundamental public importance which is currently on appeal before this Court in the following unrelated matters: *Frazier v. Agin* (No. 20-0038), *Frazier v. Bowman* (No. 20-0034), *Frazier v. Raschella* (No. 20-0103), *Frazier v. Murphy* (No. 20-0092), *Frazier v. Workman* (No. 20-0035), *Frazier v. Bragg* (No. 19-0519), *Frazier v. Fazio* (No. 20-0102), *Frazier v. Fowler* (No. 20-0076), and *Warner v. Frazier* (No. 20-0199).

ARGUMENT

I. Standard of Review

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code § 29A–6-1 (1964). The Court reviews questions of law presented *de novo*; and findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015).

II. This court's judicially created remedy for violations of W. Va. Code § 17C-5-9 (2013) in *Reed v. Hall* and *Reed v. Divita* must be reversed because it thwarts the purpose of the administrative sanctions for DUI and lets impaired drivers avoid license revocations by excluding all relevant evidence of DUI.

Despite finding that the Investigating Officer had reasonable grounds to believe that Mr. Talbert was DUI (App. at P. 192, FOF 2), that there was evidence of the use of drugs, alcohol, controlled substances or any combination (*Id.* at FOF 3), and that the Respondent was lawfully arrested (*Id.* at FOF 4), the OAH reversed the revocation order of the DMV because "[p]ursuant to *Reed v. Divita*, No. 14-1018 [*sic*] (Kanawha County 14-AA-45)(September 2015) (memorandum

decision) denial of the driver's due process rights under West Virginia Code § 17C-5-9 is grounds for reversal of the Respondent's Order of Revocation." (App. at P. 193.) In its *Final Order* (App. at PP. 191-195), the OAH failed in its duty, pursuant to W. Va. Code § 17C-5A-2(f) (4) (2015), to make a finding about whether the SCT was administered in accordance with the provisions of W. Va. Code §§ 17A-5 and 17A-5A and failed to even mention Mr. Talbert's .159% BAC. Relying on this Court's decisions in *Hall* and *Divita,* the circuit court upheld the OAH's *Final Order.*

A. *Hall* and *Divita* should be overruled because they conflate the more stringent remedies appropriate for criminal actions with those more appropriate for administrative proceedings and undermine important efforts to protect the public from unsafe drivers.

West Virginia Code § 17C-5-9 (2013) mandates that a suspected impaired driver "**shall** have the right to demand" (emphasis added) a test of his "blood or breath" and that analysis of the test "**shall** be made available" (emphasis added) to the arrestee upon demand. The Legislature's use of the word "shall" in this context makes this directive to the appealing party mandatory. *See, e.g.*, Syl. pt. 1, *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."); Syl. pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969) ("The word 'shall' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation."). Although the statute utilizes the mandatory language, the Legislature did not provide a remedy in the statute if a blood or breath test was not provided or if the sample was not analyzed.

In *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015), although Mr. Hall's blood sample was taken, a "chemical test thereof," as required by W. Va. Code § 17C–5–9 (2013), was never performed. 235 W. Va. 322, 331, 773 S.E.2d 666, 675. The sample was retained under the control

of the police department and was placed in an evidence locker. The investigating officer's intent was to have the blood sample tested by the West Virginia State Police Laboratory; however, during that period of time, the West Virginia State Police Laboratory was not accepting blood, so the officer did not submit it to the lab. *Id.* In *Hall*, this Court affirmed "the conclusion of the hearing examiner and circuit court that Mr. Hall was denied the statutory and due process rights, under West Virginia Code § 17C–5–9, to have his blood tested independently." *Id.* at 333, 773 S.E.2d 666, 677.

Four months later in *Reed v. Divita*, No. 14-11018, 2015 WL 5514209 (W. Va. Sept. 18, 2015) (memorandum decision), this Court emphasized that it had previously recognized the remedy when a DUI suspect requests a blood test and is denied and reiterated that W. Va. Code § 17C–5–9 (2013) accords an individual arrested for DUI a right to demand and receive a blood test within two hours of his arrest. *Id.* "This statutory right is hardly a new development." *Id.* at *4. The *Divita* Court reminded the DMV that historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. "To deny this right would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense.... The defendant's right to *request and receive* a blood test is an important procedural right that goes directly to a court's truth-finding function." *Id.*

The Investigating Officer is not an employee of the DMV, and at the administrative hearing, he or she is a fact witness, not a party. Reversal on the sole basis that the law enforcement officer did not provide Mr. Talbert a blood test upon demand leads to the result of reversing a valid administrative license revocation for aggravated DUI. In its *Final Order*, the circuit court relied on this Court's decision in *State v. York*, 175 W. Va. 740, 338 S.E.2d 219 (1985):

> Rather, W. Va. Code 17C-5-9 [1983] accords an individual arrested for driving under the influence of alcohol, controlled substances, or drugs a right to demand and

> receive a blood test within two hours of his arrest. Furthermore, **this statutory right is hardly a new development**. Historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. **To deny this right would be to deny due process of law** because such a denial would bar the accused from obtaining evidence necessary to his defense. The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function.

(App. at PP. 6-7. (emphasis in original))

York involved the application of a criminal statute, W. Va. Code § 17C-5-9 (1983), to a criminal appeal, and the current statutory dilemma is veritably a question of how the Legislature intended the administrative license revocation provisions in W. Va. Code § 17C-5A-1 *et seq.* to interrelate with the serious criminal traffic offense provisions in W. Va. Code § 17C-5-1 *et seq.* As this Court explained in syllabus point 3 of *Smith v. State Workmen's Comp. Comm'r,* 159 W. Va. 108, 219 S.E.2d 361 (1975), "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments."

This Court also recognized that:

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syllabus Point 5, *State v. Snyder,* 64 W. Va. 659, 63 S.E. 385 (1908).

Syl. Pt. 1, *State ex rel. Simpkins v. Harvey,* 172 W. Va. 312, 305 S.E.2d 268 (1983), *superseded by statute on other grounds as stated in State ex rel. Hagg v. Spillers,* 181 W. Va. 387, 382 S.E.2d 581 (1989).

And "[t]his Court has previously recognized that administrative license revocation

proceedings and criminal DUI proceedings are two separate and distinct proceedings." *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 741, 619 S.E.2d 246, 254 (2005). This Court ". . . clearly recognized that the two 'tracks' of criminal and civil drivers' license-related proceedings that arise out of an incident where a person is accused of DUI are separate . . .If the Legislature had wanted to so intertwine the criminal and civil aspects of DUI law as to automatically void related administrative driver's license suspensions when DUI criminal charges are dropped or unproven, the Legislature could have clearly done so—but it did not." *Mullen v. Div. of Motor Vehicles*, 216 W.Va. 731, 613 S.E.2d 98, 101 (2005). This Court has observed that "[a]lthough the Commissioner is to give consideration to the results of related criminal proceedings, the criminal proceedings are not dispositive of the administrative license revocation proceedings and are not a jurisdictional prerequisite to the administrative proceedings." *Carroll v. Stump,* 217 W. Va. 748, 619 S.E.2d 261 (2005). *Compare with*, Syl. Pt. 4, *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012) (overruling syllabus point 3 of *Choma v. W. Va. Div. of Motor Vehicles,* 210 W. Va. 256, 557 S.E.2d 310 (2001) and holding "When a criminal action for driving while under the influence in violation of West Virginia Code § 17C–5–2 (2008) results in a dismissal or acquittal, such dismissal or acquittal has no preclusive effect on a subsequent proceeding to revoke the driver's license under West Virginia Code § 17C–5A–1 *et seq.* Moreover, in the license revocation proceeding, evidence of the dismissal or acquittal is not admissible to establish the truth of any fact.").

Likewise, this Court's remedy for a due process violation of a criminal statute, W. Va. Code § 17C-5-9 (2013), should not be dispositive of the administrative license revocation proceeding when there is unrebutted evidence that a driver committed the offense of aggravated DUI. "[T]he penalties for DUI are imposed under the criminal, *not* administrative, DUI statutes. *Shell v. Bechtold,*

175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (per curiam) (recognizing distinction between the judicial imposition of criminal penalties and the administrative revocation or suspension of a driver's license)." *Harrison v. Comm'r, Div. of Motor Vehicles*, 226 W. Va. 23, 32–33, 697 S.E.2d 59, 68–69 (2010).

The purpose of the administrative sanction of license revocation "is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways." *Shell v. Bechtold,* 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (per curiam). This objective of removing substance-affected drivers from our roads in the interest of promoting safety and saving lives is consistent "with the general intent of our traffic laws to protect the innocent public." *Id.* "Administrative actions and criminal sanctions are independent lines of inquiry which must not be confused or integrated." *Wagoner v. Sidropolis,* 184 W. Va. 40, 43, 399 S.E.2d 183, 186 (1990) (per curiam).

"Criminal proceedings are not necessary predicates to the maintenance of administrative proceedings for the purpose of driver's license revocations under the provisions of W. Va. Code § 17C–5A–1 for driving a motor vehicle while under the influence of alcohol. Neither are they restraints on such proceedings." *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 742, 619 S.E.2d 246, 255 (2005). Further, this Court has "observe[d] that the Legislature's inclusion of a separately-designated criminal offense for driving while license revoked for DUI is indicative of the societal importance attached to removing such motorists from our roadways. *See* W. Va. Code § 17B–4–3(b)." *State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 96–97, 502 S.E.2d 190, 193–94 (1998).

In this case, "[t]he principal question at the [administrative] hearing shall be whether the person. . .did drive a motor vehicle while having an alcohol concentration in the person's blood of

eight hundredths of one percent or more, by weight. . ." W. Va. Code § 17C-5A-2(e) (2015). "The obvious and most critical inquiry in a license revocation proceeding is whether the person charged with DUI was actually legally intoxicated." *Carte v. Cline*, 194 W. Va. 233, 238, 460 S.E.2d 48, 53 (1995).

In *Reed v. Hall, supra* and *Reed v. Divita, supra*, both civil administrative license revocation appeals, this Court created an exclusionary rule for violations of the criminal statute, W. Va. Code § 17C-5-9 (2013). This flies in the face of this Court's decisions in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012). There, this Court created a general rule that the "judicially-created exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension proceeding." Syl. Pt. 3, *Toler, supra*; Syl. Pt. 7, *Smith, supra.*

This general rule was then examined by the Court in *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (per curiam). In *Ciccone*, this Court did not reverse the general rule but instead found that a change in the statute requiring a finding of lawful arrest was a statutorily-created exclusionary rule which required the exclusion of all evidence of DUI if the OAH determined that a driver was not lawfully arrested. In *Ciccone*, this Court explained that its decision in *Clower v. W. Va. Dep't of Motor Vehicles,* 223 W.Va. 535, 544, 678 S.E.2d 41, 50 (2009), applied the 2004 version of W. Va. Code § 17C–5A–2(e) which required a specific finding of "whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol ... or was lawfully taken into custody for the purpose of administering a secondary test." The 2008 version of the statute did not contain this language. *Miller v. Chenoweth,* 229 W. Va. 114, 117 n. 5, 727 S.E.2d 658, 661 n. 5 (2012) (per curiam). "However, the Legislature amended the statute in

2010, and restored the language requiring a finding that the person was either lawfully arrested or lawfully taken into custody." *Dale v. Ciccone*, 233 W. Va. 652, 659, 760 S.E.2d 466, 473 (2014) (per curiam).

Inasmuch as *Ciccone* modified *Toler, supra,* and *Smith, supra*, relative to a finding of lawful arrest, it did not overturn the prohibition against applying the judicially-created exclusionary rule to administrative license revocation proceedings. Only the statute pertaining to lawful arrest changed.

"The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible." Syl. Pt. 3, *In re Petition of McKinney,* 218 W. Va. 557, 625 S.E.2d 319 (2005). "This purpose behind the administrative sanctions for driving under the influence set forth in West Virginia Code §§ 17–5A–1 to –4 (2009) would be thwarted if the exclusionary rule was applied in an administrative license revocation or suspension proceeding at a substantial cost to society." *Miller v. Toler*, 229 W. Va. 302, 306, 729 S.E.2d 137, 141 (2012). In *Toler*, this Court considered how other courts have acknowledged this substantial cost of excluding evidence of DUI in an administrative license revocation proceeding.

For instance, in *Powell v. Secretary of State,* 614 A.2d 1303 (1992), the Supreme Judicial Court of Maine stated that: "[b]ecause the evidence has already been excluded from the criminal proceeding, there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner. The costs to society resulting from excluding the evidence, on the other hand, would be substantial. . . *Because of the great danger posed by persons operating motor vehicles while intoxicated, it is very much in the public interest that such persons be removed from our highways.* 614 A.2d at 1306–07 (emphasis added)." 229 W. Va. 302, 307, 729 S.E.2d 137,

142. In *State ex rel. Schwartz v. Kennedy,* 120 N.M. 619, 904 P.2d 1044 (1995), the New Mexico Supreme Court held that [a] license revocation hearing "is entirely separate and distinct from the proceeding to determine the guilt or innocence of the person as to the crime of DWI." 120 N.M. 619, 626, 904 P.2d 1044, 1051. The New Mexico Court further determined that the "exclusionary rule excludes evidence of the illegal stop from the criminal DWI proceeding, thereby preventing the loss of the driver's liberty interest and deterring future police misconduct." *Glynn v. State, Taxation & Revenue Dep't, Motor Vehicle Div.*, 2011-NMCA-031, 149 N.M. 518, 252 P.3d 742, 750 (2011) *overruled by Schuster v. State Dep't of Taxation & Revenue, Motor Vehicle Div.*, 2012-NMSC-025, 283 P.3d 288 (2012).

After considering other courts' rationales for not applying the criminal exclusionary rule to administrative proceedings, this Court opined that the other courts "have found that applying the exclusionary rule in an administrative license revocation or suspension proceeding offers little deterrence for police misconduct." *Miller v. Toler*, 229 W. Va. 302, 307, 729 S.E.2d 137, 142 (2012). Further, this Court agreed that "if the exclusionary rule is extended to civil license revocation or suspension proceedings there would be minimal likelihood of deterring police misconduct because the real punishment to law enforcement for misconduct is derived by excluding unlawfully seized evidence in the criminal proceeding. When this minimal deterrent benefit is compared to the societal cost of applying the exclusionary rule in a civil, administrative driver's license revocation or suspension proceeding that was designed to protect innocent persons, the cost to society outweighs any benefit of extending the exclusionary rule to the civil proceeding." 229 W. Va. 302, 306–08, 729 S.E.2d 137, 141–43.

As this Court refused to apply the judicially-created exclusionary rule as a remedy for Fourth Amendment violations, it should not exclude all evidence of DUI for violations of W. Va. Code § 17C-5-9 (2013) in administrative proceedings. This thwarts the purpose of the administrative sanctions for DUI and lets impaired drivers avoid license revocations by excluding all relevant evidence of DUI. As discussed in *Toler, supra,* when a law enforcement officer, who is not employed by or under the control of the DMV, fails to provide a blood test upon request, the evidence of DUI can be excluded or the matter dismissed completely *in the companion criminal proceeding.* Therefore, there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner in the civil, administrative license revocation proceeding. The costs to society resulting from excluding the relevant evidence of DUI, on the other hand, are substantial. The purpose of administrative license suspensions is to protect the public – not to redress police conduct.

Here, for example, the officer's failure to provide Mr. Talbert with an additional test should be remedied in the companion criminal matter and not again in the administrative case. Instead, the lack of blood analysis must simply be weighed along with the other evidence in the case.

The deterrence rationale for applying the exclusionary rule in criminal proceedings further breaks down because in this administrative license revocation proceeding, the DMV has no further obligation to investigate or provide evidence. "The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests." *Arizona v. Youngblood,* 488 U.S. 51, 59 (1988). The DMV is under no obligation to present more evidence than it has. "Part of it stems from our

unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, see *Lisenba v. California,* 314 U.S. 219, 236 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Arizona v. Youngblood,* 488 U.S. at 58.

In *Reed v. Conniff,* 236 W. Va. 300, 779 S.E.2d 568 (2015), this Court "recognized that dismissal of the proceedings would run counter to the principle that license revocation proceedings should be, where possible and equitable, resolved on their merits and conducted in a manner 'devoid of those sporting characteristics. . .of a game of forfeits [.]' [*David v. Comm'r of W. Va. Div. of Motor Vehicles,* 219 W. Va. 493, 498, 637 S.E.2d 591, 596 (2006)] (quoting *Rosier v. Garron, Inc.,* 156 W. Va. 861, 875, 199 S.E.2d 50, 58 (1973))." 236 W. Va. 300, 309, 779 S.E.2d 568, 577.

"Stare decisis is the policy of the court to stand by precedent." *Banker v. Banker,* 196 W. Va. 535, 546 n. 13, 474 S.E.2d 465, 476 n. 13 (1996). That is, "[a]s a general rule, the principle of stare decisis directs us to adhere ... to the holdings of our prior cases [.]" *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting). Moreover, " [s]tare decisis rests upon the important principle that the law by which people are governed should be 'fixed, definite, and known,' and not subject to frequent modification in the absence of compelling reasons." *Bradshaw v. Soulsby,* 210 W. Va. 682, 690, 558 S.E.2d 681, 689 (2001) (Maynard, J., dissenting) (quoting *Booth v. Sims,* 193 W. Va. 323, 350 n. 14, 456 S.E.2d 167, 194 n. 14 (1995)).

Finally, "[a]n appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty,

stability, and uniformity in the law." Syl. Pt. 4, *Musick v. Univ. Park at Evansdale, LLC*, 241 W. Va. 194, 820 S.E.2d 901 (2018).

This Court's decision that the exclusionary rule does not apply to civil, administrative license revocation proceedings predates this Court's decisions in *Hall* and *Divita. Stare decisis* does not bar this Court from revisiting *Hall* and *Divita* so that it may apply its rationale in *Toler* to limit the remedy for police misconduct to the criminal arena while still considering the relevant evidence of DUI in the administrative arena. Uniformity and certainty in the law require it.

B. The proper standard for violations of the statute should be the multi-factored test when assessing destruction of evidence.

Although a license revocation proceeding is clearly not a criminal trial for DUI, the failure to provide a suspected impaired driver with the opportunity to obtain an independent blood or breath test is most closely associated with a failure of the State to preserve evidence in a criminal matter. In the criminal case of *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), during a murder investigation, the police destroyed a bloody couch that was in evidence. The defendant was convicted, and argued on appeal that his due process rights were violated when the trial court permitted the State to introduce evidence from the couch which he was never afforded an opportunity to examine and which was destroyed prior to trial.

There, this Court noted that "[a]s a matter of state constitutional law, we find that fundamental fairness requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the **entire record**." *State v. Osakalumi*, 194 W. Va. 758, 766, 461 S.E.2d 504, 512 (1995) (emphasis added). There this Court determined that,

> [w]hen the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the

> State at the time of the defendant's request for it, would have been subject to disclosure under either *West Virginia Rule of Criminal Procedure* or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. **In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.**

Syl. Pt. 2, *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995) (emphasis added).

Per this Court's discussion in *State v. Lanham*, 219 W. Va. 710, 639 S.E.2d 802 (2006), the couch in *Osakalumi* was a critical piece of evidence given the testimony by the State medical examiner. *State v. Lanham*, 219 W. Va. 710, 714–15, 639 S.E.2d 802, 806–07 (2006). The doctor's testimony focused on the trajectory of the bullet through the couch and was paramount to the prosecution's contention that the death was a result of a homicide and not a suicide. *Id.* The doctor's testimony was the *only* evidence of murder presented at trial. *Id.* The problem, however, was that prior to disposing of the couch, the police failed to measure either the proportions of the couch, the location of the bullet hole on the couch, or the trajectory of the bullet. The police likewise failed to properly photograph either the couch or the bullet hole. *Id.* Then, two years after the disposal of the couch, the medical examiner, who had never actually seen the couch, testified at trial about the trajectory of the bullet based upon a detective's drawing of the couch. *Id.* In addition, the detective had put together the drawing of the couch from his memory after the couch had already been destroyed. *Id.* Given those facts, this Court found that the State breached its duty to preserve evidence because the defendant was foreclosed from fully and fairly examining the medical examiner's testimony. *Id.*

Unlike *Osakalumi*, there should be no exclusion of the other relevant evidence of DUI here. First, Mr. Talbert did not rebut the .159% BAC results. Even if there had not been a SCT administered to show aggravated DUI, the DMV presented sufficient evidence of bad driving, Mr. Talbert's admission to drinking alcohol, his bloodshot and glassy eyes, the odor of alcohol on his breath, his unsteadiness while standing, impairment on three standardized field sobriety tests, and a .205% PBT result which clearly prove simple DUI. The DMV presented documentary and testimonial evidence, and Mr. Talbert both testified and was given the opportunity to cross-examine the DMV's witness. The State's case in *Osakalumi* relied solely on the medical examiner's testimony about a couch that had been destroyed. Here, the DMV's case did not rely on blood test results which were later destroyed but consisted of sufficient evidence of simple DUI and unrebutted evidence of aggravated DUI.

The United States Supreme Court has considered a state's failure to preserve breath sample evidence in the context of criminal DUI cases, which further supports applying the three-part test discussed above in these circumstances. In *California v. Trombetta,* 467 U.S. 479 (1984), two DUI defendants submitted to breath tests, each registering a BAC high enough to presume intoxication under California law. Both defendants sought to suppress their respective test results on the ground that the police failed to preserve their breath samples, even though it was standard police procedure not to preserve such samples. Both defendants maintained that had their respective breath samples been preserved, their breath-analysis test results could have been impeached. The U. S. Supreme Court rejected the defendants' arguments in *Trombetta* because, among other reasons, the police discarded the samples "in good faith and in accord with normal practice"; the chances were slim that the preserved breath samples would have exonerated the defendants in that case and, even if the

samples would have revealed inaccuracies in the breath-analysis test, the defendants had "alternative means of demonstrating their innocence"; and the state's constitutional duty to preserve evidence can only be applied to "evidence that might be expected to play a significant role in the suspect's case." *Id.* at 488-490 (footnote omitted). Under *Trombetta,* the standard of constitutionality is met where evidence possesses "an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489.

In the instant matter, Mr. Talbert submitted to a chemical test which determined that his blood alcohol concentration was .159%. By the time an additional chemical test (i.e., a blood test) was administered, it may have shown a BAC below the aggravated threshold of .150%; however, such speculation does not negate the unrebutted evidence of the .159% BAC result on the Intoximeter. It certainly would not negate the substantial evidence of simple DUI. Also, given Mr. Talbert's admission of having consumed alcoholic beverages, a blood test would have confirmed his consumption but would not have negated the substantial evidence of impairment. Thus, when adjudicating a remedy when Mr. Talbert did not receive a blood test, the Hearing Examiner should have been able to consider the multi-factored test outlined in *Osakalumi* instead of excluding all relevant evidence of DUI and ignoring the principle question at the administrative hearing.

C. Revocation is appropriate when the proper standard is applied to the specific facts of this case.

Assuming, *arguendo*, that Mr. Talbert' failure to receive a blood test was a breach of the Investigating Officer's duty, the three part test for determining the consequence for such a breach is relevant to this matter. First, the Court must consider the degree of negligence or bad faith involved. Here, the Investigating Officer testified that he believed it was the policy of the sheriff's

department that impaired drivers were only entitled to a blood test if the officer suspected the driver to be under the influence of controlled substances. (App. at PP. 278-279.) The Investigating Officer acted in good faith in following what he believed was departmental policy.

Next, when determining the remedy for a violation of W. Va. Code § 17C-5-9 (2013), this Court must consider the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available. Here, "the principal question at the [administrative] hearing shall be whether the person. . .did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight. . ." W. Va. Code § 17C-5A-2(e) (2015). The evidence presented by the DMV answers the principal question and was determined by the OAH to be reliable and probative even though the OAH ultimately did not consider it.

Moreover, a blood test would not necessarily be exculpatory evidence, i.e., "evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt" because the absence of evidence in this case was not proof of petitioner's innocence. Syl. Pt. 4, in part, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). Even if Mr. Talbert received a blood test and the results were below the aggravated threshold of .150%, the remaining evidence (bad driving, odor of an alcoholic beverage on his breath, bloodshot and glassy eyes, unsteadiness while standing, admission to drinking "a few", impairment clues on three standardized field sobriety tests, and a .205% PBT result) was sufficient to uphold a license revocation for simple DUI. Clearly, the overwhelming evidence of DUI in the record outweighs the importance of the missing blood test results.

Finally, when determining the remedy for a failure to obtain a breath or blood test as requested per W. Va. Code § 17C-5-9 (2013), this Court must consider the sufficiency of the other evidence produced at the hearing to sustain the revocation. Here, the OAH found as fact that Mr. Talbert was weaving, almost struck an object or vehicle, drove with his tires on the center line marker, and swerved his vehicle. (App. at P. 191.) The OAH also found as fact that Mr. Talbert had the odor of an alcoholic beverage emitting from his breath, had visible signs of impairment, had the inability to adequately perform field sobriety tests, including the preliminary breath test, and admitted that he "drank a few" at a bar. (App. at P. 192.) Although the OAH failed to make a finding regarding the administration and results of the secondary chemical test, it is unrebutted that Mr. Talbert's BAC was .159%. (App. at PP. 284-302.) Clearly, there was more than sufficient evidence of aggravated DUI to outweigh the importance of the missing blood test.

A secondary chemical test is not required to prove that a motorist was driving under the influence of alcohol, controlled substances, or drugs for the purpose of making an administrative revocation of the driver's license. *Dale v. Oakland*, 234 W. Va. 106, 763 S.E.2d 434 (2014) (per curiam); Syl. Pt. 1, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998); Syl. Pt. 2, *Dean v. W. Va. Dept. Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam); and Syl. Pt. 2, *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995) (per curiam). Unlike the drivers in the cases listed above and the drivers in *Hall, supra,* and *Divita, supra*, in this case, there was *prima facie* evidence that Mr. Talbert was *per se* impaired.

Nothing in W. Va. Code § 17C-5A-1 *et seq.* provides for anything except mandatory revocation when a person is deemed to have committed the *per se* offense of aggravated DUI. The

DMV mandatorily revokes when, "upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner determines that a person committed an offense described in section two, article five of this chapter. . ." W. Va. Code § 17C-5A-1(c)(2015).

The standard of review for the OAH is a preponderance of the evidence. "Also worth noting is the underlying preponderance of the evidence standard pertaining to administrative revocation proceedings." *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012). *See also, Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984); *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam). Here, the OAH found that Mr. Talbert was lawfully arrested and there were reasonable grounds to arrest Mr. Talbert for DUI, then it completely ignored the unrebutted evidence of Mr. Talbert's .159% BAC and applied a remedy not found in statute. In sum, the OAH erred in failing to make the required findings in W. Va. Code § 17C-5A-2(f) (2015), and it avoided its mandate to enter an order upholding the DMV's *Order of Revocation* if it found that the driver committed a DUI offense.

Although Mr. Talbert disputed operating a motor vehicle while under the influence of alcohol (App. at P. 285), the result of the properly administered PBT showed that Mr. Talbert had a breath alcohol concentration of .205% (App. at PP. 178, 257), and the result of the properly administered SCT showed that he had a BAC of .159%. (App. at PP. 175, 179, 260.) The results of the SCT are *per se* evidence of aggravated DUI (*see,* W. Va. Code § 17C-5-2(f) (2019)) and *prima facie* evidence of impairment (*see*, W. Va. Code § 17C-5-8 (b)(3) (2013)), yet the OAH and the circuit court excluded the same because the Investigating Officer did not take Mr. Talbert for a blood test.

Further, the fact that Mr. Talbert was DUI cannot properly be ignored. It is well-established 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); Syl. Pt. 1, *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995) (per curiam); Syl. Pt. 1, *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam); Syl. Pt. 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997); *Coll v. Cline*, 202 W. Va. 599, 605, 505 S.E.2d 662, 668 (1998); Syl. Pt. 4, *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (per curiam); Syl. Pt. 4, *Lilly v. Stump*, 217 W. Va. 313, 617 S.E.2d 860 (2005) (per curiam); *Carpenter v. Cicchirillo*, 222 W. Va. 66, 68, 662 S.E.2d 508, 510 (2008) (per curiam); Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam); Syl. Pt. 3, *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam); FN. 11, *Ullom v. Miller*, 227 W. Va. 1, 14, 705 S.E.2d 111, 124 (2010); *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012); Syl. Pt. 4, *Dale v. McCormick*, 231 W. Va. 628, 749 S.E.2d 227 (2013) (per curiam); Syl. Pt. 6, *Dale v. Dingess*, 232 W. Va. 13, 750 S.E.2d 128 (2013) (per curiam); Syl. Pt. 8, *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (per curiam). *See also*, *Dale v. Oakland*, 234 W. Va. 106, 763 S.E.2d 434 (2014) (per curiam) (applying the *Albrecht* test to an administrative license revocation for DUI with a controlled substance.)

Here, it is unrebutted that Mr. Talbert was operating a motor vehicle in West Virginia on the night of his arrest for DUI and that he consumed alcoholic beverages. Finally, even if this Court ignores his unrebutted .159% blood alcohol content, there is more than sufficient evidence of impairment to uphold the license revocation for simple DUI.

Here, Mr. Talbert submitted to the designated secondary chemical test of the breath and produced a BAC of .159%. He never rebutted this result and never produced evidence that the test was improperly administered by the Investigating Officer. He already had obtained comparable

evidence by another means; therefore, there was no exculpatory value attributable to another breath or blood test. Accordingly, an appropriate remedy for a violation of W. Va. Code § 17C-5-9 (2013) should fall short of automatic rescission of the *Order of Revocation* and should depend, at least in part, on what other evidence was produced to prove the offense as well as whether the evidence that was not preserved was utilized by the court in rendering its decision.

Relying on this Court's remedy provided in *Hall* and. *Divita*, the OAH and the circuit court reversed an otherwise valid revocation because Mr. Talbert did not receive a blood test after he had already taken the designated secondary chemical test which showed a BAC of .159%. The OAH answered only part of the principal question in the affirmative and completely ignored the unrebutted evidence of Mr. Talbert's .159% BAC while applying a remedy not found in the administrative license revocation statutes. This Court should make clear that the OAH should apply the statute as it is written and to answer the principal question at the administrative hearing as found in W. Va. Code § 17C-5A-2(e) (2015). The answer to that question is that Mr. Talbert committed the offense of aggravated DUI.

CONCLUSION

This Court's decisions in *Reed v. Hall* and *Reed v. Divita* should be overruled because those decisions conflate the more stringent remedies appropriate for criminal actions with those more appropriate for administrative proceedings and undermine the DMV's statutory mandate to protect the public from impaired drivers. The ordinary rationale for the exclusionary rule in criminal contexts as explained by this Court in *Miller v. Toler* – the deterrence of police misconduct – does not apply here because any police deterrence for failing to obtain a blood test upon demand is not as strong when the evidence of DUI in the administrative arena is so compelling. The cost of

excluding all evidence of DUI at the administrative hearing is extremely high in terms of public safety when the purpose of administrative license suspensions is to protect the public – not to redress police conduct.

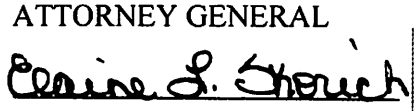
For these reasons, *stare decisis* does not compel keeping *Hall* and *Divita* on the books, and this Court should adhere to its rationale in *Toler* and require application of the multi-factored test when assessing destruction of evidence instead of permitting the complete exclusion of all relevant evidence of DUI if there are no blood test results. When the proper standard is applied to the facts of this case, revocation for aggravated DUI is the only answer to the principle question at the administrative hearing. The circuit court's *Final Order* must be reversed.

Respectfully submitted,

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

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Elaine L. Skorich, AAG, No. 8097
DMV Legal Division
Post Office Box 17200
Charleston, WV 25317
Telephone: (304) 558-2522
Telefax: (304) 558-2525
Email: Elaine.L.Skorich@wv.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 20–0134

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

Petitioner,

v.

NATHAN TALBERT,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that the foregoing *Brief of the Division of Motor Vehicles* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 11th day of June, 2020, addressed as follows:

Gregory Sproles, Esquire
509 Church Street
Summersville, WV 26651

Elaine L. Skorich
Elaine L. Skorich