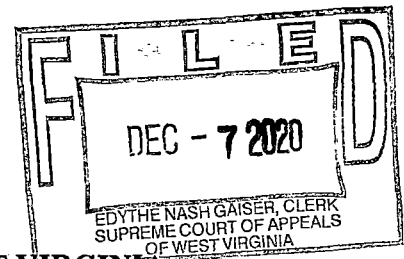


DO NOT REMOVE
FROM FILE



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0482

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

Petitioner,

v.

NICHOLAS DEEMS,

Respondent.

FILE COPY

Honorable Darl Poling
Circuit Court of Raleigh County
Civil Action No. 19-AA-11-P

PETITIONER'S REPLY BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304)558-2522
Janet.E.James@wv.gov

ARGUMENT

The Circuit Court Erred by Substituting its Judgment for That of the Factfinder and Concluding That the Time of Refusal Was 2:23 a.m.

W. Va. Code §17C-5-7(a) [2013] provides, “If any person under arrest as specified in section four of this article refuses to submit to any secondary chemical test, the tests shall not be given: Provided, That prior to the refusal, the person is given an oral warning and a written statement advising him or her that his or her refusal to submit to the secondary test finally designated will result in the revocation of his or her license to operate a motor vehicle in this state for a period of at least forty-five days and up to life; and that **after fifteen minutes following the warnings the refusal is considered final.**” [Emphasis added]. In this case, the warnings were given at 1:53 a.m. Fifteen minutes later, at 2:08 a.m., the Respondent had not consented to take the test. Therefore, the refusal was final. Fifteen minutes after that, at 2:23 a.m., the Investigating Officer pushed the button on the Intoximeter to signify that the refusal was final. The “02:23” time notation of refusal on the Intoximeter ticket (A.R.51) is not dispositive of when the Respondent first refused to take the test. It is simply when the Investigating Officer “pushed refusal.” A.R. 164.¹ The record shows that the Investigating Officer asked the Respondent “several times” (A.R. 160) to blow correctly. The Investigating Officer then “put a refusal down.” A.R. 160.

Even if the initial refusal was after the 20-minute observation period which began when the Implied Consent Statement was signed, the Respondent was still with the Investigating Officer for 20 more minutes. The Criminal Complaint states, “Once at headquarters the defendant was read his implied consent statement. The defendant signed the implied consent and was observed for twenty minutes at which time the defendant refused the Intoxilyzer EC/IR-II.” A.R. 60. This puts the refusal

¹Reference is to the Appendix Record.

at 2:13 a.m. (20 minutes after he signed the Implied Consent Statement). The Respondent was not taken to jail until 10 minutes after the Investigating Officer recorded the refusal on the Intoximeter at 2:23 a.m. (approximately 2:33 a.m.). Under either the theory that the refusal was final 15 minutes after the Implied Consent Statement was read and signed, or 15 minutes after the 20-minute observation period, the Respondent was with the Investigating Officer and able to revoke the refusal for more than 15 minutes. The circuit court's finding that the only relevant time is the Intoximeter ticket, with the 2:23 a.m. refusal time entered, is in error.

The lack of any evidence that the Respondent revoked his refusal and wanted to take the test renders the 15-minute time period moot. In *Cain v. W. Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010), this Court noted that the failure of a driver to present any evidence in his behalf does not shift the burden of proof. "[T]he Respondent was present at his administrative hearing and chose not to testify, therefore he did not deny that he was driving, and did not present any testimony or evidence that he consumed alcohol after he stopped his vehicle." 225 W. Va. 472, 694 S.E.2d 314. Here, the circuit court neglected to consider that there is no evidence (the Respondent did not testify) that the Respondent ever revoked his refusal.

The refusal time reflected on the Intoximeter ticket is not dispositive of when the test was offered or initially refused. Following the reading of the Implied Consent Statement, the Respondent refused to take the test, as evidenced by his conduct over a period of more than 15 minutes. "On the issue of whether there was a refusal to take the test, the general rule appears to be that where the request is made to take the test and the licensee by his conduct or words manifests a reluctance to take the test or qualifies his assent to take the test on factors that are extraneous to the procedures surrounding the test, proof of refusal is sufficiently established." *Jordan v. Roberts*, 151 W. Va. 750,

759, 246 S.E.2d 259, 264 (1978). The Investigating Officer clearly complied with W. Va. Code § 17C-5-7(a) [2013]. There is no evidence that the Respondent ever complied by producing a breath sample.

The Respondent is in error in arguing, "Instead of offering Mr. Deems additional instructions or allowing Mr. Deems an opportunity to correct his failed attempt, Cpl. Adkins terminated the test." Resp. Brf. at 5. This implies that the test was offered, refused and entered by the Investigating Officer within the minute of 2:23 a.m. In fact, the Investigating Officer testified that after he asked the Respondent to take the test, "I had tried to initiate the Intoxilyzer, which is he went to take it but he wouldn't blow into the machine, like he wasn't blowing. And I advised him several times, explained to him that he needed to blow into it or it's not going to pick it up." A.R. 160.

The circuit court erred in finding, "there is no evidence in the record that would show that the officer waited the required 15 minutes before he elected to remove the [Respondent] from the law enforcement agency's office and transport him to jail." A.R. 4. The DUI Information Sheet shows that the Respondent "refused after 15 minutes". A.R. 55. The evidence set forth above also shows that more than 15 minutes passed after the Respondent's refusal.

The circuit court's interpretation of the evidence is too narrow and improperly substitutes its judgment for that of the factfinder. The Office of Administrative Hearings found that 30 minutes elapsed between the signing of the Implied Consent Statement and the Investigating Officer's noting refusal on the Intoximeter. A.R. 98.

The evidence shows that the timeframes set forth in W. Va. Code §17C-5-7 were met. The circuit court's reinterpretation of the evidence of the times on the Implied Consent Statement, the Intoximeter ticket and the Investigating Officer's testimony is factually in error, is an improper

substitution of judgment, and is contrary to the provisions in W. Va. Code 17C-5-7(a)[2013]. In light of the absence of evidence that the Respondent wished to take the test, the issue of the 15-minute time for refusal is moot.

CONCLUSION

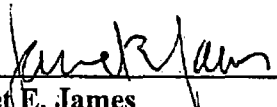
The circuit court's *Order Granting Petition and Reversing Office of Administrative Hearings' Final Order* should be reversed.

Respectfully submitted,

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

By counsel,

**PATRICK MORRISEY
ATTORNEY GENERAL**



**Janet E. James
Assistant Attorney General
West Virginia State Bar No. 4904
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, WV 25317
(304) 558-2522**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0482

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

Petitioner,

v.

NICHOLAS DEEMS,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner's Reply Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 7th day of December, 2020, addressed as follows:

David Pence, Esq.
Zerbe & Pence PLLC
P. O. Box 3667
Charleston, WV 25336



JANET E. JAMES