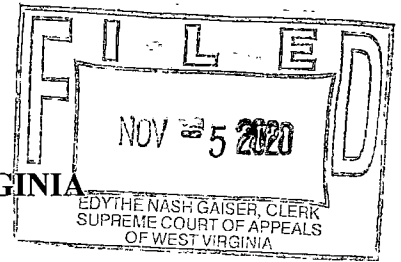


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0482**



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

Petitioner,

v.

NICHOLAS DEEMS,

Respondent.

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**Circuit Court of Raleigh County
Civil Action No. 19-AA-11-P**

RESPONDENT'S BRIEF

NICHOLAS DEEMS

BY COUNSEL

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I. STATEMENT OF THE CASE

Following his arrest for driving under the influence of alcohol on November 19, 2017, Respondent Nicholas Deems was transported to the Raleigh County Sheriff's Office by Corporal Billy J. Adkins (Cpl. Adkins) of the Raleigh County Sheriff's Department for further investigation. According to Cpl. Adkins, the Respondent was observed for a period of twenty (20) minutes while he completed paperwork. A.R. 161.¹

At 1:53 a.m., Cpl. Adkins read The West Virginia Implied Consent Statement to Respondent. Included in the Implied Consent Statement is the warning that "If you refuse you will have fifteen minutes in which to change your mind after which time your refusal will be deemed final and the arresting officer will have no further duty to offer you this approved secondary chemical test." A.R. 58.

Cpl. Adkins next initiated the Intoximete EC/IR II breath machine and Respondent placed his mouth on the mouth piece as instructed. A.R. 160. However, he did not provide a sufficient breath sample to acquire a reading. *Id.* The test was then terminated at 2:23 a.m. when Cpl. Adkins pushed the refusal button on the Intoximeter EC/IR II. A.R. 162. Mr. Deems became irate as a result. A.R. 162.

A DUI Information Sheet was completed by Cpl. Adkins in this case. Under the section titled "BLOOD TEST," Cpl. Adkins documented that he offered Respondent a blood test at 2:24 a.m., just one (1) minute after Respondent's failed breath attempt.

According to Cpl. Adkins, Mr. Deems was next removed from the Sheriff's Department "fairly quickly. I would say ten minutes or under. I'm not - - - I can't say 100 percent, but I would

¹ Reference is to the Appendix Record.

say it was fairly quickly.” A.R. 164. Thus, no evidence exists to establish that Cpl. Adkins provided Mr. Deems with the required fifteen (15) minute time limit for refusal pursuant to W.Va. Code §17C-5-7.

On December 4, 2017 The Division of Motor Vehicles issued an *Order of Revocation* regarding Respondent’s arrest for driving under the influence and refusing a secondary breath test. A.R. 49, 82. Mr. Deems timely and appropriately requested an administrative license revocation hearing before the Office of Administrative Hearings (“OAH”) and denied that he refused a secondary breath test. A.R. 16. A hearing was conducted on February 7, 2019. A.R. 136.

The OAH entered a *Final Order* on August 15, 2019 upholding the DMV’s order of revocation for DUI and refusal. A.R. 95. The Respondent appealed the *Final Order* to the circuit court of Raleigh County challenging the finding that he lawfully refused the secondary breath test. A.R. 114. On June 2, 2020, the circuit court entered its *Order Granting Petition for Appeal and Reversing Office of Administrative Hearings’ Final Order*. A.R. 1.

II. SUMMARY OF ARGUMENT

The circuit court correctly concluded that Respondent was not allotted the required fifteen minutes required to deem the refusal of the secondary breath test final pursuant to W.Va. Code §17C-5-7. The officer’s live testimony confirms that Respondent was removed from the Raleigh County Sheriff’s Office “fairly quickly. I would say ten minutes or under” after Respondent’s initial effort to provide a sufficient breath sample was registered as a refusal.

The circuit court correctly determined that the DMV failed to meet its burden of proof and that there exists no evidence in the record to show that the officer waited the required fifteen (15) minutes before removing the Respondent from the Raleigh County Sheriff’s Office for transport to

the jail. Petitioner's argument that the required fifteen minute period set forth by W.Va. Code §17C-5-7 for a motorist to recant their initial refusal begins at the time the Implied Consent warning is read is unsupported by the evidence. The circuit court correctly determined that the Implied Consent warning was read over fifteen minutes before the secondary breath test was ever offered, thus preventing Respondent from an opportunity to correct his initial failed attempt to produce a sufficient breath sample.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R. App. Pro 19 is appropriate on the basis that this case involves 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 CIRCUIT COURT CORRECTLY DETERMINED THAT RESPONDENT WAS NOT GIVEN THE REQUIRED 15-MINUTE PERIOD IN WHICH TO RECANT HIS INITIAL REFUSAL OF THE SECONDARY BREATH TEST.

The sole issue before the Court is whether the fifteen (15) minute period of time for a motorist to recant their initial refusal of the secondary breath test pursuant to W.Va. Code §17C-5-7 begins at the time the Implied Consent warning is delivered or whether at time the driver is first offered an opportunity to take the secondary breath test. The circuit court correctly concluded that the fifteen (15) minute time period beings when the driver is first offered the secondary breath test.

According to W.Va. Code §17C-5-7 (2013) “. . . 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 o at least forty-five days and up to life; and that after fifteen minutes following the warnings the refusal is considered final. The arresting officer after that period of time expires has no further duty to provide the person with an opportunity to take the secondary test.”

In this case, the Implied Consent warning provided to the Respondent at 1:53 a.m. states “If you refuse you will have fifteen minutes in which to change your mind after which time your refusal will be deemed final and the arresting officer will have no further duty to offer you this approved secondary chemical test.” A.R. 58. As evidenced by the Implied Consent warning provided to the Respondent, the fifteen minutes beings at the time of refusal.

The Petitioner asks this Court to begin the fifteen minute period for a driver to change his/her mind at the time the Implied Consent warning is read, not when the test is first offered. Such a finding would contradict the Implied Consent warning provided to the Respondent in this case and result in the inequitable result of a driver being denied any meaningful opportunity to change their mind following a refusal.

In this case, Cpl. Adkins elected not to start the secondary breath test until thirty minutes after

providing Respondent a copy of the Implied Consent warning. Had Cpl. Adkins offered Mr. Deems the secondary breath test immediately following the Implied Consent warning, all confusion would have been eliminated.

The reason a fifteen minute buffer period is included in W.Va. Code §17C-5-7 is to ensure a driver's refusal is intentional. Under the Petitioner's logic, a driver who in good-faith, unintentionally provides an insufficient sample could be charged with refusal if the officer both administers the secondary breath test more than fifteen minutes after the Implied Consent warning and decides the driver could have blown harder in the testing machine. In this example, the officer would be under no obligation to offer the driver a second opportunity to provide a breath sample.

In this case, Respondent put his lips on the mouthpiece but did not provide a sufficient sample. Instead of offering Mr. Deems additional instructions or allowing Mr. Deems an opportunity to correct his failed attempt, Cpl. Adkins terminated the test. Had Cpl. Adkins offered the test immediately after administering the Implied Consent warning, Mr. Deems would be entitled to an additional opportunity to correct his failed breath sample/refusal.

Cpl. Adkins acknowledged that Mr. Deems only became irate when he was told that his first failed attempt equated to a refusal. A.R. 162. Mr. Deems should have been offered the required fifteen minute period in which to change his mind to provide a sufficient sample as he was guaranteed in the Implied Consent warning. However, the evidence proves that Mr. Deems was removed from the Raleigh County Sheriff's Department approximately ten minutes after his first failed attempt.

The Petitioner points to the recent amendments to W.Va. Code §17C-5-7 (2020) establish the Legislature's intent to begin the fifteen minute period for recantation when the driver first refuses

the test. Respondent agrees. In this case, the Respondent did not refuse the test until it was offered at 2:23 a.m.. He should have been afforded fifteen minutes in which to change his mind.

The circuit court correctly concluded that the OAH was clearly wrong and contrary to the evidence submitted in this case. A.R. 5. "Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong. Syl. Pt. 1, *Francis O. Day Co., Inc. v. Director, Div. of Env'tl. Prot.*, 191 W.Va. 134, 443 S.E.2d 602 (1994)." Syl. Pt. 2, *Lilly v. Stump*, 217 W.Va. 313, 617 S.E.2d 860 (2005).

V. CONCLUSION

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

Respectfully submitted,

NICHOLAS DEEMS

By counsel,



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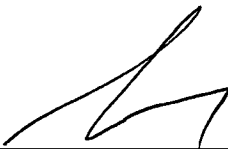
Respondent.

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 4th day of November 2020.



David Pence