IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0746
(Circuit Court Civil Action No. 19-AA-123)

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

Petitioner,

v.

JOSEPH SLYE,

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

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ASSIGNMENT OF ERROR

The circuit court erred in not upholding the DMV's *Order of Revocation* for Mr. Slye's refusal to take the designated secondary chemical test.

STATEMENT OF THE CASE

On May 23, 2018, Deputy B. Frick of the Berkeley County Sheriff's Department ("Investigating Officer") was dispatched to 91 Rutherford Lane, Bunker Hill, West Virginia, by Berkeley County Central Dispatch in response to a call reporting a male subject asleep behind the wheel of a motor vehicle and blocking the resident's driveway. (App[1]. at P. 191.) Upon arrival, the Investigating Officer observed a white GMC Sierra belonging to Mr. Slye, the Respondent herein, parked in the middle of Rutherford Lane. (App. at PP. 179, 191.) Mr. Slye was sleeping and snoring behind the wheel with the keys in the ignition and the engine running. (App. at P. 191.) The Investigating Officer woke Mr. Slye who was confused, drowsy, and disoriented and smelled strongly of an alcoholic beverage. (App. at PP. 179, 191.) Mr. Slye admitted that he had been heavily drinking Fireball whiskey. *Id.* He had slurred speech. *Id.*

Mr. Slye refused to take the standardized field sobriety tests and the preliminary breath test. (App. at PP. 180-181, 191.) The Investigating Officer arrested Mr. Slye for driving under the influence ("DUI") and transported him to the Berkeley County Sheriff's Department for processing and administration of the secondary chemical test ("SCT.") (App. at P. 191.) The Investigating Officer checked the box on the DUI Information Sheet which states that "implied consent read and provided to the subject." (App. at P. 181.) Mr. Slye refused to sign the form and to take the designated SCT. (App. at PP. 181-182, 191, 243.)

On June 19, 2018, the Division of Motor Vehicles ("DMV") sent Mr. Slye orders of

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

revocation for DUI and refusing the SCT ("refusal.") (App. at PP. 53-54.) On July 10, 2018, the Office of Administrative Hearings ("OAH") received Mr. Slye's *Written Objection and Hearing Request Form* on which he asked for an administrative hearing "on the grounds of lack of probable cause for stop, arrest, to administer preliminary breath test, intoxilyzer, incorrect administration of field sobriety tests and inability to lay proper foundation for admission of intoxilyzer results." (App. at P. 50.) Although Mr. Slye included the file number of the *Order of Revocation* for refusal, he did not check the box on the hearing request form alleging that he was challenging "the allegation that [he] refused to submit to the designated secondary chemical test." (App. at P. 49.) In the written statement attached to the hearing request form, Mr. Slye did not contest that he refused the SCT or that he was not read or provided with a copy of the West Virginia Implied Consent Statement. (App. at P. 50.)

On May 15, 2019, at the administrative hearing, the OAH admitted the DUI Information Sheet and Implied Consent Statement into evidence at the administrative hearing without objection. (App. at PP. 232, 239.) The Investigating Officer testified on direct examination that he "read him the Implied Consent. . . I just read the Implied Consent to him and then I observed him for 20 minutes. And then he refused to sign the Implied Consent." (App. at P. 243.) On cross examination, when asked if he actually gave Mr. Slye a copy of the West Virginia Implied Consent Statement, the Investigating Officer testified, "I did not, sir." (App. at P. 248.)

On September 10, 2019, the OAH upheld the license revocation for DUI but reversed the license revocation for refusal (App. at PP. 193-198) although Mr. Slye did not contest the same on his hearing request form. On October 7, 2019, the DMV appealed the part of the order regarding the refusal to the Circuit Court of Kanawha County. (App. at PP. 23-41.) On August 25, 2020, the circuit

court entered a *Final Order Denying Petition for Judicial Review*. (App. at PP. 2-7.) The circuit court concluded that the OAH's "factual finding that [Mr. Slye] was not provided with a physical copy of the Implied Consent Statement is eminently reasonable. The undisputed facts in this matter indicate that the Implied Consent Statement was read and explained to [Mr. Slye.] Similarly, the OAH's interpretation of the plain language, statutory mandate of § 17C-5-7 requiring the arresting officer provide an oral and written notice to the arrestee, is also reasonable." (App. at P. 6.) The circuit court further found that the "OAH's ruling that [Mr. Slye]'s 'refusal' did not satisfy the statutory requirements for a refusal under § 17C-5-7 cannot be 'clearly wrong' or an error of law. [DMV]'s argument that this Court should employ a totality of the circumstances test to determine whether the arresting officer's actions were in compliance with the purpose and spirit of the statute, when [DMV] admits it did not comply with the clear terms of the statute is unavailing." (App. at PP. 6-7.)

SUMMARY OF ARGUMENT

On the night of Mr. Slye's arrest, the Investigating Officer checked the box on the DUI Information Sheet which states that "implied consent read and provided to the subject." Mr. Slye failed to contest the allegation of refusal when he filed his appeal of the DUI with the OAH. At the administrative hearing, the OAH admitted the DUI Information Sheet into evidence without objection. The Investigating Officer testified on direct examination that he read the Implied Consent Statement to Mr. Slye and that Mr. Slye refused to sign the same. The Investigating Officer testified on cross examination that he did not give Mr. Slye a copy of the West Virginia Implied Consent Statement.

By asking Mr. Slye to sign the Implied Consent Statement, the Investigating Officer was

giving Mr. Slye the opportunity to read the statement for himself, but Mr. Slye refused. That is all that is required of W. Va. Code § 17C-5-7(a) (2013). The officer is required to read the statement aloud in case the driver is illiterate or cannot see the printed page and is required to let the driver read the statement for himself in case the driver is deaf or has auditory comprehension issues. The statute does not require the Investigating Officer to force the driver to read the statement, to force the driver to sign the statement to demonstrate that it was in his possession, or to provide the driver a souvenir copy of the statement to take home with him.

It is clear that the Investigating Officer complied with the mandatory requirements of W. Va. Code § 17C-5-7(a) (2013), that Mr. Slye refused to read or sign the Implied Consent Statement, and that the OAH and the Circuit Court misinterpreted the elements of the statute.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R. App. Pro. 19 (2010) is appropriate on the bases that this case involves an assignment of error in the application of settled law and a narrow issue of law.

ARGUMENT

A. Standard of Review

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)." Syllabus Point 1, *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66 (2018).

B. The circuit court erred in not upholding the DMV's *Order of Revocation* for Mr. Slye's refusal to take the designated secondary chemical test.

1. The issue of refusal was not properly before the OAH.

On his hearing request form, Mr. Slye failed to challenge that he "refused to submit to the designated secondary chemical test." (App. at PP. 49-50.) Further, Mr. Slye failed to testify at the very hearing which he requested (App. at P. 234); therefore, he did not assert later under oath that he was not given the opportunity to read the Implied Consent Statement. Accordingly, the issue of refusal was never before the OAH, and it sandbagged the administrative process by *sua sponte* creating the issue of refusal when it is unrebutted that the Investigating Officer asked Mr. Slye to sign, and therefore to read, the Implied Consent Statement but he refused to do so.

The OAH lacked jurisdiction to hear an uncontested issue at the administrative hearing. In *Reed v. Thompson*, 235 W. Va. 211, 772 S.E.2d 617 (2015), this Court opined, "[i]n 2010, the Legislature created the OAH and gave it power to hear appeals of certain orders and decisions by the DMV. W. Va. Code § 17C-5C-1 [2010]. The OAH is authorized to conduct hearings over these matters consistent with the statutory provisions in chapters 29A ('State Administrative Procedure Act'), 17B, and 17C of the West Virginia Code. W. Va. Code § 17C-5C-4 [2010.]" 235 W. Va. 211, 214, 772 S.E.2d 617, 620.

The OAH adopted administrative rules as it was authorized to do by W. Va. Code § 17C-5C-4a (2012). *See* W. Va. Code R. § 105–1–1 (2013) (setting July 1, 2013, as effective date of OAH's administrative rules[2]). The administrative rules contain no provision for hearing uncontested matters in contravention to W. Va. Code § 29A-5 *et seq.* (1964), which outlines the procedures for

[2] The 2016 version of W. Va. Code R. § 105-1 is applicable to Mr. Slye's case.

"***Contested*** Cases." To contest means "[t]o assert a defense to an adverse claim in a court proceeding. To oppose, resist, or dispute the case made by a plaintiff or prosecutor. To strive to win or hold. To controvert, litigate, call in question, challenge. To defend, as a suit or other proceeding." *Black's Law Dictionary*, 320 (6th ed. 1990).

This Court has held that an administrative agency may not exercise authority which is not given to it expressly or impliedly in statute.

> Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. *They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.*
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> Syl. Pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973) (emphasis added). *See also State ex rel. Hoover v. Berger*, 199 W. Va. 12, 19, 483 S.E.2d 12, 19 (1996) ("An administrative agency ... has no greater authority than conferred under the governing statutes.").

Reed v. Thompson, 235 W. Va. 211, 214, 772 S.E.2d 617, 620 (2015).

An administrative agency's authority to hear an uncontested matter is not valid unless the agency was given the authority under a statute or administrative rule to do so. *See Mustard v. City of Bluefield,* 130 W. Va. 763, 766, 45 S.E.2d 326, 328 (1947) (holding that, in absence of specific authority in zoning ordinance or in statute upon which ordinance was based, a board of adjustment had no power to rehear and reconsider its final order). *Reed v. Thompson*, 235 W. Va. 211, 214–15, 772 S.E.2d 617, 620–21 (2015).

Whether an administrative agency has authority to hear an uncontested matter entails a two-part inquiry. *See Atl. Greyhound Corp. v. Pub. Serv. Comm'n,* 132 W. Va. 650, 659–61, 54 S.E.2d 169, 174–75 (1949). The first question is whether an agency's power to hear an uncontested matter

is expressly or impliedly granted by statute. *Id.* at 659–660, 54 S.E.2d at 175. If not, the second inquiry is whether the following two conditions are met: (a) the Legislature granted the agency authority to adopt administrative rules of procedure; and (b) the agency adopted an administrative rule allowing it to hear uncontested matters. *Id.* at 661, 54 S.E.2d 175. If an agency has authority to hear uncontested matters under an administrative rule (as opposed to a statute), the scope of the agency's authority is strictly limited to what is contained in the rule.

This Court has held, "[An administrative agency], by rule based upon a statute which empowers it to prescribe rules of practice and procedure and the method and the manner of holding hearings, has the authority to grant, within the time and in the manner provided by such rule, a rehearing of a final order entered by the commission in a proceeding of which it has jurisdiction." Syl. Pt. 1, *Atl. Greyhound Corp. v. Pub. Serv. Comm'n.*, 132 W. Va. 650, 54 S.E.2d 169 (emphasis added). The OAH's enabling statutes, W. Va. Code §§ 17C-5C-1 *et seq.* do not grant express statutory authority to hear an uncontested matter, and no other provision in the West Virginia Code authorizes the OAH to hear uncontested matters in violation of the clear language in W. Va. Code § 29A-5-1 (1964) *et seq.*

Additionally, the OAH had no implied authority to hear an uncontested matter. In making this determination, an agency has only as much authority as is necessary to execute its duties. *Reed v. Thompson*, 235 W. Va. 211, 215, 772 S.E.2d 617, 621 (2015). Furthermore, "this Court must presume that the Legislature did not intend to confer upon the agency any greater authority than what is clearly indicated in statutory language." *Id.*

This Court has held:

Although an express grant of powers will be determined to include such other powers

> as are necessarily or reasonably incident to the powers granted, the powers *should not be extended by implication beyond what may be necessary for their just and reasonable execution.* When a court is asked to find implied powers in a grant of legislative or executive authority it must assume that the lawmakers *intended to place no greater restraint on the liberties of a citizen than was clearly and unmistakenly indicated by the language they used.*
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> *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 727, 591 S.E.2d 277, 285 (2003) (quoting *Walter v. Richie*, 156 W. Va. 98, 108, 191 S.E.2d. 275, 281 (1972)) (citation and quotations omitted) (emphasis added).

235 W. Va. 211, 215, 772 S.E.2d 617, 621.

There have been no statutes or Legislative Rules which grant the OAH express or implied authority to hear uncontested matters in contravention to the clear language of W. Va. Code § 29A-5-1 (1964) *et seq*. Therefore, Mr. Slye's failure to contest on his *Written Objection and Hearing Request Form* that he refused to submit to the SCT deprived the OAH of subject matter jurisdiction.

Finally, although the instant matter is a civil, administrative license revocation and not a criminal proceeding where a defendant's personal liberty is in jeopardy, this Court has addressed the issue of sandbagging in the criminal indictment process.

> Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. . .
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> Syl. Pt. 1, *Miller,* 197 W. Va. at 592–93, 476 S.E.2d at 539–40. We explained the reason for this rule in *State v. Palmer,* 210 W. Va. 372, 376, 557 S.E.2d 779, 783 (2001):
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> > The purpose behind this rule is to prevent a criminal defendant from 'sandbagging' or deliberately foregoing raising an objection to an indictment so that the issue may later be used as a means of obtaining a new trial following conviction. *See* 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.1(d), at 741 (2d ed. 1999). The rule we announced in *Miller* now makes this stratagem extremely perilous.

State v. Chic–Colbert, 231 W. Va. 749, 758, 749 S.E.2d 642, 651 (2013) (per curiam).

If sandbagging is prohibited in areas of the criminal arena where a defendant can sit back and simply say, "prove your case," it should be prohibited in the context of civil cases, such as the case at bar. At no time did Mr. Slye dispute that he was provided the opportunity to read and sign the Implied Consent Statement prior to his refusal. Instead, the hearing examiner manufactured an issue not in dispute and sandbagged the administrative process. In turn, the circuit court improperly sanctioned the OAH's sandbagging.

2. The circuit court misinterpreted W. Va. Code § 17C-5-7(a) (2013).

At the administrative hearing, it was unrebutted that the Investigating Officer read the Implied Consent Statement to Mr. Slye and tried to get Mr. Slye to sign the same, which he refused. Because Mr. Slye failed to testify at the very hearing which he requested, it is unrebutted that he refused to take the SCT. There was no dispute before or during the administrative hearing that Mr. Slye was read the Implied Consent Statement, given the opportunity to read and sign the statement, and that he refused to sign the document and to take the SCT. Instead, the hearing examiner manufactured an issue which was not in dispute and created a challenge where none existed. To compound the OAH's mistake, the circuit court erroneously concluded that the "OAH's factual finding that the Respondent was not provided with a physical copy of the Implied Consent Statement is eminently reasonable." (App. at P. 6.)

The facts of the instant matter are substantially similar to those in *Dale v. Reed,* No. 13-0429, 2014 WL 1407353 (W. Va. Apr. 10, 2014) (memorandum decision). There, "Deputy Paitsel read Ms. Reed the implied consent statement required by West Virginia Code § 17C-5-7(a) (2010) warning her that refusal to take a secondary chemical test would result in a revocation of her license for 45

days to life. The DUI Information Sheet completed by Deputy Paitsel indicated that he provided Ms. Reed a written copy of the implied consent statement as well[3]." *Dale v. Reed* at *1. Ms. Reed refused the SCT. *Id.*

At the hearing before the OAH, Ms. Reed argued, *inter alia*, that the evidence presented by the DMV was insufficient to sustain the implied consent revocation because there was no evidence presented that Ms. Reed was given a written statement of the implied consent law. *Id.* With regard to the written copy of the implied consent statement, Ms. Reed argued that the deputy did not testify that he gave her a copy and that no copy of the written implied consent statement was in the DMV's file. *Id.* The OAH agreed that the absence of a file copy of the written implied consent statement, along with the absence of evidence that she understood the warning, warranted reversal of the implied consent revocation; the DUI revocation was affirmed. *Id.* The DMV appealed to the circuit court, and the court agreed with the OAH's rationale and affirmed the OAH's reversal of the one-year implied consent revocation. *Id.*

In *Dale v. Reed*, this Court reminded the parties that W. Va. Code § 17C-5-7(a) provides for revocation of a driver's license for failure to submit to a secondary chemical test, in pertinent part as follows:

> If any person under arrest as specified in section four [§ 17C-5-4] 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

[3] This Court noted that "The DUI Information Sheet contains a check-marked box which states 'IMPLIED CONSENT READ AND COPY PROVIDED TO SUBJECT' (emphasis added). The DUI Information Sheet is signed by Deputy Paitsel and contains the following warning: "The signing of this statement constitutes an oath or affirmation that the statements are true and that any copy filed is a true copy. Be advised that to willfully sign a statement containing false information concerning any matter or thing material or not material is false swearing and is a misdemeanor." *Dale v. Reed* at *1.

> 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.... The officer shall, within forty-eight hours of the refusal, sign and submit to the Commissioner of Motor Vehicles a written statement of the officer that ... (4) the person was given a *written statement* advising him or her that his or her license to operate a motor vehicle in this state would be revoked for a period of at least forty-five days and up to life if he or she refused to submit to the secondary test finally designated in the manner provided in section four of this article.... Upon receiving the statement the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state for the period prescribed by this section.
>
> (emphasis added).

Dale v. Reed at *2.

This Court explained, "[a]s such, to sustain an 'implied consent' revocation, one of the requirements is that the officer provide oral and written warning that refusal to submit to the secondary chemical test will result in revocation. It is undisputed that the only evidence admitted in this case that Ms. Reed was given a written warning is the notation on the DUI Information Sheet that the implied consent form was "read and copy provided to subject. (emphasis added)." *Id.* This Court reiterated that "[u]nquestionably, however, the DUI Information Sheet is admissible, affirmative evidence of its contents . . ." pursuant to "Syl. Pt. 3, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006)." *Dale v. Reed* at *2.

This Court opined that Ms. Reed did not contend, nor did the OAH or circuit court conclude, that the DUI Information Sheet was not admissible; rather, both apparently took the position that Deputy Paitsel's live testimony—which was silent on whether he gave Ms. Reed a written copy of the implied consent statement—was of greater value than the documentary evidence which affirmatively indicated that Ms. Reed was provided a copy. *Id.* at *3. This Court pointed out that under similar circumstances, it has admonished a lower court for demonstrating a preference for

testimonial evidence over documentary evidence when "our law recognizes no such distinction in the context of drivers' license revocation proceedings. *Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010)." *Dale v. Reed* at *3. This Court also acknowledged the fact that although the DUI Information Sheet was admissible, its contents were not precluded from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy. *See, Crouch*, 219 W. Va. at 76 n. 12, 631 S.E.2d at 634 n. 12. *Dale v. Reed* at *3.

Finally, this Court held that "to the extent that Ms. Reed contends that she sufficiently 'challenged' the DUI Information Sheet on the issue of being given a written implied consent statement, her evidence is lacking. As noted above, Ms. Reed did not testify, nor was there any other affirmative evidence, that she was not given a written implied consent statement to contradict the DUI Information Sheet. *See Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866 (2005) (reversing circuit court's reversal of license revocation where there was "no testimony in conflict with the officer" regarding provision of implied consent form to driver); *Dale v. Odum and Doyle*, [233 W. Va. 601, 760 S.E.2d 415] (reversing circuit court's reversal of license revocation where driver failed to rebut evidence contained solely in DUI Information Sheet)." *Dale v. Reed*, at *3.

Rather, all Ms. Reed's counsel established was that there was no copy of the statement Deputy Paitsel gave Ms. Reed in the DMV's administrative file. *Dale v. Reed*, at *3. "However, the statute does not require that a copy of the written statement be admitted into evidence; this argument has previously been rejected by this Court. *See Gibbs v. Bechtold*, 180 W. Va. 216, 219, 376 S.E.2d 110, 113 (1988) ('Ms. Gibbs also asserts that the record does not support the administrative decision because the Implied Consent form was never offered or admitted into evidence during the

administrative hearing. We find no merit in this argument. The record contained sufficient probative evidence from which the Commissioner could conclude that the form had been read to Ms. Gibbs.')." *Dale v. Reed*, at *3. This Court then held that the circuit court's conclusion that there was insufficient evidence to establish that Ms. Reed was given a written copy of the implied consent warning was clearly wrong. *Id.*

In the instant matter, the OAH found as fact that "[e]vn though page 4 of the West Virginia DUI Information Sheet has the block for "Implied Consent Read and Provided to the Subject" filled in, the Investigating Officer testified that he did not give [Mr. Slye] a copy of the Implied Consent Statement." (App. at P. 195.) The OAH is correct, the Investigating Officer did not give Mr. Slye a souvenir copy of the form to take with home with him after he refused to take the designed SCT. Instead, the Investigating Officer testified on direct examination that he "read him the Implied Consent. . . I just read the Implied Consent to him and then I observed him for 20 minutes. And then he refused to sign the Implied Consent." (App. at P. 243.) On cross examination, when asked if he actually gave Mr. Slye a copy of the West Virginia Implied Consent Statement, the Investigating Officer testified, "I did not, sir." (App. at P. 248.)

The OAH also found as fact that Mr. Slye refused to take the standardized field sobriety tests and the preliminary breath test. (App. at P. 194.) It is unrebutted that the Investigating Officer read the Implied Consent Statement to Mr. Slye and attempted to give Mr. Slye the form to read and to sign. It is unrebutted that Mr. Slye refused to sign the statement and to take the SCT. By Mr. Slye's behavior, it is clear that he refused everything that the Investigating Officer offered him – including the opportunity to read the Implied Consent Statement himself after it had been read to him. The Investigating Officer could not force Mr. Slye to take the standardized field sobriety tests or the

preliminary breath test. Similarly, the Investigating Officer could not force Mr. Slye to place the Implied Consent Statement in hands, to read the document, and to sign the document.

West Virginia Code § 17C-5-7(a) (2013) provides in pertinent part,

> . . . 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. 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.

[Emphasis added.]

Here, it is unrebutted that the Investigating Officer read the Implied Consent Statement to Mr. Slye and attempted to give him the opportunity to read the statement before he signed it. Although the Investigating Officer was never asked on direct or cross examination if the officer handed Mr. Slye the statement to read, it is unrebutted that Mr. Slye refused to sign the form which implies that the officer had to attempt to give Mr. Slye the form to read before signing.

Whether Mr. Slye had a copy of the Implied Consent Statement sitting in front of him while he waited to refuse to take the test is immaterial. Nothing in W. Va. Code §17C-5-7(a) (2013) requires the officer to provide Mr. Slye with a copy of the statement to hold in his hands after he had already been given the opportunity to read the statement and sign the same. Rather, the Code simply states that prior to refusal, an oral warning and written statement must be given to the driver. The officer must read the Implied Consent Statement in case the suspected drunk driver is illiterate or has vision issues. The officer must provide the Implied Consent Statement to the suspected drunk driver to be able to read it himself in case he is deaf or has auditory comprehension issues. There is nothing in the Code which requires the officer to force the driver to read the statement or to sign it.

Further, although the circuit court found that Mr. Slye "was not provided with a physical copy of the Implied Consent Statement" (App. at P. 6), there is nothing in W. Va. Code §17C-5-7(a) (2013) which requires the Investigating Officer to make a physical copy of the form for the driver to keep in his possession. All that is required is that the officer read the statement to the driver and give the driver the opportunity to read it for himself. In this case, Mr. Slye refused to take the form to read and to sign. The Code requires nothing more of the Investigating Officer.

Moreover, Mr. Slye never alleged that he did not understand the Investigating Officer's reading of the Implied Consent Statement to him and that he desired to read it for himself but was denied. He also did not allege that he recanted his refusal and later wanted to take the test. Instead, Mr. Slye sat silent.

"[W]hen the requirements of *W. Va. Code* 17C-5-7 [1983] have otherwise been met, and a driver refuses to or fails otherwise to respond either affirmatively or negatively to an officer's request that he submit to a chemical analysis test, the driver's refusal or failure to respond is a refusal to submit within the meaning of *W. Va. Code* 17C-5-7 [1983]." *In re Matherly*, 177 W. Va. 507, 509, 354 S.E.2d 603, 605 (1987). *See also*, *Gibbs v. Bechtold*, 180 W. Va. 216, 219, 376 S.E.2d 110, 113 (1988) wherein Ms. Gibbs testified that while she remembered the officer reading something to her, that she kept telling him that she did not understand what he was saying, and that it was not until the next morning when she saw the Implied Consent form in her purse that she found out. There, this Court upheld the revocation for refusal even though Ms. Gibbs could not remember being provided a copy of the Implied Consent Statement.

The OAH reversed the Commissioner's revocation because the Investigating Officer did not force Mr. Slye to take the Implied Consent Statement in his hands and read it for himself, and the

circuit court added a non-existent requirement that Mr. Slye should have been given a "physical copy" of the statement presumably to have as a keepsake of his refusal. The West Virginia Legislature did not intend for a driver to avoid revocation for a refusal merely because the officer did not force the driver to take the form, to read it, and to sign it, especially when he was read the Implied Consent Statement and refused to review and sign the same. This would serve no public policy and would in no way protect a driver's rights. Instead, the OAH's and circuit court's conclusions are based on an improper statutory interpretation with no rational basis.

Finally, it is unrebutted that Mr. Slye, by his conduct, voluntarily refused to read the Implied Consent Statement and to take the SCT. "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).

This Court has looked askance at drivers who ostensibly challenge the evidence in the case against them, yet do not make any actual attempt to rebut the evidence. "In the present case, no effort was made to rebut the accuracy of any of the records, including the DUI Information Sheet, Implied Consent Statement or Intoximeter printout which were authenticated by the deputy and admitted into the record at the DMV hearing." *Groves v. Cicchirillo*, 225 W. Va. 474, 479, 694 S.E.2d 639, 644 (2010) (per curiam); "Ms. Reed did not testify, nor was there any other affirmative evidence, that she was not given a written implied consent statement to contradict the DUI Information Sheet." *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va. Apr. 10, 2014) (memorandum decision); "The

deficiency in Mr. Veltri's argument regarding the concept of retrograde extrapolation is that he failed to present any evidence at trial of the retrograde extrapolation in his individual circumstance." *Dale v. Veltri*, 230 W. Va. 598, 602, 741 S.E.2d 823, 827 (2013) (per curiam); "In fact, the only evidence of record on this issue was Deputy Lilly's testimony which clearly demonstrated that the officer gave the Implied Consent form to the appellee. As there was no testimony in conflict with the officer, we see no reason to contradict his testimony." *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866 (2005) (per curiam); "To the extent that Ms. McCormick believed Trooper Miller did not perform the test in accordance with the law, she was required to question Trooper Miller in this area." *Dale v. McCormick*, 231 W. Va. 628, 633, 749 S.E.2d 227, 232 (2013) (per curiam); "Pursuant to this Court's decision in McCormick, if Mr. Oakland had a serious inquiry or challenge to the quality or quantity of Officer Wilhelm's response about his credentials, the onus was on Mr. Oakland to inquire further." *Dale v. Oakland*, 234 W. Va. 106, 112, 763 S.E.2d 434, 440 (2014) (per curiam); ". . .[W]hile Mr. Doyle objected to the admission of the statement of the arresting officer, he did not come forward with any evidence challenging the content of that document. Consequently, there was unrebutted evidence admitted during the administrative hearing that established a valid stop of Mr. Doyle's vehicle, and the hearing examiner's finding to the contrary was clearly wrong." *Dale v. Odum*, 233 W. Va. 601, 609, 760 S.E.2d 415, 423 (2014) (per curiam).

CONCLUSION

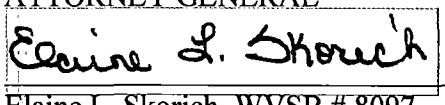
For the reasons listed above, the Petitioner prays that this Court reverses the final order of the circuit court.

Respectfully submitted,

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

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0746
(Circuit Court Civil Action No. 19-AA-123)

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

Petitioner,

v.

JOSEPH SLYE,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 23rd day of December 2020, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

B. Craig Manford, Esquire
P.O. Box 3021
Martinsburg, WV 25402

Elaine L. Skorich
Elaine L. Skorich