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DATHY S. GILSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ADAM HOLLEY, ACTING COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

RAYMOND A. BURCKER,

Respondent.

Civil Action No. 19-AA-75
Judge Jennifer F. Bailey



FINAL ORDER

The Petitioner, Adam Holley, Acting Commissioner of the West Virginia Division of Motor Vehicles ("DMV") appeals that portion of the *Final Order* of the Office of Administrative Hearings ("OAH") entered June 12, 2019, which rescinded the revocation of the Respondent's driver's license for driving a motor vehicle in this State while under the influence of alcohol, controlled substances and/or drugs while having a blood alcohol content in excess of .15% ("aggravated DUP").

STATEMENT OF FACTS

1. On February 23, 2012 at approximately 7:15 p.m., Senior Patrolman J. D. Bird of the Charles Town Police Department ("Investigating Officer") was dispatched to a three-vehicle accident on Route 9 at the Crosswinds Drive intersection in Charles Town, Jefferson County, West Virginia. SMON Doc. 18¹. Upon arriving at the scene, he discovered three motor vehicles, including one driven by the Respondent, which were involved in the crash. *Id.*

2. At 7:22 p.m., an ambulance arrived. The Respondent was treated for injuries sustained in the crash and transported to Jefferson Memorial Hospital in Ranson, West Virginia.

¹Reference is to the Statement of Matters Officially Noted, as filed with the Court on September 11, 2019.

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The Respondent arrived at the hospital at 7:47 p.m. SMON Doc. 18.

3. At 8:00 p.m., personnel at Jefferson Memorial Hospital drew a blood specimen from the Respondent for diagnostic medical purposes. SMON Doc. 18.

4. At 8:15 p.m., Corporal Benjamin Anderson of the Charles Town Police Department arrived at the hospital to take a statement from the Respondent. SMON Doc. 26 at 21. At that time, the Respondent acknowledged that he was driving east on Route 9 when the crash occurred. SMON Doc. 26 at 23.

5. At approximately 8:30 p.m., hospital personnel analyzed the blood specimen. SMON Doc. 18.

6. At 9:42 p.m., the Investigating Officer went to the hospital and spoke with the Respondent. The Respondent told the Investigating Officer that he had been at a friend's house in Berkeley County and was traveling east on his way home when the crash occurred. While at the hospital, the Investigating Officer spoke with an emergency room nurse who told him that the Respondent told her that he had consumed Nyquil cold medicine but no alcohol. The Investigating Officer also spoke with emergency medical squad personnel who stated that they believed the Respondent was under the influence of alcohol. SMON Doc. 18.

7. On March 15, 2012, the Investigating Officer submitted an Affidavit and Complaint for Search Warrant for the Respondent's medical records generated by Jefferson Memorial Hospital. On that date, the Magistrate issued the search warrant and the Investigating Officer obtained the records from the hospital. SMON Doc. 18.

8. The records showed that the Respondent's serum alcohol concentration was .23 g/dl of serum. SMON Doc. 26 at 10. The alcohol concentration in the whole blood was therefore .198%. SMON Doc. 26 at 11.

9. On March 17, 2012, the Investigating Officer went to the Respondent's residence and spoke with him. The Respondent told the Investigating Officer that when he was traveling on Route 9 he looked down at his speedometer and when he looked up there was a car in front of him. He lifted his foot off the accelerator and turned right before the crash occurred. He also told the Investigating Officer that he had consumed Nyquil and one Coors beer between 1:00 p.m. and 6:00 p.m. on the day of the crash. SMON Doc. 18.

10. Thereafter, the Investigating Officer prepared a Criminal Complaint charging the Respondent with DUI while having .15% or more blood alcohol concentration. SMON Doc. 18.

11. On March 23, 2012, the Magistrate Court of Jefferson County issued a warrant for the Respondent's arrest. SMON Doc. 18.

12. On March 27, 2012, Senior Patrolman J. W. Newlin of the Charles Town Police Department lawfully arrested the Respondent for DUI of alcohol, controlled substances or drugs with a blood alcohol content in excess of .15 ("aggravated DUP"). SMON Doc. 18.

13. On May 6, 2014, the DMV sent the Respondent an *Order of Revocation* and an Order of Disqualification for aggravated DUI. SMON Doc. 3.

14. The Respondent requested, through counsel, an administrative hearing before the OAH. SMON Doc. 2.

15. On February 23, 2016, the OAH conducted an administrative hearing. SMON Doc. 26. At the hearing, no witness could testify that the diagnostic blood draw performed on the Respondent was administered or analyzed in accordance with the applicable procedures found in

the West Virginia Code of State Rules.

16. On June 12, 2019, the OAH entered a *Final Order* affirming the Commissioner's revocation for DUI but rescinding the enhancement to aggravated DUI. SMON Doc. 21.

CONCLUSIONS OF LAW

1. A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4 (1998).

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1998).

2. "In reviewing the judgment of the lower court, this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syl. Pt. 4, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

3. The Petitioner's sole assignment of error on appeal is that the OAH erred by rescinding the enhancement of the Respondent's license revocation to aggravated DUI because the evidence did not show that the blood draw and chemical analysis were performed in accordance with the testing protocols set forth in Title 64 West Virginia Code of State Rules, Series 10 § 8.

4. The OAH admitted the results of the diagnostic blood test pursuant to *Lowe v.*

Cicchirillo, 223 W. Va. 175, 180-181, 672 S.E.2d 311, 316-317 (2008).

5. The OAH relied on *State v. Coleman*, 208 W. Va. 560, 542 S.E.2d 74 (2000) to find that W. Va. Code §17-C-5-8 requires that the State establish that the tests were “performed in accordance with methods and standards approved by the state Bureau for Public Health” in order for the blood test results to be given *prima facie* weight that the person was intoxicated. The OAH went on to find that the evidence did not show that hospital personnel withdrew the Respondent’s blood specimen and conducted the diagnostic blood alcohol analysis in accordance with the testing protocols set forth in the Code of State Rules. Accordingly, the OAH concluded that the result of Respondent’s diagnostic blood analysis were admitted into evidence as it was relevant evidence on the principle question of whether the Respondent was driving a motor vehicle in this state while under the influence of alcohol but further concluded that the test was not adequate and sufficient proof that the Respondent drove a motor vehicle in this state while having an alcohol concentration in his blood of fifteen hundredths of one percent or more.

6. The Petitioner argues that the blood tests results were not offered to show *prima facie* proof of intoxication but rather to show that the Respondent’s blood alcohol content exceeded 0.15%. The Petitioner relies on *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 454 S.E.2d 77 (1994) for the proposition that a blood test made for diagnostic purposes by hospital staff that was properly subpoenaed by the Investigating Officer and admitted into evidence should be given weight.

7. However, the issue in *Bedell* is distinguishable from the issue at hand. The statute at issue in *Bedell* was West Virginia Code § 17C-5-4, which provides that any person who drives in this State shall be deemed to have given consent to a secondary chemical test, and that the secondary test must be incidental to a lawful arrest and administered at the direction of the

arresting officer who has reasonable grounds to believe the driver committed the offense. The petitioner in *Bedell* argued that the results of his blood test administered by hospital staff were inadmissible because the same did not comply with §17C-5-4. The *Bedell* Court held that §17C-5-4

simply authorizes a law enforcement officer to obtain a blood test incident to a lawful arrest where the officer has reasonable grounds to believe that the individual committed an offense and creates an administrative mechanism through which an individual's license may be revoked. The inclusion of such authorization within our statutory scheme certainly does not intimate a legislative intent to disallow in the criminal context evidence of alcohol content obtained by medical personnel in the course of treatment.

Bedell at 79.

8. In the case at hand, Respondent does not contend there was any issue with lack of consent, lawful arrest, or reasonable grounds for the stop. Respondent contended below that the blood test was inadmissible, or in the alternative should be given no weight, because the Petitioner failed to establish that the blood test was properly administered pursuant to West Virginia Code of State Rules. This is a separate and distinct issue from the issue before the West Virginia Supreme Court of Appeals in *Bedell*.


9. Though there was other evidence that supported a finding of DUI, the lone evidence to support an aggravated enhancement was the results of the diagnostic blood test which were completely unsupported by any evidence showing that it was administered or analyzed in accordance with the applicable Code of State Rules. Of specific concern, West Virginia Code of State Rules § 64-10-8.2(c) requires the use of non-alcoholic antiseptics when blood is being drawn for purposes of intoxication chemical tests. Absent a showing that this Rule was followed, it stands to reason that the possible use of an alcoholic disinfectant may artificially increase the level of alcohol in the Respondent's blood sample. Of the witnesses who testified


below, none could testify to the way Respondent's blood sample was withdrawn or analyzed. In the complete absence of evidence that the blood diagnostic was performed in compliance with the Code of State Rules, the OAH was justified in assigning no weight to the results for the purpose of an aggravated enhancement.

WHEREFORE, the Court does hereby **ORDER** that the OAH's *Final Order* is **AFFIRMED**. It is further **ORDERED** that the above-styled action is **DISMISSED** and **STRICKEN** from the docket of this Court. The Circuit Clerk shall mail true copies of this order to all parties and counsel of record.

The objections and exceptions of the Petitioner to this ruling are hereby noted and preserved.

Enter this 26th day of April, 2021.


Jennifer F. Bailey, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. SATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COUNTY. 4th
GIVEN UNDER MY HAND AND SEAL OF SAID COUNTY THIS 26th
DAY OF May, 2021.

CATHY S. SATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA. mh