

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Petitioner,

v.

AARON POWERS,

Respondent.

Civil Action No. 19-AA-122
Judge Jennifer F. Bailey
OAH File No. 398536A

FILED
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2021 JUL 30 PM 2:10
CATHY S. BRIDGES, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER

Petitioner appeals the *Final Order* of the Office of Administrative Hearings ("OAH") entered September 11, 2019, which modified the revocation by the Commissioner of the West Virginia Division of Motor Vehicles ("DMV") revoking the Respondent's driver's license for driving a motor vehicle in this State while under the influence ("DUI") of alcohol, controlled substances and/or drugs while having a blood alcohol content in excess of .15% (a.k.a. "aggravated DUI"). The *Final Order* affirmed the DUI but rescinded the enhancement for driving with a blood alcohol content in excess of .15%. The Petitioner appeals that portion of the *Final Order* which reversed the enhancement.

FINDINGS OF FACT

1. On August 6, 2017, at approximately 10:57 p.m., Senior Trooper M. Morgan of the West Virginia State Police ("Investigating Officer") was dispatched to a single vehicle accident on Route 7 in Berkeley County, West Virginia.
2. Upon arriving at the scene, he discovered that the vehicle traveled over an embankment and had traveled 80 feet from the roadway. There were no skid or brake marks.
3. The ambulance was on scene when the Officer arrived. The Officer spoke to Mr. Powers, but much of his speech was slurred and unintelligible. He had red, watery eyes, and



smelled of an alcoholic beverage. Mr. Powers advised that he was the driver, and that he was heading home.

4. Mr. Powers refused all field sobriety tests and the PBT.

5. Mr. Powers was taken to the hospital after the Officer had established Mr. Powers' identity. At 11:40 p.m., the hospital administered a blood test as part of its medical treatment.

6. The Officer searched the vehicle and found two boxes of "Bud Light" and empty bottles scattered throughout the vehicle.

7. The Investigating Officer went to the hospital and spoke with Mr. Powers. Mr. Powers told the Investigating Officer that he remembered nothing about the accident and refused to answer any further questions without counsel.

8. The Officer gave Mr. Powers a citation for driving under the influence.

9. Mr. Powers's medical records showed that the Respondent's serum alcohol concentration was .242 g/dl of serum. The alcohol concentration in the whole blood was therefore 0.208%.

10. The Officer obtained the results of the blood test via search warrant on August 10, 2017.

11. Thereafter, the Investigating Officer prepared a Criminal Complaint charging the Respondent with aggravated DUI.

12. On September 25, 2017, the DMV sent the Respondent an *Order of Revocation* for aggravated DUI.

13. Mr. Powers requested, through counsel, an administrative hearing before the OAH.

14. On January 30, 2019, the OAH conducted an administrative hearing.

15. On September 11, 2019, the OAH entered a *Final Order* affirming the Commissioner's revocation for DUI and rescinding the enhancement to aggravated DUI.

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 OAH reversed the aggravated DUI enhancement because the DMV did not establish that the blood draw and chemical analysis were performed in accordance with state-approved standards. The OAH relied on *State v. Coleman*, 208 W. Va. 560, 542 S.E.2d 74 (2000)(per curiam) to find that W. Va. Code §17C-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 blood test results to be given *prima facie* evidence that the person was intoxicated. The OAH admitted the blood test analysis into evidence and found that the results were evidence of DUI but were not *prima facie* evidence of aggravated DUI. The evidence was offered by the Petitioner to establish that the Respondent committed the offense of aggravated DUI as set forth in W. Va. Code § 17C-5A-2(k)(1).

4. The Petitioner argues that the flaw in the OAH's rationale in relying on *Coleman, supra*, is that the blood test results were not offered to show *prima facie* proof of intoxication but rather to show that the Respondent's blood alcohol content exceeded .15.

5. However, "[i]n the absence of evidence that the blood diagnostic was performed in compliance with the Code of State Rules, the OAH was justified in discounting the accuracy of the blood diagnostic results for the purpose of an aggravated enhancement." *Frazier v. Corley*, No. 18-1033, 2020 WL 1493971, at *5 (W. Va. Mar. 26, 2020). Though there was other evidence that supported a finding of DUI, the lone evidence put forth to establish that the Respondent's blood alcohol content exceeded the threshold for the enhancement was the results of the diagnostic blood test which were unsupported by evidence showing that it was administered or analyzed in accordance with the applicable Code of State Rules. Accordingly, pursuant to *Coleman* and *Corley*, this Court concludes that it was not error for the OAH to discount the accuracy of the blood diagnostic results and assign the results no weight for the purpose of an aggravated enhancement. Therefore, this Court agrees with the OAH that Petitioner did not meet its burden to establish the 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 29th day of January, 2021.

Jennifer F. Bailey
Jennifer F. Bailey, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. BATSON, 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 COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 2
DAY OF February, 2021.
Cathy S. Batson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA lt