IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0686

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

Petitioner,

v.

AARON POWERS,

Respondent.

Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 19-AA-122

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

THE CIRCUIT COURT COMMITTED ERROR OF LAW BY APPLYING THE "PRIMA FACIE" STANDARD APPLICABLE TO LAW ENFORCEMENT DIRECTED BLOOD TESTS INSTEAD OF THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLICABLE TO MEDICAL, DIAGNOSTIC BLOOD TESTS.

STATEMENT OF THE CASE

On August 6, 2017, Senior Trooper M. C. Morgan of the West Virginia State Police ("Investigating Officer") responded to a single-car crash on Back Creek Valley Road in Berkeley County, West Virginia. A. R. 199, 205[1]. At the scene, the driver of the vehicle, who was identified as the Respondent herein, was being treated by medical personnel. When the Investigating Officer spoke with the Respondent, he observed the odor of alcohol on the Respondent's breath and observed that the Respondent had slurred speech and was disoriented. The Investigating Officer observed that there were two 12-packs of Bud Light in the Respondent's vehicle, and that there were open bottles of the beer in the vehicle. A.R. 200, 205, 332.

The Respondent was treated for injuries sustained in the crash and transported to Berkeley Medical Center. A.R. 201, 205, 335. Personnel at Berkeley Medical Center drew a blood specimen from the Respondent for diagnostic medical purposes. A. R. 204. The Investigating Officer went to the hospital and issued the Respondent a Uniform Citation for driving under the influence of alcohol ("DUI"). A.R. 205, 336. On August 10, 2017, the Investigating Officer obtained a search warrant to obtain all of the Respondent's medical records, lab results and biological specimens obtained during the course of treatment following the crash. A.R. 205, 215-17, 333.

The records showed that the Respondent's blood serum alcohol concentration was .242 mg/dL of serum. The alcohol concentration in the whole blood was therefore .208%, by application

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[1] Reference is to the Appendix Record filed contemporaneously herewith.

of W. Va. Code R. § 64-10-8.2 (d) (2005). A.R. 205, 223, 239, 333, 339.

The DMV issued an Order of Revocation Notice to the Respondent on August 21, 2017. The basis for the revocation was that he "drove under the influence of alcohol, controlled substances, drugs or a combination of those while your blood alcohol content was .15 or higher." A.R. 17. This is also known as "aggravated DUI."

The Respondent requested a hearing from the Office of Administrative Hearings ("OAH"). The OAH conducted a hearing on January 30, 2019. A.R. 318. At the hearing, the blood test evidence was admitted (A.R. 334) but not given weight by the OAH in its Final Order. A.R. 273. The OAH's Final Order affirmed the revocation for DUI but rescinded the enhancement of the revocation for driving with a blood alcohol content in excess of .15%.

The Petitioner appealed the portion of the OAH's Final Order which rescinded the enhancement of the revocation for driving with a blood alcohol content in excess of .15% to the circuit court of Kanawha County. On July 29, 2021, the circuit court entered an Order in which it affirmed the Final Order of the OAH. A.R. 1-5.

SUMMARY OF ARGUMENT

The issue in this matter is the admissibility of and weight to be given to a medical diagnostic blood test made in the course of medical treatment, not necessarily as having *prima facie* weight as officer-directed tests do, but simply as blood alcohol evidence.

Medical, diagnostic tests, such as the one in this case, are admissible evidence in these administrative proceedings and, in the absence of a substantive challenge, should be given weight by the tribunal. *See, State ex rel. Allen v. Bedell*, 193 W. Va. 32, 454 S.E.2d 77 (1995); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam); *State v. Coleman*, 208 W. Va.

560, 542 S.E.2d 74 (2000) (per curiam). Alternatively, W. Va. Code §§17C-5-4, -6 and -8 and W. Va. Code R.§ 64-10-8.2 provide for law enforcement officials to direct that breath or blood be taken. "A secondary test of blood or breath is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having probable cause to believe the person has committed an offense prohibited by § 17C-5-2 of this code...". W. Va. Code §17C-5-4(c).Evidence obtained in this manner may be *prima facie* evidence. W. Va. Code § 17C-5-8(3) provides, "Evidence that there was, at that time, eight hundredths of one percent or more, by weight, of alcohol in his or her blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol." The medical diagnostic blood test results in this case were not offered to show *prima facie* proof of intoxication but rather to show that the Respondent's blood alcohol content exceeded .15%.

The OAH and the circuit court misapplied *Coleman, supra.* In *Coleman*, a blood test had been conducted at a hospital for diagnostic, medical purposes. The *Coleman* Court determined that the circuit judge had properly admitted the blood test results under *Bedell, supra*, which held that medical, diagnostic blood tests should be admitted into evidence and given appropriate weight. "In the instant case, the trial judge correctly admitted the hospital blood test results evidence, not as necessarily having prima facie weight, but simply as blood alcohol level evidence, under *Bedell*." 208 W. Va. 563, 542 S.E.2d 77. Although *Coleman* made the distinction between medical, diagnostic tests as opposed to law enforcement directed tests, the OAH and the circuit court misapplied the standard for law enforcement tests to the present case.

The circuit court also relied on *Frazier v. Corley*, No. 18-1033, 2020 WL 1493971 (W. Va. Mar. 26, 2020)(memorandum decision). Despite the fact that both cases involved medical diagnostic

blood tests, *Corley* expressly declined to rely on *Bedell:* "*Bedell* is not relevant to Respondent's challenge that the blood diagnostic was not properly administered under the applicable legislative rule, and does not control our decision in this case." *Corley* at *5. However, *Bedell* expressly addressed medical, diagnostic tests. "The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C-5-4..." 193 W. Va. 36, 454 S.E.2d 81. *Corley* improperly required that the medical diagnostic test meet the requirements of W. Va. Code §§17C-5-4, -6 and -8 and W. Va. Code R. 64-10-8.2. In this case, the evidence was properly admitted, was unchallenged and should have been considered as evidence of aggravated DUI.

Corley's departure from this Court's precedent is also seen in *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam), a case with substantial factual similarities to the present case. In *Lowe*, this Court, citing *Bedell*, affirmed that diagnostic blood tests are entitled to admission and weight in the absence of a substantive challenge at the administrative hearing, as opposed to law-enforcement-directed tests obtained pursuant to W. Va. Code §17C-5-4.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to R.A.P. Rule 20 is appropriate on the basis that there are cases involving inconsistencies or conflicts among the decisions of this Court.

ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code § 29A–6-1 (2021). The Court reviews questions of law presented *de novo*;

and findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015).

B. THE CIRCUIT COURT COMMITTED ERROR OF LAW BY APPLYING THE "PRIMA FACIE" STANDARD APPLICABLE TO LAW ENFORCEMENT DIRECTED BLOOD TESTS INSTEAD OF THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLICABLE TO MEDICAL, DIAGNOSTIC BLOOD TESTS.

The OAH and the circuit court failed to properly consider the blood test evidence in this case and erroneously applied a *prima facie* standard. The "*prima facie*" standard is found at W. Va. Code §17C-5-8(b)(3) and derives from W. Va. Code §17C-5-4 (2013). It only applies to post-arrest, law enforcement directed tests[2]. Medical, diagnostic tests made prior to the driver's arrest, such as the one in this case, are admissible and to be accorded appropriate weight. *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 454 S.E.2d 77 (1994); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam). *Bedell* and *Lowe* clearly support the admission and consideration of blood test results obtained during the course of medical treatment.

In this matter, the issue was whether there was a violation of W. Va. Code § 17C-5A-2 (k)(1) (2015) (aggravated DUI) as shown by a preponderance of the evidence: "If in addition to finding by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substance or drugs, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person did drive a motor vehicle while having an alcohol concentration in the person's blood of fifteen hundredths of one percent or more, by weight. . ." W. Va. Code § 17C-5A-2 (k)(1) (2015). "To warrant administrative revocation of a driver's license, the facts must establish, by a preponderance of evidence, that the person had been driving under the

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[2]This includes tests requested by the driver pursuant to W. Va. Code §17C-5-9, which are also subject to the requirements of W. Va. Code §17C-5-8.

influence." *Dale v. Ciccone*, 233 W. Va. 652, 662, 760 S.E.2d 466, 476 (2014) (per curiam). "Also worth noting is the underlying preponderance of the evidence standard pertaining to administrative revocation proceedings." *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012). *See also, Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984); *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam).

The OAH declined to give the blood test results weight[3], citing *State v. Coleman*, 208 W. Va. 560, 542 S.E.2d 74 (2000)(per curiam). The OAH held, "In the instant matter, the Petitioner's Counsel objected to the admission of the result of the chemical analysis of the Petitioner's blood and the Respondent failed to establish that the blood draw and the chemical analysis of the blood specimen were performed in accordance with state-approved standards." A. R. 303. In *Coleman*, the assignment of error pertained to a jury instruction that the blood test result was *prima facie* proof of intoxication, when in fact the blood test was performed at the hospital for diagnostic purposes. In *Coleman*, this Court noted that in order for blood test results to be "*prima facie*" evidence, the requirements of W. Va. Code §17C-5-8 must be met. However, the *Coleman* Court determined that the circuit judge had properly admitted the medical diagnostic blood test results under *Bedell, supra*: "In the instant case, the trial judge correctly admitted the hospital blood test results evidence, not as necessarily having prima facie weight, but simply as blood alcohol level evidence, under *Bedell*." 208 W. Va. 563, 542 S.E.2d 77. Syl. Pt. 1 of *Bedell* provides, "West Virginia Code § 17C-5-4 (1991) does not govern the admissibility of the results of a diagnostic blood alcohol test conducted prior to the arrest of a defendant and at the direction of a defendant's treating physician or other medical personnel." The *Coleman* Court did not further analyze the distinction between medical, diagnostic

[3] Strangely, the OAH, which expressly gave the blood test results no weight, considered the evidence as "relevant evidence that the Petitioner had consumed alcoholic beverages." A.R. 303.

blood tests and officer-directed blood tests.

The circuit court adopted the OAH's reliance on *Coleman* to find that W. Va. Code §17C-5-8 requires that the tests be "performed in accordance with the methods and standards approved by the state Bureau for Public Health." The court noted that the OAH admitted the results but found that they were not *prima facie* evidence of DUI. A.R. 4. However, the circuit court cherry-picked the language in *Coleman* which affirms that only those tests performed according to state-approved standards can be given *prima facie* weight. It ignored the *Coleman* Court's acknowledgment that the medical, diagnostic test was admitted under *Bedell*, not to show *prima facie* proof of intoxication but rather to show that the Respondent's blood alcohol content exceeded .15%.

The circuit court also relied on *Frazier v. Corley*, No. 18-1033, 2020 WL 1493971 (W. Va. Mar. 26, 2020)(memorandum decision)[4] to find that "the results of the diagnostic blood test [] were unsupported by evidence showing that it was administered or analyzed in accordance with the applicable Code of State Rules." A.R. 4. However, the *Corley* Court improperly conflated the standards for medical, diagnostic tests (which was the case in *Corley*) versus law enforcement directed tests. In *Corley*, the initial issue was whether the OAH was required to perform the blood serum to whole blood conversion as a matter of law pursuant to W.Va. Code R. § 64-10-8.2(d) or to take judicial notice of the conversion formula.

Having decided that issue in the affirmative, the Court went on to find that the "DMV failed to show that the diagnostic was performed in compliance with West Virginia Code of State Rules

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[4] It is worth noting that "[T]his Court does not create new and binding principles of law in Memorandum Decisions." *State v. Benny W.*, 242 W. Va. 618, 625, 837 S.E.2d 679, 686 (2019). Therefore, *Bedell* and *Lowe* are controlling.

§ 64-10-8.2(c)." 2020 WL 1493971, at *4. *Corley*, which involved a medical, diagnostic test, improperly relied on the implied consent and officer-directed secondary test provisions of the Code and the corresponding legislative rule to analyze the weight to be given to diagnostic blood tests: "West Virginia Code § 17C-5-4(h) plainly states that '[o]nly the person actually administering or conducting a test conducted pursuant to this article is competent to testify as to the results and veracity of the test.' Because the person who actually administered the test did not author the affidavit and was unavailable to testify, the OAH was justified in discounting the DMV's submitted affidavit stating that the test was performed correctly." *Corley* at *4. *Corley* applied the requirements for a law enforcement-directed test to a medical diagnostic test.

The facts in the present case are substantially similar to those in *Bedell*, *supra,* in which this Court found that W. Va. Code §17C-5-4 is not applicable to medical, diagnostic blood tests. The *Bedell* Court found, "[t]he Petitioner's first blood test was ordered by medical personnel for diagnostic purposes. He had not yet been charged with a crime, and the deputy had not even arrived at the hospital to investigate the accident. Thus, West Virginia Code § 17C-5-4, which provides guidelines for the manner in which law enforcement officials shall obtain blood alcohol tests, has *no application* to the facts in this case and does not serve as a prohibition to admissibility. West Virginia Code § 17C-5-4 does not govern the admissibility of the results of a diagnostic blood alcohol test conducted prior to the arrest of a defendant and at the direction of a defendant's treating physician or other medical personnel." 193 W. Va. 34–35, 454 S.E.2d 79–80 (emphasis added).

Despite the factual similarities between the cases, *Corley* expressly declined to rely on *Bedell*: "*Bedell* is not relevant to Respondent's challenge that the blood diagnostic was not properly

administered under the applicable legislative rule, and does not control our decision in this case." *Corley* at *5. *Corley* was in error in relying solely on W. Va. Code R. § 64-10-8.2 to decide a case in which the blood test analysis was performed by medical personnel in the course of diagnosis and treatment. "In the absence of evidence that the blood diagnostic was performed in compliance with the Code of State Rules,. . .we affirm the circuit court's order upholding the denial of an aggravated DUI enhancement." *Corley* at *5.

The *Corley* Court stopped short of fully and fairly summarizing the *Bedell* Court's analysis. *Bedell* held that under the facts of that case, the provisions of the West Virginia Code pertaining to implied consent and officer-directed tests were not applicable to the case at hand, where the driver was not yet under arrest and the blood test was made and analyzed for medical diagnostic purposes. *Bedell* held, "Section 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." 193 W. Va. 34, 454 S.E.2d 79. *Bedell* thereby distinguished post-arrest, officer-directed tests and medical diagnostic tests. "The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C-5-4. . ." 193 W. Va. 36, 454 S.E.2d 81. *Corley* improperly distinguished *Bedell* by stating that the driver challenged the legitimacy of the blood test results

because there was no evidence that they were performed in conformity with W. Va. Code R. §64-10-8.2, noting that "[t]hat matter was not before this Court in *Bedell*." 2020 WL 1493971, at *5. Medical diagnostic tests were addressed in *Bedell,* and the *Corley* Court improperly applied the requirements for law enforcement-directed tests to medical diagnostic tests. *Corley* created no new law, and this Court should affirm Syl. Pt. 1 of *Bedell*: "West Virginia Code § 17C-5-4 (1991) does not govern the admissibility of the results of a diagnostic blood alcohol test conducted prior to the arrest of a defendant and at the direction of a defendant's treating physician or other medical personnel."

Lowe v. Cicchirillo, 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam), a case with substantial factual similarities to the present case, relied on *Bedell* to affirm that diagnostic blood tests are entitled to admission and weight in the absence of a substantive challenge. In *Lowe*, the Investigating Officer obtained a search warrant which permitted him to obtain the appellee's medical records from United Hospital Center from the night of the incident. The records were found to contain information regarding the appellee's blood alcohol content, as well as evidence of other controlled substances present in his blood on the night of the incident. The medical records also showed that the appellee had a blood alcohol content of 0.33% when the samples were obtained and tested, which occurred within two hours of the time of the accident. The Investigating Officer attached the results of the blood test to the Statement of Arresting Officer, and submitted it to the DMV. This Court found that the records were properly admitted pursuant to W. Va. Code § 29A-5-2. "Given the specific facts of this case, we believe that the hospital record was a part of the DMV's records and therefore was properly admitted in the record at the outset of the hearing." 223 W. Va.

180, 672 S.E.2d 316. The Court further found that the driver failed to contest the results of the test and that the DMV properly gave weight to the test. "Without any challenge to their accuracy, the DMV properly considered the test results..." 223 W. Va. 181, 672 S.E.2d 317. "To the extent that the appellee failed to rebut the accuracy of the blood test results in any way, the DMV properly gave them weight." *Id.* This Court also acknowledged in *Lowe* that there is a difference between medical, diagnostic tests and officer- directed tests, citing *Bedell* at 193 W.Va. 36, 454 S.E.2d 81: "The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C–5–4..." 223 W. Va. 181, 672 S.E.2d 317[5].

Therefore, the provisions of W. Va. Code §§17C-5-4, -6 and -8 (the last section of which contains the "*prima facie*" standard) and W. Va. Code R.§ 64-10-8.2 are inapplicable to this case, as the sample and analysis were made for medical, diagnostic purposes. W. Va. Code R. § 64-10-8.2 (2005) has effect only when the test is made pursuant to post-arrest, officer-directed tests authorized in Chapter 17C: "This legislative rule establishes the methods and standards relating to implied consent for chemical test for intoxication pursuant to appropriate articles of Chapter 17C of the West Virginia Code." W. Va. Code R. § 64-10-1.1 (2005). As in *Bedell*, here the Respondent was not even under arrest when the diagnostic blood test was made. Therefore, the provisions of W. Va. Code §17C-5-4, which provide that the test be "administered at the direction of the arresting law-enforcement officer" and "incidental to a lawful arrest" do not apply to medical, diagnostic tests.

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[5]W. Va. Code § 17C-5-4 (c) provides: "A secondary test of blood or breath is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having probable cause to believe the person has committed an offense prohibited by § 17C-5-2 of this code...".

In this case, the evidence was properly admitted, was unchallenged and should have been weighed under the preponderance of the evidence standard. There was sufficient evidence adduced for the OAH to conclude that it was more probable than not that the Respondent committed the offense of aggravated DUI. It is not necessary that the evidence be *prima facie* pursuant to W. Va. Code §17C-5-8; it is relevant, uncontested evidence that the Respondent drove while having a blood alcohol content in excess of .15%. Yet the OAH admitted the evidence and, in the absence of any challenge, failed to consider or give weight to the evidence contrary to *Bedell*, *supra* and *Lowe, supra*. The OAH abused its discretion and entered an order which was arbitrary and capricious and clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The circuit court erred in affirming the OAH's Final Order.

Affirmance of the circuit court's Order would effectively exclude all blood test evidence made in the course of medical treatment. The intent of the legislature is to leave open the possibility that evidence other than that obtained by the law enforcement officer can be presented in a DUI matter. "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 193 W. Va. 34, 454 S.E.2d 79. Requiring that medical professionals, who are not charged with investigating a crime, conform to the standards in the Code of State Rules would effectively cause exclusion of all medical evidence of blood alcohol content because it would not be given any weight. Only tests obtained at the direction of the law enforcement officer and subject to the Code of State Rules standards would be considered. This would then require that a law enforcement officer responding to a crash scene direct the blood draw

at the hospital instead of investigating the crash because blood evidence dissipates rapidly. Medical, diagnostic blood tests are admissible pursuant to W. Va. Code § 29A-5-2(b) (1964), subject to challenge, and should be weighed as relevant evidence.

CONCLUSION

The circuit court's *Order* must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner's Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 30th day of November, 2021, addressed as follows:

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