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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.



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

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE BLOOD TEST RESULTS ARE ADMISSIBLE.

The Respondent attempts to divert attention from the fact that the Office of Administrative Hearings (“OAH”) and the circuit court failed to properly give weight to the blood test evidence in this case and erroneously applied a *prima facie* standard, and posits instead that the result of the medical, diagnostic blood test in this matter was not admissible. The admissibility of the results in this case is based upon W. Va. Code § 29A-5-2(b), as affirmed by a myriad of cases from *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) to *Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020).

In *Frazier v. Condia*, No. 19-0465, 2020 WL 4355713 (W. Va. July 30, 2020)(memorandum decision) the Court recognized the mandatory direction contained in W. Va. Code § 29A-5-2(b) that “[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case[.]”. *Condia* at *2. *Reed v. Lemley*, No. 17-0797, 2018 WL 4944553 (W. Va. Oct. 12, 2018)(memorandum decision) affirmed that the results of the secondary chemical test are required to be admitted. The Court held, “[a]s evidenced by the use of the word ‘shall,’ admission of the evidence identified in the statute is mandatory. [*Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 76, 631 S.E.2d 628, 634 (2006)]. The secondary chemical test result was in the DMV’s possession, and the DMV sought to avail itself of the result. Accordingly, the result of the secondary chemical test should have been admitted into evidence, subject to a rebuttable presumption as to its accuracy. *Id.* at 76, n.12, 631 S.E.2d at 634, n.12.” *Lemley* at *4.

Here, the accuracy of the blood test results was not rebutted by the Respondent. The OAH’s

Hearing Examiner admitted the blood test result (A.R. 334¹), relied on the result under two different standards and finally stated that he would give no weight to the result. The OAH found that “the blood test results contained in Respondent’s Exhibit 2 indicate a blood alcohol concentration level of two hundred and eight thousandths of one percent (.208%), by weight, which is *prima facie* evidence that the Petitioner was under the influence of alcohol.” A.R. 272. The OAH went on to state, “the Hearing Examiner shall not afford the ‘result’ of the blood analysis any weight in deciding this matter but rather will consider it only relevant evidence that the Petitioner had consumed alcoholic beverages.” A.R. 273. The OAH admitted and gave weight to the evidence but refused to allow this evidence to support a finding that the Respondent had committed the offense of aggravated DUI. As fully argued in the *Petitioner’s Brief*, the OAH erred in failing to find that the Respondent had committed aggravated DUI because it applied a *prima facie* standard to a diagnostic, medical test result.

The circuit court found that the OAH properly admitted the documents but was justified in not giving them any weight. A. R. 4. The blood test result was clearly admissible, and the OAH and circuit court erred in giving the result no weight because it did not conform to the standards for officer-directed tests.

II. STATE V. COLEMAN, 208 W. VA. 560, 542 S.E.2D 74 (2000)(PER CURIAM), READ IN TOTO, SUPPORTS THE PETITIONER’S ARGUMENT THAT MEDICAL DIAGNOSTIC BLOOD TEST RESULTS ARE ADMISSIBLE IN ACCORDANCE WITH STATE EX REL. ALLEN V. BEDELL, 193 W.VA. 32, 454 S.E.2D 77 (1995).

The Respondent also argues that the Petitioner’s reliance on *State v. Coleman*, 208 W. Va.

¹ Reference is to the Appendix Record.

560, 542 S.E.2d 74 (2000)(per curiam) is “inapplicable.” The Respondent notes, incorrectly, that in *Coleman*, the blood alcohol content was not at issue. To the contrary, in *Coleman*, the assignment of error pertained to a jury instruction that the blood test result was *prima facie* proof of intoxication, for which a blood alcohol level in excess of .10% must be shown. The *Coleman* Court determined that the circuit judge had properly admitted the medical diagnostic blood test results under *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 454 S.E.2d 77 (1995): “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.

The Respondent relies on *Frazier v. Corley*, No. 18-1033, 2020 WL 1493971 (W. Va. Mar. 26, 2020)(memorandum decision) to argue that *Bedell* is not relevant. As the Petitioner argued in his brief, *Corley* applied the requirements for a law enforcement-directed test to a medical diagnostic test, and stopped short of fully and fairly summarizing the *Bedell* Court’s analysis.

The Respondent’s arguments are premised on the lack of admissibility of the DMV records and *Corley*’s misinterpretation of *Bedell*. As the Petitioner argues here, the blood test results were properly admitted. As the Petitioner argues in his brief, *Corley* needs to be examined in light of this Court’s other precedent to discern whether medical, diagnostic blood tests should be given weight, subject to rebuttal, under the preponderance of the evidence standard.

CONCLUSION

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

Respectfully submitted,

**EVERETT FRAZIER, COMMISSIONER OF
THE WEST VIRGINIA DIVISION OF MOTOR
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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner's Reply Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 2nd day of February, 2022, addressed as follows:

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