IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0726

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

Petitioner,

DAVID GAITHER, JR.,

Respondent.

Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 19-AA-176

PETITIONER'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304)558-2522
Janet.E.James@wv.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ASSIGNMENT OF ERROR 1

THE CIRCUIT COURT ERRED IN FAILING TO WEIGH THE TOTALITY OF THE EVIDENCE.

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 4

ARGUMENT 4

A. STANDARD OF REVIEW 4

B. THE CIRCUIT COURT ERRED IN FAILING TO WEIGH THE TOTALITY OF THE EVIDENCE. 4

CONCLUSION 12

TABLE OF AUTHORITIES

Cases — Page

Albrecht v. State, 173 W. Va. 268, 314 S.E.2d 859 (1984) 11

Bennett v. Coffman, 178 W. Va. 500, 361 S.E.2d 465 (1987) 8

Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980) 4

Cain v. W. Virginia Div. of Motor Vehicles, 225 W. Va. 467, 694 S.E.2d 309 (2010) 8

Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997). 9, 11

Coll v. Cline, 202 W. Va. 599, 505 S.E.2d 662 (1998) 4, 11

Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer,
No. 13-0501, 2014 WL 1272540 (W. Va. Mar. 28, 2014) (memorandum decision). 6

Crouch v. W. Virginia Div. of Motor Vehicles, 219 W. Va. 70, 631 S.E.2d 628 (2006). 6

Dale v. Ciccone, 233 W. Va. 652, 760 S.E.2d 466 (2014) 6, 9

Dale v. Odum, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam) 7

Dale v. Reynolds,
No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision). 9

Frazier v. Fouch, 244 W. Va. 347, 853 S.E.2d 587 (2020) 3, 5

Groves v. Cicchirillo, 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam) 10

Lowe v. Cicchirillo, 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam). 11

Montgomery v. West Virginia State Police,
215 W. Va. 511, 600 S.E.2d 223 (2004) (per curiam) 9

Reed v. Hall, 235 W. Va. 322, 773 S.E.2d 666 (2015). 4

Reed v. Hill, 235 W. Va. 1, 770 S.E.2d 501 (2015) 3, 11

Reed v. Pompeo, 240 W. Va. 255, 810 S.E.2d 66 (2018) 12

Reed v. Winesburg, 241 W. Va. 325, 825 S.E.2d 85 (2019) 12

Reilley v. Byard, 146 W. Va. 292, 119 S.E.2d 650 (1961) 11

State v. Byers, 159 W. Va. 596, 224 S.E.2d 726 (1976) 9

State v. Hummel, 154 Ohio App.3d 123, 796 N.E.2d 558 (2003) 8

Ullom v. Miller, 227 W. Va. 1, 705 S.E.2d 111 (2010) 9

Statutes

W. Va. Code § 17C-5-1 ..... 3, 11

W. Va. Code §17C-5A-1 ..... 3, 11

W. Va. Code §17C-5A-2 7

W. Va. Code § 29A–5–4 4

Rules

R.A.P. Rule 19 4

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN FAILING TO WEIGH THE TOTALITY OF THE EVIDENCE.

STATEMENT OF THE CASE

Deputy Brian McCusker (the "Investigating Officer") of the Jefferson County Sheriff's Department was dispatched to a vehicle crash at the intersection of Summit Point and Paddock in Jefferson County, West Virginia at 3:36 a.m. on July 17, 2017. A.R. 53,60[1]. He arrived on scene and discovered a wrecked vehicle, a black Chevy S-10 which was registered to the Respondent. A.R. 53, 60,194.

At the scene, the Investigating Officer encountered a witness, James Stahler, who told the Investigating Officer that he noticed a Chevy S-10 in the trees and stopped to check on the driver. A.R. 54, 60. Mr. Stahler stated that he approached the Respondent and asked if he needed to call anyone. A.R. 60. Mr. Stahler observed that the Respondent was disoriented and was attempting to gather things from the vehicle. A.R. 60. Mr. Stahler stated that the Respondent began walking down the street. A.R. 60. Mr. Stahler described the Respondent as a white male wearing a white t-shirt and blue jeans. A.R. 60. Mr. Stahler stated that the Respondent was covered in blood and carrying a pair of boots and a pair of blue jeans. A.R. 60. Mr. Stahler noticed the odor of alcohol on the Respondent's breath. A.R. 60. Mr. Stahler stated that the Respondent was walking toward Charles Town prior to the Investigating Officer's arrival. A.R. 60.

While the Investigating Officer was still on the scene, he received a dispatch call advising that a caller from Locust Knoll observed a man covered in blood wearing a white t-shirt running up the road. A.R. 60. The Investigating Officer requested additional units to patrol the area. A.R. 60.

---

[1] References are to the Appendix record.

At approximately 5:33 a.m.,the Investigating Officer received a call from dispatch advising him that a white male with blood on his shirt was walking toward Charles Town on Summit Point Road. A.R. 60,191,195. The Investigating Officer encountered the Respondent, who was covered in blood. A.R. 60, 191,195. The Respondent was wearing clothes consistent with the description given by Mr. Stahler. A.R. 60,191. The Respondent was carrying a boot and a pair of blue jeans. A.R. 60. The Respondent said he was going to work. A.R. 60,192. The Investigating Officer asked the Respondent where he was coming from, and he stated a friend's house. A.R. 60. The Respondent changed his story several times and admitted that when he was coming from his friend's house he crashed his truck into a tree. A.R. 54, 60,192,195. The Respondent had a laceration on his nose and forehead. A.R. 60,191. The Investigating Officer observed that he Respondent had bloodshot eyes, was slurring his words, was unsteady, was disoriented and had alcohol on his breath. A.R. 54, 60,191.

The Respondent refused treatment by Emergency Medical Services. A.R. 60. The Investigating Officer administered a preliminary breath test which showed that the Respondent had a blood alcohol content of .12.%. A.R. 56, 60,192.

The Investigating Officer released the Respondent to another deputy who took him to a residence in Charles Town. A.R. 193,198.

After consulting with his supervisor, the Investigating Officer obtained a warrant for the Respondent's arrest on July 20, 2017, and the warrant was subsequently executed. A.R. 193.

The Division of Motor Vehicles ("DMV") entered an Order of Revocation on August 16, 2017 for driving while under the influence of alcohol, controlled substances or drugs ("DUI"). A.R. 51. The Respondent requested a hearing before the Office of Administrative Hearings ("OAH"). The OAH held a hearing on October 19, 2018 at which the Respondent appeared with counsel. A.R. 178-

207. The OAH entered a Final Order on November 25, 2019, which rescinded the revocation. A.R. 141-46.

The DMV appealed the Final Order to the circuit court of Kanawha County. Although the DMV briefed the matter, the Respondent did not appear in the appeal. By Final Order entered August 12, 2021, the circuit court affirmed the OAH's Final Order. A.R. 1-6.

SUMMARY OF ARGUMENT

The circuit court failed to weigh the totality of the evidence and systematically discounted each piece of evidence that the Respondent was DUI. The circuit court improperly discounted the evidence of a witness at the scene who described the Respondent and noted that he smelled of alcohol and was disoriented. The Investigating Officer recorded this information. The Investigating Officer's documents were admitted into evidence at the OAH hearing. Those documents are entitled to a presumption of accuracy. *Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020). The Investigating Officer testified consistent with the documents. The Respondent failed to rebut the evidence.

The circuit court further discounted the Investigating Officer's observations of the Respondent that he had slurred speech and bloodshot eyes, attributing this evidence to the crash when there was no evidence which would support that conclusion. A.R. 6. The circuit court further erred in giving a negative inference to the lack of field sobriety tests and the secondary chemical test. "Neither the DUI statutes nor our case law require a PBT or any particular field sobriety test to establish that a driver was under the influence for purposes of administrative revocation." *Reed v. Hill*, 235 W. Va. 1, 9, 770 S.E.2d 501, 509 (2015), and "There are no provisions in either W.Va.Code, 17C–5–1, et seq., or W.Va.Code, 17C–5A–1, et seq., that require the administration

of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol, controlled substances or drugs for purposes of making an administrative revocation of his or her driver's license." Syl. Pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998).

The circuit court discounted evidence of intoxication when this evidence was not rebutted and used speculation to justify discounting other evidence. The court ignored the totality of the evidence that showed that the Respondent was DUI.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to R.A.P. Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

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–5–4(a)(1998). 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).

"In reviewing the judgment of a 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. 1, *Burks v. McNeel*, 164 W. Va. 654, 264 S.E.2d 651 (1980).

B. THE CIRCUIT COURT ERRED IN FAILING TO WEIGH THE TOTALITY OF THE EVIDENCE.

The uncontradicted evidence establishes that a truck registered to the Respondent crashed into a tree, and the Respondent admitted that he had crashed the truck. The Respondent had injuries consistent with a crash. A named witness on scene, James Stahler, observed that the Respondent was disoriented, had alcohol on his breath and blood on his shirt and that he was retrieving things from his truck. Mr. Stahler observed that the Respondent began walking away from the crash carrying a pair of boots and a pair of blue jeans. When the Investigating Officer observed the Respondent at 5:33 a.m., he had bloodshot eyes, slurred his words, and had alcohol on his breath. The Investigating Officer observed that the Respondent was wearing bloodstained clothing consistent with what Mr. Stahler had described and was carrying a boot and a pair of blue jeans as Mr. Stahler had described. The uncontradicted evidence establishes a nexus between the approximate time of the crash at 3:36 a.m., when Mr. Stahler reported evidence of Respondent's intoxication, and the Investigating Officer's encounter with the Respondent at 5:33 a.m., when the Investigating Officer observed evidence of intoxication.

The circuit court improperly discounted the information gleaned by the Investigating Officer from Mr. Stahler as hearsay. A.R. 6. Mr. Stahler observed the crashed vehicle and stopped and talked to the Respondent as he gathered things out of his truck before walking down the road. This indicated that Mr. Stahler encountered the Respondent within a short time of the crash. The information which the Investigating Officer gleaned from Mr. Stahler was recorded in the documents admitted into evidence as the DMV file. It is presumed accurate unless rebutted. The DMV agency file was properly admitted into evidence. *Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020). The documents are entitled to a presumption of accuracy. "We point out that the fact that a document is deemed admissible under the statute does not preclude the contents of the

document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy." Fn. 12, *Crouch v. W. Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006). The Respondent did not contradict anything in the DMV file or the Investigating Officer's testimony. The Investigating Officer's testimony was consistent with the information in the file. The Respondent did not testify. The Investigating Officer's testimony at the hearing confirms his observations of the Respondent when he encountered him at 5:33 a.m. The Respondent offered nothing at the administrative hearing to rebut this evidence. Cross-examination of the Investigating Officer produced no contradictory or rebuttal evidence. Mr. Stahler's information was sufficient to show that shortly after the crash, the Respondent smelled of alcohol and was disoriented.

This Court has held that it is acceptable for an Investigating Officer to obtain information from others in the course of an investigation. "[W]hile the Investigating Officer completed the form, he obtained the majority of his information from Trooper Harmon, who was not present at the hearing to testify or to be cross-examined by respondent." *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer,* No. 13-0501, 2014 WL 1272540, at *2 (W. Va. Mar. 28, 2014) (memorandum decision). *See also. Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014): "Sergeant Davis received a telephone call from an identified caller, Ms. Marks. She informed him that a vehicle with Delaware plates was weaving and swerving while proceeding south on Route 119. She described the vehicle, and she also informed Sergeant Davis that the driver could possibly be intoxicated. This Court finds that such information provided Sergeant Davis with sufficient indicia of reliability to warrant his articulable reasonable suspicion of unlawful activity and to justify the investigatory stop." 233 W. Va. 659, 760 S.E.2d 474 (2014).

In *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam), documentary evidence was sufficient to uphold the administrative license revocation: "the hearing examiner found that there was no evidence presented at the administrative hearing to show the stop of his vehicle was valid because the law enforcement officer who initiated the encounter, Officer Anderson, did not appear at the hearing to testify. While the arresting officer was present, his testimony regarding what Officer Anderson told him with regard to the stop of Mr. Doyle's vehicle was stipulated by the parties to be hearsay. Although there was no testimonial evidence presented on this issue, our review of the record shows that documentary evidence was submitted during the hearing that established that the stop of Mr. Doyle's vehicle by Officer Anderson was valid." 233 W. Va. 608, 760 S.E.2d 422. Here, the information that the Investigating Officer gleaned from Mr. Stahler was recorded on the documents admitted as the DMV file. The information in those documents is presumed accurate. The information was not rebutted. Therefore, the circuit court improperly discounted the information from Mr. Stahler which established that shortly after the crash, the Respondent smelled of alcohol and was disoriented.

The totality of the evidence supports a finding that the Respondent was under the influence when he crashed his truck. In cases in which the issue is whether there was sufficient evidence to conclude that the individual revoked for DUI had actually driven his vehicle while under the influence of alcohol, this Court has found, "All that is required to seek a license revocation under West Virginia Code § 17C–5A–2 is that the arresting officer have 'reasonable grounds to believe' that the defendant committed the offense of DUI. Rather than requiring an arresting officer to witness a motor vehicle in the process of being driven, the statute requires only that the observations of the arresting officer establish a reasonable basis for concluding that the defendant had operated

a motor vehicle upon a public street in an intoxicated state." *Cain v. W. Virginia Div. of Motor Vehicles,* 225 W. Va. 467, 471, 694 S.E.2d 309, 313 (2010). "[P]robable cause exists when the facts and circumstances known to the police officer and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the accused had committed or was committing an offense. In situations where the arresting officer has not observed the operation of the vehicle, such facts and circumstances would necessarily have to include a relationship between the time there was evidence to show the influence of intoxicants and the time of operation of the vehicle." (internal citations omitted). *State v. Hummel*, 154 Ohio App.3d 123, 796 N.E.2d 558, 562–63 (2003). Here, Mr. Stahler's report to the Investigating Officer was not challenged and was "reasonably trustworthy." The indicia of intoxication at the scene of the crash, where the Respondent was still getting things out of his car when Mr. Stahler encountered him, was established by Mr. Stahler's report to the Investigating Officer, which was recorded in the officer's documents. Further, the Respondent's intoxication when the Investigating Officer encountered him supports the evidence that the Respondent was DUI.

This Court has addressed several DUI matters in which there is remoteness in time between driving and being found intoxicated. In *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987), the officers observed erratic driving, and the defendant fled the scene after the stop. "Mr. Bennett managed to elude Officers Coffman and Campbell for nearly an hour while they pursued him. During this time Mr. Bennett presumably exerted himself significantly, all the while metabolizing as he had never metabolized before." 178 W. Va. 504, 361 S.E.2d 469. When Mr. Bennett was found, he appeared intoxicated. At the jail, he registered .096% on the Intoximeter. This Court concluded that the ultimate arrest of the defendant for DUI was proper.

In *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision), the Court addressed a situation in which a driver was parked in a Kroger parking lot and was intoxicated. "[T]here need not be affirmative evidence to show that an individual charged with DUI was operating a vehicle. The evidence demonstrates that Mr. Reynolds was intoxicated, alone, in a running vehicle with the lights on; he admitted that he began drinking in one location and moved to another; and he attempted to drive away when the medics woke him. It was reasonable to believe that the car came to be in the Kroger parking lot as a result of Mr. Reynolds's actions. Further, it was reasonable to believe he drove the vehicle while intoxicated. Mr. Reynolds unquestionably drove the vehicle from the Park and Ride, where he was admittedly drinking, to Kroger, where he was indisputably drunk." 2014 WL 1407375, at *4.

In *Montgomery v. West Virginia State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (per curiam), a case in which an intoxicated individual was found in a parked police car, the Court found, "This Court's holding in *Carte* [*v. Cline,* 200 W. Va. 162, 488 S.E.2d 437 (1997)] permits the use of circumstantial evidence to charge an individual with DUI. Appellant's contention that the prosecution must introduce 'affirmative evidence' demonstrating that the individual charged with DUI actually operated the vehicle to invoke our holding in *Carte* is without merit. By adopting a standard that permits reliance upon circumstantial evidence to charge an individual with DUI, this Court implicitly approved prosecutions for the offense of driving while under the influence where affirmative proof as to the issue of driving while under the influence is absent." 215 W. Va. 517, 600 S.E.2d 229. *See also, State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976) (finding that DUI does not have to be committed in presence of officer) and *Ullom v. Miller*, 227 W. Va. 1, 13-14, 705 S.E.2d 111, 123-24 (2010)("Here, we believe there is a sufficient objective basis to conclude that

Trooper Buskirk's continued detention of Ms. Ullom, after his initial encounter with her under the community caretaker doctrine, was permissible under *Terry* and *Stuart*. Trooper Buskirk testified that Ms. Ullom was behind the wheel of the vehicle with the keys in the ignition, there was a strong odor of alcohol, Ms. Ullom's eyes were glassy and bloodshot, she was speaking with slurred speech and her motor skills were unsteady. We therefore conclude that the remainder of Trooper Buskirk's seizure of Ms. Ullom was reasonable as a legitimate *Terry* and *Stuart* investigatory stop.")

In *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam), the Court held, "[t]he DMV hearing examiner was presented with evidence that on the night of the accident, Appellee was found walking along the same side of a road where his car was found. The car came to rest along the side of the road after going over a guardrail. The record further established that Appellee was unsteady on his feet when the deputy approached him and that the deputy observed Appellee's speech was slurred and his eyes were bloodshot and glassy. In addition, the evidence reveals that Appellee was given two field sobriety tests, the HGN test and the one-leg stand test. The results from these tests were recorded by the deputy, showing that Appellee had failed in his performance. We find that these facts provide sufficient evidence to support the conclusion that Appellee was driving a motor vehicle while under the influence of alcohol, with or without the Intoximeter results, and thus represent an adequate basis for the Commissioner to revoke Appellee's driver's license." 225 W. Va. 481, 694 S.E.2d 646.

The record in this matter shows by a preponderance of the evidence that the Respondent was DUI. The Respondent admitted that he crashed his truck. The truck was registered to him, and no one else was in the truck. The Respondent's intoxication at the scene, as reported by Mr. Stahler, and the evidence of intoxication observed by the Investigating Officer approximately two hours

later, provide sufficient evidence under the preponderance of the evidence standard to warrant administrative revocation of the Respondent's license. "Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syllabus Point 2, *Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984). *Also cited at* Syllabus Point 2, *Carte v. Cline,* 200 W. Va. 162, 488 S.E.2d 437 (1997) and Syl. Pt. 4, *Lowe v. Cicchirillo,* 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam). Further, the crash itself is evidence of impairment. In *Reilley v. Byard,* 146 W. Va. 292, 301, 119 S.E.2d 650, 655 (1961), this Court commented on the actions of a motorist who left the highway and collided with a telephone pole, stating, "Rational men do not purposely operate motor vehicles in such manner. Not only traffic regulations, but also prudence and fundamental human instincts of self-preservation dictate otherwise."

The circuit court further erred in giving a negative inference to the absence of field sobriety tests ("Neither the DUI statutes nor our case law require a PBT or any particular field sobriety test to establish that a driver was under the influence for purposes of administrative revocation." *Reed v. Hill*, 235 W. Va. 1, 9, 770 S.E.2d 501, 509 (2015)) and the secondary chemical test ("There are no provisions in either W.Va.Code, 17C–5–1, et seq., or W.Va.Code, 17C–5A–1, et seq., that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol, controlled substances or drugs for purposes of making an administrative revocation of his or her driver's license." Syl. Pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998)), rather than weighing the uncontradicted evidence actually in the record.

The circuit court improperly discounted the evidence that the Respondent's eyes were bloodshot, that he was slurring and that he had the odor of alcohol on his breath. The circuit court attributed the bloodshot eyes and slurred speech to the crash when there is no evidence to show that was the case. The court then concluded that "simply smelling like alcohol is not enough" to show the he was DUI. A.R. 6. In *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66 (2018), the circuit court's findings on the same pieces of evidence were similar: "the circuit court found that 'the odor of an alcoholic beverage on one's breath can exist in the absence of being under the influence.' As to Mr. Pompeo's bloodshot eyes, the circuit court found that this issue 'may be ascribed to any number of innocent reasons' and that 'counsel's eyes were noted to have blood in them and that Patrolman Prager did not believe counsel to be intoxicated.'" 240 W. Va. 262, 810 S.E.2d 73. In *Pompeo*, this Court excoriated the lower court for systematically excluding each piece of evidence showing that the Respondent was DUI. "We find that the circuit court erroneously disregarded the evidence of impairment provided by the officers' testimony by giving undue weight to irrelevant and speculative evidence and by viewing each piece of evidence in isolation, rather than looking at the totality of the circumstances." 240 W. Va. 262, 810 S.E.2d 73. *See also, Reed v. Winesburg*, 241 W. Va. 325, 825 S.E.2d 85 (2019). The circuit court improperly discounted uncontradicted evidence of intoxication and failed to consider the totality of the evidence.

CONCLUSION

The circuit court's Final Order must be reversed.

Respectfully submitted,

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

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Janet E. James #4904
Assistant Attorney General
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304) 558-2522
Janet.E.James@wv.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0726

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

Petitioner,

DAVID GAITHER, JR.,

Respondent.

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 13th day of December, 2021, addressed as follows:

David Gaither
30 Stager Avenue
Falling Waters, WV 25419

Janet E. James