IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 22-0223
(Monongalia County Circuit Court, Civil Action No. 19-AA-3)

EVERETT FRAZIER, Commissioner,
West Virginia Division of Motor Vehicles,

Petitioner,

v.

JAD H. RAMADAN,

Respondent.

BRIEF OF RESPONDENT

Respectfully submitted,

Jad H. Ramadan,

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BRIEF OF RESPONDENT

Respondent, Jad Ramadan, by and through undersigned counsel hereby provides the Brief of Respondent, pursuant to the Scheduling Order entered on March 28, 2022.

ASSIGNMENTS OF ERROR

1. The Circuit Court correctly found that the hearing examiner improperly relied on the results of the subjective field sobriety tests, when the preliminary breath test, Breathalyzer Test, and secondary chemical test of Respondent's blood all showed that Respondent had consumed no alcohol or drugs.

2. The Circuit Court correctly found that the hearing examiner was clearly wrong in failing to give proper weight to the uncontested testimony of Respondent's expert pharmacologist, Rodney G. Richmond, that it was unlikely that Respondent was under the effects of drugs.

STATEMENT OF THE CASE

On July 9, 2015, Respondent Jad Ramadan was involved in a rear end collision in Morgantown, Monongalia County, West Virginia. (App. at 652). The accident occurred in the middle lane of traffic, and traffic was moving on both sides of the cars involved in the accident when Mr. Ramadan was initially detained. (App. at 684). Monongalia County Sheriff's Detective Wilhelm was first on the scene and testified that Mr. Ramadan appeared to be "unstable". (App. at 655). Detective Wilhelm testified that the rain "dumped on us" after we were out of the vehicle. (App. at 710). Detective Wilhelm didn't mention "slurred speech" in his written statement, and said he was most concerned about "leaving" as it was the end of his shift. (App. at 706, 711).

West Virginia State Trooper C. M. Griffith and Trooper Schlobohm were next on the scene. This was the first "in field" experience for Trooper Griffith in administering a field sobriety test. (App. at 679, 701). According to Trooper Griffith, it started raining "extremely

hard" and Mr. Ramadan was transported to a different location. (App. at 686). It was difficult for Mr. Ramadan to see, and he had to remove his glasses to perform the HGN test. (App. at 687). Although Mr. Ramadan was asked to walk a "straight line" as part of the field sobriety test, no actual line was drawn or used. (App. at 701). Weather conditions were listed as a "contributing factor" concerning the accident. (App. at 693).

Mr. Ramadan testified, at the time of the accident, he was nervous, had acute anxiety, was confused, and had difficulty focusing. (App. at 741-742, 744). Mr. Ramadan testified he was prescribed Suboxone in 2015 due to a history of substance abuse. (App. at 741-742). He also testified he has not taken any other drugs at the time of the accident. (App. at 744). Prior to the accident, he was extremely anxious, was in a state of panic, had had trouble sleeping, and had numerous (non-motor vehicle) accidents recently. Mr. Ramadan testified he had been painting all day. (App. at 742-743). Mr. Ramadan further testified he had failed out of his Ph.D. program in May of 2015 and thought his life was over. (App. at 741). Thus, there were ample reasons for Respondent's performance of the field sobriety tests.

Trooper Schlobohm testified Mr. Ramadan had equal pupils and no resting nystagmus. (App. at 722). Trooper Schlobohm administered the field sobriety tests to Mr. Ramadan, while Ms. Griffith observed. (App. at 700). Trooper Schlobohm testified that his attention was "potentially" divided when he was administering the field sobriety tests to Mr. Ramadan, as he was training Ms. Griffith. (App. at 736). Although Trooper Griffith noted that Petitioner "needed help", she did not mark "unsteady" or "staggers" on the DUI Information Sheet. (App. at 284).

Mr. Ramadan declined to give a formal written statement at the police barracks, but he described to the officers at the scene how the accident occurred, as he was permitting a car to

drive in front of him. Ms. Griffith acknowledged that most people would be nervous and fidgety if involved in an accident. (App. at 699).

Mr. Ramadan passed the preliminary breath test, and admitted he had taken Suboxone as prescribed, but no officer called a DRE, or drug recognition expert, to examine Mr. Ramadan concerning his stop or arrest. (App. at 733-734). Trooper Schlobohm further testified he had not had DRE training, but that such training would have been helpful in assessing Mr. Ramadan's condition. (App. at 732, 737). The Breathalyzer Test performed on Mr. Ramadan at the police barracks was negative. (App. at 691). The Forensic Laboratory Report dated May 13, 2016, reports no drugs were detected in Mr. Ramadan's system on the day of the accident. (App. at 756, 766).

After the accident and his arrest, Mr. Ramadan was prescribed Vistaril for anxiety at the regional jail. (App. at 745, 754). Upon his release, he was admitted to an in-patient facility in Williamsburg, VA, for 77 days, followed by eight months at a sober living facility, all part of treatment for his addiction and withdrawal symptoms. (App. at 745). He still attends NA meetings.

Mr. Ramadan testified, at the time of the accident, he was not impaired due to drugs. (App. at 747). Mr. Ramadan's testimony, that Suboxone did not cause dizziness or drowsiness when he took it, was not contradicted. (App. at 752, 758-759). Mr. Ramadan denies telling police officers he had taken Ambien or Xanax the day of the accident, and the negative drug test confirms this. (App. at 744). He is now taking the prescription drug Zoloft for anxiety. (App. at 755).

At the hearing, Mr. Rodney G. Richmond testified on behalf of Respondent. Mr. Richmond has Bachelor's and Master's degrees in pharmacy. He serves as a Director of the Center for Drug and Health Information at Harding University in Searcy, Arkansas. (App. at 762-

763). He testified that he has experience in pharmacokinetics, in both clinical and research settings. (Id.). He stated he has testified in 200 cases and has testified at trial approximately 60-70 times. (App. at 764-765).

At the hearing, Mr. Richmond testified concerning his interpretation of the Forensic Laboratory Report, dated May 13, 2016. (App. at 765, 766-775). The DMV did not call an expert. Mr. Richmond testified that, as to Xanax – either it wasn't there at all, or it was below the level of detection. (App. at 767-768). Mr. Richmond further testified that Xanax has a half-life of about 11 hours. (App. at 768). Mr. Richmond also testified that Xanax is dosed every 12 hours, and the effects would have been gone after 12 hours. (App. at 768-769). Mr. Richmond further testified that Ambien has a half-life of 2½ hours. (App. at 772-773). He testified that Ambien is typically taken at night at bedtime. (Id.). Mr. Richmond testified, in his opinion, it was not likely Mr. Ramadan was under the effects of Ambien or Xanax at the time of the accident, as neither drug was detected. (App. at 773, 776).

Although Respondent informed the officers he had taken Suboxone earlier, the West Virginia State Police Laboratory did not test for Suboxone. Regardless, Mr. Richmond testified that Suboxone does not affect nystagmus, and that any HGN results could not be caused by Suboxone. (App. at 774-776, 786-787). Mr. Richmond testified he would not expect Ambien or Xanax to cause HGN if they were not detected in the Forensic Laboratory Report, because the effect of Ambien is gone after one half-life or 2½ hours; the effect of Xanax would pass after 11 hours. (App. at 776, 788). Mr. Richmond concluded that the findings in the Forensic Laboratory Report are consistent with Mr. Ramadan's testimony that he did not take Ambien or Xanax the day of the accident. (App. at 776). No testimony was presented to contest Mr. Richmond's testimony.

SUMMARY OF ARGUMENT

The Circuit Court correctly found that the Hearing Examiner misapplied *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), in its conclusion of law. *Albrecht, supra*, held that:

> [W]here, as here, 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.

Albrecht, 314 S.E.2d at 865. *Albrecht* involved a driver involved in a one-car accident who exhibited signs of intoxication and was hospitalized where he spent three or four days in the hospital. No field sobriety tests were performed and there were no secondary chemical tests taken. This Court rejected Mr. Albrecht's arguments that there was insufficient evidence to revoke his license where there was evidence that he crashed into a utility pole, seven or eight feet off the road, his vehicle smelled of alcohol, and he admitted to the trooper that he had been drinking.

In Mr. Ramadan's case, however, secondary chemical tests of his breath and blood were performed which conclusively show that he could not have been impaired due to alcohol or drugs. Both the preliminary breath test and the subsequent Breathalyzer Test showed he had no alcohol in his system. The secondary blood test revealed no drugs in his system. The only evidence of consumption of drugs was his statement he took his prescribed medication for treating drug addition, Suboxone, and he testified that it did not cause dizziness or fatigue with him. The State did not test for, nor did it inform Mr. Ramadan that it wasn't going to test for, Suboxone.

Mr. Ramadan's expert pharmacologist, Rodney G. Richmond, testified that Suboxone does not cause horizontal gaze nystagmus. He further testified if Mr. Ramadan had taken small amounts of Xanax or Ambien (which Mr. Ramadan disputes), if a drug is not detected

in the blood screen, either it's not there at all, or it's below a level where Mr. Ramadan would be affected.

Despite the negative results of both the alcohol and drug secondary chemical tests, the Hearing Examiner relied on the field sobriety tests which are subjective tests, conducted in uncontrolled environments, and conducted on drivers who the troopers know nothing about. Both of the secondary chemical tests cleared Mr. Ramadan of alcohol or drug consumption.

Admittedly, Mr. Ramadan collided with the rear of a car he was allowing to pull in front of him. The weather was awful; a new, inexperienced trooper was performing her first field sobriety test, and Mr. Ramadan suffered from acute anxiety and substance withdrawal. But the secondary chemical tests made it clear: if he was impaired, it was not due to alcohol or drugs, and the Circuit Court correctly found that the Hearing Examiner committed clear error in so finding.

The Circuit Court further found persuasive W. Va. Code § 17C-5-8(a) which provides that evidence of .05 percent or less of alcohol in your blood is prima facie evidence a person is not under the influence of alcohol. The Legislature has demonstrated its intent that secondary chemical tests are more accurate and reliable than field sobriety tests taken at the scene of a traffic stop in determining impairment due to alcohol or drugs. Thus, the Legislature has determined that secondary chemical tests are to be given more weight than field sobriety tests, especially when the State fails to call in a Drug Recognition Expert ("DRE"). Because the Hearing Examiner failed to give the secondary chemical tests proper weight, and misapplied *Albrecht*, the Circuit Court correctly found that the Final Order revoking Mr. Ramadan's license for five (5) years was error.

The Circuit Court also correctly found that the Hearing Examiner failed to properly credit the testimony of Rodney G. Richmond, Respondent's expert. Mr. Richmond's testimony

and opinions were essentially unchallenged as the State declined to call an expert. Mr. Richmond testified that "there were no positive findings for any of the drugs that were tested." They specifically tested for alprazolam (Xanax) and zolpidem (Ambien). Although the Hearing Examiner characterized Mr. Richmond's testimony about half-lives of drugs as "ambiguous", it was thorough, succinct, and merely explained his overall opinion, that if the drugs were not detected by the drug screen, it is unlikely they could have had any effect on Mr. Ramadan. Moreover, Mr. Richmond further testified that there was no evidence of amphetamines, barbiturates, cannabinoids, cocaine, opiates, and some muscle relaxants. His conclusion was the same: if you can't even detect the drug in a drug screen, it is unlikely to be at a level to affect Mr. Ramadan. The Hearing Examiner ignored these opinions without adequate discussion.

Mr. Richmond also debunked the horizontal gaze nystagmus test. He testified, uncontradicted, that Suboxone does not cause nystagmus. Thus, if the HGN test was indeed accurate (which Respondent disputes) then it was not the result of any drugs. The Hearing Examiner failed even to mention Mr. Richmond's testimony concerning Suboxone and horizontal gaze nystagmus.

Because the Hearing Examiner relied on the subjective field sobriety tests rather than the more accurate and reliable secondary chemical tests, misapplied *Albrecht*, and because the Hearing Examiner failed to properly credit the uncontradicted testimony of Respondent's expert, Rodney G. Richmond, the Circuit Court correctly found that the Hearing Examiner's decision revoking Respondent's license for five (5) years was clearly wrong, arbitrary and capricious, and contained clear errors of law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case because the law regarding the issues presented is well-settled, the facts and legal arguments are adequately presented in the briefs and

record, and oral argument would not significantly aid the decisional process. If the Court determines that oral argument is necessary, then Respondent submits that argument under W. Va. R. App. P. 19 is appropriate because the appeal involves assignments of error in the application of settled law, and that the appeal is appropriate for disposition by memorandum decision under W. Va. R. App. P 21.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the OAH's Final Order pursuant to the West Virginia Administrative Procedures Act, which states as follows:

> 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; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedures; (4) Affected by other error of law; (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). Moreover, "[o]n appeal of an administrative order from a circuit court, the Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline,* 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996).

II. THE CIRCUIT COURT CORRECTLY FOUND LEGISLATIVE INTENT TO HOLD SECONDARY CHEMICAL EVIDENCE ABOVE SUBJECTIVE FIELD SOBRIETY TESTS.

A. The presumptions of W. Va. Code § 17C-5-8 demonstrate the Legislature's confidence in the reliability of objective secondary chemical evidence over subjective field sobriety tests.

The presumptions of W. Va. Code § 17C-5-8 with respect to alcohol are clearly a product of the Legislature's confidence in the reliability of secondary chemical evidence. Indeed, the Legislature is so confident in the reliability of secondary chemical evidence that it presumes a person with "five hundredths of one percent or less, by weight, of alcohol in his or her blood . . . was not under the influence of alcohol." W. Va. Code § 17C-5-8(b)(1). Thus, even where alcohol is detected, the Legislature is confident that a secondary chemical test is accurate enough to warrant a presumption of the alcohol's lack of influence over the person.

Petitioner complains that the Circuit Court compared apples to oranges when it extended the alcohol presumptions to controlled substances. But Petitioner offers no evidence or argument that secondary chemical tests are somehow less reliable when measuring controlled substances as opposed to alcohol. In fact, the reliability is equivalent. Instead, Petitioner argues that drugs and alcohol are incomparable because the Code is silent with respect to presumptions regarding low concentrations of controlled substances.

But Section 17C-5-8's silence with respect to legal limits of controlled substances is readily explained by Petitioner's own observation that "there is no 'legal limit' for drugs as there is for alcohol." Pet'r's Br. 11. The alcohol provisions provide the following:

> (b) The evidence of the concentration of alcohol in the person's blood at the time of the arrest or the acts alleged gives rise to the following presumptions or has the following effect:
>
> (1) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his or her blood, is prima

> facie evidence that the person was not under the influence of alcohol;
>
> (2) Evidence that there was, at that time, more than five hundredths of one percent and less than eight hundredths of one percent, by weight, of alcohol in the person's blood is relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;
>
> (3) 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.

Thus, each of the three presumptions instructs courts as to the effect of secondary chemical evidence when alcohol is present. The Code does not yet have analogous provisions for controlled substances precisely because there is no legal limit for them, not because the Legislature questions the reliability of secondary chemical evidence with respect to drugs. Indeed, the Code does not directly contemplate the complete absence of alcohol any more than it contemplates the complete absence of controlled substances.[1]

Finally, the Legislature's confidence in the reliability of secondary chemical evidence with respect to controlled substances is confirmed by Section 17C-5-12, which called for the Bureau of Public Health to submit to the Joint Committee on Government and Finance, on or before December 31, 2020, a report that includes the following:

> [r]ecommendations for the minimum levels of those drugs or controlled substances contained in § 17C-5-8(d) of this code, that must be present in a person's blood in order for the test to be admitted as prima facie evidence that the person was under the influence of a controlled substance or drug in a prosecution for the offense of driving a motor vehicle in this state.

This provision of Chapter 17C demonstrates that the Legislature has considered, and has just as much confidence in, the reliability of secondary chemical evidence when testing for controlled

[1] Granted, the Code does indirectly contemplate the complete absence of alcohol through Section 17C-5-8(b)(1), but the purpose of that provision is clearly to identify a "legal limit."

substances as it does when testing for alcohol. The Legislature is seeking guidance on a "legal limit" for controlled substances. To be sure, Respondent does not require a legal limit here because the secondary chemical evidence showed no presence of controlled substances, but the Legislature's search for a legal limit is a powerful indicator of its intent to accept objective secondary chemical evidence over subjective field sobriety tests. Accordingly, the Circuit Court correctly found, consistent with Legislative intent, that secondary chemical evidence is more accurate and reliable than field sobriety tests.

B. The statutory and due process right to demand secondary chemical evidence further evinces the Legislature's intent to favor secondary chemical evidence.

"W. Va. Code § 17C-5-9 accords an individual arrested for driving under the influence of alcohol, controlled substances, or drugs a right to demand and receive a blood test within two hours of his arrest." *State v. York*, 175 W. Va. 740, 741, 338 S.E.2d 219, 220 (1985). "The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function." *Id.* This further demonstrates the Legislature's determination that secondary chemical analysis provides important, and possibly dispositive, evidence whether a person is under the influence of alcohol or controlled substances.

Moreover, this Court has long recognized that to deny the right to secondary chemical evidence "would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense." *York*, 175 W. Va. at 741, 338 S.E.2d at 220. And while this Court's recent decision in *Frazier v. Talbert*, 245 W.Va. 293, 858 S.E.2d 918 (2021), decided that failure to follow W. Va. Code § 17C-5-9 is no longer grounds for automatically requiring a recission of the revocation order without consideration of the entire

record,[2] that holding has no bearing on the strength of secondary chemical evidence that demonstrates a complete absence of controlled substances.

It is undisputed that Mr. Ramadan was given both a preliminary breath test, and then a Breathalyzer Test, and that both tests showed he had no alcohol in his blood. Mr. Ramadan was also subject to a blood draw that tested not only for Ambien and Xanax, but also tested for amphetamines, barbiturates, cannabinoids, opioids, and muscle relaxants. Inexplicably, the DMV did not test for Suboxone. All three tests were negative.

The Hearing Examiner relied on *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1999); *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859, 864 (1984); *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997); and *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E. 2d 311 (2008) for the proposition that the OAH may revoked a person's driver's license based on evidence other than a secondary chemical test. We agree. None of those cases, however, involved a driver who allegedly failed field sobriety tests but who also had negative secondary chemical tests for alcohol and drugs. *See also*, *White v. Miller*, 228 W. Va. 797, 799, 724 S.E.2d 768, 770 (2012) (a driver's license cannot be administratively revoked solely and exclusively on the results of a drivers HGN test).

Here, a secondary chemical test (blood draw) was done, and no drugs were found in Mr. Ramadan's system. Yet, the Hearing Examiner relied on the field sobriety tests rather than the secondary chemical tests without adequate discussion. This was clearly wrong, against the weight of the substantial evidence, and arbitrary and capricious.

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[2] Despite being abrogated by *Frazier v. Talbert*, the fact that *Reed v. Hall* and *Reed v. Divita* held failure to strictly adhere to the terms of Section 17C-5-9 warranted automatic recission of the revocation order without considering the entire record is itself illustrative of the tremendous probative value of secondary chemical evidence. *See* 235 W. Va. 322, 773 S.E.2d 666; No. 14-1018, 2015 WL 5514209 (W. Va. Sept. 18, 2015) (memorandum decision).

Moreover, more than adequate reasons were presented for Mr. Ramadan's alleged failure of those tests, including, but not limited to: 1) he was a recovering substance abuser and suffering from acute anxiety, 2) he had been prescribed Suboxone for withdrawal, 3) he had a prior DUI, 4) he was involved in a traffic accident, 5) traffic was passing him on both sides of the intersection, 6) he was transported to a different location due to a sudden storm, 7) at least three officers were involved, one of whom was in training, 8) they removed his glasses, and 9) there was no baseline to compare his performance.

In other words, the Hearing Examiner was clearly wrong in finding that Mr. Ramadan was under the influence of alcohol or drugs, when both the alcohol and drug tests were negative. At a minimum, the Hearing Examiner should have made detailed findings about why he rejected the secondary chemical tests. Instead, the hearing examiner simply relied on the field sobriety tests in revoking Mr. Ramadan's license for five (5) years and that was error.

The opening paragraph of Petitioner's argument summary sets forth a long line of cases in support of the proposition that the DMV must submit sufficient evidence of driving under the influence of an impairing substance to uphold a license revocation. *See* Pet'r's Br. 6-7. But *none* of these cases concerned secondary chemical evidence that showed the complete absence of alcohol or controlled substances. *See* Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984) (holding administration of chemical sobriety test is not required to support revocation of a driver's license and that there was sufficient evidence to establish that motorist had been driving under the influence of alcohol despite the lack of secondary chemical evidence); *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995) (upholding revocation where evidence of a secondary chemical breath test indicating a .182 blood alcohol content was excluded because aroma of alcohol, swerving while driving, and horizontal gaze nystagmus provided sufficient evidence to

revoke standing alone); *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 71, 464 S.E.2d 589, 590 (1995) (holding evidence of driving under the influence was sufficient even where "the results of no blood, breath or urine tests appear[ed] in the record"); *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997) (holding evidence was sufficient to conclude the appellant was driving under the influence of alcohol even though the law enforcement officer did not witness him actually driving, because when the officer arrived on the scene the vehicle was parked at a stop light with the engine running and the transmission engaged, driver admitted to drinking ten or twelve beers, and he failed to properly perform field sobriety tests); *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998) (upholding revocation where arresting officer forgot to attach a copy of secondary breath test results, which read .257, with his report to the DMV); *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (upholding administrative discharge of state police officer based in part on a finding that he was driving under the influence of alcohol as evidenced by two secondary chemical breath tests that yielded .169 and .157 respectively blood alcohol contents); *Lilly v. Stump*, 217 W. Va. 313, 617 S.E.2d 860 (2005) (upholding revocation where driver refused to submit to secondary chemical tests after failing his first field sobriety test); *Carpenter v. Cicchirillo*, 222 W. Va. 66, 662 S.E.2d 508 (2008) (holding the officer's failure to submit his statement to the DMV within 48 hours of motorist's arrest for DUI, as statutorily required, did not prejudice the driver, and thus, did not bar the DMV from revoking the driver's license); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (upholding revocation where appellee's hospital medical records showed a blood alcohol content of .33 within two hours of the accident); *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (upholding revocation where secondary breath test results in the record indicated a blood alcohol content of .218); *Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010) (upholding revocation where driver admitted to

drinking four beers and driving but failed to provide samples sufficient to complete a secondary chemical breath test); *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012) (upholding revocation where driver's preliminary breath test exceeded the legal limit and secondary chemical test, taken at the police department at later time, yielded a blood alcohol content of .076); *Dale v. McCormick*, 231 W. Va. 628, 630, 749 S.E.2d 227, 229 (2013) (upholding where driver admitted "that she previously had drank two mixed alcoholic beverages, that she was drinking while driving, and that she had poured out alcohol from her window before she stopped"); *Dale v. Dingess*, 232 W. Va. 13, 750 S.E.2d 128 (2013) (upholding the OAH's finding that appellee had in fact been driving the vehicle where there was conflicting testimony regarding the same); *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (analyzing the lawfulness of the initial stop and upholding revocation where driver admitted to drinking four beers and had a blood alcohol content of .104); *Reed v. Hill*, 235 W. Va. 1, 770 S.E.2d 501 (2015) (reversing the circuit court's determination that there was no probable cause to arrest and upholding the revocation where secondary chemical breath test yielded a .108 blood alcohol content); *Reed v. Winesburg*, 241 W. Va. 325, 825 S.E.2d 85 (2019) (reversing the circuit court's determination that there was no probable cause to arrest and upholding the revocation where secondary chemical breath test yielded a .109 blood alcohol content); *Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020) (upholding revocation where underaged driver failed field sobriety tests and admitted to drinking and smoking marijuana at a party prior to driving); *Frazier v. Bragg*, 244 W. Va. 40, 851 S.E.2d 486 (2020) (holding officer's failure to test or make available to driver a blood sample that was taken at the driver's request did not preclude revocation); *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021) (holding officer's failure to satisfy driver's demand for blood test did not mandate automatic reversal of revocation order). Accordingly, none of Petitioner's twenty cited

cases support revoking a license where secondary chemical evidence effectively rules out the possible influence of alcohol or controlled substances.

III. THE CIRCUIT COURT CORRECTLY FOUND THAT THE HEARING EXAMINER FAILED TO PROPERLY CREDIT THE TESTIMONY OF RESPONDENT'S EXPERT RODNEY G. RICHMOND

Respondent presented as an expert witness Rodney G. Richmond, who was the Director of the Center for Drug and Health Information at Harding University. He received his Bachelor of Science in Pharmacy at WVU and his Master of Science in Pharmacy at the University of North Carolina at Chapel Hill. He was offered as an expert in Pharmacology and Pharmacokinetics, which essentially in the study of the effect that the body has on drugs. At the time of the hearing, he had testified approximately 200 times in deposition and 60-70 times at hearing or trial. The OAH had no expert.

Mr. Richmond testified that every case in which he testified (60-70) involved some aspect of half-life, dosages, drug effects, etc. He testified that there was a huge body of knowledge gained over 30 years of studying and teaching. A careful review of his testimony demonstrates his expertise. The OAH did not seriously challenge his expertise, and as discussed above, offered no expert witness of its own.

Mr. Richmond further testified essentially that the secondary chemical test (blood draw) showed that either the drugs weren't there, or, if they were, it was below the level of detection. Here, it is undisputed that no drugs tested were detected in Mr. Ramadan's system. Inexplicably, they did not test for Suboxone, a drug legally prescribed for Mr. Ramadan for withdrawal. Mr. Richmond did testify, however, that Suboxone does not cause nystagmus, which the Hearing Examiner failed to note in his Final Order.

Mr. Richmond also testified about the half-lives of Ambien and Xanax, which testimony the Hearing Examiner described as "ambiguous," and which apparently caused the

Hearing Examiner to discredit Mr. Richmond's overall testimony. But in fact, Mr. Richmond's half-life testimony is unambiguously consistent with the testing timeline set forth by the Legislature as a requirement to admissibility of secondary chemical evidence. *See* W. Va. Code § 17C-5-8(g)(2) (requiring a sample or specimen to determine the controlled substance content of a person's blood to be taken within four hours of a person's arrest in order to be admissible as evidence).[3]To ignore the substance of Mr. Richmond's testimony was arbitrary and capricious, because the substance of Mr. Richmond's testimony was this: if the secondary chemical test did not detect them, there were not sufficient drugs in Mr. Ramadan's system to affect him. Thus, any alleged failure concerning the field sobriety tests was not due to drugs.

CONCLUSION

The law is clear, if a secondary chemical test shows no alcohol was in your system, it is prima facie evidence you are not under the influence of alcohol. The same reasoning should apply if a secondary test shows there is no evidence of drugs in your system: secondary chemical evidence is simply more reliable than subjective field sobriety tests, that you are not under the influence of drugs. These tests essentially ruled out alcohol and drugs as a reason for Mr. Ramadan's alleged failure to perform the field sobriety tests. That is the issue before the Court. Because the Hearing Examiner did not adequately explain the conflict in his findings and with the undisputed physical evidence, Mr. Ramadan's five-year revocation should be reversed. *See*, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) (where there is a direct conflict in the

[3] Moreover, the fact that the Legislature has a distinct testing timeline requirement for alcohol indicates the Legislature's awareness of differing half-lives, as well as the Legislature's intent to mitigate issues that might impact the reliability of secondary chemical tests for controlled substances versus alcohol. *See* W. Va. Code § 17C-5-8(g)(1) (requiring a sample or specimen to determine the alcohol concentration of a person's blood to be taken within two hours of a person's arrest in order to be admissible as evidence).

critical evidence, the agency may not elect one version over another without a reasoned and articulate decision).

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 22-0223
(Monongalia County Circuit Court, Civil Action No. 19-AA-3)

EVERETT FRAZIER, Commissioner,
West Virginia Division of Motor Vehicles,

Petitioner,

v.

JAD H. RAMADAN,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I served the foregoing *Brief of Respondent* upon counsel of record by e-mail and U.S. Mail, postage prepaid, and addressed as follows:

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