IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0519

ADAM HOLLEY, ACTING COMMISSIONER OF
THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

GARY L. BRAGG,

Respondent.

Honorable Louis H. Bloom, Judge
Circuit Court of Kanawha County
Civil Action No. Civil Action No. 19-AA-1

PETITIONER'S BRIEF

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THE CIRCUIT COURT ERRED IN FINDING THAT THE RESPONDENT'S DUE PROCESS AND STATUTORY RIGHTS WERE VIOLATED BECAUSE HE COULD NOT EXERCISE HIS RIGHT TO HAVE THE BLOOD SAMPLE INDEPENDENTLY TESTED.

STATEMENT OF THE CASE

On January 16, 2015, Senior Trooper M. J. Miller of the West Virginia State Police, Logan Detachment ("Investigating Officer") was conducting road patrol with Senior Trooper D. M. Williamson in Williamson, Mingo County, West Virginia when they observed a 2006 Chevrolet Impala. App[1]. 116, 122, 197. The officers observed that the car was weaving, that the driver was not wearing a seatbelt, that the side view mirror did not have glass, and that the driver failed to signal a right turn. App. 116, 122, 127, 197.

At approximately 1:46 p.m., the Investigating Officer conducted a traffic stop of the vehicle and identified the driver as the Respondent herein. When the Investigating Officer approached the Respondent, he observed an open container of alcohol in the passenger side floor board. The Investigating Officer further observed that the Respondent had slurred speech and watery eyes. The Investigating Officer smelled the odor of alcohol on the Respondent's breath. App. 116, 117, 123, 127, 198-99.

The Investigating Officer asked the Respondent to get out of the car to perform standardized field sobriety tests. The Respondent was unsteady as he exited his vehicle, while walking to the roadside and while standing. The Respondent admitted that he had been drinking alcohol and taking Suboxone. App. 117, 123, 127, 198-99, 202, 232.

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[1]References are to the Appendix filed contemporaneously with this Brief.

The Investigating Officer explained the Horizontal Gaze Nystagmus ("HGN") test to the Respondent. Prior to administering the HGN Test, the Investigating Officer conducted a medical assessment of the Respondent's eyes which indicated equal pupils, equal tracking, and no resting nystagmus. The Respondent also had vertical nystagmus, which, as the Investigating Officer testified, is indicative of a high level of impairment. App. 117, 123, 127, 229. During the HGN Test, the Respondent exhibited a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and onset of nystagmus prior to 45 degrees in both eyes. App. 117, 123, 127. The Investigating Officer testified that these results indicated that the Respondent was intoxicated. App. 198. The Investigating Officer has been trained to perform the HGN test. App. 199.

The Respondent refused to take the walk-and-turn and one-leg-stand tests, stating that he had a medical condition with his feet. App. 117, 123, 127, 198, 200.

The Investigating Officer placed the Respondent under arrest at 2:13 p.m. App. 116, 200. The Investigating Officer asked the Respondent to submit to a blood draw. App. 119, 200-01, 212. The Respondent agreed to do so. App. 212. Senior Trooper Williamson took the Respondent to Williamson Memorial Hospital for a blood draw. App. 119, 123, 127, 200.The sample was drawn by Roger May, who was medically trained and authorised to draw blood. App. 61, 119. The blood sample was in the possession of Senior Trooper Williamson. At the hearing, the Investigating Officer testified that Trooper Williamson left the State Police shortly after the arrest in this case, that the State Police Laboratory did not have the blood sample, and the sample was not at the Logan or Williamson police departments. App. 201. Senior Trooper Williamson was not present as a witness. App. 201.

On March 17, 2015, the DMV sent the Respondent an *Order of Revocation* for driving under

the influence ("DUI") of alcohol, controlled substances and/or drugs. App. 20. The Respondent timely requested an administrative hearing from the Office of Administrative Hearings ("OAH"). App. 14.

On February 3, 2017, the OAH conducted an administrative hearing. At the hearing, the Respondent denied that he was drinking (App. 210) and stated that he was wearing a seatbelt. App. 211. The Respondent gave an equivocated denial that he failed to use his turn signal, testifying: "I looked through the rearview mirror and seen him coming like a bullit. [sic] That wouldn't be very smart of somebody. The law would be pulling right in behind them him not using a turn signal." App. 227. The Respondent could not recall if there was glass in his side mirror. App. 227.The Respondent admitted that he took "half a strip," or four milligrams, of Suboxone approximately two hours before the arrest. The Respondent testified that he also takes Zocor for blood pressure. App. 218-19.

On December 4, 2018, the OAH entered a *Corrected Final Order* reversing the DMV's *Order of Revocation* for DUI. App. 144. The Respondent had a previous DUI conviction on November 26, 2013. App. 122-23, 127.

DMV filed a Petition for Appeal with the Kanawha County Circuit Court on January 2, 2019. App. 161. On May 3, 2019, the circuit court entered a *Final Order Denying Petition for Judicial Review*. App. 1.

SUMMARY OF ARGUMENT

It is undisputed that the Respondent committed the offense of DUI, yet the circuit court upheld the rescission of the revocation because no blood test analysis was available. The circuit court's conclusion that the Respondent's due process and statutory rights were violated because he

could not request an independent analysis of the blood is without support. Because the Respondent did not demand or request a blood draw on the date of the arrest, W. Va. Code §17C-5-9 (1983) is not applicable to this case. That statute provides, "Any person lawfully arrested for driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his or her blood or breath to determine the alcohol concentration of his or her blood be taken within two hours from and after the time of arrest and a sample or specimen of his or her blood or breath to determine the controlled substance or drug content of his or her blood, be taken within four hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand."

The circuit court's conclusion that those who acquiesce to a blood draw are entitled to the same rights as those who request blood draws is based on speculation and assumptions. The circuit court relied on *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015) and *Reed v. Divita*, No. 14-11018, 2015 WL 5514209 (W. Va. 2015)(memorandum decision), which are distinguishable from this case in that the drivers in those cases requested blood tests.

The due process concerns of the circuit court flow from the statutory right of a driver to demand a test. It is only through unfounded speculation that the court could find that the Respondent's due process rights were implicated when there was no statutory violation. In the present case, the Respondent was not denied a right; he never invoked the right to a blood test.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves an assignment 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)(1964). 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 the lower court, this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law.'" Syllabus Point 4, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE RESPONDENT'S DUE PROCESS AND STATUTORY RIGHTS WERE VIOLATED BECAUSE HE COULD NOT EXERCISE HIS RIGHT TO HAVE THE BLOOD SAMPLE INDEPENDENTLY TESTED.

The circuit court's conclusion that the Respondent's due process and statutory rights were violated because he could not request an independent analysis of the blood is without support. The applicable statute is W. Va. Code § 17C-5-9:

> Any person lawfully arrested for driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his or her blood or breath to determine the alcohol concentration of his or her blood be taken within two hours from and after the time of arrest and a sample or specimen of his or her blood or breath to determine the controlled substance or drug content of his or her blood, be taken within four hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand.

Because the Respondent did not request a blood test, this statute is inapplicable to this case. There is also no support for a finding that the Respondent's due process rights were violated. There is no evidence that the Respondent requested the test, or that he wished to have the sample independently tested.

Reed v. Hall, 235 W. Va. 322, 773 S.E.2d 666 (2015) and *Reed v. Divita*, No. 14-11018, 2015 WL 5514209 (W. Va. 2015)(memorandum decision) are distinguishable from the present case in that in those cases, the drivers requested blood tests. An additional distinction is that in *Divita,* the sample was destroyed.

Reed v. Hall, supra and *Reed v. Divita, supra* do not support granting an equitable solution (reversal of the revocation) when no such solution is permitted by statute. This Court made no new law in those cases. This Court acknowledged the rights of drivers, pursuant to W. Va. Code §17C-5-9 (2013), to demand and receive a blood test. In *Hall*, in which the driver requested a blood test, this Court concluded, "The subsequent statutory requirement, however, was not satisfied because a blood test on that blood sample was never conducted." *Reed v. Hall*, 235 W. Va. at 332, 773 S.E.2d at 676. The subsequent statutory requirement, that a "chemical test thereof be made," (W. Va. Code §17C-5-9) is contingent on the driver demanding a blood test. As noted above, that is not the factual scenario in this case.

In *Hall* and *Divita*, this Court imposed a non-existent remedy for failure to obtain an analysis of the blood samples: the Court rescinded the revocations for DUI. In light of *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987), which renders blood test results immaterial in the case of refusal ("It is clear now that a person who refuses to take the designated breathalyzer or urine test will have his license revoked, even if he takes an alternative blood test that conclusively proves that

he was not intoxicated."), the remedy for failure to provide a blood test, when there is evidence of DUI, must fall short of recision of the revocation. In *Reed v. Conniff*, 236 W. Va. 300, 779 S.E.2d 568 (2015), this Court "recognized that dismissal of the proceedings would run counter to the principle that license revocation proceedings should be, where possible and equitable, resolved on their merits and conducted in a manner 'devoid of those sporting characteristics ... of a game of forfeits [.]' [*David v. Comm'r of W. Va. Div. of Motor Vehicles*, 219 W.Va. 493, 498, 637 S.E.2d 591, 596 (2006)] (quoting *Rosier v. Garron, Inc.*, 156 W.Va. 861, 875, 199 S.E.2d 50, 58 (1973))." 236 W. Va. 309, 779 S.E.2d 577.

There is no provision for reversing a revocation when the DUI offense has been proven. Nothing in W. Va. Code §17C-5-9 provides for a finding, as in this case, that an offense in which there was reasonable suspicion for the stop, a lawful arrest, and evidence of impairment, for which DMV is mandated to revoke, can be found not to have happened.

Because the Respondent did not demand or request a blood draw on the date of the arrest, W. Va. Code §17C-5-9 (1983) is not applicable to this case. This Court has held that "[w]hen a driver asserts that his or her right to a blood test requested pursuant to W. Va. Code §17C-5-9 (1983) has been violated, the burden of proof is on the driver to show he or she made the request in compliance with the conditions set forth in the statute for making that request." Syl. Pt. 3, *Dale v. Painter*, 234 W. Va. 343, 765 S.E.2d 232 (2014)(emphasis added). Furthermore, "a request for a blood test made pursuant to W. Va. Code §17C-5-9 (1983) must be made to the investigating officer or officers." *Id.*, Syl. Pt. 8. The Respondent **never** requested a blood test. *Hall, supra* and *Divita, supra* are distinguishable in that the drivers in those cases demanded or requested to submit to a blood draw on the date of the arrest. They invoked their rights under W. Va. Code § 17C-5-9.

Not only did the Respondent not request a blood test, he did not demand the analysis of the blood. "The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand." W. Va. Code § 17C-5-9 (1983). "The requirement that a driver arrested for DUI must be given a blood test on request does not include a requirement that the arresting officer obtain and furnish the results of that requested blood test." Syl. Pt. 3, *In re Burks,* 206 W.Va. 429, 525 S.E.2d 310 (1999). Syl. Pt. 6, *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). There is no basis for recision of the revocation due to the lack of evidence of a blood test result.

The circuit court's conclusion that those who acquiesce to a blood draw are entitled to the same rights as those who request blood draws is based on speculation and assumptions. To this point, the circuit court held, "This would presumably remain true in instances of bad faith on the arresting officer's part, including if the officer intentionally destroys the sample." App. 5. The circuit court speculated that "in situations where the arresting officer requests the blood draw, the impetus upon the driver to also request a blood draw is removed, as the driver has been assured by the officer that a blood draw will occur if they acquiesce. To say that the driver loses constitutional and statutory protections by trusting that the officer will do as they say is unfounded and inconsistent with the Supreme Court of Appeals precedent." App. 5. These conclusions are outside the record in this case. There is no evidence that the officer destroyed the sample, whether intentionally or not; there is no evidence that the Respondent was "assured" that a blood test would occur or that he would have requested a test if the officer did not ask him to submit to one.

Contrast this reasoning to that in *State v. York*, 175 W. Va. 740, 338 S.E.2d 219 (1985), a criminal case in which the due process rights of a driver to demand and receive a blood test were noted and ascribed to the driver: "W.Va. Code 17C-5-6 [1981] outlines how law enforcement

officials shall administer this test and the right of the person tested to have an additional test at his own expense. But from a driver's right to ask for a blood test in addition to the breathalyzer test, we cannot infer a duty on the part of law-enforcement officers to administer a blood test in every case in which they arrest someone for driving while intoxicated. *W.Va.Code* 17C-5-9 [1983] clearly does not *require* blood tests. Under the *Code* law enforcement officers are under no duty to inform the defendant of his right to additional tests. Rather, *W.Va.Code* 17C-5-9 [1983] 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. Furthermore, this statutory right is hardly a new development." 175 W. Va. at 741, 338 S.E.2d at 220–21. Obviously recognizing the circumscriptions of W. Va. Code § 17C-5-9 [1983], "the dispositive question is whether Mr. York, in fact, requested a blood test." *Id.*

The due process concerns of the circuit court flow from the statutory right of a driver to demand a test. It is only through unfounded speculation that the court could find that the Respondent's due process rights were implicated when there was no statutory violation. In the present case, the Respondent was not denied a right; he never invoked the right to a blood test.

In this case, the DMV made all of its evidence available. The evidence shows that blood was drawn at the Investigating Officer's request by a trained professional authorized to draw blood. The blood sample was in the possession of Senior Trooper Williamson. Neither the West Virginia State Police Lab, the Logan Police Department nor the Williamson Police Department had the sample. The DMV has no further obligation to investigate or provide evidence. "The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do

not have a constitutional duty to perform any particular tests." *Arizona v. Youngblood*, 488 U.S. 51, 59, 109 S. Ct. 333, 338, 102 L. Ed. 2d 281 (1988). The DMV is under no obligation to present more evidence than it has. "Part of it stems from our unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, see *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Arizona v. Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337.

Contrary to the speculation of the circuit court that "[t]his would presumably remain true in instances of bad faith on the arresting officer's part, including if the officer intentionally destroys the sample" (App. 5), there was no showing of bad faith on the part of the police or the DMV in this case. "We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* There was no due process violation.

A secondary chemical test is not required to prove that a motorist was driving under the influence of alcohol, controlled substances, or drugs for the purpose of making an administrative revocation of the driver's license. Syl. Pt. 1, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E. 2d 662 (1998); Syl. Pt. 2, *Dean v. W.V. Dept. Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995)(per curiam); and Syl. Pt. 2, *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995). The revocation of the Respondent's license for DUI is supported by *Albrecht, supra*: "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." Syl. Pt. 2, *Albrecht v. State, supra.* The absence of a blood test result in this case should have no effect on the OAH's determination of whether the Respondent was DUI. Yet that factor became the sole basis for rescinding the DMV's Order of Revocation.

Nothing in W. Va. Code §§ 17C-5-9 (2013) or 17C-5A-1(c) (2015) provides for anything except mandatory revocation when a person is deemed to have committed the offense of DUI. The DMV must revoke when, "upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner determines that a person committed an offense described in section two, article five of this chapter." W. Va. Code § 17C-5A-1(c)(2015).

Nothing in statute or caselaw supports the reversal of an otherwise valid revocation based on the absence of blood test results. Keeping in mind that there is no question that the Respondent drove under the influence of alcohol, controlled substances or drugs, or any combination thereof,[2] the creation of a heretofore non-existent remedy for the absence of blood test results means that the DMV, contrary to its mandate in W. Va. Code §17C-5A-1(c), shall not revoke upon DUI if the blood test result is not available when a blood draw occurred for any reason. The OAH clearly found that the Respondent was DUI, and should have given the blood test evidence (*i.e.*, a blood test was made, and the whereabouts of the sample are unknown) the weight it deserved. No reasonable amount of

[2]Although the circuit court did not address it, the OAH found that the Investigating Officer had a lawful reason to encounter the Respondent (App. 144); that he had reasonable grounds to believe that the Respondent was DUI (App. 144); that there was evidence of the use of alcohol, drugs, controlled substances or any combination thereof (App. 145); and that the Respondent was lawfully arrested. App. 145.

weight given to that evidence would lead to the revocation being rescinded. This is an absurd conclusion. If the blood test result had been positive, it would have affirmed the indicia of intoxication shown by the evidence in the case. If it had been negative, the evidence of Respondent's DUI, including indicia of impairment, would still have to be considered and weighed. The stretching of the law to find that the absence of blood test results causes the exclusion of all other evidence and requires recision of the revocation is insupportable.

CONCLUSION

The *Final Order Denying Petition for Judicial Review* must be reversed.

Respectfully submitted,

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