THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ADAM HOLLEY, ACTING COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES, Petitioner, v. GARY L. BRAGG, Respondent.	CASE NO: 19-0519 JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA SUMMARY RESPONSE OF RESPONDENT

SUMMARY RESPONSE OF RESPONDENT

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
THE HONORABLE LOUIS H. BLOOM PRESIDING
Civil Action No. 19-AA-1

GARY L. BRAGG,
By Counsel,

By: _____

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I. INTRODUCTION

This case involves a motorist, who after being arrested for allegedly driving under the influence of alcohol, agreed to a blood test at Williamson Memorial Hospital to determine what amount, if any, of alcohol or controlled substances were in his system at the time of his arrest. However, due exclusively to the negligence of the Investigating Officer, Trooper D.M. Williamson, the West Virginia State Police Laboratory, the Logan Police Department or the Williamson Police Department, the blood sample was lost and/or destroyed, and it is not clear whether the blood sample was submitted for testing and analysis.

A person arrested for driving under the influence of alcohol has a Due Process right to have a sample of his blood taken to determine the concentration of alcohol in his blood. *See* W.Va. Code § 17C-5-9 (2018). In following both the plain language of the statute and established precedent of the Supreme Court of Appeals of West Virginia, the Office of Administrative Hearings ("OAH") reversed the Order of Revocation previously issued by Patricia S. Reed, Commissioner West Virginia Division of Motor Vehicles ("DMV"), based upon the violation of Respondent's right to Due Process in conjunction with W.Va. Code §17C-5-9.

Unwilling to accept this result, Petitioner appealed this decision to the Circuit Court of Kanawha County. By Order dated May 3, 2019, the Honorable Louis H. Bloom denied Petitioner's Petition for Judicial Review because Respondent's due process and statutory rights had been violated. Appendix at 001. Straining for one last bite at the apple, Petitioner commenced this appeal of settled law to the Supreme Court of Appeals of West Virginia. This appeal should be denied because this Court has ruled that motorists, like Respondent, have a right to have their blood drawn, and that this right was violated when the blood drawn was lost.

II. FACTS

Several salient case determinative facts are uncontested. Respondent, Gary L. Bragg ("Respondent") was arrested by Senior Trooper M.J. Miller and Senior Trooper D.M. Williamson of the West Virginia State Police, Logan Detachment on January 16, 2015. *Id.* at 48-51. After his arrest for driving under the influence, the Investigating Officer, Trooper D.M. Williamson asked whether Respondent would submit to a blood test. *Id.* at 51. Respondent agreed to have his blood drawn to determine the amount of alcohol in his blood. *Id.* Investigating Officer, Trooper D.M. Williamson maintained complete custody and control over the blood sample from the time it was drawn from Respondent until it was taken to the West Virginia State Police Laboratory. *Id* at 55. These facts are undisputed.

At the Administrative Hearing on February 3, 2017, the Investigating Officer testified that the State Police Laboratory did not have the blood sample, and the sample was not at the Logan or Williamson police departments. *Id.* at 201-202. Respondent is blameless and played no role in the loss or destruction of his blood sample. Due to the negligence in storage of the Respondent's blood sample, it was not available at the Administrative Hearing to determine conclusively whether Respondent was legally impaired by alcohol.

Respondent appeared at the Administrative Hearing, and denied that he was drinking alcohol at the time of his arrest on January 16, 2015. *Id.* at 210. All of these facts are undisputed.

Hearings Examiner, Aimee N. Jackson reviewed the record, and found that Respondent's Due Process rights had been violated, and rescinded the revocation of his license. This decision was approved by Chief Hearing Examiner, Teresa D. Maynard, whose decision was affirmed by the Circuit Court of Kanawha County. This Court should follow suit.

III. STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia has proclaimed the following standard of review for its consideration of a circuit's decision on an administrative appeal:

> On appeal of an administrative order from a circuit court, this 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*, 474 S.E.2d 518 (W.Va. 1996). Thus, this Court reviews questions of law *de novo*, but defers to the findings of fact of the administrative officer unless they are clearly wrong.

IV. ARGUMENT

A. The Circuit Court correctly denied the Petition for Judicial Review because Respondent's due process and statutory rights were violated by Trooper Williamson when he lost Respondent's blood sample.

"Due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments." *Syl. Pt. 2, State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960). Not only has the Supreme Court of Appeals of West Virginia held that due process rights extend to administrative hearings, but also the Supreme Court of Appeals of West Virginia has repeatedly held that a Due Process right is triggered when a motorist charged with impaired driving consents to a secondary test of his blood following his arrest.

The Petitioner has sought to eliminate or restrict this right in recent cases before the West Virginia Supreme Court without success. Nonetheless, the Petitioner persists and asks this Court to reverse settled law on the issue of lost or destroyed blood samples in an impaired driving case before the OAH.

By statute, any person arrested for driving under the influence of alcohol has the due process right to have their blood tested to determine the amount of alcohol in it:

> **§17C-5-9. Right to demand test.**
>
> *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 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.*

W.Va. Code § 17C-5-9 (2018) (emphasis added). Accordingly, by statute, any person arrested for driving under the influence of alcohol in West Virginia has a right to demand that a blood sample be taken, be tested and be provided to the person when the results are obtained.

The Supreme Court of Appeals of West Virginia has enforced the mandatory language of this statute in its rulings. Originally, the West Virginia Supreme Court held in *In re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (1999) that a motorist in an impaired driving case who requests a blood test has a right to the test with the assistance of the investigating officer. According to *Burks*, the officer is not required to supply and furnish the results of the test following the completed testing. However, the Court noted "[o]f course, the arresting officer cannot pose an impediment to the driver's obtaining the results of and information about the test." *Id.*

Later, the Court revisited the issue in *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). In both cases, the Court concluded that a driver charged with impaired driving who requested a blood draw has a Due Process right to a blood test and to receive blood test results.

In *Hall*, the driver requested the blood test after refusing a secondary chemical test of the breath. The investigating officer submitted the blood sample to the West Virginia State Police Crime Lab for testing. However, due to limitations at the Lab at the time, it was returned to the investigating officer and remained untested. *Id.* at 332, 676. Petitioner unsuccessfully argued that the officer had no obligation to have the blood tested. Rejecting Petitioner's argument, the Court concluded that the officer must ensure that the blood sample is both collected and tested when a motorist requests a blood test in an impaired driving case. *Id.* at 333, 677.

Shortly thereafter, the Court in *Divita* concluded that a violation of W.Va. Code §17C-5-9 occurred when an investigating officer destroyed a driver's blood sample after the results were returned for alcohol but before it could be tested for controlled substances. Much like the present case, both the driver and the officer sought the blood test in *Divita*. As a result, the Court in *Divita* agreed that the driver's license revocation must be rescinded.

Unrelenting, Petitioner now asks this Court to recognize an additional requirement not listed in *In re Burks*, *Hall*, *Divita* or W.Va. Code §17C-5-9 - that a motorist must request the blood test before it is offered by the investigating officer to trigger Due Process protection. No such requirement exists in any case-law or authority offered by the Petitioner.

The Petitioner attempts to draw a distinction between a driver pro-actively requesting a blood test versus consenting to one upon request. No such distinction exists in *In re Burks*, *Hall*, *Divita* or W.Va. Code §17C-5-9. According to Petitioner's logic, a citizen's Due Process right would hinge on who won the race to ask for a blood test first. Practically speaking, what difference does it make? If a driver wants and/or consents to a blood test, his rights under W.Va. Code §17C-5-9 should be triggered and should not be diminished simply because the investigating officer broached the subject first.

Requesting a blood test or agreeing to a blood test when offered is a distinction without a difference. There is no evidence to suggest the Respondent resisted or took any action to suggest he did not want a blood test after his arrest. He permitted the sample to be taken.

The Petitioner has argued that Respondent's request for a blood test was somehow not in compliance with *Dale v. Painter*, 234 W.Va. 343, 765 S.E.2d 232 (2014), which requires the request for a blood test to be made to the investigating officer. In *Painter*, the request for a blood test was made to an employee of the jail, not to the investigating officer.

In this case, the request for a blood test was made to Investigating Officer, Trooper D.M. Williamson, who was the investigating officer at the time or arrest, which then lead to the blood test at Williamson Memorial Hospital. Once the blood was drawn from Respondent, he had a Due Process right to receive it: "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." *Reed*, 235 W.Va. at 332, 773 S.E.2d at 676 (quoting *State v. York*, 175 W.Va. 740, 741, 338 S.E.2d 219, 221 (1985)). Thus, once his blood was drawn at Williamson Memorial Hospital, Respondent had a Due Process right to receive it.

Not only did Respondent have a right to receive his blood before or at the Administrative Hearing, but also "the arresting officer cannot pose an impediment to the driver's obtaining the results of and information about the test." *In re Burks*, 206 W.Va. at 433, 525 S.E.2d at 313. By losing or destroying Respondent's blood sample or blood test results, Investigating Officer, Trooper D.M. Williamson clearly imposed an impediment to Respondent's ability to obtain "the results of and information about the test." This violated the Due Process rights of Respondent contained in W.Va. Code §17C-5-9 and precedent established by the Supreme Court of Appeals of West Virginia.

Hearings Examiner, Aimee N. Jackson correctly followed both W.Va. Code §17C-5-9 and the rulings of the West Virginia Supreme Court of Appeals in reversing the revocation of Respondent's driver's license. That Petition for Appeal was correctly denied by the Circuit Court of Kanawha County. The Supreme Court of Appeals of West Virginia should do the same because the Investigating Officer, Trooper D.M. Williamson clearly violated the Due Process rights of Respondent when he (or the West Virginia State Police Laboratory, the Logan Police Department or the Williamson Police Department) lost or destroyed Respondent's blood sample results. Accordingly, the ruling of the Circuit Court should be affirmed.

B. Respondent did not commit a DUI, a conclusion reached at every level of this case.

Next, and perhaps more flimsy, the Petitioner argues that Respondent should be denied his Due Process rights to have his blood drawn and the test results provided to him because Investigating Officer found indications that Respondent was impaired. Specifically, Petitioner has argued that "It is undisputed that Respondent committed the offense of DUI, ..." Petitioner's Brief at 3. This is an utter fallacy.

Respondent has consistently stated that he was not under the influence of alcohol when he was arrested on January 16, 2015. At the Administrative Hearing on February 3, 2017, testified that he was not drinking at the time of his arrest: "I was not drinking. . . . Matter of fact, I don't even drink. Appendix at 001. Moreover, he has stated that he attempted the breathalyzer twice during his arrest:

> And, he asked me take a breathalyzer. I said, "Sure." He sticks the breathalyzer up I blow in it. He takes it off, looks at it. He said, "There's something wrong with this," shakes it like that and throws it in a dispenser in his police cruiser. . . . "Here. Take this one." . . . I take another one. And he looks at Williamson, and he said, "We need to get a knew breathalyzer because this one is tore up. It don't work no more.

Id. at 212. The D.U.I. Information sheet falsely notes Respondent refused the test. *Id.* at 50.

Petitioner has argued that Respondent had "watery eyes." Petitioner's Brief at 1. Additionally, Petitioner has argued that Respondent failed the Horizontal Gaze Nystagmus test. *Id.* at 2. This is unsurprising because Respondent is blind in his left eye: "He put a pen in front of my eyes. I explained to him, 'Sir, I'm blind in this left eye.'" Appendix at 212.

Looking at the evidence, the prosecuting attorney agreed with Respondent because Respondent plead guilty to Defective Equipment. *Id.* at 15. The DUI Second Offense was dismissed. *Id.* at 16-17. Trading a DUI Second Offense for Defective Equipment is a loss for law enforcement. It shows just how bad this DUI case was for the prosecution.

With these facts in play between Respondent and the DMV at the hearing, the presence of any exculpatory evidence was even more important. This is why W.Va. Code §17C-5-9 exits, to permit Respondent to conclusively prove his blood alcohol content at the time of his arrest.

The results of this blood test would have been the single best evidence in this case to determine the alcohol concentration in Respondent's blood. By failing to make the results of this blood test available to Respondent, the Investigating Officer denied Respondent his Due Process right to receive the receive the results of his blood test. This is why Hearings Examiner, Aimee N. Jackson made the following Conclusions of Law:

> It is the position of the Chief Hearing Examiner that individuals who voluntarily submits to a blood sample at the request of an Investigating Officer should be afforded the dame [sic] due process protections as those who demand a blood test. The Investigating Officer's failure to test blood or to make blood evidence available to the Petitioner for further testing denied the Petitioner's statutory due process rights under W.Va. Code §17C-5-9 and is grounds for reversal of the Respondent's Order of Revocation pursuant to *Reed v. Divita*, No. 14-1018 (Kanawha County 14-AA-45) (September 2015) (memorandum decision).

Id. at 146. This ruling was correct under both established precedent of the Supreme Court of Appeals of West Virginia and W.Va. Code §17C-5-9. The Circuit Court of Kanawha County concurred with the rulings made by Ms. Jackson.

In adhering to the requirements of W.Va. Code §17C-5-9 and following the precedent of the Supreme Court of Appeals of West Virginia, the Circuit Court of Kanawha County protected Respondent's due process right to have his blood drawn, regardless of whether he requested it:

> Regardless, in situations where the arresting officer request 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 a driver loses constitutional and statutory protections by trusting that officer will do as they say is unfounded and inconsistent with the Supreme Court of Appeals of West Virginia's precedent. This Court declines to hold that drivers' due process rights are contingent upon a race between the driver and the police officer to first request a blood draw and/or analysis thereof.

Id. at 5. Thus, the Circuit of Kanawha County ruled that a motorist's due process rights to have blood drawn and tested was not contingent on who first requested the blood draw.

After it had held that a motorist's due process rights to a blood draw are not conditioned on whether the arresting officer or the driver requests the blood draw, Judge Louis H. Bloom ruled that these due process rights were violated when the blood sample was lost:

> This Court **FINDS** that Respondent's due process and statutory rights were violated because Trooper Williamson violated Respondent's right to have his blood sample independently tested by losing the same. Respondent's failure to request a blood test is completely rational in light of being told by at least one – and possibly two – West Virginia State Troopers that a blood draw would be performed and his blood sample tested for alcohol. This test never occurred, nor was the sample preserved to be made available to Respondent for independent testing.

Id. at 6. Accordingly, the Circuit Court of Kanawha County found that Respondent's due process and statutory rights were violated when the investigating officer lost his blood sample. Respondent simply asks this Court to follow its precedent and affirm the decisions that where reached at each and every stage of this proceeding. Thus, Respondent asks the Supreme Court of Appeals of West Virginia to find that the Circuit Court of Kanawha County was correct when it ruled that Respondent's rights were violated when his blood sample was lost.

C. OAH did not exceed its statutory authority in following established case law.

Lastly, Petitioner argued below that the OAH somehow violated its statutory duty under W.Va. Code §17C-5A-2(f) (2018) by following the law set forth in *Hall* and *Divita*. Petitioner argues that the OAH exceeded the scope of its statutory authority by following *Hall* and *Divita*. The same argument was made to the Supreme Court of Appeals of West Virginia during arguments and ultimately rejected by the Court. To prevail in this case, this court must ignore or overturn the *Hall* and *Divita* cases. Essentially, the Petitioner now seeks a third at-bat after striking out twice on this issue before this Court. This Court should deny the DMV that opportunity and affirm the well-reasoned, precedent following decision of Hearings Examiner, Aimee N. Jackson and Circuit Judge, Louis H. Bloom.

In the concluding remarks to his decision that Respondent's due process and statutory rights had been violated, Judge Louis H. Bloom addressed these issues:

> Petitioner further argues that the OAH both violated its statutory duties and acted arbitrarily and capriciously by applying the law in this manner and reversing the *Order of Revocation.* Because this Court finds that the OAH properly adjudicated this matter and accurately applied the relevant law, Petitioner's arguments on these grounds are denied.
>
> Petitioner also argues that the *Hall* and *Divita* decisions are "in error in granting an equitable solution (reversal of the revocation) when no such solution is provided for in statute." This Court agrees with both decisions and nonetheless lacks the authority to modify any decision of the Supreme Court of Appeals of West Virginia. Petitioner's argument here is denied.

Id. Thus, the Circuit Court of Kanawha County rejected Petitioner's arguments, and followed *Hall* and *Divita* to conclude that Respondent had statutory and due process rights to have his blood drawn and tested. Respondent only asks that this Court follow its precedent and the decisions reached at each and every stage of this action. For these reasons, Petitioner's appeal should be denied.

V. CONCLUSION

The *Hall* and *Divita* cases are directly on-point and support the OAH's reversal of the Order of Revocation and the Kanawha County Circuit Court's Order affirming it. Contrary to Petitioner's fear-mongering, affirming these decisions will not result in a simple way for drunk drivers to evade revocation. Implied Consent still exits, and will encourage drivers to submit to the breathalyzer, as Respondent did. Why wouldn't he? He hadn't been drinking at the time of his arrest. After he had twice blown into the breathalyzer, Respondent agreed to a blood test.[1] Why wouldn't he? He hadn't been drinking at the time of his arrest. He knew that the alcohol concentration in his blood would be below the legal limit. When law enforcement lost or destroyed this most salient exculpatory evidence, it denied him the right to conclusively prove that he was not legally drunk at the time of his arrest and violated his Due Process rights. Due to this violation of Respondent's Due Process rights, Hearings Examiner, Aimee N. Jackson properly rescinded the Order of Revocation.

Rather than bowing to established precedent, Petitioner stubbornly appealed to the Circuit Court of Kanawha County. This was after Interlock had been installed in Respondent's vehicle, causing him to waste money to both install it and remove it. *See* Official Notice, attached as *Exhibit A*.

Doubling down on its intransigence, Petitioner filed this appeal, where it asks this Court to overturn its precedent for a third time. Petitioner should reimburse Respondent for the costs he incurred in installing and removing the Interlock from his vehicle as well as reasonable attorney fees and costs for forcing him to respond to the appeal to Circuit Court and this vexatious appeal

[1] The presence of implied consent will usually lead to the investigating officer suggesting the blood test.

of settled case law. This Court should punish Petitioner for its continued attempt to take advantage of West Virginia drivers by attempting to relitigate settled case law.

Not only should this case punish Petitioner by awarding Respondent attorney fees and costs, but also it should send a message to law enforcement officers. It will encourage officers in drunk driving cases to follow their training and protocol to ensure blood test evidence is properly submitted for testing and properly stored following testing as the law requires in the small sample size of arrests where blood test evidence is an issue. To hold otherwise would be to deprive West Virginia drivers of their Due Process right to the best exculpatory evidence. Furthermore, it would permit law enforcement officers to lose or destroy blood test samples or blood test results, and thereby result in innocent drivers losing their privilege to drive in West Virginia.

This Court should not permit this twisted result. For the reasons discussed in this brief, it should affirm the decisions of both the OAH, which reversed the Order of Revocation, and the Circuit Court of Kanawha County that approved of the reasoning of the OAH, and award Respondent, Gary L. Bragg attorney fees and costs, including the costs expended to install and remove the Interlock device and to reinstall it in his vehicle.

Respondent, Gary L. Bragg specifically filed a Summary Response because oral argument is not needed for this Court to affirm its existing precedent.

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