IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT
CLERK

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,[1]
Petitioner,

Civil Action No. 19-AA-100
OAH Case No. 234450B
Judge Louis H. Bloom

v.

NATHAN TALBERT,
Respondent.

FINAL ORDER

Pending before the Court is a *Petition for Judicial Review* filed on September 4, 2019, by the Petitioner, Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by counsel Elaine L. Skorich. The *Petition* seeks to reverse the *Final Order* entered by the Office of Administrative Hearings ("OAH") on August 5, 2019. The *Final Order* reversed the July 2, 2015, *Order of Revocation* following a hearing on February 25, 2016. Upon reviewing the record, applicable law, and pleadings, the Court finds and concludes as follows.

STANDARD OF REVIEW

Pursuant to W. Va. Code § 29A-5-4(g), a circuit court reviewing an administrative agency's decision

> [M]ay 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; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or

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LEGAL SERVICES

[1] This action was initially filed by Adam Holley as Acting Commissioner. On January 6, 2020, Everett Frazier was appointed Commissioner of the West Virginia Division of Motor Vehicles and thus is substituted into this action pursuant to Rule 41(c) of the *West Virginia Rules of Appellate Procedure*.

(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) (1998). The reviewing court "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."[2]

FINDINGS OF FACT

1. On June 20, 2015, Deputy John Ellison of the Nicholas County Sheriff's Department was on patrol in Summersville, West Virginia.[3] Deputy Ellison observed a black GMC Sierra driving erratically and executed a stop of the vehicle.[4] The vehicle was being driven by the Respondent in this action, Nathan Talbert. Deputy Ellison observed a strong odor of alcohol emanating from the interior of the vehicle; the Respondent admitted that he had been drinking that night.[5]
2. Deputy Ellison asked the Respondent to perform three standard field sobriety tests: the horizontal gaze nystagmus, the walk-and-turn, and the one-leg stand.[6] According to the *West Virginia D.U.I. Information Sheet*, the Respondent failed to satisfactorily perform these tests.[7] Deputy Ellison then placed the Respondent under arrest for Driving under the Influence.[8]
3. Deputy Ellison informed the Respondent that blood tests are only available to individuals suspected of driving under the influence of controlled substances, not alcohol.[9] During the OAH hearing on February 25, 2016, Deputy Ellison first testified that the Respondent

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[2] Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996).
[3] Hearing Transcript, Feb. 25, 2016, p. 13, line 1.
[4] *Id.* at lines 2-13.
[5] *Id.* at p. 14, line 17 – p. 15, line 9.
[6] *Id.* at p. 14, lines 9-14.
[7] Statement of Matters Officially Noted, Document 15.
[8] Transcript, p. 20, lines 7-16.
[9] *Id.* at p. 24, lines 5-8; *see also*, Arrest Video, Statement of Matters Officially Noted, Document 12.

"inquired about a blood test, but [Respondent never] requested a blood test."[10] However, later in the hearing, Deputy Ellison admitted that the Respondent had requested a blood test, and had inquired or requested as much at least three times.[11] Nevertheless, Deputy Ellison failed to provide the Respondent with the opportunity to have his blood tested.

APPLICABLE LAW

4. W. Va. Code § 17C-5-9 provides that

> 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.

5. In its *In re Burks* decision, the Supreme Court of Appeals of West Virginia held that "a person who is arrested for driving under the influence who requests and is entitled to a blood test, pursuant to W. Va. Code, § 17C-5-9, must be given the opportunity, with the assistance and if necessary the direction of the arresting law enforcement entity, to have a blood test that insofar as possible meets the evidentiary standards of 17C-5-6."[12] [13]

6. In *Reed v. Hall*, the driver arrested for Driving under the Influence ("DUI") and requested a blood test.[14] The blood draw was performed but the blood sample was never submitted for testing.[15] The Court held that the driver "was denied the statutory and due process

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[10] *Id.* at p. 24, lines 9-10.
[11] Transcript, p. 27, lines 18-23.
[12] Syl. Pt. 2, 206 W. Va. 429, 433, 525 S.E.2d 310, 314 (1999).
[13] *In re Burks* was decided on the issue of whether police were required to furnish the results of a completed test to the driver. While no test was completed here, the Court's interpretation of § 17C-5-9 nonetheless applies.
[14] 235 W. Va. 322, 325, 773 S.E.2d.666, 669 (2015).
[15] *Id.*

rights, under West Virginia Code § 17C-5-9, to have his blood tested independently."[16] The Court thus affirmed the circuit court in reversing the license revocation.[17]

7. In *Reed v. Divita*, the driver was arrested for DUI of a controlled substance; both the driver and arresting officer requested a blood test. [18] The blood sample was submitted to the West Virginia State Police Lab where it was tested only for alcohol and returned to the officer with instructions that it may be resubmitted for further testing if necessary.[19] Rather than resubmitting the sample or preserving it for the license revocation hearing, the officer destroyed the sample at the conclusion of the criminal matter.[20] Citing *Hall*, the Court held that the "respondent was denied her statutory and due process rights under West Virginia Code § 17C-5-9" because she was denied the ability to have her blood sample independently tested.[21]

CONCLUSIONS OF LAW

8. The Petitioner DMV first argues that "the OAH erred in reversing the revocation solely on the basis that Mr. Talbert did not receive a blood test." The Petitioner DMV correctly states that "the OAH cannot make law; it must apply existing law to the facts before it." However, the Petitioner then argues that the OAH erred by applying the Supreme Court's *Hall* and *Divita* opinions to this matter. The Petitioner disagrees with the holdings therein, arguing that "the Supreme Court imposed a non-existent remedy for failure to obtain an analysis of the blood samples." The Petitioner essentially argues that the OAH must always apply existing law, but that the OAH should have ignored these Supreme Court opinions and applied the law as the

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[16] *Id.* at 332-33, 676-77.
[17] The driver's license was nonetheless revoked because he refused to perform a secondary breath test pursuant to W. Va. Code § 17C-5-4. The Court affirmed that portion of the revocation and reversed the blood test portion.
[18] No. 14-11018, 2015 WL 5514209, at *1 (W. Va. Sept. 18, 2015).
[19] *Id.*
[20] *Id.*
[21] *Id.* at *3.

DMV believes it should be. This is plainly not the role of the OAH. As offered by the Petitioner, the OAH must apply the law as it exists. Here, the OAH saw the undisputed facts before it: the Respondent requested a blood test and Deputy Ellison refused to grant as much due to his ignorance of the law. Quite simply, this matter is a textbook application of Supreme Court precedent. The OAH properly applied the relevant statutes and judicial opinions and reversed the *Order of Revocation* because Respondent's due process right to a blood test was violated. It appears disingenuous for the Petitioner DMV to argue that the OAH must apply the law as it exists when, in the very same pleading, the Petitioner DMV argues that the OAH erred by adhering to State Supreme Court precedent. The Court **FINDS** that the OAH appropriately reversed the *Order of Revocation* based on a violation of the Respondent's due process right to a blood test. The Court thus **FINDS** that the OAH did not err or abuse its discretion in its *Final Order*.

9. Second, the Petitioner DMV argues that "[b]ecause the Investigating Officer's mistake of law was reasonable, the OAH erred in ignoring the unrebutted evidence of aggravated DUI." Citing an opinion of the Supreme Court of the United States, the Petitioner DMV argues that "objectively reasonable mistakes of law do not rise to the level of a constitutional violation." The Court **FINDS** that Deputy Ellison's error was not an "objectively reasonable mistake of law." It is well-established in this State that drivers suspected of Driving under the Influence have both statutory and due process rights to obtain a blood test. In 1985, the Supreme Court of Appeals of West Virginia held as follows

> 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.** Historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol

> in his system. **To deny this right would be to deny due process of law** because such a denial would bar the accused from obtaining evidence necessary to his defense. 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.

State v. York, 175 W. Va. 740, 741, 338 S.E.2d 219, 221 (1985) (internal citations omitted) (emphasis added).

10. The statutory right to a blood test for one suspected of driving under the influence of alcohol has existed since at least 1983, and the State Supreme Court has held since 1985 that denial of this right implicates due process. To say that Deputy Ellison made a "reasonable mistake of law" by denying to the Respondent a right that has existed for nearly 35 years seems to be a mischaracterization. Instead, the Court **FINDS** that the right to a blood test for individuals suspected of Driving under the Influence is a well-established right in West Virginia. Additionally, the Court **FINDS** that officers do not commit objectively reasonable mistakes of law when denying this right. Instead, as repeatedly held by the State Supreme Court, this denial implicates the driver's due process rights and thus mandates reversal of the *Order of Revocation*. The Court **FINDS** that the OAH did not err or abuse its discretion in its decision.

DECISION

Accordingly, the Court **ORDERS** the *Petition for Judicial Review* **DENIED** and the *Final Order* of the OAH **AFFIRMED**. There being nothing further, the Court does **ORDER** that the above-styled appeal be **DISMISSED** and **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to all parties and counsel of record, as well as the Office of Administrative Hearings at 1124 Smith Street, B100, Charleston, WV 25301.

ENTERED this 21 day of January 2020.

Louis H. Bloom

Date: 1/22/20
Certified copies sent to: OAH
By: Deputy Circuit Clerk