

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Petitioner,

v.

DOUGLAS H. NULL,

Respondent.

Civil Action No. 19-AA-106  
The Honorable Jennifer F. Bailey  
OAH File No. 376754A

FILED  
2020 FEB 14 PM 2:37  
JENNIFER F. BAILEY, CLERK  
KANAWHA COUNTY CIRCUIT COURT



**FINAL ORDER**

Pursuant to W. Va. Code § 29A-5-4 (1998), this case is an appeal from the *Final Order* of the Office of Administrative Hearings (“OAH”) entered August 15, 2019, which reversed a decision (SOMON 2) of the Commissioner<sup>1</sup> of the West Virginia Division of Motor Vehicles (“DMV”), revoking Mr. Null’s driver’s license for driving a motor vehicle in this State while under the influence (“DUI”) of controlled substances or drugs.

**STANDARD OF REVIEW**

A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W. Va. Code §29A-5-4 (1998).

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; 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
- (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

<sup>1</sup> Since January 6, 2020, Everett J. Frazier is the Commissioner of the Division of Motor Vehicles.

unwarranted exercise of discretion.

W. Va. Code §29A-5-4(g) (1998).

“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.” Syl. Pt. 4, State ex rel. Miller v. Reed, 203 W. Va. 673, 510 S.E.2d 507 (1998). “The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syl. Pt. 3, In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996). Syl. Pt. 2, Webb v. West Virginia Bd. of Medicine, 212 W. Va. 149, 569 S.E.2d 225 (2002).” Lilly v. Stump, 217 W. Va. 313, 317, 617 S.E.2d 860, 864 (2005).

### **FINDINGS OF FACT**

1. On May 26, 2014, at approximate 17:24 hours, Trooper First Class J. S. Pauley (“Investigating Officer”), formerly of the West Virginia State Police, observed a blue Ford Contour traveling 60 miles per hour (“mph”) in a posted 50 mph zone on Route 60 in the Spring Hill area of Kanawha County, West Virginia.
2. The Investigating Officer stopped the Ford and identified the driver as Douglas H. Null, the Respondent herein.
3. According to the DUI Information Sheet, Mr. Null had normal speech, had bloodshot eyes, was normal exiting the vehicle, was unsteady while walking to the roadside, was unsteady while standing, admitted to smoking a bowl of marijuana and had a bowl with burnt residue inside his vehicle. At the hearing below, Mr. Null testified, un rebutted, that he allowed a friend to smoke marijuana in his car and the marijuana bowl belonged to the friend. He testified

that he, in fact, did not smoke marijuana but admitted to the same because he thought there would be no way for him to prove to the Investigating Officer that it belonged to someone else.

4. According to the DUI Information Sheet, the Investigating Officer explained and administered the Horizontal Gaze Nystagmus Test to Mr. Null.

5. According to the DUI Information Sheet, prior to administering the test, the Investigating Officer conducted a medical assessment of Mr. Null's eyes which indicated that Mr. Null was a viable candidate for the test because he had equal pupils, no resting nystagmus, and equal tracking of his eyes.

6. According to the DUI Information Sheet, during the test, Mr. Null exhibited lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to an angle of 45 degrees in both eyes.

7. According to the DUI Information Sheet, the Investigating Officer administered the Vertical Nystagmus Test, and Mr. Null exhibited impairment on this test because he exhibited distinct and sustained nystagmus at maximum elevation.

8. According to the DUI Information Sheet, the Investigating Officer explained and demonstrated the Walk-and-Turn Test to Mr. Null.

9. According to the DUI Information Sheet, during the instruction stage, Mr. Null could not keep his balance and started the test too soon. During the test, Mr. Null exhibited impairment because he stepped off the line, made an improper turn, and raised his arms to balance.

10. According to the DUI Information Sheet, the Investigating Officer explained and demonstrated the One Leg Stand Test.

11. According to the DUI Information Sheet, Mr. Null exhibited impairment on this test because he swayed while balancing, used his arms to balance, hopped, and put his foot down.

12. The Investigating Officer had reasonable grounds to believe that Mr. Null was DUI, arrested him, and transported him to Thomas Memorial Hospital for a blood draw. It is disputed who requested the blood draw. The DUI Information Sheet indicates that the officer requested the draw; however, Mr. Null testified that he requested the blood draw to prove that he was not intoxicated.

13. At 17:55 hours, phlebotomist Lindsey Edmond drew a sample of Mr. Null's blood which the Investigating Officer submitted to the West Virginia State Police Laboratory for analysis.

14. After the blood draw, the Investigating Officer transported Mr. Null to the West Virginia State Police Detachment in South Charleston for processing.

15. On June 24, 2014, the DMV sent Mr. Null an *Order of Revocation* for DUI of alcohol, controlled substances and/or drugs.

16. On July 16, 2014, the OAH received Mr. Null's request for an administrative hearing to contest the *Order of Revocation*. On March 4, 2016, the OAH conducted an administrative hearing. The Investigating Officer did not appear for the hearing.

17. At the administrative hearing, it was discovered that after the termination of the companion criminal case, the blood sample was destroyed before testing was completed.

18. On August 15, 2019, the OAH entered a *Final Order* reversing the Commissioner's *Order of Revocation* for DUI because:

it is the position of the Chief Hearing Examiner that an individual who voluntarily submits to a blood sample at the request of the Investigating Officer should be afforded the same due process protections as those who demand a blood test. Therefore, given this precedent, the Petitioner was denied the ability to present potentially, exculpatory evidence of his blood and was, therefore, denied due

process rights under W. Va. Code §17C-5-9 when the blood sample analysis was cancelled before the testing was completed.

20. On September 16, 2019, the DMV filed the instant appeal with this Court.

### APPLICABLE LAW

1. 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.

2. In Reed v. Hall 235W. Va. 322, 325, 773 S.E.2d 666, 669 (2015), the driver arrested on suspicion of Driving Under the Influence (“DUI”) requested a blood test. The blood draw was performed but the blood sample was never submitted for testing. Id. The Court held that the driver “was denied the statutory and due process rights under West Virginia Code §17C-5-9, to have his blood tested independently.” Id. at 332-33, 676-77.

3. In Reed v. Divita, No. 14-11018, 2015 WL 5514209, at \*1 (W. Va. Sept. 18, 2015), the driver was arrested for DUI of a controlled substance; both the driver and arresting officer requested a blood test. 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. Id. 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. 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. Id at \*3.

### CONCLUSIONS OF LAW

Petitioner argues that the Respondent's statutory and due process rights are not implicated by the failure to test Respondent's blood sample because the law enforcement officer, not Respondent, asked Respondent to submit to a blood draw and Respondent simply acquiesced to that request. However, it appears from the testimony of Mr. Null, the only witness to testify at the hearing below, that he, and not the Investigating Officer, requested the blood draw. This Court is hesitant to disregard the live testimony of an individual placed under oath in favor of a piece of paper. Therefore, Hall, supra, is directly on point and the OAH decision must be affirmed because Mr. Null was denied the ability to present potentially exculpatory evidence of his blood and was, therefore, denied due process rights under W. Va. Code §17C-5-9 when the blood sample analysis was cancelled before the testing was completed.

However, if this Court were to construe the DUI Information Sheet and Mr. Null's testimony in a manner that were consistent and find that the Investigating Officer requested the blood test as well as Mr. Null, then Divita, supra, is directly on point and the OAH decision must be affirmed because Mr. Null was denied the ability to present potentially exculpatory evidence of his blood and was, therefore, denied due process rights under W. Va. Code §17C-5-9 when the blood sample analysis was cancelled before the testing was completed.

Even if this Court were to go a step further and disregard Mr. Null's testimony in favor of the DUI Information Sheet and assume that the Investigating Officer was the only one to request the blood draw, the West Virginia Supreme Court did not limit its holding in Divita, supra, to a mere determination regarding who requested the blood test. Instead, the driver was "denied her statutory and due process rights under West Virginia Code §17C-5-9" because she was "unable

to receive the results of any toxicological analysis from the West Virginia State Police Lab [and] was also prevented from securing her own independent test of the blood sample.”

Moreover, under the Petitioner’s reasoning, a driver’s due process and statutory rights to have one’s blood tested following an arrest for DUI cannot be violated as long as the officer requests the blood draw, not the driver. This would assumedly remain true in instances of bad faith on the part of the arresting officer’s or State’s part, including if the officer or State intentionally destroys the sample.

Regardless, 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 State 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 driver’s due process rights are contingent upon a race between the driver and the police officer to first request a blood draw and/or an analysis thereof.

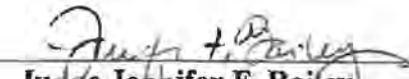
Petitioner further assigns error based on the OAH ignoring evidence that Respondent committed DUI in reaching its decision. In Hall, *supra*, the Supreme Court of Appeals of West Virginia affirmed the circuit court and OAH in overturning the Commissioner’s revocation of the driver’s license for DUI. In that case, the driver drove on the wrong side of the road, failed a field sobriety test, and admitted to consuming alcoholic beverages. Nevertheless, this evidence that the driver committed DUI was foreclosed by the failure of the State to test blood or to make blood evidence available to the driver, thus constituting a violation of the driver’s statutory and due process rights. This Court finds the facts and reasoning of Hall applicable to the case at hand. While there may be some evidence of impairment, the violation of Respondent’s statutory


and due process rights under West Virginia Code §17C-5-9 are dispositive. Therefore, this Court agrees with the Hearing Examiner that the failure of the State to test blood or to make blood evidence available to the Respondent for further testing denies the Respondent's statutory and due process rights under West Virginia Code §17C-5-9.

**DECISION**

Accordingly, the Court **ORDERS** the *Petition for Appeal* **DENIED** and the *Final Order of Chief Hearing Examiner* of the OAH **AFFIRMED**. There being nothing further, this Court does **ORDER** that the above-style 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, West Virginia, 25301.

ENTERED this 13<sup>th</sup> day of February, 2020.

  
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**Judge Jennifer F. Bailey**  
Kanawha County Circuit Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20  
DAY OF February, 2020  
  
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CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK