IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 20–0225

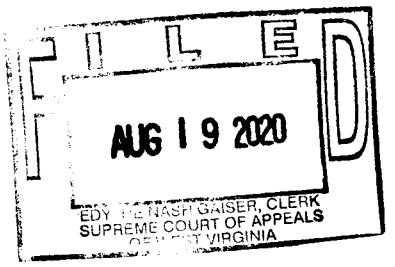
EVERETT J. FRAZIER, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Petitioner,

v.

DOUGLAS NULL,

Respondent.



REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

EVERETT J. FRAZIER, Commissioner,
Division of Motor Vehicles,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich #8097
Assistant Attorney General
DMV Legal Division
Post Office Box 17200
Charleston, West Virginia 25317
Telephone: (304)558-2522
Telefax: (304) 558-2525
Elaine.L.Skorich@wv.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

CASES **Page**

STATUTES **Page**

STATUTES **Page**

RULE **Page**

MISCELLANEOUS **Page**

Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by and through his undersigned counsel, and pursuant to Rev. R. App. Pro. 10(g) (2010) submits the *Reply Brief of the Division of Motor Vehicles*.

ARGUMENT

1. The actions of the prosecuting attorney, law enforcement officer, and crime lab are not attributable to the Commissioner of the DMV.

In his response brief, Mr. Null argues that the "destruction of the blood sample was solely the fault of the State of West Virginia" (Resp. Br. at P. 2) and that the "State of West Virginia is solely to blame for the destruction of Respondent's blood sample prior to test." *Id.* at P. 6. Mr. Null further avers that the DMV "took no action to ensure the blood sample was preserved, tested and made available to Respondent upon demand while in the custody of the State of West Virginia. . . [and that] No memorandum, letter or notice of pending action was presented in this case to establish that the Petitioner informed the Lab of its separate pending action and interest in the blood test results prior to the blood sample being destroyed several months after Respondent's arrest." *Id.*

Contrary to Mr. Null's assertions, the DMV is not responsible for the actions of the Kanawha County Prosecuting Attorney's Office. The Commissioner is the executive officer designated to operate the ***administrative*** agency of the DMV pursuant to W. Va. Code § 17A-2-2 (1951). Conversely, the "prosecuting attorney shall attend to the ***criminal*** business of the state in the county in which he or she is elected and qualified. . ." W. Va. Code § 7-4-1(a) (2017). Here, the blood sample was the Investigating Officer's evidence - not the DMV's evidence. The Commissioner is not a party to the companion criminal matter, and Mr. Null has not provided any statutory authority which permits the Commissioner to require a county prosecutor to maintain the officer's evidence after the disposition of a criminal case. Similarly, Mr. Null has not provided any statutory authority

which permits the Commissioner to require the West Virginia State Police ***Crime*** Lab to preserve the officer's evidence.

Mr. Null also argues that the "Commissioner conflates the issue of deprivation of due process caused by the violation of the *statutory* requirement set forth in W. Va. Code § 17C-5-9 and W. Va. Code § 17C-5A-1(b) with the application of the judicially-created exclusionary rule to circumstances where the relevant statute does not require an action." (Resp. Br. at P. 7 (emphasis original).) West Virginia Code § 17C-5-9 (2013) provides in statute that an impaired driver has a right to demand a blood test. However, the Legislature did not provide a remedy in the statute if the driver did not receive a blood draw or analysis. Instead, this Court judicially-created a remedy in *Reed v. Hall,* 235 W. Va. 322, 773 S.E.2d 666 (2015) and *Reed v. Divita*, No. 14-11081, 2015 WL 5514209 (W. Va. Sept. 18, 2015) (memorandum decision). Similar to the judicially-created exclusionary rule for violations of a driver's 4th Amendment rights, the remedy in *Hall* and *Divita* excludes all evidence of driving while under the influence ("DUI") of alcohol, controlled substances and/or drugs from being considered if there is no blood test analysis. There is no conflation: both are judicially-created exclusionary rules which oppose this Court's rationale in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012), that, absent a statutory requirement, this Court will not extend the judicially-created exclusionary rule for criminal matters to the administrative process. The principle that excluding the evidence of DUI in an administrative license revocation proceeding because of a 4th Amendment violation offers little deterrence for police misconduct remains the same when there is a violation of W. Va. Code § 17C-5-9 (2013).

In support of his position, Mr. Null cites to three criminal cases: *State v. Smerker*, 332 Mont. 221, 136 P.3d 543 (2006) ("While the precise statutory standards vary by state, other jurisdictions

have also adhered to the central theme that an officer may not unreasonably impede the right to the blood test requested by the driver."); *People v. Newberry*, 166 Ill.2d 310, 652 N.E.2d 288 (1995) (holding that the destruction of evidence in the criminal case violated the defendant's due process rights be cause he lacked a means to procure comparable evidence for his defense.); and *United States v. Cooper*, 983 F.2d 928 (1993) (holding that after the destruction of evidence in the criminal case, Cooper "should not be made to suffer because the government agents discounted their version and, in bad faith, allowed its proof, or its disproof, to be buried in a toxic waste dump.") (Resp. Br. at PP. 9-10.)

In all three of these criminal cases, the police misconduct was redressed when the defendants' cases were dismissed for a due process violation; however, none of these cases involved a separate administrative matter where the purpose is to protect the public. Consistent with the rationale in *Toler, supra,* when a law enforcement officer, a criminal prosecutor, or an employee of the West Virginia State Police Crime Lab, who is not employed by or under the control of the DMV, fails to ensure analysis of a blood sample, the evidence of DUI can be excluded or the matter dismissed completely in the companion criminal proceeding. Therefore, there is little additional deterrent effect on police conduct by preventing consideration of the evidence of DUI by the hearing examiner in the civil, administrative license revocation proceeding. The costs to society resulting from excluding the relevant evidence of DUI, on the other hand, are substantial.

2. The Office of Administrative Hearings should be required to consider the factors outlined in *Osakalumi.*

Mr. Null contends that the DMV attempts to distance itself from the holding in *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995). (Resp. Br. at P. 10.) As explained in the *Brief*

of the Division of Motor Vehicles and above, the Commissioner's *Order of Revocation* should not be affected by a due process violation caused by the actions of a person not under the DMV's control. However, if this Court determines that a judicially-created remedy for violation of W. Va. Code § 17C-5-9 (2013) should be applied to both the criminal and the administrative processes, then this Court should require the administrative tribunal to consider the factors outlined in *Osakalumi, supra*, for determining what consequences should flow from the failure to preserve evidence.

Specifically, the Office of Administrative Hearings ("OAH") should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction. Syl. Pt. 2,. *Osakalumi, supra.* In the present case, instead of considering these factors or any other criteria, the OAH summarily reversed the revocation because there are no blood test results, citing this Court's decisions in *Hall, supra*, and *Divita, supra.* In this case as well as the several other similar matters currently on appeal to this Court, the OAH failed to perform any analysis about the negligence of the individual in control of the blood sample, the importance of the blood sample in light of the other evidence, and the sufficiency of the other evidence. Fundamental fairness and the public interest demand a more thorough review of these cases by the OAH.

3. West Virginia Code § 17C-5-9 (2013) is a criminal statute, the remedy for a violation of which should not be in the civil, administrative license revocation proceeding.

In his response brief, Mr. Null argues that there should be no "additional requirement that a driver must assert his right to a blood test before an officer offers the test in order to be afforded his statutory and due process protections under W. Va. Code § 17C-5-9." (Resp. Br. at PP. 10-11.)

Further, Mr. Null asserts that "[i]f a driver wants a blood test, his rights under W. Va. Code § 17C-5-9 should not be diminished simply because the investigating officer broached the subject first." (Resp. Br. at P. 11.)

Mr. Null's argument ignores the plain language of W. Va. Code § 17C-5-9 (2013) which provides that a driver arrested for DUI "shall have the right **to demand**" a blood test. The plain language makes the ***demand*** a prerequisite for the right to attach. The Legislature's use of the word "shall" in this context makes this directive to the appealing party mandatory. *See, e.g.*, Syl. pt. 1, *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."); Syl. pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969) ("The word 'shall' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation."). The requirements in statute and case law flow from a driver exercising his right ***to demand*** a blood test.

"In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. Pt. 1, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004). To demand means "[t]o claim as one's due; to require; to ask relief." *Black's Law Dictionary* 429 (6th Ed. 1990). A demand is the "assertion of a legal right; a legal obligation asserted in the courts. An imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act. . . An asking with authority, claiming or challenging as due." *Id.* To agree means "to

acquiesce in." *Id.* at 66. Agreeing to take a blood test is not the same as 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. *See*, W. Va. Code § 17C-5-9 (2013).

This Court cannot change the plain language of the statute. "It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded." *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959). Until the Legislature revisits W. Va. Code § 17C-5-9 (2013) and amends the plain language requiring the driver to demand a blood test before the right inures, this Court "must continue to apply the statute's plain language, rather than 'attempt to make it conform to some presumed intention of the Legislature not expressed in the statutory language.'" *State v. Smith*, 844 S.E.2d 711, 720 (W. Va. 2020).

Even if Mr. Null demanded a blood test as he argues on page 11 of his response brief, this Court's decisions in *Hall*, *supra*, and *Divita*, *supra*, should be overruled because they created a remedy in the civil arena where the Legislature had not provided one. This Court has determined that "[d]ue 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). Syl. Pt. 1, *McJunkin Corp. v. West Virginia Human Rights Commission,* 179 W. Va. 417, 369 S.E.2d 720 (1988)." *Reed v. Divita*, No. 14-11018, 2015 WL 5514209, at *3 (W. Va. Sept. 18, 2015) (memorandum decision). But "[j]udges are not free, in defining 'due process,'" to impose . . .

'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *U. S. v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Rochin v. Cal.*, 342 U.S. 165, 170 (1952)). Such limitations on the judicial power in due process issues include considering any relevant precedents and then assessing the several interests at stake. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

As early as 1978, this Court observed that "[t]here is a clear statutory demarcation between the administrative issue on a suspension and the criminal issues on a charge of driving while under the influence." *Jordan v. Roberts,* 161 W. Va. 750, 757, 246 S.E.2d 259, 263 (1978). And since then, this Court has "consistently held, license revocation is an administrative sanction rather than a criminal penalty." *State ex rel. DMV v. Sanders,* 184 W. Va. 55, 58, 399 S.E.2d 455, 458 (1990) (per curiam). Indeed, this Court held in Syllabus Point 2 of *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005), "[a]dministrative license revocation proceedings for driving a motor vehicle under the influence . . . are proceedings separate and distinct from criminal proceedings arising from driving a motor vehicle under the influence. . . ." *Hall, supra,* and *Divita, supra,* fail to recognize the distinction between the criminal DUI statutes, W. Va. Code § 17C-5-1 *et seq.*, and the civil, administrative license revocation statutes, W. Va. Code § 17C-5A-1 *et seq.*

Furthermore, this Court has determined that "[i]n the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted. *Woodrum v. Johnson,* 210 W. Va. 762, 766 n. 8, 559 S.E.2d 908, 912 n. 8 (2001) (internal quotations and citations omitted)." *SER. W. Va. Dep't of Transp., Div. of Highways v. Reed*, 228 W. Va. 716, 724 S.E.2d 320, 324 (2012). Further,

As Justice Cleckley noted in *State v. Guthrie,* 194 W. Va. 657, 461 S.E.2d 163

> (1995): "[A] precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled than an opinion which demonstrates that the court was aware of conflicting decisions and gave at least some persuasive discussion as to why the old law must be changed." *Guthrie,* 194 W. Va. at 679 n. 28, 461 S.E.2d at 185 n. 28.

SER. W. Va. Dep't of Transp., Div. of Highways v. Reed, 228 W. Va. 716, 724 S.E.2d 320, 324 (2012).

As explained in the *Brief of the Decision of Motor Vehicles*, this Court's decisions in *Hall, supra*, and *Divita, supra*, omit analysis of the differences between the criminal DUI statutes and the administrative DUI statutes; discussion of the duty of the OAH to weigh ***all*** of the evidence of DUI when making its required findings pursuant to W. Va. Code § 17C-5A-2(f)(2) (2015); and consideration that an officer's negligence or bad faith can be remedied in the companion criminal matter and not again in the administrative DUI case. These issues warrant this Court's revisiting its decisions in *Hall* and *Divita.*

CONCLUSION

This Court's decisions in *Hall* and *Divita* should be overruled because those decisions conflate the more stringent remedies appropriate for criminal actions with those more appropriate for administrative proceedings and undermine the DMV's statutory mandate to protect the public from impaired drivers. The ordinary rationale for the exclusionary rule in criminal contexts as explained by this Court in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012) – the deterrence of police misconduct should be confined to the criminal context. The cost of excluding all evidence of DUI at the administrative hearing, which puts impaired drivers back on the road, is extremely high in terms of public safety when the purpose of administrative license suspensions is to protect the public – not to redress police conduct.

Stare decisis does not compel keeping *Hall* and *Divita* on the books, and this Court should adhere to its rationale in *Toler* and require application of the multi-factored test when assessing destruction of evidence instead of permitting the complete exclusion of all relevant evidence of DUI if there are no blood test results. When the proper standard is applied to the facts of this case, revocation for aggravated DUI is the only answer to the principal question at the administrative hearing pursuant to W. Va. Code § 17C-5A-2(e) (2015).

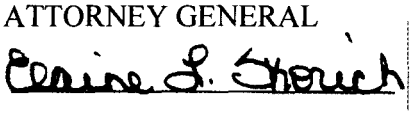
For the reasons outlined above as well as in the *Brief of the Division of Motor Vehicles*, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Elaine L. Skorich, WVSB # 8097
Assistant Attorney General
DMV Legal Division
P.O. Box 17200
Charleston, WV 25317-0010
Telephone: (304) 558-2522

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DOUGLAS NULL,

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CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that the foregoing *Reply Brief of the Division of Motor Vehicles* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 19th day of August 2020, addressed as follows:

David Pence, Esquire
P. O. Box 3667
Charleston, WV 25336

Elaine L. Skorich