IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0225

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

Respondent,

vs.

DOUGLAS NULL,

RESPONDENT.

Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 19-AA-106

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

OVERVIEW

This case involves a motorist who after being arrested for driving under the influence of controlled substances, agreed to a blood test at Thomas Memorial Hospital to determine what amount, if any, controlled substances were in his system at the time of his arrest. However, due exclusively to the negligence of the State of West Virginia, the blood sample was destroyed and never tested or analyzed. App. 207[1]. Consequently, the Office of Administrative Hearings (OAH) reversed the Order of Revocation previously issued based upon the violation of Respondent's right to Due Process in conjunction with W.Va. Code §17C-5-9. App. 192.

EVIDENCE AT THE OAH

Several case determinative facts are uncontested in this case. After his arrest for impaired driving on May 26, 2014 by West Virginia State Trooper J.S. Pauley, Respondent was taken to Thomas Memorial Hospital for a blood test. App. 145.

The arresting officer noted on his D.U.I. Information Sheet that he requested Respondent produce a blood sample for testing, which Respondent willingly complied. *Id.* The Respondent testified that he actually requested the blood test first and the arresting officer agreed to take him for a test. App. 213. Regardless, Respondent was cooperative, did not refuse to provide a blood sample and sought the results of the test afterward. App. 145, 213.

A blood test was effectuated and the blood sample was delivered to the West Virginia State Police Crime Lab. App. 145. It is uncontested that the arresting officer maintained complete custody and control over the blood sample from the time it was produced until it was

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[1] App. Refers to the *Appendix* previously filed in this matter.

delivered to the West Virginia State Police Crime Lab. App. 207.

Likewise, it is uncontested that the blood sample was later destroyed while in the sole custody of the West Virginia State Police Crime Lab. *Id.* The destruction of the blood sample was solely the fault of the State of West Virginia. *Id.* Respondent is blameless and played no role in the destruction of the blood sample. Because of the negligence on behalf of the State of West Virginia, the results of Respondent's blood test were never produced. App. 207.

The Petitioner blames the West Virginia State Police Crime Lab and the Kanawha County Prosecuting Attorney's Office for destroying the blood sample at the latter's direction after the criminal charges were dismissed. App. 207. However, the Petitioner produced zero evidence to explain what steps it took to ensure the blood sample in this case was preserved and tested for the administrative purposes. For example, the Petitioner failed to send the West Virginia State Police Crime Lab a preservation letter or take any meaningful step to ensure the blood sample was preserved for testing.

Unlike the arresting officer, who failed to appear or testify in this matter despite numerous continuances by the Petitioner to secure his presence, the Respondent testified at the administrative license revocation proceeding on March 4, 2016 and admitted to speeding but denied being impaired the evening of his arrest. App. 212-213. Respondent explained that an individual had smoked marijuana in his vehicle earlier in the day which explains why the arresting officer smelled marijuana in his vehicle at the time of the traffic stop. App. 219. Respondent explained that the answers documented on the post-arrest interview section of the D.U.I. Information Sheet were completed by the arresting officer and that he was instructed to sign the bottom, which he complied. App. 18.

On August 15, 2019, the OAH entered a *Final Order* reversing the Petitioner's *Order of Revocation* previously issued. App. 156. On September 16, the DMV filed a *Petition for Judicial Review* with the Circuit Court of Kanawha County. App. 31. Respondent was *pro se* before the Circuit Court of Kanawha County. On February 14, 2020 the circuit court entered its *Final Order* denying the Petition for Judicial Review.

II. SUMMARY OF ARGUMENT

The lower court followed the law set forth 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). The Petitioner cites no changes in the law at the time of Respondent's arrest which would render *Hall* and *Divita* inapplicable. Instead, Petitioner offers the same arguments rejected in both *Hall* and *Divita.*

The Petitioner asks this Court to limit the application of W.Va. Code §17C-5-9 to instances where the driver pro-actively requests a blood test prior to being offered a test by the arresting officer. However, neither W.Va. Code §17C-5-9 nor *Hall* and *Divita* require such an obligation. Which individual requests the blood test first is irrelevant so long as the driver asserts his right to a blood test pursuant W.Va. Code §17C-5-9. A private citizen does not forfeit a statutory and/or Constitutional right by failing to assert that right before it is offered by law enforcement.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not appropriate because the dispositive issues have been authoritatively decided and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. Standard of Review

This Court's review of a circuit court's order in an administrative appeal is made pursuant to West Virginia Code 29A-6-1. The Court reviews questions of law presented *de novo* and findings of fact by the administrative officer are accorded deference "unless the reviewing court believed the findings to be clearly wrong." Syl. Pt. 1, *Reed v. Hall*, 235 W.Va. 322, 773 S.E.2d 666 (2015). "In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

B. The circuit court correctly affirmed the Final Order of the OAH which determined that Respondent's statutory and due process rights were violated by the State's destruction of his blood sample prior to testing pursuant to W.Va. Code §17C-5-9.

The holdings in *Reed v. Hall, supra*, and *Reed v. Divita, supra*, are directly on-point and outcome determinative in this case. Both the OAH hearing examiner and the lower court correctly applied the law and found that Respondent's statutory and due process rights were violated by the unlawful destruction of his blood sample prior to testing. Petitioner now asks this Court to overrule *Hall* and *Divita* and authorize the unlawful and prejudicial destruction of blood test evidence prior to testing.

In support of his argument to overrule *Reed v. Hall, supra*, and *Reed v. Divita, supra*, the Petitioner offers the same arguments presented during the original litigation in those cases. Petitioner offers no changes in statute or case law since those cases were decided in 2015 to support

his position.

According to 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 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."

Moreover, pursuant to W. Va. Code §17C-5A-1(b), upon a DUI arrest, the officer's DMV report "shall" include the applicable "results of any secondary tests of blood, breath, or urine."

As with the driver in *Hall*, a "chemical test thereof" of the blood sample was never performed in this case as required by W.Va. Code §17C-5-9, thus resulting in a deprivation of his statutory and due process rights. *Hall* at 675, 331. The Court's holding in *Hall* is consistent with its prior holding set forth in *In re Burks*, 2016 W.Va. 429, 525 S.E.2d 310 (1999) which held

> "[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[1983], must be given the opportunity, with the assistance and if necessary the direction of the arresting law enforcement entity, to have the blood test insofar as possible meets the evidentiary standards of 17C-5-6[1981]."

According to *In re Burks*, the officer is not required to supply and furnish the results of the test following the completed testing. *Id.* 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.*

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. The Commissioner unsuccessfully argued that the officer had no obligation to have the blood tested. Rejecting the Commissioner'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.

In this case, the State of West Virginia is solely to blame for the destruction of Respondent's blood sample prior to testing. The Petitioner admits that at all times prior to its destruction, the sample of Respondent's blood was in the sole custody and control of the State of West Virginia. The Petitioner 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. Instead, the Petitioner grasps for excuses as to why destruction of the Respondent's blood sample was justified, ranging from the dismissal of criminal charges to a failure to coordinate with the Kanawha County Prosecuting Attorney's Office and the West Virginia State Police Crime Lab.

Contrary to the Petitioner's claim, he was also negligent in failing to ensure the Respondent's blood test evidence was tested. 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.

In an effort to lobby this Court to overturn *Hall* and *Divita*, the Petitioner yet again argues that W.Va. Code §17C-5-7 is a criminal statute and that reversing an order of revocation based upon a violation of a criminal statute equates to applying the judicially-created exclusionary rule to the administrative process. Contrary to the self-serving efforts of Respondent to mold the argument sub judice into one implicating an exclusionary rule analysis, the instant issue is merely one involving the simple application of W. Va. Code §17C-5-9. 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.

For example, the Court addressed the application of the judicially-created exclusionary rule to instances where an officer violated a driver's Fourth Amendment right to be free from illegal search and seizure at a time when W.Va. Code §17C-5-2(2008) lacked the requirement for an arrest to be lawful. *Miller v. Toler*, 229 W.Va. 302, 729 S.E.2d 137 (2012). The Court held that absent the statutory requirement that an arrest be lawful, the Court will not extend a judicially created exclusionary rule to create a remedy in the administrative process[2]. *Miller v. Toler*, 229 W.Va. 302, 729 S.E.2d 137 (2012).

The Petitioner cites cases throughout the United States where courts have refused to apply a judicially-created exclusionary rule to instances involving unlawful traffic stops as set forth in

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[2] In 2010, the Legislature returned the requirement of a "lawful arrest" to W.Va. Code §17C-5-2, thus returning the requirement that a traffic stop be lawful in order to effectuate a revocation for driving while impaired. *Dale v. Arthur*, No. 13-0374, 2014 WL 1272550 (W.Va. March 28, 2014)(memorandum decision)

Toler. However, the exclusionary rule is inapplicable to this case because W.Va. Code §17C-5-7 extends the due process right to have a blood test both performed and tested. Respondent's claim that the lower court is authorizing the application of the exclusionary rule in a civil hearing is erroneous. Why would the lower court apply the *judicially* created exclusionary rule when doing so is unnecessary in light of the Legislature's creation of a *legislatively* created exclusionary rule?

Moreover, even though the purpose of the administrative sanction of license revocation is to protect the public, the administrative process must comply with the requirements of due process of law. "A driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution." *Abshire v. Cline*, 193 W.Va. 180, 455 S.E.2d 549 (1995).

Ignoring the prejudice suffered by Respondent to having his blood sample destroyed, Petitioner urges this Court to adopt the impossible task of weighing the destroyed blood test evidence along with all the other remaining evidence in the case. There exists no single piece of evidence with greater significance in a DUI case than a secondary test of the blood, especially where one party denies under oath consuming any controlled substance or drugs the day of his arrest. App. 213. Respondent demanded a blood test, commissioned an attorney to challenge the revocation of his driver's license and denied under oath the charge that he consumed controlled substances while driving.

As a result of the failure of the Petitioner and the West Virginia State Police Crime Lab to preserve and test Respondent's blood sample, the Respondent suffered actual and extreme prejudice. The blood sample was the only available piece of objective evidence which would

determine whether the Respondent had controlled substances in his system. Respondent willingly submitted to a blood sample and encouraged the DMV to obtain the results of the blood test prior to the administrative hearing, which was continued multiple times in order to secure the blood test evidence.

Logically speaking, why demand a blood test or agree to an adversary's request for toxicology results if Respondent did not want the blood test results introduced at the hearing? Respondent's conduct proves that he wanted and expected the subpoenas to have the blood test results at the hearing.

"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. See, e.g., *State v. Smerker*, 332 Mont. 221, 136 P.3d 543 (2006)." FN 10 *Reed v. Hall*, supra. Also, the underlying case is even more extreme than that decided in *People v. Newberry*, 166 Ill.2d 310, 652 N.E.2d 288 (1995) where a lab technician, not knowing that the State intended to bring additional criminal charges, inadvertently destroyed a drug sample incriminating the accused because he mistakenly believed the case had been dropped.

The court in *Newberry* ruled that the destruction of evidence violated the accused fundamental due process rights because he lacked a means to procure comparable evidence which was critical to his defense. *Id.* at 291, 316. The court in *Newberry* described the State's claim that the accused was not without recourse because he could still assail the State's field evidence and original test evidence as "illusory." *Id.*

The same conclusion was reached in *United States v. Cooper*, 983 F.2d 928 (1993). In Cooper, DEA agents seized and later destroyed the accused's lab equipment which it alleged was

used for illegal methamphetamine production. *Id.* The court concluded that no comparable alternative means of defending himself existed. *Id.* at 932. The *Cooper* court stated the accused "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." *Id.*

The Petitioner attempts to distance himself from holding set forth *State v. Osakalumi*, 194 W.Va. 758, 461 S.E.2d 504 (1995) where the State's unlawful destruction of critical evidence resulted in an outcome determinitive ruling. However, the destruction of blood test evidence in this case is even more egregious than the destruction of the couch in *Osakalumi.* Absent the blood test evidence, Respondent is forced into a swearing match against a law enforcement officer and the hearing examiner is left to speculate, what amount, if any, controlled substances was in Respondents's system at the time of the arrest. Compounding the matter in this case is that the arresting officer failed to appear at the hearing, thus forcing Respondent into a swearing match against a stack of testimonial documents.

The Petitioner cites *California v. Trombetta*, 467 U.S. 479 (1984) which is easily distinguishable from the underlying case because California lacked any statute similar to W.Va. Code §17C-5-9 creating a right to a blood test. No such statute existed in California creating a driver's right to have his breath sample preserved during testing in a DUI with alcohol case.

C. The lower court correctly concluded that Respondent demanded a blood test within the meaning of W.Va. Code 17C-5-9.

The Petitioner asks this Court to modify the holding in *Reed v. Divita, supra,* and *Reed v. Hall, supra,* to include the 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. The Respondent attempts to draw a distinction between a driver pro-actively requesting a blood test versus consenting to one when offered by law enforcement. 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. Imagine if a private citizen's Miranda rights existed only if the individual asserted his rights under Miranda before the officer Mirandized him. The result is ludicrous.

Practically speaking, what difference does it make? If 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. 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. Likewise, the arresting officer was not forced to secure a warrant for blood testing.

The lower court correctly pointed out that Respondent, the only witness at the hearing, testified that he demanded a blood test first. App. 007. In his D.U.I. Information Sheet, the arresting officer alleges that he offered the blood test first and the Respondent acquiesced. App. 145. Thus, there exists a conflict in evidence regarding who broached the subject first and the exchange was not recorded. However, both parties agree that Respondent willingly complied with the request, cooperated with the blood test and sought the results at the administrative hearing.

The lower court noted:

> "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 or State's part, including if the officer or State intentionally destroys the sample." App. 008.

The Petitioner's argument was considered and rejected by the Court in *Reed v. Divita, supra.* 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 underlying case, both the driver and the officer sought the blood test in *Divita.* The Court refused to limit a the driver's right under W.Va. Code §17C-5-9 when both the arresting officer and driver mutually request a blood test. As a result, the Court in *Divita* agreed that the driver's license revocation must be rescinded.

The Court revisited the issue of a blood test result in an administrative license revocation proceeding in *Frazier v. Hussing*, No. 19-0056, 2020 WL 533965 (W.Va. Feb. 3, 2020)(memorandum decision). The Court did not overrule the *Hall* or *Divita* case. Instead, the Court found that the driver failed to file a brief within the requirements of Rule 10(d) of the West Virginia Rules of Appellate Procedure and that the blood test results were never requested or sought after by the driver in that case.

Both *Reed v. Hall, supra,* and *Reed v. Divita, supra,* are directly on-point and outcome determinitive in this case.

V. CONCLUSION

WHEREFORE, based upon the foregoing, the Respondent hereby respectfully requests that the order of the circuit court be affirmed.

Respectfully submitted,

DOUGLAS NULL

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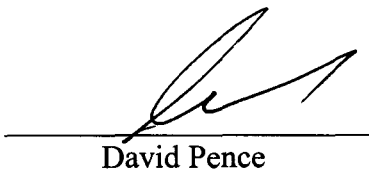
CERTIFICATE OF SERVICE

I, David Pence, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **RESPONDENT'S BRIEF** by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Elaine Skorich, Asst. Attorney General
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

on this 28th day of July 2020.



David Pence