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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0482

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

Petitioner,

v.

NICHOLAS DEEMS,

Respondent.

Honorable Darl Poling
Circuit Court of Raleigh County
Civil Action No. 19-AA-11-P

PETITIONER'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304)558-2522
Janet.E.James@wv.gov

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ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN REVERSING THE REVOCATION ON THE BASIS THAT THE RESPONDENT WAS NOT GIVEN A 15-MINUTE PERIOD IN WHICH TO RECANT HIS INITIAL REFUSAL OF THE DESIGNATED TEST OF THE BREATH.

STATEMENT OF THE CASE

On November 19, 2017, Corporal Billy J. Adkins of the Raleigh County Sheriff's Department ("Investigating Officer") responded to a vehicle crash in Crab Orchard, Raleigh County, West Virginia. A.R. 53,60,154.[1] The Investigating Officer encountered the Respondent at 1:22 a.m. and identified the Respondent as the driver. A.R. 52,60,155.

The Respondent had a strong odor of alcohol coming from his breath, had slurred speech, was uncoordinated, had bloodshot, watery eyes, was unsteady, was staggering and needed help walking to the roadside, and was unsteady while standing. A.R. 53,60, 154. The Respondent admitted that he had been drinking. A.R. 60, 154.

The Respondent refused to perform the horizontal gaze nystagmus test, the walk and turn test, the one leg stand test and the preliminary breath test. A.R. 54,55,60,155-57.

The Investigating Officer had reasonable cause to believe that Respondent had been driving while under the influence of alcohol, controlled substances, and/or drugs and placed the Respondent under arrest for driving under the influence of alcohol ("DUI") at 1:34 a.m. A.R. 52,60,156.

The Investigating Officer transported the Respondent to the Raleigh County Sheriff's Office where he read and explained the Implied Consent Statement containing the penalties for refusing to submit to a designated secondary chemical test and the 15-minute time limit for refusal contained in W. Va. Code §17C-5-7 [2013] to the Respondent. A.R. 58, 60, 160. The Respondent signed the

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[1]Reference is to the Appendix Record.

form at 1:53 a.m. A.R. 58,160. The Investigating Officer observed the Respondent for 20 minutes to ensure that he did not ingest anything and attempted to administer the Intoximeter test. The Respondent refused to take the test. A.R. 55, 60,161. The Investigating Officer testified,"he went to take it but he wouldn't blow in the machine, like he wasn't blowing. And I advised him several times, explained to him that he needed to blow into it or it's not going to pick it up. He didn't blow into it and I put a refusal down. At that time, he became belligerent and irate, and he refused being processed, anything, and we transported him to Southern Regional." A.R. 160. The Respondent never recanted his refusal in the 15 minutes following his initial refusal. A.R. 55. The Intoximeter slip reflects that the Respondent refused the test at 2:23 a.m. A.R. 51. The Investigating Officer testified that the time between the Respondent's refusal and his transport to the Southern Regional Jail was "I would say ten minutes or under. I'm not–I can't say 100 percent, but I would say it was fairly quickly." A.R. 164.

The Division of Motor Vehicles revoked the Respondent's license for DUI and for refusal to submit to the designated secondary chemical test of the breath ("refusal"). A.R. 49, 82.

The Office of Administrative Hearings ("OAH") entered a *Final Order* on August 15, 2019, which affirmed the DMV's orders of revocation for DUI and refusal. A.R. 95 *et seq.*

The Respondent appealed the *Final Order* to the circuit court of Raleigh County. A.R. 114 *et seq.* On June 2, 2020, the circuit court entered an *Order Granting Petition for Appeal and Reversing Office of Administrative Hearings' Final Order*, finding that there was no evidence to show that the officer waited 15 minutes following the Respondent's first refusal of the Intoximeter test before transporting him to jail, and reversed the OAH's *Final Order*. A.R. 1 *et seq.*

SUMMARY OF ARGUMENT

The circuit court's order is in error both factually and legally. The circuit court found that the Respondent was transported from the police station to the jail within 10 minutes of signing the Implied Consent Statement, which is not supported by the evidence. The Respondent was at the police station for at least 40 minutes after signing the Implied Consent Statement.

As a legal matter, the Investigating Officer satisfied the requirements of W. Va. Code §17C-5-7(a)[2013]. The statute provides that "after fifteen minutes following the [Implied Consent] warnings the refusal is considered final." The Respondent signed the Implied Consent Statement at 1:53 a.m., and the refusal was documented at 2:23 a.m., 30 minutes later. There is no evidence in the record to show that the Respondent ever recanted the refusal. The circuit court erred in finding, "There is no evidence in the record that would show that the officer waited the required 15-minutes before he elected to remove the Petitioner from the law enforcement agency's office and transport him to jail." A.R. 4. The circuit court improperly applied W. Va. Code §17C-5-7. The amendments to W. Va. Code § 17C-5-7 effective June 4, 2020 show that the Legislature's intention is that the 15 minutes runs from the time of refusal, not from the time of the Implied Consent warnings.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R. App. Pro. 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. 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 believes the findings to be clearly wrong. *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 ERRED IN REVERSING THE REVOCATION ON THE BASIS THAT THE RESPONDENT WAS NOT GIVEN A 15-MINUTE PERIOD IN WHICH TO RECANT HIS INITIAL REFUSAL OF THE DESIGNATED TEST OF THE BREATH.

The circuit court concluded that there was no evidence to show that the "officer waited the required 15-minutes before he elected to remove the Petitioner from the law enforcement agency's office and transport him to jail." A.R. 4. "Simply put, if the officer had waited an additional 5-minutes in this matter the refusal would have been final." A.R. 4.

The circuit court erred both factually and legally. The circuit court found, "the record shows the Petitioner was offered a breath test at 2:23 a.m., a refusal was entered, and the Petitioner was offered a blood test at 2:24 a.m. The officer's live testimony at the administrative hearing indicates the Petitioner was transferred within 10-minutes or less after signing the Implied Consent directly contradicting the offier's [sic] written report and EC/IR-II Subject Test slip." A.R. 4. This is an incorrect recitation of the facts based on the record. The Implied Consent Statement was signed by the Respondent at 1:53 a.m.[2] The Investigating Officer pressed the button on the Intoximeter indicating that the Respondent refused the test at 2:23 a.m., 30 minutes after the Investigating Officer gave the Respondent the written and verbal warning required by W. Va. Code §17C-5-4. A.R. 51.

[2]The statement provided, "If you refuse you will have fifteen minutes in which to change your mind after which time your refusal will be deemed final and the arresting officer will have no further duty to offer you this approved secondary chemical test." A.R. 58.

The Investigating Officer's testimony that the time between when the Investigating Officer "pushed refusal" or "after the secondary chemical test" (A.R. 164) to when the Respondent was moved from the Sheriff's Department to the regional jail was, "I would say ten minutes or under. I'm not–I can't say 100 percent, but I would say very quickly" (A.R. 164). The Respondent was not moved to the jail within 10 minutes of signing the Implied Consent Statement–he was at the station for 30 more minutes until the Investigating Officer pressed the "refusal" button on the Intoximeter, and for approximately 10 minutes after that.

The Respondent's refusal to take the test was immediate. The Investigating Officer testified, "he went to take it but he wouldn't blow in the machine, like he wasn't blowing. And I advised him several times, explained to him that he needed to blow into it or it's not going to pick it up. He didn't blow into it and I put a refusal down. At that time, he became belligerent and irate, and he refused being processed, anything, and we transported him to Southern Regional." A.R. 160. The Respondent's failure to blow into the Intoximeter constitutes refusal. "On the issue of whether there was a refusal to take the test, the general rule appears to be that where the request is made to take the test and the licensee by his conduct or words manifests a reluctance to take the test or qualifies his assent to take the test on factors that are extraneous to the procedures surrounding the test, proof of refusal is sufficiently established." *Jordan v. Roberts*, 161 W. Va. 750, 759, 246 S.E.2d 259, 264 (1978). "When the requirements of *W.Va.Code,* 17C-5-7 [1983] have otherwise been met, and a driver refuses to or fails otherwise to respond either affirmatively or negatively to an officer's request that he submit to a blood alcohol content test, the driver's refusal or failure to respond is a refusal to submit within the meaning of *W.Va.Code,* 17C-5-7 [1983]." Syl. Pt. 1, *In re Matherly*, 177 W. Va. 507, 354 S.E.2d 603 (1987). "Nor does the statute require that the refusal be intelligently, knowingly and willingly made. The statute requires only that the driver refuse to take the test." *Id.* at 177 W. Va. 509, 354 S.E.2d 605.

The circuit court erroneously interpreted W. Va. Code §17C-5-7 [2013]. The court repeatedly referred to the "required 15-minutes." The court noted that the officer was required to wait "the required 15-minutes for a refusal of secondary chemical testing." A.R. 4. In fact, the statute provides, "after fifteen minutes following the warnings the refusal is considered final. The arresting officer after that period of time expires has no further duty to provide the person with an opportunity to take the secondary test." The 15 minute period for recantation was met. Indeed, the amendments to W. Va. Code §17C-5-7(b) effective June 4, 2020 clearly show that the 15 minute period begins upon the driver's refusing to submit to the test, not on the time the warnings are given. "Upon requesting that a person submit to the secondary test, designated pursuant to § 17C-5-4 of this code, the person shall be given the written and verbal warnings set forth in § 17C-5-4(e) of this code. After the person under arrest is given the required written and verbal warnings, the person shall have the opportunity to submit to, or refuse to submit to, the secondary test. A refusal to submit to the secondary test is considered final after 15 minutes have passed since the refusal: *Provided,* That during the 15 minutes following the refusal, the arresting officers shall permit the person under arrest to revoke his or her refusal and shall provide the person with the opportunity to submit to the test upon request. After the 15 minutes have passed following a refusal to submit to the secondary test, the arresting officer has no further duty to provide the person with an opportunity to take the secondary test." W. Va. Code § 17C-5-7 [2020].

The Investigating Officer testified that once the Implied Consent Statement was signed, "after that, I had tried to initiate the Intoxilyzer." A.R. 160. The Implied Consent Statement was signed at 1:53 a.m., and the Respondent's refusal began to manifest immediately thereafter. W. Va. Code §17C-5-7(a)[2013] provides, in part, "If any person under arrest as specified in section four of this article refuses to submit to any secondary chemical test, the tests shall not be given: *Provided,* That prior to the refusal, the person is given an oral warning and a written statement advising him or her

that his or her refusal to submit to the secondary test finally designated will result in the revocation of his or her license to operate a motor vehicle in this state for a period of at least forty-five days and up to life; and that after fifteen minutes following the warnings the refusal is considered final. The arresting officer after that period of time expires has no further duty to provide the person with an opportunity to take the secondary test."

Despite the fact that the Respondent appeared at his hearing, he did not testify and he provided no evidence that he ever recanted his refusal. "There is no evidence, however, in the record which indicates that the appellant advised Officer Johnson within the fifteen-minute period or anytime thereafter that he was willing to submit to the breathalyzer test." *Cunningham v. Bechtold*, 186 W. Va. 474, 481, 413 S.E.2d 129, 136 (1991)(upholding the revocation).

The OAH found, "The [Respondent's] Counsel's argument that [DMV] failed to prove that the Investigating Officer waited a sufficient period of time between the time he was read the West Virginia Implied Consent Statement and the time of the [Respondent's] refusal and transportation to the Southern Regional Jail is wholly without merit." A.R. 97. The OAH found that 30 minutes passed between the signing of the Implied Consent Statement and the notation on the Intoximeter that the Respondent had refused the test. A.R. 98. The OAH noted that W. Va. Code §17C-5-7(a) does not require the Investigating Officer to offer a driver a second opportunity to submit to the test, but only requires that the officer wait 15 minutes before he deems the initial refusal to be final. A.R. 98.

The circuit court erred in substituting its judgment for the OAH. A court can only interfere with a hearing examiner's findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.*, 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995). The circuit court's factual findings differ from the OAH's but are not supported by the record. "[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided

the case differently." *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996).

The DMV sustained its burden of showing that the Respondent refused the test. The Respondent did not contradict this evidence. The Respondent refused to submit to the Intoximeter test and did not recant this refusal within 15 minutes following the Implied Consent warnings.

CONCLUSION

The circuit court's *Order Granting Petition and Reversing Office of Administrative Hearings' Final Order* should be reversed.

Respectfully submitted,

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

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Janet E. James
Assistant Attorney General
West Virginia State Bar No. 4904
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, WV 25317
(304) 558-2522

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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner's Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 22nd day of September, 2020, addressed as follows:

David Pence, Esq.
Zerbe & Pence PLLC
P. O. Box 3667
Charleston, WV 25336

JANET E. JAMES