

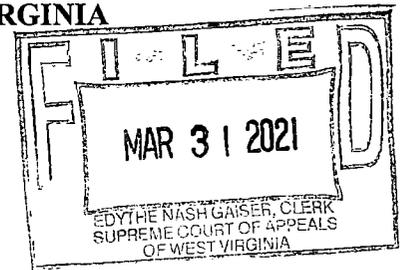
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0746

(Circuit Court Civil Action No. 19-AA-123)



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

Petitioner,

v.

JOSEPH SLYE,

Respondent.

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

**PATRICK MORRISEY
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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) submits the *Reply Brief of the Division of Motor Vehicles*.

ARGUMENT

1. The DMV cannot waive subject matter jurisdiction.

On page 3 of his response brief, Mr. Slye alleges that the DMV “has waived its right to argue that the OAH lacked jurisdiction because it presented documentary evidence and the testimony of the arresting officer on the very issue of refusal at the administrative hearing.” The Respondent’s argument fails because the DMV cannot waive subject matter jurisdiction.

“It is well established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte* by this Court.” *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345, 801 S.E.2d 216, 223 (2017). Further, “[t]his Court, on its own motion, will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein.” *Id.* at Syl. Pt. 2.

Furthermore, “[t]he urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void.” *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 700, 619 S.E.2d 209, 213 (2005); *see also* Franklin D. Cleckley, Robin Jean Davis, and Louis J. Palmer, Jr., *Litigation Handbook on W. Va. Rules of Civ. Pro.*, § 12(b)(1), at 325-26 (4th ed. 2012) (“Any judgment or decree rendered without such jurisdiction is utterly void.”).

State ex rel. Universal Underwriters Ins. Co. v. Wilson, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017).

Accordingly, the DMV has not waived the issue of the OAH’s lack of jurisdiction to hear an uncontested issue below, and this Court must address the same here.

2. The plain language of W. Va. Code § 17C-5-7(a) (2013) does not require the Investigating Officer to force a suspected drunk driver to take the Implied Consent Statement into his hands to read the document.

The DMV agrees with the Respondent that the language of W. Va. Code § 17C-5-7(a) (2013) is plain and unambiguous and requires no interpretation; however, both the circuit court below and the Respondent read more into the statute than is required. The relevant statute states in pertinent part that “prior to the refusal, the person is given an *oral warning and a written statement.*” The statute does not require that the Investigating Officer give the driver a souvenir copy of the West Virginia Implied Consent Statement, nor does it require the Investigating Officer to physically force a copy of the Statement into a driver’s hands so that he may read it for himself.

Here, it was unrebutted that the Investigating Officer read the Implied Consent Statement to Mr. Slye and attempted to have him to sign the same. It is unrebutted that Mr. Slye refused to sign the document. There was no dispute that Mr. Slye was given the opportunity to read and sign the statement and that he refused to put the document into his hands to read the warning for himself. That is all that the statute requires – to have the officer read the statement aloud and to give the driver the opportunity to read it for himself. Moreover, Mr. Slye has never asserted that the Investigating Officer failed to read the Implied Consent Statement to him or that he was not given the opportunity to read the statement for himself.

After the Investigating Officer testified that he attempted to give the document to the Respondent to read and to sign, the officer testified that he did not give the Respondent a copy of the form to take home. It is irrelevant that Mr. Slye did not have a copy of the Implied Consent Statement in his pocket to take home as a keepsake: he had already refused to take the test, and the period for recantation had expired.

The OAH hearing examiner, the circuit court, and the Respondent have all interpreted W. Va. Code § 17C-5-7(a) (2013) to mean that after a drunk driver refuses to put the Implied Consent Statement in his hands and refuses to take the secondary chemical test, he must be given a copy of the statement to take with him. Clearly, the Legislature did not intend for a driver who refused to take all field sobriety tests, refused to take the preliminary breath test, refused to take the Implied Consent Statement into his hands to read and to sign, refused to take the secondary chemical test, and refused to testify at the very hearing which he requested to escape a license revocation for refusing the secondary chemical test because the Investigating Officer did not make a copy of the statement for the driver to take home.

CONCLUSION

For the reasons contained in the *Brief of the Division of Motor Vehicles* as well as those listed above, the Petitioner prays that this Court reverses the final order of the circuit court and uphold the Respondent's license revocation for refusing the designated secondary chemical test.

Respectfully submitted,

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

By Counsel,

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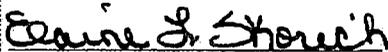
JOSEPH SLYE,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 31st day of March 2021, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

B. Craig Manford, Esquire
P.O. Box 3021
Martinsburg, WV 25402


Elaine L. Skorich