IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0746

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

Petitioner,

v.

Appeal From a Final Order
Of the Circuit Court of Kanawha County
(Case No. 19-AA-123)

JOSEPH SLYE,

Respondent.

BRIEF OF RESPONDENT JOSEPH SLYE

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I. ASSIGNMENTS OF ERROR

The Petitioner, Everett J. Frazier, Commissioner, West Virginia Division of Motor Vehicles, advances one assignment of error with two sub-parts. Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the assignment of error is not restated here but will be addressed below.

II. STATEMENT OF THE CASE

The Petitioner correctly and accurately sets for the factual and procedural history of the case and the Respondent adopts the same.

III. SUMMARY OF ARGUMENT

Any claim by the Petitioner that the OAH lacked jurisdiction to hear the matter involving whether or not the Respondent failed to contest the issue of refusal on his Written Objection and Hearing Request Form (A.R. 120) has been waived by the Petitioner when he presented both documentary and testimonial evidence on the issue at the administrative hearing not realizing that the arresting officer had not complied with the statute in question, W.Va. Code §17C-5-7(a). Additionally, the Circuit Court did not misinterpret W.Va. Code §17C-5-7(a) but pursuant to the overwhelming case law of the State, but applied the clear and unambiguous statute to the facts of the case.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Standard of Review

"On appeal of an administrative [decision] ... findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Syllabus Point 2 (in part), *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996)." Likewise, "[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syllabus Point 1, *Francis O. Day Co., v. Director, Div. of Envtl. Prot.*, 191 W.Va. 134, 443 S.E.2d 602 (1994). Cited in *Lowe v. Cicchirillo*, 223 W.Va. 175, 179, 672 S.E.2d 311, 315 (2008) (per curiam).

"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." Syllabus Point 1, *Burks v. McNeel*, 164 W.Va. 654, 264 S.E.2d 651 (1980). Syllabus, *Bolton v. Bechtold*, 178 W.Va. 556, 363 S.E.2d 241 (1987). Syl. Pt. 2, *State ex rel. Dep't of Motor Vehicles v. Saunders*, 184 W.Va. 55, 399 S.E.2d 455 (1990). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Respondent's Arguments in Opposition to Petitioner's Assignments of Error

B. The Circuit Court committed no error in not Upholding the DMV's Order of Revocation for Mr. Slye's Refusal to Take the Designated Secondary Chemical Test

1. The Petitioner waived any argument that the issue of refusal was not properly before the OAH by presenting documentary evidence and testimony on the issue at the administrative hearing which lead to the previously unknown fact that the arresting officer failed to comply with the provisions of W.Va. Code §17C-5-

7(a) as his documentation from the traffic stop was incomplete and misleading.

This issue is presented for the first time on appeal before this Court and therefore must be jurisdictional in nature for this Court to consider it. *Noble v. West Virginia DMV*, 223 W.Va. 818, 679 S.E.2d 650 (2009). *See:* Brief of the Department of Motor Vehicles before the Circuit Court of Kanawha County. (A.R. 15). 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.

According to the Petitioner's argument, the Commissioner did not need even present any evidence on the issue of refusal at the administrative hearing because the Respondent allegedly failed to give notice that he contested the allegation that he refused the designated secondary chemical test. The Petitioner claims that by not checking the correct box on the Request for Hearing Form but nevertheless referencing both the DUI case and the Refusal case, i.e., DMV File Nos. 402481-A/B the Respondent conceded the issue and failed to put it in contest. Therefore, the DMV invited the error it now claims to have occurred. The argument is a red herring, circular and without merit.

The Petitioner moved for admission of three key documents contained within its files under W.Va. Code §29A-5-2(b) to-wit: Form #314 West Virginia DUI Information Sheet, (A.R. 178); West Virginia Implied Consent Statement, (A.R. 182); and the Arresting Officer's Criminal Complaint (A.R. 191). On page 4 of the Form #314 (A.R. 181) it is noted that the Respondent refused the secondary chemical test. The Implied Consent Statement notes the Respondent refused to sign the form. The Criminal Complaint recites that once in custody and transported to the Sheriff's Department, the arresting officer waited twenty (20) minutes and asked the Respondent if he would submit to the designated secondary chemical test of his breath, "in which he refused."

(A.R. 191). Nowhere in these documents is there any indication that the arresting officer actually complied with the requirements of W.Va. Code §17C-5-7(a). The Petitioner thus presented the testimony of the arresting officer on the issue to clarify compliance with said statute.

Direct Examination by Mr. Thornton:

Q: Okay. Now, after which point, we know from the record, that you took him back to the station. What happened once you got him there?

A: Well, I read him the Implied Consent. You know, I explained - - I just read the Implied Consent to him and then I observed him for 20 minutes. And then he refused to sign the Implied Consent. . . .

(A.R. 243).

Cross Examination by Mr. Manford

Q: Okay. On the Implied Consent, did you actually read the Implied Consent Law to him? You know, I'm now asking your to take the designated Secondary Chemical Test. Blah, blah, blah. All that stuff?

A: Yes, sir.

Q: Okay. And did you actually give him a copy?

A: I did not, sir.

Q: You did not?

A: No, sir.

(A.R. 248).

Of course the arresting officer had not complied with the statute by admitting on cross-examination that he failed to provide the Respondent with a copy of the Implied Consent form to

review during the 20 minute wait period before his continued refusal would be final. More importantly, the Petitioner failed to object to the question posed to the arresting officer at the administrative hearing from Respondent's counsel: "Okay. And did you actually give him a copy [Implied Consent Form]?" "No Sir." (A.R. 248). The Petitioner raised the issue to which it now claims the OAH had no jurisdiction to hear in the first place.

W.Va. Code §17C-5-7(a) provides in pertinent 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.

Emphasis added.

The DMV was seeking to enhance the Respondent's suspension/revocation for refusing to submit to the designated secondary chemical test, to-wit, the EC/IR II intoxilyzer. The DMV had the burden to present evidence on the issue. The DMV waived any argument it might have had on this issue by presenting evidence on the issue of refusal at the administrative hearing. Obviously, the DMV did not know that the arresting officer had failed to provide the Petitioner with a copy of the Implied Consent Statement as required by W.Va. Code §17C-5-7(a).

2. The Circuit Court did not Misinterpret West Virginia Code §17C-5-7(a).

In a very recent case, *State v. Mills*, 844 S.E.2d 99, 108 (2020), this Court set forth all relevant case law regarding the prohibition to interpret unambiguous statutory law. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be

interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). "Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein." Syllabus Point 1, *Dunlap v. State Compensation Director*, 149 W.Va. 266, 140 S.E.2d 448 (1965). "Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." Syllabus Point 1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syllabus Point 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. V. State Tax Dep't of West Virginia*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). *Id.*, at pg. 108.

W.Va. Code §17C-5-7(a) is plain and unambiguous in its directive that prior to the refusal the person must be given both 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 driver's license.

The undisputed evidence in the case is that the arresting officer did not provide the Respondent with a written statement (i.e. the Implied Consent Statement) as required by the statute. The statute's meaning and mandate is plain and clear, not subject to judicial interpretation as argued by the Petitioner. The Circuit Court of Kanawha County clearly and painfully addressed the issue in its Order of August 24, 2020 (A.R. pgs. 6 - 7):

"6. The arresting officer failed to comply with W.Va. Code §17C-5-7's mandate when he did not provide the Respondent with a written copy of the Implied Consent Statement, and Petitioner provides no facts or legal reasoning to remediate the failure. Thus, OAH's ruling that the Respondent's "refusal" did not satisfy the statutory requirements for a refusal under §17C-5-7 cannot be "clearly wrong" or an error of law. Petitioner's argument that this Court should employ a totality of the circumstances test to determine whether the arresting officer's actions were in compliance with the purpose and spirit of the statute, when Petitioner admits it did not comply with the clear terms of the statute, is unavailing.

7. It gives this Court no pleasure to affirm the OAH's ruling – specifically in a matter where the Respondent was so clearly under the influence and so clearly refused to comply with any officer requests. However, the clear, plain language of the applicable statute, the manner in which courts are required to interpret the will of the Legislature through its written word, and the testimony of the arresting officer, gives this Court little alternative."

Accordingly, the Circuit Court did not misinterpret but applied the clear and unambiguous language of W.Va. Code §17C-5-7(a) as required by law.

VI. CONCLUSION

WHEREFORE, the Respondent, Joseph Slye, argues that the Petitioner's lone assignment of error is meritless and that this Court should affirm the Final Order entered by the Circuit Court of Kanawha County on the 25th day of August, 2020, and for such other relief as the Court may deem just, necessary and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, B. Craig Manford, hereby certify that on this 5th day of March, 2021, a true and accurate copy of the foregoing **Brief of Respondent Joseph Slye** was delivered to Elaine L. Skorich, Esq., Assistant Attorney General, Appellate Division, 812 Quarrier Street, 6th Floor, Charleston, West Virginia, 25301, elaine.l.skorich@wvago.gov by electronic mail and First Class United States Mail, postage prepaid.

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