IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLINT CASTO,
Petitioner Below, Petitioner

vs.) No. 21-0371

(An appeal of a final order of the Circuit Court of Kanawha County, Case No. 20-AA-86)

EVERETT FRAZIER, Commissioner,
West Virginia Division of Motor Vehicles,
Respondent Below, Respondent.

PETITIONER'S BRIEF

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TABLE OF CONTENTS

Assignments of Error	1
Statement of the Case	1
Summary of Argument	4
Statement Regarding Oral Argument and Decision	5
Argument	5
1. The Circuit Court erred by affirming the order of the OAH upholding the revocation of the Petitioner's license, when the evidentiary record overwhelmingly demonstrated that the Petitioner had not ingested any alcohol or controlled substances.	5
2. The order of revocation must be vacated and the administrative proceeding dismissed because this matter remains pending after July 1, 2021.	11
Conclusion	12

TABLE OF AUTHORITY

Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984)	6, 8
Brady v. Maryland, 373 U.S. 83 (1963)	7
Buffey v. Ballard, 782 S.E.2d 204 (W. Va. 2015)	7
Frazier v. Talbert, No. 20-0134 (W. Va. June 15, 2021)	*passim*
In re Burks, 206 W. Va. 429, 525 S.E.2d 310 (1999)	7
W. Va. Code § 17C-5C-1a(c)(1)	11
W. Va. Code §17C-5C-3(3)	11, 12
W. Va. Code § 29A-5-4	5, 6

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by affirming the order of the OAH upholding the revocation of the Petitioner's license, when the evidentiary record overwhelmingly demonstrated that the Petitioner had not ingested any alcohol or controlled substances.
2. The order of revocation must be vacated and the administrative proceeding dismissed because this matter remains pending after July 1, 2021.

STATEMENT OF THE CASE

On April 13, 2019, the Petitioner, Clint Casto, encountered Patrolman R.C. Montagu of the Charleston Police Department after Petitioner parked hi 2005 Pontiac Vibe and entered 7-11 on Washington Street in Charleston, West Virginia. (Appendix Record ["A.R."], at 11-12 119-120, 370). At the time, Patrolman Montagu was parked outside of 7-11 standing near his police cruiser. The encounter occurred at approximately 2:54 A.M. *Id.*

According to Patrolman Montagu, Petitioner parked his vehicle outside of the lines in front of the 7-11 parking area and kept his engine running while he entered the store. There were no other vehicles in the parking lot. Patrolman Montagu explained that Petitioner was unsteady exiting the vehicle and walking. Petitioner was normal while standing. He described Petitioner as looking impaired and disoriented with bloodshot eyes. (A.R., at 12, 119, 372).

Petitioner testified that he parked outside of 7-11 and entered the store to buy something to drink after working a full shift with Ticketmaster and then driving for Uber. Petitioner explained that he was reading labels on some of the products to ensure the food complied with his diet. Petitioner explained that he was nervous when several cops approached him outside 7-

11 and questioned him about whey he was reading labels on products inside the store. (A.R., at 12, 397-399).

After a brief encounter with Patrolman Montagu, petitioner agreed to perform a series of field sobriety tests. Patrolman Montagu asked Petitioner if he had taken any medications or drugs, and Petitioner explained that he had not. (A.R., at 12, 375). On the Horizontal Gaze Nystagmus test, Petitioner did not show any signs of impairment. Petitioner's eyes did not lack smooth pursuit, display nystagmus at maximum deviation or onset of nystagmus prior to 45 degrees. Thus he scored zero negative clues on that test. (A.R., at 12-13, 121).

On the walk and turn test, Petitioner allegedly struggled to maintain balance, stopped walking, raised arms to balance, performed the turn improperly and took the incorrect number of steps. Petitioner explained that he had previously suffered a right leg injury from a motorcycle crash which negatively impacted his balance. Petitioner explained that he was nervous during the test and that Patrolman Montagu was talking fast while delivering the instructions. Patrolman Montagu agreed that he had to repeat the instructions to Petitioner. (A.R., at 13, 121, 399-401).

On the one leg stand test, Petitioner used his arms to balance and counted to twenty five during the thirty second test. According to Patrolman Montagu's DUI Information Sheet, Petitioner only received one negative score on that thirty second test. Petitioner did not put his foot down, sway while balancing or hop during that test. The decision point on the one leg stand test is two, therefore Petitioner's score was below the decision point level. (A.R., at 13, 121).

On the modified Romberg exercise Petitioner estimated that thirty seconds elapsed after

twenty four seconds. He also swayed by two inches, had body tremors and eyelid tremors. The modified Romberg exercise is not a pass fail test. On the lack of convergence test, Petitioner's eyes did not converge all the way. His eyes were not dilated or constructed. A roadside preliminary breath test was administered to Petitioner which registered 0.00%. (A.R., at 13-14, 121-122).

The Petitioner denied being impaired but explained that he was very nervous and extremely fatigued. He demanded a blood test when informed of his arrest. (A.R., at 14, 123). Petitioner was taken to CAMC Hospital and a blood draw was effectuated by phlebotomist Katie Cole at 3:35 A.M. (A.R., at 14, 132-133).

Patrolman Montagu did not request that a separate drug recognition expert be called to further investigate Petitioner and administer additional DRE tests. (A.R., at 14, 383). Thus, the evidentiary record in favor of revocation consists of the testimony and report of Patrolman Montagu and the blood test which was negative for all tested controlled substances. (A.R., at 14, 159-162). No drugs or medication was found in Petitioner's vehicle or on his person. No empty bill bottles or other drug paraphernalia were found in Mr. Casto's vehcile or person. (A.R., at 14, 392). There is no testimony of powder in the Petitioner's nose, nor were there track marks to suggest intravenous use. (A.R., at 14, 367-395)

In a letter dated July 30, 2020, Forensic Scientist Austi L. Soush explained that the results of Petitioner's blood test did not reveal any positive findings of toxicological significance on any of the compounds found on the West Virginia State Police Toxicology Drug Panel. The West Virginia State Police tested the Petitioner's blood sample for ninety (90) different controlled substance compounds. (A.R., at 14, 159-162).

Petitioner timely requested a hearing to challenge the Commissioner of the West Virginia Division of Motor Vehicle's Order of Revocation dated April 22, 2019. (A.R., at 14, 56). A hearing was conducted on July 7, 2020 before OAH hearing examiner William Bands. (A.R., at 14, 357-412). The Petitioner submitted proposed findings of fact and conclusions of law following the hearing. (A.R., at 241-247). A Final Order was issued by the OAH on December 10, 2020 affirming the Order of Revocation previously entered. (A.R., at 296-307).

The Petitioner filed a Petition for Judicial Review in the Circuit Court of Kanawha County. (A.R., at 318-332). The Petitioner alleged that the OAH's final order was arbitrary and capricious, and that the Respondent failed to satisfy the burden of proof. *Id.* The Circuit Court, Judge Dan O'Hanlon presiding, held a hearing on the Petitioner's motion for a stay of his license revocation on January 20, 2021. (A.R., at 38-49). After hearing evidence on the same, the Court found that "there's a substantial probability that the petitioner will prevail on the merits of this appeal and the petitioner will suffer irreparable harm if it is not stayed, so I'm going to stay it at this time." (A.R., at 48). Subsequently, the parties briefed the matter. (A.R., at 11-34). In the meantime, Judge Maryclaire Akers was appointed to the bench. Notwithstanding Judge O'Hanlon's previous findings, Judge Akers adopted the Respondent's proposed order, and upheld the OAH order. (A.R., at 2-10). It is from this order that the Petitioner now appeals.

SUMMARY OF ARGUMENT

There is no competent evidence whatsoever that the Petitioner had ingested alcohol or a controlled substance prior to operating his vehicle. The OAH order to the contrary was arbitrary and capricious, and did not rest on a reasonable weighing of the evidentiary record. The only evidence in favor of the Respondent is the set of mixed results on field sobriety tests conducted

on a person who was suffering from fatigue and a leg injury. Those results, if credited, are evidence of impairment, but not evidence that the Petitioner had ingested a substance. For the lower court to refuse to overturn the OAH Final Order when a 90-substance drug panel was entirely negative, when there was no controlled substance or paraphernalia recovered, nor any other actual evidence that the Petitioner was actually *under the influence* of alcohol or a controlled substance, was an abuse of discretion, and must be reversed. Furthermore, because this matter remains pending after July 1, 2021, the Legislature has exercised its authority in W. Va. Code § 17C-5C-1a to require the vacation of the order of revocation and the dismissal of the revocation action, in accordance with this Court's own analysis in Footnote 23 of *Frazier v. Talbert*, No. 20-0134 (W. Va. June 15, 2021).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for Oral Argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, because it involves an unsustainable exercise of discretion by the lower court. It should be disposed of by signed opinion reversing the order below.

ARGUMENT

1. The Circuit Court erred by affirming the order of the OAH upholding the revocation of the Petitioner's license, when the evidentiary record overwhelmingly demonstrated that the Petitioner had not ingested any alcohol or controlled substances.

The standard of review of a circuit court's review of the decision of the Office of Administrative Hearings is *de novo* on questions of law, and "clearly erroneous" on questions of fact:

> 1. "'On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by

> the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.' Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996)." Syl. Pt. 1, *Dale v. Odum*, 233 W.Va. 601, 760 S.E.2d 415 (2014).

Syl. Pt. 1, *Talbert*, at *2.

> 2. "Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: '(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'" Syl. Pt. 2, *Shepherdstown Volunteer Fire Dept. v. State ex rel. State of W.Va. Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

Syl. Pt. 2, *Talbert*, *2.

In this case, the OAH order, and the Circuit Court order upholding it, were both clearly wrong in light of the evidentiary record. The OAH effectuated an arbitrary and capricious result in upholding the Petitioner's revocation, and the Circuit Court has multiplied the harm done to a law abiding citizen by failing in its duty to overturn a fundamentally unsupportable order. The Respondent's burden of proof in the face of the administrative appeal of a revocation order has been set forth by this Court [emphasis added]:

> 4. "'Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol.' Syl. Pt. 2, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984)." Syl. Pt. 5, *Reed v. Hill*, 235 W. Va. 1, 770 S.E.2d 501(2015).

Syl. Pt. 4, *Talbert*, at *3.

In this case, there was simply *no* evidence that the Petitioner had consumed alcoholic beverages, or controlled substances. The mere fact that in the opinion of the investigating officer that the Petitioner appeared to be intoxicated; i.e., that he "exhibited symptoms of intoxication," is not a substitute for evidence that he actually consumed alcohol or a controlled substance.

The 90-substance panel showed zero positive results of toxicological significance for any substance. (A.R., at 159-162). Nothing. The Circuit Court, adopting the language advanced by the Respondent in the Respondent's own brief before that court, (A.R., at 27), concluded that "a negative blood test is not exculpatory." (A.R., at 8). No authority was cited for this proposition. This is obviously a disturbing legal conclusion coming from a court vested with ensuring that the State's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), are fulfilled. It is also contrary to this own Court's prior observations that "There is little point in having the right to demand a potentially exculpatory blood test, if the test that is given is not up to the evidentiary standard for blood tests set forth in the statutes." *In re Burks*, 206 W. Va. 429, 525 S.E.2d 310, 314 (1999). Presumably, if a blood test result could be "potentially exculpatory," then a negative result is what would fulfill that "potential." Exculpatory evidence "is defined as '[e]vidence tending to establish a criminal defendant's innocence.' Black's Law Dictionary 637 (9th ed.2009)." Footnote 22, *Buffey v. Ballard*, 782 S.E.2d 204 (W. Va. 2015). The idea that this evidence does not *tend* to establish the Petitioner's innocence of the accusation of DUI, in either the criminal or civil context, is preposterous.

In this case, in the absence of any other evidence of consumption of drugs, the negative

drug test dictates that the Respondent did not prove that the Petitioner "consumed alcoholic beverages [or drugs]" when there is no other evidence of the consumption of drugs – no paraphernalia, no medicine bottles, no powder, no track marks, nothing. The question for the OAH is not simply whether the Petitioner was suffering under any impairment. The question is whether or not he was driving while under the influence of alcohol or drugs – whether he had consumed any alcohol or drugs. Counsel for the Respondent misstated this standard to the Circuit Court during the January 20, 2021 hearing:

> Although it is clear in case law that those credibility determinations by the fact finder are owed deference by a reviewing court and that the blood test came back negative, that does not undo the fact of evidence of impairment. It doesn't matter that the officer can't state what drug he took or how he was impaired. The -- the question is was he driving and was he impaired. And there was no question that he was driving. And there is all this evidence of impairment, which I've just recited.

(A.R., at 43-44).

If that was actually the standard – evidence of impairment plus evidence of driving, then the Respondent *might* prevail, although even the evidence of impairment is shaky at best. That is not the standard set forth in *Albrecht*, however. Even if the Petitioner was impaired, by fatigue or some other reason, the Respondent is not permitted a legal presumption that he therefore consumed alcohol or controlled substances. The Respondent must prove that the Petitioner committed a DUI crime by a preponderance of the evidence. In the face of the overwhelming probative value of the negative drug test, none of the circumstances in the rest of the evidentiary record support the finding that the Petitioner actually committed a DUI offense. For instance, the OAH found that the Petitioner was not credible, in a general sense. (A.R., at 342). The OAH and the Circuit Court failed to explain how the Petitioner's credibility would have any bearing on the veracity of the negative drug panel. The OAH engages in circuitous

analysis concerning what presumptions, if any, should apply to the blood test result, before determining that, because it is merely "one apple on the tree of the totality of the circumstances," it will give more weight to the field sobriety tests. (A.R., at 341). The OAH determined, without actually pointing to any evidence of drug consumption versus mere impairment, that, as a matter of law, the Petitioner had driven an automobile while under the influence of drugs or a controlled substance. (A.R., at 342). This conclusion is clearly contrary to the factual record, and it was error for the Circuit Court to sustain it in light of the drug test results.

In the OAH proceeding, the Respondent attempted to explain away the negative drug tests by intimating that the Petitioner could have been affected by some trace substance. In doing so, Patrolman Montagu engaged in specious theorizing. Patrolman Montagu was asked:

> Q. There's nothing in your report here to indicate that he had consumed any alcohol or had been using any marijuana.
>
> A. That's not necessarily true. His performance on the standardized field sobriety tests and the ARIDE field sobriety tests did indicate a high probability of impairment. It's just that the blood did not come back with – the bottom three on the last page, 88, 89, and 90, those are three of the related compounds with marijuana, delta 9 tetrahydrocannabinol being the active impairing ingredient, and then the other two are metabolites. So those three based on the thresholds were not detected. But, his performance on some of the field sobriety tests could be in line with alcohol or drug use.
>
> Q. You're saying they could?
>
> A. Correct.
>
> Q. But that doesn't mean that they were.
>
> A. No, they're definitely subject to the totality of the circumstances in the investigation.

(A.R., at 386).

Continuing this line of theorizing concerning marijuana metabolites, Patrolman Montague testified as follows on questioning from Respondent's counsel:

> Q. [...] One other thing. You used the word in regard to the blood analysis documents, especially the legend of substances tested for on the final two pages of that report, you oftentimes referred to the threshold level. I'm assuming what you're talking about is that there is, whatever that level is, that is a floor, and quantities above the floor, they don't have a ceiling, but if they're below the floor they don't show up on the test.
>
> A. Correct, sir. For instance, if you look at the very bottom 190, 11-Hydroxy Delta-9 THC, the screen limit of detection is one nanogram per millimeter of blood. So regarding that, between 0 and 1, with all the decimal points in there, if that was the true and one hundred percent accurate measurement, then it would not be detected by this panel.
>
> Q. So it doesn't meet the minimum level being tested for does not mean necessarily that any of those substances are not in someone's system. They're just not in the system at a sufficient level to be detected by that test pursuant to those minimums set by the West Virginia State Police.
>
> A. Correct.

(A.R., at 393-394).

Thus, we can understand the Respondent's theory of the case: that the Petitioner must have had marijuana metabolites below one nanogram per milliliter in his blood. (If there is some other theory about his alleged drug consumption, it was never specified in the record). Of course, the Respondent has submitted no scientific evidence to suggest that quantities of THC in blood lower than one nanogram per milliliter are psychoactive, in support of Patrolman Montagu's substantively obfuscatory, if factually accurate, testimony quoted above. The Respondent essentially asks the fact finder to assume, based on utterly speculative theorizing, that a negative drug test actually means that the Petitioner was using drugs. There is no burden of proof so weak as to be satisfied by this evidence.

The lower court turns the old aphorism – "absence of evidence is not evidence of

absence" – on its head, as it has treated the "evidence of absence" of drug consumption as a mere "absence of evidence" in choosing to rely on Patrolman Montagu's speculative observations. It is notable that the Respondent, in its briefing and proposed orders below, did not cite a single case in which a properly conducted negative drug panel was ignored in favor of field sobriety tests or other circumstantial evidence. Surely, if such a case existed, it would have been cited. There is no precedent for this result. It is utterly arbitrary and capricious, it is clearly wrong, and it must be reversed.

2. The order of revocation must be vacated and the administrative proceeding dismissed because this matter remains pending after July 1, 2021.

In footnote 23 of *Talbert*, this Court noted the effect of recent legislation abolishing the administrative hearing procedures for license revocations:

> We observe that, in 2020, the Legislature, among other changes, amended the procedure for driver's license revocation for DUI. See generally W. Va. Code § 17C-5-2 [2020]. Additionally, with regard to appeals of revocation orders, we note that the OAH "shall be terminated" on July 1, 2021, W. Va. Code § 17C-5C-1a(d) [2020], and that, in certain cases, revocation or suspension orders that are pending before the OAH on or after that date "shall be dismissed." W. Va. Code § 17C-5C-1a(c)(1). In other cases, however, the appeal "shall be transferred to the circuit court" "for the circuit in which the event giving rise to the contested decision of the Commissioner . . . occurred." W. Va. Code § 17C-5C-1a(c)(2); W. Va. Code § 17C-5C-1a(b). "For any appeal transferred . . . the circuit court shall adopt any existing records of evidence and proceedings in the [OAH], conduct further proceedings as it considers necessary, and issue a final decision or otherwise dispose of the case . . . ." W. Va. Code § 17C-5C-1a(c)(2). The parties herein do not address the impact of West Virginia Code § 17C-5C-1a on respondent's case [i.e., whether respondent's revocation "shall be dismissed" or the appeal "shall be transferred to the circuit court"], an issue that must be determined upon remand. To expedite this determination, we issue the mandate of the Court contemporaneously with the issuance of this opinion.

Talbert at *26 (footnote 23).

This case is within the class of cases required for dismissal by W. Va. Code § 17C-5C-

1a(c)(1), which reads: "(1) If any appeal of a revocation or suspension order, described in §17C-5C-3(3) of this code, is pending before the office on or after July 1, 2021, the underlying revocation or suspension order shall be dismissed." DUI revocations, and revocations for refusal to submit to tests, are the types of cases described in §17C-5C-3(3). Accordingly, as this matter remains pending (as did *Talbert*), the appropriate disposition is for the Petitioner's revocation to be dismissed, and for no further proceedings in the circuit court.

CONCLUSION

The Petitioner respectfully requests that this Court reverse the lower court, and remand the matter for an order dismissing the Petitioner's revocation on either of the grounds asserted herein, or any other relief the Court deems just and proper.

Respectfully submitted,

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EVERETT FRAZIER, Commissioner,
West Virginia Division of Motor Vehicles,
Respondent Below, Respondent.

CERTIFICATE OF SERVICE

On this 7th day of August, 2021, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petitioner's Brief to Janet James, Esq., by U.S. Mail to PO Box 17200, Charleston, WV 25317.

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