IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No.: 21-0371

CLINT CASTO,
Petitioner Below, Petitioner

vs.)

(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 REPLY BRIEF

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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 REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for Oral Argument pursuant to Rule 19 o 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 licesne, when the evidentiary record overwhelmingly demonstrated that the Petitioner had not ingested any alcohol or controlled substances.

The Respondent appears to agree Syllabus Point 2, *Albrecht v. State*, 173 W.Va 268, 314 S.E.2d 859 (1984), states the correct standard for the revocation of driving privileges. Respondent's Brief, at 6. That standard requires the following elements to be met. First, that there is "evidence that a driver was operating a motor vehicle upon a public street or highway"; second, that the driver "exhibited symptoms of intoxication"; and third, that the driver "had consumed alcoholic beverages."[1]

Even though there was a comprehensive negative drug panel (A.R., at 14, 159-162) and even though there was no other corroborating evidence of substance use (i.e., an admission, drug

1 In practice, and in the context of this case, this third element includes other controlled substances that may be the basis of a DUI under W. Va. Code Section 17C-5-2a.

paraphernalia, needle marks, etc.), it appears to be the Respondent's position that the second element (arguably sustained by the field sobriety tests) in and of itself satisfies the third element. In support of this theory the Respondent cites *Groves v. Cicchirillo*, 225 W.Va 474, 694 S.E.2d 639 (2010). In that case, there was a breath test result of .218 BAC, obviously a stark contrast to this case. *Id.*, 694 S.E.2d at 641. However, as the Respondent points out, this Court held that even without the breath test result, there still would have been sufficient evidence in the record to justify revocation. What the Respondent conveniently omits to point out, is that the *Groves* record included the following admission by the driver to the officer: "Sir, I done drank too much." *Id.*, at footnote 9. In no way whatsoever does *Groves* support the notion that a revocation can be upheld when there is no evidence of consumption.

Two other cases cited by the Respondent, without any elaborating comment, are *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997), and *Lowe v. Ciccharillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008). *Carte* is another case in which intoximeter evidence was not made part of the record. *Id*, at footnote 3. However, in total contrast to the instant case, the driver admitted to drinking "ten or twelve" alcoholic beverages. *Id.*, 488 S.E.2d at 439. *Lowe* is also inapposite to support the Respondent's position, as irrespective of questions of admissibility of the blood test in that case, the driver admitted to imbibing alcoholic beverages. *Id.*, 672 S.E.2d at 314.

Finally, the Respondent cites *White v. Miller*, 228 W.Va. 797, 724 S.E.2d 768 (W. Va. 2012), a case involving, in part, the degree to which a revocation may rely upon the Horizontal Nystagmus Gaze test, and the quantum of the other evidence necessary to prove alcohol consumption in addition to said test. In that case, although this Court ruled in favor of the driver on the issue of the invalidity of the checkpoint, it ruled that there was enough evidence in addition to the HNG test to support revocation, if not for the checkpoint issue, because, as in the

other cases, there was an admission of alcohol consumption. *Id.*, 724 S.E.2d at 778. Similarly, in *Boley v. Cline*, 193 W.Va. 311, 456 S.E.2d 38 (1995), the exclusion of a chemical test showing alcohol in the blood was not fatal to the DMV's case, because, among other evidence, there was evidence of alcohol consumption in the form of the odor of alcohol. In *Dean v. Department of Motor Vehicles*, 195 W.Va. 70, 464 S.E.2d 589 (1995), the lack of a chemical test was overcome, once again, by the admission of the driver to consuming alcohol. The Respondent has cited no case in its brief, and the Petitioner has found none, in which a revocation has been upheld in the absence of any evidence of the consumption of a drug or alcohol, let alone when an admissible chemical test shows no presence of any intoxicating substance whatsoever in the driver's body.

Somewhat astonishingly, the Respondent has pivoted in its brief from a reliance on the investigating officer's hypothesis of marijuana use below the detectable threshold (a theory that is utterly speculative, and for which this is no corroboration whatsoever). (A.R., at 386, 393-394). Instead, the Respondent now advances the theory that: "The Petitioner may have ingested an inhalant or other rapidly-dissipated drug, or a drug for which the State Police Lab does not test." Respondent's Brief, at 8. This, like the undetectable marijuana theory, is utterly speculative, and there is no corroboration in the record for this theory. This "inhalant" theory is invented from whole cloth. There is not even a scintilla of evidence to support it:

> 6. "'Substantial evidence' requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive." Syllabus Point 4, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).

Syl. Pt. 6, *Lowe v. Cicchirillo*, *supra*.

There is competent, exceptionally probative evidence to show that the Petitioner was clean. There is nothing but rank, and borderline frivolous speculation, to explain away the test

results. The Respondent states "[The blood test] is not dispositive proof that the Petitioner had no drugs or controlled substances in his system." Respondent's Brief, at 8. The Respondent apparently forgets which side has the burden of proof. It was not upon the Petitioner to prove a negative as to any potential theory of substance ingestion. It was upon the Respondent to prove a theory of drug consumption in light of the unequivocal blood test result. It was arbitrary and capricious for the administrative tribunal to revoke the Petitioner's license without any substantial evidence to show how the Petitioner could possibly have been impaired as a result of a controlled substance in light of the uncontroverted blood test result, as opposed to fatigue, leg injury, or any other explanation evident in the record for the Petitioner's alleged "impairment." (A.R., at 378, 401).

This Court has written repeatedly about the due process interests in the ability of a driver to be able to obtain potentially exculpatory blood test results. See, *State v. York*, 175 W.Va. 740, 338 S.E.2d 219 (1985); *In re Burks,* 206 W.Va. 429, 525 S.E.2d 310 (1999); *Reed v. Hall,* 235 W.Va. 322, 773 S.E.2d 666 (2015); *Frazier v. Talbert*, 858 S.E.2d 918 (2021); and *Frazier v. Bragg*, 851 S.E.2d 486 (W. Va. 2020). The right to such testing is also protected by the Legislature pursuant to W. Va. Code Sections 17C-5-6 and 17C-5-9. If the right to secure blood testing implicates rights secured both by the Constitution and by statute, how then may exculpatory results simply be ignored? It borders on farce for the OAH to rely on the Petitioner's spotty, but hardly conclusive, performance on field sobriety tests after working two jobs at 3:00 in the morning, while wishing away the test results showing no alcohol, and no controlled substances, present in his system. If the result in this case is a sustainable application of the administrative revocation process, then it is truly a blessing to the liberty of citizens in a free society that the Legislature has abolished it.

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

The Respondent appears to base its opposition to this assignment of error on the theory that this matter is not "pending" before the OAH because the OAH entered its final order on December 10, 2020. Respondent's Brief, at 10. The question of whether W. Va. Code Section 17C-5C-1a(c)(1), as discussed in Footnote 23 of *Frazier v. Talbert*, 858 S.E.2 1918 (W. Va. 2021) requires dismissal of the instant action turns on whether the language "pending before" encompasses cases that are on appeal from the OAH in the circuit courts and in this Court. The Petitioner asserts that because it remains possible that this matter will be remanded to the OAH until the present appeal is decided (as was ordered in *Talbert*), that this case is within the universe of cases "pending before" the OAH, which are subject to dismissal after July 1, 2021.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that the order of the Circuit Court upholding his revocation be reversed, 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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By Counsel,

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CERTIFICATE OF SERVICE

On this 16th day of October, 2021, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Reply Brief to Janet James, Esq., by U.S. Mail to PO Box 17200, Charleston, WV 25317.

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