IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0438

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

Petitioner,

v.

RAYMOND BURCKER,

Respondent.

**Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. Civil Action No. 19-AA-75**

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

THE CIRCUIT COURT COMMITTED ERROR OF LAW BY APPLYING THE "PRIMA FACIE" STANDARD APPLICABLE TO LAW ENFORCEMENT DIRECTED BLOOD TESTS INSTEAD OF THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLICABLE TO MEDICAL, DIAGNOSTIC BLOOD TESTS.

STATEMENT OF THE CASE

On February 23, 2012 at approximately 7:15 p.m., Senior Patrolman J. D. Bird of the Charles Town Police Department ("Investigating Officer") was dispatched to a three-vehicle crash on Route 9 at the Crosswinds Drive intersection in Charles Town, Jefferson County, West Virginia. A.R. 222, 224, 229, 230[1].Upon arriving at the scene, he discovered three motor vehicles, including one driven by the Respondent, which were involved in the crash. *Id.*

At 7:22 p.m., an ambulance arrived. The Respondent was treated for injuries sustained in the crash and transported to Jefferson Memorial Hospital in Ranson, West Virginia. The Respondent arrived at the hospital at 7:47 p.m. A.R. 231, 260.

At 8:00 p.m., personnel at Jefferson Memorial Hospital drew a blood specimen from the Respondent for diagnostic medical purposes. A.R. 218.

At 8:15 p.m., Corporal Benjamin Anderson of the Charles Town Police Department arrived at the hospital to take a statement from the Respondent. A.R. 217, 332. At that time, the Respondent acknowledged that he was driving east on Route 9 when the crash occurred. A. R. 332.

At approximately 8:30 p.m., hospital personnel analyzed the blood specimen. A.R. 228.

At 9:42 p.m., the Investigating Officer went to the hospital and spoke with the Respondent. The Respondent told the Investigating Officer that he had been at a friend's house in Berkeley County and was traveling east on his way home when the crash occurred. While at the hospital, the

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[1]Reference is to the Appendix Record filed simultaneously herewith.

Investigating Officer spoke with an emergency room nurse who told him that the Respondent admitted to her that he had consumed Nyquil cold medicine but no alcohol. The Investigating Officer also spoke with emergency medical squad personnel who stated that they believed the Respondent was under the influence of alcohol. A.R. 222.

On March 15, 2012, the Investigating Officer submitted an Affidavit and Complaint for Search Warrant for the Respondent's medical records generated by Jefferson Memorial Hospital. On that date, the Magistrate issued the search warrant, and the Investigating Officer obtained the records from the hospital. A.R. 222-27, 321.

The records showed that the Respondent's serum alcohol concentration was .23 g/dL of serum. A.R. 228, 321. The alcohol concentration in the whole blood was therefore .198%. A.R. 322. W. Va. Code R. §64-10-8.2(d).

On March 17, 2012, the Investigating Officer went to the Respondent's residence and spoke with him. The Respondent told the Investigating Officer that when he was traveling on Route 9, he looked down at his speedometer and when he looked up, there was a car in front of him. He lifted his foot off the accelerator and turned right before the crash occurred. He also told the Investigating Officer that he had consumed Nyquil and one Coors beer between 1:00 p.m. and 6:00 p.m. on the day of the crash. A.R. 223, 229.

Thereafter, the Investigating Officer prepared a Criminal Complaint charging the Respondent with DUI while having .15% or more blood alcohol concentration. A.R.222-23.

On March 23, 2012, the Magistrate Court of Jefferson County issued a warrant for the Respondent's arrest. A.R. 233.

On March 27, 2012, Senior Patrolman J. W. Newlin of the Charles Town Police Department lawfully arrested the Respondent for DUI of alcohol with a blood alcohol content in excess of .15 ("aggravated DUI"). A.R. 233.

On May 6, 2014, the DMV sent the Respondent an *Order of Revocation* and an *Order of Disqualification* for aggravated DUI. A.R. 23-24.

The Respondent requested, through counsel, an administrative hearing before the Office of Administrative Hearings ("OAH"). A.R. 25.

On February 23, 2016, the OAH conducted an administrative hearing. A.R. 312 *et seq*.

On June 12, 2019, the OAH entered a *Final Order* affirming the Commissioner's revocation for DUI and rescinding the enhancement to aggravated DUI. A.R. 267 *et seq*.

The DMV appealed that portion of the OAH's *Final Order* which rescinded the revocation of the Respondent's license for driving while having a blood alcohol content in excess of .15% to the circuit court. A.R. 287 *et seq*.

On April 29, 2021, the circuit court entered a Final Order affirming the *Final Order* of the OAH. A.R. 1-7. The present appeal ensued.

SUMMARY OF ARGUMENT

This matter involves an arrest for driving under the influence with a blood alcohol content in excess of 0.15. Personnel at Jefferson Memorial Hospital drew a blood specimen from the Respondent for diagnostic medical purposes. Hospital personnel analyzed the blood specimen. The Investigating Officer submitted an Affidavit and Complaint for Search Warrant for the Respondent's medical records generated by Jefferson Memorial Hospital. The Magistrate issued the search warrant and the Investigating Officer obtained the records from the hospital.

The records showed that the Respondent's serum alcohol concentration was .23 g/dl of serum. The alcohol concentration in the whole blood was therefore .198%. W. Va. Code R. § 64-10-8.2 (d).This evidence was submitted to the OAH but was given no weight.

The OAH and the circuit court failed to properly weigh the blood test evidence under the preponderance of the evidence standard and erroneously applied a *prima facie* standard. The OAH and the circuit court misapplied *State v. Coleman*, 208 W. Va. 560, 542 S.E.2d 74 (2000). In *Coleman*, a blood test had been made at a hospital for diagnostic, medical purposes. The *Coleman* Court determined that the circuit judge had properly admitted the blood test results under *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 454 S.E.2d 77 (1995), which held that medical, diagnostic blood tests should be admitted into evidence and given appropriate weight. "In the instant case, the trial judge correctly admitted the hospital blood test results evidence, not as necessarily having prima facie weight, but simply as blood alcohol level evidence, under *Bedell*." *State v. Coleman*, 208 W. Va. 563, 542 S.E.2d 77 (2000). Although *Coleman* made the distinction in the standards for weighing medical, diagnostic tests as opposed to law enforcement directed tests, the OAH misapplied the standard for law enforcement tests to the present case.

In *Bedell*, this Court found that W. Va. Code §17C-5-4 is not applicable to medical, diagnostic blood tests. The provisions of W. Va. Code §§17C-5-4, -6 and -8 (which contains the "*prima facie*" standard) and W. Va. Code R.§ 64-10-8.2 are inapplicable to this case, as the sample and analysis were made for diagnostic purposes. Further, in *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008), a case with substantial factual similarities to the present case, this Court affirmed that diagnostic blood tests are entitled to admission and weight in the absence of a substantive challenge.

Since the issuance of the OAH order in this matter, this Court has decided *Frazier v. Corley*, No. 18-1033, 2020 WL 1493971 (W. Va. Mar. 26, 2020)(memorandum decision), in which the OAH found that diagnostic blood test results cannot be afforded *prima facie* weight. The *Corley* Court relied on the implied consent and officer-directed secondary test provisions of the Code, and the corresponding legislative rule, to analyze the weight to be given to diagnostic blood tests: "West Virginia Code § 17C-5-4(h) plainly states that '[o]nly the person actually administering or conducting a test conducted pursuant to this article is competent to testify as to the results and veracity of the test.' Because the person who actually administered the test did not author the affidavit and was unavailable to testify, the OAH was justified in discounting the DMV's submitted affidavit stating that the test was performed correctly." *Corley* at *4. *Corley* failed to distinguish between the *prima facie* standard and the preponderance of the evidence standard. In this case, the evidence was properly admitted, was unchallenged and should have been weighed along with all of the other evidence under the preponderance of the evidence standard.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to R.A.P Rule 20 is appropriate on the basis that there are cases involving inconsistencies or conflicts among the decisions of this Court.

ARGUMENT

A. STANDARD OF REVIEW

"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).

"'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 4, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

B. THE CIRCUIT COURT COMMITTED ERROR OF LAW BY APPLYING THE "PRIMA FACIE" STANDARD APPLICABLE TO LAW ENFORCEMENT DIRECTED BLOOD TESTS INSTEAD OF THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLICABLE TO MEDICAL, DIAGNOSTIC BLOOD TESTS.

The OAH and the circuit court failed to properly weigh the blood test evidence under the preponderance of the evidence standard and erroneously applied a *prima facie* standard. The "*prima facie*" standard derives from W. Va. Code §17C-5-4 and only applies to post-arrest, law enforcement directed tests. Medical, diagnostic tests made prior to the driver's arrest are admissible and to be accorded appropriate weight. *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 454 S.E.2d 77 (1994); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008). The circuit court is in error in finding that the present case is distinct from *Bedell*. A.R. 6. As will be seen below, *Bedell* and *Lowe* clearly support the admission and consideration of blood test results obtained during the course of medical treatment.

In this matter, the issue was whether there was a violation of W. Va. Code § 17C-5A-2 (k)(1) (2015) as shown by a preponderance of the evidence: "If in addition to finding by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substance or drugs, the Office of Administrative Hearings also finds by a preponderance

of the evidence that the person did drive a motor vehicle while having an alcohol concentration in the person's blood of fifteen hundredths of one percent or more, by weight. . ." W. Va. Code § 17C-5A-2 (k)(1) (2015). "To warrant administrative revocation of a driver's license, the facts must establish, by a preponderance of evidence, that the person had been driving under the influence." *Dale v. Ciccone*, 233 W. Va. 652, 662, 760 S.E.2d 466, 476 (2014). "Also worth noting is the underlying preponderance of the evidence standard pertaining to administrative revocation proceedings." *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012). *See also, Albrecht v. Department of Motor Vehicles,* 173 W. Va. 268, 314 S.E.2d 859 (1984); *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam).

The OAH admitted the documentary evidence of the blood test results showing that the Respondent had a blood alcohol content of .198% pursuant to *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008), noting that *Lowe* held that diagnostic blood test evidence is admissible and to be accorded appropriate weight. A.R. 271. The burden then shifted to the driver to present evidence of its unreliability. Since there was no challenge, the evidence should have been given its full face value and weight as relevant evidence.

However, the OAH declined to give the blood test results weight, citing *State v. Coleman*, 208 W. Va. 560, 542 S.E.2d 74 (2000)(per curiam). The OAH held, "Notwithstanding the foregoing, since the evidence does not show that hospital personnel withdrew the Petitioner's blood specimen and conducted the diagnostic blood alcohol analysis in accordance with the testing protocols set forth in Title 64, *West Virginia Code of State Rules.* Series 10 § 8 (2005) the test results cannot be accorded *prima facie* weight." A. R. 271. In *Coleman*, the assignment of error pertained to a jury instruction that the blood test result was *prima facie* proof of intoxication, when in fact the blood test was

performed at the hospital for diagnostic purposes. In *Coleman*, this Court noted that in order for blood test results to be "*prima facie*" evidence, the requirements of W. Va. Code §17C-5-8 must be met. However, the *Coleman* Court determined that the circuit judge had properly admitted the diagnostic blood test results under *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 454 S.E.2d 77 (1995): "In the instant case, the trial judge correctly admitted the hospital blood test results evidence, not as necessarily having prima facie weight, but simply as blood alcohol level evidence, under *Bedell*." 208 W. Va. 563, 542 S.E.2d 77 (2000). Having made the distinction between law enforcement directed tests and medical, diagnostic tests, the *Coleman* Court concluded, "We must therefore agree with the appellant's contention that the judge's instruction to the jury on the prima facie weight of the blood test results evidence did not properly belong in the trial court's charge-because the blood test results in question did not meet the statutory criteria for being given such weight." 208 W. Va. 563, 542 S.E.2d 77 (2000).

The OAH improperly applied *Coleman* and reverted from applying the standard for medical providers (preponderance of the evidence) to the standard for law-enforcement directed tests (W. Va. Code §§17C-5-4, -6 and -8 (which contains the "*prima facie*" standard) and W. Va. Code R.§ 64-10-8.2). The diagnostic blood test results in this case were not offered to show *prima facie* proof of intoxication but rather to show that the Respondent's blood alcohol content exceeded .15%.

The facts in the present case are substantially similar to those in *Bedell*, in which this Court found that W. Va. Code §17C-5-4 is not applicable to medical, diagnostic blood tests. The circuit court is in error in finding that *Bedell* is inapplicable to the present case. A.R. 6. The *Bedell* Court found, "The Petitioner's first blood test was ordered by medical personnel for diagnostic purposes. He had not yet been charged with a crime, and the deputy had not even arrived at the hospital to

investigate the accident. Thus, West Virginia Code § 17C-5-4, which provides guidelines for the manner in which law enforcement officials shall obtain blood alcohol tests, has *no application* to the facts in this case and does not serve as a prohibition to admissibility. West Virginia Code § 17C-5-4 does not govern the admissibility of the results of a diagnostic blood alcohol test conducted prior to the arrest of a defendant and at the direction of a defendant's treating physician or other medical personnel." 193 W. Va. 34–35, 454 S.E.2d 79–80 (emphasis added).

Therefore, the provisions of W. Va. Code §§17C-5-4, -6 and -8 (which contains the "*prima facie*" standard) and W. Va. Code R.§ 64-10-8.2 are inapplicable to this case, as the sample and analysis were made for diagnostic purposes. W. Va. Code R. § 64-10-8.2 has effect only when the test is made pursuant to post-arrest, officer-directed tests authorized in Chapter 17C: "This legislative rule establishes the methods and standards relating to implied consent for chemical test for intoxication pursuant to appropriate articles of Chapter 17C of the West Virginia Code." W. Va. Code R. § 64-10-1.1. 5. As *Bedell* points out, the defendant was not even under arrest when the diagnostic blood test was made. Therefore, the provisions of W. Va. Code §§17C-5-4, which provide that the test be "administered at the direction of the arresting law-enforcement officer" and "incidental to a lawful arrest" do not apply to medical, diagnostic tests.

In *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam), a case with substantial factual similarities to the present case, this Court affirmed that diagnostic blood tests are entitled to admission and weight in the absence of a substantive challenge. "Those results showed that the appellee's blood was drawn at 9:54 p.m., while the crash occurred approximately one hour earlier, at 8:48 p.m. Deputy Fleming attached the results of the blood test to the Statement of Arresting Officer, and submitted it to the DMV." 223 W. Va. 180, 672 S.E.2d 316. "Given the specific facts

of this case, we believe that the hospital record was a part of the DMV's records and therefore was properly admitted in the record at the outset of the hearing." 223 W. Va. 180, 672 S.E.2d 316 and "there was no evidence offered by the appellee to undermine the authenticity of the blood test results once they were admitted during the administrative hearing. To the extent that the appellee failed to rebut the accuracy of the blood test results in any way, the DMV properly gave them weight." *Id.* at 223 W. Va. 181, 672 S.E.2d 317. "Without any challenge to their accuracy, the DMV properly considered the test results..." *Id.*

Frazier v. Corley, No. 18-1033, 2020 WL 1493971 (W. Va. Mar. 26, 2020)(memorandum decision) had not been decided when the OAH *Final Order* was issued in this matter in 2019, therefore neither the OAH nor the circuit court relied on it[2]. However, the *Corley* Court improperly conflated the standards for medical provider versus law enforcement directed tests. *Corley,* which involved a medical, diagnostic test, relied on the implied consent and officer-directed secondary test provisions of the Code, and the corresponding legislative rule, to analyze the weight to be given to diagnostic blood tests: "West Virginia Code § 17C-5-4(h) plainly states that '[o]nly the person actually administering or conducting a test conducted pursuant to this article is competent to testify as to the results and veracity of the test.' Because the person who actually administered the test did not author the affidavit and was unavailable to testify, the OAH was justified in discounting the DMV's submitted affidavit stating that the test was performed correctly." *Corley* at *4. *Corley* failed to distinguish between the *prima facie* standard and the preponderance of the evidence standard.

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[2]It is worth noting that "[T]his Court does not create new and binding principles of law in Memorandum Decisions." *State v. Benny W.*, 242 W. Va. 618, 625, 837 S.E.2d 679, 686 (2019). Therefore, *Bedell* is controlling.

Despite the factual similarities between the cases, *Corley* expressly declined to rely on *Allen v. Bedell, supra:* "*Bedell* is not relevant to Respondent's challenge that the blood diagnostic was not properly administered under the applicable legislative rule, and does not control our decision in this case." *Corley* at *5. *Corley* was in error in relying solely on W. Va. Code R. § 64-10-8.2 to decide a case in which the blood test analysis was performed by medical personnel in the course of diagnosis and treatment. "In the absence of evidence that the blood diagnostic was performed in compliance with the Code of State Rules....we affirm the circuit court's order upholding the denial of an aggravated DUI enhancement." *Corley* at *5.

The *Corley* Court stopped short of fully and fairly summarizing the *Bedell* Court's analysis. *Bedell* held that under the facts of that case, the provisions of the West Virginia Code pertaining to implied consent and officer-directed tests were not applicable to the case at hand, where the driver was not yet under arrest and the blood test was made and analyzed for medical diagnostic purposes. *Bedell* held, "Section 17C-5-4 simply authorizes a law enforcement officer to obtain a blood test incident to a lawful arrest where the officer has reasonable grounds to believe that the individual committed an offense and creates an administrative mechanism through which an individual's license may be revoked. The inclusion of such authorization within our statutory scheme certainly does not intimate a legislative intent to disallow in the criminal context evidence of alcohol content obtained by medical personnel in the course of treatment." 193 W. Va. 34, 454 S.E.2d 79. *Bedell* thereby distinguished the different analyses of post-arrest, officer-directed tests and medical diagnostic tests. "The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C-5-4..." 193 W. Va. 36, 454 S.E.2d

81. *Corley* improperly distinguished *Bedell* by stating that the driver challenged the legitimacy of the blood test results because there was no evidence that they were performed in conformity with W. Va. Code R. §64-10-8.2, noting that "[t]hat matter was not before this Court in *Bedell*." 2020 WL 1493971, at *5. *Corley* ignored the different standards set forth in *Bedell* for weighing post-arrest, law enforcement directed tests and diagnostic, medical tests.

In this case, the evidence was properly admitted, was unchallenged and should have been weighed along with all of the other evidence under the preponderance of the evidence standard. There was sufficient evidence adduced for the OAH to conclude that it was more probable than not that the Respondent committed the offense of aggravated DUI. It is not necessary that the evidence be *prima facie* pursuant to W. Va. Code §17C-5-8; it is relevant, uncontested evidence that the Respondent drove while having a blood alcohol content in excess of .15%. Yet the OAH admitted the evidence and, in the absence of any challenge, applied an incorrect standard and failed to consider or give weight to the evidence contrary to *Bedell*, *supra* and *Lowe*, *supra*. The OAH abused its discretion and entered an order which was arbitrary and capricious and clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The circuit court erred in affirming the OAH's order.

Affirmance of the circuit court's Final Order would effectively exclude all blood test evidence made in the course of medical treatment. The intent of the legislature is to leave open the possibility that evidence other than that obtained by the law enforcement officer can be presented in a DUI. "The inclusion of such authorization within our statutory scheme certainly does not intimate a legislative intent to disallow in the criminal context evidence of alcohol content obtained by medical personnel in the course of treatment." *Allen v. Bedell*, 193 W. Va. 34, 454 S.E.2d 79. Requiring that medical

professionals, who are not charged with investigating a crime, conform to the standards in the Code of State Rules would effectively cause exclusion of all medical evidence of blood alcohol content because it would not be given any weight. Only tests obtained at the direction of the law enforcement officer and subject to the Code of State Rules standards would be considered. This would then require that a law enforcement officer responding to an crash scene direct the blood draw at the hospital instead of investigating the crash because blood evidence dissipates rapidly. Medical, diagnostic blood tests are admissible pursuant to W. Va. Code § 29A-5-2(b), subject to challenge, and should be weighed as relevant evidence.

CONCLUSION

The Final Order should be reversed.

Respectfully submitted,

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NO. 21-0438

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

Petitioner,

v.

RAYMOND BURCKER,

Respondent.

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 U. S. Mail, Postage prepaid, this 10th day of September, 2021, addressed as follows:

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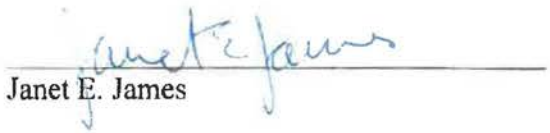

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