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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0568

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

FILE COPY

Petitioner,

v.

CHERYL L. YODER,

Respondent.

Honorable R. Steven Redding
Circuit Court of Berkeley County
Civil Action No. 19-P-353

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. THE CIRCUIT COURT ERRED IN TAXING THE DIVISION OF MOTOR VEHICLES WITH COSTS.

The Respondent concedes that the circuit court erred in assessing costs against the Division of Motor Vehicles. Resp. Brf. at 20-21.

2. THE RESPONDENT HAS FAILED TO ADDRESS THE ISSUE RAISED BY THE PETITIONER AND RELIED ON EVIDENCE DEHORS THIS RECORD.

It is important to note that the circuit court has entered two orders made on the same set of operative facts and issues. The June 20, 2021 Final Order on Remand is on appeal here; the January 26, 2022 Final Order is on appeal in *Frazier v. Yoder*, No. 22-0112. In the June 20, 2021 Final Order, the circuit court explicitly made “no ruling on the issue of whether the determination of the Hearing Examiner that the Petitioner failed to prove that she requested a blood draw of the arresting officer should be revisited.” A.R.¹ 15. Yet, to go *dehors* the record, the circuit court’s January 26, 2022 Final Order was decided *solely* on the basis of the purported blood test request. The January 26, 2022 Final Order held that the officer’s failure to provide the Respondent with a blood test constituted a violation of her due process rights, and “*on this ground alone*, the Order of the West Virginia DMV dated July 29, 2017, revoking the Petitioner’s personal and commercial driver’s licenses for driving a motor vehicle in this State while under the influence of controlled substances or drugs must be overturned.” (Emphasis added).

The present matter is an appeal from the June 20, 2021 *Final Order upon Remand*, in which the circuit court found that the DMV’s evidence was insufficient to uphold the order of revocation and that the Respondent rebutted the DMV’s evidence. A.R. 3,19. That order also remanded the

¹Reference is to the Appendix Record.

matter to the Office of Administrative Hearings for further evidence. In her brief, the Respondent has argued based on evidence adduced at the remand hearing. That evidence is not before the Court in this matter, but will be in *Frazier v. Yoder*, No. 22-0112 in which a Notice of Appeal was filed on February 11, 2022.

The remainder of the Respondent's argument pertains to the purported request for a blood test. This issue is fully addressed in the *Petitioner's Brief*. Moreover, as set forth above, the purported blood test request is explicitly *not the basis* for appeal of the June 20, 2021 *Final Order upon Remand*. The Respondent is arguing outside the record of this case.

CONCLUSION

The *Final Order upon Remand* should be reversed.

Respectfully submitted,

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

By counsel,

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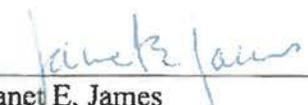
CHERYL L. YODER,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner's Reply Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 4th day of March, 2022, addressed as follows:

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