**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Docket No. 21-0686

**EVERETT 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-122)

**AARON POWERS,**

Respondent.

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# BRIEF OF RESPONDENT AARON POWERS

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## I. ASSIGNMENTS OF ERROR

The Petitioner, Everett Frazier,[1] Commissioner, West Virginia Division of Motor Vehicles, advances one assignment of error. 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

### *Procedural History*

The Petitioner correctly and accurately sets for the factual and procedural history of the case and the Respondent adopts the same. Additionally, and of some relevance to the decision to be had, the arresting officer issued a traffic citation for DUI to the Respondent while he was receiving treatment at the hospital on August 6, 2017, but did not secure his medical records via search warrant until August 10, 2017. A.R. 42 & 43. Respondent also notes that an objection was made at the administrative hearing before the Office of Administrative Hearings (OAH) to the admission of the Respondent's medical records obtained by search warrant from Berkeley Medical Center for failure to prove that the blood draw evidence was collected in accordance with Public Law §64-10-8. A.R. 326-328.

In the Final Order of the OAH of September 10, 2019, the Hearing Examiner, relying in part upon *State v. Coleman*, 208 W.Va. 560, 542 S.E.2d 74 (2000)(per curiam), noted the objection of the Respondent (Petitioner before the OAH) and found that the DMV failed to establish that the blood draw and the chemical analysis of the blood specimen were performed in accordance with state-approved standards and thus did not afford the "result" of the blood analysis (i.e., BAC being

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[1] Adam Holley was the Acting Commissioner of the West Virginia Division of Motor Vehicles at the time of the institution of the action.

at or over .15%) any weight in deciding the matter. The Hearing Examiner, nevertheless, did consider the relevant evidence that the Petitioner did consume alcoholic beverages and found he was driving a motor vehicle while under the influence of alcohol but that sufficient evidence was not submitted to establish his blood alcohol concentration was one hundred fifteen thousandths of one percent (.15%), by weight, or higher. A.R. 273.

On appeal to the Circuit Court of Kanawah County, the Court ruled pursuant to *Frazier v. Corley*, No. 18-1033, 2020 WL 1493971 (W.Va. Mar. 26, 2020), *supra*, that the blood draw in the case, collected for medical diagnostic purposes, was unsupported by evidence that it was administered or analyzed in accordance with the applicable State Rules. The Court then concluded that it was not error for the OAH to discount the accuracy of the blood diagnostic results and assign no weight for the propose of imposing the aggravated enhancement. (A.R. 4).

The Petitioner thereafter filed the instant appeal to this Honorable Court.

## III. SUMMARY OF ARGUMENT

The Petitioner argues that the Circuit Court committed error 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 Petitioner relies upon *State ex rel Allen v. Bedell*, 193 W.Va. 32, 454 S.E.2d 77 (1977) and *State v. Coleman, supra*, as authority that the medical diagnostic blood draw in this case was admissible evidence and should have been given sufficient weight by the Hearing Examiner to establish the aggravating enhancement, i.e., blood alcohol content at or greater than .15%. This very issue, upon almost identical facts, was before the Court in *Frazier v. Corley, supra*, wherein this Court found that *Bedell* was inapplicable (as it dealt with challenges under the implied consent statute) and ruled that in the absence of

evidence that a diagnostic blood draw was performed in compliance with the Code of State Rules, the OAH was justified in discounting the accuracy of the blood diagnostic results for the purpose of applying the aggravating enhancement. Accordingly, the decision of the Circuit Court of Kanawha County should be affirmed.

## 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).

**B. The Circuit Court Did Not Err in Affirming the Decision of the OAH as the Same Was Not Clearly Wrong as No Evidence Was Presented by the Petitioner as to the Respondent's BAC.**

Clearly the Petitioner had the burden of proving by a preponderance of the evidence the Respondent's BAC in order to obtain the enhanced suspension time of his driver's license. The record is simply devoid of any admissible evidence of the Respondent's blood alcohol content (BAC). The issue is not whether the OAH or Circuit Court erroneously applied a *prima facie* standard but rather whether or not the medical diagnostic evidence was even admissible in the first instance. Reliance upon *Bedell, supra*, is misplaced as the Court stated in *Corley* "*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 pg. 7).

Further, Petitioner's reliance upon *Coleman* is also inapplicable as *Coleman's* diagnostic blood draw showed "an elevated blood alcohol level" in a DUI with death case wherein the actual BAC was not in issue, i.e., it didn't matter whether the BAC was at or above .15% or below, just that the driver was under the influence. In the case *sub judice*, the issue is was the Respondent's BAC proven to be at .15% or higher by admissible evidence procured under the applicable provisions of the West Virginia Code of State Rules. As noted in *Corley*, the "Respondent's challenge essentially questions the accuracy of the blood test results in the face of noncompliance with the Code of State Rules. Thus there was no evidence presented by the Petitioner that the blood collection process conformed to the requirements of Public Law §64-10-8. The Respondent adequately rebutted the

accuracy of the serum blood test results noting that there was no proof that the blood draw was taken in compliance with W.Va. Public Law §64-10-8 especially given the fact that alcohol products are routinely used by hospitals to obtain blood for diagnostic testing and here, there was no verification that a non-alcoholic product was used to prep the Respondent prior to the blood draw.

## VI. CONCLUSION

WHEREFORE, the Respondent, Aaron Powers, argues that the Petitioner's lone assignment of error is meritless and that this Court should affirm the Final Order Denying Petition for Judicial Review entered by the Circuit Court of Kanawha County July 29, 2021, and for such other relief as the Court may deem just, necessary and proper.

Respectfully submitted,

Aaron Powers
By Counsel

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## CERTIFICATE OF SERVICE

I, B. Craig Manford, hereby certify that on this 14th day of January, 2022, a true and accurate copy of the foregoing **Brief of Respondent Aaron Powers** was delivered to Janet E. James, Esq., Assistant Attorney General, DMV - Office of the Attorney General, P.O. Box 17200, Charleston, West Virginia, 25317, and to Janet.E.James@wv.gov, by electronic mail and First Class United States Mail, postage prepaid.

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