IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v. No. 21-0568

CHERYL L. YODER,

Respondent,

and

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

Petitioner,

v. No. 22-0112

CHERYL L. YODER,

Respondent.

(Appeals from the Berkeley County Circuit Court,
Civil Action Nos. 19-P-353 and 21-AA-5)

PETITIONER'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304)558-2522
Janet.E.James@wv.gov

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ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN FINDING THAT THE RESPONDENT REQUESTED A BLOOD TEST AND IN REVERSING THE OAH'S FINAL ORDER.

STATEMENT OF THE CASE

On July 3, 2017, PFC C.R. Williamson of the Martinsburg City Police ("Investigating Officer") observed a vehicle weaving and traveling below the speed limit on Queen Street in Martinsburg, Berkeley County, West Virginia. A.R. 147, 154[1]. The Investigating Officer followed the vehicle as it made a slow right turn onto King Street and suddenly pulled off the road into a parking lot on West King Street. A.R. 154. The Investigating Officer continued past the vehicle and observed that it pulled in behind him. The Investigating Officer went through the light at the intersection of King and Maple Streets and pulled into a parking spot. The vehicle sat through a red light, and when the light turned green, the vehicle came within inches of the Investigating Officer's front bumper and attempted to park in front of the Investigating Officer's car. During this attempt to park, the vehicle ended up crossways in the road. The vehicle then drove away. A.R. 154. The Investigating Officer initiated a stop of the vehicle in the 300 block of West King Street at 12:38 a.m. A.R. 147, 154. The driver, later identified as the Respondent herein, stumbled out of her car and started walking back to the Investigating Officer's car. The Investigating Officer ordered the Respondent back to her car. She complied. A.R. 154.

The Investigating Officer observed that the Respondent had slurred speech and red eyes. She was disoriented and had a dry mouth and a raspy voice. A.R. 148, 154.

The Investigating Officer then explained the horizontal gaze nystagmus test to the Respondent. The medical assessment prior to the test showed equal pupils, equal tracking, and no resting nystagmus, which rendered the Respondent a viable candidate for the test. A.R. 149. During the test, the Respondent had lack of smooth pursuit in both eyes, distinct and sustained nystagmus

[1] Reference is to the Appendix records filed with the Court on October 20, 2021 and May 26, 2022.

at maximum deviation in both eyes and onset of nystagmus prior to 45 degrees in both eyes. A.R. 149.

The Investigating Officer then explained and demonstrated the walk and turn test to the Respondent. The Respondent was unable to keep her balance and started the test too soon. A.R. 149. The Respondent also stopped while walking, stepped off the line, made an improper turn, missed heel-to-toe, raised her arms to balance and took an incorrect number of steps. A.R. 149.

The Investigating Officer then explained and demonstrated the one leg stand test. The Respondent used her arms to balance and put her foot down. The Investigating Officer stopped the test for the Respondent's safety. A.R. 149.

The Investigating Officer then lawfully arrested the Respondent at 12:53 a.m. for driving under the influence of alcohol, drugs or controlled substances ("DUI"). A.R. 147, 154. The Investigating Officer suspected that the Respondent was impaired by prescription drugs. A.R. 154.

The Investigating Officer administered an Intoximeter test. The result was a zero, showing that she had no alcohol in her blood. A.R. 150, 154.

The Division of Motor Vehicles ("DMV") sent the Respondent an Order of Revocation Notice (A.R. 44) and an Order of Disqualification of her commercial driver's license on July 28, 2017. A.R. 58.

The Respondent requested a hearing from the Office of Administrative Hearings ("OAH") on the revocation of her license for DUI. A.R. 28.

The OAH conducted an evidentiary hearing on October 4, 2018. A.R. 217 *et seq*. At the hearing, the OAH admitted the DMV's agency documents into evidence. A.R. 222. The Investigating Officer and the processing officer, Patrolman Jarvis of the Martinsburg Police Department, were subpoenaed by the DMV but did not appear at the hearing. The DMV moved for a continuance of the hearing, and the OAH denied the continuance request. A.R. 223.

At the hearing, the Respondent testified that on the night of the arrest she was not taking any narcotic drugs, and that the only medications she takes are an Anoro inhaler and a nasal spray. A.R.

225. The Respondent offered three exhibits into evidence. A.R. 144-46. Exhibit 1 showed that the Respondent obtained a Non-DOT Rapid Drug Screen on July 3, 2017 at 11:19 a.m, more than 10 hours after her arrest. The urine test was negative for an 11-panel test. A.R. 142. The other exhibits showed drug screen results from July 14, 2017 and August 23, 2017. A.R. 145-46. The Respondent also testified that she asked the Investigating Officer for a drug test. A.R. 226, 231.

The OAH entered a *Final Order* on September 6, 2019. A.R. 156 *et seq.* The *Final Order* upheld the revocation and disqualification for DUI.

The Respondent appealed the matter to the circuit court of Berkeley County in Civil Action No. 19-P-353. A.R. 286-87. The circuit court reversed the OAH's *Final Order* on March 25, 2020 with entry of an *Order*. The DMV appealed the *Order* to this Court. This Court entered a Memorandum Decision in *Frazier v. Yoder*, No. 20-0336, 2021 WL 653244 (W. Va. Feb. 19, 2021). This Court held, "Since we have determined that the circuit court's ruling ran afoul of our recent holding in *Fouch* [*Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020)], this case requires remand for consideration in light of the *Fouch* decision." *Frazier v. Yoder* at 4.

On remand, the circuit court entered a *Final Order upon Remand* on June 20, 2021 and once again reversed the OAH's September 6, 2019 *Final Order*; remanded the matter to the OAH for a hearing at which the Respondent could present evidence as to the meaning and import of the Valley Health Urgent Care Non-DOT 11 panel negative urine screen which she obtained on July 3, 2017; and ordered that the DMV "shall be taxed with the costs of these proceedings." A.R. 1-20. The Petitioner appealed the *Final Order upon Remand* to this Court in No. 21-0568, which is consolidated with the present appeal.

The OAH conducted a hearing pursuant to the circuit court's *Final Order upon Remand* on June 28, 2021, during which the OAH took additional evidence. A.R. 366-424. The Respondent presented two witnesses, Krissi Malloy, who was employed by Valley Health Urgent Care and administered the 11 panel urine screen to the Respondent, and Kelly Peters, a Certified Forensic Nurse Examiner, who testified as to what drugs a typical 11 panel drug screen tests for. A.R. 366-

423. The OAH affirmed the revocation of the Respondent's license by Final Order entered June 29, 2021. A.R. 353-357.

The Respondent appealed the OAH's Final Order to the circuit court of Berkeley County in Civil Action No. 21-AA-5. Following briefing, the circuit court entered a *Final Order* on January 26, 2022, reversing the OAH's Final Order. A.R. 288-318. The sole basis for the court's reversal was that her due process rights were violated because she requested a blood test and did not receive one. A.R. 315. The present appeal is taken on this *Final Order*.

SUMMARY OF ARGUMENT

The circuit court found that the Respondent requested a blood test from the Investigating Officer on the night of her arrest and that "the arresting officer's failure to provide a blood test to the Petitioner upon her request and demand for the same constitutes a violation of the Petitioner's right to due process, to-wit the right to preserve exculpatory evidence" and held, "on this ground alone, the Order of the West Virginia DMV dated July 29, 2017, revoking the Petitioner's driver's 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." A.R. 315. The circuit court's grounds for this determination are that the Respondent testified that she asked for a test, her testimony was not rebutted by the documentary evidence, and the Respondent obtained a urine screen several hours after her arrest. The circuit court gave passing reference to the cases upholding the standards that it owes deference to the findings and credibility determinations of the factfinder and that it cannot substitute its judgment for that of the factfinder, then proceeded to violate both of those standards.

The circuit court substituted its judgment for that of the factfinders below, concluding that the OAH Hearing Examiners' conclusions were arbitrary and their orders clearly wrong. A.R. 19, 313. The OAH found that the Respondent's evidence of the drug test that she obtained after her release was minimally relevant. Following a remand hearing before the OAH on this issue, the OAH held, "Simply because the Acting Chief Hearing Examiner found the Petitioner's two witnesses to

be credible this does not mean that the Petitioner was not under the influence....Ms. Peters testified that there are many drugs that the 11-panel drug screen does not test for." A.R. 355.

Without relying on the testimonies of the witnesses at the remand hearing, the circuit court found that the Respondent's testimony that she requested a blood test was credible (the OAH Hearing Examiner who heard her testimony found that it was not); that the DMV's documentary evidence did not rebut this testimony (it did, and the court supported its finding with speculation that it would have been logical for the Investigating Officer to take the Respondent for a blood test. A.R. 311); and that because she obtained a drug test more than 10 hours after her release, it was clear that she requested a test from the Investigating Officer. A.R. 312. Through speculation, failure to give deference to the finders of fact and substitution of its own judgment, the circuit court reversed the OAH's *Final Order*.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rule 19 of the Rules of Appellate Procedure is appropriate on the bases that this case involves assignments of error in the application of settled law, claiming an unsustainable exercise of discretion where the law governing that discretion is settled, and claiming insufficient evidence or a result against the weight of the evidence.

ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code § 29A-6-1 (1964). The Court reviews questions of law presented *de novo*; and findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Syl. Pt. 1, *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). "This Court, in conjunction with appeals under the Administrative Procedures Act, has indicated that a reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision." *Donahue v. Cline*, 190 W. Va. 98,

102, 437 S.E.2d 262, 266 (1993) (per curiam).

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE RESPONDENT REQUESTED A BLOOD TEST AND IN REVERSING THE OAH'S FINAL ORDER.

In this consolidated case, the circuit court has entered two orders made on the same set of operative facts and issues. In the June 20, 2021 *Final Order Upon Remand*, 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. 15. Yet the circuit court's January 26, 2022 *Final Order* was decided *solely* on the basis of the purported blood test request. That 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) A.R. 315. The *Final Order* was to be premised on the evidence taken at the OAH remand hearing, which the court admits "was remanded to the OAH for determination of the sole issue of what substances the Valley Health Urgent Care 11 Panel Non-DOT Urine Drug Screen tested for and what a negative screen would thus mean in the context of the case and in light of all other evidence." A.R. 307-08. The court did not meaningfully address the testimony taken at the OAH remand hearing, which the court had ordered.

In the present *Final Order* (A.R. 288-318), the circuit court reiterated much of the reasoning it set forth in the *Final Order on Remand* (A.R. 1-20). First, the court implicitly found that the Respondent's testimony that she requested a blood test was credible. The court notes it as fact. A.R. 14, 310. Second,

the court found that the DMV agency documents failed to rebut the Respondent's testimony. The circuit court noted that "the Hearing Examiner's refusal or neglect in considering such probative and substantial evidence [*i.e.*, the Respondent's testimony] was arbitrary, capricious, and an abuse of discretion." The circuit court also stated, "It is clear to this Court that the Hearing Examiner made his credibility determinations without addressing or considering the favorable rebuttal evidence presented by the [Respondent] as has been outlined and analyzed by the Court herein." A. R. 313.

To the contrary, the OAH found that the Respondent's testimony was not credible and that the DMV agency documents were credible. In the OAH's September 6, 2019 *Final Order*, the Hearing Examiner who heard the testimony of the Respondent found, "No clear evidence was presented that she requested the assistance of the Investigating Officer in obtaining a blood test." A.R. 159. The OAH Hearing Examiner found that the documents created by the Investigating Officer "are more credible and in line with common sense that [*sic*] the [Respondent's] testimony" (A.R. 159) and "[The Investigating Officer's] narrative detailing the [Respondent's] behavior and appearance is consistent with one who was impaired by a controlled substance or drugs. The [Respondent's] testimony as to her driving pattern and the reasons why she drove this way, does not make sense, especially in light of the Investigating Officer's account that she almost hit his patrol car..." A.R. 159-60. The OAH clearly found that the Respondent's testimony was not credible, and the DMV's documentary evidence was reliable. The circuit court improperly re-weighed the evidence, rather than giving deference to the factfinder.

In support of its conclusion that the DMV agency documents failed to rebut the Respondent's testimony, the court first speculated that "Officer Williamson, suspecting the [Respondent] was impaired by drugs, did not request the [Respondent] to submit to a blood draw, which would have been the next logical step in his investigation after his stated belief, in the complaint...that the [Respondent] was under

the influence of controlled substances or drugs." A.R. 311. Nothing requires an officer to ask a driver to submit to a blood test. Indeed, "'[t]here are no provisions in either W. Va.Code, 17C–5–1 (1981) *et seq.*, or W. Va.Code, 17C–5A–1 (1981) *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for purposes of making an administrative revocation of his driver's license.' Syllabus Point 1, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984)." Syl. Pt. 6, *Dale v. Oakland*, 234 W. Va. 106, 763 S.E.2d 434 (2014)(per curiam).

Further, the court challenged the Investigating Officer's filling out of the "Blood Test" portion of the DUI Information Sheet. A.R. 311. The DUI Information Sheet reflects a box checked "no" in answer to whether there was a blood test. A.R. 152. The circuit court, specifically reiterating the questions, noted that the Investigating Officer failed to check any of the other boxes in the "Blood Test" box on the DUI Information Sheet. A.R. 311. However, the other questions are irrelevant after checking the "no" box. Yet the court seemingly gives a negative inference to this evidence, finding that the Investigating Officer did not offer a blood test "despite his suspicion that she was impaired by drugs." A.R. 312. The court draws conclusions that are not supported by the record and which fail to give deference to the factfinders.

Third, the court supported its finding that the Respondent requested a test from the Investigating Officer with the fact that the Respondent obtained a urine drug screen the morning after her arrest. "The most significant reason the Court believes the Petitioner did request a blood draw from officer Williamson is the fact that within ten (10) hours and twenty-six (26) minutes after her arrest, release from jail and the refusal of Berkeley Medical Center to draw her blood without a physician's order, the Petitioner obtained an 11-panel urine drug screen from Valley Health Urgent Care..." A.R. 15, 312. "To this Court, the negative urine screen bolsters the veracity of the [Respondent's] testimony that she had requested a blood draw from Officer Williams at the time of her arrest." *Id.* This non-sequitur is not supported in the record,

and it completely violates the deferential standard which the court should have applied.

Additionally, the court failed to address the fact that because the test was taken more than four hours after the Respondent's arrest, it was of no evidentiary value in this proceeding. "[E]vidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood or breath, is admissible, if the sample or specimen was taken within the time period provided in subsection (g)." W. Va. Code §17C-5-8(a) (2013). Subsection (g) of that statute provides, "For the purposes of the admissibility of a chemical test under subsection (a):...(2) For a sample or specimen to determine the controlled substance or drug content of a person's blood, must be taken within four hours of the person's arrest." In *Sims v. Miller*, 227 W. Va. 395, 709 S.E.2d 750 (2011), this Court affirmed the provisions of W. Va. Code § 17C-5-8. The nexus drawn by the court between the purported blood test request and the Respondent's obtaining a urine screen is speculative, without support in the record and without regard to the Hearing Examiner's finding that the Respondent's testimony was not credible and his conclusion that there is not sufficient evidence to show that the Respondent requested a blood test.

The court acknowledged that it may not re-weigh the evidence, reassess the credibility of witnesses or substitute its judgment for that of the fact finder. A.R. 312. *See*, *Reed v. Winesburg*, 241 W. Va. 325, 333, 825 S.E.2d 85, 93 (2019): "In the present case, the circuit court failed to give deference to the OAH's factual finding that, based on the totality of the evidence, Mr. Winesburg exhibited numerous signs of impairment." Yet the court simply concluded that the Hearing Examiner's conclusion that the Respondent did not request a blood test was clearly wrong and that his "refusal or neglect" in considering such probative and substantial evidence was arbitrary and capricious and an abuse of discretion. A.R. 313. Inasmuch as the Hearing Examiner neither refused nor neglected to consider the Respondent's testimony,

this is a clear substitution of judgment.

As to the credibility of the Respondent, the court found, "It is clear to this Court that the Hearing Examiner made his credibility determinations without addressing or considering the favorable rebuttal evidence presented by the [Respondent] ...not just her testimony but all of the actions she took on July 3, 2017 immediately after being released from jail." A.R. 313. As set forth above, all of the evidence was weighed, thus, this outright dismissal of the Hearing Examiner's credibility determinations is completely unfounded. "We cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact. We must defer to the ALJ's credibility determinations and inferences from the evidence, despite our perception of other, more reasonable conclusions from the evidence. ... Whether or not the ALJ came to the best conclusion, however, she was the right person to make the decision. An appellate court may not set aside the factfinder's resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents. ... The ALJ is entitled to credit the testimony of those it finds more likely to be correct. [*Martin v. Randolph Cty. Bd. of Educ.*] at 306, 465 S.E.2d at 408 (internal citations and quotations omitted)." *Frazier v. S.P.*, 242 W. Va. 657, 664, 838 S.E.2d 741, 748 (2020). The circuit court's findings are not supported by the record.

The circuit court excoriated the Hearing Examiner for speculating that the Respondent's decision to get a urine screen "could have been made after her interactions with the Investigating Officer when she had a chance to talk to others." A.R. 159, 315. However, the lower court itself indulged in speculation in discounting the Investigating Officer's documentary evidence. "Officer Williamson, suspecting the [Respondent] was impaired by drugs, did not request the [Respondent] to submit to a blood draw, which would have been the next logical step in his investigation..." A.R. 311.

The issue of the purported blood test request does not affect the outcome of this case. In *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021), this Court held, "we imprudently concluded that law enforcement's failure to follow West Virginia Code § 17C-5-9 when a driver demands a blood test is, per se, a violation of due process in the context of the administrative revocation of a driver's license, automatically requiring a rescission of the revocation order without consideration of the entire record." *Id.* at 245 W. Va. 302-03, 858 S.E.2d 927–28. This Court found, "For purposes of appellate review, it is imperative that the trier of fact make specific findings relative to these factors[[2]] in its decision." *Id.* at 245 W. Va. 305, 858 S.E.2d 930. No such findings were made in the present case because the factfinders concluded that the Respondent did not request a blood test.

The circuit court further found that the Acting Chief Hearing Examiner arbitrarily concluded that the 11-panel drug screen did not test for drugs under which the Respondent may have been under the influence (A.R. 315-16) and that because she "screened negative for 11 substances on the urine test in such close temporal proximity to her arrest, this is clear evidence to this Court that she was negative for a dozen of the most commonly abused impairing and addicting substances at the time of her arrest. To admit this powerful evidence and then basically ignore it, in this Court's view, was clear error." A.R. 316. In the September 6, 2019 OAH *Final Order*, the Hearing Examiner wrote, "no evidence was presented to explain the results to include what substances the tests were designed to discover and what substances the tests would not discover. The results indicate 'normal' but no information was presented as what that means." A.R. 159. Following a remand hearing before the OAH on this issue, the OAH noted that Kelly Peters testified that there are many drugs that the 11-panel drug screen does not test for. A.R. 355. The

[2] "[T]he trier of fact must consider (1) the degree of negligence or bad faith involved in the violation of the statute; (2) the importance of the blood test evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the proceeding to sustain the revocation." *Frazier v. Talbert*, 858 S.E.2d 929.

OAH held, "Simply because the Acting Chief Hearing Examiner found the [Respondent's] two witnesses to be credible this does not mean that the Respondent was not under the influence....Ms. Peters testified that there are many drugs that the 11-panel drug screen does not test for." A.R. 355. The Acting Chief Hearing Examiner concluded, "Considering that the evidence presented in the second hearing indicated that the 11-panel drug screen test does not test for all drugs, and considering the evidence presented at the first hearing that indicated that the [Respondent] displayed so many clues indicating impairment, the evidence indicates that, more likely than not, the [Respondent] was driving while under the influence of a controlled substance or drugs that the 11 panel drug screen does not test for." A.R. 356. The circuit court erred in substituting its judgment for both Hearing Examiners, who reasonably concluded that the urine screen evidence was not exculpatory. The court erred in concluding that testing negative for 11 commonly abused drugs was exculpatory and the Hearing Examiner erred in finding otherwise.

The circuit court further attempted to bolster its connection between the negative drug test and the Respondent's purported request for a blood test by noting that the 11-panel drug screen is used in abuse and neglect cases and as condition of bond and probation in criminal cases. A.R. 17-18, 316. This standard is not relevant to the case at hand, it circumvents the proper standard of review in these matters, it fails to give appropriate deference to the factfinder and it is evidence of the circuit court's pervasive substitution of judgment in the present case.

The circuit court erred in concluding that the factual findings of the OAH were clearly wrong, and reversed the findings of the trier of fact simply because the reviewing court would have decided the case differently. It erred in concluding that the Respondent requested a blood test, and in reversing the OAH's order on that basis. "[W]e agree with the DMV, and find that the circuit court abused its discretion by failing to examine the totality of the evidence, by failing to give deference to the findings of fact made by the OAH, and by substituting its own judgment in contravention of our established standards of review."

Frazier v. S.P. at 664, 838 S.E.2d at 748.

CONCLUSION

The *Final Order Upon Remand* entered June 20, 2021 and the *Final Order* entered January 26, 2022 should be reversed.

Respectfully submitted,

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

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Janet E. James #4904
Assistant Attorney General
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304) 558-2522
Janet.E.James@wv.gov

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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 depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 26th day of May, 2022, addressed as follows:

B. Craig Manford, Esq.
151 N. Queen St.
Martinsburg, WV 25401

Janet E. James