IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-2568 and No. 22-0112

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

Petitioner,

v.

CHERYL L. YODER,

Respondent.

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

EVERETT J. FRAZIER, Commissioner,
Division of Motor Vehicles,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

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Table of Contents

CASES **Page**

STATUTES **Page**

RULE **Page**

Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by and through his undersigned counsel, and pursuant to W. Va. R. App. Pro. 10(g) submits the *Reply Brief of the Division of Motor Vehicles.*

ARGUMENT

1. *Improper Substitution of Judgment*

In her response brief, the Respondent argues that the "evidence adduced on remand would negate any argument that the [Circuit] Court substituted its judgment for that of the Hearing Examiner's and vouch the record regarding the scope of the urinalysis at issue." (Resp. Br. at P. 24.) The Respondent further argues that "the results of the subject urine screen were valid for 48-72 hours, not just four hours with blood." *Id.* at P. 25. The Respondent also avers that the circuit court did not err in finding that the Office of Administrative Hearings ("OAH") Hearing Examiner acted arbitrarily and capriciously in concluding "by a preponderance of the evidence, that the Respondent must have been on some other controlled substance or drug not screened for in an 11 Panel Drug Screen." *Id.* The Respondent additionally contends that she "had to find her own drug screen because she was denied one by the arresting officer . . . [and the DUI Information Sheet - DMV 314] "did not rebut the Respondent's claim that she asked, at least twice, for a blood draw." *Id.* at PP. 25-26. The Respondent's arguments only work if the circuit court improperly substituted its judgment for that of the fact finder below regarding the OAH's findings of fact and credibility determinations.

In the first *Final Order* entered by the OAH on September 6, 2019, the hearing examiner found as fact that Petitioner had been operating a motor vehicle in this State. (A.R. at P. 156, FOF 1.) The hearing examiner also found as fact that there "is evidence of the use of alcohol, drugs, controlled substances or any combination of the aforementioned based upon the following: the [Respondent]'s driving pattern, her physical appearance and her performance on the standardized

field sobriety tests." *Id.* at P. 157, FOF 7. Additionally, the hearing examiner found as fact that the Respondent exhibited impairment:

> During the horizontal gaze nystagmus test, the [Respondent]'s eyes showed a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to forty-five (45) degrees. During the walk-and-turn test, the [Respondent] could not keep her balance and started too soon during the instruction phase. During the walking state, the [Respondent] stopped while walking, stepped off the line, made an improper turn, missed heel-to-toe, raised [her] arms to balance and took the incorrect number of steps. During the one-leg stand test, the [Respondent] used her arms for balance and put her foot down. The Investigating Officer stopped the one-leg stand test for the Petitioner's safety.

Id. at FOF 6.

The hearing examiner further found that, "While the Investigating Officer did not testify, his account of his interactions with the [Respondent] . . . are more credible and in line with common sense than the [Respondent]'s testimony. His narrative detailing the [Respondent]'s behavior and appearance is consistent with one who is 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 while trying to park in front of him – ending up crossways in the middle of the road. Furthermore, her decision to get out of her car and walk back to his patrol car is indicative if impaired judgment." *Id.* at PP. 159-160.

It is well-established that "[w]here there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); Syl. Pt.

4, *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021). *See also*, *Dale v. Oakland*, 234 W. Va. 106, 763 S.E.2d 434 (2014) (per curiam) (applying the *Albrecht* test to an administrative license revocation for DUI with a controlled substance.) A chemical test is not required to prove that a motorist was driving under the influence of alcohol, controlled substances, or drugs for the purpose of making an administrative revocation of the driver's license. *Dale v. Oakland*, *supra*; Syl. Pt. 3, *Frazier v. Talbert*, *supra*.

On remand, the OAH Hearing Examiner also concluded that the DMV presented sufficient evidence that the Respondent had been operating a motor vehicle in this State, was under the influence of drugs or controlled substances, and exhibited impairment clues. (A. R. at PP. 353-354.) In addition, the hearing examiner found that while the Respondent's witnesses were credible, their testimony did not demonstrate that she was not under the influence of controlled substances or drugs when she operated a motor vehicle on July 3, 2017. *Id.* at P. 355, FOF 18. The hearing examiner specifically noted that, "[s]imply 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 . . . The eleven (11) drugs that Ms. Peters testified that the 11 panel drug screen tests for does not indicate drugs or substances that are often abused such as Gabapentin, Inhalants, or synthetic marijuana." *Id.* at P. 355.

Both OAH Hearing Examiners made findings of fact and credibility determinations based upon the documentary and testimonial evidence presented, and the circuit court was precluded from substituting its judgment for that of the fact finder unless these findings were patently without basis in the record.

> Reviewing courts can only disregard a credibility determination, however, when it is "patently without basis in the record"; otherwise, the credibility determination is

"binding." *Pompeo*, 240 W. Va. at 260-61, 810 S.E.2d at 71-72 (citations omitted). And,

> if the [lower tribunal's] account of the evidence is plausible in light of the record viewed in its entirety, [a reviewing court] may not reverse it, even though [the reviewing court is] convinced that had [it] been sitting as the trier of fact, [it] would have weighed the evidence differently.

Brown v. Gobble, 196 W. Va. 559, 563, 474 S.E.2d 489, 493 (1996); see also *Frazier v. S.P.*, 242 W. Va. 657, 664, 838 S.E.2d 741, 748 (2020) (citation omitted) ("[A reviewing court] must defer to the ALJ's credibility determinations and inferences from the evidence, despite [the reviewing court's] perception of other, more reasonable conclusions from the evidence.").

Frazier v. Kelly, No. 20-0412, 2022 WL 122992, at *8 (W. Va. Jan. 12, 2022) (memorandum decision).

The OAH's account of the evidence and inferences made from that evidence were plausible, and twice the hearing examiners determined that sufficient evidence was presented to prove by a preponderance of the evidence that the Respondent drove a motor vehicle in this State while under in the influence of alcohol, drugs, a controlled substance, or any combination of the aforementioned. (A.R. at PP. 160, 356.) Twice, the OAH considered the negative results on the Respondent's urine test and determined that the evidence of intoxication and impairment outweighed the negative test result. The circuit court was not permitted to reverse the OAH simply because it would have given greater weight to the urine test and because the circuit court believed that the Respondent asked for a blood test even when the OAH made no such finding. Here, the Respondent's arguments can only advance if this Court sanctions the circuit court's improper substitution of its judgment for that of the fact finder.

2. *Frazier v. Talbert*

The Respondent argues that she "was denied due process of law to prove she was not impaired from any controlled substance at the time of her arrest. . ." and asserts that analysis of the facts of the case must be considered pursuant to this Court's opinion in syllabus 6 of *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021). (Resp. Br. at PP. 26-27.) The facts of this case do not require application of the *Talbert* test.

In syllabus point 6 of *Talbert, supra*, this Court held that,

> In a proceeding involving the revocation of a driver's license for driving under the influence of alcohol, controlled substances, or drugs ***where a driver demands a blood*** test pursuant to West Virginia Code § 17C-5-9 [2013], but the test is never given, a chemical analysis of the blood that is withdrawn is never completed, or the blood test results are lost, the 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. The trier of fact must consider these factors in determining what consequences should flow from the absence of the blood test evidence under the particular facts of the case. [Emphasis added.]

In the instant matter, the trier of fact made no specific finding that the Respondent requested a blood test be made available to her and that the Investigating Officer denied her request. The first hearing examiner opined, "[t]he [Respondent] alleges she asked the Investigating Officer's [*sic*] to take her to get a blood test and claims that he did not. No other evidence presented that clearly supports this claim. She did go to Valley Health and get a blood [*sic*] test that day, but his decision could have been made after her interactions with the Investigating Officer when she had a chance to talk to others. No clear evidence was presented that she requested the assistance of the Investigating Officer in obtaining a blood [*sic*] test. . ." (A.R. at P. 159.) Because there was no factual finding by the fact finder that the Respondent requested a blood test from the Investigating Officer, W. Va. Code § 17C-5-9 (2013) does not apply to this case. *See, Frazier v. Bragg*, 244 W.

Va. 40, 45, 851 S.E.2d 486, 491 (2020) ("To the extent the Commissioner argues that West Virginia Code § 17C-5-9 does not apply to the facts of this case because Mr. Bragg did not demand that a sample of his blood be taken, we agree.") Therefore, analysis under *Talbert, supra*, is not required.

CONCLUSION

For the reasons set forth in the *Petitioner's Brief* and for the foregoing reasons, the *Final Order* of the Circuit Court of Berkeley County must be reversed.

Respectfully submitted,

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

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CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General and counsel for Everett J. Frazier, certify that on the 16th day of August 2022, I served the foregoing *Reply Brief of the Division of Motor Vehicles* upon the following by depositing true and correct copies via U.S. Mail, first-class postage prepaid to:

B. Craig Manford, Esq.
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Martinsburg, WV 25402

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