IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0568 & 22-0112

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

Petitioner,

v.

Appeal From an Order of
the Circuit Court of Berkeley County
(Case No. 19-P-353 & 21-AA-5)

CHERYL L. YODER,

Respondent.

BRIEF OF RESPONDENT CHERYL L. YLDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules **Page**

I. ASSIGNMENTS OF ERROR

The Petitioner, Everett Frazier, Commissioner, West Virginia Division of Motor Vehicles, advances a single assignment of error. Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the assignments of error are not restated here but will be addressed below.

II. STATEMENT OF THE CASE

Procedural History

On July 28, 2017, the Commissioner of the West Virginia Division of Motor Vehicles issued an Order revoking the Respondent's (Yoder's) driver's license for driving a motor vehicle in this State while under the influence of alcohol, controlled substances, and/or drugs (A.R. Pg. 44) and also issued a companion Order of the DMV (A.R. Pg. 58) disqualifying the Respondent from operating a commercial motor vehicle for life.

The Respondent timely appealed the July 28, 2017, Revocation Order of the West Virginia DMV (A.R. Pg. 73) and an administrative hearing was subsequently had before Hearing Examiner Andrew Myers on October 4, 2018. On September 6, 2019, the Office of Administrative Hearings (hereinafter referred to as OAH) issued its first Order affirming the Revocation Order of the Commissioner of the West Virginia DMV, dated July 28, 2017. (A.R. Pg. 156).

The Respondent then, on October 5, 2019 appealed the September 6, 2019, Order of the OAH in Case No. CC-02-2019-P-353 to the Circuit Court of Berkeley County. (A.R. Pg. 174). On March 25, 2020, the Circuit Court (the Hon. Steven Redding) issued an Order overturning the September 6, 2019, Order of the OAH. The Petitioner (Commissioner) then appealed the matter to the West Virginia Supreme Court of Appeals and this Court, by Memorandum Decision issued on February 19, 2021, Docket No. 20-0336, reversed the Circuit Court's Order of March 25, 2020, and remanded

the case for reconsideration pursuant to the rulings in *Frazier vs. Fouch*, 244 W.Va. 347, 853 S. E.2d 587 (2020). This Court issued its Mandate in the case on March 23, 2021.

The Circuit Court of Berkeley County, in turn, issued its Final Order on Remand from the Supreme Court of Appeals on June 20, 2021, reversing the Final Order of the OAH of September 6, 2019, and remanding the matter to the Office of Administrative Hearings with directions to conduct an evidentiary hearing on a specific and limited topic, to-wit, "to permit the record to be developed as to what substances the Valley Health Urgent Care 11 Panel NON-DOT drug screen tested for, what a negative screen would thus mean in the context of this case in light of all the other evidence, and to provide the Respondent the opportunity to meet that evidence." (A.R. Pgs. 1-20 & 323 - 342).

The Petitioner thereafter filed an appeal to this Honorable Court which was docketed as Case No. 21-0568.

In the interim, a remand hearing was had on June 28, 2021, before William A. Freeman, Acting Chief Hearing Examiner for the OAH. Petitioner (Yoder) presented two witnesses at the administrative hearing. The first witness was Krissi C. Malloy (A.R. Pgs. 378 - 391) who was employed by Valley Health Urgent Care and who administered the 11 Panel NON-DOT Rapid Drug Screen test to the Petitioner. The second witness was Kelly J. Peters, a Certified Forensic Nurse Examiner, (A.R. Pgs. 396-414), who was qualified as an expert (A.R. 396 - 399) and testified as to what drugs a usual 11 panel drug screen tests for. Ms. Malloy authenticated the 11 Panel NON-DOT Rapid Drug Screen given to the Petitioner and testified to the procedures employed to safeguard the validity of the testing. (A.R. 379-384). Ms. Malloy testified that the drug screen tested for 11 different types of drugs, however, she was not aware as to what those 11 drugs were. (A.R. 390).

The test result was nevertheless negative. Ms. Malloy testified that the negative result meant that the test had not detected the presence of any of the 11 drugs in the panel tested. The Chief Hearing Examiner found Ms. Malloy's testimony to be credible. (A.R. 355).

Ms. Peters testified that a typical 11 panel drug screen tested for 11 different types of drugs including: 1) marijuana, 2) cocaine, 3) basic opioids, 4) Amphetamine, 5) PCP, 6) Benzodiazepines, 7) Barbiturates, 8) Methadone, 9) Propoxyphene, 10) Methaqualone, and 11) Oxycontin. (A.R. 401). Peters testified that these are the most common drugs of abuse but that there are also other drugs that can cause impairment that would not show up in an 11 panel drug screen. The Acting Chief Hearing Examiner also found Ms. Peter's testimony to be credible. (A.R. 355).

Peters also testified that given the negative results of the Eleven Panel Drug Screen in question, the Petitioner would not have used any of those eleven drugs of abuse within at least 48 - 72 hours of the time of the test. (A.R. 406).

Lastly, Peters testified that she had checked the West Virginia Department of Pharmacy's online database and found that the last time the Petitioner had a prescription filled for a narcotic was for Dilaudid in February of 2017. (A.R. 403).

The Hearing Examiner concluded that the testimony of the Petitioner's two witnesses, although credible, did not demonstrate that the Petitioner was not under the influence of some controlled substances or drugs not included in an 11 Panel Drug Screen, while operating a motor vehicle on July 3, 2017. (A.R. 355). The Acting Chief Hearing Examiner concluded: "[c]onsidering 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 indicated that the Petitioner displayed so many clues indicating impairment, the evidence indicates that, more likely

than not, the Petitioner was driving while under the influence of a controlled substances or drugs that the 11 panel drug screen test does not test for." (A.R. 356).

Thereafter the OAH issued a new Order again revoking the Petitioner's driver's license and commercial license on June 29, 2021. (A.R. 353 - 357). The Petitioner then filed her Second Petition for Judicial Review before the Circuit Court of Berkeley County, West Virginia on July 20, 2021, Case No. 21-AA-5. On January 26, 2022, the Circuit Court again found for the Petitioner reversing the Order of the OAH of June 29, 2021. (A.R. 288 - 318).

Facts and Evidence Presented

On October 4, 2018, a hearing was had before Hearing Examiner Andrew S. Myers at the Martinsburg Regional DMV Office. Neither of the officers involved in the case (Martinsburg Police Department) appeared for the hearing though each was subpoenaed by the Respondent (Commissioner) to be present. (A.R. Pg. 222-223).

The contents of the DMV's file were moved for admission which consisted of the Investigating Officer's Criminal Complaint (narrative of the stop, investigation and arrest); the DMV #314 Form (DUI Information Sheet); and the W.Va. Implied Consent Statement Sheet. These documents were admitted without objection pursuant to W.Va. Code §29A-5-2. (A.R. Pg. 222 & Pgs. 147-154). The Commissioner then rested.

The Petitioner (Yoder) then testified at the Administrative Hearing. First, she testified that on February 28, 2017, she underwent lung surgery to remove a cancerous tumor; and that she was prescribed a couple medications after her surgery but that on the date of her stop, July 3, 2017, she wasn't taking any narcotic medication. Petitioner testified the only medications she was on at the time was an Anoro Inhaler and a nasal spray and knew she couldn't be on any impairing medications

because she held a Commercial Driver's License (CDL). (A.R. Pg. 225).

The Petitioner then testified that at the time of the traffic stop, she asked Officer Williamson to take her to the hospital to obtain a blood draw but that he never did. (A.R. Pgs. 225-226). The Petitioner then testified that she obtained drug screens on her own on July 3, 2017, July 14, 2017 and August 23, 2017. Petitioner then moved for the admission of her Exhibits Nos. 1, 2 & 3, the drug screens she testified to, which were admitted without objection. (A.R. Pgs. 227-228 & Pgs. 144, 145 & 146). Petitioner's Exhibits Nos. 1, 2 & 3 were Non-DOT Rapid Eleven Panel Urine Drug Screens obtained at Valley Health Urgent Care in Martinsburg, West Virginia on the dates above referenced all showing negative results for all drugs tested. (Id.).

Petitioner testified that on the night she was stopped and arrested for DUI she had nothing in her system that was of a impairing nature including alcohol or prescription medication. (A.R. Pg. 229). On cross-examination the Petitioner testified that for the first week after her surgery she was prescribed medication for pain but after that she was told to take Tylenol. (A.R. Pg. 229). Next, Petitioner was questioned about the notation in Officer Williamson's Complaint (Respondent's Exhibit No. 1, A.R. Pg. 154) that she was driving irregularly, that she attempted to park in front of his squad car and that she came within inches of his front bumper. She stated that as she was driving through Martinsburg, she was looking around her hometown and couldn't believe it looked so disgusting and that out of common courtesy she pulled over to allow the officer following her to go around her. She also stated that she didn't get within inches of the officer's front bumper as recited in the report. (A.R. Pgs. 230-231). She was also asked on cross-examination why she had slurred speech as referenced in the Officer's paperwork. She said she talks with a lisp and she had some dental work done. (A.R. Pg. 231).

The Petitioner also testified that she did poorly on the field sobriety tests because "she recently had her lungs broken" referring to her surgery in February 2017 and it was "kind of hard for me to do what I was doing," i.e., the field sobriety tests. (Id.). When asked why she did poorly on the Horizontal Gaze Nystagmus test she said that the Officer had her there taking the test for six to ten minutes and after a while she began laughing (getting impatient) just following his finger over and over. She testified "I kept telling him I'm not drinking, go - - please take me to go get a drug test." (A.R. Pg. 229-231). The Petitioner then rested her case and the Respondent failed to present any rebuttal. (A.R. Pg. 232).

In the Final OAH Order, entered September 6, 2019, the Hearing Examiner made the following pertinent findings of fact. (A.R. Pgs. 156-162). First the Hearing Examiner noted that the Officer's narrative indicated that on July 3, 2017, at approximately 1:13 am., he was traveling south behind the Petitioner on Queen Street in Martinsburg. The Officer then noted in his documentation that the Petitioner was traveling well below the posted speed limit and was swerving in the traffic lane.[1] The Officer then noted the Petitioner made a "wide, slow right turn" off of Queen Street onto King Street and then suddenly pulled off the road into a parking spot around the two hundred block of West King Street.

The Officer's documentation then recites that he drove past the Petitioner's vehicle and she then pulled in immediately behind his vehicle.[2] The Hearing Examiner next found that the Petitioner

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1

The Officer's actual complaint/narrative states that she was "weaving in the traffic lane."

2

This finding of fact again deviates from the Officer's complaint/narrative which states: "I continued to drive past the vehicle and watched it immediately pull in behind me. I made it through the light at the intersection of King and Maple and pulled into a parking spot. I waited for the vehicle as it stopped at the red light."

then attempted to park in front of the Officer's vehicle and came within inches of his front bumper then over corrected her vehicle and attempted to back up ending up crossways in the middle of the road. The Hearing Examiner states that the Petitioner then stopped and pulled away when she could not properly park. (Id.).

The Hearing Examiner next noted that Officer wrote in his complaint that the Petitioner stumbled out of her vehicle and started walking back to his cruiser; that he then ordered her to return to her vehicle several times; that when he approached and spoke to her he observed her to have slightly slurred speech and red eyes; that the Officer also noted that the Petitioner appeared to be disoriented, confused, had dry mouth and raspy voice (from the form DMV 314); and that the Officer noted the Petitioner made strange statements, however, no evidence as to what statements were actually made are part of the record. (Id.).

The Hearing Examiner then found from the Investigating Officer's documentation that he administered three standardized field sobriety tests to the Petitioner, to-wit, the Horizontal Gaze Nystagmus Test, the One-Leg-Stand Test and the Walk-and-Turn Test. The Hearing Examiner then noted the Officer reported that the Petitioner did poorly upon these tests. On the Horizontal Gaze Nystagmus Test the Officer noted that the Petitioner's eyes showed a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and onset of nystagmus prior to forty-five degrees. The Hearing Examiner noted that the Officer performed a Medical Assessment prior to administering the test. On the Walk-and-Turn Test the Officer noted the Petitioner could not keep her balance and started too soon in the instruction stage; that she then 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. On the One-Leg-Stand Test, the Officer stated the Petitioner used her arms for

balance and put her foot down. The Officer noted that then stopped the test for the Petitioner's safety. (Id.).

Based upon the documents admitted into evidence, the Hearing Examiner found "[t]here is evidence of the use of alcohol, drugs, controlled substances or any combination of the aforementioned based on the following: the Petitioner's driving pattern, her physical appearance and her performance on the standard field sobriety tests." (Id.).

The Hearing Examiner then noted that the Petitioner was placed under arrest, transported to the Martinsburg Police Department, read and given a copy of the West Virginia Implied Consent Statement,[3] that all procedures were adhered to for the giving of the EC/IR II Intoxilizer Test and that she then took the test registering a zero (0.00) result for blood alcohol. (Id.).

The Hearing Examiner then noted that the Officer's complaint/narrative stated that he called the Petitioner's parents who indicated that her mental state had always been fine but that she was on a lot of prescription drugs. (Id.).

The Hearing Examiner noted that the Petitioner testified that she had lung surgery in February of 2017 to remove a cancerous tumor; that she testified after the surgery she was taking a couple medications but that when she was arrested on July 3, 2017, she was not taking any medication that contained narcotics; that she had an inhaler and a nasal spray; and that the Petitioner testified that she requested to be taken to the hospital for a blood draw and that the Investigating Officer refused

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3

The Implied Consent Statement in the record does not note that the Petitioner was advised of the penalties for refusing to provide a breath sample for a CDL driver.

her request.[4] (Id.).

The Hearing Examiner gave no weight to the Petitioner's Exhibits 1 through 3 and stated in his decision:

> "While I admitted the Petitioner's Exhibits 1 through 3 relating to her [blood] tests, no evidence was presented to explain the results to include what substances the tests were designed to discover and what substances the test would not discover. The results indicate 'normal' but no information was presented as to what that means. As such, the relevance of those documents are minimal, only indicating that either the Petitioner believed she was not under the influence or that the Petitioner knew the tests would not reveal the substances she had taken."
>
> (A.R. Pg. Pg. 159).

The Hearing Examiner then stated the following regarding the Petitioner's testimony that she requested a blood draw but that the Investigating Officer refused such request:

> "The Petitioner alleges she asked the Investigating Officer's to take her to get a blood test and claims that he did not. No other evidence was presented that clearly supports this claim. She did go to Valley Health and get a blood test that day, but this 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 test; in any case, she was able to obtain a blood test that day - even though she did not present evidence explaining the results of the blood test."

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[4] The WV DMV Form #314 contains a section on page 6 (A.R. 150) denominated as "BLOOD TEST." The following information blanks are on the form with only one block checked:

BLOOD TEST: ☐ YES ■ NO TIME REQUESTED: _____

WAS REQUEST FOR A BLOOD SAMPLE DIRECTED BY THE ARRESTING OFFICER? ☐ YES ☐ NO

REFUSED? ☐ YES ☐ NO

DID SUSPECT REQUEST BLOOD SAMPLE? ☐ YES ☐ NO

The Hearing Examiner did not mention any reference in the Final Order to a blood draw being requested by the Investigating Officer and refused by the Petitioner. This would lead a reasonable, objective person to conclude that the Officer did not request a blood draw even given the fact that he claimed the Petitioner showed signs of impairment and registered 0.00 on the EC/IR II, the next logical step in the Officer's investigation, where he suspected drug impairment would have been to request a blood draw.

(Id.).

The Petitioner's drug tests were 11 panel urine screens not blood tests. The July 3, 2017 screen was obtained immediately upon the Petitioner's release from custody the same day of her arrest (July 3, 2017 at 11:19 am., A.R. Pg. 144). She testified that at first she went to City Hospital [now Berkeley Medical Center] to obtain a drug test to show that she wasn't on drugs. (A.R. Pg. 248). She testified that she went there because that was where she had her lung surgery in February of 2017. She stated, however, that the Hospital wouldn't test her (presumably without a Doctor's order). So, the Petitioner immediately went to Urgent Care and obtained the subject 11 panel Non-DOT urine drug screen. (Id.).

The record does not reflect any questions by the Hearing Examiner to the Petitioner or her counsel regarding what drugs would have been tested for in an eleven (11) panel drug screen or even mentioning any problem with understanding what an eleven (11) panel drug screen was.

The Hearing Examiner then concluded:

> "I find by a preponderance of the evidence, the Petitioner was under the influence of alcohol, controlled substances and/or drugs at the time [he] was driving [his] motor vehicle. Pursuant to *Crouch v. W.Va. Div. of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006), when Respondent's Exhibit No. 1 is admitted into evidence, a rebuttable presumption is created as to its accuracy. While the Investigating Officer did not testify, his account of his interactions with the Petitioner, as recounted in Respondent's Exhibit 1, are more credible and in line with common sense [than] the Petitioner's testimony. His narrative detailing the Petitioner's behavior and appearance is consistent with one who was impaired by a controlled substance or drugs. The Petitioner'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 of impaired judgment. Overall, the preponderance of the evidence supports that the Petitioner was under the influence of a controlled substance or drug that impeded her ability to split her attention and impaired her judgment."

(A.R. Pg. 159-160).

On March 25, 2020, the Circuit Court of Berkeley County overturned the Final Order of the OAH of September 6, 2019, setting forth the following findings of fact and conclusions of law:

A. The Court finds it troubling that neither officer involved in the traffic stop and investigation in this case made time to attend the Administrative Hearing after being duly subpoenaed to attend. These officers had first hand knowledge and their failure to testify at the hearing, in the Court's view, implicates the Petitioner's due process rights to a full and fair hearing.

B. The Court also finds it troubling that the DMV was allowed by the Hearing Examiner to proceed only upon the investigating officer's paperwork, without testimony, and that the Petitioner was denied the ability to cross-examine the author of said documentation on the witness stand.

C. Nevertheless, the Court finds that based upon the record, PFC [Williamson] did have a reasonable articulable suspicion or probable cause to effect a traffic stop of the Petitioner from his description of her driving and her own admissions regarding the same.

D. The Court does easily find by a preponderance of the evidence, however, that the Petitioner did in fact request the arresting officer to take her for a blood draw either during or at the conclusion of the traffic stop. First, PFC [Williamson] failed to attend the Administrative Hearing after being duly summoned to attend by subpoena. Thus the Petitioner's assertion that she requested a blood draw was not rebutted and Williamson's failure to appear could be predicated upon his recognition that he would be cross-examined on this issue. Additionally, suspecting the Petitioner was impaired by drugs, Officer Williamson did not, according to the DMV 314 request the Petitioner 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 she was under the influence of drugs. Williamson also did not note in his complaint that he requested the Petitioner to submit to a blood draw, again despite his suspicion that she was impaired by drugs.

E. The most significant reason the Court believes the Petitioner did in fact 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 the Berkeley Medical Center to draw her blood without a physician's order, the Petitioner obtained an Eleven Panel Urine Drug Screen producing negative results for Amphetamines, Barbiturates, Benzodiazepines, Buprenorphine, Cocaine, Methamphetamines, Methadone, Opiates, Oxycodone, PCP and THC.

F. Next, the Court finds that the Hearing Examiner's decision to afford the submitted drug screen evidence of the Petitioner no or only minimal weight to be clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Court finds the result of this drug test, negative for those 11 substances, to be very good evidence that Petitioner was not impaired by illegal or prescription drugs just roughly one dozen hours earlier on the same day. The Court finds said decision to also be arbitrary and capricious and an abuse of discretion.

G. The record is devoid of any inquiry by the Hearing Examiner to anyone at the hearing as to what an eleven (11) panel drug screen tested for. In his decision the Hearing Examiner in effect stated he didn't know what drugs were tested in an Eleven Panel Drug Screen. If the Hearing Examiner didn't know or was unsure what the evidence presented and admitted was, it was his duty to inquire - - which he could easily have done, of both counsel to his satisfaction as to those facts - - and not simply ignore the significance of such evidence. Without such an inquiry by the Hearing Examiner, both the Petitioner and her counsel would have naturally assumed that the Court would have known what an eleven (11) panel drug screen was and its significance. Instead the Hearing Examiner surmised that the Petitioner had somehow obtained a drug screen which would not detect the drugs she was actually on, a supposition that was prejudicial to the Petitioner, and not justified based upon the evidence in the record.

H. The Court also finds that while the Hearing Examiner did admit the Petitioner's drug screen evidence, he obviously failed to consider it not even knowing what it was or even inquiring of the Petitioner or her counsel regarding its relevance if he didn't understand. If the drug screen evidence had actually been considered, the Hearing Examiner would have easily concluded that a negative finding for the aforesaid eleven drugs of impairment, obtained within eleven hours of arrest, rebutted any claim that she was driving while impaired beyond a preponderance of the evidence.

I. The Court finds that the Petitioner in this case did the very thing [that] was within her power, immediately upon her release from jail, to dispute or disprove the contention that she was under the influence of drugs at the time of the traffic stop. This action the Court finds to be consistent with Petitioner's argument as to the vital significance of her commercial driver's license as the source of her livelihood. The Petitioner had been seriously ill and had undergone surgery several months prior to the traffic stop, which occurred late in the night. All of the circumstances set forth in the record, taken together, lead the Court to find that the Petitioner adequately and by at least a preponderance of the evidence rebutted the allegation (i.e., Respondents' exhibits generated by Officer Williamson that established their presumptive correctness but that were greatly undermined by Petitioner's testimony and that were not rehabilitated or otherwise resubstantiated because the officers were not at the hearing to testify) that she was driving her vehicle while under the influence of any drug or

> controlled substance. The Court concludes that the Hearing Examiner's finding to the contrary is clearly wrong.

The Respondent then appealed the Circuit Court's decision overruling the Final Order of the OAH to this Court. On February 19, 2021, the Supreme Court issued a Memorandum Decision finding that pursuant to its decision in *Frazier v. Fouch*, No. 19-0350, 2020 WL 7222839 (W.Va. Nov. 6, 2020), the Circuit Court's Order "was erroneous to the extent that if found that the officer's failure to testify at the OAH hearing implicated respondent's (Yoder's) due process rights to a full and fair hearing."

This Court declined to address the arguments of the DMV that the Circuit Court erred in substituting its judgment for that of the Hearing Examiner's failing to give the Hearing Examiner deference as the fact finder on credibility determinations. The Supreme Court then reversed the Circuit Court's Order of March 25, 2020, and remanded the case back to the Circuit Court for an order consistent with the *Fouch* decision.

On June 20, 2021, the Circuit Court of Berkeley County issued its Final Order Upon Remand. (A.R. Pg. 1-20). The Circuit Court noted that "[b]ecause the Supreme Court of Appeals reversed this Court's decision on the above ground, the opinion did not reach this Court's prior ruling that the evidence was insufficient, or sufficiently rebutted by the evidence brought forth by the Petitioner at the OAH hearing, such that her personal and commercial driver's licenses should not have been revoked." (Id.).

The Circuit Court then stated: "[w]ith these rulings, analysis and directives of the Supreme Court's Memorandum Decision of February 19, 2021, in mind, and the Court having carefully reconsidered the entire administrative record filed herein including the Petition, the respective briefs

of the parties, the Court hereby makes the following findings of fact and conclusions of law. . . ." The Court then again made findings of fact from the record which were by and large identical to the findings set forth in its Order of March 25, 2020. The Court did, however, expand on some key findings in the Final Order on Remand as follows.

A. At Paragraph 11 of the Order, the Circuit Court stated:

> Next the complaint recites that the Petitioner stumbled out of the vehicle and started walking back to the officer's cruiser. The Court notes that this recitation in the Complaint is in conflict with a portion of the West Virginia DUI Information Sheet ("DMV Form 314") offered into evidence by the Respondent, which noted under the Personal Contact section of the form, wherein the three boxes "Normal" are each checked by the officer, in qualifying how the Petitioner exited the vehicle, walked to the roadside and stood.

B. At Paragraph 14 of the Order, the Circuit Court noted that the DMV Form 314 contains a section to document impairment from controlled substances entitled "Additional Impairments Tests" - "A.R.I.D.E. Officers Only." Although the tests listed in this section of the DMV 314, the Modified Romberg and Lack of Convergence Tests are to be administered by ARIDE certified officers only, there is a place for officer observations regarding pupil size being Normal, Dilated or Constricted. The Circuit noted: "[t]he record does not contain information from the officer's observations as to the Petitioner's pupils being dilated or constricted or normal."

C. At Paragraph 17 of the Order, the Court stated:

> The WV DMV Form 314 indicates that PFC Williamson first made contact with the Petitioner at 12:39 a.m., on July 3, 2017; placed her under arrest at 12:53 a.m. and transported her to the station. According to the officer's DMV Form 314, the breath test reflecting 0.000% blood alcohol was administered at 1:44 a.m. The Petitioner was held for the remainder of the night at the Eastern Regional Jail until she bonded

out the next morning. Petitioner then attempted to get a drug test at Berkeley Medical Center but was informed that she needed a physician's order. Petitioner obtained a negative Non-DOT 11 panel urine drug screen from Valley Health Urgent Care, Martinsburg, dated July 3, 2017 and marked with the time "11:19 a.m."

D. The Circuit Court then again outlined the arguments of both the Petitioner and Respondent as was set forth in the Court's March 25, 2020 Order. The Court then set forth its Analysis on Remand as follows:

E. The Court finds that PFC Williamson did have a reasonable articulable suspicion or probable cause to effect a traffic stop of the Petitioner from his descriptions of her driving and her own admissions regarding the same.

F. The Court finds there is persuasive evidence that the Petitioner did in fact request the arresting officer to take her for a blood draw either during or at the conclusion of the traffic stop. The Petitioner's testimony that she requested a blood draw, at least twice during her encounter with Officer Williamson, was not rebutted by the documentary evidence of record. Pursuant to the DMV 314, Respondent's Exhibit No. 1 at page 6 of the document, Officer Williamson, suspecting the Petitioner was impaired by drugs, did not request the Petitioner to submit to a blood draw, which would have been the next logical step in his investigation after his stated belief, in the complaint, (Respondent's Exhibit No. 1), that the Petitioner was under the influence of controlled substances or drugs.

G. Respondent's Exhibit No. 1, the DMV Form 314 at page 6 of the document under the heading of "BLOOD TEST," provides the investigating officer with the ability to document whether a blood test was done; the time it was requested; whether the request for a blood sample was made by the arresting officer or at the request of the suspected impaired driver; and whether or not it was refused. Officer Williamson checked the box noting no blood test was done on his DMV Form 314, and failed to mark either the "yes" or "no" box under the question "[w]as request for a blood sample directed by the arresting officer?" The Court notes that the form also contains a notation "did suspect request blood sample" which is a right provided for by W.Va. Code § 17C-5-6. The Court notes that W.Va. Code § 17C-5-6 provides in pertinent part: "The person tested may, at his or her own expense, have a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his or her employment, of his or her own choosing, administer a chemical test in addition to the test administered at the direction of the law-enforcement officer." This section was also left blank. Officer Williamson also did not note in his complaint that he requested the Petitioner to submit to a blood draw, despite his suspicion that she was impaired by drugs.

H. 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 producing negative results for (according to the Petitioner): Amphetamines, Barbiturates, Benzodiazepines, Buprenorphine, Cocaine, Methamphetamines, Methadone, Opiates, Oxycodone, PCP and THC. To this Court, the negative urine screen bolsters the veracity of the Petitioner's testimony that she had requested a blood draw from Officer Williamson at the time of her arrest. Because the Court reaches the conclusion that this matter must be remanded for a new evidentiary hearing on another basis, to properly consider the significance of the July 3, 2017 negative 11 panel urine drug screen, the Court makes 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.

I. The Court finds that the Hearing Examiner's decision to afford the admitted drug screen evidence of the Petitioner no or only minimal weight to be clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Court finds said decision to also be arbitrary and capricious and an unwarranted exercise of discretion.

J. The record is devoid of any inquiry by the Hearing Examiner to anyone at the Hearing as to what an 11 panel drug screen tested for. In his decision the Hearing Examiner in effect stated he didn't know what drugs were tested in an 11 Panel Drug Screen. If the Hearing Examiner did not know or was unsure what the evidence presented and admitted was, it was his duty to inquire and not simply ignore the significance of the evidence. Without such an inquiry by the Hearing Examiner, both the Petitioner and her counsel seem to have assumed that the Hearing Examiner would have known what an 11 panel drug screen was and the significance of the July 3 negative result especially having occurred inside 11 hours from the Petitioner's arrest. Instead the Hearing Examiner surmised that the Petitioner had somehow obtained a drug screen which would not detect the drugs she was actually on.

K. The Petitioner states on page 11 of her Brief:

"At this time in our history, it is almost common knowledge within judicial circles that an eleven (11) panel drug screen detects usage of the eleven most common controlled substances including: Amphetamines, Barbiturates, Benzodiazepines, Buprenorphine, Cocaine, Methamphetamines, Methadone, Opiates, Oxycodone, PCP and THC. In fact "eleven panel drug screen" is a term of art within the medical/judicial/rehabilitation fields and carries with it the basic understanding that such test screens for all of the drugs of abuse or impairment seen daily by medical,

judicial and psychological professionals. Within a minute of a simple Google or internet search of the term "eleven panel drug screen" anyone will readily and accurately find from multiple sources whose accuracy cannot reasonably be questioned based simply upon them all providing the same information, what drugs such a test will screen for, i.e., all of the aforementioned controlled substances.

L. The Court agrees with the Petitioner's argument as to the potential significance of the drug screen evidence. The Court does not go so far as to agree with Petitioner's argument that the Hearing Examiner should have exercised his discretion under Rule 201 of the West Virginia Rules of Evidence and taken judicial notice of what an Eleven Panel Non-Dot Urine Drug Screen tests for (although the undersigned judge, in light of his experience with drug screens, would likely have done so.). The Court finds that the failure of the Hearing Examiner to develop the record as to what substances the July 3 screen tested for, as well as the opportunity for the Respondent to meet that evidence, was clearly wrong and an unwarranted exercise of discretion in view of the reliable, probative and substantial evidence on the whole record.

M. The Court also finds that while the Hearing Examiner did admit the Petitioner's drug screen evidence, he failed to give it the weight that it deserved. He also failed to inquire of the Petitioner or her counsel regarding its relevance if he did not know its significance and the drugs it tested for. If the drug screen evidence had been developed and considered properly, the Hearing Examiner may well have been compelled to conclude that a negative finding for the eleven drugs screened for, obtained inside eleven hours of arrest, rebutted any claim that she was driving while impaired under the preponderance of the evidence standard of proof.

N. The gist of the Catch 22 situation that the Hearing Examiner placed the Petitioner in is revealed in the Hearing Examiner's statement that: "in any case, she was able to obtain a blood [sic: urine] test that day - even though she did not present evidence explaining the results of the blood [sic: urine] test." The July 3 screen (the "medical paperwork" the Hearing Examiner had referred to in his continuance order) was admitted; it was negative for eleven substances; and nothing in the record explains it away. If the Hearing Examiner did not understand the significance of the test, then he should have made inquiry, in the Court's view. This Court handles abuse and neglect cases involving children where urine drug screens virtually identical to the one in the case at bar are routinely the basis for reuniting children with their parents when the parents screen negative over a period of time.

O. Clearly, if the use of an 11 panel drug screen is a sufficient and reliable tool for gauging whether or not it is safe to return a child to a previously drug addicted parent, it most certainly should be sufficient to be utilized in a driving while impaired case. Similarly, circuit courts throughout the state routinely rely upon 11 panel drug screens as term and condition of both bond and probation in criminal cases. If relied

upon to the detriment of a criminal defendant's liberty, it should be sufficient to defend against a driving impaired case. Conversely, if the test results were positive for an impairing substance, it would rightfully be used against one charged with driving impaired.

P. There are some permutations in the types of screens (for example most common are 5, 8 and 11 panel depending upon how comprehensive versus targeted a result is sought). However, they all screen for the most commonly used impairing and addicting substances and clearly, the 11 panel tests very broadly. Since the Petitioner blew a 0.0000% on the breath test, and 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 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.

Q. Admission of the documentary evidence contained in the DMV's file under W.Va. Code §29A-5-2(b), as noted by the Supreme Court of Appeals in *Crouch v. Commissioner*, 219 W.Va. 70, 76, n.12, 631 S.E.2d 628, 634, n.12 (2006), merely creates a rebuttable presumption of accuracy:

"the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy."

R. Therefore, the Court finds that the Petitioner adequately, sufficiently and by a preponderance of the evidence, challenged and rebutted the presumption contained in the Respondent's admitted documentary evidence that she was driving her vehicle while under the influence of an impairing substance in light of all of the evidence presented. The Court finds that the Hearing Examiner's finding to the contrary is clear error.

S. In light, however, of our Supreme Court of Appeal's admonitions that the reviewing Court in an APA cases appealing driver's license revocations should not reweigh the evidence, reassess the credibility of witnesses, substitute its judgment for that of the Hearing Examiner, *see Syl. Pt. 4, Frazier v. S.P.*, 242 W.Va. 657, 838 S.E.2d 741 (2020), or indicate a preference for live testimony over documentary evidence, *see Groves v. Cicchirillo,* 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2008), the Court believes that this matter should be remanded to the OAH for a new evidentiary hearing to permit the record to be developed as to what substances the Valley Health Urgent Care 11 Panel Non-Dot Drug Screen tested for, what a negative screen would thus mean in the context of this case and in light of all the other evidence, and to provide the Respondent the opportunity to meet that evidence.

As previously noted, the matter was then remanded per the directive of the Circuit Court to the OAH "to permit the record to be developed as to what substances the Valley Health Urgent Care 11 Panel NON-DOT drug screen tested for, what a negative screen would thus mean in the context of this case in light of all the other evidence, and to provide the Respondent the opportunity to meet that evidence." (A.R. Pgs. 1-20 & 323 - 342).

A hearing upon the Circuit Court's remand was had on June 28, 2021. After receiving the evidence regarding what an eleven (11) panel drug screen tested for, the Acting Chief Hearing Examiner concluded: "[c]onsidering 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 indicated that the Petitioner displayed so many clues indicating impairment, the evidence indicates that, more likely than not, the Petitioner was driving while under the influence of a controlled substances or drugs that the 11 panel drug screen test does not test for." (A.R. 356).

The Respondent then appealed the said Final Order of the OAH (June 28, 2021) to the Circuit Court of Berkeley County West Virginia. (A.R. 288 - 318). The Circuit Court noted persuasive evidence was presented below that the petitioner did in fact request the arresting officer take for blood draw at the conclusion of the traffic stop. The Court stated the Respondent had testified that she made at least two requests of the arresting officer for a blood draw which testimony was not rebutted by the documentary evidence presented by the Petitioner. The Court noted that Officer Williamson's notation on the DMV 314 that no draw blood draw was requested was contrary to what a prudent law enforcement officer would have done upon suspecting a person was impaired by drugs and operating a motor vehicle. The Court noted that in that circumstance, a blood draw would have been the next logical step in the investigation.

Further, the Court noted, that Respondent's (Petitioner here) Exhibit No. 1, the DMV Form 314 at page 6 provides a box to be checked as to whether or not the suspect requested a blood draw which is a right under West Virginia Code §17C-5-8. Officer Williamson failed to note yes or no on the form.

The Circuit Court then said the most significant reason that it believed the Respondent did in fact request a blood draw was that within 10 hours and 26 minutes after her arrest, being released from jail and the refusal of the Berkeley Medical Center to draw her blood without a physician's order, she obtain an 11 panel urine drug screen from Valley Health Urgent Care producing negative results for the most common drugs of abuse in 2017.

The Circuit Court then found that the negative urine screen bolstered the veracity of the Respondent's testimony that she had requested a blood drawn from the officer at the time of her arrest. Accordingly, the Circuit Court found by a preponderance of the evidence that the Respondent did in fact request and demand a blood draw from the officer and the same was denied her. The court went on to find that the conclusion of the hearing examiner that the Respondent did not in fact request or demand a blood draw was clearly wrong in view of reliable, probative and substantive substantial evidence on the whole record and that the hearing examiner's refusal or neglect to consider such probative and substantial evidence was arbitrary, capricious and an abuse of discretion. Further the Court found that the petitioner's testimony was not rebutted by the documentary evidence of record.

The Circuit Court also stated it was cognizant that it must give deference to the fact finder's credibility determinations unless clearly wrong, arbitrary, capricious or an abuse of discretion. The Court then went on to find that the hearing examiner made credibility determinations without

addressing or considering the favorable rebuttal evidence presented by the petitioner. The Court also noted that the Respondent''s rebuttal evidence was not just her testimony but all the action she took on July 3, 2017 immediately after being released from jail.

The Circuit Court then stated that under *Dale v. Painter*, 234 W.Va. 343, 765 S.E.2d 232 (2014), holding that W.Va. Code §17C-5-9 provides a suspected impaired driver with the statutory right to a blood test when properly invoked and that the arresting officer's failure to so provide a blood test constitutes a violation of the drivers right to due process i.e., the right to preserve exculpatory evidence.

Additionally, the Circuit Court found that the Respondent's testimony did not simply establish mere acquiescence to the arresting officer's request for blood draw but constituted her unequivocal demand and request for a blood draw by the officer.

Finally the Circuit Court found that the Respondent adequately, sufficiently and by a preponderance of the evidence, challenged and rebutted the presumption of accuracy contained in the Commissioner's submitted documentary evidence that on July 3, 2017, she was driving her vehicle under the influence of impairing substance in light of all of the evidence presented. The Court found the Acting Chief Hearing Examiner's findings in his decision issued June 29, 2021, were clearly wrong.

III. SUMMARY OF ARGUMENT

The Petitioner sets forth one assignment of error asserting that the Circuit Court erred in finding that the Respondent requested a blood test in reversing the OAH's Final Order. The Circuit Court, however, did not substitute its judgment for that of the Hearing Examiner nor fail to give deference to his determinations but, however, found the Hearing Examiner's factual finding that the

Respondent did not request a blood draw were "clearly wrong in view of the reliable, probative and substantial evidence on the whole record."

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 unless the Court believes oral argument would be of benefit in the determination of the case.

V. ARGUMENT

A. STANDARD OF REVIEW

A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W.Va. Code §29A-5-4, which provides:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise
> of discretion.

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

The Petitioner argues that the Circuit Court erred by finding that the Hearing Examiner gave no or minimal weight to the drug screen evidence presented by the Respondent. Petitioner argues that W.Va. Code §17C-5-8(a) prohibits consideration of chemical evidence taken more than four hours after arrest. The pertinent provisions of W.Va. Code §17C-5-8 recite:

> (a) Upon trial for the offense of driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence 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).

(g) 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.

The Commissioner also argues that there was no showing that the method of analyzing urine specimens employed by the Petitioner met the requirements of W.Va. Code St. R. § 64-10-9.

First, W.Va. Code §17C-5-8 deals only with blood or breath analysis. Further, W.Va. Code St. R. §64-10-9 deals only with alcohol detection and quantification not with controlled substances. Because the Circuit Court was abundantly familiar with the use of 11 Panel Drug Screens in its day-to-day proceedings in abuse and neglect cases as well as juvenile and adult criminal matters, (as set forth in its Order on Remand) it knew that the Hearing Examiner was obviously not familiar with such drug screens. Of course the Hearing Examiner would not be knowledgeable of urine screening because it is almost never utilized in the context of DUI revocation proceedings.

Nevertheless, pursuant to the Memorandum Decision of this Court, and in an effort not to substitute its judgment for that of the Hearing Examiner's, the Circuit Court remanded the matter to the OAH to conduct a hearing upon the specific issue to permit the record to be developed as to what substances the Valley Health Urgent Care 11 Panel Non-Dot Drug Screen tested for, what a negative screen would thus mean in the context of this case and in light of all the other evidence, and to provide the Respondent the opportunity to meet that evidence. The evidence adduced on remand would negate any argument that the Court substituted its judgment for that of the Hearing Examiner's and vouch the record regarding the scope of the urinalysis at issue.

That remand hearing took place and evidence was adduced by the Respondent that a typical

11 panel drug screen tested for 11 different types of drugs including: 1) marijuana, 2) cocaine, 3) basic opioids, 4) Amphetamine, 5) PCP, 6) Benzodiazepines, 7) Barbiturates, 8) Methadone, 9) Propoxyphene, 10) Methaqualone, and 11) Oxycontin and that given the negative results of the Eleven Panel Drug Screen in question, the Petitioner would not have used any of those eleven drugs of abuse within at least 48 - 72 hours of the time of the test. The Acting Chief Hearing Examiner also found the expert testimony as to these opinions to be credible. Nevertheless, the Acting Chief Hearing Examiner concluded, 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. The Circuit Court noted such a finding to certainly be arbitrary and capricious.

The Petitioner also ignores the Circuit Court's finding that as soon as she was released from jail, the Respondent sought out the 11 Panel Drug Screen, after being unable to secure a blood draw without a doctor's order, and being denied one by the arresting officer. Additionally, from the credible expert testimony adduced on remand, the results of the subject urine screen were valid for 48 to 72 hours, not just four hours with blood. As noted by the Court, the Respondent did the very thing that was within her control, to-wit, to obtain a drug screen as soon as she was released from jail.

Of course the Respondent had to find her own drug screen because she was denied one by the arresting officer. As the Circuit Court pointed out, the Respondent holds a commercial driver's license and she drives commercially for a living and it would have abundantly logical and reasonable for her to requested a blood draw from the arresting officer to preserve her employment. The Respondent testified at least twice during the original hearing of October 4, 2018, that she requested a blood draw from the arresting officer, who was not present to rebut her claim nor did his

documentation (DUI Information Sheet - 314) substantiate that he asked for a blood draw despite believing the Respondent was impaired from controlled substances or illegal drugs. The Petitioner argues that once the arresting officer marked the box on the 314 that no blood draw was taken, his failure to mark any of the other boxes was irrelevant. Why then are the boxes on the 314 there in the first place? Obviously to document what happened and who did what. The pertinent section of the 314 as evidenced in this case is as follows:

BLOOD TEST: ☐ YES ■ NO TIME REQUESTED: _____

WAS REQUEST FOR A BLOOD SAMPLE DIRECTED BY THE ARRESTING OFFICER? ☐ YES ☐ NO

REFUSED? ☐ YES ☐ NO

DID SUSPECT REQUEST BLOOD SAMPLE? ☐ YES ☐ NO

This document did not rebut the Respondent's claim that she asked, at least twice, for a blood draw. The officer chose to leave blank the question "did suspect request blood sample?" As previously pointed out, if the officer suspected the Respondent was impaired from controlled substances or drugs, it would have been his natural inclination to request a blood draw but he didn't. Further, he wasn't A.R.I.D.E. certified so as to be able to render his own expert opinion of impairment from the typical tests employed to detect the same such as the Modified Romberg Test, the Lack of Convergence Test, the Finger-to-Nose Test, etc.

Next the Petitioner argues that the issue over the purported blood draw does not affect the outcome of the case under the Court's recent ruling in *Frazier v. Talbert*, 245 W.Va. 295, 858 S.E.2d 918 (2021). In *Talbert*, the Court adopted its analysis in *Osakalumi*, 194 W.Va. 758, 461 S.E.2d 504 (1995), and fashioned a three-factor test:

> [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. 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.

Talbert, W.Va. at 307, S.E.2d 930.

Applying this test to the case at bar, it is clear (1) that the arresting officer was at least negligent in his documentation of the evidence in his 314 not marking the appropriate and relevant boxes and may have very well just concluded he wasn't going to go to the trouble of taking the Respondent for a blood draw at 12:53 am.; (2) a blood draw would have been extremely important to the Respondent but she was denied her statutory right to a blood test which test would have exonerated her especially in light of the 11 Panel Drug Screen she obtained on her own as soon as she was released from jail; and (3) that the sufficiency of the other evidence produced at the proceeding, including the negative results of the 11 Panel Drug Screen, would inure to the benefit of the Respondent. As Respondent's counsel at the original hearing on October 4, 2018, noted some people who are not impaired do poorly on field sobriety tests and others who are impaired can pass. The real difference in this case is the drug screen evidence produced by the Respondent because without it, the other evidence could arguably lead to the revocation but with it, the chances that the blood draw would have produced a positive result are substantially decreased and thus the deprivation of the Respondent's right to the blood draw becomes critical.

Accordingly, the Respondent was denied due process of law to prove she was not impaired from any controlled substance or drug at the time of her arrest and took the measures she could to obtain substitute evidence of her sobriety.

VI. CONCLUSION

WHEREFORE, the Respondent, Cheryl L. Yoder, argues that the Petitioner's lone remaining assignment of error is meritless and that this Court should affirm the Final Order of the Circuit Court of Berkeley County overruling the Revocation Order of the Commissioner of the West Virginia Division of Motor Vehicles and reinstating the personal and commercial driving privileges of the Respondent, and for such other relief as the Court may deem just, necessary and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, B. Craig Manford, hereby certify that on this 11th day of July, 2022, a true and accurate copy of the foregoing **Brief of Respondent Cheryl L. Yoder** was delivered to Janet E. James, Esq., Assistant Attorney General DMV, Office of the Attorney General, P.O. Box 17200, Charleston, West Virginia, 25301, Janet.E.James@wvago.gov by electronic mail and First Class United States Mail, postage prepaid.

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