

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEVEN O. DALE, ACTING COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

Case No.: 13-1225

CHRISTINA PAINTER,

Respondent.

FROM THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

APPELLEE'S SUMMARY RESPONSE TO BRIEF OF APPELLANT

Submitted by:

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TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE	2
II. APPELLANT ERRORS	2
III. POINTS AND AUTHORITIES	3
IV. STATUTES	4
V. ARGUMENT	3,4,5,6
VI. CONCLUSION	6

I. STATEMENT OF THE CASE

Appellant's statement of the case, in conjunction with the Circuit Court's statement is accurate as far as it goes and is adopted herein and incorporated by reference.

II. APPELLANT ERRORS

A. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT RESPONDENT REQUESTED A BLOOD TEST AND WAS NOT PROVIDED WITH ONE.

B. THE CIRCUIT COURT REASONABLY CONCLUDED THAT THE RESPONDENT'S CONSTITUTIONAL AND STATUTORY RIGHTS WERE VIOLATED FOR NOT OBTAINING A BLOOD TEST.

III. POINTS AND AUTHORITIES

	<u>Page</u>
<i>Cahill v. Mercer County Bd. of Educ.</i> , 208 W.Va. 177	4
<i>In the Interest of Tiffany Marie S.</i> , 196 W.Va. 223 (1996)	4
<i>Moczek v. Bechtold</i> , 178 W.Va. 553, 555, 363 (1987)	4
<i>In re Burks</i> , 206 W.Va. 429, 525 S.E.2d 310 (1999)	4
<i>State v. York</i> , 175 W.Va. 740,741, 338 S.E.2d 219,221 (1985)	5,6
<i>Koenig v. North Dakota Dept. of Transp.</i> , 2012 ND 18, (2012)	6
<i>Final Order Findings of Fact and Conclusions of Law Hearing Transcripts</i>	

IV. STATUTES

	<u>Page</u>
W.Va. Code §17C-5-9	4,5,6
North Dakota Century Code §39-20-02	6

V. ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT RESPONDENT REQUESTED A BLOOD TEST AND WAS NOT PROVIDED WITH ONE.

As noted in the Circuit Court's order, there are two factual determinations made by the Chief Hearing Examiner that are pertinent to this Petition for appeal: (1) the petitioner requested a blood test pursuant to §17C-5-9 , and (2) that this request was denied. A reviewing court is severely limited in its ability to overturn factual determinations made by a hearing examiner , *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 180, 539 S.E.2d 437, 440 (2000). The West Virginia

Supreme Court of Appeals has described a finding as clearly erroneous when:

Although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, In the *Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)

The relevant code section to this appeal is W.Va. Code §17C-5-9, which states:

Any person lawfully arrested for driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his blood, breath or urine be taken within two hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand.

This section “does not require that an alternative test be offered; it merely accords an additional right to individuals to have another test to supplement the designated secondary test if that designated secondary test is either a breath or urine test.” *Moczek v. Bechtold*, 178 W.Va. 553, 555, 363 S.E.2d 238, 240 (1987). However, if an individual requests such a test, they “must be given the opportunity... to have a blood test that insofar as possible meets the evidentiary standards of 17C-5-6 (1981).” Syl. Pt. 2, *In re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (1999)

In the *Final Order Findings of Fact and Conclusions of Law* signed April 27, 2012, the Chief Hearing examiner noted that Ms. Painter requested a blood test from the investigating Officer. Specifically, in the Final Order, the Chief Hearing Examiner remarked that Ms. Painter “stated that she asked for a blood test in addition to the secondary chemical test because she was worried that the secondary chemical test would show an inaccurate result due to her gastric bypass surgery.” *Hearing Transcripts at P. 6*. The chief hearing examiner specifically found that “Even though the Petitioner

requested a blood test and was never given one..." *Hearing Transcripts at P. 7*

B. THE CIRCUIT COURT REASONABLY CONCLUDED THAT THE RESPONDENT'S CONSTITUTIONAL AND STATUTORY RIGHTS WERE VIOLATED FOR NOT OBTAINING A BLOOD TEST.

As stated above in Section A., the relevant code section to this appeal is W.Va. Code §17C-5-9, which states:

Any person lawfully arrested for driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his blood, breath or urine be taken within two hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand.

This Honorable Court has ruled, that the rights given by §17C-5-9 are both an important statutory and constitutional right.

W.Va. Code §17C-5-9... accords an individual arrested for driving under the influence of alcohol... a right to demand and receive a blood test within two hours of his arrest. Furthermore, this Statutory right is hardly a new development. Historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. To deny this right would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense... The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function.

State v. York, 175 W.Va. 740,741, 338 S.E2d 219,221 (1985)

Any person denied constitutional rights and/or statutory rights during an arrest on a criminal

matter is awarded suppression of such evidence upon proper showing of such denial in court. The same should hold true in administrative matters such in North Dakota. The North Dakota Century Code §39-20-02 provides a right to an additional blood test similar to that in W.Va. Code §17C-5-9. The Supreme Court of North Dakota has stated that in an administrative hearing, “if an individual is denied this statutory right, results of tests administered at the direction of law enforcement may be suppressed or the charges may be dismissed.” *Koenig v. North Dakota Dept. of Transp.*, 2012 ND 18, 810 N.W.2d 333,336 (2012).

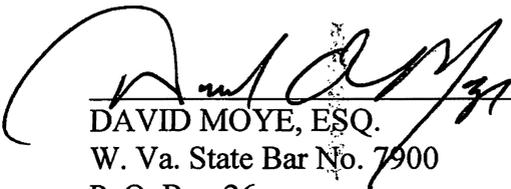
A motorist has a right to due process in the revocation of his or her driver’s license. Due process includes the right to present evidence on one’s behalf. Clearly, this right is violated if an individual is denied the ability to obtain evidence that has the ability to prove their innocence.

VI. CONCLUSION

For the foregoing reasons, the Appellee respectfully requests this honorable court to affirm the decision of the circuit court below.

Appellee requests oral argument in this case.

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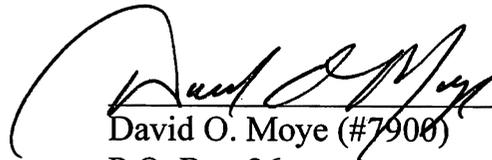
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CERTIFICATE OF SERVICE

I, David O. Moye, hereby certify that I have served a copy of the foregoing Appellee's Summary Response to Brief of Appellant to the attorneys for all parties, or if such parties are not represented by an attorney, to the parties themselves, by depositing an exact copy in the United States Mail, Certified, and postage pre-paid:

Done this 15th day of April, 2014

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