

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

F. DOUGLAS STUMP, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner/Respondent Below,

v.

PHILLIP S. LILLY,

Respondent/Petitioner Below,

BRIEF OF APPELLANT

F. DOUGLAS STUMP, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

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NO. 31945

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F. DOUGLAS STUMP, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Appellant,

v.

PHILLIP S. LILLY,

Appellee.

BRIEF OF APPELLANT

This brief is submitted by the Appellant, F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "DMV"), pursuant to this Honorable Court's order entered September 30, 2004 in the above-cited matter.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellant seeks reversal of the *Opinion Order* entered on January 30, 2004, by the Honorable H.L. Kirkpatrick, Judge of the Circuit Court of Raleigh County (hereinafter, "Order"), in an administrative appeal styled *In Re: Petition by Phillip S. Lilly for Judicial Review of Administrative Decision Made by Roger Pritt, Commissioner, Department of Transportation, Division of Motor Vehicles, Revoking the License of Phillip S. Lilly to Operate a Motor Vehicle*, Civil Action No. 03-AA-15-K. Through its Order, the Circuit Court reversed an administrative driver's license revocation order (hereinafter, "Final Order") entered by the Commissioner, by which the Appellee Philip Lilly's (hereinafter, "Appellee" or "Lilly") privilege to drive was revoked for driving under the influence

of alcohol (hereinafter, "DUI") and for refusal to submit to the designated secondary chemical test (hereinafter, "Implied Consent"), effective September 5, 2003.

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from the Final Order, wherein the Commissioner revoked Appellee's privilege to drive in West Virginia for a period of ten years¹ for DUI and Implied Consent. The Circuit Court reversed the Final Order upon the grounds that there was an insufficient foundation laid for introduction of field sobriety tests, that Appellee was not provided with a written copy of the Implied Consent Statement, and that there was insufficient evidence on the record as a whole to support the revocation.

B. THE ADMINISTRATIVE PROCEEDINGS

Appellee was arrested on January 19, 2002, by Deputy L. D. Lilly (hereinafter, "Dep. Lilly"), of the Raleigh County Sheriff's Department, for DUI. Dep. Lilly apprised the DMV of Appellee's arrest by submitting the requisite "Statement of Arresting Officer."²

After reviewing the Statement of Arresting Officer, the DMV issued an initial Order of Revocation³, dated January 31, 2002, concurrently revoking Appellee's privilege to drive in West Virginia for ten years for DUI and Implied Consent, and thereafter pending completion of the safety and treatment program and payment of the pertinent costs and fees.

¹The revocation continues in effect until Respondent completes a Safety and Treatment Program and pays all pertinent fees and costs. Final Order at 8.

²Exhibit 2 of the Certified Record as submitted to the Circuit Clerk of Raleigh County, West Virginia on October 10, 2003 (hereinafter, "Record Exhibit ___").

³Record Exhibit 3.

The administrative hearing took place on February 25, 2003. By Final Order of the Commissioner, effective September 5, 2003, the Appellee's privilege to drive was revoked for DUI and Implied Consent for concurrent periods of ten years for each offense.

On September 4, 2003, Appellee filed a *Petition* in the Circuit Court of Raleigh County. On January 26, 2004, a hearing on the petition was had before the Honorable H.L. Kirkpatrick, at which Randy Hoover, Esquire, counsel for Appellee, and Raleigh County Prosecuting Attorney Larry Frail presented argument. The court issued its Order on January 30, 2004, reversing the Final Order of the Commissioner. It is from this Order that the present appeal is taken.

II.

STATEMENT OF THE FACTS

On January 19, 2002, Dep. Lilly, an officer of the Raleigh County Sheriff's Department, responded to a 911 call at 117 Ridge Avenue in Princewick, Raleigh County, West Virginia. Transcript of Administrative Hearing⁴ held on February 25, 2003, at 5 (hereinafter, "Tr. at _"). Dep. Lilly observed tire tracks going across the yard, under a clothesline and over a windmill. Tr. at 5. He then observed a Chevrolet S-10 sitting in the yard, with the motor revving and the tires spinning. Tr. at 6. While interviewing the driver of the truck, who was the Appellee, Appellee stated that he had gotten a little bit off the road and was trying to get back on the road. Tr. at 6. Dep. Lilly noticed a very strong odor of alcoholic beverage on Lilly's breath, and noted that his speech was slurred. Tr. at 6. Dep Lilly observed that Lilly was staggering, and had slurred speech, and bloodshot, red and glassy eyes. Tr. at 6.

⁴Record Exhibit 20.

Dep. Lilly had Appellee walk to a flat parking area made of asphalt and then asked Appellee to submit to field sobriety tests. After Dep. Lilly explained the one-leg stand test and demonstrated it for Lilly, he attempted the test. Lilly used his arms for balance and put his feet down. He could not perform the test as instructed, and almost fell over. Tr. at 7. Dep. Lilly explained the walk-and-turn test to Lilly and demonstrated it for him. Lilly said he could not do the test and refused further field sobriety testing. Tr. at 7.

Dep. Lilly placed Lilly under arrest for DUI and transported him to the Raleigh County Sheriff's Office. Tr. at 7. After they arrived at the Sheriff's Office, Dep. Lilly read and explained the Implied Consent Statement to Lilly, who indicated that he understood it. Tr. at 7. He refused to sign the statement and to submit to the test. Dep. Lilly then waited 20 minutes and once again asked Lilly to submit to the test. He once again refused to sign the statement and to submit to the test. Tr. at 7. Whereupon, Dep. Lilly waited another 15 minutes and once again asked Lilly to submit to the test, and he refused. Tr. at 7.

Following the administrative hearing, the Commissioner issued the Final Order in which he found that there was sufficient evidence to show that Lilly was DUI on January 19, 2002, and that he refused to submit to a finally designated secondary chemical test. By the Final Order, the Appellee's privilege to drive was revoked for concurrent terms of ten years for DUI and ten years for Implied Consent effective September 5, 2003.

III.

ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED IN HOLDING THAT THERE WAS NOT AN ADEQUATE FOUNDATION LAID BY THE ARRESTING OFFICER TO PERMIT INTRODUCTION OF EVIDENCE OF THE FIELD SOBRIETY TESTS.
- II. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLEE HAD NOT BEEN PROVIDED WITH A COPY OF THE IMPLIED CONSENT STATEMENT AND IN REFUSING TO CONSIDER EVIDENCE OF THE APPELLEE'S REFUSAL TO SUBMIT TO THE SECONDARY CHEMICAL TEST.
- III. THE CIRCUIT COURT ERRED IN HOLDING THAT THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED TO SHOW THAT APPELLEE WAS DUI.

IV.

POINTS AND AUTHORITIES

- A. In reviewing the decision of the circuit court, following the circuit court's review of the decision of an administrative agency, this Court reviews *de novo* conclusions of law and application of law to the facts. *Webb v. West Virginia Bd. of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 (2002)(per curiam).
- B. "In reviewing the judgment of a 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).
- C. "If a person initially refuses to submit to the designated secondary chemical test after being informed in writing of the consequences of such refusal, he shall be informed orally and in writing that after fifteen minutes said refusal shall be deemed to be final and the arresting officer shall after said period of time expires have no further duty to provide the

person with an opportunity to take the secondary test." W. Va. Code § 17C-5-7(a).

- D. In reviewing a contested case, the circuit court is required to examine the record of the proceeding below to ascertain whether there is evidence to support the administrative agency's decision; and such examination is to be conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts. W. Va. Code § 29A-5-4(g); *Rice v. Consolidated Public Retirement Bd. of State of W.Va.*, 199 W.Va. 214, 483 S.E.2d 560 (1997)(per curiam).
- E. The State must show, by a preponderance of the evidence, that the Petitioner operated a motor vehicle upon a public street or highway, exhibited symptoms of intoxication and had consumed alcoholic beverages. *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984).
- F. The revocation was upheld based upon the driver's weaving while driving, officer's detection of the smell of beer on the driver, the fact that the appellant's vehicle had been weaving on the highway, and the results of a horizontal gaze nystagmus test of the driver's one good eye. *Boley v. Cline*, 193 W.Va. 311, 456 S.E.2d 38 (1995) (per curiam).
- G. This Court upheld the revocation upon the arresting officer's testimony that upon stopping the appellee, he smelled alcohol and the appellee flunked two sobriety field tests. *West Virginia Division of Motor Vehicles v. Cline*, 188 W.Va. 273, 423 S.E.2d 882 (1992)(per curiam).
- H. Marjorie M. Donahue was sitting in the driver's seat of the vehicle, and according to the trooper's testimony she admitted that she had been driving the vehicle. The trooper noticed the odor of alcohol on her breath. Further, according to the trooper's testimony, Ms. Donahue was unable to perform field sobriety tests adequately. The arresting officer had "reasonable grounds to believe the person [Ms. Donahue] to have been driving a motor vehicle upon a public highway while under the influence of intoxicating liquor." *Donahue v.*

Cline, 190 W.Va. 98, 102, 437 S.E.2d 262, 266 (1993) (per curiam).

- I. An accident occurred on April 14, 1973, and a state trooper arrived at the scene some twenty-five minutes after the accident. Isaac Byers was sitting upright in the vehicle in a semi-conscious state. When the trooper leaned into the vehicle, he detected the strong odor of an alcoholic beverage. This Court concluded that there was adequate probable cause for the arrest. *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976).
- J. Field sobriety test results can establish probable cause for an arrest, and requisite proof to demonstrate driving under the influence of alcohol. *Hill v. Cline*, 193 W. Va. 436, 440, 457 S.E.2d 113, 117 (1995); *Boley v. Cline*, 193 W. Va. 311, 314, 456 S.E.2d 38, 41(1995)(per curiam).

V.

STANDARD OF REVIEW

This Court's review of this matter is controlled by the West Virginia Administrative Procedures Act. In reviewing the decision of the circuit court, following the circuit court's review of the decision of an administrative agency, this Court reviews *de novo* conclusions of law and application of law to the facts. *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002)(per curiam). However, "In reviewing the judgment of a 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). "The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts." *Donahue v. Cline*, 190 W. Va. 98,102, 437 S.E.2d 262, 266 (1993) (per curiam) citing *Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187

W. Va. 312, 418 S.E.2d 758 (1992) (per curiam). This Court may reverse, modify or vacate the Order of the circuit court. W. Va. Code § 29A-5-4.

VI.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN HOLDING THAT THERE WAS AN INSUFFICIENT FOUNDATION LAID FOR THE RESULTS OF THE FIELD SOBRIETY TESTS TO BE CONSIDERED.

In its Order, the circuit court concluded that “Although Deputy Lilly testified that he administered field sobriety tests to Petitioner Lilly, Deputy Lilly did not lay an adequate foundation for the introduction of the results of tests,” (Order at 4, ¶ 2.) and “The record demonstrates that Deputy Lilly never [sic] did not testify that he had been properly trained to administer field sobriety tests; and this Court finds that there was not a sufficient foundation laid for the introduction of those tests administered to Petitioner Lilly on the night of the Petitioner’s arrest.” Order at 4, ¶3. As a consequence, the circuit court did not give the results of the field sobriety tests any weight.

However, the evidence adduced is sufficient to sustain admission of Appellee’s failure of the one-leg-stand and refusal of the walk-and-turn tests as part of the basis for the finding that he was DUI. On the one-leg-stand test, Dep. Lilly explained the test and demonstrated it for him (Tr. at 6-7). Appellee used his arms for balance and put his feet down, and almost fell down. Tr. at 7. On the walk-and-turn test, Dep. Lilly explained how to do the test, and demonstrated for Appellee. However, Appellee refused to perform that test or any other field sobriety testing. Tr. at 7.

The Kanawha County circuit court case cited by Appellee, *Bias v. Cline*, Civil Action No. 94-AA-207, does not have precedential value before this Court. Moreover, *Bias* does not undermine

the evidence presented in this case. Despite the circuit court's admonitions in *Bias*, nothing in West Virginia law requires that the guidelines promulgated by the National Highway Transportation Safety Administration must be adhered to in their entirety: they are guidelines for optimal administration of field sobriety tests. It is rare that conditions are perfect for administration of these tests. Dep. Lilly was a member of the Raleigh County Sheriff's Department; thus, it may be judicially recognized that he was not a lay person regarding field sobriety tests. He testified fully about the circumstances surrounding his attempt to administer field sobriety tests. He went through the standardized procedure of explaining and demonstrating the tests.

There is nothing in statutory or case law in West Virginia that mandates a particular standard, including the guidelines promulgated by the National Highway Transportation Safety Administration, for administration of field sobriety tests. Although police officers are trained in how to administer field sobriety tests and to judge the results thereof, they are not expert witnesses. For that reason, and for the reason that W. Va. Code §29A-5-2 "could be interpreted to indicate something less than strict adherence to the Rules of Evidence" (*Order Denying Respondent's Motion to Vacate the Courts "Opinion and Final Order", Bias v. Cline, supra* at 2), W.V.R.E. Rule 702 does not preclude the evidence in this case. In case law to date, revocations have been upheld on officers' testimony regarding the results of the tests, as a purely factual matter. *Cunningham v. Bechtold*, 186 W.Va. 474, 413 S.E.2d 129 (1991)(per curiam); *Hill v. Cline*, 193 W.Va. 436, 457 S.E.2d 113 (1995); *Hinerman v. West Virginia Dept. of Motor Vehicles*, 189 W.Va. 353, 431 S.E.2d 692 (1993)(per curiam); *Simon v. West Virginia Dept. of Motor Vehicles*, 181 W.Va. 267, 382 S.E.2d 320 (1989); *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997).

The evidence of field sobriety testing is *de minimus* in this case and hardly supports reversal of the Final Order. Appellee only submitted to the one-leg stand test, and he failed that test. He refused to submit to further tests. Even in the absence of evidence of the field sobriety tests, the Final Order must be affirmed on the basis that there was a preponderance of the evidence which showed that Appellee was DUI and refused to submit to the secondary chemical test.

II. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLEE HAD NOT BEEN PROVIDED WITH A COPY OF THE IMPLIED CONSENT STATEMENT AND IN REFUSING TO CONSIDER EVIDENCE OF THE RESPONDENT'S REFUSAL TO SUBMIT TO THE SECONDARY CHEMICAL TEST.

In its Order, the circuit court found that "Close scrutiny of the entirety of the record leads this Court to conclude that Petitioner Lilly was not provided with a written copy of the Implied Consent Statement containing the penalties for refusal to submit to a secondary chemical test..." Order at 4, ¶5. However, this is not supported by the record. In fact, it is completely contradicted by the record.

The undisputed testimony of Dep. Lilly established that he read and explained the Implied Consent form to Appellee, and Appellee indicated that he understood it. Tr. at 7. This testimony in itself established that Appellee was presented with the Implied Consent form. Appellee declined to sign the form and take the test. Tr. at 7. Whereupon, Dep. Lilly waited twenty minutes and then asked Appellee to sign the Implied Consent Form and take the test, both of which requests Appellee declined to perform. Tr. at 7. Although a third request is not required by statute, Dep. Lilly waited another 15 minutes and once again asked Appellee to submit to the test, and once again Appellee

refused. Tr.at 7. The Implied Consent form⁵ reflects that the refusal was at 2:05 on January 19, 2002.

By statute, if a driver is arrested for driving under the influence of alcohol and

refuses to submit to any secondary chemical test, the tests shall not be given: Provided, That prior to such refusal, the person is given a written statement advising him that his refusal to submit to the secondary test finally designated will result in the revocation of his license to operate a motor vehicle in this state for a period of at least one year and up to life. If a person initially refuses to submit to the designated secondary chemical test after being informed in writing of the consequences of such refusal, he shall be informed orally and in writing that after fifteen minutes said refusal shall be deemed to be final and the arresting officer shall after said period of time expires have no further duty to provide the person with an opportunity to take the secondary test.

W. Va. Code § 17C-5-7(a).

Dep. Lilly met and exceeded the statutory requirements for presenting implied consent information and opportunities to submit to the Intoxilyzer test. In terms of a refusal to take the designated secondary chemical test, the only time period of any moment is the fifteen minutes between the first refusal and the second time the Implied Consent form is read to the arrested driver. A second refusal at that point is deemed final and the officer is not under any obligation to offer the driver any further opportunity to reconsider his or her refusal. W. Va. Code § 17C-5-7. Dep. Lilly's testimony reflects that he responded to the call at 12:42 on January 19, 2002 (Tr. at 5). The Statement of Arresting Officer shows that the arrest took place at 12:58. By 2:05 Appellee had refused to submit to the Intoxilyzer test or even to sign the Implied Consent form. (Tr. at 7; Exhibit A). This includes three opportunities for the Appellee to submit to the Intoxilyzer test; one more

⁵The Implied Consent form was enclosed with the "Statement of Arresting Officer" and was made "State Exhibit 1" (Record Exhibit 1) at the administrative hearing (Tr.at 4), is appended hereto as "Exhibit A".

than is required by law. Further evidence of Appellee's refusal is contained on the Intoxilyzer ticket, which also accompanied the Statement of Arresting officer submitted to the DMV. (Record Exhibit 2).

The evidence adduced at the administrative hearing demonstrated that Dep. Lilly complied with both the spirit and the letter of the implied consent law. Appellee was fully and properly apprised of the potential consequences of his refusal to take the designated secondary chemical test *and* he was thrice presented with the Implied Consent Statement. This is evidenced by Dep. Lilly's testimony that on three occasions he asked Appellee to sign the Implied Consent Statement and Appellee refused. There is no basis for the circuit court's refusal to consider evidence of the implied consent violation because Appellee "was not provided with a written copy of the Implied Consent Statement". Order at 5, ¶6. The Order must be reversed on this ground.

III. THE CIRCUIT COURT ERRED IN HOLDING THAT THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED TO SHOW THAT RESPONDENT WAS DUI.

In its Order, the circuit court found that there was not enough evidence, under the "*Albrecht* standard", to sustain a revocation based upon DUI. The circuit court noted that "the only relevant evidence presented by Deputy Lilly to the Commissioner was that the Deputy observed Petitioner Lilly had bloodshot and glassy eyes; had slurred speech; and had an odor of alcohol on his breath." Order at 5, ¶9. The circuit court then concluded, "The Court finds that the circumstances surrounding Petitioner Lilly's arrest do not rise to the level of those circumstances in the *Albrecht* opinion." Order at 5, ¶10. On this issue, the circuit court inappropriately substituted its judgment for

that of the Commissioner, and erred in failing to consider the totality of the evidence and in finding that the evidence was insufficient to establish that Appellee was DUI.

In reviewing a contested case, the circuit court is required to examine the record of the proceeding below to ascertain whether there is evidence to support the administrative agency's decision; and such examination is to be conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts. W. Va. Code 29A-5-4(g); *Rice v. Consolidated Public Retirement Bd. of State of W.Va.*, 199 W. Va. 214, 483 S.E.2d 560 (1997)(per curiam). In the Final Order, the Commissioner found that "Sufficient evidence was presented to show that the Respondent drove a motor vehicle in this state while under the influence of alcohol on January 19, 2002." Final Order at 7, ¶ 9. On the same facts, the circuit court inappropriately substituted its judgment and found that "sufficient proof under the preponderance of the evidence standard was not presented to show that Petitioner Lilly had consumed alcoholic beverages and then operated a motor vehicle in this State while under the influence of alcohol." Order at 5-6, ¶ 11.

The circuit court failed to consider all of the circumstances which led to the Commissioner's finding that the Appellee was DUI. The totality of the evidence submitted is more than sufficient to show by a preponderance of the evidence that Appellee drove a vehicle in this state while under the influence of alcohol. He had driven into a yard⁶, the explanation for which was that "he had

⁶ In footnote 4 of *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984) this Court, citing *Reilley v. Byard*, 146 W.Va. 292, 301, 119 S.E.2d 650, 655 (1961), noted: "commenting on the actions of a motorist who left the highway and collided with a telephone pole, [this Court] stated: 'Rational men do not purposely operate motor vehicles in such manner. Not only traffic regulations, but also prudence and fundamental human instincts of self-preservation dictate otherwise.'" 173 W. Va. 273, 314 S.E.2d 865.

gotten a little bit off the road and was trying to get back to the road". Tr. at 6. Appellee was sitting in his vehicle, revving the engine and spinning the tires.⁷ Tr. at 6. This was not the Appellee's yard, as evidenced by Dep. Lilly's reference to "this complainant's back yard". Tr. at 6. Dep. Lilly smelled "a very strong odor" of alcohol on Appellee's breath, and noted that his speech was slurred. Appellee's eyes were bloodshot and glassy. Tr. at 6. When Dep. Lilly and Appellee were walking up the hill to a parking area, Appellee was, in Dep. Lilly's words, "having a really hard time walking up the hill. He was staggering, appeared to be very intoxicated." Tr. at 6. This undisputed evidence alone is enough to sustain the license revocation.

Cases which illustrate the amount of evidence necessary for a finding, by the preponderance of the evidence, that a driver was DUI, support a finding in the present case that Appellee was DUI. Under *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984), the State must show, by a preponderance of the evidence, that a driver operated a motor vehicle upon a public street or highway, exhibited symptoms of intoxication and had consumed alcoholic beverages. That standard was in fact met in this case. In *Albrecht*, the appellant lost control of his vehicle and crashed, his vehicle smelled of alcohol, and he admitted to the arresting officer that he had been drinking. In *Boley v. Cline*, 193 W.Va. 311, 456 S.E.2d 38 (1995) (per curiam), the revocation was upheld based upon the driver's weaving while driving, the officer's detection of the smell of beer on the driver,

⁷A passage from an opinion of this Court is pertinent to the facts of this case: "It is obvious that the defendant lost control of the Buick automobile he was operating. There can be no other reasonable conclusion from the evidence. Obviously he did not purposely drive the Buick off the hard surface, across the 15-foot berm and into a telephone pole with severe force and violence. Rational men do not purposely operate motor vehicles in such manner. Not only traffic regulations, but also prudence and fundamental human instincts of self-preservation dictate otherwise." *Reilley v. Byard*, 146 W.Va. 292, 301, 119 S.E.2d 650, 655 (1961).

the fact that the appellant's vehicle had been weaving on the highway, and the results of a horizontal gaze nystagmus test of the driver's one good eye. *Boley*, 193 W. Va. at 314, 456 S.E.2d at 41. In both cases, the revocation was affirmed, and this Court found that there was sufficient evidence to support the revocation under the preponderance of the evidence standard.

The facts in *Donahue v. Cline*, 190 W.Va. 98, 437 S.E.2d 262 (1993) (per curiam) and *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976) are substantially similar to the present case, and this Court affirmed the license revocations in each of these cases:

The evidence adduced at Ms. Donahue's hearing showed that a police officer who was investigating an accident found a vehicle lodged halfway in a fence along the side of a road. Marjorie M. Donahue was sitting in the driver's seat of the vehicle, and according to the trooper's testimony she admitted that she had been driving the vehicle. The trooper noticed the odor of alcohol on her breath. Further, according to the trooper's testimony, Ms. Donahue was unable to perform field sobriety tests adequately.

.....

In the *Byers* [*State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976)] case, the facts were somewhat similar to those presented in the present case. An accident occurred on April 14, 1973, and a state trooper arrived at the scene some twenty-five minutes after the accident. Isaac Byers was sitting upright in the vehicle in a semi-conscious state. When the trooper leaned into the vehicle, he detected the strong odor of an alcoholic beverage. The trooper believed that Mr. Byers appeared to be intoxicated. This Court concluded that there was adequate probable cause for the arrest.

In the present case, the Court believes that the facts were sufficiently similar to the *Byers* case for Trooper Ensminger to believe that Ms. Donahue was under the influence of alcohol and that his testimony demonstrated that he had "reasonable grounds to believe the person [Ms. Donahue] to have been driving a motor vehicle upon a public highway while under the influence of intoxicating liquor."

Donahue, 190 W. Va. 102, 437 S.E.2d 266. In the present case, the location of Appellee's vehicle, and the odor of alcohol on Appellee's breath served as reasonable grounds to believe that Lilly had been operating a motor under the influence of alcohol.

The field sobriety tests are also evidence of the fact that Appellee was DUI. On the one-leg-stand test, Appellee could not perform the test as instructed; he used his arms for balance, put his feet down and almost fell down during the test. He then refused to perform the walk-and-turn test, or any further tests offered by Dep. Lilly, including the Intoxilyzer test. This Court has recognized that field sobriety test results can establish probable cause for an arrest, and requisite proof to demonstrate driving under the influence of alcohol. *Hill v. Cline*, 193 W. Va. 436, 440, 457 S.E.2d 113, 117 (1995); *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995) (per curiam) (quoting *Cunningham v. Bechtold*, 186 W. Va. 474, 413 S.E.2d 129 (1991) (per curiam)). According to the *Boley* Court, a driver's "failure to satisfactorily complete field sobriety tests, including the horizontal gaze nystagmus test, sufficiently warranted a police officer 'in believing that the appellant was driving under the influence of alcohol.'" *Boley*, 193 W. Va. at 314, 456 S.E.2d at 41 (quoting *Cunningham*, 186 W. Va. at 478, 413 S.E.2d at 133). In *West Virginia Division of Motor Vehicles v. Cline*, 188 W. Va. 273, 423 S.E.2d 882 (1992)(per curiam), this Court upheld the revocation upon the arresting officer's testimony that upon stopping the appellee, he smelled alcohol and the appellee flunked two sobriety field tests. The evidence presented by Dep. Lilly certainly surpassed the quantum of evidence in cases such as these. Thus, the totality of the evidence is sufficient to establish that Appellee was DUI, especially in light of the *Albrecht*, *Boley*, *Byers* and *Donahue* cases, *supra*.

The circuit court clearly erred in finding that there was insufficient evidence of DUI to uphold the revocation. It inappropriately substituted its judgment for that of the Commissioner, and

erred in failing to consider the totality of the evidence and in finding that the evidence was insufficient to establish that Appellee was DUI. The Order must be reversed on this ground.

VII.

RELIEF REQUESTED


WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant hereby prays that the Order entered by the circuit court of Raleigh County on January 30, 2004, reversing the Final Order which took effect on September 5, 2003, be reversed and vacated, and remanded with directions to affirm the Final Order.

Respectfully submitted,

**F. DOUGLAS STUMP, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

By Counsel

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



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Office of the Attorney General
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DPS 47A
(REV. 5-7-95)

WEST VIRGINIA IMPLIED CONSENT STATEMENT

FOR PERSONS UNDER 18 YEARS OF AGE

PURSUANT TO STATE LAW (CHAPTER 17D, ARTICLE 5, SECTION 6A), I AM NOW DIRECTING YOU TO TAKE AN APPROVED CHEMICAL TEST OF YOUR BREATH FOR THE PURPOSE OF DETERMINING THE ALCOHOLIC CONTENT OF YOUR BLOOD. IF YOU REFUSE TO SUBMIT TO THIS TEST, YOUR PRIVILEGE TO OPERATE A MOTOR VEHICLE IN THIS STATE WILL BE REVOKED FOR A PERIOD OF AT LEAST 30 DAYS AND UP TO LIFE.

DEPENDANT SIGNATURE

OFFICER SIGNATURE

DATE

TIME

FOR COMMERCIAL DRIVERS

PURSUANT TO STATE LAW (CHAPTER 17E, ARTICLE 1, SECTION 15), I AM NOW DIRECTING YOU TO TAKE AN APPROVED TEST FOR THE PURPOSE OF DETERMINING THE ALCOHOLIC CONTENT OF YOUR BLOOD. YOUR REFUSAL TO SUBMIT TO THIS TEST WILL RESULT IN YOUR DISQUALIFICATION TO OPERATE A COMMERCIAL MOTOR VEHICLE IN THIS STATE FOR A PERIOD OF AT LEAST ONE YEAR AND UP TO LIFE.

DEPENDANT SIGNATURE

OFFICER SIGNATURE

DATE

TIME

FOR ALL OTHER DRIVERS

PURSUANT TO STATE LAW (CHAPTER 17C-5-7), I AM NOW DIRECTING YOU TO TAKE AN APPROVED CHEMICAL TEST OF YOUR BREATH FOR THE PURPOSE OF DETERMINING THE ALCOHOLIC CONTENT OF YOUR BLOOD.

IF YOU REFUSE TO TAKE THIS TAKE THIS TEST, YOUR PRIVILEGE TO OPERATE A MOTOR VEHICLE IN THIS STATE WILL BE SUSPENDED FOR A PERIOD OF AT LEAST ONE YEAR AND UP TO LIFE.

IF YOU REFUSE, YOU WILL HAVE FIFTEEN MINUTES IN WHICH TO CHANGE YOUR MIND, AFTER WHICH TIME YOUR REFUSAL WILL BE DEEMED FINAL AND THE ARRESTING OFFICER WILL HAVE NO FURTHER DUTY TO OFFER YOU THIS APPROVED SECONDARY CHEMICAL TEST.

x Refused

DEPENDANT SIGNATURE

J. D. Talley

OFFICER SIGNATURE

01-19-02

DATE

0205

TIME

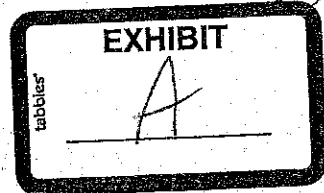
PENALTIES FOR REFUSAL TO TAKE A SECONDARY CHEMICAL TEST OF YOUR BLOOD, BREATH OR URINE

CHAPTER 17C, ARTICLE 5, SECTION 4 OF THE WEST VIRGINIA CODE OF 1981, AS AMENDED, PROVIDES THAT IF YOU DRIVE A MOTOR VEHICLE IN THIS STATE YOU SHALL BE DEEMED TO HAVE GIVEN YOUR CONSENT BY THE OPERATION THEREOF TO A SECONDARY CHEMICAL TEST OF YOUR BLOOD, BREATH OR URINE FOR THE PURPOSE OF DETERMINING THE ALCOHOLIC CONTENT OF YOUR BLOOD.

A SECONDARY TEST OF BLOOD, BREATH OR URINE SHALL BE INCIDENTAL TO A LAWFUL ARREST AND SHALL BE ADMINISTERED AT THE DIRECTION OF THE ARRESTING OFFICER HAVING REASONABLE GROUNDS TO BELIEVE THAT YOU HAVE BEEN DRIVING A MOTOR VEHICLE IN THIS STATE WHILE UNDER THE INFLUENCE OF ALCOHOL, CONTROLLED SUBSTANCES OR DRUGS.

YOU HAVE THE RIGHT TO REFUSE TO TAKE A BLOOD TEST, BUT YOUR REFUSAL TO SUBMIT TO A BREATH OR URINE TEST WILL RESULT IN THE REVOCATION OF YOUR DRIVER'S LICENSE.

IF YOU REFUSE TO SUBMIT TO THE SECONDARY TEST FINALLY DESIGNATED, YOUR LICENSE TO OPERATE A MOTOR VEHICLE WILL BE REVOKED FOR A PERIOD OF AT LEAST ONE YEAR AND UP TO LIFE, IN ACCORDANCE WITH CHAPTER 17C, ARTICLE 5, SECTION 7 OF THE WEST VIRGINIA CODE.



NO. 31945

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

F. DOUGLAS STUMP, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner/Respondent Below,

v.

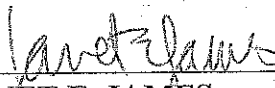
PHILLIP S. LILLY,

Respondent/Petitioner Below,

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Brief of Appellant* were served upon petitioner by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 8th day of November, 2004, addressed as follows:

Randy D. Hoover, Esquire
Post Office Box 5521
Beckley, West Virginia 25801



JANET E. JAMES