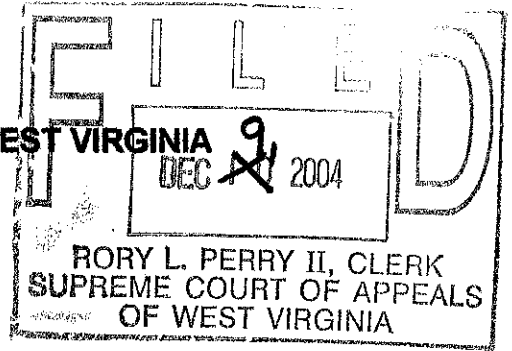


NO. 31945

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,**

**BRIEF OF APPELLEE**

**Respectfully Submitted,  
PHILLIP S. LILLY  
By Counsel,**

**RANDY D. HOOVER  
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NO. 31945

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellant,

v.

PHILLIP S. LILLY,

Appellee,

**BRIEF OF APPELLEE**

This brief is submitted by the Appellee, Phillip S. Lilly, 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**

Appellee seeks affirmation of the *Opinion Order* entered on January 30, 2004, by the Honorable H.L. Kirkpatrick, III, Judge of the Circuit Court of Raleigh County, in an administrative appeal styled *In Re: Petitioner 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. By Order, the Circuit Court reversed the Final Order entered by the Commissioner on September 5, 2004, revoking Appellee Phillip S. Lilly's license to operate a motor vehicle for driving under the

influence of alcohol and for refusing to submit to the designated secondary chemical test.

**A. THE ADMINISTRATIVE APPEAL**

In the administrative appeal, Appellee filed a Petition for Judicial Review of the Final Order wherein the Commissioner revoked Appellee's privilege to operate a motor vehicle in the State of West Virginia for a period of ten (10) years for driving under the influence of alcohol and refusing to submit to the secondary chemical test. The Commissioner's Final Order was reversed by Judge Kirkpatrick, finding insufficient foundation laid for introduction of the field sobriety tests, failure of the State to provide Appellee with a copy of the Implied Consent Statement and insufficient evidence on the record as a whole to warrant the revocation.

**B. THE ADMINISTRATIVE PROCEEDINGS**

On January 19, 2002, Appellee was arrested by Deputy L.D. Lilly of the Raleigh County Sheriff's Department for driving under the influence. Thereafter, Deputy Lilly submitted his "Statement of the Arresting Officer" to the Division of the Motor Vehicles. Subsequently, the Division issued an Order of Revocation dated January 31, 2002 revoking Appellee's privilege to operate a motor vehicle in the State of West Virginia, for ten (10) years for driving under the influence of alcohol and refusing to submit to the secondary chemical test.

An administrative hearing was held on February 25, 2003. The Commissioner thereafter issued a Final Order, effective September 5, 2003, upholding the original Order of Revocation revoking Appellee's privilege to operate a motor vehicle in the

State of West Virginia, for ten (10) years for driving under the influence of alcohol and refusing to submit to the secondary chemical test.

Appellee filed a Petition in the Circuit Court of Raleigh County on September 4, 2003, and scheduled a Judicial Review of the matter on January 26, 2004. On that date, arguments were heard by the Honorable H.L. Kirkpatrick, III, by Randy D. Hoover, counsel for Appellee and Larry Frail, Prosecuting Attorney for Raleigh County. Judge Kirkpatrick issued his Order reversing the Final Order of the Commissioner on January 30, 2004.

## II.

### STATEMENT OF FACTS

On January 19, 2002, at 12:42 a.m., Deputy Lilly responded to a 911 call at 117 Ridge Avenue in Princewick, Raleigh County, West Virginia. Transcript of Administrative Hearing held on February 25, 2003, at 5 (hereinafter, "Tr. at \_\_\_"). Upon arrival Deputy Lilly noticed a vehicle in the backyard of that residence with its headlights on. Tr. at 5. Deputy Lilly got onto the property of 119 Ridge Avenue and observed a vehicle in the backyard of that residence. Tr. at 5. Deputy Lilly saw tracks leading from the driveway to the vehicle. Tr. at 6. The vehicle's motor was revving and the tires were spinning. Tr. at 6. While interviewing the driver of the truck Appellee stated that he had gotten a little bit off the road and was trying to get back to the road. Tr. at 6. Deputy Lilly noticed a very strong odor of an alcoholic beverage about Appellee's breath. Tr. at 6. Appellee's speech was slurred and his eyes were bloodshot, red and glassy. Tr. at 6. Appellee walked up a hill with Deputy Lilly to a

parking area to perform field sobriety tests. Appellee staggered while walking up the hill. Tr. at 6.

Deputy Lilly had Appellee walk to a flat parking area made of asphalt and then asked Appellee to submit to field sobriety tests. After Deputy Lilly explained the one-leg stand test and demonstrated it for Appellee, Appellee attempted the test. Appellee 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. Deputy Lilly explained the walk-and-turn test to Appellee and demonstrated it for him. Appellee said he could not do the test and refused further field sobriety testing. Tr. at 7.

Deputy Lilly placed Appellee 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, Deputy Lilly read and explained the Implied Consent Statement to Appellee, who indicated that he understood it. Tr. at 7. Appellee refused to sign the statement and to submit to the test. Deputy Lilly then waited twenty minutes and once again asked Appellee to submit to the test. Appellee once again refused to sign the statement and submit to the test. Tr. at 7. Whereupon, Deputy Lilly waited another fifteen minutes and once again asked Appellee to submit to the test, and Appellee 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 Appellee 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 an Implied Consent violation effective September 5, 2003.

III.

**ASSIGNMENTS OF ERROR**

- I. **THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THERE WAS AN INSUFFICIENT FOUNDATION LAID FOR THE RESULTS OF THE FIELD SOBRIETY TEST TO BE CONSIDERED.**
  
- II. **THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THERE WAS AN INSUFFICIENT FOUNDATION LAID FOR THE RESULTS OF THE FIELD SOBRIETY TEST TO BE CONSIDERED.**
  
- III. **THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SHOW THAT APPELLEE WAS DUI.**

IV.

**ARGUMENT**

- I. **THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THERE WAS AN INSUFFICIENT FOUNDATION LAID FOR THE RESULTS OF THE FIELD SOBRIETY TEST TO BE CONSIDERED.**

Appellant contends that the Circuit Court erred in excluding the results of the field sobriety tests because the arresting officer failed to lay a foundation for their admission. Appellee disagrees.

At the administrative hearing Appellee objected "to the admission of any scientific tests, technical tests or tests requiring specialized knowledge until proper foundation has been laid for the admission of such evidence," pursuant to Rule 702 of the West Virginia Rules of Evidence. Tr. at 4. The Administrative Procedures Act, W.Va Code §29-A-5-1, at seq. requires that the West Virginia Rules of Evidence be followed in administrative proceedings W.Va. Code §29-A-5-2(a). A field sobriety test

would certainly be considered a technical test or a test requiring specialized knowledge. Since the arresting officer offered no testimony or evidence as to his training and the reliability of the field sobriety tests, the Circuit Court's ruling was correct.

The issue of admissibility of standardized field sobriety tests was fully developed in the Circuit Court of Kanawha County in *Bias v. Cline*, Civil Action No. 94-AA-207, decided December 2000; Motion to Vacate, decided April 2001. A copy of the ORDER DENYING APPELLEE'S MOTION TO VACATE THE COURTS "OPINION AND FINAL ORDER" is attached for the Court's consideration.

Appellee argues further that "in case law to date revocations have been upheld on officer's testimony regarding the results of the tests, as purely factual matter." and cites several cases. Brief of Appellant p.9. It should be noted that in the cases cited "insufficient foundation" was not an issue and therefore the cases seem irrelevant.

**II. THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THERE WAS AN INSUFFICIENT FOUNDATION LAID FOR THE RESULTS OF THE FIELD SOBRIETY TEST TO BE CONSIDERED.**

The Circuit Court concluded that Appellee "was not provided with a written copy of the Implied Consent Statement containing the penalties for refusal to submit to a secondary chemical test as required by W.Va. Code §17C-5-7." Opinion Order p.4.

W.Va. Code §17C-5-7 provides the statutory procedure that must be followed to uphold a revocation for an implied consent violation. The statute states that if a person arrested for driving under the influence refuses to submit to any secondary chemical test, the tests shall not be given. Provided, that prior to officially charging the person with an implied consent violation, the officer must do two things: (1) give the person a

written statement advising him that his refusal to submit to the secondary chemical test will result in the revocation of his license for a period of at least one year and up to life, and (2) if after having been informed in writing of the consequences of such refusal, if the person again refuses, the officer shall inform the person orally and in writing after fifteen minute period of time the officer will have no further duty to provide the person with an opportunity to take the test. The statute is specific as to what type of oral and written information must be given to the arrestee, as well as, when this information must be given. In *Cunningham v. Bechtold*, 413 S.E.2d 129, 186, W.Va. 474,478 (1991) this Court affirmed that an officer must both read and give a copy of the implied consent form to an arrestee in order to comply with W.Va. Code §17C-5-4.

Based upon the evidence of record it cannot be established whether the officer in this case complied with the requirements of W.Va. Code §17C-5-4 and 17C-5-7. Although the officer asserts that he gave Appellee a copy of the implied consent form the record does not reflect when he did so. Tr. at 4,7.

Appellant must establish that Appellee was given a written copy at the critical time required by W.Va. Code §17C-5-4 and 17C-5-7. Since the record is void of this information the Circuit Court order should be affirmed.

**III. THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SHOW THAT APPELLEE WAS DUI.**

It is well recognized that the most reliable evidence to establish intoxication is a secondary chemical test. Such a test was not available in this case. When secondary chemical tests are not available the Courts look next to the standardized field sobriety tests when looking for objective evidence of intoxication. The Circuit Court properly

excluded the field sobriety tests in this case because the officer failed to lay a proper foundation for their admission. Opinion Order p.4

This Court, in *Albrecht v. State*, 173 W.Va. 268, 314 S.E. 2d 859, 865 (1984), a DUI case without the benefit of a secondary chemical test or field sobriety test, held that:

"when there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication and had consumed alcoholic beverages this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol."

The Circuit Court properly concluded that the admissible evidence did not meet this Court's requirement under *Albrecht*. The Circuit Court found that Appellee was operating a truck in the back yard of a residence and not a public street or highway. In the Commissioner's Finding of Fact he states Deputy Lilly was dispatched by the 911 Center to investigate a complaint of a person whom allegedly drove into a residential yard. Final Order p.2. Deputy Lilly testified that he responded to a 911 call and upon arrival noticed a vehicle in the back yard. Tr. at 5. Deputy Lilly only saw tracks leading from the driveway through the yard. Tr. at 6. Although Appellee advised Deputy Lilly that he had gotten a little off the road, the record does not reflect what type of roadway was involved. The Circuit Court's conclusion that the State failed to establish that Appellee was driving under the influence on a public street or highway should be affirmed.

The evidence regarding whether Appellee consumed alcohol, and the weight to be given to it, was also weaker in this case than in *Albrecht*. In *Albrecht* the appellant

admitted that he had consumed alcoholic beverages. Appellee made no such admission. Although Deputy Lilly detected an odor of alcohol on Appellee's breath, the officer agreed that "it's not possible to determine the extent to which a person may or may not be intoxicated by the mere smell of alcohol on his breath." Tr.at 6,7,8. This response on cross examination should be considered evidence favorable to Appellee. It gives rise to question what value, if any, should be given to such evidence. The Commissioner's finding of intoxication was based in part upon the results of the field sobriety tests. DMV Final Order, P.5. With the exclusion of the field sobriety tests and lack of a secondary chemical test, the record is replete of any objective evidence of intoxication. Accordingly, the Circuit Court's finding that the circumstances surrounding Appellee's arrest do not rise to the level of those circumstances in *Albrecht* should be affirmed.

V.

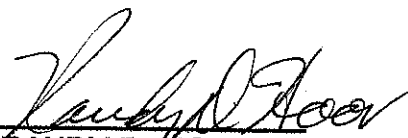
**RELIEF REQUESTED**

Wherefore, based upon the foregoing Appellee respectfully requests that the Order entered by the Honorable H.L. Kirkpatrick, III, on January 30, 2004, reversing the Commissioner's Final Order of September 5, 2003, be affirmed.

Respectfully Submitted,

PHILLIP S. LILLY

By Counsel

  
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SCOTT BLAS,

Petitioner,

v.

Civil Action No. 94-AA-207

JANE CLINE, Commissioner  
West Virginia Department of  
Motor Vehicles,

Respondent.

ORDER DENYING RESPONDENT'S MOTION TO  
VACATE THE COURT'S "OPINION AND FINAL ORDER"

This matter is before the Court on the respondent's motion to vacate the "Opinion and Final Order" entered by this Court on December 22, 2000. The respondent filed a memorandum addressing certain legal precedent cited by the petitioners and, to some extent, relied upon by the Court in its "Opinion and Final Order." The petitioners then filed a memorandum in response to the respondent's memorandum. Having reviewed the parties' respective memoranda, the Court is of the opinion to deny the respondent's motion to vacate its "Opinion and Final Order."

Without reiterating each and every point made in the "Opinion and Final Order," the Court is satisfied that its original decision is correct. There are several points which the Court desires to emphasize.

First, evidence respecting field sobriety tests is evidence which falls within Rule 702 of the Rules of Evidence, in that it is "scientific, technical or other specialized knowledge." Clearly, Rule 705 requires the witness to testify to underlying facts, including the foundation for his or her testimony, on cross-examination. The Administrative Procedures Act, W. Va. Code § 29A-5-1, et

*seq.*, requires that the Rules of Evidence be followed in administrative proceedings. W. Va. Code § 29A-5-2(a). Even to the extent that § 29A-5-2(a) could be interpreted to indicate something less than strict adherence to the Rules of Evidence, they provide guidance respecting the admissibility of and weight to be given to evidence of this nature.

Second, there is some validity to the petitioners' assertion that the respondent's position is somewhat contradictory. On the one hand, the respondent contends that field sobriety tests are reliable in proving whether or not a driver is intoxicated. The literature and the testimony presented to the commissioner's hearing examiner at the Bias hearing both indicate that the testing undertaken by the National Highway Transportation Safety Administration shows that the results of the field sobriety tests are reliable<sup>1</sup> only when administered in accordance with standardized procedures, and under certain conditions. Police officers are trained to administer the tests using the standardized procedures developed by the NHTSA. They routinely offer the results as empirical and objective evidence that the driver is intoxicated.

However, when a driver seeks to ensure that results of the field sobriety tests are vested with the reliability asserted by the officer, the respondent routinely holds, and herein he contends, that there is no need for the officer to prove that field sobriety tests are administered in accordance with the standardized procedures and under the conditions which render their results reliable. He reasons that the officers' testimony respecting the results is mere lay testimony, describing certain behavior which would allow any individual to determine whether or not the driver is intoxicated. If the respondent were correct in this contention, there would be no need to establish standardized

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<sup>1</sup> As the Court noted in the "Opinion and Final Order," the field sobriety tests are at best 80% reliable, even when administered under the best of conditions.

procedures, determine the ideal conditions and train police officers to administer the field sobriety tests accordingly. If the commissioner were correct, to test for intoxication, anyone could make up a test, and administer it and interpret the results in any manner they desire.<sup>2</sup>

The commissioner also fails to address the fact that certain aspects of the field sobriety tests constitute evidence of intoxication only when considered within the context of the tests, e.g. beginning the tests before the officer completes the instructions, or incorrectly making the turn in the walk-and-turn test. This is not behavior which would necessarily allow a lay person to conclude that the driver is intoxicated. In order to demonstrate that these "clues" are indicia of intoxication, it is necessary for the officer to show the context in which they are considered. This can only be done by requiring the officer to lay a proper foundation.

He also ignores the fact that certain clues on field sobriety tests indicating intoxication may also be caused by other factors. A proper foundation would show whether the officer attempted to determine whether or not the other factors might be present.

Third, it appears that the courts from a majority of jurisdictions have concluded that field sobriety tests are reliable only when administered in accordance with the standardized procedures. In some instances, they have expressly required the officer to lay a foundation before testifying to the results of field sobriety tests. In other instances, it appears that the courts have reached the

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<sup>2</sup> Once again, the Court will emphasize that there are certain behaviors, such as the manner of driving, speech or movement, that could lead anybody, even a lay person, to conclude that an individual is intoxicated. It is safe to say that, in most instances, behavior that might allow a lay person to conclude that a driver is intoxicated could lead the arresting officer to the same conclusion without the necessity of administering field sobriety tests. However, field sobriety tests are not the casual observations of lay persons. Instead, because they are deemed to have added reliability when properly administered, they are generally given greater weight and are deemed to be more objective.

conclusion that the results of the field sobriety tests are reliable, and that this conclusion has been based on the premise that the tests were administered in accordance with the standardized procedures.

Finally, in conducting hearings respecting license revocations, the commissioner is acting in a quasi-judicial capacity. In doing so, is required to maintain absolute objectivity. Acting in part through his hearing examiners, his job is to determine whether or not licensed drivers are operating motor vehicles in West Virginia while intoxicated or while under the influence of alcohol. Certainly, he has no interest in revoking the licenses of drivers who are not driving under the influence.

The results of field sobriety tests shed light on the subject of whether or not a driver is operating a motor vehicle while under the influence. Except insofar as evidence is irrelevant, immaterial or unduly repetitious, the commissioner should want to hear and consider any and all evidence which would tend to bolster the reliability of field sobriety tests, or any other tests the officer may administer.<sup>3</sup> Laying a proper foundation for field sobriety tests is hardly irrelevant or immaterial. Unless the foundation is required of multiple witnesses, it is hardly repetitive. A proper foundation for field sobriety tests enhances the reliability of the test results and, consequently, the commissioner's decisions. In light of this, the Court would anticipate that the commissioner would welcome such

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<sup>3</sup> A far superior method for showing whether or not a driver is driving while intoxicated is the use of the secondary chemical test which, in virtually every case if not every case, is the breath test. Too often, the arresting officer comes to the administrative hearing unprepared to lay a proper foundation for admission of the breath test.

The breath test is far more reliable in determining statutory intoxication than the field sobriety tests. It tests for blood alcohol content, not factors that may result from intoxication, but which may also result from causes other than intoxication. The breath test does not involve the elements of subjectivity that are involved in field sobriety tests. Laying of a proper foundation for the breath test is far easier than laying the proper foundation for the field sobriety tests. The breath test makes it easier for the commissioner to determine whether an individual is driving while intoxicated, based on an objective standard.

evidence, regardless of whether it points towards or away from intoxication. The Court cannot explain the vigor with which the commissioner argues against the admission of relevant, material evidence, that can only improve the accuracy of his decisions.

Accordingly, the Court does **HEREBY ORDER** that the respondent's motion to vacate the Court's "Opinion and Final Order," entered December 22, 2000, is denied. The Court does **FURTHER ORDER** that a certified copy of this Order be sent to all parties or counsel of record. The Court notes the objection and exception of the parties, insofar as their interests are adversely affected by this Order.

ENTER this 18<sup>th</sup> day of April, 2001.

  
JUDGE

HONORABLE LOUIS H. BLOOM

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,

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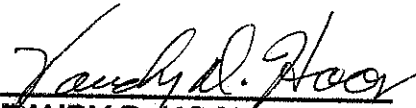
PHILLIP S. LILLY,

Respondent/Petitioner Below,

CERTIFICATE OF SERVICE

I, Randy D. Hoover, Counsel for Appellee, do hereby certify that the foregoing Brief of Appellee was served upon Petitioner by depositing a true copy thereof, postage paid, in the regular course of the United States mail this the 9th day of December, 2004, address as follows:

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