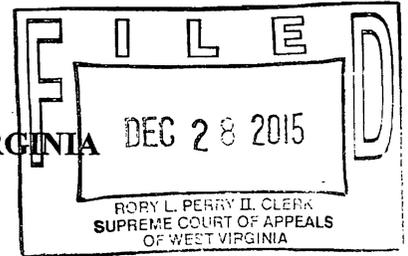


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0971



**PATRICIA S. REED, Commissioner,
Division of Motor Vehicles,**

Petitioner,

v.

PAMELA HAYNES

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

**PATRICIA S. REED,
COMMISSIONER, DIVISION OF
MOTOR VEHICLES,**

By Counsel,

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I. ASSIGNMENT OF ERROR

The circuit court erred in reversing the enhancement of Ms. Haynes' 2012 DUI license revocation.

II. STATEMENT OF THE CASE

On September 23, 2003, Ms. Haynes was driving in Parkersburg, West Virginia while under the influence of alcohol. (App.¹ at P. 245.) She was arrested by B. A. Pickens of the Wood County Sheriff's Office at 8:55 in the evening, and her blood alcohol content was .236%. (App. at P. 246.) On September 30, 2003, the West Virginia Division of Motor Vehicles ("DMV"), Petitioner herein, sent Ms. Haynes an *Order of Revocation* (case number 308257A) for driving while under the influence of alcohol ("DUI") to her address on file with the DMV. (App. at P. 247.) The order was returned to the DMV with the notation "FOE" (forwarding order expired.) (App. at P. 248.) Ms. Haynes was an Ohio resident at the time of her 2003 DUI, yet she still had a valid West Virginia license.

On October 10, 2006, Ms. Haynes faxed the DMV a proof of residency document from the Ohio Bureau of Motor Vehicles. (App. at P. 250) The document shows that she received a DUI in Ohio in 2006, and that her license was suspended. *Id.* Ms. Haynes also faxed to the DMV a *72 Hour Residential DIP Completion Report* showing that she completed a safety and treatment course. (App. at P. 251.) Because Ms. Haynes was unable to reinstate her Ohio license until she showed proof of reinstatement for her 2003 offense in West Virginia, she completed the requirements for license reinstatement in West Virginia. Namely, Ms. Haynes completed a safety and treatment class (App. at P. 251) and made a credit card payment of forty-five dollars (\$45.00) over the phone to reinstate her West Virginia license in case number 308257A. (App. at PP. 252-253.) On October

¹App. refers to the Appendix filed contemporaneously with Petitioner's brief.

11, 2006, the DMV sent Ms. Haynes a letter informing her that her driving privileges were restored in West Virginia. (App. at P. 254.)

On May 3, 2012, at 7:26 in the evening, Ms. Haynes, once again a West Virginia resident (App. at PP. 255-256), was arrested for DUI at a sobriety checkpoint in Kanawha County. (App. at PP. 309-315.) Her blood alcohol content was .108%. The DMV again revoked Ms. Haynes' driving privileges and enhanced the penalty based upon her 2003 DUI revocation. (App. at P. 342.) Even though the 2012 DUI was Ms. Haynes' third offense in a ten year period, West Virginia treated it as a second offense. Ms. Haynes appealed the order to the Office of Administrative Hearings ("OAH") (App., at P. 266), and the OAH upheld the order of revocation for DUI. (App., at PP. 287-299.) The OAH had no authority to rule on Ms. Haynes' objections to the enhanced penalty.

On September 26, 2014, Ms. Haynes filed a *Petition for Review and Writ of Prohibition, Administrative Appeals Docketing Statement, Civil Case Information Sheet and Designation of Record* in the Circuit Court of Kanawha County. (App. at PP. 14-36.) On March 12, 2015, Petitioner filed a separate *Petition for Writ of Prohibition* in the Circuit Court of Kanawha County (App. at PP. 169-173), and on March 30, 2015, the circuit court entered an *Order on Consolidation and Transfer* by which the two matters were consolidated. (App. at P. 202.) On August 27, 2015, the circuit court entered its *Final Order Granting the Writ of Prohibition Excluding the Previous Offense, Affirming the Decision Below, and Remanding Back for the Purpose of Reconsidering the Administrative Penalty*. (App. at PP. 2-13.) The DMV appeals the enhancement portion of the circuit court's final order which was brought to the circuit court via an extraordinary remedy but not the circuit court's affirmance of the OAH's final order on the merits.

III. SUMMARY OF ARGUMENT

Ms. Haynes has three DUI revocations. The West Virginia DMV is treating her as a repeat offender because two of those revocations were West Virginia incidents while she held a valid West Virginia license. Ms. Haynes, however, wants to be treated as a first offender. The DMV satisfied its statutory requirement for service by sending an *Order of Revocation* to Ms. Haynes' address of record in 2003 and further provided actual notice in 2006 when she could not reinstate her Ohio driver's license until she satisfied West Virginia's reinstatement requirements for the 2003 offense. In 2006, when Ms. Haynes learned of her 2003 revocation in West Virginia, she did not seek a writ of prohibition or mandamus in West Virginia. Instead, Ms. Haynes completed a safety and treatment course and paid reinstatement fees to West Virginia. Accordingly, Ms. Haynes consented to her 2003 DUI revocation, and her 2012 DUI penalty must be enhanced by her 2003 DUI offense.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to W. Va. Rev. R. App. Pro. 19 (2010), the Commissioner requests oral argument in this case because this matter involves an assignment of error in the application of settled law and a result against the weight of the evidence.

V. ARGUMENT

A. Standard of Review

“Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari.” Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). *See also*, Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Id. at Syl. Pt. 4.

B. The circuit court erred in reversing the enhancement of Ms. Haynes' 2012 DUI license revocation.

The circuit court found that all records from the 2003 DUI arrest indicate that she had an Ohio driver's license at the time of her 2003 arrest. (App. at P. 12.) The circuit court further found that the notice of the "proposed" revocation from the DMV was sent to Ms. Haynes' former West Virginia address, from which she had moved three years prior. *Id.* Next, without citing any legal authority, the circuit court concluded that although the DMV "claims that they were under no obligation to send the notification to the known current address, which [Ms. Haynes] provided at the time of the arrest and is evidenced in the investigating officer's report, this rationale controverts justice." (App. at PP. 12-13.)

In 2003, Ms. Haynes held a valid West Virginia driver's license with an address in the DMV's records. Therefore, the DMV had no duty to send the revocation order to Ohio. W. Va. Code § 17B-2-13; Syl. Pt. 8, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998). Moreover, the 2003 *Statement of the Arresting Officer* (App. at P. 245) indicates that Ms. Haynes

once again had an address in Parkersburg even though she held an Ohio driver's license. West Virginia Code § 17B-2-13(a) (1999) states in pertinent part, "[w]henever any person after . . . receiving a driver's license moves from the address named . . . in the license issued to the person, . . . the person shall within twenty days thereafter notify the division in writing of the old and new addresses. . . and of the number of any license then held by the person on the forms prescribed by the division." When Ms. Haynes moved back to the State of West Virginia, she had a statutory duty to inform the DMV of her new address but failed to do so. Her violation of the law more than 10 years ago cannot be used to escape enhancement today.

Further, in 2006, Ms. Haynes received the equivalent of a DUI charge in the State of Ohio and could not reinstate her license in that state until she completed the requirements for reinstatement in West Virginia. (App. at P. 250.) West Virginia will permit an out of state resident to take the safety and treatment class in his or her state if they show proof of residence, so on October 10, 2006, Ms. Haynes faxed the DMV a proof of residency document from the Ohio Bureau of Motor Vehicles. (App. at P. 250) The document shows that she received a DUI in Ohio in 2006, and that her license was suspended. *Id.* Ms. Haynes also faxed to the DMV a *72 Hour Residential DIP Completion Report* showing that she completed a safety and treatment course. (App. at P. 251.)

There simply is no question that Ms. Haynes offended in West Virginia two times in ten (10) years and that the DMV's notice of the 2003 offense failed to reach her because she was improperly licensed in two states and failed to properly apprise the DMV of her new address in a timely fashion.

West Virginia Code § 17A-2-19 (1951) provides:

Whenever the department is authorized or required to give any notice under this chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given

either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person **at his address as shown by the records of the department. The giving of notice by mail is complete upon the expiration of four days after such deposit of said notice.** Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the department or affidavit of any person over eighteen years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof.

[Emphasis added.]

In *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998), this Court held that giving a new address to the arresting officer did not meet statutory requirements for giving notice to the DMV of a change of address, and that the DMV satisfied the requirements of due process by sending revocation orders to drivers at addresses shown by the DMV's records.

The law is clear that Ms. Haynes had a statutory duty to keep the DMV apprised of her correct address. West Virginia Code § 17B-2-13 (1996) requires that an individual holding a driver's license must notify the DMV in writing of a change of address within twenty (20) days after a change to the new address is made. "The person who holds a driver's license has the responsibility to notify the Department of a change of address and the Department has no obligation to seek out those persons who fail to notify the Division." *Davis v. W. Va. Dep't of Motor Vehicles, et al.*, 187 W. Va. 402, 405, 419 S.E.2d 470, 473 (1992). *Accord State ex rel. Dept. of Motor Vehicles v. Sanders*, 184 W. Va. 55, 59, 399 S.E.2d 455, 459 (1990) ("the burden is on the licensee to notify the Department of Motor Vehicles of a change of address"); *State ex rel. Mason v. Roberts*, 173 W. Va. 506, 509, 318 S.E.2d 450, 453 (1984) ("the DMV [Division] has no obligation to track him down"). *State ex rel. Miller v. Reed*, 203 W. Va. 673, 681, 510 S.E.2d 507, 515 (1998).

Ms. Haynes may argue that she moved from West Virginia to Ohio thus relinquishing her West Virginia driver's license and any responsibility to notify the DMV of her change of address; however, there is no such exemption in the statute. Ms. Haynes received a West Virginia driver's license, moved from the address named on the license issued to her, and failed to notify the DMV in writing of the old and new addresses within twenty days after moving. Accordingly, Ms. Haynes violated her statutory duty, and the DMV had no duty to track her down.

On September 30, 2003, the DMV sent the *Order of Revocation* to her address of record, and notice was complete four (4) days later pursuant to W. Va. Code § 17A-2-19 (1951). Ms. Haynes did not file an administrative appeal within thirty (30) days as required by W. Va. Code §§ 17C-5A-2 (2010) and 29A-5-4 (1998).

Moreover, Ms. Haynes completed the requirements for reinstatement of her West Virginia license for the 2003 offense. She could have attempted to appeal the 2003 DUI revocation in 2006 when she actually learned of it but did not. Ms. Haynes could have also filed a complaint for a writ of prohibition at that time. She did not. Instead, she assented to the 2003 revocation by submitting her Ohio proof of residency form, a treatment completion form and the payment of \$45.00 to reinstate her West Virginia license.

Pursuant to *Black's Law Dictionary*, 6th Ed. (1990), assent is defined as: "Compliance; approval of something done; a declaration of willingness to do something in compliance with a request; acquiescence; agreement. To approve, ratify and confirm. It implies a conscious approval of facts actually known, as distinguished from mere neglect to ascertain facts." "Assent' is defined as to admit a thing is true; to express one's agreement, acquiesce, concurrence; to yield, agree, approve, accord; the act of the mind in admitting or agreeing to anything; concurrence with approval;

consent. *Norton v. Davis*, 18 S.W. 430, 83 Tex. 32, 36, citing *Webster's Dictionary*.” 49 W. Va. Op. Att'y Gen. 445 (1962) “A person manifests assent or intention through written or spoken words or other conduct.” *Restatement (Third) of Agency* § 1.03. See also, FN 16, *Harper v. Jackson Hewitt, Inc.*, 227 W. Va. 142, 156, 706 S.E.2d 63, 77 (2010).

“A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.” Syl. Pt. 1, *Maples v. West Virginia Dep't of Commerce*, 197 W. Va. 318, 475 S.E.2d 410 (1996). *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 215, 719 S.E.2d 381, 383 (2011). Accordingly, Ms. Haynes waived any right to appeal her 2003 revocation because she had actual notice of it and acquiesced to the revocation by fulfilling the requirements for reinstatement.

Further, Ms. Haynes did not ask the circuit court below to order the DMV to remove the 2003 DUI revocation from her driving record; to refund the reinstatement fees that she paid to West Virginia; or to give her an administrative hearing on the 2003 DUI revocation. Given that Ms. Haynes completed the requirements for reinstatement of her license in 2006 thus assenting to the 2003 revocation, the reversal of those procedural steps would be counterintuitive to Ms. Haynes' desire to have her cake and eat it too. Instead, Ms. Haynes' requested relief was that the circuit court order the DMV not to enhance her 2012 DUI revocation sanction with her 2003 DUI revocation.

In *Harrison v. Div. of Motor Vehicles*, 226 W. Va. 23, 697 S.E.2d 59 (2010), this Court addressed the issue of the DMV's mandatory duty to enhance the administrative penalty if the driver was previously convicted or revoked. In *Harrison*, the focus of the appeal was

whether a driver's license revocation period can be enhanced by an earlier DUI incident that occurred during the time when DMV did not revoke driver's licenses upon court notification that the license holder entered a plea of nolo contendere in the related criminal DUI case. That is, prior to the time that this Court found that statutory administrative procedure provides that DMV shall revoke licenses when convictions occur, including those resulting from pleas of nolo contendere.

226 W. Va. 23, 29, 697 S.E.2d 59, 65.

This Court in *Harrison* considered the due process issue of enhancing a second offense based upon a conviction for a first offense when the driver was not administratively revoked for the first offense. There, the lower courts both found that it would violate due process or would be inequitable to allow DMV to use a prior conviction for enhancement purposes when at the time the conviction occurred DMV did not follow the procedural steps set forth in W. Va. Code § 17C-5A-1a so as to “establish a ‘conviction’ for purposes of enhancement of the penalty for subsequent offenses.” 226

W. Va. 23, 32, 697 S.E.2d 59, 68.

In its review of W. Va. Code § 17C-5A-2, this Court opined,

[t]he mandatory intent of the Legislature is clearly stated in the first sentence of subsection (d), which provides “***[n]otwithstanding any provision of the code to the contrary, a person shall participate*** in the program if the person is convicted under section two [§ 17C-5-2], article five of this chapter or the person's license is revoked under section two [§ 17C-5A-2] of this article or section seven [§ 17C-5-7], article five of this chapter ***and the person was previously either convicted or his or her license was revoked*** under any provision cited in this subsection within the past ten years.” As the Code provision neither limits nor qualifies the circumstances to which the non-discretionary duty applies, DMV properly followed the mandate of the statute by treating Appellees' prior convictions as predicate offenses for enhancement purposes.

226 W. Va. 23, 34, 697 S.E.2d 59, 70. [Emphasis in the original.]

Ms. Haynes had a DUI revocation on her record in 2003; therefore, the Commissioner was statutorily mandated to enhance her administrative sanction in 2012. Unlike the drivers in *Harrison*

who had not been previously revoked, when Ms. Haynes decided to drive drunk in 2012, she knew about her 2003 DUI revocation yet chose to do so regardless of the increased sanction for the second offense.

This Court has even permitted enhancement of a second DUI when the first administrative process has not reached finality. In *Carney v. Sidiropolis*, 183 W. Va. 194, 394 S.E.2d 889 (1990), Carney had an administrative hearing for his first DUI, but before the Commissioner entered a final ruling, Carney was again drinking and was arrested a second time for driving under the influence of alcohol. Following this arrest, the DMV revoked Carney's driver's license for a period of ten years. The ten-year revocation period was predicated on the fact that the revocation was Carney's second revocation. Carney argued that since the first revocation had not become final, that revocation could not be relied upon to enhance the penalty for the second offense. This Court upheld the enhancement and opined,

[t]his Court believes that it was the clear intent of the legislature to authorize the use of a prior revocation or suspension, even if it has not yet been fully tested on appeal, in enhancing the revocation period for a subsequent offense. Clearly, such a construction more clearly protects the innocent public from drunken drivers than does a construction which allows such drivers to continue operating their vehicles until the legal formalities of their cases have been concluded.

183 W. Va. 194, 196, 394 S.E.2d 889, 891. Clearly, this Court recognized the DMV's mandatory duty to enhance the sanctions for serial offenders.

VI. CONCLUSION

The DMV complied with the statutes regarding service and with the case law regarding not having to hunt down drivers who do not notify the DMV of changes in address. The circuit court failed to address the statutes or the case law in its final order but merely determined that since Ms.

Haynes said that she was unaware of the 2003 revocation (even though she was aware of the 2003 DUI), the enhancement was unjust.

Ms. Haynes has had three DUI revocations in a ten year period. One of the main purposes of the repeat offender law is to address recidivism by changing the behavior of a driver to driving only while sober through the installation of an ignition interlock system. In addition to being contrary to law, it is unjust to the motoring public to treat Ms. Haynes as a first offender when she has committed three DUI offenses in the past ten years.

For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

PATRICIA S. REED,
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MOTOR VEHICLES,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**PATRICIA S. REED, COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

NO. 15-0971

PAMELA HAYNES,

Respondent.

VII. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 28th day of December, 2015 by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

William B. Richardson, Jr., Esquire
RICHARDSON, RICHARDSON & CAMPBELL
P. O. Box 266
Parkersburg, WV 26102


Elaine L. Skorich