

11-0815

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JUSTIN BRANT WOOD,
Petitioner,

v.

Civil Action No.: 10-AA-192¹
Judge Louis H. Bloom

JOE E. MILLER, Commissioner,
Division of Motor Vehicles,
Respondent.²

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FINAL ORDER

Pending before this Court is a "Petition for Appeal" filed by the petitioner, Justin Brant Wood ("Petitioner"), by counsel, Michael L. Solomon, and transferred to this Court from the Circuit Court of Taylor County on December 10, 2010. Although titled a "Petition for Appeal," the Petitioner actually requests extraordinary relief from an Order of Revocation entered on August 12, 2010, by the respondent, Joe E. Miller, Commission of the Division of Motor Vehicles ("Respondent"), revoking the Petitioner's privilege to operate a motor vehicle based upon a conviction of the offense of DUI, effective September 16, 2010.³ Specifically, the Petitioner argues that based on the applicable law the Order of Revocation has no legal basis because the Petitioner was not convicted of a DUI, for the purposes of revoking his license for the same, but instead pled no contest to a DUI charge.

¹ The Court notes that although the civil action number denotes the present action as an administrative appeal, the relief sought by the Petitioner is actually extraordinary, as no administrative hearing was held on the order of revocation revoking the Petitioner's driver's license.

² The original Petition for Appeal named David Bolyard, Commissioner, as the Respondent. Upon request by the Respondent in its Brief, the Court substitutes Joe E. Miller, current Commissioner of the Division of Motor Vehicles as the proper Respondent in the present action. See W.Va. R. Civ. P. 25(d)(1).

³ See footnote 1, *supra*.

Upon review of the underlying record, the parties' legal memoranda filed herein, and the applicable law, the Court is of the opinion that the Petitioner's Petition should be granted, based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On February 3, 2010, the Petitioner was arrested for driving under the influence of alcohol in Monongalia County, West Virginia by the Morgantown City Police Department. *See* DUI Information Sheet, p. 1.

2. On February 17, 2010, the Respondent issued an Order of Revocation, revoking the Petitioner's driver's license, based upon its receipt of the DUI Information Sheet from the investigating officer of the February 3, 2010 arrest. The Court finds that such Order of Revocation was proper by the Respondent.

3. On March 2, 2010, the Petitioner timely requested an administrative hearing on the February 17, 2010 Order of Revocation. An administrative hearing was scheduled on May 20, 2010. However, the hearing had to be rescheduled to September 30, 2010, due to the investigating officer's failure to appear. *See* DMV Record, Exs. 4 and 7.

4. On July 6, 2010, the Petitioner pled no contest to DUI in the Municipal Court of Morgantown, WV. *See* DMV Record.

5. By a second Order of Revocation dated August 12, 2010, the Respondent revoked the Petitioner's privilege to drive a motor vehicle based upon notice from the clerk of the Morgantown Municipal Court that the Petitioner was *convicted* of the offense of DUI. Ex. B, Appellant's (Petitioner's) Memorandum of Law in Support of Motion to Stay License Revocation. (emphasis added) It is from this Order of Revocation that the Petitioner seeks relief.

6. The Petitioner argues that under the applicable law there was no basis for the Respondent's August 12, 2010 Order of Revocation. Appellant's (Petitioner's) Memorandum of Law in Support of Appeal, p. 2. The Petitioner cites to W.Va. Code § 17C-5A-1a(a), the statute providing the legal basis for the Respondent's August 12, 2010 Order of Revocation, which states that if a person is *convicted* for an offense described in W.Va. Code § 17C-5-2 or for an offense described in a municipal ordinance which has the same elements as an offense described in said section, then the person's driver's license shall be revoked or suspended. (emphasis added). Specifically, the Petitioner argues that W.Va. Code § 17C-5A-1a(e)(2010) states that "for the purposes of this section... a plea of no contest does not constitute a conviction." Accordingly, the Petitioner asserts that since he pled no contest to DUI in Morgantown Municipal Court, he was not "convicted" under the applicable law providing the legal basis for the Respondent's Order of Revocation and thus, said Order of Revocation has no legal basis. *Id.*

7. The Respondent argues that the second Order of Revocation was proper under W.Va. Code § 17C-5A-3a(d), because the Petitioner is a second offender. W.Va. Code § 17C-5A-3a(d) addresses participation in the Motor Vehicle Alcohol Test and Lock program and states:

Notwithstanding any provision of this code to the contrary, a person shall participate in the program if the person is convicted under section two, article five of this chapter (§17C-5-2) or the person's driver's license is revoked under section two of this article (§17C-5A-2) or section seven, article five of this chapter (§17C-5-7) 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. (emphasis added)

The Respondent argues that under the above code section a plea of no contest counts toward revocation and the Petitioner has erred in his reading of the code. Respondent's Brief in Response, p. 2.

STANDARD OF REVIEW

“Unless otherwise provided by law, the standard of review by a circuit court in a writ of certiorari proceeding is de novo.” *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*, 223 W.Va. 146, 672 S.E.2d 282 (2008).

CONCLUSIONS OF LAW

1. Under W. Va. Code § 17C-5A-1a, granting the Respondent the authority to revoke a person's driver's license based upon receipt of written notice of a conviction of DUI, states that for the purposes of said section, a plea of no contest is not considered a conviction. The second Order of Revocation, dated August 12, 2010, clearly states that the basis for said revocation was the Respondent's receipt of notice from the Morgantown Municipal Court that the Petitioner was “*convicted* of the offense of DUI.” Ex. B, Appellant's (Petitioner's) Memo in Support of Motion for Stay. (emphasis added). Thus, the Court concludes that as a matter of law the Respondent exceeded its legitimate authority by revoking the Petitioner's driver's license by the August 12, 2010 Order of Revocation, as the Petitioner was not convicted of DUI under the applicable law.

2. The Court further concludes that the code section cited by the Respondent to support the Respondent's argument that the second Order of Revocation was proper under W.Va. Code § 17C-5A-3a is wholly without merit. First, W.Va. Code § 17C-5A-3a is the statute establishing the Motor Vehicle Alcohol Test and Lock Program and participation in such program. The statute does not grant the Respondent a legal basis to revoke a person's driver's license; it only sets forth the parameters for participation in the program once such person's license is revoked. *See* W.Va. Code § 17C-5A-3a(a)(1). Second, the three code sections cited in W.Va. Code § 17C-5A-3a(a)(1) mandating a driver's participation in the program if their license was revoked or they were convicted pursuant to said sections and their license was previously revoked or

they were previously convicted of DUI are not applicable herein. (emphasis added) Under W.Va. Code § 17C-5A-1a, the Petitioner was not *convicted* of a DUI offense listed in W.Va. Code §17C-5-2 because he pled no contest. *See* paragraph 1, Conclusions of Law. (emphasis added). Further, the Petitioner's license was neither revoked pursuant to an administrative hearing held in accordance with W.Va. Code § 17C-5A-2, nor because he refused to submit to any secondary chemical test, under W.Va. Code §17C-5-7. Thus, even if this is the Petitioner's second DUI and his license was previously revoked or he was previously convicted of DUI, the current license revocation was not pursuant to any of the code sections listed in W.Va. Code §17C-5A-3a, which by the word "and" in the statute would be required. Finally, as previously noted, W.Va. Code §17C-5A-3a does not provide the Respondent with a legal basis to revoke a person's driver's license, but only sets forth the parameters of participation in the Motor Vehicle Alcohol Test and Lock Program once a person's driver's license is revoked under the code sections listed in W.Va. Code § 17C-5A-3a(d).

3. Notwithstanding the above conclusions of law, the Court concludes that the Respondent's Order of Revocation dated February 17, 2010, based upon the Respondent's receipt of the DUI Information Sheet from the investigation officer, has a proper legal basis. *See* W.Va. Code §17C-5A-1(c). Accordingly, the Court concludes that the Respondent may proceed under such Order of Revocation, by holding an administrative hearing on such Order of Revocation, as the record indicates such was timely requested by the Petitioner.

DECISION

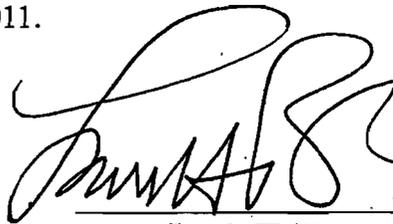
Based on the foregoing, the Court does hereby **ORDER** that the Petitioner's Petition is **GRANTED**, consistent with this Order. The Court does further **ORDER** that the above-styled action be **DISMISSED** and **STRICKEN** from the docket of the Court. The objections of any party aggrieved by this Order are noted and preserved.

The Clerk is **DIRECTED** to mail a certified copy of this Order to all counsel of record at the following addresses:

Michael L. Solomon, Esq.
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Scott E. Johnson, Esq.
Asst. Attorney General
DMV-Office of the Attorney General
P.O. Box 17220
Charleston, WV 25317-0010

ENTERED this 20 day of April, 2011.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. BATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF APRIL 2011
Cathy S. Batson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

C. Edens

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C. Edens
Deputy Circuit Clerk