

11-0891

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

MARK THOMPSON,

Petitioner,

v.

Civil Action No. 11-MISC-196

Judge Tod J. Kaufman

JOE MILLER, Commissioner of the
West Virginia Division of Motor Vehicles,

Respondent.

2011 MAY 27 AM 10:36
CATHY S. [unclear]
KANAWHA COUNTY CIRCUIT COURT

Final ORDER JK

Before the Court is Petitioner's Petition for a Writ of Prohibition and Application for Stay filed on April 18, 2011. Petitioner seeks for this Court to prohibit the Respondent from revoking Petitioner's privilege to operate a motor vehicle based exclusively on his plea of no contest to driving under the influence of alcohol on February 8, 2011, at the Berkeley County Magistrate Court. Respondent filed a Motion to Dismiss on April 22, 2011. A Stay Order was entered on April 28, 2011.

FACTUAL AND PROCEDURAL BACKGROUND

On September 28, 2010, Petitioner was arrested for driving under the influence of alcohol ("DUI"). Petitioner requested an administrative hearing on the license revocation. The hearing was scheduled for April 29, 2011.

On February 8, 2011, Petitioner entered into a plea agreement with the State of West Virginia wherein the Petitioner pled no contest to first offense DUI.

On March 25, 2011, Petitioner received an Order of Revocation, effective April 27, 2011, revoking Petitioner's privilege to operate a motor vehicle based on his no contest plea of

February 8, 2011. The Order of Revocation states that the Division had received notice that Petitioner was convicted of driving a motor vehicle in this state while under the influence of alcohol and additionally that Petitioner is convicted administratively for refusing to submit to the secondary chemical test.

On April 6, 2011, the Office of Administrative Hearings sent a letter to Petitioner stating that they had received an abstract showing a conviction for driving under the influence and as a result, Petitioner's hearing scheduled for April 29, 2011, had been canceled.

DISCUSSION

For purposes of automatic license revocations, W.Va. Code § 17C-5A-1a(e) states: "a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury. A plea of no contest does not constitute a conviction for purposes of this section except where the person holds a commercial drivers' license or operates a commercial vehicle." Petitioner did not enter a plea of guilty and was never found guilty by a court or jury. Petitioner also does not carry a commercial license or operate a commercial vehicle. Therefore, in accordance with W.Va. Code § 17C-5A-1a(e), Petitioner was not convicted for license revocation purposes, and as a result, the Respondent exceeded his authority by revoking Petitioner's license based upon his plea of no contest.

Furthermore, Respondent's argument that Petitioner has previously been convicted and his no contest plea to a second offense counts toward revocation is without merit. Respondent improperly relies on W.Va. Code § 17C-5A-3a(d) which states:

"[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, article five of this chapter or the person's license is revoked under section two of this article

or section seven, 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.”

This code section establishes the Motor Vehicle Alcohol Test and Lock Program and governs participation in such program. It explains when a person must participate in the program, and more specifically, lists three code sections that require participation when a second offense is involved. It does not provide the Respondent with authority to revoke Petitioner’s license based upon a no contest plea to a second offense. Moreover, it does not give the Respondent authority to prohibit the Petitioner from a hearing on his license revocation based upon his no contest plea.

Petitioner’s license was revoked under section seven, article five of this chapter; a code section, as stated above, that requires participation in the Motor Vehicle Alcohol Test and Lock Program when a second offense is involved. However, as explained above, nothing in W.Va. Code § 17C-5A-3a(d) gives the Respondent the authority to revoke Petitioner’s license without permitting the Petitioner to have a hearing. More importantly, W.Va. Code § 17C-5-7 even requires that the Respondent have a hearing. “A person whose license to operate a motor vehicle in this state has been revoked shall be afforded an opportunity to be heard, in accordance with the provisions of section two, article five-a of this chapter.” W.Va. Code § 17C-5-7(c). As a result, Respondent exceeded its authority by cancelling Petitioner’s administrative hearing based upon a plea of no contest.

Respondent’s reliance upon W.Va. Code § 17C-5A-3a(d) is improperly placed. Respondent has exceeded its authority by revoking Petitioner’s license based upon a no contest plea and also, by prohibiting Petitioner from a hearing on such revocation. As a result, this Court hereby ORDERS Respondent to hold an administrative hearing on Petitioner’s license

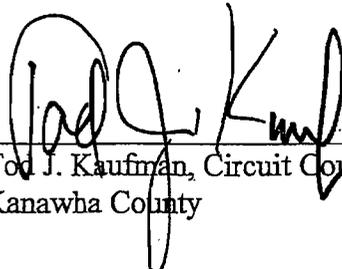
revocation. Accordingly, Petitioner's Writ of Prohibition is hereby GRANTED. This case is DISMISSED and STRICKEN from the open docket of this Court.

The clerk of the court shall distribute copies of this Order to all counsel of record:

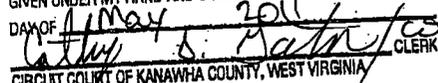
Harley Wagner, Esquire
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P.O. Box 17200
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Enter this Order the 27 day of May, 2011.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, 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 27
DAY OF May 2011

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA