

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOV 10 2011

DOCKET NO. 11-0891

JOE E. MILLER, Commissioner,
Division of Motor Vehicles,
Respondent, Below, Petitioner,

v.

MARK THOMPSON,
Petitioner below, Respondent.

Respondent's Brief

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RESPONDENT'S BRIEF

QUESTION PRESENTED

Under West Virginia Code § 17C-5A-3a(d), does the Division of Motor Vehicles have the authority to suspend or revoke an individual's driver's license, without a hearing on the merits, for driving under the influence, second offense, when the individual enters a plea of no contest in criminal court?

STATEMENT OF THE CASE

On September 28, 2010, respondent was arrested for driving under the influence (DUI) of alcohol by Trooper N. F. Alatta of the West Virginia State Police. A.R. at 48. On October 28, 2010, petitioner issued an Order revoking respondent's driver's license. A.R. at 47. The period of revocation was one (1) year because respondent had a previous DUI conviction or revocation in 2004. A.R. at 55. Respondent timely requested an administrative license revocation hearing with the Division of Motor Vehicles (DMV) and Office of Administrative Hearings (OAH) on October 8, 2010. A.R. at 58-63.

An administrative hearing was scheduled for April 29, 2011 at the DMV Regional Office in Martinsburg, West Virginia. A.R. at 74. Prior to that hearing, respondent entered into a plea agreement with the State of West Virginia wherein respondent pled no contest to DUI, first offense, in the Magistrate Court of Berkeley County, West Virginia. A.R. at 81. Subsequently, respondent was notified by OAH and DMV that his hearing scheduled for April 29, 2011, was cancelled and that his driver's license was revoked based upon his plea of no contest in Berkeley County Magistrate Court. A.R. at 11, 80.

On April 14, 2011, respondent filed a Writ of Prohibition with the Kanawha County Circuit Court alleging that petitioner improperly relied upon respondent's plea of no contest in revoking respondent's driver's license. A.R. 5-12. On May 27, 2011, Judge Kaufman entered a Final Order holding that petitioner did improperly rely upon the respondent's plea of no contest when revoking respondent's license and that respondent was entitled to a hearing on the merits of his driver's license revocation. A.R. at 3. Petitioner then filed the instant appeal on September 23, 2011.

SUMMARY OF THE ARGUMENT

DMV's authority to revoke an individual's driver's license based upon a conviction, and without the right to a hearing, rests in West Virginia Code § 17C-5A-1(a). W. Va. Code § 17C-5A-1a(e) provides:

For the purposes of this section, 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 driver's license or operates a commercial vehicle.

2010. Petitioner mistakenly relies upon W. Va. Code § 17C-5A-3a to revoke respondent's driver's license. The purpose of W. Va. Code § 17C-5A-3a is to provide for the establishment of the Motor Vehicle Test and Lock Program and to determine when an individual must participate

in said program. This purpose is clear from the title of the section. It does not give petitioner authority to prohibit respondent from a hearing on his license revocation based upon his plea of no contest. Therefore, the Circuit Court was correct in ruling that petitioner exceeded his authority by cancelling [respondent's] administrative hearing based upon a plea of no contest. A.R. at 3. As such, petitioner's appeal should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees with petitioner that oral argument is not necessary in this matter. The decision process will not be significantly aided by oral argument since the facts and legal authority are adequately presented in the briefs and appeal record.

ARGUMENT

- I. The Circuit Court did not err in ruling that petitioner lacked the authority, under W. Va. Code 17C-5A-3a, to suspend or revoke respondent's driver's license when he entered a no contest plea and had a prior DUI offense or administrative revocation.**

The Circuit Court below granted respondent's petition for Writ of Prohibition. Petitioner avers that granting relief sounding in prohibition was in error arguing that prohibition extends only to prevent usurpation of power by a judicial or quasi-judicial tribunal and does not extend to ministerial acts. *State ex rel. Noce v. Blankenship*, 93 W. Va. 273, 116 S.E. 524 (1923). *See also Kump v. McDonald*, 64 W. Va. 323, 61 S.E. 909, 910 (1908); *State ex rel. Potter v. Office of Disciplinary Counsel*, 226 W. Va. 1, 2, 697 S.E.2d 37, 38 (2010) (per curiam). Petitioner further argues that the act of revoking a license is not quasi-judicial, but ministerial, it only becomes quasi-judicial after initiation of adversarial proceedings. *DeRosa v. Bell*, 24 F.Supp.2d 252, 256 (D. Conn. 1998). *Compare State ex rel. Bolyard*, 221 W. Va. 713, 718, 656 S.E.2d 464, 469

(2007) and *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998) with *Cowie v. Roberts*, 173 W. Va. 64, 67, 312 S.E.2d 35, 38 (1984). However, even if the case is pled as an action for prohibition, this Court may construe the pleading as one for mandamus. *State ex rel. Affiliated Constr. Trades Foundation v. Vieweg*, 205 W. Va. 687, 692, 520 S.E.2d 854, 859 (1999) (per curiam).

A writ of mandamus will not issue unless three elements coexist: 1.) a clear legal right in the petitioner to the relief sought; 2.) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and 3.) the absence of another adequate remedy. *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). A failure to meet anyone of the three elements is fatal to the request for relief. *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 331, 685 S.E.2d 903,909 (2009); *State ex rel. Richey v. Hill*, 216 W. Va. 155, 160, 603 S.E.2d 177, 182 (2004). The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus is de novo. *State v. Dean*, 195 W. Va. 57, 464 S.E.2d 576 (1995). Further, interpreting a statute . . . presents a purely legal question subject to de novo review. *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

A driver's license is a property interest which requires the protection of this State's Due Process Clause before its suspension can be obtained. *Jordan v. Roberts*, 161 W. Va. 750, 246 S.E.2d 259 (1978). According to the *Jordan* court, in order to comply with the West Virginia Due Process clause, a hearing is required, upon request of the licensee. *Id.* Under *Jordan*, respondent clearly has the right to an administrative hearing prior to his license being revoked by petitioner. Respondent is not seeking to get out of a driver's license suspension, he is merely

seeking that he be afforded an opportunity to be heard at an administrative hearing before his license is revoked.

The only time petitioner may revoke a person's driver's license without affording them a hearing is defined in W. Va. Code § 17C-5A-1a:

- (a) If a person has a term of conditional probation imposed pursuant to section two-b, article five of this chapter, or is convicted for an offense defined in section two, article five of this chapter . . . the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section.

(2010). The section goes on further to provide guidance on what constitutes a conviction:

- (e) For the purposes of this section, 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 driver's license or operates a commercial vehicle.

W. Va. Code § 17C-5A-1a(e) (2010). It is uncontroverted that respondent entered a no contest plea in the Magistrate Court of Berkeley County. Furthermore, said plea does not constitute a conviction for license revocation purposes according to W. Va. Code § 17C-5A-1a.

However, petitioner cites and relies upon another section of the code to revoke respondent's driver's license in this case. Petitioner points to W. Va. Code § 17C-5A-3a(d), which states:

Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under section two of this article or section seven, article five of this chapter and the person was previously either convicted of his or her license was revoked under any provision cited in this subsection within the past ten years. The minimum revocation period for a person required to participate in the program under this subsection is one year and the minimum period for use of the ignition interlock device is two years, except that the minimum revocation period for a person required to participate because of a violation of subsection (n), section two of this article or subsection (l), section two, article five of this chapter is two months and the minimum period of participation is one year.

(2010). Petitioner claims that W. Va. Code § 17C-5A-3a(d) grants him the authority to revoke an individual's driver's license, if he receives notice of a conviction and the individual has previously been revoked within the preceding ten years, without granting that individual the opportunity to be heard at an administrative hearing. However, as Judge Kaufman found below:

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 [petitioner] with authority to revoke [respondent's] license based upon a no contest plea to a second offense. Moreover, it does not give the [petitioner] authority to prohibit the [respondent] from a hearing on his license revocation based upon his no contest plea.

A.R. at 3. This ruling is in line with a previous ruling out of the same circuit by Judge Bloom in which he held that W. Va. Code § 17C-5A-3a, “does not grant the [petitioner] 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.” A.R. at 33. Even looking at the title of W. Va. Code § 17C-5A-3a, “Establishment of and participation in the Motor Vehicle Alcohol Test and Lock Program,” it does not seem that any additional powers are given to petitioner to revoke under this code section. (2010).

Petitioner focuses on the “notwithstanding clause” placed at the beginning of W. Va. Code § 17C-5A-3a(d) and claims that because of its placement there, it can ignore the mandates of all other sections, including W. Va. Code § 17C-5A-1a. Petitioner claims that the “notwithstanding clause” indicates the legislative intent that W. Va. Code § 17C-5A-3a(d) take precedence over any other enactment dealing with the same subject matter. However, in the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, phrase or word, but rather from a general consideration of the act or statute in its entirety. Syllabus Pt., 1, *Parkins v. Londeree*, 146 W. Va. 1051, 124

S.E.2d 471 (1962). This Court has also held that statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments. Syllabus Pt. 3, *Smith v. State Workmen's Comp. Comm.*, 159 W. Va. 108, 219 S.E.2d 361 (1975). In *Freuhauf Corp. v. Huntington Moving and Storage*, the Court held, "statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent." Syllabus Pt. 5, 159 W. Va. 14, 217 S.E.2d 907 (1975).

Thus in order to look at what the legislature intended by placing the "notwithstanding clause" at the beginning of W. Va. Code § 17C-5A-3a(d), the Court must look at Chapter 5A as a whole and not just focus on the one phrase as petitioner does. W. Va. Code § 17C-5A-1a deals with the revocation of a driver's license based upon a conviction and without affording an administrative hearing. W. Va. Code § 17C-5A-2 deals with the administrative hearing process, when petitioner can revoke a driver's license after a hearing has occurred, and sets forth the applicable revocation periods for the various offenses. W. Va. Code § 17C-5A-3 deals with the Safety and Treatment Program, and lays out what an individual must do to get their driver's license reissued. W. Va. Code § 17C-5A-3a, as stated *supra*, establishes the Motor Vehicle Alcohol Test and Lock Program and explains when a person must participate in said program.

Prior to enacting W. Va. Code § 17C-5A-3a, driver's license suspensions for second or subsequent offense DUI's were solely laid out in W. Va. Code § 17C-5A-2(j), which states:

. . . Provided, however, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: *Provided further,* That if the person's license has previously been suspended or revoked more than once under the provisions of this section or

section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(2010). W. Va. Code § 17C-5A-3a(d) modifies the requirements of W. Va. Code § 17C-5A-2(j) by reducing duration of second and subsequent offense suspensions from ten (10) years and a lifetime revocation respectively, to a flat one (1) year followed by mandatory participation in the Motor Vehicle Alcohol Test and Lock Program. This is the purpose of the “notwithstanding clause” put into W. Va. Code § 17C-5A-3a(d), to modify the existing code provision for the second and subsequent offense suspensions from a ten (10) year and lifetime suspension to one (1) year suspensions with mandatory participation in the test and lock program to follow. It does not grant petitioner any additional authority to revoke or suspend an individual’s license. It merely provides that once petitioner revokes or suspends an individual’s license, pursuant to its authority either under W. Va. Code § 17C-5A-1a or W. Va. Code § 17C-5A-2, the type of suspension should the person have a prior suspension or revocation within the previous ten (10) years. *See* W. Va. Code § 17C-5A-3a(a)(1)¹.

Petitioner seeks to revoke respondent’s driver’s license due to the fact that they received a notice of a conviction from the Magistrate Court of Berkeley County. A. R. at 80. Petitioner argues that W. Va. Code § 17C-5A-3a(d) allows him to revoke a license, without a hearing, upon conviction if the individual has a prior suspension within the prior ten years. This is the same

¹ W. Va. Code § 17C-5A-3a(a)(1) provides: The Division of Motor Vehicles shall control and regulate a Motor Vehicle Alcohol Test and Lock Program for persons whose licenses have been revoked pursuant to this article or the provisions of article five of this chapter or have been convicted under section two, article five of this chapter, or who are serving a term of a conditional probation pursuant to section two-b, article five of this chapter.

language set forth in W. Va. Code § 17C-5A-1a(a). However, the distinction between the two statutes is that section 1a defines what constitutes a conviction while section 3a does not. According to *Freuhauf Corp.* cited supra, when construing the legislative intent behind a statute, statutes which have a common purpose are to be regarded in *pari materia*. 159 W. Va. 14 (1975). Doing this, one can infer what constitutes a conviction from W. Va. Code § 17C-5A-1a into the reading of W. Va. Code § 17C-5A-3a. Surely, the legislature did not intend to use two different meanings of the word conviction in the same chapter when dealing with the same subject matter. When dealing with a license revocation based upon a conviction of an offense described in W. Va. Code §17C-5-2, the legislature has clearly stated that a plea of no contest does not constitute a conviction for those purposes. W. Va. Code § 17C-5A-1(a)(e) (2010). Thus petitioner lacked the authority to revoke respondent's driver's license without affording him the opportunity to be heard at an administrative hearing. The Circuit Court below ruled correctly in finding such and ordering that petitioner afford respondent a hearing on the merits of his revocation. To find otherwise would be going against the legislative intent behind Chapter 5A.

CONCLUSION

When applying the above discussion to the requirements this Court has set for actions in mandamus under *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969), the Circuit Court below did not err in granting extraordinary relief: 1.) It is clear that under the State's Due Process clause that respondent has the right to have an administrative hearing on the merits of his license suspension; 2.) It is also clear from the above discussion that petitioner has the legal duty to provide respondent an administrative hearing on the merits of his license suspension; and 3.) respondent does not have any other adequate legal remedy than to seek extraordinary relief from the courts.

Therefore, respondent asks that this Honorable Court rule that the Circuit Court below did not err in finding that petitioner lacks the authority to suspend respondent's driver's license, without a hearing, after he entered a no contest plea and he had a prior DUI conviction or suspension within the prior ten (10) years. Consequently, this Honorable Court should deny petitioner's appeal in this matter.

Respectfully submitted,

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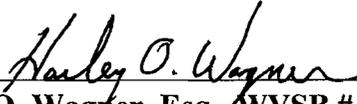
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MARK THOMPSON,
Petitioner below, Respondent.

CERTIFICATE OF SERVICE

Harley O. Wagner and Jason M. Glass, counsel for the respondent, Mark Thompson, certify that on the 8th day of November, 2011, the forgoing **Respondent's Brief** was served upon counsel for petitioner by depositing true and correct copies thereof in the United States Mail, First Class Postage Prepaid addressed as follows:

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