

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1241

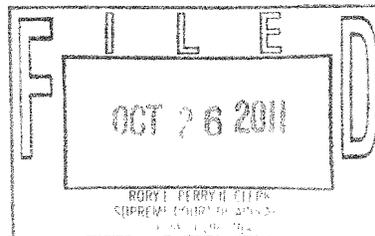
JOHN R. HOLLAND, II,

Petitioner below, Appellant,

v.

JOE E. MILLER, Commissioner, West
Virginia Department of Motor Vehicles,

Respondent below, Appellee.



RESPONSE BRIEF

JANET E. JAMES #4904
SENIOR ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
Janet.E.James@wv.gov
(304) 926-3874

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RESPONSE BRIEF

SUMMARY OF ARGUMENT

The Appellant's *Notice of Appeal* and *Brief of Petitioner Upon Appeal* in this appeal contain argument on the issues of the Appellee's authority to reschedule an administrative hearing when a subpoenaed officer has failed to appear, and whether an award of attorney fees against the Appellee is warranted in that instance. Appellant argues that this case is distinguishable from *Miller v. Hare*, 708 S.E.2d 531, 2011 WL 1500916, 2011 W. Va. LEXIS 18 (2011). However, the facts in *Hare* are substantially similar to those in the present case.

In the *Hare* opinion, this Court determined that the Appellee has authority to continue an administrative hearing when an investigating officer fails to appear at a hearing when subpoenaed, and fails to request a continuance. The Court also determined in *Hare* that the trial court had erred in awarding attorney fees to the driver in that matter.

Hare, supra, is determinative of the issues presented in this matter.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the basis that this case involves assignments of error in the application of settled law.

STATEMENT OF THE CASE

Appellant has placed a great deal of emphasis on a “Memo to File” from Hearing Examiner Kathie Holland to the Division of Motor Vehicles’ file in this matter, dated February 17, 2010. App’x. At 5. Appellant cites a large portion of that memo, verbatim, at page 8 of his Brief.

However, scrutiny of the file demonstrates that the “Memo to File” is incorrect in the following crucial ways: (1) the memo incorrectly implies that the officer’s failure to appear at the June 18, 2009 was nefarious, when, in fact, he was not subpoenaed to appear; and, (2) the memo incorrectly implies that a hearing was convened on September 23, 2009 and the officer failed to appear, when, in fact, no hearing was ever convened on this date and was continued due to internal DMV docket management issues.

Appellant was arrested for second-offense driving under the influence of alcohol on January 10, 2009. He timely requested an administrative hearing. On March 12, 2009, the Division issued a Notice of Hearing for June 18, 2009. App’x. At 9. Significantly, the Appellant did not check the box on the Hearing Request Form which provides:

The arresting officer will only attend the hearing if requested to do so.

[] I request the investigating officer’s attendance.

App’x. At 7. W. Va. Code § 17C-5A-2(d) [2008]. Therefore, the investigating officer’s attendance was not requested by the Appellant in this matter. Also significantly, the Appellee did not request the officer’s attendance at the June 18, 2009 hearing. Although a notice of hearing was sent to the

Investigating Officer, it was not sent by certified mail, and the officer was not subpoenaed to this hearing.

At the June 18, 2009 hearing, Petitioner appeared with his counsel. The investigating officer did not appear. At the hearing, the Hearing Examiner offered and accepted the documents in the Division's file into evidence, including the DUI Information Sheet, which was the officers' sworn statement that he arrested the Appellant for DUI. The Appellant testified at the hearing, *inter alia*, that he was not driving under the influence of alcohol. The Hearing Examiner continued the hearing to subpoena the officer to address the conflicts in evidence. App'x. At 10.

On June 30, 2009, a notice of hearing was issued rescheduling the hearing for September 23, 2009. App'x. At 11. A subpoena for the attendance of the investigating officer was issued on June 30, 2009. App'x. At 12. However, the file was sent to Robert DeLong, who was not the Hearing Examiner assigned to the case. On September 15, 2009, Mr. DeLong issued a Memorandum to Mary Jane Barr, Supervisor, advising her that although the hearing was set for September 23, 2009, he was returning the file to the Division to be given to Kathie Holland, the assigned Hearing Examiner, and that he was returning the file "for continuance and rescheduling." App'x. At 6. On September 15, 2009, counsel for the Appellant was notified by the Division that the hearing set for September 23, 2009 was continued. App'x. At 13.

On November 17, 2009, Appellant's counsel's office was notified that the hearing had been rescheduled for February 17, 2010. App'x. At 14. A notice of hearing was issued on November 24, 2009, rescheduling the hearing for February 17, 2010. App'x. At 15. Also on November 24, 2009, a subpoena was issued commanding the presence of the investigating officer at the February 17, 2010

hearing. App'x. At 16. On February 17, 2010, Appellant and his counsel appeared for the hearing. The investigating officer did not appear. App'x. At 5.

On July 27, 2010, a notice of hearing was issued continuing the February 17, 2010 hearing to September 30, 2010. App'x. At 17. A subpoena was issued on July 17, 2010 commanding the investigating officer to appear at the hearing on September 30, 2010. App'x. At 18. However, the September 30, 2010 hearing was continued at the request of the Appellant. On August 19, 2010, the Division rescheduled the hearing with Caroline in Appellant's counsel's office, for November 17, 2010. App'x. At 19.

On August 20, 2010, a notice of hearing was issued continuing the September 30, 2010 hearing to November 17, 2010. App'x. At 20. On August 20, 2010, a subpoena was issued commanding the attendance of the investigating officer to appear at the November 17, 2010 hearing. App'x. At 21. However, the November 17, 2010 hearing was continued by the circuit court following the Appellant's filing of a *Petition for Writ of Prohibition And/or Writ of Mandamus* in the circuit court of Kanawha County on October 21, 2010. App'x. At 2, 22.

On May 12, 2010, the circuit court issued the *Order Vacating Stay and Denying Petition* which is the subject of the present appeal. The circuit court correctly found that the *Petition for Writ of Prohibition And/or Writ of Mandamus* was rendered moot by this Court's opinion in *Miller v. Hare*, 708 S.E.2d 531, 2011 WL 1500916, 2011 W. Va. LEXIS 18 (2011).

ARGUMENT

This proceeding involves an appeal from a circuit court's denial of a writ of prohibition. "The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ

of prohibition is *de novo*.” Syl. pt. 1, *State ex rel. Callahan v. Santucci*, 210 W.Va. 483, 557 S.E.2d 890 (2001).

The internal “Memo to File” by Hearing Examiner Kathie Holland (App’x. At 5) incorrectly implied that the officer was required to attend the June 18, 2009 hearing (he was not); and that a hearing was convened on September 23, 2009 (it was not). The FIRST hearing to which the officer was subpoenaed and did not appear was convened on February 17, 2010. Neither of the next two hearings set (September 30, 2010 and November 17, 2010) were convened, and neither was continued due to the officer’s failure to appear. The September 30, 2010 hearing was continued by the Appellee due to the file being improperly directed to the wrong Hearing Examiner, and the November 17, 2010 hearing was aborted due to the circuit court’s order staying further hearing pending resolution of the Appellant’s *Petition for Writ of Prohibition And/or Writ of Mandamus*. Thus, there has not yet been a SECOND hearing to which the investigating officer was subpoenaed and did not appear.

In *Miller v. Hare, supra*, this Court found:

When the investigating officer failed to appear at the administrative revocation hearing in this case, the Commissioner took the position that it had the necessary authority under both the applicable statutes and regulations to grant a continuance of his own accord notwithstanding the fact that a continuance had not been requested by either the licensee or the officer. We agree.

708 S.E.2d 535. This Court noted that following the statutory amendments to W. Va. Code § 17C-5A-2 in 2008, the Appellee instituted a policy of continuing hearings when an officer who had been subpoenaed pursuant to the licensee's request failed to show up at the revocation hearing:

As reflected by a memorandum dated June 30, 2009, from Joe E. Miller, DMV Commissioner, to all hearing examiners and final order clerks, the DMV employed the following approach to securing the officer's attendance at revocation hearings: "Upon the first non-appearance of a subpoenaed officer, the DMV will contact the officer by telephone to secure attendance at the next scheduled hearing. Upon the second nonappearance ... the DMV will enforce the subpoena in circuit court."

Fn. 12, *Miller v. Hare, supra*.

There has not yet been a "second nonappearance" by the officer in this case. Therefore, pursuant to *Miller v. Hare, supra*, the Appellee is entitled to schedule another administrative hearing, and to subpoena the investigating officer thereto. Should the officer fail to appear at said hearing, then the Commissioner may enforce the subpoena in circuit court.

The Appellant also challenges the actions of the Appellee on the grounds of the 180-day time limit on holding hearings, found at W. Va. Code § 17C-5A-2(c). That section provides:

Any hearing shall be held within one hundred eighty days after the date upon which the commissioner received the timely written request for a hearing unless there is a postponement or continuance. The commissioner may postpone or continue any hearing on the commissioner's own motion or upon application for each person for good cause shown.

As was noted above, the June 18, 2009 hearing, which was held within 180 days of the request for hearing, was continued by the Appellee in order to subpoena the officer to resolve the conflicts in evidence. The September 23, 2009 hearing was continued in order to transmit the file to the assigned hearing examiner. The September 30, 2010 hearing was continued at the request of the Appellant. The November 17, 2010 hearing was continued by the circuit court in light of the *Petition for Writ of Prohibition And/or Writ of Mandamus*.

All of the aforementioned continuances are valid in their own right and/or comport with the Appellee's legislative rule governing continuances:

The Commissioner may postpone or continue a hearing on his or her own motion. The motion shall be for good cause including, but not limited to, docket management, availability of hearing examiners or other essential personnel, Division error in scheduling or notice, or mechanical failure of essential equipment, i.e. recording equipment, file storage equipment, etc.

91. C. S. R. 1-3.8.3. There is no violation by the Appellee of the rule set forth above.

The Appellant also asks for attorney fees in the *Brief of Petitioner on Appeal*, (although not in his *Notice of Appeal*), relying on *David v. Commissioner of Motor Vehicles*, 219 W.Va. 493, 637 S.E.2d 591 (2006). In *Miller v. Hare*, this Court reversed the trial court's award of attorney fees on the basis of *David, supra*, holding:

The only parallel between the two cases is the investigating officer's failure to appear at the administrative hearing after being subpoenaed. Not only was *David* decided under a different statutory scheme that did not impose a duty on the DMV to secure the investigating officer's attendance at the revocation hearing, but the continuance in *David* was based upon an improper reliance on the emergency rule whereas in Mr. Hare's case, the continuance was granted pursuant to the Commissioner's statutory right to continue a hearing on his own motion. *Cf.* W. Va.Code §§ 17C-5A-2 (2004) to 17C-5A-2(d) (2008); *see* W.Va.Code § 17C-5A-2(c). Simply put, none of the grounds we relied upon in *David* to remand the case for a possible award of attorney's fees are present in this case.

708 S.E.2d 536.

Inasmuch as the Appellee properly exercised his statutory right to continue the hearing in the present case, there is no basis for an award of attorney fees.

Contrary to the representations of the Appellant, the circuit court did not err in dismissing this matter as moot pursuant to *Miller v. Hare, supra*. The Appellee is entitled to proceed with setting another hearing in this matter in order to obtain the attendance of the investigating officer.

CONCLUSION

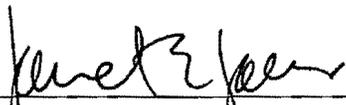
For the above-reasons, the circuit court should be affirmed, and the matter dismissed.

Respectfully submitted,

**JOE E. MILLER, Commissioner
West Virginia Division of Motor Vehicles,**

By counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



**JANET E. JAMES (WVSB No. 4904)
SENIOR ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, WV 25317
(304) 926-3874**

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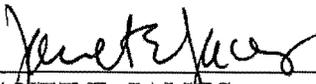
JOE E. MILLER, Commissioner, West
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Respondent below, Appellee.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing *Response Brief* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 26th day of October, 2011, addressed as follows:

William C. Forbes, Esquire
1118 Kanawha Blvd., East
Charleston, WV 25301



JANET E. JAMES