12-0202

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2012 JAN -4 AM 1:22

CATHY S. GATES, CLERK
KANAWHA COUNTY CIRCUIT COURT

**BENJAMIN M. KNOPP,**

Petitioner,

v.

CASE NO. 11-MISC-480
Judge Paul Zakaib, Jr.

**THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,**
**and JOE E. MILLER, COMMISSIONER,**

Respondents.

**PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Now comes the Petitioner, BENJAMIN M. KNOPP, by Counsel, Richard D. Smith, Jr., and tenders the following proposed findings of facts and conclusions of law relative to the Writ of Prohibition seeking to prohibit the Respondents from enforcing its September 26, 2007 Order revoking the Petitioner driver's license. The said findings are based upon the pleadings filed by the parties herein:

**PROPOSED FINDINGS OF FACT**

1. On January 2, 2007, the Petitioner was arrested and charged with first offense Driving Under the Influence, a violation of W.Va. Code §17C-5-2.

2. By letter dated January 11, 2007, the Respondent, Division of Motor Vehicles ("DMV"), notified the Petitioner that pursuant to W.Va. Code §17C-5A-1(c); his privilege to operate a motor vehicle would be revoked as of February 15, 2007. (See **Exhibit A to Verified Petition**).

3. On January 12, 2007, the Petitioner requested an administrative hearing before the

Respondent DMV to challenge the "[s]econdary chemical test of the blood, breath, or urine" and "[s]obriety checkpoint operational guidelines." (See **Exhibit B to Verified Petition**).

4. On April 23, 2007, an administrative hearing was held at the DMV in Parkersburg, West Virginia. (See **Exhibit B to Verified Petition**).

5. The Respondent Commissioner, by his predecessor in office, executed a Final Order dated May 11, 2007 adopting the following conclusions of law: "1. The evidence in this matter does not prove that Benjamin M. Knopp drove a motor vehicle in this state while under the influence of alcohol on January 2, 2007. 2. Accordingly, the Order of Revocation heretofore entered in this matter must be rescinded." (See **Exhibit C to Verified Petition**).

6. In the same Final Order, the Respondent Commissioner, by his predecessor in office, further adopted that "the Order of Revocation, dated January 11, 2007, revoking Benjamin M. Knopp's privilege to drive a motor vehicle is hereby reversed, and this case is dismissed. The findings and conclusions herein are and shall be limited solely to the facts and circumstances in this particular case and shall have no effect upon any other suspension or revocation of Benjamin M. Knopp's driving privilege which may currently be in effect." *Id.*

7. On May 22, 2007 the Petitioner pled guilty to the underlying criminal offense in Wood County Magistrate Court. (See **Exhibit D to Verified Petition**).

8. On September 26, 2007 the Petitioner was sent notification from the Respondent DMV that pursuant to Chapter 17C, Article 5A, "Section 1(A)" and as a result of the May 22, 2007 guilty plea his license would be revoked. (See **Exhibit E to Verified**

**Petition**). Notification was sent to "48 Cedar Drive." *Id.*

9. The Petitioner never received the September 26, 2007 notice; it was returned "Return to Sender," (See Attached **Exhibit 1**), although the Petitioner had changed his address with the DMV on April 13, 2007. (See Attached **Exhibit 2**, Issue Date: "04-13-2007", Address: "181 Cedar Drive").

10. No administrative hearing was subsequently held.

11. The Petitioner was not notified that his license was suspended/revoked until the Summer of 2011 during a routine traffic stop. (See **Verified Petition** at page 3).

12. The Petitioner filed his petition and this Court determined that the pleading stated sufficient allegations and ordered its filing. (Order, Honorable Paul Zakaib, Jr., 11/10/2011).

## CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this request for extraordinary relief pursuant to W. Va. Code §53-1-2, W. Va. Code §14-2-2, and *State ex rel. Miller v. Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1998).

2. For the reasons stated in the paragraphs that follow, the Court concludes that the issuance of the September 26, 2007 order of revocation by the Respondent Commissioner was improper and contrary to the clear provisions of West Virginia Code §17C-5A-1a(d) which provides: "The provisions of this section shall not apply if an order reinstating the operator's license of the person has been entered by the commissioner prior to the receipt of the transcript of the judgment of conviction." *West Virginia Code Annotated*, §17C-5A-1a(d) (1994).

3. It is well-settled that "[t]he primary object in construing a statute is to ascertain

and give effect to the intent of the Legislature." Syl. Pt. 1., *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

4. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2., *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

5. "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." *Retail Designs, Inc. v. West Virginia Div. of Highways,* 213 W.Va. 494, 500, 583 S.E.2d 449, 455 (2003) (quoting Syl. pt. 1, *Nelson v. West Virginia Pub. Employees Ins. Bd.,* 171 W.Va. 445, 300 S.E.2d 86 (1982)).

6. West Virginia Code §17C-5A-1a(c), Revocation upon conviction for driving under the influence of alcohol, controlled substances or drugs, provides in pertinent part: "If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted for an offense described in section two, article five of this chapter...because the person did drive a motor vehicle while under the influence of alcohol...the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state." *West Virginia Code Annotated*, §17C-5A-1a(c) (1994).

7. West Virginia Code §17C-5A-1a(d) is clear and unambiguous in its terms. The Court finds that W.Va. Code §17C-5A-1a(d) is conditional in its application as evidenced by the use of the term "if"; that is, given certain criteria the Respondent Commissioner either applies all provisions of W.Va. Code §17C-5A-1a or does not apply any provisions of W.Va. Code §17C-5A-1a. It is clear to this Court that the

term "order reinstating" means an order issued by the Commissioner which serves "to restore to a previous effective state."[1] It is also clear to this Court, that the legislature intended that time be a key factor of whether or not to apply all or any provision contained within W.Va. Code §17C-5A-1a as evidenced by the use of the term "prior to" contained within W.Va. §17C-5A-1a(d); that is, if an "order reinstating" the Petitioner's license were issued at a point in time **before** the commissioner's receipt of the transcript of conviction then no provision of W.Va. Code §17C-5A-1a are not to be applied by the Respondent Commissioner.

8. Further, in reading the language of the entire provision of W.Va. Code §17C-5A-1a the Court finds that the mandatory authority placed upon the Respondent Commissioner under W.Va. Code §17C-5A-1a(d) overshadows the Commissioner's mandatory duty under W.Va. Code §17C-5A-1a(c) to revoke a person's license upon conviction for driving under the influence, a violation of W.Va. Code §17C-5-2. To find otherwise would require the DMV Commissioner to become dependent upon a court clerk's timely transmission of a record of criminal conviction before the DMV Commissioner could issue a ruling.

9. The Respondent Commissioner acted unlawfully when it issued its Order of Revocation dated September 26, 2007 under the plain meaning of W. Va. Code §17C-5A-1a(d). The Petitioner has established that the condition under W.Va. Code §17C-5A-1a(d) has been satisfied; accordingly, the Respondent Commissioner clearly overstepped his authority.

a. First, the Respondent Commissioner's Final Order dated May 11, 2007, by its own terms, rescinded its January 11, 2007 Order of Revocation. Since the

[1] http://www.merriam-webster.com/dictionary/reinstate

Petitioner was not subject to any other suspension or revocation, the act of rescinding its earlier Order of Revocation effectively reinstated the Petitioner's driving status to a lawfully licensed driver; that is, free from any revocation or suspension.

b. Second, is the fact that the Respondent Commissioner's Final Order was dated May 11, 2007 and the Petitioner did not plea guilty until May 22, 2007; that is, the Final Order was issued some eleven (11) days "prior to" the Petitioner's guilty plea and "prior to" the time any transcript of conviction could have been received by the Respondent Commissioner.

c. Third, is the fact that the Final Order was, by its own terms, *final;* the Final Order dismissing the case did not contain any limiting language to put the Petitioner on notice that he could be subjected to revocation at a later time. (**Exhibit C to Verified Petition**, page 3).

10. The Respondent Commissioner does not have a mandatory duty to revoke the Petitioner's license in this case under the holdings of *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 246 and *Baker v. Bolyard*, 221 W.Va. 713, 656 S.E.2d 464. Both Courts held that revocation upon conviction was required under W.Va. Code §17C-5A-1a. Of particular importance is that the facts in the Petitioner's case are immediately distinguishable from both *Stump* and *Baker*. The facts in both *Stump* and *Baker* involved no contest pleas (at the time these cases were decided, a no contest plea was the equivalent of a guilty plea) to criminal charges which were entered into while the administrative process was *pending* before the Commissioner entered a Final Order; that is, both cases addressed circumstances where a then valid

criminal conviction became final *before* the Commissioner's Final Order was issued. In the Petitioner's case, the administrative process was completed and the "case dismissed" prior to pleading guilty. (See generally **Exhibit C to Verified Petition,** page 3). Second, unlike the argument presented by the Petitioner in this case, neither the Court in *Stump* nor *Baker* addressed the application of W.Va. Code §17C-5A-1a(d) to the facts in the cases before them.

## ORDER

Based on all of the foregoing findings of fact and conclusions of law, the Court hereby **ORDERS**, **ADJUDGES**, and **DECREES** that Respondent Commissioner's September 26, 2007 Order of Revocation be, and hereby is, Dissolved, and Respondent is hereby Ordered to reinstate Petitioner's privilege to operate a motor vehicle in the State of West Virginia, forthwith.

It is ORDERED that the Clerk of this Court serve a certified copy of this Order upon Respondent, The West Virginia Division of Motor Vehicles, P.O. Box 17200, Charleston, West Virginia 25317, upon Respondent Joe E. Miller, Commissioner, 5707 MacCorkle Ave., SE, Charleston, West Virginia 25317, upon Janet E. James, Esq., Counsel for Respondents, P.O. Box 17200, Charleston, West Virginia 25317, and upon Richard D. Smith, Jr., Counsel for the Petitioner, P.O. Box 2034, Parkersburg, West Virginia 26102-2034.

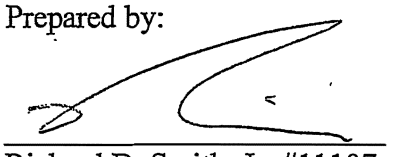
Dated this 3rd day of January, 2012.

PZJr

Hon. Paul Zakaib, Jr., Judge

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 4TH DAY OF JANUARY 2012
CLERK

Prepared by:



Richard D. Smith, Jr. #11107
Counsel for Petitioner
P.O. Box 2034
Parkersburg, WV 26102-2034
304-865-0801