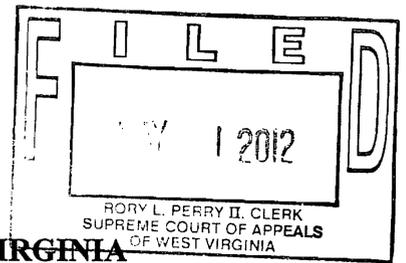


NO. 12-0202



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Respondent Below, Petitioner,

v.

BENJAMIN M. KNOPP,

Petitioner Below, Respondent.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

PAGE

ASSIGNMENT OF ERROR 1

THE CIRCUIT COURT ERRED IN REVERSING THE ORDER OF
REVOCAION ON CONVICTION ON THE BASIS OF W. VA. CODE § 17C-
5A-1a 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 3

ARGUMENT 3

THE CIRCUIT COURT ERRED IN REVERSING THE ORDER OF
REVOCAION ON CONVICTION ON THE BASIS OF W. VA. CODE § 17C-
5A-1a 3

CONCLUSION 11

TABLE OF AUTHORITIES

	<u>Page</u>
<u>FEDERAL CASES:</u>	
<u>United States v. Halper,</u> 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)	6,7
<u>STATE CASES:</u>	
<u>Carroll v. Stump,</u> 217 W. Va. 748, 619 S.E.2d 261 (2005)	8
<u>Harrison v. Commissioner, Division of Motor Vehicles,</u> 226 W. Va. 23, 697 S.E.2d 59 (2010)	4,8,9
<u>Kostrzewski v. Commissioner of Motor Vehicles,</u> 52 Conn. App. 326, 727 A.2d 233 (1999)	7
<u>Mullen v. Division of Motor Vehicles,</u> 216 W. Va. 731, 613 S.E.2d 98 (2005)	8
<u>Shell v. Bechtold,</u> 175 W. Va. 792, 338 S.E.2d 393 (1985)	5,8
<u>Shumate v. West Virginia Department of Motor Vehicles,</u> 182 W. Va. 810, 392 S.E.2d 701 (1990)	7
<u>State Department of Highway Safety and Motor Vehicles v. Gordon,</u> 860 So. 2d 469 (Fla.App. 1 Dist.,2003)	6
<u>State ex rel. Baker v. Bolyard,</u> 221 W. Va. 713, 656 S.E.2d 464 (2007)	4,5,6
<u>State ex rel. Miller v. Reed,</u> 203 W. Va. 673, 510 S.E.2d 507 (1998)	4
<u>State ex rel. Stump v. Johnson,</u> 217 W. Va. 733, 619 S.E.2d 246 (2005)	6
<u>State v. Hickam,</u> 235 Conn. 614, 668 A.2d 1321	6,7
<u>State v. Scheffel,</u> 82 Wash. 2d 872, 514 P.2d 1052 (1973), appeal dismissed, 416 U.S. 964, 94 S. Ct. 1984, 40 L. Ed. 2d 554 (1974)	7

<u>Williams v. West Virginia Division of Motor Vehicles,</u> 226 W. Va. 562, 703 S.E.2d 533 (2010)	3
---	---

STATUTES:

W. Va. Code § 17B-3-9	10
W. Va. Code § 17C-5A-1	4,5
W. Va. Code § 17C-5A-1a	Passim
W. Va. Code § 17C-5A-1a(b)	8,9
W. Va. Code § 17C-5A-1a(c)	4,9
W. Va. Code § 17C-5A-1a(d)	Passim
W. Va. Code § 17C-5A-2	5,9,11
W. Va. Code § 17C-5A-2(n)	9
W. Va. Code § 17C-5A-2(q)	5, 11, 12

MISCELLANEOUS:

91 C.S.R. 1, § 3.7.2	4
R.A.P. Rule 20	3

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BRIEF OF PETITIONER

Comes now the Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles, by counsel, Janet E. James, Senior Assistant Attorney General, and submits this brief in accordance with the Court's *Scheduling Order*.

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN REVERSING THE ORDER OF REVOCATION ON CONVICTION ON THE BASIS OF W. VA. CODE § 17C-5A-1a.

STATEMENT OF THE CASE

Petitioner was arrested for driving under the influence ("DUI") on January 2, 2007. App'x. At 1-2. His privilege to drive was initially revoked by an Order of Revocation dated January 11, 2007. App'x. At 3. Petitioner timely requested an administrative hearing, and a hearing was held on

April 23, 2007. The arresting officer failed to appear for the hearing, so the Division entered a Final Order effective May 11, 2007 which rescinded the initial Order of Revocation. App'x. At 4-6.

On or about May 22, 2007, Petitioner pled guilty to DUI in the Magistrate Court of Wood County, West Virginia, relating to the January 2, 2007 arrest. App'x. At 7. On or about June 13, 2007, the Division received a West Virginia Uniform Citation reflecting Petitioner's guilty plea. App'x. At 7. On September 26, 2007, the Division entered an Order of Revocation based upon the Petitioner's conviction for DUI. App'x. At 9. That order was returned to the Petitioner marked "return to sender, unclaimed, unable to forward". App'x. At 8. On October 21, 2011, Petitioner filed a *Petition for Writ of Prohibition* in the circuit court of Kanawha County, seeking relief from the Division's revocation order. App'x. At 10-30.

On January 3, 2012, the circuit court entered *Petitioner's Proposed Findings of Fact and Conclusions of Law* (App'x. At 52)(hereinafter, "Order") reversing the September 26, 2007 Order of Revocation (App'x. At 29). It is from that Order that Petitioner appeals.

SUMMARY OF ARGUMENT

Once again the Court is asked to consider the Petitioner's interpretation of W. Va. Code §17C-5A-1a(d), which provides:

The provisions of this section [Revocation upon conviction for driving under the influence of alcohol, controlled substances or drugs] 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.

This issue was before the Court in *Williams v. West Virginia Div. of Motor Vehicles*, 226 W.Va. 562, 703 S.E.2d 533 (2010); however, the Court properly disposed of that case on the issue of jurisdiction, and did not reach the merits.¹

The Commissioner is obligated to revoke the license of a person who has been convicted of DUI. The aforementioned statute does not vitiate this duty, even if the administrative order of revocation has been rescinded, as it was in this matter.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument under R.A.P. Rule 20 is appropriate in that this Court has not specifically decided the issue in this matter, and there has been a split of authority among the circuits as to the proper interpretation of the statute.

ARGUMENT

THE CIRCUIT COURT ERRED IN REVERSING THE ORDER OF REVOCATION ON CONVICTION ON THE BASIS OF W. VA. CODE § 17C-5A-1a.

“Where the issues on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.’ Syl. Pt. 1, *Chrystal R.M. v.*

¹Although, apparently, the Court would have agreed with the Petitioner’s interpretation of the statute:

The underlying action of the DMV was a mandatory license revocation based exclusively upon the statutorily-required revocation subsequent to the Appellee’s plea of *nolo contendere*, with no requirement for an administrative hearing.

226 W.Va. 568, 703 S.E.2d 539.

Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).” Syl. pt. 5, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998). The facts in this case are not in dispute.

In the present case, Respondent’s initial Order of Revocation was made pursuant to W. Va. Code § 17C-5A-1. Following the hearing in that matter, the revocation was rescinded pursuant to W. Va. Code § 17C-5A-2(q) and 91 C.S.R. 1, § 3.7.2. because the arresting officer failed to appear. (App’x. At 22-24). At that point, Respondent had never actually served a revocation period for the 2007 arrest; nor was he required to complete the Safety and Treatment Program or pay a reinstatement fee to get his license back. When he plead guilty, he was convicted, and the Commissioner had a duty to revoke his license at that time.

West Virginia’s statutory framework for license revocation provides two means by which a driver’s license may be revoked for DUI. *State ex rel. Baker v. Bolyard*, 221 W.Va. 713, 656 S.E.2d 464 (2007); *Harrison v. Commissioner, Div. of Motor Vehicles*, 226 W.Va. 23, 697 S.E.2d 59 (2010). If the requisite elements of either are met, the Commissioner has a mandatory duty to revoke.

A person may have his license revoked administratively upon the submission of an officer’s affidavit (in which event the person may request an administrative hearing on the merits) pursuant to W. Va. Code § 17C-5A-1; or a person’s license may be revoked upon conviction of DUI pursuant to W. Va. Code § 17C-5A-1a. “If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted . . . the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state.” W. Va. Code § 17C-5A-1a(c).

As the Court pointed out in *Baker, supra*, mandatory revocation due to conviction triggers a change in the applicable statutory provisions:

Appellant's plea of *nolo contendere* to criminal DUI charges triggered a change in which statutory provisions governed Appellee's actions relative to the revocation or suspension of Appellant's license to operate a motor vehicle in this State. Prior to entry of the *nolo contendere* plea, Appellee's actions relative to revocation or suspension of Appellant's license were governed by W. Va. Code § 17C-5A-1, which provides for an administrative hearing and determination. However, once Appellant pled *nolo contendere* to the criminal DUI charges, the mandatory revocation provisions of W. Va. Code § 17C-5A-1a were triggered, thus changing the applicable statute under which the Appellee was authorized and required to proceed. Thus, Appellant's arguments regarding a violation of his due process rights by the Appellee's actions in revoking his license to operate a motor vehicle in this state are without merit. By entering his *nolo contendere* plea, Appellant was convicted of criminal DUI charges, thus, he was no longer statutorily entitled to an administrative hearing to challenge the revocation of his license.

221 W. Va. 718, 656 S.E.2d 469.

In the present case, as in *Baker*, the Petitioner's receipt of the notice of guilty plea "triggered a change in which statutory provisions governed [the Division's] actions relative to the revocation or suspension of Respondent's license to operate a motor vehicle." *Id.* Regardless of the fact that Petitioner rescinded the initial revocation because the arresting officer failed to appear at the administrative hearing, Petitioner was obligated to revoke Respondent's license following its receipt of the notice of guilty plea. As this Court noted at footnote 7 in *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985):

Under *Code*, 17C-5A-2 [1981], a DUI conviction is not a necessary predicate for license revocation. The conviction is, however, the equivalent of a finding that

“the person did drive a motor vehicle under the influence of alcohol ... to a degree which renders him incapable of safely driving.”

The circuit court erred in finding that because *Baker* and *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 246 (2005) were factually distinguishable from the present case, the Commissioner’s mandatory duty to revoke was nullified by the dismissal of the administrative matter. “The administrative revocation of a driver’s license for DUI is not “punishment” of the offender. See *Dep’t of Highway Safety & Motor Vehicles v. Grapski*, 696 So.2d 950, 951 (Fla. 4th DCA 1997). Rather “it is an administrative remedy for the public protection that mandatorily follows conviction for certain offenses.” *Id.* (quoting *Smith v. City of Gainesville*, 93 So.2d 105, 107 (Fla.1957)); see also *Dep’t. of Highway Safety and Motor Vehicles v. Vogt*, 489 So.2d 1168, 1170 (Fla. 2d DCA 1986). When a driver’s license revocation is made mandatory by statute, revocation is an administrative function rather than the imposition of a criminal sentence. See *Grapski*, 696 So.2d at 951.” *State Dept. of Highway Safety and Motor Vehicles v. Gordon*, 860 So.2d 469, 471 (Fla.App. 1 Dist.,2003).

The circuit court’s interpretation of the statute implies that revocation on conviction constitutes double jeopardy. This is in error; the revocation is administrative (although based on the criminal outcome), and, as this Court pointed out in *Baker, supra*, it is made under a different statute than the original revocation. Further, the revocation is remedial.

Our Supreme Court had the opportunity to interpret the holding in *Halper* [*United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)]in *State v. Hickam*, *supra*, 235 Conn. 614, 668 A.2d 1321. In *Hickam*, our Supreme Court found that “[t]he majority of courts that have addressed the issue of whether the imposition of a civil sanction constitutes punishment for purposes of the double jeopardy clause ... have rejected the notion that *Halper* intended to

characterize as punishment all civil or administrative sanctions that have any deterrent effect.... The majority of courts have also concluded that administrative sanctions that have the remedial purpose of advancing public safety interests do not constitute punishment for purposes of double jeopardy analysis.” (Citations omitted.) *State v. Hickam*, supra, 235 Conn. at 621, 668 A.2d 1321. Therefore, the court concluded that “*Halper* stands for the proposition that a civil or administrative sanction that serves a legitimate remedial purpose and is related rationally to that purpose does not give rise to a double jeopardy violation even if the sanction has some deterrent effect.” We conclude that the compact is remedial for double jeopardy purposes.

Kostrzewski v. Commissioner of Motor Vehicles, 52 Conn.App. 326, 347, 727 A.2d 233, 246 (1999).

In *Shumate v. West Virginia Dept. of Motor Vehicles*, 182 W.Va. 810, 392 S.E.2d 701 (1990), this Court agreed with the reasoning of the Washington Supreme Court in *State v. Scheffel*, 82 Wash.2d 872, 514 P.2d 1052 (1973) (en banc), appeal dismissed, 416 U.S. 964, 94 S.Ct. 1984, 40 L.Ed.2d 554 (1974), that revocation of a drivers license is civil in nature, and is not a punishment:

We also disagree with the defendants' argument that the revocation of a driver's license is a punishment. While recognizing in one context that it might be so interpreted, it has been almost universally held that the suspension or revocation of a driver's license is not penal in nature and is not intended as punishment, but is designed solely for the protection of the public in the use of the highways. It is also well established that a proceeding to revoke a driver's license is a civil not a criminal action.

82 Wash.2d 879, 514 P.2d 1056.

The administrative and criminal processes following a DUI arrest are separate and distinct, and each stands alone.

A law-enforcement officer arresting a person for DUI has two distinct and separate duties to perform. The first is to file a report or Statement of Arresting Officer with the Commissioner as required by W. Va. Code § 17C-5A-1(b) (1994), initiating an administrative proceeding for the revocation of the arrested person's driver's license. The other is to take the arrested person before a magistrate, present a sworn criminal complaint and initiate a criminal proceeding against the person arrested. Any default by the arresting officer in fulfilling the second of these two duties should not affect the validity of the arresting officer's fulfillment of the first. Since the first and the second set of duties of the arresting officer are separate and distinct and initiate two separate proceedings, one administrative, the other criminal, any default by the arresting officer in fulfilling either of them should not prejudice the other proceeding.

Carroll v. Stump, 217 W.Va. 748, 756, 619 S.E.2d 261, 269 (2005).

Thus, the dismissal of the initial revocation has no bearing on the subsequent revocation on conviction. *See also, Mullen v. Division of Motor Vehicles*, 216 W.Va. 731, 734, 613 S.E.2d 98, 101 (2005) (“If the Legislature had wanted to so intertwine the criminal and civil aspects of DUI law as to automatically void related administrative driver's license suspensions when DUI criminal charges are dropped or unproven, the Legislature could have clearly done so—but it did not.”); *Harrison, supra*, at 226 W.Va. 23, 697 S.E.2d 59. The mandatory duty of the DMV Commissioner to revoke upon receipt of notice of conviction remains:

... DMV is not charged with the responsibility for *establishing* convictions, which is purely a court function. A conviction occurs within the confines of the criminal jurisdiction of the courts, and we have clearly stated that administrative license revocation proceedings for DUI are proceedings separate and distinct from criminal proceedings. Syl. Pt. 3, *Carroll v. Stump*, 217 W.Va. 748, 619 S.E.2d 261 (2005). Further, although the orders refer to the enhancement of the revocation period as a “penalty,” the penalties for DUI are imposed under the criminal, *not* administrative, DUI statutes. *Shell v. Bechtold*, 175 W.Va. 792, 796, 338 S.E.2d 393, 396 (1985) (recognizing distinction between the judicial imposition of criminal

penalties and the administrative revocation or suspension of a driver's license). *The agency's duty pursuant to West Virginia Code § 17C-5A-1a is to act upon notification from a criminal court that a conviction of DUI occurred.* Contrary to the lower courts' observation, the meaning of conviction for enhancement purposes is an inherent part of the direction in West Virginia Code § 17C-5A-1a(b) that an abstract of judgment be sent to DMV by “[t]he clerk of the court in which a person is convicted for an offense described in section two [§ 17C-5-2], article five of this chapter ...”. *DMV's duty to revoke is automatic upon receipt of the court's notice and does not require the agency to make any independent determination regarding the conviction.* W. Va.Code § 17C-5A-1(c). Obviously, one's license may be revoked without a conviction. The reference in the orders to the provision in West Virginia Code § 17C-5A-2 (n), which is currently found in subsection (p),^[footnote omitted] regarding use of convictions for revocation purposes is limited by its terms as applicable only to section two of Article 5A, which deals with matters involving DMV hearings and revocations resulting therefrom.

Harrison, supra, at 226 W.Va. 32-33, 697 S.E.2d 68 - 69 (Emphasis added).

There are two independent ways in which a license may be revoked, and rescission of an administrative license revocation does not vitiate the Commissioner's mandatory duty to revoke on conviction. The fact that the administrative proceedings had been concluded at the time Respondent herein plead guilty to DUI does not extinguish the Commissioner's duty to revoke on conviction, and the circuit court was in error on that point. (App'x. At 58).

W. Va. Code § 17C-5A-1a precludes a person from being revoked two times for the same offense. W. Va. Code § 17C-5A-1a(d) is intended to prevent two revocations stemming from the same offense: “[t]he 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.” (Emphasis added.) Reinstatement presumes that a revocation period

has been served, that a reinstatement fee has been paid, and that all other requirements have been met in order to get one's license back (e.g., completion of the Safety and Treatment Program and/or Interlock). "Reinstate" is defined by Black's Law Dictionary (Fifth Edition) thus: "To reinstall; to reestablish; to place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed." For example, W. Va. Code § 17B-3-9 sets forth the provisions for reinstatement following revocation of a license:

The Division, upon suspending or revoking a license, may not require that the license be surrendered to and be retained by the Division. The surrender of a license may not be a precondition to the commencement and tolling of any applicable period of suspension or revocation: *Provided*, That before the license may be reinstated, the licensee shall pay a fee of fifty dollars, in addition to all other fees and charges, which shall be collected by the Division and deposited in a special revolving fund to be appropriated to the Division for use in the enforcement of the provisions of this section.

A person's driving privilege can only be reinstated if it was taken away in the first place.

"Reinstatement" must be distinguished from "rescission." Rescission means that the revocation is dissolved as though it never existed. Rescission is made in the context of an administrative appeal of an initial order of revocation pursuant to W. Va. Code §17C-5A-2(q): "If the commissioner finds to the contrary with respect to the above issues, the commissioner shall **rescind** his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter." (emphasis added). Black's Law Dictionary (Fifth Edition) defines "rescind" thus: "To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. To declare a contract void in its inception and to put an end to it as though it never were....Not merely to

terminate it and release parties from further obligations to each other but to abrogate it from the beginning and restore parties to relative positions which they would have occupied had no contract ever been made.” In the case of rescission, the person does not suffer any loss. When a revocation is rescinded pursuant to W. Va. Code § 17C-5A-2, the person’s revocation has been stayed during the pendency of a hearing, and the person has been legally able to drive. Moreover, there are no requirements of Safety and Treatment Program, Interlock, or reinstatement fees in order for full licensure to be restored. The person has never suffered the imposition of a revocation period. The revocation simply goes away.

Pursuant to W. Va. Code § § 17C-5A-1a, the Petitioner’s Order of Revocation entered on September 26, 2007 (App’x. at 29) must be affirmed and the circuit court’s Order overturned.

CONCLUSION

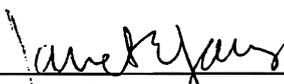
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant prays that this Court reverse the Order entered by the Circuit Court of Kanawha County on January 3, 2012.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing "Brief of Petitioner" was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 1st day of May, 2012, addressed as follows:

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JANET E. JAMES