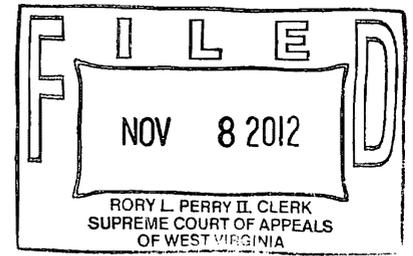


Case No. 12-1213



IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA, ex rel.  
JOE E. MILLER, Commissioner,  
West Virginia Division of Motor Vehicles,

Petitioner,

v.

MARK A. KARL, Judge of the  
Circuit Court of Marshall County,  
and JAMES LEONARD PARKER,

Respondents.

Underlying Proceeding  
No. 12-CAP-5K  
Marshall County Circuit Court

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

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TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF  
APPEALS OF WEST VIRGINIA

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**RESPONSE TO PETITION FOR WRIT OF PROHIBITION**

Comes now James Leonard Parker, (hereinafter “Respondent”), and through Counsel, in response to the Petitioner’s Writ of Prohibition and states as follows:

**I. QUESTIONS PRESENTED**

1. Does a proffer of evidence by counsel satisfy the requirements of W.Va. Code §17C-5A-2(s) for proof of irreparable harm?
2. Must a Circuit Court order only granting a stay of license revocation contain specific findings of fact?
3. Must a Circuit Court order granting a stay of license revocation state its duration with specificity?

**II. STATEMENT OF THE CASE**

1. The Respondent, by Counsel, filed a timely *Petition for Review* in the Circuit Court of Marshall County pursuant to W.Va. Code § 29A-5-4.
2. In addition to his Petition, the Respondent, also made *Application for Stay of Final Order* pursuant to W.Va. Code §29A-5-4(c). In the written application for Stay, the Petitioner, by Counsel, stated that he would

suffer irreparable harm by the loss of his driving privileges if the stay were not granted.

3. At said hearing, the Respondent, Mr. Parker, appeared in person and by undersigned Counsel and the Court heard arguments of Counsel regarding the evidence and record below, and the harm or hardship, which would be experienced by respondent.
4. Undersigned Counsel requested the Court to issue the stay based upon the Petition, the representations of Counsel and the underlying findings of fact and conclusions of law.
5. The Petitioner had an opportunity to be heard and placed on the record her argument regarding the underlying facts and applicable laws that there would not be a likelihood that the Respondent would prevail on the merits and argued that the requirements of W. Va. Code §17C-5A-2(s) were not satisfied. Judge Karl stated “Mr. Lantz has indicated there’s going to be irreparable harm in that he’s not able to do his work, he’s not able to get to medical appointments. I, as matter of course, grant stays. I’m going to grant a stay in this case and order the record be produced so that I can review it.” (Tr., P. 7, lines 6-11)
6. The Petitioner correctly states that counsel further asks Judge Karl to Order that the Stay be self-terminating at 150 days and Judge Karl stated, “I’ll grant the Motion as to the 150 day stay.” (Tr., P. 8, lines 6-7) However, the Petitioner failed to illuminate that the undersigned Counsel further inquired of the Court as to whether or not the 150

days were self-terminating or upon the Court's review, to which Judge Karl responded "only upon my review." (Tr., P.8, line 15)

7. On June 30, 2012, Judge Karl entered an Order prepared by undersigned Counsel in this matter. Undersigned Counsel acknowledges that although he intended to send the Order to Petitioner's Counsel, review of his file evidences that it was not sent or reviewed by Petitioner's Counsel as a result of oversight.
8. Said Order issued a stay that has not exceeded 150 days and will not exceed 150 days until November 27, 2012.

### **III. SUMMARY OF ARGUMENT**

The Circuit Court of Marshall County has not exceeded its jurisdiction by granting the Order to Stay the License Revocation of Respondent Parker pursuant to its authority vested by W. Va. Code §29A-5-4(c) which clearly states that "pending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper." Although the petitioner will argue that W.Va. Code § 29A-5-4(c) has been superseded by W.Va. Code § 17C-5A-2(s), it was not done so specifically and expressly as required by W.Va. Code § 29A-7-3 and therefore, has not been superseded.

Further, the Court did hold a hearing in this matter. After notice to the parties and after hearing both parties, the court did issue the requested stay. Said stay has not exceeded 150 days and doesn't violate the requirements set forth in W.Va. Code §17C-5A-2(s)

In light of the court's authority under W.Va. Code § 29A-5-4(c) and W.Va. Code § 17C-5A-2(s), the Circuit Court of Marshall County has not exceeded its legitimate authority and this Petition for Writ of Prohibition should be dismissed.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondents submits that review of the record should allow this Court to dispose of the pending case without oral argument.

#### **V. ARGUMENT**

##### **1. The Court did not exceed its power under W.Va. Code § 29A-5-4(c).**

The Petitioner argues that in the instant matter, Judge Karl exceeded any legitimate power by granting a stay “as a matter of course”; instead of relying on evidence produced at the hearing; by issuing an open-ended stay; and by failing to make findings. Petitioner contends all of these items are required by W.Va. Code §17C-5A-2(s). Significantly, petitioner completely ignores the stay provisions contained in W.Va. Code § 29A-5-4(c).

W. Va. Code§29A-5-4 deals specifically with Judicial Review of Contested Cases. In *Harper v. Bechtold*, 180 W.Va. 674, 379 S.E. 2d 397 (1989), the court stated that the revocation of a driver’s license under W.Va. Code§17C-5A-2 is an administrative proceeding subject to the Appeal provisions of the Administrative Procedures Act, W.Va. Code § 29A-5-4. W. VA. Code §17C-5A-2(s) also states that a person whose license is at issue as well as the Commissioner shall be entitled to Judicial review as set for in Chapter 29A of this Code.

W.Va. Code §29A-5-4(c) states in relevant part, that the "appellant at any time after the filing of his Petition, may apply to such circuit court for a stay of or

supersedeas to such final order or decision. Pending the Appeal, the court may grant a stay or supersedeas upon such terms it deems proper." See W.Va. Code § 29A-5-4(c).

The Petition for Review and Application of Stay filed by Respondent Parker were made pursuant to W.Va. Code § 29A-5-4(c). This statute provides the circuit court with authority to grant a stay, such as the one that was granted by Judge Karl in this matter, under terms that the court "deems proper".

The petitioner will likely argue that the provisions in Chapter 29 regarding stays have been superseded; however, W.Va. Code §29A-7-3 discusses subsequent legislation and states that "no subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so specifically and expressly." See W.Va. Code § 29A-7-3.

A careful reading of W.Va. Code §17C-5A-2, reveals that there is no language "specifically and expressly" modifying or superseding the grant of authority regarding a stay issued pursuant to W.Va. Code §29A-5-4(c).

If the Legislature had intended that the provisions of 17C-5A-2(s) only were to apply notwithstanding the provisions in W.Va. Code §29A-5-4(c) they could have achieved such a result as they did later in the very same paragraph of §17C-5A-2(s) when they stated "notwithstanding the provisions of section four Article five of said chapter, the Office of Administrative Hearings may not be compelled to transmit a certified copy of the file or the transcript of hearing to the Circuit Court in less than sixty days." See W.Va. Code § 17C-5A-2(s).

The Legislature in drafting §17C-5A-2(s) did specifically and expressly modify and supersede the requirement under W.Va. Code §29A-5-4(d), that an agency be required to transmit a copy of the file or transcript within 15 days; however, they apparently choose not to specifically or expressly supersede the authority given to the circuit court to grant a stay under W.Va. Code §29A-5-4(c). The Respondent contends that the authority granted under W.Va. Code §29A-5-4(c) clearly permits a stay under terms that the Circuit Court deems proper; therefore the actions by Judge Karl in this matter are not in excess of his legitimate authority.

The Respondent acknowledges that the Petitioner will likely argue that W.Va. Code § 17C-5A-2(s) is clear, more recent and more specific and therefore, under the rules of statutory construction, W.Va. Code § 17C-5A-2(s) should apply. Further, Respondent assumes that Petitioner will argue that *Adkins v. Cline*, 216 W.Va. 504, 607 S.E.2d 833, (2004) and *Smith v. Bechtold*, 190 W.Va. 315, 438 S.E.2d 347, (1993) both support a conclusion that W.Va. Code § 17C-5A-2(s) and the restrictions therein apply to all stays and is the only statute that applies regarding stays of an order from the Office of Administrative Hearings. However, neither the *Bechtold* case, nor the *Cline* case address the apparent inconsistencies between the statutes or the requirement under Chapter 29 of specific and express language necessary to modify or supersede a provision in Chapter 29. Respondent is not aware of any case of record that addresses these inconsistencies.

**2. Regardless of the applicability of W.Va. Code § 29A-5-4(c), the circuit court has satisfied the requirements of W.Va. Code § 17C-5A-2(s).**

Respondent further contends that regardless of the applicability of W.Va. Code § 29A-5-4(c) or W.Va. Code § 17C-5A-2(s), the stay did not exceed the legitimate authority of the Circuit Court. The fact presented herein distinguishes it from the two cases cited by the Petitioner, those being *Smith v. Bechtold, Supra.*, and *Adkins v. Cline, Supra.* In both *Bechtold* and *Cline* the court had issued repeated stays and it was unclear in both cases whether or not the Court even held a hearing on the matter or gave either side the opportunity to be heard.

In the matter currently before the court, there was notice and a hearing on the Application for Stay at which the Petitioner did appear by counsel. The respondent through counsel argued reasons based upon the record below as to why he felt the respondent would ultimately be successful on the merits. Respondent's counsel then made a proffer of evidence to the court as to the reasons the respondent would suffer "substantial hardship" which the court found as irreparable harm, as evidenced by the court's comments on the record. (Tr., P.7, line 6-11)

Petitioner argues that the court erred by not requiring "evidence," although the petitioner concedes that "the substantial probability that the appellant shall prevail on the merits," can be satisfied by argument of counsel, but a showing of irreparable harm may not. This concession contradicts petitioner's argument that the statute requires the taking of "evidence" (which the petitioner represents must be testimonial). Respondent asserts that when the court concludes that there is a substantial likelihood that one will prevail on the merits in a proceeding involving

license revocation, irreparable harm will always exist because the individual's privilege to drive would be wrongfully suspended for a period of time without any redress for the wrong. Additionally and importantly it should be noted that if the underlying revocation is ultimately not overturned the license suspension can then be enforced without harm to the petitioner.

This court has previously recognized that "proffer evidence" is permissible. In a memorandum decision issued *In the Interest of: L.R., K.R. and M.R.*, No. 11-1762, (West Virginia Supreme Court May 29, 2012)(memorandum decision) this court found that the circuit court did not err in accepting proffered evidence by the DHHR at a dispositional hearing and making findings in a termination order. The court recognized the guardian's argument that the statute required the DHHR to prove by clear and convincing proof, but did not specify any particular manner or mode of testimony or evidence.

Respondent contends that proffered evidence should be permitted in a temporary proceeding for a stay of a license revocation where no harm will occur to the opposing party and such procedure promotes judicial economy.

Petitioner further argues that the order of the circuit court fails to make any findings of fact and therefore, was improperly granted and that the stay exceeds one hundred and fifty days in violation of W. Va. Code §17C-5A-2(s)

There is no requirement in the statute that the order of stay requires findings of fact and conclusions of law.

Additionally, W.Va. Code§17C-5A-2(s) states in no event shall the stay of the order exceed one-hundred-fifty (150) days. Petitioner's argument is not ripe for

consideration because the stay has not exceeded 150 days. The order signed by Judge Karl was executed on June 30, 2012 and 150 days would be November 27, 2012. As of the time of the writing of this response, and as of the time of the Petition, the stay has not exceeded the 150 days. The order executed by Judge Karl indicates that the stay will be in effect until further order of the court and so long as that order occurs before the 150 days, petitioner's argument on this issue must fail because there would be no violation of W.Va. Code § 17C-5A-2(s).

Counsel apologizes to the court and petitioner's counsel for his oversight in not providing the proposed order to opposing counsel before submission to the court as required under West Virginia Trial Court Rules 24.01. With that said, the petitioner had a remedy short of seeking a writ of prohibition, that being the filing of an objection to the order with the circuit court and/or contacting the preparer of the order to seek resolution of the conflict and filing of an amended order.

## VI. CONCLUSIONS

For the reasons listed herein, Respondent requests that this Court deny Petitioner's Petition for Writ of Prohibition and dismiss the petition.

Respectfully Submitted,

Respondents

By Counsel,

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, Herman D. Lantz, Esquire, do hereby certify that the foregoing "*Response to Petition for Writ of Prohibition*" was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States Mail, this 7<sup>th</sup> day of November, 2012, addressed as follows:

The Honorable Mark A. Karl, Judge  
Marshall County Circuit Court  
600 Seventh Street  
Moundsville, WV 26003

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\_\_\_\_\_  
Herman D. Lantz, Esq.