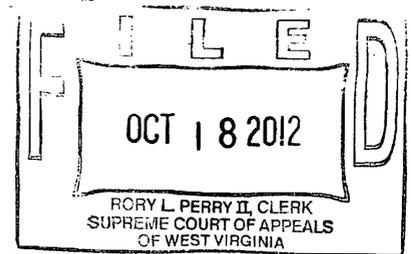


Case No. 12-1223



BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

Petitioner,

v.

**CHARLES KING, Judge of the
Circuit Court of Kanawha County,**

Respondent,

and

NICHOLE ERWIN,

Party in Interest.

PETITION FOR WRIT OF PROHIBITION

**DARRELL V. McGRAW, JR.
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PETITION FOR WRIT OF PROHIBITION

Comes now Joe E. Miller (hereinafter "Petitioner"), Commissioner of the West Virginia Division of Motor Vehicles (hereinafter "DMV"), by and through the undersigned counsel, and hereby submits the instant Petition for Writ of Prohibition pursuant to Revised Rule of Appellate Procedure 16 for the reasons that follow. (The circuit court Order is listed in the Appendix as Exhibit 1.)

I. QUESTIONS PRESENTED

1. Does a proffer by counsel satisfy the evidentiary requirements of W. Va. Code § 17C-5A-2(s) for proof of irreparable harm?
2. Must a circuit court order granting a stay of a license revocation contain specific findings of fact?

II. STATEMENT OF THE CASE

1 The DMV is a state agency with responsibility for, among other things, enforcing statutory provisions relating to the privilege to drive a motor vehicle in West Virginia. W. Va. Code §§ 17A-2-1, 17B-3-1 *et seq.*

2 The Commissioner of the DMV is the executive officer of the DMV. As such, the Commissioner is an officer of the State of West Virginia who is appointed by, and serves at the will and pleasure of the Governor of West Virginia. W. Va. Code § 17A-2-2.

3 The relator, Commissioner Joe. E. Miller, appears in his official capacity as the executive officer of the DMV.

4 In his official capacity, Commissioner Joe. E. Miller issued an order revoking the privilege of Respondent Erwin¹ to drive in West Virginia because she was found to have driven under the influence of alcohol (hereinafter, "DUI").

5. Respondent Erwin , by counsel, timely filed a *Petition for Review of Administrative Order* in the Circuit Court of Kanawha County on or about May 16, 2012, which petition is currently pending before Judge King in the Circuit Court of Kanawha County.

6. On July 26, 2012, a hearing was held on Petitioner's request for stay.

7. At said hearing, Respondent Erwin failed to appear, and her counsel proffered to the Court the reasons why she would be suffer irreparable harm as required by W. Va. Code §17C-5A-2(s).

8. At hearing, because Ms. Erwin was not present, no testimony was taken and no

¹ Since the time that this case was styled, Respondent Erwin has married and is now known as Nichole Dunbar. For clarity's sake, Petitioner shall refer to the Respondent by the name under which the case was captioned.

evidence was admitted into the record regarding her request for a stay.

9. The undersigned argued that the requirements of W. Va. Code §17C-5A-2(s) and the holding of this Court in *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993), were not satisfied, and Judge King stated, “I will shorten this too, Ms. Skorich, with all due respect. I hear a number of these cases and routinely I grant a stay. Okay?.” (Exhibit 2, P. 7, lines 8-9.)

10. On August 28, 2012, Judge King entered an Order prepared by Respondent Erwin’s counsel.

11. Said Order failed to make any findings “upon the evidence adduced” at hearing as required by W. Va. Code §17C-5A-2(s).

III. SUMMARY OF ARGUMENT

The extraordinary remedy of prohibition is sought herein on the grounds that the circuit court of Kanawha County has exceeded its jurisdiction in granting an order staying the license revocation of Respondent Erwin in the present matter which may resolved only by issuance of a writ in the present case. The stay has been granted without the procedure required by W. Va. Code §17C-5A-2(s), namely, evidence was not presented to the Court regarding Respondent Erwin’s alleged irreparable harm and findings of fact were not included in the Order. Because these actions violate the clear requirements set forth in W. Va. Code §17C-5A-2(s) and applicable case law, Judge King has exceeded his legitimate authority.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

The DMV submits that review of the record should allow this Court to dispose of the pending case without either issuance of a Rule or oral argument. However, if this Court schedules oral argument, the DMV submits that the argument should proceed under Rule 19.

V. ARGUMENT

1. **Prohibition is the Only Remedy to Correct a Clear Legal Error.**

Pursuant to W. Va. Code §53-1-1, a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." In that regard, a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court, although having jurisdiction, exceeds its legitimate powers. *See, State ex el. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 602 S.E.2d 542 (2004).

In the instant matter, Judge King exceeded any legitimate power by granting a stay "routinely" instead of relying on evidence adduced at hearing and by failing to make findings as required by W. Va. Code § 17C-5A-2(s). In the matter *sub judice*, there is no other remedy available because the Order granting stay is not a final, appealable order. In that regard, immediate relief from this Court is necessary to prevent an illegal stay of revocation to continue.

2. **A proffer by counsel is insufficient to satisfy the evidentiary requirements of W. Va. Code § 17C-5A-2(s) for proof of irreparable harm.**

Judge King's order was improperly granted, in violation of West Virginia Code 17C-5A-2(q), which provides:

the court may grant a stay or supersedeas of the order only upon motion and hearing, and a finding by the court **upon the evidence presented**, that there is a substantial probability that the appellant shall prevail upon the merits, and the appellant will suffer irreparable harm if the order is not stayed: Provided, That in no event shall the stay or supersedeas of the order exceed one-hundred-fifty days.

[Emphasis added.]

The August 28, 2012, Order is also in violation of this Court's ruling in *Smith v. Bechtold*,

190 W. Va. 315, 438 S.E.2d 347 (1993) which said:

Under the clear language of [now W. Va. Code §17C-5A-2(s)], a circuit court's authority to grant a stay is limited to granting a stay for no more than thirty days [now 150 days], and only after notice and hearing to the parties.

In this Court's view, this statute does not preclude a circuit court from issuing consecutive stays, but, as the statute indicates, before any stay may be granted in an appeal from a decision of the Commissioner of the Department of Motor Vehicles revoking a driver's license, **the circuit court must conduct a hearing where evidence is adduced, and "upon the evidence presented", must make a finding** that there is a substantial probability that the appellant will prevail upon the merits and that he will suffer irreparable harm if a stay is not granted.

[Emphasis added.]

This Court further concluded in *Smith v. Bechtold* that

...The Court believes, however, that if the circuit judge granted the stays without conducting evidentiary hearings and without meaningfully analyzing the evidence adduced during the hearings, he exceeded the legitimate powers granted to him under the statute.

190 W. Va. 315, ___, 438 S.E.2d 347, 351 (1993).

It is without question that this Court requires the circuit courts to conduct evidentiary hearings at which testimony is taken or other evidence is submitted so that the a meaningful analysis of the alleged irreparable harm can be made. Petitioner submits that the second part of W. Va. Code § 17C-5A-2(s), "the substantial probability that the appellant shall prevail on the merits," can be satisfied by argument of counsel; however, only through the taking of evidence can a circuit court make a reasoned decision as to the alleged irreparable harm that a driver may suffer. "A proffer is not evidence, *ipso facto*." *U. S. v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1977). *See also, Crawley v. Ford*, 43 Va.App. 308, 597 S.E.2d 264 (2004); *Jones v. U. S.*, 829 A.2d 464 (D.C. 2004); *Daniels*

v. *U. S.*, 613 A.2d 342, 349 (D.C. 1992); *Parker v. U. S.*, 751 A.2d 943 (D.C. 2000). Moreover, a “proffer is not evidence unless the parties stipulate that a proffer will suffice.” *Ford v. State*, 73 Md.App. 391, 404, 534 A.2d 992, 998 (1998). Petitioner did not so stipulate, and as the record shows, Petitioner objected to the admission of a proffer as evidence below.

Further, fundamental fairness requires that the DMV be afforded the opportunity to cross-examine the driver as to the alleged irreparable harm instead of merely taking counsel’s proffer as evidence. The DMV has the right to inquire further into the driver’s situation and the alleged harm that will befall her if she cannot drive pending her appeal. The circuit court erred by accepting opposing counsel’s proffer and by not providing Petitioner the opportunity to question Respondent Erwin regarding her alleged irreparable harm.

3. A circuit court order granting a stay of a license revocation must contain specific findings of fact.

West Virginia Code § 17C-5A-2(s) unequivocally states that “the court may grant a stay or supersedeas of the order **only upon** motion and hearing, and **a finding** by the court upon the evidence presented...” Clearly, a stay order must state with specificity the facts upon which the Court relied on in determining that driver would suffer irreparable harm and the reasons why the Court believes that the driver will be successful in her *Petition for Review of Administrative Order*.

The instant Order makes no findings and does not reconcile the arguments and proffers with the decision of the Court in granting the stay. Even if the Order did not use the words “Findings of Fact” or “Finding,” there is no discussion whatsoever to indicate why the Court found that Respondent Erwin was likely to succeed on the merits of her appeal or why she would be irreparably harmed if the stay was not granted. The Order below is completely devoid of any of the statutory

requirements for granting a stay; therefore, it was improperly granted.

4. This Court must address the issues herein as they are subject to be oft repeated.

Even if Judge King issues an amended order after the filing of this instant matter, this Court must still review and determine the issues presented because they will be repeated throughout the State of West Virginia. As this Court has previously determined, “[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.” Syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984). See also, *Wooten v. Coulson*, 226 W. Va. 508, 703 S.E.2d 280 (2010).

Petitioner issues approximately 10,000 DUI license revocation orders each year, 2500 of which are appealed administratively. Approximately 130 of those revocations are eventually appealed to the circuit courts of this state. In almost every case where a driver appeals his/her license revocation, a stay hearing is requested. Because there are 55 different jurisdictions conducting stay hearings, there is a possibility for 55 different interpretations of the evidentiary requirements of W. Va. Code §17C-5A-2(s); therefore, the matter will continue to be repeated as other drivers request stays of their license revocations.

It is clear that the same issues that this Court has attempted to correct in *Smith v. Bechtold* and *Adkins v. Cline* continue throughout the circuit court of this state. The total disregard of the statutory requirements and this Court’s previous holdings has become a chronic problem throughout this State and must be addressed again.

VII. CONCLUSION

For the reasons listed above, Petitioner prays that this Court grant Petitioner's Petition for Writ of Prohibition and overrule Respondent's Order Denying Motion to Dismiss.

Respectfully submitted,

JOE E. MILLER, Commissioner,
Division of Motor Vehicles,

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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and

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Party in Interest.

VIII. VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA

In accordance with the requirements of W. Va. Code § 53-1-3, the undersigned hereby verifies that the foregoing Petition constitutes a fair and correct statement of the proceedings in the civil action identified in this Petition, based upon his information and belief.

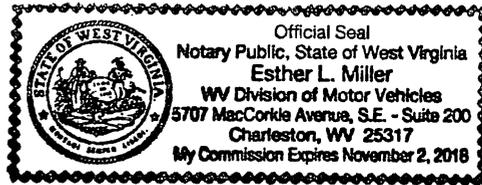
Joe E. Miller

Joe E. Miller, Commissioner,
West Virginia Division of Motor Vehicles

Subscribed and sworn before me this 17th day of October, 2012.

My commission expires on: 11-2-2018

Esther L. Miller
Notary Public



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IX. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that the foregoing "*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 18th day of October 2012, addressed as follows:

The Honorable Charles King, Judge
Kanawha County Circuit Court
111 Court Street
Charleston, WV 25301

Paul S. Detch, Esquire
201 North Court Street
Lewisburg, WV 24901


Elaine L. Skorich