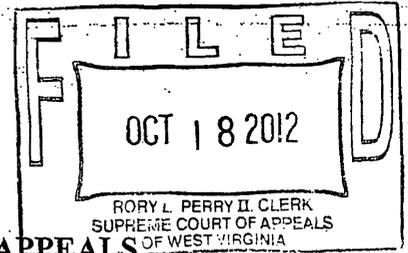


Case No. 12-1224



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.

**WILLIAM S. THOMPSON, Judge of the
Circuit Court of Boone County,**

Respondent,

and

PATRICK I WHITE,

Party in Interest.

PETITION FOR WRIT OF PROHIBITION

**DARRELL V. McGRAW, JR.
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and

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Party in Interest.

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 A.)

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 state its duration with specificity?

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 Parker to drive in West Virginia because he was found to have driven under the influence of alcohol (hereinafter, "DUI.")

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

6. On August 28, 2012, a hearing was held on Petitioner's request for stay which was contained in his *Petition for Review of Administrative Order* and not by separate motion as required in W. Va. Code §17C-5A-2(s).

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

8. At hearing, no testimony was taken and no evidence was admitted into the record regarding Respondent White's request for a stay.

9. The undersigned argued that the requirements of W. Va. Code §17C-5A-2(s) were not satisfied, and Judge Thompson proceeded without requiring Mr. White to testify.

10. Judge Thompson required the parties to submit proposed orders regarding their respective positions, and Petitioner filed its proposed order on September 7, 2012. (Exhibit B.)

11. Respondent White filed his proposed order which Judge Thompson then entered on September 10, 2012.

12. Said Order failed to limit the stay to 150 days as required by W. Va. Code §17C-5A-2(s).

13. On September 12, 2012, Petitioner filed a *Motion to Vacate Order Granting Temporary Stay* because said Order failed to limit the stay to 150 days. (Exhibit C.)

14. The circuit court has taken no action on Petitioner's pending *Motion to Vacate*.

III. SUMMARY OF ARGUMENT

The extraordinary remedy of prohibition is sought herein on the grounds that the circuit court of Boone County has exceeded its jurisdiction in granting an order staying the license revocation of Respondent White in the present matter which may be 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 White's alleged irreparable harm, and an open-ended stay has been issued in violation of W. Va. Code § 17C-5A-2 and *Adkins v. Cline*. 216 W. Va. 504, 607 S.E.2d 833 (2004). Because these actions violate the clear requirements set forth in W. Va. Code §17C-5A-2(s) and applicable case law, Judge Thompson 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 Thompson exceeded any legitimate power by granting a stay instead of relying on evidence adduced at hearing and by issuing an open-ended stay - both in violation of 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 Thompson's order was improperly granted, in violation of W. Va. 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 Order of September 10, 2012, 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.

[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 even the Order points out on page two that the court below "entertained argument and proffers of counsel" and not the statutorily required "upon evidence adduced."

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 him if he cannot drive pending his appeal. The circuit court erred by accepting opposing counsel's proffer and by not providing Petitioner the opportunity to question Respondent White regarding his alleged irreparable harm.

3. A circuit court order granting a stay of a license revocation must state its duration with specificity.

West Virginia Code § 17C-5A-4(s) is quite clear in its language stating that "in no event shall the stay or supersedeas of the order exceed one-hundred-fifty days." While it is possible that some courts may grant a stay for a lesser duration of time, it is common for stays to be granted for the maximum permitted by law - 150 days. A stay order which does not delineate the duration of the stay creates an open-ended stay which has been determined by this Court to be contrary to law.

This Court undertook to solve a similar problem with stays in *Adkins v. Cline*,

The open-ended stays ordered in these consolidated cases were in direct violation of West Virginia Code § 17C-5A-2, which at the time the stays were instituted contained a thirty-day limitation of stays in such matters and currently contains a 150-day limitation of stays. Once these open-ended stay orders were instituted, the Appellees quite understandably made no attempt to bring these matters to a resolution. Thus, the DMV was required to carry the burden of bringing these issues to the attention of the lower court, requesting the court to vacate the stays, and then initiating this appeal when the lower court reversed the revocations and remanded to the commissioner. During oral argument, the DMV informed this Court that several other pending cases are subject to impermissibly lengthy stays. Such stays cannot be permitted due to their obvious violation of statute, as well as the unreasonable delay in providing final legal resolution to these administrative revocation matters. Thus, we direct that stays of administrative license revocation proceedings in violation of the 150-day statutory limitation of West Virginia Code § 17C-5A-2 must proceed to final resolution as soon as practicable, and no additional stays in violation of such statute should be ordered.

216 W. Va. 504, ___, 607 S.E.2d 833, 836 (2004).

Clearly, the stay cannot exceed 150 days per statute and case law; however, Petitioner submits that an Order granting a stay must so state lest it be open-ended. The Order prepared by Respondent White's counsel and signed by Judge Thompson does not limit the stay. Thus, the Order violates the statute and this Court's intent in *Adkins v. Cline* to limit a stay to 150 days. Because "a court speaks through its orders," the Order indicates that the Court meant to leave the stay open-ended. *State ex rel. Erlewine v. Thompson*, 156 W. Va. 714, 718, 207 S.E.2d. 105, 107 (1973).

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

Even if Judge Thompson 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

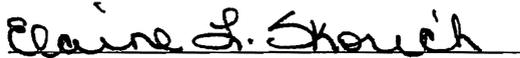
For the reasons listed above, Petitioner prays that this Court grant Petitioner’s Petition for Writ of Prohibition and overrule Respondent’s Order Denying Motion to Dismiss.

Respectfully submitted,

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

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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Counsel for Petitioner

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Respondent,

and

PATRICK I WHITE,

Party in Interest.

VIII. VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA

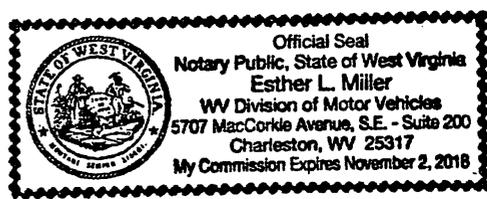
In accordance with the requirements of W. Va. Code § 53-1-3, the undersigned hereby verifies that the foregoing Petition constitutes a fair and correct statement of the proceedings in the civil action identified in this Petition, based upon his information and belief.

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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and

PATRICK I WHITE,

Party in Interest.

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 William S. Thompson, Judge
Boone County Circuit Court
200 State Street
Madison, WV 25130

Matthew M. Hatfield, Esquire
221 State Street, Suite 101
P. O. Box 598
Madison, WV 25130



Elaine L. Skorich