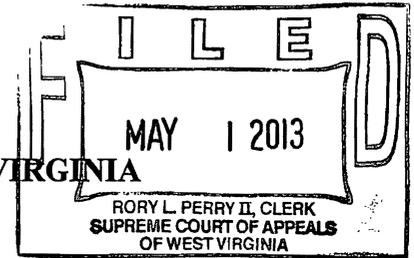


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0438



STATE OF WEST VIRGINIA EX REL.
STEVEN O. DALE, ACTING COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Petitioner/Respondent,

v.

THE HONORABLE JAMES C. STUCKY,
IN HIS OFFICIAL CAPACITY AS JUDGE OF
THE THIRTEENTH JUDICIAL CIRCUIT, AND
MICHAEL DOONAN,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

WHETHER THE CIRCUIT COURT OF KANAWHA COUNTY SHOULD BE PRECLUDED FROM ACCEPTING TRANSFER OF AN ADMINISTRATIVE APPEAL FROM THE CIRCUIT COURT OF WOOD COUNTY WHEN THE WOOD COUNTY CIRCUIT COURT DID NOT HAVE JURISDICTION OVER THE CASE?

STATEMENT OF THE CASE

The Petitioner, Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles¹, seeks a writ of prohibition to prevent Respondent Judge Stucky from accepting jurisdiction in the matter styled *Michael Doonan v. West Virginia Division of Motor Vehicles*, Civil Action No. 13-MISC-54 (Kanawha County), an administrative appeal which was originally filed in Wood County and was transferred by the circuit court of Wood County to the circuit court of Kanawha County.

At the January 22, 2013 hearing in this matter before the circuit court of Wood County, Respondent Doonan admitted that he no longer resides in Wood County. A.R. at 9. There was no evidence that Respondent Doonan does business in Wood County. Over the objection of the Petitioner, who argued that the circuit court of Wood County had no jurisdiction and that venue was improper in Wood County, the circuit court granted Respondent Doonan's request to transfer the matter to Kanawha County. A.R. at 9-10.

The underlying appeal is based on the following facts. On January 1, 2010, Respondent Doonan was observed speeding in Parkersburg, Wood County, West Virginia. The investigating

¹The Division of Motor Vehicles 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.* The Commissioner of the Division is the executive officer of the Division. 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. The Petitioner, Steven O. Dale, Acting Commissioner, appears in his official capacity as the duly-appointed executive officer of the Division.

officer who stopped Respondent Doonan noted that he had the odor of an alcoholic beverage on his breath, his eyes were glassy and bloodshot, and he had slurred speech. Respondent Doonan admitted that he had drunk four beers earlier. Respondent Doonan was unsteady. He failed the standard three field sobriety tests. Respondent Doonan refused to submit to a preliminary breath test. The investigating officer placed him under arrest for driving under the influence of alcohol (“DUI”). Following his arrest, Respondent Doonan refused to submit to the secondary chemical test on January 1, 2010, in Wood County, West Virginia. A. R. at 19-25.

Respondent Doonan timely requested an administrative hearing and the hearing subsequently convened on November 3, 2010 and November 4, 2011. A Final Order was issued effective December 19, 2012, which affirmed the revocation of his driver’s license for second-offense DUI. A. R. at 27-38. Counsel for Respondent Doonan received the Final Order on December 11, 2012. A.R. at 39.

On January 10, 2013, Respondent Doonan, by counsel, filed a *Petition for Review* and a *Motion to Stay* in the circuit court of Wood County. A. R. At 41-46.

A hearing was convened before the circuit court of Wood County on January 22, 2013. At that hearing, the Honorable J.D.Beane ordered that the matter be transferred to Kanawha County, following Respondent Doonan’s admission that he does not reside in Wood County. There was also no evidence that Respondent Doonan does business in Wood County. The Petitioner objected to the transfer on the basis that the circuit court of Wood County had no jurisdiction over the case. A.R. Tr. at 7-11.

Upon transfer of the case to Kanawha County, the Honorable James C. Stucky was assigned to the case. On February 6, 2013, the Petitioner filed a *Notice of Special Limited Appearance and*

Motion to Dismiss in the circuit court of Kanawha County. A. R. at 12-18. On April 22, 2013, the circuit court entered an *Order Denying Motion to Dismiss*. On the same date, the Court entered an order granting Respondent Doonan a 150-day stay of his license revocation. A. R. at 1-4.

Relief in prohibition is sought pursuant to the original jurisdiction of this Court pursuant to W. Va. Code §§ 51-1-3 and 53-1-2. The extraordinary remedy of prohibition is sought herein on the grounds that the Wood County circuit court had no jurisdiction to transfer this matter to the circuit court of Kanawha County, and the circuit court of Kanawha County should be precluded from accepting jurisdiction of the case.

SUMMARY OF ARGUMENT

Petitioner petitions this Court to preclude Respondent Judge Stucky from accepting the transfer of this administrative appeal from the Wood County circuit court. The Wood County circuit court had no jurisdiction over this case because Respondent Doonan is neither a resident of nor does business in Wood County. The Administrative Procedures Act (“APA”) governs jurisdiction of petitions for appeal of administrative cases, and it requires that a petitioner file his case either in Kanawha County or in the county in which he resides or does business. Because the Wood County circuit court had no jurisdiction in the case, it had no authority to transfer the matter to Kanawha County. Therefore, the circuit court of Kanawha County must be precluded from accepting the transfer of this matter from Wood County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the facts and legal argument are adequately presented in the *Verified Petition for Writ of Prohibition* and *Appendix*, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. The Circuit Court of Kanawha County Should Be Precluded from Accepting Transfer of this Administrative Appeal from the Circuit Court of Wood County Because the Wood County Circuit Court Did Not Have Jurisdiction over the Case, and Had No Authority to Transfer the Case.

Petitioner petitions this Court to prevent the circuit court of Kanawha County from accepting jurisdiction of this matter. The Wood County circuit court did not have jurisdiction over this matter, and venue was inappropriate in Wood County, therefore the Wood County circuit court exceeded its jurisdiction in transferring the case.

This Court has original jurisdiction in prohibition proceedings pursuant to art. VIII, § 3, of *The Constitution of West Virginia*. That jurisdiction is recognized in Rule 16 of the *Rules of Appellate Procedure* and in various statutory provisions. W. Va. Code § 51-1-3 [1923]; W. Va. Code § 53-1-2 [1933]. In considering whether to grant relief in prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W. Va. 163, 130 S.E. 111 (1925): “The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction.” Syl. pt. 1, *State ex rel. Johnson v. Reed*, 219 W. Va. 289, 633 S.E.2d 234 (2006).

In the current matter, which concerns whether the circuit court exceeded its jurisdiction, the relevant guidelines are found in *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), syllabus point 4 of which holds:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means,

such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

The Petitioner is mindful that relief in prohibition may not be used as a substitute for appeal. However, this Court has consistent precedent to the effect that prohibition is the appropriate remedy to prevent a court from proceeding when it lacks jurisdiction. In *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953), this Court held:

The Court, noting in its opinion in the Wolfe [*Wolfe v. Shaw*, 113 W.Va. 735, 169 S.E. 325] case that the defendant had preserved his right to raise the question on writ of error, should an adverse judgment be entered against him, nevertheless, granted it by saying: '* * * A trial as to Wolfe would be futile, because any judgment rendered against him would ultimately have to fall if challenged on a writ of error.' The basis of the action again was the lack of jurisdiction of the trial court.

138 W.Va. 212, 75 S.E.2d 372 - 373.

More recently, this Court granted relief in prohibition where a circuit court accepted an appeal which was filed out of time, before the merits of the case were adjudicated by the circuit court. *State ex rel. Commissioner W. Va. Div. of Motor Vehicles v. Hon. Derek Swope, Judge*, No. 13-0005 (April 25, 2013). The present case is similarly postured: a circuit court has accepted an appeal without having jurisdiction to do so. In *Commissioner v. Swope, supra*, this Court held,

“Having, thus, exceeded its jurisdiction in declaring the appeal timely, the circuit court of Mercer County is prohibited from further consideration of White’s appeal...”.

A writ should be issued because Petitioner “has no other adequate means, such as direct appeal, to obtain the desired relief.” *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. Interlocutory orders, such as the *Order Denying Motion to Dismiss* at issue here, are not subject to direct appeal. *See, James M.B. v. Carolyn M.* 193 W.Va. 289, 456 S.E.2d 16 (1995) and *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). Further, as the Court intimated in *Crawford v. Taylor, supra*, to proceed to resolution on the merits would be futile, because any judgment rendered would ultimately have to fall due to lack of jurisdiction.

Respondent Doonan appealed the revocation of his driver’s license for DUI and refusal to submit to the secondary chemical test, his second offense, to the circuit court of Wood County on January 10, 2013. At a hearing before the Honorable J. D. Beane on January 22, 2013, Respondent Doonan conceded that he does not reside in Wood County. He failed to show or even aver that he does business in Wood County. The Petitioner moved for dismissal of the matter pursuant to W. Va. Code § 29A-5-4(b), which provides, in part:

Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency....

Respondent Doonan moved the circuit court to transfer the matter to Kanawha County, and Petitioner objected thereto on the basis that the Wood County circuit court did not have the requisite

jurisdiction to transfer the matter. By *Order* entered January 25, 2013, the Wood County circuit court ordered the matter transferred to Kanawha County. A.R. at 5-6.

In the circuit court of Kanawha County, the Petitioner, by special limited appearance, moved the court to dismiss the matter on the basis that the Wood County circuit court did not have jurisdiction over the matter and therefore did not have the authority to transfer the case. A.R. at 12-16. By *Order Denying Motion to Dismiss* entered April 23, 2013, the circuit court of Kanawha County denied the Petitioner's motion. A. R. at 1.

Judicial review of an administrative order or decision concerning revocation is obtained in circuit court, and subsequently in this Court, under the Contested Cases provision of the *State Administrative Procedures Act*, W. Va. Code § 29A-5-1 [1926], *et seq.* See, *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011). The relevant statute, W. Va. Code § 29A-5-4(b), provides, in part:

Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency....

At the January 22, 2013 hearing before the circuit court of Wood County, counsel for Respondent Doonan advised that court, "...it's come to our attention that Mr. Doonan is no longer a resident of Wood County. So we would ask the Court to transfer this case to Kanawha County and have the Kanawha County court hear it there." A.R. at 9. No evidence was offered to show that Respondent Doonan does business in Wood County.

Subject matter jurisdiction, "the courts' statutory or constitutional *power* to adjudicate the case[,] *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), is derived from constitution and statute. *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996) ("a trial court cannot write its own jurisdictional ticket, but it must act within the confines of constitutional as well as statutory limits on its jurisdiction."). Subject matter jurisdiction relates to institutional concerns on the authority of the judiciary to act, concerns that the parties cannot be expected to protect. *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 851 (1986). Subject matter jurisdiction "must exist as a matter of law for the court to act[.]" *State ex rel. Smith v. Thornsberry*, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003), and cannot be vested outside the parameters of constitution and statutes. Thus, this Court has "stated categorically that '[s]ubject matter jurisdiction may never be waived.'" *State ex rel. Barden and Robeson Corp. v. Hill*, 208 W.Va. 163, 168, 539 S.E.2d 106, 111 (2000) (quoting *Dishman v. Jarrell*, 165 W.Va. 709, 712, 271 S.E.2d 348, 350 (1980) (citing *West Virginia Secondary School Activities Comm'n v. Wagner*, 143 W.Va. 508, 102 S.E.2d 901 (1958))). See also *Gonzalez v. Thaler* 132 S.Ct. 641, 648 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."). Neither the Wood nor Kanawha County circuit courts had, or has, subject matter jurisdiction over the present appeal.

Further, West Virginia's "removal" statute does not provide support for the transfer ordered by the Wood County circuit court. W. Va. Code § 56-9-1 provides:

A circuit court, or any court of limited jurisdiction established pursuant to the provisions of section 1, article VIII of the Constitution of this State, wherein an action, suit, motion or other civil proceeding is pending, or the judge thereof in vacation, may on the motion of any party, after ten days' notice to the adverse party or his attorney, and for good cause shown, order such action, suit, motion or other civil

proceeding to be removed, if pending in a circuit court, to any other circuit court, and if pending in any court of limited jurisdiction hereinbefore mentioned to the circuit court of that county: Provided, that the judge of such other circuit court in a case of removal from one circuit to another may decline to hear said cause, if, in his opinion, the demands and requirements of his office render it improper or inconvenient for him to do so.

The requisites of removal pursuant to W. Va. Code § 56-9-1 are not met in this case. This statute is not intended for administrative appeals such as this, but rather for cases in which a party will be prejudiced by having his case hearing in a particular county, or the parties are inconvenienced, or the judge needs to be disqualified.

In Footnote 4 of *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 125, 464 S.E.2d 763, 767 (1995), this Court held:

...the provisions of W.Va.Code, 56-9-1, are triggered only when the moving party can demonstrate *good cause* justifying the transfer. ...[Rule 21 of the Federal Rules of Criminal Procedure] Rule 21(a) is similar to W.Va.Code, 56-9-1. It may be invoked successfully only when the circuit court is persuaded that the prejudice is such that unless abated will deprive the parties of a fair trial. Historically, *good cause* in the context of this statute means the moving party must demonstrate prejudice. ...

More importantly, transfers under W.Va.Code § 56-9-1, are not automatic. In referring to W.Va.Code § 56-9-1, this Court stated:

“[T]his procedure is not automatic and is subject to the approval of the chief justice of this Court who, by virtue of Article VIII, Section 3 of the West Virginia Constitution, serves as ‘the administrative head of all courts.’ Moreover, this same section enables the chief justice to assign a judge ‘from one circuit to another,’ so that it may be more expeditious to bring in a judge rather than transfer the case to another circuit.” *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va.

at 236, 400 S.E.2d at 244.

In *Riffle, supra*, this Court found that “... the circuit court did not rely upon this section in making its ruling. The order entered by the circuit court did not mention *good cause* within the contemplation of W.Va.Code, 56-9-1. Rather, the order transferred the case due to the convenience of the parties. Furthermore, the appropriate procedures were not invoked to effectuate a transfer under W.Va.Code, 56-9-1.” The “good cause” provisions in W.Va. Code § 56-9-1 illustrate that the provisions of that statute are not relevant to this matter:

The *good cause* referred to in this section applies to situations where the judge is disqualified, *see Forest Coal Co. v. Doolittle*, 54 W.Va. 210, 46 S.E. 238 (1903); where an uninterested and unbiased jury cannot be found in the circuit where the suit was originally filed, *see Ingersoll v. Wilson*, 2 W.Va. 59 (1867); or where the clerk of the court is a party litigant. *See Hunter v. Beckley Newspapers Corp.*, 129 W.Va. 302, 40 S.E.2d 332 (1946).

195 W.Va. 125, 464 S.E.2d 767.

This case does not present issues of prejudice, inconvenience, or disqualification of a judge; it is one in which there is a lack of jurisdiction, and improper venue. The request for transfer to Kanawha County is a last-ditch effort to keep the appeal alive.

Although it is ancillary to the present matter, it is worth noting that Respondent Doonan could have initially filed his appeal in Kanawha County. The appeal period ran 30 days after his receipt of the Final Order on December 11, 2012. *See, State ex rel. Commissioner W. Va. Div. of Motor Vehicles v. Hon. Derek Swope, Judge, supra*. Any appeal filed in this matter after January 10, 2013 is out of time. Therefore, he cannot re-file his appeal in Kanawha County.

The Petitioner respectfully asks this Court to exercise its original jurisdiction over this matter and enter an order directing the Respondents to show cause why a writ of prohibition should not issue to prevent them from accepting transfer, and therefore, jurisdiction in *Michael Doonan v. West Virginia Division of Motor Vehicles*, Civil Action No. 13-MISC-54 (Kanawha County).

There is no basis for transfer of this matter where the transferring court had no jurisdiction. The circuit court of Kanawha County must be precluded from accepting jurisdiction over this matter.

CONCLUSION

WHEREFORE, based upon the foregoing, the Petitioner respectfully requests that a rule to show cause issue against the Respondents to demonstrate why a writ of prohibition should not be issued to prevent the Respondents from accepting transfer and jurisdiction of the matter of *Michael Doonan v. West Virginia Division of Motor Vehicles*, Civil Action No. 13-MISC-54 (Kanawha County), and for such other and further relief which this Court deems just and proper.

Respectfully submitted,

**STEVEN O. DALE, ACTING COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,**

By counsel,

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VERIFICATION

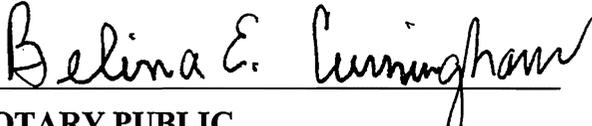
STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, TO-WIT:

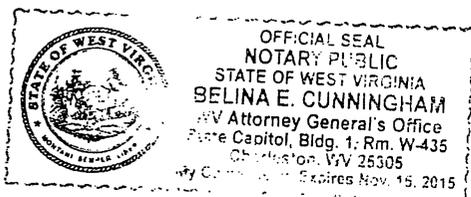
I, Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles, upon being duly sworn, depose and say that I have read the foregoing *Verified Petition for Writ of Prohibition and Appendix* thereto and that, to the best of my information, knowledge and belief, the facts and allegations set forth therein are true and accurate.


STEVEN O. DALE, ACTING COMMISSIONER

Taken, subscribed and sworn to before me this 1st May day of ~~April~~, 2013.

My commission expires 11/15/15.


NOTARY PUBLIC



CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Verified Petition for Writ of Prohibition* was served upon all persons upon whom a rule to show cause should be served, if granted, by depositing true copies thereof, postage prepaid, in the regular course of the United States mail, this 1st day of May, 2013, addressed as follows:

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