

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

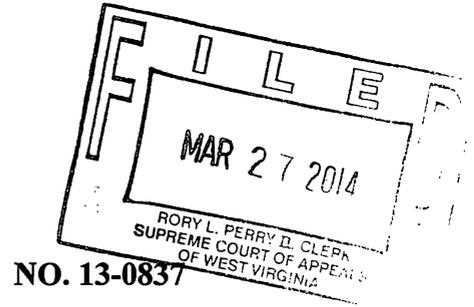
**STEVEN O. DALE, ACTING COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,**

Petitioner,

v.

JIMMIE J. SIZEMORE, II,

Respondent.



FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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Division of Motor Vehicles,**

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I. ARGUMENT

A. **Mr. Sizemore's First Mistake: he relies on facts not in evidence.**

Mr. Sizemore relies on evidence which is not before this Court. On both pages 2 and 3 of his responsive brief, Mr. Sizemore alleges that the arresting officer contacted Mr. Sizemore's counsel to request a continuance to go on a hunting trip and that Mr. Sizemore's counsel consented to the continuance which was later denied by the DMV. There is no evidence in the record to indicate that the officer requested a continuance; that Mr. Sizemore's counsel agreed to the same; or that the DMV denied the officer's request. To the contrary, the record clearly shows that the officer had been subpoenaed to the hearing; that the officer did not appear at the hearing; that the hearing examiner was not aware of any continuances that the officer may have requested or been granted; and that Mr. Sizemore declined to waive the officer's attendance at the hearing. (App¹. at P. 61.)

There is simply no evidence anywhere that the officer had requested a continuance that had been denied. There are no documents verifying the alleged continuance request, and Mr. Sizemore did not call the officer to the circuit court hearing in order to testify about the alleged continuance request. When asked if he had anything else to present to the circuit court on the issue of the writ of prohibition, Mr. Sizemore's counsel stated, "only if you want to hear from the arresting officer that the facts as I portrayed them as an officer of this Court are as I portray them. And again, we would just ask that if want to hear from him we'll be happy to make him available." (C. C. Tr². at P. 15.) Instead of requiring Mr. Sizemore to present evidence, the circuit court stated, "I don't feel the need for any further testimony in this matter. I don't think that your representations have been

¹App. refers to the Appendix filed with this Court on January 14, 2014.

² C. C. Tr. refers to the circuit court transcript which is part of the Appendix filed with this on January 14, 2014.

challenged as far as that scenario and so I am going to order that Mr. Sizemore's licensing privileges are restored and that this matter is dismissed from the docket." (C. C. Tr. at P. 16.) There was no affidavit from the officer attached to Mr. Sizemore's [*Complaint for*] *Writ of Prohibition and Application for Stay*, and the DMV was unable to cross-examine a non-existent witness as to the facts upon which Mr. Sizemore relied.

Mr. Sizemore relied on his counsel's proffer, and quite simply, a proffer is not evidence which the circuit court should have considered.

"A proffer is not evidence, *ipso facto*." *U.S. v. Reed*, 114 F.3d 1067, 1070 (10th Cir.1997); *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.2003); *Parker v. US.*, 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 (1988).

State ex rel. Miller v. Karl, 231 W. Va. 65, 743 S.E.2d 876, 881 (2013).

In its *Opinion and Order Granting Writ of Prohibition and Application for Stay*, the circuit court erred in not only categorizing Mr. Sizemore's proffers as "undisputed" facts (App. at P. 4), but the circuit court also improperly relied on those proffers in finding that the "facts" of the instant matter are distinguishable from the facts in *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 531 (2011) because in this case

the arresting officer sought a pre-hearing continuance of the license revocation hearing. Petitioner consented to the continuance, but the Commissioner denied the arresting officer's continuance request. The Commissioner's action in denying the investigating officer's prehearing [*sic*] continuance request, the Commissioner's failure to appear for the hearing and present evidence in support of the State's case, followed by the Commissioner's decision to schedule a second hearing, demonstrates [*sic*] a persistent disregard by the Commissioner of procedural law.

(App. at P. 7.)

Even if Mr. Sizemore's proffered "facts" were true, the DMV could not have granted the

officer a continuance anyway. There is nothing in the record showing that the officer requested a continuance in writing. The regulation in effect at the time that the officer allegedly requested a continuance of the hearing states,

[t]he Commissioner may grant the person requesting a hearing a continuance of the scheduled hearing. The person shall make the request for continuance *in writing*, and it must be received by the Commissioner at least five (5) days prior to the scheduled hearing date. The Commissioner shall grant the request if good cause is shown. Good cause shall include such reasons as serious illness, medical appointments, court appearances, or religious holidays. In no case may the Commissioner grant more than one continuance per party except as provided in Subdivisions 3.8.3 and 3.8.4.

[Emphasis added.] W. Va. 91 C.S.R. § 1-3.8.1 (2005). The same continuance request procedures were extended to the to the arresting officer. W. Va. 91 C.S.R. § 1-3.8.2 (2005).

Since the record contains no written request by the officer for a continuance, and the hearing examiner's Memorandum from the day of the hearing demonstrates that he was unaware of a continuance request (App. at P. 61) (because it would have been in the file in the hearing examiner's possession), there is further indication that a request for a continuance was not made. Moreover, Mr. Sizemore has alleged in his Statement of the Case that his counsel "contacted the Commissioner's office and advised that Mr. Sizemore had no objection to the hearing continuance requested by the arresting officer;" however, there is nothing in the record or even Mr. Sizemore's facts attesting that the officer actually made a continuance request to the DMV. In sum, there is nothing in the record to show that the officer made an oral or written request for a continuance. To the contrary, the record indicates that the hearing examiner had no record of any continuance request. (App. at P. 61.) Therefore, the circuit court improperly relied on an unsubstantiated proffer when it found that, among other things, "the Commissioner's action in denying the investigating officer's prehearing

[sic] continuance request...demonstrates a persistent disregard by the Commissioner of procedural law.” (App. at P. 7.) Clearly, there was no hearing request for the Commissioner to deny.

B. Mr. Sizemore’s Second Mistake: he misinterprets W. Va. Code § 55-17-2(1) (2008).

In his responsive brief, Mr. Sizemore alleges that the definition of “action” contained in W. Va. Code § 55-17-2(1) (2008) is inapplicable to his administrative case because another statute, W. Va. Code § 29A-5-1 *et seq.*, the Administrative Procedures Act (“APA”), authorizes a “specific procedure for appeal or similar method of obtaining relief from the rule of an administrative agency.” *See* W. Va. Code § 55-17-2(1) (2008). This argument is nonsensical. Admittedly, the APA does contain a provision for judicial review of administrative matters and would have been applicable to Mr. Sizemore’s matter if he had not sought a *Writ of Prohibition and Application for Stay* prior to the Division of Motor Vehicles (“DMV”) issuing a final order in the administrative matter below.

Mr. Sizemore overlooks W. Va. Code § 29A-5-4(a) (1998) which states, “Any party adversely affected by a *final order or decision in a contested case* is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.” [Emphasis added.] There is no final order or decision in the administrative matter because Mr. Sizemore prematurely halted all administrative proceedings below with the filing of his [*Complaint for*] *Writ of Prohibition and Application for Stay*. Accordingly, judicial review under the APA is unavailable to Mr. Sizemore and cannot be considered in this Court’s review of W. Va. Code § 55-17-2(1) (2008).

Further, Mr. Sizemore argues that W. Va. Code § 17C-5A-2 (2008) provides for circuit court review of the DMV’s conduct in complying with statutes, rules and regulations applicable to the revocation of licenses. Again, Mr. Sizemore’s argument is illogical. W. Va. Code § 17C-5A-2

(2008) contains the administrative hearing procedures and agency's burden of proof when a driver objects to an order of revocation. The only judicial review requirements contained in W. Va. Code § 17C-5A-2 (2008) are outlined in subsection (s) and discuss circuit court involvement only once a final order has been issued. If W. Va. Code § 17C-5A-2 (2008) were to apply to the matter at bar, then Mr. Sizemore and the circuit court clearly violated the statute by granting an *ex-parte* stay without conducting an evidentiary hearing. See, Syllabus Point 2, *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993) (holding, "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.") See also, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876, 877 (2013).

Mr. Sizemore cannot have his cake and eat it too. He cannot argue that the APA is applicable if there was no final order issued by the DMV while at the same time enjoying an *ex-parte* stay of the administrative matter pursuant to W. Va. Code § 53-1-1 (1933) *et seq.* It is unrebutted that Mr. Sizemore filed a *Writ of Prohibition and Application for Stay*. West Virginia Code § 55-17-3(a) (2008) specifically exempts from the notice requirement administrative appeals (those subject to judicial review under the APA), criminal appeals, including the extraordinary remedy of habeas corpus, and injunctive relief where there is a showing that delay could cause irreparable harm if this statute were followed. No other extraordinary remedies are exempted from the pre-suit requirements of W. Va. Code 55-17-3(a) (2008).

In his brief, Mr. Sizemore argued that his request for attorney fees and costs does not constitute a potential judgment as defined by W. Va. Code § 55-17-2(3) (2008) then withdrew his request for said fees and costs. Such a waiver does not divest Mr. Sizemore from the 30 day pre-suit notice requirement. West Virginia Code § 55-17-1(a) (2008) makes it quite clear that pre-suit notice is not just concerned about the effect of judgments on the public coffers but is also intended to provide the Legislature with notice about possible subsequent legislative action. The pre-suit notice is also required because “government agencies and their officials require more notice of these actions and time to respond to them and the Legislature requires more timely information regarding these actions, all in order to protect the public interest.” W. Va. Code § 55-17-1(a) (2008). Only the Legislature, and not Mr. Sizemore’s counsel, can determine if a judgment in a particular matter could require possible subsequent legislative action; therefore, it is imperative that pre-suit notice be given to a state agency regardless of whether a monetary judgment is sought.

In sum, because of Mr. Sizemore’s own action, there was no final order issued in the administrative matter below. Therefore, neither the provisions of W. Va. Code § 29A-5-4 (1998) nor W. Va. Code § 17C-5A-2 (2008) apply here. The matter before this Court was filed as a request for an extraordinary remedy that is not exempted from the 30 day pre-suit notice requirement of W. Va. Code § 55-17-3(a) (2008). Mr. Sizemore failed to comply with the notice requirement of W. Va. Code § 55-17-3. Pursuant to this Court in *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007), compliance with the pre-suit notification provisions set forth in W. Va. Code § 55-17-3(a) (2008) is a jurisdictional pre-requisite for filing an action against a State officer or agency. The failure to comply with the statutory notice requirements requires dismissal and “deprives the circuit

court of jurisdiction[.]” *Motto*, 647 S.E.2d at 855. The circuit court had no jurisdiction to hear the matter below.

C. Mr. Sizemore’s Third Mistake: he ignored the contents of the DMV’s Answer.

In his responsive brief, Mr. Sizemore alleged that the DMV never raised the issue of personal jurisdiction before filing the instant appeal with this Court. On April 19, 2011, the DMV filed an *Answer* with the circuit court. The first Defense raised by the DMV was that “this Court lacks personal jurisdiction over the Respondent.” (App. at P. 39.) Even after Mr. Sizemore’s counsel was served with a copy of the *Answer*, he failed to cure the defect of proper service for the twenty-two months this matter languished without prosecution. The DMV never waived that defense even when it was required to argue the merits of Mr. Sizemore’s case at a hearing that was not noticed.

D. Mr. Sizemore’s Fourth Mistake: he ignores his burden of showing good cause as to why he failed to prosecute his case within a year.

In his responsive brief, Mr. Sizemore alleges that when the *Opinion and Order Granting Writ of Prohibition and Application for Stay* was entered below, the DMV failed to object to the same, and, therefore, waived the right to object to the *Opinion and Order Granting Writ of Prohibition and Application for Stay* now. First, Mr. Sizemore is without clean hands on this procedural argument. Rule 24.01(a) of the W. Va. Trial Court Rules (1999) requires all orders to be submitted to the judicial officer promptly, but no later than eleven (11) days after having been directed to do so by the court. The hearing before the circuit court was on March 26, 2013 (App. at P. 17), yet the undersigned had to remind Mr. Wallace on April 15, 2013, to prepare an order (App. at P. 14). Then on May 30, 2013, the undersigned had to remind the circuit court that no order had been entered in the March 26th matter. (App. at P. 10.) More than six months after the hearing was held, the circuit

court entered the *Opinion and Order Granting Writ of Prohibition and Application for Stay* on October 2, 2013. (App. at P. 8.)

Further, Rule 24.01(b) of the W. Va. Trial Court Rules (1999) states that “[e]xcept for good cause shown or unless otherwise determined by the judicial officer, no order may be presented for entry unless it bears the signature of all counsel and unrepresented parties.” As indicated on the signature page, Mr. Sizemore’s counsel did not comply with Rule 24.01(b) of the W. Va. Trial Court Rules (1999). (App. at P. 8.)

Rule 24.01(d) of the W. Va. Trial Court Rules (1999) states that

in the event counsel has any objections regarding wording or content of a proposed order, counsel shall have the affirmative duty of contacting the preparer thereof before contacting the judicial officer in an effort to seek a resolution of the conflict...Objecting, proposing modifications, or agreeing to the form of a proposed order shall not affect a party’s rights to appeal the substances of the order.

While the undersigned did not object to the form of the circuit court’s order, at no point did the DMV waive the right to object to the circuit court’s error regarding dismissal for lack of prosecution. There was no conflict regarding the wording of the circuit court’s ruling on the motion to dismiss because the order simply did not mention the motion or argument on the same.

Mr. Sizemore also alleges that Rule 41(b) of the W. Va. Rules of Civil Procedure (1998) does not compel dismissal of cases but, instead, grants the circuit court discretion to dismiss the case. The DMV agrees that dismissal under Rule 41(b) is discretionary; however, this Court has determined that

“[B]efore a case may be dismissed under Rule 41(b), [a plaintiff may avoid dismissal by showing good cause for the delay in prosecuting the case.] ... **[T]he plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action;** if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the

case to proceed; if the defendant does show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant.... [T]he court, in weighing the evidence of good cause and substantial prejudice, should also consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice....” Syllabus Point 3, in part, *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996).

[Emphasis added.] Syllabus Point 1, *Caruso v. Pearce*, 223 W. Va. 544 678 S.E.2d 50 (2009).

At the hearing on the DMV’s motion, counsel for the DMV argued that pursuant to *Caruso*, Mr. Sizemore bore the burden of going forward with evidence as to good cause for not dismissing the action. (C.C. Tr. at P. 7.) Instead of addressing the issue of good cause for lack of prosecution, the circuit court next asked Mr. Sizemore’s counsel how the instant matter is distinguished from *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 531 (2011). (C.C. Tr. at P. 8.) Next, Mr. Sizemore’s counsel argued the inapplicability of the *Hare* case (C.C. Tr. at PP. 8-12), and the DMV’s counsel argued that Mr. Sizemore had not addressed the issue of good cause for not prosecuting his case. *Id.* at 12. In response, Mr. Sizemore’s counsel stated that the issue is “almost comical” (*Id.*) and deflected the issue of good cause completely by arguing:

I filed this petition back in March of 2011. You know, again, I had contacted the DMV. Well, let me back up, Judge.

Let me go on. Before I ever filed this writ on the DMV, I called the DMV and just said, “Well, hey, won’t you, based on the record before that, issue a final order?” They declined to do it and attempted to reset this.

So I filed that writ, and again, you know, what’s my interested [*sic*] in proceeding further? So again, I don’t think there’s any mootness here. It’s within a year from – I guess within two years from the time that I found [*sic*] this.

And again, my client is charged with first offense driving under the influence. He’s not been charged since then. He wasn’t previously charged.

This was a one time thing with a case that factually, we think that we won at the administrative level. And again, Judge, I don’t think there’s any mootness whatsoever in these [*sic*] particular instance.

(C.C. at PP. 12-13.)

The DMV's counsel then pointed out to the circuit court that the DMV's motion was also for lack of prosecution and that "Mr. Wallace danced around everything but the good cause for not going forward with this matter." *Id.* at 13. Without Mr. Sizemore's counsel uttering another word about good cause for his lack of prosecution or presenting any evidence regarding good cause for the delay in prosecution, the circuit court ruled, "...I don't think this rises to the level of a dismissal for lack of prosecution, and so I'm denying the motion on that basis as well." *Id.* at 15. Just as Mr. Sizemore's counsel danced around his burden of showing good cause for not prosecuting the instant matter for more than a year while before the circuit court, he does so here as well.

Even if the circuit court's agenda was to address only the merits of Mr. Sizemore's request for a writ, the circuit court erred in not applying the law regarding motions for lack of prosecution as determined by this Court in *Caruso, supra*.

" 'When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.' " *United States National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446, 113 S.Ct. 2173, 2178 (1993), quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 1718 (1991).

State v. Blake, 197 W. Va. 700, 478 S.E.2d 550 (1996). Both from the bench and in its final order, the circuit court failed to address Mr. Sizemore's burden of showing good cause for not prosecuting his case for more than a year. The circuit court was required to follow this Court's holding in *Caruso* because the issue had been properly raised.

E. Mr. Sizemore's fifth mistake: he ignores the requirements for the issuance of a writ of prohibition.

In his responsive brief, Mr. Sizemore argues that the circuit court considered the five factors set forth in *State ex re. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)³ and that not all of the factors need be satisfied. The DMV agrees that the circuit court order cited syllabus point 4 of the *Hoover* case which lists the five factors the circuit court must consider in granting a writ of prohibition (App. at P. 3), but that is where the circuit court's analysis ended. There is absolutely no other mention of any of the five factors elsewhere in the circuit court's order nor is there any sort of discussion as to how Mr. Sizemore met *any* of the five factors. It is preposterous for Mr. Sizemore to allege that the circuit court considered the five factors in *Hoover* when there is absolutely nothing in the order save for a citation of the standard which the circuit court was to follow.

First, the circuit court failed to look at other available remedies before letting Mr. Sizemore escape license revocation for driving while under the influence of alcohol. Mr. Sizemore argues in his responsive brief that pursuant to W. Va. 91 C.S.R. § 1-3.7.2 (2005), if the arresting officer fails to appear at the hearing, but the driver appears, the revocation may not be based solely on the arresting officer's affidavit or other documentary evidence submitted by the arresting officer.

³To wit: (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.

Therefore, according to Mr. Sizemore and the circuit court's order, the matter must be dismissed outright. However, neither the circuit court's order nor Mr. Sizemore's responsive brief provides the statute or rule which requires the dismissal of the revocation if the factual scenario outlined in W. Va. 91 C.S.R. § 1-3.7.2 (2005) occurs. The circuit court erred by legislating an administrative remedy from the bench.

“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.”

Syllabus point 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973). *See also*, syllabus point 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003). There is no statute or rule which calls for the dismissal of a license revocation for drunk driving if the officer fails to appear at the hearing. Courts cannot read more into the statute or rule than what the Legislature wrote. Even if the DMV cannot issue a final order based solely on the DUI Information Sheet submitted by the investigating officer, there is still an available remedy for Mr. Sizemore: the DMV can continue the matter on its own motion due to the unavailability of essential personnel (i.e., the investigating officer.) W. Va. 91 C.S.R. § 1-3.8.3 (2005). At the continued hearing, the officer can testify and be subject to cross-examination, but Mr. Sizemore need not testify or be subject to cross-examination again unless he wants to be recalled on rebuttal. If Mr. Sizemore's license revocation was upheld, he had available to him the right to judicial review pursuant to W. Va. Code § 29A-5-4 (1998), *et seq.* Again, the circuit court failed to consider any other available remedy, but instead created a remedy not available by statute or rule.

Next, contrary to Mr. Sizemore's assertions in his responsive brief, the circuit court failed to address how Mr. Sizemore will be damaged or prejudiced in a way that is not correctable on appeal if the administrative hearing was continued. *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011) requires Mr. Sizemore to show how he would suffer substantial and actual prejudice because of any delay, meaning that his ability to defend his case would be impaired. In its final order, the circuit court failed to address any substantial and actual prejudice.

The only factor regarding the granting of a writ of prohibition which the circuit court endeavored to address in its order is whether the continuance granted by the tribunal below was error as a matter of law. In his responsive brief, Mr. Sizemore alleges that *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 531 (2011) is distinguished from the instant matter because the investigating officer here asked for and was denied a continuance by the DMV. Again, there is no evidence anywhere in the record to support Mr. Sizemore's factual assertion. There is no written request for a continuance by the officer. There is no email or memorandum from a DMV employee indicating that the officer called the DMV requesting a continuance. There is no order from the hearing examiner denying a continuance request by the officer. What the file does reflect, however, is that Mr. Sizemore asked for and was granted two continuance requests even though W. Va. 91 C.S.R. § 1-3.8.1 (2005) only permits one continuance request per party. The file also contains a memorandum from the hearing examiner stating that "Sergeant Foster did not attend the hearing and I am not aware of any continuances that he may have requested or been granted with respect to the scheduled hearing date." (App. at P. 61.)

As argued in the *Brief of the Division of Motor Vehicles*, the evidence in the instant matter shows that there is no substantive factual difference between this case and *Hare* save for the fact that

Mr. Sizemore was granted two continuances below and Mr. Hare never requested any continuances. Therefore, the circuit court erred in distinguishing this matter from *Hare*.

Another *Hoover* factor which Mr. Sizemore failed to address in his responsive brief and which the circuit court ignored in its final order is whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law. Admittedly, the issue of the DMV continuing administrative license revocation hearing in order to secure the investigating officer was oft repeated in the period from 2008-2010. However, as this Court determined in *Hare*, the DMV has a statutory duty to continue the administrative hearing in order to secure the officer's attendance - especially when the driver requests the officer's attendance and refuses to waive his request.

II. CONCLUSION

For the reasons outlined above as well as those in the *Brief of the Division of Motor Vehicles*, the DMV respectfully requests that this Court grant its *Petition for Appeal* and remand this matter to the DMV for further hearing.

Respectfully submitted,

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

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

NO. 13-0837

JIMMIE J. SIZEMORE, II,

Respondent.

III. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 27th day of March, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Michael K. Wallace, Esquire
P. O. Box 8980
South Charleston, WV 25303


Elaine L. Skorich