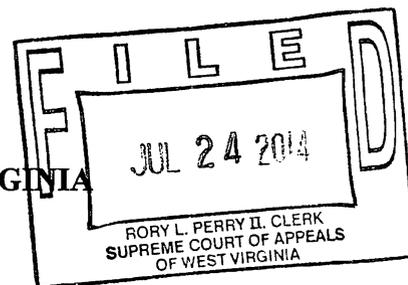


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

**Petitioner,**

**v.**

**NO. 14-0040**

**DAVID S. LITTLETON,**

**Respondent.**

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**FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

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**REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES**

**Respectfully submitted,**

**STEVEN O. DALE, Acting Commissioner,  
Division of Motor Vehicles,**

**By Counsel,**

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## I. ARGUMENT

Now comes Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles, and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits his reply to the *Response Brief of David S. Littleton*. The Commissioner stands on his initial brief for all points not further addressed herein.

### A. **Why Mr. Littleton is wrong about the Commissioner's challenge to the Findings of Fact.**

On the first page of his responsive brief to this Court, Mr. Littleton alleges that at “no time has the Petitioner challenged the Findings of Fact contained in the Hearing Examiner’s Decision as being unsupported by the evidence. The failure of the Petitioner to challenge the Findings of Fact in the Hearing Examiner’s Decision constitutes a waiver of that issue before this Court.” Mr. Littleton is correct: the Petitioner did not object to the Findings of Fact actually made by the hearing examiner for the Office of Administrative Hearings (“OAH.”) However, Petitioner did object to the facts relative to the indicia of Mr. Littleton’s intoxication which were not considered by the OAH in its final order.

Petitioner argued below that Mr. Littleton failed the secondary chemical test (“SCT”) with a result of .096%, yet the OAH ignored that fact completely. (App<sup>1</sup>. at P. 51.) The Commissioner also argued below that the OAH erroneously ignored all of the evidence of Mr. Littleton’s intoxication after it determined that “Respondent’s evidence fails to demonstrate that sufficient reasonable articulable suspicion existed to initiate a lawful traffic stop of the motor vehicle . . . Petitioner was not lawfully placed under arrest. . .” (App. at P. 61.) Clearly, the Commissioner’s arguments related not to the evidence which the OAH actually considered and included in its

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<sup>1</sup> App. refers to the two volume Appendix filed with this Court on April 17, 2014.

Findings of Fact but to the evidence which it ignored. Mr. Littleton's argument about the Commissioner waiving the issue to contest the facts in this matter is, therefore, without merit.

**B. Why Mr. Littleton is wrong about the criminal deferral statute and the issue of lack of jurisdiction.**

On the second page of his responsive brief to this Court, Mr. Littleton opines,

At the time Mr. Littleton was charged with DUI, the Deferral Program [*sic*] was a new system. The particular details and procedures under the Deferral Program [*sic*] were not widely known or followed by the Magistrate Courts. The Courts were still "feeling their way along" in an attempt to implement this new program [*sic*.]

First, there is no such thing as a "Deferral Program." West Virginia Code § 17C-5-2b (2010) permits a criminal defendant who has committed his first DUI offense (as long as it is not an aggravated offense, as long as the offense was for alcohol intoxication only, and as long as he does not hold a commercial driver's license) to defer further criminal proceedings if he pleads guilty to DUI, serves 15 days of license revocation, and successfully completes at least 165 days on the Motor Vehicle Alcohol Test and Lock Program. Subsection (d) of W. Va. Code § 17C-5-2b (2010) plainly states that the criminal defendant's "election to participate in deferral" constitutes a waiver of his or her right to an administrative hearing.

Regardless of how new the statute or how "widely known or followed by the Magistrate Courts," the waiver language in the statute was clear and unambiguous. Mr. Littleton elected to waive his right to an administrative hearing when he elected to participate in deferral. In his responsive brief, Mr. Littleton intimates that his ignorance of the law was an excuse for his trying to unwind his guilty plea. This Court, however, has addressed the issue of failing to know the law in effect at the time one acts.

This Court has reviewed the appendix filed by petitioner and finds within it no

indication that counsel for respondent intentionally, or inadvertently, misled either petitioner or Mr. Romano into thinking that attorney's fees and expert's fees are normally included as "costs" under Rule 68(c). No reason exists not to apply the general principle that ignorance of the law is no excuse: "'Agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally valid and obligatory.'" Point 1 Syllabus, *Harner v. Price*, 17 W. Va. 523 [ (1880) ]." Syl. Pt. 2, *Sanders*.

*Cain v. Kennedy*, 11-1713, 2013 WL 656622 (W. Va. Feb. 22, 2013) (Memorandum decision.)

Mr. Littleton's assertion regarding the magistrate courts not following the deferral law when first implemented is also of no import here. First, Mr. Littleton fails to inform this Court that at the time of the administrative hearing on January 19, 2012 (App. at P. 419), only the Magistrate Court of Jefferson County had signed an order granting his withdrawal of guilty plea. It was not until March 7, 2014, that the Circuit Court of Jefferson County signed an *Order* permitting Mr. Littleton to withdraw his "Condition [*sic*] Plea of Guilty." (App. at P. 597.) That date is two years after the administrative hearing was placed back on the docket of the OAH and two months after the instant appeal was filed with this Court on January 2, 2014.

Pursuant to Rule 9(e) of the Rules of Criminal Procedure for Magistrates unequivocally states that "A magistrate may neither entertain nor grant a motion to withdraw a plea of guilty or no contest." Therefore, the Magistrate Court of Jefferson County had no authority to participate in Mr. Littleton's manipulation of the process by entering an order granting withdrawal of Mr. Littleton's guilty plea. (App. at PP. 126-127.) By the same token, when Mr. Littleton sent the illegal withdrawal order to the OAH, that tribunal lacked authority to reverse its order to cancel the administrative hearing. (App. at PP. 246-250.)

In discussing *ultra vires* acts by public officials, this Court has held that, "Ordinarily, unlawful or *ultra vires* promises are nonbinding when made by public officials, their predecessors

or subordinates, when functioning in their governmental capacity. *W. Va. Public Employees Ins. Bd. v. Blue Cross Hospital Service, Inc.*, 174 W. Va. 605, 609, 328 S.E.2d 356, 360 (1985); Syl. Pt. 1, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970); *Cunningham v. County Court of Wood County*, 148 W. Va. 303, 309–10, 134 S.E.2d 725, 729 (1964). See also, *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985).

This Court has also held that a “state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W. Va. 303, 310, 134 S.E.2d 725, 729 (1964).” Syl. Pt 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hospital Service, Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). See also, *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985).

The *ultra vires* acts of the magistrate court and then the OAH create the lack of jurisdiction issue for the administrative hearing because the magistrate had no authority to “take back” Mr. Littleton’s guilty plea, and the OAH had no authority to reverse its order canceling the administrative based upon an illegal order from the magistrate. Clearly, two *ultra vires* acts do not an *intra vires* act make. Therefore, the issue here is certainly one of jurisdiction and not waiver, and jurisdiction can be raised at any time. *McKinley v. Queen*, 125 W. Va. 619, 625, 25 S.E.2d 763, 766 (1943) (citation omitted).

Finally, it must be acknowledged that Mr. Littleton’s lack of familiarity with the new “Deferral Program” is irrelevant here. Mr. Littleton is not in his current predicament because he did not know or understand that his commercial driving privileges would make him ineligible for dismissal and discharge but because he twice misinformed the magistrate court about his CDL status.

On October 20, 2010, Mr. Littleton plead guilty to DUI in the Magistrate Court of Jefferson County and signed a *Plea Order Granting Conditional Probation for DUI Deferral* on which he attested before Magistrate William E. Senseney that the "defendant has informed the court that he/she does not hold a commercial driver's license and does not operate commercial vehicles." (App. at PP. 148-149.) On January 5, 2011, after Mr. Littleton completed the Safety and Treatment classes (App. at P. 277), the Magistrate Court of Jefferson County entered a *Plea Order Granting Conditional Probation for DUI/ Deferral* (Case Number 10-M-2705) wherein Mr. Littleton again attested that "defendant has informed the court that he/she does not hold a commercial driver's license and does not operate commercial vehicles." (App. at PP. 221-222.)

Mr. Littleton's decision to misinform the magistrate court twice regarding his CDL status had absolutely nothing to do with the administrative process. To determine otherwise would set an troubling precedent that would permit drivers to provide inaccurate information to the courts just because a statute has been recently enacted. It is never acceptable to misinform a court of important facts. Mr. Littleton's guilty plea should stand because he is guilty of DUI not because he was ineligible for expungement and dismissal.

## 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*.

Respectfully submitted,

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

By Counsel,

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VEHICLES,

Petitioner,

v.

NO. 14-0040

DAVID S. LITTLETON,

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 24<sup>th</sup> day of July, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

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Elaine L. Skorich