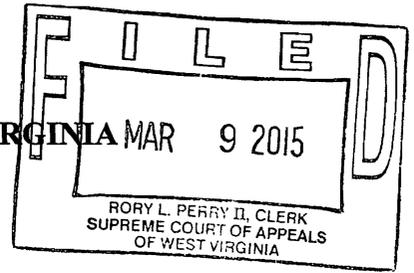


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-1063
(Circuit Court Civil Action No. 14-P-120)



**PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

ROBERT B. CONNIFF,

Respondent.

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

**PAT REED, Commissioner,
West Virginia Division of Motor Vehicles,**

By Counsel,

**PATRICK MORRISEY
ATTORNEY GENERAL**

**Elaine L. Skorich, WWSB # 8097
Assistant Attorney General
DMV - Attorney General's Office
P.O. Box 17200
Charleston, WV 25317-0010
elaine.l.skorich@wv.gov
(304) 926-3874**

Table of Contents

	Page
I. ARGUMENT	1
A. Mr. Conniff is precluded from arguing that he was prejudiced	1
B. The circuit court did not have the jurisdiction to rule on the merits of the case at a stay hearing	2
C. Mr. Conniff continues to ignore the merits of the administrative hearing	4
II. CONCLUSION	5
III. CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

CASES **Page**

Johnson v. Commissioner,
178 W. Va. 675, 363 S.E.2d 752 (1987) 5

Miller v. Moredock,
229 W. Va. 66, 726 S.E.2d 34 (2011) 1

Miller v. Smith,
229 W. Va. 478, 729 S.E.2d 800 (2012) 2

Miller v. Toler,
229 W. Va. 302, 729 S.E.2d 137 (2012) 2

Shell v. Bechtold,
175 W. Va. 792, 338 S.E.2d 393 (1985) 5

State ex rel. Hall v. Schlaegel,
202 W. Va. 93, 502 S.E.2d 190 (1998) 5

STATUTES **Page**

W. Va. Code § 17C-5A-2(a) (2008) 3

W. Va. Code § 17C-5A-2(e) (2008) 4

W. Va. Code § 17C-5A-2(f) (2008) 2

W. Va. Code § 17C-5A-2(s) (2008) 3

W. Va. Code § 29A-5-4(f) (1998) 4

RULES **Page**

R. Pro. Admin. Appeals 2(a) (2008) 1

W. Va. Rev. R. App. Pro. 10(g) (2010) 1

I. ARGUMENT

Now comes Pat Reed, Commissioner of the West Virginia Division of Motor Vehicles, and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits her reply to the *Brief of Respondent*, Robert B. Conniff. The Commissioner stands on her initial brief for all points not further addressed herein.

A. **Mr. Conniff is precluded from arguing that he was prejudiced.**

On page 25 of his responsive brief, Mr. Conniff argues that he should not have to prove prejudice because of delays by the DMV and avers that he did suffer prejudice because the DMV did not provide fees and costs “to properly and adequately prepare for the other hearings” and because the victim that Mr. Conniff hit when he was driving drunk “could not be located years later for cross examination regarding the alleged accident forming the basis for the initial stop.” Mr. Conniff failed to raise the issue of prejudice in his petition for judicial review. Pursuant to Rule 2(a) of the Rules of Procedure for Administrative Appeals promulgated by this Court in 2008, only “issues set forth in the petition or fairly comprised therein will be considered by the circuit court on review.” Since Mr. Conniff failed to raise the issue of prejudice below, he cannot now argue the same.

Assuming, *arguendo*, that the issue of prejudice is before this Court, Mr. Conniff cannot prevail. Pursuant to *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011), Mr. Conniff was required to have an evidentiary hearing to show actual and substantial prejudice caused by any delay, and he has not done so here. Mr. Conniff could have filed a complaint for writ of prohibition if he was actually and substantially prejudiced, but he did not. Instead, Mr. Conniff attempts, for the first time on appeal, to allege actual and substantial prejudice in his responsive brief.

Mr. Conniff claims that he was deprived of his right to a fair hearing because the DMV did not provide fees and costs to properly and adequately prepare for the other hearings, yet there was

never an evidentiary hearing before the circuit court to address this issue. Mr. Conniff also alleges that he was prejudiced because he could not cross examine a witness, yet there was never an evidentiary hearing before the circuit court to address this issue.

It is important to point out to the Court that Mr. Conniff's assertion that the delay caused the unavailability of a material witness, even if true, is without substance. Mr. Conniff was arrested for DUI on May 30, 2010, during the two years that the "lawful arrest" language was absent from W. Va. Code § 17C-5A-2(f) (2008). This Court held in *Miller v. Smith*, 229 W. Va. 478, 484, 729 S.E.2d 800, 806 (2012),

In syllabus point three of *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012), this Court held that "[t]he judicially-created exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension proceeding." Thus, the validity of an underlying traffic stop is relevant to a determination of criminal punishment, rather than to civil administrative license revocation.

Since the validity of the stop is irrelevant in the administrative license revocation proceeding for DUI arrests which occurred between June 7, 2008 and June 11, 2010, the cross-examination of the victim of the hit-and-run incident would have been for naught. Clearly, Mr. Conniff cannot and has not shown actual and substantial prejudice by any delay in the proceedings.

B. The circuit court did not have the jurisdiction to rule on the merits of the case at a stay hearing.

On page 27 of his responsive brief, Mr. Conniff avers that the "lower court, *sua sponte*, turned the hearing into one on the merits, and considered the issues of law including the failure to subpoena the officer to the first hearing." The circuit court's responses to counsel at the hearing below do not support Mr. Conniff's proposition.

At the stay hearing, the circuit court announced,

So the first thing, I'm going to remand it to the department [*sic*] to make additional findings on all the legal issues that were raised. I'm not disputing the factual issues that were raised, but there has [*sic*] been no findings on the legal issues that have been raised. Unless they're in front of the Court, the Court can't make final decision on that.

(C. Ct. Tr. at P. 14.)

The circuit court continued,

But the hearing didn't take place as scheduled due to the department's [*sic*] part, and that's the issue that I just framed. The department [*sic*] may well have sufficient legal – or evidentiary testimony to sustain the conviction [*sic*], but that's not in the order. There's nothing in the order to indicate that, why the department [*sic*] did not issue the subpoenas and that hearing examiner was okay with that. There has to be a specific finding, and so while anything that is filed I would consider, as long as the order doesn't address the issues that have been raised, I can't review it.

(C. Ct. Tr. at P. 15.) If the circuit court had all of the information that it needed to make a final determination on the legal issues, then there would have been no need to remand the matter to the DMV to make further findings, and Mr. Conniff's converse assertions are nonsensical.

Further, after the circuit court granted the stay of the license revocation and remanded the matter to the DMV, counsel for the DMV then questioned the necessity for granting of a stay pursuant to W. Va. Code § 17C-5A-2(s) (2008) since the matter was remanded to the DMV. The matter would be automatically stayed pursuant to W. Va. Code § 17C-5A-2(a) (2008) while the matter was pending before the DMV. Before the DMV could explain further, the circuit court that only seconds before said that it could not make a determination without the DMV addressing certain legal issues impetuously responded, "Okay. What I'll do then, to satisfied [*sic*] that problem is that I'll just grant the motion to dismiss the case on the part of the state for failure to make findings of fact that are consistent with that, and you can do whatever you want to do to appeal the ruling." (C. Ct. Tr. at P. 16.)

Finally, contrary to Mr. Conniff's assumptions, the DMV is not arguing that it wanted another hearing before the circuit court. Instead, the DMV asserts that the circuit court did not have the administrative record before it when it ruled on the merits of the case and that W. Va. Code § 29A-5-4(f) (1998) mandates that the circuit court's review be "upon the record made by the agency." On page 28 of his responsive brief, Mr. Conniff alleges that the administrative record was filed on September 4, 2014 and that the circuit court did not enter the order prepared by Mr. Conniff's counsel until September 11, 2014 thereby intimating that the circuit court looked at the administrative record before entering the order.

The certified docket shows that the Ohio County Circuit Clerk received the administrative record on September 8, 2014, and that the judge signed the final order prepared by Mr. Conniff's counsel on September 11, 2014. (App. at P. 1.) There is nothing in the record to indicate that the circuit court received a copy of the administrative record from the circuit clerk or even reviewed it before signing the order prepared by Mr. Conniff's counsel. In fact, because the final order drafted by Mr. Conniff's counsel before the administrative record was filed comports with the circuit court's ruling from the bench on August 8, 2014 and fails to mention or cite to the administrative record, shows otherwise. Clearly, the circuit court erred without reviewing the record below.

C. Mr. Conniff continues to ignore the merits of the administrative hearing.

Unfortunately, in the absence of a meritorious defense, Mr. Conniff attempts to hoodwink this Court by emphasizing a non-prejudicial procedural issue instead of considering the statutorily mandated principal question at the administrative hearing – whether Mr. Conniff drove a motor vehicle in this state with a blood alcohol content in excess of .08. *See*, W. Va. Code § 17C-5A-2(e) (2008). The circuit court also fell victim to Mr. Conniff's smoke and mirrors defense and ignored

all evidence of DUI.

On page 32 of his responsive brief, Mr. Conniff alleges that the “DMV was only concerned with protecting its interests and had no concerns for the rights of the respondent.” To the contrary, as this Court has long held, “[t]he purpose of the administrative sanction of license revocation is the removal of persons under the influence of alcohol and other intoxicants from our highways ... The revocation provisions are not penal in nature ... and should be read in accord with the general intent of our traffic laws to protect the innocent public.” *Shell v. Bechtold*, 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985). Further, “[t]he administrative sanction of license revocation is intended to protect the public from persons who drive under the influence of alcohol.” *Johnson v. Commissioner*, 178 W. Va. 675, 677, 363 S.E.2d 752, 754 (1987). Finally,

[t]he purpose of the administrative sanction of license revocation, as we stated in *Shell v. Bechtold*, 175 W. Va. 792, 338 S.E.2d 393 (1985), ‘is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways.’ *Id.* at 796, 338 S.E.2d at 396. This objective of removing substance-affected drivers from our roads in the interest of promoting safety and saving lives is consistent ‘with the general intent of our traffic laws to protect the innocent public.’

State ex rel. Hall v. Schlaegel, 202 W. Va. 93, 97, 502 S.E.2d 190, 194 (1998).

The DMV acted in concert with this Court’s holdings that the agency must protect the motoring public from drunk drivers like Mr. Conniff who caused a hit-and-run crash then provided a breath sample indicating that his blood alcohol content was .269%, more than three times the legal limit. Those facts were not considered by the court below and cannot be ignored here either.

II. CONCLUSION

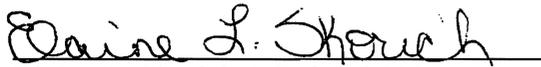
For the reasons outlined above as well as those outlined in the *Brief of the Division of Motor Vehicles*, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

PAT REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Elaine L. Skorich, WVSB # 8097

Assistant Attorney General

DMV - Office of the Attorney General

P.O. Box 17200

Charleston, WV 25317-0010

Telephone: (304) 926-3874

Elaine.L.Skorich@wv.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-1063
(Circuit Court Civil Action No. 14-P-120)

**PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

ROBERT B. CONNIFF,

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 9th day of March, 2015, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

Joseph J. John, Esquire
John Law Offices
200 Board of Trade Building
80 Twelfth Street
Wheeling, WV 26003-3273


Elaine L. Skorich