

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

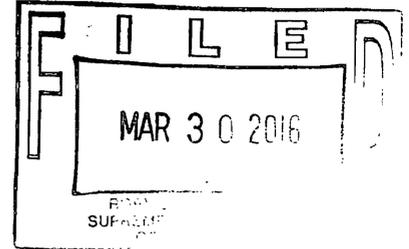
**PATRICIA S. REED COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

JOSHUA D. BECKETT,

Respondent.



NO. 15--1044

FROM THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

**PAT REED, COMMISSIONER,
Division of Motor Vehicles,**

By Counsel,

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Now comes Pat Reed, Commissioner of the West Virginia Division of Motor Vehicles (“DMV”) and pursuant to Rule 10(g) (2010) of the Revised Rules of Appellate Procedure, hereby submits the *Reply Brief of the Division of Motor Vehicles*.

I. ARGUMENT

A. **Interpretation of W. Va. Code § 17C-5-2a(a)**

In his brief, Mr. Beckett argues that the crux of the issue herein is whether the reference in W. Va. Code § 17C-5-2a(a) (1983) to “anywhere within the physical boundaries of this state” is sufficiently specific to extend the state’s police power for DUI-related offenses onto private property. (Respondent’s brief at P. 8.) Further, Mr. Beckett argues that even if the West Virginia Legislature enacted W. Va. Code § 17C-5-2a(a) (1983) in reaction to *State v. Ball*, 164 W. Va. 588, 264 S.E.2d 844 (1980), that Code section does not specifically extend jurisdiction over DUI offenses onto private property not open to the public. (Respondent’s brief at PP. 8-9.)

First, because Mr. Beckett’s blood alcohol content exceeded .15%, W. Va. Code § 17C-5-2(f) (2010) applied to him. W. Va. Code § 17C-5-2(f) was initially enacted in 1951. That statute states, in pertinent part, that any person who drives a vehicle *in this state* while he has an alcohol concentration in his blood of fifteen hundredths of one percent or more, by weight, is guilty of a misdemeanor. The statute is clear that the jurisdictional boundaries extend to the state’s borders. Further, W. Va. Code § 17C-5-2a (1983) defines “in this State” for purposes of DUI cases as anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. The statutes are unambiguous; therefore, there is no need for interpretation by this Court.

The Circuit Court of Monroe County and Mr. Beckett, however, disagreed with the DMV’s

plain reading of the statutes, and in his brief, Mr. Beckett looks to Washington State to support his argument. Specifically, Mr. Beckett argues that other states with similar laws have found no implication of any duty to protect the public when a motor vehicle crash takes place on private property. The DMV submits that while the interpretation of “in this state” in West Virginia’s DUI statutes is a matter of first impression here, Kentucky has decided a case on point which should be controlling.

In *Lynch v. Com.*, 902 S.W.2d 813 (Ky. 1995), Mr. Lynch was charged and convicted for a violation of Kentucky’s DUI statute, KRS 189A.010(1), and the Kentucky Supreme Court reviewed the evolution of Kentucky’s statutes pertaining to DUI offenses in its state.

A progression of the DWI legislation, with factors involved in this case, is as follows: The 1946 statute (KRS 189.520[2]) stated: “No person shall operate a motor vehicle on a highway while under the influence of intoxicating liquors or narcotic drugs.”

Thereafter in 1968, legislation pertaining to impaired driving (KRS 189.520[2]) was amended to state: “No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability.”

The language above remained substantially the same at the time the statute was redesignated in 1984 as KRS 189A.010(1). The current statute, 189A.010(1) was amended in 1991, and is as follows:

- (1) No person shall operate or be in physical control of a motor vehicle anywhere in this state:
 - (a) While the alcohol concentration in his blood or breath is 0.10 or more based on the definition of alcohol concentration in KRS 189A.005;
 - (b) While under the influence of alcohol;
 - (c) While under the influence of any other substance or combination of substances which impairs one's driving ability; or
 - (d) While under the combined influence of alcohol and any other substance which impairs one's driving ability.

Lynch v. Com., 902 S.W.2d 813, 814 (Ky. 1995).

The *Lynch* court noted that the legislature, by effectuating a change in the language from “*on a highway*” to “*anywhere in this state,*” explicitly intended to extend the prohibition against driving while intoxicated beyond the public highways so as to include the entire state. Mr. Lynch argued that there are other traffic statutes which appertain to and use the term “public highway,” and therefore create confusion with the phrase “anywhere in this state.” The Kentucky court held that the

fallacy of Lynch's argument is readily apparent by reference to his contention that the legislation intended the limitations to apply only to driving or operating a motor vehicle on public roadways in this Commonwealth, when clearly the statute imposes no limitation. *Lyle v. Swanks and Madison Standard Service Station*, Ky.App., 577 S.W.2d 427 (1979).

The meaning of the statutory term “anywhere in this state” appears most clear from the language of the statute and, as a whole, is to be construed in accord with the intent designed by the legislature. See *Department of Alcoholic Beverage Control v. Liquor Outlet, Inc.*, Ky.App., 734 S.W.2d 816 (1987). The term “anywhere” is not unfamiliar or without prior use. The term “anywhere” is synonymous with “anywhere in this state.” The words employed in the statute are to be given their ordinary meaning. The language of the statute is both unambiguous and plain and is to be given effect as written. *Griffin v. City of Bowling Green*, Ky., 458 S.W.2d 456 (1970). When the plain wording of the present statute is compared with that of the statutes prior to 1968, the obvious legislative intent is to change the term “operate a motor vehicle on a highway” to “operate a motor vehicle anywhere in this state.” *Lincoln County Fiscal Court v. Department of Public Advocacy, Comm. of Kentucky*, Ky., 794 S.W.2d 162 (1990). *Commonwealth v. Shively*, Ky., 814 S.W.2d 572 (1991).

KRS 189A.010(1) is sound legislation when viewed from the increased number of motor vehicles and multiplicity of accidents which, without elaboration, makes the careful operation of vehicles a matter of public concern. It was succinctly stated in a Court of Appeals' opinion, which one could not improve upon, that KRS 189A.010 is crystal clear. If you consume alcohol or any other substance that impairs your driving ability, then you have an obligation to cease driving. *Cruse v. Commonwealth*, Ky.App., 712 S.W.2d 356 (1986).

A statute of this type is not just a road regulation, but a prohibition against an intoxicated person's driving an automobile, which may be an act dangerous to the public wherever it may occur. It is further true because of jeopardy to the life/safety of the driver himself.

Lynch v. Com., 902 S.W.2d 813, 814-15 (Ky. 1995).

The court in *Lynch* further addressed the question of whether the prohibition constitutes an unreasonable restriction upon the conduct of the individual wherein it violates his constitutional right with regard to privacy and the right of a party to do as he pleases on his own property.

This statute is not unbridled government decision making, as it is not a law restricting individual freedom without any relation to a valid public interest. To the contrary, it exemplifies a common theme with many jurisdictions relating to the magnitude and import of such a statute. It is not violative of Section 2 of the Kentucky Constitution. Although the offense may be committed on a public highway or wherever the statute makes it a criminal offense to operate or control a motor vehicle under the influence of intoxicants anywhere in the state, the place of operation is not a material element of the offense.

It is generally recognized that a law prohibiting a person from driving a motor vehicle while intoxicated is a remedial statute. Such a statute may be liberally interpreted in favor of the public interest and against the private interest of the driver involved. *State, Dept. of Public Safety v. Juncewski*, 308 N.W.2d 316 (Minn.1981). A plethora of jurisdictions have held it reasonable to construe “elsewhere throughout the state” to encompass all areas of the state, public or private, and forthrightly recognized that the danger posed by the intoxicated driver is not lessened by characterizing the property on which he is driving or in control of a motor vehicle as public or private. *State v. Novak*, 338 N.W.2d 637 (N.,D.,1983). An intoxicated person should not be permitted to operate automobiles anywhere because of the potential dangers of such instrumentalities. One in such condition may not remain off the highway; actually he might injure others in other places. *Farley v. State*, 251 Miss.497, 170 So.2d 625 (1965).

It would be absurd to say that a person driving or operating a motor vehicle while intoxicated or under the influence of intoxicating liquors or narcotic drugs was not guilty of a violation of the statute under consideration merely because at the moment such person was stopped he happened to be either on or near a private roadway instead of a public street, because no one can say when such a person, while in a befuddled state of mind as a result of his or her condition, will leave the private road and pursue a mad course down a public highway with the resulting damage so frequently reported. *State v. Carroll*, 225 Minn. 384, 31 N.W.2d 44 (1948). The prohibitions of the statute in question are directed toward the condition of the operator. An intoxicated person should not be permitted to operate an automobile anywhere because of the potential dangers of such instrumentalities. *State v. Drews*, 23 Ohio Misc. 370, 261 N.E.2d 357 (1970).

Lynch v. Com., 902 S.W.2d 813, 815 (Ky. 1995).

The *Lynch* court concluded,

[o]ur decision may not be regarded as sanctioning an unwarranted invasion of a person's private property for an ostensible purpose and without probable cause when, in reality, an intrusion upon private property may be actuated by some motive not related to the purpose of the statute or as an additional subterfuge for circumventing the constitutional provision against the search of property without a valid warrant. Personal rights of freedom of movement (privacy) will not be lightly regarded. There continues to be a balancing of private right against public interest and welfare. There is a heightened, as well as a logical, appreciation of the demands of public and personal safety to which an individual's personal liberties must yield when such yielding is not of an inalienable right. We simply restate that the enjoyment of many personal rights and freedoms is subject to many kinds of restraints under the police power of the state, which includes reasonable conditions as may be determined by governmental authority to be essential to public welfare, safety, and good order of the people. *Mansbach Scrap Iron Company v. City of Ashland*, 235 Ky. 265, 30 S.W.2d 968 (1930); *Commonwealth v. Mitchell*, Ky., 355 S.W.2d 686 (1962).

Lynch v. Com., 902 S.W.2d 813, 815-16 (Ky. 1995).

While the facts in *State v. Day*, 96 Wash. 2d 646, 638 P.2d 546 (1981) are similar to those in the case at bar, the rationale by the dissenting justices must also be considered. There, the three dissenters opined that while the Washington State legislature doubtless found that intoxicated drivers constitute a menace to the safety of others, there was nothing in the statute to indicate that the legislature considered the threat to exist only on the highways of the state. The language of the act was to the contrary. Furthermore, the dissenters did not agree that the only reasonable purpose to be served by the legislation was protection of others from the immediate threat posed by an intoxicated driver.

An automobile being driven can move very quickly from a position of relative safety to one of great danger. The fact that the defendant was off the road and posed no immediate threat did not mean that he would not tire of driving his vehicle in circles and take to the road-or that he posed no threat to property or whatever life there might be in the area. Moreover, the legislature had a right to consider the threat that

an intoxicated driver poses to his own safety. That the legislature may properly enact laws for the protection of the persons upon whom their burdens are placed, see *State v. Laitinen*, 77 Wash.2d 130, 459 P.2d 789 (1969), cert. denied, 397 U.S.1055, 90 S.Ct. 1397, 25 L.Ed.2d 671 (1970) (motorcycle helmet law sustained); accord, *State v. Zektzer*, 13 Wash.App.24, 533 P.2d 399, rehearing denied, 85 Wash.2d 1013, cert. denied, 423 U.S.1020, 96 S.Ct. 457, 46 L.Ed.2d 392 (1975); and see *State v. Smith*, 93 Wash.2d 329, 610 P.2d. 869 (1980).

State v. Day, 96 Wash. 2d 646, 651-52, 638 P.2d 546, 549 (1981).

In a factually similar case, the Kansas Court of Appeals declined to extend the holding of *State v. Day*, *supra*. In *Duft v. Kansas Dep't of Revenue*, 275 P.3d 931 (Kan. Ct. App. 2012) (unpublished disposition), Duft failed a breath alcohol test and was arrested for DUI after a sheriff's deputy saw him driving a four-wheeler on his own farm. Duft argued that he was on private property and, the purpose of the implied-consent statute (which contained the “in this state” language”) is to promote highway safety and protect the public—and applying this law to persons driving on their own personal property does not further these purposes.

The Kansas Court opined that the plain language of the statute undercuts Duft's argument and that the Kansas Legislature made clear that the applicable statute applies to any person who operates a vehicle within the state of Kansas. The legislature did not limit application of the statute to persons on public property. “Because the language of [the statute] is unambiguous and clear, this court will not speculate about whether the legislature intended for the statute to apply to persons who only operate a vehicle on private property.” *Id.* The *Duft* court stated that if the legislature had meant for the statute to apply only to public property, the legislature could easily have said so.

Despite the “including but not limited to” language in W. Va. Code § 17C-5-2a (1983), the Legislature *declined* to go down the road of creating exceptions to this statute. This Court should also decline to carve out exceptions. The plain language of both W. Va. Code § 17C-5-2(f) (2010)

and W. Va. Code § 17C-5-2a (1983) provides that a DUI offense may occur anywhere within the boundaries of this State. Since the text, “given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). *Davis Memorial Hosp. v. W. Va. State Tax Comm'r*, 222 W. Va. 677, 682, 671 S.E.2d 682, 687 (2008).

B. Mr. Beckett’s Blood Alcohol Level

Mr. Beckett has failed to properly cross-assign errors in *Respondent’s Brief*; therefore, this Court should not entertain the second point of his argument regarding his blood alcohol level exceeding the “legal limit.” Specifically, Revised Rule of Appellate Procedure 10(f) (2010) states that the respondent, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof in the manner provided in subsection (c) of Revised Rule of Appellate Procedure 10. Such cross-assignment of error **must** be clearly reflected on the cover page of his brief. Mr. Beckett did not comply with Rule 10(f). Assuming, *arguendo*, that this Court accepts Mr. Beckett’s argument about his blood alcohol level as a satisfactory cross-assignment of error, he still cannot prevail here as the Office of Administrative Hearings properly admitted Mr. Beckett’s medical records.

After his crash at approximately 1:20 a.m. (App. at P. 149), Mr. Beckett was transported to the Greenbrier Valley Medical Center for treatment. (App. at P. 214.) The Investigating Officer obtained a copy of Mr. Beckett’s medical records (App. at PP. 151-192) which indicated that Mr. Beckett’s blood alcohol content was seventeen hundredths of one percent (.17%) at the time of his blood draw at 2:30 a.m. (App. at P. 183). As a result, the Investigating Officer charged Mr. Beckett

with the offense of driving while under the influence (“DUI”) of alcohol with a blood alcohol content greater than .15% (a.k.a. aggravated DUI.) (App. at 147-149 and P. 220.)

In his brief, Mr. Beckett argues that W. Va. Code § 17C-5-6 requires the blood draw to be made by a doctor, nurse, trained medical technician, etc. However, W. Va. Code § 17C-5-6 (1981) only applies to blood tests give at “the request and direction of the law-enforcement officer.” Here, Mr. Beckett’s blood was drawn as part of his medical treatment after he crashed his all-terrain vehicle and not at the request or direction of the Investigating Officer.

The instant matter is factually similar to *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) wherein Lowe argued that there was no person authorized by statute to draw blood who testified at his hearing, nor was there any chemist or technician who testified as to how his blood was tested or as to the actual test results. This Court found that the hospital record was a part of the DMV's records and therefore was properly admitted in the record at the outset of the hearing pursuant to W. Va. Code § 29A-5-2(b) (1998) because it was attached to the Statement of Arresting Officer [now DUI Information Sheet] and submitted to the DMV as a part of the officer's report. *Lowe v. Cicchirillo*, 223 W. Va. 175, 180, 672 S.E.2d 311, 316 (2008). The admission of this type of information is mandatory on behalf of the agency. *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 76, 631 S.E.2d. 628, 634 (2006); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam); *Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010); *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam); *Miller v. Chenoweth*, 229 W. Va. 114, 727 S.E.2d 658 (2012)(per curiam); *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam).

Here, the Investigating Officer attached Mr. Beckett's medical records, *inter alia*, to the DUI Information Sheet (App. at PP. 142-192) and submitted the same to the DMV as required by W. Va. Code § 17C-5A-1(b) (2010). Pursuant to statute and an abundance of case law from this Court, the file (which included his medical records) upon which the DMV relied when revoking Mr. Beckett's driver's license was required to be admitted into evidence below and considered by the Office of Administrative Hearings. Clearly, the DMV proved by a preponderance of the evidence that Mr. Beckett's blood alcohol content was .17% approximately an hour after his crash, and the license revocation for aggravated DUI must stand.

II. CONCLUSION

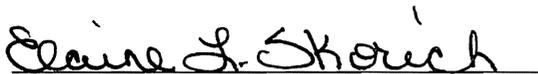
For the reasons set forth above as well as in the *Brief of the Division of Motor Vehicles*, the decision of the circuit court should be reversed.

Respectfully submitted,

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

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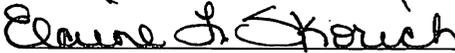
JOSHUA D. BECKETT,

Respondent.

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 30th day of March, 2016 by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Jeffrey A. Pritt, Esquire
PRITT LAW FIRM PLLC
P. O. Box 708
Union, WV 24983


Elaine L. Skorich