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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1044

PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,
Respondent Below, Petitioner,

v.

JOSHUA D. BECKETT,
Petitioner Below, Respondent.

RESPONDENT'S BRIEF

(Appeal from Circuit Court of Monroe County Civil Action No. 15-C-25)

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STATEMENT OF THE CASE

The Respondent generally agrees with Petitioner's Statement of the Case and therefore, pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, will utilize this section only to add some additional facts deemed necessary for appellate review:

There is no dispute that Joshua Beckett was injured as the result of an ATV accident which occurred on February 4, 2012, at Pickaway, Monroe County, West Virginia. Mr. Beckett was subsequently charged with a violation of W.Va. Code § 17C-5-2(e) for driving under the influence of alcohol with a blood alcohol level greater than 0.15%. However, that charge was ultimately dismissed by the Monroe County Magistrate Court. See *Transcript of Administrative Hearing*, pp. 35-36 (October 11, 2012) [237-38].[1]

While the magistrate court charge was pending the Petitioner revoked Mr. Beckett's license via an *Order of Revocation* (April 4, 2012) [78]. However, Mr. Beckett lodged a timely objection to the *Order*, noting that he "did not operate a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs on a publicly maintained highway, or any area otherwise open to the public or publicly maintained[.]" *Written Objection*, p. 2, ¶ 4 (May 1, 2012) [81]. As part of his objection, Mr. Beckett also specifically preserved his right to challenge the blood test

[1]References to the Appendix Prepared by Petitioner are set forth herein as "[___]".

results, id. at p. 1 [80]; and, to object to admission of the same "without a proper evidentiary foundation[.]" Id. at p. 2, ¶ 3 [81]. Accordingly, this matter proceeded to an administrative hearing at which time the parties stipulated that the ATV accident happened "on private family farm property that was not open to the public." *Transcript*, p. 6 [208].

At the hearing Petitioner sought to introduce medical records which had been subpoenaed by the investigating officer from Greenbrier Valley Medical Center.[2] The purpose of the records was to establish that Mr. Beckett's blood alcohol level exceeded the legal limits at the time of the accident.[3] However, Mr. Beckett posed several objections to admission of these records, including that: (1) No evidentiary foundation was established confirming compliance with W.Va. Code § 17C-5-6 (which requires that the blood be drawn by a qualified person); *Transcript*, id. at p. 27 [229]; and, (2) No evidentiary foundation was established confirming the legal chain of custody with regard to Mr. Beckett's blood sample (as the records were conspicuously labeled: **"This assay is for medical purposes only. Legal 'chain of custody' is not**

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[2]A complete copy of Mr. Beckett's medical records are contained in the Appendix at pages 151-92.

[3]Various copies of Mr. Beckett's lab test results can be found in the Appendix at pages 174-75, 183-84, 196-97 and 200-01.

performed."), id. at pp. 27-28 (emphasis supplied) [229-30].[4]

The Hearing Examiner indicated that she would review the tendered documents and noted Mr. Beckett's objections to them, *Transcript*, p. 28 [230]; but thereafter never issued a ruling one way or another as to admissibility of the same (presumably because she ruled in Mr. Beckett's favor on the jurisdictional issue). The Chief Hearing Examiner likewise made no mention of Mr. Beckett's objections to the medical records when he overruled the Hearing Examiner and held in favor of the Petitioner. Mr. Beckett raised this issue once again before the Circuit Court, *Petitioner's Brief in Support of Petition for Review*, pp. 2-3, 7-9 [27-28, 32-34]; but that Court never addressed the issue either (again most likely because of the ruling on jurisdiction). Consequently, Mr. Beckett's timely and relevant objections to the admission of the blood test results in his case have never been ruled upon.

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[4]Petitioner introduced an Affidavit from the custodian of the hospital records confirming the authenticity of the same. *Affidavit of Nancy L. Hageman* (Oct. 8, 2012) [195]. And also an Affidavit from the person who analyzed the blood sample. *Affidavit of Brenda Clever* (Oct. 9, 2012) [199]. However, no testimony or documentary evidence was introduced establishing who drew the blood, or the legal chain of custody of the blood sample prior to analysis by Ms. Clever.

SUMMARY OF ARGUMENT

The Petitioner revoked Mr. Beckett's driving privileges because he operated a motor vehicle "in this state" while under the influence of alcohol. However, it is not disputed that Mr. Beckett's operation of a vehicle was limited to private property which was not open to the public.

The Circuit Court of Monroe County held that under State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (W.Va. 1980), the operative jurisdictional statute, W.Va. Code § 17C-5-2a, was not sufficiently specific enough to permit the Petitioner to revoke Mr. Beckett's driving privileges for conduct which occurred solely on private property which was not open to the public. This ruling is correct because that statute uses limiting language which restricts Petitioner's jurisdiction over private property only to those areas which are "open to the use of the public for purposes of vehicular travel."

Moreover, Petitioner failed to prove below that Mr. Beckett's blood alcohol level exceed the legal limit at the time of the accident. Petitioner attempted to introduce medical records to which Mr. Beckett timely objected on meritorious grounds. Those records should have been excluded (but the objections were never ruled upon), and without the same there was no proof of any offense.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent believes that the facts and legal arguments will be adequately presented in the briefs and record on appeal, and that the decisional process would not be significantly aided by oral argument. However, if the Court determines that oral argument is appropriate, then the Respondent believes that a Rule 19 argument should be scheduled as this case involves assignments of error in the application of settled law and/or a narrow issue of law. The Respondent also believes that a memorandum decision would be appropriate in this instance, as the ruling of the Circuit Court is correct and should be upheld.

ARGUMENT

A. INTRODUCTION

On September 18, 2015, the Circuit Court of Monroe County entered an Order reversing the Petitioner's *Order of Revocation* which had suspended Mr. Beckett's driving privileges. The lower Court determined that the Petitioner had no jurisdiction under the applicable statute to revoke Mr. Beckett's driver's license for an incident which occurred wholly on private property which was not open to the public. That ruling should be upheld not only for the reason espoused by the Circuit Court, but also because the Petitioner failed to prove that Mr. Beckett's blood alcohol level exceeded the legal limit.

B. STANDARD OF REVIEW

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Reed v. Conniff, 236 W.Va. 300, 779 S.E.2d 568, Syll. Pt. 1 (2015)(citing Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518, Syll. Pt. 1 (1996).

I. The Circuit Court Did Not Misinterpret W.Va. Code § 17C-5-2a(a).

The Petitioner contends that Mr. Beckett drove a vehicle "in this state" on February 4, 2012, while having a blood alcohol content of 0.15% or more. The legal issue presented by this appeal is whether the Circuit Court was correct in determining that the phrase "in this state" does not give the Petitioner jurisdiction to revoke someone's driving privileges for alleged offenses which occur on property which is not open to the public. The Petitioner contends that her police power should be so expanded, but a plain reading of the applicable statutes and the primary legal authority relied upon by the Circuit Court, State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (W.Va. 1980), proves otherwise.

Both DUI offenses and license revocation proceedings are jurisdictionally governed by two statutes. First, W.Va. Code § 17C-2-1 limits the application of the provisions of Chapter 17 "to the operation of vehicles upon streets and highways except: (1) Where a different place is *specifically* referred to in a given section." (Emphasis supplied.) However, for DUI related matters, the scope is broadened somewhat by W.Va. Code § 17C-5-2a(a), which defines the phrase "in this state" to "mean 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".[5]

The crux of the issue is whether the reference in W.Va. Code § 17C-5-2a(a) to "anywhere within the physical boundaries of this state" is sufficiently specific enough to extend the state's police power for DUI-related offenses onto private property not open to the public. The Circuit Court held not, because in State v. Ball this Court said that "if Chapter 17C [of the West Virginia Code] is to apply elsewhere than upon streets and highways, a different place must be *specifically set forth*." *Order Reversing Commissioner's Order of Revocation*, p. 4 (Sept. 18, 2015) [5] (citing State v. Ball, 164 W. Va. 588, 594, 264 S.E.2d 844, 847 (1980) (emphasis added by Circuit Court)). However, Petitioner asserts that W.Va. Code § 17C-5-2a(a) was enacted shortly after State v. Ball was decided (as an apparent reaction thereto), and therefore the Ball decision is no longer controlling.[6] *Petitioner's Brief*, pp. 3, 5.

The problem with Petitioner's argument is that W.Va. Code § 17C-5-2a(a), in its current form, even if enacted in reaction to State v. Ball, does not *specifically* extend jurisdiction over DUI

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[5]The operative phrase "in this state" is then used in the implied consent statute, W.Va. Code § 17C-5A-1(a), which provides that if one operates a motor vehicle "in this state", they have tacitly consented to the license revocation procedures.

[6]Respondent does not have access to versions of the West Virginia Code from the 1980's, or legislative history regarding the same, but presumes that Petitioner's representations in this regard are correct.

offenses onto private property not open to the public. The Ball decision allowed a defendant to escape prosecution for DUI because he was arrested on a private parking lot which was open to the public, as opposed to driving drunk on a street or highway. 264 S.E.2d at 848. What the legislature apparently accomplished by enacting W.Va. Code § 17C-5-2a(a) was to remedy the conclusion reached in Ball, by specifying that DUI offenses can be prosecuted (and licenses revoked) if they occur on "other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel." Clearly, once this statute was passed, one could not escape prosecution for driving drunk on private property open to the public such as a parking lot. However, Mr. Beckett contends that it is just as clear that this statute does not give Petitioner the right to impose sanctions against him for conduct occurring solely on private property which is not open to the public.

As the Circuit Court held, the Ball decision still retains vitality because it requires *specificity* in describing where DUI is proscribed. However, the only realistic manner in which to construe the reference in W.Va. Code § 17C-5-2a(a) to "anywhere within the physical boundaries of this state" is that the same is an obvious general jurisdictional reference, as it is certainly not specific at all. If not, then why did the legislature feel compelled to subsequently spell out exactly where DUI offenses are prohibited?

The latter part of that statute expressly limits punishment for DUI to public highways, or private land that is open to the public. If the reference to "anywhere" within this state was sufficiently specific, then the legislature could have simply stopped at that point but it instead chose to use limiting language immediately thereafter. The fact that it included such verbiage proves the point that it was trying to satisfy the specificity requirement of Ball, while at the same time extending Petitioner's police power to those areas which are private but otherwise open to the public.

In Mr. Beckett's case it was stipulated that the accident in question happened "on private family farm property that was not open to the public." The mention of the term "farm" is critically important as it confirms the private nature of the land in question. Obviously, land which is being used for agricultural purposes is not compatible with being "open to the use of the public for purposes of vehicular travel", as one might find it difficult to grow crops or pasture livestock on fields where the public is permitted to drive through whenever they want to do so. Also, agricultural land is deemed to be both "enclosed and posted" by operation of law. See W.Va. Code § 61-3B-1(5) and (7). Furthermore, one who enters upon farm land without the permission of the owner is subject to prosecution for trespassing which likewise confirms that such land is not open to the public for any use, much less vehicular travel. W.Va. Code § 61-3B-3(a).

It was the Petitioner's obligation to prove that Mr. Beckett operated a vehicle on property "open to the use of the public for purposes of vehicular travel". However, to the contrary, the stipulation did not satisfy this burden, and no such evidence was introduced during the hearing. Consequently, the Respondent did not carry her burden of proof. Nevertheless, in an effort to avoid this finding, Petitioner attempts to stretch her jurisdiction by speculating that somehow Mr. Beckett's conduct invokes a duty to protect the public and/or that he put "others in harm's way". *Petitioner's Brief*, p. 6. But no evidence was introduced below that any member of the public was ever endangered by Mr. Beckett's conduct on private property.[7]

Other states with similar laws have found no implication of any duty to protect the public when an incident (such as that in which Mr. Beckett was involved) takes place solely on private property to which the public has no access. In State v. Day, 96 Wn.2d 646, 638 P.2d 546 (Wash. 1981), the Supreme Court of Washington considered a scenario very similar both factually and legally to the one presented here. The primary Washington statute in effect at that time had identical language prohibiting such

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[7]Petitioner contends that "an EMT was required to go onto private land to tend to Mr. Beckett's injuries." Petitioner's Brief, p. 6. However, there was no such evidence. To the contrary, one of the EMT's testified at the administrative hearing that when they arrived Mr. Beckett "was sitting in the back seat of a vehicle." Transcript, p. 11 [213]. He never testified that they drove an ambulance out into a farm field.

conduct "within this state". Day, 638 P.2d 546-47 (citing RCW 46.61.506). And, Washington also had another statutory provision - arguably broader than ours - which indicated "that this prohibition shall apply 'upon highways and elsewhere throughout the state.'" Id. at 547.

The Defendant in Day was found "driving an unlicensed 1971 Ford pickup rapidly in circles in a field owned by his parents." Id. at 546. He was not near a public road and was not observed driving on one, but was noticed by a passing deputy and arrested. Id. There was apparently no dispute that the Petitioner was under the influence. Id.

Although the Washington Court agreed that DUI statutes exist to protect the public from the "menace" posed by drunk drivers, id. at 649; it also noted that the "exercise of police power must pass the judicial test of reasonableness . . . . Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property . . . ." Id. at 548. That Court went on to state:

> In light of the purpose of the statutes and the unique facts herein, it would be an unreasonable exercise of police power to extend the prohibition to petitioner's conduct. He was posing no threat to the public. This is not a case where it is logical to assume he would leave the private property and pursue a course along a public roadway. The vehicle was unlicensed and he was not on or even near a public road. In addition, the land on which he was driving was privately owned and the public had no right to be there nor was the public expected to be on the property. His arrest did not further the purpose of the statute in any way.

> Accordingly, we hold that the unique facts presented by this case do not fall within the scope of the statutory scheme.

Day, 638 P.2d at 548.

The reasoning of the Washington Court applies here. Drunk drivers are a menace to our society, and their conduct must be regulated. However, Mr. Beckett's incident in no way involved or posed any danger to the public at all, and his license revocation does not advance the public policy underlying our DUI statutes. Accordingly, it is patently unreasonable to extend the Petitioner's police power to encompass Mr. Beckett's conduct under the particular facts and circumstances of this case, and the decision of the Circuit Court to overturn his license revocation should be upheld as the Commissioner simply had no jurisdiction to revoke his driving privileges.[8]

II. The Ruling of the Circuit Court Should be Upheld Because the Petitioner Failed to Prove Mr. Beckett's Blood Alcohol Level Exceeded the Legal Limit

The Petitioner only called one witness who had personal contact with Mr. Beckett on the night of the accident: EMT

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[8]Other states with similar statutes have also found jurisdiction lacking in such situations. For example, the Supreme Court of Nebraska found that an individual sitting in a parked car on a residential driveway was not on private property open to public access as required under their state's law, and therefore found probable cause for that person's arrest for DUI to be lacking. State v. McCave, 282 Neb. 500, 805 N.W.2d 290, 306-07 (Neb. 2011). See also, Furman v. Call, 234 Va. 437, 362 S.E.2d 709, 710 (Va. 1987)("Thus, the test for determining whether a way is a "highway" depends upon the degree to which the way is open to public use for vehicular traffic.").

Christopher Miller. Mr. Miller did testify that Mr. Beckett smelled of alcohol, *Transcript*, p. 13 [215], but did not state that he was intoxicated, nor present any evidence or testimony from which a judicial officer could conclude that his blood alcohol level exceeded the legal limit.

The remaining evidence presented was either hearsay, or consisted of the questionable records from Greenbrier Valley Medical Center. As noted previously, Mr. Beckett timely objected to the admission of the medical records. The transcript reflects that the proper evidentiary foundation for their admission was not satisfied; and, neither the Hearing Examiner, Chief Hearing Examiner, nor the Circuit Court ever ruled upon Mr. Beckett's objections and whether such records were admissible or not.

Mr. Beckett's objections to the admission of these records were significant. W.Va. Code § 17C-5-6 quite clearly states: "Only a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his or her employment, acting at the request and direction of the law-enforcement officer, may withdraw blood to determine the alcohol concentration in the blood, or the concentration in the blood of a controlled substance, drug, or any combination thereof." The offered records did not establish that this procedure was followed, and it appeared from the labeling on the records that Mr. Beckett's blood had been drawn for medical purposes only as opposed to the officer requesting the same.

Furthermore, the records specifically stated that the legal chain of custody for Mr. Beckett's blood sample had not been established, and no additional evidence or testimony in that regard was introduced.

Mr. Beckett's objections to these records were clearly meritorious and preclude their admission into evidence in these proceedings. Without this evidence, there is no proof that Mr. Beckett's blood alcohol level exceeded the legal limit at the time of the accident. Consequently, if for any reason this Court does find that the Petitioner had jurisdiction to revoke Mr. Beckett's driving privileges despite the private property issue, the *Order of Revocation* should still be overturned because no admissible evidence was introduced proving that Mr. Beckett's blood alcohol level exceeded the legal limit at the time of the accident.

CONCLUSION

For the foregoing reasons the Respondent, Joshua D. Beckett, respectfully requests that this Court uphold and confirm the decision of the Circuit Court of Monroe County to reverse Petitioner's *Order of Revocation*, together with such other and further relief as this Court deems just and equitable.

JOSHUA D. BECKETT
By Counsel

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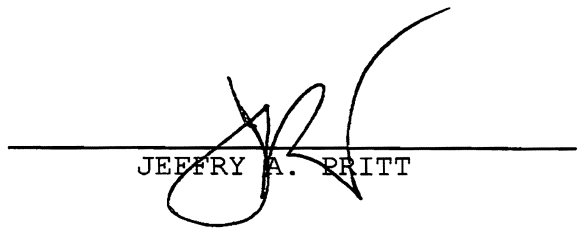
CERTIFICATE OF SERVICE

I, Jeffry A. Pritt, counsel for the Respondent, do hereby certify that service of the attached RESPONDENT'S BRIEF has been made upon the Petitioner by depositing a true and correct copy of the same in the regular U.S. mail, postage prepaid, and addressed to her counsel of record as follows:

Elaine L. Skorich
Assistant Attorney General
DMV-Attorney General's Office
P.O. Box 17200
Charleston, WV 25317-0010

this 11th day of March, 2016.



JEFFRY A. PRITT