

Case No. 19-0755

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, ex rel.
ADAM HOLLEY, Acting Commissioner,
West Virginia Division of Motor Vehicles,

Petitioner,

v.

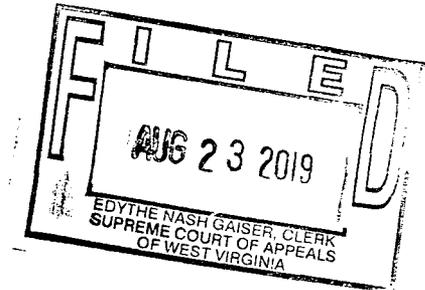
WILLIAM S. THOMPSON, Judge of the
Circuit Court of Boone County,

Respondent,

and

NICHOLAS BLANKENSHIP,

Party in Interest.



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PETITION FOR WRIT OF PROHIBITION

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Comes now Adam Holley (“Petitioner”), Acting Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), by and through the undersigned counsel, and hereby submits the instant *Petition for Writ of Prohibition* pursuant to Revised Rule of Appellate Procedure 16 for the reasons that follow.

I. QUESTIONS PRESENTED

1. May a circuit court enter and *ex parte* order granting a stay of an *Order of Revocation* issued by the Commissioner of the DMV?
2. In an appeal of an order of an administrative license revocation, may a circuit court order the opposing party to prepare and file the administrative record of the tribunal with the circuit court?

II. STATEMENT OF THE CASE

The DMV is a state agency with responsibility for, *inter alia*, enforcing statutory provisions relating to the privilege to drive a motor vehicle in West Virginia. W. Va. Code §§ 17A-2-1 (1951), 17B-3-1 (1999) *et seq.* The Petitioner is the executive officer of the DMV. As such, the Petitioner is an officer of the State of West Virginia who is appointed by, and serves at the will and pleasure of the Governor of West Virginia. W. Va. Code § 17A-2-2 (1951). The Petitioner appears in his official capacity as the executive officer of the DMV.

The Petitioner issued an *Order of Revocation* revoking the privilege of Nicholas Blankenship to drive in West Virginia because he was found to have driven under the influence (hereinafter, “DUI”) of controlled substances and/or drugs. (App¹. at P. 14 .) Mr. Nicholas, by counsel, appealed the license revocation to the Office of Administrative Hearings (“OAH”) (*Id.*), a separate operating agency within the Department of Transportation, which has jurisdiction to hear and determine appeals of orders of the Commissioner of the DMV revoking a driver’s license for DUI. W. Va.

¹App. refers to the *Appendix* filed contemporaneously with the instant petition.

Code §§ 17C-5C-1 (2010), 17C-5-C-3(3) (2010).

On April 10, 2019, the OAH issued a final order upholding the DMV's *Order of Revocation*. (App. at PP. 14-19.) On May 7, 2019, Mr. Nicholas, through counsel, filed a *Petition for Review of Administrative Order* in the Circuit Court of Boone County, which petition is currently pending before Judge William Thompson in the Circuit Court of Boone County. (App. at PP. 6-10.) On May 8, 2019, the Circuit Court of Boone County entered an *ex parte Order Filing Petition for Review* wherein the circuit court ordered a 150 day stay of Mr. Nicholas's license revocation and ordered the Petitioner to provide the administrative record, including a transcript, to the circuit court within 30 days of receipt of the circuit court's order. (App. at PP. 2-3.)

III. SUMMARY OF ARGUMENT

The extraordinary remedy of prohibition is sought herein on the grounds that the circuit court of Boone County has exceeded its jurisdiction in granting an *ex parte* order staying the license revocation of Mr. Nicholas and requiring the Petitioner to produce the administrative record in the possession of the OAH. These matters may be resolved only by issuance of a writ in the present case. The stay of revocation has been granted without the procedure required by W. Va. Code §17C-5A-2(s) (2015), namely, a motion, a hearing where evidence is adduced, and findings by the circuit court that there is substantial probability that Mr. Nicholas shall prevail upon the merits and will suffer irreparable harm if the order of revocation is not stayed. In addition, the order requiring the DMV to produce the administrative record of the OAH violates W. Va. Code §17C-5A-2(s) (2015) which commands that the "party filing the appeal shall pay the *Office of Administrative Hearings* for the production and transmission of the certified file copy and the hearing transcript to the court." [Emphasis added.] Because these actions violate the clear requirements set forth in W. Va. Code

§17C-5A-2(s) and applicable case law, *infra*, Judge Thompson has exceeded his legitimate authority.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The DMV submits that review of the record should allow this Court to dispose of the pending case without either issuance of a Rule or oral argument. However, if this Court schedules oral argument, the DMV submits that the argument should proceed under Rule 19 as this matter involves assignments of error in the application of settled law; an unsustainable exercise of discretion where the law governing that discretion is settled; and a narrow issue of law.

V. ARGUMENT

A. *Standard of Review*

“Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari. Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).” Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1. Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).” Syl. Pt. 1, *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 655 S.E.2d 137 (2007) (per curiam).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (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.

Syl., Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). *See also*, Syl. Pt. 1, *W. Va. Div. of Motor Vehicles v. Swope*, 230 W. Va. 750, 742 S.E.2d 438 (2013).

B. *Prohibition is the Only Remedy to Correct a Clear Legal Error.*

Pursuant to W. Va. Code §53-1-1 (1923), a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." In that regard, a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court, although having jurisdiction, exceeds its legitimate powers. *See, State ex el. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 602 S.E.2d 542 (2004).

In the instant matter, Judge Thompson exceeded any legitimate power by granting an *ex parte* stay instead of relying on evidence adduced at hearing and requiring the opposing party in this matter to produce and pay for the administrative record - both in violation of W. Va. Code § 17C-5A-2(s) (2015). In the matter *sub judice*, there is no other remedy available because the order granting a stay and ordering the DMV to produce the record is not a final, appealable order. In that regard, immediate relief from this Court is necessary to prevent an illegal stay of revocation to continue.

C. *The Petitioner will be prejudiced in a way that is not correctable on appeal.*

“The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.”

Syl. Pt. 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005); Syl. Pt. 2, *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012); *Reed v. Conniff*, 236 W. Va. 300, 306, 779 S.E.2d 568, 574 (2015); *Reed v. Grillot*, No. 17-0691, 2019 WL 1012160, at *5 (W. Va. Mar. 4, 2019) (memorandum decision). *See also*, *Ferrell v. Cicchirillo*, No. CIV.A. 1:08CV220, 2009 WL 1468364, at *4 (N.D.W. Va. May 26, 2009) (“The State of West Virginia has found that the purpose of the State's administrative driver's license revocation proceedings is public safety.”)

As will be more fully explained below, Mr. Blankenship filed an appeal of his administrative license revocation with the Circuit Court of Boone County and failed to notify the administrative tribunal, the OAH, to request that the administrative record be produced. Instead, the circuit court ordered the opposing party to produce a record not in its possession. If noticed correctly, the OAH is afforded 60 days to produce the administrative record pursuant to W. Va. Code § 17C-5A-2(s) (2015).² Then, after production of the administrative record and pursuant to Rule 5 of the Rules of Procedure for Administrative Appeals (2008) (“RPAA”), Mr. Blankenship will be afforded 30 days to file a brief; the DMV will be afforded 30 days to file a response; and Mr. Blankenship will be afforded 15 days to file a reply. By the end of the briefing period, the 150 day stay ordered by the circuit court will have expired, yet Mr. Blankenship will be afforded the opportunity to request an extension of the *ex parte* order granting a stay of his license revocation.³

² “Notwithstanding the provisions of section four, article five of said chapter, the Office of Administrative Hearings may not be compelled to transmit a certified copy of the file or the transcript of the hearing to the circuit court in less than sixty days.”

³ “A stay or supersedeas of the order issued pursuant to W. Va. Code § 17C-5A-2(s) (2012) must contain an express provision limiting the duration to no more than 150 days, although the circuit court is not precluded from issuing consecutive stays for good cause shown.” Syllabus point 4, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013).

Until the circuit court enters a final order, Mr. Blankenship, an adjudicated impaired driver, will be permitted to operate a motor vehicle in this state while putting the motoring public at risk, and the DMV will continue to be prejudiced in meeting its statutory duty to remove impaired drivers from the roadway as quickly as possible.

D. The circuit court's order is clearly erroneous as a matter of law.

1. The order granting an *ex parte* stay of Mr. Blankenship's license revocation violates statutory and case law.

Judge Thompson's order was improperly granted, in violation of W. Va. Code § 17C-5A-2(s) (2015), which provides:

the court may grant a stay or supersedeas of the order only **upon motion and hearing**, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits, and the appellant will suffer irreparable harm if the order is not stayed: Provided, That in no event shall the stay or supersedeas of the order exceed one-hundred-fifty days.

[Emphasis added.]

The circuit court's order is also in violation of this Court's determination that

[b]efore 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. Syllabus Point 2, *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993).

[Emphasis added.] Syllabus Point 2, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876, 877 (2013)⁴. This Court concluded in *Smith v. Bechtold* that “. . . if the circuit judge granted the stays without conducting evidentiary hearings and without meaningfully analyzing the evidence adduced

⁴ Judge William Thompson of Boone County presided over one of the three matters consolidated in *State ex rel. Miller v. Karl*.

during the hearings, he exceeded the legitimate powers granted to him under the statute.” 190 W. Va. 315, 319, 438 S.E.2d 347, 351.

It is without question that this Court requires the circuit courts to observe the requirements outlined in W. Va. Code § 17C-5A-2(s) (2015), namely: require the petitioners below to file motions for stay and to conduct evidentiary hearings at which testimony is taken or other evidence is submitted so that the a meaningful analysis of the alleged irreparable harm can be made.

Although the second part of West Virginia Code § 17C-5A-2(s), providing “the substantial probability that the appellant shall prevail on the merits,” can be satisfied by proffer and argument of counsel, a circuit court can only make a reasoned decision as to the alleged irreparable harm that a driver may suffer through the taking of evidence. We agree with the Commissioner's arguments.

...

Fundamental fairness dictates that the Commissioner be granted an opportunity to cross-examine the driver as to irreparable harm. We believe that the Commissioner has the right to inquire further into the driver's situation and the alleged harm that will befall the driver if the license revocation is not stayed pending appeal. Once the Commissioner has had the opportunity to cross-examine the driver on these issues, the circuit court should then make the necessary factual and legal findings on the record to satisfy the requirements of the statute.

State ex rel. Miller v. Karl, 231 W. Va. 65, 69-70, 743 S.E.2d 876, 880-81 (2013).

The circuit court exceeded its legitimate authority by entering Mr. Blankenship’s proposed *Order Filing Petition for Review* without requiring Mr. Blankenship to file a motion, without conducting a hearing upon which evidence was adduced, and without making the required findings as to irreparable harm and substantial probability of success on the merits. Even if the DMV had been provided an opportunity to respond to Mr. Blankenship’s petition prior to the Circuit Court of Boone County entering the *ex parte* order below, the circuit court was required to comply with W. Va. Code § 17C-5A-2(s) (2015).

‘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, 124 L.Ed.2d 402, 412 (1993), quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152, 166 (1991).

State v. Blake, 197 W. Va. 700, 706, 478 S.E.2d 550, 556 (1996).

2. The circuit court exceeded its authority by ordering the DMV, the opposing party below, to prepare and file the administrative record of the OAH, the tribunal.

In the *Order Filing Petition for Review*, the Circuit Court of Boone County ordered that “the Commission file with the Clerk of this Court a complete copy of the transcript of hearing, all exhibits in the file, and a copy of all administrative orders made by the Commissioner within 30 days after receipt of this Order.” (App. at P. 2.) West Virginia Code § 17C-5A-2(s) (2015) is clear in its language that the “party filing the appeal shall pay the *Office of Administrative Hearings* for the production and transmission of the certified file copy and the hearing transcript to the court.”

Since June 6, 2010, the OAH is “a separate operating agency within the Department of Transportation.” W. Va. Code § 17C-5C-1(a) (2010). The OAH has jurisdiction to hear and determine all appeals outlined in W. Va. Code § 17C-5C-3 (2010). The DMV, a party to the matter before the circuit court, cannot produce the administrative record. The DMV’s record does not contain the administrative record before the OAH or a transcript of the administrative hearing. The OAH, a separate statutory agency, is the custodian of the record which the Petitioner is required to request for this Court’s judicial review. *See*, W. Va. Code § 29A-5-1(a) (1998)⁵ and W. Va. Code

⁵ “The agency shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of

§ 29A-5-4(f) (1998).⁶

Mr. Blankenship failed, as required by Rule 2(e)⁷ of the RPAA, to attach a certificate of service to his *Petition for Review of Administrative Order* and failed, as mandated by Rule 4(a) of the RPAA, to file a *Designation of the Record* indicating that he served the OAH with a copy of his petition.⁸ Instead, Mr. Blankenship attached a summons in violation of Rule 2(e)⁹ of RPAA. Therefore, the OAH has not been put on notice that the administrative appeal was filed or that the circuit court will require an administrative record for its review.¹⁰

The OAH promulgated procedural rules which address the production of the administrative record.

Upon written request of a party, the OAH will facilitate having the recording of the hearing transcribed and a copy furnished to the party requesting the hearing transcript at the expense of the requesting party. The filing of an appeal from a final order that necessitates the transcription shall constitute such a written request from the party filing the appeal. The OAH or the transcription service provider may demand pre-payment of the transcription and transcript costs, including the original and copy of

rehearing or judicial review.”

⁶ “The review shall be conducted by the court without a jury and shall be upon the record made before the agency.”

⁷ “The certificate of service shall show proof of service on the agency whose final decision, order, rule or ruling is involved (unless the agency is the petitioner), even if the agency is not a party.”

⁸ “Upon filing of the Petition, the petitioner shall designate those parts of the record deemed material to the questions presented in the appeal, including the relevant proceedings to be transcribed, and serve notice of such designation upon all parties below.”

⁹ “No summons shall be issued or served in connection with the Petition and Docketing Statement.”

¹⁰ *See*, W. Va. Code § 29A-5-4(f) which provides, “[t]he review shall be conducted by the court without a jury and shall be upon the record made before the agency . . .” *See also*, RPAA 6(a) providing, “[t]he circuit court shall only consider evidence which was made part of the record in the proceeding before the administrative agency. . .”

the transcript, from a requesting party. Upon completion of the hearing transcript, the original transcript shall be filed with the OAH and made part of the official OAH record.

The official OAH record consists of written objections, motions and responses thereto, orders, hearing notices, subpoenas, hearing exhibits, any other evidence that was considered or reviewed by the OAH when drafting the final order, the final order, and the hearing transcript, if any. The parties may file a joint designation of record that limits the record for appeal purposes. The expense of preparing such record for appeal shall be taxed as a part of the costs of the appeal.

W. Va. Code State R. §§105-1-16.1, 105-1-16.2 (2016).

Mr. Blankenship cannot circumvent statute or rule by having the circuit court order the DMV to produce and to pay for that which he is required to request from the OAH, and the circuit court exceeded its legitimate authority in so ordering.

E. This Court must address the errors raised herein as they are subject to be oft repeated and manifests a persistent disregard of the Circuit Court of Boone County for the procedural requirements of W. Va. Code § 17C-5A-2(s) (2015).

Even if Judge Thompson issues an amended order after the filing of this instant matter, this Court must still review and determine the issues presented because they will be repeated throughout the State of West Virginia and by the circuit court below. As this Court has previously determined,

[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review. Syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984).

State ex rel. Wooten v. Coal Mine Safety Bd. of Appeals, 226 W. Va. 508, 515, 703 S.E.2d 280, 287 (2010).

In the last month, the OAH has issued hundreds of final orders in an effort to eliminate the backlog recognized by this Court in *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017) and

Straub v. Reed, 239 W. Va. 844, 806 S.E.2d 768 (2017). The OAH is currently issuing orders at a pace to entirely eliminate the backlog by the end of 2019. As a consequence, the number of circuit court appeals has increased significantly as impaired drivers seek to avoid safety and treatment programs, interlock restrictions and other driving consequences under the remedy created in *Staffileno, supra*, when there has been a delay in issuing a final order. It is imperative that this Court send a message to the circuit courts regarding their compliance with the existing statutory appellate procedure which is equally clear as the message sent to the OAH about issuing timely final orders.

In addition, the Circuit Court of Boone County has manifested a persistent disregard for the procedural requirements of W. Va. Code § 17C-5A-2(s) (2015). As previously mentioned, this Court addressed Judge Thompson's violations of the relevant statutory requirements for granting a stay of a license revocation in *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013). Despite this Court's determination that the circuit court must hold a hearing where evidence is adduced and must make findings of fact regarding irreparable harm and probability of success on the merits, Judge Thompson entered an *ex parte* order granting a stay of the DMV's license revocation order in the instant matter. The circuit court's disregard of the statutory stay requirements and this Court's previous holdings has become a chronic problem and must be addressed again.

VII. CONCLUSION

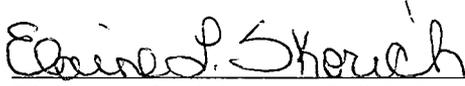
For the reasons listed above, Petitioner prays that this Court grant Petitioner's *Petition for Writ of Prohibition*.

Respectfully submitted,

ADAM HOLLEY, Acting Commissioner,
West Virginia Division of Motor Vehicles,

By Counsel,

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ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Elaine L. Skorich", written over a horizontal line.

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