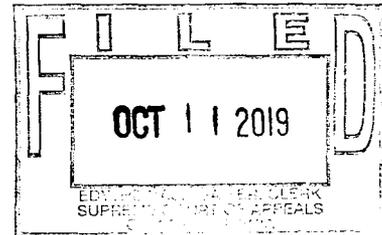


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BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

**State of West Virginia, ex rel.
Adam Holley, Acting Commissioner,
West Virginia Division of Motor Vehicles,**

Petitioner,

vs)

No. 19-0755

**The Honorable William S. Thompson,
Judge of the Circuit Court of Boone
County, and Nicholas Blankenship,**

Respondents.

**RESPONSE OF RESPONDENT NICHOLAS BLANKENSHIP
TO PETITION FOR WRIT OF PROHIBITION**

**Wendle Cook, WWSB#812
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Attachment: Blankenship Exhibit 1

TABLE OF AUTHORITIES

STATUTES:

W. Va. Code §17C-5A-2(s) (2015)

W. Va. Code § 17C-5C-1(a)

W. Va. Code § 17C-5-C3(3)

W. Va. Code § 29A-1-2(b)

Wendle Cook, counsel for Nicholas Blankenship a driver charged with driving under the influence of alcohol or drugs, states the following response to this petition for writ of prohibition.

I. STATEMENT OF THE CASE

Nicholas Blankenship is a driver charged with driving under the influence of alcohol or drugs in 2012. His license were revoked more than fourteen months later. His file apparently laid at the State Police Headquarters during that time. The underlying criminal charges against him were later dismissed. The underlying facts of this license revocation are important because the State of West Virginia is complaining that Judge Thompson signed an order requiring the DMV to produce a transcript within 30 days, where the latest statute provides for 60 days, and provides for payment of a fee for the transcript. When this appeal was filed, counsel for Mr. Blankenship submitted an order to Judge Thompson that was based upon the old statute that provided 30 days to prepare a transcript, instead of 60 days. There is an apparent conflict of laws regarding the manner in which the transcript is ordered and paid for. Counsel for the State argues that the Office of Administrative Hearings should have been named as a party, but West Virginia Code 17-C-5-4 specifically states that the OAH may not be named as a party.

ARGUMENT

The Order Filing Petition For Review ordered that a hearing on the merits of the claim be set by counsel for the petitioner following receipt of the hearing transcript. That seems to make sense. You get the transcript and then you have a hearing.

If you cannot make the OAH a party, then the only other State agency with access to the transcript would be the DMV. Respondent understands that he may have to pay for a transcript, but

there is nothing in the statute that requires prepayment. In fact, it would be impossible to know the cost until the transcript was completed.

The Order Filing Petition For Review and Petition For Review of Administrative Order are attached hereto as Blankenship Exhibit 1.

Petitioner's argument is based upon an interpretation of West Virginia Code 17C-5-4, which reads as follows: A person whose license is at issue and the commissioner shall be entitled to judicial review as set forth in chapter twenty-nine-a of this code. Neither the commissioner nor the Office of Administrative Hearings may stay enforcement of the order. The court may grant a stay or supersede as 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 supersede as of the order exceed one hundred fifty days. The Office of Administrative Hearings may not be made a party to an appeal. 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. 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. Circuit Clerk shall provide a copy of the circuit court's final order on the appeal to the Office of Administrative Hearings by regular mail, by facsimile, or by electronic mail if available.

The law is clear that the State agency gets 60 days to produce the transcript. However, the statute does not state that the cost of the transcript must be paid in advance. The statute does require that a hearing be held. The order signed by Judge Thompson provides that a hearing be held and that

the transcript be produced. It appears that the argument of the DMV is that there are insufficient findings made in the order to justify a stay of the revocation order.

W. Va. Code, § 29A-5-4 provides that no appeal bond is required for an administrative appeal; that the court may grant a stay upon such term as it deems proper; and that the agency shall transmit to such circuit court the original or a certified copy of the entire record of proceedings. Here, the agency is the DMV. The OAH cannot be named as a party.

§ 29A-5-4. Judicial review of contested cases.

(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.

(b) Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency. A copy of the petition shall be served upon the agency and all other parties of record by registered or certified mail. The petition shall state whether the appeal is taken on questions of law or questions of fact, or both. No appeal bond shall be required to effect any such appeal.

(c) The filing of the petition shall not stay enforcement of the agency order or decision or act as a supersedeas thereto, but the agency may stay such enforcement, and the appellant, at any time after the filing of his petition, may apply to such circuit court for a stay of or supersedeas to such final order or decision. **Pending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper.**

(d) Within fifteen days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened. The expense of preparing such record shall be taxed as a part of the costs of the appeal. The appellant shall provide security for costs satisfactory to the court. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional

costs involved. Upon demand by any party to the appeal, the agency shall furnish, at the cost of the party requesting same, a copy of such record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and the court shall order such record filed.

(e) Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

(f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one, article six of this chapter.

The order that was presented to Judge Thompson by counsel for the Respondent did contain an error regarding the 60 day period that the State agency is granted to produce a transcript. Counsel takes responsibility for those errors. However, those errors can be easily cured by a remand to the Circuit Court with instructions to require a hearing and allowing the OAH 60 days to produce a transcript. Mr.

Blankenship does not currently possess a valid driver license, so there is no irreparable harm caused by the order.

II. CONCLUSION

For the reasons listed above, the Petitioner prays that this Court deny Petitioner's *Petition for Writ of Prohibition*. *There exists no irreparable harm, as the Respondent, Nicholas Blankenship, does not currently possess a valid driver license.. This matter can be resolved by an order remanding the case back to Judge Thompson with an order to have a probable cause hearing and allowing the State agency 60 days to produce a transcript.*

Respectfully submitted,
NICHOLAS BLANKENSHIP,
By Counsel,



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BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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vs)

No. 19-0755

**The Honorable William S. Thompson,
Judge of the Circuit Court of Boone County,
and Nicholas Blankenship,**

Respondents.

CERTIFICATE OF SERVICE

I, Wendle D. Cook, counsel for Nicholas Blankenship, do hereby certify that on this 11th day of October, 2019, the foregoing **Response of Nicholas Blankenship** was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, addressed as follows:

The Honorable William S. Thompson, Judge
Boone County Circuit Court
200 State Street
Madison, WV 25130

Elaine L. Skorich
Assistant Attorney General
DMV Legal Division
PO Box 17220
Charleston, WV 25317



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*Counsel for Nicholas Blankenship***



IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

**NICHOLAS BLANKENSHIP,
Petitioner,**

v. Civil Action No. 19-

**WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,
ADAM HOLLEY, ACTING
COMMISSIONER,
Respondent.**

PETITION FOR REVIEW OF ADMINISTRATIVE ORDER

Your Petitioner, Nicholas Blankenship by counsel, Wendle D. Cook, states and avers as follows:

1. Your Petitioner works, attends school, receives medical treatment, and conducts business in Boone County, West Virginia.
2. This Court has jurisdiction over the matters contained herein pursuant to Chapter 29-A-5-4 of the West Virginia Code. This review contains questions of law and questions of fact.
3. Your Petitioner's driver's license was revoked as a result of a statement of arresting officer alleging that the Petitioner did drive a motor vehicle in the State of West Virginia on July 9, 2012, while under the influence of alcohol, controlled substances, or any combination of the aforementioned . in violation of West Virginia Code 17C-5-2. That statement of arresting

officer was not filed by the officer who prepared it, rather, it was filed by a different officer well over one year later.

4. The Order of Revocation was entered on October 1, 2013, more than fourteen months after the alleged driving incident occurred.

5. Your Petitioner timely objected to the revocation and requested a hearing before the Commissioner of the Department of Motor Vehicles.

6. A hearing was held on December 7, 2017, before Hearing Examiner Aimee Jackson.

7. A Decision of Hearing Examiner dated April 9, 2019, was issued by Aimee Jackson, Hearing Examiner, finding that the defendant did drive a motor vehicle while under the influence of controlled substances or drugs on July 19, 2012.

8. A Final Order Of Chief Hearing Examiner was entered by Teresa D. Maynard on April 10, 2019.

9. Your Petitioner asserts the substantial rights of the Petitioner have been violated because the administrative findings and subsequent revocation order are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedures;

- (4) Affected by error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence of the whole record;
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

9. The Petitioner was acquitted on the underlying criminal charge of driving under the influence.

10. Your Petitioner states that the order entered by the Commissioner contains clear errors of law and was made upon unlawful procedures. Specifically, but without limitation, your Petitioner states that there existed no probable cause for the arrest; the arresting officer failed to follow federal regulations required by the National Highway Traffic Safety Administration and West Virginia law in administering field sobriety tests; the arresting officer failed to follow West Virginia Department of Health regulations in performing preliminary and secondary testing; the Hearing Examiner stated at the beginning of the hearing that she was taking judicial notice that the breathalyzer tests performed by the arresting officers were made upon lawful procedures. The act of taking judicial notice of facts at issue and contested by the Petitioner constitutes a clear violation of the Commissioner's regulations and violated the Petitioner's protected constitutional right to due process.

11. Your Petitioner states that the errors of law committed by the Commissioner are clear and should certainly result in a reversal of the order of the Commissioner bearing date of May 11, 2009.

12. Your Petitioner states that the hearing examiner stated that the blood test results were not admissible for the reason that the testing was not timely

performed. Thereafter, the Hearing Examiner admitted the blood test results, in violation of West Virginia law and procedure.

13. The secondary breath test was normal.

14. The preliminary test result was normal.

15. The blood testing was performed more than four hours after the arrest, and more than eight hours after the alleged driving incident.

16. The blood test results were stated to be presumptively positive for benzodiazapines and methadone, but the technicians specifically stated that drug analysis was not performed, as the specimen sample was insufficient for verification.

17. Your Petitioner is presently employed on a regular basis as a commercial truck driver. This revocation has caused his license to be pulled.

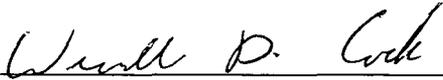
18. The constitutional rights of the Petitioner have been violated first by the time lapse in filing the statement of arresting officer, next by the admission of blood test results that state on their face that drug analysis could not be performed due to an insufficient sample, and third by the Hearing Examiner admitting the blood test results when the test results were not collected within the four hour time limit and where the report of test results states that drug analysis was not performed due to an insufficient sample.

PRAYER

Wherefore, your Petitioner does pray that his petition for appeal be filed, that the Commissioner be required to produce a true and accurate copy of the transcript of the hearing and all exhibits contained within the file, that

an order be entered staying the Final Order dated May 11, 2009, until such time as a hearing on the merits of the petition can be held, that the revocation order entered by the Commissioner be reversed and set aside in accordance with West Virginia Code 29A-5-4(g), and for such other and further relief that this Court would deem appropriate.

Nicholas Blankenship,
By Counsel,



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