

DO NOT REMOVE
FROM FILE

FILE COPY

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 20-0142

STATE OF WEST VIRGINIA ex rel.
EVERETT FRAZIER, COMMISSIONER
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES

Petitioner,

vs)

HONORABLE WARREN R. MCGRAW, Judge of the
Circuit Court of Wyoming County, and
DALTON WATTS,

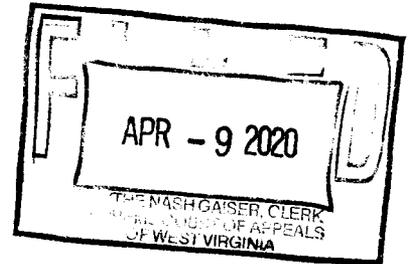
Respondents.

DALTON WATTS' SUMMARY RESPONSE
TO PETITION FOR WRIT OF PROHIBITION

Lela Walker
Attorney at Law
WV State Bar No. 8703
P.O. Box 909
Oceana, WV 24870
(304) 682-0600
lelawalker@hotmail.com

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600



BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 20-0142

**STATE OF WEST VIRGINIA ex rel.
EVERETT FRAZIER, COMMISSIONER
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES**

Petitioner,

vs)

**HONORABLE WARREN R. MCGRAW, Judge of the
Circuit Court of Wyoming County, and
DALTON WATTS,**

Respondents.

**DALTON WATTS' SUMMARY RESPONSE
TO PETITION FOR WRIT OF PROHIBITION**

NOW COMES the Respondent, Dalton Watts, by counsel, Lela Walker, and hereby files his summary response, pursuant to Rule 16(h) of the Revised Rules of Appellate Procedure, to the *Petition For Writ Of Prohibition* ("writ"). This response was due on March 30, but the Court's COVID-19 Order stated that response times were stayed. The Honorable Warren R. McGraw (Judge McGraw), Judge of the Circuit Court of Wyoming County, West Virginia, issued a stay of the suspension of Respondent's, Dalton Watts, driving privileges in compliance with the mandates set forth in W.Va. Code 17C-5A-2A, et. seq. and W.Va. Code 29A-5-1, et. seq. Specifically, the stay was issued upon motion and hearing and a finding by Judge Warren R. McGraw upon the evidence presented that the Respondent shall prevail upon the merits of the appeal and

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

that he will suffer irreparable harm if the stay is not imposed. Neither the Wyoming County Circuit Court nor Judge McGraw exceeded its jurisdiction or its legitimate power and, accordingly, this Court should not issue the writ.

Factual Background

The Respondent filed a Petition on September 19, 2019, in the Circuit Court of Wyoming County, West Virginia, asking that the Commissioner's Order of Revocation against Dalton Watts, be reversed, and that Dalton Watts' license be reinstated until further order of the court, ("Petition", a copy of which is attached). The Petition was properly noticed and set for hearing before Judge McGraw on November 6, 2019. The Petitioner filed the following responses in opposition to the "Petition": Notice of Special Limited Appearance, Motion to Dismiss and Motion for Attorney Fees and Cost. All parties appeared on November 6, 2019, for a hearing upon the said motion and were afforded the opportunity to offer evidence and present argument.

The Respondent was called as a witness. The Respondent testified that he had NOT been arrested or even given a ticket from his traffic stop. He also testified that his breathalyzer results were below the legal limit. The Respondent further testified that he had not received notice of the hearing held on August 19, 2019, in his contested DMV hearing and knew nothing of the hearing that he did not attend until he received an administrative order from the Office of Administrative Hearings dismissing his case.

Now that the transcript and records have been released to the Respondent from the DMV, it appears that the Respondent was represented by counsel (*not the undersigned*) at the underlying administrative hearings. It appears that Respondent's counsel and counsel

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

for the DMV asked for numerous continuances for two years that were granted by the Administrative Judge for various reasons. It also unfortunately appears from the record that Respondent's counsel did not appear at the final hearing on August 19, 2019, for the Respondent's matter. Said counsel also did not give the Respondent notice of the hearing either. There is no way of concluding if the Respondent's former counsel actually knew of the hearing and failed to appear or if the former counsel did not know of the final hearing at all. No matter how the former counsel failed to appear for the hearing, the end result is the same. The Respondent's license was suspended due to his and his counsel's failure to appear.

When the Respondent took the administrative order suspending his driver's license to his former counsel, said counsel told him that he didn't want anything to do with the case anymore.

The Respondent then came to my office begging for help.

At the November 6, 2019, hearing, the Respondent further testified that he would suffer irreparable harm from not having a driver's license due to his needing to get from Cyclone in Wyoming County to Boone County for perform work underground as a roof bolter. The Respondent testified that he had been driving that 50 minute trip to work everyday without a valid license hoping not to get involved in a traffic stop for any reason.

The Petitioner objected to the Respondent being allowed to testify. The Petitioner argued that the Petition was not an appeal of the administrative court's ruling as the matter asked for "extraordinary relief."

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

Respondent's counsel pointed out on the record that the Respondent's order from the administrative hearing instructed the Respondent to appeal using West Virginia Code §29A-5-4, which was the same statute followed by the Respondent when drafting said Petition for appeal. The Respondent was not asking for "extraordinary relief," and the matter was simply an appeal.

The Petitioner's Motion to Dismiss was denied at the Circuit Court hearing. The Respondent's request to stay suspension of the Respondent's drivers license was granted until an appeal could be heard by the Circuit Court of Wyoming County.

The Petitioner then filed this Writ Of Prohibition with the West Virginia Supreme Court of Appeals. The Petitioner argues that the Circuit Court of Wyoming County should not have jurisdiction, that pre-suit notification was not given to the DMV, and that the DMV is entitled to money from the Respondent.

Argument

Standard For Issuance Of Writ

W.Va. Code 53-3-1 generally states a writ of prohibition shall lie as a matter of right when the inferior court does not have jurisdiction over the subject matter or, having such jurisdiction, exceeds its legitimate power. Further, a writ of prohibition, like writs of mandamus and habeas corpus, is an extraordinary remedy and should only be issued for extraordinary causes. State ex rel Suriano v. Gaughan, 198 W.Va. 339, 480 S.E.2d 548 (W.Va. 1996). In determining whether to issue a writ of prohibition, "*this Court will look to the adequacy of other available remedies such as an appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court*

LELA WALKER

ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance". Syl. Pt. 1 Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (W.Va. 1979).

As discussed in greater detail below, there is a low probability the Wyoming County Circuit Court will be completely reversed if this writ is not issued. The net result is likely to remain the same.

"Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue."

Certainly, the circumstances which warrant the issuance of a writ are limited. The Petitioner must, therefore, demonstrate that the Wyoming County Circuit Court either: 1) had no jurisdiction over the matter or 2) exceeded its legitimate power. It can show neither.

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

A. The Wyoming County Circuit Court Has Jurisdiction Over The Administrative Appeal

A person whose driver's license is at issue is entitled to judicial review pursuant to W.Va. Code 29A-1-1, et. seq. *"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 any one of the petitioners resides or does business . . ."* W.Va. Code 29A-5-4(b). The Respondent (petitioner below) is a resident of Wyoming County, West Virginia. Pursuant to Rule 2(a) and Rule 2(b) of the Rules Of Procedure For Administrative Appeal, a petition for review of an administrative order shall be filed in the office of the clerk of the circuit court in which venue lies by law. The underlying offense (driving under the influence) is alleged to have occurred in Oceana, Wyoming County, West Virginia. Further, there was no arrest made. After field sobriety tests and a breathalyzer resulting in a 0.076 BAC, the Respondent was not arrested and allowed to continue driving. The Wyoming County Circuit Court has jurisdiction over this administrative appeal. This cannot be argued.

B. The Wyoming County Circuit Court Satisfied The Evidentiary Requirements Set Forth In W.Va. Code 17C-5A-2(s)

A court may grant a stay of an administrative order concerning the revocation of a driver's license *"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. .*

" W.Va. Code 17C-5A-2(s). A circuit court is granted wide discretion concerning the

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

manner in which it handles hearings, motions, etc. In fact, W.Va. Code 29A-5-4© provides, in part, that a circuit court, pending the administrative appeal, may grant a stay upon such terms as it deems proper.

First, the Wyoming County Circuit Court issued the stay upon a motion and hearing. This is not in dispute.

Second, evidence was presented concerning whether there is a substantial probability that that the appellant shall prevail upon the merits. Specifically, the entire incident (the subject traffic stop) resulted in no criminal charges, and the Defendant was allowed to continue driving by law enforcement after passing field sobriety tests and a breathalyzer test that resulted in a 0.076, which is below the legal limit.

Third, evidence and arguments were presented concerning the irreparable harm which the Respondent would suffer if the stay were not issued. Specifically, the Respondent lives in Oceana, Wyoming, West Virginia – a rural area which has no available public transportation (bus services, taxi services, rail/subway services) and was working in the coal mines in Boone County, West Virginia. This was approximately a 1 hour commute. Judge McGraw, upon information and belief, took judicial notice of this fact at the Motion hearing. Obviously, the Respondent, like many others, is dependent upon driving a vehicle in order to live and function on a daily basis. The Respondent testified as to the harm he would suffer at the hearing on November 6, 2019.

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

The Petitioner did not and should now be precluded from obtaining the issuance of a writ based upon this issue. In sum, the Wyoming County Circuit Court issued the stay AFTER it heard arguments from counsel, reviewed the pleadings (evidence) filed herein, etc. Thus, the lower tribunal did not exceed its legitimate power herein.

Relief Requested

The Petitioner repeatedly states that there was a request for “extraordinary relief” but does not clearly identify or explain the “extraordinary relief” being sought. The fact is that this is a simple appeal from an administrative order of the DMV. The Petitioner only states that “extraordinary relief” is sought so that the Petitioner can attempt to ignore the existence of West Virginia Code §29A-5-4, which states that a person can appeal an administrative order of the DMV in the Circuit Court of the county in which they reside.

Respondent Watts should not be responsible for court costs or DMV attorney fees because Wyoming County Circuit Court was the proper venue and jurisdiction. The Respondent prays that this Court deny the writ of prohibition as Wyoming County Circuit Court and the Honorable Warren R. McGraw were the proper jurisdiction and venue, and further action on the matter resulting in a suspension of Respondent Watts’ drivers license could and would cause great and irreparable harm. The Petitioner fails to identify the “extraordinary relief” which it repeatedly states was sought and the stay was issued in compliance with the evidentiary requirements set forth in W.Va. Code 17C-5A-2(s) and W.Va. Code 29A-5-4©.

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600

DALTON WATTS,

A Party In Interest,
By counsel

Lela Walker

Lela Walker
Attorney for Dalton Watts
P.O. Box 909
Oceana, WV 24870
(304) 682-0600
WV Bar No. 8703

LELA WALKER
ATTORNEY AT LAW, PLLC

528 Cook Parkway
P.O. Box 909
Oceana, WV 24870
(304) 682-0600