No. 32581 Joseph W. McVey v. Roger Pritt, Commissioner of the West Virginia Division of Motor Vehicles

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OF WEST VIRGINIA

Davis, J., concurring:

I believe the majority opinion reaches the correct result. In this case, the circuit court reversed the Commissioner's[1] revocation of a driver's license for a period of ten years for a second offense DUI within ten years of the driver's first DUI violation. The circuit court found that the Commissioner had improperly enhanced Mr. McVey's license revocation period based upon his first offense, which resulted in a suspension of his driver's license for driving under the age of twenty-one with a measurable amount of alcohol. The majority opinion correctly reversed the decision of the circuit court, and I have chosen to write separately to articulate the logic I applied in arriving at this conclusion.

On May 26, 1998, at the age of sixteen, Mr. McVey was arrested for driving with a measurable amount of alcohol.[2] His driver's license was suspended for a period of sixty days pursuant to W. Va. Code § 17C-5A-1 (1994) (Repl. Vol. 2000), which states, in pertinent part:

> (a) Any person who is licensed to operate a motor vehicle in this state and who drives a motor vehicle in this state shall be deemed to have given his or her consent by the operation thereof, subject to the provisions of this article, to the procedure

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[1]F. Douglas Stump replaced Roger Pritt as the Commissioner of the West Virginia Division of Motor Vehicles, effective January 1, 2004.

[2]The Intoxilyzer ticket showed a blood alcohol content of .054.

> set forth in this article for the determination of whether his or her license to operate a motor vehicle in this state should be revoked because he or she . . . did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than ten hundredths of one percent, by weight.
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> . . . .
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> (c) . . . . If the results of the tests indicate that at the time the test or tests were administered the person was under the age of twenty-one years and had an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than ten hundredths of one percent, by weight, the commissioner shall make and enter an order suspending the person's license to operate a motor vehicle in this state. . . .
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> (f) . . . . [I]f the commissioner determines that the results of the tests indicate that at the time the test or tests were administered the child had, in his or her blood, an alcohol concentration of two hundredths of one percent or more, by weight, but also determines that the act of the child in driving the motor vehicle was not such that it would provide grounds for arrest for an offense defined under the provisions of subsection (a), (b), (c), (d), (e), (f) or (g), section two, article five of this chapter if the child were an adult, the commissioner shall make and enter an order suspending the child's license to operate a motor vehicle in this state. If the commissioner determines that the act of the child in driving the motor vehicle was such that it would provide grounds for arrest for an offense defined under the provisions of subsection (a), (b), (c), (d), (e), (f) or (g), section two, article five of this chapter if the child were an adult, the commissioner shall make and enter an order revoking the child's license to operate a motor vehicle in this state. . . .

Thereafter, on September 29, 2002, at the age of twenty-one, Mr. McVey was

again arrested for DUI. The Commissioner revoked Mr. McVey's privilege to drive a motor vehicle in this State for a period of ten years, commensurate with W. Va. Code § 17C-5A-2(I) (2000) (Repl. Vol. 2000), which provides, in pertinent part:

> (I) If the commissioner finds by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, . . . the commissioner shall revoke the person's license for a period of six months: Provided, That if the commissioner has previously suspended or revoked the person's license under the provisions of this section or section one [§ 17C-5A-1] of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years . . . .

Given the statutory nature of the applicable law, a review of the various canons of statutory construction is instructive to my analysis of the majority's rationale underlying its decision of this case.

When examining an issue requiring statutory construction, it is first necessary to determine the expression of legislative intent evident in the subject statute. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). "Once the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof." *State ex rel. McGraw v. Combs Servs.*, 206 W. Va. 512, 518, 526 S.E.2d 34, 40 (1999). If the language employed by the Legislature in the given enactment is plain, such provision should be applied, and not construed. "A statutory provision which is clear and unambiguous and

plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). *Accord DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed." (citations omitted)).

Prominent in this mandate to the Commissioner is the Legislature's use of the word "shall". This Court repeatedly has held that "[i]t is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. pt. 1, *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982). *Accord* Syl. pt. 6, *State v. Myers*, 216 W. Va. 120, 602 S.E.2d 796 (2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 925, 160 L. Ed. 2d 813 (2005). *See also State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 264-65, 588 S.E.2d 418, 429-30 (2003) ("Ordinarily, the word 'shall' has a mandatory, directory connotation." (citations omitted)); *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." (citations omitted)).

As noted above, statutory language that is plain should be applied as written and not construed. *See, e.g.*, Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488.

That said, it is clear that the language of W. Va. Code § 17C-5A-2(I) plainly imposes a mandatory period of revocation of ten years. Accordingly, because Mr. McVey had a previous offense, the ten-year revocation is mandatory. *See* W. Va. Code § 17C-5A-2(I) ("[I]f the commissioner has previously suspended or revoked the person's license . . . within the ten years immediately preceding the date of arrest, the period of revocation *shall* be ten years[.]" (emphasis added)). Thus, because Mr. McVey had a prior offense for DUI, his punishment was properly enhanced by the Commissioner pursuant to W. Va. Code § 17C-5A-2(I). Therefore, the majority was correct in reversing and remanding the circuit court's decision, which found that Mr. McVey's prior suspension could not be used for enhancement purposes.

In view of the foregoing, I concur.