IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0990
(Putnam County Circuit Court Civil Action No. 21-AA-2)

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

STEVE BRISCOE,

Respondent.

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

EVERETT J. FRAZIER, Commissioner,
Division of Motor Vehicles,

By Counsel,

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Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by and through his undersigned counsel, and pursuant to W. Va. R. App. Pro. 10(g) submits the *Reply Brief of the Division of Motor Vehicles*.

ARGUMENT

The DMV was required and entitled to put on evidence at an administrative hearing regarding Mr. Briscoe's appeal of his license suspension for driving while revoked for DUI because at the time that he committed the second offense, his driving privileges were validly revoked.

In his response brief, Mr. Briscoe argues that the "DMV bases its petition for appeal on the testimony adduced at the May 20, 2021 hearing before the Circuit Court of Putnam County, West Virginia, wherein it is purported that Mr. Briscoe drove a motor vehicle in contravention of what was eventually its vacated suspension. . ." (Resp. Br. at P. 4.) He further alleges that he "did not testify to driving on any specific day, and no evidence that he drove on May 20, 2022. . . there is no evidence that Mr. Briscoe drove a vehicle period. No evidence that Husson's Pizza is located in the State of West Virginia." (Resp. Br. at P. 5.)

The DMV asserts that although Mr. Briscoe's testimony at the *supersedeas* hearing on May 20, 2021, was sufficient under a preponderance of the evidence standard to prove that he had driven a motor vehicle while his license was revoked for driving under the influence of alcohol ("DUI"), the DMV was denied the opportunity to put on any evidence at the administrative hearing which Mr. Briscoe requested when he filed his *Petition for Administrative Appeal* on June 30, 2021, pursuant to W. Va. Code § 17B-3-6(d) (2009)[1],

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[1] "Upon suspending the driver's license of any person as hereinbefore in this section authorized, the division shall immediately notify the licensee in writing, sent by certified mail, return receipt requested, to the address given by the licensee in applying for license, and upon his or her request shall afford him or her an opportunity for a hearing as early as practical within [*sic*] not to exceed twenty days after receipt of such request in the county wherein the licensee resides unless the division and the licensee agree that such hearing may be held in some other county. Upon such hearing the commissioner or his or her duly authorized agency may administer oaths and may issue subpoenas for the attendance of

W. Va. Code § 17C-5C-1a (2020)[2], and W. Va. Code § 29A-5-1(a) (1964)[3]. (App. at PP. 1, 3-10.)

Mr. Briscoe's appeal was a contested case which required an administrative hearing. "A 'contested case' means a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are **required by law** or constitutional right **to be determined after an agency hearing**, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and does not include rulemaking." W. Va. Code § 29A-1-2(b) (2015) (emphasis added). *See also*, W. Va. R. Pro. Admin. App. 1(c) (2008). At the administrative hearing, "[a]n opportunity shall be afforded **all parties** to present evidence and argument with respect to the matters and issues involved." W. Va. Code § 29A-5-1(a) (1964) (emphasis added).

In his response brief, Mr. Briscoe further argues that his revocation for DUI was moot because "the Putnam County Circuit Court found in the original May 20, 2021[4], hearing that the

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witnesses and the production of relevant books and papers and may require reexamination of the licensee. . ."

[2] Beginning on July 1, 2020, "jurisdiction over appeals described in § 17C-5C-3 of this code, except for those described in § 17C-5C-3(3) [DUI matters] of this code, shall be transferred to the circuit court for the circuit in which the event giving rise to the contested decision of the Commissioner of the Division of Motor Vehicles occurred."

[3] In any contested case all parties shall be afforded an opportunity for hearing after at least ten days' written notice. . ."

[4] On its form *Order of Suspension*, the DMV stated that Mr. Briscoe's violation date was May 20, 2021. (App. at P. 7.) That is the date that Mr. Briscoe testified under oath that he had been driving to deliver pizza for Husson's Pizza since April 23, 2021, the date that his license revocation for DUI became effective. (Resp. Br. at P. 4.) The DMV notes that the transcript from the May 20, 2021 hearing in Civil Action No. 21-AA-1 was not made part of the administrative record produced by the Circuit Clerk of Putnam County in Civil Action No. 21-AA-2, the matter on appeal with this Court. (App. at P. 1.)

relief necessary for the Respondent's warrantless, unconstitutional arrest was and should be to offer a global protection unto the Respondent directly linked to the consequences thereof. . . Further the Putnam Court has ruled that any evidence used against Mr. Briscoe derived from his unlawful arrest was inadmissible as fruit of the poisonous tree. . . The inadmissibility of that which is improperly found is only meaningful if the exclusion of such evidence shields the Respondent from both the direct and indirect consequences that flow therefrom." (Resp. Br. at P. 6.)

Mr. Briscoe's and the court's reasoning that his suspension for driving revoked is dependent upon the constitutionality of his arrest is misplaced. These are separate and distinct causes of actions, and the ultimate disposition of the DUI appeal is irrelevant to whether the DMV's *Order of Revocation* for DUI was valid at the time that Mr. Briscoe drove and whether the circuit court had statutory authority to retroactively "stay[5]" the DMV's revocation order. In his response brief, Mr. Briscoe fails to address the DMV's arguments regarding the circuit court's authority and the validity of the revocation at the time that Mr. Briscoe drove for work. The mandatory revocation which is the subject of the instant appeal (Docket No. 21-0990) is contingent upon the circuit court's lack of authority to retroactively apply W. Va. Code § 17C-5A-2(s) (2015) in the DUI appeal which is the subject of the appeal before this Court in Docket No. 21-0991.

It is clear that W. Va. Code § 17C-5A-2(s) (2015) provides in pertinent part, "[n]either the commissioner nor the Office of Administrative Hearings may stay enforcement of the order. The court may grant a stay or supersede as [*sic*] 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

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[5] The circuit court characterizes its action as "relating back" its *supersedeas* order to the date that the OAH entered its *Final Order*, April 9, 2021, which is 10 business days prior to when Mr. Briscoe's license revocation became effective. (App. at P. 85.)

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 [*sic*] of the order exceed one hundred fifty days." [Emphasis added.]

Pursuant to W. Va. Code § 17C-5C-3(3) (2010), the Office of Administrative Hearings ("OAH") had jurisdiction over DUI appeals from orders of the Commissioner of the DMV. At the time that the OAH entered its *Final Order* on April 9, 2021, its decision was presumed valid unless reversed on appeal by the circuit court. *See*, W. Va. Code § 29A-5-4(g) (1998). At the supersedeas hearing, the circuit court was required to determine the substantial probability of success on the merits of the appeal pursuant to W. Va. Code § 17C-5A-2(s) (2015); however, the circuit court could not enter a final order until it had reviewed the administrative record from OAH. *See* W. Va. Code § 29A-5-4 (f) (1998) ("The review shall be conducted by the court without a jury and shall be upon the record made before the agency . . .") Therefore, at the time that Mr. Briscoe's license revocation became effective on April 23, 2021, ten days after entry of the OAH's *Final Order*, the license revocation was valid.

There is no authority in W. Va. Code § 17C-5A-2(s) (2015) for any circuit court to grant a stay retroactive to the date that the revocation became effective. The clear language in the stay/supersedeas statute discusses the future tense – not the past-tense: ". . . ***will*** suffer irreparable harm if a stay is not granted." The Legislature's clear and unambiguous language requires a circuit court to consider whether a drunk driver ***will be*** harmed if a stay is not granted from that point forward, not whether the driver was harmed by a valid revocation already in effect at the time of the stay/supersede [*sic*]as hearing. By the inclusion of the word "supersedeas" in W. Va. Code § 17C-5A-2(s) (2015), the Legislature anticipated that license revocations may go into effect prior to a stay

hearing being conducted and that the order of revocation could be "superseded" by the circuit court. However, the Legislature did not provide authority for a circuit court to suspend all applicable statutes, rules and case law in order to protect a driver who drove while his license was revoked but before a court could take evidence and supersede the already effective revocation order. The circuit court's order permitting Mr. Briscoe to avoid a mandatory license suspension for driving while revoked by "relating back to the date of the original suspension" has no basis in the statutory or case law, and Mr. Briscoe has failed to address the DMV's statutory construction argument and has failed to show that the circuit court had authority to enter "its order of stay related to the same nunc pro tunc." (Resp. Br. at P. 5.)

Finally, Mr. Briscoe's argument that the indirect consequence of his suspension for driving while revoked is further "fruit of the poisonous tree" which was borne out of his original DUI charge (Resp. Br. at P. 6), has no merit. This Court made plain in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012) that the "judicially-created exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension proceeding." Syl. Pt. 3, *Toler, supra*; Syl. Pt. 7, *Smith, supra.*

This general rule was then examined by the Court in *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (per curiam) wherein this Court did not reverse the general rule but instead found that a change in the statute requiring a finding of lawful arrest was a statutorily-created exclusionary rule which required the exclusion of all evidence of DUI if the OAH determined that a driver was not lawfully arrested. In *Ciccone*, this Court explained that its decision in *Clower v. W. Va. Dep't of Motor Vehicles,* 223 W. Va. 535, 544, 678 S.E.2d 41, 50 (2009), applied the 2004 version of W. Va. Code § 17C-5A-2(e) which required a specific finding of "whether the person was lawfully

placed under arrest for an offense involving driving under the influence of alcohol ... or was lawfully taken into custody for the purpose of administering a secondary test." The 2008 version of the statute did not contain this language. *Miller v. Chenoweth,* 229 W. Va. 114, 117 n. 5, 727 S.E.2d 658, 661 n. 5 (2012) (per curiam). "However, the Legislature amended the statute in 2010, and restored the language requiring a finding that the person was either lawfully arrested or lawfully taken into custody." *Dale v. Ciccone*, 233 W. Va. 652, 659, 760 S.E.2d 466, 473 (2014) (per curiam). Inasmuch as *Ciccone* modified *Toler, supra,* and *Smith, supra*, relative to a finding of lawful arrest, it did not overturn the prohibition against applying the judicially-created exclusionary rule to administrative license revocation proceedings. Only the statute, W. Va. Code § 17C-5A-2(f), pertaining to lawful arrest changed.

Mr. Briscoe's suspension for driving while revoked was issued pursuant to W. Va. Code § 17B-3-6(d) (2009), and the Legislature did not provide a statutory exclusionary rule therein. Accordingly, this Court's general rule in *Toler, supra,* and *Smith, supra*, that the "judicially-created exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension proceeding" applies to Mr. Briscoe's suspension for driving revoked. Consequently, the circuit court's "global relief" (App. at P. 85) of retroactively applying a stay of Mr. Briscoe's license revocation for DUI in order to shield him from the consequences of a suspension for driving while revoked was improper.

CONCLUSION

The *Order of Dismissal* must be reversed, and the matter remanded for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General and counsel for Everett J. Frazier, certify that on the 27th day of June 2022, I served the foregoing *Reply Brief of the Division of Motor Vehicles* upon the following by depositing true and correct copies via U.S. Mail, first-class postage prepaid to:

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