IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0991
(Putnam County Circuit Court Civil Action No. 21-AA-1)

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

1. *Improper Supersedeas Order*

In his responsive brief, Mr. Briscoe alleges that "[i]t cannot be lost that the entirety of this matter and the resolution thereof is based upon the Respondent's unlawful arrest in violation of his Constitutional Rights, and thus the Petitioner's arguments will be addressed in reverse order." (Resp. Br. at P. 6.) The Respondent further argues that "[t]he 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. There is no valid reason in law or equity that justifies a second punishment based upon an unlawful first punishment, and the DMV should not be rewarded for the same." *Id.* at P. 14. The DMV submits that pursuant to W. Va. Code § 17C-5A-2(s) (2015), the circuit court was required to consider whether there was a substantial probability that Mr. Briscoe would prevail on the merits of his appeal for driving while under the influence ("DUI") of alcohol; however, the circuit court's lack of statutory authority to retroactively apply a stay or supersedeas of Mr. Briscoe's license revocation is not dependent upon the constitutionality of his arrest.

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 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). Mr. Briscoe filed his *Petition for Administrative Appeal* on April 14, 2021 (App. at P. 164), and on April 19, 2021, Mr. Briscoe noticed his *Motion for Stay of Execution* for hearing on May 20, 2021. (App. at P. 1.) The circuit court did not set the matter for hearing before Mr. Briscoe's license became revoked on April 23, 2021, ten days after entry of the OAH's *Final Order*. (App. at P. 338.)

On May 20, 2021, at the supersedeas hearing, the circuit court was required to determine the 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 reverse the OAH's *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, the license revocation was valid because the OAH's *Final Order* had not been overturned.

The circuit court had authority to stay Mr. Briscoe's license revocation prior to it becoming effective if the court had scheduled a hearing and took evidence pursuant to W. Va. Code § 17C-5A-2(s) (2015). It did not. There is no authority, however, in W. Va. Code § 17C-5A-2(s) (2015) for a 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/supersedeas 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. Therefore, after a revocation becomes effective, a circuit court only has authority to supersede the revocation, not to retroactively stay it.

However, the Legislature did not provide authority for a circuit court to suspend all applicable statutes, rules and case law to protect a driver who drove while his license was revoked validly 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, other than "equity," to enter its order retroactively. An order granting a stay or a superseadeas is a creature of statute, and there is no discretion for "equity" in the unambiguous language provided by the Legislature.

The only question here is whether Mr. Briscoe was lawfully revoked at the time he drove for his pizza delivery job. The record makes it clear that the answer to that question is yes. There is no law in equity or otherwise that allows the circuit court's desire to "undo" that reality. The circuit court cannot provide retroactive relief from a lawfully entered revocation order. At no point has Mr.

Briscoe shown that the entry of the suspension order for driving while revoked was unlawful at the time it was issued.

Moreover, accepting the circuit court's "global relief" by retroactively staying Mr. Briscoe's license revocation has public policy implications. First, it usurps the executive branch's (i.e., the administrative agency's) authority to issue a final order. Otherwise, the decisions of administrative agencies would be merely "suggestions" while waiting for the matter to be appealed and/or stayed by a circuit court. This would only encourage impaired drivers to drive during the revocation period expecting a circuit court to retroactively apply a stay. More importantly, the DMV needs certainty in its record keeping system because law enforcement and magistrate courts rely on the DMV to provide accurate drivers' histories in real time. If a circuit court had authority to issue equitable relief by erasing license revocations, then all violations for driving while revoked could be nullified. Clearly, this is not what the Legislature intended.

2. ***Warrantless Arrest***

In his *Statement of Facts*, Mr. Briscoe improperly characterizes the Investigating Officer's initiation of contact with Mr. Briscoe as "a stop."

> Deputy J. A. Warner effectuated a "stop" of the automobile previously operated by Steve Christopher Briscoe which was related to a complaint by a third party. At the time of the alleged "stop", Mr. Briscoe's vehicle was parked in the driveway at his residence located in Scott Depot . . .It is undisputed that Mr. Briscoe was inside his home when Deputy J.A. Warner knocked on the door.

(Resp. Br. at P. 2.) In his recitation of the facts, Mr. Briscoe further misapprehends the facts about Mr. Briscoe's operation of his vehicle. "Deputy Warner did not have any independent knowledge of Mr. Briscoe's vehicle being operated in an unlawful manner, nor had he witnessed him operate said vehicle. In fact, there is **no evidence of any kind** that Mr. Briscoe operated his vehicle while

under the influence of alcohol or any other intoxicating substance (emphasis added)." (Resp. Br. at PP. 2, 3.)

Here, it is unrebutted that the Investigating Officer did not stop Mr. Briscoe's vehicle but initiated contact with Mr. Briscoe at his home in the course of the officer's investigation of a reported domestic violence incident. However, the Respondent, like the circuit court below, ignores the unrebutted documentary evidence contained in the DMV's file which was admitted into evidence before the OAH pursuant to W. Va. Code § 29A-5-2(b) (1964) and which was presumed accurate unless rebutted pursuant to FN 12, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) and *Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587, 593 (2020). In the Investigating Officer's narrative statement he wrote, "I arrived on scene at and spoke to Lora Swann. Lora advised her boyfriend; Steve Briscoe had just left her residence and was driving "drunk". Lora advised Steve left in a black car and was possible going to his house on Rocky Step Road. Lora advised Steve and she had been drinking and got in an argument." (App. at P. 305.)

Mr. Briscoe next argues that "in the absence of reasonable suspicion, a warrantless arrest for a misdemeanor must be justified by (a) probable cause and (b) exigent circumstances" (Resp. Br. at P. 8) and that the "facts of this case, yield that Mr. Briscoe was inside his home at the time of his arrest and thus prohibit a warrantless arrest for a misdemeanor, under the constitutional protections against unreasonable searches and seizures found in article III, section 6 of the West Virginia Constitution. There can be no greater expectation of privacy that should be afforded the Respondent to be free from such an unlawful, warrantless arrest as the one herein[.]" (Resp. Br. at P. 9.) Mr. Briscoe further argues that the "DMV cannot build its house on the sand-based foundation of an alleged domestic matter as the foundations for exigent circumstance necessary to sanitize Mr.

Briscoe's unlawful arrest. In the instant matter, there is no evidence that the [*sic*] Mr. Briscoe committed any offense in the presence of Deputy Warren as he was peaceably inside his own home." (Resp. Br. at P. 12.)

The Respondent's argument is devoid[1] of the operative facts in this case: the Investigating Officer obtained information from Ms. Swann which indicated that she and Mr. Briscoe had a verbal argument which became physical, and he pushed and grabbed her chest causing redness which the officer observed. (App. at P. 305.) Ms. Swann told the officer that Mr. Briscoe had just left her residence and was driving "drunk." *Id.* Ms. Swann further advised the officer that Mr. Briscoe left in a black car and was possibly going to his house on Rocky Step Road and that both of them had been drinking. *Id.* These unrebutted facts caused the Investigating Officer to travel to Mr. Briscoe's residence to continue investigating the domestic battery complaint.

The Investigating Officer's sworn testimony is that he went to the Respondent's house to ask questions about an unrelated matter [the domestic battery situation] but also because it had been related to him that the Respondent had been operating a motor vehicle while impaired. (App. at P. 378.) The Investigating Officer did not need a search warrant or exigent circumstances to ask questions of the Respondent, and because the Respondent failed to testify at the hearing which he requested, there is no evidence in the record that the Respondent did not voluntarily answer his door

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[1] The Respondent instead alleges that the "entirety of the factual 'evidence' herein is based upon the unreliable statement of a disgruntled paramour that he left on Thanksgiving morning, who never appeared at Court and whose case was appropriately dismissed." (Resp. Br. at P. 10.) These facts were not contained in the administrative record below, are not contained in the record before this Court, and should be stricken. Further, "[w]hen a criminal action for driving while under the influence in violation of West Virginia Code § 17C-5-2 (2008) results in a dismissal or acquittal, such dismissal or acquittal has no preclusive effect on a subsequent proceeding to revoke the driver's license under West Virginia Code § 17C-5A-1 et seq. Moreover, in the license revocation proceeding, evidence of the dismissal or acquittal is not admissible to establish the truth of any fact." Syl. Pt. 4, in part, *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012).

and speak to the Investigating Officer. Similarly, there is no evidence in the record that the Respondent told the officer to leave his property or to get a warrant. Instead, there is unrebutted evidence that the Respondent willingly opened the door and voluntarily spent 40 minutes answering the Investigating Officer's questions without telling the officer to leave and return with a warrant. (App. at P. 389.) Based upon these unrebutted facts, the Investigating Officer was not required to show exigent circumstances, and the circuit court erred in finding that exigent circumstances were required. The Respondent cannot claim unlawful entry and therefore an unlawful arrest when it is unrebutted that he opened the door of his own volition and willingly participated in the Investigating Officer's questioning for 40 minutes.

CONCLUSION

For the reasons set forth in the *Brief of the Division of Motor Vehicles* and for the foregoing reasons, the *Final Order* of the Circuit Court of Putnam County must be reversed.

Respectfully submitted,

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WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

By counsel,

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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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