**No. 29700—*State of West Virginia v. Ottis Ray Euman***

McGraw, Chief Justice, concurring:

**FILED**
**January 11, 2002**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**RELEASED**
**January 14, 2002**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I agree with the majority that affirmance in this case is appropriate because W. Va. Code § 17B-4-3(b) (1999) "clearly state[s] that a person who drives a vehicle on the public highways of this state when the privilege to do so has been lawfully revoked for driving under the influence of alcohol is guilty of driving on a revoked license." I write separately merely to clarify the reach of the canon of statutory construction implicitly relied upon by the appellant in this case.

Appellant's argument in this case is that since the Legislature specifically provided in subsection (a) of W. Va. Code § 17B-4-3 that an out-of-state driver's license suspension or revocation could serve as a predicate for the offenses set forth in that subsection, but did not so provide with respect to the offenses contained in subsection (b), it must therefore have intended to prohibit use of non-West Virginia revocations in the latter context. Although not expressly stated, appellant is relying upon the canon of statutory construction *expressio unius est exclusio alterius*, which in this context instructs that "explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context." *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 779 (D.C. Cir. 1990).

This Court has previously recognized that "[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *see also State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) ("*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction.") (citing *Brockway Glass Co. Inc., Glassware Div. v. Caryl*, 183 W. Va. 122, 394 S.E.2d 524 (1990); *Dotts v. Taressa J.A.*, 182 W. Va. 586, 591, 390 S.E.2d 568, 573 (1990)). The *expressio unius* maxim is premised upon an assumption that certain omissions are intentional. As the Court explained in *Riffle*, "[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation." 195 W. Va. at 128, 464 S.E.2d at 770.

Importantly, *expressio unius* is not a rule of law, but merely an aid to construing an otherwise ambiguous statute. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:23, at 315 (6th ed. 2000). And even in this limited capacity courts have frequently admonished that "[t]he maxim is to be applied with great caution and is recognized as unreliable." *Director, Office of Workers' Compensation Programs v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982). The feebleness of the rule stems from the very nature of the inference that underlies it. As one commentator stated, the *expressio unius* maxim "is a questionable one in light of the dubious reliability of inferring specific intent from silence." Cass R. Sunstein, *Law and Administration after Chevron*,

90 Colum. L. Rev. 2071, 2109 n.182 (1990); *see also* Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 873-74 (1930) (calling canon "one of the most fatuously simple of logical fallacies, the 'illicit major,' long the *pons asinorum* of schoolboys") (citation omitted). Thus, as the Seventh Circuit Court of Appeals succinctly observed, "Not every silence is pregnant; *expressio unius est exclusio alterius* is therefore an uncertain guide to interpreting statutes . . . ." *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983) (citations omitted).

What appellant is attempting to do here is create an ambiguity in subsection (b) of § 17B-4-3 where none in fact exists. In this case, the text of subsection (b) makes it an offense for a person to drive a motor vehicle when his or her driver's license has been revoked for, among other things, driving under the influence of alcohol. Subsection (b) uses the broad phrase "lawfully revoked" without further limitation as to the source of such action, meaning that the statute may clearly be understood to apply to both in- and out-of-state license revocations. Consequently, in the absence of an ambiguity in the statutory text, the *expressio unius* maxim simply does not apply.[1] *See State ex rel. Van Nguyen v. Berger*, 199 W. Va. 71, 76-77, 483 S.E.2d 71, 76-77 (1996) (stating that "because [the penal statute] is not vague or ambiguous, there is no need to construe the statute, and we need not turn to the rules of statutory construction, including the maxim of *expressio unius est exclusio alterius*").

[1]The rule of lenity or strict construction of penal statutes, which has also been argued by appellant in this case, is likewise inapplicable. *See, e.g., State v. Green*, 207 W. Va. 530, 538 n.13, 534 S.E.2d 395, 403 n.13 (2000) ("Because we find the statutory text to be unambiguous . . ., we do not consider the rule of lenity.) (citation omitted).

I therefore readily concur with the majority opinion in this case.