IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
June 7, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30251

RELEASED
June 7, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MICHAEL BUTCHER,
Petitioner Below, Appellant,

V.

JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,
Respondent Below, Appellee.

Appeal from the Circuit Court of Wetzel County
Honorable Mark A. Karl, Judge
Civil Action No. 97-P-27

REVERSED

Submitted: May 21, 2002
Filed: June 7, 2002

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file

dissenting opinions.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. "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." Syllabus point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

Per Curiam:

This appeal was filed by Michael Butcher, appellant/petitioner below (hereinafter referred to as "Mr. Butcher"), from a ruling by the Circuit Court of Wetzel County affirming

an administrative decision to suspend Mr. Butcher's driver's license. Mr. Butcher's driver's license was suspended by Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles, appellee/respondent below (hereinafter "the Commissioner"), as a result of Mr. Butcher's refusal to take a designated chemical breath test to determine whether he was driving while impaired. Mr. Butcher contends that he was not properly informed that his driving license would be suspended should he refuse to take the designated chemical breath test. After reviewing the briefs and record in this case and listening to oral arguments, we reverse the circuit court's order.

I.

FACTUAL AND PROCEDURAL HISTORY

During the late evening hours of December 14, 1996, officer S.G. Kastigar, a deputy sheriff of Wetzel County, stopped a vehicle driven by Mr. Butcher. Deputy Kastigar stopped the car because Mr. Butcher was driving, at night, without headlights. During the stop, deputy Kastigar noticed signs that indicated Mr. Butcher had been drinking. Deputy Kastigar administered three field sobriety tests to Mr. Butcher. He failed all three tests. When deputy Kastigar asked Mr. Butcher to take a chemical breath test, he refused. Deputy Kastigar then read to Mr. Butcher a standard implied consent statement, thereby informing him that should he refuse to take the chemical breath test his driver's license "may" be suspended for a period of at least a year and up to life. Nevertheless, Mr. Butcher again refused to take the chemical breath test. Deputy Kastigar subsequently arrested Mr. Butcher for second offense driving

under the influence.

After the arrest, deputy Kastigar forwarded to the Commissioner a report indicating Mr. Butcher had been arrested for driving under the influence. The report also stated that he refused to take a chemical breath test. On December 27, 1996, the Commissioner issued an order notifying Mr. Butcher that his driver's license was revoked because of his refusal to take the chemical breath test. The order informed Mr. Butcher that he was entitled to have an administrative hearing to contest the revocation. Mr. Butcher contested the revocation. A hearing was held on April 8, 1997. Following the hearing, the Commissioner found that the evidence established that Mr. Butcher had refused the chemical breath test. Consequently, the Commissioner issued a final order on December 2, 1997, revoking Mr. Butcher's driver's license for 10 years.

On December 30, 1997, Mr. Butcher appealed the Commissioner's final order to the circuit court. On June 30, 2000, the circuit court filed an order affirming the Commissioner's final order. Mr. Butcher filed a motion for reconsideration on July 6, 2000.[1]

[1]The appeal in this case is timely. Mr. Butcher filed his motion for reconsideration within ten days of the filing of the circuit court's order. *See* Syl. pt. 7, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995) ("A motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion.").

The circuit court filed an order on June 6, 2001, denying the motion for reconsideration. Thereafter, this appeal was filed.

II.

STANDARD OF REVIEW

The issue presented in this case requires an analysis of our DUI statutes. We have held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Moreover, "[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syl. pt. 1, *Francis O. Day Co., Inc. v. Director, Div. of Envtl. Prot.*, 191 W. Va. 134, 443 S.E.2d 602 (1994).

III.

DISCUSSION

Mr. Butcher contends that deputy Kastigar informed him that his driver's license "may" be suspended for refusing to take the chemical breath test. Mr. Butcher asserts that this warning was erroneous because under W. Va. Code § 17C-5-7(a) (2000), he should have been informed that the revocation of his driver's license for refusing to take the chemical breath test was mandatory. This Court has held that "[w]hen interpreting a legislatively created law, we typically afford the statute a construction that is consistent with the Legislature's intent."

Coordinating Council for Indep. Living, Inc. v. Palmer, 209 W. Va. 274, 281, 546 S.E.2d 454, 461 (2001). *See also* Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."). We have also indicated that "[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). However, "[a] statute that is ambiguous must be construed before it can be applied." Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992).

The pertinent language in W. Va. Code § 17C-5-7(a) provides that an officer attempting to perform a chemical breath test must inform the driver "that his refusal to submit to the secondary test finally designated *will* result in the revocation of his license to operate a motor vehicle in this state for a period of at least one year and up to life."[2]

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[2]W. Va. Code § 17C-5-7(a) (2000) states in full:

> If any person under arrest as specified in section four of this article refuses to submit to any secondary chemical test, the tests shall not be given: Provided, That prior to such refusal, the person is given a written statement advising him that his refusal to submit to the secondary test finally designated will result in the revocation of his license to operate a motor vehicle in this state for a period of at least one year and up to life. If a person initially refuses to submit to the designated secondary chemical test after being informed in writing of the consequences of such refusal, he shall be informed orally and in writing that after fifteen minutes said refusal shall be deemed to be final and the

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arresting officer shall after said period of time expires have no further duty to provide the person with an opportunity to take the secondary test. The officer shall within forty-eight hours of such refusal, sign and submit to the commissioner of motor vehicles a written statement of the officer that (1) he had reasonable grounds to believe such person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (2) such person was lawfully placed under arrest for an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (3) such person refused to submit to the secondary chemical test finally designated in the manner provided in section four of this article; and (4) such person was given a written statement advising him that his license to operate a motor vehicle in this state would be revoked for a period of at least one year and up to life if he refused to submit to the secondary test finally designated in the manner provided in section four of this article. The signing of the statement required to be signed by this section shall constitute an oath or affirmation by the person signing such statement that the statements contained therein are true and that any copy filed is a true copy. Such statement shall contain upon its face a warning to the officer signing that to willfully sign a statement containing false information concerning any matter or thing, material, or not material, is false swearing and is a misdemeanor. Upon receiving the statement the commissioner shall make and enter an order revoking such person's license to operate a motor vehicle in this state for the period prescribed by this section.

For the first refusal to submit to the designated secondary chemical test, the commissioner shall make and enter an order revoking such person's license to operate a motor vehicle in this state for a period of one year. If the commissioner has previously revoked the person's license under the provisions of this section, the commissioner shall, for the refusal to submit to the designated secondary chemical test, make and enter an order revoking such person's license to operate a motor vehicle in this state for a period of ten years: Provided, That the license may be reissued in five years in accordance with the provisions of section three, article five-a of this chapter. If the commissioner has previously revoked the person's license more than once under the provisions of this section, the commissioner shall, for the refusal to submit to the designated secondary chemical test, make and enter an order revoking such person's license to operate a motor vehicle in this state for a period of life: Provided, That the license may be reissued in ten years in accordance with the

(continued...)

(Emphasis added.)

Mr. Butcher argues that the word "will," as used in W. Va. Code § 17C-5-7(a), implies a definite suspension. Therefore, he was incorrectly advised by deputy Kastigar's use of the word "may," as "may" implies a discretionary suspension. Several cases from other jurisdictions have been cited by Mr. Butcher as support for his position. For example, in *State v. Huber*, 540 N.E.2d 140 (Ind. App. Ct. 1989), the defendant refused to take a chemical breath test after the arresting officer warned him that his driver's license "may" be suspended. The defendant's driver's license was suspended; however, a trial court ordered the license restored because the arresting officer failed to use the word "will" when advising the defendant, as

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[2](...continued)
provisions of section three, article five-a of this chapter. A copy of each such order shall be forwarded to such person by registered or certified mail, return receipt requested, and shall contain the reasons for the revocation and shall specify the revocation period imposed pursuant to this section. No such revocation shall become effective until ten days after receipt of the copy of such order. Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn his consent for a test of his blood, breath or urine as provided in section four of this article and the test may be administered although such person is not informed that his failure to submit to the test will result in the revocation of his license to operate a motor vehicle in this state for the period provided for in this section.

A revocation hereunder shall run concurrently with the period of any suspension or revocation imposed in accordance with other provisions of this code and growing out of the same incident which gave rise to the arrest for driving a motor vehicle while under the influence of alcohol, controlled substances or drugs and the subsequent refusal to undergo the test finally designated in accordance with the provisions of section four of this article.

required by statute, regarding the suspension of his license. The Indiana Court of Appeals upheld the trial court's decision. In doing so, the court stated: "The phrase 'may be suspended' connotes discretionary action. Thus the advisement failed to convey the strong likelihood that suspension of driving privileges would follow Huber's refusal to submit to a breathalyser test." *Huber*, 540 N.E.2d at 142. *See also Graves v. Commonwealth*, 535 A.2d 707 (Pa. 1988) (reversing suspension because officer used the word "could" instead of "will"); *Mairs v. Department of Licensing*, 854 P.2d 665 (Wash. Ct. App. 1993) (reversing suspension because officer used the word "probably" instead of "will"); *Welch v. State*, 536 P.2d 172 (Wash. Ct. App. 1975) (reversing suspension because officer used the word "could" instead of "will").

Conversely, the Commissioner argues that deputy Kastigar's warning "substantially" complied with the requirements of the statute and therefore the suspension of Mr. Butcher's driving license should not be disturbed.[3] A few cases were cited by the Commissioner to support its "substantial" compliance argument. For example, in *Commonwealth Dep't of Pub. Safety v. Tuemler*, 526 S.W.2d 305 (Ky. Ct. App. 1975), a driver had his license suspended for refusing to take a breathalyser test.[4] The driver argued that the arresting officer informed him that "chances" were he would lose his license for refusing to take the test. The driver contended that this warning was misleading, because suspension

[3]The Commissioner's brief indicates that it has revised its implied consent statement to now require use of the phrase "will be suspended."

[4]On appeal to a trial court, the suspension was rescinded. The State appealed to the higher court.

was automatic. The appellate court ruled that the warning "substantially apprised [the driver] of the consequences of refusing to take the test." *Tuemler*, 526 S.W.2d at 306. The appellate court also noted that "revocation is not necessarily 'automatic,' but is subject to an administrative hearing[.]" *Id*. The appellate court reinstated the suspension.

In another case cited by the Commissioner, *In re.Olien*, 387 N.W.2d 262 (S.D. 1985), a driver had his license revoked after refusing a blood test. The driver contended on appeal that the officer mislead him by stating that refusal to take the blood test "can" result in revocation of his license. The applicable statute required warning that a license revocation "shall" be imposed. The Supreme Court of South Dakota acknowledged that the statute was not literally complied with by the arresting officer. However, the court affirmed the revocation after finding "the officer's advice substantially complied with [the statute.]" *Olien*, 387 N.W.2d at 264.

We are not persuaded by the "substantial" compliance authorities cited by the Commissioner. The pertinent language of W. Va. Code § 17C-5-7(a) is clear and unambiguous. "[A] statute which is clear and unambiguous should be applied by the courts and not construed or interpreted." *Carper v. Kanawha Banking & Trust Co*., 157 W. Va. 477, 517, 207 S.E.2d 897, 921 (1974) (citation omitted). Under the statute, an officer making a DUI arrest must inform the arrestee that a refusal to submit to a chemical breath test "will" result in a license suspension.

Here, Mr. Butcher was never informed that his license "will" be suspended for refusing to take the chemical breath test. Instead, Mr. Butcher was erroneously told that his license "may" be suspended. Our cases have held that "[t]he word 'may' generally . . . connotes discretion." *State v. Hedrick*, 204 W. Va. 547, 552, 514 S.E.2d 397, 402 (1999) (citations omitted). No discretion existed. Mr. Butcher's license was automatically suspended when the Commissioner received the report from deputy Kastigar. We are unable to determine from the record what course Mr. Butcher would have taken had he been properly advised of the consequences of his refusal to take the chemical breath test. As Mr. Butcher was unable to make an intelligent decision because of the erroneous warning given to him, we reverse the circuit court's order.

IV.

CONCLUSION

Mr. Butcher's driver's license was suspended as a result of his being given an inaccurate and misleading warning regarding the consequences of his refusal to take a chemical breath test. Therefore, we reverse the circuit court's affirmance of the suspension. We further order that Mr. Butcher's driver's license be restored.

Reversed.