No. 30251 - *Michael Butcher v. Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles*

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OF WEST VIRGINIA

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Albright, Justice, concurring:

I concur with the result articulated by the majority opinion. I write separately to address a disturbing trend in the manner in which this Court periodically chooses to present new points of law. While the majority opinion correctly decides the substantive legal matter, its pronouncements are framed within the context of a per curiam opinion and no new syllabus points were presented to formalize the ruling. As Justice Workman astutely observed in her dissent to *State v. Lopez,* 197 W.Va. 556, 476 S.E.2d 227 (1996),

> This case portrays the increasing use of per curiam opinions to alter the law as it currently exists in West Virginia while declining to enunciate the change in a new syllabus point. It illustrates an evolving problem that this Court should correct. Although this is not the first example of this phenomenon, it is the one least justified. In the past some good reason has existed. It has occurred where there has been a "compromise" decision. It has occurred when the membership of the Court has been in a state of flux, with all the accompanying philosophical shifting, and a "temporary" court had the good judgment to recognize that it was not the time to make major policy changes in the law. None of those phenomenon are present here.

Id. at 569, 476 S.E.2d at 240 (Workman, dissenting).

In syllabus point two of *Walker v. Doe*, 210 W.Va. 498, 558 S.E.2d 290 (2001), this Court explained that "[t]his Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution."[1] Where such new points of law are not articulated through syllabus points for whatever reason, the statements of syllabus point three of *Walker* are applicable and support my assertion that per curiam opinions are authoritative statement of the law. Syllabus point three of *Walker* explains:

> Per curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases.

Syllabus point four continues in that vein: "A per curiam opinion may be cited as support for a legal argument."

Justice McGraw incisively explained as follows in his concurrence to *Walker:* "Nor does a per curiam opinion's failure to formally include a newly-forged legal principle in its syllabus relegate such rule to the status of mere dictum." 210 W. Va. at 498, 558 S.E.2d at

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[1]Article VIII, section 4 of our state constitution provides, in pertinent part, that: "[I]t shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case."

298 (McGraw, concurring). "[A] new point of law cannot be ignored based simply upon the fact that it was articulated in a per curiam opinion." *Id*.

Consequently, while I agree with the conclusions of the competent majority opinion, I would clarify the import of the opinion by emphasizing that a new legal statement has the full force and effect of law, notwithstanding the fact that it is presented in the format of a per curiam opinion and is not formally articulated in a syllabus point. In conformity with the longstanding principle of this Court that we will apply the plain meaning of a statute, I believe that the majority opinion clearly stands for the proposition that where a statute requires that an accused be given written notice that refusal to submit to a chemical breath test "will" result in revocation of his license, this Court will strictly enforce the plain meaning of that statute.[2] The majority opinion conclusively establishes that the legislature's use, in West Virginia Code § 17C-5-7(a), of the term "will" is dispositive. In other words, "will" means "will," and this Court will apply the plain meaning of the statute.

The dissent raises another issue worthy of some response by introducing the concept that form should not be elevated over substance. In support of this proposition, the dissent quotes *Holstein v. Norandex, Inc*., 194 W. Va. 727, 729 n.2, 461 S.E.2d 473, 475 n.2

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[2]With specific reference to the "substantial compliance" issue, I am pleased that counsel for the Commissioner announced during oral argument that the pertinent forms now comply with the statutory requirements.

(1995).[3] Indeed, I agree with the concept enunciated in the cited footnote of *Holstein*, a case in which there was an allegation that the appellant failed to comply with technical procedural rules for the designation of a record within a certain time period. Key to the Court's *Holstein* ruling, however, was that the appellant's alleged failure to comply with the procedural rule was determined to be harmless, with no showing of actual prejudice. Similarly, in *Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980), cited in *Holstein*, the issue was the plaintiffs' failure to comply with the procedural rule requiring them to notify the defendant that

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[3]The full text of the cited footnote provides as follows:

> The appellee contends that this appeal should be dismissed because the appellant failed to comply with Rule 73(a) of the West Virginia Rules of Civil Procedure and, more specifically, the appellant did not designate the record within thirty days of the lower court's dismissal of defendant Counts. We disagree for several reasons. First, the appellant did, in fact, comply with Rule 73(a) by filing his designation within the first thirty days available when he could lawfully file it in state court without violating 28 U.S.C. § 1446(d), which provides that, upon removal of a state court civil action to federal court, "... the state court shall proceed no further unless and until the case is remanded." Second, assuming, arguendo, that 28 U.S.C. § 1446(d) is not applicable, the alleged failure to comply with Rule 73(a) is harmless, and appellees have shown no actual prejudice affecting their substantial rights. Finally, dismissal of this appeal for failure to timely designate the record, under these circumstances, would be a classic example of placing form over substance, a procedure historically criticized and routinely rejected by this Court. *See, e.g., Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980).

Holstein, 194 W. Va. at 729 n.2, 461 S.E.2d at 475 n.2.

the trial transcript had been filed and made part of the record, and no actual prejudice was found. In *Talkington*, we explained that "[w]e will not sacrifice an appellant's substantial rights for rules that do not result in prejudice." *Id.* at 493, 264 S.E.2d at 453.

The admonition against placing form over substance is certainly valuable in the investigation of whether technical procedural rules have been violated; the question thus would become whether the substantial rights of the parties have been affected by the procedural irregularity or oversight. In my opinion, however, that inquiry is constructive only in the evaluation of alleged technical procedural errors. The omission alleged in the present case rises above a mere procedural irregularity, and application of the concepts utilized in evaluations of purely procedural imperfections is improper and irrelevant. It is "our rules of civil procedure [which] seek to avoid emphasis of form over substance." *Butler's Discount Auto Sales, Inc. v. Roberts*, 172 W.Va. 83, 86, 303 S.E.2d 722, 725 (1983).[4] Our application

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[4]Rule 61 of the West Virginia Rules of Civil Procedure provides that technical procedural errors not affecting the substantial rights of parties are to be ignored:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

of the plain and unambiguous meaning of a statute requiring written notification that certain conduct will result in revocation of the right to operate a motor vehicle should not succumb to such inapplicable and imprecise analysis.[5]

In its discussion of West Virginia Code § 17C-5-7(a), the dissent also overlooks an important component of the statutory requirement. The statute not only provides that the driver must be informed that his refusal to submit to the test will result in revocation of his license; the statute also provides that such notice must be in writing. The dissent essentially advocates judicial revision of legislative pronouncements, or at the very least judicial pardon for blatant violation of statutory requirements. The dissent justifies this approach by the

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[5]The string cites offered by the dissent readily illustrate my point; they deal primarily with issues of a strictly procedural technical nature such as filing a grievance, filing affidavits in opposition to a motion for summary judgment, publication in a newspaper, and other technical irregularities. In *State v. Valentine*, 208 W. Va. 513, 541 S.E.2d 603 (2000), discussed by the dissent in support of its substantial compliance theory, this Court applied the harmless error doctrine to resolve the matter, rather than engaging in a substantial compliance deliberation. In *In re Burks*, 206 W. Va. 429, 525 S.E.2d 310 (1999), also referenced by the majority, the procedure with which there was substantial compliance did not directly implicate the rights of the accused and dealt only with whether the officer mailed his statement to the Commissioner on time. *See also State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 195 W.Va. 537, 466 S.E.2d 388 (1995) (holding that strict compliance, rather than substantial compliance, would be adopted in insurance insolvency cases, the parameters of which were governed by statute); *Jones v. Tri-County Growers, Inc.*, 179 W.Va. 218, 366 S.E.2d 726 (1988) (holding that compliance with all requirements of Wage Payment and Collection Act was required and that substantial compliance was insufficient); *State ex rel. Browning v. Blankenship*, 154 W.Va. 253, 268, 175 S.E.2d 172, 181 (1970) (rejecting theory of substantial compliance with requirements related to governor's veto power over budgetary items, finding that "[t]he express provision of the Modern Budget Amendment here involved, which is plain and unambiguous and is mandatory in character, is not satisfied by substantial compliance but instead must be accorded full and literal compliance").

application of a slippery slope standard of "substantial compliance" and exaltation of the procedurally-based principle that form should not rise above substance. Through that means, the dissent approves the failure to comply with two essential requirements of the statute: (1) giving the accused a proper explanation of the consequences of a refusal to submit to the test, and (2) giving that explanation in writing. In the defendant's case neither requirement was fulfilled.

Indeed, as this Court observed in *Rosier v. Garron*, 156 W. Va. 861, 199 S.E.2d 50 (1973), "the distinction between procedural rules and substantive rights is frequently illusory." *Id*. at 875, 199 S.E.2d at 58. This Court should not surrender to the confusion that such a distinction can generate. Purely technical procedural rules which do not affect the substantial rights of the parties are a completely different animal from what we encounter in the present case. The statutory rules enunciated in West Virginia Code § 17C-5-7(a) constitute substantive rules designed to preserve essential individual rights. Applying notions of substantial compliance is simply improper.

As this Court candidly remarked in *Board of Church Extension v. Eads*, 159 W.Va. 943, 230 S.E.2d 911 (1976), "the legal reasoning process of courts is inherently result oriented." *Id*. at 953, 230 S.E.2d at 917.

> Notwithstanding protestations on the part of countless thousands of appellate judges during the course of numerous centuries, legal reasoning in complex cases inevitably works backward from

> the result to the rule rather than from the rule to the result. For example, "substantial compliance," "intention of the drafters," "clear and unambiguous," "unconscionability," and "constructive fraud" are all legal phrases which can be used selectively to arrive at any given result which suits the fancy of the court.

Id. , 230 S.E.2d at 917-18. The legal approach commonly labeled "substantial compliance" is thus just another of a myriad of legal instruments designed to justify a desired result. It is a component of the legal elasticity which must exist in order to fashion law and protect equities; yet its utilization must not be unbridled. It must not be the justification for outright derogation of a statute. As the majority should have stated explicitly in a syllabus point, a statute which requires a written statement advising an individual that refusal to submit to a test will result in revocation of his driving privileges must be strictly applied in accord with its plain meanintg. Elusive concepts of law must not be invoked to justify a jurist's determination that violations of explicit and substantial statutory requirements should be condoned.

I am compelled to express one final point of disagreement with the dissent. My final point is that the existence of the ultimate right to challenge an initial suspension of driving privileges for failure to submit to the secondary breath test does not correct or diminish the effect of giving improper notice not complying with the statute. In the interim between the entry of an order preliminarily suspending one's license for failure to submit to the test – which may be entered in as little as 48 hours after the arrest – and the rendering of a decision upon the administrative hearing – which may be several weeks or even months after the arrest – the accused's license is suspended *without regard to whatever challenge the*

accused may offer at the hearing. The "right" to present exculpatory evidence at that later hearing does not and cannot erase the effect of that suspension, no matter how convincing later exculpatory evidence may be. The suggestion in the dissent that failure to comply with the plainly worded statutory requirement ought to be excused by reason of the later right to such a hearing defies common sense.

Based upon the foregoing, I respectfully submit this concurring opinion.