No. 32501 – *Gary E. Carroll v. F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles*

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Albright, Chief Justice, dissenting:

In its aggressive reach to permit the administrative revocation of an operator's license to operate independently of criminal proceedings for driving under the influence of alcohol, the majority has ignored both statutory prerequisites necessary for the invocation of the administrative revocation proceedings and basic precepts inherent in criminal proceedings in this state. Refusing to recognize the interrelated nature of administrative and criminal sanctions for driving under the influence, the majority wrongly concludes that shoddy police procedures should be overlooked and license revocation permitted even when the statutory conditions for imposing such administrative sanction have not been fully met.

Under West Virginia Code § 17C-5A-1, the triggering event for the initiation of the administrative revocation proceedings is the filing of a written statement by a law-enforcement officer within forty-eight hours of his/her arrest of an individual for driving under the influence in violation of West Virginia Code § 17C-5A-2 (2004). By statute, that written statement is required to "include the specific offense with which the person is charged and, if applicable, a copy of the results of any secondary tests of blood, breath or urine." W.Va. Code § 17C-5A-1(b). This statement must be signed, as "[t]he signing of the

statement . . . shall constitute an oath or affirmation by the person signing the statement that the statements contained therein are true. . . ." *Id.*

In this case, the arresting officer took the Appellee to jail, completed a criminal complaint which he failed to sign, and left the document for the magistrate's review in the morning. Upon the magistrate's perusal of the criminal complaint, the absence of the arresting officer's signature was immediately recognized as a fatal procedural impediment. Consequently, the complaint was not lodged and a warrant was not issued due to the absence of a sworn complaint and, consequently, the failure to demonstrate probable cause. In short, the Appellee was never formally charged by the Wayne County Magistrate with driving under the influence in violation of West Virginia Code § 17C-5-2. Accordingly, the notice sent by the arresting officer to the DMV which triggered the license revocation proceedings was missing one of the essential statutory predicates for instituting such proceedings. Critically, this fatal defect voided the jurisdiction of the DMV to revoke Appellee's operator's license under West Virginia Code § 17C-5A-1(b).

In its review of the administrative appeal, the circuit court identified various procedural flaws with regard to the revocation of Appellee's operator's license, including the impact of the fact that probable cause had never been found to charge Appellee with driving under the influence. Rather than appreciating the significance of those fundamental

procedural flaws, the majority – intent on upholding a revocation at all costs – either downplayed their importance or improperly analyzed the procedures involved.

While citing the seminal case from this Court that properly identifies the meaning of the term "charged" in criminal law parlance, the majority completely overlooked its significance. In *State ex rel. Burdette v. Scott*, 163 W.Va. 705, 259 S.E.2d 626 (1979), this Court elucidated:

> W.Va. Code, 62-1-1 [defining criminal complaint] and -2 [issuance of warrant] (1965), make it clear that a person is "charged" with a crime once a written complaint has been filed against him and a judicial officer, having found that the complaint contains sufficient facts to establish probable cause that a crime has been committed by the defendant, issues a warrant.

163 W.Va. at 709, 259 S.E.2d at 629. Rather than appreciating the importance of the second part of the "charging" process – the approval by the judicial officer of the sufficiency of the grounds to establish probable cause – the majority completely disavows the critical nature of this aspect of the "charging" process and concludes that the term "charged" is synonymous with arrest.

The circuit court fully understood the dangers of permitting a law enforcement officer to institute revocation proceedings without the critical component of independent review by a judicial officer:

> [D]ue process requires that the arresting officer complete the criminal charging process before he can proceed to the administrative revocation hearing. To rule otherwise would permit law enforcement officers to make arbitrary, and possibly unlawful arrests and never seek a judicial charge for the underlying criminal offense. I do not believe that due process would be satisfied by permitting a law enforcement officer to act unilaterally in triggering the administrative revocation procedure without any judicial involvement in the arrest and charge. A law enforcement officer's reasonable belief that a person is driving while intoxicated is no substitute for the independent judicial determination of probable cause for an arrest.

The majority goes seriously astray in its analysis by insisting that the administrative and criminal sanctions for driving under the influence are "separate and distinct." This is an inaccurate statement of the law. Simple perusal of the statute authorizing administrative sanctions for driving under the influence demonstrates the interrelated nature of these two forms of punishment for committing this offense. Only upon an arrest for violation of West Virginia Code § 17C-5-2 that is followed by a timely filing of a written and signed statement by the arresting officer that identifies the offense the individual is *actually* charged with can the administrative revocation proceedings be initiated. To suggest that the two systems work completely independently of each other, as the majority maintains, is simply not true. Rather than being distinct systems with no reliance on each other, the criminal and administrative proceedings for charges of driving under the influence are indisputedly intertwined. We recognized the two-track approach inherent to this area of the law (administrative and criminal) in *Choma v. West Virginia*

Division of Motor Vehicles, 210 W.Va. 256, 557 S.E.2d 310 (2001), observing "that the separate procedures [administrative and criminal] are connected and intertwined in important ways." *Id.* at 260, 557 S.E.2d at 314. Accordingly, we held in *Choma* that the DMV commissioner "must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the commissioner, when evidence of such results is presented in the administrative proceeding." 210 W.Va. at 257, 557 S.E.2d at 311, syl. pt. 3, in part.

In its haste to disconnect the administrative sanctions from the criminal penalties for driving under the influence, the majority fails to understand that the criminal charging process, and all the attendant procedural protections that necessarily accompany that process, are the springboard from which the administrative sanctions are authorized by the Legislature. Without a valid charging process – one that includes review by a judicial officer of the sufficiency of probable cause for the charge – there is no predicate basis for initiating the administrative sanctions authorized by West Virginia Code § 17C-5A-1.

Rather than attempting to salvage one revocation proceeding that was improperly initiated, the majority should have recognized that our legal system would be better served with a forward looking resolution of this matter. Instead of doggedly upholding Appellee's license revocation, the majority should have recognized that the better

result for purposes of the long term operation of the license revocation system would have been to hold that an unsigned complaint that results in the lack of a formal charge for an offense falling under West Virginia Code § 17C-5-2 similarly results in the absence of the predicate jurisdictional basis for instituting revocation proceedings. Had the law enforcement officer been notified that the complaint was not lodged due to the lack of his signature, a new complaint could have been prepared and submitted to the magistrate within the one-year-period permitted for such offenses. In this fashion, both the criminal system and the administrative revocation system that is uniquely dependent on the charging of offenses under West Virginia Code § 17C-5-2 would be better served. The alternative, which the majority chose, is to implicitly rubberstamp shoddy police practices and to encourage the institution of administrative charges upon potentially baseless grounds. To assume that the Legislature intended that administrative sanctions be imposed for driving under the influence without the attendant procedural protections that are imposed for instituting criminal charges was certainly imprudent and clearly not in accord with the legislative scheme adopted for the implementation of such sanctions.

Based on the foregoing, I respectfully dissent. I am authorized to state that Justice Starcher joins me in this dissent.