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

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OF WEST VIRGINIA

Davis, J., concurring:

I concur completely in the decision reached by the majority opinion in this case. I write separately to elaborate on the majority's interpretation of W. Va. Code § 17C-5A-1 (2004) (Repl. Vol. 2004), and to address any misconceptions that may arise from the dissenting opinion regarding the distinctions between an administrative revocation of a driver's license for driving under the influence of alcohol, controlled substances or drugs (hereinafter referred to as "DUI"), and a criminal conviction for DUI.

While I fully agree with the majority's conclusion that, under W. Va. Code § 17C-5A-1(b), the initiation before a magistrate of a criminal prosecution for DUI is not a jurisdictional prerequisite to the Commissioner's commencement and completion of an administrative revocation of a drivers' license for DUI, I believe an examination of the relevant statute through the lens of our rules of statutory interpretation adds further credence to this conclusion.

As plainly demonstrated by the majority and dissenting opinions in this case, the term "charged" in W. Va. Code § 17C-5A-1(b) has created an ambiguity as to the proper

application of that code section. "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).[1] Importantly, however, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Thus, it is this Court's task to identify and give effect to what the Legislature intended the word "charged" to mean.[2] "In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 404 n.11, 549 S.E.2d 266, 278 n.11 (2001) (quoting *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995) (additional quotations omitted)).

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[1]*See also* Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("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.").

[2]This is where the dissent has erred, by improperly seeking to impose its own view of what the language in question should mean.

> "This Court does not sit as a superlegislature . . . It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions." *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986).

State v. Anderson, 212 W. Va. 761, 765, 575 S.E.2d 371, 375 (2002) (per curiam).

With respect to whether the Legislature intended the the word "charged" as used in W. Va. Code § 17C-5A-1(b) to require a formal criminal charge, one must look no further than W. Va. Code § 17C-5A-1(c). W. Va. Code § 17C-5A-1(c) states that

> [i]f, upon examination of the written statement of the officer and the tests [sic] results described in subsection (b) of this section, the commissioner shall determine that a person *was arrested* for an offense described in section two [§17C-5-2], article five of this chapter . . . and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person was arrested he or she was under the influence of alcohol, controlled substances or drugs, *the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state.*

(Emphasis added). Thus, in describing when the commissioner shall order revocation of a driver's license based upon the written statement of the arresting officer, the Legislature has mandated that the commissioner examine the document to determine that "a person *was arrested*." W. Va. Code § 17C-5A-1(c) (emphasis added). "'In 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)." *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 27, 488 S.E.2d 20, 27 (1997). There is nothing in this statute to indicate that the commissioner must confirm that the individual was actually criminally charged with DUI, through a criminal complaint or otherwise, as a prerequisite to revoking a driver's license.

> "[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through

> judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted*." . . . Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."

Perito v. County of Brooke, 215 W. Va. 178, 184, 597 S.E.2d 311, 317 (2004) (additional internal quotations, and citations, omitted). Viewed in this light, it is plain that the Legislature's use of the term "charged" in W. Va. Code § 17C-5A-1(b) was intended only as a descriptive term to identify the particular offense for which the person was arrested.

Moreover, while the majority's opinion deftly distinguishes between the nature of the penalties at issue in the case *sub judice, i.e.*, administrative sanctions, versus those which are not at issue in this proceeding as a result of their dismissal below, *i.e.,* criminal sanctions, my dissenting colleagues have failed to make such a distinction, choosing, instead, to blur this critical line. When an individual is suspected of driving while under the influence of alcohol, controlled substances or drugs, he/she may be penalized administratively, pursuant to W. Va. Code § 17C-5A-1; criminally, in accordance with W. Va. Code § 17B-4-3 (2004) (Repl. Vol. 2004); or both administratively and criminally, under both of the aforementioned statutes. Such a distinction is crucial, particularly in a case such as the one at issue in this appeal, because the Legislature has specifically identified, defined, and permitted two separate consequences for these offenses because of their egregious nature and the devastating effects that the commission of these crimes may have on innocent and unsuspecting third parties. In doing so, the Legislature has recognized that one route of

punishment is through the criminal justice system, and that such punishment consists of incarceration and the imposition of monetary fines. *See* W. Va. Code § 17B-4-3(b). The alternative or additional consequence is through administrative channels, and consists of the revocation of the offender's driver's license. W. Va. Code § 17C-5A-1(c).

In its deliberation and determination of this case, the majority recognizes such a distinction. The dissenters, however, do not. Instead, my dissenting brethren obfuscate the difference between the procedures and penalties provided for the imposition of administrative versus criminal sanctions for driving under the influence by suggesting that both types of sanctions require the exact same evidentiary standards and procedural requirements. This interpretation of the law is not only incorrect, but is violative of the basic constitutional concept prohibiting the imposition of double jeopardy for the same offense: "No person shall . . . be twice put in jeopardy of life or liberty for the same offence." W. Va. Const. art. III, § 5. *Accord* U.S. Const. amend. V. *See also* Syl. pt. 1, in part, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977) ("The Double Jeopardy Clause in Article III, Section 5 of the *West Virginia Constitution*, ... prohibits multiple punishments for the same offense."). Insofar as the Legislature has created administrative and criminal penalties for persons driving under the influence, which differ both substantively and procedurally, it is apparent that the Legislature intended to differentiate between the two types of offenses and to create both administrative and criminal sanctions for DUI, not one type of offense that is subject to impermissible double punishments. *See* Syl. pt. 8, *State v. Zaccagnini*, 172 W. Va.

491, 308 S.E.2d 131 (1983) ("Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."). The majority correctly recognizes this distinction; the dissenters do not.

For the foregoing reasons, I respectfully concur with the Opinion of the Court.