

No. 32748 – *In Re: Petition of Scott A. McKinney for Judicial Review of Administrative Decision Made by F. Douglas Stump, Commissioner, Department of Transportation, Division of Motor Vehicles*

FILED

December 2, 2005

Albright, Chief Justice, concurring, in part, dissenting, in part:

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OF WEST VIRGINIA

While I certainly agree with the majority's holding of law which acknowledges the objective of this state's administrative driver's license revocation procedures is the protection of innocent parties, I dissent to the majority's conclusion that West Virginia Code § 17B-3-6(a)(1)¹ requires the suspension of an operator's driver's license "regardless of whether the licensee is convicted of the offense" that is the statutory trigger for the suspension. Critically, the offense to which Mr. McKinney pled guilty² was not an offense that requires license suspension under West Virginia Code § 17B-4-3(c) – the statute to which West Virginia Code § 17B-3-6(a)(1) looks for purposes of identifying whether

¹The pertinent part of the statute provides that:

(a) The division is hereby authorized to suspend the driver's license of any person without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

(1) *Has committed an offense for which mandatory revocation of a driver's license is required upon conviction[.]*

W.Va. Code § 17B-3-6(a)(1) (emphasis supplied).

²He pled guilty to a speeding offense and to driving while suspended for administrative reasons in violation of West Virginia Code § 17B-4-3(a). The penalty for a conviction under West Virginia Code § 17B-4-3(a) is a fine and jail time depending on whether the offense at issue is a first, second, or third commission.

mandatory revocation is involved. Consequently, the majority has wrongly permitted license suspension that is not authorized by either West Virginia Code § 17B-3-6(a)(1) or West Virginia Code § 17B-4-3.

The trial court found significant the fact that the Legislature had amended West Virginia Code § 17B-4-3 in 1999 to remove the language that formerly permitted an additional one year of license suspension for driving on a suspended license for a first offense. *See* W.Va. Code § 17B-4-3(c) (1994).³ Now, the additional one year of license suspension is only authorized by statute for the second or subsequent convictions of offenses under subsection (a) of West Virginia Code § 17B-4-3. *See* W.Va. Code § 17B-4-3(c) (2004). The trial court, when trying to resolve this issue of statutory interplay, reasoned as follows:

Here the intention of the Legislature is clear, and that should be the end of the matter. The Legislature has directly spoken to the precise question at issue. Code § 17B-3-6(a)(1) authorizes the suspension of a person's driver's license when

³That provision provided as follows:

(c) Upon receiving a record of the conviction of any person under subsection (a) or (b) of this section upon a charge of driving a vehicle while the license of such person was lawfully revoked, the division shall extend the period of such suspension for an additional period of one year from and after the date such person would otherwise have been entitled to apply for a new license.

W.Va. Code § 17B-4-3(c) (1994).

mandatory revocation is required upon conviction. Code § 17B-4-3 [1999] eliminated the revocation of the person's driver's license for an additional year for the first offense driving on a suspended license for administrative reasons. [Mr. McKinney] was convicted of Driving Suspended for Administrative Reasons within the contemplation of Code § 17B-4-3(a). Therefore, the Commissioner has revoked [Mr. McKinney's] license for an additional year even though [Mr. McKinney] was convicted of an offense that precludes a mandatory revocation. Accordingly, the Final [DMV] Order was violative of Code § 29-5-4(g)(2) in that it was issued in excess of the statutory authority of the agency.

While the majority chooses to ignore the significance of the language “upon conviction” that appears in both of the statutes under consideration, that language should play a critical and determinative role in determining whether administrative revocation is warranted. As with any criminal offense, it is the criminal conviction that triggers the applicable civil penalty at issue here. Only by circumventing the critical significance of the actual conviction's role to the invocation of administrative sanctions under the legislative scheme at issue can the majority reach the result that a conviction for an offense for which mandatory revocation is required is not necessary for license suspension under West Virginia Code § 17B-3-6(a)(1). The analysis employed by the majority to reach its result is unquestionably tortured and certainly effectuates an absurd result. *See Charter Commun. v. Community Antenna Serv., Inc.*, 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002) (recognizing that “[i]t is the ‘duty of this Court to avoid whenever possible a construction

of statute which leads to absurd, inconsistent, unjust or unreasonable results’”) (quoting *State v. Kerns*, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990)).

The misguided result adopted by the majority has far reaching ramifications for the prosecutors of this state. What this Court began in *Stump v. Johnson*, __ W.Va. __, __ S.E.2d__, No. 32651 (filed July 7, 2005), in preventing prosecuting attorneys from entering into plea agreements that impact upon the authority of the Department of Motor Vehicles with regard to administrative license revocation proceedings has now been ratcheted up another notch. The practice of resolving numerous violations of the state’s motor vehicle laws through plea agreements will likely end when affected citizens recognize that despite their entry of a plea to an offense that does not carry a mandatory license revocation they will still lose their license.⁴ An additional impact of the majority’s decision will be an unwelcome increase in the number of DUI and DUI suspension cases that prosecutors are essentially powerless to resolve through any type of plea agreements. Thus,

⁴And what the majority, in its shortsighted approach, fails to realize is the far reaching economical implications for the citizens of this state who upon losing their license are essentially precluded from gainful employment due to the necessity of automotive transportation to reach their place of employment. While I do not wish to minimize the seriousness of DUI offenses, I do think it is important to recognize that there are those cases where the offense at issue does not warrant license revocation for a full year, especially where the Legislature has determined that the punishment for the criminal offense does not carry that sentence. To impose a harsher administrative sanction than that allowed for the criminal offense seems absurd.

it is not hard to see that the logical extension of the majority's ruling is to effectively tie the hands of prosecutors with regard to disposing of such cases.

Based on the foregoing, I respectfully concur, in part, and dissent, in part, from the majority's opinion.

I am authorized to state that Justice Starcher joins in this separate opinion.