

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Virgil Dingess,
Petitioner Below, Petitioner**

vs.) No. 11-0557 (Logan County 10-AA-4)

**Joe E. Miller, Commissioner of the
West Virginia Division of Motor Vehicles,
Respondent Below, Respondent**

FILED

**October 21, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Virgil Dingess, petitioner below, appeals a circuit court order granting a motion by respondent Commissioner of the Division of Motor Vehicles (“the Commissioner”) to dismiss petitioner’s appeal to the circuit court as untimely.

This Court has considered the parties’ briefs and the record on appeal. The matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court’s order entered in this appeal on May 31, 2011. The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In December 2009, the Commissioner revoked petitioner’s license for driving under the influence. Petitioner sought and received an administrative hearing. The hearing examiner affirmed petitioner’s revocation for a minimum period of one year beginning on September 1, 2010. Return receipt cards indicate that petitioner’s attorney received the hearing examiner’s decision on July 23, 2010, and that petitioner received the decision on July 24, 2010.

On August 30, 2010, more than thirty days after receiving the decision, petitioner filed a petition for judicial review of a contested case in the Circuit Court of Logan County. In response, the Commissioner filed a motion to dismiss petitioner’s appeal as untimely.

In an order dated November 3, 2010, the circuit court dismissed petitioner's appeal as untimely. The circuit court determined that because petitioner filed his appeal outside the thirty-day period imposed by West Virginia Code § 29A-5-4, the circuit court was jurisdictionally barred from hearing the appeal. The circuit court further ruled that Rule 60(b) of the West Virginia Rules of Civil Procedure, and any excusable negligence, could not overcome the jurisdictional bar. Petitioner now appeals the circuit court's decision.

In Syllabus Point 1 of *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996), we set forth the following standard to guide our review of the circuit court's order:

On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Petitioner makes three arguments for why the circuit court's order dismissing his appeal was in error. First, petitioner argues that the circuit court erred in finding that his appeal was untimely because the hearing examiner's decision stated that petitioner's license would be suspended as of September 1, 2010, thereby creating an inference that the appeal period did not expire until September 1, 2010.

We reject petitioner's argument, because West Virginia Code § 29A-5-4 plainly states that petitions for appeal of a hearing examiner's decision must be filed "within thirty days after the date upon which such party received notice of the final order." Moreover, Rule 2(b) of the West Virginia Rules of Procedure for Administrative Appeals states that:

No Petition shall be filed from a state agency decision or final order in a contested case after the time period allowed by law. The petition shall be filed in the office of the circuit clerk of the circuit court in which venue lies by law, within 30 days after the petitioner receives notice of the final order or decision from the agency, unless otherwise provided by law.

Because petitioner's appeal to the circuit court was filed more than thirty days after both the petitioner and his counsel received the hearing examiner's decision, the circuit court did not err in dismissing the appeal.

Petitioner next argues that the hearing examiner's decision did not contain a certificate of service indicating the date on which the decision was mailed to him or his counsel as required by Rule 5 of the West Virginia Rules of Civil Procedure. We reject this assertion

because West Virginia Code §17C-5A-2(s) clearly provides that administrative orders by a hearing examiner are to be served on a driver by registered or certified mail, and not in accordance with the Rules of Civil Procedure. Furthermore, the Commissioner established that he complied with this mandate by producing the return receipt cards showing when petitioner and his counsel received the hearing examiner's decision in the mail.

Finally, petitioner's counsel argues that, assuming *arguendo* that petitioner's appeal was untimely filed, the circuit court erred because it did not consider the excusable neglect argument proffered by the petitioner's counsel. Essentially, petitioner's counsel proffered that, because his fiancée was killed by a drunk driver in January 2010, he had repeatedly "wrestled" with whether he should continue to represent petitioner. As a result, he failed to timely file petitioner's appeal.

After examining the circumstances in this appeal, the Court cannot conclude that the petitioner's counsel's failure to timely file petitioner's appeal should be excused. To allow an untimely filing would render the "limitation period established by the Legislature . . . utterly meaningless." *McCourt v. Oneida Coal Co., Inc.*, 188 W.Va. 647, 654, 425 S.E.2d 602, 609 (1992). Therefore, we find no error in the circuit court's rejection of petitioner's counsel's excusable neglect argument.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh