STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Mark Davis,
Petitioner Below, Petitioner

vs.) No. 11-1189 (Kanawha County 09-AA-164)

Joe Miller, Commissioner,
West Virginia Division of Motors Vehicles,
Respondent Below, Respondent

FILED
December 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mark Davis, *pro se*, appeals the July 12, 2011 order of the Circuit Court of Kanawha County affirming the final order of the Commissioner of the West Virginia Division of Motors Vehicles revoking his privilege to drive for six months for driving under the influence of alcohol ("DUI") as described in West Virginia Code § 17C-5-2. The respondent commissioner, by Janet E. James, his attorney, filed a summary response to which petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. 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 of Appellate Procedure.

On December 4, 2007, Officer James Wilson of the Charleston Police Department stopped petitioner for a one-way street violation on Homer and Beatrice Streets in Charleston, West Virginia. Officer C.E. Sizemore of the Charleston Police Department arrived on the scene and observed petitioner standing outside his vehicle.

While speaking with petitioner, Officer Sizemore noted that petitioner had an odor of an alcoholic beverage on his breath, that his eyes were glassy, that his speech was normal, that his attitude was cooperative, and he had no trouble walking or standing. Petitioner admitted to Officer Sizemore that he had drunk two beers while at the St. Albans Moose Club.

Officer Sizemore explained, demonstrated, and administered three field sobriety tests to petitioner. On the horizontal gaze nystagmus test, Officer Sizemore noted that petitioner's eyes had equal tracking and pupil size. During the test, petitioner's eyes had onset of nystagmus prior to a forty-five degree angle and distinct nystagmus at maximum deviation indicating that he was under the influence.

On the walk-and-turn test, petitioner did not touch heel to toe and stepped off the line. Petitioner could not complete the walk-and-turn test because of a neuroma in his left foot. On the one-leg stand test, petitioner swayed while balancing, used his arms for balance, hopped, and put his foot down during the test.[1] Petitioner stood on his right foot while performing the one-leg stand test. Officer Sizemore placed petitioner under arrest and transported him to the Charleston Police Department.

Officer Sizemore was trained at the West Virginia State Police Academy to administer the secondary chemical test of the breath on April 15, 2004. The Intoximeter EC/IR II has been approved for use by the West Virginia Division of Health for use as a secondary breath testing instrument. In the case at bar, the Intoximeter test showed that petitioner had a blood alcohol content of .067.[2]

Petitioner made a request to the respondent commissioner for an administrative hearing, and the hearing was subsequently held on August 6, 2009.[3] The respondent commissioner's final order was effective from October 9, 2009. In the final order, the respondent commissioner affirmed the initial order of revocation and revoked petitioner's privilege to drive for six months and until all obligations for reinstatement are met.[4]

On September 25, 2009, petitioner appealed the respondent commissioner's final order to the circuit court and subsequently made a motion for a stay. On September 30, 2009, the circuit court granted a 150 day stay of the respondent commissioner's final order, which order provided that the stay "shall expire without further Order of this Court."[5]

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[1] According to petitioner, he was wearing cowboy boots with two inch heels during the field sobriety tests.

[2] A preliminary breath test was administered at the scene. However, as reflected in the respondent commissioner's final order, the results of the preliminary breath test "cannot be given any weight because the record reflects that it was administered two minutes after the Arresting Officer's initial contact with [petitioner] and therefore the fifteen minute timeframe was not adhered to in accordance with the guidelines."

[3] The responsibility for administratively reviewing an initial revocation of the privilege to drive has since been shifted from the Commissioner to the independent Office of Administrative Hearings. *See generally* W.Va. Code §§ 17C-5C-1 *et seq.*

[4] In the separate criminal proceeding, petitioner was charged with DUI first offense and subsequently pled guilty to reckless driving. He was fined $100 plus court costs. The complaint from the criminal proceeding, upon which petitioner relies in his appeal, shows two different readings, .067 and .063, from the Intoximeter test. However, the .063 figure is not properly in evidence because the criminal complaint is not a part of the administrative record. *See* Part III, infra.

[5] The stay was statutorily capped at 150 days. *See* W.Va. Code § 17C-5A-2(q) (2000). The

Petitioner filed his brief in the circuit court on November 13, 2009. Counsel for the respondent commissioner telephonically requested an extension of time in which to file a response brief. The circuit court granted the extension which was confirmed by a letter from the respondent commissioner's counsel to the circuit court. Counsel for the respondent commissioner subsequently filed a response brief on January 14, 2010. On February 14, 2010, petitioner filed a motion for the circuit court not to consider the respondent commissioner's response brief.

The circuit court's order affirming the respondent commissioner's final order revoking petitioner's privilege to drive for six months was entered on July 12, 2011. In its order, the circuit court found that the one-way violation provided reasonable suspicion to stop petitioner's vehicle and that thereafter, Officer Sizemore developed probable cause to arrest petitioner for DUI. The circuit court further found that the DUI Information Sheet was offered and accepted as part of the administrative record pursuant to West Virginia Code § 29A-5-2 and W.Va. Code R. § 91-1-3 (3.9.4.b) (2005). *See also Crouch v. West Virginia Division of Motor Vehicles*, 219 W.Va. 70, 75, 631 S.E.2d 628, 633 (2006) (stating that under West Virginia Code § 29A-5-2(b), "*[a]ll evidence, including* papers, records, agency staff memoranda and *documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case*.") (quoting statute) (emphasis by the Court).

The circuit court found that Officer Sizemore's signature on the DUI Information Sheet constitutes an affirmation of the veracity of the information contained therein. The circuit court further found that "[t]he Commissioner properly relied on the evidence of Petitioner's performance on the field sobriety tests to determine that he was DUI" and that "the Commissioner properly considered and weighed the evidence and found that the officer's observations of Petitioner were entitled to significant weight."

As to whether Commissioner Miller's final order should be reversed because of the length of the proceedings, the circuit court ruled as follows:

> 9. The time between the administrative hearing and issuance of the Final Order did not violate Petitioner's due process rights, nor did it prejudice Petitioner.
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> 10. The time between the hearing and issuance of the Final Order does not from a basis for overturning an administrative order. In *Johnson v. State Dept. of Motor Vehicles*, 173 W.Va. 565, 570, 318 S.E.2d 616, 620 (1984) (per curiam), the West Virginia Supreme Court of Appeals noted: "Similarly, in Syllabus Point 2 of *Kanawha Valley Transportation Co. v. Public Service [Commission]*, 159 W.Va. 88, 219 S.E.2d 332 (1975), this Court stated, 'The mere delay in the disposition or decision of a case does not vitiate the order or judgment. If a decision is unduly delayed, a

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statutory cap is now found at West Virginia Code § 17C-5A-2(s).

> proceeding in mandamus may be instituted to compel a decision but not how to decide.'" In the present case, Petitioner took no action to compel issuance of the Final Order. The *Johnson* Court noted that in an earlier decision the Court had held that "any error associated with a delay in a final child custody hearing was waived by the parent's failure to object the continuances granted." *Johnson*, 173 W.Va. at 570, 318 S.E.2d at 620 (citing *State v. Scritchfield*, 167 W.Va. 683, 694-95, 280 S.E.2d 315, 322 (1981)).
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> 11. Petitioner has shown no prejudice stemming from the time between the convening of the administrative hearing and issuance of the Final Order. Petitioner benefitted during this time because the revocation of his driving privilege was stayed pending issuance of the Final Order. W.Va. Code § 17C-5A-2(s) ("During the pendency of any hearing, the revocation of the person's license to operate a motor vehicle in this state shall be stayed.").
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> 12. The timing of the issuance of the Final Order does not form a basis for reversal.
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> 13. The timing of [the respondent commissioner]'s filing of his brief does not form a basis for reversal of the Final Order.

Accordingly, the circuit court denied petitioner's motion that the court not consider the respondent commissioner's brief and affirmed the final order revoking petitioner's privilege to drive.

Petitioner appealed the circuit court's order to this Court and filed his merits brief on November 16, 2011. On December 30, 2011, this Court on its own motion extended the deadline for the respondent commissioner to file his response brief to January 19, 2012. On January 12, 2012, petitioner filed two motions. The first motion asked this Court to reconsider its order extending the deadline for the respondent commissioner's brief. Petitioner's second motion was a motion for judgment based upon the fact that the respondent commissioner's brief was not filed by the original deadline of January 2, 2012. This Court refused both of petitioner's motions by separate orders entered January 31, 2012.[6]

On January 19, 2012, the respondent commissioner filed his summary response and a motion to supplement the appendix with the DUI Information Sheet. This Court granted the motion to supplement the appendix on January 31, 2012. On February 6, 2012, Mr. Davis moved for an extension of time to file his reply brief and a response to the respondent commissioner's motion to supplement the appendix.[7] This Court granted an extension of time to February 27,

[6] Petitioner's motion for judgment was refused as moot in light of this Court's previous order of December 30, 2011.

[7] Pursuant to Rule 29(b) of the Revised Rules of Appellate Procedure, there is no requirement for this Court to wait for a response to a motion before ruling on it. Rule 29(b) further provides that

2012, by an order entered February 15, 2012. Petitioner filed his reply brief and a response to the respondent commissioner's motion to supplement on February 27, 2012.[8]

I. STANDARD OF REVIEW

In syllabus point one of *Miller v. Moredock*, 229 W.Va. 66, 726 S.E.2d 34 (2012), this Court reiterated:

> "'Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Syllabus Point 2, *Shepherdstown Volunteer Fire Dept. v. [State ex rel] West Virginia Human Rights [Commission]*, 172 W.Va. 627, 309 S.E.2d 342 (1983).' Syl. Pt. 1, *Johnson v. State [Department] of Motor*

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any party aggrieved by the Court's ruling "may request reconsideration, vacation, or modification of such action within ten days of the date of the order."

[8] Petitioner argues that the respondent commissioner's motion to supplement the appendix was untimely under Rule 7(e) of the Revised Rules of Appellate Procedure which provides that "[t]he respondent may, within ten days after receiving the petitioner's list, serve on the petitioner a list of additional parts of the record to which it wishes to direct the Court's attention." However, Rule 7(g) provides that "[a] party may file a motion for leave to file a supplemental appendix that includes such matters from the record not previously submitted." Rule 7(g) requires good cause for why the proffered material was not previously included. In his motion to supplement, the respondent commissioner asserted that petitioner's appendix was deficient in a number of ways including having numerous documents that were not part of the record below. In contrast, the respondent commissioner noted that the DUI Information Sheet "is a part of the record below." Therefore, after careful consideration, this Court concludes that the respondent commissioner's motion was properly filed under Rule 7(g) and declines to reconsider its order granting the motion to supplement the appendix.

Vehicles, 173 W.Va. 565, 318 S.E.2d 616 (1984)." Syl. Pt. 3, *State ex rel. Miller v. Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1998).[9]

II. PETITIONER'S DEMAND FOR JURY TRIAL

Petitioner asserts that he checked the box on the Civil Case Information Sheet to indicate that he was demanding a jury trial. The respondent commissioner argues that there is no right to a jury trial in an appeal of a driver's license revocation. *See* W.Va. Code § 29A-5-4(f) ("The review shall be conducted by the court without a jury and shall be upon the record made before the agency . . . ."). Therefore, this Court concludes that petitioner's argument that the circuit court should have provided him with a jury trial lacks substantial merit.

III. PETITIONER'S RELIANCE ON CRIMINAL COMPLAINT AND RESULT OF SEPARATE CRIMINAL PROCEEDING

In making various arguments that the respondent commissioner's final order should be reversed, petitioner relies on certain information found in the complaint from the separate criminal proceeding. The respondent commissioner asserts, and the circuit court found, that the criminal complaint is not properly a part of the administrative record. Petitioner does not challenge the circuit court's finding. Furthermore, to the extent that petitioner relies upon the fact that the DUI charge against him was dismissed and he pled guilty to reckless driving; such evidence from the criminal proceeding is inadmissible. *See* Syl. Pt. 4, in part, *Miller v. Epling*, 229 W.Va. 574, 729 S.E.2d 896 (2012) ("[I]n the license revocation proceeding, evidence of the dismissal or acquittal [in the criminal proceeding] is not admissible to establish the truth of any fact.") (overruling Syl. Pt. 3, *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001)). Therefore, this Court concludes that petitioner is not permitted to rely on the criminal complaint and the result of the separate criminal proceeding.

IV. PETITIONER'S CHALLENGES TO RESPONDENT COMMISSIONER'S FINDINGS

Petitioner asserts that the traffic stop was not warranted and that Officer Wilson, who initially made the stop, was never available to testify. Petitioner asserts that approximately five hours lapsed between his consumption of two alcoholic beverages and his arrest for DUI. Petitioner asserts that the circuit court failed to properly review the record regarding the field sobriety tests. Petitioner asserts that the result of the preliminary breath test was found to be inadmissible and that the secondary breath test showed a blood alcohol content which was below the legal limit for DUI.[10] In response, the respondent commissioner asserts that the DUI

[9] The Administrative Procedures Act, West Virginia Code §§ 29A-1-1 *et seq.*, applies to petitioner's appeal of the respondent commissioner's final order. *See Moredock*, 229 W.Va. at __, 726 S.E.2d at 37 ("Judicial review of an order of the Commissioner [of the DMV] is conducted pursuant to the contest cases provision of West Virginia's Administrative Procedures Act.").

[10] Petitioner further contends that he did not have access to all parts of the record. However, after a

Information Sheet and the testimony of Officer Sizemore, the arresting officer, provided the evidence upon which the respondent commissioner's final order was based. The respondent commissioner argues that the findings in the respondent commissioner's final order cannot be overturned unless they are clearly wrong. *See*, *e.g.*, *Cunningham v. Bechtold*, 186 W.Va. 474, 479, 413 S.E.2d 129, 134 (1991). After careful consideration, this Court concludes that the respondent commissioner's finding are not clearly wrong and that his final order revoking petitioner's driving privileges is not characterized by an abuse of discretion.

V. PETITIONER'S CLAIM OF PREJUDICE FROM LAPSE OF TIME BETWEEN FILING OF APPEAL OF FINAL ORDER AND ENTRY OF CIRCUIT COURT'S ORDER

Petitioner complains that there was a lapse of nearly two years between the filing of his appeal of the respondent commissioner's final order and the entry of the circuit court's order affirming the final order revoking his driving privileges. In response, the respondent commissioner asserts that at no time has petitioner made a showing that he has suffered any prejudice and that petitioner did nothing to expedite the issuance of the circuit court's order.

In *Moredock*, supra, which presented the analogous situation where there was a seventeen month delay in the issuance of the Commissioner's final order, this Court held, in syllabus point five: "[The motorist] must demonstrate that he has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay." Petitioner attempts to show actual prejudice by the fact that the circuit court's 150 stay of Commissioner Miller's final order expired without the circuit court's having ruled on his appeal. The stay was statutorily capped at 150 days. *See* W.Va. Code § 17C-5A-2(q) (2000). The statute did not preclude the circuit court from issuing consecutive stays. *See Moredock*, 229 W.Va. at __, 726 S.E.2d at 37 (noting that an additional 150 day stay was granted); *Smith v. Bechtold*, 190 W.Va. 315, 319-20, 438 S.E.2d 347, 351-52 (1993) (rejecting the DMV's argument that the circuit court exceeded its statutory authority by granting multiple stays).[11] In the case at bar, petitioner never asked for an additional stay. The docket sheet also reveals petitioner never made a motion asking the circuit court to rule on his appeal. He also never petitioned this Court in mandamus to compel the circuit court to make a ruling. *See Moredock*, 229 W.Va. at __ n. 7, 726 S.E.2d at 40 n. 7 ("The reviewing court is free to consider the aggrieved party's failure to pursue a ruling as a factor in determining whether he has suffered actual and substantial prejudice as a result of the delay."). Therefore, after careful consideration, this Court finds that petitioner cannot demonstrate that he has suffered actual and substantial prejudice as a result of the lapse of time between the filing his appeal and the entry of the circuit court's order. This Court concludes that the circuit court's order affirming the respondent commissioner's final order, revoking petitioner's driving privileges for six months for DUI, is affirmed.

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careful review of the record, this Court finds no merit to petitioner's contention.

[11] At the time of *Smith*, the stay was statutorily capped at thirty days.

For the foregoing reasons, we find no error in the circuit court's decision and affirm its July 12, 2011, order affirming the respondent commissioner's final order.

Affirmed.

ISSUED: December 7, 2012

CONCURRED IN BY:

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