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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16-0487 - Reed v. Staffileno

LOUGHRY, Chief Justice, dissenting:

The OAH's post-hearing delay in issuing its order affirming the DMV Commissioner's revocation order is seriously troubling. Neither a licensee nor the DMV Commissioner should be required to wait such a long period of time to obtain a decision in an administrative appeal. Nonetheless, the delay in this case did not present grounds for the circuit court to overturn the revocation of the respondent's driver's license. Both the circuit court and the majority of this Court have overlooked that the respondent simply gambled on winning his appeal when he accepted a new job without first contacting the OAH or taking any legal steps to obtain a decision. The majority has also wrongly chosen to ignore the circuit court's erroneous legal conclusions regarding who was responsible for the post-hearing delay. In allowing a DUI revocation order to be overturned under these facts, the majority has thrown open the floodgates to allow a tsunami of drunk drivers to gain reinstatement of their licenses due solely to dilatory administrative practices.

The respondent's driver's license was revoked because he allowed his intoxicated[1] friend, Ms. Haynes, to drive his vehicle on the roadways of Brooke County. He gave her the keys to his car despite the fact that they had been at a bar for the preceding two

[1]The result of a secondary chemical test of Ms. Haynes's breath revealed that her blood alcohol content was .159 percent, which is more than twice the legal limit and constitutes aggravated DUI. *See* W.Va. Code §§ 17C-5-2(a)(E), (e) (2013 & Supp. 2016).

and one-half hours, and despite Haynes's admission that she had been drinking beer. The respondent admitted he had been observing Ms. Haynes's driving prior to the traffic stop because he was aware of her alcohol consumption. A person who knowingly permits his or her vehicle to be driven by someone under the influence of alcohol is subject to the same administrative license revocation as if he or she had personally driven while intoxicated. *See* W.Va. Code § 17C-5A-2(j) (2013 & Supp. 2016). Accordingly, the DMV Commissioner issued an order revoking the respondent's driver's license for knowingly allowing Ms. Haynes to drive his vehicle while she was under the influence of alcohol.

The respondent's revocation was automatically stayed when he appealed to the OAH.[2] After the OAH held an evidentiary hearing on his appeal, but while the matter was still pending a decision, the respondent decided to quit his job as a state tax auditor and become a school bus driver. Thus, even though he knew that the revocation of his driver's license had *merely been stayed* pending the outcome of his appeal, he elected to accept a job that required him to hold a valid driver's license. This career change is the sole basis for his claim of actual and substantial prejudice from the OAH's delay. However, there is nothing in the appendix record to show that the respondent was forced to retire from his auditor position, or that he was forced by circumstances to take a job driving school children.

[2]Because of the automatic stay that took effect when the petitioner filed his appeal to the OAH and because the circuit court stayed the OAH's decision, the respondent has retained his driver's license throughout these proceedings.

Indeed, at the circuit court's hearing on the respondent's motion to stay the OAH decision, the respondent testified he could have remained at his prior employment. It is clear that his change of employment, and any alleged prejudice, resulted entirely from his voluntary decisions. Obviously, the respondent gambled on the possibility that he would win his appeal and get the revocation order overturned.

Despite the respondent's decision to obtain a job that required a valid driver's license, and with knowledge that the revocation order was only temporarily stayed, neither he nor his lawyer ever communicated in any fashion with the OAH in an attempt to hasten the issuance of the critical decision. The petitioner also did not exercise his right to file a petition for a writ of mandamus: "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 proceeding in mandamus may be instituted to compel a decision but not how to decide." Syl. Pt. 2, *Kanawha Valley Transp. Co. v. Public Service Comm'n*, 159 W.Va. 88, 219 S.E.2d 332 (1975). This Court has warned licensees against waiting to raise the issue of delay for the first time on appeal to the circuit court:

> *[A] party who elects not to seek mandamus relief but who, instead, raises the delay issue for the first time on appeal to the circuit court, does so at his peril.* 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.

Miller v. Moredock, 229 W.Va. 66, 73 n.7, 726 S.E.2d 34, 41 n.7 (2011) (emphasis added). While I am sympathetic to the fact that litigants should not be required to file mandamus petitions just to receive a decision in administrative appeals, it would have been reasonable for the respondent to have contacted the OAH or filed a petition for mandamus before making a career change–particularly to a job requiring a valid driver's license as a qualification! Given these facts, the circuit court should have taken into consideration the respondent's failure to affirmatively pursue a ruling on his appeal.

According to the majority, when a delay occurs after the administrative hearing is held, the issue of prejudice "will ordinarily involve some type of change in a party's circumstances that may have been substantially prejudiced because of the delay in issuing a final order by OAH." The majority then concluded that the facts of this case–where the only prejudice was a job change wholly within the respondent's control and where the respondent rolled the dice rather than pursuing a ruling–justified the circuit court's overturning of the administrative agency's decision. I completely disagree. After considering all of the facts and the procedural history of this case, it is clear that the petitioner did not present evidence of actual and substantial prejudice rising to the level of a due process violation.

Woefully, I fear that the majority's reliance on the weak evidence of prejudice in this case may result in countless drunk drivers securing the unwarranted reinstatement of

their licenses. During oral argument, the Commissioner's attorney, who explained that she handles DMV appeals on a full-time basis, informed the Court of a backlog of cases at the OAH. Additionally, in her Notice of Appeal filed on February 17, 2017, the Commissioner listed thirteen pending circuit court appeals presenting issues of post-hearing delay by the OAH. Armed with the majority's opinion in this case, every licensee who has experienced post-hearing delay, including drivers who committed serious drunk driving violations and harmed innocent people, will now be motivated to seek the reversal of their license revocations by citing to or worse yet, creating, a change of circumstances in their lives.

Equally problematic are the glaring instances of legal error in the circuit court's final order. Upon finding the presence of actual and substantial prejudice to the respondent, the court was then required to balance that prejudice against the reasons for the administrative delay. *See Miller*, 229 W.Va. at 67-68, 726 S.E.2d at 35-36, syl. pt. 5.[3] The circuit court made no findings addressing the reasons for the delay and failed to engage in the required balancing. These omissions are most likely the result of the circuit court's repeated insistence that the OAH and the DMV are the same or "allied" agencies. Although there is no dispute that the post-hearing delay was entirely attributable to the OAH, the circuit court faulted the DMV. The court concluded that the "Respondent [DMV] has been reckless

[3]Relying on *Miller*, the majority of this Court incorporated this balancing test into its new syllabus point two.

in failing to accord Petitioner [Mr. Staffileno] his due process rights" and "[u]fortunately, Respondent's [DMV's] dilatory practices in license revocation cases are judicially well known."[4] The circuit court supported this second statement with citations to three cases that involved the prior system where the DMV Commissioner was responsible for the administrative hearing process. However, in 2010 the Legislature designated the OAH as the agency to hear and decide all driver's license revocation appeals.[5] By design and express statement of law, the OAH is a separate agency from the DMV.[6] The DMV participates in the administrative hearings only as a party litigant.[7] The OAH hearing examiners who preside over the hearings, and the chief hearing examiner responsible for rendering the ultimate decision, are not within the employment, supervision, or control of the DMV or the DMV Commissioner.[8] Given its insistence on looking to and blaming the wrong agency,

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[4]Because Mr. Staffileno filed the appeal in circuit court, he was designated as the petitioner and the DMV was designated as the respondent in the court's order.

[5]*See, e.g.*, W.Va. Code § 17C-5A-2 (2013 & Supp. 2016) (directing OAH to preside over and decide driver's license revocation appeal hearings); W.Va. Code §§ 17C-5C-1 to -5 (2013) (creating OAH and specifying its jurisdiction); § 17C-5C-4 (2013) (designating DMV Commissioner as party who may be represented by counsel at OAH hearing).

[6]*See supra* note 5. West Virginia Code § 17C-5C-1(a) states, "[t]he Office of Administrative Hearings is created as a separate operating agency within the Department of Transportation."

[7]*See* W.Va. Code § 17C-5C-4.

[8]*See* W.Va. Code § 17C-5C-1 (designating OAH as separate agency and authorizing appointment of chief hearing examiner); § 17C-5C-2 (authorizing chief hearing examiner to employ other hearing examiners).

the circuit court lacked the information it needed to address and weigh the reasons behind the delay.[9]

Selecting to side-step the circuit court's failure to apply the balancing test, the majority concludes that once a licensee shows actual and substantial prejudice from a post-hearing delay, the burden is then shifted to the DMV Commissioner to inform the circuit court of the reason for the delay. Inasmuch as the DMV Commissioner was not responsible for the delay, but was merely another party in the appeal, it is unclear how the Commissioner would even know the reason. Requiring such a showing made sense under the old statutory framework, but it lacks any basis under the current law.

For all of the foregoing reasons, I can only conclude that the circuit court's decision to reverse the OAH on the basis of the post-hearing delay was clearly wrong, characterized by an abuse of discretion, and based upon mistake of law. Accordingly, I respectfully dissent.

[9]The majority states that the circuit court issued an amended order clarifying its awareness that the DMV and the OAH are separate agencies. However, the only amended order in the appendix record was entered on November 20, 2015, and pertains to the circuit court's stay order. Despite seeming to acknowledge in that amended stay order that the DMV and the OAH are different, the circuit court, in its final order entered on April 8, 2016, once again conflated the two agencies.