

No. 33303

*State of West Virginia ex rel. Alan D. Baker v. David H. Bolyard,
Director, Division of Motor Vehicles, State of West Virginia*

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Starcher, J., dissenting:

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OF WEST VIRGINIA

The majority opinion in the instant case continues and compounds the error made by a majority of this Court in *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 246 (2005). That error is to ignore the clear meaning of the language of the applicable statute, *W.Va. Code*, 17C-5A-1 [2004], in order to achieve a result that, while desired by the majority, is quite contrary to the statute's obvious intent. The majority's error is apparent upon a straightforward parsing of the statutory language in question.

This Court's reading of the statute must be guided by the following principles:

Ordinarily, when we construe a statute, we give effect to each word employed in a legislative enactment. It has been a traditional rule of statutory construction that "the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." In other words, "it is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective." "We cannot assume in the absence of wording clearly indicating contrariwise that the Legislature would use words which are unnecessary, and use them in such way as to obscure, rather than clarify, the purposes which it had in mind in the enactment of the statute."

Osborne v. U.S., 211 W.Va. 667, 673, 567 S.E.2d 677, 683 (2002) (citations and internal

quotation marks omitted).

The statutory language in question begins by saying that a driver's license shall be revoked (or suspended) if the driver is "convicted" of DUI. *W.Va. Code*, 17C-5A-1a(a).¹

This statutory language alone would have sufficed, in itself, to accomplish the Legislative purpose that the majority wishes were the case – that is, if the Legislature had wanted *any* DUI conviction to suffice for license revocation, including a conviction resulting from a *nolo contendere* plea.

However (for reasons that the majority opinion, in its studied myopia, does not attempt to address or explain), the Legislature went on and added statutory language that specifies and delineates those types of "convictions" that require license revocation. This choice by the Legislature – to add specific definitional language that is wholly unnecessary under the interpretation reached by the majority opinion – provides our first reason for believing that the majority opinion has the legislative purpose and meaning wrong.

The language that the Legislature added is found at 17C-5A-1a(e): "For purposes of this section, a person is ["convicted"] when the person enters a plea of guilty *or* is found guilty by a court or jury." (*Id.*, emphasis added.)

Let's look more closely at this language used in 17C-5A-1a(e). The types of convictions that require license revocation are set out in the disjunctive, in two phrases that

¹"If a person is convicted for an offense defined in section two, article five or this chapter . . . the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section." *W.Va. Code*, 17C-5A-1a(a).

are separated by the word “or.”

The first phrase says that a revocation-causing conviction exists when that conviction results from a “plea of guilty.” Notably not included in this phrase is a plea of *nolo contendere*, which is the only other type of a plea that results in a conviction.

If we apply to this phrase the cardinal principle of statutory construction “*inclusio unius est exclusio alterius*” (“the inclusion of one is the exclusion of others”)², then by specifically *including* those convictions that result from pleas of guilty, the Legislature thereby means to *exclude* convictions resulting from pleas of *nolo contendere* for license revocation purposes. This piece of statutory analysis provides further reason to believe that the majority opinion is in error.

As previously noted, the next phrase in the Legislature’s specification of the types of conviction that require license revocation sets out an *alternative* to convictions that result from a “plea of guilty.” That alternative basis is when a conviction results from a person being “found guilty [of DUI] by a court or jury.” *Id.*

The core “reasoning” in the majority opinion says that this second “found guilty” part of the definition of “conviction” should be read to include a person’s being “found” guilty as a result of a plea, which the majority opinion says includes a plea of *nolo contendere*.

²This doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language. *State ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996).

However, if this alternative type of conviction includes adjudications of guilt that are based on a plea, then there would have been no reason to include the first statutory phrase specifying the “plea of guilty” basis. This piece of analysis provides more evidence that the majority opinion is wrong in its reading of the Legislative intent and purpose.

This analysis is buttressed by the fact that the second phrase specifies two ways that a person can be “found guilty” – by a court, or by a jury. If the “found guilty” language really meant the entry of a judgment of guilt by a court after a plea *or* after a trial – which is what the majority opinion argues – then the modifying phrase “by a court or jury” would be unnecessary, and the phrase could end with the words “found guilty.”

There is only one situation where the distinction between being “found guilty” by a court as opposed to by a jury is meaningful – and that situation is a trial. So it is clear that the Legislature, in the “found guilty by a court or jury” language in the second phrase, wanted to be clear that a conviction after a trial, whether a trial by jury or by a judge, would result in license revocation. This analysis provides yet another reason undercutting the majority’s reading of the statute.

Based on the foregoing analysis, it is clear that the Legislature specified two types of DUI conviction that result in license revocation: (1) those convictions that result from the entry of a guilty plea; and (2) those convictions that result from being found guilty after a trial by a judge or by a jury. This is the only interpretation that makes sense of all of the words in the statute.

While the foregoing statutory parsing is a somewhat tedious but useful

exercise, it is not really necessary. A quick reading of the statute by a first-year law student would yield the same result – which, of course, is why for decades (until the majority opinion in *Stump v. Johnson* came flying out of left field) the Division of Motor Vehicles has not revoked licenses for *nolo contendere*-based convictions.³ In other words, the very people charged with administering the law were applying it properly until the majority opinion in *Stump*!

In its transparently deliberate misreading of the statute in the instant case and in *Stump*, the majority has violated its constitutional duty to read, interpret, and apply a statute according to law.⁴ Accordingly, I dissent.

³Last year, the Legislature noticed this Court’s error in *Stump*, and promptly enacted W.Va. CSR 91-5-14: “. . . a plea of *nolo contendere* stands as neither an admission of guilt nor a conviction for administrative revocation proceedings.” Will that rule hold up in the face of the majority’s evident desire to impose its wishes, regardless of the Legislature’s intent? It’s hard to say.

⁴This kind of exercise of “raw judicial power” – to accomplish what the majority opinion *wishes* the statute said – does have the effect of “putting the members of the Legislature in their place.” That’ll teach those pesky lawmakers to be “soft” on drunk driving! It’s worth noting that the main beneficiaries of the majority opinion are people who can afford to hire a lawyer to try to poke holes in the evidence in a criminal DUI case. Under the statute as the Legislature wrote it, people who don’t have that kind of money can plead *nolo contendere*, accept the criminal penalty, and still have a chance to contest their license revocation in an administrative proceeding. Under the majority opinion’s rule, *only the wealthy* can afford to try to keep their licenses. Under the majority opinion, it’s one set of laws for the rich, and another law for ordinary folks! I hate drunk driving, but I dislike unequal justice just as much. That’s why I respect the decision of the Legislature, and decry the majority opinion’s shameless distortion of the statute.