

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOUGLAS STUMP, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner/Respondent Below,

v.

JEFFREY M. MULLEN,

Petitioner Below/Respondent.

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

Respectfully submitted,

DOUGLAS STUMP, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

By counsel,

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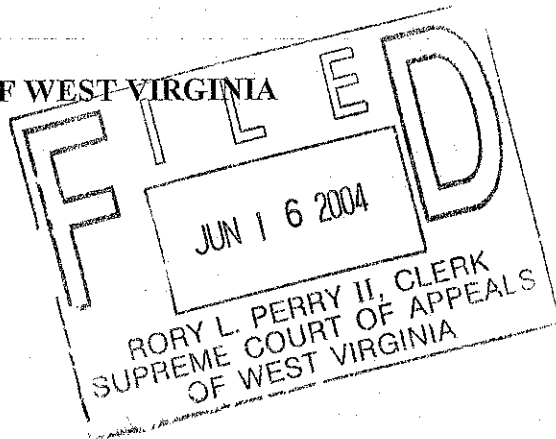


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C. Commissioner must revoke the privilege to drive upon receipt of the Statement of Arresting Officer. W.Va. Code 17C-5A-2; <i>Coll v. Cline</i> , 202 W. Va. 599, 505 S.E.2d 662 (1998)	3
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NO. 31740

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Appellant,

v.

JEFFREY M. MULLEN,

Appellee.

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal, from an order entered on September 18, 2003, by the Honorable James P. Mazzone, Judge of the Circuit Court of Ohio County (hereinafter, "Order"), in a petition for expungement of records styled *In re: Petition of Jeffrey Michael Mullen For Expungement of Records*, Civil Action No. 03-P-119. Through its Order, the circuit court ordered expungement of

all of the Division of Motor Vehicles' (hereinafter, "Division") records of the arrest of the Appellee for driving under the influence of alcohol (hereinafter, "DUI"). Through its *Supplemental Order* entered September 30, 2003 in the same case, the circuit court ordered expungement of the criminal DUI records. The *Supplemental Order* is not appealed here.

II.

STATEMENT OF THE FACTS

Appellee was arrested for DUI on July 29, 2000 in Ohio County, West Virginia. A Statement of Arresting Officer was submitted to the Division on July 29, 2000, and received by the Division on August 2, 2000. An Intoxilyzer ticket attached to the Statement of Arresting Officer showed that the blood alcohol content in Appellee's system was .177.

On August 4, 2000, the DMV issued an "Order of Revocation" by which the Respondent's privilege to drive was revoked for six months. The Respondent received said order on August 8, 2000. He did not request an administrative hearing on the revocation of his privilege to drive. He subsequently completed the requisite Safety and Treatment Program and paid reinstatement fees, and his privilege to drive was restored on November 17, 2000.

On or about August 8, 2003, Appellee, *pro se*, filed a *Petition for Expungement of Records* (hereinafter, "Petition") in the circuit court of Ohio County. He also filed a pleading captioned *Jeffrey Mullen v. State of West Virginia, Department of Motor Vehicles*, entitled "Statement of Facts", which is dated August 29, 2003. In that document, Appellee averred, "The criminal charges were dismissed by order dated August 10, 2000." Attached to this document is a copy of a "Criminal Case History" from the Magistrate Court of Ohio County on which it is noted: "STATE'S MOTION (RANDY GOSSETT) STATE DOES NOT WISH TO PROSECUTE."

In its Order, the circuit court ordered expungement of the Division's file relating to the Appellee's DUI arrest, and ordered expungement of the criminal record.

III.

ISSUE

WHETHER THE CIRCUIT COURT ERRED IN ORDERING EXPUNGEMENT OF THE DIVISION'S RECORD BASED ON THE DISMISSAL OF THE CRIMINAL CHARGES.

IV.

POINTS AND AUTHORITIES

- A. Inasmuch as this is purely a legal question, this Court's standard of review is *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 139, 459 S.E.2d 415, 416 (1995).
- B. W.Va. Code § 61-11-25(a): Any person who has been charged with a criminal offense under the laws of this state and who has been found not guilty of the offense, or against whom charges have been dismissed, and not in exchange for a guilty plea to another offense, may make a motion in the circuit court in which the charges were filed to expunge all records relating to the arrest, charge or other matters arising out of the arrest or charge: Provided, That any person who has previously been convicted of a felony may not make a motion for expungement pursuant to this section. The term records as used in this section includes, but is not limited to, arrest records, fingerprints, photographs, index references or other data whether in documentary or electronic form, relating to the arrest, charge or other matters arising out of the arrest or charge. Criminal investigation reports and all records relating to offenses subject to the provisions of article twelve, chapter fifteen of this code because the person was found not guilty by reason of mental illness, mental retardation or addiction are exempt from the provisions of this section.
- C. Commissioner must revoke the privilege to drive upon receipt of the Statement of Arresting Officer. W.Va. Code 17C-5A-2; *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998).

V.

STANDARD OF REVIEW

The question presented, *i.e.* whether the circuit court may properly order the DMV to expunge a person's DUI record, is a legal one. Inasmuch as this is purely a legal question, this Court's standard of review is *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995).

VI.

ARGUMENT

The circuit court cited no authority for ordering expungement of the Appellee's DUI record at the Division. It relied solely on the dismissal of the criminal charges: "because there was no adjudication on the merits of the criminal case, expungement of both the criminal and the administrative records is appropriate." Order at 2.

The revocation of the Appellee's license was administrative, and was unchallenged. The Commissioner revoked Respondent's privilege to drive based upon receipt of the Statement of Arresting Officer, pursuant to W. Va. Code § 17C-5A-2. The revocation was not based on a criminal conviction.

Inasmuch as there is no provision for expungement of DUI records maintained by the Division, the Order's mandate is non-viable. Further, the Order violates statutory record-keeping requirements imposed by statute upon the Division. For example, W. Va. Code § 17B-2-14(3) requires the Division to maintain records of, *inter alia*, "The name of every licensee whose license has been suspended or revoked by the division and after each such name a notation of the reasons

for such action.” Notably, the statute providing for revocation on conviction (as opposed to revocation based upon the Statement of Arresting Officer) makes no provision for expungement. W.Va.Code §17C-5A-1a. One would think that if the legislature intended to provide for expungement of any of the Division’s records, it would have done so in this statute.

More importantly, expungement of DUI records precludes enhancement of penalty for subsequent offenses. Although the Division correctly found that Appellee was DUI, and this has never been challenged, if the Appellee is arrested again for DUI, the Division will be forced to treat it as a first offense. W. Va. Code §§ 17C-5-7 and 17C-5A-2 set forth the revocation periods required to be imposed by the Commissioner, based upon prior suspensions or revocations. *See also, Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985)(per curiam). Subsequent DUI revocations require reliance on previous revocations in order to apply the appropriate penalty (*i.e.*, a revocation period of ten years for a second offense; or life, for a third offense). It would work a manifest injustice to the “innocent public” to treat a repeat DUI offender as a perennial first-offender. *See, Carney v. Sidiropolis*, 183 W.Va. 194, 394 S.E.2d 889 (1990)(per curiam).

There is a difference between judicial imposition of criminal penalties and the administrative revocation or suspension of a driver’s license, and, consequently, in the records kept in each type of case. Here, Appellee requested expungement of records based upon W.Va. Code § 61-11-25, a criminal statute. The distinction between the two kinds of records is clarified in *Shell v. Bechtold, supra*: “The revocation provisions are not penal in nature, and should be read in accord with the general intent of our traffic laws to protect the innocent public.” 175 W. Va. 796, 338 S.E.2d 396 (citations omitted). In this case, the Petition was a form made for requesting

expungement of criminal records pursuant to W. Va. Code § 61-11-25. Neither that code section nor any other provides for expungement of administrative records at the DMV.

Revocation of a driver's license for DUI falls entirely within the Commissioner's jurisdiction, not within the jurisdiction of the criminal court. In *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998), this Court (Davis, C.J.) discussed the Commissioner's jurisdiction to revoke a license for DUI:

As noted above, subject matter jurisdiction means, generally, jurisdiction over the nature of the claim. Considering the above-quoted statute [W. Va. Code § 17A-2-9] in light of this general principle, it is apparent that this provision grants the Commissioner the authority, and therefore vests in him/her the subject matter jurisdiction, to "enforc[e] ... all laws the enforcement of which is now or hereafter vested in the department." The provisions of W. Va. Code § 17C-5A-1(c) require the Commissioner to enforce W. Va. Code § 17C-5-2, which prohibits driving under the influence of alcohol, controlled substances or drugs, by mandating that the Commissioner revoke the driver's license of individuals violating that section of the Code. Thus, the Commissioner's decisions under 17C-5A-1(c) are within the jurisdictional province of W. Va. Code § 17A-2-9 in that such decisions are rendered to enforce a law the enforcement of which is vested in the division.

202 W. Va. 608, 505 S.E.2d 671 (footnote omitted).

In *Coll, supra*, this Court also noted that there are "alternative evidentiary bases" on which the Commissioner may administratively revoke a driver's license (*i.e.*, for blood alcohol content of 0.1 or more *or* for DUI). 202 W. Va. 608, 505 S.E.2d 671. The administrative basis for revocation of the driver's license by the Commissioner is *completely separate* from any criminal actions.

Appellee's basis for requesting expungement in this matter is not supportable. He never challenged the legitimacy of his license revocation, but merely averred that his insurance rates have gone up. In his unverified "Statement of Facts" Appellee stated, "Due to the fact that the arrest for DUI remains on record with the Department of Motor Vehicles, my automobile insurance premiums

have dramatically risen.” This is not a basis on which to grant expungement of administrative records, especially when no other basis in law exists to do so.

VII.

RELIEF REQUESTED

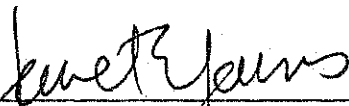
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Appellant hereby respectfully requests that the Order be reversed and vacated.

Respectfully submitted,

**DOUGLAS STUMP, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

By counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing "Brief of Appellant" was served upon the following by depositing a true copy thereof, via certified mail, return receipt requested, postage prepaid, in the regular course of the United States mail, this 16th day of June, 2004, addressed as follows:

Jeffrey Mullen, D.O.
741 Erow Street
Morgantown, WV 26505



JANET E. JAMES