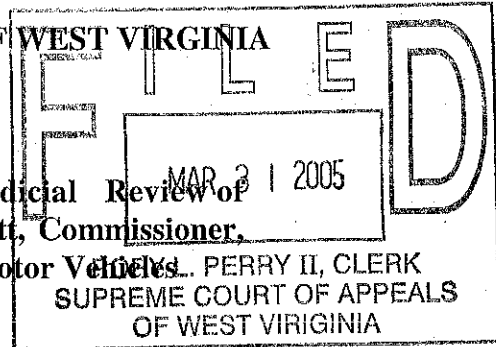


NO. 32531

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Re: Petition of Kenneth D. Donley for Judicial Review of  
Administrative Decision Made by Roger Pritt, Commissioner,  
Department of Transportation, Division of Motor Vehicles



FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

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APPELLEE'S BRIEF

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Respectfully submitted,

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Commissioner of the Division  
of Motor Vehicles,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE:        PETITION OF KENNETH D. DONLEY FOR  
              JUDICIAL REVIEW OF ADMINISTRATIVE  
              DECISION MADE BY ROGER PRITT,  
              COMMISSIONER, DEPARTMENT OF  
              TRANSPORTATION, DIVISION OF MOTOR  
              VEHICLES

APPELLEE'S BRIEF

This response brief is submitted by the Appellee, F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles<sup>1</sup>, Department of Transportation, in response to the *Brief Submitted in Support of the Appeal of Kenneth D. Donley*, received by Appellee on March 2, 2005.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal from an order of the Mercer County Circuit Court, entered October 27, 2004, by the Honorable John R. Frazier, Judge (hereinafter, "Order"), in an administrative appeal styled *In Re Petition of Kenneth D. Donley for Judicial Review of Administrative Decision Made by Roger Pritt, Commissioner, Department of Transportation, Division of Motor Vehicles, Suspending the License of Kenneth D. Donley to Operate a Motor Vehicle*, Civil Action No. 03-C-496-F. The origins of this appeal lie in the conviction of the Appellant, Kenneth D. Donley (hereinafter, "Appellant") for driving under the influence of alcohol (hereinafter, "DUI") which led to the administrative revocation of his privilege to drive. Appellant challenged the revocation at the administrative level.

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<sup>1</sup>Effective January 1, 2004, F. Douglas Stump succeeded Roger Pritt as Commissioner of the Division of Motor Vehicles.

After an administrative hearing held on September 9, 2002, the purpose of which was for Appellant to present evidence to show that he was not the same person named in the transcript of conviction, the Commissioner of the Division of Motor Vehicles (hereinafter, "Commissioner") issued a Final Order revoking Appellant's privilege to drive for a period of ten years, with a possibility of reinstatement in five years. Said order was effective September 9, 2003.

Appellant appealed the Final Order to the Circuit Court of Mercer County on September 3, 2003. By Order entered on October 27, 2004, the Circuit Court upheld the Commissioner's Final Order revoking Appellant's driver's license; however, the Circuit Court further ordered that the effective date of the revocation be set as October 1, 1998, which would make Appellant eligible to have his license reinstated as of September 23, 2004, after complying with the statutory requirements for reinstatement.

Appellant's Petition for Appeal was filed with this Court on October 29, 2004. By Order entered on February 9, 2005, this Court granted Appellant's Petition for Appeal.

## II.

### STATEMENT OF FACTS

The events that led to Appellant's arrest, and ultimately to the revocation of his privilege to drive, began on April 18, 1998, when Appellant was arrested for DUI by Senior Trooper M.R. Crowder of the West Virginia State Police Department. Appellant was convicted for the April 18, 1998 offense on June 18, 1998, in the Mercer County Magistrate Court. The Abstract of Judgment from the Mercer County Magistrate Court was not received by the Division of Motor Vehicles

(hereinafter, "Division") until March 6, 2001. Admin. Exhibit 1.<sup>2</sup> As a result, the Division issued an initial revocation order, dated December 11, 2001, advising Appellant that his privilege to drive in West Virginia was being revoked. Admin. Exhibit 2. Appellant was advised of his right to request an administrative hearing to challenge the revocation on the single issue allowed by law, which was whether Appellant was the same person named in the Abstract of Conviction.

Upon Appellant's timely request, an administrative hearing was scheduled for March 25, 2002. However, this hearing was continued by motion of the Commissioner until September 9, 2002. The Commissioner concluded that "the Respondent named in the transcript of the Judgment of Conviction, transmitted to the Division of Motor Vehicles by the Magistrate Court of Mercer County, West Virginia, and the Respondent whose driving privilege is being revoked by the Division of Motor Vehicles, based upon that transcript of Judgment of Conviction, are one and the same person." Final Order at 5. Admin. Exhibit 11. Pursuant to his statutory duty<sup>3</sup>, the Commissioner issued a Final Order, which took effect on September 9, 2003, revoking Appellant's privilege to drive in West Virginia "for a period of ten years and thereafter until all obligations for reinstatement are fulfilled." Final Order at 6. The enhanced revocation period of ten years, with a possibility of reinstatement after five years, resulted from Appellant's arrest for DUI on December 20, 1992.<sup>4</sup>

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<sup>2</sup>Exhibits in the administrative record are referred to herein by the numbers assigned at the administrative level.

<sup>3</sup>W. Va. Code § 17C-5A-2(i).

<sup>4</sup>If the driver's license has been suspended or revoked for a DUI-related offense "within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years." W. Va. Code § 17C-5A-2(i).

On September 3, 2003, Appellant filed the underlying appeal in the Circuit Court pursuant to the Administrative Procedures Act. Admin. Exhibit 12. On October 27, 2004, Judge Frazier entered an Order which upheld the Commissioner's Final Order revoking Appellant's driver's license, but changing the effective date of the revocation of Appellant's drivers' license to October 1, 1998, which would make him eligible to have his license reinstated as of September 23, 2004, if he complied with the requirements for reinstatement.

### III.

#### ISSUE PRESENTED

- I. **WHETHER THE COMMISSIONER MET DUE PROCESS REQUIREMENTS IN HOLDING THE HEARING AND ISSUING THE FINAL ORDER REVOKING APPELLANT'S LICENSE.**

### IV.

#### POINTS AND AUTHORITIES

- A. "Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syl. pt. 1, *Francis O. Day Co. v. Director, Division of Environmental Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994).
- B. "'Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)." Syl. pt. 5, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).
- C. Any such hearing shall be held within one hundred eighty days after the date upon which the commissioner received the timely written request therefor, unless there is a postponement or continuance. The commissioner may postpone or continue any hearing on the commissioner's own motion, or upon application for each person for good cause shown. W. Va. Code § 17C-5A-2(b).

- D. The Commissioner may postpone or continue a hearing on his or her own motion. 91 C.S.R. 1, § 3.8.3.
- E. “[W]hen the Department continues a revocation hearing, the Department's notice must state the reasons for the continuance, identify who requested the continuance and provide a specific future hearing date.” *State ex rel. Cline v. Maxwell*, 189 W. Va. 362, 367, 432 S.E.2d 32, 37 (1993).

## V.

### STANDARD OF REVIEW

This Court must apply a “clearly wrong” standard to its review of the facts of this case, and a *de novo* standard to its review of the law applied. “Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.” Syl. pt. 1, *Francis O. Day Co. v. Director, Division of Environmental Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994). “Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).” Syl. pt. 5, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

This Court has determined that it may not substitute its judgment for that of the administrative body, but must look at the record as a whole to determine whether the agency’s decision is supportable. “This Court, in conjunction with appeals under the Administrative Procedures Act, has indicated that a reviewing court must evaluate the record of the agency’s proceedings to determine whether there is evidence on the record as a whole to support the agency’s decision. The evaluation is to be conducted pursuant to the administrative body’s findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts.”

*Donahue v. Cline*, 190 W. Va. 98, 102, 437 S.E.2d 262, 266 (1993) (per curiam) citing *Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187 W. Va. 312, 418 S.E.2d 758 (1992)(per curiam).

## VI.

### ARGUMENT

#### I. THE COMMISSIONER MET DUE PROCESS REQUIREMENTS IN HOLDING THE HEARING AND ISSUING THE FINAL ORDER REVOKING APPELLANT'S LICENSE.

Appellant asserts that the trial court erred in "finding that technically the Commissioner complied with the statute of limitations and due process requirements." Appellant's Brief at 8. He complains that the administrative hearing was not held within the one hundred eighty day requirement set forth in the statute.

Much of the delay of which Appellant complains was due to the Mercer County Magistrate Court's failure to transmit the Abstract of Judgment. The Division did not revoke Appellant's license during that period; the Division did not issue its initial order of revocation until it received the Abstract of Judgment.

Appellant was arrested on April 18, 1998, for DUI and was convicted on June 18, 1998, in the Mercer County Magistrate Court. The Division did not receive the Abstract of Judgment from the Mercer County Magistrate Court until March 6, 2001. Appellant complains about the length of time which passed between the Appellant's guilty plea and the Magistrate's transmitting the Abstract of Judgment to the Division; however, the Division had no control over the delay in receiving the Abstract of Judgment from the Magistrate's office. Moreover, the 180-day timeframe

in W. Va. Code § 17C-5A-2(b) has no applicability to the transmission of an Abstract of Judgment from the Magistrate to the Division.

In the Circuit Court's Order, Judge Frazier correctly found that "the Commissioner technically met the requirements of the statutory provisions for providing [Appellant] a hearing within the required time limit." However, the Court incorrectly imposed revocation dates for the revocation of Appellant's license.

The Circuit Court found that the effective date of the revocation of Appellant's driving privilege should be set for October 1, 1998, and that Appellant is eligible to have his license reinstated as of September 23, 2004, after complying with the statutory requirements. However, the Commissioner was unaware of the Appellant's guilty plea until March 6, 2001, when it received the Abstract of Judgment. The Appellant's license was not suspended or revoked during that period. Indeed, his license was not revoked until September 9, 2003, because the revocation was stayed pending his "identity" hearing before the Division. Thus, the Circuit Court erred in imposing a sham revocation period beginning some five years before Appellant actually suffered a revocation. The revocation period for a ten-year revocation such as Appellant's may be halved to five years if the driver completes the Safety and Treatment Program and pays applicable fees; thus, the Circuit Court effectively eliminated the revocation period in Appellant's case.

Appellant errs in stating: "The Commissioner showed the Petitioner pled guilty on April 18, 1998." Petitioner's Brief at 6. In fact, the Order of Revocation dated December 11, 2001 stated that "this Division has received notice that you were convicted of driving a motor vehicle in this state while under the influence of alcohol on Apr 18, 1998." This revocation order stated that Appellant

was convicted of the April 18, 1998 DUI arrest, not that Appellant was convicted on April 18, 1998. This order was correct and did not list the wrong date as Appellant states in his brief.

Appellant timely requested an administrative hearing by letter dated December 18, 2001. By Notice of Hearing, dated December 27, 2001, Appellant was notified that the hearing was scheduled for March 25, 2002. On March 4, 2002, a Continuance and Rescheduling letter was sent that rescheduled the hearing for September 9, 2002, upon the motion of the Commissioner because there was no hearing examiner available. W. Va. Code § 17C-5A-2 allows for such continuances:

Any such hearing shall be held within one hundred eighty days after the date upon which the commissioner received the timely written request therefor, unless there is a postponement or continuance. The commissioner may postpone or continue any hearing on the commissioner's own motion, or upon application for each person for good cause shown. The commissioner shall adopt and implement by a procedural rule written policies governing the postponement or continuance of any such hearing on the commissioner's own motion or for the benefit of any law-enforcement officer or any person requesting the hearing, and such policies shall be enforced and applied to all parties equally.

W. Va. Code § 17C-5A-2(b). The procedural rule that governing continuances of hearings provides as follows:

The Commissioner may postpone or continue a hearing on his or her own motion. The motion shall be for good cause including, but not limited to, docket management, **availability of hearing examiners** or other essential personnel, Division error in scheduling or notice, or mechanical failure of essential equipment, i.e. recording equipment, file storage equipment, etc.

91 C.S.R. 1, § 3.8.3 (emphasis added).

The Commissioner followed all statutory and procedural rule requirements. The administrative hearing was scheduled within the one hundred eighty days provided for in statute, but

was legitimately continued beyond that period on motion of the Commissioner. “[W]hen the Department continues a revocation hearing, the Department’s notice must state the reasons for the continuance, identify who requested the continuance and provide a specific future hearing date.” *State ex rel. Cline v. Maxwell*, 189 W. Va. 362, 367, 432 S.E.2d 32, 37 (1993). The Commissioner’s notice complied with all these requirements by stating “the request made by Motion of the Commissioner for a continuance on the hearing scheduled for March 25, 2002 at 1:00 p.m., has been granted because there is no assigned hearing examiner for this location at this time. The hearing has been rescheduled for September 9, 2002.” Admin. Exhibit 5.

The continuance of the hearing removed the Commissioner from the 180-day requirement set forth in W. Va. Code §17C-5A-2(b). Thus, Appellant’s argument is without merit.

Moreover, Appellant was not prejudiced by the delay. The revocation of Appellant’s driver’s license was stayed pending issuance of the Final Order. Appellant was not “prejudiced by the actions of the Division of Motor Vehicles because he has been without a license to drive an automobile since his license was revoked by the DMV.” Appellant’s Brief at 13-14. The offense that resulted in the revocation of Appellant’s driving privilege occurred on April 18, 1998, but the Final Order revoking Appellant’s driving privilege did not go into effect until September 9, 2003. Thus, Appellant did not lose his driving privileges until September 9, 2003.

The delay between the time of the Division’s administrative hearing and the issuance of the Final Order did not unconstitutionally deprive Appellant of due process. *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996) sets forth the analysis to be followed by the Court in analyzing whether delay has reached unconstitutional proportions. The holding in that case supports the Division’s position in the present case in that this Court found that there was not a delay

which deprived the Plaintiff therein of any rights (“this case does not come close to exceeding the limits of fairness and reasonableness.”) *Hutchison*, 198 W. Va. 155, 479 S.E.2d 665.

This Court enunciated the principles that 1) the Court will not set bright lines discerning when the delay becomes unconstitutional (“This Court cannot set definite temporal boundaries for determining when a particular delay caused by a state actor's misconduct rises to constitutional dimension; the flexibility required by due process doctrines and the range of variables that can affect fairness in this context preclude our imposing specific time limits.”) 198 W. Va 155-56, 479 S.E.2d 665-66; and 2) that averments of delay cannot serve to determine the underlying merits of a case (“Although we have held that due process requires governmental agencies to comply with their own regulations, we have also refused to confer substantive entitlements on claimants simply because an agency failed to comply strictly with a particular time deadline.”) 198 W. Va. 157, 479 S.E.2d 667 (citations omitted).

Not only does Appellant ignore the fact the first three years of delay were due to the Magistrate Court's failure to transmit the Abstract of Judgment, he misinterprets W. Va. Code §17C-5A-2 as it applies to the present case. The Appellee did not deny Appellant due process, and acted appropriately in granting a hearing, continuing it, and finally issuing its Final Order. The Order was correct in finding that the Commissioner met statutory requirements; however, there is error in the Order regarding the date of imposition of the Appellant's revocation period. Thus, the Order must be affirmed in part, and modified to reflect the appropriate and actual effective date of Appellant's revocation as September 9, 2003.

VII.

CONCLUSION

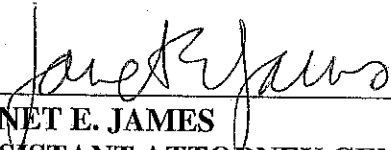
WHEREFORE, based upon the foregoing, the Appellee hereby respectfully requests that the Order entered by the Circuit Court of Mercer County on October 27, 2004, denying Appellant's Petition for Judicial Review, be affirmed in part and modified to reflect the correct date of revocation as September 9, 2003.

Respectfully submitted,

F. DOUGLAS STUMP,  
Commissioner of the Division  
of Motor Vehicles,

By Counsel,

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ATTORNEY GENERAL

  
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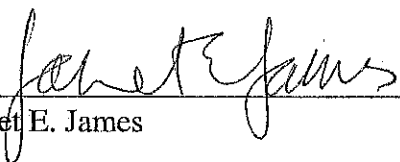
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Department of Transportation, Division of Motor Vehicles

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Appellee's*  
*Brief* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the  
regular course of the United States mail, this 31<sup>st</sup> day of March, 2005, addressed as follows:

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