

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

KENNETH E. REESE, JR.,

Petitioner,

v.

Petition No. 08-P-139

JOSEPH CICCHIRILLO,
Commissioner, Department of Transportation,

Respondent.

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FINAL ORDER MODIFYING LICENSE REVOCATION

On the 29th day of October, 2008, the Petitioner appeared, in person and by his counsel, David W. Frame, and the Respondent, Joseph Cicchirillo, Commissioner of the West Virginia Department of Transportation, appeared, by Janet James, Assistant Attorney General for the State of West Virginia, who appeared by telephone, and argued matter.

Based upon the petition, the record on file and the facts stipulated to by the parties, the Court makes the following findings of fact and conclusions of law:

Findings of Fact:

1. On May 23, 2002, the petitioner was arrested and charged with 1st offense D.U.I., a violation of West Virginia Code §17C-5-2, in Harrison County, West Virginia.
2. On May 28, 2002, the petitioner entered a plea of nolo contendere in the Magistrate Court of Harrison County, and he was sentenced by the Magistrate.
3. Based on the 2002 arrest for D.U.I., the defendant was notified by the

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Division of Motor Vehicles that his operator's license would be revoked unless he requested an administrative hearing to contest the revocation.

4. The defendant requested and was granted an administrative hearing.

5. The petitioner appeared at the date, time and place designated by the D.M.V. for the administrative hearing, and the arresting officer did not appear.

6. The D.M.V. dismissed the administrative proceeding, reversed the Order of Revocation, and took no further action with respect to his license.

7. On May 31, 2008, the petitioner was arrested and charged with 2nd offense D.U.I., a violation of West Virginia Code §17C-5-2, in Harrison County, West Virginia.

8. On July 23, 2008, as part of a plea bargain with the State of West Virginia, the petitioner entered a plea of nolo contendere to the offense of 1st D.U.I. in the Magistrate Court of Harrison County, and he was sentenced by the Magistrate.

9. Based on the 2008 arrest for D.U.I., the defendant was notified by the West Virginia Division of Motor Vehicles that his license would be revoked for D.U.I., unless he requested an administrative hearing to contest the revocation.

10. The Official Notice from the D.M.V. recited that the petitioner had a "prior offense," dated May 23, 2002.

11. The defendant requested an administrative hearing on the basis that he did not believe that his 2002 nolo plea constituted a valid predicate offense for the purpose of enhancing his revocation on the 2008 offense.

12. The D.M.V. scheduled an administrative hearing.

13. The Clerk of the Magistrate Court forwarded an Affidavit of Judgment to the D.M.V. with respect to the petitioner's plea of nolo contendere for the 2008 D.U.I.

14. On August 8, 2008, the D.M.V. mailed an Order of Revocation, notifying the

petitioner that his administrative hearing was canceled and his license was revoked, effective September 12, 2008, as a result of his "conviction" in the Magistrate Court.

15. Without explanation, the August 8, 2008 order stated that the petitioner's revocation was for the period of "one (1) year and thereafter accompanied by successful completion of the mandatory Alcohol Test and Lock Program pursuant to Chapter 17C, Article 5A, Section 3a of the Code of West Virginia, and completion of the Safety and Treatment Program"

16. The one (1) year revocation imposed on the petitioner in the August 8, 2008 Order of Revocation is the enhanced penalty for a second offense. West Virginia Code §17C-5A-3a

17. The Petitioner filed his petition on September 8, 2008, seeking judicial review of the administrative decision and order within thirty (30) days of receiving notice of the agency decision and order, pursuant to West Virginia Code §29A-5-4, and the Respondent has made no objection regarding filing, service or any other jurisdictional aspect of the appeal.

18. The petitioner admits that he entered a plea of nolo contendere twice in the last ten (10) years, and he concedes that revocation of his license is appropriate for the most recent offense, but he contends that the administrative revocation should be limited to the period applicable to a first offense because the 2002 plea of nolo contendere did not result in the revocation of his license, the D.M.V. did not follow the procedures set out in West Virginia Code §17C-5A-1a to establish a "conviction," neither the Magistrate Court or the D.M.V. documentation relating to the 2002 offense ever used the words convict, convicted or conviction and it violates due process to apply the current interpretation adopted in the cases of *State ex rel. Stump v. Johnson*, 217

W.Va. 733, 619 S.E.2d 246 (2005), and *State ex rel. Barker v. Bolyard*, 221 W.Va. 713, 656 S.E.2d 464 (2007) regarding the effect of a nolo plea retroactively.

Conclusions of Law

1. The petitioner's 2002 plea of nolo contendere did not trigger the automatic revocation of his license, because, prior to *Stump* and *Baker*, the D.M.V. interpreted existing law to allow the challenge of the administrative license revocation after a plea of nolo contendere, and only convictions that resulted in license suspension or revocation were deemed to be valid predicate offenses for the purpose of enhancement of administrative penalties for subsequent offenses, per West Virginia Code §17C-5A-2(n).
2. As a result of the D.M.V.'s interpretation and application of the law prior to *Stump* and *Baker*, it did not follow the procedural steps set out in West Virginia Code §17C-5A-1a to revoke the petitioner's license and establish a "conviction" for purposes of enhancement of the penalty for subsequent offenses.
3. The Due Process clause of the West Virginia State Constitution applies to civil administrative license revocation proceedings, in recognition of the important property interest inherent in drivers' licenses. *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978).
4. The most basic requirement embodied in the concept of Due Process is that the government must follow the process or procedure set out by law.
5. Since the D.M.V. did not observe the procedure set out in West Virginia Code §17C-5A-1a to revoke the petitioner's license and establish a "conviction" after his 2002 nolo contendere plea, it violates Due Process for the D.M.V. to treat the petitioner's 2002 nolo plea as a "conviction" or "revocation" retroactively.
6. Although West Virginia Code §17C-5A-3a modified the law by adding prior

"conviction[s]" as well as a prior "suspension[s]" or "revocation[s]," as a basis for enhanced penalties for subsequent offenses, West Virginia Code §17C-5A-3a does not define "conviction," nor does any other section of chapter 17C, article 5A define it, beyond the provisions of West Virginia Code §17C-5A-2, which only treat a "conviction" that results in a "suspension" or "revocation" as a valid predicate offense for enhancement of subsequent revocations. See, West Virginia Code §17C-5A-2(n).

7. The term "conviction" is broadly and generally defined as the "act or process of judicially finding someone guilty of a crime; the state of having been proved guilty." *Black's Law Dictionary*, as cited in n. 8 of the majority opinion of *Baker*.

8. In the courts of this state, criminal defendants may enter and persist in asserting one (1) of three (3) pleas: "guilty," "not guilty" or "nolo contendere."

9. It is self-evident that a plea of "nolo contendere" is not a plea of "guilty," and by no twist of logic or rhetoric can a defendant who entered a plea of nolo contendere be said to have been found "guilty."

10. By extension of the definition of "conviction" used by the West Virginia Supreme Court of Appeals, a defendant who pleads nolo contendere was not necessarily "convicted" prior to the *Stump* and *Baker* decisions.


11. The *Stump* and *Baker* opinions do not address the retroactivity of the doctrine they adopted, and, although they did not explicitly overrule prior case law, it would be inequitable to apply the new principle of law adopted in those opinions retroactively to individuals who entered pleas of nolo contendere in criminal cases in reliance upon the prevailing interpretation of that time, later to learn that he is subject to enhanced penalties for subsequent offenses based on a change in the law. See, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 347, 256 S.E.2d 879, 887 (1979) (discussed

and applied recently in *Caperton v. A.T. Massey Coal Company, Inc.*, ___ S.E.2d. ___, 2008 WL 918444 (W.Va.)).

12. The petitioner's 2002 plea of nolo contendere is not a valid predicate offense for the purpose of enhancing the revocation for his 2008 offense because the D.M.V. failed to follow the procedure prescribed by law to establish a "conviction" or "revocation" with respect to his 2002 plea, and it is inequitable to apply the new principle of law adopted in *Stump* and *Baker* retroactively.

Based on the foregoing findings and conclusions, it is hereby **ORDERED** that Commissioner of the Department of Transportation shall modify the revocation of the petitioner's license to reflect the period of time applicable to a first offense, along with the corresponding requirements for participation in the alcohol test and lock program and the safety and treatment programs and the payment of all applicable fines, fees and costs.

ENTERED: March 21, 2008


Thomas A. Bedell, Circuit Court Judge