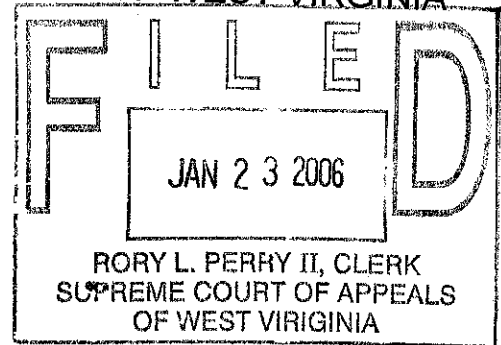


NO. 32876

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

F. DOUGLAS STUMP,  
COMMISSIONER, WEST VIRGINIA  
DIVISION OF MOTOR VEHICLES,  
Petitioner,



THE HONORABLE JACK ALSOP,  
IN HIS OFFICIAL CAPACITY AS JUDGE  
OF THE FOURTEENTH JUDICIAL CIRCUIT,  
LONNIE D. ROSE, and RITA M. TONKIN,  
Respondents,

REPLY BRIEF  
OF  
JACK ALSOP,  
JUDGE OF THE FOURTEENTH  
JUDICIAL CIRCUIT

### **KIND OF PROCEEDING AND NATURE OF RULING BELOW**

This is an action in prohibition whereby the petitioner seeks to prohibit the enforcement of a portion of the circuit court's order, entered in the underlying actions, which portion challenged requires corrective action by the petitioner.

The circuit court found that the procedures being utilized by the Division of Motor Vehicles were violative of constitutional due process principles and statutory requirements and ordered corrective action. The petitioner did not appeal the findings of the circuit court as to the violations of constitutional principles and statutory requirements, which findings have become final. The petitioner is challenging the authority of a circuit court to order corrective action, even when the circuit court finds that the procedures of the petitioner are contrary to law.

## STATEMENT OF THE CASE

### TONKIN

Respondent Tonkin was arrested for DUI on March 20, 1998, in Glenville Gilmer County, West Virginia. Her privilege to drive was revoked by initial order dated March 26, 1998. Tonkin timely requested an administrative hearing. A final order was issued by the Commissioner revoking the driver's license of the respondent Tonkin, and the circuit court, upon a review, set aside the order of revocation and remanded the case to the Commissioner on April 4, 2003. Hearing Examiner, Ramona Ward, heard the case on August 25, 2003, and an order was entered by the Commissioner effective February 22, 2005, once again revoking respondent Tonkin's drivers license. At a hearing held before the circuit court on May 9, 2005, the undisputed testimony was that Hearing Examiner Ramona Ward, recommended that the order of revocation be set aside and reinstating respondent Tonkin's driving privileges. The undisputed testimony was that a staff person changed the recommended decision of Hearing Examiner Ward and submitted to the Commissioner, for the Commissioner's signature, an order upholding the revocation of license, which was entered by the Commissioner. The evidence was that the Commissioner had no knowledge of Hearing Examiner Ward's recommended order and the change by staff. Further, the undisputed testimony before the Circuit Court was that this action of changing recommended decisions of the hearing examiners, without the Commissioner's knowledge, by staff in the Division of Motor Vehicles is not uncommon.

## **ROSE**

Respondent Rose was arrested for DUI on February 8, 2001, in Sutton, Braxton County, West Virginia. His privilege to drive was revoked by initial order dated February 27, 2001. Rose timely requested an administrative hearing. Hearing Examiner, Ramona Ward, heard the case on January 14, 2002, and an order was entered by the Commissioner effective February 22, 2005, revoking respondent Rose's drivers license. At a hearing held before the circuit court on May 9, 2005, the undisputed testimony was that Hearing Examiner, recommended that the order of revocation be set aside and reinstating respondent Rose's driving privileges. The undisputed testimony was that a staff person changed the recommended decision and submitted to the Commissioner, for the Commissioner's signature, an order upholding the revocation of license, which was entered by the Commissioner. The evidence was that the Commissioner had no knowledge of Hearing Examiner Ward's recommended order and the change by staff. Further, the undisputed testimony before the Circuit Court was that this action of changing recommended decisions of the hearing examiners, without the Commissioner's knowledge, by staff in the Division of Motor Vehicles is not uncommon.

## **ARGUMENT**

Your respondent, Jack Alsop, Judge of the Fourteenth Judicial Circuit, asserts that the circuit court did not exceed the jurisdiction of the circuit court nor did the circuit court exceed the legitimate scope of its authority.

As to review of an administrative decision, the Circuit Court has the authority to reverse, vacate or modify the decisions of the agency, if the substantial rights of the petitioner, or petitioners, have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.<sup>1</sup>

The petitioner concedes that this Court has the power to find that the Division's application of its rules violated the due process rights of the Respondent's Tonkin and Rose. (Petitioner's Memorandum, p. 6)

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<sup>1</sup> W. Va. Code 29A-5-4

Further, the petitioner has not challenged the circuit court's findings that the petitioner's actions were erroneous. The circuit court's order in the underlying actions, entered on July 5, 2005, as to those findings, has now become final, the Commissioner having not challenged those findings in this proceeding and period of time for the petitioner to appeal those findings has now expired.<sup>2</sup>

The petitioner essentially argues that although the circuit court has the authority to find that the petitioner has violated constitutional and statutory rights of the respondents, Tonkin and Rose, the circuit court does not have the authority to require that corrective action be taken by the petitioner as to these serious constitutional and statutory transgressions.

The respondent court asserts that such a position is contrary to law and will, if adopted, deprive any court of ever having the authority to see that its orders are enforced, for the proper administration of justice.

Article VIII Section VI of the Constitution of the State of West Virginia provides that the "Circuit Courts shall also have such jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law."

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<sup>2</sup> Rule 3 West Virginia Rules of Appellate Procedure require that any petition for appeal must be filed within four months.

As heretofore set forth, Chapter 29 A Article 5 Section 4 grants the authority of the circuit court to review decision of the petitioner and to vacate such decisions when the decisions are contrary to constitutional and statutory authority.

It is well settled law that the circuit court has the authority to enforce its orders and to make such orders as are appropriate in furtherance of the courts legitimate powers.

“Jurisdiction signifies the power of court to speak the law, both in formulating laws of general application and applying law to individual cases.” **Eastern Associated Coal Corp. v. Doe**, 220 S.E.2d 672, 159 W. Va. 200. (1975).

In addition, the circuit court “has the inherent power to do all things that are reasonably necessary for administration of justice within its scope of jurisdiction.” **Kocher v. Oxford Life Ins. Co.**, 602 S.E.2d 499, 216 W. Va. 56 (2004).

Stated another way, “Jurisdiction is the inherent power of a court to decide a case.” **State ex. Rel McGraw v. Telecheck Services, Inc.**, 582 S.E.2d 885, 213 W. Va. 438 (2003).

A review of the actions by the circuit court reveals that the actions of the court are clearly within its legitimate powers.

After the circuit court found a violation of statutory and constitutional rights (which the petitioner does not challenge), the circuit ordered that corrective action be taken.

The petitioner complains that the circuit ordered the petitioner to cease and desist the use of procedures that the court found to be violative of both constitutional and statutory procedures and asserts that the circuit court does not have the authority to order such action. If a circuit court does not have the authority to order an agency to cease and desist its actions, which violate both statutory and constitutional provisions, then those protections become hollow and such limitation impedes the effective administration of justice and the enforcement of due process protections.

The commissioner further complains that the circuit court, in requiring, the promulgation of regulations, by the commissioner, which regulations will set forth a procedure for the commissioner to follow when the commissioner modifies any recommended decisions of a hearing examiner, violates the separation of powers doctrine.

One must not lose sight of the fact that the commissioner's role to providing for a hearing as to the revocation of one's driver's license, is a role that at a minimum, is a "quasi-judicial" role. **State ex. Rel. City of Huntington v. Lombardo**, Syl. Pt. 1, 143

S.E.2d 535, 149 W. Va. 671 (1965). In such "quasi-judicial" role, the Commissioner must follow legal principles and statutory protections in the administrative hearing process.

It is well settled law that an inferior tribunal should make appropriate findings of fact and conclusions of law, in matter that the inferior tribunal hears, so that an appellate court will have a decision, by which it may make a meaningful review. Commonwealth Tire Co. v. Tri-State Tire Co., 156 W. Va. 351, 193 S.E.2d 544 (1972).

It is also well settled law, that a reviewing court, as to the decisions of the petitioner, must give great weight to the petitioner's findings of fact. Stewart v. West Va. Bd of Exmrs. For Registered Professional Nurses, 197 W. Va. 386, 475 S.E.2d 478 (1996).

Therefore, it is a logical conclusion, that for a circuit court to have a meaningful review, of the actions of the Commissioner, that some type of record should be made, when the Commissioner, pursuant to his statutory authority, elects to modify the decision of the hearing examiner, for it was the hearing examiner that heard the evidence, had the opportunity to observe the witnesses and make determination as to the credibility of the evidence and the weight that such evidence is to receive. The cloak of secrecy, which the petitioner seeks to operate, deprives those involved of being able to determine exactly what has occurred in the administrative proceeding and is violative of due process. One must

not ignore the undisputed evidence in the underlying action is that a staff person, working in the Division of Motor Vehicles, changed and reversed the recommended decision of the hearing examiner, submitted the revised decision to the Commissioner for entry, without the Commissioner ever knowing that the hearing examiner, that heard the case recommended dismissal and the orders recommending dismissal were never submitted to the Commissioner and are not contained within the administrative record of the Division of Motor Vehicles.

The petitioner's argument that the actions of the circuit court are violative of the separations of power doctrine is without merit. The circuit court did not attempt to invade the powers of the commissioner as to the precise manner in which the order of the circuit court is to be followed by the commissioner. The order of the circuit court only requires that the commissioner promulgate such reasonable regulations that are appropriate to ensure that the commissioner, in administrative revocation proceedings, follows the statutory and constitutional mandates.

Such action by the circuit court is proper, for "Where the course of procedure is established by law, it is the duty of the courts to see to it that it is observed until the

legislature in its wisdom shall see fit to change that course of procedure by statute. State ex. Rel. Blankenship v. McHugh, 158 W. Va. 986, 217 S. E. 2d, 49 (1975).

According, the circuit court having jurisdiction of this case, having both the expressed and inherent power to enforce its order, having the duty to see to it that the procedures established by law are followed, prohibition will not lie in this case.

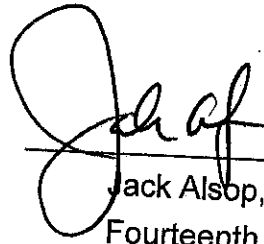
"The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of jurisdiction." *Syl State ex. Rel. Vienyard v. O'Brien*, 100 W. Va. 163, 130 S. E. 111 (1925)." Syllabus Point 1, *State ex. Rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S. E.2d 480 (2004).

Wherefore, the respondent Judge prays that the writ of prohibition be denied, that this Court find that the actions of the circuit court were proper and that the rule to show cause was improvidently issued.

#### CONCLUSION

The action of the circuit court, in the underlying cases, being in accordance with established principles of law, prohibition will not lie to prohibit the enforcement of the circuit court's order.

Respectfully submitted this 20<sup>th</sup> day of January 2006.



Jack Alsop, Judge  
Fourteenth Judicial Circuit  
2 Court Square  
Webster Springs,  
West Virginia 26288

**CERTIFICATE OF SERVICE**

I, Jack Alsop, do hereby certify that I served the foregoing Reply Brief upon the petitioner, via fax and by mailing a true copy thereof to his attorney of record, Janet E. James, Assistant Attorney General, Office of the Attorney General, State Capitol Complex, Building 1, Room W-435, Charleston, West Virginia and upon the respondents, via fax and by mailing a true copy thereof to their attorney of record, Howard J. Blyler, P. O. Box 217, Cowen, West Virginia 26206, on this 20<sup>th</sup> day of January, 2006.

