

IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA

HAROLD PETRY,

Appellant,

v.

Supreme Court No.: 32886

THE STATE OF WEST VIRGINIA, and
F. DOUGLAS STUMP, Commissioner,
West Virginia Division
of Motor Vehicles,

Appellee.

REPLY BRIEF

First, it must be brought to the Commissioner's attention that there is certain factual assertions in the Commissioner's brief that are incorrect. The Commissioner says that Petry originally pled guilty to DUI but, "[s]ubsequently, Appellant was able to have the charge reduced to reckless driving. . ." (Comm'r. Br., at 4). That statement is erroneous. Petry never pled guilty to DUI. He originally pled guilty to reckless driving and the Cabell County Magistrate Clerk sent the wrong information to the Commissioner.¹ (A copy of Petry's plea agreement and disposition are included herein as an exhibit.)

Appellant set forth in his petition the legal and factual support showing that the delay in adjudicating this matter was excessive, unconstitutional, and prejudicial. Caselaw directly on point was cited. *Cline v. Maxwell*, 432 S. E. 2d 32 (W.Va. 1993). For example, it was stated quite clearly in the petition that the Supreme Court of Appeals of West Virginia has held that a

¹Moreover, Petry pled to reckless driving on May 21, 1999. Why did the Commissioner not render a decision prior to this the time he allegedly received the erroneous abstract in 2005?

thirty-two (32) month delay by the Commissioner of Motor Vehicles in a driver's licence revocation proceeding is "presumptively prejudicial," although the "presumption is rebuttable by the government." *Id.* Here, the delay by the Commissioner from the date of the hearing now approaches seven years, i.e., approximately eighty (80) months or nearly *three times as long* as the delay determined to be presumptively prejudicial in *Cline, supra*. Thus, even ignoring the actual prejudice to Petry, there can be no question that the delay was constitutionally excessive, and presumptively prejudicial to Appellant, and warrants reversal of the Final Order.

Despite the fact that the foregoing discussion of the holding in *Cline v. Maxwell, supra*, was one of the centerpieces of Appellant's argument concerning delay, Appellee remarkably offers absolutely no rebuttal or discussion of the *Cline* court's holding concerning "presumptive prejudice." That lack of response is conclusive that no meritorious response exists.

Moreover, as clearly demonstrated in his petition, even if the "presumptive prejudice" had been rebutted, that rebuttal is overcome by the substantial actual prejudice suffered by Petry.

None of the cases cited by the Commissioner support a contrary conclusion. Ignoring *Cline v. Maxwell's* mandate concerning presumptive and actual prejudice, the Commissioner primarily relies on *Hutchison v. City of Huntington*, 479 S. E. 2d 649 (1996) to argue that the delay herein was not manifestly unfair and thus, not a denial of due process. The Commissioner fails to point out, however, that the delay in *Hutchison* was only *four months*, as opposed to the *eighty month* delay in the case at bar. The Commissioner also ignores the *Hutchison* court's holding that due process requires resolution of a claim on the merits "pursuant to articulated standards and in a reasonable timely manner. *Id.*, at 655. (Emphasis supplied). In *Hutchison*, the court merely concluded that a delay as short as four months was not, "so unreasonable as to

offend the basic notions of fairness embodied in the Due Process Clause.” *Id.* How the Commissioner could think that a four month delay is akin to a delay of almost *seven years* is inconceivable, and no attempt is made to articulate any basis for ignoring this distinction. As the *Hutchison* court observed, “there are limits on official delays, and refusals to decide can be tantamount to arbitrary rejections violative of the due process. . .”² *Id.*

Most importantly, while recognizing that analogy was not perfect, the *Hutchison* court observed that the “comparison between speedy trials and prompt administrative action was a good one.” *Id.*, at 666. The speedy trial time limit in Magistrate Court, the court most appropriate for comparison, is one year. Contrary to the Appellee’s argument discussed below, the remedy for the state’s failure to adhere to the speedy trial requirement is dismissal. See *Stiltner v. Harshbarger*, 296 S. E. 2d 861 (WV 1982).

Finally, the *Hutchison* court held that there were a number of considerations in determining whether the delay was constitutionally deficient, such as the length of the delay, the reasons for the delay and harm caused by the delay. *Id.* Here, the length of the delay was extraordinary; the Commissioner had advanced no legitimate reason for delaying his matter and losing the record; and, as pointed out in Appellant’s petition, the harm caused by the delay is serious and irredeemable.³

²Indeed, the *Hutchison* court favorably cited *Allen v. West Virginia Human Rights Comm.*, 824 S. E. 2d 99 (WV 1984), which found that several years of delay in processing Human Rights cases violated due process and equal protection, and *Taylor v. MacQueen*, 322 S. E. 2d 709 (WV 1984), which held that as little as two years in ruling on a case violated Article III, §17, of the *West Virginia Constitution*.

³Also, in *Hutchison*, plaintiff was a property owner who was seeking a building permit. The delay involved the time period between the application for the permit and the decision by the City of Huntington on his application. The court rightly and logically concluded that, “we would

In support of his contention that the delay in this matter was not unreasonable, the Commissioner also relies on *In re Petition of Donley*, 618 S. E. 2d 458 (WV 2005). *Donley* is inapposite.

In *Donley*, Donley was arrested for second offense DUI on April 18, 1998 and on June 18, 1998, he pled guilty to the charge in Mercer County Magistrate Court. For unexplicable reasons, the court did not send the abstract of judgment to the Commissioner until March 6, 2001. Upon receipt, the Commissioner timely issued an order of revocation. On December 18, 2001, Donley requested a hearing which, after one continuance by the Commissioner, was held on September 9, 2002. The Commissioner revoked Donley's license for ten years, effective September 9, 2003.

Donley argued that the revocation was invalid, among other reasons, the delay in revoking his license was a violation of due process. The Circuit Court rejected Donley's contention but backdated the effective date of his revocation to October 1, 1998. The court rejected Donley's due process claim noting that the only issue was whether Donley was the same person who was convicted in Magistrate Court, that the Commissioner had nothing to do with the delay and the Commissioner timely scheduled a hearing upon receipt of the request for hearing, that Donley did not claim prejudice, and in fact, he was not prejudiced by the delay as the court had backdated his revocation to 1998. Thus, "the delay of nearly three years in forwarding the abstract of judgment," said the court, "is simply inconsequential." *Id.*, at 461.

In sum, in *Donley*, prejudice could not even be presumed because from the date that

hamstring governmental efforts to investigate relevant facts and conscientiously consider applications, if we were to impose a strict deadline, as a matter of constitutional law." *Id.* Here, of course, there was no issue of giving the Commissioner time to investigate.

Donley entered his guilty plea, he knew his license would be revoked. In addition, unlike here, Donley didn't even allege prejudice, and couldn't, for the reasons articulated by the court above. Finally, Donley did not rely on an understanding that he would not be losing his driver's license to make important decisions regarding his future.

Citing *Kanawha Valley Transportation Company v. Public Service Commission*, 219 S. E. 2d 332 (WV 1975), *State ex rel. Patterson v. Aldredge*, 317 S. E. 2d 805 (WV 1984), and *State ex rel. Cackowska*, 130 S. E. 2d 204 (WV 1963), the Commissioner next argues that even if the delay constituted a denial of due process, the DMV's delay somehow placed a legal obligation *on the Petitioner* to file a lawsuit in mandamus to force the Commissioner to perform his duty and render the decision. Simply stated, that argument is absurd. Although the caselaw *allows* an individual to pursue mandamus relief when a state official or agency fails to perform a duty, that right is far different than placing the legal burden on a citizen to file lawsuits for extraordinary relief to force state officials and agencies to so act. The law clearly does not impose any such requirement, and no caselaw is cited to support such a novel proposition.

The cases cited by the DMV are inapplicable for other reasons. In none of the cases cited by the Commissioner was a violation of due process alleged or addressed. There is nothing in those opinions that suggest that a litigant has any sort of duty to sue for extraordinary mandamus relief to protect his due process rights, or that failure to file a lawsuit seeking extraordinary relief somehow *waives* a person's constitutional rights under the Due Process Clause. The Commissioner's argument in this regard is disingenuous. Constitutional rights cannot be waived. To the contrary, published decisions state just the opposite – that a court [in this case the quasi judicial functions of the DMV] has “an affirmative duty” to render a decision timely. (*Patterson*,

supra, at *Syllabus* Point 1). Mandamus is merely an avenue of relief that may be pursued to compel a decision, but it neither alleviates a court's "affirmative duty" to act timely, nor does it impose any duty on a citizen to apply for extraordinary relief or be deemed to have waived constitutional rights. Nothing cited by Appellee remotely supports that proposition.

While, as noted by the Commissioner, the *Cline* court did reference the comment in *Kanawha Valley Transportation Co. v. Public Service Comm'n*, *supra* about mandamus as a result of delay, the court nevertheless found that remedy too rigid, recognizing that under proper circumstances, even a six month delay could and should result in dismissal. *Cline*, *supra*, at 367-368. Indeed, the *Cline* court noted that the *Kanawha Valley Transportation Co.* case merely recognized that a delay *less than a year* did not "by itself," justify overturning an order by the Public Service Commission.⁴ *Id.*, at 368. (Emphasis supplied).⁵

It also is telling that the few cases cited by the Commissioner were decided prior to *Cline*. The Commissioner's primary authority is *Kanawha Valley Transportation v. Public Service*

⁴Moreover, it is significant that *Kanawha Valley Transportation Co.*, *supra* and *Allen v. Human Rights Comm.*, 324 S. E. 2d 99 (WV 1984), a case also relied upon by the Commissioner, involved delays between the filing of charges and the hearing, not like here, delays after the hearing and then an attempt to require the driver to undergo another hearing six years later.

⁵If one looks at the implications of the Commissioner's position, it becomes even more apparent that it is wrong not just from a legal perspective but from a policy perspective as well. It is readily conceded by both parties to this litigation that untimely delays by the Division of Motor Vehicles can deprive a driver of his or her constitutional rights. However, the Commissioner wants to shift the burden of protection from the perpetrator of the delay to the victim of the delay. One must keep in mind also that many individuals prosecuted for DUI are people of limited financial resources and simply can't afford additional extraordinary litigation to compel the Commissioner to do his job. In addition, many drivers, especially unrepresented ones, may not understand they are supposed to receive a definitive written decision from the Commissioner. Inordinate delay may mislead them into thinking that the Division has decided not to revoke their licenses which, in fact, is the case herein.

Commission, 159 W. Va. 88, 219 S. E. 2d 332 (1975) which was decided in 1975, thirty years ago. Moreover, in that case, the hearing was held on March 29, 1974 and the order to the company was issued in March 18, 1975, less than one year later. Finally, most significantly and unlike the case here, the company did not even claim *any prejudice* as a result of the delay nor claim there had been any material changes in its position between the hearing and the final order.⁶ Those facts are wholly distinguishable from the facts here.

The record is undisputed that the delay was presumptively prejudicial, and the Commissioner has not offered any rebuttal to that presumption. It also is uncontested that Appellant has suffered "actual prejudice" as the result of the delay. Finally, the cases cited by the

⁶The Commissioner also cites *Allen v. State Human Rights Comm'n.*, 324 S. E. 2d 99 (1984) to support his contention that the Petitioner had a duty to compel the agency to do its job and thus, dismissal was in appropriate. However, in that case, the plaintiffs had filed discrimination complaints against their employer because of extraordinary delay in investigating and deciding their claims. The plaintiffs sought to compel the Commission to render a timely decision on the merits of their claim. Obviously, plaintiffs did not seek dismissal. Dismissal would have foreclosed relief to the plaintiffs. Dismissing their cases would have punished the plaintiffs for seeking protection of their rights and rewarded the agency for its dilatory procedure. Thus, *Allen* is completely irrelevant to the circumstances herein.

The Commissioner also cites *McDonald v. Cline*, 455 S. E. 2d 558 (1995) for the proposition that hardship to the driver is inapplicable to license revocation proceedings and is irrelevant. *McDonald* is factually and legally inapposite. *McDonald* is not a delay case involving the destruction of evidence. After a hearing, McDonald's driver's license was revoked by the Commissioner for driving under the influence of alcohol. On appeal, McDonald made the absurd assertion that he was denied due process of law and equal protection of the laws because his employment depended upon his ability to drive and thus, the loss of his license more negatively impacted on him than the unemployed or those whose jobs were not dependent on their having a driver's license. As McDonald did not claim discrimination based on a protected class, *i.e.* color, creed, sex, national origin or social class, the court summarily rejected his equal protection and due process arguments. Those facts and assertions are totally incongruent with those herein, for the simple reason that they have nothing to do with procedural due process and delay.

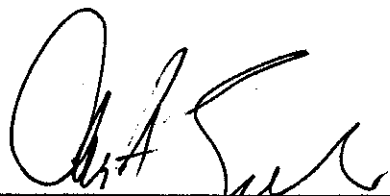
Commissioner in its response are wholly inapposite and inapplicable. Thus, it is abundantly clear that the delay herein and the negligent destruction of the record is unconstitutional, prejudicial, and violated Petry's due process rights, warranting reversal and dismissal.

CONCLUSION

WHEREFORE, for the reasons stated herein and in Appellant's original brief, Appellant prays this honorable court to prohibit the Appellee from holding another hearing on the revocation of his driver's license, that his driver's license be permanently restored to him, or that Appellant be granted whatever alternative relief this honorable court deems appropriate.

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