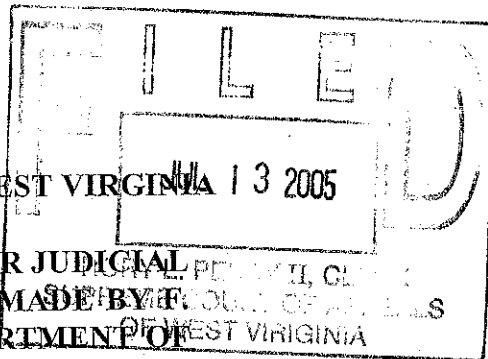


NO. 32748

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN RE:

PETITION BY SCOTT A. MCKINNEY FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISION MADE BY DOUGLAS STUMP, COMMISSIONER, DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, REVOKING THE LICENSE OF SCOTT A. MCKINNEY TO OPERATE A MOTOR VEHICLE

FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

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

By counsel,

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A. (a) Except as otherwise provided in subsection (b) or (d) of this section, any person who drives a motor vehicle on any public highway of this state at a time when his or her privilege to do so has been lawfully suspended or revoked by this state or any other jurisdiction is, for the first offense, guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars; for the second offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for a period of ten days and, in addition to the mandatory jail sentence, shall be fined not less than one hundred dollars nor more than five hundred dollars; for the third or any subsequent offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for six months and, in addition to the mandatory jail sentence, shall be fined not less than one hundred fifty dollars nor more than five hundred dollars		4
(b) Any person who drives a motor vehicle on any public highway of this state at a time when his or her privilege to do so has been lawfully revoked for driving under the influence of alcohol, controlled substances or other drugs, or for driving while having an alcoholic concentration in his or her blood of eight hundredths of one percent or more, by weight, or for refusing to take a secondary chemical test of blood alcohol content, is, for the first offense, guilty of a misdemeanor and, upon conviction thereof, shall be		

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- (c) Upon receiving a record of the first or subsequent conviction of any person under subsection (b) of this section upon a charge of driving a vehicle while the license of such person was lawfully suspended or revoked, the division shall extend the period of such suspension or revocation for an additional period of one year from and after the date such person would otherwise have been entitled to apply for a new license. Upon receiving a record of the second or subsequent conviction of any person under subsection (a) of this section upon a charge of driving a vehicle while the license of such person was lawfully suspended or revoked, the division shall extend the period of such suspension or revocation for an additional period of one year from and after the date such person would otherwise have been entitled to apply for a new license.

W. Va. Code §17B-4-3 5

- B. The division is hereby authorized to suspend the driver's license of any person without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:(1) Has committed an offense for which mandatory revocation of a driver's license is required upon conviction. W. Va. Code 17B-3-6(a) 5

- C. "Neither a prosecuting attorney, law enforcement officer nor any other person has the authority to enter into an agreement that would prevent the Commissioner of the West Virginia Department of Motor Vehicles from carrying out his or her legislative responsibilities or to prevent or impede a law enforcement officer from presenting evidence of the arrest in the Commissioner's license revocation administrative hearing."

Syllabus Point 3, *State ex rel. F. Douglas Stump, Com'r, WV Div. of Motor Vehicles v. Hon. Gary L. Johnson*, --- W.Va. ---, --- S.E.2d ---, No. 32651 (filed July 7, 2005). 6

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DOUGLAS STUMP, COMMISSIONER, DEPARTMENT OF
TRANSPORTATION, DIVISION OF MOTOR VEHICLES.**

BRIEF OF APPELLANT

This brief is submitted by the Appellant, F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division" or "DMV"), pursuant to this Honorable Court's order entered June 9, 2005 in the above-cited matter.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellant seeks reversal of the order entered on November 17, 2004 (hereinafter, "Order"), by the Honorable Judge H.L. Kirkpatrick, III (hereinafter, "Judge Kirkpatrick"), judge of the circuit court of Raleigh County, in an administrative appeal styled *In re: Petition by Scott A. McKinney for Judicial Review of Administrative Decision Made by F. Douglas Stump, Commissioner, Department of Transportation, Division of Motor Vehicles, Revoking the License of Scott A. McKinney to Operate a Motor Vehicle*, Civil Action No. 04-AA-17-K. Through its Order, the circuit court of Raleigh County reversed an administrative driver's license revocation order effective June 4, 2004 (hereinafter, "Final Order").

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from the Final Order, wherein the Appellant suspended Appellee's privilege to drive in West Virginia for one year for operating a motor vehicle while his license was revoked for driving under the influence (hereinafter, "DUI"), pursuant to W. Va. Code § 17B-3-6.

On October 4, 2004, a hearing was held before Judge Kirkpatrick.

By Order entered November 17, 2004, Judge Kirkpatrick reversed the Final Order, citing as grounds that because Appellee was convicted of driving suspended for administrative reasons (which does not require revocation) within the contemplation of W. Va. Code § 17B-4-3(a), the Commissioner was precluded from suspending Appellee's license for an additional year pursuant to W. Va. Code § 17B-3-6. Order at 5.

Appellant hereby seeks appellate review of the Order which reversed the Final Order and resulted in reinstatement of Appellee's driving privilege.

B. THE ADMINISTRATIVE PROCEEDINGS

The Division issued an *Order of Suspension*, dated March 11, 2003, which advised Appellee that his privilege to drive was suspended for one year pursuant to W. Va. Code § 17B-3-6(a)(1). The *Order of Suspension* advised Appellee that "the Division's records and/or other evidence shows you drove on 02/24/02 while your license were suspended for driving under the influence of alcohol."

An administrative hearing was held on February 23, 2004. Based upon the record, the Appellant upheld the suspension. In his Final Order, Appellant concluded that Appellee "operated a motor vehicle on February 24, 2002, while his license was revoked for driving under the influence." Additionally, Appellant found that "Pursuant to West Virginia Code § 17B-3-6(a), the

Division is authorized to suspend the driver's license of any person without preliminary hearing upon showing by its records or other sufficient evidence that the licensee has committed an offense in which mandatory revocation of a driver's license is required upon conviction." Final Order at 3. It was from said Final Order that Appellee appealed to the circuit court, as described above.

II.

STATEMENT OF THE FACTS

Appellee was arrested for DUI on August 1, 1997. His license was revoked based on conviction for that offense on October 2, 1997, and remained revoked for that offense on February 24, 2002, when Appellee was arrested for speeding and for driving while revoked for DUI.

Appellee subsequently plead guilty to reduced charges in the Raleigh County Magistrate Court: an Abstract of Judgment sent to Appellant reflected that on October 9, 2002, Appellee plead guilty to a lesser speeding offense and that he plead guilty to a charge that was reduced from Driving While Revoked for DUI to Driving While Suspended for administrative reasons.

Thus, Appellee's criminal offense was reduced from the offense described in W. Va. Code §17B-4-3(b) (driving a motor vehicle while revoked for DUI) to the offense described in W. Va. Code §17B-4-3(a) (driving a motor vehicle while suspended or revoked for administrative reasons).

However, the Division's records continued to reflect that Appellee's license was revoked for the August 1, 1997 DUI – this was not changed by the reduction of charges to which he plead guilty. Consequently, the Division, pursuant to W. Va. Code §17B-3-6(a)(1), suspended Appellee's license for one year, based upon the showing by its records that he was revoked for DUI on February 24, 2002, and by the evidence in the Abstract of Judgment which reflected that he was driving on February 24, 2002. The suspension order was based upon W. Va. Code §17B-3-6(a), which provides

that the Division may suspend a license upon a showing by its records or "other sufficient evidence" that a driver has committed an offense for which mandatory revocation is required on conviction. The basis for the Division's order was its records, which reflected revocation for DUI, and the Abstract of Judgment, which showed that Appellee was driving on a date when he was revoked for DUI.

III.

ASSIGNMENT OF ERROR

WHETHER THE CIRCUIT COURT ERRED IN RELYING SOLELY ON THE GUILTY PLEA TO DRIVING WHILE REVOKED FOR ADMINISTRATIVE REASONS, DISREGARDING THE EVIDENCE THAT APPELLEE WAS DRIVING ON A DATE WHEN HE WAS REVOKED FOR DUI, FOR WHICH A ONE-YEAR SUSPENSION IS AUTHORIZED.

IV.

POINTS AND AUTHORITIES

- A. (a) Except as otherwise provided in subsection (b) or (d) of this section, any person who drives a motor vehicle on any public highway of this state at a time when his or her privilege to do so has been lawfully suspended or revoked by this state or any other jurisdiction is, for the first offense, guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars; for the second offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for a period of ten days and, in addition to the mandatory jail sentence, shall be fined not less than one hundred dollars nor more than five hundred dollars; for the third or any subsequent offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for six months and, in addition to the mandatory jail sentence, shall be fined not less than one hundred fifty dollars nor more than five hundred dollars.

(b) Any person who drives a motor vehicle on any public highway of this state at a time when his or her privilege to do so has been lawfully revoked for driving under the influence of alcohol, controlled substances or other drugs, or for driving while having an alcoholic concentration in his or her blood of eight hundredths of one percent or more, by weight, or for refusing to take a secondary chemical test of blood alcohol content, is, for the first offense, guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for six months and in addition to the mandatory jail sentence, shall be fined not less than one hundred dollars nor more than five hundred dollars; for the second offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for a period of one year and, in addition to the mandatory jail sentence, shall be fined not less than one thousand dollars nor more than three thousand dollars; for the third or any subsequent offense, the person is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than one year nor more than three years and, in addition to the mandatory prison sentence, shall be fined not less than three thousand dollars nor more than five thousand dollars.

- (c) Upon receiving a record of the first or subsequent conviction of any person under subsection (b) of this section upon a charge of driving a vehicle while the license of such person was lawfully suspended or revoked, the division shall extend the period of such suspension or revocation for an additional period of one year from and after the date such person would otherwise have been entitled to apply for a new license. Upon receiving a record of the second or subsequent conviction of any person under subsection (a) of this section upon a charge of driving a vehicle while the license of such person was lawfully suspended or revoked, the division shall extend the period of such suspension or revocation for an additional period of one year from and after the date such person would otherwise have been entitled to apply for a new license.

W. Va Code § 17B-4-3.

- B. The division is hereby authorized to suspend the driver's license of any person without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:(1) Has committed an offense for which mandatory revocation of a driver's license is required upon conviction. W. Va. Code 17B-3-6(a) .

- C. "Neither a prosecuting attorney, law enforcement officer nor any other person has the authority to enter into an agreement that would prevent the Commissioner of the West Virginia Department of Motor Vehicles from carrying out his or her legislative responsibilities or to prevent or impede a law enforcement officer from presenting evidence of the arrest in the Commissioner's license revocation administrative hearing."

Syllabus Point 3, *State ex rel. F. Douglas Stump, Com'r, WV Div. of Motor Vehicles v. Hon. Gary L. Johnson*, --- W.Va. ----, --- S.E.2d ---, No. 32651 (filed July 7, 2005).

- D. "The interpretation and evaluation of that information is the function of the DMV." *Hamilton v. Gourley*, 103 Cal.App.4th 351 (Cal.App.3 Dist. 2002).

V.

STANDARD OF REVIEW

"[T]his Court applies the same standard of review that the circuit court applied to the Commissioner's administrative decision-giving deference to the Commissioner's purely factual determinations; and giving *de novo* review to legal determinations." *Choma v. West Virginia Div. of Motor Vehicles*, 210 W.Va. 256, 258, 557 S.E.2d 310, 312 (2001).

VI.

ARGUMENT

- A. **THE CIRCUIT COURT ERRED IN RELYING SOLELY ON THE GUILTY PLEA TO DRIVING WHILE REVOKED FOR ADMINISTRATIVE REASONS, DISREGARDING THE EVIDENCE THAT APPELLEE WAS DRIVING ON A DATE WHEN HE WAS REVOKED FOR DUI, FOR WHICH A ONE-YEAR SUSPENSION IS AUTHORIZED.**

The circuit court erred in finding that because Appellee successfully reduced his criminal charge from driving while revoked for DUI (mandatory revocation) to driving while revoked for administrative reasons (no mandatory revocation), the Division was bound to refrain from suspending the license because the new charge is not one for which mandatory revocation is required. The circuit court ignored the Appellant's reliance on W. Va. Code §17B-3-6, which allows the Division to suspend based upon its records and other sufficient evidence.

Judge Kirkpatrick's rationale was that because Appellee's ultimate conviction (for driving while revoked for administrative reasons) is not an offense for which mandatory revocation is required, his license cannot be suspended. However, the facts remain that the Division's records show that Appellee was revoked for DUI (for which mandatory revocation *is* required upon conviction) on February 24, 2002; and the Abstract of Judgment constitutes "other sufficient evidence" (W. Va. Code §17B-3-6) that Appellee was driving on that date. DUI revocation + driving = one-year suspension.

At the hearing in this matter, counsel for Appellee conceded that "Prior to February 24, 2002, Scott McKinney had been arrested for one or more DUIs, and on February 24, 2002, his license were [sic] revoked for driving under the influence of alcohol." Transcript of Hearing before the Honorable H. L. Kirkpatrick, Judge of the Circuit Court of Raleigh County, October 4, 2004 at 3 (hereinafter, "Tr. at ___"). There is no question that Appellee's license was revoked for DUI on the date in question.

The Appellant then relied on the plea to driving while revoked for administrative reasons as evidence that Appellee was in fact driving on the date in question. The combination of these facts was the basis for the suspension pursuant to W. Va. Code §17B-3-6.

As further error, Judge Kirkpatrick relied on an illegitimate plea agreement to reverse the Final Order. Counsel for Appellee told the circuit court: "Mr. McKinney entered into a plea agreement with the state of West Virginia that in exchange for the State dismissing the driving while revoked and the other minor traffic charge, that he would plead guilty to a lesser offense of driving while revoked for administrative reasons." Tr. at 3. This Court has recently held that such an agreement is void as against public policy:

"Neither a prosecuting attorney, law enforcement officer nor any other person has the authority to enter into an agreement that would prevent the Commissioner of the West Virginia Department of Motor Vehicles from carrying out his or her legislative responsibilities or to prevent or impede a law enforcement officer from presenting evidence of the arrest in the Commissioner's license revocation administrative hearing."

Syllabus Point 3, *State ex rel. F. Douglas Stump, Com'r, WV Div. of Motor Vehicles v. Hon. Gary L. Johnson*, --- W.Va. ----, --- S.E.2d ---, No. 32651 (filed July 7, 2005).

The plea agreement in this matter can not properly be used to prevent the Appellant from suspending Appellee's license pursuant to W. Va. Code §17B-3-6. The circuit court erred in relying on the plea.

The circuit court further erred in relying solely on legislative intent as evidenced by statutory amendments to W. Va. Code §17B-4-3 in 1999, and in failing to properly analyze W. Va. Code § 17B-3-6(a). Counsel for Appellee averred that Appellee's plea was based upon changes in W. Va. Code 17B-4-3, which was amended in 1999. Counsel for Appellee told the circuit court: "One of the reasons why Mr. McKinney entered into that plea, and why I encouraged him to do so, was so that a revocation—an extra year of revocation would not be extended because the statute does not provide for it." Tr. at 4-5. In his Order, Judge Kirkpatrick relied on the 1999 amendment to W. Va.

Code §17B-4-3: “Code 17B-4-3 [1999] eliminated the revocation of the person’s driver’s license for an additional year for first offense driving on a suspended license for administrative reasons.” Order at 5. Judge Kirkpatrick found that it was the legislative intent that convictions for driving while revoked for administrative reasons could not be used to suspend; however, Judge Kirkpatrick failed to properly analyze W. Va. Code § 17B-3-6(a), which was the basis for the Division’s *Order of Suspension*, to see that the Appellant relied on its own records as well as the evidence in the Abstract of Judgment (plea).

The Division did not revoke based upon the plea (conviction) itself; that information was used only to establish that Appellee was driving on February 24, 2002. The Division also relied upon its own records, which reflected that Appellee was revoked for DUI on February 24, 2002.

Clearly, Appellee was not convicted for driving while revoked for DUI. Rather, the Division relied on the provisions of W. Va. Code §17B-3-6(a)(1), which authorizes the Division “to suspend the driver’s license” upon a showing “by **its records or other sufficient evidence**” that the licensee “has committed an offense for which mandatory revocation of a driver’s license is required upon conviction.” Division’s **records show** that Respondent was **revoked for DUI** (for which mandatory revocation of a driver’s license is required upon conviction) on February 24, 2002; the **Abstract of Judgment shows**, by his guilty plea to driving on a license revoked for administrative reasons, that Appellee was **driving** on February 24, 2002. Therefore, the Division was authorized, in accordance with W. Va. Code § 17B-3-6, to suspend Appellee’s license for one year.

A California case supports the Division’s use of the Abstract of Judgment as evidence that Appellee was driving on February 24, 2002. In *Hamilton v. Gourley*, 103 Cal.App.4th 351 (Cal.App.3 Dist. 2002), the Third District Court of Appeals found that the DMV may consider the

circumstances of the conviction to determine whether the driver was operating a commercial vehicle at the time of his or her arrest, although this fact was not explicitly in the abstract of conviction. "The interpretation and evaluation of that information is the function of the DMV." 103 Cal.App.4th 359.

VII.

RELIEF REQUESTED


WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant hereby prays that the Order entered by the Circuit Court of Raleigh County on November 17, 2004, reversing the Final Order, be reversed and vacated, and remanded with directions to affirm the Final Order.

Respectfully submitted,

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

By Counsel,

DARRELL V. McGRAW, JR.
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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Brief of Appellant* was served upon the following by depositing true copies thereof, postage prepaid, in the regular course of the United States mail, this 13th day of July, 2005, addressed as follows:

Randy D. Hoover, Esquire
Post Office Box 5521
Beckley, WV 25801



JANET E. JAMES