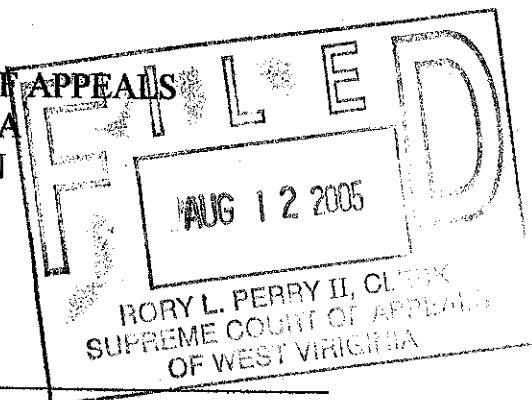


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON

NO. 32748



FROM THE CIRCUIT COURT OF RALEIGH COUNTY, 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

PETITIONER/RESPONDENT SCOTT A. McKINNEY'S
BRIEF OF APPELLEE

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BRIEF OF APPELLEE

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA:**

This Brief of Appellee is submitted by the Appellee, Scott A. McKinney ("Mr. McKinney"), in response to the Brief of Appellant filed on or about July 13, 2005. For the reasons set out below, Mr. McKinney respectfully asks the Court to affirm the Order entered on November 17, 2004 by Chief Circuit Judge H.L. Kirkpatrick III in the Circuit Court of Raleigh County, West Virginia.

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.

Mr. McKinney accepts as accurate the statement of the Kind of Proceeding and Nature of the Ruling Below set out in the Brief of Appellant pp. 1-3.

II. STATEMENT OF THE FACTS.

Mr. McKinney was arrested on August 1, 1997; he was charged with DUI. He was subsequently convicted of that charge. Mr. McKinney's operator's license was revoked on account of that conviction on October 2, 1997 under W.Va. Code § 17C-5A-2 (repl. vol. 2004). His license was still in a state of revocation on February 24, 2002, when Mr. McKinney was arrested in Raleigh County for speeding. Mr. McKinney was also charged under W.Va. Code § 17B-4-3(b)(2004 repl. vol.) with driving on a license that had been suspended on account of a DUI conviction.

The charges arising out of the 2002 traffic stop were tried in the Raleigh County Magistrate's Court. Mr. McKinney pled guilty to a speeding offense that was for a lesser amount of miles over the limit than that for which he had originally been ticketed. In addition, Mr. McKinney pleaded guilty to Driving While Suspended for administrative reasons in violation of W.Va. Code § 17B-4-3(a)(2004 repl. vol.).

Naturally, Mr. McKinney's records at the Department of Transportation, Division of Motor Vehicles ("the DMV"),¹ showed on the date of those 2002 Raleigh County

¹ For ease of reference, the appellant herein will hereinafter be referred to simply as "the DMV."

convictions that the appellee's license continued to be revoked on account of that 1997 conviction. As a result, based on its reading of the statutory scheme, the DMV suspended Mr. McKinney's license for one year pursuant to W. Va. Code § 17B-3-6(1)(2004 repl. vol.). This action was based upon the facts that (a) Mr. McKinney's license was in a state of DUI revocation on the date the appellee was arrested on February 24, 2002; and (b) he had ostensibly been operating a motor vehicle at the time of that February 24, 2002 arrest.

III. APPELLEE'S RESPONSE TO ASSIGNMENT OF ERROR.

Contrary to the DMV's formulation of the issues and subsequent argument based on that formulation, the statutory scheme in effect on the date of his February 24, 2002 did not authorize the DMV to suspend Mr. McKinney's operator's license on account of his (a) 1997 DUI revocation; and (b) February 24, 2002 convictions. For that reason, the circuit court did not err in vacating the one-year suspension levied by the DMV. For that reason as well, the Order entered in the lower court should be affirmed in this proceeding.

IV. STANDARD OF REVIEW.

As this Court recently stated:

"Where the issue on an 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." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Mullen v. State of West Virginia, Division of Motor Vehicles, ___ W. Va. ___, 613 S.E.2d 98, 100 (2005). Where, as here, the facts are undisputed, the Court applies the rule that "[s]ince there is only a legal question presented, and not a factual one, the sole standard of review to

be followed by this Court is *de novo*." *Carroll v. Stump*, ___ W.Va. ___, ___ S.E.2d ___, 2005 W.Va. Lexis 109 at *10 (W.Va., filed July 7, 2005). As a result, the Court's review of the Order below is plenary.

V. ARGUMENT.

THE CIRCUIT COURT CORRECTLY FOUND THAT THE DMV HAD IMPROPERLY INTERPRETED AND APPLIED EXISTING LAW WHEN IT SUSPENDED MR. MCKINNEY'S DRIVER'S LICENSE FOR ONE YEAR.

A. Introduction.

Mr. McKinney agrees that under the statutory scheme that existed prior to 1999, the suspension of his license would have been proper and in accordance with law. In that year, however, the legislature amended those statutes so as to abrogate that rule. Notwithstanding, the DMV has failed to follow those amended statutes. Instead, it engaged in a strained interpretation of the present statutory scheme so as to reach a result which the legislature clearly intended to prevent when it enacted the 1999 amendment. Chief Circuit Judge Kirkpatrick plainly recognized that fact when he issued his Order vacating Mr. McKinney's license suspension. This Court should reject the DMV's attempt to continue misapplying the law as it exists today by upholding that Order from the Raleigh County Circuit Court.

B. The Circuit Court Properly Reversed and Set Aside the Final Order of the Commissioner of the Division of Motor Vehicles.

The correctness of the Order below is best demonstrated by examining the history of the applicable statutory scheme as it has evolved through the years. First, W.Va. Code § 17B-4-3(b) provides as follows:

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.

This Section, as Judge Kirkpatrick pointed out, "was left unchanged by the 1999 amendment" (Order p. 3).

W.Va. Code § 17B-4-3(c)(as amended, 1999), however, was significantly and determinatively changed for purposes of the case at hand. In its former incarnation, the statute provided that:

Upon receiving a record of the conviction of any person *under subsection (a) or (b)* of this section upon a charge of driving a vehicle while the license of such person was lawfully revoked, the division shall extend the period of such suspension 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.

(Emphasis supplied).

W.Va. Code § 17B-4-3(a) referenced in former W.Va. Code § 17B-4-3(c) provided in turn as follows:

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.

That subsection as it now reads contains slight statutory changes but for purposes of the case at hand, it remains identical to its 1999 counterpart.

W.Va. Code § 17B-4-3(c), however, has been significantly changed. In its present form it provides as follows:

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.

Under the present statutory provisions, then, it is clear that if an individual is convicted of driving while his license is revoked on account of a conviction for DUI, his license can be suspended for one year. Of course, Mr. McKinney was not convicted of driving while under a DUI revocation in 2002 at all. Rather, he was convicted of driving while his license was suspended for administrative reasons, which is quite a different matter.

By changing the language "under subsection (a) or (b) of this section" in former subsection (c) to "under subsection (b) of this section" under new subsection (c), the legislature plainly required a *second* conviction for driving while suspended or revoked for administrative reasons to trigger the suspension process. In this case there has been no second such conviction. To recapitulate, therefore, a *first* conviction for driving while under DUI suspension or revocation triggers an additional one-year suspension. It takes a *second or subsequent* conviction for driving while under simple suspension or revocation for any other reason to trigger that one-year suspension. Given the fact that Mr. McKinney's 2002 conviction for driving while his license was administratively suspended was his first offense, he cannot, under the plain wording of the statute, have his license lawfully suspended on account of that conviction.

Notwithstanding, the DMV relies on another statutory source for its decision to suspend Mr. McKinney's license after the 2002 conviction. Specifically, the DMV relies upon W.Va. Code § 17B-3-6(a)(Repl. vol. 2004) for its action. That statute provides in pertinent part as follows:

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.²

The DMV's argument appears to be that even though Mr. McKinney was not convicted on February 24, 2002 of driving while under a DUI suspension or revocation, the agency can nonetheless use the "records or other sufficient evidence" clause of W.Va. Code § 17B-3-6(a)(1) to establish that he was so driving on that date notwithstanding the actual nature of his conviction. *See* Brief of Appellant p. 7. Those alleged "records or other sufficient evidence" would, under the DMV's argument at least, consist of the facts that (a) Mr. McKinney's license was in a state of DUI revocation on the date he was arrested, *i.e.*, February 24, 2002; and (b) Mr. McKinney was undeniably operating a motor vehicle at the time of that February 24, 2002 arrest.³

² W.Va. Code § 17B-3-6(a) has ten subparts; however, a review of the remaining nine subparts reveals that it is clearly W.Va. Code § 17B-3-6(a)(1) upon which the DMV relies in this case.

³ One notes in this regard that the DMV in its administrative Final Order included the following Finding of Fact:

File Exhibit 4 contained an Abstract of Judgment indicating that [Mr. McKinney]

It is easy to see that reliance upon W. Va. Code § 17B-3-6(a)(1) to support the license suspension does nothing more than to beg the question. That is, the question is whether Mr. McKinney did in fact commit that triggering offense. Here, the offense for which Mr. McKinney was found guilty was not a triggering offense under the statute. Thus, § 17B-3-6(a)(1) is not implicated in this case.

One would expect the DMV at this point to protest on the ground that no matter what offense Mr. McKinney was convicted of, the fact remains that the evidence shows that he was operating a vehicle while committing an offense that required mandatory revocation. Again, however, the law as it now stands does *not* require revocation, mandatory or otherwise, on account of such facts. As a result, the following observations and conclusions on that score by Judge Kirkpatrick cannot be faulted:

Here the intention of the Legislature is clear, and that should be the end of the matter. The Legislature has spoken directly to the precise question as issue. Code § 17B-3-6(a)(1) authorizes the suspension of a person's driver's license when mandatory revocation is required upon conviction. Code § 17B-4-3 [1999] eliminated the revocation of the person's driver's license for an additional year for the first offense driving on a suspended license for administrative reasons. [Mr. McKinney] was convicted of Driving Suspended for Administrative Reasons within the contemplation of Code § 17B-4-3(a).

entered a guilty plea in Raleigh County Magistrate Court to the charge of driving while his license was suspended for driving under the influence of alcohol on February 24, 2002, with the date of conviction as October 9, 2002.

(Final Order, Findings of Fact ¶ 5). This finding is wholly inaccurate, of course, for Mr. McKinney did not plead guilty to that charge at all but rather to a charge of driving while suspended or revoked for administrative reasons. To the extent the DMV's administrative disposition of this matter rested upon that factual finding, it is clearly insupportable.

Therefore, the Commissioner has revoked [Mr. McKinney's] license for another year even though [Mr. McKinney] was convicted of an offense that precludes a mandatory revocation. Accordingly, the Final [DMV] Order was violative of Code § 29A-5-4(g)(2) in that it was issued in excess of the statutory authority of the agency.

(Order p. 5)(emphasis by the court).

That is, by removing subsection (a) as a triggering offense under W. Va. Code § 17B-4-3(c), the legislature clearly intended to abrogate the mandatory suspension required under the prior form of the statute *unless* there was an actual conviction for driving while under DUI revocation. It is not contended in this case that there was any such conviction. Under the revised statute, whereas a conviction under W. Va. Code § 17B-4-3(a) would under former practice had led to a mandatory suspension, it is now the case that a "second or subsequent conviction," W. Va. Code § 17B-4-3(c), is required for a one-year suspension to be levied. Here, there is but a single conviction; a fortiori, as judge Kirkpatrick observed, "the intention of the Legislature is clear, and that should be the end of the matter" (Order p. 5).

The DMV also faults the circuit court for "relying solely on legislative intent" (Brief of Appellant at 8). That criticism is misplaced. When one compares the pre- and post-1999 statutory schemes, it could hardly be clearer that "the amendment specifically deleted the mandatory requirement imposed upon the Division to extend a suspension for one year for a first conviction under subsection (a)" (Order pp. 3-4)(emphasis by the court)(footnote omitted). Sole reliance upon legislative intent is proper here because the demonstrated legislative intent was to preclude the very action taken by DMV in this case. It would have

made no sense for the legislature to have amended W.Va. Code § 17B-4-3 to preclude mandatory suspensions under that statute in the case of fact patterns like that presently before the Court but at the same time to permit the DMV to make an end run around the amendment to achieve the very result forbidden under the amended statute by resorting to a different statute under the same chapter, *i.e.*, W.Va. Code § 17B-3-6(a)(1).

This conclusion is supported by the fact that "a well established canon of statutory construction counsels against ... an irrational result [for] 'it is the "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.'" *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W.Va. 71, 561 S.E.2d 793, 799 (2002). Clearly it would be "irrational ... 'absurd, inconsistent, unjust [and] unreasonable,'" *id.*, to presume that the legislature had intended to lessen the penalty for driving on a suspended license while at the same time retaining the identical rejected penalty in another section under the same Chapter. The Court should reject that view by affirming the Order below.

Certainly, statutory draftsmanship is not an exact science. Even though the legislative changes made to W.Va. Code § 17B-4-3 could hardly be clearer in their intended effect, it might be said that the legislative intent would have been clearer still if that body had also changed the language in W.Va. Code § 17B-3-6(a)(1) as part of the amendatory process. Still, when a statute is susceptible of two interpretations in the face of an amendment, the reading "which best harmonizes with the general tenor and spirit of the act," *syl. pt. 6, Old Dominion Building & Loan Association*, 64 W.Va. 101, 46 S.E. 222 (1903), is to be

preferred. That principle entails that even if, *arguendo* only, some small measure of contradiction might be said to exist between W.Va. Code § 17B-4-3 and W.Va. Code § 17B-3-6(a)(1), the demonstrated intent would be best served by applying the changes made to W.Va. Code § 17B-4-3 as better expressing the intent of the legislature in enacting the amendment in the first place. Plainly, an adoption in this proceeding of the DMV's contrary view would be even less faithful to the legislature intent in passing the 1999 amendment.

Indeed, even if amended W.Va. Code § 17B-4-3 and unamended W.Va. Code § 17B-3-6(a)(1) were deemed to be in irreconcilable conflict, the result reached in the circuit court would be the correct one notwithstanding. W.Va. Code § 17B-3-6(a)(1) deals with the subject of the mandatory revocation of drivers' licences in general terms; the provision is not tied to a particular kind of offense. W.Va. Code § 17B-4-3(c), by contrast, deals with revocations and suspensions arising out of the offense of driving while one's license is suspended or revoked. In relation to this proceeding, W.Va. Code § 17B-3-6(a)(1) deals only generally while W.Va. Code § 17B-4-3(c) deals specifically with the particular facts of this case. Under settled rules of statutory construction, this entails that the Court should apply W.Va. Code § 17B-4-3(c) as the more specific statute as opposed to applying W.Va. Code § 17B-3-6(a)(1), the more general enactment.

This principle was expressed by the Court when it stated that “[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” *State ex rel. Wyant v. Brotherton*, 214 W.Va. 434, 589 S.E.2d 812, 818 n. 13 (2003), quoting syl. pt. 1,

UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984). Under that test, it is clear that the more specific terms of W.Va. Code § 17B-4-3(c) should be applied as opposed to the comparative generalities contained in W.Va. Code § 17B-3-6(a)(1). Application of that rule would entail, of course, the approval of the Order entered below.

In any case, it would improper for the Court to treat the various parts of Chapter 17B in isolation. Rather, they should be interpreted and applied as a consistent, unified whole.

As the Court stated many years ago:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syl. pt. 5, *State v. Snyder*, 64 W.Va. 649, 63 S.E. 385 (1908). That rule, needless to say, continues to govern the adjudicative process today. See, e.g., *Messer v. Huntington Anesthesia Group, Inc.*, ___ W.Va. ___, ___ S.E.2d ___, 2005 W.Va. Lexis 116 at *50 to *51 (W.Va., filed July 7, 2005). These principles governed Judge Kirkpatrick's disposition of the case in the court below (Order pp. 4-5), and should prove determinative here as well.

Finally, the DMV argues that "[a]s further error, Judge Kirkpatrick relied on an illegitimate plea agreement to reverse the Final Order" (Brief of Appellant p. 8). In support of that assertion of error, the DMV invokes syl. pt. 3, *State ex rel. Stump v. Johnson*, ___

W.Va. ___, ___ S.E.2d ___, 2005 W.Va. Lexis 110 (W.Va., filed July 7, 2005).⁴ It also points to the fact that there was testimony before Judge Kirkpatrick that the convictions before the Raleigh County Magistrate's Court were the result of a plea bargain (Brief of Appellant p. 8, citing Tr. p. 3).

The DMV's argument is unavailing. There is, in fact, no evidence whatever that Judge Kirkpatrick relied on the fact of a plea bargain in reversing the DMV's Final Order. The mere fact that a plea bargain was mentioned in counsel's argument before the circuit court is hardly sufficient to establish that the circuit judge relied on that fact in reaching his decision. Indeed, one searches Judge Kirkpatrick's Order in vain for any mention of the words "plea bargain" or their equivalent. The DMV's invocation of *Stump v. Johnson, supra*, is a red herring that need not detain the Court from reaching a proper disposition of this appeal.

VI. CONCLUSION

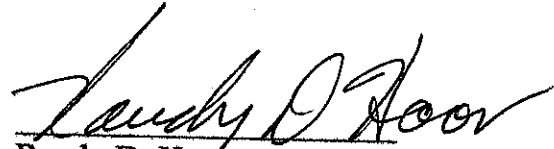
For the reasons set out above, Appellee Scott A. McKinney respectfully asks the Court to deny the instant appeal and instead to affirm the Order entered on November 17, 2004 by Judge H.L. Kirkpatrick III in the Circuit Court of Raleigh County, West Virginia.

Respectfully submitted,

SCOTT A. MCKINNEY

⁴ Because *Stump v. Johnson, supra*, was rendered nearly eight months after Judge Kirkpatrick had issued his Order, the circuit court could only with difficulty have anticipated the holding in that case.

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August 11, 2005

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the foregoing *Brief of Appellee* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States Mail, this day of August 2005, addressed as follows:

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