

NO. 33220

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

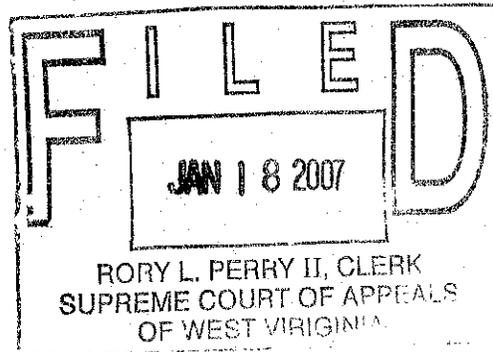
ANDREW MOTEN,

Appellant,

v.

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

Appellee.



BRIEF OF APPELLEE

Respectfully submitted,

WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

JANET E. JAMES
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar #4904
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
(304) 558-2522

TABLE OF CONTENTS

	<u>Page</u>
KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW	1
STATEMENT OF FACTS	2
ISSUE PRESENTED	3
WHETHER THE APPELLEE MUST CONTINUE ITS ADMINISTRATIVE LICENSE REVOCATION PROCEEDINGS PENDING RESOLUTION OF CRIMINAL DRIVING UNDER THE INFLUENCE CHARGES STEMMING FROM APPELLANT'S ARREST?	3
STANDARD OF REVIEW	3
ARGUMENT	4
APPELLEE IS NOT REQUIRED TO CONTINUE ITS ADMINISTRATIVE LICENSE REVOCATION PROCEEDINGS PENDING RESOLUTION OF CRIMINAL CHARGES STEMMING FROM APPELLANT'S ARREST.	4
CONCLUSION	8

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Adkins v. Cline</i> , 216 W. Va. 504, 607 S.E.2d 833 (2004)	4, 5
<i>Carroll v. Stump</i> , 217 W. Va. 748, 619 S.E.2d 261 (2005)	5, 6, 7
<i>Choma v. West Virginia Division of Motor Vehicles</i> , 210 W. Va. 256, 557 S.E.2d 310 (2001)	4, 5, 6, 7
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W.Va. 138, 459 S.E.2d 415 (1995)	4
<i>In re Daniel D.</i> , 211 W. Va. 79, 562 S.E.2d 147 (2002)	5
<i>Francis O. Day Co. v. Director, Division of Environmental Protection</i> , 191 W. Va. 134, 443 S.E.2d 602 (1994)	3
<i>State ex rel. Miller v. Reed</i> , 203 W. Va. 673, 510 S.E.2d 507 (1998)	4
<i>State ex rel. Stump v. Johnson</i> , 217 W. Va. 733, 619 S.E.2d 246 (2005)	5, 6

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Appellee.

BRIEF OF APPELLEE

Comes now the Appellee, Joseph Cicchirillo¹, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "DMV"), by counsel, Janet E. James, Assistant Attorney General, and submits this brief in response and opposition to the *Brief of Appellant*, filed on behalf of Andrew Moten, in which Appellant appeals the denial of a *Motion for Relief from Judgment and/or in the Alternative Motion for Reconsideration* by Final Order of the Honorable John A. Hutchison, Judge of the Circuit Court of Raleigh County, entered on March 6, 2006.

KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

Appellant was arrested on October 19, 2003, by Officer J.M. Kerr, (hereinafter, "Ofc. Kerr") of the Mabscott Police Department, for driving under the influence of alcohol (hereinafter "DUI").

¹Effective October 17, 2005, Joseph Cicchirillo replaced F. Douglas Stump as Commissioner of the West Virginia Division of Motor Vehicles.

Ofc. Kerr apprised the DMV of Appellant's arrest by submitting the requisite "Statement of Arresting Officer."²

Appellant was notified by an *Order of Revocation*, dated November 14, 2003, that his privilege to drive was revoked for ten years. Appellant had a prior offense date of February 12, 1995. He timely requested a hearing, and the hearing was held on May 5, 2004. A *Final Order* was effective on August 23, 2004, upholding the initial revocation of Appellant's privilege to drive for ten years. Appellant filed a *Petition* in the Circuit Court of Raleigh County on August 25, 2004. On December 15, 2004, the circuit court entered a *Final Order* denying the relief requested in the *Petition*. On October 12, 2005, the circuit court entered an *Order Denying Motion for Relief from Judgment*. By *Memorandum Opinion*, dated February 10, 2006, Judge Hutchison denied the Appellant's *Motion for Relief from Judgment and/or in the Alternative Motion for Reconsideration* and ordered counsel for the DMV to prepare an order that recited the findings of the Court. By *Final Order* entered on March 6, 2006, Judge Hutchison once again denied the relief sought by Appellant. It is from this order that Appellant appeals to this Honorable Court.

STATEMENT OF FACTS

On October 19, 2003, Ofc. Kerr had received a be-on-the-lookout call for a vehicle that might be a possible DUI. Transcript of Administrative Hearing held on May 5, 2004 at the DMV office in Beckley, West Virginia at 7 (hereinafter, "Tr. at 7"). Appellant's vehicle matched the description and had the same registration. The arresting officer observed Appellant's vehicle make a very wide left turn without using his signal. Appellant's vehicle then made a wide right turn causing several vehicles in the opposite lane of travel to go up on the sidewalk. Tr. at 7.

²Exhibit 3 of the Certified Record.

Ofc. Kerr initiated a traffic stop and approached the driver. Ofc. Kerr noticed a strong odor of an alcoholic beverage coming from Appellant's vehicle. Tr. at 7. Appellant fumbled around in his wallet looking for his driver's license, registration and proof of insurance, and finally found them in the glove compartment. Tr. at 7. While speaking to Appellant, Ofc. Kerr noticed a strong odor of an alcoholic beverage coming from his breath. Appellant had very bloodshot eyes and slurred speech. Tr. at 7. Ofc. Kerr asked Petitioner to step out of the vehicle to perform field sobriety tests. Tr. at 7.

Before performing the tests, Ofc. Kerr demonstrated each test for Appellant and Appellant advised that he understood the instructions. Tr. at 7. On the heel-to-toe, Appellant kept starting the test before being instructed to start, used his arms for balance and took an incorrect number of steps. On the finger to nose test, Appellant could not touch the tip of his nose with his finger or keep his balance. Appellant could not count from 1001 to 1030 in the correct order. Appellant could not perform the one-legged stand test due to medical problems. Tr. at 7. After failing the field sobriety tests, Petitioner was arrested for suspicion of DUI. Tr. at 7.

ISSUE PRESENTED

WHETHER THE APPELLEE MUST CONTINUE ITS ADMINISTRATIVE LICENSE REVOCATION PROCEEDINGS PENDING RESOLUTION OF CRIMINAL DRIVING UNDER THE INFLUENCE CHARGES STEMMING FROM APPELLANT'S ARREST?

STANDARD OF REVIEW

"Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syl. pt. 1, *Francis O. Day Co. v. Director, Division of Environmental Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994). "Where the issue on 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.' Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." Syl. pt. 5, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

ARGUMENT

APPELLEE IS NOT REQUIRED TO CONTINUE ITS ADMINISTRATIVE LICENSE REVOCATION PROCEEDINGS PENDING RESOLUTION OF CRIMINAL CHARGES STEMMING FROM APPELLANT'S ARREST.

Petitioner argues that he was not given a full opportunity to present favorable evidence in his defense at the administrative hearing because the criminal case had not yet been resolved at that time, and therefore that he is entitled to a remand of his case for submission of said evidence under *Adkins v. Cline*, 216 W.Va. 504, 607 S.E.2d 833 (2004). However, the holding in *Adkins* was limited to cases which were pending at the time of issuance of *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001). In the present case, the arrest did not take place until almost two years after issuance of *Choma*; thus, Appellant was required to present evidence of the outcome of his criminal case, if at all, at the administrative hearing. The Appellee was under no obligation to continue the administrative hearing until resolution of the criminal case.

In *Adkins, supra*, this Court held: "Because the Appellees' cases were pending when this Court issued *Choma*, *Choma* is applicable to final resolution of their cases." In addressing the issue of prospectivity of the *Choma* opinion, this Court was clear that cases which were not pending at the time that the *Choma* opinion was issued (November 28, 2001) need not be remanded for further administrative hearing. The limited scope of the *Adkins* opinion is evident from the opinion:

No substantive issue was significantly altered or overruled by *Choma*; an additional consideration for the commissioner was simply added. This additional requirement is of narrow impact and affects few parties. It in no manner demonstrates a dramatic departure from

prior case law and does not impinge any party's previously vested rights. Since *Choma* requires the commissioner only to give "consideration" to the results of any criminal prosecution, we believe this resolution of the matter is fair to all parties. Because the Appellees' cases were pending when this Court issued *Choma*, *Choma* is applicable to final resolution of their cases.

607 S.E.2d 842.

Appellee did not deny Appellant any of his rights under *Choma, supra*. He was fully entitled to present evidence of related criminal proceedings at the administrative hearing. The relief he requests, under the auspices of *Choma, supra*, is that the Appellee be mandated to continue its license revocation proceedings until the criminal proceeding is resolved.

As the circuit court found in its December 15, 2004 *Dismissal Order*, this case presents an analogy to abuse and neglect cases. The circuit court cited *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002) and Rule 5 of the Rules of Procedure for Child Abuse and Neglect, which provides:

Under no circumstances shall a civil protection proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings.

The importance of and rationale for this rule is analogous to and supported by this Court's oft-stated position regarding DUI cases: "This Court has repeatedly recognized that legislative procedures for the administrative revocation of a driver's license are meant to protect the public from persons who drive under the influence of alcohol." *Carroll v. Stump*, 217 W.Va. 748, 619 S.E.2d 261, 268 (2005).

Granting Appellant's request for relief would require a reversal of the considerable body of law in West Virginia which holds that criminal proceedings for DUI proceed on entirely separate tracks from administrative license revocations for DUI. The Court reiterated this principle in *State*

ex rel. Stump v. Johnson, 217 W.Va. 733, 619 S.E.2d 246, 254 (2005), citing several of the precedential authorities in West Virginia caselaw:

"This Court has previously recognized that administrative license revocation proceedings and criminal DUI proceedings are two separate and distinct proceedings. In the recent case of *Mullen v. Division of Motor Vehicles*, 216 W.Va. 731, 613 S.E.2d 98, 101 (2005), this Court, through Justice Starcher, observed that we have... clearly recognized that the two 'tracks' of criminal and civil drivers' license-related proceedings that arise out of an incident where a person is accused of DUI are separate ... If the Legislature had wanted to so intertwine the criminal and civil aspects of DUI law as to automatically void related administrative driver's license suspensions when DUI criminal charges are dropped or unproven, the Legislature could have clearly done so--but it did not. *Id.*" *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005). In *Carroll*, we observed that "[a]lthough the Commissioner is to give consideration to the results of related criminal proceedings, the criminal proceedings are not dispositive of the administrative license revocation proceedings and are not a jurisdictional prerequisite to the administrative proceedings."

619 S.E.2d 254.

Bishop's argument that the Commissioner's revocation duties are somehow ancillary to the criminal proceeding held in Nicholas County necessarily fails. "Administrative actions and criminal sanctions are independent lines of inquiry which must not be confused or integrated." *Wagoner v. Sidropolis*, 184 W.Va. 40, 43, 399 S.E.2d 183, 186 (1990) (per curiam). Criminal proceedings are not necessary predicates to the maintenance of administrative proceedings for the purpose of driver's license revocations under the provisions of W. Va. Code § 17C-5A-1 for driving a motor vehicle while under the influence of alcohol. Neither are they restraints on such proceedings.

619 S.E.2d 255. As the Court noted in *Carroll v. Stump, supra*, there are ways in which the two proceedings intertwine, such as the requirement of consideration of certain evidence by the Commissioner under *Choma, supra*; however, none of the ways in which the two proceedings

intertwine compels the Appellee to continue its proceedings while awaiting the outcome of the criminal proceedings.

Although, the Commissioner is to give consideration to the results of related criminal proceedings, the criminal proceedings are not dispositive of the administrative license revocation proceedings and are not a jurisdictional prerequisite to the administrative proceedings. In *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 260, 557 S.E.2d 310, 314 (2001), we recognized that we had previously upheld the statutory two-track approach... [and] that the separate procedures [administrative and criminal] are connected and intertwined in important ways. For example, criminal arrests for DUI trigger license suspensions, W. Va. Code, 17C-5A-1(b) [1994]; and a criminal conviction for DUI is in itself grounds for license suspension. W. Va. Code, 17C-5A-1a (1994). Similarly, in *Wagoner v. Sidropolis*, 184 W.Va. 40, 43, 399 S.E.2d 183, 186 (1990) (per curiam), we stated: the administrative enhancement provisions of W. Va. Code § 17C-5A-2 (1981) are triggered by the statement of an arresting officer rather than the guilty plea of an offender. The guilty plea is only relevant to criminal sanctions which may result. Administrative actions and criminal sanctions are independent lines of inquiry which must not be confused or integrated.

Carroll v. Stump, 619 S.E.2d 269.

In addition to the fact that Appellant is not entitled to a remand of his case for consideration of the outcome of the criminal case, it is unlikely that such evidence would have altered the Commissioner's finding. The Appellant proffers that "Mr. Moten's criminal case was dismissed, as the Prosecuting Attorney of Raleigh County declined to further prosecute the matter." (Pet. Brf. at 5), and "the State dismissed the criminal proceedings against the appellant." Pet. Brf. at 7. Because there was apparently no adjudication of the facts of the case, it is unlikely that the Commissioner would have had any evidence which would compel him to reverse his finding, by a preponderance of the evidence, and based on the arresting officer's testimony, that Appellant was DUI. Having so found, the Commissioner had a mandate to revoke the Petitioner's license.

CONCLUSION

The cases cited by Appellant do not support his request for remand of his case to the Appellee for consideration of the outcome of the criminal case. Moreover, the granting of the relief requested would cause a substantial upheaval of well-settled law in West Virginia which holds that criminal proceedings following a DUI arrest are not restraints on administrative license revocation proceedings.

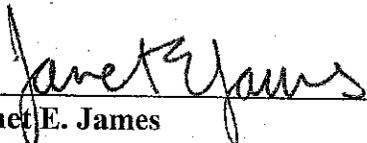
WHEREFORE, Appellee respectfully prays that the *Final Order*, entered March 6, 2006, be affirmed.

Respectfully submitted,

**JOSEPH CICCHIRILLO, COMMISSIONER,
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

By Counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



**Janet E. James
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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 Appellee* was served upon opposing counsel by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 18th day of January, 2007 addressed as follows:

John D. Wooton, Esquire
Post Office Box 2600
Beckley, West Virginia 25802



JANET E. JAMES