

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

JEFFREY D. CARPENTER,

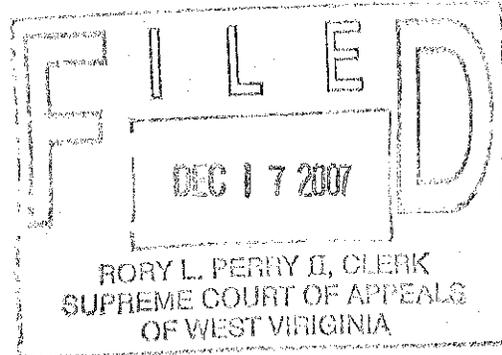
Appellee/Petitioner Below,

v.

Case No. 33654

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

Appellant/Respondent Below.



APPELLEE'S BRIEF

Respectfully Submitted:

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VIRGINIA,

Respondents.

APPELLEE'S BRIEF

Now comes the Appellee, Jeffrey D. Carpenter, by counsel, and submits this Brief pursuant to the prior Order of this Honorable Court.

PROCEEDING BELOW

On July 18, 2003, the Commissioner of the Division of Motor Vehicles issued an Order of Revocation revoking the Appellee's privilege to drive in the State of West Virginia for a period of six (6) months. Appellee subsequently requested an administrative hearing to contest his revocation.

On July 12, 2004, an administrative hearing was held at which time Patrolman L.T. Taylor of the Charleston Police Department appeared and testified on behalf of the State of West Virginia. Appellee appeared at the hearing by counsel.

On October 4, 2004, the Commissioner of the West Virginia Division of Motor Vehicles issued a Final Order reaffirming the earlier revocation of Appellee's privilege to operate a motor vehicle in the State of West Virginia for a period of six (6) months. The results of the secondary chemical test were not considered by the Commissioner in making the determination to revoke Appellee's driving privileges; instead the Commissioner relied on the case of *Albrecht v. State of West Virginia*, 173 W.Va. 268, 314 S.E.2d 859, in making the determination that there was sufficient evidence presented to show that the Appellee drove a motor vehicle in the State of West Virginia while under the influence of alcohol.

On or about October 13, 2004, Appellee filed a *Petition for Judicial Review* from the Commissioner's October 4, 2004 Final Order with the Circuit Court of Kanawha County, West Virginia.¹ By Order entered on February 22, 2007, the Circuit Court of Kanawha County reversed the Commissioner's October 4, 2007 Order of Revocation on the grounds that Appellee's due process rights had been violated in the underlying administrative proceedings. Appellants now appeal the February 22, 2007 Order of the Circuit Court of Kanawha County, West Virginia to this Honorable Court. For the following reasons, the Appellee, Jeffrey D. Carpenter, respectfully prays that the February 22, 2007 Order of the Circuit Court of Kanawha County, West Virginia be affirmed and for such other, further and general relief as this Honorable Court finds just and appropriate under the circumstances of his case.

¹At the time of filing of Appellee's Petition for Judicial Review with the Circuit Court of Kanawha County, West Virginia on October 13, 2004, F. Douglas Stump was serving in the capacity of Commissioner of the West Virginia Division of Motor Vehicles. Effective October 17, 2005, Joseph Cicchirillo replaced F. Douglas Stump as Commissioner of the Division of Motor Vehicles.

STATEMENT OF THE FACTS

Appellee, Jeffrey D. Carpenter, was arrested by Patrolman L.T. Taylor of the Charleston Police Department on May 18, 2003 and charged with first offense driving under the influence of alcohol.

On or about July 18, 2003, Appellant, Commissioner of the West Virginia Division of Motor Vehicles, issued an initial order of revocation suspending Mr. Carpenter's privilege to operate a motor vehicle in the State of West Virginia for a period of six (6) months. Mr. Carpenter promptly requested an administrative hearing to contest the revocation of his driving privileges.

On or about July 12, 2004, an administrative hearing was conducted before a hearing examiner of the West Virginia Division of Motor Vehicles at which time Patrolman Taylor appeared and presented testimony. Appellee, Jeffrey D. Carpenter, was represented at the July 12, 2004 administrative hearing by counsel, John R. Mitchell, Jr.

During the course of his testimony at the July 12, 2004 administrative hearing, Patrolman Taylor testified that while he had mailed the original Statement of Arresting Officer to the Division of Motor Vehicles, that he had subsequently received a letter from the Division of Motor Vehicles requesting that he submit a second Statement of Arresting Officer to the Division of Motor Vehicles.² Patrolman Taylor further testified that he had no specific recollection as to why a second Statement of Arresting Officer was needed, but that he had completed a second Statement of Arresting Officer and had forwarded the Statement to the Division pursuant to its written request.³ The second Statement of Arresting Officer was forwarded to the Division of Motor Vehicles by

²See Administrative Hearing Transcript at page 7.

³See Administrative Hearing Transcript at page 7.

Patrolman Taylor more than forty-eight (48) hours after the Appellee's arrest.⁴ The second Statement of Arresting Officer was subsequently received at the West Virginia Division of Motor Vehicles on June 11, 2003.⁵

On or about October 4, 2004, Appellant, Commissioner of the West Virginia Division of Motor Vehicles, issued a Final Order reaffirming the earlier revocation of Appellee's driving privileges for a period of six (6) months.

On or about October 13, 2004, Appellee, Jeffrey D. Carpenter, by his present counsel, filed a Petition for Judicial Review from the Commissioner's October 4, 2004 Final Order in the Circuit Court of Kanawha County, West Virginia setting forth a number of grounds upon which Appellee sought reversal of the Commissioner's October 4, 2004 Final Order.⁶

Pursuant to an Opinion and Order Reversing Administrative Order entered by the Kanawha County Circuit Court on February 22, 2007, the Circuit Court of Kanawha County reversed the Appellant's October 4, 2004 Final Order and reinstated Appellee, Jeffrey D. Carpenter, to his privilege to operate a motor vehicle in the State of West Virginia. The Circuit Court found in its February 22, 2007 Order that the Appellant, Commissioner of the West Virginia Division of Motor Vehicles, had violated the Appellee's due process right to a fair and impartial hearing tribunal by improperly assisting the arresting officer to submit the proper paperwork to aid in the revocation

⁴See Administrative Hearing Transcript at page 7.

⁵See Administrative Record at Exhibit 1.

⁶The Circuit Court of Kanawha County, West Virginia declined to consider Appellee's remaining grounds for reversal of the Commissioner's October 4, 2004 Final Order in its February 22, 2007 Order as the Court found in Appellee's favor relating solely to Appellee's contention that his due process rights had been violated in the underlying administrative proceedings.

process.⁷

On or about June 25, 2007, Appellant, Commissioner of the West Virginia Division of Motor Vehicles, filed a Petition for Appeal to this Court from the February 22, 2007 Order of the Circuit Court of Kanawha County, West Virginia.

ISSUE PRESENTED

- I. WHETHER THE CIRCUIT COURT ERRED IN REVERSING THE COMMISSIONER'S ORDER OF REVOCATION BASED UPON A FINDING THAT THE APPELLEE'S DUE PROCESS RIGHTS HAD BEEN VIOLATED AT THE ADMINISTRATIVE LEVEL?

STANDARD OF REVIEW

This Court's review of this matter is controlled by the provisions of *West Virginia Code* Chapter 29A, Article 5, Section 4(g). This Court may affirm the order or decision of the agency or remand the case for further proceedings. This Court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the Petitioner 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 procedures; or (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 or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

⁷See Opinion and Order Reversing Administrative Order at page 3.

This Court reviews questions of law *de novo*. See generally *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

ARGUMENT

A. THE CIRCUIT COURT ACTED APPROPRIATELY IN DISMISSING THE COMMISSIONER'S ORDER OF REVOCATION BASED UPON A FINDING THAT APPELLEE'S DUE PROCESS RIGHTS WERE VIOLATED AT THE ADMINISTRATIVE LEVEL.

In *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978), this Court specifically held that licensees are entitled to due process during administrative license revocation proceedings. This Court stated as follows:

“In *North v. Board of Regents*, *supra*, we indicated the requirements of procedural due process may vary depending on the nature of the case. We stated the more valuable the right sought to be deprived, the more safeguards will be interposed. Because of these substantial interests held in *North*, we held the following due process procedures must be applicable . . . a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges; to confront his accusers; and to present evidence on his own behalf, an unbiased hearing tribunal; and an adequate record of the proceedings.”

West Virginia Code Chapter 17C, Article 5A, Section 1 requires that an arresting officer submit their Statement of Arresting Officer to the West Virginia Division of Motor Vehicles within forty-eight hours of arresting a licensee for the offense of driving while under the influence of alcohol.

In *In Re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (1999), this Court examined the issue of whether the failure by an officer to timely submit the Statement of Arresting Officer to the Division of Motor Vehicles within forty-eight (48) hours of a licensee's arrest acted as a jurisdictional impediment for the Division to proceed with administrative proceedings to revoke a driver's license for driving while under the influence of alcohol. This Court ultimately held that the requirement to submit the statement within forty-eight (48) hours of the licensee's arrest was a requirement imposed upon the officer, and not the Division of Motor Vehicles, and thus did not preclude the Division from proceeding at the administrative level, absent prejudice to the licensee resulting from such a delay.

In the instant case, the Circuit Court of Kanawha County, West Virginia acted appropriately in reversing the Commissioner's October 4, 2004 Final Order on the grounds that Appellant violated Appellee's due process right to a fair and impartial hearing tribunal at the administrative level. The arresting officer failed to submit his Statement of Arresting Officer to the West Virginia Division of Motor Vehicles within forty-eight (48) hours of Mr. Carpenter's arrest as required by *West Virginia Code* 17C-5A-1. It is uncontradicted in the administrative record that the Statement of Arresting Officer was not received at the West Virginia Division of Motor Vehicles until June 11, 2003, approximately three weeks after the Appellee's arrest for the offense of driving while under the influence of alcohol.⁸ While it is not readily apparent from the administrative record as to the reasons for the officer's delay in submitting the Statement of Arresting Officer, it does appear that at least one reason for the delay resulted from the officer submitting improper paperwork to the Division, which caused the Division to notify the officer that additional paperwork was needed to

⁸See Administrative Hearing Transcript at page 6.

properly commence the administrative proceedings against the Appellee, Jeffrey D. Carpenter.⁹ Appellee is aware of no statutory provisions that authorize the West Virginia Division of Motor Vehicles, or its employees, to assist the arresting officer in the revocation process. In effect, by assisting the arresting officer to submit the proper paperwork to aid in the revocation process, the Division of Motor Vehicles has failed to be fair and impartial to the Appellee, Jeffrey D. Carpenter, during the administrative proceedings, thus resulting in clear prejudice to Mr. Carpenter. At a minimum, the Division's actions in assisting the officer to properly begin the revocation proceedings against Mr. Carpenter violate Mr. Carpenter's due process right to a fair and impartial hearing tribunal, as enunciated by this Court in *Jordan, supra*.

Appellant cites to this Court's holding in *Coll v. Cline*, 202 W.Va. 599, 505 S.E.2d 662 (1998) as authority for the proposition that it is proper for Appellant to request resubmission by the arresting officer of appropriate paperwork to the Division to initiate the administrative license revocation proceedings against Appellee under the facts of the instant case. However, the facts of *Coll* are clearly distinguishable from the facts of this case in as much as *Coll* dealt with an otherwise proper Statement of Arresting Officer to which the officer had inadvertently failed to attach the results of the secondary chemical test as required by *West Virginia Code* Chapter 17C, Article 5A, Section 1(b). *Coll* is also clearly distinguishable from the facts of this case in as much as the Commissioner declined under the facts of *Coll* to forward the Statement of Arresting Officer back to the officer, or to otherwise request resubmission of the proper paperwork. Conversely, under the facts of the instant case, the Division overstepped its statutory authority by requesting resubmission of the **entire** Statement of Arresting Officer, in what appears to be a concerted effort on the part of

⁹See Administrative Hearing Transcript at pages 7-8.

the Division to assist the officer in the initiation of the administrative license revocation proceedings against the Appellee.. Ultimately, it was this conduct that the Circuit Court of Kanawha County found to be a violation of Appellee's due process right to a fair and impartial hearing tribunal as Appellant's actions were aimed at improperly assisting the officer with the initiation of revocation proceedings. This is not the role of Appellant in these types of proceedings. This Court has clearly recognized that submission of the proper paperwork to initiate administrative license revocation proceedings is a requirement imposed on the arresting officer, and not the Division of Motor Vehicles. See generally *In Re Burks, supra*; *Coll v. Cline, supra*. Therefore, the Circuit Court of Kanawha County properly found that the Division's actions in assisting the arresting officer in this regard constituted a violation of the Appellee's right to receive administrative due process in the underlying administrative proceeding.

PRAAYER FOR RELIEF

For the reasons set forth above, the Appellee, Jeffrey D. Carpenter, respectfully requests that the February 22, 2007 Order of the Circuit Court of Kanawha County, West Virginia be affirmed and for such other, further and general relief as this Court finds just and appropriate under the circumstances.

JEFFREY D. CARPENTER,
By Counsel

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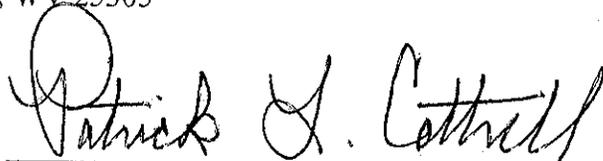
F. DOUGLAS STUMP, Commissioner
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CERTIFICATE OF SERVICE

I, PATRICK L. COTTRELL, counsel of record for the Petitioner herein, do hereby certify that I served a copy of the foregoing APPELLEE'S BRIEF upon all counsel or parties of record in this action by depositing a true and exact copy of the same in the regular course of the United States Mail, postage prepaid, to the last known addresses listed below this 17th day of December, 2007, unto:

Janet E. James, Esq.
Assistant Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, WV 25305



PATRICK L. COTTRELL