

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

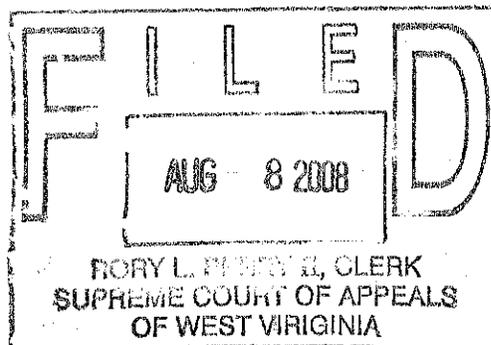
STATE OF WEST VIRGINIA ex rel.
JOSEPH CICCHIRILLO, Commissioner
Of the Division of Motor Vehicles,

Petitioner,

v.

THE HONORABLE J.D. BEANE, Judge
of the Circuit Court of Wood County, and
THOMAS J. SANTER, Real Party in Interest,

Respondents.



REPLY TO EMERGENCY PETITION

And now comes the Respondent, Petitioner below, Thomas J. Santer, by and through his attorney, James M. Bradley, Jr., and for and as his Reply to Emergency Petition does state as follows:

1. The Petitioner mischaracterizes both the relief sought in the Circuit Court and the basis for that Court's jurisdiction. This was not an action to stop a license revocation hearing, as was the case in Stump v. Johnson; 217 W. Va. 733 619 S.E. 2d 246 (2005) nor was it an attempt to "interfere with the Department of Motor Vehicle's duties..." as alleged in the Petition. The Petitioner below sought to enforce the statutory mandate that afforded the Petitioner a hearing, "as early as practical, not to exceed 20 days", which mandate had been completely ignored in its presentation to the Circuit Court and is now not mentioned in its Emergency Petition in this Court. The statute requires that a hearing be held in Wood County, not in Kanawha County.

While not repeating the whole of the allegations contained in the Petition below (Pet'r Appx. Ex. 9) the pertinent facts are as follows:

2. Mr. Santer, a 33 year old Wood County resident, was involved in a single vehicle accident in Marietta, Ohio on February 28, 2008. He had briefly lost consciousness, lost control of the vehicle and ended up in a residential yard. The accident was reported to the Marietta Municipal Court who issued an Order notifying the West Virginia Division of Motor Vehicles (hereinafter "Division") of the circumstance of the accident.

3. The accident was a result of a convulsion which Mr. Santer suffered with attendant brief loss of consciences. A neurologist subsequently examined Mr. Santer, performed a series of tests, including an EEG, and could find no evidence of underlying epilepsy. Mr. Santer had recently and suddenly stopped a medication and his neurologist stated that the convulsion, according to the best evidence available, was precipitated by the sudden stop in medication and therefore would not likely be a recurrent event. All of this was initially reported to the Division (Resp. Ex 1).

4. The Division then requested that Mr. Santer's attending physician fill out a form, which she did, indicating that he did not suffer from any of the listed impairments, that he did not need to be medically evaluated for driver license purposes and no restriction be placed on his ability to drive (Pet'r Appx. Ex. 3). Not satisfied, the Division asked that Mr. Santer's neurologist, M. Barry Loudon, M.D., fill out a second form, explaining the recent episode. Dr. Loudon reported that Mr. Santer had suffered an episode "once and only once", it was not recurring and the neurologist recommended that no restrictions be placed on Mr. Santer's license (Pet'r Appx. Ex. 4). The form stated that in Dr. Loudon's opinion, Mr. Santer could safely operate a motor vehicle.¹

¹ Included in the Petitioner exhibits are two letters from the members of the License Advisory Board, which, until this filing had not been shared with the Respondent. The letters indicate that 1 physician needs additional information about the drug Mr. Santer had stopped taking and the other physician recommended a 6 month suspension which would be up on August 28, 2008.

5. Without furnishing Mr. Santer with a due process hearing or other method where he could contest the findings, the Division summarily suspended Mr. Santer's license, effective June 15, 2008 (Pet'r Appx. Ex. 5). The letter made no mention of a hearing.

6. WV Code 17B-3-6 authorizes the division to suspend or revoke a person's drivers license, when its records or other sufficient evidence, show that the driver has committed one of a series of offenses, most of which involve a prior judicial determination of his guilt. The only ground for suspension that the statute leaves to the sole discretion of the division "(5) Is incompetent to drive of Motor Vehicle." (Resp. Appx. Ex. 2)

7. The statute mandates a hearing. Subsection (d) provides that upon the licensee's request the division "shall afford him an opportunity for a hearing as early as practical within not to exceed 20 days" in the county wherein the licensee resides. Mr. Santer's counsel requested such a hearing 3 days later, on June 18, 2008. There has been no response.

8. The Commissioner has and continues to ignore the mandatory provisions of WV Code 17B-3-6(d) offering the Petitioner "...as early as practical within not to exceed 20 days" in the county wherein the licensee resides. This continuing violation of the mandatory statutory provisions denies Mr. Santer the equal protection of the law and the due process of law as secured in Article 3, Section 1 and 3 of the Constitution of West Virginia and by the 14th Amendment to the United States Constitution.

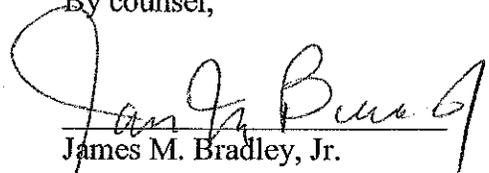
9. Thus, in the proceeding below, Mr. Santer was attempting to enforcement the hearing requirement of 17B-3-6(d). He was not taking issue with the Commissioner wrongfully exercised his discretion is so doing. The statute clearly gives the Commissioner that authority (17B-3-6). He just wanted a hearing. The statute says it's mandatory (17B-3-6(d)).

10. Since the Petitioner has invoked this Court's original jurisdiction in prohibition, the Respondent asks that an Order be entered directing the Commissioner to offer the Respondent a hearing as contemplated by WV Code 17B-3-6(d) and to continue the stay of the suspension of the Respondent's license until such time as the Commissioner complies.

Respectfully submitted,

Thomas J. Santer

By counsel,



James M. Bradley, Jr.

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304-424-5163

WV State Bar ID #436

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RESPONDENT'S APPENDIX OF EXHIBITS

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304-424-5163
WV State Bar ID #436**

RESPONDENT'S APPENDIX OF EXHIBITS

1. M. Barry Loudon, M.D.'s letter of April 22, 2008
2. WV Code 17B-3-6

M. A. Morehead, M.D.
M. B. Louden, M.D.
L. Scott Sole, M.D.
Debra L. Byler, M.D.
Ruby J. Parveen, M.D.

Board Certified Specialists

- Adult & Child Neurology
- Clinical Neurophysiology,
EEG, EMG, Evoked Responses
- Intraoperative Monitoring
- Sleep Medicine

parkersburg neurological associates, inc.

3803 Emerson Avenue • P.O. Box 4179 • Parkersburg, WV 26104

(304)485-5041

(740)373-4699

FAX (304)485-5678

April 22, 2008

File # X10836 ✓ For DMV
LKA E685019

RE: Thomas Santer

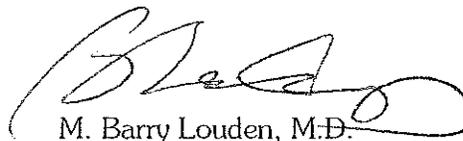
Chart# 07-81-94

DOB: 12/15/74

To Whom It May Concern:

I have followed Tom Santer with respect to a convulsion which precipitated an automobile accident some weeks ago. By the best evidence available, this convulsion was precipitated by a sudden change in medication and therefore will not likely be a recurrent event. There was no evidence of an underlying epilepsy. Despite this, I am treating him for prophylaxis vs. additional convulsions. I think that it is safe for him to drive.

Sincerely,



M. Barry Louden, M.D.

MBL/lf

T-4/23/08

§ 17B-3-5

MOTOR VEHICLE DRIVER'S LICENSES

Note 12

12. Enhanced suspension or revocation

There is no requirement in administrative revocation of driver's license action that an offender be informed of administrative enhancement of sanctions for subsequent offenses. State ex rel. Dept. of Motor Vehicles v. Sanders, 1990, 399 S.E.2d 455, 184 W.Va. 55. Automobiles ⇌ 144.2(8)

Defendant's municipal court conviction for driving under influence was appropriate prior conviction upon which Commissioner of Department of Motor Vehicles could base enhanced administrative sanction of revocation of driver's license for subsequent offenses. Code, 17C-5A-2, 17C-5A-3. State ex rel. Dept. of Motor Vehicles v. Sanders, 1990, 399 S.E.2d 455, 184 W.Va. 55. Automobiles ⇌ 144.2(8)

Lifetime revocation of driver's license was justified by licensee's driving under influence conviction and two subsequent arrests for driving under influence. Code, 17C-5A-2, 17C-5A-3. State ex rel. Dept. of Motor Vehicles v. Sanders, 1990, 399 S.E.2d 455, 184 W.Va. 55. Automobiles ⇌ 144.2(8)

If first license revocation for driving while under influence of alcohol used to enhance revocation period on second offense should be reversed on appeal in a manner which renders it a nullity, driver should be entitled to reopen second revocation. Code, 17C-5A-1 et seq. Carney v. Sidiropolis, 1990, 394 S.E.2d 889, 183 W.Va. 194. Automobiles ⇌ 144.2(8)

Municipal court conviction could be used to support an enlarged ten-year suspension of driver's license for second offense of driving under the influence of alcohol. Code, 17C-5A-1. Bolton v. Bechtold, 1987, 363 S.E.2d 241, 178 W.Va. 556. Automobiles ⇌ 144.2(8)

Municipal court conviction for operating a motor vehicle while under the influence of alcohol may support enlarged ten-year suspension of driver's license upon second offense of driving under the influence of alcohol. Anile v.

Roberts, 1986, 345 S.E.2d 822, 176 W.Va. 522. Automobiles ⇌ 144.2(8)

13. Collateral attack

Because sanctions which may be imposed by Department of Motor Vehicles on a person convicted of driving while under influence of intoxicating liquor are increased if he has a prior conviction within statutorily specified time, a collateral attack may be made on prior or subsequent convictions on constitutional grounds, even if prior conviction was in another state. Code, 17C-5-2(c). State ex rel. Lemley v. Roberts, 1979, 260 S.E.2d 850, 164 W.Va. 457. Automobiles ⇌ 144.1(3)

14. Review

In driver's license revocation case, Supreme Court of Appeals applies the same standard of review that the circuit court applied to the administrative decision of the Commissioner of Motor Vehicles, 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, 2001, 557 S.E.2d 310, 210 W.Va. 256. Automobiles ⇌ 144.2(3)

If there are irregularities in revocation proceeding, motorist should pursue appeal to the circuit court to challenge revocation and may not continue to operate a vehicle until apprehended and then make a belated attack on the revocation order. Code, 17C-5A-2. State v. Cole, 1988, 376 S.E.2d 618, 180 W.Va. 412. Automobiles ⇌ 144.2(2.1)

The circuit court's general power to review upon appeal did not give circuit court authority to modify legislature's specific mandate that license of person who drives while under influence of alcohol shall be revoked for a period of six months. Code, 17C-5A-2(i), 29A-5-4(g). Johnson v. Commissioner, Dept. of Motor Vehicles, 1987, 363 S.E.2d 752, 178 W.Va. 675. Automobiles ⇌ 144.2(8)

§ 17B-3-6. Authority of division to suspend or revoke license; hearing

(a) 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) Has by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in the death or personal injury of another or property damage;

(3) Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;

- (4) Is an habitually reckless or negligent driver of a motor vehicle;
 - ✓ (5) Is incompetent to drive a motor vehicle;
 - (6) Has committed an offense in another state which if committed in this state would be a ground for suspension or revocation;
 - (7) Has failed to pay or has defaulted on a plan for the payment of all costs, fines, forfeitures or penalties imposed by a magistrate court or municipal court within ninety days, as required by section two-a, article three, chapter fifty or section two-a, article ten, chapter eight of this code;
 - (8) Has failed to appear or otherwise respond before a magistrate court or municipal court when charged with a motor vehicle violation as defined in section three-a of this article;
 - (9) Is under the age of eighteen and has withdrawn either voluntarily or involuntarily from a secondary school, as provided in section eleven, article eight, chapter eighteen of this code; or
 - (10) Has failed to pay overdue child support or comply with subpoenas or warrants relating to paternity or child support proceedings, if a circuit court has ordered the suspension of the license as provided in article five-a, chapter forty-eight-a of this code and the child support enforcement division has forwarded to the division a copy of the court order suspending the license, or has forwarded its certification that the licensee has failed to comply with a new or modified order that stayed the suspension and provided for the payment of current support and any arrearage due.
- (b) The driver's license of any person having his or her license suspended shall be reinstated if:
- (1) The license was suspended under the provisions of subdivision (7), subsection (a) of this section and the payment of costs, fines, forfeitures or penalties imposed by the applicable court has been made;
 - (2) The license was suspended under the provisions of subdivision (8), subsection (a) of this section, and the person having his or her license suspended has appeared in court and has prevailed against the motor vehicle violations charged; or
 - (3) The license was suspended under the provisions of subdivision (10), subsection (a) of this section, and the division has received a court order restoring the license or a certification by the child support enforcement division that the licensee is complying with the original support order or a new or modified order that provides for the payment of current support and any arrearage due.
- (c) Any reinstatement of a license under subdivision (1), (2) or (3), subsection (b) of this section shall be subject to a reinstatement fee designated in section nine of this article.
- (d) Upon suspending the driver's license of any person as hereinbefore in this section authorized, the division shall immediately notify the licensee in writing, sent by certified mail, return receipt requested, to the address given by the

licensee in applying for license, and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty days after receipt of such request in the county wherein the licensee resides unless the division and the licensee agree that such hearing may be held in some other county. Upon such hearing the commissioner or his duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the division shall either rescind its order of suspension or, good cause appearing therefor, may extend the suspension of such license or revoke such license. The provisions of this subsection (d) providing for notice and hearing are not applicable to a suspension under subdivision (10), subsection (a) of this section.

Acts 1951, c. 129; Acts 1988, c. 85; Acts 1988, 3rd Ex. Sess., c. 7; Acts 1989, c. 124; Acts 1993, c. 98; Acts 1997, 1st Ex.Sess., c. 16, eff. April 20, 1997.

Law Review and Journal Commentaries

The West Virginia Statute Conditioning Possession of a Student Driver's License on School Attendance: Constitutionally Deficient and De-

monstrably Ineffective. Mark J. Merrill, 94 W. Va. L. Rev. 495 (1991-92).

Library References

Key Numbers

Automobiles ⇨ 144.2(1, 2).
Westlaw Key Number
48Ak144.2(1); 48Ak144.2(2).

Encyclopedias

C.J.S. Motor Vehicles § 164.2.

Searches:

Notes of Decisions

- In general 1
- Collateral attack 4, 5
- In general 4
- Forum 5
- Due process 2
- Forum, collateral attack 5
- Hearing 3

1. In general

Driver's license revocation provisions are not penal in nature and should be read in accord with general intent of traffic laws to protect innocent public. *Shell v. Bechtold*, 1985, 338 S.E.2d 393, 175 W.Va. 792. Automobiles ⇨ 144.1(1)

Commissioner of Motor Vehicles is an administrative official not capable of performing the judicial function of determining validity of judgments. *State ex rel. Lemley v. Roberts*, 1979, 260 S.E.2d 850, 164 W.Va. 457. Automobiles ⇨ 144.2(1)

Conviction of one violating statute is not ordinarily necessary before revocation of permit. Acts 1920, c. 112, § 82, class I, amended by Acts 1925, c. 17, § 82, class H. *State v. State Road Commission*, 1925, 131 S.E. 7, 100 W.Va. 531. Automobiles ⇨ 106

2. Due process

Mandatory administrative revocation of automobile operator's license, without administrative hearing, did not deny person whose license was revoked due process of law where there had been prior hearing and conviction on underlying criminal charge. Code, 17B-3-5, 17B-3-6. *Wells v. Roberts*, 1981, 280 S.E.2d 266, 167 W.Va. 580. Automobiles ⇨ 132

3. Hearing

See, also, Notes of Decisions following § 17B-3-5.

Statute providing for mandatory revocation of driver's license based on final conviction for driving under influence of alcohol outside state does not provide for administrative hearing prior to revocation and, thus, neither it nor statute providing for administrative hearing upon request in connection with discretionary suspension of operator's license based on evidence that licensee has committed specified offense granted hearing to motorist whose license was suspended based on out-of-state conviction for driving under influence (DUI). Code, 17B-3-5, 17B-3-6. *Sniffin v. Cline*, 1995, 456 S.E.2d 451, 193 W.Va. 370. Automobiles ⇨ 144.2(5.1)

Statute providing for administrative hearing upon request in connection with discretionary

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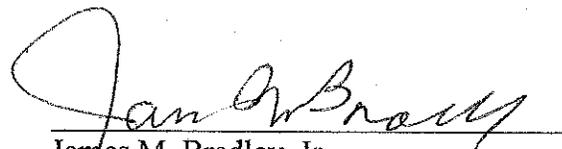
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CERTIFICATE OF SERVICE

I, James M. Bradley, Jr., counsel for the Respondent, Thomas J. Santer, certify that on this 8th day of August, 2008, I served the foregoing *Reply to Emergency Petition and Respondent's Appendix of Exhibits* via facsimile and by depositing true and correct copies thereof in the United State Mail, First Class Postage Prepaid, addressed as follows:

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Assistant Attorney General
Office of the Attorney General
Building 1, Room W-435
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