

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34970

JOHN BRIAN HARRISON,

Petitioner Below/Appellee,

v.

COMMISSIONER, DEPARTMENT OF TRANSPORTATION,

Respondent Below/Appellant.

and

NO. 34971

KENNETH E. REESE, JR.,

Petitioner Below/Appellee,

v.

COMMISSIONER, DEPARTMENT OF TRANSPORTATION,

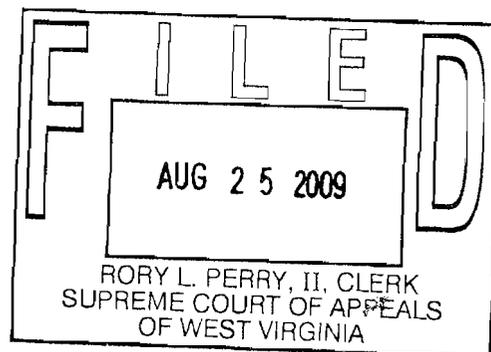
Respondent Below/Appellant.

REPLY BRIEF

JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,
DEPARTMENT OF TRANSPORTATION,

By counsel,

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REPLY BRIEF

Comes now the Appellant, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division" or "Appellant"), Department of Transportation, by counsel, Janet E. James, Assistant Attorney General, and submits this brief in reply to *Brief of Appellee, John Brian Harrison* and *Brief of Appellee, Kenneth E. Reese, Jr.*

Appellees mistakenly rely on the provisions of W. Va. Code §17C-5A-2 to support their argument that a prior revocation or suspension is required in order to enhance their second offenses. In 2005, W. Va. Code §17C-5A-3a was extensively amended to require that subsequent offenders

who drive under the influence of alcohol must submit to the Motor Vehicle Test and Lock Program. The amendments thereto also provided that enhancement for subsequent offenses must be based on either prior revocations or convictions¹:

(d) Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under section two, article five of this chapter or the person's license is revoked under section two of this article or section seven, article five of this chapter and the person was previously either convicted or his or her license was revoked under any provision cited in this subsection within the past ten years. ... The division shall add one year to the minimum period for the use of the ignition interlock device for each additional previous conviction or revocation within the past ten years. ...

W. Va. Code § 17C-5A-3a (2008).

Although Appellee Reese excoriates Justice Benjamin for his opinions in *State ex rel. Stump v. Johnson* 217 W.Va. 733, 619 S.E.2d 246 (2005) and *State ex rel. Baker v. Bolyard*, 221 W.Va. 713, 656 S.E.2d 464 (2007) (App'ee. Reese Brf. at 9-10, 15), Appellees have been on notice since 2005 that no contest pleas are convictions for revocation purposes under West Virginia law (*Stump, supra*). They have also been on notice since 2005 that any subsequent offense would result in enhancement of the revocation based on the prior conviction (W. Va. Code § 17C-5A-3a). Thus, as to their 2008 DUI convictions, it is worth noting this Court's opinion in *Shumate v. West Virginia Dept. of Motor Vehicles*, 182 W.Va. 810, 392 S.E.2d 701 (1990)(citing *State v. Scheffel*, 82 Wash.2d 872, 514 P.2d 1052 (1973) (en banc), *appeal dismissed*, 416 U.S. 964, 94 S.Ct. 1984, 40 L.Ed.2d

¹ W. Va. Code § 17C-5A-3a was also amended in 2007 and 2008. The 2007 amendments were in effect at the time of Reese's 2008 arrest; the 2008 amendments were in effect at the time of Harrison's 2008 arrest. For purposes of these cases, the relevant provisions, which went into effect in 2005, remained unchanged in the ensuing years. Appellant will use the 2008 version of the statute for purposes of this brief.

554 (1974)) that “The defendants could have avoided the impact of the act by restraining themselves from breaking the law of this state.” 182 W.Va. 813, 392 S.E.2d 704.

The respective Appellees argue that the Appellant is improperly retroactively applying the definition of “conviction” set forth in *Stump, supra*, to their 2002 and 2003 no contest pleas. However, the relevant time frame in this regard is the Appellees’ 2008 arrests. The Appellant did not go back, in 2005, and revoke Appellees for their 2002 and 2003 convictions. *That* would constitute retroactive application.

Rather, the Appellant took the law as it existed at the time of Appellees’ 2008 arrests, and applied it. The law in effect in 2008 provided that no contest pleas operate as convictions; and it required that Appellees’ 2008 offenses be enhanced on the bases of the earlier convictions. Again citing *State v. Scheffel*, 82 Wash.2d 872, 514 P.2d 1052 (1973) (en banc), *appeal dismissed*, 416 U.S. 964, 94 S.Ct. 1984, 40 L.Ed.2d 554 (1974), this Court in *Shumate, supra*, agreed that “*It was the final violation which brought them within the ambit of the act....A statute is not retroactive merely because it relates to prior facts or transactions where it does not change their legal effect.*” 182 W.Va. 813, 392 S.E.2d 704. *See also, Jones v. Sidiropolis* 183 W.Va. 37, 393 S.E.2d 675 (1990).

The legal effect of the no contest pleas is that they were convictions from the time of passage of W. Va. Code §17C-5A-1a in 1991. (“A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.” *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-313 (1994)). The 2005 amendment to W. Va. Code § 17C-5A-3a was made prior to Appellees’ 2008 arrests, and it placed them on notice that those arrests may subject them to enhancement based upon their earlier convictions.

Appellees note the amendment to 91 C.S.R. § 5-14.1 in 2006 as a legislative backlash to *Stump*. Passage of the legislative rule followed failure of an amendment to W. Va. Code § 17C-5A-1a (H.B. 4308, R.S. 2006), which failed.

However, this legislative rule cannot stand, as the rule runs afoul of clear legislative intent as expressed in statute, and because it would improperly limit the agency's authority under the statute. The amendment to the legislative rule is inconsistent with the governing statute, and therefore, the statute supercedes the rule. "It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority." Syl. Pt. 3, *Rowe v. W. Va. Dept. of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982). Therefore, even though a legislative rule is passed by the Legislature, if that legislative rule is in contradiction to the statute, the rule is void. When a court of last resort "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law, [and] it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 & 313 n.12 (1994).

Appellees also argue that treating their 2002 and 2003 no contest pleas as convictions for enhancement purposes is inequitable. Inasmuch as the Appellant has acted appropriately in these cases, the equitable argument pales in light of the public policy undergirding of the existing statutes.

In *Shumate, supra*, this Court reiterated those principles, finding that a license revocation is not “punishment”:

“The intent of the West Virginia traffic laws which provide that the commissioner of motor vehicles revoke the licenses of dangerous drivers is protection for the innocent public.” *Stalnaker v. Roberts*, 168 W.Va. 593, 599, 287 S.E.2d 166, 169 (1981). Similarly, the Supreme Court of Appeals of Virginia has held that “the revocation is not for the punishment of the offender, but is for the protection of the public in removing from the highways a dangerous driver.” *Huffman v. Commonwealth*, 210 Va. 530, 532, 172 S.E.2d 788, 789 (1970). *See also Scheffel*, quoted above.

182 W.Va. 813-814, 392 S.E.2d 704 - 705.

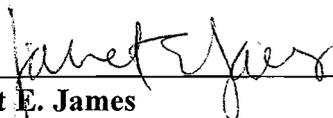
WHEREFORE, Appellant hereby prays that the *Final Order Denying Respondent's Motion to Dismiss and Modifying License Revocation* entered by the Circuit Court of Marion County on March 31, 2009, and the *Final Order Modifying License Revocation* entered by the Circuit Court of Harrison County on November 21, 2008, modifying the Revocation Orders of the Division be reversed and vacated, and remanded with directions to affirm the *Revocation Orders*.

Respectfully submitted,

**JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, DEPARTMENT OF
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By counsel,

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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Reply Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 25th day of August, 2009, addressed as follows:

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