

RECEIVED

APR - 3 2009

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

Attorney General Office
Tax Division

FINAL ORDER

JOHN BRIAN HARRISON,

Petitioner,

Vs.

/ / /

UPON PETITION TO REVIEW
ORDER OF THE WEST VIRGINIA
DEPARTMENT OF MOTOR VEHICLES

JOSEPH CICCHIRILLO,
Commissioner, West Virginia
Division of Motor Vehicles,

CIVIL ACTION NO.: 08-AA-9
DMV FILE NO.: 307511B

Respondent.

FINAL ORDER DENYING RESPONDENT'S MOTION TO DISMISS
AND MODIFYING LICENSE REVOCATION

On the 27th day of March, 2009, the Petitioner, John Brian Harrison, appeared, in person and by his counsel, Neal Jay Hamilton, and the Respondent, Joe E. Miller (successor to Joseph Cicchirillo), Commissioner of the West Virginia Division of Motor Vehicles, appeared, by his counsel, Janet James, Assistant Attorney General for the State of West Virginia.

Whereupon, the Court first considered the Respondent's Motion to Dismiss, previously filed and served herein, and after hearing the statements and arguments of counsel, and considering the matters of record herein, the Court is of the opinion to, and does hereby, deny the Respondent's Motion to Dismiss and accordingly ORDER: that Respondent's Motion to Dismiss shall be and is hereby denied.

Whereupon, the Court then proceeded to inquire of the counsel whether the merits of the issues raised in Petitioner's Petition for Review and subsequent Motion, as previously filed and served herein could be argued and addressed at this time, to which both parties affirmatively agreed was appropriate, and there being

MAR 30 2009

DW

no objection, the Court thereupon heard the statements and arguments of counsel, and after consideration of which, and consideration of all matters filed herein, and based upon the record on file and the facts stipulated by the parties, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1) On August 7, 2003, the petitioner was arrested and charged with 1st offense D.U.I., in Morgantown Municipal Court, in Monongalia County, West Virginia.

2) That on October 16, 2003, the petitioner entered a "No Contest Plea" in Morgantown Municipal Court, and he was sentenced by the Municipal Court Judge.

3) That based on petitioner's August 7, 2003 arrest for D.U.I. the petitioner was notified by the Division of Motor Vehicles that his driving privileges would be revoked unless he requested an administrative hearing to contest the revocation.

4) That petitioner timely and properly requested and was granted an administrative hearing regarding the revocation of his driving privileges from his August 7, 2003, arrest.

5) The petitioner appeared at the date, time and place designated by the D.M.V. for the administrative hearing, and the arresting officer did not appear.

6) Petitioner's contest regarding the administrative revocation of his driving privileges from his August 7, 2003 arrest was successful, and by "Final Dismissal Order" dated at Charleston, West Virginia Jan 13, 2004, the D.M.V. dismissed the administrative proceeding, reversed the Order of Revocation, took no further

action with respect to petitioner's license, and notified petitioner that "the Division's Order of Revocation, directed to you (Petitioner) on August 15, 2003, is hereby dismissed". The petitioner's privilege to drive a motor vehicle in West Virginia was never revoked based on the August 7, 2003 arrest or the no contest plea of October 16, 2003.

7) On August 8, 2008, the petitioner was arrested and charged with 2nd Offense D.U.I., a violation of West Virginia Code §17C-5-2, in Taylor County, West Virginia.

8) On February 13, 2009, as part of a plea agreement with the State of West Virginia, the petitioner entered a plea of guilty to the offense of 1st Offense D.U.I. in the Magistrate Court of Taylor County, and he was sentenced by the Magistrate.

9) Based on the 2008 arrest for D.U.I. the petitioner was notified by the West Virginia Division of Motor Vehicles that his license would be revoked for D.U.I., unless he requested an administrative hearing to contest the revocation.

10) The Official Notice from the D.M.V. recited that the petitioner had a "prior" offense dated August 7, 2003.

11) The defendant timely and properly requested an administrative hearing, part of the grounds therefore was that his August 7, 2003 no contest plea did not constitute a valid predicate for the purpose of enhancing his revocation on the 2008 offense.

12) The D.M.V. scheduled and conducted an administrative hearing.

13) The Clerk of the Magistrate Court of Taylor County forwarded an Affidavit of Judgment to the D.M.V. with respect to

the petitioner's plea of guilty to the offense of 1st Offense D.U.I. for the August 8, 2008, D.U.I. arrest.

14) On March 6, 2009, the D.M.V. mailed an Order of Revocation, notifying the petitioner that "this Division has received notice from the clerk of the Taylor County Magistrate Court that you were convicted of the offense of D.U.I." and that his license was revoked, effective April 10, 2009, as the result of his "conviction".

15) Without explanation, the March 6, 2009 order stated that petitioner's revocation was for the period of "one (1) year and thereafter accompanied by successful completion of the mandatory Alcohol Test and Lock Program pursuant to Chapter 17C, Article 5A, Section 3a of the Code of West Virginia, and completion of the Safety and Treatment program...".

16) The one (1) year revocation imposed on the petitioner in the March 6, 2009 Order of Revocation is the enhanced penalty for a second offense. West Virginia Code §17C-5A-3a

17) The petitioner filed his original petition on September 25, 2008, seeking judicial review of the administrative decision and order of revocation dated in Charleston, August 26, 2008, which upon hearing on November 6, 2008, was thereafter held in abeyance by this Court, and was thereafter reinstated upon the Motion of Petitioner by Order of this Court on March 11, 2009, and within thirty (30) days of receiving notice of the agency decision on order of March 6, 2009, pursuant to West Virginia Code §29A-5-4 and the Respondent has made no objection regarding filing, service or any other jurisdictional aspect of the appeal.

18) The Petitioner admits that he entered a plea of no contest on October 16, 2003, in the Municipal Court of Morgantown, Monongalia County, West Virginia, and admits that he entered a plea of guilty on February 13, 2009, to 1st offense D.U.I. in the Magistrate Court of Taylor County, West Virginia, and concedes that revocation of his license is appropriate for the most recent offense, but he contends that the administrative revocation should be limited to the period applicable to a first offense because the 2003 plea of no contest did not result in the revocation of his driving privileges, the D.M.V. did not follow the procedures set out in West Virginia Code §17C-5A-1a to establish a "conviction", neither the Municipal Court documentation or the D.M.V. documentation relating to the 2003 offense ever used the words convict, convicted or conviction, and it violates due process to apply the current interpretation adopted in the cases of State ex rel Stump v. Johnson, 217 W.Va. 733, 619 S.E.2d 248 (2005) and State ex rel Baker v. Bolyard, 221 W.Va. 713, 656 S.E.2d 484 (2007) regarding the effect of a no contest plea retroactively.

Conclusions Of Law

1. The petitioner's 2003 plea of no contest did not trigger the automatic revocation of his license, because, prior to Stump and Baker, the D.M.V. interpreted existing law to allow the challenge of the administrative license revocation after a plea of no contest, and only convictions that resulted in license suspension or revocation were deemed to be valid predicate offenses for the purpose of enhancement of administrative penalties for subsequent offenses, per West Virginia Code §17C-5A-2(n).

2. As a result of the D.M.V.'s interpretation and application of the law prior to Stump and Baker, it did not follow the procedural steps set out in West Virginia Code §17C-5A-1a to revoke the petitioner's license and establish a "conviction" for purposes of enhancement of the penalty for subsequent offenses.

3. The Due Process clause of the West Virginia State Constitution applies to civil administrative license revocation proceedings, in recognition of the important property interest inherent in drivers' licenses. Jordan v. Roberts, 161 W.Va. 750, 246 S.E.2d 259 (1978).

4. The most basic requirement embodied in the concept of Due Process is that the government must follow the process or procedure set out by law.

5. Since the D.M.V. did not observe the procedure set out in West Virginia Code §17C-5A-1a to revoke the petitioner's license and establish a "conviction" after his 2003 no contest plea, it violates Due Process for the D.M.V. to treat the petitioner's 2003 no contest plea, as a "conviction" or "revocation" retroactively.

6. Although West Virginia Code §17C-5A-3a modified the law by adding prior "conviction(s)" as well as a prior "suspension(s)" or "revocation(s)", as a basis for enhanced penalties for subsequent offenses, West Virginia Code §17C-5A-3a does not define "conviction", nor does any other section of chapter 17C, article 5A define it, beyond the provisions of West Virginia Code §17C-5A-2, which only treat a "conviction" that results in a "suspension" or "revocation" as a valid predicate offense for

enhancement of subsequent revocations. See West Virginia Code §17C-5A-2(n).

7. The term "conviction" is broadly and generally defined as the "act or process of judicially finding someone guilty of a crime; the state of having been proved guilty". Black's Law Dictionary, as cited in n. 8 of the majority opinion of Baker.

8. In the courts of this state, criminal defendants may enter and persist in asserting one (1) of three (3) pleas: "guilty", "not guilty" or "no contest".

9. It is self-evident that a plea of "no contest" is not a plea of "guilty", and by no twist of logic or rhetoric can a defendant who entered a plea of no contest be said to have been found "guilty".

10. By extension of the definition of "conviction" used by the West Virginia Supreme Court of Appeals, a defendant who pleads no contest was not necessarily "convicted" prior to the Stump and Baker decisions.

11. The Stump and Baker opinions do not address the retroactivity of the doctrine they adopted, and, although they did not explicitly overrule prior case law, it would be inequitable to apply the new principle of law adopted in those opinions retroactively to individuals who entered pleas of no contest in criminal cases in reliance upon the prevailing interpretation of that time, later to learn that he is subject to enhanced penalties for subsequent offenses based on a change in the law. See, Bradley v. Appalachian Power Co., 163 W.Va. 332, 347, 258 S.E.2d 879, 887 (1979) (discussed and applied recently in Caperton v. a.t. Massey

Coal Company, Inc., ____ S.E.2d____, 2008 WL 918444 (W.Va.)).

12. The petitioner's 2003 plea of no contest is not a valid predicate offense for the purpose of enhancing the revocation for his 2008 offense because the D.M.V. failed to follow the procedure prescribed by law to establish a "conviction" or "revocation" with respect to his 2003 plea, and it is inequitable to apply the new principle of law adopted in Stump and Baker retroactively.

Based on the foregoing findings and conclusions, it is hereby ORDERED that Commissioner of the Department of Transportation, Division of Motor Vehicles, shall modify the revocation of the petitioner's license to reflect the period of time applicable to a first offense, along with the corresponding requirements for participation in the alcohol test and lock program and the safety and treatment programs and the payment of all applicable fines, fees and costs.

The Circuit Clerk is further Ordered to forward a certified copy of this Order to counsel of record at the following:

1) Janet James, Office of the Attorney General
State Capitol Complex, Building 1, Room E-26
Charleston, WV 25305
Counsel for Joseph Cicchirillo, Commission WVDMV
and

2) Neal Jay Hamilton
P. O. Box 509
Fairmont, WV 26555-0509
Counsel for Petitioner

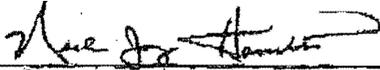
[Handwritten Signature]
CLERK OF THE CIRCUIT CLERK

ENTER: 3/30/09

[Handwritten Signature]

JUDGE

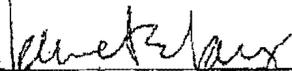
Prepared for Entry By:



Neal Jay Hamilton, Esquire
P. O. Box 509
Fairmont, WV 26555-0509
S.B.I.D. #1557 / 1 (304) 366-0573

Counsel for Petitioner, John Brian Harrison

Inspected for Entry By:



Janet James, Esquire
Assistant Attorney General
Office of the Attorney General
State Capitol Complex, Building 1, Room W435,
Charleston, WV 25305
S.B.I.D #4904 / 1 (304) 558-2522

Counsel for Joe E. Miller (successor to Joseph Cicchirillo),
Commissioner WVDMV