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.

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

BRIEF OF APPELLANT

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DEPARTMENT OF TRANSPORTATION,

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A. 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or section seven, article five of this chapter and the person was previously either convicted or his or her license was revoked under any provision cited in this subsection within the past ten years.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 minimum revocation period for a person required to participate in the program under this subsection is one year and the minimum period for the use of the ignition interlock device is two years.

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B. If a person is convicted for an offense defined in section two, article five of this chapter . . . because the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or the combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, . . . and if the person does not act to appeal the conviction within the time periods described in subsection (b) of this section, the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section.

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C. "In giving effect to the plain language contained within W. Va. Code § 17C-5A-1a(e), we find that a person pleading guilty or found guilty by a court or jury of driving under the influence of alcohol, . . . shall be considered 'convicted,' and that the Commissioner has a mandatory duty to revoke the person's license to operate a motor vehicle in the State of West Virginia as provided by W. Va. Code § 17C-5A-1a(a)." *Stump*, 217 W. Va. 742, 619 S.E.2d 255 9

D. Where a person enters a plea of *nolo contendere* to an offense defined in W. Va. Code § 17C-5-2 (2007), the mandatory license revocation or suspension provisions of W. Va. Code § 17C-5A-1a(a) (2004) are triggered because that person has been found guilty by a court, by virtue of a *nolo contendere* plea to criminal charges, and is thus deemed convicted of the offense pursuant to the provision of W. Va. Code § 17C-5A-1a(e) (2004).

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E. 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). 9

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BRIEF OF APPELLANT

Comes now the Appellant, Joe E. Miller, successor to Joseph Cicchirillo as 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 pursuant to Orders received from this Honorable Court on June 10, 2009, which consolidated the above-cited matters.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

A. HARRISON

Appellant seeks reversal of the *Final Order Denying Respondent's Motion to Dismiss and Modifying License Revocation* entered on March 31, 2009, by the Honorable David R. Janes, Judge of the Circuit Court of Marion County (hereinafter, "*Marion Co. Order*"), in an administrative appeal styled *John Brian Harrison v. Joseph Cicchirillo, Commissioner, West Virginia Division of Motor Vehicles*, Civil Action No. 08-AA-9. Through the *Marion Co. Order*, the Circuit Court modified an administrative driver's license revocation order entered by the Division, by which John Brian Harrison's (hereinafter, "Harrison" or "Appellee") privilege to drive was revoked.

1. THE ADMINISTRATIVE APPEAL

In the underlying appeal, Harrison sought relief from the Order of Revocation based on his conviction of DUI, dated August 26, 2008, wherein the Division imposed an enhanced revocation period on Harrison's privilege to drive in West Virginia[1]. The Circuit Court modified the Revocation Order on the basis that Harrison'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." *Marion Co. Order* at 8, ¶ 12.

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[1] The enhanced revocation was for a period of one year, and thereafter accompanied by successful completion of the mandatory Alcohol Test and Lock Program and completion of the Safety and Treatment Program for driving under the influence of alcohol.

2. THE ADMINISTRATIVE PROCEEDINGS

Harrison was arrested for DUI on August 7, 2003. On October 16, 2003, he was convicted of DUI following a plea of no contest to that offense.

On August 8, 2008, Harrison was again arrested in Taylor County, West Virginia, for DUI.

Based upon the 2008 arrest, the Division issued an Order of Revocation, dated August 26, 2008, with an enhanced revocation period.

Upon Harrison's request, an administrative hearing was scheduled for December 4, 2008.

Before the administrative hearing was held, Harrison filed a *Petition for Review of Administrative "Order of Revocation" of Driving Privileges of the West Virginia Department of Motor Vehicles* on or about September 25, 2008.

On or about November 18, 2008, Judge Janes entered an *Order Holding Action in Abeyance*, noting that the action was premature because there was not yet a Final Order from the Division regarding Harrison's administrative appeal.

Subsequently, the Clerk of the Marion County Magistrate Court notified the Division that the disposition of Harrison's charge of Second Offense DUI was guilty.

The Division filed a *Motion to Dismiss* on March 3, 2009, because Harrison's appeal was rendered moot by the mandatory, non-delegable obligation of the Division to revoke Harrison's license upon conviction.

Based upon the conviction for the 2008 arrest, the Division issued an Order of Revocation, dated March 6, 2009, with an enhanced revocation period.

Harrison filed a *Motion to Reinstate Petition to Active Status* on March 10, 2009.

On March 11, 2009, Judge Janes entered an *Order Reinstating Petition to Active Docket of This Court and Setting Hearing.*

Following a hearing on March 27, 2009, Judge Janes entered a *Final Order Modifying License Revocation*, from which the Division seeks appeal.

B. REESE

Appellant seeks reversal of the *Final Order Modifying License Revocation* entered on November 21, 2008, by the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County (hereinafter, "*Harrison Co. Order*"), in an administrative appeal styled *Kenneth E. Reese, Jr. v. Joseph Cicchirillo, Commissioner, Department of Transportation*, Civil Action No. 08-P-139. Through the *Harrison Co. Order*, the Circuit Court modified an administrative driver's license revocation order entered by the Division, by which Kenneth E. Reese, Jr.'s (hereinafter, "Reese" or "Appellee") privilege to drive was revoked.

1. THE ADMINISTRATIVE APPEAL

In the underlying appeal, Reese sought relief from the Order of Revocation based on his conviction of DUI, dated August 8, 2008, wherein the Division imposed an enhanced revocation period on Reese's privilege to drive in West Virginia[2]. The Circuit Court modified the Revocation Order on the basis that Reese's "2002 plea of nolo contendere 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 2002 plea." *Harrison Co. Order* at 6, ¶ 12.

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[2] The enhanced revocation was for a period of one year, and thereafter accompanied by successful completion of the mandatory Alcohol Test and Lock Program and completion of the Safety and Treatment Program for driving under the influence of alcohol.

2. THE ADMINISTRATIVE PROCEEDINGS

Reese was arrested for DUI on May 23, 2002. On May 28, 2002, he was convicted of DUI following a plea of *nolo contendere* to that offense.

On May 31, 2008, Reese was again arrested in Harrison County, West Virginia, for DUI.

Based upon the 2008 arrest, the Division issued an Order of Revocation, dated June 24, 2008, with an enhanced revocation period. Upon Reese's request, an administrative hearing was scheduled for August 15, 2008.

On or about July 23, 2008, the Division received an Abstract of Judgment from the Harrison County Magistrate Court reflecting that on July 23, 2008, Reese pled no contest to the May 31, 2008 DUI.

By Order of Revocation, dated August 8, 2008, Reese was advised that his privilege to drive was revoked on the basis of the conviction pursuant to W. Va. Code §17C-5A-1a. That Order of Revocation also contained an enhanced revocation period, based upon his 2002 offense.

Reese filed a *Petition to Appeal Administrative Revocation of Driver's License* on or about September 8, 2008. Following a hearing on October 29, 2008, Judge Bedell entered a *Final Order Modifying License Revocation*, from which the Division seeks appeal.

II.

STATEMENT OF THE FACTS

A. HARRISON

On August 8, 2008, Corporal J.A. Simmons (hereinafter, "Cpl. Simmons") of the West Virginia State Police pulled over a vehicle in Taylor County that was using "excessive speed" and "fleeing/evasion." D.U.I. Information Sheet. The Appellee, John Harrison, was the driver of the

vehicle. *Id.* Cpl. Simmons detected the smell of an alcoholic beverage on Harrison's breath, and he admitted to drinking two beers. *Id.* Harrison was unsteady exiting his vehicle, unsteady while walking to the roadside, and unsteady while standing. *Id.* Harrison's eyes were red and glassy. *Id.*

Cpl. Simmons asked Harrison to perform field sobriety tests. On the horizontal gaze nystagmus test, Harrison's eyes lacked smooth pursuit, had onset of nystagmus prior to 45 degrees and had distinct and sustained nystagmus at maximum deviation. *Id.* On the walk-and-turn test, Harrison started too soon, missed heel to toe, raised his arms to balance, and took an incorrect number of steps. *Id.* On the one leg stand test, Harrison swayed while balancing and used his arms for balance. *Id.* Each test was explained and both the walk-and-turn test and the one leg stand test were demonstrated for Harrison. *Id.* The weather was sunny and the tests were performed on an asphalt surface. *Id.*

Cpl. Simmons placed Harrison under arrest and transported him to the station for processing. Harrison was read and given a copy of the Implied Consent Statement. *Id.* Cpl. Simmons observed Harrison for twenty minutes to make sure he had not ingested food, drink or other foreign matter in his mouth, and began the process on the Intox EC/IR-II. *Id.* The Intox EC/IR-II printer was online and no errors were indicated. *Id.* The instrument read "press enter to start" and Cpl. Simmons entered data as prompted. *Id.* Instrument displayed "please blow" and Cpl. Simmons placed an individual disposable mouthpiece into the breath tube and had Harrison blow into the mouthpiece. *Id.* The gas reference standards were run on the Intox EC/IR-II and the results indicated that the instrument was working properly, with results of the reference standard of .082 and .081. *Id.* Cpl. Simmons was certified by the West Virginia Bureau for Public Health on 05/07/04. *Id.* The breath test is the designated secondary chemical test of the West Virginia State Police. *See* Certified

Records of secondary chemical test designations for West Virginia law enforcement agencies located in the record. The results of the Intox test showed Harrison's blood alcohol concentration level was .144. D.U.I. Information Sheet.

B. REESE

On May 31, 2008, Patrolman L.J. Brewer (hereinafter, "Ptlm. Brewer") of the Nutter Fort Police Department pulled over a vehicle on Route 98 in Harrison County that was "accelerating or decelerating rapidly" with "slow or excessive speed." D.U.I. Information Sheet. The Appellee, Kenneth Reese, was the driver of the vehicle. *Id.* Ptlm. Brewer detected the smell of an alcoholic beverage on Reese's breath, and he admitted to drinking "three beers and five shots of Jack." *Id.* Reese was unsteady exiting his vehicle, unsteady while walking to the roadside, and unsteady while standing. *Id.* Reese's eyes were bloodshot and glassy and his speech was slurred and slow. *Id.*

Ptlm. Brewer asked Reese to perform field sobriety tests. On the horizontal gaze nystagmus test, Reese's eyes lacked smooth pursuit and had distinct nystagmus at maximum deviation. *Id.* On the walk-and-turn test, Reese started too soon, stepped off the line, raised his arms, took an incorrect number of steps, and did an improper turn. *Id.* On the one leg stand test, Reese swayed while balancing, put his foot down and lost his balance. *Id.* Reese failed a preliminary breath test. *Id.*

Ptlm. Brewer placed Reese under arrest and transported him to the station for processing. Reese was read and given a copy of the Implied Consent Statement. *Id.* Ptlm. Brewer observed Reese for twenty minutes to make sure he had not ingested food, drink or other foreign matter in his mouth, and began the process on the Intox EC/IR-II. *Id.* The Intox EC/IR-II printer was online and no errors were indicated. *Id.* The instrument read "press enter to start" and Ptlm. Brewer entered data as prompted. *Id.* Instrument displayed "please blow" and Ptlm. Brewer placed an individual

disposable mouthpiece into the breath tube and had Reese blow into the mouthpiece. *Id.* The gas reference standards were run on the Intox EC/IR-II and the results indicated that the instrument was working properly, with results of the reference standard of .080 and .080. *Id.* Ptlm. Brewer was certified by the West Virginia Bureau for Public Health on 02/16/07. *Id.* The breath test is the designated secondary chemical test of the Nutter Fort Police Department. *See* Certified Records of secondary chemical test designations for West Virginia law enforcement agencies located in the record. The results of the Intox test showed Reese's blood alcohol concentration level was .176. D.U.I. Information Sheet.

III.

ASSIGNMENT OF ERROR

WHETHER THE RESPECTIVE CIRCUIT COURTS ERRED IN MODIFYING THE REVOCATION ORDERS TO EXCLUDE APPELLEES' PRIOR NO CONTEST PLEAS AS CONVICTIONS FOR ENHANCEMENT PURPOSES.

IV.

POINTS AND AUTHORITIES

A. 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 minimum revocation period for a person required to participate in the program under this subsection is one year and the minimum period for the use of the ignition interlock device is two years.

West Virginia Code § 17C-5A-3a(d).

B. If a person is convicted for an offense defined in section two, article five of this chapter . . . because the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or the combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, . . . and if the person does not act to appeal the conviction within the time periods described in subsection (b) of this section, the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section.

West Virginia Code § 17C-5A-1a(a).

C. "In giving effect to the plain language contained within W. Va. Code § 17C-5A-1a(e), we find that a person pleading guilty or found guilty by a court or jury of driving under the influence of alcohol, . . . shall be considered 'convicted,' and that the Commissioner has a mandatory duty to revoke the person's license to operate a motor vehicle in the State of West Virginia as provided by W. Va. Code § 17C-5A-1a(a)." *Stump*, 217 W. Va. 742, 619 S.E.2d 255.

D. Where a person enters a plea of *nolo contendere* to an offense defined in W. Va. Code § 17C-5-2 (2007), the mandatory license revocation or suspension provisions of W. Va. Code § 17C-5A-1a(a) (2004) are triggered because that person has been found guilty by a court, by virtue of a *nolo contendere* plea to criminal charges, and is thus deemed convicted of the offense pursuant to the provision of W. Va. Code § 17C-5A-1a(e) (2004).

Baker, 221 W. Va. 717-718, 656 S.E.2d 468-469

E. 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).

V.

STANDARD OF REVIEW

This Court's review of this matter is controlled by the West Virginia Administrative Procedures Act. Review of questions of law is *de novo* (Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)); review of factual questions is guided by whether there is evidence on the record as a whole to support the agency's decision. This Court may reverse, modify or vacate the Order of the circuit court. W. Va. Code § 29A-5-4.

VI.

ARGUMENT

THE ENHANCEMENT OF THE REVOCATION ON CONVICTION OF APPELLEES' DRIVERS LICENSE BY THE DIVISION WAS PROPER.

Although Harrison's license was not revoked for the 2003 DUI offense, and Reese's license was not revoked for the 2002 DUI offense, W. Va. Code §17C-5A-3a(d) required that their convictions for those offenses be used by the Commissioner for "enhancement" purposes in a subsequent DUI revocation.

1. When a court exercises its judicial power and duty to construe the meaning of a statute, this is the meaning of the statute from the day it was enacted.

West Virginia's Constitution explicitly enshrines the doctrine of separation of powers. W. Va. Const. art. 5, § 1. This provision "is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." *State ex rel. Barker v. Manchin,* 167 W. Va. 155, 167, 279 S.E.2d 622, 630 (1981).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137, 177 (1803). This recognition applies with equal force in West

Virginia. *Randolph County Bd. of Ed. v. Adams*, 196 W. Va. 9, 24, 467 S.E.2d 150, 165 (1995). The judicial power extends to authoritatively construing a statute. Therefore, "It is this Court's responsibility to say what a statute means, and once the Court has spoken, 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, 312-313 (1994).

"'The judicial Power' includes the power to interpret authoritatively . . . Acts of [the legislature and], those interpretations are 'supreme' simply because they are just that--interpretations. Judicial constructions of Acts . . . do not 'make' law, but simply inform others of what 'Laws . . . made' by [the legislature] mean." Christopher R.J. Pace, *Supremacy Clause Limitations on Federal Regulatory Preemption,* 11 Tex. Rev. L. & Pol. 157, 169 (2006). Therefore, "'[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[,]'" *AT & T Corp. v. Hulteen,* 129 S. Ct. 1962, 1971 n.5 (2009) (*Rivers,* 511 U.S. at 313). *See also Washington v. Commissioner of Correction,* 950 A.2d 1220, 1232 (Conn. 2008); *McClung v. Employment Develop. Dep't*, 99 P.3d 1015, 1020 (Cal. 2004); *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 772 (Iowa 2004); *Haugen v. Blaine Bank of Montana*, 926 P.2d 1364, 1367 (Mont. 1996), a declaration of what the statute "had *always* meant," *Rivers,* 511 U.S. at 313 n.12 (emphasis in original), that is what the "statute has meant continuously since the date when it became law." *Id.*

2. The plain language of West Virginia Code § 17C-5A-1a(3) required the DMV to consider the Appellees' first no contest pleas as convictions.

When Appellees were convicted of their second DUI offenses in 2008, it was the obligation of the Division to enhance the revocations. W. Va. Code §17C-5A-3a(d). Harrison has pled no contest and guilty to DUI within the past ten years. Reese has twice pled no contest to DUI within the past 10 years. There is no dispute that under current law no contest pleas act as convictions for revocation purposes. Neither of the Appellees contest that their respective guilty and no contest pleas in 2008 act as convictions.

The language of W. Va. Code § 17C-5A-1a has been in the statute, unchanged, since section 1a was amended into Chapter 17C, Article 5A in 1991. It provides:

> If a person is convicted for an offense defined in section two, article five of this chapter . . . because the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or the combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, . . . and if the person does not act to appeal the conviction within the time periods described in subsection (b) of this section, the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section.
> West Virginia Code § 17C-5A-1a(a).

As *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005) recognized, the "plain language"[3] of W. Va. Code § 17C-5A-1a required the Appellant to consider a no contest plea

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[3]In *giving effect to the plain language contained within W. Va. Code § 17C-5A-1a(e)*, a person pleading guilty or found guilty by a court or jury of driving under the influence of alcohol, controlled substances, or drugs, shall be considered "convicted," and the Commissioner has a mandatory duty to revoke the person's license to operate a motor vehicle in the State of West Virginia as provided by W. Va.Code § 17C-5A-1a(a).

Syl. Pt. 2, *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 734, 619 S.E.2d 246, 247 (2005)(emphasis

as a conviction. Thus, the circuit court orders, which rely on the Appellant's earlier interpretation of the statute, are fatally flawed because an agency has no power to ignore statutory language. A "'statute is the command of the sovereign,' and an agency implementing a statute may not ignore, or provide its own substitute for, a standard articulated in the statute." *Friends of Richards-Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1195 (8th Cir. 2001) (quoting *Sokol v. Kennedy,* 210 F.3d 876, 880 (8th Cir.2000)). *See also Zarr v. Barlow,* 800 F.2d 1484, 1490 (9th Cir. 1986) (an "agency is not free to ignore the statute and continue to administer . . . programs under whatever standard it believes is correct or expedient."). In short, an agency's "'interpretation' of the statute cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver,* 447 U.S. 807, 825 (1980).

This Court's reading of W. Va. Code § 17C-5A-1a(3) in *Stump*(or at least *Stump's* legal analysis) was foreshadowed in a number of decisions. In *University of West Virginia Bd. of Trustees on Behalf of West Virginia University v. Fox,* 197 W. Va. 91, 475 S.E.2d 91 (1996), this Court "recogniz[ed] that where the issue is whether or not a person has been previously 'convicted', a judgment of conviction based upon a *nolo contendere* plea may indeed be admitted into evidence to litigate that issue." Id at 96, 475 S.E.2d at 96. This Court continued, **"[s]uch might be applicable where a statute attaches an enhanced criminal penalty for successive offenses or provides an administrative penalty in the event of a 'conviction.'"** *Id.*, 475 S.E2d at 96. The rationale in *Fox* was raised to a syllabus point (point 3) in *State v. Evans,* 203 W. Va. 446, 508 S.E.2d 606 (1998), where this Court held, "[a] conviction derived from a plea of nolo contendere may be used for purposes of this state's recidivist sentencing laws." And, in fact, as far back as 1930, this Court

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added).

concluded that a superimposed penalty for a prior *conviction* includes within the ambit of the word conviction a plea of nolo contendere. Syl. *State v. Moss,* 108 W. Va. 692, 152 S.E. 749 (1930).

Thus, since the enactment of W.Va. Code § 17C-5A-1a(3), a no contest plea *was* a conviction. It can hardly be said that applying the law is a due process violation. *Shumate v. West Virginia Dept. of Motor Vehicles,* 182 W.Va. 810, 392 S.E.2d 701 (1990).

3. The Appellant was required to apply W. Va. Code 17C-5A-3a to the Appellees' prior convictions.

The question in this case is not one of retroactivity but of application of an unambiguous statute as it has been interpreted by this Court. The circuit courts erred in finding that the Division applied *Stump, supra*, and *Baker, supra*, retroactively. They conceded that *Stump* and *Baker* "did not explicitly overrule prior case law." *Marion Co. Order* at p. 7, ¶ 11; *Harrison Co. Order* at p. 5, ¶11.

The circuit court opinions ignore the plain language of W. Va. Code § 17C-5A-1a in favor of focusing on retroactivity or equity. In *Harrison*, the circuit court held, "It would be inequitable to apply the new principle of law adopted in [*Stump* and *Baker*] retroactively to individuals who enter 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." *Marion Co. Order* at p. 7, ¶ 10. In *Reese*, the circuit court held, "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 nolo contendere 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 the a change in the law. *Harrison Co. Order* at p. 5, ¶ 11. Both circuit courts cite W. Va. Code §17C-5A-2, the provisions of which are inapplicable to revocation on conviction. As discussed above, the "prevailing interpretation" of the agency is of no moment inasmuch as the plain meaning of the statute prevails.

Thus, the Appellant was obligated in the present cases to apply W. Va. Code § 17C-5A-3a when determining the appropriate revocation period for their 2008 convictions. That section provides:

> 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.
>
> W. Va. Code, § 17C-5A-3a

The circuit court orders improperly found that the Commissioner erred in applying this mandate to the revocations of the Appellees in the present cases.

VII.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, 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 TRANSPORTATION,

By counsel,

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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.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Brief of Appellant* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 10th day of July, 2009, addressed as follows:

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JANET E. JAMES