

NO. 35490

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MEREDITH D. WILLIAMS,

Appellee/Petitioner Below,

v.

**THE WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, AND JOSEPH CICCHIRILLO,
COMMISSIONER,**

Appellants/Respondents Below.

BRIEF OF APPELLANT

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

By counsel,

**JANET JAMES
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 4904
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304) 926-3874
Counsel for Appellants**

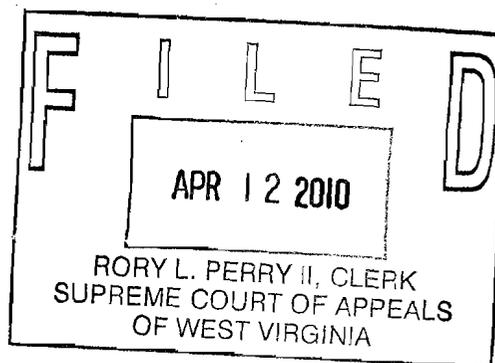


TABLE OF CONTENTS

	<u>Page</u>
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	2
A. THE ADMINISTRATIVE APPEAL	2
B. THE ADMINISTRATIVE PROCEEDINGS	2
II. STATEMENT OF THE FACTS	3
III. ASSIGNMENTS OF ERROR	4
A. THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS	4
B. THE CIRCUIT COURT ERRED IN REVERSING THE ORDER OF REVOCATION ON CONVICTION ON THE BASIS THAT THE APPELLANTS ERRONEOUSLY ENTERED A SECOND ORDER OF REVOCATION BASED ON W. VA. CODE § 17C-5A-1a	5
IV. POINTS AND AUTHORITIES	5
A. Review of legal questions is <i>de novo</i> . Syl. Pt. 1, <i>Chrystal R.M. v. Charlie A.L.</i> , 194 W.Va. 138, 459 S.E.2d 415 (1995)	5
B. "Any suit in which the governor, any other state officer, or a state agency is made a party defendant" shall be brought and prosecuted in the circuit court of Kanawha County. W. Va. Code § 14-2-2	5
C. Jurisdiction of writs of mandamus and prohibition shall be in the circuit court of the county in which the record or proceeding is to which the writ relates. W. Va. Code § 53-1-2	5
D. The "Division's records relating to driver's licenses are maintained at the State Capitol in Charleston, Kanawha County, West Virginia." <i>State ex rel. Miller v. Reed</i> , 203 W. Va. 673, 684, 510 S.E.2d 507, 518 (1998).	5
E. "Accordingly, since the 'record,' to which Bishop's mandamus/prohibition circuit court action "relates," his driver's license, is in Kanawha County, and because the Commissioner was effectively a "defendant" below in Bishop's mandamus/prohibition	

circuit court action, we find that the Circuit Court of Nicholas County lacked the jurisdiction to proceed with Bishop's mandamus/prohibition circuit court actions and that the proper jurisdiction and venue for the action was the Circuit Court of Kanawha County." *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005) 5

F. "If the commissioner finds to the contrary with respect to the above issues, the commissioner shall rescind his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter." W. Va. Code § 17C-5A-2(q) 5

G. "If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted . . . the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state." W. Va. Code § 17C-5A-1a(c) 6

H. "The provisions of this section shall not apply if an order reinstating the operator's license of the person has been entered by the commissioner prior to the receipt of the transcript of the judgment of conviction." W. Va. Code § 17C-5A-1a(d) 6

I. Appellant's plea of *nolo contendere* to criminal DUI charges triggered a change in which statutory provisions governed Appellee's actions relative to the revocation or suspension of Appellant's license to operate a motor vehicle in this State. Prior to entry of the *nolo contendere* plea, Appellee's actions relative to revocation or suspension of Appellant's license were governed by W. Va. Code § 17C-5A-1, which provides for an administrative hearing and determination. However, once Appellant pled *nolo contendere* to the criminal DUI charges, the mandatory revocation provisions of W. Va. Code § 17C-5A-1a were triggered, thus changing the applicable statute under which the Appellee was authorized and required to proceed. Thus, Appellant's arguments regarding a violation of his due process rights by the Appellee's actions in revoking his license to operate a motor vehicle in this state are without merit. By entering his *nolo contendere* plea, Appellant was convicted of criminal DUI charges, thus, he was no longer statutorily entitled to an administrative hearing to challenge the revocation of his license. *State ex rel. Baker v. Bolyard*, 221 W. Va. 713, 718, 656 S.E.2d 464, 469 (2007) 6

J. Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under

J. 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 (d). 6

V. STANDARD OF REVIEW 7

VI. ARGUMENT 7

A. THE CIRCUIT COURT LACKED JURISDICTION TO HEAR THIS CASE, AND VENUE WAS IMPROPER IN THE CIRCUIT COURT 7

B. THE REVOCATION OF APPELLEE'S LICENSE ON THE BASIS OF HER NO CONTEST PLEA WAS PROPER 10

VII. RELIEF REQUESTED 16

TABLE OF AUTHORITIES

PAGE

CASES

<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995)	5, 7
<i>State ex rel. Baker v. Bolyard</i> , 221 W. Va. 713, 718, 656 S.E.2d 464, 469 (2007) . . .	6, 10, 14, 15
<i>State ex rel. Miller v. Reed</i> , 203 W. Va. 673, 510 S.E.2d 507 (1998)	5, 7, 8, 9
<i>State ex rel. Stump v. Johnson</i> , 217 W. Va. 733, 619 S.E.2d 246 (2005)	5, 9

STATUTES:

W. Va. Code § 14-2-2	5, 7, 8
W. Va. Code § 17A-2-2	8
W. Va. Code § 17B-3-9	13
W. Va. Code § 17C-5A-1	14
W. Va. Code § 17C-5A-1a	passim
W. Va. Code § 17C-5A-1a(c)	6, 11
W. Va. Code § 17C-5A-1a(d)	passim
W. Va. Code § 17C-5A-2	10, 11, 13
W. Va. Code § 17C-5A-2(q)	5, 9, 13, 14
W. Va. Code § 17C-5A-3a	11, 15
W. Va. Code § 17C-5A-3a(d)	6, 11, 14
W. Va. Code § 29A-5-1	10
W. Va. Code § 53-1-2	5, 7, 8

MISCELLANEOUS

91 C.S.R. 1, § 3.7.2	14
--------------------------------	----

NO. 35490

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MEREDITH D. WILLIAMS,

Appellee/Petitioner Below,

v.

THE WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, AND JOSEPH CICCHIRILLO,
COMMISSIONER,

Appellants/Respondents Below.

BRIEF OF APPELLANT

Come now the Appellants, West Virginia Division of Motor Vehicles (hereinafter, "Division") and Joe E. Miller, successor to Joseph Cicchirillo as Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "DMV"), by counsel, Janet E. James, Assistant Attorney General, and submits this brief in accordance with the order of the Court. Appellants seek reversal of the *Order Denying Motion to Dismiss and Reversing Order of Revocation* entered on May 29, 2009, by the Honorable David R. Janes, Judge of the Circuit Court of Marion County (hereinafter, "Order"), in an administrative appeal styled *Meredith D. Williams v. The West Virginia Division of Motor Vehicles, and Joseph Cicchirillo, Commissioner*, Civil Action No. 08-AA-5. Through its Order, the Circuit Court denied Appellants' *Motion to Dismiss* and reversed an administrative driver's license revocation order entered by the Appellants by which the Appellee's privilege to drive was revoked.

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from an Order of Revocation, dated June 12, 2008, which took effect on July 17, 2008 (hereinafter, "Revocation Order"), wherein the Division revoked the Appellee's privilege to drive in West Virginia, based on her conviction for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed the Division's Revocation Order upon the grounds that it was improper and contrary to the clear provisions of West Virginia Code § 17C-5A-1a(d) for the Division to issue a second order of revocation based upon the same offense, following her no contest plea, when Appellee's initial revocation had been previously rescinded by the Division.

B. THE ADMINISTRATIVE PROCEEDINGS

Appellee's privilege to drive was initially revoked for the present offense by an Order of Revocation for a DUI arrest that occurred on June 20, 2007. Appellee's license had been previously revoked for DUI for offenses that occurred on April 13, 2003 and March 19, 2005. Appellee timely requested an administrative hearing, and a hearing was held on August 31, 2007. The arresting officer failed to appear for the hearing, so the Division entered a Final Order effective September 20, 2007 which rescinded the initial Order of Revocation.

On or about March 20, 2008, Appellee pled no contest to second-offense DUI in the Magistrate Court of Marion County, West Virginia, relating to the June 20, 2007 arrest. On or about April 14, 2008, the Division received an Abstract of Judgment from the Marion County Magistrate Court reflecting Appellee's no contest plea. On June 12, 2008, the Division entered an Order of Revocation based upon the Appellee's conviction for DUI. Appellee then filed a *Petition for*

Judicial Review of a Final Order Revoking Privilege to Drive a Motor Vehicle in the Circuit Court of Marion County (Case No. 08-AA-5) on July 24, 2008, seeking reversal of the Appellants' order.

On November 17, 2008, the Appellants filed a *Notice of Limited Appearance, Motion to Dismiss and Response Brief*. Appellants argued that Appellee's Petition was a request for relief in prohibition and mandamus and was not an appeal from a contested case, and therefore, the circuit court lacked jurisdiction and venue was improper in the circuit court. Appellants also argued that the Order of Revocation on conviction was proper.

On May 29, 2009, the Honorable David R. Janes, Judge of the Circuit Court of Marion County, entered an *Order Denying Motion to Dismiss and Reversing Order of Revocation*.

II.

STATEMENT OF THE FACTS

Appellee was arrested for DUI on April 13, 2003. She was subsequently arrested for DUI on March 19, 2005. Her license was revoked for each of these offenses. Appellee was arrested for DUI a third time on June 20, 2007.

The administrative proceeding following her 2007 arrest resulted in a *Final Order* effective September 20, 2007, by which the revocation was rescinded due to the officer's failure to appear. The *Final Order* provided: "This dismissal applies only to the administrative license revocation hearing. Should the Respondent be convicted of driving under the influence as the result of any criminal disposition, the Respondent's driving privilege shall be revoked upon receipt of an abstract of conviction pursuant to West Virginia Code § 17C-5A-1a."

On March 20, 2008, Appellee pled no contest to DUI, second offense in the Magistrate Court of Marion County, relating to the June 20, 2007 offense. The Division received the relevant abstract reflecting this judgment on April 14, 2008.

Meanwhile, on April 28, 2008, Appellee was approved to complete the Test and Lock program, based on the 2003 and 2005 offenses. By Order of Revocation dated June 12, 2008, Appellee was advised that her privilege to drive was revoked on the basis of the conviction for the 2007 offense pursuant to W. Va. Code § 17C-5A-1a. Once the conviction was processed through the Division, Appellee was informed by letter dated June 25, 2008, that the revocation on conviction disqualified her from the Test and Lock program.

Appellee filed a *Petition for Judicial Review of a Final Order Revoking Privilege to Drive a Motor Vehicle* seeking relief from the Order of Revocation on conviction. Appellants filed a motion to dismiss said petition on the basis that it was not an appeal from a contested case, and that therefore the circuit court lacked jurisdiction and that venue was improper in that court. Appellants also argued that the Order of Revocation on conviction was proper. By *Order Denying Motion to Dismiss and Reversing Order of Revocation*, entered May 29, 2009, Judge Janes denied the motion to dismiss and reversed the Division's Revocation Order.

III.

ASSIGNMENTS OF ERROR

A. **THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS.**

- B. THE CIRCUIT COURT ERRED IN REVERSING THE ORDER OF REVOCATION ON CONVICTION ON THE BASIS THAT THE APPELLANTS ERRONEOUSLY ENTERED A SECOND ORDER OF REVOCATION BASED ON W. VA. CODE § 17C-5A-1a.**

IV.

POINTS AND AUTHORITIES

- A. Review of legal questions is *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).
- B. “Any suit in which the governor, any other state officer, or a state agency is made a party defendant” shall be brought and prosecuted in the circuit court of Kanawha County. W. Va. Code § 14-2-2.
- C. Jurisdiction of writs of mandamus and prohibition shall be in the circuit court of the county in which the record or proceeding is to which the writ relates. W. Va. Code § 53-1-2.
- D. The “Division's records relating to driver's licenses are maintained at the State Capitol in Charleston, Kanawha County, West Virginia.” *State ex rel. Miller v. Reed*, 203 W. Va. 673, 684, 510 S.E.2d 507, 518 (1998).
- E. “Accordingly, since the ‘record,’ to which Bishop's mandamus/prohibition circuit court action “relates,” his driver's license, is in Kanawha County, and because the Commissioner was effectively a “defendant” below in Bishop's mandamus/prohibition circuit court action, we find that the Circuit Court of Nicholas County lacked the jurisdiction to proceed with Bishop's mandamus/prohibition circuit court actions and that the proper jurisdiction and venue for the action was the Circuit Court of Kanawha County.” *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005).
- F. “If the commissioner finds to the contrary with respect to the above issues, the commissioner shall rescind his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter.” W. Va. Code § 17C-5A-2(q).

- G. "If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted . . . the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state." W. Va. Code § 17C-5A-1a(c).
- H. "The provisions of this section shall not apply if an order reinstating the operator's license of the person has been entered by the commissioner prior to the receipt of the transcript of the judgment of conviction." W. Va. Code § 17C-5A-1a(d).
- I. Appellant's plea of *nolo contendere* to criminal DUI charges triggered a change in which statutory provisions governed Appellee's actions relative to the revocation or suspension of Appellant's license to operate a motor vehicle in this State. Prior to entry of the *nolo contendere* plea, Appellee's actions relative to revocation or suspension of Appellant's license were governed by W. Va. Code § 17C-5A-1, which provides for an administrative hearing and determination. However, once Appellant pled *nolo contendere* to the criminal DUI charges, the mandatory revocation provisions of W. Va. Code § 17C-5A-1a were triggered, thus changing the applicable statute under which the Appellee was authorized and required to proceed. Thus, Appellant's arguments regarding a violation of his due process rights by the Appellee's actions in revoking his license to operate a motor vehicle in this state are without merit. By entering his *nolo contendere* plea, Appellant was convicted of criminal DUI charges, thus, he was no longer statutorily entitled to an administrative hearing to challenge the revocation of his license. *State ex rel. Baker v. Bolyard*, 221 W. Va. 713, 718, 656 S.E.2d 464, 469 (2007).
- J. 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 (d).

V.

STANDARD OF REVIEW

This Court must apply a “clearly wrong” standard to its review of the facts of this case, and a “*de novo*” standard to its review of the law applied. “Where the issues on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.’ Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).” Syl. pt. 5, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

VI.

ARGUMENT

A. THE CIRCUIT COURT LACKED JURISDICTION TO HEAR THIS CASE, AND VENUE WAS IMPROPER IN THE CIRCUIT COURT.

With no analysis regarding the Appellants’ *Motion to Dismiss* this matter from the circuit court of Marion County, that court summarily denied the *Motion*. The lower court made a legal conclusion about the Order of Revocation, then “based” its denial of the Motion on those findings.

In the matter below, Appellee asked the circuit court to find that the entry of the Order of Revocation based on her conviction was beyond the scope of the Appellants’ authority, and to compel the Appellants to rescind the order. Therefore, the *Petition* was a request for relief in prohibition and mandamus. Actions in which extraordinary relief is sought against a state officer must be brought in Kanawha County, and jurisdiction of extraordinary writs shall be in the circuit court of the county in which the record or proceeding is to which the writ relates. W. Va. Code §§ W. Va. Code § 14-2-2; 53-1-2.

W. Va. Code § 14-2-2 clearly provides: “[a]ny suit in which the governor, any other state officer, or a state agency is made a party defendant” shall be brought and prosecuted in the circuit court of Kanawha County. The Commissioner of the Division of Motor Vehicles is an officer of the State of West Virginia who is appointed by, and serves at the will and pleasure of, the Governor of West Virginia. W. Va. Code § 17A-2-2.

W. Va. Code § 53-1-2 provides that jurisdiction of writs of mandamus and prohibition shall be in the circuit court of the county in which the record or proceeding is to which the writ relates. This Court has made clear that “the Division's records relating to driver's licenses are maintained at the State Capitol in Charleston, Kanawha County, West Virginia.” *State ex rel. Miller v. Reed*, 203 W. Va. 673, 684, 510 S.E.2d 507, 518 (1998). In *Miller v. Reed*, the Appellees sought to compel the DMV to provide them with administrative hearings on their license revocations, although their requests therefor were out of time. This Court held:

When an individual brings a mandamus action seeking to compel the West Virginia Division of Motor Vehicles to perform a statutory duty which relates to the Division's maintenance of records, and such action is not an administrative appeal pursuant to the West Virginia Administrative Procedures Act, West Virginia Code §§ 29A-1-1 to 29A-7-4 (1998), West Virginia Code §§ 14-2-2(a)(1) and 53-1-2 require that such action shall be brought in the Circuit Court of Kanawha County, but such an action cannot be used to circumvent the administrative appeals procedure.

Syl. pt. 12, *supra*. In *Miller v. Reed, supra*, this Court also noted:

West Virginia Code § 53-1-2 (1994) provides that “[j]urisdiction of writs of mandamus and prohibition ... shall be in the circuit court of the county in which the record or proceeding is to which the writ relates.” In both cases, the Division's records relating to driver's licenses are maintained at the State Capitol in Charleston, Kanawha County, West Virginia. There is no question that, in regard to these

two cases, jurisdiction for a writ of mandamus must be brought in the Circuit Court of Kanawha County. Both actions sought to compel the Division to provide Mr. Shedd and Ms. Burrough with an administrative hearing to challenge the revocation of their driver's licenses, and such records are maintained in Kanawha County.

203 W.Va. 684, 510 S.E.2d 518 (1998).

In *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005), the Appellee had attempted to bring an action for extraordinary relief against the Commissioner of the Division of Motor Vehicles in the Circuit Court of Nicholas County. The Supreme Court found that the Nicholas County court lacked jurisdiction and that venue was improper:

Accordingly, since the "record," to which Bishop's mandamus/prohibition circuit court action "relates," his driver's license, is in Kanawha County, and because the Commissioner was effectively a "defendant" below in Bishop's mandamus/prohibition circuit court action, we find that the Circuit Court of Nicholas County lacked the jurisdiction to proceed with Bishop's mandamus/prohibition circuit court actions and that the proper jurisdiction and venue for the action was the Circuit Court of Kanawha County.

217 W. Va. 740-41, 619 S.E.2d 253- 54.

The present matter is not an appeal; Appellee sought relief from the Appellants' order of revocation on her conviction. The administrative hearing resulted in an order rescinding the revocation pursuant to W. Va. Code 17C-5A-2(q)(2004)¹. Subsequently, the Commissioner issued

¹"If the commissioner finds to the contrary with respect to the above issues, the commissioner shall **rescind** his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter." W. Va. Code §17C-5A-2(q)(2004)(emphasis added).

an Order of Revocation upon conviction pursuant to W. Va. Code §17C-5A-1a². By the time the Appellants received notification of Appellee's conviction, W. Va. Code §17C-5A-2 was no longer in play. "...once Appellant pled *nolo contendere* to the criminal DUI charges, the mandatory revocation provisions of W. Va. Code § 17C-5A-1a were triggered, thus changing the applicable statute under which the Appellee was authorized and required to proceed." *State ex rel. Baker v. Bolyard* 221 W. Va. 713, 718, 656 S.E.2d 464, 469 (2007). Appellants were obligated to revoke on conviction pursuant to W. Va. Code §17C-5A-1a.

Appellee argues that under W.Va. Code § 17C-5A-1a(d), the restoration of her license following the administrative hearing was a "reinstatement," not a "rescission". That is not the case, as will be argued *infra*.

The provisions of W. Va. Code § 17C-5A-1a, pertaining to reinstatement, do not apply in this case. Revocation on conviction is a ministerial function of the Division, not one in which the Division looks behind the conviction to determine the merits of the case. The Commissioner's obligation to revoke upon being notified that a person has been convicted of DUI is mandatory and non-delegable. In no way does this matter fall under the "contested case" provisions of W. Va. Code § 29A-5-1 et seq. This matter is in the nature of an extraordinary writ and must be brought in Kanawha County. The circuit court erred in denying Appellants' *Motion to Dismiss*.

B. THE REVOCATION OF APPELLEE'S LICENSE ON THE BASIS OF HER NO CONTEST PLEA WAS PROPER.

²W. Va. Code § 17C-5A-1a(d) provides: "The provisions of this section shall not apply if an order **reinstating** the operator's license of the person has been entered by the commissioner prior to the receipt of the transcript of the judgment of conviction."

Appellee's conviction of the 2007 DUI offense requires that she participate in the Test and Lock Program as a subsequent offender. W. Va. Code § 17C-5A-3a. The June 12, 2008 Order of Revocation advised Appellee that she was required to complete the Alcohol Test and Lock Program.

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 (d). Because of her two previous revocations for the 2003 and 2005 offenses, she was required to participate in the program.

The circuit court entirely ignored this Code section, relying solely upon W. Va. Code § 17C-5A-1a(d) to find that it was improper for the Division to issue an Order of Revocation on conviction after rescinding her revocation following the administrative hearing. The statutory framework for license revocation provides two means by which a driver's license may be revoked for DUI. If the requisite elements of either are met, the Commissioner has a mandatory duty to revoke. A person may have his license revoked administratively upon the submission of the DUI Information Sheet (in which event the person may request an administrative hearing on the merits) pursuant to W. Va. Code § 17C-5A-2; *or* a person's license may be revoked upon conviction pursuant to W. Va. Code § 17C-5A-1a and W. Va. Code § 17C-5A-3a(d). "If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted . . . the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state." W. Va. Code § 17C-5A-1a(c).

At the September 8, 2008 hearing in this matter, the circuit court seemed to be surprised that there are two ways in which the Division may revoke a license. The court inquired, “So the DMV basically got two chances to revoke her license on the third arrest?” Transcript of Hearing before the Honorable David Janes held on September 8, 2008 at 7 (hereinafter, “Tr. at 7”). Subsequently, the court stated, “Let’s say she’s got a hearing and the arresting officer appears at the administrative hearing before the hearing examiner, and on that evidence the hearing examiner finds that the revocation should be dismissed and her license should be reinstated, then upon a subsequent conviction she can still have her license revoked?” Tr. At 7. “And there are cases that say that’s permissible?” Tr. At 8.

The circuit court was interested in the fact that this issue had been raised in *Curfman v. Bolyard*, Supreme Court No. 081554. Tr. 8-9. At the time of the September 8, 2008 hearing, this Court had not yet refused the petition in *Curfman*. This Court refused the Petition by Order entered on September 25, 2008. It appears that the circuit court desired caselaw to back up the statutory interpretation offered by the Appellants.

The circuit court erred in finding that the Order of Revocation on conviction was improper and misinterpreting W. Va. Code 17C-5A-1a(d). A person may not be revoked two times for the same offense. W. Va. Code § 17C-5A-1a(d) is intended to prevent two revocations stemming from the same offense: “[t]he provisions of this section shall not apply if an order **reinstating** the operator’s license of the person has been entered by the commissioner prior to the receipt of the transcript of the judgment of conviction.” (Emphasis added.) Reinstatement presumes that a revocation period has been served, that a reinstatement fee has been paid, and that all other requirements have been met in order to get one’s license back. “Reinstatement” is defined by Black’s

Law Dictionary (Fifth Edition) thus: “To reinstall; to reestablish; to place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed.” “Reinstatement” must be distinguished from “rescission”. Code sections pertaining to motor vehicles law are illustrative. For example, W. Va. Code § 17B-3-9 sets forth the provisions for reinstatement following revocation of a license:

The Division, upon suspending or revoking a license, may not require that the license be surrendered to and be retained by the Division. The surrender of a license may not be a precondition to the commencement and tolling of any applicable period of suspension or revocation: *Provided*, That before the license may be reinstated, the licensee shall pay a fee of fifty dollars, in addition to all other fees and charges, which shall be collected by the Division and deposited in a special revolving fund to be appropriated to the Division for use in the enforcement of the provisions of this section.

Rescission, on the other hand, means that the revocation initially put in place cannot stand. Rescission is made in the context of an administrative appeal of an initial order of revocation pursuant to W. Va. Code § 17C-5A-2(q): “If the commissioner finds to the contrary with respect to the above issues, the commissioner shall **rescind** his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter.” (emphasis added). Black’s Law Dictionary (Fifth Edition) defines “rescind” thus: “To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. To declare a contract void in its inception and to put an end to it as though it never were....Not merely to terminate it and release parties from further obligations to each other but to abrogate it from the beginning and restore parties to relative positions which they would have occupied had no contract ever been made.” When a revocation is rescinded pursuant to W. Va. Code § 17C-5A-2,

the person's revocation has been stayed during the pendency of a hearing, and the person has been legally able to drive. Moreover, there are no requirements of Safety and Treatment Program, Interlock, or reinstatement fees in order for full licensure to be restored. The person has never suffered the imposition of a revocation period.

In the present case, Appellee's initial Order of Revocation was made pursuant to W. Va. Code § 17C-5A-1. Following the hearing in that matter, the revocation was rescinded in a Final Order pursuant to W. Va. Code § 17C-5A-2(q) and 91 C.S.R. 1, § 3.7.2. At that point, Appellee had never actually served a revocation period for the 2007 arrest; nor was she required to complete the Safety and Treatment Program or pay a reinstatement fee to get her license back.

However, Appellee was advised that despite the rescission following the hearing, her license could be revoked on conviction. The Final Order rescinding her initial revocation stated: "This dismissal applies only to the administrative license revocation hearing. Should the Respondent be convicted of driving under the influence as the result of any criminal disposition, the Respondent's driving privilege shall be revoked upon receipt of an abstract of conviction pursuant to West Virginia Code § 17C-5A-1a."

The Appellants were obligated to revoke Appellee's license upon receipt of the Abstract of Judgment from the Magistrate Court of Marion County, which showed that Appellee had pled no contest to DUI. W. Va. Code §§ 17C-5A-1a; 17C-5A-3a(d); *Stump, supra*; *State ex rel. Baker v. Bolyard*, 221 W. Va. 713, 656 S.E.2d 464 (2007).

This Court's analysis in *Baker, supra*, supports Respondents' position that a revocation on conviction following rescission of the revocation is proper. In *Baker* the Court noted,

Appellant's plea of *nolo contendere* to criminal DUI charges triggered a change in which statutory provisions governed Appellee's actions relative to the revocation or suspension of Appellant's license to operate a motor vehicle in this State. Prior to entry of the *nolo contendere* plea, Appellee's actions relative to revocation or suspension of Appellant's license were governed by W. Va. Code § 17C-5A-1, which provides for an administrative hearing and determination. However, once Appellant pled *nolo contendere* to the criminal DUI charges, the mandatory revocation provisions of W. Va. Code § 17C-5A-1a were triggered, thus changing the applicable statute under which the Appellee was authorized and required to proceed. Thus, Appellant's arguments regarding a violation of his due process rights by the Appellee's actions in revoking his license to operate a motor vehicle in this state are without merit. By entering his *nolo contendere* plea, Appellant was convicted of criminal DUI charges, thus, he was no longer statutorily entitled to an administrative hearing to challenge the revocation of his license.

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

As in *Baker*, the Appellants' receipt of the Abstract of Judgment "triggered a change in which statutory provisions governed [the Division's] actions relative to the revocation or suspension of Respondent's license to operate a motor vehicle." *Id.* The Appellants were obligated to revoke Appellee's license following their receipt of the Abstract of Judgment.

It is impossible to read the *Baker* case and W. Va. Code § 17C-5A-3a to mean that the Commissioner must ignore or fail to act on an abstract of conviction simply because he has rescinded the administrative revocation. The law is clear that the Commissioner has a mandatory duty to revoke a person's license when he receives an abstract of conviction reflecting a no contest plea to DUI. The provisions of W. Va. Code § 17C-5A-1a(d) do not constitute an exception to this duty. Pursuant to W. Va. Code § § 17C-5A-1a and 17C-5A-3a, the Appellants' Order of Revocation entered on June 12, 2008 must be affirmed and the circuit court's Order overturned.

VII.

RELIEF REQUESTED

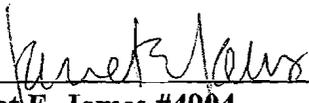
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant prays that this Court reverse the Order entered by the Circuit Court of Marion County on May 29, 2009.

Respectfully submitted,

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

By Counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



**Janet E. James #4904
Assistant Attorney General
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304) 926-3874
Counsel for Appellants**

NO. 35490

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MEREDITH D. WILLIAMS,

Appellee/Petitioner Below,

v.

THE WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, AND JOSEPH CICCHIRILLO,
COMMISSIONER,

Appellants/Respondents Below.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, and counsel for Appellants, do hereby certify that the foregoing was served upon Respondent by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 12th day of April, 2010, addressed as follows:

Jeffery L. Freeman, Esquire
Post Office Box 1147
Fairmont, West Virginia 26554



JANET E. JAMES