

NO. 35436

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRY LEE PHILLIPS,

Petitioner,

v.

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

Respondent.

APPELLEE'S BRIEF

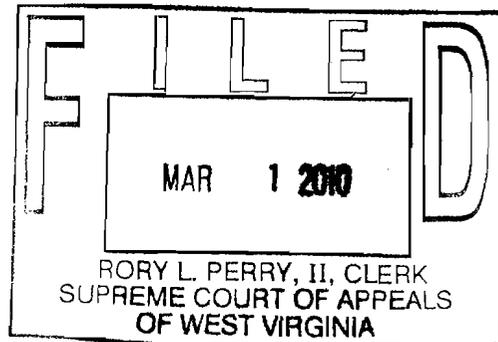
Respectfully submitted,

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

By Counsel

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

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APPELLEE'S BRIEF

Comes now the Appellee, Joe E. Miller, successor to Joseph Cicchirillo as Commissioner of the West Virginia Division of Motor Vehicles (hereinafter "Division"), by counsel, Janet E. James, Assistant Attorney General, and submits this brief in response to the appellant's brief.

KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

After receiving an abstract of conviction from the State of Virginia showing that Petitioner had been convicted of "Improper Driving" the Appellee entered this offense on Appellant's driving record as "Hazardous Driving" with an internal DMV Code of "035" and assessed Appellant three points on his license.

Appellant filed a *Petition for Review of Commissioner's Designation of Driving Record* in the Circuit Court of Boone County requesting the Court to order the Division to remove the hazardous driving designation from his driving record.

After Appellee filed a *Motion to Dismiss for Lack of Jurisdiction and Improper Venue*,

the Honorable Jay M. Hoke, Chief Judge, entered a *Procedural Order: Denying Motion to Dismiss/Transferring Case to Proper Venue*, which denied Appellee's *Motion to Dismiss* and transferred the matter to the Kanawha County Circuit Court.

A hearing was held before the Honorable Louis H. Bloom on March 31, 2009. An *Order Denying Writ of Prohibition* was entered by Judge Bloom on April 23, 2009.

Appellant filed *Terry Lee Phillips' Petition for Appeal* in this Court on July 9, 2009. By order entered January 13, 2010, this Court granted the petition.

STATEMENT OF FACTS

On March 27, 2007, Appellant was issued a citation in the State of Virginia for "Reckless Driving" for driving 85 miles per hour in a 65 miles per hour zone. Appellant contested the citation and entered a plea to "Improper Driving" pursuant to Virginia Code § 46.2-869.

On June 4, 2007, the Division received an abstract of conviction from the State of Virginia, which had been sent pursuant to the Driver License Compact (W. Va. Code §§ 17B-1A-1 *et seq.*), showing that Appellant had been convicted of "Improper Driving" by the State of Virginia. (Va. Code Ann. § 46.2-869).

On or about August 1, 2007, Appellee entered this offense on Appellant's driving record as "Hazardous Driving" with an internal DMV Code of "035" and assessed Appellant three points on his license.

On June 27, 2008, Appellant filed a *Petition for Review of Commissioner's Designation of Driving Record* in the Circuit Court of Boone County requesting the Court to order the Division to remove the hazardous driving designation from his driving record.

On October 21, 2008, Appellee filed a *Motion to Dismiss for Lack of Jurisdiction and Improper Venue*.

On January 16, 2009, the Honorable Jay M. Hoke, Chief Judge, entered a *Procedural Order: Denying Motion to Dismiss/Transferring Case to Proper Venue*, which denied Appellee's *Motion to Dismiss* and transferred the matter to the Kanawha County Circuit Court.

A hearing was held before Judge Bloom on March 31, 2009. The briefing schedule was set during the hearing. An *Order Denying Writ of Prohibition* was entered by Judge Bloom on April 23, 2009.

Appellant filed his Petition for Appeal in this Court on July 9, 2009. By order entered January 13, 2010, this Court granted the petition.

ISSUE PRESENTED

WHETHER THE DESIGNATION OF APPELLANT'S IMPROPER DRIVING CONVICTION FROM THE STATE OF VIRGINIA AS A HAZARDOUS DRIVING OFFENSE WITH A THREE POINT ASSESSMENT AND A "035" DESIGNATION BY THE APPELLEE WAS PROPER.

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).

ARGUMENT

THE DESIGNATION OF APPELLANT'S IMPROPER DRIVING CONVICTION FROM THE STATE OF VIRGINIA AS A HAZARDOUS DRIVING OFFENSE WITH A THREE POINT ASSESSMENT AND A "035" DESIGNATION BY THE APPELLEE WAS PROPER.

Pursuant to Article III of the Driver License Compact (W. Va. Code § 17B-1A-1 *et seq.*), to which West Virginia is a party,

[t]he licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. Such report shall clearly identify the person convicted; describe the violation specifying the section of the statute, code or ordinance violated; identify the court in which action was taken; indicate whether a plea of guilty or not guilty was entered, or the conviction was a result of the forfeiture of bail, bond or other security; and shall include any special findings made in connection therewith.

The provisions of Article IV(c) provide that when an offense is not described in precisely the same language in the two relevant states, the licensing state shall find an offense in the licensing state of a "substantially similar nature" in entering convictions and appropriately assessing points:

If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in subsection (a) of this article, such party state shall construe the denominations and descriptions appearing in subsection (a) hereof as being applicable to and identifying those offenses or violations of a substantially similar nature and the laws of such party state shall contain such provisions as may be necessary to ensure that full force and effect is given to this article.

W. Va. Code 17B-1A-1, Article IV(c).

In the present case, Appellant was convicted of "Improper Driving" pursuant to Va. Code Ann. § 46.2-869. That statute provides:

Notwithstanding the foregoing provisions of this article, upon the trial of any person charged with reckless driving where the degree of culpability is slight, the court in its discretion may find the accused not guilty of reckless driving but guilty of improper driving. However, an attorney for the Commonwealth may reduce a charge of reckless driving to improper driving at any time prior to the court's decision and shall notify the court of such change. Improper driving shall be punishable as a traffic infraction punishable by a fine of not more than \$500.

Va. Code Ann. § 46.2-869.

Upon review of the conviction and the Virginia Statute, Appellee properly determined that the corresponding statute was W. Va. Code § 17C-6-1(a), which provides:

No person may drive a vehicle on a highway at a speed greater than is reasonable and prudent under the existing conditions and the actual and potential hazards. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highways in compliance with legal requirements and the duty of all persons to use due care.

W. Va. Code § 17C-6-1(a).

Pursuant to the Code of State Rules, 91 C.S.R. 5, § 7.2, Appellee assessed three points to Appellant's license under the category "Driving too fast for conditions, failure to keep vehicle under control or hazardous driving." The Petitioner's license was internally coded "035", which is described as "Hazardous Driving."

Appellant argues conversely that because he plead down his reckless driving charge in Virginia, which means 20 or more miles per hour over the speed limit, that he was necessarily convicted of going somewhere between one and 19 miles per hour over the limit. He argues that W. Va. Code § 17C-6-1 absolves him of liability for the conviction of improper driving. However, none of the specific speed restrictions in that statute are applicable in the present case. The speed simply

is not established in the record; moreover, neither Va. Code Ann. § 46.2-869 nor W. Va. Code §17C-6-1 contain any speed restrictions relevant to the facts in this case.

The provisions of W. Va. Code §17C-6-1 which prohibit the Division from acting upon transcripts of convictions for offenses of less than 10 miles per hour on a controlled access highway are not applicable in this case because the precise speed is not in the record. The record is unclear whether the Appellant was driving ten miles or less below the speed limit.

The Division's assessment of an "035" designation and three points is not based on a speed-specific offense. The descriptions above provide that the offense recorded was "Driving too fast for conditions, failure to keep vehicle under control or hazardous driving." This is consistent with W. Va. Code § 17C-6-1, 91 C.S.R.5-7, and the Division's internal coding, which designates that "035" is a "hazardous driving" offense. Hence, the Division's assignment of three points and an "035" designation most closely approximated the denominations and descriptions appearing in Va. Code Ann. § 46.2-869 as being applicable to and identifying those offenses or violations.

State v. Euman, 210 W.Va. 519, 522, 558 S.E.2d 319, 322 (2001), cited by Appellant, supports Appellee's position in this matter. As in *Euman*, Appellant acknowledges that he was convicted of a speeding charge. The Appellee acted appropriately in assigning Appellant three points and an "035" designation.

A writ of prohibition will issue "in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. In order for a writ of prohibition to lie, there must be (1) a judicial or quasi-judicial agency which: (2) has exceeded or usurped its jurisdiction and; (3) there is no adequate remedy at law. The Appellee adhered to its statutes and rules as set

forth in the West Virginia Code and the Code of State rules, and therefore did not exceed its authority. The Supreme Court of Appeals of West Virginia has stated as follows:

“Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.” Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

Syl. pt. 2, *Cowie v. Roberts*, 173 W. Va. 64, 312 S.E.2d 35 (1984). In light of the fact that Appellant is unable to identify any way in which the Division has exceeded its jurisdiction in this matter, prohibition will not lie as a matter of law.

CONCLUSION

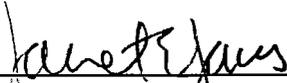
WHEREFORE, Appellee respectfully prays that the *Order*, entered October 25, 2007, be affirmed.

Respectfully submitted,

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

By Counsel,

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



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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Appellee's* *Brief* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 1st day of March, 2010, addressed as follows:

Steven M. Thorne, Esquire
Cook & Cook
Post Office Box 190
Madison, West Virginia 25130



JANET E. JAMES