

WEST VIRGINIA SUPREME COURT OF APPEALS

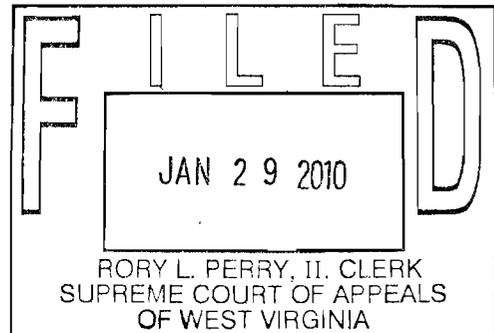
TERRY LEE PHILLIPS,

Appellant,

Supreme Court No. 35436
Civil Action No. 08-C-143
Order Date: 4-23-2009

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

Appellee.



TERRY LEE PHILLIPS'
PETITION FOR APPEAL

Steven M. Thorne
Cook & Cook
P.O. Box 190
Madison, WV 25130
(304) 369-0110

BRIEF ON BEHALF OF APPELLANT, TERRY PHILLIPS

HISTORY OF THE CASE

The Appellant filed a Writ of Prohibition in the Circuit Court of Boone County, West Virginia, which was transferred to Kanawha County Circuit Court, alleging that the West Virginia Division of Motor Vehicles (DMV) improperly designated a conviction for an out-of-state moving violation as a hazardous driving offense, contrary to the facts and the law of the State of West Virginia. The Writ of Prohibition was denied by Order entered on April 23, 2009. The Appellant now appeals that decision.

FACTS

1. The Appellant, Terry Phillips, was issued a citation in the State of Virginia for Reckless Driving on March 27, 2007. The citation stated that he was driving 85 mph in a 65 mph zone on interstate 77, which is a limited access highway. There were no other allegations of hazardous driving other than exceeding the posted speed limit by 20 mph. (See Petitioner's exhibit #1)
2. Mr. Phillips contested the citation for reckless driving and retained counsel in the State of Virginia to represent his interests. On May 8, 2007, Mr. Phillips entered a guilty plea to Improper Driving pursuant to Virginia Code Section 46.2-869, which is the least restrictive moving violation within the Virginia Code. West Virginia does not have a corresponding statute. (Id.)

3. Improper Driving in the State of Virginia is a lesser included offense to Reckless Driving where the degree of culpability is slight. No speed designation was determined, however, it had to be less than twenty (20) mph over the posted limit or else he would have been convicted of Reckless Driving. (See Petitioner's exhibit #2)
4. Reckless driving in the State of Virginia is the same as in West Virginia, in this case 20 mph over the posted speed limit with a six (6) point assessment. However, Improper Driving in the State of Virginia allows for a three (3) point assessment. Moreover, Improper Driving is categorized in the State of Virginia equivalent to speeding one to nine miles over the posted speed limit. (Petitioner's exhibit #3 at p.1, 3, 7 and 10)
5. West Virginia Code Section 17B-1A-1 Article IV(c) states as follow:" 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."
6. West Virginia Code Section 17C-6-1(i) states: " If an owner or driver is convicted under the provisions of this section for the offense of driving above the speed limit on a controlled-access highway or interstate highway of this state and if the evidence shows that the motor vehicle was being operated at ten miles per hour or less above the speed limit, then notwithstanding the provisions of section four, article three, chapter seventeen-b of this code, a certified abstract of the judgment on the conviction shall not be transmitted to the division of motor vehicles: Provided, That the provisions of this subsection do not apply to conviction of owners or drivers who have been issued a commercial driver's license as defined in chapter seventeen-e of this code, if the offense was committed while operating a commercial vehicle."

West Virginia Code Section 17C-6-1(j) states: "If an owner or driver is convicted in another state for the offense of driving above the maximum speed limit on a controlled-access highway or interstate highway and if the maximum speed limit in the other state is less than the maximum speed limit for a comparable controlled-access highway or interstate highway in this state, and if the evidence shows that the motor vehicle was being operated at ten miles per hour or less above what would be the maximum speed limit for a comparable controlled-access highway or interstate highway in this state, then notwithstanding the provisions of section four, article three, chapter seventeen-b of this code, a certified abstract of the judgment on the conviction shall not be transmitted to the division of motor vehicles or, if transmitted, shall not be recorded by the division, unless within a reasonable time after conviction, the person convicted has failed to pay all fines and costs imposed by the other state: Provided, That the provisions of this subsection do not apply to conviction of owners or drivers who have been issued a commercial driver's license as defined in chapter seventeen-e of this code, if the offense was committed while operating a commercial vehicle."

7. Pursuant to 17B-1A-1 Article IV©, the West Virginia Department of Motor Vehicles is required to construe out-of-state convictions for offenses not provided for in the West Virginia Code to similar offenses within the West Virginia Code. The West Virginia code section most similar to Improper Driving is Speeding less than ten mph over the posted speed limit. West Virginia Code Section 17C-6-1(i) states that if you are less than ten (10) mph over the posted speed limit on a limited access highway there shall be no points assessed.
8. The West Virginia Department of Motor Vehicles improperly designated the Improper Driving convictions as a Hazardous Driving offense and assessed three (3) points to his license and included the "035" designation for hazardous driving.

9. The designation of the DMV was improper because the most similar moving violation to Improper Driving is speeding less than ten (10) mph over the posted speed limit. There were no allegations of hazardous driving other than going twenty (20) miles over the posted speed limit. Further, there is no West Virginia Statue that allows for a three point assessment and the hazardous driving designation. The only way that a hazardous driving designation can be assessed in the State of West Virginia is for a conviction for Reckless Driving, Driving under the influence or some type of reckless endangerment, which requires a six (6) point assessment.
10. In this case there is no evidence of hazardous driving other than the allegation of speed that was reduced to Improper Driving. In the State of West Virginia you can go nineteen (19) miles over the speed limit and you will be assessed three (3) points and no hazardous driving. The only method under West Virginia Law that the West Virginia DMV can assess a hazardous driving designation in this case would have been if Mr. Phillips had entered a guilty plea to Reckless Driving.
11. By Order entered on April 23, 2009, the Court found that it was not clearly erroneous for the DMV to record the out-of-state conviction as "Driving too fast for conditions, failure to keep vehicle under control or hazardous driving". (Petitioner's exhibit #4)

ISSUE

Whether the West Virginia Department of Motor Vehicles erred by designating an Improper Driving conviction from the State of Virginia as a Hazardous Driving offense, which included a three (3) point assessment and an "035" designation, where the out-of-state conviction for Improper

Driving was based solely on speeding less than 20 miles per hour over the speed limit.

ARGUMENT

FN1. Consistent with this Court's holding in *State v. Hulbert*, 209 W.Va. 217, 544 S.E.2d 919 (2001), as with out-of-state domestic violence convictions, we emphasize that out-of-state DUI convictions may only be used as predicate offenses for charging a defendant with driving while revoked for DUI when the foreign statute under which the defendant was convicted contains essentially the same elements as those required for an offense under W.Va.Code § 17B-4-3(b). When the foreign statute contains different or additional elements, it must be shown that the factual predicate upon which the DUI conviction was obtained would have supported a conviction under West Virginia law.

Under the Driver License Compact, each state is required to treat a conviction in a sister state in the same manner as it would an in-state conviction. Code, 12B-1A-1, 17B-1A-2.

State v. Euman, 210 W.Va. 519, 558 S.E. 2d 319 (2001)

The Petitioner has the burden of proving that the West Virginia Division of Motor Vehicles erred by designating the Virginia Improper Driving offense. The facts in this case are not in dispute. He was charged with Reckless Driving for allegedly going 20 mph over the posted speed limit and entered a guilty plea to a lesser included offense of Improper Driving on a limited access highway. There were no allegations of

hazardous driving other than exceeding the posted speed limit by twenty (20) mph.

The law in this case, 17B-1A-1, requires the DMV to designate an out-of-state conviction to a West Virginia statute that is most similar. The definition and penalties for Improper Driving in the Virginia Code are instructive. The State of Virginia categorizes Improper Driving as the least restrictive moving violation in their code. It is equivalent to Speeding less than ten miles per hour over the posted Speed limit.

West Virginia Code Section 17C-6-1(i) states that if you are convicted of going less than ten (10) miles over the speed limit on a limited access highway, such as an interstate, then no points shall be assessed. Three (3) points shall be assessed if you are convicted of going ten (10) to nineteen (19) miles over the speed limit. West Virginia does not allow for a hazardous driving designation for either without other evidence. The West Virginia Code allows for a hazardous driving designation on if you are convicted of Reckless Driving or a higher offense or commit some hazardous act while driving that places the general public at risk of injury. The West Virginia code clearly states that driving one (1) to nineteen (19) miles over the speed limit is not a factor for hazardous driving.

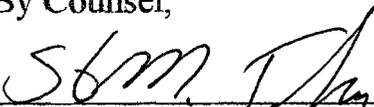
The definition for Improper Driving is somewhat vague, but reasonable minds can determine that it is a speeding violation somewhere from one (1) to nineteen (19) miles over the posted speed limit.

The Euman case reiterates West Virginia Code Section 17B-1A-1, Article IV©. Both require that the elements of the offense must be equivalent to the West Virginia Statute. Actually, there is no specific West Virginia statute for Hazardous Driving. It is the policy at DMV to designate Improper Driving as a hazardous driving offense because that is the way it has always been done. There are no facts in this case to support the designation for hazardous driving. The DMV has abused its discretion in this case.

CONCLUSION

The Appellant respectfully asks that this Honorable Court to issue an order requiring the West Virginia Department of Motor Vehicles to remove the "035" hazardous driving designation from his driving record.

Terry Lee Phillips,
By Counsel,



Steven M. Thorne (#5534)
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Madison, WV 25130
(304) 369-0110

PLAINTIFF'S EXHIBIT #1

Exhibit #1

EXTRA COPY

07-37188 VIRGINIA UNIFORM SUMMONS

Case No. 07005867

HEARING DATE AND TIME

YOU ARE SUMMONED TO APPEAR IN THE CITY OF (COUNTY OF) Wythe County

PROSECUTING ATTORNEY (NAME) *Andrew*

GENERAL DISTRICT COURT (JUDICIAL) GENERAL DISTRICT COURT (CRIMINAL) JUVENILE & DOMESTIC RELATIONS DISTRICT COURT

DEFENSE ATTORNEY (NAME) *Charles R.*

245 South Fourth, Street Wytheville, Virginia, 24382

THE ACCUSED (NAME) *Phillips Terry*

ON VIOLATION OF STATE OF VIRGINIA CITY OF TOWN

THE ACCUSED (ADDRESS) *221 962 862*

LAST SECTION *221 962 862* DESCRIBE CHARGE *Reckless Driving Per Se - 45/100*

AND WAS TRUED AND FOUND BY ME *5-8-07*

COMMERCIAL MOTOR VEHICLE YES NO HAZARDOUS MATERIALS YES NO RECALIBRATED IN FACTORY YES NO HIGHWAY SAFETY EQUIPMENT YES NO

THE ACCUSED (DATE OF BIRTH) *5-22-62*

I PROMISE TO APPEAR AT THE TIME AND PLACE SHOWN ABOVE. SIGNATURE OF DEFENDANT *Terry Phillips*

THE ACCUSED (SEX) *M*

YOU MUST APPEAR AT TRIAL. SIGNATURE OF COURT CLERK *Andrew*

THE ACCUSED (HAIR COLOR) *BRN*

IF YOU ARE NOT APPEARING TO COURT ONLY IF THIS BLOCK IS CHECKED AND ALL INSTALLATIONS ON DEFENDANT'S COPY ARE FULFILLED

THE ACCUSED (EYES) *BRN*

ONLY CIVIL (276) 223-6075 IF JUDICIAL HELP IS NEEDED.

THE ACCUSED (HEIGHT) *5-7*

LOADING ADDRESS SAME AS ABOVE AT EACH CHANGE FROM RD.

THE ACCUSED (WEIGHT) *170*

110-001 FINE 1140-25255 CIVIL PENALTY 400 FINED TRAFFIC INFRACTION FEE 401 FINED MISDEMEANOR FEE 402 FINED MISDEMEANOR FEE - DRUGS

THE ACCUSED (HAIR STYLE) *W*

110-001 FINE 1140-25255 CIVIL PENALTY 400 FINED TRAFFIC INFRACTION FEE 401 FINED MISDEMEANOR FEE 402 FINED MISDEMEANOR FEE - DRUGS

THE ACCUSED (EYES) *BRN*

110-001 FINE 1140-25255 CIVIL PENALTY 400 FINED TRAFFIC INFRACTION FEE 401 FINED MISDEMEANOR FEE 402 FINED MISDEMEANOR FEE - DRUGS

THE ACCUSED (HAIR STYLE) *W*

110-001 FINE 1140-25255 CIVIL PENALTY 400 FINED TRAFFIC INFRACTION FEE 401 FINED MISDEMEANOR FEE 402 FINED MISDEMEANOR FEE - DRUGS

THE ACCUSED (EYES) *BRN*

110-001 FINE 1140-25255 CIVIL PENALTY 400 FINED TRAFFIC INFRACTION FEE 401 FINED MISDEMEANOR FEE 402 FINED MISDEMEANOR FEE - DRUGS

THE ACCUSED (HAIR STYLE) *W*

ORIGINAL (written vertically on the left)

Where Citation was Amended (written vertically on the right)

PLAINTIFF'S EXHIBIT #2

§ 46.2-869

MOTOR VEHICLES

§ 46.2-870

... subsection, the court may require successful completion of an aggressive driving program. (2002, cc. 752, 782.)

Cross references. — As to penalties for Class 1 and 2 misdemeanors, see § 18.1-11. As to the Uniform Demerit Point System, see § 46.2-492.

§ 46.2-869. Improper driving; penalty. — 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 Class 1 misdemeanor punishable by a fine of not more than \$500. (1966, c. 511, § 46.2-192.2; 1972, c. 278; 1989, c. 727; 1990, c. 770; 2000, c. 340.)

CASE NOTES

Editor's note. — The cases below were decided under former Title 46.1 or prior law.

Guilt to be established beyond reasonable doubt. — Both reckless driving and improper driving are criminal offenses and to obtain a conviction of either the Commonwealth's evidence must establish guilt beyond a reasonable doubt. Bacon v. Commonwealth, 220 Va. 766, 263 S.E.2d 390 (1980).

Evidence sufficient. — Where defendant was driving at night with admitted poor vision, on a secondary road with which he was familiar, and when he approached an

unobstructed stop sign, he skidded through the intersection and down an embankment causing vehicle damage, the evidence was sufficient to support his conviction for improper driving. Hale v. Commonwealth, 23 Va. App. 587, 478 S.E.2d 710 (1996).

When evidence insufficient. — The mere fact that an accident happened, or that the automobile followed an erratic course for 362' after it was out of control, does not give rise to an inference of reckless driving or of improper driving. Bacon v. Commonwealth, 220 Va. 766, 263 S.E.2d 390 (1980).

PLAINTIFF'S EXHIBIT #3

Exhibit # 3



Moving Violations and Point Assessments

When you are convicted of a traffic violation, the court notifies the Department of Motor Vehicles (DMV). DMV does the following:

- posts the conviction to your driving record;
- assigns you demerit points according to the severity of the offense;
- issues an order of suspension, if applicable;
- issues an order requiring the successful completion of a driver improvement clinic, if applicable; and
- notifies your insurance company upon request.

The following lists present the traffic violations that have demerit points. These violations are grouped according to the number of DMV demerit points assigned to each violation. The number of years that the conviction stays on your DMV record is in parentheses beside each violation. An asterisk (*) indicates that the conviction remains on your record permanently.

DMV also posts to your record traffic violations that do not carry demerit points. These, however, are not listed here. Demerit points will also be assigned to your record for traffic convictions incurred in other states.

- Six Point Violations - reckless driving
- Four Point Violations
- Three Point Violations improper driving

The length of time that a conviction stays on your record depends on the severity of the violation. If you receive an order or notice of revocation, suspension, disqualification or cancellation, your convictions could remain on your record for even longer than specified in one of these lists.

DMV demerit points remain on your record for two years from the date that you commit the offense. The dates that demerit points are removed from your driving record are not related to the dates that convictions are removed from your record.

Your insurance company may also assign points on your insurance record; however, DMV demerit points are not related to insurance company points. Insurance company points are developed by individual companies.

DMV is not liable for damages that may result from errors on these lists. For a full description of violations and penalties, contact us. This information may change without prior notice.

Be sure to read [A Different Kind of Crash Course](#) for more information about how DMV's Driver Improvement Program works.

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Six Point Violations

| Reckless Driving | Driving Under the Influence | Manslaughter | Habitual Offenders |
Licenses/Permits | Commercial Motor Vehicles | Other Violations |

The number of years that the conviction stays on your DMV record is in parentheses beside each violation. An asterisk (*) indicates that the conviction remains on your record permanently. Demerit points will also be assigned to your record for traffic convictions incurred in other states.

The violations listed may change without prior notice.

Reckless Driving (Felony or Misdemeanor)

- Reckless driving - speeding in excess of 80 mph (11 years)
- Reckless driving - speeding 20 mph or more above the posted speed limit (11 years)
- Reckless driving - racing (11 years)
- Reckless driving - passing or overtaking an emergency vehicle (11 years)
- Reckless driving - passing a school bus (11 years)
- Reckless driving - passing on the crest of a hill (11 years)
- Reckless driving - passing at a railroad crossing (11 years)
- Reckless driving - passing two vehicles abreast (11 years)
- Reckless driving - driving two vehicles abreast (11 years)
- Reckless driving - driving too fast for conditions (11 years)
- Reckless driving - failing to give a proper signal (11 years)
- Reckless driving - faulty brakes/improper control (11 years)
- Reckless driving - on parking lots, etc. (11 years)
- Reckless driving - with an obstructed view (11 years)

- Reckless driving - generally (11 years)
- Speeding 20 mph or more above the posted speed limit (5 years)

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Driving Under the Influence

- Driving while intoxicated (11 years)
- Driving under the influence of alcohol or drugs (11 years)
- Driving under the influence of drugs (11 years)
- Driving after illegally consuming alcohol (persons under age 21) (3 years)
- Driving while intoxicated - maiming (11 years)
- Involuntary manslaughter/alcohol (11 years)
- Refusing blood/breath test (11 years)
- Driving while your license is suspended or revoked for driving while intoxicated (11 years)
- Driving while your license is revoked for driving while intoxicated - maiming (11 years)
- Driving while your license is revoked for driving while intoxicated - involuntary manslaughter (11 years)

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Manslaughter

- Manslaughter (11 years)
- Involuntary manslaughter (11 years)
- Involuntary manslaughter/aggravated (11 years)

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Habitual Offenders

- Driving after being declared a habitual offender (11 years)
- Authorizing person suspended for habitual offender and/or driving while intoxicated to drive (3 years)

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Licenses/Permits

- Driving on suspended license (11 years)
- Driving while your license is suspended or revoked (11 years)
- Driving while your license is suspended or revoked for non-payment of court fines and costs (11 years)
- Driving under suspension or revocation before giving proof of financial responsibility (11 years)

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Commercial Motor Vehicles

- Driving commercial motor vehicle while disqualified (*)
- Driving commercial motor vehicle with blood alcohol .04 or more (*)
- Driving commercial motor vehicle with blood alcohol .08 or more (*)
- Driving commercial motor vehicle under influence of drugs (*)
- Driving commercial motor vehicle under influence of drugs/alcohol (*)
- Refusing blood/breath test while operating commercial motor vehicle (*)
- Violating out of service order (11 years)

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Other Violations

- Speeding 20 mph or more above the posted speed limit (5 years)
- Injuring person while racing - felony (11 years)
- Failure to stop at the scene of a crash - injury (11 years)
- Failure to stop at the scene of a crash - death (11 years)
- Failure to stop at the scene of a crash - property damage of \$1000 or more (11 years)
- Emergency vehicle violation - death (11 years)
- Vehicular assault or willful stopping, impeding or damaging vehicle (11 years)
- Blocking access to service facility (11 years)
- Attempting to elude police
 - felony offense (11 years)
 - misdemeanor offense (3 years)
- Passing stopped school bus (non-reckless) (3 years)

- Operating unsafe vehicle (3 years)

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Four Point Violations

- | Reckless Driving/Speeding | Passing | Stopping/Yielding | Keeping to the Right |
- Following/Signaling | Railroad Crossings |
- Railroad Crossings (Commercial) | Other Violations |

The number of years that the conviction stays on your DMV record is in parentheses beside each violation. An asterisk (*) indicates that the conviction remains on your record permanently. Demerit points will also be assigned to your record for traffic convictions incurred in other states.

The violations listed may change without prior notice.

Reckless Driving/Speeding

- Reckless driving - failure to stop before entering a highway (11 years)
- Speeding (5 years)
- Speeding 10-14 mph above the posted speed limit (5 years)
- Speeding 15-19 mph above the posted speed limit (5 years)
- Speeding 10-19 mph above the posted speed limit (5 years)

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Passing

- Passing when unsafe (3 years)
- Passing to the left of approaching vehicle (3 years)

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Stopping/Yielding

- Failure to drive to the right and stop for police/fire/emergency vehicle (3 years)
- Failure to stop for pedestrian with white cane (3 years)
- Failure to stop and yield right-of-way (3 years)
- Failure to yield right-of-way (3 years)
- Failure to yield when turning left (3 years)
- Failure to yield to funeral procession (3 years)

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Keeping to the Right

- Failure to drive on right half of highway or street (3 years)
- Failure to keep to the right when crossing an intersection (3 years)
- Driving to the left of rotary traffic island (3 years)

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Following/Signaling

- Following too closely (3 years)
- Failure to signal before moving from curb (3 years)
- Improper signal (3 years)

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Railroad Crossings

- Failure to obey railroad crossing signal (3 years)
- Failure to stop at railroad grade crossing (3 years)
- Failure to keep to the right at a railroad crossing (3 years)
- Failure to stop passenger-carrying vehicle at railroad grade crossing (3 years)
- Railroad crossing/stopping (3 years)
- Improper operation of crawler-type tractor over railroad crossing (3 years)

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Railroad Crossings (Commercial Motor Vehicle Drivers)

- Failure to slow down/stop at a railroad crossing (*)
- Failure to have sufficient space to drive through a railroad crossing (*)
- Failure to obey traffic control device or enforcement official at a railroad crossing (*)
- Failure to have sufficient undercarriage clearance at a railroad crossing (*)

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Other Violations

- Operating a motor vehicle while suspended/revoked/restricted with a blood alcohol content of .02% or more (11 years)
- Failure to stop at the scene of a crash, unattended property, damage in excess of \$500 (11 years)

- Failure to stop at the scene of a crash, property damage (3 years)
- Emergency vehicle violation - property damage (5 years)
- Emergency vehicle violation - injury (5 years)
- Aggressive driving (5 years)
- Failure to obey traffic signal (3 years)
- Failure to obey lane directional signal (3 years)
- Failure to obey highway lane markings (3 years)
- Improper backing, stopping or turning (3 years)
- Driving the wrong way on one-way highway or street (3 years)
- Impeding/disrupting funeral procession (3 years)
- Disregarding police officer's signal to stop (3 years)
- Disregarding crossing guard/officer's signal (3 years)

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 **Three Point Violations** 

| Speeding | Passing/Driving | Turning/Backing | Signs/Signals | Lights |
| Licenses/Permits | Commercial Motor Vehicles | Other Violations |

The number of years that the conviction stays on your DMV record is in parentheses beside each violation. An asterisk (*) indicates that the conviction remains on your record permanently. Demerit points will also be assigned to your record for traffic convictions incurred in other states.

The violations listed may change without prior notice.

Speeding

- Speeding 1-9 mph above the posted speed limit (5 years)
- Impeding traffic, slow speed (5 years)

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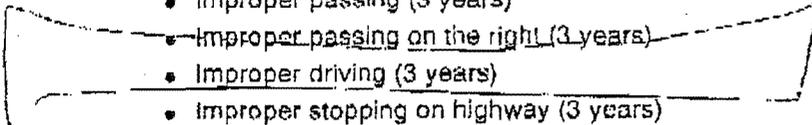
Passing/Driving

- Improper passing (3 years)
- ~~Improper passing on the right (3 years)~~
- Improper driving (3 years)
- Improper stopping on highway (3 years)
- Changing course after signaling (3 years)
- Coasting with gears in neutral (3 years)
- Failure to give way in favor of overtaking vehicle (3 years)
- Failure to give way when abreast of another car (3 years)
- Driving through safety zone (3 years)
- Driving over fire hose (3 years)
- Unauthorized use of crossover on controlled highway (3 years)
- Driving/riding on sidewalk (3 years)

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Turning/Backing

- Improper turn (3 years)
- Improper U-turn (3 years)

   46-2-869

- Violation of right turn on red (3 years)
- Violation of left turn on red (3 years)

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Signs/Signals

- Failure to obey highway sign (3 years)
- Evading traffic control device (3 years)

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Lights

- Driving without lights/excessive lights (3 years)
- Failure to dim headlights (3 years)
- Parking without proper lights displayed (3 years)
- Inadequate hazard lights (3 years)

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Licenses/Permits

- No Virginia driver's license (3 years)
- No Virginia license plate (3 years)
- Failure to obtain a driver's license (3 years)
- No driver's license - vehicle/motorcycle (3 years)
- Failure to have license revalidated (3 years)
- Learner's permit violation (3 years)
- Permitting unlicensed person to drive (3 years)
- Driving in violation of restricted license (restrictions related to physical limitation, such as mechanical control device) (3 years)

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Commercial Motor Vehicles

- Driving commercial motor vehicle with alcohol in blood (*)
- Driving commercial motor vehicle without license (3 years)
- Driving commercial motor vehicle with more than 1 driver's license (3 years)
- Driving commercial motor vehicle without endorsement(s) (3 years)
- Driving commercial motor vehicle without license in possession (3 years)
- Commercial driver's license/instruction permit violation (3 years)
- Driving commercial motor vehicle in left lane of interstate (3 years)
- Driving in excess of 13 hours in a 24-hour period (3 years)
- Driving public passenger-carrying vehicle under age (3 years)

- Driving bus transporting school children without a safety belt (3 years)
- Driving school bus without license (3 years)
- Driving school bus under age (3 years)
- Vehicle height exceeds limit for tunnels (3 years)

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Other Violations

- Failure to stop at the scene of a crash, unattended property (3 years)
- Failure to leave the scene of a crash at the direction of officer (3 years)
- Failure to report a crash, unattended property, less than \$250 damage (3 years)
- Following/parking within 500 feet of fire apparatus (3 years)
- Emergency vehicle violation (3 years)
- Drinking while driving (3 years)
- Improper driving/riding motorcycle (3 years)
- Driving with TV screen visible to driver (3 years)
- Driving while using earphones (3 years)
- Passenger restriction violation (3 years)
- Curfew violation (3 years)
- HOV violation, second or subsequent offense - Northern Virginia planning district 8 (3 years)

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Va. Code Ann. § 46.2-869 (2008)

§ 46.2-869. Improper driving; penalty

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.

PLAINTIFF'S EXHIBIT #4

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TERRY LEE PHILLIPS,

Petitioner,

v.

Civil Action No. 09-MISC-27
Judge Louis H. Bloom

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

Respondents.

**ORDER DENYING
WRIT OF PROHIBITION**

On March 31, 2009, this matter came on for a hearing on a "Petition for Writ of Prohibition" ("Petition") filed by petitioner, Terry Lee Phillips ("Mr. Phillips"), through counsel, Steven M. Thorne. The respondents, West Virginia Division of Motor Vehicles and Joe E. Miller, as successor to Joseph Cicchirillo as Commissioner (collectively "DMV"), appeared by counsel, Janet E. James.

Upon review of the Petition, the briefs filed by the parties, the arguments made by counsel, and the pertinent law, the Court finds that the writ of prohibition should be denied for the reasons set forth more fully below.

FINDINGS OF FACT

1. Mr. Phillips was issued a citation in the State of Virginia for "Reckless Driving" on March 27, 2007. The citation states that he was driving 85 miles per hour in 65 miles per hour zone on a limited access highway.

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KANAWHA COUNTY CIRCUIT COURT

2. Mr. Phillips contested the citation. On May 8, 2007, Mr. Phillips entered a guilty plea to "Improper Driving" pursuant to Virginia Code § 46.2-869.¹

3. On June 4, 2007, the DMV received an abstract of conviction showing that Mr. Phillips had been convicted of "Improper Driving" by the State of Virginia.

4. West Virginia law does not provide for the offense of "Improper Driving."

5. Upon review of the conviction and both Virginia and West Virginia law, the DMV determined that under its rules, Mr. Phillips's out-of-state conviction should be recorded as "Driving too fast for conditions, failure to keep vehicle under control or hazardous driving."² Mr. Phillips was assessed three points on his driver record.

6. Mr. Phillips filed his Petition on the basis that (1) the DMV should not have recorded his out-of-state conviction on his West Virginia driver record and/or (2) the DMV improperly recorded his "Improper Driving" conviction as a "Hazardous Driving." He asks that said offense be removed from his driving record.³

CONCLUSIONS OF LAW

1. A writ of prohibition will issue "in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction... or, having such jurisdiction, exceeds its

¹ Virginia Code § 46.2-869 states, "[U]pon 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."

² The offense of "Driving too fast for conditions, failure to keep vehicle under control or hazardous driving," as outlined by W.Va. C.S.R. § 91-5-7.2, is based on a violation of W.Va. Code § 17C-6-1, which provides: (a) 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.

³ At the hearing, counsel for Mr. Phillips represented to the Court that through his Petition, Mr. Phillips is not seeking to challenge the DMV's assessment of three points from his driver's license record. Rather, counsel stated that Mr. Phillips is only seeking to challenge the DMV's designation of the offense as an "035" offense for "Hazardous Driving."

legitimate powers.” W.Va. Code § 53-1-1; *See also* Syl. Pt. 2, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984) (wherein the Supreme Court of Appeals of West Virginia found that the DMV is subject to a writ of prohibition when it performs quasi-judicial acts). A writ of prohibition will not issue, however, to prevent a simple abuse of discretion by an inferior court.” Syl. pt. 1, *State ex rel. Nelson v. Frye*, 221 W.Va. 391, 655 S.E.2d 137 (2007).

2. In this case, Mr. Phillips appears to be claiming that the DMV exceeded its legitimate powers by improperly recording his out-of-state conviction of “Improper Driving” and improperly designating the offense as “Hazardous Driving.” In determining whether to grant relief through a writ of prohibition based on an assertion that a lower tribunal has acted beyond its legitimate powers, the Supreme Court of Appeals of West Virginia has stated that the following factors should be examined:

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
- (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. pt. 1, *State ex rel. Nelson v. Frye*, 221 W.Va. 391, 655 S.E.2d 137 (citing Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)). The Supreme Court of Appeals has stated that these factors should serve as “general guidelines” and in particular, the third factor, regarding the existence of clear error as a matter of law, should be given substantial weight. *Id.*

3. Applying these standards to the present case, the Court concludes that Mr. Phillips has not demonstrated that the DMV's decision to record his out-of-state conviction was clearly erroneous, or that it was clearly erroneous for the DMV to record the offense on his driver record as "Driving too fast for conditions, failure to keep vehicle under control or hazardous driving."

4. Pursuant to the Driver License Compact, W.Va. Code § 17B-1A-1 *et seq*, the DMV received an abstract of conviction from the State of Virginia regarding Mr. Phillips's conviction. The Driver License Compact is a contractual agreement among certain states, including West Virginia, which seek to promote compliance with each party state's motor vehicles laws by empowering the licensing authority of a "home state" to revoke or suspend the driver's license of a resident motorist based upon an out-of-state conviction for certain types of motor vehicle offenses. Specifically, Article III of the Driver License Compact states:

The 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.

If the out-of-state conviction involves an offense, which is expressly enumerated in the Driver License Compact, then the "home state" must give the same effect to the foreign conviction. *See* W.Va. Code 17-B-1A-1, Article IV(a).⁴ If, however, the out-of-state

⁴ The offenses specifically enumerated in the Driver License Compact are as follows: (1) manslaughter or negligent homicide resulting from the operation of a motor vehicle; (2) driving a motor vehicle while under

conviction is for an offense, which is not described in the Driver License Compact, Article IV(b) states that the “licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state.”

5. Under West Virginia law, the DMV is authorized to suspend or revoke the license of any resident of West Virginia upon receiving notice of the conviction of such person in another state of an offense, which if committed in West Virginia, would be grounds for suspension or revocation of the license. W.Va. Code, § 17B-3-3. Based on W.Va. Code § 17B-3-3, and other statutory authority, DMV legislative rules provide that if any licensee of the State of West Virginia is convicted in any other jurisdiction, of an offense, which if committed in West Virginia, would be grounds for suspension or revocation of the license, then the DMV shall enter the offense and a certain point total on the licensee’s driver record, which is maintained by the DMV. W.Va. C.S.R. § 91-5-7.2. The rule then outlines general descriptions of offenses, the statutes upon which they are based, and the point value assigned to violations of those offenses. *See* W.Va. C.S.R. § 91-5-7.2.

6. In this case, Mr. Phillips was cited for “Reckless Driving,” based on speeding twenty (20) miles per hour or more above the posted speed limit. *See* Virginia Code § 46.2-862. Mr. Phillips ultimately, however, pled guilty to “Improper Driving” under Virginia Code § 46.2-869, which states as follows:

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

the influence; (3) any felony in the commission of which a motor vehicle is used; (4) and failure to stop and render aid in the event of a motor vehicle accident resulting in the death or personal injury to another.

such change. Improper driving shall be punishable as a traffic infraction punishable by a fine of not more than \$500.⁵

7. First, Mr. Phillips asserts that the DMV should not have recorded the out-of-state conviction on his driver record based on W.Va. Code § 17C-6-1(j), which states:

If an owner or driver is convicted in another state for the offense of driving above the maximum speed limit on a controlled-access highway or interstate highway and if the maximum speed limit in the other state is less than the maximum speed limit for a comparable controlled-access highway or interstate highway in this state, and if the evidence shows that the motor vehicle was being operated at ten miles per hour or less above what would be the maximum speed limit for a comparable controlled-access highway or interstate highway in this state, then a certified abstract of the judgment on the conviction shall not be transmitted to the division of motor vehicles or, if transmitted, shall not be recorded by the division.

(emphasis added). Because he pled down his “Reckless Driving” charge for driving twenty (20) miles per hour over the speed limit to “Improper Driving,” Mr. Phillips argues that he was necessarily convicted of driving somewhere between one (1) and nineteen (19) miles per hour over the speed limit. Therefore, under W.Va. Code § 17C-6-1(j), Mr. Phillips asserts the DMV should not have recorded the offense on his driver record because he was within the speed restrictions set forth by that statute.

8. The Court concludes, however, that the offense to which Mr. Phillips pled guilty- “Improper Driving”- does not contain any speed specific restrictions. As it is not clear from the record that Mr. Phillips was convicted of driving ten (10) miles or less below the speed limit on a highway or interstate in West Virginia, the Court cannot say that the

⁵ Although “Improper Driving” is set forth as a crime by statute, Virginia law does not further define the offense or outline the elements of the offense.

DMV exceeded its legitimate power by recording the out-of-state conviction on Mr. Phillips's driver record.

9. Next, Mr. Phillips asserts that even if the out-of-state conviction should have been recorded under West Virginia law, the DMV improperly designated the conviction as "Driving too fast for the conditions, failure to keep vehicle under control or hazardous driving." Mr. Phillips argues that under Virginia law "Improper Driving" is a "less serious" offense that specifically equates to "Speeding between one and nine miles per hour above the posted speed limit." Specifically, Virginia Code § 46.2-492(D)(3), which addresses Virginia's Point System for rating convictions of traffic offenses, states:

Traffic offenses of a less serious nature such as improper driving in violation of § 46.2-869, speeding between one and nine miles per hour above the posted speed limit, improper passing in violation of § 46.2-838, failure to obey a highway sign in violation of § 46.2-830 and other offenses of a less serious nature as the Commissioner may designate, shall be assigned three demerit points.

10. The Court concludes, however, that although "Improper Driving" and "Speeding between one and nine miles per hour above the posted speed limit" may be in a similar category of offenses, Mr. Phillips's plea of guilty to "Improper Driving" does not necessarily mean that he was convicted of driving ten (10) miles or less below the speed limit. Rather, Virginia law sets forth those offenses separately. Without any evidence of the exact speed restrictions Mr. Phillips was found guilty of violating, the Court cannot conclude that the DMV's decision to record Mr. Phillips's out-of-state conviction as "Driving too fast for conditions, failure to keep vehicle under control or hazardous driving" was clearly erroneous as a matter of law.

DECISION

Therefore, based on the foregoing, the Court finds that Mr. Phillip's "Petition for Writ of Prohibition" must be **DENIED**. There being nothing further, this action shall be **DISMISSED** and removed from the docket of the Court.

The objection of any party aggrieved by entry of this order is noted and preserved.

The Clerk is hereby **DIRECTED** to forward a certified copy of this Order to all counsel of record.

ENTERED this 23 day of April 2009.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. MATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF April 2009
Cathy S. Matson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA



4/23/09
Date:
Certified copies sent to:
- counsel of record
- parties
- other
By: (please indicate)
- certified mail
- tax
- hand delivered
- interdepartmental
- other (specify)
eputy Circuit Clerk

CERTIFICATE OF SERVICE

I, Steven M. Thorne, do hereby certify that an original and nine (9) copies of the foregoing *Designation of Record, Supreme Court Docketing Statement and Petition for Appeal* on behalf of Terry Lee Phillips, was served via the U.S. Mail, postage prepaid to:

**Clerk of Supreme Court
East Wing, Room 317
State Capitol
Charleston, WV 253050**

and a true copy of the same was served on the following via the U.S. Mail, postage prepaid in an envelope addressed to:

**West Virginia Division of Motor Vehicles
Joseph Cicchirillo, Commissioner
1300 Kanawha Blvd. E. Building 3
Charleston, WV 25317**

**Terry Phillips
160 Madison Avenue
Madison, WV 25130**

On this the 20 day of July, 2009.


STEVEN M. THORNE (#5534)
COUNSEL FOR PETITIONER
Cook & Cook Attorneys
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Post Office Box 190
Madison, WV 25130
(304) 369-0110

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KANAWHA COUNTY CIRCUIT COURT

CERTIFICATE OF SERVICE

I, Steven M. Thorne, do hereby certify that an original and nine (9) copies of the foregoing *Brief* on behalf of Appellant, Terry Lee Phillips, was served via the U.S. Mail, postage prepaid to:

**Clerk of Supreme Court
East Wing, Room 317
State Capitol
Charleston, WV 253050**

and a true copy of the same was served on the following via the U.S. Mail, postage prepaid in an envelope addressed to:

**Janet James, Esquire
Assistant Attorney General
1900 Kanawha Blvd. E., Room E-26
Charleston, WV 25305**

**Terry Phillips
160 Madison Avenue
Madison, WV 25130**

On this the 21 day of January, 2010.



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