

35436

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**

FILED
2009 APR 23 PM 1:46
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

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.

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.

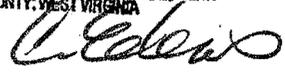
The Clerk is hereby **DIRECTED** to forward a certified copy of this Order to all counsel of record.

ENTERED this 23 day of April 2009.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. BATSON, 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 23
Cathy S. Batson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA



4/23/09
Date:
Certified copies sent to:
___ court of record
___ parties
___ other
By: *J. James*
S. Thorne
Deputy Circuit Clerk

CERTIFICATE OF SERVICE

FILED

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

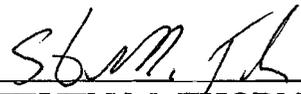
**Clerk of Supreme Court
East Wing, Room 317
State Capitol
Charleston, WV 253050**

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
62 Avenue C
Post Office Box 190
Madison, WV 25130
(304) 369-0110

2009 JUL 21 4:06
CATHY S. GATSON, CLERK
KANAWHA COUNTY COURT