

11-0081

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

JOHN MOREDOCK,

Petitioner,

v.

Civil Action No. 09-AA-174
Judge Carrie L. Webster

2010 AUG -9 PM 12:54
CATHY S. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

JOE MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES

Respondent.

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Attorney General Office
Tax Division

FINAL ORDER

Mr. Moredock and his counsel, Carter Zerbe, Esq., come before this Court appealing the revocation of Mr. Moredock's driver's license. The Commissioner of the West Virginia Division of Motor Vehicles is represented by Janet James, Esq. The central issue of the petition of appeal concerns a delay between the administrative hearing and final order. This Court finds that the delay constitutes a due process violation and orders the Commissioner's Final Order reversed.

Facts and Procedural History

On September 29, 2007, Mr. Moredock was arrested for driving under the influence of alcohol. A Statement of the Arresting Officer, Officer Duncan of the Charleston Police Department, was subsequently submitted to the West Virginia Division of Motor Vehicles (hereinafter "DMV"). Mr. Moredock properly and timely requested an administrative hearing with the DMV concerning revocation of his driving privileges.

A hearing was schedule for February 20, 2008. However, this hearing was continued by the DMV based upon the request for a continuance by the hearing examiner assigned to the matter. The hearing was then re-scheduled and conducted on May 6,

2008, approximately eight months following Mr. Moredock's arrest. Over seventeen months following the scheduled hearing, on October 13, 2009, a Final Order was received by Mr. Moredock revoking his driver's license. The Petitioner timely filed the present Petition for Judicial Review.

Standard of Review

On appeal of an administrative order, the Court is bound by the statutory standards in West Virginia Code § 29A-5-4 (Administrative Procedures Act, "APA") and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless clearly wrong. Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Review is limited to the record made before the administrative agency, and the circuit court is authorized to accept additional evidence only where there is an allegation of procedural irregularity. *West Virginia Code* § 29A-5-4(f) [1964]. The scope of judicial review of a contested case generally is delineated by the APA:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudice because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g)

Applicable Law

The West Virginia Constitution does not allow property deprivation without due process. *West Virginia Constitution*, Art. III, § 10. The same Constitution requires that "justice be administered without delay." *West Virginia Constitution*, Art. III, § 17. These two provisions have been interpreted as requiring administrative agencies "to dispose

promptly of matters properly submitted.” Syl. Pt. 7, *Allen v. W.Va. Human Rights Comm’n*, 174 W.Va. 139 (1984).

“A driver’s license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution.” Syl. Pt. 1, *David v. Commissioner of West Virginia Div. of Motor Vehicles*, 219 W.Va. 493, 637 S.E.2d 591 W.Va., (2006) (citing Syl. Pt. 1, *Abshire v. Cline*, 193 W.Va. 180 (1995)).

“The mere delay in the disposition or decision of a case does not vitiate the order or judgment. If a decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision but not how to decide.” Syl. Pt. 2, *Kanawha Valley Transp. Co. v. Public Service Comm’n*, 159 W.Va. 88 (1975). Nevertheless, delays that prejudice a litigant violate due process. *Miller v. Cline*, 193 W.Va. 210, 214 (1995).

According to *Leonard*, delays can be presumptively prejudicial. Syl. Pt. 1, *State ex. rel. Leonard v. Hey*, 269 S.E.2d 394 (W.Va. 1980). However, “the presumption is rebuttable by the government.” *Id.*

To date, the West Virginia Supreme Court of Appeals has not “set definite temporal boundaries for determining when a particular delay caused by a state actor’s misconduct rises to constitutional dimensions; the flexibility required by due process doctrines and the range of variables that can affect fairness in this context preclude our imposing specific time limits.” *Hutchison v. City of Huntington*, 198 W.Va. 139, 155-156 (1996).

Factors to consider when determining whether an administrative delay violates due process include the “length of the delay, the reason for the delay, the harm caused by

the delay, and what other alternatives to relief were available...Clearly the most important of the factors is the reason for the delay." *Id.* at 156.

Analysis

Drunk drivers present a danger to themselves and others. However, this danger "cannot excuse the need for scrupulous adherence to our constitutional principles." *State ex rel. v. Maxwell*, 189 W.Va. 362, 369 (1993).

Mr. Moredock has a property interest in his license. Therefore, due process must be afforded before his license may be revoked. One element of due process is timely resolution of appeals. The length of the delay in this case is extraordinary, over 17 months between the hearing and final order and over two years between the request for hearing and final order.

The record does not reflect that Mr. Moredock ever sought a continuance or took any other action which would operate to delay the underlying matter. Not resolving Mr. Moredock's case in a timely manner is exacerbated by the DMV's failure to provide a reasonable justification for the delay. Furthermore, although Mr. Moredock may have sought a writ of mandamus to compel action on the part of the DMV, he was not required to do so. Mr. Moredock is not foreclosed from raising the issue of delay in this matter as the Court has found no law to suggest that a litigant must move, at their own expense, for mandamus to protect his or her due process rights.

The excessive delay, over 17 months between the hearing and final order and over two years between the request for hearing and final order in issuing the order, violated the Petitioner's due process rights.

Decision

Accordingly, the Court **ORDERS** the Commissioner's decision **REVERSED**, this matter is hereby **DISMISSED** and **STRICKEN** from the open docket of this Court. The Court **FURTHER DIRECTS** that a certified copy of the **FINAL ORDER** be sent to the following addresses:

Carter Zerbe, Esq.
Post Office Box 3667
Charleston, WV 25336

Janet James, Esq.
Office of the Attorney General
State Capital Complex, Bldg. 1
Room W-435
1900 Kanawha Blvd., East
Charleston, WV 25305

Entered this 9 day of August, 2010.

Carrie Webster

HONORABLE CARRIE L. WEBSTER

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, 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 11
DAY OF AUGUST 2010
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA *elt*