

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JOE E. MILLER, COMMISSIONER OF THE
DIVISION OF MOTOR VEHICLES,**

Petitioner/Respondent Below,

v.

NO. 11-0081

JOHN MOREDOCK,

Respondent/Petitioner Below.

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

Now comes Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Senior Assistant Attorney General, and submits this brief in the above-captioned case pursuant to the Court's scheduling order.

ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER ON THE BASIS THAT THE DELAYS BETWEEN THE REQUEST FOR HEARING, THE HEARING, AND THE ISSUANCE OF A FINAL ORDER DEPRIVED THE RESPONDENT OF DUE PROCESS, ESPECIALLY IN LIGHT OF THE FACT THAT THE RESPONDENT FAILED TO SHOW THAT HE WAS PREJUDICED.

STATEMENT OF THE CASE

Petitioner asks this Court to review and reverse the *Final Order* entered on August 9, 2010, by the Honorable Carrie L. Webster, Judge of the Circuit Court of Kanawha County (hereinafter, "Final Order"), in an administrative appeal styled *John Moredock v. Joe E. Miller, Commissioner*,

West Virginia Division of Motor Vehicles, Civil Action No. 09-AA-174. Through its Final Order, the Circuit Court reversed an administrative driver's license revocation order entered by Joe E. Miller, Commissioner of the Division, by which the Respondent's privilege to drive was revoked on November 20, 2009.

In the underlying administrative appeal, Respondent sought relief from the administrative order which took effect on November 20, 2009, (hereinafter, "Commissioner's Order"), wherein Commissioner Miller revoked Respondent's privilege to drive in West Virginia for a period of six months, for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed the Commissioner's Order on the basis that the delays between Respondent's request for a hearing, the holding of the hearing, and the issuance of the Commissioner's Order violated Respondent's due process rights.

Respondent was arrested for driving under the influence of alcohol on September 29, 2007. Officer J. S. Duncan of the Charleston Police Department apprised the Division of Respondent's arrest by submitting a DUI Information Sheet, an Implied Consent Statement, a West Virginia Uniform Traffic Crash Report and an Intoximeter printout ticket. DMV File Exhibit 1. After reviewing the documents in Record Exhibit 1, the Division issued an initial order, dated October 10, 2007, revoking Respondent's privilege to drive in West Virginia for two years, and accompanied by successful completion of the safety and treatment program and payment of the pertinent costs and fees, for DUI causing injury.

Respondent timely requested an administrative hearing. The hearing was scheduled for February 20, 2008, but was continued by the DMV because the hearing examiner was in training. The hearing was rescheduled for May 6, 2008. On May 6, 2008, the hearing was held. The

Commissioner's Order was issued effective November 20, 2009, affirming the revocation for DUI but finding an insufficient basis to find that the injury was caused by the Respondent, and revising the revocation period accordingly.

Respondent filed a *Petition for Judicial Review* on or about October 21, 2009. On November 10, 2009, the circuit court entered an *Order Granting Stay*, by which the revocation of Respondent's privilege to drive was stayed for 150 days. On April 8, 2010, the Court unilaterally entered another stay of Respondent's revocation for 150 days. On August 9, 2010, the Court entered the Final Order reversing the Commissioner's Order, from which the Division seeks appeal.

Respondent crashed his vehicle head-on into another car at 2:43 a.m. on September 29, 2007, on Cantley Drive, Kanawha County, West Virginia. Transcript of Administrative Hearing held on May 6, 2008, at the DMV Regional Office in Kanawha County, Charleston, West Virginia at 13 (hereinafter, "Tr. at 13"). Officer J. S. Duncan of the Charleston Police Department responded to the scene of a two-vehicle crash.

Officer Duncan made contact with Respondent, and noted the odor of alcohol on Respondent's person. DUI Information Sheet (DMV File Exhibit 1); Tr. At 14. Officer Duncan detected that Respondent had glassy eyes, slurred speech, and was unsteady walking to the roadside and standing. Respondent admitted drinking a couple of beers. DMV File Exhibit 1; Tr. At 14. Officer Duncan performed a horizontal gaze nystagmus test, the walk-and-turn test and the one-leg stand test on the Respondent, all of which Respondent failed. Record Exhibit 1; Tr. at 15-20. Respondent also failed a preliminary breath test. Record Exhibit 1; Tr. at 20. Respondent was placed under arrest at 3:18 a.m. on September 29, 2007. Record Exhibit 1; Tr. At 23. Officer

Duncan transported Respondent back to the police department station, and read Respondent the Implied Consent Statement at 3:51 a.m. Record Exhibit 1; Tr. at 23.

The breath test is the designated secondary chemical test of the Charleston Police Department. Tr. at 2. Officer Duncan was certified as a test administrator of the EC/IR Intoximeter II on March 3, 2005. Tr. at 2; Record Exhibit 1. Officer Duncan observed the Respondent for 20 minutes prior to collection of the breath specimen to ensure that Respondent did not ingest any food, drink or other matter into his mouth. The Intoximeter printer was online and there were no errors indicated in the display. The instrument was turned on and the display read, "Press Enter to Start". Officer Duncan entered data as prompted by the machine. The Intoximeter displayed the instruction "Please Blow," and Officer Duncan placed an individual disposable mouthpiece into the breath tube. Respondent blew into the mouthpiece. A gas reference standard was run on the Intoximeter and the results indicated that the instrument was working properly. The results of the reference standard were .083 and .082. When the display read, "Test Complete," Officer Duncan waited for the printout. The printout ticket reflects that Respondent had a blood alcohol content of .172. Record Exhibit 1; Tr. At 23-25.

SUMMARY OF ARGUMENT

The delay in issuance of the Commissioner's Order in this matter does not constitute a valid basis for reversal of the Commissioner's Order. The Respondent's license revocation was stayed during the pendency of the hearing, and he has failed to show actual prejudice by the delay. Reversal of the revocation on the basis of delay, when the unchallenged evidence shows that Respondent committed the offense of DUI, is legally unsupported, and flies in the face of this Court's well-established standard for review of DUI cases: the underlying factual predicate required to support

an administrative license revocation is whether the investigating officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence. The case is not appropriate for a memorandum decision because of the need for a precedent to stem the tide of circuit court orders reversing DUI license revocations on the basis of delay.

ARGUMENT

I. THE DELAYS BETWEEN THE REQUEST FOR HEARING, THE HEARING AND ISSUANCE OF THE COMMISSIONER'S FINAL ORDER ARE NOT A BASIS FOR REVERSING THE CIRCUIT COURT'S FINAL ORDER, ESPECIALLY IN LIGHT OF PETITIONER'S FAILURE TO SHOW THAT HE WAS PREJUDICED THEREBY.

The Commissioner appeals a circuit court order reversing its revocation of Respondent's driver's license. This Court gives deference to the Commissioner's purely factual determinations, but a *de novo* review to legal determinations. Thus, "[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va.Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syllabus Point 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). "In cases where the circuit court

has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syllabus point 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Although at the outset of the Final Order the circuit court notes that "The central issue of the petition of appeal concerns a delay between the administrative hearing and final order," (Final Order at 1), the circuit court ultimately concluded that "The length of the delay in this case is extraordinary, over 17 months between the hearing and the final order and over two years between the request for hearing and final order." Final Order at 4. The circuit court made *no* finding that the Respondent had been prejudiced by the delay. The delay from the request for hearing in October 2007 until the hearing was held on May 2008, with only one continuance, is neither unusual nor improper given the immense caseload of DMV Hearing Examiners. Likewise, the 17-month delay between the hearing and issuance of the Final Order is not unusual or improper. Of course, the Respondent's license revocation was stayed during the pendency of the entire process.

In order to affirm the circuit court's Final Order, this Court would have to find that the Respondent suffered actual prejudice. *State ex rel. Knotts v. Facemire*, 223 W.Va. 594, 678 S.E.2d 847 (2009); *Petry v. Stump*, 219 W.Va. 197, 632 S.E.2d 353 (2006). In order to make such a finding, "a hearing will be necessary to determine whether Petitioner can demonstrate that actual prejudice has resulted from the delay." 223 W.Va. 603, 678 S.E.2d 856. The extent of Respondent's attempt to show prejudice, other than myriad averments by counsel in the briefs, is an affidavit from his employer to the effect that he needs to drive for work. Exhibit A to Pet.'s Resp. Respondent

failed to show that his ability to defend himself was impaired by the delay, as this Court required in

Knotts:

As the Fourth Circuit held in *Jones [v. Angelone]*, 94 F.3d 900 (4th Cir.1996)], a defendant is required to introduce evidence of “actual substantial prejudice” to establish that his case has been prejudiced by preindictment delay.

This is a heavy burden because it requires not only that a defendant show actual prejudice, as opposed to mere speculative prejudice, ... but also that he show that any actual prejudice was *substantial*-that he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected.

94 F.3d at 907 (emphasis in original).

223 W.Va. 603, 678 S.E.2d 856. “[T]he mere passage of time in rendering an administrative determination will not, standing alone, justify its annulment. Instead, a party must demonstrate actual and substantial prejudice as a result of the delay.” *Board of Ed. v. Donaldson*, 839 N.Y.S.2d 558, 561 (N.Y.A.D. 3 Dept. 2007) (citations omitted). Respondent’s tepid attempts do not approach the necessary standard for proving prejudice.

Even if actual prejudice were found, it must be balanced against the government’s justification for the delay. In the present matter, the already ponderous caseloads of the Hearing Examiners was exacerbated by amendments to West Virginia Code 17C-5A-1 et seq., which placed on the Division the burden of securing the attendance of the investigating officers when requested. The additional duties of the Hearing Examiners involved coordinating the notices of non-appearance of the officers with the Division’s petitions for enforcement of the officers’ subpoenas in circuit

court; a theretofore nonexistent dimension to the hearing process. Further, despite the allusion to the Commissioner's allegedly delaying issuance of final orders in the hopes that a criminal conviction will resolve the matter, there has been no showing that the delay was an intentional device to deprive Respondent of his rights. Indeed, the outcome of the criminal matter is not even of record in this case.

Many years ago, this Court enunciated the principles that failure to object to a delay amounts to a waiver of the objection, and that the party seeking redress must show that he was prejudiced in his ability to defend himself on review.

First, there is no evidence of record which indicates that the appellee voiced any objection to the continuances ordered. In *State v. Scritchfield*, W.Va., 280 S.E.2d 315, 322 (1981), this Court held that any error associated with a delay in a final child custody hearing was waived by the parent's failure to object to continuances granted. Similarly, in Syllabus Point 2 of *Kanawha Valley Transportation Co. v. Public Service Comm'n*, 159 W.Va. 88, 219 S.E.2d 332 (1975), this Court stated, "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." In the present action, the appellee neither objected to the continuances ordered nor attempted to hasten the proceedings through mandamus or otherwise.

Second, there has been no showing of prejudice which would warrant reversal of the Commissioner's order. As we have already noted, absent a showing of prejudice to the substantial rights of the petitioner for review, a circuit court has no authority under W.Va. Code § 29A-5-4(g) to reverse an agency decision in a contested case.

Johnson v. State Dept. of Motor Vehicles (per curiam), 173 W.Va. 565, 570, 318 S.E.2d 616, 620 (1984).

See also, Special Care of New Jersey, Inc. v. Board of Review, 742 A.2d 1023, 1026 (N.J. Super. A.D. 2000) (“the remedy Special Care seeks is not justified by the Board’s delay, particularly where the record reveals no effort by Special Care to compel the Board to act.”); *DeMilo and Co., Inc. v. Department of Transp.*, 658 A.2d 170, 175 (Conn. Super. 1993) (“The short answer to the plaintiff’s argument is that § 4-180 provides its own remedy in the case of an administrative agency that fails to render a timely decision. That remedy is an application to this court for an order to compel the issuance of a decision. The plaintiff did not avail itself of that remedy in this case, and the court concludes that the remedy was waived.”). *Accord* 2 Am. Jur.2d *Administrative Law* § 572 (footnote omitted) (“The preferred remedy for administrative delay is an order compelling agency action, not a reversal of the eventual agency decision.”); 73A C.J.S. *Public Administrative Law and Procedure* § 456 (). *Cf. F.T.C. v. Anderson*, 631 F.2d 741, 750 (D.C. Cir. 1979) (under the federal Administrative Procedures Act, a “citizen may be entitled to a court ruling that an agency exercise its discretion even though the court cannot say which way the discretion is to be exercised.”).

This Court then took up the delay issue in *State ex rel. Cline v. Maxwell*, 189 W.Va. 362, 432 S.E.2d 32 (1993), finding that “the delay, standing alone, is not sufficient to justify the dismissal of the licensees’ revocation proceedings.” 189 W.Va. 367, 432 S.E.2d 37. Although that principle is still good law, it must be noted that the *Cline v. Maxwell* case is partially inapposite to the present case, in that the system for license revocation posed hardships at that time which are now obviated by the mechanism of staying the revocation until resolution of the case; and by its reliance on *State ex rel. Leonard v. Hey*, --- W.Va. ----, 269 S.E.2d 394 (1980), which was overruled by *Knotts, supra*, to support the notion of “presumptive prejudice”.

This Court relied on *Johnson, supra*, in declining to reverse the licence revocation in *Smith v. Bechtold*, 190 W.Va. 315, 438 S.E.2d 347 (1993), in which the appeal of the license revocation languished in circuit court for more than five years. In *Smith*, the Court enunciated the principle that the driver's failure to object or take any other action to hasten the proceeding constituted a waiver of the delay issue.

In the present case, there is some suggestion that the delay in the prosecution of Mr. Smith's appeal was invited by Mr. Smith or his attorney. Through his attorney and over the objection of the Department of Motor Vehicles, he moved for, and obtained, stays of the revocation of his license. There is nothing to indicate that he, at any point, objected to the delays, and there is no indication that he, at any point, instituted a mandamus proceeding or took any other action to hasten the progress of the appeal. In these regards, the case is quite similar to the *Johnson* case.

190 W.Va. 319, 438 S.E.2d 351.

This Court once again took up the issue of delay in the context of a driver's license revocation proceeding in *In re Petition of Donley*, 217 W. Va. 449, 618 S.E.2d 458 (2005). In *Donley*, the delay was the result of a Magistrate's failure to send in an abstract of judgment to the Division of Motor Vehicles for more than three years. Although this Court found that the delay was unreasonable in this case, it further held that Mr. Donley was not entitled to relief because no prejudice flowed from the delay.

In this case, the delay between the hearing and issuance of the Final Order was approximately seventeen months. Compare *Kanawha Valley Transp. Co.*, 159 W. Va. at 94-95, 219 S.E.2d at 338 (16 to 24 months not prejudicial), [*accord Britt v. Britt*, 606 S.E.2d 910, 913 (N.C. App. 2005) (16 months)]; *Hartman v. Hartman*, 624 N.Y.S.2d 470, 472 (N.Y.A.D. 3 Dept. 1995) ("There was a 19-

month delay between the hearing and the order of custody which petitioner claims was prejudicial to his interests. Although we believe the delay was unduly long, such delay in and of itself is insufficient to require a new hearing.”); *City-Wide Asphalt Co., Inc. v. City of Independence*, 546 S.W.2d 493, 498-99 (Mo. App. 1976) (16 month between bench trial and order not prejudicial).

Not only did Respondent fail to show actual prejudice, he has benefitted from the delay because the revocation of his driving privilege was stayed pending issuance of the Final Order. W. Va. Code § 17C-5A-2(s) (“During the pendency of any hearing, the revocation of the person’s license to operate a motor vehicle in this state shall be stayed”).

Thus, the delay in issuance of an administrative Final Order where Respondent did nothing to compel issuance of the Final Order, where the revocation has been stayed during the pendency of the litigation, and where the Respondent has failed to show prejudice, does not vitiate the Final Order.

Hutchison v. City of Huntington, 198 W. Va. 139, 479 S.E.2d 649 (1996), which involved denial of a building permit, stands for the proposition that this court cannot set definite temporal boundaries for resolution of an administrative appeal:

This Court cannot set definite temporal boundaries for determining when a particular delay caused by a state actor’s misconduct rises to constitutional dimension; 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.

198 W.Va. 155-156, 479 S.E.2d 665 - 666.

Hutchison was cited by the circuit court in its Final Order (at 3). *Hutchison*'s placement of emphasis on a standard of "reasonableness and fairness" is not the standard which this Court should impose upon the present case, as set forth *supra*. The case is instructive for its acknowledgment that temporal strictures would hamper governmental efforts. "Indeed, we would hamstring governmental efforts to investigate relevant facts and conscientiously consider applications if we were to impose so strict a deadline, as a matter of constitutional law." 198 W.Va. 155, 479 S.E.2d 665.

The circuit court's Final Order contains less than one page of analysis, and, as argued *supra*, that analysis is deficient. Respondent has failed to show that he was prejudiced by the delay (a criterion which may end the Court's consideration of this matter summarily); the circuit court failed to hold a hearing on whether the Respondent was prejudiced; the Division has justified the delay; the delay is not extraordinarily long in the context of caselaw or in the context of the normal operation of the Division; the Respondent took no action to hasten the process within the Division; and the merits of the case were ignored. The Final Order must be reversed and the Commissioner's Order reinstated in order to achieve justice in this matter.

Reversal of the revocation order in this matter on the basis of delay also disregards the applicable standard for review in administrative license revocation matters. This Court has affirmed the applicable standard for review of administrative license revocation cases in *Cain v. West Virginia Div. of Motor Vehicles*, 225 W.Va. 467, 694 S.E.2d 309 (2010):

As set forth in West Virginia Code § 17C-5A-2(f), [footnote omitted] the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.

and in *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010):

In instances of administrative license revocation, our decisions have clearly stated that there is no statutory requirement that proof of a motorist driving under the influence of alcohol be established by secondary chemical test results. See Syl. Pt. 1, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 4, *Coll v. Cline*. What we have consistently held is that

[w]here there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol. Syllabus Point 2, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984). Syllabus Point 2, *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997).

Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008).

The reversal of a revocation order on the basis of delay is unsupportable on its face, as well as an alarming departure from the question of whether the person was driving a vehicle while under the influence of alcohol.

CONCLUSION

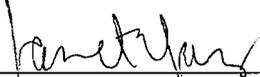
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests the *Final Order* entered by the Circuit Court of Kanawha County on August 9, 2010 be reversed by this Court.

Respectfully submitted,

**JOE E. MILLER, Commissioner
West Virginia Division of Motor Vehicles,**

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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner'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 27th day of May, 2011, addressed as follows:

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JANET E. JAMES