

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

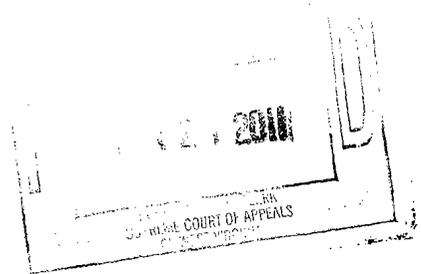
Petitioner/Respondent Below,

v.

NO. 11-0081

JOHN MOREDOCK,

Respondent/Petitioner Below,



RESPONDENT'S BRIEF

Carter Zerbe and David Pence  
Counsel for Petitioner  
WV State Bar #4191 and #9983  
P. O. Box 3667  
Charleston, WV 25336  
(304)345-2728  
Email: [info@carterzerbelaw.com](mailto:info@carterzerbelaw.com)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	2
III. SUMMARY OF ARGUMENT	4
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	4
V. ARGUMENT	5
A. DELAY OF OVER TWO YEARS IS PRESUMPTIVELY PREJUDICIAL.	5
B. MOREDOCK WAS NOT OBLIGATED TO INSTITUTE A MANDAMUS PROCEEDING TO PROTECT HIS CONSTITUTIONAL RIGHTS AND FORCE THE COMMISSIONER TO CARRY OUT HIS DUTIES.	11
C. EVEN IF A DELAY OF OVER TWO YEARS REQUIRED A SHOWING OF PREJUDICE, MOREDOCK HAS MET THAT REQUIREMENT.	17
VI. CONCLUSION	20

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Allen v. State Human Rights Comm.</i> , 324 S. E. 2d 99, 116 (WV 1984)	6, 11, 12
<i>Board of Ed. v. Donaldson</i> , 839 N. Y. S. 558 (N.Y. A.D. 3 Dept. 2007)	10
<i>Britt v. Britt</i> , 606 S. E. 2d 910 (N. C. App. 2005)	10
<i>Brozena v. Commonwealth</i> , 802 A. 2d 1 (Pa. 2002)	9
<i>City-Wide Asphalt Co., Inc. v. City of Independence, Missouri</i> , 546 S. W. 2d 493 (Mo. App. 1976)	11
<i>Cline v. Maxwell</i> , 432 S. E. 2d 32 (1993)	2, 6, 7, 11, 12, 15, 16
<i>Demilo and Company, Inc. v. Department of Transportation et al.</i> , 658 A. 2d 170 (Conn. 1993)	15
<i>Dolin v. Roberts</i> , 173 W. Va. 443, 317 S. E. 2d 802 (1984)	6
<i>Frantz v. Palmer</i> , 564 S. E. 2d 398, 402 (W. Va. 2001)	13
<i>Hartman v. Hartman</i> , 624 N. Y. S. 2d 470 (N. Y. A.D. 3 Dept. 1995)	11
<i>Hutchison v. City of Huntington</i> , 198 W. Va. 139, 479 S. E. 2d 649 (1996)	9, 20
<i>In re Arndt</i> , 341 A. 2d 596 (N. J. 1975)	10
<i>In re Donley</i> , 217 W. Va. 449, 618 S. E. 2d 458 (W. Va. 2005)	19, 20
<i>Johnson v. State Department of Motor Vehicles</i> , 318 S. E. 2d 616 (1984)	10
<i>Jordan v. Roberts</i> , 246 S. E. 2d 259 (1978)	5

*Kanawha Valley Transportation Company v. Public Service Commission*, 10, 12, 13  
219 S. E. 2d 332 (W. Va. 1975)

*McCallister v. Miller*, Petition No. 10-AA-86 (2010) 11, 14

*McJunkin Corp. v. West Virginia Human Rights Commission*,  
179 W. Va. 417, 369 S. E. 2d 720 (WV 1988) 5

*Petry v. Stump*, 219 W. Va. 197; 632 S. E. 2d 353 (2006) 10, 11

*Sansom v. Cicchirillo*, C. A. # 05-AA-183 13

*Smith v. Bechtold*, 190 W. Va. 315; 438 S. E. 2d 347 (1993) 15

*Smith v. Siders*, 155 W. Va. 193 183 S. E. 2d 433 (1971) 5

*Special Care of New Jersey, Inc. and Board of Review*, 742 A. 2d 1023  
(N. J. 2000) 15

*State ex rel. Knotts v. Facemire*, 223 W. Va. 594; 678 S. E. 2d 847  
(2009) 7, 8

*State ex rel. Patterson v. Aldredge*, 317 S. E. 2d 805, Syllabus pt. 1  
(WV 1984) 7, 13, 14

*State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 249 S. E. 2d 765  
(WV 1978) 5

*Stiltner v. Harshbarger*, 296 S. E. 2d 861 (WV 1982) 9

*Taylor v. MacQueen*, 174 W. Va. 77; 322 S. E. 2d 709 (1984) 9

*Wellman v. the Commissioner of the Department of Motor Vehicles*,  
C. A. # 05-AA-96 (2006) 11, 13

## STATUTES

*West Virginia Code §17C-5A-2(s)* 17

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.

RESPONDENT'S BRIEF

I. INTRODUCTION

At the time of the incident, John Moredock was 24 years of age. He was a recent graduate of the University of Georgia with a major in finance. He was embarking on his first real job having recently been employed in risk management with Commercial Insurance. At the time of the incident, Moredock had no criminal record or conviction of any kind. In addition, the DUI charge arising out of the incident herein was dismissed. While there was an accident involved in this incident, neither driver suffered any injury. The other driver had been drinking and Moredock was not cited for the accident.

The date of the incident was September 29, 2007. Moredock requested a hearing on October 10, 2007. The Commissioner continued the hearing which had been scheduled for February 20, 2008. The hearing was subsequently held on May 6, 2008, eight months after Moredock's arrest. The final order was not issued until October 13, 2009, over *two years* after Moredock's arrest, over two years after the officer had documented the charge with the Commissioner, and over two years after the Commissioner had issued his initial revocation

order.

The Commissioner claims a delay of over two years is insufficiently long to constitute a denial of due process without a showing of prejudice to the driver. In his petition, the Commissioner failed to cite a seminal case from this honorable court, *State ex rel. Cline v. Maxwell*, 432 S. E. 2d 32 (1993) that establishes that the Commissioner's argument is defective but, now in his brief, the Commissioner makes a pithy reference to it. The Circuit Court properly followed this authority to determine that the delay in this case was so long that prejudice was presumed. Thus, a finding of prejudice was not necessary. The Circuit Court, following established law and common sense, also determined that Moredock was not required to mandate the Commissioner to perform his constitutional duties to render a timely decision.

The Commissioner also ignores several cases from the Kanawha County Circuit Court including a case from Judge Berger who Judge Webster replaced which provides on point adverse authority. However, even if the law was otherwise, as established below, Moredock was, in fact, prejudiced and proved that prejudice in the court below. Finally, for the most part, the Commissioner relies on non DUI out of state cases which have little or no relevance to the situation herein or to decided case law in West Virginia.

For the reasons set out herein, Moredock respectfully requests this honorable court to deny the Commissioner's petition.

## II. STATEMENT OF THE CASE

Moredock does not deem it necessary to repeat the procedural history and facts enumerated by the Commissioner to the extent they are accurate and complete. However, to the extent they are incomplete, Moredock enumerates the following facts.

As pointed out in the introduction, the date of the incident was September 29, 2007. Moredock requested a hearing on October 10, 2007. The Commissioner continued the hearing which had been scheduled for February 20, 2008. The hearing was subsequently held on May 6, 2008, eight months after Moredock's arrest. The final order was not issued until October 13, 2009, over *two years* after Moredock's arrest, over two years after the officer had documented the charge with the Commissioner, and over two years after the Commissioner had issued his initial revocation order.

Because of the delay in this matter, Moredock suffered prejudice. By the time a decision was rendered in this matter, his circumstances had changed making his ability to drive an essential part of his job. (See affidavit from Raye King, president of Moredock's company which was introduced into evidence at Moredock's stay hearing before Judge Holliday and Judge Holliday's stay order finding irreparable harm, which were enclosed as Exhibits "A<sub>1</sub>" and "A<sub>2</sub>" with Petitioner's Response in Opposition to Petitioner's Petition for Appeal.)

There was nothing improper about Moredock's driving nor any evidence that he caused the accident. (Tr. 35-36).

The driver of the other vehicle had been drinking. (Tr. 42).

The sole basis for the officer's decision to require Moredock to submit to field sobriety tests was, "the presence of alcoholic beverage on his person, Moredock's admission that he had a couple of drinks, and a "slight" sway while standing. (Tr. 14-15).<sup>1</sup>

The arresting officer described Moredock as "extremely polite" and "extremely

---

<sup>1</sup>While the officer noted on his DUI information form that Moredock's speech was slurred and his eyes were glassy, at the hearing he did not mention those symptoms at all.

cooperative.” (Tr. 15, 33).

The arresting officer administered three field sobriety maneuvers to Moredock: the horizontal gaze nystagmus (“HGN”), the walk and turn (“WAT”), and the one-leg stand (“OLS”). (Tr. 15-20).

Prior to administering the HGN, the officer determined that Moredock’s eyes did not track equally and he had unequal pupils. Because these results indicated a medical condition, pursuant to NHTSA standards, the results of the test were not considered by the Commissioner. (Tr. 16).

On the WAT, “failure” is a score of 2 or above. Since Moredock received a score of 3, he barely failed. (Tr. 42-43). Moredock kept his balance during the instruction stage, didn’t stop walking to maintain his balance, didn’t step off the line, and took the correct number of steps. (Tr. 43-44).

On the OLS, “failure” is also a score of 2 or above. Moredock scored a 2. (Tr. 45). Moreover, the test was misscored. The test is supposed to last only 30 seconds. Moredock did not put his foot down until the 30 seconds had expired. (Tr. 48-49).

In accordance with the testimony of the arresting officer, the Division of Motor Vehicles concluded that Moredock did not cause injury to any other person. (Final Order, at 5, 6).

### III. SUMMARY OF ARGUMENT

(See INTRODUCTION)

### IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The court has already issued an Order requiring this case to be scheduled for a Rule 19 oral argument.

## V. ARGUMENT

In his petition, the Petitioner makes two basic arguments.

1. The delay was not long enough for prejudice to be presumed and, thus, since Moredock did not establish prejudice, his assertion of unreasonable delay must fail.

2. Even if the delay was unreasonable, Moredock's remedy was to institute mandamus proceedings to force the Petitioner to act and since he didn't do so, Moredock has waived any claim for relief.

### A. A DELAY OF OVER TWO YEARS IS PRESUMPTIVELY PREJUDICIAL.

Addressing the first issue, even assuming Moredock had not established prejudice which, in fact, he most certainly did, his procedural due process right to a decision without unreasonable delay was violated in this matter. This State's procedural due process provision, West Virginia Constitution Art. III, §10, states that, "No person shall be deprived of life, liberty, or property, without due process of law. . ." An important element of this procedural due process guaranty is found in West Virginia Constitution Art. III, §17, which provides that "justice shall be administered without. . . delay."

Due process of law extends to actions of administrative offices and tribunals (See *Smith v. Siders*, 155 W. Va. 193 183 S. E. 2d 433 (1971); *McJunkin Corp. v. West Virginia Human Rights Commission*, 179 W. Va. 417, 369 S. E. 2d 720 (WV 1988) and is synonymous with fundamental fairness. *State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 249 S. E. 2d 765 (WV 1978). Specifically, in Syllabus Point 1 of *Jordan v. Roberts*, 246 S. E. 2d 259 (1978), our highest court recognized that, "[a] driver's license is a property interest which requires protection of state's due process clause before its suspension can be obtained under implied consent law."

With respect to the quasi-judicial functions of administrative agencies, due process requires them to timely adjudicate matters properly submitted to them. See *Allen v. State Human Rights Comm.*, 324 S. E. 2d 99, 116 (WV 1984). More pointedly, in Syllabus Point 3 of *Dolin v. Roberts*, 173 W. Va. 443, 317 S. E. 2d 802 (1984), the West Virginia Supreme Court of Appeals noted that, “[u]nreasonable delay can result in denial of procedural due process in license suspension cases.”

The seminal case on the delay issue in the context of a DUI driver’s license revocation issue is *State ex rel. Cline v. Maxwell*, 432 S. E. 2d 32 (1993). In that case, this court had to address the same issue in the context of a delay in the hearing. “We have long recognized,” said the court,

“that administrative agencies that perform quasi-judicial functions must comply with the mandate of the *West Virginia Constitution*, Art. III, Sec. 17, that “**justice shall be administered without . . . delay.**” See Syllabus Point 7, *Allen v. State Human Rights Comm’n.*, 174 W. Va. 139, 324 S. E. 2d 99 (1984) (“administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted”); Syllabus Point 1, *Workman v. State Workmen’s Compensation Comm’r.*, 160 W. Va. 656, 236 S. E. 2d 236 (1977) (“[l]ong delay in processing claims. . . is not consistent with the declared policy of the Legislature”); *State ex rel. Bowen, v. Flowers*, 155 W. Va. 389, 184 S. E. 2d 611 (1971) (a **seven-month delay** in holding a hearing is **unreasonable**).”

432 S. E. 2d at 36, n. 5 (Emphasis supplied).

In that case, the Circuit Court had found that a six month delay was a *per se* deprivation of due process and ordered the Commissioner to restore the driver’s license to the driver and to dismiss the administrative charges. However, the Supreme Court of Appeals reversed. The court

recognized “[d]ue process requires a balance between the state’s interest in law enforcement and the citizens’ interest in being free from governmental harassment.” *Id.*, at 36. Although the court agreed with the Circuit Court that a six month delay by the department was “unreasonable,” it found “that the delay *standing alone*, is not sufficient to justify the dismissal of the licensee’s revocation proceedings.” *Id.*, at 37-38. (Emphasis supplied). The court emphasized, however, that some delays are “presumptively prejudicial.” In that case, the burden shifts to the government to rebut the presumption.

Applying the above principle to the situation herein, if a six month delay is unreasonable and a violation of due process, then a delay over four (4) times that long is not only grossly excessive but presumptively prejudicial as well.

While much of the delay in this case occurred after the hearing, the same principles apply to the failure of the Respondent to make a timely decision. In *State ex rel. Patterson v. Aldredge*, 317 S. E. 2d 805, Syllabus pt. 1 (WV 1984), the court held that “judges have an *affirmative duty* to render timely decisions on matters properly submitted within a reasonable time following their submission.” (Emphasis supplied).

The Commissioner’s first line of defense is to claim that “[i]n order to affirm the Circuit Court’s Final Order, the court would have to find that the Respondent suffered actual prejudice.” *Id.* Abandoning some of the cases he relied upon in his petition, the Commissioner now places primary reliance on *State ex rel. Knotts v. Facemire*, 223 W. Va. 594; 678 S. E. 2d 847 (2009) to support his claim that in order to prevail, Moredock has to show actual prejudice. This case does not even come close to undercutting or diminishing this court’s holding in *Cline*. *First, Knotts* is a criminal case, having little applicability to the special circumstances involved in civil license

revocation issues.

*Second*, even in the criminal context, *Knotts* is limited to pre-indictment delay. Indeed, the court took great pains to confine its decision to the pre-indictment or pre-accusation period, repeatedly qualifying its discussion of the delay with the above terms. In fact, every time it mentions delay the court used such restrictive adjectives. One of the reasons the court was so intent on confining its decision to pre-indictment was because the stigma associated with being charged had not yet occurred. The Defendant had not yet had to endure the humiliation of being charged with a crime and the psychological strain of having to wait its outcome. Unlike the situation in *Knotts, supra*, the delay here occurred after the charges had been leveled against Moredock. For over two years he has had these charges hanging over his head. While it may not rise to the level of some other crimes, the stigma of being charged with DUI is a heavy burden. Moreover, as a young professional just starting his career, he was kept on tender hooks for over two years, uncertain as to whether he would be able to keep his job, whether his career would be damaged; and unable to plan for his future or make other fundamentally important decisions because of his unsettled status of his driving ability.

*Third*, the court, in particular, noted that in the context of criminal cases “[t]he law has provided other mechanisms to guard against *possible* or *distinguished* from *actual* prejudice resulting from the passage of time between crime and arrest or charge.” *Knotts*, at 853, 600, quoting *Jones v. Angelone*, 94 F. 3d 900, 906 (4<sup>th</sup> Cir. 1996). (Italics in original). These other mechanisms included a statute of limitations which, of course, is not available here.

*Fourth* and finally, the court specifically recognized that “the Sixth Amendment right to a speedy trial is not implicated in cases where the delay at issue is pre-indictment.” *Knotts*, at 850,

Given these circumstances, Judge Cleckley's decision in *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S. E. 2d 649 (1996) provides an ideal template for examining the delay issue herein. In *Hutchison*, plaintiff was a property owner who was seeking a building permit. The delay involved the time period between the application for the permit and the decision by the City of Huntington on his application. The delay was only four (4) months, quite a contrast to what we have here. While the *Hutchison* court concluded that a delay as short as four months was not, "so unreasonable as to offend the basic notions of fairness embodied in the Due Process Clause" (*Id.*, at 665), it nevertheless, emphasized that such decision should be made in a "reasonably timely manner." *Id.* It also emphasized that there are limits on official delays and refusals to decide can be tantamount to arbitrary rejections violative of due process. . ." *Id.* Indeed, the court cited with approval *Taylor v. MacQueen*, 174 W. Va. 77; 322 S. E. 2d 709 (1984) which held that a ". . .delay of approximately two years in ruling on a case violated Art. III, §17 of the W. Va. Constitution. . ." *Id.* As pointed out in Respondent's initial brief, while the court recognized the analogy was not perfect, it indicated that the analogy between speedy trials and prompt administrative action was "a good one." *Id.*, at 666.

The speedy trial limit in Magistrate Court, the court most appropriate for comparison, is one year. The remedy for the State's failure to adhere to the speedy trial requirements is dismissal. A showing of prejudice is not required. See *Stiltner v. Harshbarger*, 296 S. E. 2d 861 (WV 1982).

Courts from other jurisdictions have reversed drivers license revocation orders after finding similarly unreasonable delays that violate due process. Some of those cases have found delays much shorter than the instant delay to violate due process. For example, in *Brozena v.*

*Commonwealth*, 802 A. 2d 1 (Pa. 2002), a **one year delay** was found to have unreasonably prejudiced a driver whose license had been suspended, such that reversal of the suspension order was warranted. In *In re Arndt*, 341 A. 2d 596 (N. J. 1975), the New Jersey driver's license administrator's inaction in the driver's license suspension proceedings of **twenty (20) months and ten (10) months** amounted to an unfair disregard of motorist's rights warranting vacation of suspension order. In that case, the court recognized the serious interests at stake in such proceedings compels the agency to meet due process and fairness requirements:

“License-revocation proceedings do realistically affect drivers in a serious way, often threatening their ability to earn a livelihood, and it is settled they must meet those incidents of fairness underlying due process.”

*Id.*, 341 A. 2d at 436.

Threatening Moredock's ability to earn a living is exactly what is happening here.

Another case relied upon by the Commissioner, *Johnson v. State Department of Motor Vehicles*, 318 S. E. 2d 616 (1984) is equally unavailing. *Johnson*, which relied on *Kanawha Valley Transportation Company v. Public Service Commission*, 219 S. E. 2d 332 (W. Va. 1975) is a per curiam decision. Most importantly, there was no claim of a denial of due process. It was decided over twenty five (25) years ago. The case was both implicitly and explicitly overturned. Moreover, *Johnson* only involved a delay of *four months* and there was no claim of prejudice. Indeed, the court intimated that if the delay had been long enough, the delay would have been unconstitutional without a showing of prejudice. *Id.*, at 620.

Finally, the Commissioner references *Petry v. Stump*,<sup>2</sup> 219 W. Va. 197; 632 S. E. 2d 353

---

<sup>2</sup>Either in his petition or brief, the Respondent also cites cases from other jurisdictions e.g., *Board of Ed. v. Donaldson*, 839 N. Y. S. 558 (N.Y. A.D. 3 Dept. 2007); *Britt v. Britt*, 606 S.

(2006) to support his claim that actual prejudice must be shown. The Commissioner misconstrues the holding in *Petry*. While the court in *Petry* did find prejudice, it also found the extent of the delay so egregious that it was presumptively prejudicial.

In sum, none of the cases relied upon by the Commissioner explicitly or even implicitly overturn or diminish the court's decision in *Cline*.

The Respondent also ignores cases from the Circuit Court of Kanawha County rejecting his position. For instance, in *Wellman v. the Commissioner of the Department of Motor Vehicles*, C. A. # 05-AA-96 (2006), Judge Berger found that a delay of just a few more months than that involved herein was presumptively prejudicial. (A copy of *Wellman* and the other Circuit Court cases cited in this brief were supplied to this court in Respondent's Response to Petitioner's Petition.) And, more recently, in *McCallister v. Miller*, Petition No. 10-AA-86 (2010), Judge Zakaib determined that a delay seven months less than that involved herein was presumptively prejudicial and a denial of due process.

**B. MOREDOCK WAS NOT OBLIGATED TO INSTITUTE A MANDAMUS PROCEEDING TO PROTECT HIS CONSTITUTIONAL RIGHTS AND FORCE THE COMMISSIONER TO CARRY OUT HIS CONSTITUTIONAL DUTIES.**

The Commissioner's reliance on *Allen v. State Human Rights Comm'n.*, 324 S. E. 2d 99 (1984) to support his contention that the Petitioner had a duty to compel the agency to do its job is equally problematic. In that case, the plaintiffs had filed discrimination complaints against

---

E. 2d 910 (N. C. App. 2005); *Hartman v. Hartman*, 624 N. Y. S. 2d 470 (N. Y. A.D. 3 Dept. 1995); *City-Wide Asphalt Co., Inc. v. City of Independence, Missouri*, 546 S. W. 2d 493 (Mo. App. 1976) for the proposition that the delay herein was not long enough without evidence of actual prejudice. Aside from the fact that here there is actual prejudice, aside from the fact that these cases are outside our jurisdiction, and contrary to settled case law herein, aside from the fact that these cases are far removed from the subject of DUI license revocation, these cases contradict Respondent's assertion that mandamus is required.

their employer because of extraordinary delay in investigating and deciding their claims. The plaintiffs sought to compel the Commission to render a timely decision on the merits of their claim. Obviously, plaintiffs did not seek dismissal. Dismissal would have foreclosed relief to the plaintiffs. Dismissing their cases would have punished the plaintiffs for seeking protection of their rights and rewarded the agency for its dilatory procedure. Thus, *Allen* is completely irrelevant to the circumstances herein.<sup>3</sup>

It is also telling that the few cases cited by the Commissioner were decided prior to *Cline*. For instance, the Commissioner's primary authority *Kanawha Valley Transportation, supra* was decided in 1975, thirty years ago. Moreover, in that case, the hearing was held on March 29, 1974 and the order to the company was issued in March 18, 1975, less than one year later. Finally, unlike the case here, the company did not even claim *any prejudice* as a result of the delay nor claim there had been any material changes in its position between the hearing and the final order. Those facts are wholly distinguishable from the facts here.

In none of the cases cited by the DMV was a violation of due process alleged or addressed. There is nothing in those opinions that suggest that a litigant has any sort of duty to sue for extraordinary mandamus relief to protect his due process rights, or that failure to file a lawsuit seeking extraordinary relief somehow *waives* a person's constitutional rights under the Due Process Clause. By failing to cite authority directly contrary to its position and relying on cases that are clearly inapplicable, the Commissioner's argument is disingenuous and misleading.

In short, constitutional rights can not be waived. To the contrary, published decisions in

---

<sup>3</sup>Moreover, it is significant that *Kanawha Valley Transportation Co., supra* and *Allen v. Human Rights Comm.*, 324 S. E. 2d 99 (WV 1984), a case also relied upon by the Commissioner, only involved delays between the filing of charges and the hearing.

this jurisdiction state just the opposite – that a court [in this case the quasi judicial functions of the DMV] has “an affirmative duty” to render a decision timely. *State ex rel. Patterson v. Aldredge*, 317 S. E. 2d 805 (WV 1984). “Despite the availability of extraordinary relief as a means of seeking the issuance of delayed decisions, taxpayers should not have to resort to the judicial system to obtain a timely tax ruling.” *Frantz v. Palmer*, 564 S. E. 2d 398, 402 (W. Va. 2001).

Thus, the hollowness of Respondent’s position is reflected in the fact that it relies upon outdated, discredited cases and ignores case law directly on point.

The Respondent also ignores multiple cases from the Circuit Court of Kanawha County rejecting his position. For instance, in *Wellman, supra*, Judge Berger specifically rejected the Commissioner’s interpretation of *Kanawha Valley, supra* and held that “even though Wellman could have sought a Writ of Mandamus, he was not required to. Not seeking a Writ of Mandamus does *not* preclude Wellman from raising the delay issue on appeal.” *Id.*, at 4.

Similarly, in *Sansom v. Cicchirillo*, C. A. # 05-AA-183, another DUI administrative delay case, which was admittedly much longer than the delay herein, Judge Walker had the following to say about Respondent’s position:

“The Respondent argues that the Petitioner had the obligation, when he became dissatisfied with the length of time between the administrative hearing and the issuance of the Final Order, to file an action in mandamus. The Respondent claims that the Petitioner contributed to the delay by his own lack of action. The Court does not agree. In support of this argument, the Respondent cites *Kanawha Valley Transportation Co. v. Public Service Comm’n.*, 159 W. Va. 88, 219 S. E. 2d 332 (1975), which held:

‘The mere delay in the disposition or decision of a case does not vitiate the order of judgment. If a

decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision but not how to decide.’

189 W. Va. 368-369, 432 S. E. 2d 38-39.

The Court notes that the Supreme Court held that a proceeding in mandamus *may* be instituted. There is nothing to suggest that a litigant *must* move for mandamus to protect his due process rights, at his or her own expense. In *State ex rel. Patterson v. Aldredge*, 173 W. Va. 446, 317 S. E. 2d 805 (1984), the Supreme Court determined that a court has “an affirmative duty” to render a decision. Thus, a writ of mandamus is simply an avenue of relief that may be pursued to compel a decision. However, a litigant is not required to file a writ of mandamus in order to receive a decision by a court which has an affirmative duty to act.”

Thus, Judge Walker reached exactly the same conclusion as Judge Berger.

Very recently, in *McCallister supra*, decided on December 20, 2010, Judge Paul Zakaib made the following determination in another delay case involving the Commissioner.

“With regard to the Respondent’s delay in issuing a decision in this matter, the record reflects that McCallister never once sought a continuance and did nothing to delay this matter. Not resolving McCallister’s case in a timely manner is exacerbated by the DMV’s failure to provide a reasonable justification for the delay. Although McCallister could have sought a writ of mandamus to compel action on the part of the DMV, he is certainly not required by law to do so. The excessive delay of approximately five months in conducting a hearing and approximately twelve months between a hearing and final order violated Petitioner’s right to due process of law.”

Thus, Judge Zakaib determined that a delay significantly less than occurred herein was presumptively prejudicial and denial of due process. Echoing the decision of Judges Berger and Walker, he also held that the driver was not required to institute a mandamus action to protect his constitutional rights.

Finally, it must be stressed that the court in *Cline* did not even hint that drivers would need to seek extraordinary relief in order to preserve their due process protection.

In a desperate attempt to find authority for his mandamus position, the Commissioner ignores settled case law here and instead relies on authority elsewhere. Petitioner wanders far afield to areas totally unconnected to DUI administrative law and to cases which are easily distinguishable. For instance, Respondent cites *Special Care of New Jersey, Inc. and Board of Review*, 742 A. 2d 1023 (N. J. 2000), a case from a New Jersey Appeals Court involving the issue of whether Special Care was liable for an employees disability benefits. The delay involved was less than a year, no denial of due process was alleged and no prejudice was shown, alleged, or demonstrated.

*Demilo and Company, Inc. v. Department of Transportation et al.*, 658 A. 2d 170 (Conn. 1993), another foreign case relied upon by Petitioner, was a property dispute case between the Connecticut Department of Transportation and a property owner. The delay was a secondary issue and, again, in connection with it, no due process violation was alleged.<sup>4</sup> The Plaintiff merely alleged that it was a violation of a statute and that statute specifically provided mandamus as a remedy for delay. Finally, the delay in that case was approximately *three months*.

Seeking to add another arrow to his quiver, the Commissioner also relies on another case, *Smith v. Bechtold*, 190 W. Va. 315; 438 S. E. 2d 347 (1993), which was uncited in his appeal petition. Reaching back to 1993, the Commissioner cites *Smith* for the proposition that *Moredock* was required to seek relief in mandamus. However, the Commissioner failed to disclose to this court that much of the delay was caused by Smith. Thus, the court correctly

---

<sup>4</sup>Due process claims were raised in connection with other issues in the case.

noted, “that it has long recognized that it is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.” 438 S. E. 2d , at 351. In addition, no prejudice was even alleged, let alone proven.<sup>5</sup>

In addition, this case has been implicitly discredited by *Cline v. Maxwell* and its progenies.

It finally must be said that, in connection with DUI administrative hearings, it would be completely unfair to require drivers to compel the Commissioner to perform his constitutional duty. The driver would have to be able to predict the future to ascertain beforehand how his circumstances might change to render his ability to drive essential to his livelihood or otherwise a necessity. Petitioner is caught between Scylla and Charybdis: Should he compel the Respondent to render a decision and risk the loss of his driver’s license and the consequences that follow or, should he assume that his driver’s license is safe because the long passage of time demonstrates that Respondent is not going to take his license. He is like Damocles. He has a sword hanging by a thread over his head, and he doesn’t know whether changing his position will trigger its fall.

Thus, if one looks at the implications of the Commissioner’s position, it becomes even more apparent that it is wrong not just from a legal perspective but from a policy perspective as well. It is readily conceded by both parties to this litigation that untimely delays by the Division of Motor Vehicles can deprive a driver of his or her constitutional rights. However, the Commissioner wants to shift the burden of protection from the perpetrator of the delay to the victim of the delay. One must keep in mind also that many individuals prosecuted for DUI are

---

<sup>5</sup>It is also noteworthy that the delay before the administrative agency was only 10 months. The delay between his arrest and hearing was only four (4) months and the delay between the hearing and the decision was only six (6) months.

people of limited financial resources and simply can't afford additional and extraordinary litigation to compel the Commissioner to do his job. Inordinate delays also mislead drivers into thinking that the Division has decided not to revoke their license.

In light of the above, the Respondent's claim that a delay of over two years was not presumptively prejudicial or that Moredock was required to file a mandamus action to protect his constitutional rights is without merit. However, if Moredock had been required to demonstrate prejudice to determine that he was denied due process, he did so.

C. EVEN IF A DELAY OF OVER TWO YEARS REQUIRED A SHOWING OF PREJUDICE, MOREDOCK HAS MET THAT REQUIREMENT.

Even if prejudice could not be presumed--and certainly a delay of two years is presumptively prejudicial--Moredock established prejudice. First of all, as noted above, Judge Holliday, who was presiding by temporary assignment during the transition from Judge Berger to Judge Webster, granted a stay of the revocation of Moredock's driver's license pending resolution of this matter on the merits. To do so, pursuant to applicable law, i.e., *West Virginia Code* §17C-5A-2(s), he not only had to find that Moredock would likely prevail on the merits but if he lost his drivers' license, he would suffer irreparable harm. That is exactly what he did. The harm to Moredock was as follows: Having assumed that after waiting over two years for the Commissioner to act on this issue and believing that its failure to do so evidenced a likelihood that his driver's license was safe, Moredock accepted a promotion from his employer, Commercial Insurance. His new position required him to have frequent contact with his clients making his ability to drive an important part of his job responsibilities. Without his driver's license, Moredock would have been seriously hampered in the ability to carry out his job

responsibilities and his job placed in jeopardy.<sup>6</sup>

It is not only Moredock's rights that are at stake here. It must be kept in mind to protect the public as well as the driver, the whole system is designed to facilitate a speedy resolution of license revocation issues. The officer is required to submit the charges (Statement of Arresting Officer) to the DMV within forty-eight hours of the arrest. The driver must request a hearing within ten days to avoid an initial revocation, and in any case, within thirty days to secure a hearing on the revocation. Originally hearings were required to be held within twenty days until the legislature concluded that time limit was not practical.

Nevertheless, the thrust of West Virginia's implied consent law is to solve license revocation issues as quickly as possible. Also, as pointed out above, underlying the West Virginia implied consent law is the complementary policy of providing the driver with a speedy resolution of the issue of his driving privileges as the ability to drive is extremely important in this modern age. It is especially so in a state in which there is little public transportation. One's livelihood and the ability to support one's family are often dependent on the ability to drive.

The delay between the arrest and the hearing in this matter is compounded by the even longer delay between the hearing and the final order. With rare exceptions, and this case was not one of them, hearings last no more than an hour and often less than that. The final orders are brief in the extreme. Here, the final order, a substantial portion of which, is boiler plate, consists of slightly over 7 pages. The findings of fact occupy three pages. The "Discussion" slightly over

---

<sup>6</sup>To make matters worse for Moredock, just prior to Petitioner's appeal to this tribunal, Moredock was promoted again, which makes his ability to drive an even more essential aspect of his job. In waiting until the last day to file his appeal, Petitioner has further jeopardized Moredock's employment and his future employment career should he lose his driver's license.

a page and the Conclusions of Law and Final Order which consists of canned language is approximately two pages. Even with the legal staff scrutinizing every order that the Commissioner issues, a 17 month delay is unwarranted and excessive. In his response to Petitioner's Petition, Respondent asserted that, "upon information and belief, a major reason for delays in these types of cases is because the Commissioner delays the decision in hopes of receiving documentation of conviction which obviates the need for him to render a decision based on the hearing." The Commissioner appropriately take Moredock to task for making that suggestion without support in the record.

However, the Commissioner then hypocritically asserts, without any support in the record, that the lengthy delay between the hearing request and hearing was caused by the "immense caseload of DMV Hearing Examiners." (Pet. Br., at 7). Throughout this litigation the Commissioner has never produced evidence, documentary or otherwise, to support his unadorned claim. The Commissioner would have the court base its ruling on a canard. Significantly, the Commissioner offers *no* rationale for the 17 month delay between the hearing and the issuance of the Final Order other than to say again, without evidentiary support, such a delay "is not unusual or improper." *Id.*

The Respondent also relies heavily on *In re Donley*, 217 W. Va. 449, 618 S. E. 2d 458 (W. Va. 2005) for the proposition that prejudice must be shown with respect to unreasonable delays. Of course, as discussed below, that is exactly what Moredock has done. It must be pointed out, moreover, that Donley dealt with the failure of the Magistrate Court to timely send an abstract of conviction to Respondent. As *Donley* was convicted, he was not entitled to a hearing on the revocation unless he contended he was not the person convicted, which was

clearly not the case. In addition, the Circuit Court had vacated the effective date of the revocation which would have been effective three years later i.e., on September 9, 2003 and replaced it with an effective date of October 1, 1998, which was a few months after he had pled guilty, thereby giving Donley the benefit of the delay.

The Commissioner attempts to debase Moredock's evidence of prejudice, referring to the affidavit of the Chief Operating Officer of Moredock's company as a "tepid" attempt to show prejudice. What the Commissioner does not disclose to the court is that, almost without exception, Circuit Judges do not permit evidentiary hearings on the issue of prejudice, especially when the delay is as lengthy as what occurred herein. They render decisions based on documentary evidence and the arguments of counsel. In any case, the loss of his job, demotion or other detrimental effect on his job or other employment opportunities are not unsubstantial harms.

Moredock agrees delays substantially shorter than what occurred herein should require a showing of prejudice. Again, *Hutchison* provides authoritative guidance. That court indicated a number of factors should be taken into consideration "such as the length of the delay, the reason for the delay, the harm caused by the delay, and what other alternative to relief were available." *Id.*, at 666. However, "the most important of the factors, said the court, "is the reason for the delay." *Id.* Thus, even if the delay had been shorter, at no stage in this litigation has the Commissioner provided any evidence to justify the long delay herein.

## VI. CONCLUSION

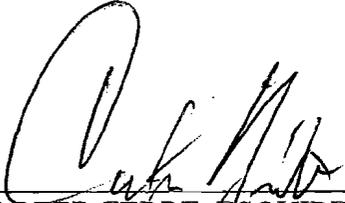
For the foregoing reasons, Respondent respectfully requests this honorable court to sustain the decision of the Circuit Court or, in the alternative, remand the case to the Circuit

Court for an evidentiary hearing.

Respectfully submitted,

JOHN MOREDOCK

By Counsel



---

CARTER ZERBE, ESQUIRE  
W. Va. State Bar No. 4191  
P. O. Box 3667  
Charleston, WV 25336  
(304)345-2728  
Email: [info@carterzerbelaw.com](mailto:info@carterzerbelaw.com)



---

DAVID PENCE, ESQUIRE  
W. Va. State Bar No. 9983  
P. O. Box 3667  
Charleston, WV 25336  
(304)345-2728  
Email: [info@carterzerbelaw.com](mailto:info@carterzerbelaw.com)

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,

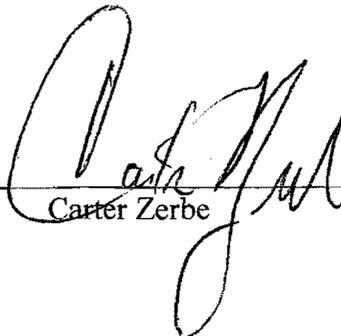
Respondent/Petitioner Below

**CERTIFICATE OF SERVICE**

I, Carter Zerbe, counsel for Respondent, do hereby certify that I have served a true and exact copy of the foregoing RESPONDENT'S BRIEF by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Janet James, Asst. Attorney General  
DMV - Office of the Attorney General  
P. O. Box 17200  
Charleston, WV 25317

on this 27<sup>th</sup> day of June 2011.

  
Carter Zerbe