

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Andrew Reger,
Petitioner Below, Petitioner**

vs) No. **11-1704** (Kanawha County 11-MISC-395)

**West Virginia Department of Transportation,
Division of Motor Vehicles,
Respondent Below, Respondent**

FILED

June 7, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Andrew Reger, by counsel Paul E. Biser, appeals the circuit court’s order refusing his petition for a writ of mandamus requiring the West Virginia Department of Transportation, Division of Motor Vehicles (“DMV”) to reinstate his driving privileges in West Virginia. The DMV, by counsel Elaine L. Skorich, filed its response.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

On August 6, 2010, petitioner was cited for the operation of a motor vehicle while under the influence of alcohol (“DUI”) in the State of Ohio. At his arraignment and without counsel, he pled guilty to the charge. The State of Ohio sent a notice of the conviction to the State of West Virginia after which the DMV revoked petitioner’s driving privileges in West Virginia under West Virginia Code § 17B-1A-1.¹ Thereafter, petitioner filed a motion to set aside the Ohio court judgment and to withdraw his guilty plea. The Ohio court vacated the initial conviction after which petitioner pled guilty to physical control of a vehicle while under the influence, a non-moving violation in Ohio.

Petitioner notified the DMV that his conviction for DUI in Ohio had been vacated and that he had been subsequently convicted of a non-moving violation. Notwithstanding this notification, the DMV refused to reinstate petitioner’s driving privileges in West Virginia.

¹West Virginia Code § 17B-1A-1, the Driver License Compact, in essence, provides that certain convictions of driver’s license violations committed in other states shall be given the same effect in West Virginia.

Petitioner filed a petition for a writ of mandamus in the Circuit Court of Kanawha County seeking to require the DMV to reinstate his driving privileges in West Virginia. Petitioner states that the circuit court refused the petition without a hearing and without providing an opportunity to respond to the DMV's brief filed below.

“A *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus.” Syl. Pt. 1, *Harrison County Com'n v. Harrison County Assessor*, 222 W.Va. 25, 658 S.E.2d 555 (2008). We review a circuit court's underlying factual findings and conclusions of law in a mandamus case under a clearly erroneous standard. *O'Daniels v. City of Charleston*, 200 W.Va. 711, 715, 490 S.E.2d 800, 804 (1997), (citing *Staten v. Dean*, 195 W.Va. 57, 62, 464 S.E.2d 576, 581 (1995)). “A writ of mandamus will not issue unless three elements coexist - (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).” Syl. Pt. 1, *State ex rel. Regional Jail and Correctional Facility Authority v. County Commission of Cabell County*, 222 W.Va. 1, 657 S.E.2d 176 (2007).

Petitioner asserts three assignments of error in the circuit court's denial of his petition for a writ of mandamus. Petitioner first questions whether he was convicted of an offense in Ohio that was required to be reported to West Virginia under the Driver's License Compact. In his second, related argument, petitioner asserts that the conviction in Ohio would not warrant a license suspension in West Virginia even assuming that petitioner had been convicted of an offense in Ohio that should have been reported to West Virginia. In this case, petitioner initially admitted to an Ohio court that he was under the influence of alcohol at the time of his arrest. Petitioner withdrew his plea in Ohio, however, this withdrawal does not negate the fact that he was driving while under the influence at the time of his arrest in Ohio. “[A] person pleading guilty . . . of driving under the influence of alcohol, controlled substances, or drugs, shall be considered ‘convicted,’ and the Commissioner has a mandatory duty to revoke the person's license to operate a motor vehicle in the State of West Virginia as provided by W.Va. Code § 17C-5A-1a(a).” Syl. Pt. 2, in part, *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 246 (2005). Further, circumstantial evidence is sufficient to prove DUI in West Virginia without the need to have the officer actually observe any driving. Syl. Pt. 2, *Cain v. The West Virginia Division of Motor Vehicles*, 225 W.Va. 467, 694 S.E.2d 309 (2010) (*quoting* Syl. Pt. 3, *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997)). Petitioner was found on the side of the road, behind the wheel of a motor vehicle, with a blood alcohol concentration of .08%. Pursuant to West Virginia Code § 17B-3-3, this is sufficient to justify a charge and conviction of DUI in West Virginia, in addition to the suspension of a driver's license. Under the standards set forth above, we find no error in the circuit court's denial of the requested petition for writ of mandamus on the first or second assignments of error.

Petitioner's final assignment of error is the claim that he was denied due process as a result of the DMV's revocation of petitioner's driver's license. West Virginia Code § 17B-3-3 states, “The [DMV] is authorized to suspend or revoke the license of any resident of this State . . . to drive a motor vehicle in this State upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this State, would be a ground for the

suspension or revocation of the license of an operator or chauffeur.” As we have previously found, a person whose driver’s license is revoked on the basis of an out-of-state DUI conviction, without an administrative hearing, is not denied due process. *Miller v. Cline*, 193 W.Va. 210, 214-15, 455 S.E.2d 769, 773-74 (1995). Based on the fact that petitioner was originally convicted of DUI in Ohio, the DMV had the statutory right to revoke petitioner’s driver’s license, and the circuit court did not err in denying the requested writ of mandamus on this basis.

Based on the record before this Court, we find that the DMV was not under a legal duty to refrain from revoking petitioner’s driver’s license and is not under a legal duty to reinstate his driver’s license related to petitioner’s conviction for DUI in Ohio. Therefore, we find no error in the Circuit Court of Kanawha County’s denial of petitioner’s request for a writ of mandamus.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 7, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum