No. 30245 -- State of West Virginia v. Bryan McClead

**FILED**
**July 8, 2002**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**RELEASED**
**July 10, 2002**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, concurring in part and dissenting in part:

I concur to affirming the appellant's conviction for driving on a revoked driver's license. However, I dissent to the reversal of the appellant's third offense DUI conviction.

Specifically, I disagree with the majority's interpretation of W.Va. Code § 17-5-7(a) which states, in part, that "[i]f any person under arrest . . . refuses to submit to any secondary chemical test, the tests shall not be given[.]" I believe that this simply means that the refusal to submit to a secondary chemical test triggers the administrative procedures necessary to suspend the party's driver's license. Moreover, proper evidence of this refusal, without any additional evidence of intoxication, may result in revocation of the party's driver's license. *See* W.Va. Code §§ 17C-5-4(e) and 17C-5-7(a).

Unlike the majority, I do not believe that the implied consent provision preempts the application of traditional search and seizure principles to DUI criminal prosecutions. Nothing in the text of these statutes expressly indicates a Legislative intent to do so. Further, a fair reading of these statutes does not conflict with search and seizure law. Therefore, I

believe that nothing in our implied consent law prevented Trooper Branham from obtaining a warrant if he could convince a neutral magistrate of the existence of probable cause.

In sum, I conclude that it was not error, plain or otherwise, for Trooper Branham to inform the appellant that a warrant could be used to obtain his blood. Accordingly, I dissent to the reversal of the appellant's third offense DUI conviction.