No. 30251 - Michael Butcher v. Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles

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RORY L. PERRY II, CLERK
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OF WEST VIRGINIA

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Davis, Chief Judge, dissenting:

The Commissioner of the West Virginia Division of Motor Vehicles (hereinafter referred to as the "Commissioner") suspended the driver's license of Michael Butcher, after conducting a hearing in which it was determined that Mr. Butcher unjustifiably refused to take a chemical breath test. The circuit court affirmed the suspension. This Court was asked to determine whether Mr. Butcher was prejudiced by deputy S.G. Kastigar's use of the word "may" instead of the word "will," when the officer advised Mr. Butcher of the consequences of refusing to take a chemical breath test. The majority opinion has determined that the technical violation in the use of the word "may" required Mr. Butcher's driver's license to be reinstated. I believe the majority decision represents "a classic example of placing form over substance, a procedure historically criticized and routinely rejected by this Court." *Holstein v. Norandex, Inc*., 194 W. Va. 727, 729 n.2, 461 S.E.2d 473, 475 n.2 (1995). Therefore, I dissent.

Pursuant to W. Va. Code § 17C-5-7(a) (1986) (Repl. Vol. 2000), an officer attempting to perform a chemical breath test must inform the driver "that his refusal to submit to the secondary test finally designated *will* result in the revocation of his license to operate

a motor vehicle in this state for a period of at least one year and up to life." (Emphasis added.) It is undisputed that deputy Kastigar informed Mr. Butcher that if he refused to submit to a chemical breath test, his driver's license "may" be suspended. The Commissioner argued that deputy Kastigar's warning "substantially complied" with the requirements of the statute. Therefore, the suspension of Mr. Butcher's driver's license should not be disturbed. I agree with the Commissioner.

I believe the majority opinion has "[i]gnor[ed] the concept of 'substantial compliance[,]' which we have applied so often in the past, [and that] the majority blindly followed the technical letter of the law and failed to uphold the spirit of the law, thereby allowing an injustice." *Brady v. Hechler*, 176 W. Va. 570, 574, 346 S.E.2d 546, 551 (1986) (Brotherton, J., dissenting). *See also State ex rel. Catron v. Raleigh County Bd. of Educ*., 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Powderidge Unit Owners Assoc. v. Highland Props., Ltd*., 196 W. Va. 692, 474 S.E.2d 872 (1996) (recognizing that substantial compliance with Rule 56(f), rather than strict adherence to its proscriptions, may suffice); *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996) (finding substantial compliance with publication requirements); *Mahmoodian v. United Hosp. Ctr., Inc*., 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board*

of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure).

Moreover, two recent decisions by this Court dictated the analysis that should have been used, as well as the outcome of the instant case. First, in *State v. Valentine*, 208 W. Va. 513, 541 S.E.2d 603 (2000), we refused to disturb a criminal conviction even though there was technical noncompliance by the trial court with all the requirements of Rule 11 of the West Virginia Rules of Criminal Procedure. The defendant in *Valentine* entered a guilty plea to voluntary manslaughter. Subsequent to sentencing, the defendant sought to have the guilty plea set aside because the trial court failed to advise him that he could not withdraw his plea should the court impose a sentence in excess of the term proposed in his plea agreement. We acknowledged in *Valentine* that, under Rule 11(e)(2), it is required that "the court *shall* advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea." (Emphasis added). In spite of the "mandatory" requirement of Rule 11(e)(2), this Court "refuse[d] to exalt form over substance in Rule 11 hearings." *Valentine*, 208 W. Va. at 517, 541 S.E.2d at 607. In *Valentine*, we concluded that no evidence existed to prove that the defendant was under any false belief that he could withdraw his plea were he to be sentenced to more than the term recommended in the plea agreement. Consequently, we found the technical violation of Rule 11(e)(2) to be without

prejudice.[1]

Second, the decision in *In re Burks*, 206 W. Va. 429,525 S.E.2d 310 (1999), was also dispositive of the analysis and outcome of the instant case. In *Burks*, the Commissioner entered a final order revoking the appellee's driver's license after he was arrested for driving under the influence. However, the circuit court reversed the Commissioner's order because the arresting officer did not mail the "Statement of Arresting Officer" to the Commissioner within forty eight hours of the appellee's arrest as required by statute. The Commissioner appealed the reversal of its order. This Court made two critical observations in order to resolve the case in favor of the Commissioner. First, we recognized "that the 48-hour reporting duty in W. Va. Code § 17C-5A-1(b) [1994] is directed to and imposed on the arresting officer, and not on the [Commissioner]." *Burks*, 206 W. Va. at 432, 525 S.E.2d at 313. Second, we noted that other decisions by the Court have held "that technical and nonprejudicial noncompliance with reporting time requirements that are imposed on a law enforcement officer was not a jurisdictional impediment to the [Commissioner] taking action regarding a license suspension." *Id*. (*citing Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998), and *Dolin v. Roberts*, 173 W. Va. 43, 317 S.E.2d 802 (1984)). We

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[1]*See also* Syl. pt. 7, in part, *State v. Redden*, 199 W. Va. 660, 487 S.E.2d 318 (1997) ("In a circuit court proceeding, when a criminal defendant's jury trial waiver is personal, knowing, intelligent, and voluntary as reflected in an on-the-record statement in open court, the failure to obtain a written waiver signed by the defendant does not in itself make the jury trial waiver invalid, despite the technical 'writing' requirement of Rule 23(a) of the West Virginia Rules of Criminal Procedure.").

ultimately held in syllabus point 1 of *Burks* that:

> A law enforcement officer's failure to strictly comply with the DUI arrest reporting time requirements of W. Va. Code § 17C-5A-1(b) [1994] is not a bar or impediment to the commissioner of the Division of Motor Vehicles taking administrative action based on the arrest report, unless there is actual prejudice to the driver as a result of such failure.

In both *Valentine* and *Burks*, we refused to allow noncompliance with technical legal requirements to overturn the rulings. In each case we determined there was no prejudice to the complaining party by the failure of officials to strictly comply with the law. As a result of finding no prejudice, we refused to allow the technical violations to reverse the lower rulings. Here, the majority opinion completely disregarded this Court's prior analysis and its prior decisions.

I agree with Mr. Butcher that deputy Kastigar should have used the word "will" during the reading of the license revocation warning. However, for two specific reasons, I do not believe that omission of the word "will" was prejudicial. First, the record failed to disclose that Mr. Butcher would have agreed to take the chemical breath test regardless of the nature of the warning given. It appears that Mr. Butcher, who had a previous DUI arrest, had no intention of taking the chemical breath test. Deputy Kastigar testified that Mr. Butcher stated that he would not take the test because he was previously advised that he should refuse to take the test. Therefore, it is absolutely clear from the record that even had deputy Kastigar used the word "will," Mr. Butcher would, nevertheless, have refused to take the test.

The second reason I find no prejudice involves the practical impact of the statutory warning. My examination of W. Va. Code § 17C-5-7(a) reveals no legislative intent that the warning required to be given was intended to convey to an arrestee that in *all* cases an absolute and unchallengeable suspension would result. Why? An initial suspension may be challenged. W. Va. Code § 17C-5A-2(a) provides that "[u]pon the written request of a person whose license to operate a motor vehicle in this state has been . . . suspended . . ., the commissioner of motor vehicles shall stay the imposition of the period of . . . suspension and afford the person an opportunity to be heard." During the aforementioned hearing, a person whose license has been suspended *may offer any exculpatory evidence for refusing to take the chemical breath test*.[2]

Because an initial suspension may be challenged, I believe the Legislature chose to use the word "will" in W. Va. Code § 17C-5-7(a), as it relates to the suspension warning.

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[2]W. Va. Code § 17C-5A-2(p) (2000) (Repl. Vol.) obligates the Commissioner to find the following by a preponderance of the evidence before revoking an individual's license to operate a motor vehicle:

> (1) The arresting law-enforcement officer had reasonable grounds to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (2) the person was lawfully placed under arrest for an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (3) the person refused to submit to the secondary chemical test finally designated; and (4) the person had been given a written statement advising the person that the person's license to operate a motor vehicle in this state would be revoked for a period of at least one year and up to life if the person refused to submit to the test finally designated[.]

Importantly, the Legislature in this context chose not to use the word "shall."[3] Yet, in other parts of W. Va. Code § 17C-5-7(a), the legislature used the word "shall" seventeen times. Therefore, I conclude that it was no accident that the legislature used the precise word "will" instead of "shall" in W. Va. Code § 17C-5-7(a). I believe the word "will" was used in W. Va. Code § 17C-5-7(a) because an initial suspension can be challenged.

For the reasons set forth, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion and reserves the right to file a separate dissenting opinion.

[3]"Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) (citations omitted).