

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

No. 33303

FILED
October 30, 2007
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. ALAN D. BAKER,
Plaintiff Below, Appellant

V.

DAVID H. BOLYARD, DIRECTOR, DIVISION OF MOTOR
VEHICLES, STATE OF WEST VIRGINIA,
Defendant Below, Appellee,

Appeal from the Circuit Court of Greenbrier County
The Honorable James J. Rowe, Judge
Civil Action No. 06-C-04(R)

AFFIRMED

Submitted: October 9, 2007
Filed: October 30, 2007

E. Lavoyd Morgan, Jr.
Lewisburg, West Virginia
Attorney for Appellant

Darrell V. McGraw, Jr.
Attorney General
Janet E. James
Assistant Attorney General
Charleston, West Virginia
Attorney for Appellee

JUSTICE BENJAMIN delivered the opinion of the Court.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

JUSTICE MAYNARD concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “In giving effect to the plain language contained in W. Va. Code § 17C-5A-1a(e), a person pleading guilty or found guilty by a court or jury 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).” Syllabus Point 2, *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 733 (2005).

2. Where a person enters a plea of *nolo contendere* to an offense defined in W. Va. Code § 17C-5-2 (2007), the mandatory license revocation or suspension provisions of W. Va. Code § 17C-5A-1a(a) (2004) are triggered because that person has been found guilty by a court, by virtue of a *nolo contendere* plea to criminal charges, and is thus deemed convicted of the offense pursuant to the provisions of W. Va. Code § 17C-5A-1a(e) (2004).

Benjamin, Justice:

In the instant matter, Appellant Alan D. Baker seeks reversal of the August 21, 2006, order entered by the Circuit Court of Greenbrier County which affirmed the Appellee's¹ December 9, 2005, order revoking Appellant's driver's license for a period of six months. The Appellee's December 9, 2005, revocation order was entered upon receipt of a notification from the Greenbrier County Magistrate Court that Appellant had been convicted of driving under the influence, first offense, after entering a plea of *nolo contendere* to the charge. Upon thorough review of the record presented for our review, the arguments of the parties and the pertinent legal authorities, we affirm the lower court's decision.

I.

¹ The style of this matter, as designated by the Appellant, names the Appellee as David H. Bolyard, Director, Division of Motor Vehicles, State of West Virginia. Documents appearing in the record before this Court denote David H. Bolyard as the director of Driver Services for the Division of Motor Vehicles. However, the term "Appellee" as used in this opinion shall refer to the Commissioner of the Division of Motor Vehicles and anyone acting on his behalf at all times relevant, as it is the actions of the Commissioner, acting pursuant to his statutory authority, which are at issue herein. *See* W. Va. Code § 17C-1-27 (1973); W. Va. Code § 17C-5A-1 (2004); W. Va. Code § 17C-5A-1a (2004).

FACTUAL AND PROCEDURAL HISTORY

Appellant was arrested in Greenbrier County, West Virginia on July 31, 2005, and charged with driving under the influence, first offense (hereinafter “DUI”).² The criminal complaint indicates that Appellant was arrested at 5:02 a.m. that morning. At 5:54

² The criminal complaint filed in the Greenbrier County Magistrate Court alleges a violation of W. Va. Code § 17C-5-2(d)(1)(A) (E). W. Va. Code § 17C-5-2(d) (2005) provides:

- (d) Any person who:
 - (1) Drives a vehicle in this state while he or she:
 - (A) Is under the influence of alcohol; or
 - (B) Is under the influence of any controlled substance; or
 - (C) Is under the influence of any other drug;
 - (D) Is under the combined influence of alcohol and any controlled substance or any other drug; or
 - (E) Has an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight;
 - (2) Is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than one day nor more than six months, which jail term is to include actual confinement of not less than twenty-four hours, and shall be fined not less than one hundred nor more than five hundred dollars.

Statutory amendments in 2007 did not impact this provision of W. Va. Code § 17C-5-2, but increased the penalty provisions set forth in W. Va. Code § 17C-5-2(a)(3). Accordingly, this opinion will refer to the 2007 statutory enactment as the operative language remained intact.

a.m., his blood alcohol content was tested³ and measured 0.211. After receiving the Statement of Arresting Officer indicating that Appellant had been arrested for DUI, Appellee issued an order on August 12, 2005, revoking Appellant's license for a period of six months in accordance with the provisions of W. Va. Code § 17C-5A-1(c) (2004)⁴ and notifying Appellant of his right to an administrative hearing to challenge such revocation. Appellant, through counsel, requested an administrative hearing to challenge the revocation. His challenge was based upon an assertion that there was no probable cause to administer the secondary breath test and insufficient probable cause for the initial traffic stop. An administrative hearing was held pursuant to this request on October 17, 2005.

Shortly thereafter, Appellant entered a *nolo contendere* plea to the criminal

³ The record indicates that the testing mechanism utilized was the Intox EC/IR-II, a secondary breath test.

⁴ West Virginia Code § 17C-5A-1(c) (2004) provides, in pertinent part:

If, upon examination of the written statement of the officer and the test results described in subsection (b) of this section [referring to secondary tests of blood, breath or urine], the commissioner shall determine that a person was arrested for an offense described in section two, article five of this chapter . . . and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of once percent or more, by weight, or at the time the person was arrested he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state.

DUI charge in the Greenbrier County Magistrate Court.⁵ The Greenbrier County Magistrate Court forwarded an abstract of judgment, dated October 27, 2005, to Appellee, indicating that Appellant had pled *nolo contendere* to the charges set forth in the criminal complaint. Upon receipt of the abstract of judgment, Appellee issued a December 9, 2005, order revoking Appellant's license for a period of sixty days pursuant to the provisions of W. Va. Code § 17C-5A-1a (2004).⁶ This revocation order noted that Appellant's conviction for DUI

⁵ Pursuant to this plea, Appellant was sentenced to twenty-four hours of community service and fined two hundred and fifty dollars.

⁶ Provisions of W. Va. Code §17C-5A-1a (2004) pertinent to the instant matter include:

- (a) If a person is convicted for an offense defined in section two, article five or this chapter . . . because the person did drive a motor vehicle while under the influence of alcohol, . . . , or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, . . . , and if the person does not act to appeal the conviction within the time periods described in subsection (b) of this section, the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section.

. . .

- (c) If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted for an offense described in section two, article five of this chapter . . . or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight one hundredths of one percent or more, by weight, the commissioner shall make and enter

(continued...)

in the Greenbrier County Magistrate Court constituted sufficient evidence to support any prior order of revocation such that a separate decision would not be forthcoming from any administrative hearing previously held. The December 9, 2005, revocation order also indicated that, upon written request, a hearing would be held upon the sole issue of whether or not Appellant was the person so convicted.

On January 9, 2006, Appellant filed a petition for review of the Appellee's December 9, 2005, revocation order in the Circuit Court of Greenbrier County. In that

⁶(...continued)

an order revoking the person's license to operate a motor vehicle in this state. . . . The order shall contain the reasons for revocation or suspension and the revocation and suspension periods provided for in section two of this article. Further, the order shall give the procedures for requesting a hearing which is to be held in accordance with the provisions of this section. The person shall be advised in the order that because of the receipt of a transcript of the judgment of conviction by the commissioner a presumption exists that the person named in the transcript of the judgment of conviction is the person named in the commissioner's order and such constitutes sufficient evidence to support revocation or suspension and that the sole purpose for the hearing held under this section is for the person requesting the hearing to present evidence that he or she is not the person named in the transcript of the judgment of conviction

...

- (e) For the purposes of this section, a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury.

petition, Appellant argued that Appellee erred by relying upon Appellant's *nolo contendere* plea to the DUI charge to satisfy the conviction requirement of W. Va. Code § 17C-5A-1a. More specifically, he argued that his constitutional rights were violated because Appellee could only revoke his license upon specific findings of fact made after administrative hearing. Thus, according to Appellant, Appellee acted in excess of his authority in revoking the license upon notification of the *nolo contendere* plea to the criminal DUI charges. After a hearing on the Appellant's petition, the circuit court *denied* the petition and remanded the matter to the Division of Motor Vehicles by Order dated February 27, 2006. The February 27, 2006, order provided Appellant with thirty days to demand "further hearing." On April 10, 2006, Appellant filed a motion for contempt before the Circuit Court of Greenbrier County arguing that the Division of Motor Vehicles was in contempt of the Court's February 27, 2006, order because it was refusing to afford Appellant a full evidentiary hearing and was taking the position that Appellant was entitled to a hearing only on the issue of whether he was the person named in the abstract of judgment from the Greenbrier County Magistrate Court. After a hearing on August 21, 2006, the Circuit Court of Greenbrier County entered a second order affirming the decision of the Division of Motor Vehicles, but staying the revocation order for a period of sixty days to allow for appeal of the decision to this Court. Appellant filed a timely petition for appeal to this Court which was granted by order dated January 24, 2007.

II.

STANDARD OF REVIEW

The parties disagree regarding the current posture of this appeal. Appellant maintains this matter constitutes an appeal of an administrative order and is therefore governed by the standards applicable to appellate review of administrative decisions. Appellee characterizes this appeal as a matter of statutory interpretation and the proper application of this Court's prior decision in *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005). Regardless of how this appeal is characterized, the applicable standard of review is *de novo*. See Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) (holding that upon appeal of an administrative order from a circuit court, this Court reviews questions of law *de novo*); Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). Accordingly, our review herein is plenary.

III.

DISCUSSION

Before this Court, Appellant has argued that the circuit court erred by not

reversing Appellee’s decision to suspend his license to operate a motor vehicle, that his due process rights were violated by the arbitrary and capricious actions of Appellee and that a plea of “no contest” (or *nolo contendere*) does not constitute a conviction as defined in W. Va. Code § 17C-5A-1a. According to the Appellant, this Court’s decision in *Stump* did not specifically address the question of whether a plea of *nolo contendere* to a DUI charge constitutes a plea of guilty which would permit the Appellee to revoke his license without the benefit of an administrative hearing. Appellant further argues that, while not changing the applicable statutory language, the Legislature authorized a new legislative rule, which clarified the original legislative intent behind W. Va. Code § 17-5C-1a. Effective May 15, 2006, W. Va. C.S.R. § 91-5-14.1 was amended to include the following language: “[f]or the purposes of this rule, a plea of *nolo contendere* stands as neither an admission of guilt nor a conviction for administrative revocation proceedings.”⁷ Thus, Appellant maintains that Appellee violated his constitutional rights by revoking his license based upon his *nolo contendere* plea to the DUI charge rather than by findings of fact and conclusions of law

⁷ Incorporating the May 2006 amendment, W. Va. C.S.R. § 91-5-14.1 now provides:

The Division shall revoke a licensee’s privilege to operate a motor vehicle in accordance with the provisions of W. Va. Code §§ 17C-5-7 and 17C-5A-1 et seq. if the licensee drives under the influence of alcohol, controlled substances or drugs, refuses to submit to a designated secondary chemical test, or commits any other related offense found within W. Va. Code §§ 17C-5-7 and 17C-5A-1 et seq. For the purposes of this rule, a plea of *nolo contendere* stands as neither an admission of guilt nor a conviction for administrative revocation proceedings.

made after a full administrative hearing.

By contrast, Appellee argues that, pursuant to *Stump*, Appellant's plea of *nolo contendere* to the DUI charge triggered the mandatory revocation provisions of W. Va. Code § 17C-5A-1a. As Appellant's DUI charge and plea occurred during the "window" of time between this Court's decision in *Stump* and the effective date of W. Va. C.S.R. § 91-5-14.1, Appellee maintains he was obligated under the law to automatically revoke Appellant's license upon notification of the *nolo contendere* plea by the Greenbrier County Magistrate Court. We agree with Appellee.

One of the issues this Court addressed in *Stump* was the impact that a "no contest" (or *nolo contendere*) plea has upon the Commissioner of the Division of Motor Vehicle's statutory duty to revoke a person's driver's license due to a DUI conviction. It was undisputed in *Stump*, that the driver had pled no contest to a criminal DUI charge. *Stump*, 217 W. Va. at 742, 619 S.E.2d at 255. As part of the plea agreement to resolve the criminal DUI charge, the arresting officer agreed not to present evidence regarding the DUI arrest at any administrative license revocation proceeding. *Id.* at 736, 619 S.E.2d at 249. In analyzing the issue, this Court noted that W. Va. Code § 17C-5A-1a(a) mandates the Commissioner of the Division of Motor Vehicles to revoke or suspend a person's license to operate a motor vehicle in this State upon notification of a person's conviction for DUI. *Id.*

at 742, 619 S.E.2d at 255. Recognizing that W. Va. Code § 17C-5A-1a(e) provides that for the purposes of the automatic revocation provisions of the statute “a person is convicted when the person enters a plea of guilty or *is found guilty* by a court or jury[,]” this Court noted the driver at issue had been found guilty based upon his plea of no contest to the DUI charge. *Id.* (emphasis in original). Based upon this analysis, we held in syllabus point 2, that:

[i]n giving effect to the plain language contained in W. Va. Code § 17C-5A-1a(e), a person pleading guilty or found guilty by a court or jury 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, *Stump*, 217 W. Va. 733, 619 S.E.2d 246.

As noted, Appellant herein argues that *Stump* is not controlling because it did not *specifically* hold that a plea of *nolo contendere* to a criminal DUI charge triggers the mandatory revocation provisions of W. Va. Code § 17C-5A-1a(a). We disagree. However, in order to prevent any further similar assertions of a lack of clarity regarding our holding in *Stump*, we take this opportunity to clarify *Stump*. To the extent this Court’s prior holding in *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005), may be deemed ambiguous, it is hereby clarified. Where a person enters a plea of *nolo contendere* to an

offense defined in W. Va. Code § 17C-5-2 (2007), the mandatory license revocation or suspension provisions of W. Va. Code § 17C-5A-1a(a) (2004) are triggered because that person has been found guilty by a court, by virtue of a *nolo contendere* plea to criminal charges, and is thus deemed convicted of the offense pursuant to the provisions of W. Va. Code § 17C-5A-1a(e) (2004).⁸

Accordingly, Appellant's plea of *nolo contendere* to criminal DUI charges triggered a change in which statutory provisions governed Appellee's actions relative to the revocation or suspension of Appellant's license to operate a motor vehicle in this State. Prior to entry of the *nolo contendere* plea, Appellee's actions relative to revocation or suspension of Appellant's license were governed by W. Va. Code § 17C-5A-1, which provides for an administrative hearing and determination. However, once Appellant pled *nolo contendere* to the criminal DUI charges, the mandatory revocation provisions of W. Va. Code § 17C-5A-1a were triggered, thus changing the applicable statute under which the Appellee was authorized and required to proceed. Thus, Appellant's arguments regarding a violation of his due process rights by the Appellee's actions in revoking his license to operate a motor vehicle in this state are without merit. By entering his *nolo contendere* plea, Appellant was

⁸ A finding that the entry of a *nolo contendere* plea is a sufficient finding of guilt to satisfy the statutory conviction requirement is consistent with the well-established meaning of the term "conviction." As defined in *Black's Law Dictionary*, the term "conviction" means "1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime." *Black's Law Dictionary* 358 (8th Ed. 2004).

convicted of criminal DUI charges, thus, he was no longer statutorily entitled to an administrative hearing to challenge the revocation of his license.

As there can be no question that Appellant's DUI arrest, conviction and administrative license revocation all occurred after this Court's decision in *Stump* and prior to any attempt to alter the applicable administrative rules governing license revocations due to DUI convictions, the decision of the Circuit Court of Greenbrier County must be affirmed. By order dated February 27, 2006, the Circuit Court of Greenbrier County properly denied Appellant's challenge to the Appellee's December 9, 2005, revocation order because Appellant's *nolo contendere* plea triggered Appellee's mandatory duty to revoke or suspend Appellant's license pursuant to W. Va. Code § 17C-5C-1a. Contrary to the position taken by Appellant in his April 10, 2006, motion for contempt filed before the circuit court, the circuit court's February 27, 2006, order did not require Appellee to conduct a full evidentiary hearing. Appellee's revocation order, which was upheld by the circuit court, was entered pursuant to W. Va. Code § 17C-5C-1a, and thus any subsequent hearing challenging the revocation order was limited to the identity of the person named in the abstract of judgment. *See* W. Va. Code § 17C-5A-1a(c). Accordingly, the circuit court's August 21, 2006, order affirming the Appellee's decision for the second time was proper.

IV.

CONCLUSION

Wherefore, for the reasons set forth herein, the decision of the Circuit Court of Greenbrier County affirming the Appellee's administrative order revoking Appellant's license to operate a motor vehicle in this State due to Appellant's conviction for DUI is likewise affirmed.

Affirmed.