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Administrative Law

James W. McNeely
West Virginia University College of Law

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ADMINISTRATIVE LAW

I. USE OF MANDAMUS AGAINST STATE AGENCIES

Van Meter v. West Virginia Department of Motor Vehicles, 313 S.E.2d 405 (W.Va. 1984).

During the survey period, the West Virginia Supreme Court of Appeals considered several cases dealing with the use of mandamus actions to force state agencies to perform statutory duties. The expanded role of mandamus was recognized in Walls v. Miller where the court stated a willingness to enlarge the scope of mandamus when an urgent question of public policy was to be decided and no reason existed for delaying its adjudication. The court has consistently stated that a writ of mandamus will issue when three elements coexist: 1) petitioner has shown a clear legal right to the relief sought; 2) there exists a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; 3) there is an absence of another adequate remedy. Even if another specific and adequate remedy does exist however, a mandamus will still be ordered if such other remedy is not equally as beneficial, convenient and effective.

Within this established framework, the supreme court once again considered the propriety of the mandamus remedy in Van Meter v. West Virginia Department of Motor Vehicles. Van Meter had changed automobile liability insurance companies but failed to notify the Department of Motor Vehicles of continuing coverage as required by the Motor Vehicle Responsibility Law. As a result, Van Meter's registration plate was seized and a ten dollar reinstatement fee and fifteen dollars fine were imposed under the penalty provisions of West Virginia Code section 17A-9-7. Van Meter filed an original mandamus action with the court to compel the Department to refund the twenty-five dollars in fees and fines. He argued the purpose of the relevant statute was to remove uninsured motorists from the highways and not to place obstacles in the way of individuals who seek to change insurance carriers. Although the court agreed with the petitioner's characterization of the

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1 Walls v. Miller, 251 S.E.2d 491 (W. Va. 1978).
2 Id. at 495.
5 Van Meter v. West Virginia Dep't of Motor Vehicles, 313 S.E.2d 405 (W. Va. 1984).
8 Van Meter, 313 S.E.2d at 406.
SURVEY OF DEVELOPMENTS

1985

SURVEY OF DEVELOPMENTS

legislative purpose, it found that the statutory requirement that individuals furnish the Department with evidence of their continuing coverage was not an unduly burdensome means of achieving this goal. Since the petitioner failed to establish either a clear legal right to the relief sought or a legal duty on the respondent's part, the court refused to issue the writ of mandamus. The court noted that if the petitioner found the system unsatisfactory he should address his complaints to the legislature.

In three other cases, however, the court awarded writs of mandamus which required the Directors of the Department of Health and the Workers' Compensation Commissioner to perform statutory and regulatory duties that were found to be nondiscretionary. The case of Reed v. Hansbarger grew out of the food poisoning of more than one hundred inmates at the Huttonsville Correctional Center in November 1983. The inmates petitioned the court to compel the public health officials charged with the enforcement of state health and sanitation laws to 1) enforce licensing requirements, 2) conduct regular inspections, and 3) close noncomplying food service facilities at Huttonsville. The respondents contended that they had made a persistent effort in the last two years to eliminate deficiencies in the food service operations at Huttonsville and that conditions were improving. They blamed the particular incident during Thanksgiving on the inmates' smuggling turkey back to their dormitories and eating it later. As a further excuse respondents offered that food poisoning often occurs in public restaurants in spite of the fact that they are inspected regularly and issued permits. The respondent officials admitted that the prison facility was a "food service establishment" subject to rules promulgated by the West Virginia Board of Health and that the Huttonsville facility had operated without proper permit since 1982. However, they sought to justify their noncompliance with these regulations by emphasizing that the inmates could hardly "dine elsewhere" and the cost of providing foods should the prison facilities be closed would be prohibitive.

The court dismissed these arguments and pointed to the many violations that a recent inspection of the facility had revealed. Such violations included the presence of cockroaches in the kitchen, peeling paint in the food coolers, and poor ventilation. The court did not share the respondents' feeling that progress had

9 Id. at 405-06.
10 Id. at 406-07.
12 Id. at 617.
13 Id. at 618.
14 Id.
15 Section 3.12 of the West Virginia Board of Health Food Sanitation Rules (1983) provides that the term "food service establishment" includes private, public or nonprofit organization or institution routinely serving food. Id. at 619.
16 Reed, 314 S.E.2d at 619.
17 Id. at 618.
been made at Huttonsville and noted that the food poisoning incident was but one in a long series of repeated health and sanitation violations at Huttonsville. Finding that the Director of the Department of Health had a statutory duty to enforce the rules and regulations governing sanitary conditions at food service establishments, the court granted the writ. It compelled the respondents to 1) enforce the appropriate rules of the West Virginia Board of Health by prohibiting officials from operating the Huttonsville facility until a valid permit was obtained, 2) enforce the rules governing inspection of food service facilities at Huttonsville every six months, 3) enforce those rules imposing mandatory penalty provisions, and 4) enforce all sections of the Board of Health rules which are applicable to food service establishments.

In United Mineworkers of America v. Lewis (UMWA) and Mid-Eastern Geotech Inc. v. Lewis, the court considered requests for mandamus to require the Workers' Compensation Commission to perform certain duties. In UMWA, the union presented five separate areas where they alleged that the Commissioner's procedures were contrary to statutory mandates. First, the court awarded the writ to require the Commissioner to issue an annual report pursuant to West Virginia Code section 23-1-17. The second area of concern was the cutoff of temporary total benefits which occurred when a claimant reached the maximum degree of improvement but had not yet been authorized by a doctor to return to work. The Commissioner maintained that when such conflicting information was received by her from a physician, her staff made an independent evaluation of the case to determine if benefits should continue. The court held that when a physician indicated that a claimant had reached the maximum degree of improvement but was still unable to work, temporary total disability benefits should continue until either the claimant is released to return to work or it conclusively appears that the inability to return to work is the result of permanent disability or medical problems unrelated to the compensable injury.

The court refused, however, to interpret West Virginia Code section 23-4-7a to require that the Commissioner make permanent partial disability awards within thirty days of the termination of temporary total disability benefits. The court

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18 Id. at 617.
19 Id. at 620 (citing W. VA. CODE §§ 16-1-10(a) and 16-1-10(14) (Supp. 1984)).
20 Id. at 620.
23 UMWA, 309 S.E.2d at 60.
24 W. VA. CODE § 23-1-17 (1981) requires that the Commissioner of the Workers' Compensation Fund file, on or about September 15th, an annual report detailing activities of the department through June 30th.
25 UMWA, 309 S.E.2d at 61.
26 Id. at 62.
27 W. VA. CODE § 23-4-7a (1981) provides for the establishment of a "program for the monitoring of injury claims where the disability continues longer than might ordinarily be expected."
admitted that the intention of the statute was to reduce the hiatus between the cessation of temporary benefits and the award of permanent benefits. But it concluded that the medical and legal inquiries associated with the award of permanent partial disability benefits were too complex to require that they always be completed within thirty days.  

The next issue raised by petitioners in UMWA was the allegation that those employers who had elected to self-insure rather than subscribe to the workers’ compensation funds were abusing that system. Petitioners claimed that some employers refused to pay medical bills, delayed the filing of accident reports, and refused to comply with pay orders. The court found that while the claimants had the same legal rights to payments as they would if their employer was a subscriber to the fund, the claimant had no available means to vindicate that right. The court ordered the Commissioner to establish a procedure by which claimants can bring actions against self-insurers who fail to make the required payments. Upon such failure, a self-insurer would either be fined or forced to forfeit their status as a self-insurer.

The last issue addressed in UMWA was whether the Commissioner should be forced to order employees to pay claimant’s expenses for medical examinations or reports and witness costs incurred as a result of unsuccessful employer protests. The petitioners claimed that West Virginia Code section 23-5-1 mandated such a finding. The court disagreed with petitioners’ contention that a protest by an employer accompanied by the submission of the employer’s medical evidence necessarily forced the claimant to secure new medical testimony. Therefore, it found that the statute did not require reimbursement to claimants for all expenses incurred in introducing medical testimony at protest hearings. However, the court held that when a claimant is required to produce his doctors at a protest hearing for cross examination by the employer, and the claimant ultimately prevails, the cost of producing those doctors should be borne by the employer. The court found these expenses were within the meaning of “other expenses” found in West Virginia Code section 23-5-1.

In Geotech, an employer brought a mandamus proceeding to force the Workers’ Compensation Commission to reinstate it as a subscriber in good standing to the Workers’ Compensation Fund. The Commissioner had determined that

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38 UMWA, 309 S.E.2d at 63.
39 Id. at 64-65.
30 W. VA. CODE § 23-5-1 (1981) states in pertinent part:
After protest by the employer only to any finding or determination of the Commissioner made on or after July one, one thousand nine hundred seventy-one, and the employer does not prevail in its protest, and, in the event the claimant is required to attend a hearing by subpoena or agreement of counsel or at the express directions of the commissioner, then such claimant in addition to reasonable traveling and other expenses shall be reimbursed for loss of wages incurred by him in attending such hearing.
31 UMWA, 309 S.E.2d at 65.
32 Geotech, 318 S.E.2d 428.
Geotech was in default because of failure to submit various payments and quarterly reports. She required that Geotech pay 1) a deficiency in its account balance, 2) all interest due on untimely premium payments, and 3) an amount to reimburse the fund for benefits paid relating to Geotech's account. Geotech contended that it was never given notice of the default or any interest due and, therefore, it should not lose the benefits and protections of the Workers’ Compensation Fund.

West Virginia Code section 23-2-56 provides that an employer who is in default for failure to pay premiums to the fund be given an opportunity to settle that default for an amount which includes all delinquent premiums plus interest. Geotech was never given notice of the settlement provisions of section 23-2-5b, and it was not until after the deadline for settlement had passed that the Commissioner informed Geotech of its default. The court found that the petitioner was entitled to notice of its default and held that Geotech was improperly denied the opportunity to settle. The Commissioner was directed to permit the petitioner to apply for a settlement under the provisions of the statute.

The failure of state agencies to perform their statutory duties were the bases of requests for writs of mandamus by the petitioner in United Mineworkers of America v. Scott and Citizens Concerned About Valley Mental Health Center v. Hansbarger. In Scott, the union challenged the operation of the Board of Coal Mine Health and Safety and raised questions about the Board's statutory structure and functions. Petitioners' primary concerns were 1) the promulgation of regulations in response to many fatalities and injuries, 2) the promulgation of regulations governing the conformance of equipment to the height of coal seams, and 3) the promulgation of procedural rules.

At the outset, the court reviewed the development of the Board of Coal Mine Health and Safety and noted that the Board's first priority was to protect the health and safety of the coal miner. The court also stated that, under Chapter 22 of the code, which created this Board, the petitioners were representatives of the class that the statute was designed to protect. Therefore, the petitioners had a clear right to compel performance of nondiscretionary duties mandated by the statute. The first area of concern which the court addressed was the promulgation of regulations in response to coal mine fatalities and injuries. The statute requires that, within

33 Id. at 429-30.
34 Id. at 430-31.
36 Geotech, 318 S.E.2d at 431.
37 Id. at 432.
38 Id. at 433.
39 Id.
42 Scott, 315 S.E.2d at 619.
43 Id. at 621.
120 days after the review of these fatalities, the Board should adopt rules to prevent their recurrence unless a majority of the quorum present determines that no rules could assist in preventing these fatalities. The respondents admitted that since 1982, when the Board was restructured, it reviewed seventeen fatalities and arrived at a "general consensus" that regulations would not have any beneficial effect. However, no formal vote was ever taken by the Board, although the statute directs that this be done. The court admonished the Board for operating through consensus rather than a formal voting system and for not publishing the reasons for its determinations, which the statute also requires. In awarding the writ, the court directed the Board, the Board's Chairman and its Administrator to promulgate, by the first day of July, rules and regulations which would prevent the recurrence of specific fatalities unless a majority of the quorum present determines that no possible rule or regulation would prevent fatalities. If the Board reaches this conclusion, it should publish findings of fact and conclusions of law which set forth its determination.

The second issue addressed in Scott was the need for regulation to govern the conformance of mining equipment to the height of the coal seam being mined. Petitioners argued that eleven mine fatalities since 1977 resulted from miners being caught between mining equipment and the roof and ribs of a mine. Respondents admitted that a hazardous condition results when equipment does not conform to seam height; yet no regulations have been promulgated as required by statute. In its writ, the court directed the Board to outline the necessary rules and regulations to effectuate the legislative mandate of conforming underground mining equipment to the height of coal seams being mined.

The last concern which the court considered was the petitioners' allegation that the Board's proposed procedural rules would frustrate its duty to enunciate effective health and safety regulations. The Board had adopted an "order of business" agenda which divided its meetings into certain categories. The court noted that the intent of West Virginia Code section 22-2A-4a was that the process for initiation of regulations by the Board be as informal and expeditious as possible. Finding that the proposed procedural rules might simply cause further delay, the court directed the Board to re-evaluate these rules to determine if they obstruct or delay the goal of devising health and safety regulations to protect coal miners.

Citizens Concerned About Valley Mental Health Center v. Hansbarger was
a mandamus action brought by various citizens served by the Valley Mental Health Center in Morgantown against officers of the West Virginia Department of Health and the Valley Mental Health Center. The petitioners requested the court to compel the Department of Health to promulgate rules and regulations that would force the Valley Mental Health Center to provide certain basic mental health services to the community. In addition, the petitioners claimed that the Center was misusing state funds made available to it through the Department of Health and that the Department had failed to effectively supervise those funds. Respondents answered that any additional state regulations would diminish community involvement in the Center’s decision making process. On the issue of accountability, it contended that management of the Center and its use of funds rested within the discretion of the Center’s Board of Directors.

The court quoted the statutory duty of the West Virginia Department of Health under West Virginia Code section 27-2A-1 as it applied to the Valley Mental Health Center. In addition to the provisions of the statute, the court set out the pertinent sections of the West Virginia Board of Health regulations that govern the services to be provided by mental health centers to the communities they serve. There also existed a contract between the Department of Health and Valley Mental Health Center which described the nature of the services to be provided by the Center. The court found that the statute, regulations, and contract evidenced an intent upon the part of the legislature that the boards of directors of mental health centers have some discretion with respect to the delivery of mental health services. However, this discretion is limited by certain obligatory services that were required by the applicable statute, regulations, and the contract.

Finding that the issues raised by the petitioners required further investigation and development, the court directed that the West Virginia Department of Health conduct hearings and inquiries about the administration of Valley Mental Health Center. The petitioners would be permitted to assert before the Department of Health that the needs of the public served by Valley Mental Health Center could not be met under existing standards established by the state, or that the guidelines, if adequate, were not being enforced. With respect to the petitioners’ contention that Valley Mental Health Center misused state funds by establishing inflated salaries and employee benefits, the court directed that the Department of Health investigate the charges, because the record presented was too incomplete to resolve the issue.

II. Administrative Suspension of Drivers’ Licenses


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54 Id. at 19.
55 Id.
56 See sections 5.1.1 and 5.1.2 of the rules and regulations of the West Virginia Board of Health which set forth the essential elements of care in support services.
58 Id. at 25-26.
59 Id.
The West Virginia Supreme Court of Appeals reviewed the administrative suspension of drivers' licenses in five cases where the individuals had been arrested for driving under the influence of alcohol. In all five cases, the court upheld the suspensions by the Department of Motor Vehicles.

In the first two cases surveyed, Cowie v. Roberts and State ex rel. Mason v. Roberts, the court considered the responsibility of defendants to pursue all available administrative remedies after arrest. The West Virginia Code provides the right to request an administrative hearing when a license has been revoked or suspended. If the hearing officer upholds the action of the Department, the defendant then has the right to request judicial review of the administrative process. In both these cases, the primary question before the court was whether to allow judicial reversal of administrative license suspension when the defendant had not exhausted the available administrative remedy provided by law.

In Cowie, the appellant did not request an administrative hearing after receiving notice that his license was to be suspended for a period of ten years because of an arrest and prior conviction for drunk driving. The appellant filed a petition for a writ of prohibition in circuit court attempting to prohibit enforcement of the suspension order. Cowie's request for the writ was denied, and the denial was appealed to the supreme court. Stating that requiring the exhaustion of administrative remedies is a well-established rule in this jurisdiction, the court rejected the appellant's attempt to substitute a petition for a writ of prohibition for the exhaustion of administrative appeals available to him. The court noted that, as a general rule, "prohibition cannot be sustained for a writ of error or appeal unless a writ of error or appeal would be an inadequate remedy" and that the appellant had not contended that the available administrative appeal procedures were "inadequate" in any way.

In deciding the mandamus issue, Justice McGraw stated that "the existence of an administrative appeal is as important in determining the appropriateness of extraordinary remedies, such as prohibition and mandamus, as is the existence of..."
an alternate avenue of judicial relief." Thus, mandamus was not available since the petitioner had failed to pursue administrative remedies available to him. Although the court held that Covie had no right to a writ of prohibition, it did find that administrative license suspension was subject to prohibition. Commissioner Roberts had argued that license suspension was a purely ministerial act, and therefore, not subject to prohibition. The court found that the legislative mandate of hearings prior to suspension of licenses made the process one that was quasi-judicial in nature and therefore subject to prohibition.

In *State ex rel. Mason v. Roberts*, the court upheld a license suspension, despite the fact that the appellant had not been convicted of the charge of driving under the influence of alcohol. Mason's license was suspended by the Department upon the receipt of the arresting officer's affidavit pursuant to West Virginia Code section 17C-5A-1(b). A breath analysis had not been administered but the blood test indicated an alcohol content below the minimum level to prove intoxication. When the appellant's license was suspended, he never received any actual notice of the suspension because he failed to inform the Department of a change in address.

Despite a variety of alleged verbal contacts by the appellant with the Department of Public Safety and the Department of Motor Vehicles, and despite a letter to the Department from the arresting officer attempting to withdraw the submitted affidavit, the Department insisted upon the suspension because the appellant had not requested an administrative hearing in writing. After nearly a year of ineffective communication, the appellant filed a petition for a writ of mandamus to compel reinstatement of his license.

The court found that the appellant had a statutory duty under section 17B-2-13 to inform the Department of Motor Vehicles of his change in address. Additionally, the court noted that effective actual notice had been received by the appellant. In considering the alleged attempts of the appellant to communicate by telephone with the Department, the court found nothing in the record that substantiated appellant's claim. Granting that no one had informed Mason that he needed to submit anything in writing, the court nevertheless determined that the appellant was on notice from "the numerous contacts appellant supposedly had with various law enforcement and administrative officials [that] something was amiss with regard to his driver's license." The court suggested that the appellant should have made further inquiry or contacted an attorney. Finding that the appellant had failed

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67 *Id.*
68 *Id.* at 39.
69 *Id.* at 38.
71 *Id.* at 451.
72 *Id.* at 452.
73 *Id.* at 453.
74 *Id.*
75 *Id.*
to prove the existence of any of the three requisite elements for mandamus, the court affirmed the judgment of the circuit court.\textsuperscript{76}

In a third case concerning administrative suspensions, \textit{Albrecht v. West Virginia Department of Motor Vehicles},\textsuperscript{77} the court considered the statutory and constitutional basis for requiring the administration of a chemical sobriety test to support an arrest for driving under the influence of alcohol and reviewed the standard of proof required in administrative license suspensions. Subsequent to being involved in an automobile accident, Albrecht had been charged with driving under the influence of alcohol. The evidence for the charge and the resultant suspension was his "staggering and incoherent behavior" at the scene of the accident, the smell of alcohol in the vehicle, and his inability to stand without assistance.\textsuperscript{78} Additionally, Albrecht had admitted to the arresting officer that he consumed two or three twelve-ounce bottles of beer before the accident.\textsuperscript{79} The record reflected, however, that Albrecht received a cerebral concussion in the accident and his admission to the officer was made while he was in the hospital recovering from the immediate effects of that concussion.\textsuperscript{80} Finally, despite Albrecht's stay in the hospital for three or four days after the accident, the arresting officer did not order any test of the appellant's blood, breath, or urine.\textsuperscript{81} The suspension of the appellant's license was ordered by a hearing examiner for the Department of Motor Vehicles. On a petition for review, the decision was upheld by the Circuit Court of Kanawha County. Albrecht then appealed to the supreme court.\textsuperscript{82}

The court first addressed the issue of whether the relevant statute required the administration of chemical sobriety tests as a precondition for administrative suspension of a driver's license. In reading the relevant West Virginia Code section,\textsuperscript{83} the court found that "driving under the influence of alcohol" and "driving with an alcoholic concentration of .10%" were separate grounds for suspension of a driver's license.\textsuperscript{84} The court also found that the use of the disjunctive "or" in that section, as well as in West Virginia Code section 17C-5A-1(a)\textsuperscript{85} "ordinarily con-

\textsuperscript{76} \textit{Id.} at 453-54. (citing State \textit{ex rel. Kucera v. City of Wheeling}, 153 W. Va. 538, 170 S.E.2d 367 (1969)).
\textsuperscript{77} Albrecht v. West Virginia Dep't of Motor Vehicles, 314 S.E.2d 859 (W. Va. 1984).
\textsuperscript{78} \textit{Id.} at 861.
\textsuperscript{79} \textit{Id.}.
\textsuperscript{80} \textit{Id.}.
\textsuperscript{81} \textit{Id.}.
\textsuperscript{82} \textit{Id.} at 861-62.
\textsuperscript{83} W. VA. CODE § 17C-5A-2(c) (1981) requires the Commissioner to make certain findings when a hearing is requested.
\textsuperscript{84} \textit{Albrecht}, 314 S.E.2d at 862.
\textsuperscript{85} W. VA. CODE § 17C-5A-1(a) (1981) states in pertinent part:
[\textit{F}or the determination of whether his license to operate a motor vehicle in this state should be revoked or suspended because he did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcoholic concentration in his blood of ten hundredths of one percent (.10), or more, by weight.]
W. VA. CODE § 17C-5A-1(a) was recently amended and provides as follows:
notes an alternative between the two clauses it connects." Therefore, the court concluded that the relevant statutes contained "alternative grounds for revocation of a driver's license." The court also found that the language of West Virginia Code section 17C-5-4 gave the state the right to require a chemical sobriety test in connection with, or incidental to, a lawful arrest, but rejected a reading which would have made an arrest for driving under the influence of alcohol unlawful unless such a test is performed.

In affirming the suspension of appellant's license, the court concluded that "there are no provisions in either W.Va. Code, 17C-5-1 (1981), et seq., or W.Va. Code, 17C-5A-1 (1981), et seq., that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for the purpose of making an administrative revocation of his driver's license." The court also rejected the argument that its holding in Jordan v. Roberts, that due process procedures were required for suspension of a driver's license, would mandate the use of a chemical sobriety test in all arrests for driving under the influence of alcohol. The court held that neither federal nor state constitutional due process provisions required such a test. On the issue of the required standard of proof to support administrative license suspension, the court cited Jordan and West Virginia Code section 17C-5A-2(j)(4) in affirming that only a preponderance of the evidence is required to justify administrative suspension. The court concluded that "even if one dismisses Mr. Albrecht's seemingly drunken behavior following the accident as the result of a cerebral concussion," the evidence presented was sufficient to support the administrative action of the Commissioner of Motor Vehicles.

In two cases during the survey period, the West Virginia Supreme Court of Appeals considered instances of delayed administrative procedures and the failures of arresting officers to submit timely and complete affidavits to the Department of Motor Vehicles. In both cases, the court upheld administrative suspension of drivers' licenses, despite delays in proceedings and irregularities in affidavits submitted by the arresting officers.

[F]or the determination of whether his license to operate a motor vehicle in this state should be revoked because he did drive a motor vehicle while under the influence of alcohol, controlled substance or drugs, or combined influences of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcoholic concentration in his blood of ten hundredths of one percent or more, by weight, or did refuse to submit to any designated secondary chemical test.

**Albrecht, 314 S.E.2d at 862.**

**Id.**


**Albrecht, 314 S.E.2d at 863.**

**Id. at 864.**

**Jordan v. Roberts, 246 S.E.2d 259 (W. Va. 1978).**

**Albrecht, 314 S.E.2d at 864.**


**Albrecht, 314 S.E.2d at 864.**
In *Dolin v. Roberts*, the appellant, Dolin, was arrested for driving under the influence of alcohol on March 27, 1982. The chemical sobriety tests administered to him on that date indicated a blood alcohol content well above the minimum required to establish intoxication. However, those test results were not included in the affidavit mailed by the arresting officer on March 27 and received by the Department of Motor Vehicles on March 30, 1982. The affidavit was returned to the arresting officer for inclusion of the legally required test results, but that officer did not resubmit the affidavit with the test results attached until August 3, 1982.

The Commissioner of Motor Vehicles issued a notice of suspension to Dolin, which he received on August 13, 1982. He then requested an administrative hearing, which was scheduled for August 31, 1982. Prior to the date of that hearing, Dolin filed a petition for a writ of prohibition in the Circuit Court of Boone County seeking to prohibit the scheduled hearing. The circuit court entered an order granting the writ of prohibition since the twenty week delay between arrest and suspension was contrary to the “twenty-four hour” provision in then West Virginia Code. It further found that the delay was violative of Dolin’s procedural due process rights. That order was appealed to the supreme court by the Commissioner of the Department of Motor Vehicles.

In reversing the order of the circuit court, the supreme court found that under the provisions of West Virginia Code section 17C-5A-1(c), there was “no mandatory time limit within which the Commissioner of the Department of Motor Vehicles must enter a license suspension order pursuant to an affidavit from an arresting officer in a drunken driving case.” The court stressed that “there was absolutely nothing in the statute which suggested that license suspensions pursuant to drunk driving arrest affidavits must take place within twenty-four hours of those arrests.” Addressing the circuit court’s finding that the twenty week delay between arrest and suspension was grossly excessive and violative of the appellee’s due process rights, the supreme court found that the submission of the arresting officer’s affidavit

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96 *Id.* at 803-04.
97 *Id.* at 804. At the time of Dolin’s arrest, W. VA. CODE § 17C-5A-1(b) (Supp. 1983) provided: Any law-enforcement officer arresting a person for an offense described in section two [17C-5-2], article five of this chapter shall report to the Commissioner of the Department of Motor Vehicles by sworn, written statement within twenty-four hours the name and address of the person so arrested. Such report shall include the specific offense with which the person is charged, and if applicable, a copy of the results of any secondary tests of blood, breath or urine. The law enforcement officer shall certify that such tests were administered in accordance with the provisions of article five [§ 17C-5-1 et seq.] of this chapter, and that he believes the results to be correct.

W. VA. CODE § 17C-5A-1(b) was amended in 1983 to lengthen the time within which arresting officers must report drunk driving arrests to the Department of Motor Vehicles from twenty-four hours to forty-eight hours.

98 W. VA. CODE § 17C-5A-1(c) (Supp. 1983).
99 *Dolin*, 317 S.E.2d at 804.
100 *Id.* at 805.
was prompt and the minor delay was merely the result of the officer's failure to attach the breathalyzer test results. The court stated that a trial court must determine "[t]he effects of less gross delays upon a defendant's due process rights . . . by weighing the reason for delay against the impact of the delay upon the defendant's ability to defend himself."

The court also found that, in the case of delay, "the burden rests initially upon the defendant to demonstrate how such delay has prejudiced his case if such delay is not prima facie excessive." Finding no allegation of prejudice in the petition for a writ of prohibition, no mention of prejudice in the circuit court's order granting the writ, and no assertions of prejudice as a result of the delay on appeal, the court held that there were no procedural due process violations resulting from that delay. Accordingly, the court reversed the order of the Boone County Circuit Court which prohibited an administrative hearing on Dolin's driver's license suspension.

The West Virginia Supreme Court of Appeals addressed the extent of judicial review of administrative suspensions, as well as the impact of delayed or flawed affidavits submitted by arresting officer in Johnson v. Department of Motor Vehicles. Johnson was arrested for driving under the influence of alcohol and was informed by the Department of Motor Vehicles that his license was suspended. That suspension was affirmed in an administrative hearing, but reversed by the Circuit Court of Kanawha County. The Commissioner of the Department of Motor Vehicles appealed to the supreme court.

The court first analyzed the statutory authority of a court to review an administrative order. It noted that the party seeking review must show "prejudice to his substantial rights as a result of one or more of the statutorily enumerated grounds." The court concluded that "absent such a showing, the reviewing court has no authority to reverse an order or decision of an administrative agency in a contested case." On the issue of delay of the administrative hearings as a result of postponements by the Department of Motor Vehicles, the court found that no statutory interpretation of the language of West Virginia Code section 17C-5A-2(b)

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101 Id. (quoting State ex rel. Leonard v. Hey, 269 S.E.2d 394 (W. Va. 1980)) (syllabus point two).
102 Id.
103 Id.
104 Id. (quoting State v. Richey, 298 S.E.2d 879, 883 (W. Va. 1982)) (syllabus point one).
105 Id.
107 Id. at 618-19.
108 Id. at 619-20.
109 Id. (citing Shepardstown Volunteer Fire Dep't v. West Virginia Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983)).
110 W. VA. CODE § 17C-5A-2(b) (1981) provides that a license suspension hearing "shall be held
was necessary to decide the issue because the appellee "neither objected to the continuances ordered nor attempted to hasten the proceedings through mandamus or otherwise." The court also found that the required showing of prejudice to the substantial rights of the petitioner had not been made. The court particularly noted that, since the appellee had retained his driver's license during the continuances, the delay operated to his advantage.

The appellee's second assignment of error was that the arresting officer's affidavit was fatally flawed. He alleged that the jurat (the ending clause of an affidavit) indicated that the affidavit had been sworn to some four hours later than the time certified by the arresting officer as the time of mailing of the same affidavit. The court noted that the only explanation offered for the discrepancy was an "innocent mistake on the part of the notary in indicating the times." The affidavit also incorrectly listed the arresting officer as the person who conducted the breath analysis sobriety test.

The supreme court found that the arresting officer's affidavit, despite the admitted inconsistencies and errors in the document and its attachments, substantially met all the requirements of the statute. It found no allegation or proof of both faith or fraud in the inconsistency between the jurat and the certificate of mailing. The court further found that any error on the report of tests results "cannot be said to affect the integrity of the affidavit." The court therefore found no basis for reversal of the Commissioner's order on the ground that it was made upon unlawful procedure, and found no error in the affidavit or its attached exhibits that would justify any such reversal.

On a final assignment of error the high court found that the appellee's challenge of the introduction of the breathalyzer results on judicial review, after he made no objection to its admission at the administrative hearing "smacks of surprise and must be deemed to constitute waiver of the error on appeal to the circuit court." Although recognizing that there is some relaxation of procedural rules in administrative hearings, the court held that such relaxation was not warranted here. The court therefore found no ground for reversal of the administrative action as a result of admission of the breathalyzer evidence at the hearing.

within twenty days after the date upon which the commissioner received the timely written request. Therefore, unless there is a postponement or continuance, the commissioner may postpone or continue any hearing on his own motion, or upon application for each person for good cause shown."

111 Johnson, 318 S.E.2d at 620.
112 Id.
113 Id.
114 Id. at 621.
115 Id.
116 Id.
117 Id. at 622.
118 Id. at 621-22.
119 Id. at 622.
120 Id.
court concluded that the circuit court had no authority, under West Virginia Code section 29A-5-4, to reverse and vacate the Commissioner’s license suspension order. The order of the circuit court was reversed and the case remanded for entry of a proper order upholding the administrative decision.

James W. McNeely