THE SUPREME COURT OF ARKNASAS HOLDS THAT ARKANSAS CODE ANNOTATED, SECTION 5-65-402 PROVIDES LICENSEES WITH DUE PROCESS

In *Miller v. Arkansas Department of Finance and Administration*,[1] the Supreme Court of Arkansas held that Arkansas Code Annotated, section 5-65-402, requiring the suspension of a driver's license at the administrative level, prior to a court hearing, does not deprive licensees of their constitutional right to due process.[2]

On December 21, 2010, Mr. Miller was placed under arrest for the offense of DWI, and was required to surrender his license.[3] He was given a temporary driver's license, valid for thirty days, and upon expiration, his driver's license was to be suspended for six months and his commercial driver's license, suspended for one year.[4]

At Miller's request an administrative hearing was held on January 7, 2011 to contest the suspension of his privileges.[5] The appellant presented a note from his physician explaining that he suffered from chronic back pain and was therefore on Fentanyl and Percocet to control his pain.[6] The doctor noted that levels of opiates were therefore expected in his urine samples, and stated "[t]hese findings may account for his odd presentation when arrested by a State Trooper recently for possible DWI."[7]

The hearing officer, Maureen Strobel, upheld the suspension of the appellant's driver's license and commercial driver's license.[8] The suspension period was set to begin January 21, 2011.[9] On January 14, 2011, the appellant filed a petition in Washington County Circuit Court, seeking de novo review of his suspension and the reinstatement of his driver's license.[10] The court set a hearing for the appeal on February 8, 2011, which was later postponed for unknown reasons until February 24, 2011.[11]

Before the hearing, set for February 24, 2011, the appellant filed a motion contending that Arkansas Code Annotated, section 5-65-402 was unconstitutional because the statute was in violation of the due process

1. 2012 Ark. 165, 401 S.W.3d 466.
2. *Miller*, 2012 Ark. 165, at 1, 401 S.W.3d at 467.
3. *Id.* at 1, 401 S.W.3d at 467.
4. *Id.* at 1–2, 401 S.W.3d at 467.
5. *Id.* at 2, 401 S.W.3d at 467.
6. *Id.*, 401 S.W.3d at 467.
7. *Miller*, 2012 Ark. 165, at 2, 401 S.W.3d at 466, 467.
8. *Id.* at 2, 401 S.W.3d at 467.
9. *Id.*, 401 S.W.3d at 467.
10. *Id.*, 401 S.W.3d at 467.
11. *Id.*, 401 S.W.3d at 468.

clause.[12] Miller claimed that because he could not subpoena any witnesses or present evidence favorable to him, did not receive a full and fair hearing.[13] Additionally, he argued that because the hearing officer did not consider the evidence he presented from his doctor, section 5-65-402 as applied in this case did not provide him with due process.[14]

At the hearing on February 24, 2011, the appellant called the hearing officer, Maureen Strobel, to testify.[15] Strobel stated that in making her decision on the appellant's suspension, she considered both the officer's sworn statement and the reports the appellant brought from his physician.[16] She mentioned though, that she would always believe the accuracy officer's statements unless there was contrary evidence.[17] However, in this instance, she found that Miller had failed to bring anything to her attention that contradicted anything in the officer's report.[18]

Following a full hearing on March 15th, the circuit court held that the statute was not applied unconstitutionally, and that the hearing officer had properly considered the letter from Miller's doctor in reaching her decision.[19] The court held that appellant was driving while intoxicated and reinstated the suspension of the appellant's driving privileges.[20] However, the circuit court did not issue a decision pertaining to the facial constitutional challenge of Arkansas Code Annotated, section 5-65-402 and thus, the issue was not addressed on appeal.[21] A written report of the ruling was issued on June 1, 2011, and appellant filed a notice of appeal of June 7, 2011.[22]

A driver's license is a constitutionally protected interest,[23] and thus, due process must be provided before an individual can be deprived of his or her license.[24] In *Mathews v. Eldridge*[25] it was established that due process requires (1) the consideration of the private interest affected by the action, (2) the risk of depriving an individual of such an interest, and (3) the Gov-

12. *Miller*, 2012 Ark. 165, at 3, 401 S.W.3d at 468.
13. *Id.*, 401 S.W.3d at 468.
14. *Id.*, 401 S.W.3d at 468.
15. *Id.* at 4, 401 S.W.3d at 468.
16. *Id.*, 401 S.W.3d at 468.
17. *Miller*, 2012 Ark. 165, at 3, 401 S.W.3d at 468.
18. *Id.* at 4, 401 S.W.3d at 468.
19. *Id.* at 6, 401 S.W.3d at 469.
20. *Id.*, 401 S.W.3d at 469.
21. *Id.* at 7,401 S.W.3d at 470.
22. *Miller*, 2012 Ark. 165, at 6, 401 S.W.3d 466, 469.
23. *Id.* at 7, 401 S.W.3d at 470 (citing Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971)).
24. *Id.*, 401 S.W.3d at 470.
25. 424 U.S. 319, 96 S.Ct. 893 (1976).

ernment's interest, including any financial and administrative burdens that an additional procedural requirement would require.[26]

In reviewing the appeal, the Court analyzed two cases to determine what measures must be taken to conform with licensee's due process right to a hearing.[27] *Dixon v. Love*[28] and *Mackey v. Montrym*,[29] both held that the suspension of a driver's license without the opportunity for a pre-suspension hearing may still provide due process. In *Dixion* an Illinois statute was upheld after it was challenged for allowing the prehearing suspension or revocation of a license based on official records.[30] The court in *Mackey* clarified that where "prompt postdeprevation review is available for correction of administrative error," predeprevation procedures must only provide a "reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be."[31]

The appellant however, argued that his hearing was a "sham" because the hearing officer, Maureen Strobel, only considered the State's proof and did not consider evidence the evidence he submitted.[32] Miller offered as support, *In the Matter of Sweeney*,[33] in which the judge held that Sweeny's due process rights were violated because the hearing officer received the arresting officer's report, rather than his sworn testimony.[34] Additionally, Miller cited *Javed v. Department of Public Safety, Division of Motor Vehicles*,[35] a case interpreting the due process clause of the Alaska Constitution and two additional cases *Thomas v. Fiedler*[36] and *Kempke v. Kansas Department of Revenue*,[37] both recognized that a de novo hearing before a circuit could in fact cure defects that occurred at an administrative hearing.

The Court held that Miller did not establish that the circuit court erred in finding that the statute was constitutional as applied to his case.[38] First, Miller did not provide an argument showing that the circuit court's decision

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26. *Miller*, 2012 Ark. 165, at 8, 401 S.W.3d 466, 470 (2012) (citing *Mathews*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)).
27. *Miller*, 2012 Ark. 165, at 8–9, 401 S.W.3d at 471.
28. 431 U.S. 105, 97 S.Ct. 1723 (1977).
29. 443 U.S. 1, 99 S.Ct. 2612 (1979).
30. *Miller*, 2012 Ark. 165, at 8, 401 S.W.3d 466, 470 (2012) (citing *Dixon*, 431 U.S. 105, 97 S.Ct. 1723 (1977)).
31. *Miller*, 2012 Ark. 165, at 8–9, 401 S.W.3d 466, 471 (2012) (citing *Mackey*, 443 U.S. 1, at 13, 99 S.Ct. 2612, at 2618 (1979)).
32. *Miller*, 2012 Ark. 165, at 9, 401 S.W.3d 466, 471.
33. 257 A.2d 764 (Del. Super. Ct. 1969).
34. *Miller*, 2012 Ark. 165, at 9, 401 S.W.3d 466, 471 (2012) (citing *Sweeny*, 257 A.2d 764, 765 (1969)).
35. 921 P.2d 620 (Alaska 1996).
36. 700 F.Supp. 1527 (E.D. Wis. 1988)
37. 281 Kan. 770, 133 P.3d 104 (2006).
38. *Miller*, 2012 Ark. 165, at 11, 401 S.W.3d at 472.

was clearly erroneous.[39] The appellant did not present evidence that the court made a clear mistake in deciding that the hearing officer did in fact consider the letter from Miller's doctor in her decision to suspend Miller's licenses.[40]

Second, the Supreme Court found that none of the cited authority strongly supported Miller's argument.[41] *Sweeney* was decided before the United States Supreme Court held that sworn police reports are acceptable evidence absent available police testimony.[42] Further, *Javed* interpreted the Alaska Constitution, not the federal due process clause,[43] and *Thomas* and *Kempke* actually conflicted with his argument that a de novo circuit court hearing could not cure his allegedly insufficient administrative hearing.[44]

Finally, the court clarified that despite Miller's complaint that he was denied prompt post-deprivation review because his final de novo hearing occurred seventy days after the stay was granted by the circuit court, it was still within the one hundred and twenty day limit established in Arkansas Code Annotated section 5-65-402(c)(2)(C)(i).[45]

Miller v. Arkansas Department of Finance held that Arkansas Code Annotated section 5-65-402, requiring a driver to surrender his license upon request for certain crimes, was not unconstitutional as applied to Miller's case.[46] While Miller argued that the hearing officer failed to consider evidence he presented, denying him of his due process rights, the Court determined that prompt de novo review by a circuit court sufficiently provides a licensee with his due process of rights.[47] Thus, Arkansas licensees may be required to surrender their licenses upon arrest based upon the official report provided by the arresting officer as long as prompt de novo review is available to cure possible administrative defects.

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39. *Id.*, 401 S.W.3d at 472.
40. *Id.*, 401 S.W.3d at 472.
41. *Id.* at 11–12, 401 S.W.3d at 472.
42. *Id.* at 12, 401 S.W.3d at 472 (citing *Mackey*, 443 U.S. at 14, 99 S.Ct. 2618).
43. *Miller*, 2012 Ark. 165, at 12, 401 S.W.3d at 472 (citing *Javed*, 921 P.2d 620, 625).
44. *Id.*, 401 S.W.3d at 472.
45. *Id.*, 401 S.W.3d at 473.
46. *Id.*, 401 S.W.3d at 473.
47. *Id.*, 401 S.W.3d at 473.