

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

DOYLE WALKER

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 2009CA00091

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Canton Municipal Court,
Case No. 2008 TRD 09838

JUDGMENT:

REVERSED; JUDGMENT VACATED

DATE OF JUDGMENT ENTRY:

June 28, 2010

APPEARANCES:

For Defendant-Appellant:

STEPHEN J. KANDEL
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Suite 1003
Canton, OH 44702

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant Doyle Walker appeals his conviction and sentence for driving under a suspended license in the Canton Municipal Court.

STATEMENT OF THE FACTS AND CASE

{¶2} On November 16, 2008, Appellant was involved in an automobile accident on Interstate 77. The police responded and determined that Appellant was at fault for the accident. The police cited Appellant for an improper lane change in violation of Canton City Ordinance 331.08. While at the scene, the police checked Appellant's driving status through LEADS, which revealed that as of November 10, 2008, Appellant's driver's license was under a child support suspension. Appellant was also cited for driving under suspension in violation of Canton City Ordinance 335.07.

{¶3} Appellant entered a not guilty plea at his arraignment and the matter proceeded to a jury trial on March 12, 2009.

{¶4} At trial, testimony was heard from Kathy Pritchard, a supervisor at the Canton Reinstatement Office of the Bureau of Motor Vehicles. The Bureau of Motor Vehicles imposed a suspension upon Appellant's driver's license on November 10, 2008, and mailed notification of the license suspension to Appellant on November 19, 2008. Pritchard acknowledged that the notification of Appellant's license suspension was mailed to Appellant after Appellant was cited for driving under suspension. Pritchard testified that Appellant's driver's license had been under two prior child support suspensions on April 27, 2007 and August 9, 2007.

{¶5} Mary Hall, a supervisor with the Child Support Enforcement Agency ("CSEA"), also testified. She stated that on August 15, 2006, a default notice was

mailed to Appellant informing him that he was in default for not paying his required child support payments. The default notice is automatically computer-generated by the Ohio Department of Jobs and Family Services Division of Child Support located in Columbus, Ohio. The default notice states that the obligor will remain in default until the arrearage balance equals zero. The default notice further states that pursuant to R.C. 3123.22, partial payment does not prohibit the CSEA from taking additional enforcement actions including, but not limited to, initiating proceedings to suspend the obligor's driver's license.

{¶6} In addition to the default notice, the Stark County CSEA sends the obligor "last chance letters." These letters serve to give the obligor further notice that the obligor is in default of their child support obligation. The Stark County CSEA mailed Appellant last chance letters to Appellant's known addresses on March 2, 2007 to an address located in Richmond, Virginia; on March 6, 2007 to an address located on Heritage Avenue in Canton, Ohio; and on October 3, 2008 to an address located on Housel Avenue in Canton, Ohio. The last chance letters state that Appellant was mailed an "Advanced Notice to Obligor of Default and Potential Action" on August 15, 2006. The letter further reads, "I am now notifying you that our next action will be to impose a 'suspension' or 'block' on your driver's license." The CSEA gives Appellant seven days to contact the office to comply with the child support order.

{¶7} Hall testified that Appellant never contacted the CSEA. The Columbus CSEA sent Appellant a notice for license reinstatement procedures, which was dated November 12, 2008. The record does not demonstrate when Appellant received the reinstatement notice.

{¶8} Appellant testified on his behalf. He stated that he was shocked to find out that his driver's license had been suspended. He stated that he never received any notice from the CSEA that he was in default of his child support obligations or that his driver's license could be suspended. He was living in Richmond, Virginia until August 2006 when he returned to Canton, Ohio. Appellant testified that his current address is on Housel Avenue in Canton, Ohio and it is the same address as the one used to mail the October 3, 2008 last chance letter.

{¶9} After he was cited for driving under suspension on November 16, 2008, Appellant contacted the CSEA to question the suspension. He then subsequently received a letter from the BMV dated November 19, 2008 notifying him of his license suspension.

{¶10} The matter was sent to the jury and the jury returned a verdict of guilty for driving under suspension. The trial court also convicted Appellant of a marked lanes violation.¹

{¶11} The trial court sentenced Appellant to 180 days in jail, suspended on the condition of 75 hours of community service.

{¶12} It is from this decision that Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶13} Appellant raises two Assignments of Error:

{¶14} "I. THE APPELLANT'S CONVICTION FOR DRIVING UNDER SUSPENSION OR LICENSE RESTRICTION IN VIOLATION OF CODIFIED

¹ No direct appeal was taken from the marked lanes conviction.

ORDINANCE 335.07 WAS IN VIOLATION OF DUE PROCESS GUARANTEES UNDER THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶15} “II. THE APPELLANT’S CONVICTION FOR DRIVING UNDER SUSPENSION OR LICENSE RESTRICTION IN VIOLATION OF CODIFIED ORDINANCE 335.07 WAS NOT SUFFICIENT AS A MATTER OF LAW BECAUSE DEFENDANT LACKED THE CULPABLE MENTAL STATE OF ‘RECKLESSNESS.’”

I., II.

{¶16} We will consider Appellant’s Assignments of Error simultaneously. Appellant argues in his first Assignment of Error that his conviction for driving under suspension in violation of his due process rights under the Ohio and United States Constitutions. He states in his second Assignment of Error that his conviction for driving under suspension was against the sufficiency of the evidence. We agree.

{¶17} Appellant was cited under City of Canton Ordinance 335.07. City of Canton Ordinance 335.07 is identical to R.C. 4510.11, which states in part:

{¶18} “No person whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under any provision of the Revised Code, other than Chapter 4509 of the Revised Code, or under any applicable law in any other jurisdiction in which the person's license or permit was issued shall operate any motor vehicle upon the public roads and highways or upon any public or private property used by the public for purposes of vehicular travel or parking within this state during the period of suspension unless the person is granted limited driving privileges and is operating the vehicle in accordance with the terms of the limited driving privileges.” R.C. 4510.11(A).

{¶19} This Court has previously held in *State v. Webb* (1998), 126 Ohio App.3d 808, 711 N.E.2d 711, that notice of a suspension is an inferred element of a driving under suspension charge. “[A]ctual knowledge of suspension is not an element of driving under suspension pursuant to the statutory definition, [but] a person should not be convicted of that offense when he has no way of knowing that his operator's license is suspended.” *Id.* citing *State v. Gilbo* (1994), 96 Ohio App.3d 332, 338, 645 N.E.2d 69, 72-73. “[I]t would be fundamentally unfair to convict a defendant for driving under suspension when he has not been given notice that his license has been suspended; therefore, a notice element is inferred in the offense of driving under of suspension.” *Id.*

{¶20} R.C. 3123.55 empowers the registrar of the bureau of motor vehicles to impose a suspension upon a holder of a driver's license upon receiving notice from a child enforcement agency that the holder is in default under a child support order. It is also the responsibility of the BMV to provide notice to individuals whose licenses are revoked or suspended. Ohio Adm.Code 4501:1-10-01(A) states that:

{¶21} “Unless a different method is specified by law, the registrar of motor vehicles shall give written notice of any order revoking, canceling, or suspending a driver's license, a commercial driver's license, motorcycle operator's license or endorsement, or temporary permit, or any order requiring the surrender of a certificate of registration or registration plates, by regular mail sent to the person at the person's last known address as determined in accordance with this rule.”

{¶22} Ohio Adm.Code 4501:1-10-02(E) provides that:

{¶23} “The giving of written notice is complete upon the deposit of the written notice with the United States Postal Service. Actual receipt by the addressee is not required if the [BMV] has complied with rule 4501:1-10-01 of the [OAC] and this rule.”

{¶24} In this case, there is no argument that the BMV failed to follow the proper procedures in mailing Appellant notice of his license suspension. The argument is that while CSEA and BMV took action to suspend Appellant’s license on November 10, 2008, the BMV did not mail notification to Appellant of the license suspension until November 19, 2008, after Appellant was cited for driving under suspension on November 16, 2008.

{¶25} Upon the issue of notice of the license suspension by the BMV, Kathy Pritchard, a supervisor at the Canton Reinstatement Office of the Bureau of Motor Vehicles, testified as follows:

{¶26} “Q. And the BMV also has an obligation to notify a person – a driver – of the suspension, correct?

{¶27} “A. Correct.

{¶28} “Q. Are you aware of any notification of this suspension to Doyle Walker?

{¶29} “A. Yes. There was one.

{¶30} “Q. Okay. And are you aware of what date that notification came to Doyle Walker?

{¶31} “A. The notification was mailed out on November 19th.

{¶32} “ * * *

{¶33} “Q. * * * You said the date that the suspension went into effect was November the 10th, right?

{¶34} “A. Correct.

{¶35} “Q. Are you aware of the date that Mr. Walker was cited for driving under sus-, - [sic] driving under child support suspension?

{¶36} “A. I believe it was November 16th.

{¶37} “Q. Okay. And certainly then the date that the BMV letter is dated is three days after the date of that incident, correct?

{¶38} “A. Yes.” (T. 44-45).

{¶39} It is readily clear that Appellant was not notified that his driver's license was suspended by the BMV at the time he was charged with the offense. Notice of the suspension was not complete until the BMV deposited the notice of suspension in the mail on November 19, 2008. OAC 4501:1-10-02(E); see also, *State v. Heiney*, 11th Dist. No. 2006-P-0074, 2007-Ohio-1200, ¶16. As such, the State did not present sufficient evidence for a jury to find Appellant guilty of driving under suspension beyond a reasonable doubt. In addition, due process was not satisfied as Appellant was not given notice of the suspension by the BMV until after being charged.

{¶40} Accordingly, we sustain Appellant's Assignments of Error.

{¶41} The judgment of the Canton Municipal Court is reversed and vacated as to Appellant's conviction and sentence for driving under suspension.

By: Delaney, J.

Edwards, P.J. concur

Hoffman, J. concurs separately

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

PAD:kgb

Hoffman, J., concurring

{¶42} I generally concur in the majority's analysis and disposition of Appellant's two assignments of error.

{¶43} Although not necessary for resolution of this appeal, I write separately to note I am not convinced notice of the suspension was complete upon the BMV's deposit of the notice in the mail on November 19, 2008. I question whether OAC 4501: 1-10-02(E) satisfies constitutional due process requirements.

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DOYLE WALKER	:	
	:	
	:	
	:	Case No. 2009CA00091
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Canton Municipal Court is reversed and vacated as to Appellant's conviction and sentence for driving under suspension. Costs assessed to Appellee.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN