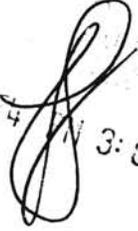


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No. 71136-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

**KENNETH C. WISEMAN and MARY L. GHIGLIONE,
husband and wife,**

Appellants,

v.

**WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
(WSDOT), and its Attorney, ROBERT FERGUSON, Attorney
General for the State of Washington,**

Respondents.

BRIEF OF APPELLANTS

Ray Siderius WSBA 2944
SIDERIUS LONERGAN & MARTIN, LLP
500 Union Street, Suite 847
Seattle, WA 98101
206/624-2800

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I. ASSIGNMENTS OF ERROR

A. The trial court erroneously dismissed the petition for review on the ground that it had not been served on the Washington State Department of Transportation (WSDOT) within thirty (30) days after the Administrative Hearing of June 10, 2013.

B. The trial court did not consider RCW 34.05.485(4) in erroneously dismissing the petition. That statute provides that an order entered in a brief adjudicative proceeding is an initial order and is not considered a final order until 21 days after issuance. This meant that the order Judge Harris entered on June 10, 2013 did not become a final order until July 2, 2013 thereby giving the appellants until August 1, 2013 to serve their appeal, a deadline that WSDOT concedes appellants met.

C. The trial court erroneously ruled that the petition was not brought as a rule challenge.

D. The trial court erroneously refused to apply retroactively Substitute House Bill 1941 which had passed the Washington Legislature 2013 session, had an effective date of July 28, 2013, and which amended RCW 46.63.160 and thereby provided mitigating circumstances that permit reduction and/or dismissal of civil toll penalties, including a provision that

if a person owing a toll charge does not receive from WSDOT a notice of civil penalty “within a reasonable time of the toll violation” the adjudicator may reduce or dismiss the civil penalty.

E. The trial court erroneously refused to recognize that petitioners, having first received a notice of civil penalty on May 16, 2013, did not receive the notice “within a reasonable time of the June 12, 2012 toll violations” permitting reduction or dismissal of the penalties in accord with SHB 1941, the amended statute.

F. The trial court erroneously refused to apply retroactively the provisions of Substitute House Bill 1941 which require that an envelope containing a notice of civil penalties must prominently indicate that the envelope’s contents are time-sensitive and related to a toll violation.

II. STATEMENT OF THE CASE

This is an appeal from the Superior Court’s decision on Petition for Review of “Final Order on Administrative Hearing.” By the terms of that final Order, appellants Kenneth Wiseman and Mary Ghiglione must pay Highway 520 bridge toll violations in the sum of \$8,346.82. The Order was entered on June 10, 2013, signed by Barbara Harris, Administrative Law Judge and is attached as Exhibit A to the Petition for Review. (CP 8-13.)

The Superior Court Judge who decided the Petition for Review is the Honorable King County Judge John P. Erlick, who, on October 10, 2013 granted the Motion of the Washington State Department of Transportation (WSDOT) to dismiss the petition (CP 66-67) and who denied (CP 81), on October 28, 2013, appellants' Motion for Reconsideration. (CP 68-80).

Judge Erlick made two serious errors in both the Order Granting WSDOT's Motion to Dismiss and the denial of Appellants' Motion for Reconsideration: (a) in the Order of Dismissal appending a handwritten explanation on p. 2 of his ruling on the Motion to Dismiss (CP 67) , writing that the petition was "not timely served or filed," thereby adopting the argument that had been offered by WSDOT (CP 20-29) that the petition for review had to be served on WSDOT within thirty (30) days following the June 10th date of entry of the administrative order¹ and (b) refusing to rule that petitioners, having first received a notice of civil penalty on May 16, 2013, did not receive the notice "within a reasonable time of the June 2012 toll violations" and accordingly SHB 1941, Washington Legislative 2013

¹ This first error was not Judge Erlick's fault because neither counsel advised him that a statute in the Washington Administrative Code extended the thirty-day period for service. (See explanation at p. 8, *infra*.)

Session should be applied retroactively, thereby providing a defense to the civil penalty judgment that had been entered.

III. STANDARD OF REVIEW

This is a trial court dismissal of all proceedings based on lack of jurisdiction and presumably the standard of review is *de novo*.

IV. ARGUMENT

Kenneth Wiseman and Mary Ghiglione are husband and wife and reside in North Seattle. Ken's work requires that he drive across Lake Washington and he uses the Highway 520 bridge. Ken and Mary first applied for and obtained a "Good to Go" pass on June 22, 2011 (see p. 61 of the administrative record). With a "Good to Go" pass, the tolling is done by license plate and the toll charge deducted from the bank/credit union account of the pass holder. Ken and Mary are both gainfully employed with excellent credit, holding valid credit cards. Mary was employed by Swedish Hospital as director of blood management. The original "Good to Go" account was established in her name, listing her employer. For the first year there was no problem with tolls with the charges being paid automatically from Mary's account with Watermark Credit Union. In May of 2012, two problems developed. Mary's blood management specialty resulted in her being

recruited by a hospital in San Diego where she became employed, commuting four days a week to Southern California and then back to the Seattle residence. Also, at this time, Watermark Credit Union merged with Sound Credit Union. These two changes caused problems with the ability of Mary's employer and Credit Union to reach her with email messages.

Meanwhile, Ken continued to use Highway 520 bridge, incurring toll charges which both Ken and Mary believed were being paid automatically.

As the court is undoubtedly aware, toll charges are nominal, typically \$4 per crossing. The civil penalty that can be imposed for non-payment of even a single crossing charge is \$40. The applicable statute, RCW 46.63.160(4) provides that the vehicle is subject to the civil penalty if the toll charge is not paid within eighty (80) days after the toll charge for a bridge crossing.

Surprisingly, until the 2013 amendments to RCW 46.63.160 (which petitioners here contend should be retroactively applied) there was no statute or other requirement that WSDOT provide written notice to the driver who had incurred a toll charge, that the \$40 civil penalty might be imposed. The WSDOT procedure was:

(a) If a nominal toll charge remained unpaid for 80 days, WSDOT had the right to assess the \$40 civil penalty with RCW 46.63.160(3) reading: “. . . notice of civil penalty *may* be issued. . . “ (Emphasis supplied.) WSDOT was not required to assess a civil penalty.

(b) If WSDOT elected to assess the civil penalty, there was no requirement that WSDOT notify the “80-day delinquent driver” that the high civil penalties might be assessed in the event WSDOT elected to assess a penalty nor any time limit within which WSDOT had to assess it.

Some drivers, such as petitioners here, were not aware that the toll crossing payments were not being made. Thus, after every 80 days of non-payment, a new list of crossings that had previously represented nominal toll charges became eligible for WSDOT’s imposition of penalties.

Whether accidentally or intentionally, the above procedures led to an unusual practice by WSDOT. That Department deferred any declaration of assessment of penalties for a year or more, thereby enabling WSDOT not only to assess penalties for the first period (usually a month) during which the 80 days had run and the penalties were assessable, but assessing civil penalties for each and every monthly period thereafter, waiting in each case for the 80-day period to run before giving any notice of assessment of

penalties. Petitioners assert that had they been notified during the month following the first 80 day expiration that penalties might be assessed, they would have resolved the problem simply by payment of all of the lesser nominal toll charges.:

During a seven day period in May of 2013 (May 16, 2013 through May 22, 2013) WSDOT issued to petitioners six notices of civil penalties for over \$8,000 in penalty amounts. The dates the civil penalties were assessed and the amounts of each of the assessments are listed at the bottom of page 2 of the administrative record. Here are the specifics on what WSDOT did to the petitioners:

| Date of Notice to Petitioners Assessment of Penalty | Admin. Record Page # | Penalty Assessed | Period Monthly Toll charges were incurred | Date 80-day period begins |
|--|-----------------------------|-------------------------|--|----------------------------------|
| 05/16/13 | AR 161 | \$1,553.75 | June 2012 | 06/28/12 |
| 05/16/13 | AR 142 | \$1,471.10 | July 2012 | 07/26/12 |
| 05/16/13 | AR 124 | \$1,384.56 | July/Aug 2012 | 08/28/12 |
| 05/16/13 | AR 107 | \$1,344.23 | Sept/Oct 2012 | 10/03/12 |
| 05/20/13 | AR 181 | \$1,653.65 | Oct/Nov 2012 | 11/05/12 |
| 05/22/13 | AR 202 | \$ 939.53 | Nov/Dec 2012 | 12/05/12 |
| | Total: | \$8,346.82 | | |

What is apparent from the above is on the penalty assessment appearing at AR 161 of the administrative record, the penalty for the entire month of June, 2012 could have been assessed as early as September 17, 2012 (81 days after June 28th) and during that period no penalty could have been assessed on the other five, because as to each the 80-day period was still running or had not yet begun. If WSDOT had, at any time between September 17, 2012 and October 15, 2012 notified the petitioners that something had gone wrong with their bank situation and the payments had not been made and that a penalty might be assessed, petitioners would have immediately recognized the problem, been required to pay the original \$1,553.75 penalty, and would only owe nominal toll for the other crossings. Instead, what WSDOT did was, during the 5-day period in 2013 declare assessment of penalties for all six periods with total penalties which have now been assessed and judgment entered against the petitioners for \$8,346.82.

**V. ORIGINAL ARGUMENT OF WSDOT
ON THE MOTION TO DISMISS THE PETITION FOR REVIEW**

The first response of WSDOT to the Petition for Review (CP 20) was limited to the 30-day argument. The WSDOT motion on p. 2, line 20, described a single issue, namely, “does the court lack jurisdiction in this case

because the petitioner failed to timely serve WSDOT or the Attorney General as required by RCW 34.05.542.” It is correct to say that WSDOT now admits that it was mistaken in concluding that petitioners had not timely served the Petition for Review, and has now conceded in oral statements to petitioner’s counsel the facts as stated in Assignment of Error B, *supra* and has conceded that petitioners complied with RCW 34.05.485(4) and the service was timely.

Unfortunately, neither counsel were aware of the importance of RCW 34.05.485(4). The WSDOT attorney called this to the attention of petitioner’s counsel. Thus, neither counsel advised Judge Erlick whose dismissal based on failure to timely serve was not his fault.

VI. 2013 REMEDIAL LEGISLATION

The original Petition for Review filed by the petitioners here attached as Exhibit B (CP 14-19) a copy of Substitute House Bill 1941, which, on p. 5 reflects that it was “passed by the House April 23, 2013 – passed by the Senate April 16, 2013 and approved by the Governor on May 14, 2013.” The original Petition for Review asserted that the legislation was both remedial and retroactive, and, as directed by the Supreme Court, *McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 12 P.3d 144 (2000) if a party

claims that a statute is remedial and/or retroactive it is helpful to quote from the Bill's House and Senate reports. Petitioners' Response to WSDOT's Motion to Dismiss the Petition included both the Senate bill report (CP 52-54) and the House bill report (CP 56-58) on the legislation. The Senate Bill report at p. 2 (CP 53) contained the following:

You may have seen the article in *The Seattle Times* last year where a woman could demonstrate that she never received the Notice of Civil Penalty, but the administrative law judge could not waive or reduce the civil penalty because the statute did not provide for mitigating circumstances. All this Bill does is spell out some circumstances where we think the judge could lower or waive the civil penalty. I want to point out that the toll is still owed, the judge may not waive or reduce the toll that is owed.

In 2012 administrative law judges began holding hearings for toll violations civil penalties cases. When people testify at an administrative hearing they are under oath. They also must produce evidence to support what they are testifying to at the hearing. This bill provides a judge with the authority to lower or waive the civil penalties if the judge finds that a valid mitigating circumstance, which occurred within a reasonable time period from the alleged toll violation, warrants lowering or waiving the civil penalties. The toll will still be owed.

The House report contained the following (CP 57):

This is a consumer protection bill that fixes a problem with our current tolling statute. Administrative law judges are under the impression that they do not have the discretion to waive a civil penalty. The bill also bifurcates the adjudication of a toll charge and a civil penalty. This bill

gives people some relief and some equity, providing that exclusive list of circumstances is more fiscally reasonable and judicially efficient.

Administrative law judges should be given discretion to consider mitigating circumstances. The exclusive list of mitigating factors are things that the judges already see when people challenge tolls and civil penalties.

The Washington legislature's SHB 1941 is clearly retroactive legislation. The issue came up in *McGee Guest Home, Inc. v. DSHS, supra*, finding that the legislation there involved was retroactive. The court stated at p. 324:

In fact, amendments to statutes may be applied retroactively to effectuate legislative intent. Citing cases.

Generally, statutory amendments apply prospectively . . . however an amendment will be applied retroactively if '(1) the legislature so intended; (2) it is 'curative' or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition. Citing cases. We look to both the statute's purpose and the language in analyzing the issue of retroactivity. Citing cases. Final legislative bill reports are pertinent in this regard. Citing *Young v. Snell*, 134 Wn.2d 267, 948 P.2d 1291 (1997).

On the issue of retroactivity of remedial legislation, see also *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007); *Ballard Square Condo Owners Assoc. v. Dynasty Construction Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006).

VII. THE ORIGINAL PETITION FOR REVIEW INCLUDED A RULE CHALLENGE

The Administrative Procedure Act defines a “rule” (RCW 34.05.010(16)) reading in part as follows:

(16) ‘Rule’ means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) *which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings.* (Emphasis supplied.)

Exhibits B and C to petitioners’ response to the WSDOT Motion to Dismiss are both printed copies of WSDOT’s rule. Both of these establish requirements relating to agency hearings and are accordingly within the definition of the rule itself. For example, Exhibit B to petitioners’ response (CP 37) is entitled “WSDOT Begins New Toll Enforcement Program” and contains the following sentence:

Unlike traffic court, this process does not allow toll enforcement judges to reduce penalty amounts for unpaid toll amounts owed – they make a judgment on whether the vehicle crossed the bridge and that the penalty notice names the vehicle’s legal owner.

Exhibit C to petitioner’s response (CP 39) also establishes requirements relating to agency hearings. Under the caption, “Disputing a Notice of Civil Penalty,” the document reads:

A judge cannot reduce the penalty amount and will only decide whether you are responsible for the disputed civil penalty.

It should be obvious that the 2013 Legislative enactment, SHB 1941, was remedial legislation to be retroactively applied and created a new “mitigating circumstance” that directly affects petitioners, permitting the adjudicator to reduce or dismiss the civil penalty in the event “the alleged violator did not receive a toll charge bill or notice of civil penalty” within a reasonable time of the alleged toll violation. Petitioners assert that deferring such a notification of civil penalty for almost a year before any notification to petitioners establishes without further proof that mitigating circumstance.

If this court accepts the concession that petitioners’ original papers were in fact timely and properly served within the required deadlines, the case should obviously be remanded. If this court, for some reason does not accept WSDOT’s concession, it should still be remanded because the original petition included a rule challenge that relied on the statutory amendment of 2013. Petitioners, to avoid further appeals, urge that this higher court rule that on remand SHB 1941 is indeed retroactive and applicable to petitioners, granting to petitioners the benefit of the mitigating circumstance described in this brief.

VIII. CONCLUSION

Petitioners request that this court reverse the Superior Court order dismissing petitioners' administrative petition for review and remand for hearing, ruling that the statute, SHB 1941, is remedial and retroactive, providing to the petitioners, the mitigating circumstance described above.

Respectfully submitted this 23rd day of January, 2014.



Ray Siderius WSBA 2944
SIDERIUS LONERGAN & MARTIN LLP
Attorneys for Petitioners

500 Union Street, Ste 847
Seattle, WA 98101
206/624-2800

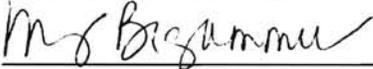
Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date below, I faxed and/or mailed (emailed) or caused delivery by legal messenger of a true copy of this document to:

Kimberly D. Frinell
Assistant Attorney General
7141 Cleanwater Drive SW
P.O. Box 40113
Olympia, WA 98504-0113

email: KimberlyF1@ATG.WA.GOV

Dated: January 23, 2014, at Seattle, Washington.



Mary Berghammer