

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs, December 7, 2007

**METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON
COUNTY, v. DARYL K. STARK**

**Direct Appeal from the Circuit Court for Davidson County
No. 06C2109 Hon. Amanda McClendon, Circuit Judge**

No. M2007-00635-COA-R3-CV - Filed January 31, 2008

The Trial Court granted defendant permission to attend traffic school in lieu of a fine. On appeal, we reverse because State and federal law does not permit diversion for a commercially licensed operator.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Reversed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

James E. Robinson, Andrew D. McClanahan and John L. Kennedy, Nashville, Tennessee, for appellant.

OPINION

This is an appeal by the appellant, involving the sentence imposed upon defendant's violation of the municipal traffic ordinances in Davidson County. Defendant was issued a ticket for speeding, and the citation states that the defendant was driving 80 mph in a 55 mph zone.

Defendant appealed from the General Sessions Court Judgment against him to the Circuit Court.

A hearing was held in Circuit Court and the citation officer testified that the citation was issued to defendant on June 2, 2006, after observing the defendant's vehicle approaching him

at a high rate of speed. He testified that he was in an unmarked vehicle, and defendant was passing other traffic. He testified that he used his radar gun and clocked the defendant at 80 mph, and that the speed limit in the area was 55.

He pulled defendant over, and explained that his radar gun was calibrated daily, and that it was accurate even if it was used while he was in motion. He further testified that a couple of miles before the area where he clocked defendant, the speed limit was 70 mph.

Defendant testified that he lived in Bowling Green, Kentucky, and that he was on vacation traveling with his family. He testified that it was dark when he was pulled over, and it was just 2-3 miles past where he had seen a 70 mph speed limit sign, so he had his cruise control set on 70 mph, and that he never saw a sign changing the speed limit to 55 mph.

He testified that he worked for UPS as a delivery driver and trainer, and that he taught other drivers about safety, speed, etc. He testified that he believed the speed limit was 70 mph where he was pulled over, but admitted that he was not very familiar with the interstate system in Nashville, and could have missed a sign. He further testified that he had a commercial driver's license.

At the conclusion of the proof, the Trial Court commented that the traffic officer had an "impeccable" reputation, but that one was still guilty of speeding even if it was done by mistake. The Court observed that it could be seen how a person might miss the speed reduction, and the Court also empathized with the impact this would have on defendant's CDL.¹ The Court mentioned traffic school as an option, but the Metro attorney stated that their position was that a person with a CDL could not attend traffic school due to the federal legislation that prevented people with CDLs from being able to mask traffic violations, and asked that a \$50.00 fine and court costs be imposed against defendant.

Defendant's attorney argued, that since he was in his personal vehicle, he should be allowed to attend traffic school, and the Trial Court agreed to allow defendant to attend traffic school, and stated that the citation would be dismissed once that was completed and the court costs paid.

The issue on appeal is whether a trial court may allow a defendant to attend traffic school and have his citation dismissed when the defendant possessed a CDL?

Metro argues that the Court's Judgment was improper because defendant possessed a CDL, and state and federal regulations prohibit the holder of a CDL from attending traffic school in lieu of punishment, or otherwise "masking" the citation or having it deferred. Defendant did not file a brief on appeal.

Tenn. Code Ann. §55-10-301(b) gives the trial court the discretion to order a traffic

¹Commercial Driver's License.

law violator to attend a driver education course, and it states:

Any person violating any of the provisions of chapters 8 and 9 of this title and parts 1-5 of this chapter may be required, at the discretion of the court, to attend a driver education course approved by the department of safety in addition to or in lieu of any portion of other penalty imposed; provided, that the course is approved by the department, . . .

This statute goes on to state, however, that subsection (b) “shall not apply to any person who holds a Class A, B, or C license and is charged with any violation, except a parking violation, in any type of motor vehicle.” Tenn. Code Ann. §55-10-301(c). Class A, B, or C licenses are defined in Tenn. Code Ann. §55-50-102 as those issued for the operation of vehicles weighing more than 26,000 pounds, and are those typically referred to as “commercial” drivers’ licenses.

Metro argues that subsection (c) was added to bring the state law into compliance with federal regulations found at title 49, part 384 of the Code of Federal Regulations, governing “State Compliance with Commercial Drivers License Program”. Specifically, 49 C.F.R. §384.226² states:

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the driver's record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

While Tenn. Code Ann. §55-10-301 does not specifically state that it was enacted to bring Tennessee law into compliance with these federal regulations, other sections of the traffic/drivers’ license statutes do specifically reference the federal regulations. *See, e.g.*, Tenn. Code Ann. §55-50-401.

The federal regulation is clear. The State cannot mask or defer imposition of judgment to prevent a CDL driver’s conviction for any type of traffic violation (besides parking) in any type of motor vehicle from appearing on the driver’s record, whether the offense was committed in the driver’s home state or different state. 49 C.F.R. §384.226. Likewise, Tenn. Code Ann. §55-10-301(c) makes clear that a trial court should not utilize that statute to allow a commercial license holder to attend traffic school in lieu of other punishment.

Based upon the state and federal laws addressing this issue, the Trial Court erred in allowing the defendant to attend traffic school and in holding his traffic violation would be dismissed upon completion of traffic school. Defendant holds a commercial driver’s license, which prevented the Trial Court from allowing him to benefit from this type of judicial diversion. Apparently, the

² 49 C.F.R. §384.103 states that the regulations in that part apply to all states.

Trial Court was influenced by the fact that defendant was driving a personal vehicle at the time of the violation, but the state and federal law make clear that this is of no consequence.

Accordingly, we reverse the Judgment of the Trial Court and remand for the entry of an appropriate Judgment in compliance with State and federal law.

The cost of the appeal is assessed to Daryl K. Stark.

HERSCHEL PICKENS FRANKS, P.J.

TOP 8 CONCEPTS TO UNDERSTAND ABOUT THE MOTOR CARRIER SAFETY IMPROVEMENT ACT'S PROHIBITION ON "MASKING, DEFERRAL & DIVERSION"

- THE MOTOR CARRIER SAFETY IMPROVEMENT ACT (MCSIA) PROHIBITS "MASKING," "DEFERRAL" OR "DIVERSION" BY TRIAL COURTS
- "MASKING," "DEFERRAL" OR "DIVERSION" CAN ONLY OCCUR IN TRIAL COURT OF ORIGINAL JURISDICTION
- "MASKING," "DEFERRAL" OR "DIVERSION" OCCURS IF COURT TRIES TO HIDE, DIVERT, DEFER, DELAY OR MASK A FINAL JUDGMENT AGAINST A CDL DRIVER. PROHIBITED ACTIONS BY A COURT INCLUDE:
 - Holding, Hiding, or Not Reporting a final judgment to State (DPS)
 - Changing conviction on moving violation to non-moving violation
 - Granting DSC to dismiss a charge
 - Granting Deferred Disposition to dismiss a charge
- COURT'S GRANTING PROSECUTOR'S MOTION TO DISMISS A CHARGE AGAINST CDL DRIVER IS NOT PROHIBITED UNDER THE MOTOR CARRIER SAFETY IMPROVEMENT ACT (MCSIA)
- A COURT'S DECISION TO ACQUIT A CDL DRIVER AFTER A TRIAL IS NOT PROHIBITED UNDER THE MOTOR CARRIER SAFETY IMPROVEMENT ACT (MCSIA)
- A PROSECUTOR'S DECISION TO NOT PURSUE A CHARGE AGAINST A CDL DRIVER IS NOT PROHIBITED UNDER THE MOTOR CARRIER SAFETY IMPROVEMENT ACT (MCSIA)
- A PROSECUTOR'S DECISION TO REDUCE A CHARGE OR PURSUE A DIFFERENT CHARGE AGAINST A CDL DRIVER IS NOT PROHIBITED UNDER THE MOTOR CARRIER SAFETY IMPROVEMENT ACT (MCSIA)
- LEGAL AND ETHICAL ARE NOT THE SAME

THE LAW: UNITED STATES CODE 49 CFR §384.226 Prohibition on masking convictions.

The State must not **mask, defer imposition of judgment, or allow an individual to enter into a diversion program** that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the driver's record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.



Federal Motor Carrier Safety Administration

- **Commercial Motor Vehicle Safety Act of 1986**
- **Motor Carrier Safety Improvement Act of 1999**

March 20, 2006 Missouri Department of Revenue Questions are Answered by Federal Motor Carrier Safety Administration

What is considered “masking” under the MCSIA?

The state of Missouri requested clarification from the Federal Motor Carrier Safety Administration regarding the masking provisions outlined in the Motor Carrier Safety Improvement Act that became effective on September 30, 2005. The following scenarios were addressed and responses published on March 20, 2006.

FMCSA: *Generally, for masking or diversion to occur, there first must be a judgment of guilt.*

For example, masking may occur when the court holds the paperwork on a conviction for some reason and does not allow the State to take appropriate action. Diversion may occur when the court allows a driver – after an adjudication of guilt – to perform alternate services such as traffic school to get the conviction erased.

Specific Fact Situations Addressed by the Federal Motor Carrier Safety Administration

✓ **Prosecutor’s Decision not to Pursue Case - Okay**

Situation #1: CDL holder issued traffic citation for Driving While Intoxicated in his private vehicle. Prosecutor reviews the records and determines that there is a problem with the evidence and decides not to prosecute the case, so no charges are filed with court. No conviction is entered.

Response) FMCSA: No violation of 49 CFR §383/384. The federal CDL regulations require a conviction as defined by §383.5. In this case, the evidence did not support the burden of proof to be properly adjudicated by the prosecutor and there were no excepted actions taken to otherwise circumvent the regulations (i.e., no masking or diversion of the offense or penalty).

✓ Trial Court's Dismissal of Case at Trial - Okay

Situation #2: CMV operator is issued traffic citation for "Careless and Imprudent" driving. Prosecutor files charges for "Careless and Imprudent Driving". Case goes to trial and contrary evidence is presented by operator to show he was not driving in a careless and imprudent manner and court ultimately dismisses the case.

Response) FMCSA: No violation of 49 CFR §383/384. Again, the federal regulations require a conviction and in this case the court found flawed or lacking evidence to convict the driver on the offense cited. There were no excepted actions taken by the court to otherwise circumvent the regulations (i.e., no masking or diversion of the offense or penalty). Ultimately, the driver in this case received his/her day in court and prevailed.

✓ Plea Bargaining Okay: Prosecutor's Decision to Pursue Equipment Violation only in Spite of Officer's Citation for Moving Violation of "Improper Lane Change"

Situation #3: CMV operator issued traffic citation for "Improper Lane Change in a CMV". Prior to the citation being filed with the court the prosecutor determines to only file the charge as a "defective muffler". Final conviction is for "defective muffler" and that is the only charge ever signed by the prosecutor or filed with the court.

Response) FMCSA: This practice is not in violation of 49 §CFR 384.226 because the violation was reduced before a judgment of guilt was pronounced. Before we can apply the conditions in 49 §CFR 384.226 to determine whether masking has taken place, there has to be a judgment of guilt (conviction) for a violation. **The masking provision in 49 CFR §384.226 do not prevent plea bargaining from taking place.**

✓ Prosecutor's Reduction of Charge - Okay

Situation #4: CDL holder is issued a traffic citation for "Excessive Speed" in private vehicle (speeding 75 mph in 60 mph zone). After original charge is filed with court, prosecutor amends original charge to "Speeding 65 mph in a 60 mph zone". Final conviction is for Speeding 65 mph in a 60 mph zone.

Response) FMCSA: This practice is not in violation of 49 §CFR 384.226 because the violation was reduced before a judgment of guilt was pronounced. Before we can apply the conditions in 49 §CFR 384.226 to determine whether masking has taken place, there has to be a judgment of guilt (conviction) for a violation. The masking provision in 49 CFR §384.226 do not prevent plea bargaining from taking place.

Court Allowing DSC after Conviction to Dismiss Charge is Considered Diverting - Illegal

Situation #5: CDL holder operating a non-commercial vehicle and is issued a traffic citation for "Failure to Yield Right of Way". Prosecutor files charges for "Failure to Yield Right of Way". Court convicts person of "Failure to Yield Right of Way" and the conviction is posted in the driver's record, but allows a Driver Improvement Program in lieu of having the director assess points on the Missouri driving record.

Response) FMCSA: The failure to assign "points" does not violate 49 CFR §383/384. However, if the federal regulations required the imposition of a disqualification period for the convicted offense and the court then allowed a Driver Improvement Program in lieu of having the director impose a disqualification for the prescribed period of time this would be in violation of 49 CFR §384.215/284.213/384.231 as a diversion deferral program.

✓ Court Vacating Original Judgment & Nullifying Conviction - Okay

Situation #6: CMV operator is issued a traffic citation for "Operating a CMV while Suspended/Revoked/ Withdrawn". Prosecutor files charges for "Operating CMV while license suspended/revoked/ withdrawn". Final conviction is for "Operating CMV while license suspended/revoked/withdrawn. Later, court allows attorney for CMV operator to withdraw original plea and conviction and after new court hearing, court ultimately enters a conviction for "Improper CDL Class/Endorsement".

Response) FMCSA: This is not in violation of 49 CFR §384.226 because the court vacated (withdrew) the original conviction or adjudication of guilt. By granting the attorney's request to vacate (withdraw) the original plea and conviction, the court has nullified the conviction. The definition of "conviction" in 49 CFR §383.5 defines a conviction to mean "an unvacated adjudication of guilt".

Why does the state disqualify a driver's commercial driving privilege when a traffic ticket is received in a personal vehicle?

According to 49 CFR 383.51 and 302.700, RSMo., CDL drivers who are convicted of certain disqualifying offenses while operating their personal vehicle may have their CDL privilege disqualified. There are some offenses that must be committed in a CMV for disqualification action to be taken.

Why is the department so strict with CDL drivers?

The Motor Carrier Safety Improvement Act (MCSIA) states that CDL drivers are professional drivers and should be held to a higher standard. The state legislature passed a law in 2004 (Senate Bill 1233) to include the changes from MCSIA into state law. The department is only enforcing the state and federal laws.

Unites States Code, Title 49--Transportation

PART 384--STATE COMPLIANCE WITH COMMERCIAL DRIVER'S
LICENSE PROGRAM

UNITED STATES DEPARTMENT OF TRANSPORTATION

49 C.F.R. § 384.226 Prohibition on masking convictions.

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the driver's record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

This new provision is intended to prohibit States not only from masking convictions, but also from using diversion programs or any other disposition that would defer the listing of a guilty verdict on a CDL driver's record. This provision of the MCSIA also requires that records of such conviction information be made available to all authorized parties and government entities.

The Motor Carrier Safety Improvement Act of 1999 requires the agency to withhold Motor Carrier Safety Assistance Program grant funds from the states if they do not comply with the regulation.

The Federal Motor Carrier Safety Administration (FMCSA) may prohibit a state from issuing, renewing, transferring, or upgrading CDLs if the agency determined the state is in substantial noncompliance with the CDL licensing and sanctioning requirements.