

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2008-000171-001 DT

05/19/2008

COMMISSIONER EARTHA K. WASHINGTON

CLERK OF THE COURT
S. Bindenagel
Deputy

STATE OF ARIZONA

ROBERT S HUBBARD

v.

BEN GOREN (001)

BEN GOREN
PO BOX 964
TEMPE AZ 85280

REMAND DESK-LCA-CCC
TEMPE CITY COURT

RECORD APPEAL RULE / REMAND

Lower Court Appeal No. 07-036982-4

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A). The court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

On December 4, 2007, Officer R. Johnson of the Tempe Police Department cited the appellant, Ben Goren, with violating A.R.S. § 28-815(A). A hearing was held in the Tempe City Court on January 17, 2008, with the appellant and the officer testifying. The officer told the lower court that he was driving southbound in the curb lane on Rural Road at 3:15 p.m. on December 4, 2007. The traffic going southbound was heavy at that time. Vehicle traffic, based on the officer's experience, is usually between 35 to 40 miles per hour (mph). As he was approaching Apache Road he noticed southbound traffic began to slow down to 15-20 mph. The traffic was slowing because there was a bicyclist in the curb lane who was riding his bike in the left wheel lane. Based on the bicyclist's conduct, cars in the curb lane were slowing down then driving to the center lane, passing the bicyclist before then moving back to the curb lane.

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Mirroring the action of the other cars, the officers moved into the center lane next to the bicyclist and instructed him to move to right of the curb lane so as not to impede traffic. The appellant told the officer that he was riding in the left of the wheel lane because it was safer to do so because of the narrowness of the curb lane. The officer and the appellant pulled over. The appellant showed the officer A.R.S. § 28-815(A)(4) which he said allowed him to ride as he was doing. He also showed the officer A.R.S. § 28-735(A), which dictates vehicular traffic's obligation to bicyclists when trying to pass them.

The officer told the lower court that the curb lane was very wide and he believed there was no reason for the appellant to be in the left wheel track of the curb lane. The officer had measured the curb lane where the appellant was riding and told the court that it measured in at 12 feet 10 inches. He said the average width of a car traveling down the road was 6 feet 6 inches and that the width of the appellant's bike was 3 feet 4 inches. Based on his calculations, the officer believed that the appellant would have the necessary three feet safety gap that A.R.S. § 28-735(A) requires of cars if they were passing him of the road way. The officer told the court the appellant did not fall into the exception in A.R.S. § 28-815(A)(4) and should have been in the right of the curb lane or on the sidewalk like other bicyclists he saw in the area at that time.

The appellant told the lower court that the curb lane he was riding in was too narrow for him to ride in the right hand side. He calculated the distance of the curb lane to be 11 feet of drivable road; as such a driver would not be able to maintain the necessary three feet distance from him when attempting to pass. Because of the road width, the appellant testified that A.R.S. § 28-815(A)(4) applied to him and thus allowed him to be riding where the officer said he was.

At the conclusion of testimony the lower court held the appellant responsible for the charged violation. In coming to its conclusion the court took the appellant's measurement of the road as accurate. It held that because the road was narrow the appellant was not compelled to ride his bicycle on the right side of the curb lane. Taking into consideration the appellant's Exhibit 3, a pamphlet created by the Arizona Department of Transportation on bike riding safety, the lower court held that the appellant should have been riding his bicycle on the narrow road in the center of the curb lane. Because the appellant instead was riding in the left wheel track of the curb lane, the lower court held that he was not giving drivers in the center (median) lane an opportunity to maintain a three feet distance from him. Because of the appellant's position in the curb lane and his proximity to drivers in the center lane, the lower court held that the appellant had violated A.R.S. § 28-815(A)(4).

The appellant filed a timely notice of appeal and now brings the matter before this Court.

The issue in this case is whether the lower court abused its discretion in finding the appellant responsible with violating A.R.S. § 28-815(A)(5). This Court must view the evidence

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in a light most favorable in sustaining the judgment, and will not substitute its judgment for the lower court.¹ An appellate court affords great weight to the trial court's assessment of witnesses' credibility and will not reverse the trial court's weighing of evidence absent clear error.²

When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court examines the record only to determine whether substantial evidence exists to support the action of the lower court.³ The Arizona Supreme Court has explained in *State v. Tison*⁴ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.

If conflicts in evidence exist, the appellate court resolves such conflicts in favor of sustaining the judgment and against the appellant.⁵

A.R.S. § 28-815(A)(5) states in part:

A person riding a bicycle on a roadway at less than the normal speed of traffic at the time and place and under the conditions then existing shall ride as close as practicable to the right hand curb or edge of the roadway, except under any of the following situations:
...(4) If the lane in which the person is operating the bicycle is too narrow for a bicycle and a vehicle to travel safely side by side within the lane.

A.R.S. § 28-735(A) requires a driver driving in the same direction as a bicyclist to exercise due care when overtaking and passing the bicyclist. This is done by "leaving a safe distance between the motor vehicle and the bicycle of not less than three feet until the motor vehicle is safely past the overtaken bicycle."

In his memorandum the appellant argues that the lower court incorrectly held that he had a duty to the drivers in the center lane, i.e. that he had a responsibility to ensure that they were

¹ *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

² *In re: Estate of Shumway*, 197 Ariz. 57, 64, 3 P.3d 977, 984 (1999), review granted in part, opinion vacated in part, 198 Ariz. 323, 9 P.3d 1062 (2000).

³ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 52, 961 P.2d 449, 450 (1998); *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

⁴ *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

⁵ *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

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able to maintain a three feet distance from him on the roadway. He also argues that the lower court incorrectly held that A.R.S. § 28-815(A)(4) required him to ride his bicycle in the middle of the curb lane when that lane was too narrow to allow both him and another car to travel safely side by side.

Title 28 of the Arizona Revised Statutes sets out the law covering the operation of motor vehicles and bicycles on Arizona roads and highways. Article 7 of Title 28 covers a motor vehicle driver's obligation to drive on the right side of the roadway, and duties when overtaking and passing others. The duty imposed in A.R.S. § 28-735(A) is applicable to drivers of motor vehicles not bicyclists. Article 11 of Title 28 covers a bicyclist's duty when operating a bicycle on a road way. A.R.S. § 28-812 states:

A person riding a bicycle on a roadway or on a shoulder adjoining a roadway is granted all of the rights and is subject to all the duties applicable to the driver of a vehicle by this chapter..., except special rules in this article and except provisions of this chapter and chapters 4 and 5 of this title that by their nature can have no application.

The exception therefore listed in A.R.S. § 28-815(A)(4) is applicable to bicyclists not motor vehicles. Nowhere in the statute's exception does it require the bicyclist to ensure that a motor vehicle driver is able to maintain a three feet distance from him when the driver is in a different lane. The lower court in this case, therefore abused its discretion in finding the appellant responsible for the charged violation.

IT IS ORDERED reversing the finding of responsibility and sanction imposed by the Tempe City Court on January 17, 2008.

IT IS FURTHER ORDERED remanding this matter back to Tempe City Court for all further and future proceedings, if any, in this case.