SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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SANFORD F. YOUNG,

Index No. 111675/06

Petitioner,

vs.

CITY OF NEW YORK DEPARTMENT OF FINANCE
PARKING VIOLATIONS ADJUDICATIONS

Respondents.

For a Judgment Under Article 78 of The Civil Practice Law and Rules to Vacate the Final Adjudication and Administrative Appeal against Petitioner.

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EMILY JANE GOODMAN, J.:

This is the unusual case of a parking violation summons reaching the Supreme Court.

Petitioner Sanford F. Young brings this Article 78 proceeding to annul the determination of respondent New York Department of Finance ("DOF") Parking Violations Bureau ("PVB") Appeals Board dated May 22, 2006, which upheld a finding of guilt for parking during restricted hours.

On November 29, 2005, a Notice of Parking Violation (the "summons") was issued to petitioner's vehicle as it sat parked across from 1330 First Avenue in Manhattan. The summons charged petitioner with violating the weekday prohibition against parking

in that area between the hours 4 and 7 p.m. The summons noted the time of the offense as 6:59 p.m.

On December 9, 2005, petitioner entered a plea of not guilty through respondent's website and requested an online hearing. In the field provided to explain the asserted defense, petitioner made the following statement:

> "A New York Minute" The ticket, which says I was parked at 6:59 PM in a "No Parking... 4P-7P" area is absurd and wrong! Knowing full well -- as a life long New Yorker and lawyer -- that it is not legal to park on the Avenues until 7:00PM, and that some officers write tickets in the last few, I did not park my car until a couple of mins past 7:00. I am certain it was past 7:00 because I was watching my car clock -- which is in the instrument panel. I also know that the clock I accurate because I synchronize it with my cell phone which time is set by Verizon and my watch. Therefore, I respectfully ask that the summons be dismissed. Thank you.

By letter dated December 21, 2005, DOF's Adjudication Bureau acknowledged receipt of petitioner's request for a hearing and offered to settle for a fine reduced from $65 to $43. Petitioner did not accept the offer. On March 10, 2006, Administrative Law Judge John F. MacKay, Jr. issued a Decision and Order finding petitioner guilty. The ALJ stated, in pertinent part:

> The respondent has been charged with violating Traffic Rule 4-08(d) which prohibits parking a vehicle in a violation of the restriction posted on signs, markings or traffic control devices. Respondent is not persuasive that he did not park until after the restriction ended.

Petitioner appealed the Decision and Order by letter dated March 28, 2006. Petitioner argued, inter alia, that the respondent failed to establish the charge by substantial credible evidence or to overcome the burden which arose from his denial of the allegations of the summons. On May 22, 2006, the Appeals Board upheld the ALJ's decision, finding that there was "no error of fact or law." This Article 78 proceeding followed.

The petition is granted and the summons is dismissed. Pursuant to Vehicle and Traffic Law ("VTL") § 240(b) and 19 Rules of the City of New York ("RCNY") § 39-08(e), "[n]o charge may be established except upon proof by substantial evidence." Although under VTL § 238(1) and 19 RCNY §39-08(f)(4) the summons acts as prima facie evidence of the facts contained therein (see, Wheels, Inc. v PVB, 185 AD 110, 112-13 [1st Dept 1992]), it does not create a presumption of guilt but merely shifts the burden of proof to the alleged violator (see, Gruen v PVB, 58 AD2d 48, 49 [1st Dept 1977]; Matter of Heisler v Atlas, 69 Misc 2d 911 [Sup Ct NY Co 1972]). If the petitioner submits testimony refuting the charges that is "not patently incredible," then the summons must be dismissed absent the submission of additional evidence by the respondent to meet its ultimate burden (see, Gruen, supra, Heisler, supra).

In this case, petitioner's online statement disputing the allegation of parking during prohibited hours overcame the prima

facie case established by the summons. Petitioner's testimony regarding how he checked the time before parking was sufficiently detailed and cannot be characterized as "patently not credible." At a minimum, it created a question of fact which shifted the burden to respondent. Insofar as respondent failed to counter petitioner's showing, the ALJ and the Appeals Board erred in upholding the summons.

Respondent attempts to distinguish Gruen and Heisler by asserting that the petitioners in those cases submitted "sworn detailed testimony." As noted above, the issue is whether petitioner's account was "not credible." There is nothing about his statement that he parked "a couple min[utes] past 7:00" (as opposed to 60 seconds earlier, i.e., 6:59) that defies belief. Respondent's speculative challenge to the accuracy of the car clock merely raises an additional question of fact, a question that respondent did not raise on the record below.

Finally, respondent's suggestion that the sworn summons must prevail over petitioner's unsworn online statement is without merit. First, no objection was raised in the proceedings below. The ALJ did not reject petitioner's statement as unsworn but merely found, incorrectly, that it was not sufficiently "persuasive" to shift the burden of proof. Second, respondent affirmatively invited written testimony to be submitted through its website. All such statements are of necessity unsworn, and

under the standard respondent proposes the sworn summons would always prevail. Under this standard, compliance with respondent's online procedures would be rendered an exercise in futility, a result which would constitute a gross violation of the driving public's due process rights and would be an illusory alternative to a paper or in-person response.

The Court need not comment on the policy and/or practice of issuing a summons seconds before the permissible time, even if that had been what occurred.

Accordingly, it is

ORDERED and ADJUDGED, that the petition is granted to the extent that the decisions dated March 10, 2006 and May 22, 2006 are vacated, and the summons is dismissed; it is further

ORDERED and ADJUDGED, that Petitioner, having an address at 225 Broadway, Suite 2008 New York New York 10007, do recover from respondent the amount of $65.00 (the fine paid by Petitioner), plus interest from the date of this decision, plus costs and disbursements as taxed by the Clerk of the Court.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: June 13, 2007

ENTER:

/S/

J.S.C.