

MANDATE

Certified and Issued as Mandate Under NH Sup. Ct. R. 24

Timothy A. Gudas

Clerk/Deputy Clerk

12-9-2021

Date

THE STATE OF NEW HAMPSHIRE**SUPREME COURT**

In Case No. 2021-0045, Femi Isijola v. Director, New Hampshire Division of Motor Vehicles, the court on December 9, 2021, issued the following order:

Supreme Court Rule 22(2) provides that a party filing a motion for rehearing or reconsideration shall state with particularity the points of law or fact that he claims the court has overlooked or misapprehended.

We have reviewed the claims made in the motion for reconsideration and conclude that no points of law or fact were overlooked or misapprehended in our decision. Accordingly, upon reconsideration, we affirm our November 18, 2021 decision, which affirms the trial court's final decision on the merits as to all claims raised by the plaintiff on appeal, and deny the relief requested in the motion.

Relief requested in motion for reconsideration denied.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Timothy A. Gudas,
Clerk**

Distribution:

Clerk, Merrimack County Superior Court, 217-2020-CV-00533

Honorable Andrew R. Schulman

Mr. Femi Isijola

Jessica A. King, Esquire

Attorney General

Lin Willis, Supreme Court

File

MANDATE

Certified and Issued as Mandate Under RSH Sup. Ct. R. 24

Timothy A. Gudas
Clerk/Deputy Clerk

12-9-2021
Date

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2021-0045, Femi Isijola v. Director, New Hampshire Division of Motor Vehicles, the court on November 18, 2021, issued the following order:

Having considered the brief and reply brief of the plaintiff, Femi Isijola, the memorandum of law of the defendant, the Director of the New Hampshire Division of Motor Vehicles, and the record submitted on appeal, including the trial court's well-reasoned order, the court concludes that oral argument is unnecessary in this case, see Sup. Ct. R. 18(1), and that the plaintiff has not established reversible error, see Sup. Ct. R. 25(8); see also Gallo v. Traina, 166 N.H. 737, 740 (2014).

Affirmed.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Timothy A. Gudas,
Clerk**

Distribution:

Clerk, Merrimack County Superior Court, 217-2020-CV-00533
Honorable Andrew R. Schulman
Honorable Tina L. Nadeau
Mr. Femi Isijola
Jessica A. King, Esquire
Attorney General
Carolyn A. Koegler, Supreme Court
Lin Willis, Supreme Court
File

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack County

Merrimack Superior Court

Femi Isijola a/k/a Philip Mark

v.

Director, NH DMV

217-2020-CV-00533

FINAL ORDER

This matter is a statutory appeal from a final decision of the Director of the Division of Motor Vehicles. RSA 263:76. The Director revoked plaintiff Femi Isijola's operating privileges and registrations after finding that he made materially false statements in his applications. RSA 260:10; RSA 261:178; N.H. Code Admin. Rules Saf-C 204.15(a)(6), (c) and (g). This finding was made following an evidentiary hearing before a Department of Safety hearings examiner.¹

¹The procedural history is somewhat more nuanced. On May 27, 2020 the investigating trooper filed a Request For Administrative Action with the Director seeking the immediate suspension of plaintiff's license and registration. This request was accompanied by the trooper's narrative report. Upon receipt of the trooper's Request and narrative report, the Division of Motor Vehicles generated a document captioned "Red Card Request." The Red Card Request indicated that the relief requested was "immediate suspension." The Director—in her own, personal, wet-ink handwriting—ordered the disposition of "I/S," which the court understands to mean "immediate suspension."

However, while plaintiff's registration was immediately suspended, his license was not suspended or revoked until he had the benefit of an evidentiary hearing. This is what the relevant statutes provide:

Continued on next page

This court's scope of review is narrow and deferential. The court cannot reconsider the facts *de novo*, but is instead limited to determining whether the Director's decision was "unreasonable or unlawful." RSA 263:76. The Director's findings of fact are *prima face* lawful and reasonable and Isijola bears the burden of proof. *Id.*

I.

Isijola first argues that the evidence presented at his administrative hearing was insufficient to support a finding that he made materially false statements. This argument fails because the evidence was not merely sufficient but overwhelming.

The hearings examiner heard testimony from both the Investigating trooper and Isijola. The hearings officer also considered documents that were attached to the trooper's report including (a) official records and emails from the New Hampshire and Rhode Island Divisions of Motor Vehicles and (b) records from a Rhode Island DMV

Continued from previous page

(A) RSA 261:178 permits the Director to suspend registrations based upon satisfactory evidence that the owner of a vehicle has made a false statement in the application for registration. The owner can then request a hearing pursuant to RSA 261:6.

(B) RSA 261:10 permits the Director to suspend and revoke both registrations and licenses, "after hearing" upon satisfactory evidence that false statements were made in an application.

Pursuant to RSA 261:178, the Director suspended plaintiff's registration effective June 15, 2020. Plaintiff immediately requested a hearing. A hearing was then scheduled to address both (a) suspension of registration under RSA 261:178 and (b) suspension or revocation of license and registration under RSA 260:10. The hearing was held on August 5, 2020. The Hearings Examiner issued her final order revoking plaintiff's license and revocation on September 14, 2020.

Plaintiff then filed the instant appeal to Superior Court on October 2, 2020. The court held an oral argument on December 3, 2020.

investigation with attached records from the Rhode Island Probate Court. There were no objections to the admissibility of evidence. See generally, N.H. Code Admin. Rule 203.19 (“(a) Administrative hearings shall not be bound by common law or the rules of evidence. (b) All relevant evidence shall be admissible. (c) Evidence may include, but shall not be limited to: (1) Depositions; (2) Affidavits; (3) Official documents; and (4) Testimony of witnesses.”).

The hearings officer reviewed a November 2016 petition filed by Isijola in the Rhode Island Probate Court to legally change his name to “Femi Easyjay Isijola.” Although the resulting Probate Court order was not admitted, Isijola testified that the name change was approved and that, as of November 2016 his name had become “Femi Easyjay Isijola.” Isijola has not legally changed his name again. Thus, his legal name remains “Femi Easyjay Isijola.”

Prior to November 2016, Isijola’s legal name was “Philip Israel Mark.” This was established by his Rhode Island Probate Court petition as well as his own testimony. Additionally, there was reference in the Rhode Island paperwork to the fact that Isijola had obtained a U.S. Passport under the name “Philip Israel Mark” prior to 2016.

There was some dispute at the hearing—although it is not material—as to whether “Philip Israel Mark” was Isijola’s birth name. The trooper opined that it was, based on an unsourced assumption in the Rhode Island investigators’ report. However, Isijola testified (and previously told the Rhode Island investigators) that (a) his birth name was “Isijola”, (b) he legally changed his name to “Philip Israel Mark” in 2007 by a petition filed in the New Hampshire Probate Court, and (c) he then legally changed his name to “Femi Easyjay Isijola” in November 2016 by his petition in the Rhode Island

Probate Court.² All that is important to this case, however, is that Isijola's legal name became "Femi Easyjay Isijola" in November 2016 and has remained so ever since.

In July 2017, Isijola applied for and received a New Hampshire driver's license using his former name of "Philip Israel Mark." That license expired on February 16, 2018. The record is silent as to why the license was valid for only one year. However, on February 15, 2018 Isijola filed another application for a New Hampshire driver's license along with an application for a New Hampshire vehicle registration. Both applications were under his former name "Philip Israel Mark." Isijola did not disclose that this was not his legal name. He did not disclose that his legal name was "Femi Easyjay Isijola."

The February 15, 2018 license renewal application contained two other matters of concern. First, Isijola listed his mailing address as a P.O. Box and a physical address on Mammoth Road in Hooksett. Eleven months later, in December 27, 2018, Isijola filed a Record Change Request that listed a new physical and mailing address on Hooksett Road in Hooksett. Two months after that, in February 2019, Isijola filed another Record Change Requested indicating that he had changed units in the same Hooksett Road development.³ The trooper looked into whether Isijola had ever lived at

²In connection with this statutory appeal, Isijola provided this court with a copy of a 2007 Certificate of Name Change issued by the Merrimack County (New Hampshire) Probate Court in In Re: Name Change Of Philip Israel Mark, 2007-0063. This certificate states that Isijola's birth name was "Olumfemi Abiola Isijola" and that a name change to "Philip Israel Mark" was approved on January 27, 2007. The New Hampshire Probate Court record is not part of the certified record and was not considered by the Hearings Examiner.

³Both Record Change Request forms include a section for name changes. Isijola left that those sections blank and continued to use the name "Philip Israel Mark."

the Mammoth Road address. He spoke with the landlord, and the former landlord, and learned that the apartment had been rented to the same woman for several years and that neither landlord had ever heard of any the names that Isijola has used.

Isijola testified that he once actually lived at the Mammoth Road address. However, he provided no details (such as when he first moved in or his relationship with the tenant) and he did not explain why he used the P.O. Box as a mailing address. He claimed to have some document(s) that could help prove he had resided at the Mammoth Road address. However, he did not describe those documents and they were not included in the certified record or referenced in the Hearings Examiner's report.

The second problem with Isijola's February 15, 2018 license application was that he stated he did not currently hold, and had not held, a license from another state for the past twelve months. In fact, as Isijola conceded at the hearing, he had a current Rhode Island license under the name "Femi Isijola." The history of his Rhode Island license is important:

-Isijola obtained his Rhode Island license in June 2017. This was about a month before he obtained his New Hampshire license in July 2017 (and there is no indication in the record that he disclosed his Rhode Island license at that time). He used the name "Femi Easyjay Isijola" for his Rhode Island license and the name "Philip Israel Mark" for his New Hampshire license. Thus, he almost simultaneously obtained licenses from two states, under two different names, claiming two different addresses as his legal residence.

-Then in February 2019 Isijola made contradictory statements to the New Hampshire and Rhode Island Divisions of Motor Vehicles. As noted above, in New Hampshire, using the name "Philip Israel Mark," he filed a Record Change Request to notify the NH DMV that he had moved from one unit in a Hooksett Road development to another. That same month, in Rhode Island, Isijola provided sufficient documentation to obtain a Real-ID compliant Rhode Island license under the name "Femi Easyjay Isijola." To obtain a Real ID complaint driver's license, an applicant must furnish satisfactory proof of residence in the state of issuance.

-In 2020 the Rhode Island Division of Motor Vehicles cancelled Isijola's Rhode Island license because he had been issued a Massachusetts license. More particularly, in March 2019 Isijola applied for and received a Massachusetts driver's license under the name "Femi Easyjay Isijola" with the same social security number. In a series of increasingly strongly worded emails to the Rhode Island authorities, Isijola insisted that (a) he was entitled to his Rhode Island Real ID compliant license and (b) he was a resident of Rhode Island. Eventually, in March 2020, Isijola spoke in person with a DMV enforcement officer. The investigator's report states that:

Subject was asked if he was a current Rhode Island resident and if he had been the entire duration between the period Rhode Island issued him an operator license on 6/02/17 and [the] present. The subject answered "he is and had been." Subject was then asked if he ever went by a different name or alias, he responded that "he hadn't, never." Subject was questioned on residences he used in Massachusetts and Rhode Island. Subject claimed to have lived in Rhode Island

at least the last 2 (two) years. He listed various Massachusetts residences and mailing addresses as seen in the RILETS search results without prompt.

-Isijola told the Rhode Island enforcement officer that he did not apply for or receive a Massachusetts license in March 2019 and, therefore, claimed to be the victim of identity theft). However, Isijola testified at the instant New Hampshire hearing that he did, in fact, apply for and receive a Massachusetts license using the address 68 Main Street, Leominster, MA.

As noted in Footnote 1, Isijola's administrative hearing in this case was held on August 5, 2020. On that date he testified that he left Rhode Island "in the middle of, uh, this—of, uh March" and then became a "fulltime" resident of New Hampshire. Thus, Isijola effectively admitted that he had was not a fulltime New Hampshire resident until March 2020. In fairness, Isijola was not asked to clarify his testimony on this point.

At the time of the hearing, in August 2020, Isijola was living with his mother in Hookset at an address that he never gave to the Division of Motor Vehicles. However, when notified of the address on the morning of the hearing, the investigating trooper went to there to investigate. He spoke with a woman who identified herself as Isijola's mother. The woman said that Isijola was in fact living at that address. The trooper testified that the woman wouldn't tell him how long Isijola had been living there. Isijola did not clarify the matter during his testimony.

Based substantially on this evidence, the hearings examiner found, on behalf of the Director, that Isijola provided false information in his license and registration applications.

The hearings examiner's findings are fully supported by the evidence. The testimony (including Isijola's testimony) and exhibits clearly proved that he simultaneously held driver's licenses from three states, under two names, using three different addresses. More important, the evidence proved beyond all cavil that Isijola (a) did not use his legal name in his New Hampshire applications and (b) wrongly stated that he did not have a current license from another state.

The evidence is less pellucid, yet sufficient to support the hearings examiner's finding under the preponderance of evidence standard, that Isijola did not maintain a primary physical residence at the Mammoth Road address listed on his February 2018 license application.

II

Isijola's second argument is that the administrative proceeding was fundamentally unfair due to ineffective assistance of counsel. In a criminal case, effective assistance of counsel is guaranteed by the Sixth Amendment to the United State Constitution and Part 1, Article 15 of the New Hampshire Constitution. Therefore, a criminal conviction may be vacated if the defendant received deficient and prejudicial representation. However, this is not a criminal matter and Isijola's loss of license was not a criminal sentence. See, e.g., State v. Bowles, 113 N.H. 571 (1973) (motor vehicle habitual offender certification and the attendant revocation of driving privileges is civil and regulatory, rather than criminal); Lopez v. Director, New Hampshire Div. of Motor Vehicles, 145 N.H. 222 (2000) (administrative license revocation proceedings are civil in nature). In civil cases, there is no constitutionally grounded right to effective assistance of counsel and litigants are bound by the actions of their attorneys. As the U.S.

Supreme Court tersely put it, "[C]lients must be held accountable for the acts and omissions of their attorneys." Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 396 (1993). See, Manchester Housing Authority v. Zyla, 118 N.H. 268, 269 (1978) ("It is firmly established that action taken in the conduct and disposition of civil litigation by an attorney within the scope of his authority is binding on his client."); Paras v. City of Portsmouth, 115 N.H. 63, 67 (1975) ("An attorney is the agent of the client, provided his acts are within the scope of his authority. [citation omitted]. Plaintiff is, therefore, bound by the acts of his attorney, including acts of omission or neglect.").

That said, there was some indication at Isijola's hearing that the agency relationship between attorney and client had deteriorated to a point of no return. During Isijola's direct examination he accused counsel of "working in consultant with the, uh, uh, with the Trooper [sic]." (Transcript p.25). Isijola then addressed counsel, while he was in the midst of his testimony, to say, "[Y]ou wanted me to go and get arrested. And that's why you want to continue this, so you get me arrested. Um, I want this on the record because I want the Hearer to hear what is going on, because if I do not say this, it is going to bear on the ground [sic]." (Transcript p. 25). Isijola also accused counsel of giving his address to the trooper so that the trooper could arrest him.

However, the hearings officer had no information prior to the hearing that the relationship between Isijola and his attorney was anything other than placid and:

(a) Neither counsel nor Isijola asked the hearings examiner for a mistrial due to the breakdown of attorney/client communications;

(b) Neither counsel nor Isijola asked the hearings examiner to suspend or continue the hearing (and, indeed, Isijola complained during his testimony that counsel wanted to “get this continued”); and

(c) Isijola never terminated counsel’s representation or told the hearings examiner that he wished to do so.⁴

Therefore, the issue boils down to whether the hearings examiner committed plain error by failing to *sua sponte* suspend the hearing or take other action relating to the status of counsel.⁵ Plain error review should be used sparingly and only when “a miscarriage of justice would otherwise result.” Aranosian Oil Co., Inc. v. State, 168 N.H. 322, 331 (2015) *Id.* (quotation omitted). To find plain error: “(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of [the] proceedings.” *Id.* (quoting State v. Matey, 153 N.H. 263, 266 (2006)). If any one of these four elements is lacking, the hearings’ examiners’ failure to act cannot be reversed as plain error.

In this case, it is not necessary to look beyond the fourth element—i.e., that the error must seriously affect the fairness, integrity or public reputation of the proceedings. During the Superior Court oral argument in this matter Isijola admitted that (a) his legal

⁴Isijola terminated counsel’s representation after the administrative proceeding had concluded, in connection with (a) his failed effort to obtain a Director’s Review (which is a procedural step only available in administrative license suspension cases brought under the implied consent statute, RSA 265-A:33) and (b) this Superior Court appeal.

⁵The court assumes, *arguendo*, that the plain error doctrine applies in statutory appeals to Superior Court under RSA 263:76.

name was "Femi Easyjay Isijola" from November 2016 to the present, (b) he applied for his New Hampshire license under his former name of "Philip Israel Mark," and (c) he knew that he was using a name other than his legal name. Further, there is no dispute that Isijola obtained licenses from Rhode Island and Massachusetts in the manner described above. The only potential *bona fide* dispute of fact was whether Isijola had any connection with the Mammoth Road address on his February 2018 applications. But even if this fact were determined in Isijola's favor, the evidence would still be overwhelming as to whether he provided materially false information in his applications. Therefore, Isijola did not suffer any prejudice with respect to the outcome of the hearing. On these facts, despite the apparent breakdown in the attorney/client relationship, the court cannot find that the hearing was unfair or that the result calls the integrity of the proceeding into question.

For all of these reasons the Director's decision is AFFIRMED and judgment is granted to the Director.

January 26, 2021



Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/27/2021