

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2007-000160-001 DT

07/03/2007

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT  
S. Bindenagel  
Deputy

STATE OF ARIZONA

JOHN M POMBIER

v.

A MELVIN MCDONALD (001)

A MELVIN MCDONALD JR.

MESA CITY COURT  
REMAND DESK-LCA-CCC  
HON J MATIAS TAFOYA  
PRESIDING JUDGE  
MESA MUNI COURT  
245 W 2ND STREET  
MESA AZ 85201  
PAUL THOMAS  
COURT ADMIN  
MESA MUNI COURT  
245 W 2ND STREET  
MESA AZ 85201

**RECORD APPEAL REVERSAL / REMAND**

**Lower Court Case No. 2006042175**

After a trial to the court was conducted on November 21, 2006, Appellant A. Melvyn McDonald was found responsible for a red light violation pursuant to A.R.S. Section 28-645(A)(3)(A). Thereafter, Appellant filed a *Motion To Set Aside Finding Of Responsible* on December 1, 2006, which was later denied by the trial court. Appellant then filed a timely appeal.

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The Superior Court has jurisdiction over this civil appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The court has considered the record of the proceedings from the trial court, exhibits made of record, and the Opening Brief filed by Appellant.

On appeal, the Superior Court views the facts in the light most favorable to sustaining the trial court's judgment. *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180 (1984).

One issue raised by Appellant relates to evidentiary matters.<sup>1</sup> It is noted that he did not raise these objections in the trial court and, ordinarily, may not raise them for the first time on appeal. *See State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980) (absent fundamental error, lack of timely objection operates as a waiver on appeal.); *State v. Thomas*, 130 Ariz. 432, 636 P.2d 1214 (1981). This is further supported by *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) which provided:

Our adversarial system properly and necessarily precludes injection of new issues on appeal. The reason for this well-recognized rule is simplicity itself—without the rule, the system won't work. In extremely limited circumstances, we recognize that some issues may be so important that overriding considerations concerning the integrity of the system will excuse a party's failure to raise the issue in the trial court. This limited exception is known as the doctrine of "fundamental error."

Central to the adversarial process is the right for a party to confront the evidence presented against that party. There is nothing more fundamental than this right and it is questionable, at best, for a substitute person to testify as to information and evidence gathered by another.<sup>2</sup> For there also to be a lack of disclosure of the fact that the testifying person lacked personal knowledge must be deemed fundamental error since it goes to the heart of "the integrity of the system."

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<sup>1</sup> At trial, Appellant asked two questions of the testifying officer. In response to the first question regarding another vehicle, the officer testified: "*I cannot answer that, Sir. I only have information of yours, but it's very possible.*" (Transcript of Proceedings, page 5, lines 12-20). Appellant did not press the issue thereafter as to the information that this officer had regarding this violation.

<sup>2</sup> Appellant alleges that after the conclusion of the trial court proceeding, the testifying officer disclosed that she "*played no role in the inspection of the equipment or in the determination of the validity of the citation. She explained to McDonald that the officer directly involved in the investigation was ill and that she had covered for that person. She was merely reiterating what she believed the sick officer would have testified to had that officer been well on the date of trial.*" (Opening Brief, page 3, lines 5-9). This information is part of the record of the trial proceeding as it was the subject of the *Motion To Set Aside* filed by Appellant.

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Appellant has raised other grounds for his appeal. Those need not be addressed further as the foregoing issue fully disposes of this matter.

**IT IS THEREFORE ORDERED** remanding this matter to the Mesa City Court with instructions to set aside the finding of responsibility and for entry of an order dismissing the citation against Appellant. Further, any fines, sanctions or penalties paid by Appellant shall be refunded to him.