

El-Bayeh v. Mass. Dep't of Transp.

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Decided Apr 30, 2021

20-P-728

04-30-2021

Mikhael EL-BAYEH v. MASSACHUSETTS
DEPARTMENT OF TRANSPORTATION.MEMORANDUM AND ORDER PURSUANT
TO RULE 23.0

After receiving a speeding ticket on a portion of Interstate Highway 3 (Route 3) near Burlington on which he regularly commutes, the plaintiff brought this action for a declaratory judgment and injunctive relief. In his complaint, he alleges that the defendant Massachusetts Department of Transportation (MassDOT) "special speed regulation" SSR #7659 (SSR), which sets the fifty-five miles per hour (mph) speed limit posted on this portion of Route 3, was unlawfully promulgated. In particular, he alleges that under MassDOT procedures and regulations, before a special speed regulation may be issued a traffic study including a speed study must be conducted. See Massachusetts Department of Transportation, Procedures for Speed Zoning on State Highways and Municipal Roads.² Those regulations provide that posted speed limits should in general be set based on a speed study that determines what the eighty-fifth percentile of traffic speed is under optimal conditions. See *id.* at § 5.f.

² A copy of these regulations can be found at <http://whu.keyan123.cn/rwt/WESTLAW/https://P75YPLUNMF3YGLUHN75A/doc/procedures-for-speed-zoning-on-stateand-municipal-roadways/download>.

The complaint alleges that the plaintiff submitted a public records request to ascertain whether a speed study had been conducted prior to the promulgation of SSR #7659 in 1996. He received no "responsive records indicating that SSR #7659 was supported by a speed study or promulgated in accordance with MassDOT [p]rocedures." He alleges that there is no evidence that a speed study was done prior to the promulgation of the SSR in 1996, and that after substantial work was completed upgrading this stretch of Route 3 so that its design speed was seventy mph, "MassHighway executed a speed study on U.S. Route 3 and issued an internal memorandum advising that the [fifty-five] mph posted speed limit was not in conformance with law and was a safety concern." He alleges that officers of the defendant Massachusetts State Police were improperly responsible for the decision not to raise the speed limit and argues that the posted speed limit must be consistent with the speed study. He seeks declarations, including that the speed limit was unlawfully promulgated and is unenforceable, and injunctive relief, including a requirement that MassDOT bring the speed limit into compliance with the law and that in the meantime it not be enforced.

The motion judge allowed the defendant's motion to dismiss on the basis of an absence of an actual controversy sufficient to allow invocation of the declaratory judgment act, see *G. L. c. 231A, § 1*, a lack of standing, see *New Bedford Educators Ass'n v. Chairman of the Mass. Bd. of Elementary & Secondary Educ.*, 92 Mass. App. Ct. 99, 107-108 (2017), and failure to state a claim upon

which relief could be granted. See [Mass. R. Civ. P. 12 \(b\) \(6\)](#), 365 Mass. 754 (1974). The plaintiff has appealed. "We review the denial of a motion to dismiss de novo," taking all the factual allegations in the complaint as true and making all the reasonable inferences that can be drawn therefrom in favor of the nonmoving party, here the plaintiff. [Curtis v. Herb Chambers I-95, Inc.](#), 458 Mass. 674, 676 (2011).

MassDOT does not argue that the facts alleged amount to compliance with the regulations in promulgating the SSR or the posted speed limit, nor does it argue that it is permitted to promulgate an SSR in the absence of a speed study, or in this case, a speed limit that is lower than is consistent with the speed study. Rather, MassDOT notes that a facial challenge to a public safety regulation like a speed limit is an uphill battle, that rational presumptions must be made in favor of its validity, and that regulations must be deferred to. In its brief, MassDOT says that to be valid, the regulation must only be reasonably related to the purposes of the enabling legislation, and that MassDOT has extraordinarily broad power to manage highways as it sees fit and to set regulations for speed limits if it so chooses: "MassDOT saw fit to set and maintain a speed limit of [fifty-five] mph on Route 3. Setting a speed limit of [fifty-five] mph is reasonably related to MassDOT's legislative mandate to 'administer, control and operate the state highway system.' [G. L. c. 6C, § 3](#) [13]. To state a plausible claim, Mr. El-Bayeh would have had to allege facts tending to show that there is no reasonable relationship between SSR #7659 and these broad grants of statutory authority." These arguments suggest that MassDOT may impose any reasonable speed limit, even if it fails to follow the regulatory procedure set out for the adoption of speed limits. But MassDOT cites no authority for the proposition that it may adopt an SSR or a posted speed limit without following its own regulations, including undertaking and utilizing a speed study, nor do they assert, at least so far as

we understand their brief, that failure to conduct a speed study or to impose a speed limit consistent with it may cause no injury because, regardless of its results, the speed set by MassDOT for any particular road is within its discretion. And indeed, at argument, counsel conceded that MassDOT must comply with its own regulations in promulgating SSRs and speed limits.

In this case, however, we need not resolve any of the questions presented by the merits of the plaintiff's claim, because it founders on the preliminary matter of standing. We are faced with a question of who might have standing to enforce the regulation about promulgation of the SSR and the posting of the speed limit, and what form a challenge to the SSR and the speed limit might take. It is not enough to say that the "true" speed limit is always what is "reasonable and proper." [G. L. c. 90, § 17](#). Although that is true, and it does permit one charged with speeding perhaps to avoid conviction in some circumstances notwithstanding a violation of the speed limit, violation of a posted limit is prima facie evidence of failure to drive at a reasonable and proper speed, and it is of course the primary basis upon which speeding violations are found.

It is clear, and counsel for MassDOT agreed at argument, that one charged with speeding might in defense of a speeding citation challenge the lawfulness of the promulgation of the posted speed limit sign. That is one avenue available for redress from an unlawfully promulgated speed limit. And there can be no doubt that one arrested for speeding on the basis of such a posted limit has standing to challenge that posted limit. The plaintiff, however, did not do so in contesting his speeding ticket, and he argues that, since MassDOT is not a party to speeding cases, and such cases provide no mechanism for invalidating the continued use of unlawfully promulgated speed limits or ensuring that they are promulgated only in accordance with the controlling regulations, defense of a single speeding ticket provides an inadequate remedy for those, like him,

credibly threatened by citation for violation of what he alleges is an unlawfully promulgated regulation.

MassDOT agrees that it must follow its own regulations. But at argument it could not identify any party who, in its view, would have standing to challenge its promulgation of an unlawful speed limit. It argues that it cannot be that anyone who drives on Route 3 in Burlington can bring an action challenging the speed limit, and we agree that there must be some particularized harm done to a putative plaintiff in order for him or her to have standing. In this Commonwealth, though, our law, at the least, disfavors rights without remedies. Indeed, certiorari actions are available precisely when there is "no other available remedy." Rosenfeld v. Board of Health of Chilmark, 27 Mass. App. Ct. 621, 626 (1989). Likewise, "[t]he purpose of the declaratory judgment statute, G. L. c. 231A, is 'to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations.'" G. L. c. 231A, § 9 "[A] complaint for declaratory relief is an appropriate way of testing the ... propriety of practices involving violations of rights, which are consistent and repeated in nature." Nelson v. Commissioner of Correction, 390 Mass. 379, 388 n.12 (1983), citing G. L. c. 231A, § 2." Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 724-725 (2016).

But even were we to assume someone has standing who has already been charged with speeding as a result of what he alleges is an unlawful speed limit on a particular stretch of highway, and who continues to use this same stretch of highway that he alleges has an unsafely low speed limit regularly for his commute, thereby exposing him to the risk that by driving safely he will again subject himself to a civil citation, the plaintiff in this case would still lack standing to bring this claim.³

³ We note that in an unpublished memorandum and order pursuant to our former rule 1:28, Hingham Police Dep't v.

Zotos, Mass. App. Ct., 11-P-1716 (May 16, 2012), which has no precedential value and is not raised by MassDOT, but which is addressed by the plaintiff in his brief, a panel of this court held that there was no prejudice to an individual charged with speeding who alleged that the speed limit was unlawfully promulgated where the speed he was traveling was above the speed limit that would have been applicable under G. L. c. 90, § 17, had the roadway been unposted. The maximum speed on an unposted roadway in the Commonwealth is fifty mph. See G. L. c. 90, § 17. Assuming without deciding that Zotos was decided correctly, we do not think it is applicable to a civil action such as this, as it would render every speed limit over fifty mph that is too low immune from challenge. In addition, it would not in any event be applicable here, since the plaintiff is alleging that under a 2005 speed study the speed limit should have been raised above fifty-five mph.

The rule we have assumed would theoretically apply only to those who have been charged with speeding as a result of the allegedly unlawfully low speed limit. Although the plaintiff does not advocate for a particular speed limit, he asserts in his complaint that the "design speed" of Route 3 is seventy miles per hour,⁴ suggesting that he believes this could be an appropriate speed limit (the highest speed limit currently posted anywhere in the Commonwealth is sixty-five miles per hour).⁵ Taking judicial notice, as we are allowed to do, see Flynn v. Brassard, 1 Mass. App. Ct. 678, 681 (1974), of the record of the plaintiff's case before this court challenging his speeding ticket, Massachusetts Dep't of State Police v. El-Bayeh, Mass. App. Ct., 20-P-700 (February 26, 2021) (unpublished opinion under rule 23.0), the charge against him was based on his traveling ninety-six miles per hour. Even if we assume, for the sake of argument, that seventy miles per hour is indeed the proper speed limit for Route 3, and we also assume that, as a practical matter, the police

generally only stop people going more than ten miles per hour over the speed limit, that, at most, would afford standing to someone ticketed for traveling eighty miles per hour or less. The plaintiff was driving ninety-six miles per hour, twenty-six miles per hour above a speed limit he appears to believe is appropriate, one that is five miles per hour above the highest speed limit currently posted in Massachusetts. In such circumstances, his speeding ticket was not caused by the allegedly unlawfully low posted speed limit; he would have received a ticket even if the speed limit were raised to seventy -- or even eighty -- miles per hour.

⁴ The plaintiff explains in his complaint that the "design speed" is "the speed at which geometric features of the highway will reasonably accommodate a poor driver, in a poor vehicle, when the road surface is wet."

⁵ Although there appears to be no maximum speed limit in Massachusetts, *G. L. c. 90, § 17A*, provides, "[u]nless otherwise prohibited by federal law, the maximum speed for motor vehicles traveling on interstate highway route 90, the Massachusetts Turnpike, between the New York state border and the Westfield interchange, and from the Ludlow interchange to the Auburn interchange,

interstate highway route 91 from the Vermont border to Northampton, Exit 21, and interstate 95 from the Newbury interchange 56 to the Danvers interchange 50, shall be sixty-five miles per hour." For context, as of February of 2021, the maximum posted speed limit in Massachusetts is sixty-five miles per hour, and the highest maximum posted speed limit nationwide is eighty-five miles per hour on certain portions of highway in Texas. See Insurance Institute for Highway Safety: Highway Loss Data Institute, Maximum Posted Speed Limits by State, <http://whu.keyan123.cn/rwt/WESTLAW/htps/P75YPLUJNFVHGLUQPJUB/topics/speed/speed-limit-laws#fn8>.

Therefore, because the plaintiff lacks standing, the order allowing the motion to dismiss is affirmed.⁶

⁶ We express no opinion whether a party with standing would properly bring a challenge to a speed limit as unlawfully promulgated by way of an action in the nature of certiorari, or by way of an action seeking a declaratory judgment, as the plaintiff did here.

So ordered.

Affirmed.
