STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. CUM-24-43

STATE OF MAINE,

Appellee

v.

CHRISTOPHER RAY,

Appellant.

On Appeal from the Bureau of Motor Vehicle Violations
Docket No. T4176631

REPLY BRIEF OF APPELLANT CHRISTOPHER RAY

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ARGUMENT

I. Overview

The State's arguments in support of upholding the District Court's decision, especially those surrounding the Court's interpretation of 29-A § M.R.S. 2063(2), are generally unsupported by the language of 29-A § M.R.S. 2063, uncorroborated by other portions of the Motor Vehicle and Traffic Code, inconsistent with applicable Maine case law, and lack merit. The State is also unable to remedy the problems associated with the dearth of competent evidence in the record to support actual and presumed factual findings and the Court's decision against Mr. Ray. Although the State attempts to get past these and other difficulties by claiming, among other things, that Mr. Ray never made or preserved certain 2063 arguments, attempting to shift burdens of proof, and reframing arguments, these efforts do little to advance its positions. Further, the State's responses to Mr. Ray's obvious error argument—which was focused on violations of Mr. Ray's substantial rights, concerns about prosecutorial duties of candor, injustices arising out of the unlawful July 7, 2023 traffic stop, and acts and omissions at the January 3, 2024 hearing that reflect poorly on the public reputations of the law enforcement community and the judiciary—are unimpressive at best. As such, Mr. Ray maintains that this Court has reason to vacate the judgment against him and remand this matter back to the District Court for judgment in his favor.

II. The State's Arguments in Support of Upholding the District Court's Statutory Interpretations Are Inconsistent with the Plain Language of Section 2063, the Motor Vehicle and Traffic Code, the Rules of Statutory Construction, Maine Case Law & Other Legal Authority.

Instead of sufficiently addressing Mr. Ray's concerns regarding the District Court's explicit misstatements, misinterpretations and misunderstandings surrounding 29-A § M.R.S. 2063, *see* Blue Br. 13-23, or offering any meaningful response to Mr. Ray's argument that the District Court erred and abused its discretion by reading conditions into 29-A § M.R.S. 2063(2) that do not exist, *id.*, the State attempts to save the District Court decision from being vacated by the Law Court by offering an array of new, but unconvincing, arguments on how language in the statute at issue should be read. The State's arguments include unfounded and unsupported claims that: (a) bicyclists should be excluded from 2063's definition of "traffic," (b) the term "way" as used in section 2063(2) includes sidewalks, curbs, unpaved shoulders and other areas and, therefore, the Legislature enacted 2063(2-A) to make it clear that bicyclists were required to ride as far right as practicable on paved shoulders but not those areas, (c) the words "notwithstanding" and "may" as used in section 2063(2-A) mean "consistent with" and "must," respectively, and (d) in the contest of 29-A § M.R.S. 2063(2), "practicable" means "possible," despite applicable Maine case law explicitly holding otherwise. Mr. Ray addresses each of the State's arguments in turn below.

a. Bicycle Riders Are "Traffic" Under Subsection 2063(2).

Recognizing the fatal consequences of its own failure to meet its burden of proof that Mr. Ray was traveling "a speed less than the normal speed of traffic moving in the same direction at that time and place," and the absence of competent evidence in the record to support the District Court's assumed finding on the same, the State now attempts to argue that bicyclists are specially excluded from the definition of "traffic" used in subsection 2063(2). Red Br. 20, f. 15. However, to exclude bicyclists from 2063(2)'s definition of traffic, especially when the State concedes they are generally included in the definition of traffic throughout the rest of the statute and the entire Motor Vehicle Code, is nonsensical, inconsistent with the rules of statutory construction, and contrary to the Legislature's efforts to treat bicyclists as normal members of traffic system with the same rights and responsibilities a motorists unless special exceptions or regulations apply.[1]

The State's assertion that a bicyclist cannot be part of 2063(2)'s definition of traffic "because it is impossible for a bicyclist to operate at less than his own speed" is illogical and inconsistent with the laws in footnote one and the Legislature's intent. Not only is the State's claim patently untrue because it is

[1] More specifically, the Maine Motor Vehicle and Traffic Code, including section 2063, makes it explicitly clear that bicyclists are traffic, are to be expected on Maine roadways, and generally share the same rights and responsibilities as motor vehicle operators, including the right to set, or be part of setting, the normal speed of traffic at any given time or place. 29-A § M.R.S. 101 (preamble) & (83); 29-A M.R.S. § 2063 (generally), 29-A M.R.S. § 2063 (2) & (5).

possible for bicyclists, like motorists, to adjust their speeds and operate at less than (or greater than) their own speed, but the fact that it makes such an argument serves as another example of the State's misunderstandings about bicyclists and the normal role they play in our traffic system. In addition, the State's argument that bicyclists cannot be traffic under 2063(2) because a bicyclist can't go slower then themself mistakenly assumes the presence of only one bicyclist on the roadway, which is often not the case. Bicycle traffic, like motor vehicle traffic, may involve one, ten, sixty or some other number of bicyclists on a way. Accordingly, although it is often the case that the normal speed of traffic is set by multiple users (be they trucks, cars, bicyclists, RVs, skateboarders, motorcyclists, construction vehicles, and/or others), one bicyclist may indeed be normal traffic, and one bicyclist may lawfully set the normal pace of traffic for themself and/or other operators depending on the circumstances, including those set forth in 29-A M.R.S. § 2074.

Finally, it should not be lost on the Court that the State's argument that including bicyclists within 2063(2)'s definition of traffic will create situations where one very slow-moving bicyclist is allowed to set the normal speed of traffic "indefinitely" is a straw man fallacy. While it is true that section 2063 is a traffic safety statute with several provisions and subsections giving bicyclists special rights for their safety, and while it is also true that the statute requires all operators (including bicyclists) to make accommodations for slower bicyclists and/or

bicyclists exercising their subsection 2063(2) rights, the inclusion of bicyclists in 2063(2)'s definition of traffic does not mean, nor has it ever meant, that one slow-moving bicycle is authorized to set the pace of normal traffic indefinitely. 29-A M.R.S. § 2063(2). In sum, bicyclists are traffic under 2063(2), Mr. Ray was traffic under 2063(2) on the morning he was stopped and charged by Mr. Rumsey,[2] and the State has not offered any legitimate reason for the Law Court to hold otherwise.

b. "Way" Is a Key Term That *Is Not* Defined to Include Paved Shoulders and *Is* Synonymous with the Terms "Roadway" and "Lane" As They Are Used in Section 2063.

In the State's further attempts to save the District Court's decision from being overturned on appeal, it claims that key term in the statute at issue is "way" and argues the term includes paved shoulders (but not unpaved shoulders, sidewalks, curbs or other areas) and is not synonymous with the terms "roadway" and "lane," even though the three terms are used interchangeably with one another throughout the statute at issue. *Compare* Red Br. 16-18 *with* 29-A M.R.S. § 2063.[3]

[2] Further, as discussed in Mr. Ray's brief, Mr. Ray was "traffic" operating in compliance with the law. Despite the State's urgings otherwise, there is no competent evidence in the record to support an argument that any rate of speed other than 17-19 mph was the normal rate of speed for the only known traffic moving in the same direction at that time and place (i.e. the two bicyclists and one motorist approaching and traveling through multiple marked crosswalks with yellow warning signs, a school zone, and other locations where operators were legally required to anticipate the presence of children and pedestrians, regardless of whether school was in session). See 29-A M.R.S. §§ 2063(2) & 2074. Nor is there any competent evidence in the record that Mr. Ray was operating at less than the normal rate of speed for the only known traffic moving in the same direction at that time and place As such, just as the State's efforts to claim Mr. Ray was not traffic must fail, so must its efforts to defeat this appeal.

[3] For example, the first sentence of subsection 2063(2) uses the terms "roadway" and "way" interchangeably. A careful read of that same sentence makes it clear that for the subsection 2063(2)

To make its point, the state offered the definition of "way" contained within 29-A M.R.S. § 101 (92) in its brief while conveniently leaving out four key words: "**used for vehicular traffic**." *See* Red Br. 16-17. The full definition of the term "way," as it reads in the Maine Motor Vehicle and Traffic Code, is as follows:

> 'Way' means the entire width between boundary lines of a road, highway, parkway, street or bridge **used for vehicular traffic,**[4] whether public or private.

29-A M.R.S. § 101 (92) (Emphasis added). Further, the definitions of "vehicle" and "traffic" found in the Code and discussed in the footnote below underscore the importance of the language omitted by the State in its brief. Vehicular traffic uses "roadways" and "lanes" for travel, but it is not permitted to use paved shoulders for travel. As such, contrary to the State's urgings otherwise, it makes complete sense to interpret "way" as used in section 2063(2) as synonymous with "lane" and "roadway" because all three places describe locations where vehicular traffic normally travels and conveys (i.e., moves) persons or property. Also, reading "way" as synonymous with "lane" is consistent with the last portion of 29-A

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mandate to apply to a bicyclist, the bicyclist must be operating "upon a roadway." It is not possible for a person "operating a bicycle upon a roadway" to be simultaneously operating as far right as practicable within a paved shoulder. However, because the terms "roadway" and "way" are interchangeable with each other and with the term "lane," it is possible for a person operating a bicycle upon a roadway to also operate as far right as practicable within the way or the lane.

[4] The term "Vehicular traffic" is not defined in section 101 of the Code, but the terms "vehicle" and "traffic" are separately defined. "Vehicle" is defined as "a device **for conveyance of persons or property on a way**" and explicitly "does not include conveyances propelled or drawn by human power." 29-A M.R.S. § 101 (91) (emphasis added). "Traffic" means pedestrians, ridden or herded animals, vehicles, bicycles and other conveyances either singly or together using public way **for travel**. 29-A M.R.S. § 101 (83) (emphasis added).

M.R.S. § 2063(2)(D), which reads: "or a lane of substandard width that makes it unsafe to continue along the right portion of the way." This is yet another portion of subsection 2063(2) that uses the terms interchangeably without reference to or suggestion that paved shoulders are part of the lane or way.[5] Finally, the interpretation urged by Mr. Ray reads harmoniously with 29-A M.R.S. § 2063(2-A), which treats paved shoulders as separate areas from their abutting ways.[6]

c. The State's Interpretation of Subsection 2063(2-A) Is Inconsistent with the Rules of Statutory Construction and Recent Case Law.

In a further effort to claim that paved shoulders form part of the "way" and that bicyclists are required to ride as far right as practicable in them, the State urges the Court to redefine the term "Notwithstanding," which is used to open subsection 2063(2-A), to mean "Consistent with" and argues with no legal or other support for the proposition that the language of subsection 2063(2-A) "clarifies that a bicyclist

[5] In its opposition brief, the State cites 29-A M.R.S. § 2051to argue that the term "way" cannot be read synonymously with "lane" in the context of 29-A M.R.S. § 2063(2) because section 2051 refers to ways as occasionally divided into two or more traffic lanes and, therefore, a way cannot be a single lane and must include paved shoulders. Red Br. 17. What the State misses, however, is that section 2051, if relevant to the Court's analysis of 2063, supports rather than contradicts Mr. Ray's argument that Maine "ways," whether one lane, two lane or more, are areas for vehicular traffic travel that pursuant to 2063(5) may also be used by bicyclists but do not include paved shoulders (which are not areas where vehicular traffic is allowed to travel).

[6] It is also worth mentioning that Mr. Ray's read of the law is consistent with positions the State takes in its summary of Maine bicycling laws. *See* State of Maine, Dep't of Transp., *Maine Bicycling Laws* (located at: https://www.maine.gov/mdot/bikeped/docs/MaineBicyclingLaws.pdf). In direct contrast to what the State argues in its Law Court Brief, the State's published summary of bicycle laws explicitly declares: **"Bicyclists are not required to ride in shoulders or bike lanes in Maine."** *Id* (emphasis added). Similarly, in its publication, the State substitutes the term "travel lane" for "way" when saying where a rider may position themselves in the way, thereby further contradicting its argument that the terms are not synonymous in the context of section 2063(2). *See id.*

need not move to the right beyond the paved shoulder in order to make room for faster vehicles (i.e., a bicyclist need not move to the curb, the sidewalk, or the unpaved shoulder)." Red Br. 18, f. 12. The State's arguments are flawed for the reasons set forth below, among others.

When interpreting statutory language, "[w]ords and phrases shall be construed according to the common meaning of the language." 1 M.R.S. § 72(3) (2023). Here, the language of 29-A M.R.S. § 2063(2-A) reads: "*Notwithstanding* subsection 2, a person operating a bicycle or roller skis *may* travel on paved shoulders." (Emphasis added). The common meaning of "notwithstanding" is not and has never been defined as: "consistent with." Moreover, if subsection 2063(2-A) was "consistent with" section 2063(2) that would mean paved shoulders were already part of the definition of "way" described in 2063, and there would have been no need for the Legislature to add subsection (2-A) to the statute to ensure that bicyclists were permitted to ride in them. *Howard v. White,* 2024 ME 9, ¶ 11, 308 A.3d 213; *Dickau v. Vermont Mut. Ins. Co.,* 2014 ME 158, ¶ 22, 107 A.3d 621; *Labbe v. Nissen Corp*., 404 A.2d 564, 567 (Me. 1979).

In addition, the State's argument overlooks the Law Court's recent analysis of similar statutory language in *Cassidy Holdings, LLC v. Aroostook Cnty. Comm'rs,* 2023 ME 69, 204 A.3d 259. In *Cassidy Holdings* the Court was tasked

with interpreting 36 M.R.S. § 844(2) to determine the interplay between subsections 1 and 2 of that statute and asked to decide whether subsection 2 required an owner of nonresidential property valued at $1 million or greater to pursue a discretionary appeal before the State Board and not the county commissioners.[7] There, the Court examined several dictionary definitions of the term "notwithstanding" and concluded that the term, as used generally and in subsection 844(2), meant "in spite of." *Cassidy Holdings, LLC v. Aroostook Cnty. Comm'rs,* 2023 ME 69, ¶¶ 12-13, 204 A.3d 259, 262 (citations omitted). Further, the Court concluded that the use of "notwithstanding" in the statute meant subsection 1 of section 844 did not affect subsection 2. It also interpreted the term "may" as used in 36 M.R.S. § 844(2) consistent with the interpretation urged by Mr. Ray in this case. *See together Cassidy Holdings,* 2023 ME 69, ¶¶ 14-15, 204 A.3d 259, 263; 1 M.R.S. § 71 (9-A); & Blue Br. 20-21. Applying the rules of

[7] Subsection 844(2) read as follows:

> *Notwithstanding* subsection 1, the applicant *may* appeal the decision of the assessors or the municipal officers on a request for abatement with respect to nonresidential property or properties having an equalized municipal valuation of $1,000,000 or greater, either separately or in the aggregate, to the State Board of Property Tax Review within 60 days after notice of the decision from which the appeal is taken or after the application is deemed to be denied. If the State Board of Property Tax Review determines that the applicant is over-assessed, it shall grant such reasonable abatement as it determines proper. For the purposes of this subsection, "nonresidential property" means property that is used primarily for commercial, industrial or business purposes, excluding unimproved land that is not associated with a commercial, industrial, or business use.

(Emphasis added.)

statutory interpretation, the dictionary definitions of "notwithstanding" and "may," and the logic used in *Cassidy Holdings* to this case, 29-A M.R.S. § 2063(2) should be read as not affecting 29-A M.R.S. § 2063(2-A). Put simply, 29-A M.R.S. § 2063(2) addresses where a bicyclist must ride on a "way" when certain conditions are present and/or determinations are made, but it does not affect a bicyclist's 29-A M.R.S. § 2063(2-A) permissive right to ride (i.e. travel) on a paved shoulder, nor does it affect where a bicyclist may ride within paved shoulders.

Finally, we address the State's argument that subsection 2063(2-A) is a clarifying statute that "clarifies that a bicyclist need not move to the right beyond the paved shoulder in order to make room for faster vehicles (i.e., a bicyclist need not move to the curb, the sidewalk, or the unpaved shoulder)." *See* Red Br. 18, f. 12, is not supported by the plain language of subsection 2-A, appears to be cut from whole cloth, and further perpetuates the inaccurate (and dangerous) belief held by the District Court, Chief Rumsey, and others that section 2063 requires a bicyclist to make room for faster vehicles (i.e. motor vehicle traffic) regardless of the applicability of other subparts of and/or language in the statute at that time and place. Moreover, because the definition of "way" as used in 29-A M.R.S. § 2063(2) does not include paved shoulders, unpaved shoulders, curbs, sidewalks or other areas not used for vehicular traffic, there is no need for the type of

clarification suggested by the State. 29-A M.R.S. § 101 (92); *see also* Section II (b), *supra.*

In sum, the State has presented insufficient rationale to support the District Court's finding that paved shoulders are part of 2063(2)'s definition of "way," which the District Court then made part of its decision to hold Mr. Ray liable for violation of the statute. As such, if the Court agrees with Mr. Ray, the District Court's decision should be vacated by the Law Court because there is no competent evidence in the record to support any actual or presumed finding that Mr. Ray was riding anywhere but along the fog line and as far right as practicable within the way (as that term is defined by the Legislature not the District Court) with his tire probably on the left side of the fog line. R; A. 8-11, Trial Tr. 2-15; Blue Br. 1-9; 21.

d. The State and the District Court Interpretations of the Term "Practicable" Do Not Square with the Law Court's Holding in *Hillock.*

Without acknowledgment of or due regard for applicable Maine case law to the contrary, the State argues that the term "practicable," as it appears in the context of 29-A M.R.S.§ 2063(2) means "possible" (and other words synonymous with it) and, hence, the District Court's interpretation and application of that term in the hearing below was correct. *Compare* Red. Br. 16 *with Hillock v. Bailey,* 223 A.2d 426, 433 (Me.1966). However, as the Law Court made clear long ago in a

case directly on point, when the term "practicable" is employed in a traffic safety statute focused on protecting vulnerable users, the definition is not so simple, and "'**practicable' is not synonymous with 'possible'** . . ." *Hillock*, 223 A.2d at 433. Rather, the Law Court requires the term to be "defined with a view to carrying out the underlying purpose of the law" and the Legislature's intent "to achieve maximum safety for the traveling public." *Id.* As such, the District Court got it wrong when it stated: "I think the statute reads that you are -- as a cyclist have an affirmative responsibility to move over as far right as **possible** to let traffic pass," and then found Mr. Ray in violation of the same. A. 10, Tr. 12:5-7 & 13:4-5. Like the State's proposed definition of "practicable," the District Court's read, interpretation and application of the relevant law explicitly contradicts the holding in *Hillock* that 'practicable" cannot be read to mean "possible" in the context of a safety statute like 2063. As such, the District Court's mistaken understanding of the law, which it then used to reach a decision, is reason enough for the Law Court to vacate the District Court's decision.

III. Mr. Ray Preserved All of His 29-A M.R.S.§ 2063 Arguments and the District Court's Findings on One or More of Them are Unsupported by Competent Evidence in the Record, Clearly and Obviously Erroneous, and Warrant Abandonment of the Decision.

Contrary to the State's claims otherwise, Mr. Ray testified at trial that he was following 29-A M.R.S.§ 2063 ("I was following that statute") and sufficiently

preserved his right to argue on appeal that he was riding in compliance with the statute, as well as with its language and subparts, including 29-A M.R.S.§ 2063(2)(C) and 2063(D), when he was pulled over by Mr. Rumsey. A. 10, Tr. 11:12-13. By clearly asserting that he was complying with the statute, Mr. Ray was also arguing that he had determined it was unsafe to ride further right, that he was operating at the normal speed of traffic moving in the same direction at that time and place, and that he was riding as far right in the way as practicable. A. 10, Tr. 11:12-13. Further, Mr. Ray argued through his testimony and the presentation of video evidence that he felt it necessary to ride where he did to avoid impediments, undulations, bumps, and imperfections and other hazards, and he also argued that he kept his tire along or just to the left side of the fog line (i.e. as far right as practicable on the way as one can be and arguably in the shoulder at times), and none of that testimony was controverted by the State at trial. A. 9-10, Tr. 6:11-11:16; Tr. Video.[8] In addition, in his presentation of the video, Mr. Ray argued and demonstrated his compliance with section 2063(2) at the time of the

[8] The State attempts to use the video footage to establish the absence of unsafe and hazardous conditions on or around the surface of the way or the paved shoulder and to claim that there were more unsafe conditions in the way than on the paved shoulder. However, Mr. Ray did not testify that the hazardous surfaces conditions on July 7, 2023 were the same as those in the video, nor did he purport that the video was able to capture undulations and changes in the surface that he determined were unsafe for him to ride on or near. Rather, he used the video for the purpose agreed upon with the Court (to show the area he was riding in at the time of the alleged violation (school and pedestrian zones laden with crosswalks, warning signs, and right hand turns) and to point out where he was riding, how he was riding, the fog line described in his testimony, and some of the hazards that were present and that he used to make his determination that it was unsafe to ride further right on July 7, 2023.

alleged violation by showing that the area where he was traveling straight was a place where right turns were permitted. *See* 29-A M.R.S.§ 2063(2)(C). Hence, this uncontroverted evidence alone is further reason for Law Court to conclude that the District Court's presumed findings on 29-A M.R.S.§ 2063(2)(C) were not supported by competent evidence in the record, clearly and obviously erroneous, and harmful. Similarly, upon a complete review of the record, it is anticipated that the Court will find that there was also no competent evidence in the record to support other material factual findings against Mr. Ray or in favor of the State in association with 29-A M.R.S.§ 2063 and § 29-A M.R.S. §105. *See* Blue Br. 24-31. As such, the Court has ample District Court errors to choose from when deciding which ones to rely on to vacate the District Court's decision.

IV. The State, Not Mr. Ray, Carried the Burden of Proving That a Violation 29-A M.R.S. § 2063 Occurred, and the District Court Committed Clear and/or Obvious Error by Shifting the Burden to Mr. Ray and Finding Him in Violation of the Statute Without the Requisite Competent Evidence in the Record to Support Its Findings and Decision.

In an additional effort to avoid having the Law Court vacate the District Court's decision, the State argues that the District Court correctly placed the burden of proof on Mr. Ray with respect to establishing the existence or non-existence of various conditions required for the District Court to decide whether Mr. Ray was in violation of the statute. Contrary to the State's urgings otherwise,

the burden was on the State, not Mr. Ray, to prove by a preponderance of the evidence that Mr. Ray violated 29-A M.R.S.§ 2063(2). 29-A M.R.S.§ 103.[9] As such, it was on the State, not Mr. Ray, to establish all the conditions precedent or absent necessary for a decision in its favor, and it was inappropriate, an abuse of discretion, a clear error, and an obvious error for the District Court to shift the burden of proof to Mr. Ray.[10]

CONCLUSION

For the reasons set forth here and in Mr. Ray's original brief, the Law Court is respectfully requested to vacate the decision of the District Court and remand the matter back to the District Court for entry of judgment in favor of Mr. Ray.

Dated at Portland, Maine, this 15th day of July, 2024.

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[9] Mr. Ray was not pursuing a tort case where the burden would have been on him to prove that he was following the conditions in the safety statute to recover monetary and other damages against another party. Rather, the State was charging him for allegedly engaging in unsafe behavior and seeking monetary renumeration (a fine) from him.

[10] This is especially so where the District Court repeatedly and on the record misstated the law and provisions in it and added requirements and language to 29-A M.R.S.§ 2063(2) that do not exist while questioning Mr. Ray and asking him to prove why he was not in violation of the law. See generally, A. 8-10, Tr. 3-13; see also Blue Br. 13-23.

CERTIFICATE OF SERVICE

I, Lauri Boxer-Macomber, hereby certify that on July 15, 2024, I hand delivered one (1) original and ten (10) copies of the Reply Brief of Appellant Christopher Ray to the Law Court and two (2) copies of the said brief to District Attorney Jacqueline Sartoris and Assistant District Attorney Grant S. Whelan, Cumberland County District Attorney's Office, 142 Federal St, Portland, ME 04101. I also certify that on July 15, 2024, I sent an electronic copy of the Reply Brief of Appellant Christopher Ray in electronic form to the Clerk of the Law Court via email at: lawcourt.clerk@courts.maine.gov and copied District Attorney Jacqueline Sartoris at: sartoris@cumberlandcounty.org and Assistant District Attorney Grant S. Whelan at: whelan@cumberlandcounty.org on that communication.

Dated: July 15, 2024

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