IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CARL A. CASCIO
Appellant,

v.

CITY OF BOYNTON BEACH,
Appellee.
_____/

APPELLATE DIVISION (CRIMINAL): AC
CASE NO: 2013-AP-900064-AXXX-MB
L.T. NO.: 2013-TR-071224-AXXX-SB

Opinion filed: JUN 30 2016

Appeal from the County Court in and for Palm Beach County,
Hearing Officer James McGlynn

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PER CURIAM.

Upon consideration of Appellee's Motion for Rehearing, we grant rehearing, withdraw the Opinion issued January 4, 2016, and substitute the following in its stead.

BACKGROUND

On February 15, 2013, a red light camera captured Appellant's vehicle traveling through the intersection of Boynton Beach Boulevard and Congress Avenue in the City of Boynton Beach. At the time the car traveled through the intersection, the light was red. A Notice of Violation ("NOV") was mailed to Appellant on February 20, 2013. On April 4, 2013, a Florida

Uniform Traffic Citation ("UTC") was issued to Appellant for running the red light pursuant to sections 316.0083, 316.074(1), and 316.075(1)(c)(1), Florida Statutes (2012). The Palm Beach County Clerk of Court received an electronic transmission of the UTC the same day.

On May 29, 2013, Appellant entered a plea of Not Guilty. On September 26, 2013, Appellee City of Boynton Beach ("City") filed the "City's Notice Pursuant to Florida Rule of Evidence 90.803(c)(6)" ("Notice"), indicating that the City intended to rely on the business records and certifications of American Traffic Solutions ("ATS") "and/or its agents" during Appellant's final hearing. As pertinent to this appeal, the Notice provided that the City would rely on ATS's Reports of Mailing, indicating when and how the NOV and UTC were mailed to Appellant. On September 27, 2013, Appellant filed a "Notice of Filing Supplemental Authority and Motion to Dismiss Citations," ("Motion to Dismiss"), challenging, *inter alia*, the admissibility of and the City's reliance on the specified records.

Appellant's final hearing was held on September 27, 2013.[1] At the final hearing, Appellant's Motion to Dismiss was denied, and Reports of Mailing provided by QuestMark Information Management ("QuestMark"), an apparent agent of ATS[2], were submitted to prove that the NOV and UTC were properly mailed to Appellant in accordance with the statutory notice requirements of sections 316.0083(1)(b)1.a. and 316.0083(1)(c)1.a, Florida Statutes (2012). Appellant objected to the admission of QuestMark's Reports of Mailing, but Appellant's objections were overruled and the Reports of Mailing were admitted into evidence. At the conclusion of the final hearing, Hearing Officer James McGlynn found Appellant guilty of

[1] A transcript of the final hearing was not included in the record on appeal.

[2]Although the exact nature of the relationship between ATS and QuestMark is not established in the record, Appellant does not challenge that QuestMark is an agent of ATS.

violating section 316.075(1)(c)(1), Florida Statutes (2012). Adjudication was withheld, and Appellant was ordered to pay $206.00 in fines and court costs. This appeal followed.

STANDARD OF REVIEW

The decision of the lower court comes on appeal with a presumption of correctness. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). The burden is on Appellant to demonstrate error in order to overcome this presumption. *Id.* Appellate courts cannot properly resolve underlying factual issues contested on appeal without a record of the lower court proceedings. *Id.* Thus, absent a trial record, resolution of factual disputes by this Court would be improper. *Id.* However, *Applegate*'s holding does not restrict a reviewing court from examining issues that were decided as a matter of law. *Id.*; *State v. Herbert,* 8 So. 3d 393, 395 (Fla. 4th DCA 2009) (issues of law reviewed *de novo*).

"The standard of review for admissibility of evidence is abuse of discretion, limited by the rules of evidence. [W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to *de novo* review." *Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014) (quoting *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011)) (alteration in original).

LEGAL ANALYSIS AND RULING

Appellant raises two primary issues on appeal. First, Appellant argues that the Reports of Mailing introduced at the final hearing were improperly admitted under the business records exception to the hearsay rule because they were not the business records of the City, but rather the business records of the City's contracted third-party vendor, QuestMark. Appellant argues that without these records, the City cannot establish that it timely mailed the NOV and UTC to Appellant as required by sections 316.0083(1)(b)1.a. and 316.0083(1)(c)1.a., Florida Statutes (2012), and as a result, the lower court should have dismissed the citation.

Appellant, however, fails to cite to a case that supports the proposition that a party is not permitted to rely on the business records of another if that party follows the notice and certification requirements of sections 90.803(6)(c) and 90.902(11), Florida Statutes (2012). To the contrary, courts regularly admit business records of nonparties, so long as the party seeking admission of the evidence complies with the requirements of section 90.803(6)(c). *See e.g.*, *Shorter v. State*, 98 So. 3d 685, 689-93 (Fla. 4th DCA 2012) (DNA forensic reports); *Nimmons v. State*, 814 So. 2d 1153, 1154-55 (Fla. 5th DCA 2002) (laboratory report of victim's urine sample); *Andres v. Gilbreti*, 592 So. 2d 1250, 1250 (Fla. 4th DCA 1992) (hospital records); *see also Yisrael v. State*, 993 So. 2d 952, 955-58 (Fla. 2008) (discussing admissibility of certain Department of Correction records under business records exception).

To the extent Appellant complains that he was only on notice of the City's intent to rely on the records of ATS and not those of QuestMark, a review of the record reveals that the City's Notice announced its intent to rely on the "certification/declaration(s) of business records from American Traffic Solutions *and/or its agents*." (emphasis added). It is unclear whether in the proceedings below Appellant challenged the agency relationship between ATS and QuestMark or whether he was provided reasonable opportunity to inspect the business records in accordance with section 90.803(6)(c), but he makes no such challenge on appeal. The certification and declarations by QuestMark appear to comply with the requirements of section 90.902(11), Florida Statutes (2012), and without a transcript revealing the factual determinations on which the hearing officer's decision to admit this evidence was based, we cannot conclude that these records were improperly admitted into evidence under the business records exception to the hearsay rule. *See Applegate*, 377 So. 2d at 1152 ("Without knowing the factual context, neither

can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal.").

Second, Appellant argues that the City has failed to comply with section 316.650(3)(c), Florida Statutes (2012), because the electronic copy of the UTC was transmitted to the Clerk of Court by the "City Clerk's office" and not by a Traffic Infraction Enforcement Officer ("TIEO") as required by the statute. Although we agree that section 316.650(3)(c) appears to require that a TIEO personally transmit the electronic copy of the UTC to the Clerk of Court, a careful review of the record on appeal fails to reveal any evidence to support Appellant's claim, and without a transcript of the proceedings below, we again must defer to the factual findings of the lower tribunal. *Applegate*, 377 So. 2d at 1152.

The Court notes that Appellant raises a number of other issues in his Reply Brief based on the Fourth District Court of Appeal's holding in *City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014). While Appellant's arguments might appear to have merit and record evidence in support, those arguments either were not properly preserved below, *see F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003), or were waived on appeal by not appearing in his Initial Brief, *see Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007); *J.A.B. Enter. v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) ("[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief."). As such, it would be improper for us to address those arguments here, and the decision of the lower court must be affirmed.

Both parties in this matter seek appellate attorney's fees, but neither party has provided this Court with sufficient grounds for awarding them. Therefore, the City's Motion, titled "Appellee, City of Boynton Beach, Florida's Motion for Appellate Attorney's Fees and Costs," is denied. Appellant's Motion for Attorney's Fees and Costs is also denied. The City may seek

a determination of costs from the lower tribunal upon motion no later than 45 days after rendition of this Court's Opinion. Fla. R. App. P. 9.400.

Accordingly, the decision of the lower court is **AFFIRMED.** Appellant and Appellee's motions for attorney's fees are **DENIED.**

COX, BURTON, and KELLEY, J.J., concur.

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Opinion/Decision filed: JUN 30 2016

Appeal from County Court in and for Palm Beach County, Florida;
Hearing Officer James McGlynn

Appealed: November 18, 2013

DATE OF PANEL: DECEMBER 14, 2015

PANEL JUDGES: COX, BURTON, KELLEY

AFFIRMED/REVERSED/OTHER: AFFIRMED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	DISSENTING: With Opinion	CONCURRING SPECIALLY: With/Without Opinion
6/29/16		
_____ J.	_____ J.	_____ J.
_____ J.	_____ J.	_____ J.
6/29/16 _____ J.	_____ J.	_____ J.