2018 IL App (2d) 180411-U
No. 2-18-0411
Order filed December 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROGER PENNIE, Plaintiff-Appellant, v. THE CITY OF ROCKFORD CODE HEARING DIVISION, THE CITY OF ROCKFORD TOWING IMPOUND FEE CODE HEARING UNIT, and NICHOLAS O. MEYER, in His Official Capacity as Director, Defendants-Appellees.	)	Appeal from the Circuit Court of Winnebago County. No. 18-MR-363 Honorable Lisa R. Fabiano, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff forfeited his arguments on administrative review by failing to raise them in the trial court (which failure we presumed in light of the incomplete record) or at the administrative hearing.

¶ 2 Plaintiff, Roger Pennie, was stopped by Rockford police and issued a citation for driving on a suspended license. His vehicle was impounded. Pennie challenged the impoundment at a hearing held before the City of Rockford Towing Impound Fee Code Hearing Unit. Following

the hearing, the hearing officer sustained the impoundment. Thereafter, Pennie filed a complaint for administrative review against defendants, the City of Rockford Code Hearing Division, the City of Rockford Towing Impound Fee Code Hearing Unit, and Nicholas O. Meyer (collectively, the City), seeking judicial review of the final administrative decision. See 735 ILCS 5/3-101 *et seq.* (West 2016). Following a hearing, the trial court affirmed the decision. Pennie timely appealed, arguing that (1) the impoundment was not reasonable under the fourth amendment, because the vehicle had been legally parked, and (2) the impoundment was not statutorily authorized, because plaintiff was neither arrested nor taken into custody. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are derived from the administrative hearing transcript, which Pennie attached to his complaint for administrative review.[1] The hearing took place on March 9, 2018.

¶ 5 According to the City, on January 10, 2018, Pennie was stopped by Rockford police. At that time, Pennie had "a previous case of failing/refusing an alcohol or drug test as well as a financial responsibility insurance suspension." The City offered into evidence Exhibit A, a

[1] On November 5, 2018, Pennie filed with this court a motion to strike certain portions of the City's statement of facts, which were presumably derived from information contained in a police report that was not admitted at the administrative hearing or otherwise made a part of the record. Illinois Supreme Court Rule 341(h)(6) (eff. May 25, 2018) requires a statement of facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal. Thus, we will disregard those portions of the City's statement of facts not supported by the record.

certified copy of Pennie's driving record from the Secretary of State. Pennie was issued a citation under section 6-303(a) of the Illinois Vehicle Code (the Vehicle Code) (625 ILCS 5/6-303(a) (West 2016)), for driving on a suspended license. The City admitted into evidence exhibit B, a copy of the citation and complaint for driving on a suspended license. The City next admitted into evidence exhibit C, a Secretary of State record showing that Pennie owned the vehicle at issue.

¶ 6 The City argued that impoundment of Pennie's vehicle was proper under section 4-203(e-5) of the Vehicle Code, which provides, in pertinent part, that "[w]henever a registered owner of a vehicle is taken into custody for operating the vehicle in violation of *** Section 6-303 of this Code, a law enforcement officer may have the vehicle immediately impounded." 625 ILCS 5/4-203(e-5) (West 2016). According to the City, because Pennie was charged with violating 6-303(a) of the Vehicle Code, his vehicle was properly impounded.

¶ 7 In addition, the City argued that the impoundment was also proper under section 11-1302(c)(3) of the Vehicle Code (625 ILCS 5/11-1302(c)(3) (West 2016)), which provides as follows:

> "(c) Any police officer is hereby authorized to remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a highway when:
>
> * * *
>
> (3) the person driving or in control of such vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before a proper magistrate without unnecessary delay[.]"

According to the City, there was a clear basis to impound Pennie's vehicle when an arrest was made.

¶ 8 The City concluded that, because impoundment of Pennie's vehicle was proper, Pennie was liable for the penalty imposed pursuant to section 17-41(a)(12) of the Rockford Code of Ordinances (Rockford Code of Ordinances § 17-41(a)(12) (adopted Dec. 19, 2011)).

¶ 9 In response, Pennie, relying on *Hayenga v. City of Rockford*, 2014 IL App (2d) 131261, argued that the section 17-41(a)(12) of the Rockford Code of Ordinances did not authorize the City to impound his vehicle. The hearing officer advised Pennie that the City was not relying on that section for the impoundment. Pennie thereafter argued that the impoundment was not proper under the fourth amendment. Pennie argued that the fourth amendment required that an impoundment be supported by probable cause or be for the purpose of community caretaking. According to Pennie, under community caretaking, the police are authorized to remove from the streets any vehicle that impedes traffic or threatens public safety and convenience, which includes damaged vehicles or vehicles parked illegally. Pennie argued that an unattended but legally parked vehicle did not warrant impoundment. Pennie argued that the car was insured and legally parked during daylight hours. He further argued that he was given a notice to appear, he was allowed to leave, and he had a cell phone. He contended that it was not reasonable for the police to tow the car rather than let it remain legally parked.

¶ 10 The hearing officer asked the City if it had a copy of the police report. The City responded that it was not introducing the police report.

¶ 11 In response to Pennie's argument, the City argued that an administrative hearing was not the proper forum to make a fourth amendment argument. The City further argued that Pennie failed to present any evidence that his driver's license was not suspended when he was stopped. According to the City, based on the statutory provisions cited, Pennie's act of driving on a suspended license was a sufficient basis to impound his car.

¶ 12 The hearing officer agreed with the City, finding that the impoundment was supported by the cited statutes. The hearing officer further found that it could not address whether the impoundment violated the fourth amendment.

¶ 13 On March 19, 2018, Pennie filed a complaint against the City, seeking judicial review of the decision, asserting that the decision must be reversed as it was "contrary to law" and "against the manifest weight of the evidence."

¶ 14 On May 9, 2018, the trial court affirmed the decision of the administrative hearing officer "[f]or reasons stated on the record." The record does not contain a transcript or other account of that hearing.

¶ 15 Pennie timely appealed.

¶ 16 II. ANALYSIS

¶ 17 Pennie purports to make two arguments on appeal: (1) that the impoundment of his vehicle was not reasonable under the fourth amendment, because the vehicle had been legally parked, and (2) that the impoundment was not statutorily authorized, because he was neither arrested nor taken into custody. We are unable to consider either argument.

¶ 18 First, with respect to his constitutional argument, we note that the hearing officer found that the issue was beyond his authority to address. Pennie does not contest that finding. *Cf. Wilson v. Department of Financial & Professional Regulation*, 2013 IL App (1st) 121509, ¶ 5 ("The hearing officer noted but declined to rule on [a party's] constitutional arguments, because the officer considered arguments of that nature to be reserved for the courts."). Instead, Pennie makes his constitutional argument anew to this court. However, there is no record to indicate that he first raised the issue in the trial court. Although we review only the agency's decision, arguments not raised before the trial court are forfeited. See *Grady v. Illinois Department of*

Healthcare & Family Services, 2016 IL App (1st) 152402, ¶ 18. In his complaint, Pennie specifically asserted only that the hearing officer's decision was "contrary to law" and "against the manifest weight of the evidence." He did not explicitly raise any constitutional issue. Further, we lack any record of the proceedings in the trial court to confirm that Pennie otherwise raised the issue. Thus, we must presume that he did not and must find the issue forfeited. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) (any doubts arising from the incompleteness of the record will be resolved against the appellant); *cf. Knox v. Taylor*, 2012 IL App (2d) 110686 (without complete record, we could not confirm that appellant satisfied jurisdictional prerequisites). We also note that we cannot overlook the forfeiture, as the record before the agency does not contain any evidentiary basis on which to decide the issue on the merits. That record contains only the parties' unsworn arguments, and the hearing officer, having declined to address the issue, made none of the relevant findings of fact.

¶ 19 We further find that Pennie has forfeited any argument that the impound was improper because he was not "taken into custody" (see 625 ILCS 5/4-203(e-5) (West 2016)) or "arrested" (see 625 ILCS 5/11-1302(c)(3) (West 2016)). Pennie made no such argument at the administrative hearing and thus has forfeited it. See *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212-13 (2008) ("if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review.").

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 22 Affirmed.