

State of New Hampshire
Supreme Court

NO. 2005-0126

2008 TERM

FEBRUARY SESSION

State of New Hampshire

v.

Graham Jensen

RULE 7 APPEAL OF FINAL DECISION OF
ROCHESTER DISTRICT COURT

BRIEF OF DEFENDANT GRAHAM JENSEN

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QUESTION PRESENTED

1. Could Graham Jensen be guilty of theft when he paid his toll at the Rochester toll station on the Spaulding Turnpike, using New Hampshire Turnpike System toll tokens?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On March 23, 2006, at 2:00 in the afternoon, Graham Jensen was driving north on the Spaulding Turnpike in Rochester. *Trn.* at 7, 28; *see* RSA 237:1 *et.seq.* (Spaulding Turnpike part of New Hampshire Turnpike System). At the toll booth, he gave the toll attendant two New Hampshire Turnpike System toll tokens to pay his fare. *Trn.* at 8-9. Because the attendant believed tokens were no longer valid, Mr. Jensen was not permitted to continue on his way, and was referred to the station supervisor and then a State Trooper who was monitoring traffic at the station. *Trn.* at 13-17, 28-29. The Trooper explained to Mr. Jensen that the State had ceased honoring toll tokens, and urged him to pay by another method. Upon insisting that tokens were proper payment for the toll, Mr. Jensen was given a summons charging him with theft of services. *Trn.* at 29-30.

It is undisputed that the proper toll for Mr. Jensen's car at the Rochester station is 50 cents, *Trn.* at 9, 21, 31, 42, and that New Hampshire Turnpike System tokens were (before expiration) worth 25 cents each. *Trn.* at 10, 21-22, 31, 42. A full paper roll containing 40 tokens was present at trial, although not offered into evidence. A State's witness read the words printed on the roll: "[F]are value, 25 cents. Not redeemable for cash. Use of tokens restricted to two-axle, two and four-tired vehicles." *Trn.* at 23. Although the record is unclear what exactly happened to the two tokens offered by Mr. Jensen, it is not disputed that "the tokens were provided" by him to the attendant. *Trn.* at 14, 17-18, 30-31, 44-45.

It is also undisputed that neither the Tokens themselves nor the paper roll in which they were packaged contain any indication of an expiration date. *Trn.* at 21, 24-25, 42. Nonetheless, a law signed by the Governor on June 30, 2005 and effective on that same date, provides that the

Department of Transportation “shall cease selling tokens on all of the turnpikes in the New Hampshire turnpike system on September 1, 2005 and shall cease collecting all tokens as of January 1, 2006.” LAWS 2005, 177:54, III.

Mr. Jensen testified that on the day he paid his toll, he was aware the State had purported to expire the Tokens. *Trn.* 40, 56. He contended, however, that he had numerous rolls of Tokens in his and his family’s possession which he believed had been bought prior to that, *Trn.* 41, 43, 56-57, and which he had hoped to use before they expired. *Trn.* 41-42.

The Rochester District Court held a bench trial (*Susan W. Ashley, J.*), in which Mr. Jensen represented himself. He was convicted of Theft of Services, a Class-B Misdemeanor, RSA 637:8, and fined \$150. *Trn.* at 67, 69; COMPLAINT (Mar. 23, 2006), *Appx.* at 13. Determined to not allow the State to collect in penalties what it would not take in Tokens, Mr. Jensen refused to pay the fine.¹ The court thus sentenced him to three days incarceration, which he served. ORDER (Sept. 10, 2007), *Appx.* at 15.

¹The court found Mr. Jensen was motivated in this by a desire to “generate negative publicity for the State of New Hampshire.” ORDER (Sept. 10, 2007), *Appx.* at 15. There is not one bit of evidence in the record supporting this conclusion, however. Rather the record repeatedly shows Mr. Jensen would have been satisfied had the State given him the value he paid for. *See e.g.*, *Trn.* at 42 (“I just didn’t have the opportunity to use them.”). Thus Mr. Jensen made clear he would have taken the value in any form convenient for the State. *Trn.* at 44 (State “should have accepted tokens until they disappear”); *Trn.* at 45 (defendant suggesting State “redeem them”); *Trn.* at 45 (defendant suggesting State “buy them back”); *Trn.* at 45 (“The State should have let them go into attrition to get rid of them all”); *Trn.* at 46 (defendant suggesting State should give “credit in your [electronic toll] transponder”); *Trn.* at 64-65 (“I’m offering a solution, which I think is ... reasonable and fair. Reinstate honoring outstanding tokens, or at least allow the toll collectors to repurchase all the tokens. Another solution could be to credit, enter these tokens into their EZ-Pass account.”); *Trn.* at 66 (“But somewhere or other, in some fashion or other, and I think there’s a lot of options out there, that are fair to the State, can be done over a graceful amount of time, and the people who have been unjustly penalized here would receive compensation.”). The record does contain some evidence of Mr. Jensen’s disappointment with the State of New Hampshire for not honoring its toll Tokens, *Trn.* at 63 (“Just because the State globe has slipped off the side of the mountain into an abyss, does not mean that the State’s moral character has to slide into that same abyss.”), and of his belief that the State’s failure amounts to a civil rights issue. *Trn.* at 64. There is nothing in the record, however, suggesting a desire to “generate negative publicity for the State of New Hampshire.”

This appeal followed.

SUMMARY OF ARGUMENT

Mr. Jensen first argues that toll tokens are the tangible evidence of a contract between the State of New Hampshire and the buyer of toll tokens, such that New Hampshire is obligated to accept the tokens for payment for use on New Hampshire toll roads. He thus contends that when he tendered them at the Rochester toll station, he paid his toll and cannot be guilty of theft.

Because Mr. Jensen gave the tokens to the toll booth attendant with the intent to pay his toll, he argues the State has not proved the mental state required to be guilty of a theft crime.

He finally argues that toll tokens meet the definition of gift certificates contained in the Consumer Protection Act and, pursuant to the statute, they cannot lawfully expire. Consequently, Mr. Jensen offered adequate payment for the toll, and is not guilty of any crime.

ARGUMENT

I. Mr. Jensen is Not Guilty of Theft Because he Paid the Toll with a Token

A. Contracts

“Offer, acceptance, and consideration are essential to contract formation. There must be a meeting of the minds on all essential terms in order to form a valid contract. A meeting of the minds is present when the parties assent to the same terms.” *Syncom Industries, Inc. v. Wood*, 155 N.H. 73, 82 (2007). When the parties “have the same understanding of the terms of the contract and ... manifest an intention, supported by adequate consideration, [they are] bound by the contract.” *Durgin v. Pillsbury Lake Water Dist.*, 153 N.H. 818, 821 (2006). When a party reneges on a contract, it is liable for performance, or for money in the amount the parties contemplated. *Great Bay School & Training Center v. Simplex Wire and Cable Co.*, 131 N.H. 682 (1989).

Public bodies are held to the same contract standards. *See e.g., Morgenroth & Associates, Inc. v. Town of Tilton*, 121 N.H. 511 (1981) (State liable to engineering firm for contract regarding work on sewerage plans); *Wiseman v. State*, 98 N.H. 393, 397 (1953) (allowing “suits seeking money damages for breach of contract”); RSA 491:8 (“The superior court shall have jurisdiction to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state.”).

B. Tokens

A “token” is defined as “Something serving as an indication, proof, or expression of something else; a sign. *The American Heritage Dictionary of the English Language* (4th ed. 2004). Thus a token might be a “piece of stamped metal used as a substitute for currency.” *Id.*;

see United States v. Korpan, 354 U.S. 271 (1957) (tax imposed on machines operated by tokens); RSA 638:13, II (counterfeit tokens is a crime).

In *Barry v. New Jersey State Highway Authority*, 585 A.2d 420, 423 (N.J.Super 1990), the court found that New Jersey's failure to sell highway toll tokens at a certain price was not fraud pursuant to that State's consumer protection law because tokens were not "merchandise" under the act. Rather, "tokens are simply a prepayment for the right to enjoy a particularized governmental service, in this case, travel on a limited access state highway."

A case involving the phasing-out of New York City subway tokens is the most factually analogous case known. The New York City subway used tokens until 1994 when it switched to electronic fare cards. The City instituted a buy-back program, which due to security measures adopted after September 11, 2001 became so burdensome in the eyes of some, especially compared to the small value of most redemptions, that holders of tokens alleged it was an unconstitutional taking. The federal court held that tokens did not create property rights to state a takings claim. But citing cases involving tokens for bridges, tunnels and railroads, as between the buyer and seller of subway tokens, the federal court "assumed the relationship to be contractual in nature." It further found that "the contract at issue here is neither written nor oral – it is implied. 'Implied contracts normally arise in situations where,' as here, 'there is a bargained-for exchange contemplated by the parties, but no overt expression of agreement.'" *Ganci v. New York City Transit Authority*, 420 F.Supp.2d 190, 199 (S.D.N.Y. 2005), *aff'd*, 163 Fed.Appx. 7 (2nd Cir. 2005); *see also Phoenix Finance Corp. v. Iowa-Wisconsin Bridge Co.*, 16 A.2d 789 (Del.Super. 1940 ("ordinary metal trolley token ... entitles the holder to transportation upon demand")); RSA 638:1, II ("token," among other things are "symbols of value, right,

privilege, or identification”).

Tokens, like a ticket, are a receipt or voucher evidencing a contract or entitlement to the service for which they were purchased. *Ames v. Southern Pac. Co.*, 75 P. 310 (Cal. 1904) (railroad ticket not itself “a contract expressing all the conditions and limitations usually contained in a written agreement”; rather it is “more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage”); *Murphy v. Southern Iowa Route*, 14 N.W.2d 282 (Iowa 1944) (“ticket was not the contract of transportation, and did not purport to set forth the terms of such contract,” rather was “a voucher or token that he had paid his fare and was entitled to the transportation indicated” and was “evidence of a right to the transportation”); *Sanden v. Northern Pac. Ry. Co.*, 115 P. 408, 411 (Mont. 1911) (“ticket for which full fare is paid is generally regarded as a mere token or check” and “[u]pon a sale of it the law makes the contract”); *Dickinson v. Bryant*, 172 P. 432, 435 (Okla. 1918) (“ticket is considered not to be the evidence of the terms of the contract of passage and not conclusive of the right to passage, but only a token that the ordinary contract implied by law has been entered into”); *Hartman v. Tennessee State Fair Ass’n*, 183 S.W. 733 (Tenn. 1916) (“When appellant purchased the ticket, it was in her hands a token or evidence of a contract between the parties.”); *Watson v. Louisville & N. R. Co.*, 56 S.W. 1024, 1026 (Tenn. 1900) (“when a passenger purchases a ticket for transportation ... the ticket is not intended as a contract in itself, but as a mere token, or the evidence of a contract which the law creates, and which lies behind the ticket”).

Thus, whatever the context, when one buys a token, the party selling it becomes obligated to provide the service on the underlying contract for which the token is evidence.

C. Token for a Contract

It cannot be disputed that there was “[o]ffer, acceptance, and consideration” when Mr. Jensen bought tokens. It also cannot be disputed, at that time, he and the State had a “meeting of the minds” regarding the “essential terms” of the bargain – the tokens were a “fare” for “two-axle, two and four-tired vehicles,” and had a “fare value” of “25 cents.”

Toll tokens are but a tangible symbol of the contract between Mr. Jensen and the State that was created when Mr. Jensen purchased the tokens. In accord with both *Barry v. New Jersey State Highway Authority*, and *Ganci v. New York City Transit Authority*, the toll tokens here evidenced Mr. Jensen’s prepayment on his contract with the State of New Hampshire to – upon relinquishing the tokens – drive on its turnpikes and pass through its toll stations.

D. Because the Token was for a Contract there was no Crime

Because Mr. Jensen offered the toll tokens as the tangible symbol of his prepayment, he did not steal, and thus cannot be guilty of the crime.

II. Mr. Jensen is Not Guilty of Theft Because he Intended to Pay the Toll

To be guilty of theft, the State must prove beyond a reasonable doubt that a defendant “obtains services which he knows are available only for compensation by ... any ... means designed to avoid the due payment therefor.” RSA 637:8. The statute does not specify the specific mental state which must be proven, and therefore one must be inferred. *State v. Rollins-Ercolino*, 149 N.H. 336 (2003).

Mr. Jensen intended to pay his toll. He gave two tokens to the toll booth attendant, and his testimony repeatedly makes clear he intended to pay. Whether the mental state which had to be proved was “purposely,” “knowingly,” “recklessly,” or “negligently,” RSA 626:2, II, the State offered nothing tending to cast doubt on Mr. Jensen’s upright intent to pay his toll.

Because the State did not prove any mental state necessary for guilt, the evidence cannot support a conviction for theft of services.

III. Toll Tokens are Gift Certificates Which Cannot Expire

In 2003 the New Hampshire Legislature amended the Consumer Protection Act. LAWS 2003, ch. 193. The Act now defines a “gift certificate” as “a written promise given in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount.” RSA 358-A:1, IV-a. The Act makes unlawful “[s]elling gift certificates having a face value of \$100 or less to purchasers which contain expiration dates.” 358-A:2, XIII.²

Toll tokens squarely meet the definition of gift certificates. They are “written” and “given in exchange for payment.” They “provide the bearer, upon presentation, ... services in a specified amount.” Thus toll tokens cannot lawfully have an expiration date, and the State was obligated to honor them for their explicit purpose.

Because Mr. Jensen offered two toll tokens in payment for the service of using New Hampshire’s toll highways, he cannot be guilty of theft.

²See *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007) (portion of New Hampshire Consumer Protection Act prohibiting “dormancy fees, latency fees, or any other administrative fees or service charges that have the effect of reducing the total amount for which the holder may redeem a gift certificate” preempted by National Bank Act when gift certificate is bank- issued).

CONCLUSION

Based on the foregoing, Graham Jensen requests this court reverse his conviction.

Respectfully submitted,

Graham Jensen
By his Attorney,

Law Office of Joshua L. Gordon

Dated: February 25, 2008

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Graham Jensen requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because of the ubiquity of toll tokens, because the outcome of this case is important to numerous types of government contracts that cannot be unilaterally terminated, because the facts of this case are novel in New Hampshire, and because of the injustice of Mr. Jensen's conviction.

I hereby certify that on February 25, 2008, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: February 25, 2008

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
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Concord, NH 03301
(603) 226-4225

APPENDIX

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Docket #

TN#

State of New Hampshire COMPLAINT

Docket #

DOMESTIC VIOLENCE RELATED

VIOLATION

CLASS A

MISDEMEANOR

FELONY

CLASS B

YOU ARE HEREBY NOTIFIED TO APPEAR BEFORE SAID COURT

AT 8:00 O'CLOCK IN THE AM/PM ON May 03 2006
UNDER PENALTY OF LAW TO ANSWER TO A COMPLAINT
CHARGING YOU WITH THE FOLLOWING OFFENSE:

TO THE Rochester COURT, COUNTY OF Strafford

THE UNDERSIGNED COMPLAINS THAT: PLEASE PRINT

NAME Jensen Graham
Last Name First Name

15 Messina Woods Drive Braintree MA 02184
Address State Zip

DOB 041939 OP. LIC.# 032281531 (MA)

Sex Race Height Weight Color-Hair Color-Eyes
M F 6'4" 210 Gray Blue

COMM. VEH. COMM. DR. LIC. HAZ. MAT.

AT Rochester

ON THE 23rd DAY OF March 19 2006 at 2:00 P.M.

on/at in said county and state, did commit the offense of Theft of

Services contrary to RSA 637:08

and the laws of New Hampshire for which the defendant should be held to

answer, in that the defendant did knowingly obtain services

of another without proper compensation, the

said Graham Jensen did operator a motor vehicle

on the Spaulding Turnpike, a toll road, owned

and operated by the State of NH and did fail to

make proper payment for the use of such road

against the peace and dignity of the State.

Tr. James Downey NH State Police Troop A

Complainant Dept.

Personally appeared the above named complainant and made oath that the

above complaint by him/her subscribed is, in his/her belief, true.

DATE 4/11/06 Kim Hale Justice of the Peace

AOC-103-045 REV 3/95 DEFENDANT COPY

THE STATE OF NEW HAMPSHIRE

Strafford

Rochester District Court
76 N. Main Street
Rochester, NH 03867
603 332-3516

To: Graham Jensen
51 Messina Woods Drive
Braintree, MA 02184

RE: State Vs. Graham Jensen

Docket No. 06-CR-01960

Please find enclosed Order issued by Justice Ashley on September 10, 2007.

9/10/2007
Date

/s/ Carol A. Hatch
Clerk of Court

cc: James Downey
Department of Safety Prosecution

020-CR-1960

Docket No.

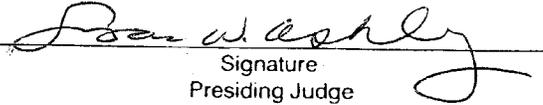
State Vs. Graham Jensen

ORDER ON DOCUMENT NO. _____

On August 31, 2007, the defendant was ordered to pay \$150 in fine & penalty assessment. At a financial review hearing on 9/10/07, the defendant refused to pay this fine or to agree to complete community service in lieu of paying the fine. Rather, the defendant wishes to be incarcerated to receive \$50/day credit, in order to generate negative publicity for the State of New Hampshire. Accordingly, this court commits the defendant to the House of Corrections for three days.

9/10/07

Date



Signature
Presiding Judge

Susan W. Ashley, Special Justice

Form No. 603-045