

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

DAVID ALAN CARMICHAEL, et al.,)
)
 Plaintiffs,)
)
v.)
)
THE COMMONWEALTH OF)
VIRGINIA, et al.,)
)
 Defendants.)

Case No.: CL08-2067

MOTION TO RECONSIDER DEMURRER
AND MEMORANDUM OF LAW IN SUPPORT

Defendant, the Commonwealth of Virginia (the “Commonwealth”), by counsel, respectfully requests that this Court reconsider its October 3, 2008 decision denying the Commonwealth’s Demurrer as to Plaintiff David A. Carmichael’s (“Plaintiff”) due process and free exercise of religion claims. In support of its motion, the Commonwealth states as follows:

I. PROCEDURAL HISTORY

On September 11, 2008, Plaintiff, *pro se*, and counsel for the defendants appeared before this Court and presented oral argument. After consideration of the parties’ written submissions and oral argument presented, this Court dismissed all claims with the exception of Plaintiff’s due process and free exercise of religion claims against the Commonwealth.¹ October 3, 2008 Order. Specifically, this Court’s Order provided “Plaintiffs’ only remaining viable claims are their fourth cause of action, alleging violations of Article 1, Section 16 of the Virginia Constitution,

¹ Defendants’ motion to dismiss the claims of Plaintiff Jesse Carmichael, a minor, was denied to allow Jesse Carmichael the opportunity to obtain an attorney. October 3, 2008 Order. For purposes of this motion to reconsider, the Commonwealth addresses the allegations of Plaintiff David Alan Carmichael.

and their fifth cause of action, alleging violations of Article I, Section 11 of the Virginia Constitution, against the Commonwealth.” *Id.* The Court noted that “[w]hether Defendants’ failure to notify Plaintiffs of their right to appeal the decision of the Division of Motor Vehicles deprived them of their Due Process rights is a justiciable issue.” *Id.*

Because this question of post-deprivation procedure was not squarely presented in the *pro se* Complaint, the Commonwealth respectfully asks that the Court allow the Commonwealth an opportunity to respond directly to this issue. In addition, the Commonwealth asks this Court to reconsider whether dismissal is proper as to Plaintiff’s claim that Va. Code § 46.2-323 violates his right to practice religion.

II. ARGUMENT

Due Process (Va. Const. art I, § 11)

Plaintiff’s argument that his due process rights have been violated because he did not receive notice of his ability to appeal an administrative decision fails to support his claim. Plaintiff was denied a driver’s license after he failed to provide his social security number to the Department of Motor Vehicles. *See* Complaint. Counsel for the Commonwealth noted in its previously-filed brief and argued at the September 11, 2008 hearing that Plaintiff failed to timely note his appeal of this decision. This Court noted in its October 3, 2008 Order that “the Commonwealth failed to advise [Plaintiffs] of the time for filing a notice of appeal pursuant to Va. Sup. Ct. R. 2A:2.” October 3, 2008 Order. However, even assuming notice was not given, failure to provide notice does not amount to a constitutional violation.

The right to operate a motor vehicle may not be suspended or revoked without due process of law, *Walton v. Commonwealth*, 255 Va. 422, 428 (1998); however, nowhere in the Complaint does Plaintiff aver that his driver’s license was either *suspended* or *revoked*. *See*

Complaint. In fact, the Complaint provides that Plaintiff did not have a driver's license as far back as July 2002. *Id.* at 9. Plaintiff instead bases his claim on the *denial* of a driver's license. *See id.* The right to drive a motor vehicle is not a fundamental constitutional right. *Walton*, 255 Va. at 428; *Commonwealth v. Shaffer*, 263 Va. 428, 431-32 (2002). Due process protection only arises once a license to operate a motor vehicle is issued. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (observing that "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood.")

Until the issuance of a driver's license, an individual has no constitutionally-protected interest. *See id.* In *Mullins v. Commonwealth*, the district court rejected the plaintiff's argument that the Commonwealth had violated his constitutional rights when the Department of Motor Vehicles denied his request for a driver's license. *Mullins v. Commonwealth*, 2007 U.S. Dist. LEXIS 1882 (W.D. Va. Jan. 9, 2007).

Similarly, another federal court in the Fourth Circuit rejected the argument that the Department of Motor Vehicles violated due process by denying the plaintiffs a driver's license when they failed to provide a social security number. *North Carolina ex rel. Kasler v. Howard*, 323 F. Supp. 2d 675, 680-681 (W.D.N.C. 2003). The plaintiffs argued that DMV's denial of their request for a driver's license deprived them of a property right and of the right to travel. *Id.* at 680. In denying the plaintiffs' due process claim, the Court noted that the plaintiffs

do not have a legitimate claim of entitlement to a drivers license. A license to operate a motor vehicle is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege . . . [plaintiffs] cannot maintain a claim that Respondent violated their due process rights by depriving them of property or liberty.

Id. (internal quotes and citations omitted).² Notably, the district court also dismissed the plaintiffs' claim based on their right to free exercise of religion. *Id.* at 680.

Plaintiff has cited to no authority supporting his proposition that he has been denied due process in violation of the Virginia Constitution. The ability of an applicant to note an appeal of DMV's administrative decision denying a driver's license, Va. Code § 46.2-321, does not relieve a plaintiff of his burden to establish the existence of a property right protected by the Constitution. In order to establish violation of the due process clause, an individual must first establish that he has been deprived of life, liberty or property without due process of law. *See Etheridge v. Medical Ctr. Hospitals*, 237 Va. 87, 97 (1989) (noting "[t]he procedural due process guarantee does not create constitutionally-protected interests; the purpose of the guarantee is to provide procedural safeguards against a government's arbitrary deprivation of certain interests.")

Unable to identify denial of a liberty or property right, the Plaintiff was entitled to no pre- or post-deprivation remedy and his due process claim must be dismissed. The Commonwealth asks that its demurrer with regards to Count Five be sustained.

Right to Free Exercise of Religion (Va. Const. art I, § 16)

"[A] generally applicable law that is neutral as to religion does not violate the First Amendment, even if it incidentally burdens a religious practice." *Thanh Van Tran v. Gwinn*, 262 Va. 572, 579 (2001) (citing *Employment Div. v. Smith*, 494 U.S. 872, 878-79, 881 (1990)). A law is not "neutral" if the object of the law is to infringe upon or restrict practices because of one's religious motivation. *Smith*, 494 U.S. at 878-79. Here, Plaintiff complains that Va. Code § 46.2-323 violates the religious freedoms embodied in the free exercise clause of Va. Const. art I,

² The court also noted that DMV's denial of the plaintiffs' request for a driver's license did not violate the right to travel. 323 F. Supp. 2d at 681 (relying on *Jones v. Helms*, 452 U.S. 412 (1981)).

§ 16. However, the statute which requires an applicant to provide information such as name, address and social security number, is a neutral law and cannot support Plaintiff's claim.

Each law enacted by the legislature "carries a strong presumption of validity." *City Council v. Newsome*, 226 Va. 518, 523 (1984). "The party challenging an enactment has the burden of proving that the statute is unconstitutional, and every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity." *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 428 (2008).

Numerous courts at both the state and federal level, including a federal court in the Fourth Circuit, have concluded that the required disclosure of a social security number in applying for a driver's license does not violate an individual's right to free exercise of religion. *Kasler*, 323 F. Supp. 2d 675; *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999); *Stoianoff v. Comm'r of Motor Vehicles*, 107 F. Supp. 2d 439 (S.D.N.Y. 2000); *Champion v. Sec'y of State*, 2008 Mich. App. LEXIS 2023, *23-24 (Mich. Ct. App. Oct. 16, 2008) (noting that "virtually every jurisdiction that has addressed a claim that furnishing one's social security number violates religious free exercise rights has rejected the argument"); *Mefford v. White*, 770 N.E.2d 1251 (Ill. App. Ct. 2002); *Kocher v. Bickley*, 722 A.2d 756 (Pa. Commw. Ct. 1999); *McDonald v. Alabama Dep't of Pub. Safety*, 756 So. 2d 880 (Ala. Civ. App. 1999); *Tennessee v. Loudon*, 857 S.W.2d 878 (Tenn. Crim. App. 1993); *Penner v. King*, 695 S.W.2d 887 (Mo. 1985).³

³ Also, in an unreported decision of the Circuit Court of Washington County, Virginia, dated November 14, 2006, the court denied the complainant's appeal of DMV's administrative decision denying his request to renew his driver's license after the complainant refused to provide his social security number. *Sydney Strother Smith, III v. D. Smit, Comm'r*, Washington County Circuit Court, Case No.: CL06000362-00. Like Mr. Carmichael, the complainant refused to provide his social security number because he believed the number to be counter to his religious beliefs. *Id.*

