

IN THE SUPREME COURT OF OHIO

KELLY MENDENHALL, et al.,)
)
Petitioners,)
)
v.)
)
THE CITY OF AKRON, et al.,)
)
Respondents.)

Case No. 06-2265

On Question Certified by the United States District Court for the Northern District of Ohio, Case Numbers 5:06 CV 0139 and 5:06 CV 0154

COPY

PRELIMINARY MEMORANDUM OF PETITIONER KELLY MENDENHALL

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SUPREME COURT OF OHIO

I. STANDARD OF REVIEW

Pursuant to S.Ct. Rule XVIII, the Supreme Court of Ohio may answer a question of law certified to it by a court of the United States when “there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decision of this Supreme Court.” The United States District Court for the Northern District of Ohio has submitted a single question to this Court for determination.

II. QUESTION CERTIFIED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Whether a municipality has the power under home rule to enact civil penalties for the offense of violating a traffic signal light or for the offense of speeding, both of which are criminal offenses under the Ohio Revised Code.

It is important to note that Petitioner Mendenhall and Respondents The City of Akron (hereinafter Akron) and Nestor Traffic Systems, Inc. (hereinafter Nestor), all agree that this case is properly before this Court. Mendenhall, Akron and Nestor also jointly asked the U.S. District Court to refine its question to more accurately address the issues in Mendenhall’s case,¹ and proposed the following alternative question to the District Court:

Whether a municipality has the power under Home Rule to assess only civil penalties against the owner of a vehicle whose car was photographed and identified as being driven in excess of the speed limit in a school zone when state law affords certain procedural protection and assesses criminal penalties and driver’s license points against the driver of a vehicle charged, by a police officer in a properly marked vehicle, with speeding in a school zone.

¹ The *Mendenhall* and *Sipe* cases involve Akron’s automated traffic speed camera enforcement system, which does not have a traffic signal enforcement component.

Mendenhall, Akron and Nestor all agree that this question is properly before the Court for certification. As the District Court recognized, there is no controlling precedent on this issue from the Ohio Supreme Court; instead, the only decision directly addressing the issue in Mendenhall's case is *Daniel Moadus, Jr., et al. v. City of Girard, et al.* (July 6, 2006), unreported, Trumbull County Common Pleas Case No. 05-CV-1927.

In the *Moadus* case, Trumbull County Common Pleas Judge John M. Stuard held that Girard Ordinance No. 7404-05 violated Article XVIII, Section 3 of the Ohio Constitution, also known as the "home rule" provision. Girard's ordinance created a civil enforcement system for speeding violations within the City of Girard, using a radar-triggered camera device similar to the system at issue in this case. The Trumbull County Common Pleas Court held that the program was unconstitutional because it transformed an act defined as criminal conduct under Ohio's general laws into a civil wrong.

Furthermore, the Court's recent decisions regarding home rule, *State ex rel. Scott v. City of Cleveland*, ___ Ohio St.3d ___, 2006-Ohio-6573, ___ N.E.2d ___, 2006 WL 3735070; *City of Cincinnati v. Baskin*, ___ Ohio St.3d ___, 2006-Ohio-6422, ___ N.E.2d ___, 2006 WL 3616396, and *American Fin. Servs. Assn., et al., v. City of Cleveland*, ___ Ohio St.3d ___, 2006-Ohio-6043, ___ N.E.2d ___, 2006 WL 3378273, do not squarely address this question.

Scott, decided December 20, 2006, upheld the Eighth District Court of Appeals' *sua sponte* dismissal of a petition for a writ of prohibition to permanently enjoin the City of Cleveland's automated traffic signal camera enforcement system, but did not directly address whether automated traffic enforcement camera systems violate home rule. *Baskin*, decided on December 8, 2006, held that Cincinnati's ordinance prohibiting the possession of any semiautomatic rifle with a capacity of more than ten rounds, does not impermissibly conflict

with R.C. § 2923.17(A) for home rule purposes. *Baskin* at ¶ 25. *American Financial Services* held that Cleveland's ordinance barring certain forms of predatory mortgage lending impermissibly conflicted with Ohio's statute barring predatory mortgage lending. *American Fin. Servs.* at ¶¶ 47-49.

The Parties' Positions. Mendenhall and the Respondents do not agree, however, as to how they believe the Court should answer the question. Mendenhall argues that Akron City Council exceeded its power under home rule when it enacted Akron Codified Ordinance 79.01 and established the automated traffic speed camera enforcement system.

As this Court is well aware, Ohio Constitution Article XVIII, Section 3, states, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." In general, a municipal ordinance is preempted by a state law when 1) the challenged ordinance seeks to exercise a power of local self-government or constitutes a police regulation; 2) the state law involved is a general or special provision; and 3) a conflict exists between the state and local provisions. See *American Fin. Servs.*, 2006-Ohio-6043 at ¶¶ 23-24; *Ohio Assn. of Private Detective Agencies, Inc. v. North Olmsted*, 65 Ohio St.3d 242, 244-245, 1992-Ohio-65, 602 N.E.2d 1147; *Beacon Journal Publ'g Co. v. Akron* (1965), 3 Ohio St.2d 191, 195, 32 Ohio Op.2d 183, 209 N.E.2d 399; *Auxter v. Toledo* (1962), 173 Ohio St. 444, 20 Ohio Op.2d 71, 183 N.E.2d 920.

Police powers. In general, a municipality exercises its police powers through ordinances that bear a substantial relation to general health, safety, welfare or morals. See *West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, syllabus para. 4, 30 Ohio Op.2d 474, 205 N.E.2d 382. There

is no question that the regulation of motor vehicle traffic falls under the aegis of governmental police powers.

General laws. A state law is a “general law” under the following circumstances: 1) the law must be part of a statewide and comprehensive legislative enactment; 2) it must apply to all parts of the state alike and operate uniformly throughout the state; 3) it must set forth police, sanitary, or similar regulations, rather than simply grant or restrict municipalities’ legislative authority to make their own police, sanitary or similar regulations; and 4) it must prescribe a rule of conduct upon citizens generally. See *American Fin. Servs.* at ¶ 30; *Canton v. State*, 95 Ohio St.3d 149, 153, 2002-Ohio-2005, 766 N.E.2d 963; see also *Niles v. Howard* (1984), 12 Ohio St.3d 162, 164, 466 N.E.2d 539. It is not disputed that Ohio’s traffic laws are general laws.

Conflict. Finally, a municipal law conflicts with a general law of the state when either the ordinance permits something that the state law prohibits, or vice versa; or when the ordinance contravenes the state’s expressed policy with respect to crimes by deliberately changing the character of the offense, such as from a misdemeanor to a felony. See *American Fin. Servs.* at ¶¶ 37-46; *Village of Struthers v. Sokol* (1923), 108 Ohio St. 263, 268, 140 N.E. 519; *Cleveland v. Betts* (1957), 168 Ohio St. 386, 389, 7 Ohio Op.2d 151, 154 N.E.2d 917; *Lorain v. Tomasic* (1979), 59 Ohio St.2d 1, 3, 13 Ohio Op.3d 1, 391 N.E.2d 726; *Schneiderman v. Sesanstein* (1929), 121 Ohio St. 80, 7 Ohio Law Abs. 349, 167 N.E. 158.

It has been Mendenhall’s consistent position that the City of Akron’s automated speed enforcement camera system ordinance fatally conflicts with Ohio law. Ohio’s motor vehicle speeding laws make the act of driving at an unreasonable rate of speed in a school zone during restricted hours a misdemeanor offense punishable by fines of at least \$150 and court costs, or, if the driver is unable to pay, community service. See R.C. §§ 4511.21, 4511.99, 2929.28. In

addition, all courts are required under R.C. § 4510.036 to report speeding violations to the Ohio Bureau of Motor Vehicles, and for each offense, the BMV assesses the driver up to four “points” against his or her driver’s license; if a driver receives 12 or more “points” within a two-year period, his or her license will automatically be suspended. R.C. §§ 4510.036, 4510.037. Conceivably, a driver who buzzes through school zones at 50 miles per hour three times in one year, earning four points each time, would pay at least \$450 in fines and costs and would find his license suspended, thereby taking him off the road.

By contrast, Akron’s automated camera system not only decriminalizes the same act, but places a financial onus² on someone other than the driver at fault; notices of violation are sent to the *owner* of the car photographed exceeding a certain speed, not the person behind the wheel when the violation occurred. Akron Code § 79.01. The Bureau of Motor Vehicles is not notified, and so no “points” are assessed. *Id.* No costs are charged. This is precisely the kind of conflict between state laws of general applicability and municipal ordinances that this Court cannot allow.

² The amount of the civil penalty has been in flux. At the program’s inception, Akron Code § 79.01 mandated penalties of \$150 or \$250. Akron City Council later reduced this amount to \$35, but it was increased to \$100 for the 2006-2007 school year.

III. CONCLUSION

This Court has never squarely addressed whether a city may assess civil penalties under Home Rule against the owner of a vehicle whose car was photographed while being driven in excess of the speed limit in a school zone, when the act of driving a car in excess of the speed limit is a criminal offense. It is an appropriate question for this Court to answer, and Petitioner Mendenhall respectfully asks the Court to review it.

Respectfully submitted,



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CERTIFICATE OF SERVICE

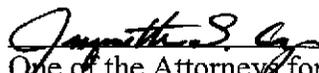
I hereby certify that a copy of the foregoing was served via regular U.S. Mail on 27

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