

IN THE SUPREME COURT OF OHIO

KELLY MENDENHALL, et al. : Case No. 06-2265
:
Plaintiffs : On Question Certified by the U.S.
: District Court for the Northern
-vs : District of Ohio, Case No.
: 5:06 Cv 0139 and 5:06 CV 0154
NESTOR TRAFFIC SYSTEMS, INC., :
et al. :
Defendants :

LEAVE TO FILE BRIEF IN OPPOSITION OF PLAINTIFFS SIPE

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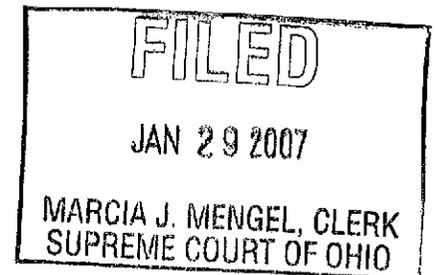
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STANDARD OF REVIEW

Pursuant to S. Ct. Rule XVIII, the Supreme Court of Ohio *may* answer a question a law certified to it by a court of the U.S. 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.**" For ease of reference, the within answering Plaintiffs present that there is controlling precedent in the decision of this Supreme Court and accordingly file their request for leave to file a Brief in Opposition. Plaintiff Mendenhall and Defendants City of Akron and Nestor on or about December 28, 2006, filed their briefs and thereafter served same via regular mail to the undersigned. The within Plaintiffs herein move for leave to file their Brief in Opposition and move this Court for a finding against same in that there is substantial controlling precedent which is cited throughout below and within the briefs of the other parties.

Rules of Practice Pursuant to R. 18, Section 6, do not identify or clarify if same. Wherein the undersigned requests that leave be granted to file same through the Clerk's office, in that the Clerk will not accept same because it is not specifically listed within the aforesaid. As grounds Plaintiffs present that:

I. The Ordinance is Unconstitutional on its Face.

A. The Ordinance Violates Article XVIII §§ 3 of the Ohio Constitution.

Article XVIII §§ 3 of the Ohio Constitution provides that: "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.**" [Emphasis added.] Ohio's laws regulating vehicle speeds (formerly GC §§ 12603, now O.R.C. §§ 4511.21) are general laws, and any municipal ordinance that conflicts with them is unconstitutional. Schneiderman v. Sesanstein (1929), 121 Ohio St. 80.

1) Conflict Exists When a Municipal Ordinance Prohibits That Which State Law Permits

One test to determine whether an ordinance conflicts with a general law is if the ordinance prohibits something that state law allows, or vice versa. Struthers v. Sokol (1923), 108 Ohio St. 263. Driving faster than the speed limits set forth in O.R.C. §§

4511.21(B) is only prima-facie unlawful, and if driving above that speed is not unreasonable "having due regard to the traffic, surface, and width of the street or highway and other conditions" existing at the time, then it is not a speeding violation under the basic rule set forth in subdivision (A) of the statute. But under Akron's Automated Enforcement ordinance if the camera records a vehicle exceeding the posted speed limit, then the vehicle owner is strictly liable, regardless of the reasonableness of the speed under the conditions existing at the time or proof as set forth under Ohio Rules of Criminal Procedure and Traffic Rules. This is clearly unconstitutional, for the ordinance prohibits something that is not necessarily prohibited under state law. It also violates the express language of O.R.C. §§ 4511.21(J), which provides that "local authorities shall not modify or alter the basic rule set forth in division (A) of this section."

(2) Conflict Exists When a Municipal Ordinance Changes the Class of an Offense

This High Court has previously held that where an ordinance only changes the penalty for an offense, it is not in conflict with a state law that imposes a different penalty for the same conduct, but if an ordinance changes the degree of an offense from a misdemeanor to a felony, it violates Ohio's constitution. City of Niles v. Howard (1984), 12 Ohio St. 3d 162. When a municipal ordinance changes conduct that is a civil offense under state law to a criminal offense under city law, it is likewise unconstitutional. The City of Akron, by changing the classification of a speeding violation from a criminal offense under state law to a civil violation under local law, has violated Ohio's constitution, and also made Defendants' burden for profit substantially less. An Ohio traffic violation is criminal in nature. See R.C. 2901.03, McNary v. State (1934), 128 Ohio St. 497, 191 N.E. 733; Breaker v. State (1921), 103 Ohio St. 670, 134 N.E. 479 (A violation of a municipal ordinance which regulates the operation of a motor vehicle is in fact a criminal violation.) See also O.Jur. 3d Automobiles Sections 73, 84, 122. It is also undisputed that any offense not specifically classified in the Ohio Revised

Code is a minor misdemeanor as set forth in O.R.C. 2901.02 effective 1/1/2004 and thereby abrogating all common law offenses per O.R.C. 2901.03 and construing same liberally in favor of Plaintiffs and the potential Class pursuant to O.R.C. 2901.04 and incorporating therein all laws per O.R.C. 2901.04(D) and/or the burden of proof not being incumbent upon Plaintiffs and the potential Class and/or the burden being that of proof against Plaintiffs and the potential Class of beyond a reasonable doubt as contained in O.R.C. 2901.05.

(3) Akron's Ordinance Violates Ohio's Uniform Traffic Laws.

Article XVIII §§ 3 of the Ohio Constitution and O.R.C. §§ 4511.06 expressly prohibits local governments from enacting any law in conflict with the uniform traffic laws contained in §§§§ 4511.01 to 4511.78, with certain limited exceptions: (1) it allows those local laws listed in §§ 4511.07 (none of which gives Akron the authority to enact its Automated Traffic Enforcement ordinance), and (2) it authorizes local governments to enact laws making parking violations civil rather than criminal offenses in accordance with O.R.C. Chapter 4521. There is no enabling statute allowing Ohio cities to change speeding and red light violations from criminal to civil offenses. If, as defendants contend, the City does not need an enabling statute to change speeding and red light violations from criminal to civil offenses, why did the legislature have to pass the enabling statutes contained in Chapter 4521 to allow cities to make parking violations civil offenses? The answer should be obvious - cities cannot pass laws that change traffic offenses from criminal to civil unless there is enabling legislation by the state allowing them to do so.

B. The Ordinance Violates Procedural Due Process Guaranteed

Under the Ohio and U.S. Constitutions.

The only "hearing", which hearing was not available at the time of issuance of the Automated Traffic Enforcement ordinance since no representative was appointed by

the Mayor as required at the time of issuance, provided by the Automated Traffic Enforcement ordinance is conducted by a person selected by the Mayor which is the very agency that issued the citation. Plaintiffs contend that at this hearing, of which only the options listed on the civil citation being available, was set forth as being final providing only to Defendants the right to collect and/or initiate proceedings for collection on said alleged judgment, and there is no right to further review. Due process of law is violated when there is no provision for judicial review of a decision made by an administrative body affecting the rights of persons or property. Stanton v. Tax Commissioner (1926), 114 Ohio St. 658. A municipal ordinance which gives the employees of a city regulatory department the right to both investigate and adjudicate whether the ordinance was violated, with no further right of review by a court of law, violates due process. Burke v. Fought (1978), 64 Ohio App. 2d 50. The U.S. Supreme Court has recognized that it is not constitutionally permissible to allow a hearing procedure in which the fact finder has an "incentive to convict." Ward v. City of Monroeville (1972), 409 U.S. 57. In Ward, the Court held that a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial," is a denial of due process. Id. at 60.

Even in an administrative proceeding, due process still requires a fair opportunity to be heard, and a fair hearing includes the right to produce testimony, the right to cross examine witnesses, and the right to be informed of the evidentiary facts on which the tribunal bases its decision. The Akron ordinance, however, provides none of these basic safeguards. The police do not have to produce any evidence other than a photograph, and no witness is required to authenticate what that photograph purports to show. No evidence is required to establish that the speed-measuring instrument was properly calibrated, or even that the device is reliable or accurate. A photograph cannot authenticate itself. One cannot effectively cross-examine a machine. While an administrative tribunal, of which Plaintiffs do not agree Defendants have the right to set

up and accordingly does not exist herein, must still hear evidence. Fundamental due process requires that a decision be based on facts, not conjecture. A speed reading obtained from a metal box cannot be competent evidence of speed without proof that the metal box can accurately measure speed and comply with Ohio Rules of Evidence 602. But in Akron, the hearing officer's only evidence that the radar device works is that the individuals at Nestor told him it works.

In Ohio, the construction and accuracy of a new radar device must be established by expert testimony at least once, in some evidentiary forum, somewhere, before other tribunals can take judicial notice of its accuracy. The reliability and accuracy of the radar device used by Nestor has never been addressed by expert testimony in any tribunal. Ohio Rules of Criminal Procedure, are applicable in Ohio in all criminal cases pursuant to Crim. R. 1 (A) and are intended to provide for the just determination of every criminal proceeding pursuant to Crim. R. 1(B), but are not applied herein, including require that a law enforcement officer issue a citation stating therein the law enforcement officer who issued the citation, sign same, serve a copy of the completed form, and without delay, swear to and file the original with the Court. Crim. R. 4.1. Further, Ohio Rules of Criminal Procedure being applicable require that all pleadings in criminal proceedings "shall" be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, no contest, thereby abolishing the use of an Automated Mobile Speed Enforcement Citation pursuant to Crim. R. 12(A). Also, the Ohio Rules of Criminal Procedure being applicable grant rights to Plaintiffs and the potential Class to demand discovery pursuant to Crim. R. 16 (A) and require disclosure of evidence by the prosecuting attorney pursuant to Crim. R. 16 (B), none of those rights being afforded Plaintiffs. The Ohio Rules of Criminal Procedure being applicable in Ohio in all criminal cases also provide for, but aren't limited to, the following: initial appearance pursuant to Crim. R. 5, indictment pursuant to Crim. R. 7 (A), summons and/or warrant pursuant to Crim. R. 9 (A) and

9(B), subpoena pursuant to Crim. R. 17, and motion for acquittal pursuant to Crim. R. 29. Again, none of the aforesaid procedural safeguards were offered Plaintiffs. Further, any offense not specifically classified in the Ohio Revised Code is a minor misdemeanor as set forth in O.R.C. 2901.02 effective 1/1/2004 and thereby abrogating all common law offenses per O.R.C. 2901.03 and to be construed liberally in favor of Plaintiffs and the potential Class pursuant to O.R.C. 2901.04 and incorporating therein all laws per O.R.C. 2901.04(D) and/or the burden of proof not being incumbent upon Plaintiffs and the potential Class and/or the burden being that of proof against Plaintiffs and the potential Class of beyond a reasonable doubt as contained in O.R.C. 2901.05. Again, none of the aforesaid are afforded Plaintiffs.

The further due process defects in the Akron ordinance are strikingly clear when compared to the procedures required for prosecuting civil parking offenses under O.R.C. Chapter 4521. Hearings for parking violations must be conducted by an administrative body established by a court having territorial jurisdiction. O.R.C. 4521.04(A)(1). The hearing officer must be either an attorney or a former law enforcement officer. O.R.C. 4521.05(A). All testimony must be under oath; the city has the burden of proving the violation; and the person charged with the violation has the right to demand the appearance of the law enforcement officer who issued the parking ticket. O.R.C. 4521.08(A). Finally, the hearing officer's decision can be appealed to the municipal court. O.R.C. 4521.08(D). All of these procedural safeguards helped to save a Columbus parking ordinance from a due process challenge in Gardner v. Columbus (6th Cir. 1988), 841 F.2d 1272.

None of these protections exist under the Akron ordinance.

An unconstitutional law is void from the date of enactment - not merely from the time it is judicially declared unconstitutional. It is a nullity, as inoperative as if it had never been enacted. 16 Ohio Jur. 3d, Constitutional Law, §§ 172.

III. CONCLUSION

Wherefore the within moving parties request leave to file their brief presenting that there is clear controlling precedent set as set forth previously and cited throughout the Preliminary Memorandum of Petitioner Kelly Mendenhall wherein no answer to said question is necessary in that same has been answered.

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 26th day of January, 2007, upon the following:

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