

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

BRIEF OF PETITIONER KELLY MENDENHALL

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ARGUMENT

I. Introduction

This case pits a small group of citizens against cities including Akron, Cleveland, Columbus, Dayton, Girard and Toledo and a group of technology providers who use automated camera enforcement systems to photograph vehicles violating speeding laws or traffic control device laws, issue civil “notices of violation” to the vehicle owners, and collect the fines. This case reaches the Court through a question certified to it by the U.S. District Court for the Northern District of Ohio.

Petitioner Kelly Mendenhall is one of the group of citizens, whose vehicle was photographed by Akron’s automated traffic camera system in November 2005. It is her contention that by whatever name, by issuing “civil violations” to vehicle owners, rather than to the drivers actually violating the law, these “traffic camera,” “red-light camera” or “cop-in-a-box” systems violate Ohio’s Constitution, because they fatally conflict with the general traffic laws the General Assembly has enacted statewide.

The City of Toledo has denigrated Mendenhall, her fellow Petitioners and the amici curiae behind her as “scofflaws.”¹ Despite Toledo’s pejorative characterization and the nobler-sounding words of the Respondents and their other amici curiae about enhancing safety through enhanced law enforcement, it is hypocritical for government to break one law in an effort to enforce another law.

In a nutshell, Respondents City of Akron and Nestor Traffic Systems argue in their joint brief that Akron Code § 79.01 is constitutional under Ohio Const. Article XVIII, Section 3, because they claim that 1) R.C. §§ 4511.06, 4511.07 and 4511.99 are not “general laws”; and 2)

¹ Brief of Amicus Curiae City of Toledo, *passim*.

the ordinance does not conflict with Ohio's general laws. This argument will focus on Akron's Code, but because the Certified Question also refers to "red-light cameras" like those in operation in Cleveland, this argument is applicable to Cleveland's ordinance and to all programs that similarly seek to substitute civil penalties for the traditional enforcement of Ohio's criminal traffic offenses.

II. Home Rule, Generally

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." (App. B,² p. 23.) 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 *City of Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422, ¶¶ 9-10, 859 N.E.2d 514, quoting *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, ¶ 9, 766 N.E.2d 963; *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; *Auxter v. Toledo* (1962), 173 Ohio St. 444, 20 Ohio Op.2d 71, 183 N.E.2d 920; see also *Beacon Journal Publ'g Co. v. Akron* (1965), 3 Ohio St.2d 191, 195, 32 Ohio Op.2d 183, 209 N.E.2d 399.

There has been no dispute that Akron City Code § 79.01 is an exercise of Akron's police powers. There is also no question that R.C. Chap. 4511's regulation of motor vehicle traffic, especially for the purpose of public safety, falls under the aegis of governmental police powers.

² Please note that "App." refers to the Appendix materials that Petitioner Mendenhall filed with her Merit Brief, unless otherwise specified.

The discussion, however, turns in part on whether the Revised Code's provisions on the subject are "general laws" – and if so, which ones.

III. Conflict Analysis

A. Ohio's speeding and traffic control signal laws are general laws

As stated earlier, Respondents argue that R.C. §§ 4511.06, 4511.07 and 4511.99 are not "general laws." This is a straw-man argument. Petitioner Mendenhall is not arguing that any of these provisions is, in itself, a "general law."

Instead, these sections are examples of statements by the General Assembly of that body's intent to preempt the field of motor vehicle traffic regulation, and that motor vehicle traffic regulation is a matter of statewide concern. R.C. § 4511.06, for example, reads as follows:

Sections 4511.01 to 4511.78, 4511.99,³ and 4513.01 to 4513.37⁴ of the Revised Code shall be applicable and uniform throughout this state and in all political subdivisions and municipal corporations of this state. No local authority shall enact or enforce any rule in conflict with such sections, except that this section does not prevent local authorities from exercising the rights granted them by Chapter 4521⁵ of the Revised Code and does not limit the effect or application of the provisions of that chapter.

R.C. § 4511.06; see also App. C, p. 50.

Given that the General Assembly has stated its intent to occupy the field and has specifically regulated this area – in Akron's case, speed limits in school zones during restricted hours – it is arrogant for Akron to claim that speeding in school zones is a "local problem."⁶

³ Traffic Laws – Operation of Motor Vehicles.

⁴ Traffic Laws – Equipment; Loads.

⁵ Granting municipalities authority to enact their own parking regulations and enforce them with civil penalties.

⁶ Brief of Respondents, p. 2.

Instead, R.C. § 4511.21, which sets speed limit laws statewide and provides for criminal penalties that are uniform statewide, is a general law. It meets the four-part test this Court set out in *Canton v. State*: 1) it is part of a statewide and comprehensive legislative enactment; 2) it applies to all parts of the state alike and operates uniformly throughout the state; 3) sets forth police, sanitary, or similar regulations, rather than simply grants or restricts municipalities' legislative authority to make their own police, sanitary or similar regulations; and 4) it prescribes a rule of conduct upon citizens generally. See *Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, ¶ 32, 858 N.E.2d 776; *Baskin*, 112 Ohio St.3d 279 at ¶ 13; *Canton*, 95 Ohio St.3d 149, syllabus. See also *Niles v. Howard* (1984), 12 Ohio St.3d 162, 164, 466 N.E.2d 539; *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44, 48, 442 N.E.2d 1278; *State ex rel. McElroy v. Akron* (1962), 173 Ohio St. 189, 194, 19 Ohio Op.2d 3, 181 N.E.2d 26; *Schneiderman v. Sesanstein* (1929), 121 Ohio St. 80, 7 Ohio Law Abs. 349, 167 N.E. 158. The same is true for R.C. § 4511.13, governing traffic control signal lights.

B. Conflict

Respondents also argue that Akron Code § 79.01 does not fatally conflict with Ohio's traffic laws because they claim 1) that it is a "supplement" to those general traffic laws; 2) that Akron's Code does not "decriminalize" speeding; and 3) that *Cleveland v. Betts* and *Schneiderman v. Sesanstein* are no longer good law. None of these arguments are valid.

1. Akron's program does not supplement state law

Akron's traffic camera program does not supplement state law, which punishes vehicle drivers for their offenses. All Akron's program does is punish vehicle owners, without proof that they committed the acts for which they are cited and fined. The only consequence of Akron Code § 79.01(D)(1) is to ensure that when a police officer is present and issues a criminal citation to a

speeding driver, the vehicle owner will not also receive a traffic camera violation notice. This language means that Akron's program is an *alternative* to state law.

2. Akron's program decriminalizes speeding

The fact of the matter is that no police officer is present at the location where these cameras are deployed in order to issue a citation to the *speeding driver*. This was, after all, part of the camera systems' purpose: to provide an unmanned, unblinking automated system. Nothing in Akron Code § 79.01 provides for the issuance of a citation against a vehicle operator, or any method of imposing liability upon a vehicle operator. And when the *only* enforcement that will occur is through the camera system, it decriminalizes at least some traffic offenses, for those drivers. The driver is permitted to proceed without penalty. Akron's ordinance not only changes the *mens rea* of speeding – it eliminates a *mens rea* requirement altogether. See *Cincinnati v. Hoffman* (1972), 31 Ohio St.2d 163, 60 Ohio Op.2d 117, 285 N.E.2d 714. This “classic conflict scenario”⁷ is what Ohio's constitution prohibits.

3. *Betts* is still good law

This Court's decision in *American Financial Services* did not abrogate *Cleveland v. Betts* (1957), 168 Ohio St. 386, 389, 7 Ohio Op.2d 151, 154 N.E.2d 917, which held that a municipal ordinance fatally conflicts with general law 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 or vice versa. See also *Toledo v. Best* (1961), 172 Ohio St.3d 371, 16 Ohio Op.2d 220, 176 N.E.2d 520. Ohio's courts have traditionally issued rulings consistent with *Betts*, both before and after that decision, and *American Financial Services* did not change that. See, e.g., *City of Niles v. Howard* (1984), 12 Ohio St.3d 162, 165, 466 N.E.2d 539; *Am.*

⁷ Brief of Respondents, pp. 11-12.

Financial Servs. v. Cleveland, 159 Ohio App.3d 489, 498, 2004-Ohio-6416, 824 N.E.2d 553; *State v. Rosa* (1998), 128 Ohio App.3d 556, 561, 716 N.E.2d 216; *Hicks v. Akron* (1961), 87 Ohio Law Abs. 530, 181 N.E.2d 279.

4. Process is important

Respondents also argue that *Schneiderman* cannot stand for the proposition that a municipal ordinance that strips a person of due process will fatally conflict with a generally-applicable state law that provides or requires due process. There are two flaws to this argument. First, the Court in *Am. Financial Servs.* reached back to the *Schneiderman* case to reiterate a conflict-by-implication test. *Am. Financial Servs.*, 112 Ohio St.3d 170 at ¶¶ 41-46. Second, *Schneiderman* very specifically found there were three reasons why the Akron school zone speed ordinance at issue violated Home Rule: 1) by reducing the allowable speed in a school zone from the statewide “reasonable speed” or 20 miles per hour to a flat 15 miles per hour in Akron, the ordinance criminalized what Ohio declined to criminalize; 2) Ohio’s speed laws focus upon barring people from driving at “unreasonable” speeds, but Akron’s ordinance arbitrarily fixed that speed at 15 miles per hour; and 3) Akron’s ordinance eliminated a jury’s ability to determine whether a speed is unreasonable and unsafe, thereby stripping from the accused a critical component of due process provided under Ohio law. *Schneiderman*, 121 Ohio St. at 86-97, 90. The Respondents cannot escape the impact of the *Schneiderman* Court’s language: “The effect of a local ordinance is to foreclose the question of the reasonableness of the speed, and to substitute the judgment of the local legislative body for the judgment of a jury. It is evidence that the two plans [state and local speed regulations] are in direct conflict and that the conflict is a very material one.” *Schneiderman*, 121 Ohio St. at 90, citation omitted.

Furthermore, Ohio has traditionally invalidated municipal ordinances that impose requirements upon people that differ from those required under state law. For example, this court in 1992 struck down a North Olmsted regulation requiring additional licensing of private investigators, over and above the requirements they must meet under Ohio law. See *Ohio Assn. of Private Detective Agencies, Inc. v. North Olmsted*, 65 Ohio St.3d 242, 1992-Ohio-65, 602 N.E.2d 1147. Other regulations that were invalid because they differed from state regulations include those imposed on hazardous waste, see *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44, 442 N.E.2d 1278; municipal water fluoridation, see *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 73 Ohio Op.2d 285, 337 N.E.2d 766; electricity transmission, *Cleveland Electric Illum. v. Painesville* (1968), 15 Ohio St.2d 125, 44 Ohio Op.2d 121, 239 N.E.2d 75; regulation of liquor storage, *City of Cleveland v. Raffa* (1968), 13 Ohio St.2d 112; and a fee for inspection of school construction plans, *Niehaus v. State ex rel. Board of Educ. Of Dayton* (1924), 111 Ohio St. 47, syllabus, 2 Ohio Law Abs. 423, 144 N.E. 433. The process is, therefore, as important as any other consideration.

5. Akron's ordinance provides no right of administrative appeal

Some of the *amici curiae* writing for the Respondents have suggested that any flaws in these ordinances can be cured with an administrative appeal to the Courts of Common Pleas under R.C. Chap. 2506. At least with Akron's ordinance, this is not the case. R.C. § 2506.01 permits appeals to the common pleas courts of "every final order, adjudication or decision" rendered by municipal officers or departments – but in order to be a "final order," the decision must have been born out of a "quasi-judicial" proceeding that is required to be held with processes that resemble a judicial trial. See *DeLong v. Southwest School Dist. Bd. of Edn.* (1973), 36 Ohio St.2d 62, 65 Ohio Op.2d 213, 303 N.E.2d 890; *State ex rel. Youngstown v.*

Mahoning Cty. Bd. of Elections, 72 Ohio St.3d 69, 72, 1995-Ohio-184, 647 N.E.2d 769; *In re Appeal of Howard* (1991), 73 Ohio App.3d 717, 719-720, 598 N.E.2d 165. Akron Code § 79.01(F) addresses the procedure to be followed in Akron's traffic camera administrative hearings as follows: "Administrative appeals shall be heard through an administrative process established by the City of Akron." Without a requirement of trial-like process, Akron's hearings are not quasi-judicial in nature, and therefore there is no right to further Chap. 2506 appeal.

IV. Am. Sub. H. B. 127

Finally, some of the *amici* writing for the Respondents argue that the General Assembly "impliedly" stamped its imprimatur upon traffic cameras when it passed a provision in Am. Sub. H.B. 127 to enact R.C. § 4511.092. That section states:

(B) A motor vehicle leasing dealer or motor vehicle renting dealer who receives a ticket for an alleged traffic law violation detected by a traffic law photo-monitoring device is not liable for a ticket issued for a vehicle that was in the care, custody, or control of a lessee or renter at the time of the alleged violation. A dealer who receives a ticket for such a violation shall notify whoever issued the ticket of the vehicle lessee's or renter's name and address. In no case shall the dealer pay such a ticket and then attempt to collect a fee or assess the lessee or renter a charge for any payment of such a ticket made on behalf of the lessee or renter.

Any argument that this provision establishes traffic cameras in the firmament of constitutional law enforcement methods is specious, especially in light of Akron's ordinance. First, this section provides *another* conflict between Akron's ordinance and state law, because it provides motor vehicle leasing and renting dealers a method of avoiding liability that Akron's code forecloses. Second, by requiring leasing and renting dealers to identify the lessee, this statute attempts to identify the offending driver, which Akron's ordinance does not. Third, the Act was signed by Governor Strickland after this Court decided to consider this case – and well

after Mendenhall began challenging Akron's ordinance in 2005. The Act, then, cannot stand for the proposition that traffic camera programs such as these were constitutionally kosher in 2005.

Finally, and most fatally, it is not the General Assembly's province to determine the constitutionality of anything. *That* is the exclusive prerogative of this Court.

III. CONCLUSION

Again, under any Home Rule analysis, a municipality's conversion of a criminal traffic offense into a "civil violation" fatally conflicts with Ohio's comprehensive statutory scheme of traffic regulations. Any ordinance that purports to do so must be held invalid. On these grounds, Petitioner Mendenhall respectfully asks the Court to answer the Certified Question in the negative.

Respectfully submitted,



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I hereby certify that a copy of the foregoing was served via regular U.S. Mail on 8

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