

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,
STATE OF OHIO,

: Case No. 07-1880

Respondent-Appellee,

v.

MATTHEW CLEMENTS,

: On Appeal from the
Hamilton County Court of Appeals
First Appellate District

Petitioner-Appellant.

MEMORANDUM IN RESPONSE

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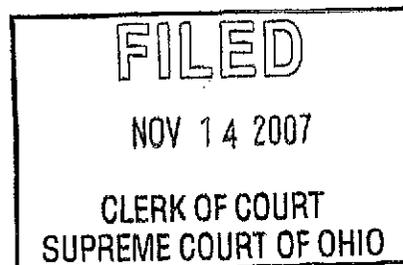


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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR
GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Petitioner contends that this case is one of public or general interest. It is not. Petitioner contends this case raises “significant issues of a constitutional magnitude that need to be addressed and resolved by this Court”. It does not.

Cases of public or general interest are cases which go beyond disputes that are of interest primarily to the parties in a lawsuit. *Williamson v. Rubich* (1960), 171 Ohio St. 253,254, 168 N.E.2d 876, 877. This case involves nothing more than a city using its legislative powers to protect the public safety and welfare of its citizens. And, as to the Petitioner, this is a case of a defendant who wants to avoid prosecution for an alleged criminal offense because he has already paid a civil fine.

The Petitioner essentially argues that a violation of R.C. 2923.02, Attempt (attempt to purchase crack cocaine) and a violation of Cincinnati Municipal Code (CMC) § 759-4, Use of a Motor Vehicle for the Delivery, Transportation, Purchase or Sale of Illegal Drugs are the same violation because the two violations occurred within the same incident. Building on that faulty foundation, Petitioner goes on to conclude that these two separate offenses are violative of constitutional protections.

Petitioner’s first challenge to the appellate court’s ruling concerns whether proceeding concurrently on the two offenses is violative of the Double Jeopardy Clauses of the United States and Ohio Constitutions. Secondly, Petitioner argues that the concurrent charges are violative of the Due Process Clause. Both challenges fail because the bases for both challenges are that these two separate and distinct violations are the same violation. They are not.

The fact is that “all legislative enactments must be afforded a strong presumption of constitutionality”. *State v. Collier* (1991), 62 Ohio St.3d 267, 269. Courts should make an effort to construe all statutes in conformity with both the State and Federal Constitutions. *Id.* In furtherance of this presumption, courts must liberally construe legislation in order to save it from constitutional infirmities, and all reasonable doubts must be resolved in favor of constitutionality. *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 330 N.E.2d 896, 898. The party who challenges a statute’s constitutionality has the burden of proving beyond a reasonable doubt that the legislation in question and the constitutional provisions are clearly incompatible. *Collier* at 267.

Petitioner's challenges do not raise debatable constitutional questions which are of concern to the general public. Petitioner has not raised any arguments here that were not dealt with adequately and appropriately by the First Appellate District Court. Petitioner is the only party interested in seeing the appellate court's findings overturned so that he may avoid a criminal prosecution by paying a civil fine.

STATEMENT OF THE CASE AND FACTS

On April 25, 2006, Petitioner-Appellant Matthew Clements was charged with two separate violations, an attempted purchase of crack cocaine in violation of R.C. 2923.02 and using a motor vehicle to facilitate the attempted commission of a crime involving drugs in violation of CMC 759-4.

On July 28, 2006, a City of Cincinnati hearing examiner found Petitioner in violation of CMC 759-4 and ordered him to pay a \$500 fine and the towing and storage costs for his impounded vehicle.

On September 13, 2006, the trial court granted Petitioner's Motion to Dismiss the criminal violation on Double Jeopardy Clause grounds, finding "the city cannot prosecute him for a crime for the same activity for which he had paid the civil penalty".

On October 3, 2006, Respondent-Appellee City of Cincinnati, State of Ohio filed a Notice of Appeal. The First Appellate District Court addressed whether the trial court erred when it granted Petitioner's Motion to Dismiss the criminal charge on double jeopardy grounds and whether CMC § 1501-1 prohibited the Respondent from pursuing both the criminal prosecution and the civil sanction.

At the appellate hearing, both parties agreed that that court's recent decision in *State v. Lyons* (Feb. 16, 2007), 1st District No. C-060448, 2007- Ohio – 652 was dispositive regarding the double jeopardy challenge that Petitioner had raised before that court. So, the First Appellate

District held that there was no violation of the Double Jeopardy Clause where Petitioner was prosecuted for the drug offense after having already been sanctioned for violating CMC 759-4.

In addition, the First District held that the language of CMC 1501-1 did not preclude the City from pursuing both the criminal prosecution and the civil sanction. Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the cause for further proceedings in accordance with its Decision.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: There is no violation of the Double Jeopardy Clause where the defendant is subject to a criminal prosecution subsequent to a civil sanction and the legislature's express intent was to establish a separate civil penalty.

The Double Jeopardy Clause of the Fifth Amendment of the United States which is applicable to the states through the Fourteenth Amendment protects against secondary criminal prosecutions and multiple criminal punishments for the same offense. *Hudson v. United States* (1997), 522 U.S. 93, 99, 118 S.Ct. 488. However, legislatures may provide both a criminal sanction and a civil sanction for the same conduct. *Id.*

In *Hudson*, the Court set forth the two-part test to determine whether a sanction is criminal or civil for purposes of a double jeopardy analysis. First, the court must determine whether the legislature's express or implied intent was to create a criminal or civil penalty. *Id.*, quoting *United States v. Ward* (1980), 448 U.S. 242, 248, 100 S.Ct. 2636. Second, even if the intention was to create a civil penalty, the court must determine whether the statutory scheme is so punitive that it transforms the civil remedy into a criminal penalty. *Id.*

The plain language of CMC 759-4 characterizes the offense as civil-- "Violation of this section is a Class D Civil Offense as defined by CMC §1501-9(b); and a person who violates this section is liable for the civil fine specified in §1501-99 for a Class D Civil Offense." CMC 759-

4. The appellate court also noted that culpability for the offense is adjudicated by an administrative hearing examiner, rather than a judge. CMC 759-7. The Supreme Court in *Hudson* found that when such authority is conferred on administrative agencies, it serves as prima facie evidence that the legislature intended a particular sanction to be civil in nature. *Hudson* at 522 U.S.103. In applying the first prong of the two-part *Hudson* test, the appellate court determined that the express intent of the City was for violations of CMC 759-4 to be civil in nature.

Next, the appellate court applied the second part of the two-part *Hudson* test. In *Hudson*, the Court stressed that Congress' intent for a penalty to be civil rather than criminal will only be overruled by a showing of the "clearest proof" of the excessively punitive nature of the sanctions. *Id.* at 104. The Court used a seven-factor test to analyze whether sanctions are punitive in nature. *Id.* See *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-9, 83 S. Ct. 554, 567-8. The seven factors are:

"[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned."

At the conclusion of its analysis, the appellate court found that the civil penalty for a violation of CMC 759-4 did not constitute criminal punishment for double jeopardy purposes. *Lyons* at ¶ 15. Significantly, the appellate court found that "the ordinance is reasonably related to its non-punitive goal of promoting public safety" and that "the penalties imposed are not

excessive in relation to the danger posed by those using motor vehicles for drug crimes”. *Lyons* at ¶¶ 17, 18.

Proposition of Law No. 2: There is no due process violation where a City pursues both criminal and civil sanctions to deter illegal drug activity in reaching its goal of promoting the public’s health, welfare and safety.

Petitioner contends that the Respondent violates its own laws if it pursues both criminal and civil penalties to deter illegal drug activity. Further, Petitioner states that the sole reason the City has created this statutory scheme is to “gratify its mercenary desire to generate additional revenues for its coffers”. This allegation is entirely untrue and unfounded.

In today’s world, it is common knowledge that illegal drug activity is a very clear and present danger which poses a significant threat to the health, welfare and safety to our citizens. Respondent has dealt with this reality by creating a local law, CMC 759-4, to work in harmony with the state law, R.C. 2923.02, to oppose this very certain threat to the communities within its jurisdiction.

Respondent’s rationale for creating CMC 759-4 is found in its legislative findings recorded in CMC 759-1. In pertinent part, CMC 759-1 states:

It is hereby found and determined by the council of the City of Cincinnati that persons who use vehicles to facilitate the attempted commission of crimes involving the purchase of illegal drugs pose a significant threat to the quality of life in Cincinnati’s neighborhoods and are a detriment to the public’s health, welfare and safety.

The council also finds and determines that the impoundment of vehicles used in the attempted commission of crimes involving the purchase of illegal drugs will temporarily remove such vehicles from the streets of the city and reduce the potential for further illicit use. Removal of the resources and instrumentalities of persons who attempt to commit such crimes will have a deterrent effect on this type of criminal behavior, thus contributing to council’s efforts to improve the quality of life in Cincinnati’s neighborhoods.

C.M.C. 1501-1 sets forth the nature of civil offenses. This section states,

“Civil Offense means an offense against the City of Cincinnati set forth in the Cincinnati Municipal Code made subject to a civil fine by this Title. Charging a person with a civil offense is an *alternative* to criminal prosecution. A person may not be charged with a civil offense if that person has been charged with a misdemeanor for the same offense. A person charged with civil offense may not be arrested for the commission of the offense.”

Petitioner conveniently focuses his argument on the word “alternative” but ignores the word “same”. The heart of Petitioner’s entire argument goes to whether violations of CMC 759-4 and R.C. 2923.02 are the same offense. They are not.

Petitioner was arrested for violating R.C. 2923.02 because he knowingly attempted to purchase crack cocaine. Petitioner was served with a notice of civil offense for a violation of C.M.C. 759-4 because he used a motor vehicle to facilitate the attempted commission of a crime involving drugs. The plain meaning of these words describe two entirely different offenses. While CMC 759-4 is intended to sanction the use of the instrumentality, R.C. 2923.02 addresses the criminal offense that was facilitated by the use of that instrumentality. Contrary to Petitioner’s contention, these are not allied offenses of similar import. And, the appellate court found that the offenses are not the same. *State v. Clements* (Aug. 31, 2007), 1st District No. C-060837, 2007- Ohio-4461.

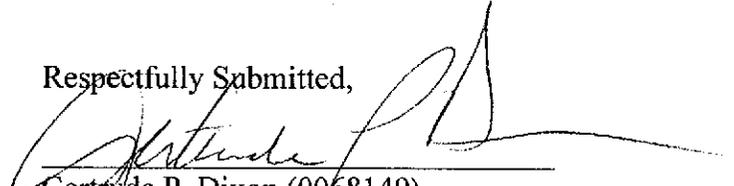
Petitioner claims that his position is supported by the plain language of CMC 1501-1. In truth, Petitioner has selected one word from CMC 1501-1 upon which every argument he makes hangs—that is the word “alternative”. Not so, with the appellate court. First, the court reviewed CMC 902 which applies to the entire CMC and states that “an offense is defined when one or more sections of the [CMC] state a positive prohibition or enjoin a specific duty”. CMC 902-1. Reading CMC 902 in conjunction with CMC 1501-1, the court concluded that “a person may not be charged with a civil offense if that person has been charged with a misdemeanor for violating the same section of the CMC”.

The court also considered the whole context of the CMC Chapter 1501 to determine the type of situations the City intended to address by CMC 1501-1. *Clements* at ¶¶ 8-10. The court reviewed each of the listed sections and chapters within CMC Chapter 1501, which consisted of over 157 offenses. *Id.* The court conducted a thorough review to avoid exactly what Petitioner accuses it of—“reading its own meaning into the plain language of CMC 1501-1”. In doing so, the appellate found two separate bases for reaching its holding.

CONCLUSION

This case does not involve any issues of public or general interest. This case does not raise debatable constitutional questions, and is of interest only to the parties involved—a Petitioner who wants to avoid responsibility for a criminal act by merely paying a civil fine and a Respondent that uses a statutory scheme to deter unlawful drug activity in its neighborhoods. Wherefore, this Court should not grant jurisdiction and should deny Petitioner’s request to hear this case on the merits.

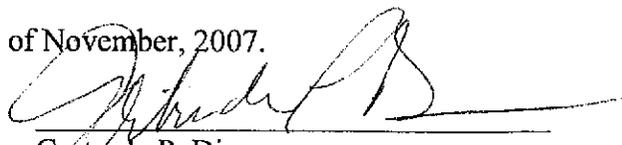
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response was served on counsel for Petitioner-Appellant, Bryan Perkins, 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, by ordinary U.S. mail on this 9th day of November, 2007.



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