

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,

Plaintiff-Appellee,

-v-

ROBERT SCHMIDT,

Defendant-Appellant

Case No. 2013-1391

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District

Court of Appeals
Case No. CA-12-098603

MEMORANDUM IN OPPOSITION TO JURISDICTION

BARBARA A. LANGHENRY (0038838)
Director of Law
VICTOR R. PEREZ (0074127)
Chief Prosecutor

ANGELA RODRIGUEZ (0074432)
Assistant Prosecutor
City of Cleveland
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 664-4850
(216) 664-4399 Fax
alr@city.cleveland.oh.us

ATTORNEYS FOR
PLAINTIFF-APPELLEE

ROBERT K. SCHMIDT
1721 Fulton Road
Cleveland, Ohio 44113
(216) 781-4096
(216) 621-9640 Fax
r.k.schmidt@cmlaw.csuohio.edu

PRO SE
DEFENDANT-APPELLANT

RECEIVED
SEP 30 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 30 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

OPPOSITION TO JURISDICTION.....1

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW.....1

Defendant-Appellant’s Proposition of Law I:

 The trial court had subject matter jurisdiction.....1

Defendant-Appellant’s Proposition of Law II:

 Defendant-Appellant was properly notified and convicted of the offense
 Charged.....3

Defendant-Appellant’s Proposition of Law III:

 The definition of sidewalk used by both the trial court and the court of appeals
 was not an overly expansive interpretation.....4

Defendant-Appellant’s Proposition of Law IV:

 The application of the term “sidewalk area” to the facts in this matter is
 not a novel construction.....5

Defendant-Appellant’s Proposition of Law V:

 Cleveland Codified Ordinance 431.37(a) is not unconstitutionally vague.....5

Defendant-Appellant’s Proposition of Law VI:

 Defendant-Appellant failed to meet the burden of proof to support a
 claim of selective prosecution.....7

CONCLUSION.....9

CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

CASES

<i>City of Cleveland v. Ksiezyk</i> , 8 th Dist. Cuyahoga Co. No. 79220, 2001 WL 1352760 (Nov. 1, 2001)	8
<i>Cleveland v. Schmidt</i> , 8th Dist. Cuyahoga Co. No. 098603, 2013-Ohio-1547.....	1, 3
<i>Cleveland v. Trzebuckowski</i> , 85 Ohio St.3d 524, 709 N.E. 2d 1148 (1999).....	7
<i>State v. Flynt</i> , 63 Ohio St. 2d 132, 407. N.E.2d 15 (1980)	7
<i>State v. Gill</i> , 63 Ohio St.3d 53, 584 N.E.2d 1200 (1992).....	5
<i>State v. Hall</i> , 8th Dist. Cuyahoga Co. No. 55289, 1989 WL 42253 (1989).....	8
<i>State v. McNeil</i> , 1 st Dist. Hamilton Co. No. C-000808, 146 Ohio App. 3d 173, 756 N.E. 2d 884 (2001)	8
<i>State v. Michel</i> , 9th Dist. Summit Co. No. 24072, 181 Ohio App. 3d 124, 908 N.E. 2d 456, 2009 -Ohio- 450 (2009).....	7
<i>State v. Smith</i> , 80 Ohio St.3d. 89, 684 N.E.2d 668, 1997-Ohio-355 (1997).....	5

STATUTES

R.C. 1713.50.....	1, 2
C.C.O. 401.41.....	6
C.C.O. 401.54.....	2, 4
C.C.O. 431.11.....	4, 6
C.C.O. 431.23.....	6
C.C.O. 431.37.....	2, 5, 7
C.C.O. 457.07.....	4
C.C.O. 689A.99.....	4

OPPOSITION TO JURISDICTION

The City of Cleveland asserts that the jurisdictional, procedural, constitutional, and substantive questions Defendant-Appellant raises have been settled by the decisions of this Court and by courts of appeals throughout the State of Ohio. There is no diversity of opinion with respect to the issues set forth in Defendant-Appellant's Brief. Therefore, this Honorable Court should decline jurisdiction in this case because this case does not present a substantial constitutional question or any issue of public or great general interest.

STATEMENT OF THE CASE AND FACTS

The City of Cleveland adopts and incorporates the facts as stated by the Ohio Eighth District Court of Appeals in *Cleveland v. Schmidt*, 8th Dist. Cuyahoga Co. No. 098603, 2013-Ohio-1547.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Defendant-Appellant's Proposition of Law I:

The trial court had subject matter jurisdiction.

Revised Code 1713.50 governs the authority and jurisdiction of private campus police officers. They are given the powers and authority "to enforce all or certain laws" of the state and political subdivision in which they are located, as well as "to arrest violators." R.C. 1713.50C. Without an agreement with the subdivision in which they are located, "members of a campus police department may exercise... the powers and authority granted to them under this division in order to preserve the peace, protect persons and property, enforce the laws of this state, and enforce the ordinances and regulations of the political subdivisions in which the private college or university is

located, but only on the property of the private college or university that employs them.”

Id.

Here, Defendant-Appellant argues that the offense of “Driving Upon Sidewalks, Street Lawns or Curbs,” Cleveland Codified Ordinance 431.37, cannot be committed on private property and therefore a private campus police officer does not have jurisdiction to enforce the ordinance. Defendant-Appellant is incorrect. Pursuant to the definition of a sidewalk in C.C.O. 401.54, the crime of driving upon sidewalks can be committed on the portion of a street between the curb lines or the lateral lines of a roadway and the adjacent property lines, intended for the use of pedestrians.

Both the trial court and the court of appeals found that Defendant-Appellant drove on a sidewalk and entered onto Case Western Reserve University’s (CWRU) property. As Defendant-Appellant’s vehicle had been left, it was parked on private property, parked across a sidewalk, parked in a cutout area of curb and parked in front of a crosswalk, all of which were intended for pedestrian use. The court of appeals found that the area on which Defendant-Appellant had parked was clearly not intended to be used as such.

As officers arrived and attempted to deal with the vehicle, Defendant-Appellant sprinted out of the building on the CWRU campus, jumped into his car and drove away. As Defendant-Appellant fled the scene, the officers on scene saw him once again drive on both CWRU’s private property and the sidewalk. Defendant-Appellant committed the traffic offense while on both private and public property concurrently and CWRU officers were within their jurisdiction to cite him for violations that they observed. Here, the offense occurred on the property of CWRU and the trial court had jurisdiction.

Defendant-Appellant's first proposition of law is without merit. Therefore, Defendant-Appellant's request for jurisdiction with this Honorable Court should be denied.

Defendant-Appellant's Proposition of Law II:

Defendant-Appellant was properly notified and convicted of the offense charged.

Defendant-Appellant's contention that the Court of Appeals decision changed the nature of the offense charged is incorrect. In addition to testimony by CWRU Police Officer Hodge, in ¶2 of the Opinion the court cited Defendant-Appellant's testimony during a motion hearing, that "the front end of [Schmidt's] car passed over the sidewalk so that the front half of his car was on CWRU property and the rest of his car was on the city of Cleveland sidewalk." Furthermore, the court found, again through evidence submitted by Defendant-Appellant, "...the area is intended for pedestrian traffic. It is a sidewalk area paved with bricks encircling a sculpture. The walkways around the sculpture are paved with concrete. The front end of Schmidt's car was parked on the bricked sidewalk area and the back end of his car was blocking the entrance to a crosswalk." Court of Appeals Opinion, ¶12. Defendant-Appellant drove on both the sidewalk and the pedestrian walkway area adjacent to the sidewalk. The Court of Appeals found that Defendant-Appellant had notice of the offense charged.

Defendant-Appellant's second proposition of law is without merit. Therefore, Defendant-Appellant's request for jurisdiction with this Honorable Court should be denied.

Defendant-Appellant's Proposition of Law III:

The definition of sidewalk used by both the trial court and the court of appeals was not an overly expansive interpretation.

“‘Sidewalk’ means that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians.” C.C.O. 401.54. Sidewalk area is not specifically defined but is used in other parts of the C.C.O. as noted by Defendant-Appellant. Memorandum in Support of Jurisdiction, p. 10, fn 2.

In C.C.O. 457.07, ‘sidewalk area’ is used as follows: “...to restrict pedestrian movement to established sidewalk area...” In addition, C.C.O. 431.11 states, “...shall yield the right of way to pedestrians lawfully using the sidewalk or sidewalk area extending across any alley.” And finally, in C.C.O. 698A.99, “permissive zones which are the Northerly sidewalk area of Huron Road between Ontario Street and East 4th Street”.) Taken in context in each example cited, sidewalk area appears to mean the area near a roadway in which pedestrian traffic is expected. Additionally, the words sidewalk and sidewalk area are used in conjunction in nearly all of the examples cited. In plain English, a sidewalk area is the area around a sidewalk upon which a pedestrian may walk. Sidewalks and sidewalk areas are not meant for vehicular traffic. They are so similar in nature that the Court of Appeals did not use an expansive construction in its definition of the offense.

Defendant-Appellant's third proposition of law is without merit. Therefore, Defendant-Appellant's request for jurisdiction with this Honorable Court should be denied.

Defendant-Appellant's Proposition of Law IV:

The application of the term "sidewalk area" to the facts in this matter is not a novel construction.

The Court of Appeals did not find that the property on which Defendant-Appellant drove was a sidewalk area solely because it was paved with bricks that contained a sculpture or paved with concrete walkways. The Court of Appeals looked at Defendant-Appellant's numerous photographs and found that the area was obviously not intended as a parking area for cars. There were no painted parking lines for motorists to use, no meters or signs. The area in question was at a painted crosswalk on Juniper Road whose natural progression led up the cutout, across a sidewalk, over bricks, past a sculpture and into a residential area of campus. Its legal use is almost strictly for pedestrians and bicyclists and NOT motor vehicle traffic.

Defendant-Appellant's fourth proposition of law is without merit. Therefore, Defendant-Appellant's request for jurisdiction with this Honorable Court should be denied.

Defendant-Appellant's Proposition of Law V:

Cleveland Codified Ordinance 431.37(a) is not unconstitutionally vague.

There is a strong presumption in favor of the constitutionality of an enactment such as C.C.O. 431.37(a), and any doubts of about its validity are resolved in favor of the enactment. *See State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio--355 (1997); *State v. Gill*, 63 Ohio St.3d 53, 584 N.E.2d 1200 (1992). The U.S. and Ohio Supreme Court have stated that an enactment is not *per se* void for vagueness because it could have been more precisely worded. *Smith, supra*. Although Defendant-Appellant

doubts the validity of C.C.O. 431.37(a), this Court should approach the doubts with a presumption in favor of its constitutionality.

C.C.O. 431.37(a) states, “No person shall drive any vehicle, other than a bicycle, upon a sidewalk or sidewalk area except upon a permanent or duly authorized temporary driveway or without first obtaining a permit from the Director of Public Service.” The ordinance exceptions permit driving upon a sidewalk or sidewalk area if one is driving upon a temporary or permanent driveway.

Defendant-Appellant claims that the crime charged is vague because one would have to guess at the meaning of the phrase “sidewalk area.” Again, the plain meaning of the phrase is clear: a sidewalk area is the area around a sidewalk in which a pedestrian may walk.

Defendant-Appellant also takes issue with the definition of “driveway”, the exception provided in C.C.O. 431.37(a), because he believes it criminalizes ordinary behavior. C.C.O. 401.41 states that a driveway is, “every way or place in private ownership used for vehicular travel by the owner and those having express or implied permission of the owner, but not by other persons.”

Reading the ordinances together, one is clearly permitted to drive over a sidewalk if one is entering private property via a way used for vehicular travel. A driveway is a way to drive onto private property. Every motorist whose home driveway intersects with a public sidewalk is *explicitly permitted* to drive over the sidewalk as the motorist leaves or returns home. Of the very few times this conduct is criminalized, the criminal conduct involves not yielding to pedestrians or vehicle traffic. Those pedestrians and vehicles have the right of way. See C.C.O. 431.11 and 431.23.

The plain reading of the definitions and ordinance clearly proscribe prohibited conduct and are not vague. Defendant-Appellant's fifth proposition of law is without merit. Therefore, Defendant-Appellant's request for jurisdiction with this Honorable Court should be denied.

Defendant-Appellant's Proposition of Law VI:

Defendant-Appellant failed to meet the burden of proof to support a claim of selective prosecution.

To support a claim of selective enforcement or prosecution, " a defendant bears the heavy burden of establishing, at least prima facie, that, (1) while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution; and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e. based upon impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *State v. Michel*, 9th Dist. Summit Co. No. 24072, 181 Ohio App. 3d 124, 908 N.E. 2d 456, 2009 -Ohio- 450 (2009), quoting *State v. Flynt*, 63 Ohio St. 2d 132, 407. N.E.2d 15 (1980)

Defendant-Appellant had the burden proving both elements of a two-prong test for the court to find selective prosecution, and here, Defendant-Appellant did not meet this burden. First, Defendant-Appellant must demonstrate he was singled out for prosecution based on actual discrimination due to invidious motives or bad faith. *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 709 N.E. 2d 1148 (1999). Yet, Defendant-Appellant only provides examples of who he claims are CWRU personnel and affiliates who park on the sidewalk and are not ticketed. Defendant-Appellant provided no testimony or evidence to support a claim that those vehicles were, in fact, not ticketed.

Courts have found that “bold assertions without evidentiary support simply should not merit the type of scrutiny that substantiated allegations would merit.” *State v. McNeil*, 1st Dist. Hamilton Co. No. C-000808, 146 Ohio App. 3d 173, 756 N.E. 2d 884 (2001), quoting *State v. Hall*, 8th Dist. Cuyahoga Co. No. 55289, 1989 WL 42253 (1989) at *1. Therefore, Defendant-Appellant has not sufficiently shown that those similarly situated to Defendant-Appellant avoided prosecution for a similar offense.

Even if the Court finds that the Defense has met the first prong of the test, the test is conjunctive and requires a showing of discriminatory selection based on bad faith. Simply showing the “exercise of some selectivity in enforcing a statute fair on its face is not unconstitutional in itself.” *City of Cleveland v. Ksiezyk*, 8th Dist. No. 79220, 2001 WL 1352760 (Nov. 1, 2001) at *2. While Defendant-Appellant asserted there was “bad faith” present in the issuance of the ticket, he provides no evidence to support that claim.

Insufficient evidence was submitted by Defendant-Appellant to claim selective prosecution. Defendant-Appellant’s sixth proposition of law is without merit. Therefore, Defendant-Appellant’s request for jurisdiction with this Honorable Court should be denied.

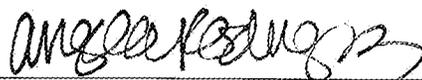
CONCLUSION

Based upon the foregoing, Defendant-Appellant's Propositions of Law do not demonstrate a case of great general or public interest. Therefore, this case is inappropriate for the exercise of this Honorable Court's discretionary jurisdiction and the City of Cleveland respectfully requests that the request for jurisdiction be denied.

Respectfully submitted,

BARBARA A. LANGHENRY
(0038838)
Director of Law
VICTOR R. PEREZ
(0074127)
Chief Prosecutor

By:


ANGELA RODRIGUEZ (0074432)
Assistant Prosecutor
City of Cleveland
1200 Ontario St., 8th Floor
Cleveland, OH 44113
(216) 664-4850
(216) 664-4831
(216) 664-4399 Fax
alr@city.cleveland.oh.us

CERTIFICATE OF SERVICE

A copy of the City's Response to the Defendant's Motion to Suppress was delivered by ordinary prepaid U.S. mail and email to, Robert Schmidt, *pro se*, 1721 Fulton Road, Cleveland, Ohio 44113, r.k.schmidt@cmlaw.csuohio.edu, on this 27th day of September, 2013.



ANGELA RODRIGUEZ, 0074432
ASSISTANT CITY PROSECUTOR