

IN THE SUPREME COURT OF OHIO

Sam Jodka,

Plaintiff-Appellee/Cross-Appellant

vs.

City of Cleveland, Ohio, et al.

Defendants-Appellants/Cross-Appellees

Case No. 2014-0636

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

Court of Appeals Case No. CA-13-099951

**MEMORANDUM OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES
 AFFILIATED COMPUTER SERVICES, INC., BOULDER ACQUISITION CORP., AND
 XEROX CORPORATION IN RESPONSE TO PLAINTIFF-APPELLEE/CROSS-
 APPELLANT SAM JODKA'S MEMORANDUM IN SUPPORT OF JURISDICTION OF
 HIS CROSS-APPEAL**

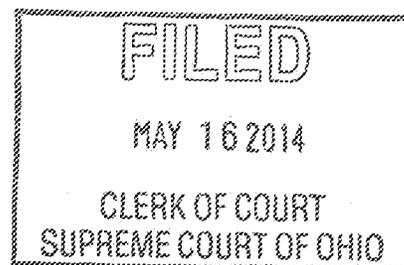
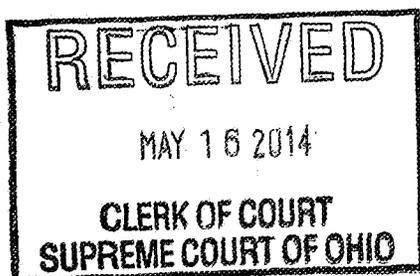
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I. JODKA'S CROSS-APPEAL IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Jodka's cross-appeal challenging the ruling of the Eighth District Court of Appeals that he lacked standing to present his constitutional arguments and to seek recovery in unjust enrichment does not present a case of public or great general interest. This is not a case where a litigant was blatantly denied a remedy as Jodka claims. Jodka lacked standing because he had remedies available to him which he decided not to pursue. He cannot claim inadequacy of a process he made no effort to bring into play nor can he create an unjust enrichment claim by ignoring available process which could have avoided the claim in the first place.

Jodka claims that he only had three options upon receipt of his violation for speeding captured by one of the city's camera units. He further claims that none of these options could provide him with relief—relief he claims is only available in municipal court. On further inspection, however, his analysis fails.

Jodka first claims that he could have “caved” and pursued an unconstitutional administrative hearing where he could not make a facial challenge to the ordinance. This argument fails to distinguish between facial and as-applied constitutional challenges to legislation. As explained herein, while it is true he could not make a facial challenge to CCO 413.031, he could have made an as-applied challenge.

He next claims that he could have done nothing, including not making payment, but then risk various sanctions such as adverse credit and impoundment of his vehicle. ACS agrees that this option is not a wise choice, but Jodka assumes too much. There is no provision in CCO 413.031 for impoundment of a vehicle. The only penalty identified is a late penalty, CCO 413.031(o), and costs for collection of the debt, CCO 413.032. If Jodka or any other motorist with a violation does not pay following completion of the administrative process made available

to him, Cleveland can go to court--most likely Cleveland Municipal Court-- file a suit, and obtain a judgment for collection purposes. Once sued on the debt, Jodka could have asserted all his defenses—including any defenses as to the constitutionality of CCO 413.031.

According to Jodka, the third and rational option was to make payment, not file an administrative appeal, wait five years, and then file an action for unjust enrichment only to have the claim dismissed for lack of standing. But he created the standing problem himself. He could have filed an administrative appeal and made an as-applied challenge. He could have filed a prompt and proper declaratory judgment action challenging CCO 413.031 on its face. He did not do either. Instead, he paid, thus relinquishing his standing.

Jodka has never disputed that: (1) he was speeding when captured by the camera in 2007; (2) he paid the violation rather than file an administrative appeal as authorized by CCO 413.031(k); and (3) he did nothing for the next five years until he filed his present unjust lawsuit in June 2012. These undisputed facts show that Jodka does not have a superior equity and it was not unjust for the City of Cleveland to collect and retain his payment. *Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751, ¶ 30 (8th Dist., Cuyahoga Cty.) (An unjust enrichment claim requires not only that there be an enrichment but that the enrichment be unjust. Because plaintiff is seeking equitable relief, “it must show a superior equity so that it would be unconscionable for [the defendant] to retain the benefit” [citation omitted]); *City of Cincinnati v. Fox*, 71 Ohio App. 233, 239, 49 N.E.2d 69 (1st Dist., Hamilton Cty., 1943) (Plaintiff must prove more than a benefit conferred. “It must go further and show that under the circumstances it has a superior equity so that as against it, it would be unconscionable for the defendant to retain the benefit”).

Jodka had remedies available to him which he chose to ignore. He created the standing issues himself. This case is thus not one of public or great general interest.

II. ARGUMENTS IN RESPONSE TO JODKA'S PROPOSED PROPOSITION OF LAW

Jodka's Proposition of Law: A plaintiff that alleges (1) that a municipality has held or collected monies under an ordinance that impairs or restricts a court's jurisdiction in violation of Article IV, Section 1 of the Ohio Constitution has standing to assert a common law unjust-enrichment claim seeking restitution if the plaintiff also alleges (2) that the defendants have held or collected plaintiff's money under the disputed ordinance. The plaintiff's standing does not depend upon whether or not the plaintiff previously submitted to an allegedly unconstitutional procedure that displaces a court's jurisdiction.

A. Jodka's voluntary payment destroyed his standing.

The Eighth District Court of Appeals correctly held that Jodka lacked standing to pursue his unjust enrichment claim (Opinion, 2014-Ohio-208, ¶ 34) and to challenge the constitutionality of CCO 413.031 (Opinion, ¶ 37).¹ Instead of invoking the process available to him to challenge the ordinance at the time he received his notice of violation, he relinquished his standing to assert a challenge by paying the violation.

There are two means for a party to challenge the constitutionality of a statute or ordinance — “on its face” or “as applied.” *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898 at ¶ 20. A facial challenge alleges that the ordinance “on its face

¹ Because the appellate court ruled that Jodka lacked standing, its ruling that CCO 413.031 violates Art. IV, Section 1 of the Ohio Constitution is *dicta*. *State of Ohio, ex rel. Lieux v. Village of Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1954), ¶ 1 of the syllabus (“Constitutional questions will not be decided until the necessity for their decision arises.”); *Ahrns v. SBA Communications Corp.*, 3d Dist. No. 2-01013, 2001-Ohio-2284 (Trial court's ruling that zoning statute, R.C. 519.211(B), was unconstitutional was unnecessary and merely *dicta* because the court resolved the case on other grounds.) The appellate court arguably should have addressed the standing issue first and then not address the constitutional issue rather than issue an advisory opinion on the constitutional issue.

and under all circumstances, has no rational relationship to a legitimate government purpose.” *Id.* at ¶ 21. A party challenging an ordinance on its face must prove, beyond a reasonable doubt, “that no set of circumstances exists under which the act would be valid.” *Id.* at ¶¶ 20, 21.

For an as-applied challenge, the party challenging the statute or ordinance must prove, by clear and convincing evidence, that “the application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.” *Id.* at ¶¶ 20, 22. An as-applied challenge does not, however, render a statute or ordinance completely inoperative. *Id.* at ¶ 22.

There were thus two avenues available to Jodka to challenge the constitutionality of CCO 413.031. First, he could have refused to pay the fine and instead requested an administrative hearing as set forth in the ordinance. While it is true that an administrative body cannot rule on the constitutionality of an ordinance, Jodka could have then filed an appeal to the Cuyahoga County Court of Common Pleas from the Parking Violations Bureau pursuant to Ohio Revised Code Chapter 2506. There he could have challenged the constitutionality of CCO 413.031 “as applied” to him under his set of circumstances. *City of Cleveland v. Posner*, 193 Ohio App.3d 211, 2011-Ohio-1370, 951 N.E.2d 476 ¶ 17 (8th Dist.); *Carroll v. City of Cleveland*, 522 Fed. Appx. 299, 2013 WL 1395900 (6th Cir. 2013).² But he first had to exhaust his administrative remedies before making an as-applied constitutional challenge in court. *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 22; *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 273, 328 N.E.2d 395 (1975). This appellate process gave him an adequate

² Jodka’s reliance on *Dawson v. City of Cleveland*, No. 999654, 2014-Ohio-1636 (8th Dist), is unavailing. In *Dawson*, the appellate court correctly ruled that the plaintiff could not make a facial challenge to CCO 413.031 via an administrative appeal under Ohio Rev. Code Ch. 2506. *Id.* at ¶ 25. ACS agrees. However, there was no indication that the plaintiff had attempted an “as applied” challenge which is permissible.

remedy at law. *Scott v. City of Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923 at ¶ 24. He did not do this. Consequently, as noted by the appellate court, he lacked standing.

Jodka's second option was to refuse to pay the fine and to file a timely declaratory judgment action in common pleas court asserting a facial challenge to the ordinance. *Posner* at ¶ 16. He did not do this either. Rather, Jodka paid the fine, and then five years later, he filed the present lawsuit which is not a proper declaratory judgment action.

Jodka presented three counts in his Complaint: Count I for violation of Article IV, Section 1 of the Ohio Constitution for which he sought restitution; Count II for violation of Article I, Section 2 of the Ohio Constitution for which he sought restitution, and Count III for class certification. He did not have a count or make a claim for a declaration that CCO 413.031 is unconstitutional. Rather, he merely assumed that it was and demanded restitution. Even his Complaint is titled, "Class Action Complaint for Restitution."

Jodka never made a request for declaratory relief in his Complaint as required by Ohio Civil Rule 57 and Ohio Revised Code Sections 2721.01 through 2721.15. *See, e.g., 12 Moore's Federal Practice* § 57.60[1] ("A complaint for declaratory relief must precisely state the declaratory judgment sought. . ."). Moreover, Jodka never moved the court for judgment in his favor that the ordinance is unconstitutional. Rather, he merely opposed the Defendants' motions to dismiss. He therefore never had a valid declaratory judgment action pending and there was no constitutional claim before the court to decide. Without a claim, Jodka could not attempt to seek relief via unjust enrichment.

Moreover, as noted by this Court, "[a]n action for declaratory judgment to determine the validity of an administrative agency regulation may be entertained by a court, in the exercise of its sound discretion, where the action is within the spirit of the Declaratory Judgment Act, a

justiciable controversy exists between adverse parties, and speedy relief is necessary to the preservation of rights which may otherwise be impaired or lost.” *Burger Brewing Co. v. Liquor Control Commission*, 34 Ohio St.2d 93, 296 N.E.2d 261 (1973) (¶ 1 of the syllabus).

Furthermore, “[a] court will not exercise its power to determine the constitutionality of a legislative enactment unless it is absolutely necessary to do so. *Greenhills Home Owners Corp. v. Village of Greenhills*, 5 Ohio St.2d 207, 215 N.E.2d 403 (1966), citing, *State of Ohio ex rel. Lieux v. village of Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1951).

There is no genuine dispute between Jodka and the City of Cleveland or ACS of sufficient immediacy and reality to justify a declaratory judgment action addressing the constitutionality of CCO 413.031. He accepted liability by paying and not contesting his citation. Instead, he could have filed an administrative appeal, or he could have immediately filed a proper declaratory judgment action upon receipt of his citation in 2007. Even though it would take time for a declaratory judgment action to proceed through court, there is no evidence in the record that Cleveland would have attempted to obtain a judgment on the unpaid violation while the declaratory judgment proceeding was pending, and even if it did, Jodka could have asserted his defenses in that action. Rather, Jodka waited five years, until June 2012, to file his “Class Action Complaint for Restitution.” In addition, his address identified in the Complaint is Columbus, Ohio. He has not alleged that he regularly drives in Cleveland and would thus be subject to the speeding cameras there on a regular basis. He simply has not alleged any genuine dispute of sufficient immediacy and reality to warrant declaratory relief.

Finally, the following federal courts outside Ohio have specifically addressed parking and traffic camera challenges where the plaintiff paid the fine without invoking available process. In each case the court held that the plaintiff lacked standing to pursue further relief. In *Van Harken*

v. *City of Chicago*, 906 F. Supp. 1182, 1187 (N.D. Ill. 1995), *aff'd as modified*, 105 F.3d 1346 (7th Cir. 1997), in addressing class certification issues in litigation over Chicago's parking violations ordinance, the court held that persons who paid their tickets without availing themselves of the administrative hearing process provided by the ordinance did not have standing to challenge the ordinance on due process grounds. The court stated, "[T]he point is that the persons who paid their tickets do not have a constitutional claim at all because they cannot claim the inadequacy of the process that they made no effort to bring into play." *Id.* Likewise, in *Stubbs v. City of Center Point, Alabama*, 2013 WL 6734092 (N.D. Ala. 2013), the court granted the city's and traffic camera company's motion to dismiss the plaintiff's due process challenge to the city's traffic camera ordinance for, *inter alia*, lack of standing. The plaintiff's payment of the fine without invoking the process available destroyed her standing. As noted by the court:

In this case, while payment of the fine could be considered an injury, [plaintiff's] injury is not causally connected to the conduct of which she complains because she paid her fine without taking advantage of the due process provided by the City to challenge it. Even if that process were insufficient to satisfy constitutional standards, it did not cause [plaintiff] to voluntarily pay here fine; no traceable connection exists.

Id. at *7. See also *Mills v. City of Springfield, Missouri*, 2010 WL 3526208 at *6 (W.D. Mo. 2010) (Motorists who received citations from red light cameras and paid the fines filed a lawsuit seeking a refund. In addressing due process challenges, the court ruled that the plaintiffs lacked standing to challenge the ordinance on due process grounds because they paid rather than invoke the adjudicative procedures available under the ordinance); *Shavitz v. City of High Point*, 270 F.Supp.2d 702, 710-11 (M.D. N.C. 2003) (Motorist who received a ticket from a red light

camera and neither paid nor contested the ticket lacked standing to raise procedural due process challenge).

B. The result is the same under a standing or *res judicata* analysis.

Whether one addresses the issue in terms of *res judicata* or lack of standing, the result is the same – Jodka has no claims to assert. The majority opinion in *Jodka* cites to *Carroll v. City of Cleveland*, 522 Fed. Appx. 299, 2013 WL 1395900 (6th Cir. 2013), in which the Sixth Circuit held that *res judicata* (claim preclusion) barred a claim of a person who paid a traffic camera violation citation without contesting the citation as authorized by the CCO 413.031 and R.C. 2506. The Sixth Circuit specifically found that “claim preclusion ‘is ... applicable to actions which have been reviewed before an administrative body, in which there has been no appeal made pursuant to R.C. 2506.01’”. *Id.* at *4, citing, *Wade v. City of Cleveland*, 8 Ohio App.3d 176, 177, 456 N.E.2d 829, 831-832, 8th Dist. 1988).

If a claim is barred by *res judicata*, which Jodka’s claims are, the majority was correct in concluding that Jodka was “an inappropriate person to assert a claim that provisions of CCO 413.031 unconstitutionally stripped the municipal court of jurisdiction over his offense.” (Opinion, ¶ 37). He no longer has a “personal stake” or presents a “hot controversy.”

C. *Lycan* and *Santos* are distinguishable.

The Eighth District Court of Appeals decisions in *Lycan v. City of Cleveland*, 8th Dist. No. 94353, 2010-Ohio 6021 (“*Lycan I*”) and 8th Dist. No. 99698, 2014-Ohio-203 (“*Lycan II*”) are distinguishable from *Jodka*.³ Unlike *Jodka* in which the plaintiff attempted (but failed) to challenge the constitutionality of CCO 413.031 on jurisdictional and equal protection grounds as the basis to recover via unjust enrichment, *Lycan I* and *Lycan II* presented no such claims.

³ *Lycan II* is also at odds with the 6th Circuit’s decision in *Carroll* on the application of *res judicata*. The City of Cleveland has filed a jurisdictional appeal to this Court of the *Lycan II* decision, Case No. 14-0358. ACS was not a party either to *Lycan II* or *Carroll*.

Rather, *Lycan I* and *Lycan II* are the class action progeny of *Dickson & Campbell v. City of Cleveland*, 181 Ohio App.3d 238, 2009-Ohio-738, 908 N.E.2d 964 (8th Dist.), in which the Eighth District held that the former version of CCO 413.031 by its language did not apply to lessees. Even Jodka (a vehicle owner and not a lessee) conceded at ¶ 51 of his Complaint, “*Lycan* ... consists only of lessees and does not involve an equal-protection issue nor the Section 1, Article IV/R.C. 1901.20 issue.”

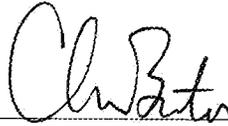
Moreover, unlike *Jodka*, the *Lycan* plaintiffs did assert a claim for declaratory judgment. 2010-Ohio-6021 at ¶ 10. As explained above, Jodka did not file a declaratory judgment action asserting constitutional challenges as a basis to seek such recovery. Jodka therefore cannot seek restitution via unjust enrichment.

This is also not a situation such as that presented in *Santos v. Ohio Bureau of Workers’ Compensation*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, where this Court allowed recovery to the plaintiffs via restitution, in a suit alleging injunctive and declaratory relief, after the Court had already ruled in a previous case [*Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 748 N.E.2d 1111 (2001)] that the workers compensation subrogation statute was unconstitutional. The plaintiff in *Holeton* was able to assert constitutional challenge because he did so defensively, as a shield to the Bureau of Workers Compensation’s efforts to assert subrogation rights. See *PDU, Inc. v. City of Cleveland*, 8th Dist. No. 81944, 2003-Ohio-3671, ¶¶ 25-27 (recognizing that violations of Sections 2, 11 and 16 of the Ohio Constitution can be asserted as defenses to a criminal prosecution, but do not create an independent cause of action). Moreover, the statutory subrogation issues in *Santos* did not arise from a contested administrative appellate process which was available to Jodka under CCO 413.031.

III. CONCLUSION

For the foregoing reasons, Defendants-Appellants/Cross-Appellees ACS respectfully requests that this Court decline jurisdiction of Jodka's cross-appeal. He created the standing issue by not invoking process available to him to contest the violation. This is not a case of public or great general interest.

Respectfully submitted,



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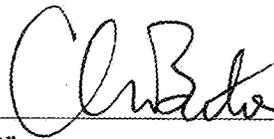
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