ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF DAYTON, OHIO	:	
Plaintiff/Appellant	:	Supreme Court Case No. 2015-~~1459~~ 1549
-vs-	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District (Case No. 26643)
STATE OF OHIO	:	Trial Court No.: 2015 CV 1457
Defendants/Appellee	:	

BRIEF OF AMICUS CURIAE, CITY OF SPRINGFIELD, OHIO IN SUPPORT OF APPELLANT

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FILED
APR 11 2016
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF FACTS

The City of Dayton created a program of automatic traffic enforcement utilizing cameras to detect red-light violations, assessing civil penalties for those violations and providing for quasi-judicial administrative hearings for contested violations. The City of Springfield established a similar program, as did Akron, Columbus and other cities and villages around Ohio. Dayton later changed its program to include automated speed enforcement.

This Court twice ruled that municipalities have Home Rule powers granted by the Ohio Constitution to enforce traffic laws with automated camera-based programs as long as those programs do not alter substantive traffic laws. *Mendenhall v. Akron*, 117 Ohio St. 3d 33 (2008) and *Walker v. Toledo*, 143 Ohio St. 3d 420 (2014).

Because the General Assembly believes that it is the font of all wisdom, it passed and Governor Kasich signed Amended Substitute Senate Bill 342[1] in an effort to override the policy decisions made by Ohio municipalities and the decisions of this Court that confirmed their power to make those policy choices.

SB 342 contains numerous provisions that address no statewide concerns, that have the sole purpose and primary effect of limiting municipal authority.

Dayton, Toledo, Akron, Springfield and other cities filed suits in their respective counties challenging the constitutionality of SB 342. Dayton, Akron and Toledo sought and won injunctions prohibiting the enforcement of SB 342 because certain provisions were unconstitutional intrusions on municipal Home Rule powers. The State appealed the Dayton, Akron and Toledo decisions. The Second District reversed the Montgomery

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[1] Hereinafter SB 342.

County Common Pleas decision in favor of Dayton and Dayton's appeal is before you in this case.

The Ninth District Court of Appeals remanded Akron's case to the Summit County Common Pleas Court without ruling on the constitutionality of SB 342. The Summit County Common Pleas judge reversed his earlier decision, based on the flawed analysis of the Second District in Dayton. The Toledo case awaits decision in the Sixth District.

Springfield did not seek injunctive relief. It sought a declaratory judgment that the entire statute, SB 342, is unconstitutional, except for three severable sections.[2] Springfield also argues that SB 342 is an unconstitutional encroachment on the right of local self-government. In these respects, Springfield's case is broader than this case.

The Clark County Common Pleas Court found the statute to be constitutional and the Second District, relying largely on its decision that is before you in this case, upheld the trial court.

Springfield has filed a notice of appeal and jurisdictional memorandum with this Court, Case No. 2016-0461. Springfield's case overlaps with the issues in this case. Springfield submits this amicus brief in support of the appellant, the City of Dayton.

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[2] ORC § 3937.411 directs insurance companies not to consider civil violations in rate determinations. ORC § 4511.0910 exempts civil violations from the assessments of points charged against a driver's license. ORC § 4511.204(C)(2) requires a state agency to report on texting while driving violations. None of these impact the Home Rule powers of cities and can be easily severed from the rest of SB 342.

ARGUMENT

Proposition of Law No. 1

Provisions in a state statute that are arbitrary and serve no purpose except to limit municipal police power are not general laws and violate the Home Rule Amendment of the Ohio Constitution.

Dayton correctly identifies three provisions of SB 342 which evidence that the purpose and effect of the bill was to unconstitutionally limit municipal authority: the officer present requirement, the 3-year study requirement and the speeding leeway requirement.[3]

A. The Officer-Present Requirement.

The bill requires that an officer be present at all times at each location where a camera is detecting traffic violations, ORC § 4511.093(B)(1). The officer's presence adds nothing to the photo-enforcement process. It merely serves to needlessly increase the cost of the program in order to force cities to curtail or abandon them.

The bill requires nothing of the officer beyond his presence. He need not be observing traffic. The officer is not required to review the violations issued while he is present. The officer does not attest to the traffic violation that the photo-enforcement system has detected.

The bill requires that the officer sitting at the site of the camera must be a full-time officer, ORC §4511.092(C). A part-time officer has authority to write a traffic ticket if the officer witnesses a red-light violation. That part-time officer can make a criminal arrest. That part-time officer can charge a person with murder. Yet, that part-time

[3] Springfield's appeal challenges these provisions and 20 others.

officer cannot be the one sitting idly beside a camera while it operates in a photo-enforcement program.

These requirements are absurd. They fulfill no state interest. These requirements add nothing to traffic safety. These requirements detract from overall public safety by anchoring a valuable trained law enforcement officer to a camera.

The sole purpose of the requirement that a full-time officer baby-sit traffic cameras was to make traffic-camera programs unaffordable for local government. Cities, including Springfield, created their photo-enforcement programs largely because it allowed them to increase traffic law compliance without consuming large amounts of police officer time. Springfield's Ordinance No. 05-41 stated that among its purposes was "alleviating the necessity for conducting extensive conventional traffic enforcement at high accident intersections." Dayton's ordinance was based on this same purpose.[4] In other words, these cities deliberately chose to engage in photo enforcement to avoid tying up their police manpower.

SB 342's police officer present requirement was imposed specifically to make photo-enforcement programs prohibitively expensive. It is designed to prohibit cities and villages from optimizing traffic enforcement while freeing up officers for other police work. The Legislative Service Commission's Fiscal Note & Local Impact Statement told the General Assembly that this provision would cost local governments about $73 million per year. The bill's primary sponsor, Sen. Willaim Seitz, said that the bill would

[4] As quoted in *Dayton v. State*, trial court Decision Order and Entry at p.2.

"force most cities to make hard choices about law enforcement priorities, and would likely reduce the number of operating cameras."[5]

B. The Three-Year Study Requirement

SB 342 requires cities to take certain state-mandated steps before they can install and utilize traffic cameras. Among these pre-deployment requirements is the requirement that the city conduct a three-year traffic study at each location where cameras are to be used. A city must also conduct a "public information campaign" with respect to each location, publish the locations in a newspaper of general circulation and issue only warning notices during the first 30 days of operation.

City officials do not need three-year studies to know where traffic cameras are likely to be most effective. City officials do not need the state to tell them the best means of imparting information to their citizens. These are local affairs, local concerns. The three-year study requirement fulfills no state purpose. It serves no state interest. It is arbitrary. This requirement serves only to increase municipal expenses and to impose one or more obstacle in the path of local decisions.

The object of the Home Rule powers of cities and villages "was to permit municipalities to use [their] intimate knowledge and determine for themselves…how local affairs should be conducted." *Froelich v. Cleveland*, 99 Ohio St. 376 (1919). This provision flies in the face of that principle. It is based on a contrary principle, one not found in the Ohio Constitution – the state knows what's best for cities and villages.

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[5] Sponsor Testimony, House Policy and Legislative Oversight Committee (December 2, 2014)

C. The Speeding Leeway Requirement

The speed limit in a school zone is 20 MPH, ORC § 4511.21(B)(1)(a). Yet, under SB 342 a vehicle must be traveling at least 26 MPH before a civil violation can be issued through a photo-enforcement program, ORC §4511.0912(a). In other locations, a vehicle must be going more than 10 MPH over the legal limit before a civil violation can be issued, ORC 4511.0912(b).

No valid interest is served by prohibiting enforcement of school speed limits via civil violation on a vehicle going 24 or 25 MPH in a school zone. No valid interest is served in prohibiting such enforcement on a vehicle going 32 MPH past children playing along a residential street. The only interest served by the speeding leniency requirement is an interest in crippling photo enforcement programs. That interest is diametrically opposed to the constitutional interest embodied in the Home Rule Amendment to the Ohio Constitution that empowers local decision-making.

The General Assembly made no secret about what it was doing. Senator Seitz said that this bill was a "giant leap towards retarding, if not outlawing" photo-enforcement programs.[6] He was not the only legislator expressing those views. Sen. Faber said that the officer-present requirement meant that the operation of photo-enforcement programs "probably wasn't fiscally achievable."[7] House sponsor Rep. Ron Maag called the bill "the next best thing to a complete ban."[8]

When Dayton and other cities filed suit challenging the constitutionality of SB 342, its sponsor, Sen. Seitz, threatened to change the local-government fund so as to

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[6] http://www.discussionist.com/10144895 (May 10, 2014)
[7] www.dispatch.com, Jim Segal (June 8,2014)
[8] www.cleveland.com, Jeremy Pelzer (March 10,2015)

impose financial penalties on cities if the courts found the bill to be unconstitutional. He said, "Even if they win, they lose."[9]

The Montgomery County Common Pleas Court found certain provisions of SB 342 unconstitutional on April 2, 2015. Summit County Common Pleas Court followed suit on April 10, and Lucas County on April 27.

The State followed through on Seitz's threat to punish cities if courts ruled in their favor and found the legislation unconstitutional. The state budget, enacted in HB 64, contained provisions that extract financial penalties from cities that continue to operate photo-enforcement programs that do not comply with the officer present and other requirements of SB 342.

Those provisions are now codified at ORC §§ 4511.0915 and 5747.502. Cities must certify that they are complying with the officer present and other requirements of SB 342, even when courts have ruled those requirements unconstitutional. Failure to so certify results in the Local Government Fund distributions to those cities being substantially reduced.

The state's purpose of restricting and obstructing the ability of municipalities to conduct photo-enforcement programs could not be more clear.

This same statutory language also shows that SB 342 does not regulate citizens. The *Canton* general law test requires that a general law must "regulate citizens generally." SB 342 fails this test.

In its decision, the Second District concedes that the three challenged provisions, the officer present requirement, the three-year study requirement and the speeding

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[9] *Id.*

leeway requirement, all regulate municipalities and not citizens. Decision at ¶28. It describes eight other provisions of the statute, none of which regulate citizens. *Id* at ¶27. It mentions other provisions that regulate system manufacturers, not a class that qualifies as "citizens generally." *Id* at 2 ¶28.

The only provisions of SB 342 that the Second District cites that refer to "motorists," the general class of citizens purportedly being regulated, are the provisions "for motorists to follow if they are recorded by the traffic cameras committing a red light or speeding violation." *Id*. A statute that sets out a hearing procedure can hardly be said to be regulating citizen conduct.

It appears as though the court missed the point of the *Canton* general law test. That test identifies the kinds of laws where municipal regulation must yield to statewide regulation because the two provide contrary directives to citizens. Citizens cannot follow one without running afoul of the other because one prohibits what the other permits.

SB 342 does not prohibit conduct by citizens that the Dayton ordinance permits. Nor does it permit citizen conduct that the ordinance prohibits. The substantive regulation of citizen conduct lies in the speed limit statue itself, ORC § 4511.21 or in the red-light statute, ORC § 4511.13(C), not in SB 342. The purpose and effect of SB 342 is not to regulate citizens. It is to regulate local governments.

Proposition of Law No. 2

Including provisions that violate the Home Rule Amendment into larger legislative enactments does not convert the offending provisions into general laws. While under home-rule analysis courts are required to analyze the legislation as a whole, they are also required to specifically analyze the challenged provisions to determine if they unconstitutionally limit cities' home-rule authority.

The Second District Court of Appeals erroneously concluded that SB 342 set forth police, sanitary or similar regulations. It found that the bill had "extensive scope and does more than grant or limit state powers," and cited Mendenhall for this proposition.[10]

This citation shows that the Second District completely misunderstood what is meant by a "police, sanitary or similar regulation." In Mendenhall, this Court was analyzing whether Akron's photo-enforcement program conflicted with a "general law." The statute at issue was ORC § 4511.21, the speed limit statute.

The speed limit law is quintessential police regulation. It regulates individual conduct. It begins with the classic formulation emblematic of a police regulation – "No person shall…"

Nowhere in SB 342 will one find the phrase "no person shall…" Nowhere will one find any provision that regulates individual conduct.

The Second District has said that if the state can set speed limits for motorists, it can prohibit cities from enforcing those limits and other traffic laws via photo-enforcement programs. One does not follow from the other.

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[10] *Mendenhall v. Akron* @ ¶ 24.

This case is analogous to *Linndale v. State*, 85 Ohio St.3d 52 (1999). The state had enacted a statute that prohibited *Linndale* and other villages from enforcing speed limits within the village along freeways unless the freeway passed through more than a certain distance in the village. This Court struck down the statute finding that it was not a general law because it was "simply a limit on the legislative powers of municipal corporations to adopt and enforce specific police regulations." *Id,* at 55.

The Second District attempted to distinguish *Linndale* on the basis that the statute in *Linndale* was phrased in prohibitory terms and SB 342 is phrased in permissive terms. Calling SB 342 permissive is a departure from reality.

In the first place, the state has no permission to give. The power of cities to legislate comes directly from the people through the Ohio Constitution. These powers "are 'inherent as an incident' of the self-executing constitutional grant in Section 3, Article XVIII of the Ohio Constitution". *State, ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections*, 62 Ohio St.3d 17, 20 (1991) *citing, State, ex rel. McClure, v. Hagerman*, 155 Ohio St. 320 (1951).

The statements of the bill's proponents discussed above show that the purpose of the bill was prohibitory and the language throughout the bill shows that prohibition was its effect.

The preamble states that the bill is "to <u>establish conditions</u> for the use by local authorities of traffic law photo-monitoring devices." SB 342, Preamble, emphasis added.

There is nothing permissive about the language SB 342 used in ORC § 4511.094 stating "No local authority shall use traffic law photo-monitoring devices ..." There is

nothing permissive in § 4511.09 entitled "Prerequisites for deployment of device." Section 4511.093(A) does use the word "may" in saying "A local authority may utilize a traffic law photo-monitoring device for the purpose of detecting traffic law violations." However, § 4511.093(B) then immediately follows with "The use of a traffic law photo-monitoring device is subject to the following conditions:" The first such condition is the officer present requirement that was known to be prohibitively expensive. The final condition listed in this section is compliance with all the other conditions set out in §§ 4511.096 to 4511.0912.

No reasonable reading of SB 342 can lead to the conclusion that the bill was permissive and it was error for the Second District to have found it to be permissive.

It was also error for the Second District to determine that SB 342 passes muster because the state added it to Chapter 4511 of the Revised Code. The statute at issue in *Linndale*, § 4549.17 was not saved by virtue of having been added to an existing chapter. SB 342 cannot be saved on that basis alone.

The Second District's adoption of this unique theory, that a statute becomes a "general law" to which municipalities must yield, guts the Home Rule amendment to the Ohio Constitution. If all that the state need do to enact laws supplanting municipal authority is to append them to existing chapters of the Revised Code, then we will have returned to where we were before the 1912 amendments and Ohio's cities and villages will be nothing more than mere vassals of the state. This Court must restore the balance between state and local power that the Ohio Constitution created and reverse the decision of the Second District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing Brief of Amicus Curiae was sent U.S. Mail, postage prepaid, to Barbara J. Doseck, City Attorney & John C. Musto, Senior Attorney, City of Dayton Department of Law, 101 West Third Street, Dayton, Ohio 45401, Counsel for Appellant, and Halli Brownfield Watson, Assistant Attorney General, State of Ohio Attorney General's Office, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215, Counsel for Appellee, this 11th day of April, 2016.

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