

IN THE SUPREME COURT OF OHIO

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| CITY OF DAYTON, | : | Supreme Court Case No. 2015-1549 |
| | : | |
| Plaintiff-Appellant, | : | On Appeal from the Montgomery |
| | : | County Court of Appeals, |
| v. | : | Second Appellate District |
| | : | (Case No. 26643) |
| STATE OF OHIO, | : | |
| | : | |
| Defendant-Appellee. | : | |

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I. INTRODUCTION

The State concedes that the Contested Provisions of S.B. 342 must be general laws in order to pass Home Rule scrutiny. Likewise, the State acknowledges this Court's numerous holdings that general laws must not merely limit municipal legislative power and must prescribe rules of conduct upon citizens in general. The State further concedes that both the Contested Provisions and the Traffic Camera Act only limit the legislative power of municipalities and do not prescribe rules of conduct on citizens in general, as they "merely regulat[e] local traffic camera ordinances." (State's Brief at pgs. 31-32). In order to avoid the consequences of these admissions, the State asks this Court to use a new test for a general law. The State argues that State laws that serve only to limit municipal power and that do not prescribe rules of conduct upon citizens generally can be general laws where there is a "plausible connection" with statutes that do set forth police regulations and prescribe rules of conduct upon citizens generally. (State's Brief at pg. 22). As a result, the State argues that this Court need not analyze the individual provisions or the act as a whole as long as it meets this minimal standard.

The State implicitly recognizes the novelty of this proposition by failing to cite any authority that supports it. Moreover, the State attempts to avoid the actual Home-Rule analysis by classifying the regulations as public policy choices of the General Assembly that are beyond the Court's reach. In its 45 page brief, the State tries in vain to support the constitutionality of the provisions by: (1) erroneously attempting to analogize photo enforcement cameras to traffic control signals; (2) citing cases that do not interpret the Home Rule Amendment; (3) citing cases that both do not interpret the Home Rule Amendment and long predate its existence; (4) citing criminal cases involving other Ohio Constitutional protections that do not apply to the City of Dayton's civil photo enforcement program; and (5) arguing that the Traffic Camera Act does not infringe upon municipal authority, but actually authorizes municipal photo enforcement.

In fact, the Home-Rule cases the State does cite establish that the Contested Provisions are not general laws, and refute the State’s “plausible connection” theory. Not only is there no support for the “plausible connection” theory, but the theory is incompatible with this Court’s precedent and fundamental concepts of Home Rule. These unconstitutional provisions cannot be insulated from review “simply by placing [them] in a larger statutory scheme.” *Toledo v. Ohio*, 6th Dist. Lucas No. L-15-1121, 2016-Ohio-4906, ¶26 (finding Contested Provisions unconstitutional because their primary effect is to limit municipal power and not regulate citizen conduct). Therefore, Dayton respectfully requests that this Court reverse the Second District Court of Appeals’ Decision, and reaffirm the Montgomery County Common Pleas Court’s Decision finding the Contested Provisions unconstitutional.

II. A “PLAUSIBLE CONNECTION” TO A GENERAL LAW DOES NOT SATISFY THE *CANTON* TEST.

Dayton is not merely arguing that the Contested Provisions are arbitrary or bad policy. Rather, the Contested Provisions fail because they are not general laws under the *Canton* test. *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶21. Specifically, they are not general laws because they purport only to grant or limit legislative power of a municipal corporation to set forth police regulations and they do not prescribe rules of conduct upon citizens generally. *Id.* The State’s argument rests on the faulty premise that the *Canton* test can be satisfied by an enactment’s mere “plausible connection” to a general law. It argues that it can enact a statute that regulates municipalities as long as the statute has a “plausible connection to state laws exercising the police power over the public at large.” (State Brief at pg. 22). This Court’s case law refutes the State’s new theory.

1. THE CASE LAW DOES NOT SUPPORT THE “PLAUSIBLE CONNECTION” THEORY.

The applicable case law requires that the *Canton* prongs be satisfied by the challenged

legislation, and not just by being “plausibly connected” to a general law. None of the cases the State cites support the “plausible connection” theory or a change in the *Canton* test. First, not only do the numerous pre-*Canton* cases cited by the State not establish a “plausible connection” exception to the *Canton* test, but they predate the test and cannot be used to limit the *Canton* test’s application.

Likewise, none of the post-*Canton* cases support the “plausible connection” theory. The police power regulations and the regulations of citizen conduct must be contained within and not merely “plausibly connected” to the challenged legislation. For example, *In Re Reynoldsburg*, 134 Ohio St. 3d 29, 2012-Ohio-5270, 979 N.E.2d 1229 this Court applied the *Canton* test to a statute that regulated public utility tariffs. This Court upheld the state statute because the legislation did not “grant or limit the municipality’s legislative police power to enact regulations” and that “the rule applies to all citizens of the state...” *Id.* at ¶¶48-49.

Likewise, this Court analyzed *Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 942 N.E.2d 370 and *Ohioans for Concealed Carry v. Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605, 896 N.E.2d 967 under the *Canton* test and found that both involved statutes that set forth police regulations and regulated citizen conduct. The regulatory provisions were contained within those statutes; they were not absorbed into those statutes through a “plausible connection” with a different statute that regulated conduct.

Marich v. Bob Bennett Construction Co., 116 Ohio St. 3d 553, 2008-Ohio-92, 880 N.E.2d 906 involved a statute that prohibited operating a motor vehicle exceeding width limitations. This Court determined that that statute was a general law without resort to any other statute with which it bore a “plausible connection.” This Court found that the statutes did not

limit municipal power to “set forth police regulations” and prescribed “a rule of conduct on citizens generally.” *Id.* at ¶¶24-25.

Moreover, the lending regulation statutes in *American Financial Services v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776 placed restrictions on lenders and were evaluated on their own merit and found to be general laws independently of other statutes.

Unlike the regulations at issue in those cases, the Contested Provisions are not general laws. As the State concedes, both the Contested Provisions and the Traffic Camera Act merely limit municipal authority and do not regulate citizens. The Contested Provisions do not mention citizens. They do not control or manage the flow of traffic. They merely purport to limit municipal legislative power, and are therefore unconstitutional.

2. NOT ONLY DO THE CASES NOT SUPPORT A “PLAUSIBLE CONNECTION” ARGUMENT, THEY SPECIFICALLY REFUTE IT.

This Court requires more than a “plausible connection” to a general law. In fact, this Court has repeatedly severed provisions as unconstitutional in violation of the Home Rule Amendment where there was more than a “plausible connection” to general laws.

In *Cleveland v. State*, 138 Ohio St.3d 232, 2014-Ohio-86, 5 N.E.3d 644 this Court severed provisions limiting municipal regulation of towing companies from R.C. 4921.25. The statute authorized PUCO to regulate towing companies and prohibited municipal regulation. The Court severed the sentence prohibiting municipal regulation as a violation of the Home Rule Amendment. This is despite the fact that the prohibition was not just plausibly, but directly connected to the general law providing for PUCO’s regulation of towing companies.

Likewise, in *Canton*, this Court severed a provision restricting municipal regulation of manufactured housing from a larger enactment that regulated manufactured housing. This Court found that the larger enactment constituted a general law. There was no question that the

severed section was “plausibly connected” to the general law, as it dealt with regulation of manufactured housing and was specifically included in the general law enactment that regulated manufactured housing.

If all that was required was a “plausible connection” to a general law this Court would never sever provisions from within an act as unconstitutional.

III. THE TRAFFIC CAMERA ACT IS NOT PART OF A COMPREHENSIVE REGULATION OF TRAFFIC.

Neither the Contested Provisions nor the Traffic Camera Act is part of a comprehensive regulation of traffic. The State argues that the Contested Provisions of S.B. 342 “must be assessed together with all state laws on traffic” to determine whether they violate the Home Rule Amendment. (State’s Brief at pg. 31). However, neither the Contested Provisions nor the Traffic Camera Act regulates traffic. Moreover, this Court has already rejected the identical argument in the *Linndale* case.

In *Village of Linndale v. State*, 85 Ohio St.3d 52, 706 N.E.2d 1227 (1999) this Court held that a state statute prohibiting municipalities from enforcing state speeding laws under certain conditions was unconstitutional. The statute invalidated there was “plausibly connected” to the speeding statute. The State claimed that statute was “traffic regulation” and inserted it into Title 45. The statute, however, was declared unconstitutional even though it shared the same characteristics that the State argues makes the Traffic Camera Act valid.

The State now argues that the statute in *Linndale* was invalidated solely because it did not operate uniformly throughout the state. (State Brief at 37). While the Court referenced uniformity in the opinion, the lack of uniform regulation was not the basis for this Court’s determination. This Court noted at the outset of its opinion in *Linndale* that the issue was if “R.C 4549.17 is not a law applying to citizens generally, but an attempt to limit the powers of a

municipal corporation to adopt or to enforce police regulations, it must be struck down as unconstitutional.”*Id.* at 1229.

In finding R.C. 4549.17 unconstitutional the Court stated that “[a]s the trial court properly found R.C. 4549.17 is ‘simply a limit on the legislative powers of municipal corporations to adopt and enforce specified police regulations.’” In addition, the Court went on to conclude that “this enactment does not prescribe a rule of conduct upon citizens generally as required by law.” *Id.* at 1230.¹

The State’s reference to R.C. 4511.11 and argument that traffic cameras are traffic control devices is similarly inapt. R.C. 4511.11 mandates local adherence to the state’s uniform standards for traffic control devices. This reference is inapt because traffic cameras are not traffic control devices. Not only do traffic cameras not control traffic, but they clearly do not fit within the definition of traffic control devices contained in R.C. 4501.01(QQ):

‘Traffic control device’ means a flagger, sign, signal, marking, or other device used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, private road open to public travel, pedestrian facility, or shared-use path by authority of a public agency or official having jurisdiction, or, in the case of a private road open to public travel, by authority of the private owner or private official having jurisdiction.

Likewise, this case is distinguishable from the *City of Dayton v. Adams*, 9 Ohio St.2d 89, 223 N.E.2d 822 (1967) and *State v. Heins*, 72 Ohio St.3d 504, 651 N.E.2d 933 (1995) interpreting state statutes and evidentiary rules requiring marked police cruisers to pull over

¹ The State argues that this Court striking the Contested Provisions would cause State wide traffic laws controlling stop signs and traffic control signals to unravel. (State’s Brief at pg. 34). First, as is further explained above, the Contested Provisions have nothing to do with traffic regulation, and traffic cameras are not traffic control devices. Second, this Court severed and invalidated similar provisions in 1999 in *Linndale*. The severance had no impact on state regulations involving stop signs and traffic control devices. Just as in the *Linndale* case, the severance of unconstitutional provisions in this case will not unravel state wide laws involving traffic control laws.

citizens for misdemeanor criminal traffic offenses. It is also distinguishable from the *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 case that interpreted a citizen's right to be free from unlawful seizures under the Ohio Constitution. First, and most importantly, none of the cases involved Home Rule arguments. They all involved criminal cases that either excluded an officer's testimony pursuant to the Rules of Evidence² or determined the Ohio Constitution's protections involving arrest for a misdemeanor. They have no application in this case applying the Home Rule Amendment to civil photo enforcement.

Here, neither the Traffic Camera Act nor the Contested Provisions regulate traffic. No motorist is authorized or prohibited from doing anything under its provisions. Having an officer present at the camera site as required by R.C. 4511.093(B)(1) does not allow a citizen to run a stop sign. Whether a stretch of roadway was studied for three weeks, three years, or three decades, has no effect on the movement of traffic. Likewise, the Speeding Leniency Provision does not make exceeding the speed limit by 5 MPH legal; it just hampers a local government's ability to hold speeders within their jurisdiction accountable for their speeding. This is just like the statute at issue in *Linndale* which this Court struck down. It is not part of the traffic code, but "simply a limit on the legislative powers of municipal corporations to adopt and enforce specified police regulations..." and "does not prescribe a rule of conduct upon citizens generally as required by law." *Id.* at 1229-1230.

IV. THE "PLAUSIBLE CONNECTION" THEORY IS INCOMPATIBLE WITH THE HOME RULE AMENDMENT.

The "Plausible Connection" theory as proposed would eliminate the essential protections

² This statute also has no application here as this Court held that the primary purpose of the law requiring marked vehicles to be used for criminal traffic enforcement was to "prevent unfortunate circumstances which could result if a frightened motorist believes he is being forced off the road by a stranger." *State v. Heins*, at 506. This does not apply to this civil enforcement where the motorists are not being pulled over.

of the Home Rule Amendment provided by both the “general law” requirement and the “conflict” requirement. The relationship between the federal government and the State is not the same as between the State and an Ohio municipality. Unlike the U.S. Constitution, the Ohio Constitution does not contain a supremacy clause. Instead, the Ohio Constitution contains the Home Rule Amendment, which not only reserves inherent power for municipalities, but it places limits on the legislature’s interference with that power. *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 254-257, 140 N.E. 595 (1923). Prior to enactment of the Home Rule Amendment, there was no express delegation of power to municipalities in the Ohio Constitution, and all power was derived from the legislature. *Id.* Ohio municipalities now derive their power directly from the Home Rule Amendment of the Ohio Constitution. Not only do municipalities derive no authority from the General Assembly, but they are also “subject to no limitations” of that body “except that [police] ordinances shall not be in conflict with general laws.” *Village of Struthers v. Sokol*, 108 Ohio St. 263, syllabus Para. 1, 140 N.E. 519 (1923).

This Court has found the meaning of the term “general laws” to be fully compatible to the definition given to the “conflict” limitation. The “general law” limitation requires the regulation of private conduct, and not the limitation of municipal power. *City of Youngstown v. Evans*, 121 Ohio St. 342, 168 N.E. 844 (1929); *Village of West Jefferson, supra*; *Canton, supra*.; See also Vaubel, *Municipal Home Rule in Ohio* (1978) 781-782.

Likewise, a conflict is present where the State permits private conduct that the municipality prohibits or vice versa. *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519, (1923). “There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other.” *Id.*

In the Home Rule cases cited by the State, the conflict arises because the State through a

licensing scheme or otherwise, permits a private activity that a municipal ordinance restricts or prohibits. The conflict arose where the State issued a permit or a license allowing the performance of a private action and this Court held that a municipal ordinance adding additional regulation “forbids and prohibits what the statute permits and licenses.” *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted*, 65 Ohio St.3d 242, 245, 602 N.E.2d 1147 (1992)(state licensing of private detectives); *Am. Financial Serv. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776 (state regulation of lending); *Auxeter v. Toledo*, 173 Ohio St. 444, 183 N.E.2d 920 (1962)(state regulation of liquor sales); *Anderson v. Brown*, 13 Ohio St.2d 53, 233 N.E.2d 584 (1968)(state licensing of trailer parks).

Likewise, the “Plausible Connection” theory would allow the General Assembly to insulate unconstitutional provisions from review merely by sticking them within a larger legislative enactment. This is precisely the argument rejected by this Court in *Linndale* and most recently rejected by the Sixth District in *Toledo v. State*, which held that “[t]he provisions of a multi-statute legislative act aimed primarily at limiting municipalities’ power to legislate cannot be insulated by placing it into a larger statutory scheme.” *Toledo v. Ohio*, 2016-Ohio-4906 at ¶26.

Here, there is no State licensing or permitting of private conduct to establish a general law or to meet the conflict test. Nothing in the Traffic Camera Act licenses or permits a citizen to run a red light or exceed the speed limit. The “plausible connection” theory that would purport to allow direct limitation of municipal power in the absence of this private regulation is incompatible with the Home Rule Amendment and this Court’s consistent interpretation of what constitutes “conflict” and a “general law.” Moreover, it would allow the General Assembly to limit legislative power simply by including unconstitutional provisions within a larger legislative

enactment, a proposition rejected by this Court in *Linndale* and most recently by the Sixth District in *Toledo v. State*. Allowing this limitation of municipal legislative power would eliminate the protections that the Home Rule Amendment provides, and return municipalities to their pre-1913 status, as vassals of the State and subject to the whim of the General Assembly.

V. THE HOME RULE AMENDMENT PROHIBITS BOTH DIRECT AND INDIRECT LIMITATIONS ON MUNICIPAL POWER.

Contrary to the State's assertion, the Traffic Camera Act does not authorize municipal photo enforcement. The State argues that rather than unconstitutionally interfering with municipal photo enforcement, the Traffic Camera Act actually authorizes municipalities to use photo enforcement. (State's Brief at pg. 10). This Court has repeatedly emphasized that an indirect limitation of municipal legislative authority by the General Assembly is equally offensive to the Home Rule Amendment as an outright prohibition:

The validity and scope of section 3628 may properly be tested by supposing an extreme case. Let it be supposed that it provided for a complete prohibition upon municipal legislation. Manifestly such a law would not be effective to take away the power conferred upon municipalities by the plain provisions of the Constitution. Or let it be supposed that section 3628 provided that municipalities should not impose any fine in excess of \$1 for violation of any police or sanitary ordinance, and that it prohibited punishment by imprisonment altogether. No one would contend that such an indirect effort would be in any wise different in effect from a plain prohibition.

Village of West Jefferson v. Robinson, 1 Ohio St.2d 113, 205 N.E.2d 382, 386 (1965);
City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).

The State's argument that the Traffic Camera Act authorizes municipal photo enforcement is both legally and factually incorrect. As an Ohio municipality, Dayton does not need the grant of authority because it already possesses it pursuant to its home rule powers provided in the Ohio Constitution. *Geauga Cty. Bd. of Commrs. v. Munn Road Sand & Gravel*,

67 Ohio St.3d 579, 584, 621 N.E.2d 696 (1993). Not only is this not an authorization of municipal photo enforcement, but it is an unconstitutional *de facto* ban. This Act was passed after the General Assembly abandoned its direct attempt at an outright ban of municipal photo enforcement in HB 69. (See Am. H.B. 69 130th General Assembly).³ HB 69 was abandoned after the Legislative Service Commission informed the General Assembly that banning municipal photo enforcement would likely be an unconstitutional infringement of municipal Home Rule Rights. (See Ohio Legislative Service Commission Memorandum of Feb. 5, 2014, Appx. pgs. 70-73).

The General Assembly is now attempting to do indirectly through the Traffic Camera Act what it knew it could not do directly through HB 69. The Traffic Camera Act's sole purpose as stated in the preamble of the Act was to restrict municipal authority to operate automated traffic monitoring programs.⁴ In fact, the Contested Provisions not only restrict municipal legislative power, but have acted as a *de facto* ban of photo enforcement, shuttering Dayton and numerous other municipalities' photo enforcement programs.

The Act established onerous requirements that serve no legitimate public purpose. As an example, the sole function of the Officer Present requirement is to make photo enforcement prohibitively expensive for cities. The Act does not require the officer to do anything other than

³ This was also after the General Assembly passed Substitute House Bill 56 (126th General Assembly) that was vetoed by then Governor Taft. In explaining his veto, Governor Taft noted the essential purpose of the Home Rule Amendment and that the Bill would have violated that purpose. Governor Taft wrote in his veto message: "Local governments and their law enforcement agencies have the best knowledge of their streets, including the location of their most dangerous intersections. Along with this knowledge, they must have the ability and flexibility to enforce traffic laws for the safety of all Ohio citizens. Substitute House Bill 56 unjustifiably eliminates the discretion of our locally elected and locally accountable officials in favor of a one-size-fits-all method with essentially unenforceable penalties."

⁴ The preamble of SB 342 states that the purpose of the Act is "to establish conditions for the use by local authorities of traffic law photo-monitoring devices to detect certain traffic law violations."

be present for the obvious reason that there is nothing for an officer to do at the location of an automated photo enforcement system. Because of the automated nature of the system, there is not even an indication to the officer sitting near the camera that a violation occurred.⁵ Even more telling of the purpose of the statute is the requirement that the officer be a full-time officer in the jurisdiction. This does nothing but further increase expense. Even though Ohio law allows a part-time police officer to make felony arrests, a part-time officer is deemed unfit by the Traffic Camera Act to be present at a traffic camera. According to the Legislative Service Commission, the Officer present requirement alone would cost Ohio cities \$73 million dollars per year.⁶ Just as with a direct ban, the Home Rule Amendment prohibits the General Assembly from passing these indirect restrictions on municipal legislative authority that result in a *de facto* ban.

VI. CONCLUSION

The purpose of the Home Rule amendment was to put the conduct of municipal affairs in the hands of those who knew the needs of the community best...the people of the city. *Froelich v. Cleveland*, 99 Ohio St. 376, 385, 124 N.E. 212 (1919). It not only grants inherent authority to municipalities, but it protects municipalities from interference from the General Assembly. *Perrysburg*, *supra* at 257. The Traffic Camera Act is precisely the interference that the Home Rule Amendment prohibits. It is a direct limitation of Dayton's legislative power that does not regulate citizen conduct. Not only does the Traffic Camera Act unlawfully interfere with

⁵ The State argues that an officer at the location of the photo enforcement camera would prevent a photo enforcement violation from being issued in situations such as a man rushing his pregnant daughter to the hospital to give birth. (State's Brief at pg. 42) This is simply not the case. The officer sitting at a photo enforcement camera does not pull over or speak with the driver. In fact, the officer sitting at the camera would not even know when, or to whom any notices of violation will be issued to. The requirement serves no legitimate purpose.

⁶ See Appx. pgs. 67-70.

municipal power, but its sole effect is to shutter Dayton's photo enforcement program. That program indisputably made Dayton's streets safer by reducing traffic violations, crashes, injuries and deaths. Since Dayton has shuttered its photo enforcement program, red light running, speeding, and associated crashes, including fatal crashes, have significantly increased. The wisdom of the Home Rule Amendment's purpose is clearly shown in this case. Local governments and their law enforcement agencies have the best knowledge of their streets, including the location of their most dangerous intersections. Along with this knowledge, they must have the ability and flexibility to enforce traffic laws for the safety of all Ohio citizens. Therefore, Appellant, City of Dayton, respectfully requests that this Court rules that the Contested Provisions of SB 342 are unconstitutional in violation of the Home Rule Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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