[Cite as *Smith v. State Highway Patrol*, 2007-Ohio-1279.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

NICK SMITH

Plaintiff

v.

STATE HIGHWAY PATROL

Defendant

Case No. 2006-02625-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶1} On July 2, 2005, at approximately 1:00 a.m., plaintiff, Nicholas A. Smith, was driving his four wheel all-terrain vehicle ("ATV") on US Route 250 in Ashland County, when the ATV was struck in the rear by a second ATV owned and operated by Kyle Smith. A passenger in plaintiff's ATV was seriously injured in the collision involving the ATVs. Defendant, Ohio State Highway Patrol ("OSHP"), was called to the scene to investigate the personal injury accident. The investigating OSHP Trooper had plaintiff's ATV towed and impounded since the vehicle, "was involved in a serious injury traffic crash and it was determined it was not capable of being driven from the scene." Defendant related the impounded ATV was, "held as part of a felony investigation," for evidentiary purposes in pursuing possible felony charges against Kyle Smith. Defendant further related plaintiff's ATV was held, "as evidence at the request of the Ashland County Prosecutor's Office ("Prosecutor")." The ATV was first impounded in a private lot until the Prosecutor requested OSHP transfer the impounded vehicle to the Ashland County Sheriff's impound lot. It appears plaintiff's ATV was moved to the Ashland County Sheriff's impound lot on or about August 1, 2005.

{¶2} Plaintiff's vehicle remained in the impound lot pending investigation of pursuing felony charges against Kyle Smith in connection with the personal injury incident of July 2, 2005. Kyle Smith, who was injured in the July 2, 2005, ATV collision, was taken to a local hospital where a sample of his blood was obtained for testing purposes to determine his blood alcohol level. Based on the results of the blood test, Kyle Smith was ultimately charged with violating R.C. 4511.19 (driving while intoxicated) on January 13, 2006. No other criminal charges were brought against Kyle Smith, but his ATV and plaintiff's ATV remained in impound from July 2, 2005, to January 4, 2006. OSHP personnel contacted the Ashland County Prosecutor's Office on July 5 and July 28, 2005, in regard to releasing the impounded ATVs to their respective owners. On both occasions, OSHP was advised to hold the ATVs for evidence. On August 1, 2005, OSHP personnel again contacted the Ashland County Prosecutor's Office about the ATVs and were advised this time to transfer the impounded vehicles to the Ashland County Sheriff's impound lot. The ATVs were then moved to the Ashland County Sheriff's lot and remained there until January, 2006.

{¶3} Plaintiff stated he paid towing and storage fees to the operator of the private lot where his ATV had been impounded from July 2 to August 1, 2005. Plaintiff noted he

made attempts on July 4, July 6, July 8, July 11, and July 15, 2006, to have his ATV released to him, Plaintiff further noted he then tried "every 2 weeks for the next 6 months," to obtain the release of his ATV from impound and finally the vehicle was released to him on January 6, 2006. Plaintiff contended he does not believe OSHP had any right under law to order his ATV impounded. Consequently, plaintiff filed this complaint seeking to recover $532.68, the total storage and towing fees he paid to the operator of the private impound lot where his ATV was stored from July 2 to August 1, 2005. The filing fee was paid.

{¶4} A photograph depicting plaintiff's ATV was submitted. The photograph taken after the collision on July 2, 2005, shows severe damage to the left rear tire and rim of plaintiff's vehicle. Despite plaintiff's assertion the ATV was drivable after the collision, it appears from an examination of the photograph that the vehicle was disabled and therefore incapable of being driven. Furthermore, the photographic evidence shows plaintiff's ATV was not equipped with tail lamps.

{¶5} Defendant denied any liability in this matter for the cost of towing and storing plaintiff's impounded ATV. Defendant contended OSHP has statutory authority (R.C. 4513.61)[1] to order into storage a vehicle coming into its possession. Defendant asserted R.C. 4513.61 is applicable to the instant claim and therefore has implied it is immune from liability for vehicle impound costs even under such circumstances when the impounded vehicle is not subject to forfeiture. Defendant explained the OSHP trooper investigating the July 2, 2005, collision "took possession of (plaintiff's) ATV and ordered it into storage." Defendant noted, "Smith's ATV was impounded after he was involved in a serious injury

[1] Defendant cited the following portion of R.C. 4513.61:

". . . [A] state highway patrol trooper . . . may order into storage any motor vehicle . . . that has come into the possession of the . . . state highway patrol trooper as a result of the performance of the . . . trooper's duties . . . except that when such a motor vehicle constitutes an obstruction to traffic it may be ordered into storage immediately."

Plaintiffs ATV came into defendant's possession due to the fact the vehicle was essentially seized as evidence. It should be noted this part of the Revised Code specifically deals with "Abandoned Vehicles."

traffic crash and it was determined it was not capable of being driven from the scene." As part of the OSHP investigation of the July 2, 2005, collision, the case was presented to the Ashland County Prosecutor's Office to decide whether or not to bring felony charges (aggravated vehicular assault) against Kyle Smith. At the recommendation of the Ashland County Prosecutor's Office, both ATVs involved in the crash on US Route 250 were requested to be held as evidence. Acting on this request, OSHP ordered plaintiff's ATV towed and impounded at a private facility. Defendant maintained OSHP had statutory authority to seize plaintiff's vehicle incident to a felony investigation.

{¶6} Furthermore, defendant contended OSHP had statutory powers under R.C. 5503.02[2] to seize plaintiff's ATV and should not bear responsibility for any impound fees related to exercising that statutory authority. Defendant asserted that OSHP, under the motor vehicle operation law enforcement and investigatory mandates, had the power and duty to seize plaintiff's ATV. Defendant insisted OSHP should not be liable for the damages claimed in the exercise of statutory powers and duties. Defendant argued OSHP cannot be held liable for the impound fees claimed under the circumstances presented where a seized vehicle is held as evidence as part of a felony investigation. It should be noted OSHP under R.C. 5503.02(D)(1)[3] has the statutory right to seize evidence. However, this statutory provision does not grant immunity from liability.

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[2] Defendant cited the following pertinent parts of R.C. 5503.02 to pursue the argument OSHP had the authority to seize plaintiff's vehicle. The cited parts states OSHP:

"shall enforce . . . the laws relating to the operation and use of vehicle on the highways

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"State highway patrol troopers shall investigate and report all motor vehicle accidents on all roads and highways outside of municipal corporations . . . "

[3] R.C. 5503.02(D)(1) states:

"(D)(1) State highway patrol troopers have the same right and power of search and seizure as other peace officers.

"No state official shall command, order, or direct any state highway patrol trooper to perform any duty or service that is not authorized by law. The powers and duties conferred on the patrol are supplementary to, and in no way a limitation on, the powers and duties of sheriffs or other peace officers of the state."

{¶7} From information available, it appears plaintiff was operating his ATV at night on a state highway in violation of at least two statutory offenses. However, plaintiff was not charged with any violation in connection with the incidents occurring on July 2, 2005. Evidence presented established plaintiff was operating an all purpose "Special Vehicle" as defined by R.C. 4519.01(B)[4]. Plaintiff was operating this all purpose special vehicle at night on a state highway, US Route 250 (see R.C. 4511.01(II)) in violation of R.C. 4519.20(A)(2) (no taillight) and in violation of R.C. 4519.41 (operation on or near highway).[5] These violations do not constitute offenses permitting or requiring impoundment of the vehicle involved in the violations.[6] Technically, plaintiff's vehicle was

[4] R.C. 4519.01(B) states:

"(B) 'All-purpose vehicle' means any self-propelled vehicle designed primarily for cross-country travel on land and water, or on more than one type of terrain, and steered by wheels or caterpillar treads, or any combination thereof, including vehicles that operate on a cushion of air, vehicles commonly known as all-terrain vehicles, all-season vehicles, mini-bikes, and trail bikes. 'All-purpose vehicle' does not include a utility vehicle as defined in section 4501.01 of the Revised Code or any vehicle principally used in playing golf, any motor vehicle or aircraft required to be registered under Chapter 4503. or 4561. of the Revised Code, and any vehicle excepted from definition as a motor vehicle by division (B) of section 4501.01 of the Revised Code."

[5] R.C. 4519.20(A)(2) states:

"(A) The director of public safety, pursuant to Chapter 119. of the Revised Code, shall adopt rules for the equipment of snowmobiles, off-highway motorcycles, and all purpose vehicles. The rules may be revised from time to time as the director considers necessary, and shall include, but not necessarily be limited to, requirements for the following items of equipment:

"(2) At least one red tail light having a minimum candlepower of sufficient intensity to be plainly visible from a distance of five hundred feet to the rear under normal atmospheric conditions during hours of darkness;"

R.C. 4519.41(D) provides:

"Snowmobiles, off-highway motorcycles, and all purpose vehicles may be operated as follows:

"(D) On the berm or shoulder of a highway, other than a highway designated in division (A)(1) of section 4519.40 of the Revised Code, when the terrain permits such operation to be undertaken safely and without the necessity of entering any traffic lane;"

[6] R.C. 4519.47 provides:

"Whenever a person is found guilty of operating a snowmobile, off-highway motorcycle, or all-purpose vehicle in violation of any rule authorized to be adopted under section 4519.21 or 4519.42 of the Revised Code, the trial judge of any court of record, in addition to or independent of any other penalties provided by law, may impound for not less than sixty days the certificate of registration of that snowmobile, off-highway motorcycle, or all-purpose vehicle. The court shall send the impounded certificate of registration to the registrar of motor vehicles, who shall retain the certificate until the expiration of the period of impoundment."

not impounded, but seized as evidence incident to an investigation on bringing charges against Kyle Smith for a violation of R.C. 2903.08 (aggravated vehicle assault; vehicular assault). No charges were ever brought against plaintiff.

{¶8} It is undisputed defendant, OSHP, has the power to seize evidence in a criminal investigation. OSHP, acting under requests from the Ashland County Prosecutor's Office, seized plaintiff's ATV as evidence for purposes of pursuing felony charges against Kyle Smith (vehicular assault). This particular charge was never brought by the Ashland County Prosecutor's Office. It has been previously held that an innocent third party owner of a seized vehicle is not liable for towing and storage fees in a situation where criminal charges relating to the use of the seized vehicle are dismissed. *State v. Britton* (1999), 135 Ohio App. 3d 151, 733 N.E. 2d 288. Accordingly, the court concludes in the instant claim, plaintiff, as the owner of a seized vehicle legally held as evidence pending a criminal investigation where no charges are subsequently pursued is not liable for towing and storage expenses related to the vehicle seizure. Defendant, as the party who ordered the seizure of plaintiff's vehicle, shall bear liability for the towing and storage damages claimed, plus reimbursement of the filing fee pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

(Emphasis added.)

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ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $557.68, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
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