[Cite as *Walker v. Toledo*, 2017-Ohio-416.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Bradley L. Walker	Court of Appeals No. L-15-1240
Appellant	Trial Court No. CI0201101922
v.	
City of Toledo, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: February 3, 2017

* * * * *

Andrew R. Mayle, Jeremiah S. Ray, Ronald J. Mayle and John T. Murray, for appellant.

Adam W. Loukx, Law Director, and Eileen M. Granata, Senior Attorney, for appellee City of Toledo.

Quintin F. Lindsmith, James P. Schuck and Sommer L. Sheely, for appellee Redflex Traffic Systems, Inc.

* * * * *

JENSEN, P.J.

Introduction

{¶ 1} Following an order of remand from the Ohio Supreme Court, the Lucas County Court of Common Pleas granted the motions for judgment on the pleadings filed by the co-defendants, the city of Toledo and Redflex Traffic Systems, Inc. The

plaintiff-appellant, Bradley L. Walker, appealed. For the reasons that follow, we affirm the trial court's decision.

Statement of Facts and Procedural History

{¶ 2} This case returns to us a second time. In 2008, the city of Toledo enacted Toledo Municipal Code 313.12, a so-called "red light camera" law. The ordinance authorizes an automated traffic-law-enforcement system that assesses civil penalties against a vehicle's owner for speeding and red-light violations. The enforcement apparatus includes a camera and a vehicle sensor that automatically produces photos, video, or digital images of vehicles violating these traffic laws. Toledo Municipal Code 313.12(b)(1). Redflex Traffic Systems, Inc., provides the equipment and shares the revenue with Toledo.

{¶ 3} Administration of the program is left to Toledo transportation officials and Toledo's police and law departments. Toledo Municipal Code 313.12(a)(2). When the Redflex equipment records a traffic violation, the city forwards a "notice of liability" to the registered owner of the vehicle, advising the owner that a civil penalty of $120 has been assessed against him or her. Toledo Municipal Code 313.12(a)(3)(B) and 313.12(d)(1) and (2). The notice of liability is not a criminal citation, and it carries no collateral consequences, such as the assignment of points against the owner's driver's license. Toledo Municipal Code 313.12(c)(5) and 313.12(d)(1) and (2).

{¶ 4} The owner must "give notice of appeal or pay the civil penalty" within 21 days of the date listed on the notice. Toledo Municipal Code 313.12(a)(3)(C) and

313.12(d)(4). Failure to file an appeal or pay is deemed a waiver of the right to contest liability and is considered an admission. Toledo Municipal Code 313.12(d)(4). If an owner does appeal, an administrative hearing is held. If the owner offers evidence to show the hearing officer that he or she was not driving the vehicle when the violation occurred, the owner will not be held responsible for the violation. Toledo Municipal Code 313.12(c)(4).

{¶ 5} Pursuant to Toledo Municipal Code 313.12(d)(4), appeals "shall be heard through an administrative process established by the Toledo Police Department." A decision in favor of the city of Toledo may be enforced by means of a civil action or any other means provided by the Ohio Revised Code.

{¶ 6} Walker received a notice of liability for a traffic violation under Toledo Municipal Code 313.12. Walker paid the city $120; he did not file a notice of appeal.

{¶ 7} On February 24, 2011, Walker filed a class-action complaint against Toledo and Redflex for unjust enrichment, seeking their return of all civil penalties collected under the statute. The complaint asserted that Toledo Municipal Code 313.12 is unconstitutional for three reasons: because it usurps the exclusive jurisdiction of the municipal court, is unconstitutionally vague, and is violative of due process. Toledo and Redflex separately filed motions to dismiss for failure to state a claim for which relief can be granted pursuant to Civ.R. 12(B)(6).

{¶ 8} The trial court granted the motions, and Walker appealed. We reversed, in part.

The Court of Appeals' June 28, 2013 Decision

{¶ 9} As to Walker's claim that Toledo Municipal Code 313.12 invaded the exclusive jurisdiction of the municipal court, we agreed. We held,

> [T]he legislature has vested the municipal court with the jurisdiction to adjudicate the violation of any municipal ordinance, including Toledo Municipal Code 313.12. The plain language of the ordinance also reveals that [Toledo] has attempted to divest the municipal court of some, or all, of its jurisdiction by establishing an administrative alternative without the express approval of the legislature. Such usurpation of jurisdiction violates Ohio Constitution, Article IV, Section 1, and is therefore a nullity. *Walker v. Toledo*, 6th Dist. Lucas No. L-12-1056, 2013-Ohio-2809, ¶ 36. ("*Walker I.*")

{¶ 10} Walker's second claim was that the ordinance is unconstitutionally vague because it delegates adjudicatory authority to the Toledo Police without articulating intelligible governance principles. This court rejected Walker's argument. We held, "The delegation of authority is extremely Spartan, but does not, in our view, rise to the level of constitutional vagueness." *Id*. at ¶ 38.

{¶ 11} In his third constitutional challenge, Walker claimed that the Toledo Police Department never established any administrative appeal procedures by which a notice of violation could be challenged. We agreed with Walker, finding, "Since at a minimum, due process of law requires notice and a meaningful opportunity to be heard, * * * it

would seem the absence of any process would be problematic. Thus, this branch of appellant's constitutional argument does not warrant dismissal." (Citation omitted.) *Id*.

{¶ 12} Thus, this court sustained Walker's exclusive jurisdiction and due process theories of relief; we rejected the vagueness argument. Walker did not appeal; Toledo and Redflex did.

{¶ 13} As described by the Ohio Supreme Court, Toledo and Redflex appealed on the issue of "whether Toledo's civil administrative enforcement of its traffic ordinances violates the Ohio Constitution or R.C. 1901.20." *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.2d 474, ¶ 12.

Decision by the Ohio Supreme Court

{¶ 14} By decision dated December 18, 2014, the Supreme Court of Ohio held,

> [W]e reaffirm our holding in *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, that municipalities have home-rule authority under Ohio Constitution, Article XVIII, to impose civil liability on traffic violators through an administrative enforcement system. We also hold that Ohio Constitution, Article IV, Section 1, which authorizes the legislature to create municipal courts, and R.C. 1901.20, which sets the jurisdiction of municipal courts, do not endow municipal courts with exclusive authority over traffic-ordinance violations. Finally, we hold that Ohio municipalities have home-rule authority to establish administrative proceedings, including administrative hearings, in furtherance of these

ordinances, that must be exhausted before offenders or the municipality can pursue judicial remedies. We therefore reverse the judgment of the court of appeals with regard to its holding that the ordinance infringes upon the jurisdiction of the municipal court, and we remand the cause to the trial court for further proceedings consistent with this opinion. *Id*. at ¶ 29.

The Trial Court's Decision Following Remand

{¶ 15} Following remand, Toledo and Redflex answered the complaint and separately filed motions for judgment on the pleadings, pursuant to Civ.R. 12(C).

{¶ 16} The trial court found that the complaint "contains no allegations raising a reasonable inference that the Ordinance was invalidly applied to Plaintiff or that Plaintiff was harmed, actually or in theory, by the Police Departments' alleged failure to establish a written administrative appeal process." *Walker v. City of Toledo*, Lucas C.P. No. CI201101922, 2015 Ohio Misc. LEXIS 4135, *16-20 (Aug. 12, 2015).

{¶ 17} The trial court granted the defendants' motions for judgment on the pleadings, and Walker timely appealed, claiming one assignment of error.

Walker's Assignment of Error

The trial court erroneously dismissed Walker's complaint in violation of this court's previous decision in *Walker I* holding that Walker's complaint states a claim upon which relief may be granted.

Standard of Review

{¶ 18} A trial court reviews a Civ.R. 12(C) motion for judgment on the pleadings using the same standard of review as a Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted. *McMullian v. Borean*, 167 Ohio App. 3d 777, 2006-Ohio-3867, 857 N.E.2d 180, ¶ 7 (6th Dist.). Thus, the trial court "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

{¶ 19} In ruling on the motion, a court is permitted to consider both the complaint and the answer as well as any material incorporated by reference or attached as exhibits to those pleadings. *Frazier v. Kent*, 11th Dist. Portage Nos. 2004-P-0077 and 2004-P-0096, 2005-Ohio-5413, ¶14. "In so doing, the court must construe the material allegations in the complaint, with all reasonable inferences drawn therefrom, as true and in favor of the non-moving party. A court granting the motion must find that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief." (Citations omitted.) *Id*. at ¶ 14.

{¶ 20} Because a Civ.R. 12(C) motion tests the legal basis for the claims asserted in a complaint, our standard of review is de novo. *Id*. at ¶ 14, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996).

Law and Analysis

{¶ 21} In support of his assignment of error, Walker makes two arguments. First, he claims, "While the majority of the Supreme Court of Ohio held that municipalities have *general* authority 'to establish administrative proceedings,' the problem here is that Toledo did *not* do so as required by its own ordinance." (Emphasis in original.)

{¶ 22} Second, appellant argues, "RedFlex and Toledo will urge that the Supreme Court's decision renders Walker's complaint invalid because he did not exhaust the administrative process. Not so." Walker claims that there was "nothing under the ordinance for Walker to 'exhaust' [because the] police department did not establish the administrative process."

{¶ 23} Indeed, Toledo and Redflex do argue that Walker failed to exhaust his administrative remedies and that his failure to do so waives further challenge.

{¶ 24} The doctrine of exhaustion requires a party to exhaust administrative remedies before seeking redress from the judicial system. *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 2002-Ohio-794, 762 N.E.2d 979, citing *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 406 N.E.2d 1095 (1980). The purpose of the doctrine is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes. *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111, 564 N.E.2d 477 (1990).

{¶ 25} A party's failure to exhaust available administrative remedies is an affirmative defense which must be timely asserted in an action or it will be considered

waived. *Grudzinski v. Med. College of Ohio*, 6th Dist. Lucas No. L-00-1098, 2000 Ohio App. LEXIS 1622 (Apr. 12, 2000). Toledo and Redflex asserted the affirmative defense in their respective answers.

{¶ 26} Where a plaintiff challenges the constitutionality of a law, and the defendant raises a failure to exhaust administrative remedies, Ohio courts distinguish "facial" from "as-applied" constitutional challenges.

{¶ 27} One who challenges the constitutional application of legislation to particular facts is required to raise that challenge at the first available opportunity during the proceedings before the administrative agency. On the other hand, a facial constitutional challenge can be raised for the first time on appeal from the administrative agency. *City of Reading v. Pub. Util. Comm. of Ohio*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 16. In *Reading*, the court explained:

> Extrinsic facts are not needed to determine whether a statute is unconstitutional on its face. When a party challenges the constitutionality of a statute as applied to a specific set of facts, however, a record is required. The proponent of the constitutionality of a statute also needs notice and an opportunity to develop an evidentiary record to support that view. See *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 232, 520 N.E.2d 188 (1988).
>
> For these reasons, we hold that a *facial* constitutional challenge to a statute need not first be raised before the commission. However, a litigant

> must raise an *as-applied* constitutional challenge in the first instance during the proceedings before the commission in order to allow the parties to develop an evidentiary record. (Emphasis in original.)

Id. at ¶ 15-16. For example, in *Reading*, the Supreme Court of Ohio held that the city waived its right to make an as-applied constitutional challenge to a statute that authorized the closure of municipal railroad crossings because the city failed to raise the issue before the Public Utilities Commission. Interestingly, the city had "reserved" the right to raise the issue on three occasions before the commission. The court held, however, that "the reservation in a footnote of a right to raise the issue is not the same as actually raising the issue." *Id*. at ¶ 17. *See also Derakhshan v. State Med. Bd.*, 10th Dist. Franklin No. 07AP-261, 2007-Ohio-5802, ¶ 23-30.

{¶ 28} Here, Walker does not dispute that the Supreme Court of Ohio rejected his facial challenge, and that the issue has been settled. Indeed, the court observed that its 2008 [*Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255] decision "is dispositive on the constitutionality of municipalities' civil administrative processes for enforcement of red-light and speeding violations captured by automated systems." *Walker*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.2d 474, at ¶ 21.

{¶ 29} Walker does challenge, however, the application of the statute as to him and class members who are similarly situated. Again, he argues (1) that the police department never established an administrative appeal process; (2) that the allegation must be considered true for purposes of a Rule 12(C) motion; (3) that there was "nothing

under the ordinance for Walker to 'exhaust' * * * since [the] police department did not establish the administrative process"; and (4) that "[a]ppealing within a process that is not 'established' is the quintessential vain act and therefore is *not* required." (Emphasis in original.)

{¶ 30} Appellant states that the allegations set forth in the complaint—that the Toledo Police Department failed to establish an appeals process—must be accepted as true.[1] Appellant correctly states the legal standard for review of a motion filed under Civ.R. 12(C). It is the same standard as a motion filed pursuant to Civ.R. 12(B). We accepted Walker's allegation in *Walker I* when the issue before the court was a Civ.R. 12(B) motion. ("This is an allegation in the complaint and must be considered as true on a motion to dismiss for failure to state a claim." *Walker I* at ¶ 39.) Just as we did in Walker I, we do so again herein. We find, however, that the absence of an appeals process is not dispositive under the facts of this case. In the words of the trial court, it "does not remedy [the] complaint's deficiency."

{¶ 31} How the department would have handled appellant's appeal and whether the absence of a policy could possibly have withstood constitutional muster is not before the court. It underscores, however, the need for Walker to have filed a notice of appeal as set forth under Toledo Municipal Code 313.12(d)(4). Had he done so, an evidentiary

[1] Elsewhere in his complaint Walker conceded that the Toledo Police Department "did somehow establish an unwritten administrative appeals process." We accept as true his primary position, however, that the department "never established the administrative proceedings.**"**

record would exist, from which any procedural infirmities, or indeed the absence of *any* procedure, could have been raised and appealed therefrom. As it stands, however, Walker's payment of the civil fine, and his failure to file a notice of appeal curtailed the development of a factual record. Like the trial court, we find noteworthy that Walker has not alleged that he desired to pursue an appeal or that he attempted but was thwarted from doing so. Therefore, even construing the material allegations in the complaint in Walker's favor, he cannot prove any set of facts in support of an "as applied" constitutional challenge that would entitle him to relief.

{¶ 32} We are also mindful that Walker made the same argument (that there was no appeal process) to the Supreme Court of Ohio. In his merit brief, Walker argued that the issue of due process was not properly before the court because neither Toledo nor Redflex appealed our ruling on that issue.[2] Walker continued, however, that "even if these new 'propositions' are considered - and even if this court somehow rules that Toledo may home-rule a court's jurisdiction - this court must still affirm." (Walker's Merit Brief at 33-34.) Walker charged,

[2] The court accepted two propositions of law from Toledo and one from Redflex. Redflex's proposition of law is relevant to Walker's argument cited above:

> Ohio municipalities have the home-rule authority to maintain pre-suit administrative proceedings, including conducting administrative hearings, in furtherance of their civil traffic enforcement ordinances. *Walker*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.2d 474, at ¶ 1-2.

> As alleged in the complaint, Toledo's entire scheme was premature. The ordinance itself contains no procedures---only a wholesale delegation to the police department. The ordinance requires that the Police Department **shall *establish*** the procedures. TMC 313.12(d)(4). * * * This was never even attempted until February 2011. (Emphasis in original). *Id.* at 33-34.)

In its decision, the Supreme Court of Ohio did not comment on the argument quoted above. Instead, the court credited Toledo Municipal Code 313.12(d)(4) as providing for a hearing. It then remarked,

> If an owner appeals, an administrative hearing is held, and if the owner offers evidence to show the hearing officer that he or she was not driving the vehicle when the violation occurred, the owner will not be held responsible for the violation. [Toledo Municipal Code] 313.12(c)(4). Under [Toledo Municipal Code] 313.12(d)(4), appeals are heard through an administrative process established by the Toledo police department. *Walker* at ¶ 7-8.[3]

[3] The court further commented that R.C. 2506.01 "provides the mechanism for further appeal" into a court of common pleas. R.C. 2506.01 states, "[E]very * * * decision of any officer * * * of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located." R.C. 2506.01 also requires a party to exhaust his administrative remedies before filing suit. *See State ex rel. Teamsters Local Union No. 436 v. Bd. of County Comm'rs*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224. Of course, Walker did not challenge his notice of violation under R.C. 2506.01 but rather challenged the constitutionality of the ordinance.

{¶ 33} We find the court's silence as to Walker's argument instructive. We are also guided by the court's rejection of *our* interpretation of its previous red light camera decision in *Mendenhall*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255. In our now-reversed decision, we opined that the Ohio Supreme Court was articulating due process concerns with an ordinance that was similar to Toledo's. The court said that we "misread" *Mendenhall*. It commented,

> Our holding that a complementary system of civil enforcement of traffic laws is within a municipality's home-rule power acknowledges that administrative procedures must be established in furtherance of this power. See, for example, our discussion of Akron's ordinance, which sets forth civil administrative-appeal proceedings, which appear to be almost identical to Toledo's. *Mendenhall* at ¶ 6-8. * * * As Walker has brought nothing to our attention to show that Toledo's administrative proceedings are inconsistent with home-rule authority as sanctioned by this court in other cases, we must agree with Redflex that Toledo's administrative-enforcement proceedings are appropriate. *Id*. at ¶ 28.

{¶ 34} Even if this language is considered dictum, in that it does not pertain to the issue certified by the court, we find it persuasive nonetheless.

{¶ 35} In conclusion, we find that Walker failed to exhaust his administrative remedies by not appealing his notice of liability. Therefore, the Lucas County Court of Common Pleas did not err in finding that the city of Toledo and Redflex were entitled to

judgment on the pleadings pursuant to Civ.R. 12(C). Walker's assignment of error is not well-taken, and the judgment is affirmed. Costs are assessed to Walker pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, P.J.
CONCUR. _____
JUDGE

Arlene Singer, J.,
DISSENTS.

SINGER, J.

{¶ 36} I must respectfully dissent. In my view, the issue that must be resolved before final resolution of this case is whether at the time Walker was ticketed for the red light camera violation, the city had established the administrative appeal proceeding pursuant to Toledo Municipal Code 313(d)(4). If the answer to that question is "no," than I would find that Walker has established the due process violation we questioned in *Walker I*:

> Finally, appellant complains that the trial court's findings that he had conceded the existence of an administrative process was both unsupported in the record * * *. The complaint alleges that Toledo police never established an administrative appeal process. This is an allegation in the complaint and must be considered as true on a motion to dismiss for failure to state a claim. Since at a minimum, due process of law requires notice and a meaningful opportunity to be heard * * *, it would seem the absence of any process would be problematic. Thus, this branch of appellant's constitutional argument does not warrant dismissal. (Citations omitted.)
>
> *Walker I* at ¶ 39.

{¶ 37} There is nothing in the record to establish that *at the time* Walker received his citation, there was an administrative appeal process in place. Similarly, although the state argues that Walker's claim must fail because he failed to "administratively exhaust" the otherwise nonexistent appeal procedures that were in effect at the time of his citation, the city *has not* alleged that there was in fact an appeal procedure created by the city at the time Walker received his citation. The trial court noted that the city created and enacted an administrative appeal procedure in February 2011. However, this procedure was enacted after Walker received his citation. It is therefore immaterial in determining whether Walker, himself, suffered a due process violation.

{¶ 38} As the majority notes, we must apply the same standard of review in our review of a Civ.R. 12(C) motion that we must in a 12(B)(6)—that being the trial court

must presume that all factual allegations in the complaint are true. To do otherwise would in effect result in our weighing of the evidence and acting as a finder of fact in violation of not only Civ.R. 12(C) but also Civ.R. 56.

{¶ 39} Therefore, because Walker has alleged that there was *no appeal procedure in place at the time he received his citation*, I would find that the trial court erred in granting the city's motion for judgment on the pleadings. Moreover, I also note that the city does not allege that there was in fact an appeal procedure created at the time Walker received his citation. I would reverse the order of the trial court and remand the case for further proceedings.

{¶ 40} Finally, I also disagree with the majority's conclusion that Walker failed to exhaust his administrative remedies. As stated by Walker, there was "nothing under the ordinance for Walker to exhaust since the police department did not establish the administrative process." It is undisputed that the city failed to create the required administrative process at the time Walker received his citation. That is the due process violation which Walker challenges. One cannot fail to exhaust that which has not been created.