[Cite as *Cleveland Parking Violations Bur. v. Barnes*, 2010-Ohio-6164.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94502

CITY OF CLEVELAND PARKING VIOLATIONS BUREAU

PLAINTIFF-APPELLEE

vs.

REGINALD E. BARNES

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-701408

BEFORE: Jones, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 16, 2010

FOR APPELLANT

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Reginald Barnes ("Barnes"), appeals the trial court's order affirming plaintiff-appellee, city of Cleveland's ("City"), imposition of civil liability upon Barnes for a speeding offense. Finding merit to the appeal, we reverse.

{¶ 2} In June 2009, a city of Cleveland mobile radar unit employing an automated traffic enforcement camera caught Barnes's car speeding 38 miles-per-hour in a 25-miles-per-hour zone. Barnes received a ticket and requested a hearing. The City's Parking Violations Bureau scheduled a hearing. At the

hearing, Barnes objected to the ticket and filed a motion to dismiss. The hearing examiner found that Barnes had operated his car in excess of the posted speed limit and found him liable.

{¶ 3} Pursuant to R.C. 2506.01, Barnes filed an administrative appeal with the court of common pleas. The trial court entered an order affirming the decision of the hearing examiner.

{¶ 4} Barnes filed a timely pro se notice of appeal and raises the following assignment of error for our review:

{¶ 5} "I. The Common Pleas Court abused its discretion when the judgment of liability is unconstitutional, illegal, arbitrary, capricious and unsupported by a preponderance of substantial, reliable, and probative evidence on the whole record."

Standard of Review

{¶ 6} In *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 735 N.E.2d 433, the Ohio Supreme Court distinguished the standard of review to be applied by common pleas courts and appellate courts in R.C. Chapter 2506 administrative appeals. The court stated:

> "The common pleas court considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. * * *

{¶ 7} "The standard of review to be applied by the court of appeals in an

R.C. 2506.04 appeal is 'more limited in scope.' *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 465 N.E.2d 848, 852. 'This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on "questions of law," which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court.' Id. at fn. 4. 'It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals, or this court, might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264, 267." *Henley* at 147.

{¶ 8} Thus, this court will only review the judgment of the trial court to determine whether the lower court abused its discretion in finding that the administrative order was supported by reliable, probative, and substantial evidence. See *Wolstein v. Pepper Pike City Council*, 156 Ohio App.3d 20, 2004-Ohio-361, 804 N.E.2d 75.

Cleveland Codified Ordinances 413.031

{¶ 9} Cleveland Codified Ordinances ("C.C.O.") Section 413.031 authorizes the use of an automated camera system to impose civil penalties on the owners of vehicles that have been photographed committing a red light violation or speeding

violation. In July 2005, the city council enacted and the mayor approved C.C.O. 413.031, which is titled "Use of Automated Cameras to Impose Civil Penalties upon Red Light and Speeding Violators." C.C.O. 413.031(a) provides:

{¶ 10} "Civil enforcement system established. The City of Cleveland hereby adopts a civil enforcement system for red light and speeding offenders photographed by means of an 'automated traffic enforcement camera system' as defined in division (p.) This civil enforcement system imposes monetary liability on the owner of a vehicle for failure of an operator to stop at a traffic signal displaying a steady red light indication or for the failure of an operator to comply with a speed limitation."

{¶ 11} Under C.C.O. 413.031, the city will mail a notice of liability to the owner of a vehicle photographed by the automated traffic enforcement system for red light or speeding violations. A party who receives a notice of liability may contest the ticket by filing a notice of appeal within 21 days from the date listed on the ticket.

{¶ 12} Although there have been numerous challenges filed contesting the constitutionality of C.C.O. 413.031, the Ohio Supreme Court upheld a city ordinance similar to Cleveland's finding that "an Ohio municipality does not exceed its home rule authority when it creates an automated system for enforcement of traffic laws that imposes civil liability upon violators, provided that the municipality does not alter statewide traffic regulations." *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶42.

Hearing Examiner

{¶ 13} Within his assignment of error, Barnes argues that the hearing examiner erred in reading evidence out loud because it prejudiced the examiner against Barnes, the location where Barnes was caught speeding was not specified in the ordinance, there was no sign posted where Barnes was caught speeding informing motorists about the mobile cameras, the City did not properly publish notice of the mobile units, and he should have been issued a warning notice instead of a ticket.

{¶ 14} First, Barnes argues that it was improper for the hearing examiner to read the evidence out loud as the examiner was also the person who would decide whether he was liable. He objected to this at the hearing; therefore, he has preserved the issue for appeal.

{¶ 15} As noted in *Gardner v. City of Cleveland* (N.D.Ohio Aug 20, 2009), 656 F.Supp.2d 751, "[t]he Parking Violation Bureau's Hearing Examiners are either attorneys or former police officers that are appointed by the Clerk of the Municipal Court. C.C.O. 459.03(b). Neither the Hearing Examiners or the Clerk of the Municipal Court has a pecuniary interest in the outcome of Plaintiff's hearing as the operating costs of the Parking Violations Bureau shall be paid by the City of Cleveland pursuant to C.C.O. 413.031(b)." Id. at ¶26.

{¶ 16} The *Gardner* court noted that the plaintiff failed to submit any evidence of actual bias or prejudgment against him by the hearing officer. Id. Instead, the plaintiff argued that a conflict of interest was created because the

hearing officer presented the evidence against the plaintiff and also acted as a finder of fact. Id. The court found, however, that "this kind of operation is a common occurrence in civil administrative proceedings and without other evidence of bias does not violate due process." Id.

{¶ 17} Likewise, in this case, Barnes has failed to show that the hearing officer was biased against him. We find no error in the hearing officer's decision to read the evidence into the record. Without a specific showing of bias or prejudgment, Barnes's claim must fail.

C.C.O. 413.031(g)

{¶ 18} In his motion to dismiss filed with the trial court, Barnes raised the issue of the location of the mobile speed unit by arguing that he did not receive any notice he was entering an area covered by one of the units. On appeal, he maintains that C.C.O. 413.031 only provides for specific locations where the City may place speed cameras. Since the location he was ticketed at was not one of the locations as designated by the ordinance, he argues it was improper for the City to issue him a notice of liability. The City maintains that the ordinance language specifying certain locations, notice requirements, and posted signs apply only to those locations associated with fixed speed and red light cameras and that it would be absurd to interpret the ordinance so as to place the same restrictions on mobile speed units.

{¶ 19} When interpreting a statute, "a court's paramount concern is the legislative intent in enacting the statute. In determining legislative intent, the

court first looks to the language in the statute and the purpose to be accomplished. Words used in a statute must be taken in their usual, normal or customary meaning. It is the duty of the court to give effect to the words used and not to insert words not used. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation." *State ex rel. Richard v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund*, 69 Ohio St.3d 409, 411-412, 1994-Ohio-126, 632 N.E.2d 1292. (Internal citations and quotations omitted.)

{¶ 20} A court may interpret a statute only where the words of the statute are ambiguous. *State ex rel. Celebrezze v. Allen Cty. Bd. of Commrs.* (1987), 32 Ohio St.3d 24, 27, 512 N.E.2d 332. Ambiguity exists if the language is susceptible of more than one reasonable interpretation. *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513, 668 N.E.2d 498.

{¶ 21} In March 2009, City Council amended C.C.O. 413.031 to add lessees to those liable under the statute, presumably in response to this court's decision in *Dickson & Campbell, L.L.C. v. Cleveland*, 181 Ohio App.3d 238, 2009-Ohio-738, 908 N.E.2d 964, appeal not allowed by 122 Ohio St.3d 1479, 2009-Ohio-3625, 910 N.E.2d 478.

{¶ 22} Amended C.C.O. 413.031(f) states that "[t]he selection of the sites where automated cameras are placed and the enforcement of this ordinance shall be made on the basis of sound professional traffic engineering and law enforcement judgments." C.C.O. 413.031(p)(1) defines an "automated traffic

enforcement camera system" as a "electronic system consisting of a photographic, video, or electronic camera and a vehicle sensor installed to work alone or in conjunction with an official traffic controller and to automatically produce photographs, video, or digital images of each vehicle * * * ."

{¶ 23} The ordinance also lists 29 locations where automated traffic enforcement camera systems will be placed. C.C.O. 413.031(g). 1517 West 25th Street, the location listed in Barnes's ticket, is not one of the locations listed in the ordinance.

{¶ 24} C.C.O. 413.031(g) also provides:

> "The Director of Public Safety shall cause the general public to be notified by means of a press release issued at least thirty days before any camera is made fully-operational and is used to issue tickets to offenders. Before a given camera issues actual tickets, there shall be a period of at least two weeks, which may run concurrently with the 30-day public-notice period, during which only 'warning' notices shall be issued.

{¶ 25} "At each site of a red light or fixed speed camera, the Director of Public Service shall cause signs be posted to apprise ordinarily observant motorists that they are approaching an area where an automated camera is monitoring for red light or speed violators. Mobile speed units shall be plainly marked vehicles."

{¶ 26} Mobile speed units are not defined or otherwise mentioned in the amended ordinance except as stated above.

{¶ 27} We find that the plain language of the statute shows that mobile speed units are included in the definition of an "automated traffic enforcement

camera system." But we agree with the City that it would be absurd to interpret the statute so as to limit the location of the mobile camera units to the 29 locations listed in the ordinance. Any other result would render mobile speed units the same as fixed locations; a result certainly not intended by city council. In other words, the use of "mobile speed units" indicates that the automated cameras in the mobile speed units would naturally move from location to location to enforce traffic laws as determined by "sound professional traffic engineering and law enforcement judgments." C.C.O. 413.031(f). It would be impractical to require the prior publication of the location of automated traffic enforcement cameras in mobile units.

{¶ 28} The City further argues that the ordinance clearly provides that the only requirement is that mobile units shall be plainly marked vehicles, but no requirement exists for notice or the posting of signs. We disagree with the City's interpretation of the ordinance. We find the plain words of the statute require the posting of signs for all automated traffic enforcement camera systems, including those placed in mobile units. To find to the contrary would create two classes of citizens similarly situated and treat them unequally: those ordinary observant motorists that received no notice that they are approaching an area where a mobile automated camera is monitoring for red light or speed violators and those ordinary observant motorists that received notice that they are approaching an area where a fixed or stationary automated camera is monitoring for red light or

speed violators.[1]

{¶ 29} As to Barnes's argument that the City did not comply with the 30-day public-notice period or the two-week period of issuing warning tickets as to its mobile units, we find that Barnes failed to provide any evidence that the City failed to meet these requirements. Therefore, we presume regularity with the City's compliance with this portion of the ordinance.

{¶ 30} Therefore, we find the City's mobile speed units do not comport with the signage requirements set forth in C.C.O. 413.031(g). Since the mobile unit that issued Barnes a ticket did not comport with the ordinance, we find that Barnes should not have been found liable.

{¶ 31} Therefore, Barnes's sole assignment of error is sustained.

Prospective Application

{¶ 32} In *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132, the Ohio Supreme Court held that "an Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision; and (3) whether retroactive application of the decision causes an inequitable result." Id. at paragraph two of the syllabus.

[1]Compliance with the City's own signage requirements may be met with portable warning signs that notify motorists in accordance with the ordinance.

{¶ 33} We have considered the above factors and determine that our decision will only apply prospectively to those causes of action that are pending at the time of the release of this opinion.[2]

{¶ 34} Accordingly, judgment is reversed and the finding of liability is vacated.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR

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[2]We further note absent a showing by those who have previously received notices of liability from mobile camera units of some loss of civil rights or some collateral disability, those who have paid their fines cannot challenge their finding of liability because such an appeal is moot. *In re B.G.*, Summit App. No. 24428, 2009-Ohio-1493; compare *In re S.J.K.*, 114 Ohio St.3d 23, 2007-Ohio-2621, 867 N.E.2d 408 (holding at syllabus that the imposition of points on a traffic offender's driving record is a statutorily imposed penalty sufficient to create a collateral disability as a result of the judgment and preserves the justiciability of an appeal even if the offender has voluntarily satisfied the judgment.)