

IN THE SUPREME COURT OF OHIO

City of Toledo	:	Supreme Court Case No. 2017-0327
	:	
Plaintiff-Appellee,	:	On Appeal from the Lucas
	:	County Court of Appeals,
v.	:	Sixth Appellate District
	:	(Case No. L-15-1286)
State of Ohio, et al	:	
	:	
Defendants-Appellants.	:	

**MEMORANDUM OF PLAINTIFF-APPELLEE
CITY OF TOLEDO OPPOSING JURISDICTION**

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INTRODUCTION

For over two-hundred and fourteen years, judicial review has been a bedrock principal of American jurisprudence and a foundational concept of separation of powers doctrine. *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803). In asking this Court to hear its appeal in this case, the State argues that a court with jurisdiction has no inherent power to enforce its own judgments nor does it have the ability to hold the legislature responsible for refusing to follow the rule of law, the Ohio constitution or the separation of powers doctrine. When the General Assembly passed the Penalty Provisions in the budget bill, the legislature attempted to enforce an unconstitutional statute via an end-run funding penalty. Under Ohio law, everyone must obey the Constitution – individuals, municipalities, governors and especially the Ohio General Assembly.

There are no substantial constitutional questions or issues of great public concern in this matter. The State's Propositions of Law are incorrect and unnecessary for the Court to consider when resolving the underlying questions concerning the Home Rule Amendment and the regulation of automated traffic enforcement cameras in Ohio.

STATEMENT OF CASE AND FACTS

This case arises out of the City's challenge to provisions of S.B. 342 that impermissibly infringed upon the City's Home Rule rights as set out in the Ohio Constitution. On April 27, 2015, after a hearing and briefing by all parties, the trial court found certain provisions of S.B. 342 to be unconstitutional. Accordingly, the trial court issued a permanent injunction that enjoined the State from enforcing those unconstitutional provisions.

The State appealed the trial court's April 27 ruling and the trial court's ruling was affirmed by the Sixth District. *Toledo v. State*, 2016-Ohio-4906. The State sought this Court's review of this decision as a certified conflict and a discretionary appeal. This Court accepted

jurisdiction on both grounds and consolidated the causes 2016-1136 and 2016-1138 into one case. The consolidated case was then stayed pending the decision in *Dayton v. Ohio*, case no. 2015-1549.

The trial court's April 27, 2015 ruling was never stayed pending appeal. Meanwhile, subsequent to filing of the City's initial complaint and after the trial court had issued a preliminary injunction, the General Assembly inserted comparatively minor provisions into the almost 3,000 page State Biennial budget bill (Am. Sub. HB 64) that would have required the City to either comply with provisions of S.B. 342 that the trial court had found unconstitutional or face a decrease in local government funds.

The key provision, R.C. 4511.0915, provided that if a city operates a photo enforcement program that is not "fully complying with R.C. § 4511.092 to § 4511.0914," the City has to file a report with the Auditor of State and suffer a monetary penalty equal to "the civil fines the local authority has billed to drivers." R.C. § 5747.50(C)(5) instructs the Ohio Tax Commissioner to withhold funds from such "noncompliant" subdivisions and R.C. § 5747.502 provides the process for punishing the "delinquent or noncompliant" subdivisions. It even requires the county treasurer to re-distribute the withheld funds to subdivisions that are not "delinquent or noncompliant."

These provisions to the budget bill were introduced approximately a week before the trial court's April 27, 2015 issuance of a permanent injunction and were not challenged in the City's initial complaint. These provisions were not the subject of stand-alone legislation to be considered on their own but were buried in the mammoth biennial budget bill.

Since R.C. §§ 4511.091.5, 5747.50(C)(5), and 5747.502 ("the Penalty Provisions") are blatantly designed to compel cities to comply with unconstitutional laws, they themselves are

unconstitutional. One vocal supporter of the offending "budgetary" provisions in the General Assembly summed up the motive underlying the offending provisions: "But [Senator] Seitz says cities are free to operate their cameras, as long as they follow the law. They'll just get less money from the state, which has demonstrated by passing the law that it disapproves of the cameras. Seitz makes an analogy comparing the state to a parent of a rebellious kid- a city. 'When a child turns 18, his parents can no longer tell the child what to do. But Mom and Dad sure don't have to give the kid an allowance to do those things Mom and Dad thinks are inappropriate,' Seitz said. 'So if you want to be 18 and do what you want, be my guest- we're simply not going to pay for it.'" <http://wyso.org/post/cities-operating-tttraffic-cameras-likely-see-less-state-money>.

On July 8, 2015, shortly after the Governor signed the state budget into law, the City filed a motion to enforce judgment with the trial court. The City's motion alleged that the Penalty Provisions -R.C. 4511.0915, 5747.50(C)(5), and 5747.502- were slipped into the budget ordinance for the purpose of undermining the trial court's April 27 judgment and other similar orders issued throughout the State. The City asked the court to enforce its prior judgment by prohibiting the enforcement of the offending provisions.

Both sides were able to fully brief the issues raised by the City's Motion to Enforce Judgment. Neither party requested an oral hearing on the issues. On October 8, 2015, the trial court issued an Opinion and Judgment Entry that granted the City's motion to enforce judgment and enjoined the State from financially penalizing the City for not complying with "R.C. Sections 4511.093(B)(I) and (3), 4511.095 and 4511.0912." (Appendix 2 of State's *Memorandum in Support of Jurisdiction*).

The State then appealed the decision of the trial court to the Sixth District, which affirmed on all of the issues. The Sixth District explained that the Penalty Provisions “violated the [trial] court’s prior injunction by penalizing the city for refusing to comply with statute that the trial court had already deemed unconstitutional.” *Toledo v. State*, 2017-Ohio-215 (6th Dist.) at ¶ 14. The Sixth District further explained that the trial court was within its constitutional authority when it enjoined the state from enforcing the Penalty Provisions because that enforcement violated the trial court’s prior injunction. *Id.* at ¶ 17. The court explained that the contempt finding was appropriate because the Penalty Provisions were an “end-run” around the trial court’s original injunction against enforcing S.B. 342. *Id.* at ¶ 25. The State now seeks to appeal this decision.

**THIS CASE DOES NOT INVOLVE SUBSTANTIAL CONSTITUTIONAL QUESTIONS
NOR IS IT OF GREAT PUBLIC OR GENERAL INTEREST**

A. The pending decision in *Dayton* does not warrant granting review of this matter

The State argues that the Court should at least grant review and hold for the decision in *Dayton*, No. 2015-1549. The *Dayton* case raises three constitutional questions concerning the original S.B. 342. The forthcoming *Dayton* decision, however, will not be dispositive of all of the constitutional challenges to S.B. 342 and therefore not necessarily dispositive of this matter.

There are additional constitutional challenges pending before this Court in *Springfield v. State*, No. 2016-0461 and *Toledo v. State*, No. 2016-1138. If the *Dayton* decision overturns the Court of Appeals, then S.B. 342 will be deemed unconstitutional, and thus the decision will support the injunction in the case at bar. On the other hand, if the *Dayton* decision affirms the Court of Appeals, there will still be unanswered constitutional challenges of S.B. 342. Therefore, the *Dayton* decision will do nothing to create the state’s ethereal “proper baseline” or

promote judicial economy. Judicial economy and “proper baselines” may be meritorious goals, but they do not rise to the level of great public interest warranting a discretionary appeal.

B. If *Dayton* is overturned, granting review becomes a meaningless academic debate as there would no longer be a controversy between the parties

On the other hand, if *Dayton* is overturned and S.B. 342 is held to be unconstitutional, then granting review of this case would be a complete waste of time. In this scenario, the sole issue will be if it was appropriate for *one* trial court to enjoin the General Assembly from enforcing an unconstitutional statute through an “end-run” spending bill.

The Court’s decision on this matter would not be of much concern to the parties because the controversy between them will have ended. The Penalty Provisions all relate to compliance or noncompliance with R.C. Sections 4511.092 to 4511.094 that would be voided by the *Dayton* ruling. Neither party would particularly care about the outcome of this matter because the key underlining conflict would have already been decided. To put it bluntly, no funding streams or municipal powers would be at stake by a Court decision under this scenario.

In other words, the *Dayton* decision being overruled would end the controversy between the parties. The State would not be allowed to enforce the unconstitutional provisions, nor prevent municipalities from receiving funds. Toledo could operate its automated traffic camera program without further unconstitutional meddling from the General Assembly. The case would be over and the matter decided by this Court on the appeal would be academic.

C. The Trial Court’s use of contempt power in this matter was not unusual, unconstitutional, nor a matter of great public interest

The State claims that the trial court’s ruling was some extreme and unconstitutional overreach of its judicial authority. The State claims that the trial court enjoined a “new” law not at issue in the initial order. First and foremost, the Penalty Provisions could hardly be disguised

as new laws. The Penalty Provisions are solely enforcement mechanisms for the existing prohibitions on automated traffic enforcements cameras created by S.B. 342. No part of S.B. 342 is modified by the Penalty Provisions. The State attempted an economic “dragooning” to stop municipalities from having automated traffic enforcement cameras.

To underscore this point, the Penalty Provisions specifically reference the statutes created by S.B. 342. R.C. Section 4511.0915 states that a local authority must file a report stating its compliance with R.C. Sections 4511.092 to 4511.094 (also know as S.B. 342) or the “gross amount of fines that have been billed” out of compliance with S.B. 342. These “new” laws cannot stand alone. They are wholly dependent on S.B. 342. The Penalty Provisions are not an example of the General Assembly “going back to the drawing board” because the prohibitions on automated traffic enforcement cameras have not been changed.

In fact, one might even characterize S.B. 342 as the foundation upon which the Penalty Provisions are built. But, the trial court had already ruled that the foundation was unconstitutional and therefore void. A law built upon an unconstitutional law would also be void.

D. The trial court’s ruling did not affect the General Assembly’s spending power

The State next argues that review is needed to address the trial courts’ “de facto invalidation of the General Assembly’s exercise of its spending power.” But the trial court’s ruling did nothing to affect the General Assembly’s spending power.

First of all, it should be noted that the General Assembly has a constitutional obligation to share tax revenue with political subdivisions. Ohio Constitution Art. XII, § 9. The General Assembly currently attempts to meet this obligation via payments made to the local government fund. The Penalty Provisions require the tax commissioner to reduce the payments made via the

local government fund to a municipality that is “noncompliant” with R.C. § 4511.0915(A)(1), which means the municipality is operating an automated traffic enforcement camera in violation of S.B. 342.

The trial court’s order does not require the General Assembly to affirmatively spend money in a certain way. The tax revenue being shared with municipalities is already determined by the local government fund formula. Rather, the trial court’s order enjoins the General Assembly from reducing the already determined funding amount because of a municipality’s violation of S.B. 342. There is no spending issue for the Court to review.

ARGUMENT

Even if the Court were to consider granting review, both the State’s arguments fail as a matter of law.

Appellant’s Proposition of Law No. 1:

A trial court has no jurisdiction to issue a post-judgment order finding the State in contempt and enjoining a new law, such as the Set-Off Law here, when the new law was not challenged in the compliant and not named in the trial court’s original order.

A. The Trial Court had jurisdiction to enforce its previous order sufficient to empower the Court to prevent post-judgment actions by a defendant that attempted to contravene the court’s order in disregard of the dignity and power of the court.

Appellant’s jurisdictional argument fails at a fundamental level because it does not properly evaluate the basis of the trial court’s action. Appellant, incorrectly, treats the City’s Motion to Enforce Judgment as a motion for supplemental relief that should have been sought prior to judgment or through a separate action. In reality, the City sought to prevent the Appellant from circumventing a valid order by economically “dragooning” the City into compliance with invalidated statutes.

Even though the State appealed this Sixth District’s order of April 27, 2015, the trial court continued to have jurisdiction to enforce the injunction while an appeal is pending.

American Motors Corp. v. Huffstutler, 61 Ohio St.3d 343, 349 (1991) (ruling that a court of common pleas "can continue to exercise supervisory authority over compliance with the injunction."); *Hosta v. Chrysler*, 172 Ohio App. 3d 654, ¶ 32 (2nd Dist. 2007) ("When a permanent injunction has been issued by the trial court on the merits of a claim, the court has continuing jurisdiction to enforce the injunction" even after a final, appealable order has been entered terminating the case.); *Lane v. Court of Common Pleas of Ross County*, 4th Dist. Ross No. 1130, 1984 WL 5701 *1, 1984 Ohio App. LEXIS 12045 (Dec. 20, 1984) ("[T]he court retain[s] jurisdiction during the pendency of the appeal upon such issues as contempt, appointment of a receiver and injunction.")

Moreover the trial court had jurisdiction and authority to enforce its own orders. The State has been enjoined from enforcing certain sections of R.C. § 4511. While the trial court's ruling is under appeal it remains a valid ruling unless it is stayed or reversed. Since a court with jurisdiction had ruled §§ 4511.0915(A)-(C), 5747.50(C)(5), and 5747.502 were (1) facially unconstitutional by imposing a penalty against cities that do not comply with unconstitutional statutes, and (2) a direct affront to the trial court's injunction against enforcement of the Stricken Acts, the trial court properly enforced its judgment by enjoining the State from taking any action that serves to implement the operation of §§ 4511.0915(A)-(C), 5747.50(C)(5), and 5747.502.

It is well-established that a court has jurisdiction to enforce its own judgments. *See*, for instance, *McDowell v City of Toledo*, 2011-Ohio-1842 (6th Dist.). In *McDowell*, the Sixth District recognized the extent of the power of a trial court to enforce its judgment. In that case a person that was not even a party to the original action was successfully able to enforce an almost 20-year old consent judgment entry. The Sixth District held:

Ohio courts have held that a consent judgment has the same force and effect as a judgment and is enforced as such. Finding that a consent

judgment operates with the same force given to a judgment on the merits in a fully adversarial proceeding, the Supreme Court of Ohio has stated: “*** Implicit in the rule is the recognition that a judgment entered by consent, although predicated upon an agreement between the parties, is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment.” Id. ¶ 39.

As in the instant case, the trial court in *McDowell* invalidated governmental action that ran counter to the terms of a valid judgment. *McDowell* illustrates the breadth of a court's power to enforce a judgment it renders.

In this case, the trial court correctly detected the Appellants' efforts to bypass a valid, unstayed judgment and properly acted within its discretion to thwart the Appellants efforts.

B. The Penalty Provisions Enforce S.B. 342

This Court has twice held that municipal home rule authority grants municipalities the ability to implement automated traffic-law enforcement systems. *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255; *Walker v. City of Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474. The effect of the Penalty Provisions is to reduce local revenue sharing that a municipality would otherwise be entitled to under the formula of the local government fund.

The State argues that the Penalty Provisions are an “incentive” for municipalities to follow the dictates of S.B. 342 (or more accurately end any automated camera traffic enforcement programs). However, an incentive is defined as “something that incites or tends to incite to action or greater effort, as a reward offered for increased productivity.”¹ An incentive, by definition does no harm. On the other hand, a penalty is “a loss, forfeiture, suffering, or the like, to which one subjects oneself by nonfulfillment of some obligation.”² Both incentives and

¹ <http://www.dictionary.com/browse/incentive?s=t>

² <http://www.dictionary.com/browse/penalty?s=t>

penalties are used to regulate behavior. The difference is an incentive makes a person better off and a penalty makes the person worse off. In this case, the State argues for the *opposite* meaning of “incentive” when explaining what the Penalty Provisions actually do to municipalities who operate constitutional, but non-S.B. 342 compliant, automated traffic enforcement programs.

To be a true incentive, the Penalty Provisions would need to provide *additional* revenues to municipalities who follow S.B. 342, which would be on top of their local government fund allocation.

Appellant’s Proposition of Law No. 2:

The General Assembly’s discretionary spending power can be limited only by an express constitutional limit on the spending itself, not by objections to goals indirectly achieved by the spending. In particular, a court cannot affirmatively order spending without a constitutional mandate for such spending, and doing otherwise violates separate-of-powers principles.

As discussed above, the trial court’s order did not affect the General Assembly’s spending power. The General Assembly engaged in its spending power authority by setting the formula for the local government fund and funding a line-item in the state budget to be distributed via that formula.

The trial court did not “order” the State to spend money. The Penalty Provisions lower the amount of local government funds dispersed to a municipality if that municipality violates the tenants of S.B. 342. The trial court’s order prevents this penalty, which is based on an unconstitutional statute. The trial court’s order does not affirmatively require the General Assembly to spend any amount.

Because the trial court’s injunction on the Penalty Provisions does not affect the General Assembly’s spending power, the State’s second proposition of law fails as a matter of logic.

CONCLUSION

For the reasons set forth above, this case does not involve a substantial constitutional question or a matter of great public interest. Moreover, if the Court reverses the *Dayton* decision, the controversy between the parties will be resolved. The State's argument is not an attack on the order of a single trial court, but moreover the bedrock principle in American jurisprudence of judicial review. The Court should decline jurisdiction.

Respectfully submitted,

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This is to certify that a copy of the foregoing was sent via e-mail on this 4th day of April 2017, to the following:

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