

MISSOURI CIRCUIT COURT  
TWENTY-SECOND CIRCUIT  
(City of St. Louis)

*Denied  
Overruled  
W.D.*

CITY OF ST. LOUIS, )  
 )  
Plaintiff, )  
 )  
v. ) No. L00218836-6  
 ) Div. 500  
James W. Lembke )  
 )  
Defendant. )

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Plaintiff City of St. Louis has instituted an ordinance violation prosecution against Defendant on the basis of an ordinance that contravenes the federal and state constitutions, exceeds the powers of the Board of Aldermen of the City of St. Louis, and contravenes the provisions of Supreme Court Rule 37, governing ordinance violation prosecutions. For the reasons stated in the motion previously filed and as elaborated in this Memorandum, this action must be dismissed.

**I. Ordinance 66868 Enacts an Arbitrary Presumption Contrary to the Due Process Clauses of the Fourteenth Amendment and Mo.Const. art. I, §10.**

The essence of Ordinance 66868 is found in its section 4, codified as St.L.R.C. §17.07.040, a copy of which is attached hereto as Exhibit A. In substance, the ordinance provides that if the City proves that a vehicle owned by the defendant was operated in violation of the City's Traffic Code Ordinance, a "rebuttable presumption" is raised that, at the time of the purported traffic offense, the owner was the operator of the automobile.

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From the text of the ordinance, three things are apparent: first, the ordinance contemplates a "prosecution," not a mere suit for a civil penalty; second, the ordinance assumes that an "automated traffic control system record" will be put into evidence establishing that, in fact, a vehicle owned by the defendant was operated in violation of the City's Traffic Code Ordinance; and, third, that evidence of the "automated traffic control system record" is sufficient to raise a presumption that the owner of the motor vehicle was the operator. Defendant submits that the presumption enacted by the ordinance is unconstitutional on its face and as applied to defendant.

Prosecutions for violations of municipal ordinances have long been characterized as civil proceeding with "quasi-criminal aspects."

Regardless of whether the prosecution is characterized as civil or criminal, it is established that constitutional questions relating to ordinance prosecutions are to be resolved under legal principles and procedural rules applicable to criminal cases. E.g., *City of Kansas City v. Tyson*, 169 S.W.3d 927 (Mo.App.W.D. 2005); *Kansas City v. Howe*, 416 S.W.2d 683, 688 (Mo.App.K.C. 1967).

In dealing with presumptions in criminal cases, due process of law<sup>1</sup> requires that there be a rational connection between the facts proved and the fact presumed; a legislative presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof

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<sup>1</sup>The construction of the due processes clauses in the federal and Missouri constitutions is fundamentally the same in this context.

of the other is arbitrary because of lack of connection between the two *in common experience*. The Supreme Court of the United States has declared the governing constitutional principle quite plainly in *Tot v. United States*, 319 U.S. 463, 467-69 (1943) (footnotes omitted):

Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

. . . It is not too much to say that the presumptions created by the law [presuming knowledge of interstate connection of firearm] are violent, and inconsistent with any argument drawn from experience. Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision.

Ordinance 66868 contains no legislative findings to support the presumption that the owner is operating a vehicle in violation of the Traffic Code Ordinance. The Court, therefore, must assess the

validity of the presumption in light of common experience as determined by the Court. Common experience is that it is at least as common for a non-owner as an owner to be operating a motor vehicle at any given time. The Court can judicially notice two significant facts in this connection (derived from the *Statistical Abstract of the United States*, published by the U.S. Census Bureau, visited online): as of 2006, there were more than 4.1 million licensed drivers in Missouri; there were 2.7 million automobiles registered in Missouri. The number of Missouri drivers therefore substantially exceeds the number of Missouri automobiles, rendering the ordinance presumption wholly arbitrary. Common experience is that someone's automobile can be operated by at least three classes of persons who are not the owner: household members, friends, and employees of repair shops. Common experience also suggests that thieves or other unauthorized persons frequently operate motor vehicles. Finally, common experience also indicates that automobile ownership is very often joint. When an automobile is registered to more than one owner, how is it rational to presume that either or both registered owners are operating the automobile at any given time?

To say that it is "more likely than not" that the owner is operating an automobile at any given time flies in the face of common experience--as anyone with teen-agers in the household can attest. It is akin to saying that the registered owner of a gun used in a murder is more likely than not to be the one who fired the gun.

Defendant acknowledges that many cases declare, without thoughtful analysis, that it is reasonable to presume that the owner

of an automobile is the operator when the automobile is photographed in what appears to be a traffic violation. These cases are summarized and their error repeated by Judge Mummert in *Kilper v. City of Arnold*, 2009 U.S. Dist. LEXIS 63471 (E.D. Mo. 2009). The City doubtless will rely on *Kilper* and the earlier cases of *City of St. Louis v. Cook*, 221 S.W.2d 468 (Mo. 1949) and *City of Kansas City v. Hertz Corp.*, 499 S.W.2d 449 (Mo. 1973).

The problem with *Kilper*, *Cook*, and *Hertz* lies in their complete failure to account for what both readily available statistics and common sense now demonstrate: that it is in fact wholly arbitrary to presume that the owner is "more likely than not" the operator of a vehicle, and it is the height of caprice to impose liability on an "owner" if in fact the automobile has multiple owners.

The presumption in this case resembles the presumptions struck down in *Leary v. United States*, 395 U.S. 6 (1969) and *Turner v. United States*, 396 U.S. 398 (1970). In those cases, Congress purported to enact presumptions concerning a defendant's knowledge that illegal narcotics had been imported. The Supreme Court examined legislative history and other data and concluded that the presumptions were invalid with respect to cocaine and marijuana, because generally available information showed that cocaine could easily be obtained from domestic sources. Thus, the statutes raising presumptions of knowledge of importation on the basis of proof only of possession of marijuana or cocaine were unconstitutional, because the possibility of availability from other sources was "sufficiently real" that a conviction resting on the presumption was not based on sufficient

evidence. Here, the possibility that a non-owner could be operating an automobile at the time of an alleged traffic violation is sufficiently real that the presumption must be regarded as arbitrary.

Lest the Court consider itself bound by *Cook* and *Hertz*, defendant urges the Court that those cases are distinguishable on a very basic level: both involved parking meter violations, not moving violations.

Furthermore, *Hertz* imposed a species of strict owner liability in a civil context. Ordinance 66868 does not purport to establish strict liability, which would entail a quite different constitutional analysis. See *Idris v. City of Chicago*, 552 F.3d 564 (7th Cir. 2009).

Finally, *Cook* was decided in 1949, at a time when the number of licensed automobile drivers and the number of registered automobiles were significantly smaller. It was perhaps reasonable to infer that the owner usually operated his automobile in 1949; but in 2009, in light of the expansion of the number of licensed drivers and the explosion in family car ownership, and after the intervening decisions in *Leary* and *Turner*, and the clarification of constitutional principles by those cases, the *Cook* reasoning simply cannot be extended beyond the parking violation context.

Assuming that the presumption enacted by Ordinance 66868 is not invalid on its face, see *County Court of Ulster County v. Allen*, 442 U.S. 143 (1979), it most certainly is invalid as applied in this case.

Defendant anticipates that the evidence will show that the automobile allegedly violating a traffic signal in this case is in fact jointly owned, and that there are five licensed drivers in defendant's household, in addition to other family members in the St. Louis

metropolitan area who operate defendant's automobiles from time to time. In such circumstances, ownership tells us nothing about who was operating the automobile in question at the time of the alleged traffic violation. See *United States v. Romano*, 382 U.S. 136 (1965).

*Romano* is particularly pertinent here. In that case, Congress had declared that a defendant's presence at the site of an illegal still was itself sufficient to raise a presumption that the defendant possessed the still. The Supreme Court rejected the presumption and held as a matter of due process that presence was insufficient to permit an inference of possession, even though the presumption was rebuttable, because the inference of possession from the fact of presence was too tenuous to permit an inference of guilt.

When an automobile is owned by more than one person, how does the ultimate fact of operation "by the owner" at the time of an alleged violation follow from proof of the basic fact of ownership? When a household has multiple automobiles and multiple licensed drivers, not all of whom are owners, what does common experience teach about the likelihood that an owner is always operating his automobile? Common experience does not support the notion that two owners are operating an automobile at a given time, or that family automobiles are usually operated by their owners. Thus, even if the presumption in this case is facially valid, it is in fact arbitrary and unreasonable when applied to multiple owners or owners whose households contain numerous non-owner drivers. Indeed, not even *Cook's* reasoning can save the ordinance as applied. In *Cook*, the Supreme Court held that the parking violation ordinance's presumption did not alter the burden of

proof, but that proof of ownership permitted an inference that an illegally parked car was parked by the owner or by the owner's authority. In this case, however, the very evidence relied on by the City to raise the presumption, namely the photograph of a vehicle apparently violating a traffic signal, actually rebuts the idea that both owners operated the vehicle at the time of the supposed violation. (Note that the presumption in the case at bar is not that the owner or owners authorized the traffic offense; the text of the ordinance establishes quite clearly that the presumption is that the owner was in fact the operator at the time of the alleged offense. Even if the City were to argue for such a presumption, the argument would be meritless, since it is a basic principle of Missouri law that criminal liability cannot be vicarious in the absence of express legislative provision. See §562.041, RSMo 2000 & Supp.)

The invalidity of the presumption enacted by Ordinance 66868 is not affected by an assertion that the constitutional rules governing civil matters provide more leeway for presumptions. Although Missouri law is clear that the validity of an ordinance prosecution must be assessed in accordance with criminal law and procedure, presumptions in civil cases are not free from due process constraints. Whether civil or criminal, the presumption must be rational. The presumption in this case is not rational by any standard.

The presumption enacted by Ordinance 66868 is not consistent with due process. Absent the presumption, no case can be made out against the defendant. Accordingly, this action must be dismissed.

**II. Ordinance 66868 Imposes a Fee without a Vote of the People,**

Contrary to Mo. Const. art. X, §22; in the Alternative, the Ordinance Is Void as a Matter of Due Process for Failure to Prescribe a Penalty.

Defendant is informed and believes that the City takes the position that this is a civil proceeding, that the constitutional standards governing the ordinance presumption in this case are more lenient than if it were a criminal case, and that the penalties to which the defendant is exposed are nominal. The defendant has demonstrated above that this is a prosecution for violation of the City's Traffic Code Ordinance, which is embodied in Chapter 17 of the City's Revised Code. Under the Traffic Code Ordinance, R.C. §17.40.020, the only penalties prescribed for violations of the Traffic Code are the standard ordinance violation penalties of a fine of up to \$500 or 90 days' imprisonment or both. The Traffic Code Ordinance does not distinguish between traffic signal violations evidenced only by an "automated traffic control system record" and other such violations. And yet the City apparently takes the position that the "red light camera" offense carries only a fine of \$100 and no other penalty.

Defendant of course does not insist on application of the standard ordinance penalties to this case, but Missouri law adheres to the venerable principle *nullum crimen sine poena*. This principle is but another way of stating that a law purporting to create crimes and punishments must be definite, certain and intelligible. Without any established penalty, defendant and other owners of automobiles are subject to extraction of money in whatever amount the City's traffic enforcers decide is desirable. This is the height of unconstitutional

arbitrariness and caprice, and also amounts to a taking of property without due process. The defendant's research has been unable to identify the source for the penalty of \$100 alleged in the notice served on the defendant in this case. If there is no penalty affixed by law to the alleged violation in this case, this prosecution cannot proceed, as defendant has not committed any cognizable offense, and the City has not authority to manufacture civil penalties out of thin air.

(Defendant would note that, if the City now chooses to rely on the general ordinance range of punishment, which include imprisonment, this removes any doubt that the presumption discussed above must be assessed in accordance with standards applicable to crimes and punishments, and not civil penalties. The reasoning of *Kilper v. City of Arnold* would therefore have no application. In that case, the Arnold city ordinance quite clearly provided for a specific "civil" penalty, and unambiguously excluded "red light camera" violations from the general penalties for ordinance violations.)

Assuming that the City's view of the applicable penalty as a civil penalty is correct, this proceeding encounters an additional bar: the Hancock Amendment. Article X, §22(a) of the Missouri Constitution forbids the imposition of any "tax, license or fees" without the approval of a vote of the people. The terms "tax, license or fees" are defined to include exactions that are designed primarily to raise revenue, although some categories of "user fees" escape the embrace of the constitutional prohibition. It is at once obvious that the purported civil penalty sought in this case cannot escape the

provision of art. X, §22(a).

In *Heller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. 1991), the Supreme Court defined the characteristics of "fees" that fall outside the ambit of §22(a) and do not require voter approval. *Heller* has been applied in a variety of contexts, most recently in *Building Owners & Managers Ass'n v. City of Kansas City*, 131 S.W.3d 216 (Mo.App.W.D. 2007). In the latter case, fire inspection fees imposed by Kansas City without a vote of the people were invalidated, because the record showed that they were not user fees but were exactions imposed on the public at large for the purpose of enforcing the building code and raising revenue.

In this case, there can be no question that the penalty sought by the City for the alleged violation of the Traffic Code is virtually identical to the fees imposed by Kansas City in *Building Owners*. Defendant anticipates that the record will show that the City has realized some \$2.9 million in "penalties" in its most recent fiscal year from the application of Ordinance 66868. The purpose of the ordinance is to raise revenue and to enforce traffic regulations, not to provide any sort of service to a user. Thus, the "penalty" of \$100 sought to be levied against defendant in this case is nothing other than a "fee" imposed by the City on ownership of an automobile. It is subject to art. X, §22(a) and cannot be enforced unless approved by the people.

Because Ordinance 66868 prescribes no ascertainable penalty, it is void. Assuming that the \$100 "penalty" somehow derives from an otherwise valid ordinance or regulation, it is in contravention of the

Hancock Amendment. In either case, this prosecution must be dismissed.

III. Ordinance 66868 Purports to Create a Rule of Evidence for Missouri Courts in Excess of the Legislative Authority of the City of St. Louis.

By its express terms, Ordinance 66868 purports to establish a presumption to facilitate the conviction of an owner for a traffic violation that cannot be proved against him. This presumption is expressly a rebuttable presumption. The problem with the presumption is not so much that it is inconsistent with the statutes governing traffic offenses in the state of Missouri but that it is quite beyond the authority of the Board of Aldermen of the City of St. Louis to decree.

The City of St. Louis is a constitutional charter city. As such, it enjoys broad power to legislate on subjects relating to municipal affairs. Traffic regulation within the City may well be a matter within the scope of the City's charter powers, even if not precisely congruent with state legislation on the same subject. However, Ordinance 66868 is not a traffic regulation. It is a rule of evidence. Nothing in Mo.Const. art. VI, §19(a), §31, or in §304.120.2, RSMo 2000 & Supp., authorizes a constitutional charter city to enact evidentiary rules for the courts of this state. Only the Supreme Court has superintending power over the courts of this state, but not even the Supreme Court can prescribe the law of evidence, by rule, for the courts. Mo.Const. art. V, §5. Only the General Assembly has the authority to enact specific rules of evidence. See generally *State v. Williams*, 729 S.W.2d 197 (Mo.banc

It is true that several cases, such as *Kansas City v. Howe*,  
*Supra* and *Cook* have discussed presumptions established by ordinance,  
but in no case have the appellate courts addressed the scope of  
municipal power to prescribe such rules as an original proposition.  
Defendant submits that there is no such power even in charter cities.

Rules of evidence in Missouri courts cannot vary from circuit to  
circuit. The state traffic laws, Ch. 304, RSMo 2000 & Supp., do not  
contemplate that violations can be proved except in accordance with  
the law of evidence governing all over criminal offenses in the state.

Section 304.120.2 authorizes municipalities to adopt additional  
traffic regulations, but it does not authorize municipalities to alter  
the law of evidence. On the contrary, it impliedly limits the  
authority of municipalities to adopt such rules in the furtherance of  
prosecution of traffic offenses by authorizing only "additional rules  
of the road or traffic regulations," not special rules of evidence to  
make it easier to mulct owners of automobiles. Cf. *State v. Kuhlman*,  
729 N.W.2d 577 (Minn. 2007) (Minneapolis red light camera ordinance  
invalid as in conflict with state law).

The evidentiary rule enacted by Ordinance 66868 is similarly  
devoid of support in the Charter itself. Article I of the Charter  
prescribes the legislative powers of the Board of Aldermen. Nothing  
in the Charter authorizes the Board to adopt rules of evidence to  
govern proceedings in city courts, much less in the state courts.  
Indeed, the courts commonly known as "city courts" are in fact and in  
law the "municipal division" of the circuit court. §479.020, RSMo

Mo. & Supp. Consequently, proceedings in city courts must conform to Rule 37 and to the rules of civil and criminal procedure and rules of evidence obtaining in circuit court. Indeed, Rule 37.61 provides that jury trials in city ordinance prosecutions must proceed in the same manner as provided for trials of misdemeanors. The Board of Aldermen is patently without power to dictate otherwise.

Because the City's effort to adopt a rule of evidence in the guise of a traffic regulation is beyond the City's authority as a constitutional charter city, the City cannot, as a matter of law, carry its burden of proof in this case, and this action must be dismissed.

IV. The Notice of Violation Mailed to Defendant in this Case Does not Conform to the Requirements of Rules 37.42 or 37.44, Mo.R.Ct., and Does Not Even Conform to the Requirements of Ordinance 66868, Depriving the Court of Authority to Proceed.

There can be no doubt that this action is an ordinance violation prosecution. As such, it is governed by the provisions of Rule 37, Mo.R.Ct. Rule 37.33 expressly provides that ordinance violation notices must be signed and must contain a declaration, verified by oath or affirmation, that the facts set out in the violation notice are true. Rule 37.34 requires that any information filed in an ordinance violation prosecution must be supported by a violation notice. Rule 37.44 authorizes service of a *summons* by mail, if an information has been filed.

It is at once apparent that the ordinance prosecution in this case was initiated in flagrant disregard of the requirements of Rule

37. The only notice sent to defendant (attached hereto as Exhibit B) is unsigned, contains no declaration that the facts alleged therein are true, and therefore cannot support the filing of an information; and, in fact, no proper summons or information was ever served on defendant in this case. In the absence of a proper notice of violation and information, the Court lacks jurisdiction to proceed, and this action must be dismissed. See, e.g., *State v. Stringer*, 36 S.W.3d 821 (Mo.App.S.D. 2001); *Tolen v. State*, 934 S.W.2d 639 (Mo.App.E.D. 1996).

The ordinance violation prosecution in this case is also barred by the City's failure to observe the requirements of its own ordinance. Ordinance 66868, City Code §17.07.050, provides for the filing of an information and summons, to be served by mail, together with a copy of the "violation notice," a copy of "the recorded image(s) of the alleged violation, which forms the basis of the information," and a "supplemental violation notice." In this case, no proper violation notice was ever served on defendant, no information was filed supported by a proper violation notice, no summons was issued and properly served, and no copies of the "recorded image(s)" of the alleged traffic violation were served.

It is elementary that the City is bound by its own ordinances. Quite apart from the City's blatant disregard of the provisions of Rule 37, the City has flagrantly ignored the terms of its own ordinance in the manner by which this ordinance violation prosecution has been commenced. Whether characterized as a jurisdictional matter, or a matter of the Court's authority to proceed, the defects in the

initiation of this prosecution are patent. Rule 37 and the procedural prerequisites of the ordinance are not mere rules of etiquette. Indeed, a prosecutor who files an information without the support of a sufficient notice of violation setting out facts declared to be true runs a grave risk of personal liability under the federal civil rights acts, particularly 42 U.S.C. §1983. See *Kalina v. Fletcher*, 522 U.S. 118 (1997). Accordingly, the proceeding should be dismissed.

#### Conclusion

The foregoing are insuperable bars to this ordinance violation prosecution. At trial, the defendant would expect to show additional reasons why the presumption in this case is peculiarly unsuitable to sustain the City's burden of proof. The critical evidence in the case, the purported photographs of defendant's automobile, is the work of a contractor who has a financial incentive to maximize prosecutions. Given this intrinsic bias, the likelihood that the City can lay a credible foundation for the admission of the purported photographic evidence essential to raise the presumption is doubtful at best. See *Municipality of Anchorage v. Baxley*, 946 P.2d 894 (Alaska 1997). But there need be no trial of this case. For the foregoing reasons, plain logic and common sense, this action should be dismissed.

Respectfully submitted,

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