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STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

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

FILED
MAY 20 2011
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

ALEXA SMITH, FAITH MORGAN,)
and DAVID BOYD, on behalf of)
themselves and all others)
similarly situated,)

Plaintiffs,)

Cause No. 0922-CC10285

Division No. 5

vs.)

CITY OF ST. LOUIS,)

Defendant.)

ENTERED
MAY 20 2011
MJZ

ORDER AND PARTIAL JUDGMENT

The Court has before it Plaintiffs' and Defendant's Cross-Motions for Summary Judgment. The Court has reviewed the submissions of the parties, the relevant authorities, and the arguments of counsel, and now rules as follows.

The following facts are uncontroverted:

On or about November 8, 2005, Defendant City of St. Louis enacted Ordinance 66868.¹ By its terms, Ordinance 66868 authorized the establishment of a red light photo enforcement program in the City of St. Louis ("the Ordinance"). The City contracted with American Traffic Solutions, Inc. ("ATS") to maintain and operate the City's red light photo enforcement system.

¹ Also known as Revised Code of the City of St. Louis section 17.07.040.

Red light photo enforcement program cameras ("red light cameras") were installed at 51 intersection approaches in the City of St. Louis to detect violations of red light traffic regulations. Although the red light cameras photograph the rear of the subject vehicles and do not photograph drivers' images, the Ordinance creates a rebuttable presumption that the registered owner of the vehicle was the operator at the time of the violation.

As part of the City's red light photo enforcement program, police officers review video recordings of suspected red light violations and determine whether probable cause exists to issue a Notice of Violation. When a violation is detected by a police officer as part of the red light photo enforcement program, a Notice of Violation is issued and sent by first class mail to the registered owner of the vehicle.

The Notices of Violation contain, among other things, information allowing violators to review video recordings of their alleged violations on an internet website.

From the inception of the red light photo enforcement program in 2007 through June 30, 2010, police officers had reviewed video recordings of 400,889 suspected violations and issued 267,777 Notices of Violation. Cases arising from the red light photo enforcement program of the City of St. Louis are brought in the City's Municipal Court. The Municipal Court supervises the City's traffic violation bureau.

Defendant has not caused the arrest of any person for a violation of the red light photo enforcement program since the inception of the program. Since the inception of the program through June 30, 2010, a total of 267,777 violations had been sent. The fine adopted by the City for violations of the red light

enforcement program is \$100. Defendant has not fined any person more than \$100 per violation since the inception of the program.

The Municipal Court's reports to the Department of Revenue are submitted electronically through REJIS. Red light camera enforcement infractions are not reported through REJIS. The Missouri Department of Revenue does not assess "points" for red light camera enforcement program infractions.

Plaintiff Alexa Smith and her mother, Deborah Smith, received a Notice of Violation issued as part of the City's red light photo enforcement program. Plaintiff Smith was 19 years old and living with her parents in 2007 when the Notice of Violation was issued. Plaintiff Smith does not dispute that her family's vehicle failed to properly stop at a red light as evidenced by the video recording of the violation. Smith does not remember if she was driving the vehicle at the time of the violation. Smith and her mother were the registered owners of the vehicle at the time of the infraction. Smith decided to "just pay [the \$100 fine] and be done with it," but then forgot to mail the check. She eventually paid the fine on October 22, 2007. She did not consult any attorney, or attempt to assert any defenses, avoidances, or other means of contesting guilt. Smith believed that a warrant could be issued for her arrest if she did not pay the fine.

The other two named Plaintiffs, Faith Morgan and David Boyd, also received Notices of Violation pursuant to the City's red light photo enforcement program.

Plaintiff David Boyd sent one affidavit of non-responsibility to the Municipal Court indicating that his vehicle had been stolen. He also sent a letter to the Municipal Court clerk verifying that his vehicle had been stolen. In May 2010, the City Counselor's

Office provided the Municipal Court copies of a police report from St. Louis County, Missouri, indicating that the vehicle referenced in the five notices of violation issued to Plaintiff Boyd had been reported stolen prior to the violations. The charges were dismissed with the notation "judicial discretion" on May 7 and May 12, 2010. Plaintiff Boyd has not paid any fine in relation to the notices he received.

Plaintiff Faith Morgan received a notice of red light camera infraction, which action remains pending in the Municipal Court. Plaintiff Morgan has not paid any fine in relation to the notice she received.

In the instant suit, Plaintiff Smith seeks a refund of the \$100 fine she paid. Boyd and Morgan seek only injunctive relief. The City asserts affirmative defenses of waiver, estoppel, and voluntary payment, among other things.

Plaintiffs make the following claims in their Third Amended Class Action Petition:

- 1) that the Ordinance violates Article I, § 10 of the Missouri Constitution (due process) in that it authorizes a taking of property and imprisonment without due process of law;
- 2) that the Ordinance violates Article I, § 19 of the Missouri Constitution (freedom from self-incrimination) in that it requires each vehicle owner charged with a traffic violation to prove that he or she was not driving the vehicle or that the vehicle was stolen, thereby compelling the owner to testify in order to overcome the Ordinance's presumption of guilt;
- 3) that the Ordinance violates Article I, § 18(a) of the Missouri Constitution (confrontation) in that confrontation

and cross-examination of Defendant's "witnesses" (the red light camera) is impossible;

4) unjust enrichment;

5) money had and received;

6) permanent injunction; and

7) that the Ordinance conflicts with the provisions of various Missouri state statutes in that it:

a. directly conflicts with the classification of a red-light violation as a moving violation (§ 302.010(12));

b. directly conflicts with the classification of a red-light violation as a misdemeanor (§ 304.281.2);

c. contradicts the requirement of reporting of "any . . . municipal ordinance, regulating the operation of vehicles on highways or any other offense in which the commission of such offense involves the use of a motor vehicle" (§ 302.225); and

d. circumvents the requirement of the Director of Revenue to assess two points for a red-light violation (§ 302.302.1(1)).

Plaintiffs each filed a separate Motion for Partial Summary judgment on the Constitutional issues and conflicts between the Ordinance and Missouri State law (Counts I, II, III, and VII of the Third Amended Class Action Petition), and Defendant filed a cross-motion for summary judgment with respect to the same issues. Defendant also filed a Motion for Summary Judgment on the City's affirmative defenses of waiver, estoppel, and voluntary payment as to Plaintiff Alexa Smith only.

Summary Judgment Standard

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Larabee v. Eichler, 271 S.W.3d 542, 545 (Mo. banc 2008); Rule 74.04(c)(6). A movant's right to judgment as a matter of law differs significantly depending upon whether that movant is a "claimant" or a "defending party." ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc 1993).

A "claimant" is one who "seeks to recover," without regard to whether recovery is sought by claim, counterclaim, cross-claim or declaratory judgment. Id. at 380. A claimant must establish that there is no genuine dispute as to those material facts upon which the claimant would have had the burden of persuasion at trial. Id. at 381. Additionally, where the defendant has raised an affirmative defense, a claimant's right to judgment depends just as much on the non-viability of that affirmative defense as it does on the viability of the claimant's claim. Id.

A defending party moving for summary judgment may establish a right to judgment by showing "(1) facts that negate any one of the claimant's element facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense." Id.

If the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the non-moving party then has a specific burden: "A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial." Rule 74.04(c)(2). The court accords the non-moving party the benefit of all reasonable inferences in the record. Id., at 376.

Plaintiff David Boyd

First, the City argues that Plaintiff David Boyd does not have standing to bring these claims because the prosecutions against Mr. Boyd were dismissed. If a party is without standing to bring a particular action, a court shall dismiss the claim because the court lacks the authority to decide the merits of the action. Farmer v. Kinder, 89 S.W.3d 447, 451 (Mo. banc 2002).

Defendant points out that the definitions of the subclasses which Plaintiff Boyd is alleged to represent are as follows:

Missouri citizens who have not paid the requisite fine, imposed as punishment by the Notice of Violation, and thus have at least one outstanding violation; and

Missouri citizens who have not paid the requisite fine, imposed as punishment by the Notice of Violation, and have asserted a defense to Defendant's prosecution but who have failed to overcome the presumption of guilt.

Defendant argues that because Plaintiff Boyd's charges were dismissed, he no longer fits in either category.

Whether Plaintiff Boyd fits the class definition is a matter to be determined upon class certification, namely, whether he adequately and typically represents the class. An uncertified

class is not yet defined, and even once certified, a class definition may be altered or amended pursuant to Rule 52.08(d) and the Court can always decertify the class in whole or in part as to particular claims. That Mr. Boyd may not end up being a class representative or that the subclass definition may change does not have any bearing on whether Mr. Boyd has standing to assert the claims alleged.

Nonetheless, the Court finds that Mr. Boyd does not have standing to assert the claims in the petition. Mr. Boyd seeks injunctive relief against Defendant's efforts to collect on the Notice of Violation, which is now moot, and a declaration that the Ordinance is invalid or unconstitutional. Under Chapter 527 RSMo, a person may challenge the validity of a municipal ordinance in an action for declaratory judgment. Section 527.020 RSMo explains who has standing to assert a claim for declaratory judgment, as follows:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The issue is whether Mr. Boyd is a person "whose rights, status or other legal relations are affected by" a municipal ordinance. A petitioner in a declaratory judgment action must show that he has a "legally protectable interest at stake." State Farm Fire & Cas. v Alberici, 852 S.W.2d 388, 389 (Mo.App. E.D. 1993). A legally protected interest necessary for standing to bring a

declaratory judgment action means "a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, either immediate or prospective." Dodson v. City of Wentzville, 133 S.W.3d 528, 535 (Mo.App. E.D. 2004). Importantly, in order to have standing, a plaintiff cannot seek a "mere advisory decree." Id.

Since Mr. Boyd's violations have been dismissed and he has no pending violations, the Court finds that he does not have a personal interest "in jeopardy" such that he has standing to bring these claims. Mr. Boyd's claims are dismissed.

Plaintiff Alexa Smith

Next, Defendant moves for summary judgment on Alexa Smith's claims, on the grounds of waiver, estoppel, and voluntary payment.² Smith paid the \$100 fine assessed against her, without asserting any defense. The payment stub attached to Smith's Notice of Violation clearly states that "payment is an admission of guilt or liability."

The voluntary payment doctrine "is well established, both in England and in this country, [and the doctrine provides] that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back, though the payment is made without a sufficient consideration, and under protest." Huch v. Charter Communications, Inc., 290 S.W.3d 721, 726 (Mo. banc 2009).

² Smith has no pending violations, so as discussed above, has no standing to seek injunctive relief. She seeks a refund of the \$100 fine she paid and declaratory judgments. As far as standing to bring the declaratory judgment claims, a palpable economic injury is sufficient to lay the basis for standing to sue. See 22A Am Jur 2d Declaratory Judgments § 22. Because she paid the \$100 fine, the Court believes she has a palpable economic injury.

However, the voluntary payment doctrine is "not applicable in all situations." Id. at 727. Notably, it is not available where the application of waiver would be improper. Id.

The critical question in determining whether waiver occurs is whether the party affected had a reasonable opportunity to raise the unconstitutional act or statute by timely asserting the claim before a court of law. State ex rel. York v. Daugherty, 969 S.W.2d 223, 225 (Mo. banc 1998). Here, Defendant argues that Smith could have asserted her constitutional defenses in Municipal Court, asserting that "the Municipal Court has no rules or procedures that limit the ability of red light camera defendants to raise constitutional defenses in Municipal Court." However, in response Plaintiffs provided the affidavit of a person who attempted to assert constitutional defenses at Municipal Court, and was cut off by the judge and told, "those are good defenses. People have made those defenses before. You're welcome to assert them at trial de novo." There is at best a question of material fact as to whether the Municipal Court is actually equipped to consider and respond to constitutional challenges.

Moreover, Plaintiff Smith never appeared at any forum in the first place in which she could have waived or asserted her constitutional claims. She mailed in her payment on the mistaken belief that a warrant for her arrest would be issued if she did not. The Notice of Violation sent to Smith contained the following language:

If, at the time and place of the violation, the vehicle was being operated by a person other than the Owner, or the vehicle or the license plate captured by the Automated Traffic Control System was stolen, the owner may submit information to that effect by using the

affidavit below. You may mail the affidavit to the St. Louis City Court, 1520 Market Street, St. Louis 63103 so that it is received on or before the Due Date on the front of this Notice or you may attend the court hearing on the date³ and the location provided on the front of this Notice of Violation.

Aside from this paragraph about reporting that the vehicle or license plate was stolen, or asserting that a different person was driving the vehicle, there is nothing in the Notice of Violation that explicitly allows a "not guilty" plea or provides a court date or instructions for obtaining a court date. In Missouri, the waiver doctrine ensures that "[a] party may not wait until he has lost the case and then, in contravention of a statute and the Constitution itself and to the cluttering up and confusion of the Courts, pick and choose his appellate forum by a belated constitutional question dragged by its very heels into the case." Duncan v. Mo. Bd. for Architects, Prof. Eng'rs & Land Surveyors, 744 S.W.2d 524, 531 (Mo.App. E.D. 1988). Plaintiff here did not wait until she lost the case and then attempt to pick and choose her appellate forum to introduce a belated constitutional question, thus the waiver doctrine should not apply. See Mills v. City of Springfield, 2010 U.S. Dist. LEXIS 92031, 12-13 (W.D. Mo. Sept. 3, 2010) (the fact that Plaintiffs paid the \$100 fines before contesting the citations does not act as a bar to all potential constitutional claims under the doctrines of waiver or estoppel).

Although the City has not shown that it is entitled to summary judgment on Plaintiff Smith's declaratory judgment claims on the basis of waiver, estoppel, or voluntary payment, the Court finds

³ Contrary to the statement on the back of the Notice of Violation, no "court date" appears on the front of the Notice, only a "Due Date."

that the City is entitled to partial summary judgment as to her claim for damages. "Though it shocks the equitable conscience, the general rule is well-settled that the sovereign need not refund taxes voluntarily paid, but illegally collected." Ring v. Metropolitan St. Louis Sewer District, 969 S.W.2d 716, 718 (Mo. banc 1998). Thus, for the City to face the possibility of any liability to those who paid the fine, there must be a waiver of sovereign immunity and the persons claiming a refund or credit for illegally paid taxes must have complied with the terms of the waiver of sovereign immunity or have paid the tax involuntarily. Id.

The uncontroverted facts show that Plaintiff Smith did not pay her fine involuntarily. Nor did she pay the fine under protest. Although Plaintiff Smith did not intentionally waive her constitutional claims by paying the fine, she cannot now seek a refund of the fine she paid. Defendant is entitled to partial summary judgment on Plaintiff Alexa Smith's claims, as they relate to damages.

Constitutional and State Law Issues

Next, the parties have filed cross-motions for summary judgment on the constitutional and preemption issues raised in the Third Amended Class Action Petition.

Due Process

First, Plaintiffs allege that the Ordinance violates the due process clause of the Missouri Constitution. Article I, §10 of the Missouri Constitution states that "no person shall be deprived of life, liberty or property without due process of law." Plaintiffs

allege that the Ordinance imposes penalties on vehicle owners in an arbitrary, unreasonable, and capricious manner without a fair hearing and without adequate procedural protections. Plaintiffs allege that the rebuttable presumption that the owner of the vehicle was its operator permits a person to be punished without proof beyond a reasonable doubt, and that motorists charged under the Ordinance are given fewer due process protections than motorists pulled over by a police officer for red light violations.

The Ordinance states in part that "If the City proves: 1) That a motor vehicle was being operated or used; 2) That the operation or use of the motor vehicle was in violation of Traffic code Ordinance as codified in Title 17 of the Revised Code; and 3) That the defendant is the owner of the motor vehicle in question, then: a rebuttable presumption exists that such owner of a motor vehicle operated or used in violation of the Traffic Code Ordinance as codified in Title 17 of the Revised Code was the operator of the vehicle at the time and place the violation was captured by the automated traffic control system record."

Prosecutions for violation of a city ordinance are in this state regarded as a civil action with quasi-criminal aspects. Independence v. Peterson, 550 S.W.2d 860, 862 (Mo.App. 1977). Constitutional questions regarding a city ordinance, however, are to be resolved under legal principles and procedural rules applicable to criminal cases. Kansas City v. Howe, 416 S.W.2d 683, 688 (Mo.App. K.C. 1967). While guilt may never be presumed, a presumption may be used in a criminal case to supply an essential element of an offense. State v. Shelby, 64 S.W.2d 269, 273 (Mo. 1933). In order for the presumption to pass constitutional muster, there must be a rational connection between the fact proved and the

fact sought to be presumed. Leary v. United States, 395 U.S. 6, 33 (1969). It is rational to presume that the owner of a vehicle was operating the vehicle at the time of a traffic violation. See Kansas City v. Hertz Corp., 499 S.W.2d 449, 453 (Mo. 1973).

Under the general rule in Missouri, the presumption only shifts the burden of production, and the burden of persuasion remains on the party with the burden of proof. Byous v. Mo. Local Gov't Employees Retirement System Bd. of Trs., 157 S.W.3d 740, 746 (Mo.App. W.D. 2005). The rebuttable presumption here does not presume the Plaintiff guilty; it merely provides a critical element of the City's claim, in the absence of any other proof or any contrary evidence. See Parrish v. Kansas City Security Service, 682 S.W.2d 20, 23 (Mo.App. W.D. 1984). The rebuttable presumption may be so rebutted, and the presumption disappears whenever substantial evidence, however slight, is adduced by the opponent. State ex rel. Baumann v. Doder, 121 S.W.2d 263, 265 (Mo.App. E.D. 1938); Neve v. Reliance Ins. Co., 357 S.W.2d 247, 251 (Mo.App. K.C. 1962). Because the rebuttable presumption in the Ordinance does not relieve the City of its burden of proof, the Court does not believe that the use of a rebuttable presumption violates the Plaintiffs' due process rights.

That the red light photo enforcement program provides fewer due process protections than a comparable police officer-initiated red light traffic violation is not in itself a violation of due process, as long as the red light photo enforcement program provides sufficient due process. Missouri's due process clause parallels its federal counterpart, and Missouri Courts have in the past treated the clauses as equivalent. Jamison v. Department of Social Services, 218 S.W.3d 399, 405 (Mo. banc 2007). "(T)he

substantive due process guarantee protects against government power arbitrarily and oppressively exercised." County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998). The Supreme Court has explained that the cognizable level of executive abuse of power is that which shocks the conscience. Id. at. 846. Plaintiffs have not identified a suspect class or a fundamental right that is implicated with camera tickets versus live tickets. Plaintiffs allege that the Ordinance only allows two defenses for red light camera tickets. First, by providing an "affidavit of non-responsibility" and identifying the driver of the vehicle, or second, by asserting that the license plate or car was stolen at the time of the alleged violation; rather than the numerous defenses available to a defendant charged with a traditional red light violation. They also allege that the Notice of Violation sent to the Plaintiffs fails to provide fair notice of the claim against them.

Plaintiffs allege that the Ordinance only allows two affirmative defenses and disallows any of the usual defenses to a charge of running a red light (funeral procession, make way for emergency vehicle, etc.). A review of the Ordinance reveals that the provision allowing the submission of an affidavit of non-responsibility is simply an alternative to appearing in court in order to overcome the rebuttable presumption set forth in the Ordinance. The Ordinance does not, on its face, prohibit the use of any of the usual defenses to a red light violation.

Plaintiffs also allege that the Notice of Violation fails to comport with Missouri Supreme Court Rule 37, Ordinance Violations. Rule 37.33 sets forth the contents required in a violation notice, as follows:

- (a) A violation notice shall be in writing and shall:
- (1) State the name and address of the court;
 - (2) State the name of the prosecuting county or municipality;
 - (3) State the name of the accused or, if not known, designate the accused by any name or description by which the accused can be identified with reasonable certainty;
 - (4) State the date and place of the ordinance violation as definitely as can be done;
 - (5) State the facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it;
 - (6) State that the facts contained therein are true;
 - (7) Be signed and on a form bearing notice that false statements made therein are punishable by law;
 - (8) Cite the chapter and section of the ordinance alleged to have been violated and the chapter and section that fixes the penalty or punishment; and
 - (9) State other legal penalties prescribed by law may be imposed for failure to appear and dispose of the violation.
- (b) When a violation has been designated by the court to be within the authority of a violation bureau pursuant to Rule 37.49, the accused shall also be provided the following information:
- (1) The specified fine and costs for the violation; and
 - (2) That a person must respond to the violation notice by:
 - (A) Paying the specified fine and court costs; or
 - (B) Pleading not guilty and appearing at trial.

(c) The violation notice shall be substantially in the form of the Uniform Citation set out in Form 37.A, with such additions as may be necessary to adapt the Uniform Citation to the jurisdiction involved.

The Notice of Violation provides the name and address of the Court (Municipal Court of St. Louis City, 1520 Market Street); the name of the prosecuting county (St. Louis City); the name of the accused; the date, time, and location of violation; the facts supporting the belief that there was a violation; a statement that the facts are true; the prosecutor's signature and a statement that "false statements on this form are punishable by law;" the traffic code sections alleged to have been violated (§ 17.07.040 and § 17.08.130); and that the failure to pay or appear may result in "further legal action . . . taken against you by the City of St. Louis." The notice does not state that a person may plead not guilty and appear at trial, and does not contain a court date. Form 37.A ("Uniform Citation") has spaces for "court date," "court time," and "court phone no.," which do not appear on the Notice of Violation at issue. Rule 37.33(c) requires that the Notice be "substantially in the form of the Uniform Citation set out in Form 37.A, with such additions as may be necessary to adapt the Uniform Citation to the jurisdiction involved." The Rule does not state when deletions from the Uniform Citation may be proper.

A failure to follow procedural rules does not by itself violate constitutional due process. Reasoner v. Meyer, 766 S.W.2d 161, 167 (Mo.App. W.D. 1989) (Nugent, J., concurring). Nonetheless, the United States Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. Mathews v. Eldridge, 424

U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976); Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Id., quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Id., quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

Resolution of the issue of whether or not the administrative procedures provided by the Ordinance are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Id., citing Arnett v. Kennedy, 416 U.S. 134, 166, 167-168, 94 S.Ct. 1633, 1650, 40 L.Ed.2d 15 (1974) (Powell, J., concurring in part), Goldberg v. Kelly, 397 U.S. 254, 263-266, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). More precisely, due process analysis generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Id., at 334-335, citing Goldberg, 397 U.S. at 263-271. As to the second prong, the risk here is that the Notice of Violation used will erroneously

lead alleged violators to believe that they do not have the right to contest the violations.

In Mills v. City of Springfield, 2010 U.S. Dist. LEXIS 92031 (W.D. Mo. Sept. 3, 2010), the District Court for the Western District of Missouri noted that "Courts evaluating automated traffic ordinances similar to that of the City of Springfield have found that an administrative scheme provides constitutionally adequate process." However, in the cases cited by Mills, Mendenhall v. City of Akron, No. 09-3061, 374 Fed. Appx. 598, 2010 U.S. App. LEXIS 6454, 2010 WL 1172474 (6th Cir. Mar. 29, 2010); and Ware v. Lafayette City-Parish Consol. Gov't, Civil Action No. 08-0218, 2009 U.S. Dist. LEXIS 97836, 2009 WL 5876275 (W.D. La. 2009), the underlying courts had found that the notices sent to the violators included "an opportunity for a hearing," Mendenhall, 374 Fed. Appx. at 600, or the "procedure for requesting a hearing." Ware, 2009 U.S. Dist. LEXIS 97836 at *22. There is no evidence that the Notices of Violation at issue here provide any information about the opportunity for a hearing or the procedure for requesting a hearing.

Section Five of the Ordinance provides in pertinent part: "Upon the filing of an information in the municipal court, the Court Clerk shall issue a summons, with a court date, pursuant to Missouri Supreme Court Rules 37.42 through 37.44. Not later than sixty (60) days after the date the violation is alleged to have occurred, the summons shall be served on the Owner by mailing it, together with: 1) a copy of the violation notice; and 2) a copy of the recorded image(s) of the alleged violation, which forms the basis of the information; and 3) a copy of the supplemental

violation notice as described in subparagraph B of this section, to the Owner's last known address by first class mail."

So, even though the Notice itself does not contain a court date, the accompanying summons should. That would, in the opinion of this Court, cure any due process concerns with providing notice to violators that they are entitled to a hearing or review of the charge against them. However, there is nothing in the record to indicate that a summons is actually issued to violators in accordance with the Ordinance. Defendant's Statement of Uncontroverted Facts states only that a "notice of violation is issued and sent by first class mail to the registered owner(s) of the vehicle," and it is uncontroverted that the notice of violation does not contain a court date or directions for obtaining one. Plaintiffs allege that they were not issued summonses with their Notices of Violation. Because there are questions of fact regarding the information provided to the alleged violators, summary judgment is improper for either party on the issue of due process.

Self-Incrimination

Next, Plaintiffs allege that the Ordinance violates Article I, § 19 of the Missouri Constitution, which states that "no person shall be compelled to testify against himself in a criminal cause. . . ." Plaintiffs argue that because of the rebuttable presumption, they are "compelled to testify of their own behalf in order to overcome the Ordinance's presumption of guilt." As set forth above, the presumption does not create a presumption of guilt. It merely provides a presumption regarding an essential element of the offense, which is operative in the absence of any

contrary evidence. Defendant is entitled to summary judgment on Count II of Plaintiffs' Third Amended Class Action Petition.

Confrontation

Next, Plaintiffs argue that the Red Light Camera ordinance denies their right to confront their accuser. Article I, § 18 of the Missouri Constitution states that an accused shall have the right to "meet witnesses against him face to face." Plaintiffs argue that "Defendant's witnesses are machines" that cannot be cross-examined. This Court disagrees. The "witness" is not the photograph. The photograph is merely a piece of evidence.

Plaintiffs each allege that the photograph of his or her vehicle is the only evidence that places the Plaintiff in the vehicle at the time of the violation, and since there is no live witness there is no opportunity to confront the witness. The right to confrontation plainly does not require that there be a live eye-witness to an offense in order to prosecute. It instead guarantees that in all criminal prosecutions, the accused shall enjoy the right to confront the witnesses against him, most basically by guaranteeing him the right to be present in the courtroom at every stage of the trial. Illinois v. Allen, 397 U.S. 337, 338 (1970). This right of confrontation is not impacted by the introduction of photographic evidence. The Court finds that the use of a red light camera does not violate Plaintiffs' right to confront witnesses. Defendant is entitled to summary judgment on Count III of Plaintiffs' Third Amended Class Action Petition.

State Law Conflict and Preemption

Finally, Plaintiffs argue the Ordinance violates several state laws. First, they argue that classifying the offense as "non-

moving" conflicts with the definition of a "moving violation" under § 302.010(12). Second, they argue that the classification of a violation under the ordinance as an "infraction" directly contradicts § 304.281.2, which designates a red light violation as a misdemeanor. Third, they argue that the Ordinance violates § 302.225 RSMo, which requires a court to report any moving traffic violation conviction to the Missouri Department of Revenue. Finally, Plaintiffs argue that the Ordinance intentionally circumvents § 302.302.1(1), which sets forth a non-discretionary requirement upon the Director of Revenue to assess two points against the driver's license of an operator with a moving violation.

If a local law is in direct conflict with state law, then the local law is determined to be contrary to the state law and, therefore, invalid. Borron v. Farrenkopf, 5 S.W.3d 618, 622 (Mo.App. W.D. 1999). Section 302.010(12) RSMo defines "moving violation" as "that character of traffic violation where at the time of violation the motor vehicle involved is in motion, except that the term does not include the driving of a motor vehicle without a valid motor vehicle registration license, or violations of sections 304.170 to 304.240, inclusive, relating to sizes and weights of vehicles." Running a red light is clearly a violation which occurs while the "motor vehicle involved is in motion," and thus a "moving violation" under state law. The Notice of Violation sent to Plaintiffs, nonetheless, states that "This violation is a non-moving infraction and no points will be assessed." However, the actual Ordinance does not make mention to the violation being "non-moving." The Ordinance, therefore, does not conflict with

state law. The statement on the Notice of Violation is inconsequential.

Section 304.281 states, with regard to the rules for traffic where controlled by light signals, that "violation of this section is a class C misdemeanor." Under § 556.016, "a crime is a 'misdemeanor' if it is so designated or if persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one year or less." Section 556.021 provides in part that "an offense defined by this code or by any other statute of this state constitutes an infraction if it is so designated or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction." It goes on to state that "an infraction does not constitute a crime and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a crime."

The Notice of Violation sent to Plaintiffs refers to the violation as an "infraction." However, the actual Ordinance does not make mention to the violation being an infraction. The Ordinance, therefore, does not conflict with § 304.281.

Section 302.225.1 states in part that "Every court having jurisdiction over offenses committed under sections 302.010 to 302.780, or any other law of this state, or county or municipal ordinance, regulating the operation of vehicles on highways or any other offense in which the commission of such offense involves the use of a motor vehicle, including felony convictions, shall, within seven days thereafter, forward to the department of revenue, in a manner approved by the director of the department of public safety a record of any plea or finding of guilty of any person in the court for a violation of sections 302.010 to 302.780 or for any

moving traffic violation under the laws of this state or county or municipal ordinances." It is undisputed that red light photo enforcement convictions are not reported to the Missouri Department of Revenue.

Plaintiffs further allege that the City's noncompliance with § 302.225 intentionally circumvents the requirement that the Department of Revenue assess points for red-light violations. Section 302.302.1(1) RSMo states that the Director of Revenue shall assess two points for "any moving violation of a state law or county or municipal or federal traffic ordinance or regulation not listed in this section, other than a violation of vehicle equipment provisions or a court-ordered supervision as provided in section 302.303." Plaintiffs allege that no points are assessed as required by the statute, because the City is not reporting the violations as required by § 302.225.

Defendant points out that the Director of Revenue has determined that points will not be assessed for municipal red light photo enforcement violations, and that such violations are not reportable as convictions to the Department of Revenue. Defendant argues that since it was the State, and not the City, that decided that red light photo enforcement violations would not be reported to the State, the City cannot be held liable for its failure to comply with the state statute. The assessment of points in § 302.302 is a duty placed upon the Director of Revenue, and the Court agrees that the City cannot be liable for the Director's failure.

Section 302.225.1 RSMo, however, requires the municipal court to forward to the highway patrol records of convictions of ordinance moving violations. Knierim v. James, 677 S.W.2d 322, 324

(Mo. banc 1984). The duty to comply is clearly placed on the municipal court. That the Department of Revenue may have instructed the City not to comply seems more in the nature of a possible third-party claim than an affirmative defense.

The failure of the City to comply with the reporting requirements of § 302.225 does not serve to invalidate the Ordinance, however. There is nothing in the Ordinance which prohibits the City from reporting the violations, and therefore the Ordinance does not conflict with § 302.225.⁴

Although the Ordinance is not in direct conflict with the specific statutes cited by Plaintiffs, the Ordinance may still be invalid if the City did not have the proper authority to enact such an ordinance. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and none others: First, those granted in express words. Second, those necessarily or fairly implied in or incident to the powers expressly granted. Third, those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable * * * [sic] And any fair reasonable doubt concerning the existence of the power is resolved by the courts against the corporation." Richmond Heights v. Shackelford, 446 S.W.2d 179, 180 (Mo.App. 1969).

Municipalities may enact supplemental ordinances in addition to state law and even enlarge upon state law, as long as there is

⁴ The Notice of Violation, which is defective in that it fails to apprise recipients of their right to contest the violation, is also improper in that it erroneously states that the "violation is a non-moving infraction and no points will be assessed." The Notice is not part of the Ordinance, however, and the Court does not believe that the Ordinance can be invalidated on the basis of language contained in the Notice.

no conflict. Vest v. Kansas City, 194 S.W.2d 38, 39 (Mo. 1946). Section 304.120.2(1) RSMo allows municipalities to "make additional rules of the road or traffic regulations to meet their needs and traffic conditions." However, municipalities may not enact ordinances which are "contrary to or in conflict with" state law. Section 304.120.3 RSMo. The Missouri Supreme Court once explained the statute as follows:

[I]f an ordinance be enacted under sanction of the state law, it will be valid as an additional regulation. On the other hand, if the ordinance make a requirement contrary to the state law with respect to a matter on which the state law is intended to be controlling, the ordinance cannot stand.

Kenney v. Hoerr, 324 Mo. 368, 373 (Mo. 1929). Section 304.120(2) gives the city broad powers of regulation over the streets and traffic thereon and specific power to make additional rules of the road or traffic regulations to meet the city's needs and traffic conditions and to establish one-way streets and regulate traffic thereon. "It is abundantly clear that the City of St. Louis has full police power to regulate and control all traffic on its streets" Automobile Club of Missouri v. City of St. Louis, 334 S.W.2d 355, 363 (Mo. 1960).

Plaintiffs do not challenge the ordinance that prohibits the running of red lights, section 17.08.130, which has been part of the City Code since at least 1979.⁵ The "steady red indication"

⁵ 17.08.130 Traffic-control signal colors and terms--Steady red indication. Vehicular traffic facing a steady red signal alone shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or if none, then before entering the intersection and shall remain standing until an indication to proceed is shown. After stopping, a driver may cautiously enter the intersection only to make a right turn unless a sign at such place prohibits such movement and shall yield the right-of-way to pedestrians lawfully within the adjacent crosswalks, and to all other traffic lawfully in the

ordinance clearly is designed to regulate and control traffic. The Ordinance at issue, on the other hand, does nothing to regulate and control the streets or traffic. It merely authorizes the use of an Automated Traffic Control System to police violations of already-existing traffic control ordinances. It also sets forth the rebuttable presumption that the Owner of a vehicle is its operator, and sets forth the procedure for notifying offenders of violations.

The use of an automated traffic control system to police traffic offenses is a drastic departure from the traditional police powers granted to municipalities; and as seen here, it raises a whole host of legal and constitutional issues. A municipality may only exercise its police powers under authority granted to it by the state. Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust, 304 S.W.3d 112, 117 (Mo. banc 2010). In at least nine states (California, Colorado, Delaware, Hawaii, Maryland, New York, North Carolina, Oregon, and Virginia) and the District of Columbia, the state legislatures have passed legislation permitting the use of red light cameras in at least some communities. See Williams v. Redflex Traffic Sys., 2008 U.S. Dist. LEXIS 22723 (E.D. Tenn. Mar. 20, 2008). In each of these states, the legislature passed enabling legislation authorizing municipalities to implement automatic traffic law enforcement systems and often characterized the resulting fines as "civil." Id.; see N.C. Gen. Stat., § 160A-300.1. The Missouri legislature, by contrast, has not created such enabling legislation. In fact, Missouri's statutes are silent as

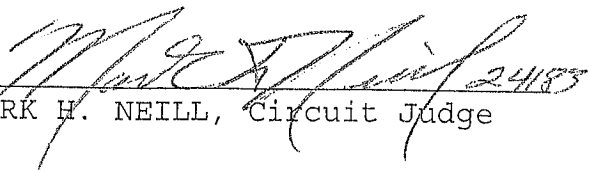
intersection or about to enter the intersection. (Ord. 57831 § 1 (part), 1979: 1960 C. § 823.110(b).)

to the use of red-light cameras. See Chapter 304, RSMo; Joel O. Christensen, Note: Wrong on Red: The Constitutional Case Against Red-Light Cameras, 32 Wash. U. J.L. & Pol'y 443, 458 (2010). The counties and municipalities in Missouri which have adopted red-light camera programs, including the City of St. Louis, have done so apparently on their own, without the sanction of a state enabling law.

Because the red-light camera ordinance does not enact "rules of the road" or "traffic regulations," the Court finds, in absence of other enabling legislation by the State of Missouri, that the City of St. Louis did not have authority to enact such an Ordinance. Therefore, Ordinance #66868 is void.

THEREFORE, it is Ordered and Decreed that Defendant's Cross-Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART. Judgment is entered in favor of Defendant City of St. Louis on Counts II and III of Plaintiffs' Third Amended Class Action Petition. Defendant's Motion for summary judgment is GRANTED IN PART as to Count I of Plaintiffs' Third Amended Class Action Petition, and DENIED IN PART as to the procedural due process claim in Count I. Defendant's Motion for Summary Judgment as to Plaintiff Alexa Smith's Claims is GRANTED IN PART, on the issue of damages. Plaintiffs' Cross-Motions for Summary Judgment are GRANTED as to Count VII. The claims of Plaintiff Boyd are dismissed. In all other respects, the parties' motions for summary judgment are DENIED.

SO ORDERED:


MARK H. NEILL, Circuit Judge

Dated: May 20, 2011

cc: Russell Watters
Michael Garvin
Jane Dueker
Edward Dowd, Jr.