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MARY L. SWANN
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
BUTLER COUNTY, OHIO

DOREEN BARROW, et al.

Plaintiffs,

-V-

VILLAGE OF NEW MIAMI, et al

Defendants.

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Case Number: CV2013 07 2047

JUDGE MICHAEL J. SAGE

DECISION AND ENTRY

The plaintiffs filed a class action lawsuit challenging the Automated Speed Enforcement Program (ASEP) in the Village of New Miami, Ohio. The plaintiffs seek class certification, a permanent injunction stopping the Village's speed enforcement program, and a refund for class members who have paid money to the Village as penalties imposed through this program.

There are multiple motions before the court. The matters are the defendants' motion to dismiss Police Chief Kenneth Cheeks, plaintiffs and defendants' cross motions for summary judgment and the defendants' motion for a stay. For the reasons stated in open court and more fully elaborated in this opinion, the court **grants** the Defendant Cheeks motion to dismiss and the plaintiffs' motion for summary judgment; **denies** the defendants' motion for summary judgment and **denies** the defendants' motion for a stay.

PROCEDURAL BACKGROUND

On August 27, 2013 the Defendant Kenneth Cheeks, Police Chief of the Village of New Miami, filed a motion to dismiss himself as a defendant from this action. On October 22, 2013 the plaintiffs filed a motion for summary judgment and a motion for class certification. On December 26, 2013 the defendants filed a motion to stay a decision on plaintiffs' motion for summary judgment. On January 6, 2014, the defendants filed their cross motion for summary judgment. Both sides requested oral arguments on pending motions, which was held on February 25, 2014. At the conclusion of oral arguments, the court granted class certification, granted plaintiffs' motion for summary judgment and enjoined the Village of New Miami from operating speed cameras under its Automated Speed Enforcement Program (ASEP). The court denied the defendants' motion for stay, and denied the Village's motion for summary judgment.

LEGAL ANALYSIS

The first issue is defendant Cheeks' motion to dismiss. Civ.R. 12(B)(6) allows a motion to dismiss based on the defense of failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Civ.R. 12(B)(6) carries a heavy burden. This motion will only be granted when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77

at 80. The court must also “presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.” *Mitchell v. Lawson Milk Company* (1988), 40 Ohio St.3d 190, at 192.

In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Milhon* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098, 1100. When a motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R.56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 723 N.E.2d 596. However, a trial court may not, on its own motion, convert a Civ.R.12(B)(6) motion to dismiss to a motion for summary judgment and thus dispose of it without giving notice to the parties on its intent to do so and fully complying with Civ.R.12(B) and Civ.R.56 in its considerations. *Id.*

The court also has before it cross motions for summary judgment. A motion for summary judgment shall only be granted when there are no genuine issues of any material fact, and the moving party is entitled to judgment as a matter of law. Summary judgment shall not be granted unless it appears from the evidence that reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion is made. In reviewing

a motion for summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317. The only evidence to be considered when ruling upon a motion for summary judgment are pleadings, depositions, affidavits, written discovery responses filed with the court, transcripts of evidence, and written stipulations of fact. Civ.R. 56(C).

Summary judgment is a procedural device to terminate litigation and to avoid formal trial when there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. *Norris v. Ohio STD Oil Co.* (1982), 70 Ohio St.2d 1. Doubts must be resolved in favor of the non-moving party. *Osborne v. Lyles* (1992), 63 Ohio St. 3d 326.

For summary judgment to be granted there can be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. Material facts are those facts that might affect the outcome of the lawsuit under the law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, 1126, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 212–213. To determine if these facts present a genuine issue, the court must decide whether the evidence presents a sufficient conflict to require submission to a jury, or whether it is so one-sided that

one party must prevail as a matter of law. *Id at 1126*

In the case at bar, the parties rely upon arguments provided in their respective supporting memoranda, oral arguments, the pleadings, copies of the Village's ordinances, affidavits filed and eight depositions filed.

DISCUSSION

This case arises out of the operation of the Automated Speed Enforcement Program in the Village of New Miami. The Village of New Miami is in St. Clair Township located just north of the city of Hamilton. New Miami is less than one square mile in size (.95 square miles) and has a population of 2249 people based on the 2010 United States Census Bureau. U.S. 127, a major north-south highway, runs through the Village and is the primary location where the speed cameras were located..

The Automated Speed Enforcement Program (ASEP) was established by Ordinance 1917 adopted by the Village Council on July 5, 2012. On August 2, 2012 the Village entered into a contract with Maryland Optotraffic, LLC, a private Maryland corporation, to operate the program. Optotraffic operates a near identical program in the Village Of Elmwood in Hamilton County, Ohio. Under the contract Optotraffic placed four speed cameras in New Miami. They also maintain the equipment; send out notices of violations and they collect fines. In exchange for this, Optotraffic received 40% of all revenues received from the

program. During the fifteen months the program was in operation over 10,000 violations were reported with over an estimated one million dollars collected. (A *Journal-News* article dated March 8, 2014 actually places the number of speed citations issued under the ASEP in New Miami at 44,993 during the fifteen months.)

Under Section 77.02 of the ordinance, New Miami enacted a “civil enforcement program” for automated speed enforcement system violations. Instead of a speeding ticket being issued by a police officer, a civil “notice of liability” was sent to the vehicle’s registered owner. Under Section 77.03 the owner of the vehicle was liable for a civil penalty imposed if the vehicle was operated at a speed in excess of the speed limit. The ordinance provided a limited number of defenses. In both commercial and privately owned vehicles, for the owner to avoid liability, the owner was required to provide the name and address of the person who was operating the vehicle. In the case of privately owned vehicles, the owner also had to provide a signed affidavit from the driver that the affiant (other than the owner) was driving the vehicle accompanied by payment of the civil penalty. Under Section 77.04(d) it is “prima facie evidence” that the owner was operating the vehicle at the time of the offense. The Village makes no attempt to determine who was the actual driver but places that burden on the owner.

Section 77.05 imposes a civil penalty upon the owner of the vehicle if the

vehicle is recorded by the speed camera violating the speed limit. If an owner fails to respond in a timely manner to a "notice of liability" under this section, the owner waives his right to contest his liability.

Section 77.07 provides the owner with his rights to appeal a "notice of liability". An owner can either provide the name of the driver as previously discussed or can file a "written notice of request for review" within 20 calendar days of after the issuance of the notice of liability. The hearing shall be before a hearing officer appointed by New Miami. Under Section 77.07(a) (3) A the Village has established a "prima facie" case by introducing a certified copy of the notice of liability with the recorded image produced by the automated speed enforcement system. This section provides four affirmative defenses which can be asserted at a hearing. Two defenses are that the vehicle or plates were stolen or that photo was illegible. The other two defenses are only available to an owner if that owner provides the name and address of the person who was operating the vehicle or had custody and control of the vehicle.

Under the New Miami ordinance there is no right to discovery, no right to subpoena witnesses, and no right of confrontation. The Ohio Rules of Evidence, the Ohio Rules of Civil Procedure, and the Ohio Traffic Rules do not apply. If an owner wishes to appeal a decision of the Hearing Officer, that person must file an appeal to the Butler County Court of Common Pleas pursuant to R.C. 2506 and pay the court costs, which are three times more than the fine.

The plaintiffs challenge the speed camera ordinance on two different grounds. The first is that any violation of a municipal ordinance must be adjudicated in a municipal court. The second grounds is that the ordinance violates the Ohio Constitution "due course of law" clause.

R.C. 1901.01(A) (1) provides: "The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory..." In this case if a traffic citation was issued, Hamilton Municipal Court would have jurisdiction. The plaintiffs argue that under Article IV, Section 1 of the Ohio Constitution and R.C. 1901 a municipal court would have exclusive jurisdiction to consider alleged violations of New Miami's ordinances. The plaintiff argues that New Miami Ordinance 1917 violates the Ohio Constitution by improperly placing judicial powers in the hands of an extrajudicial administrative body in which a hearing officer appointed by the Village has the authority to adjudicate violations of the ordinance and issue civil penalties in the form of fines.

The defendants argue that Ohio Constitution guarantees them the right under Section 3, Article XVIII to "home rule" authority and New Miami had a right to adopt the extra-judicial process used to adjudicate civil citations issued for speed camera violations.

It is important to point out that this is not a case about speed cameras or any type of automatic system used to enforce traffic laws by a municipality. In *Mendenhall v, City of Akron*, 117 Ohio St. 33, 2008-Ohio270 the use of speed

cameras in school zones was challenged. The Ohio Supreme Court ruled that Akron did not exceed its home rule authority with regard to cameras for enforcement of traffic laws. Municipalities such as New Miami clearly have the home rule authority to use speed cameras or similar devices for enforcement of traffic laws. This case deals with the process municipalities use when the alleged persons have violated their traffic laws.

The issue as to whether the municipal courts have exclusive jurisdiction to adjudicate speed camera violations is presently before the Ohio Supreme Court. The Sixth Circuit of Appeals in *Walker v. City of Toledo*, 2013 Ohio 2809 ruled the City of Toledo's attempt to bypass the municipal court system by adopting a very similar civil administrative process violated Article IV, Section 1 of the Ohio Constitution. The *Walker* majority ruled that R.C. 1901.20(A)(1) grants Municipal Courts exclusive authority to adjudicate speed violations. The City of Toledo has appealed this issue to the Supreme Court.

After reviewing *Walker*, this court finds the majority opinion persuasive and grants plaintiffs summary judgment on this issue. To decide otherwise is to permit municipalities to create an extra judicial system without all of the court's inherent protections which municipalities could easily abuse. One purpose of a court is the protection of citizens against an over-reaching government. It is this court's strong belief the writers of the Ohio Constitution intended courts with all their procedural protection to be the exclusive venue to resolve traffic and

criminal matters.

The second basis for the summary judgment is that the plaintiffs claim the ordinance adopted by New Miami violates the “due course of law” clause in Ohio’s Constitution. It is a fundamental concept of American jurisprudence that before a person can be deprived on their property by the government they are entitled to due process of law. Inherent in that concept is that a citizen of this country has a right to a fair hearing before a neutral magistrate. A citizen must be entitled to defend, enforce or protect their rights through presentation of their own evidence, confrontation and cross-examination of adverse witnesses and oral argument. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In determining whether the ordinance provides constitutionally adequate due process, the competing interests of the government and individual must be balanced. *Mathews v. Eldridge*, 424 U.S. 319 (1976). 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 (1965).

The defendants argue that the Automated Speed Enforcement Program provides adequate due process for citizens wishing to challenge a notice of liability. The defendants argue that due process is a flexible concept that calls for procedural safeguards as the particular situation demands. *Chirila v. Ohio State Chiropractic Board*, 145 Ohio App.3d 589 (2001). The court in *Chirila* recognized three factors which must be weighed. The three factors are (1) the private

interest at stake; (2) the risk of erroneous deprivation of that interest and the probable value of additional safeguards; and (3) the government's interest, including the function and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

At the heart of the matter, plaintiffs claim is that the procedure adopted in the New Miami ASEP lacks adequate due process. The court agrees. Under New Miami's Ordinance 1917:

- The Village only needs to enter certified notice of liability with a recorded image of a vehicle to establish a *prima facie* case.
- No "accusing witness" with personal knowledge of the alleged event testifies.
- It is *prima facie* evidence that the owner of the vehicle was operating the vehicle at the time of the offense.
- No person testifies for the Village or is available to testify about the device itself and its reliability, routine maintenance and calibration.
- The ordinance only provides four affirmative defenses.
- Two of the affirmative requires the owner of the vehicle to provide the name of the address of the driver if the owner claims the owner was not driving the car. This would include providing the name of a spouse or family member.
- The hearing officer is hired by the police chief of New Miami.
- There is no requirement that the hearing officer have any legal training.
- There is no requirement that a record be made. In *Rodeffer v. New Miami Police Department*, CV2013 01 0210, Judge Charles Pater granted the appellant's appeal of her civil liability penalty imposed by

New Miami writing "... the Village of New Miami has failed to file a transcript of the administrative hearing because it is unable to do so. Apparently, all or virtually all of the proceedings were not recorded."

- There is no right or method of subpoena to the administrative hearing.
- There is no right to do pre-hearing discovery.
- The Ohio Rules of Evidence, the Ohio Rules of Civil Procedure and the Ohio Traffic Rules do not apply to the hearing.
- If an individual wishes to appeal he must do so by filing an administrative appeal under Chapter 2506 and pay the necessary court costs, which are over three times the amount of the fine.

This court agrees that due process is a fluid and flexible rule of law.

The amount of due process expected in this case is not the same as one would expect in a felony case. At the heart of the concept of due process however is fairness. People who are issued a notice of liability and wish to contest that liability have a right to expect that the hearing they are mandated to appear at will be fair and that the decision will be made by a fair and impartial hearing officer based on reliable evidence.

Ordinance 1917, at first glance, appears to meet minimal requirements of due process. The ordinance provides a hearing in front of a hearing officer in which an owner can appear and challenge the notice of civil liability. The Village of New Miami has entered into a contract with a private contractor to place four speed cameras along a busy north-south highway. That contractor and the

Village split the civil fines imposed. The Supreme Court of Ohio has stated in *Mendenhall*, supra that these cameras are within the power of a municipality under Ohio's home-rule laws.

The Village has made a conscious decision to by-pass the traditional process of a police officer issuing a traffic citation for speeding and that ticket being contested in Hamilton Municipal Court. Invoking their home-rule authority, they have established a civil proceeding which ignores all basic concepts built into Ohio's rules of practice and procedure. This court has tremendous respect for those rules because the court understands that every rule adopted has withstood the scrutiny of the attorneys, law professors, judges and justices of Ohio. Built into every rule is the time honored tradition of fairness. The Village has intentionally chosen to ignore these basic tenets of procedural law and adopt a civil ordinance which is strongly skewed in its favor and which denies the people cited any chance for a fair hearing. The Village's elected council chose to by-pass the time tested process of the municipal court system by adopting this ordinance and did so at its own jeopardy. When government chooses to by-pass time tested traditions which incorporate Ohio's rules of practice and procedure then it invites scrutiny to ensure the process is fair to the citizens from whom they wish to take the their property. The Village could easily amend its ordinance so that these cases would be heard in the municipal court system. They have chosen not to.

When taken as a whole, the court believes Ordinance 1917 fails to provide basic due process rights to the citizens who appear for a hearing. No person with personal knowledge of a speeding violation either reviews the citation or appears at the hearing. Since no witness appears for the Village there is no confrontation with your accuser. The Village under the ordinance puts the burden on the owner to prove he was not the driver. The owner is forced to disclose who was driving the vehicle, including his or her spouse, to avoid liability. There is no right to discovery or right to subpoena witnesses. The hearing officer is appointed by the police chief and not required to have any legal training. There is no requirement for a record to be made. In fact the only time a person has filed a R.C. 2506 appeal, the trial court granted the appeal because the Village failed to provide a record of the proceeding.

Construing the evidence most favorable to the defendants, the court believes the plaintiffs are entitled to summary judgment as a matter of law. The Village of New Miami is permanently enjoined from operating the Automatic Speed Enforcement Program.

The defendants have requested the court stay any decision until after the Supreme Court rules in *Walker*. The court declines to do so. Even if the *Walker* decision is reversed, this court has independently granted summary judgment on the grounds that the ASEP violates Ohio's due process clause.

Finally, Defendant Cheek has filed a Rule 12 (B)(6) motion to dismiss.

Chief Cheek was named as a defendant in his capacity as the police chief for the Village of New Miami. According to his deposition, the deposition of others and affidavits, Chief Cheek was responsible for the operation of the ASEP. There is no evidence before the court that Chief Cheek acted other than within the scope of his employment. There is no evidence that he received any secondary gain or exceeded his authority as the police chief of New Miami. All evidence before the court was that Chief Cheek operated the ASEP in accordance with New Miami Ordinance 1917. Based upon the Court ruling, there is no reason for Chief Cheek to be a defendant in this action and the Motion to Dismiss is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the court **grants** the Defendant Cheeks motion to dismiss, the plaintiffs' motion for summary judgment, **denies** the defendants' motion for summary judgment and **denies** the defendants' motion for a stay.

SO ORDERED.

ENTER,

A handwritten signature in black ink, appearing to read 'Michael J. Sage', is written over a horizontal line. The signature is stylized and cursive.

Michael J. Sage, Judge

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