

Summary of SC94085, *City of Moline Acres v. Charles W. Brennan*

Appeal from the St. Louis County circuit court, Judge Mary B. Schroeder
Argued and submitted December 2, 2014; opinion issued August 18, 2015

Attorneys: The city was represented by Carl J. Lumley, Kenneth J. Heinz and Edward J. Sluys of Curtis, Heinz, Garrett & O’Keefe PC in Clayton, (314) 725-8788; and Brennan was represented by Hugh A. Eastwood, an attorney in St. Louis, (314) 809-2343, and W. Bevis Schock, also an attorney in St. Louis, (314) 726-2322.

Two organizations filed briefs as friends of the Court: the Missouri Municipal League was represented by Bernard A. Garner, an attorney in Independence, (816) 478-3848; and the American Civil Liberties Union of Missouri Foundation was represented by Anthony E. Rothert, an attorney with the foundation in St. Louis, (314) 652-3114, and Gillian R. Wilcox, an attorney with the foundation in Kansas City, (816) 470-9938.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A city appeals the circuit court’s judgment dismissing its charge against a man for violating a speeding ordinance as captured by an automated traffic enforcement system. In a decision written by Judge Paul C. Wilson and joined by three other judges, the Supreme Court of Missouri affirms the judgment. The ordinance does not conflict with either state speeding law or state law requiring the assessment of points against a violator’s driver’s license. The ordinance creates an unconstitutional presumption that a vehicle owner gave the driver specific permission to use the vehicle for speeding, but this presumption does not render the ordinance invalid – the city still can enforce the ordinance if, without relying on the unconstitutional presumption, its notice states facts showing probable cause that the owner gave the driver specific permission to use the vehicle for speeding and if the city can prove such permission beyond a reasonable doubt at trial. The information charging the man, however, is invalid under Rule 37 because it fails to state required facts and attempts to circumvent the judicial process. As such, the circuit court’s dismissal of the information with prejudice (so it cannot be refiled) is affirmed.

In an opinion joined by two judges, Judge George W. Draper III concurs in the holding invalidating the ordinance and affirming the judgment dismissing the prosecution against the man. He writes separately, however, to state that he also would have invalidated the ordinance on the ground that imposing liability against the owner rather than the operator of a vehicle does little to attain a public safety goal and, rather, comes across as a mechanism for generating revenue for the city.

Chief Justice Patricia Breckenridge dissents. Although she agrees with the principal opinion’s holding that the ordinance does not conflict with state laws regarding speeding or the assessment of points, she believes its analysis of the rebuttable presumption and the notice defects goes beyond the Court’s standard of review because these were not raised in the circuit court. The man suffered no prejudice from any deficiencies in the notice, and even if the notice was defective as a charging document, its dismissal would be without prejudice (such that charges

could be refiled) rather than with prejudice. Because the man did not argue in this Court or below that the ordinance was invalid as an unauthorized demand for payment, this Court should not decide that issue.

Judge Roger M. Prokes, presiding judge of the 4th Judicial Circuit (Atchison, Gentry, Holt, Nodaway and Worth counties), sat in this case by special designation in place of Judge Zel M. Fischer.

Facts: Moline Acres enacted an ordinance in 2012 providing it is a violation of the city's traffic code for a vehicle to be operated in excess of the posted speed limit when the violation is captured by an automated traffic enforcement system. In July 2012, a system camera photographed a vehicle owned by Charles Brennan traveling at 56 miles per hour where the posted speed limit was 45 miles per hour. The city sent Brennan a notice of violation advising Brennan that a vehicle he owned had exceeded the speed limit; that, as the vehicle's registered owner, he was liable for the violation; and that he owed a \$124 "penalty" for committing the violation, due before September 2012. The notice also advised him that paying in full before the due date would prevent the matter from being referred for prosecution in the municipal division and that, if he did not remit payment, he would be summonsed to appear in the municipal division. The notice further stated that the ordinance violation was a non-moving violation and, therefore, no points would be assessed against Brennan's driver's license. The notice also contained instructions for how to make payment to the city. Brennan retained counsel, pleaded not guilty and demanded a jury trial, and his case was certified to the circuit court. In December 2012, Brennan moved to dismiss the charge, alleging the ordinance and notice are invalid and unenforceable. After a hearing, the court sustained Brennan's motion, found the ordinance and notice contradicted state speeding statutes – sections 304.009 and 304.010, RSMo – and entered judgment dismissing the charge. The city appeals.

AFFIRMED.

Court en banc holds: (1) The circuit court erred in finding the ordinance conflicts with state law and in dismissing the charge on this ground.

(a) There is no conflict between the ordinance and sections 304.009 and 304.010. An ordinance will be invalidated for a conflict with state law only if the ordinance permits what the statute prohibits or prohibits what the statute permits. A city is authorized to establish speed regulations within the city's limits as long as those regulations are not contrary to or in conflict with chapter 304, RSMo. Section 304.010 provides uniform speed limits for roads and highways, subject to alteration by local governments under certain circumstances. The Moline Acres ordinance, however, does not purport to regulate speeding or the conduct of drivers. Rather, its language regulates the conduct of vehicle owners, prohibiting them from permitting their vehicles to be operated in excess of a posted speed limit. Accordingly, the ordinance does not permit what section 304.010 prohibits or prohibit what the statute permits. Without such a conflict, the circuit court erred in dismissing the charge on this ground.

(b) There also is no conflict between the ordinance and provisions of chapter 302, RSMo. Under section 302.302.1(1), two points must be assessed against a violator's driving record for any moving violation of a state law or county or municipal traffic ordinance not otherwise listed in section 302.302.1. The Moline Acres ordinance is not violated unless and until an owner's vehicle is photographed exceeding the speed limit. This qualifies as a moving violation as defined by section 302.010, RSMo, because the vehicle is in motion at the time of the violation. Accordingly, section 302.302.1(1) requires two points to be assessed if an owner is convicted of or pleads guilty to violating the ordinance. Neither the director of revenue nor a court nor a local legislative body that enacted an ordinance has any say in whether, when or how many points should be assessed for a particular violation – the wholly nondiscretionary assessment is set by state law. The Moline Acres ordinance, however – unlike the ordinance invalidated in SC94379, *Roeder v. City of St. Peters*, also decided today – is silent concerning the assessment of points. Accordingly, there is no conflict between the ordinance and section 302.302, and the court's judgment cannot be affirmed on this ground.

To the extent the 2013 appeals court decision in *Unverferth v. City of Florissant* holds that a notice of violation incorrectly stating that no points will be assessed creates a conflict with state law even though the ordinance is silent as to the issue, it is overruled. Courts must construe ordinances, however, to uphold their validity and avoid conflicts whenever possible.

(2) Although the ordinance creates an unconstitutional presumption, it still remains valid. To prove a violation of the ordinance, the city must prove, beyond a reasonable doubt, that the owner gave the driver specific permission to operate the vehicle at a speed in excess of the posted speed limit. The city argues the ordinance creates a rebuttable presumption that the owner gave the driver such specific permission. Such a presumption, however, is not constitutionally permissible in any proceeding, civil or criminal. There is no rational basis for an inference that an owner gave the very specific permission to exceed the speed limit that the ordinance requires because such permission cannot be said to be more likely than not to flow from mere ownership. The city's reliance on this Court's decisions in 1973 in *City of Kansas City v. Hertz Corp.* and in 1949 in *City of St. Louis v. Cook* for support of its position is misplaced. Both cases dealt with ordinances that imposed liability on a vehicle owner for the illegal parking of the vehicle, regardless of whether there was proof that the owner parked the vehicle. The Moline Acres ordinance, however, does not make the owner liable for the speeding of others but instead imposes liability for the owner's conduct in permitting a third party to use the vehicle for speeding. Accordingly, *Cook* and *Hertz* offer no guidance. Having chosen to make specific permission an element of the offense, the city cannot relieve itself of the burden of proving this element by means of an irrational presumption that ownership alone implies such permission. To the extent the ordinance allows the factfinder to infer, from ownership alone, that the owner permitted the vehicle to be operated at a speed in excess of the posted speed limit, the presumption is unconstitutional. But this does not render the ordinance invalid. The city still can charge violations of the ordinance if it can state facts in the notice showing probable cause that the owner gave the driver specific permission to use the owner's vehicle for speeding and if the city can prove this element beyond a reasonable doubt at trial without relying on the unconstitutional presumption. If the city's notice fails to show probable cause, dismissal is the

proper remedy; if the city fails to prove the specific permission element at trial, a directed verdict of acquittal is the proper remedy. In either instance, however, the ordinance remains valid.

(3) The information charging Brennan is invalid under Rule 37.34 because it is not supported by a notice of violation that conforms in form or substance to the requirements of Rule 37.33. As such, the circuit court's dismissal of the information with prejudice is affirmed. When a person is charged with violating a municipal ordinance, the notice of violation plays a key role in communicating the nature of the charge and the defendant's rights and options. To ensure this is done fairly and uniformly, this Court prescribes in detail, in Rule 37.33, the information that must be included in these notices and, in Form 37.A, the form these notices must take. Under the rule, a notice must state the name and address of the court, and the form must provide the name, division and street address of the court where the violation will be prosecuted as well as the date and time at which the defendant must make an initial appearance. The notice sent to Brennan failed to include any of this required information. The rule requires the notice to state facts supporting a finding of probable cause to believe the ordinance was violated and the accused committed the violation – including, as noted in Paragraph 2, facts showing probable cause to believe the accused gave the specific permission required in the ordinance. The notice sent to Brennan stated no such facts. The defects in the notice are instrumental in implementing the fundamentally unauthorized nature of the extrajudicial process the ordinance creates – in violation of two of the law's most basic principles. First, no penalty can be imposed by an ordinance unless there has been a judicial determination that the ordinance was violated. Second, before there can be a judicial determination, due process requires the city to prove the defendant's guilt beyond a reasonable doubt. One purpose these principles serve is to prevent a municipality from threatening prosecution as a means of forcing a person to pay the city with no due process and no proof of guilt. Rule 37.33 plays a key role in enforcing these principles by controlling the content of violation notices. The approach enacted in the ordinance and implemented by the notice ignores the process described in Rule 37 and seeks to replace it with one in which money is paid directly to the city with no judicial oversight, supervision or control – a shortcut around the judicial system and its protection for the rights of the accused. Language throughout the ordinance confirms this is its purpose. As such, the defects in the notice that Brennan identified are not mere accidents or oversights but are instrumental in achieving that purpose. There is no legal justification or authority for the ordinance and its process of demanding payments from vehicle owners in exchange for not bringing charges against them. By implementing this extrajudicial process, the notice cannot serve as support for the information under Rule 37. As a result, both the ordinance and notice are void.

Concurring opinion by Judge Draper: The author agrees with the principal opinion's holding invalidating the ordinance and affirming the circuit court's judgment dismissing the prosecution against Brennan. The author writes separately to state that he would he would invalidate the ordinance on another ground as well. This Court has held that a municipal traffic ordinance may not be a tax ordinance in the guise of an ordinance enacted under the police power and that the amount and purpose of revenue brought in by the ordinance are factors in determining whether the ordinance primarily is for regulation or revenue. It is troubling that the Moline Acres scheme would subject an innocent owner to liability for merely entrusting his or her vehicle to a family member, friend, acquaintance or coworker. If the true aim of the city's ordinance is to promote

public safety, imposing liability against the owner rather than the operator of a vehicle does little to attain that goal and, rather, comes across as a mechanism for generating revenue for the city.

Dissenting opinion by Chief Justice Breckenridge: The author agrees with the principal opinion's holding that the ordinance does not conflict with state laws regarding speeding or the assessment of points. The author writes separately, however, because she believes the principal opinion's analysis of the rebuttable presumption and the notice defects goes beyond the ground for dismissal Brennan raised to the circuit court and, therefore, beyond this Court's standard of review. Brennan had – and used – the opportunity to challenge the notice of violation and the ordinance, and he suffered no injury from the alleged deficiencies in the notice. But even if the notice was defective as a charging document such that dismissal is warranted dismissal on such grounds is one without prejudice (such that charges could be refiled). As such, this Court should not affirm the dismissal with prejudice based on the deficiencies of the notice. Further, although the principal opinion raises valid concerns about the extrajudicial process in the ordinance, Brennan did not argue to the circuit court or this Court that the ordinance was invalid as an unauthorized demand for payment, and this Court, therefore, should not decide that issue.