

[Cite as *Cleveland v. Posner*, 2010-Ohio-5368.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94689

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

JEFFREY POSNER

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-698765

BEFORE: Dyke, J., Blackmon, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 4, 2010

APPELLANT

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ANN DYKE, J.:

{¶ 1} Appellant Jeffrey Posner challenges the judgment of the court of common pleas that affirmed an administrative decision of the Photo Safety Division of the Cleveland Municipal Court Parking Violations Bureau, finding him liable for a speeding violation pursuant to Cleveland Codified Ordinance (“C.C.O.”) 413.031 (“automated traffic camera enforcement”). For the reasons set forth below, we reverse and remand in order for the court of common pleas to address Posner's constitutional due-process challenges to C.C.O. 413.031 “as applied” to his case.

{¶ 2} Appellant received a notice of liability pursuant to C.C.O. 413.031, alleging that his vehicle was identified as traveling 37 m.p.h. in a 25 m.p.h. zone.

Appellant appeared for hearing on June 15, 2009. Appellant objected to the use of the photograph of the alleged incident and the information obtained from a radar device of a nearby police vehicle, complaining that no witness appeared to establish that the computer system that generated the ticket was trustworthy, and that he had been misled about the appeals process. He asserted that his rights to due process and confrontation were violated. The hearing officer found appellant liable, and he perfected an administrative appeal to the court of common pleas.

{¶ 3} Appellant again argued that the evidence against him was improperly admitted, that his right to confrontation was violated, and that he was misled about the nature of the city's appeal process. The trial court affirmed, finding that the administrative order was supported by reliable, probative, and substantial evidence. Appellant raises three assignments of error for our review:

{¶ 4} "The court below erred in failing to address appellant's arguments."

{¶ 5} "The procedure utilized below allowed conviction upon insufficient and improperly allowed evidence."

{¶ 6} "The procedure below violated appellant's due process rights by providing for conviction upon improperly allowed evidence without the right to confront actual witnesses and compel appearance testimony."

{¶ 7} We note that these assignments of error are identical to issues raised by appellant in *Cleveland v. Posner*, Cuyahoga App. No. 93893, 2010-Ohio-3091 ("*Posner I*").

{¶ 8} In *Posner I*, this court noted:

{¶ 9} “Essentially, Posner argues that the common pleas court erred by not considering his constitutional due-process challenge-based on evidentiary issues-to the city's automated traffic camera enforcement system.”

{¶ 10} In that case, the trial court ruled that the administrative order was supported by reliable, probative, and substantial evidence. The city argued that the trial court correctly determined that appellant had only challenged the constitutionality of C.C.O. 413.031 on its face, and that the trial court had no jurisdiction to consider such challenge. A divided panel of this court held that he raised both a facial challenge to C.C.O. 413.031 and an “as applied” challenge, and that the trial court erred by not considering his evidentiary, due-process arguments, as applied to his case.

{¶ 11} The majority held:

{¶ 12} “After reviewing the record in the case sub judice, it is clear that Posner raised ‘as applied’ challenges, as well as facial challenges, to the constitutionality of C.C.O. 413.031. Throughout his brief to the common pleas court, he argued that C.C.O. 413.031 was unconstitutional on its face and as applied to his case. He raised several specific arguments challenging the evidence used against him. Although the common pleas court had no jurisdiction to determine a facial challenge to the ordinance, it should have addressed Posner's ‘as applied’ arguments.

{¶ 13} “We therefore reverse the decision of the trial court and remand with instructions to address Posner's constitutional due-process challenges to C.C.O. 413.031 ‘as applied’ to his case.”

{¶ 14} We conclude that *Posner I* is controlling herein and that the common pleas court erred by not considering his constitutional due-process challenge-based on evidentiary issues-to the city's automated traffic camera enforcement system. Despite the city’s contention that appellant raised only a facial challenge to C.C.O. 413.031, which cannot be asserted in an administrative appeal, the record in this matter demonstrates that he also raised an “as applied” challenge. We therefore reverse the decision of the trial court and remand with instructions to address appellant’s constitutional due-process challenges to C.C.O. 413.031 “as applied” to his case.

{¶ 15} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
PATRICIA ANN BLACKMON, P.J., CONCURS. (SEE SEPARATE
CONCURRING OPINION)

PATRICIA ANN BLACKMON, P.J., CONCURRING:

{¶ 16} I concur with the majority opinion that we are bound by our most recent precedent in *City of Cleveland v. Posner*, Cuyahoga App. No. 93893, 2010-Ohio-3091.

{¶ 17} However, I write separately because *Posner* also raised the right to confrontation. Recently, in a criminal case before the U.S. Supreme Court, the defendant argued that he had a right to question the lab worker who signed a piece of paper that certified the substance he had been carrying as cocaine. The majority agreed. See *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. ____, 129 S.Ct. 2527. In light of the *Melendez-Diaz* case, I believe the trial court should address its impact on a speed camera case such as *Posner*, where the defendant-appellant argued the right of confrontation of a speed certification.