2015 IL App (1st) 133798-U

FIFTH DIVISION
May 8, 2015

No. 1-13-3798

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRIAN SMOLENSKY, Individually, and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 09 M 2000126
VILLAGE OF SKOKIE, a Municipal Corporation,	)	Honorable Thaddeus S. Machnik, Judge Presiding.
Defendant-Appellee.	)	

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶1 *Held*: Affirming the judgment of the circuit court of Cook County where plaintiff has failed to show that the challenged ordinance is unconstitutionally vague or contradictory.

¶2 Plaintiff, Brian Smolensky, challenged the impoundment of his vehicle and the imposition of a $500 fee on grounds that the Village of Skokie (the Village) ordinances involved were unconstitutional. Plaintiff appeals the trial court's decision to grant summary judgment against his complaint in favor of the Village. For the following reasons, we affirm.

¶3 BACKGROUND

¶4 The pertinent facts of this case are largely undisputed. Plaintiff Brian Smolensky was stopped by police on November 22, 2008, in the Village of Skokie, Illinois, and cited for making an improper right turn at a traffic light. He was also issued a ticket for improper lane usage and speeding. Suspecting that plaintiff was intoxicated, the police administered field sobriety tests and a preliminary breath test, which plaintiff failed. Plaintiff was arrested and charged with driving under the influence of alcohol (625 ILCS 5/11-501 (West 2008)). Pursuant to the Skokie Code of Ordinances, plaintiff's vehicle was seized and impounded. Also pursuant to ordinance, plaintiff was required to pay an "administrative and public safety fee" of $500, in addition to towing and storage fees, in order to obtain a release of the vehicle. Skokie Code of Ordinances § 106-142, Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008); Skokie Code of Ordinances § 106-143, Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008).

¶5 Plaintiff initially pursued an administrative review challenging the $500 fee. Skokie Code of Ordinances § 106-145, Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008). At the hearing before the administrative hearing officer, plaintiff testified that while at the scene, he requested to be allowed to call his stepfather, who was a lawyer, to determine whether he should take the breathalyzer test, but the police did not allow him to make the call. He was permitted to make a call at the police station an hour and a half later. He testified that he did not learn that his vehicle had been impounded until his stepfather arrived following his call from the station. Plaintiff argued that he requested a telephone call while at the scene and his attorney could have arrived at the scene in 15 minutes, but he was not permitted to make a call. The hearing officer determined that section 106-143 gave the officer discretion to decide, based on the circumstances at the scene, whether to allow an arrestee to make a telephone call. The hearing officer concluded that

the seizure and impoundment of the vehicle were proper and upheld the fee.

¶6 Plaintiff subsequently filed a complaint and then an amended complaint against the Village in the circuit court seeking judicial review of the administrative determination and alleging in a class action claim that the ordinance 106-143 was unconstitutional on its face. Plaintiff asserted that his due process rights were violated because he was not given proper notice of the impoundment at the scene before it occurred and he was not allowed to contact someone to remove his vehicle before it was towed to avoid the $500 fee. Plaintiff further contended that section 106-143(b) and (c) of the ordinance provided contradictory instructions to law enforcement as, on one hand, it directed that an officer shall inform an arrestee of his rights regarding the seizure and impoundment of his vehicle, but on the other hand, it directed that an officer was under no duty to inform the arrestee at the scene that he may contact someone to remove the vehicle.

¶7 The Village moved for summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1005 (West 2008). The Village argued that there was no due process right under Illinois or federal law to inform plaintiff that another person was allowed to remove his vehicle. The Village claimed that plaintiff could not bring a facial challenge to the ordinance because he did not raise any First Amendment grounds for his allegations, and he was therefore limited to arguing that the ordinance was vague as applied to himself. The Village contended that, in any event, defendant had no constitutional right to consult with an attorney or other person before submitting to a breath test or having his vehicle impounded. The Village also asserted that the ordinance was not unconstitutionally vague or contradictory.

¶8 The trial court entered a written order granting the Village's motion for summary

judgment. The court rejected plaintiff's facial challenge to the ordinance. The trial court reasoned that the ordinance's reference in section 106-143(b) to the "circumstances, rights, and obligations" relating to the seizure and impoundment of a vehicle were further detailed in subsequent sections which outlined procedures for release of a vehicle, the right to a hearing, and notice of the seizure and impoundment. Further, the trial court held that section 106-143(c) was clear and unambiguous in that it set forth a specific circumstance under which an arrestee may have another individual drive the vehicle away from the scene, *i.e.*, where another properly licensed and fit person is at the scene prior to arrival of the tow truck, but it specifically did not require an officer to allow the arrestee, while at the scene, to contact someone to retrieve the vehicle. The trial court concluded that the ordinance was not contradictory. In addition, the trial court disagreed with plaintiff's contention that the statute was a revenue statute as its title and preamble repeatedly referred to the seizure and impoundment of vehicles and public safety. Finally, noting that plaintiff did not pleaded an "as applied" challenge in his complaint but had subsequently raised this additional argument, the trial court held that the purpose of the ordinance was to ensure public safety and there was no evidence that it was arbitrary or discriminatory as applied to plaintiff. Plaintiff filed a timely notice of appeal from the trial court's judgment.

¶9 ANALYSIS

¶10 On appeal, plaintiff contends that the trial court erred in granting the Village's motion for summary judgment against his complaint because the ordinance is vague, contradictory, and unconstitutional facially and as applied.

¶11 "[S]ummary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2-1005(c) (West 2000)). The court strictly construes the pleadings, depositions, admissions, and affidavits against the movant and liberally in favor of the opponent. *Id.* We review *de novo* the circuit court's decision to grant a motion for summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Further, as this case proceeds from plaintiff's challenge to the administrative hearing officer's decision, we observe that, to the extent that plaintiff challenges that decision on appeal, we review the agency's factual findings to determine whether they are against the manifest weight of the evidence and we review any questions of law *de novo*. *Hayenga v. City of Rockford*, 2014 IL App (2d) 131261, ¶ 14.

¶12 This case also requires this court to interpret the language of a municipal ordinance, an issue which we also review *de novo. Ries v. City of Chicago*, 242 Ill. 2d 205, 216 (2011). To that end, we employ the same general rules used in statutory construction. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 7 (2009). Our primary goal is to give effect to the intent of the enacting body, which is best embodied in the language of the ordinance itself. *Id.* at 6-7. We accord an ordinance its plain and ordinary meaning and enforce clear and unambiguous language as written. *Id*. In doing so, we must view the ordinance as a whole, including other relevant provisions. *Crittenden v. Cook County Comm'n on Human Rights*, 2012 IL App (1st) 112437, ¶ 81. However, where the language is susceptible to more than one reasonable interpretation, we may resort to extrinsic aids of statutory construction. *Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155, ¶ 10.

¶13 In addition, we also review *de novo* a challenge to the constitutionality of a municipal ordinance. *City of Chicago v. Alexander*, 2014 IL App (1st) 122858, ¶ 18. As with statutes,

"municipal ordinances are presumed constitutional. [Citation.] The party challenging the ordinance has the burden of establishing a clear constitutional violation." *Id.* This court must "uphold the constitutionality of a statute when reasonably possible ([citation]), and, therefore, if a statute's construction is doubtful, a court will resolve the doubt in favor of the statute's validity." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306-07 (2008). When a party asserts that an ordinance is facially unconstitutional, the challenger must show that the ordinance "is unconstitutional in every situation. [Citation.] By contrast, an ordinance is unconstitutional as applied if a particular application of the statute is unconstitutional." *Alexander*, 2014 IL App (1st) 122858, ¶ 22. "Where a statute or ordinance is constitutional as applied to a party, a facial challenge will also fail, since there is necessarily at least one circumstance in which the statute or ordinance is constitutional." *Id.* A facial challenge is extremely difficult to mount successfully and it is employed sparingly by the courts. *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 25. An as-applied challenge focuses on the particular context or circumstances surrounding the plaintiff, who aims to show that the statute is unconstitutional as applied to him. *Id.* ¶ 26.

¶14 Moreover, the due process clause forbids a statute or ordinance from being unconstitutionally vague, that is, the ordinance must not "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits so that one may act accordingly" and the ordinance must also "provide[] reasonable standards to law enforcement to ensure against authorizing or even encouraging arbitrary and discriminatory enforcement." *Wilson v. Cook County*, 2012 IL 112026, ¶ 21. However, an ordinance need not be mathematically precise or perfectly clear to pass constitutional muster. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 164 (1993). When

assessing whether an ordinance is impermissibly vague, we give each word its plain, ordinary meaning and consider the language in the context of the entire provision. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 26. The challenger's ability to point to hypothetical situations in which the meaning of a term may be questionable or may be susceptible to misapplication will not result in a declaration of vagueness. *Granite City*, 155 Ill. 2d at 16465. Additionally, a greater amount of tolerance is given in civil ordinances, where vagueness must "permeate[] the text" of the provision in order to be found unduly vague. *Wilson*, 2012 IL 112026, ¶ 23. So long as "the plain text of the ordinance sets forth clearly perceived boundaries," the ordinance will be upheld. *Id.* ¶ 24.

¶15 Initially, we address plaintiff's assertion that the ordinance must be strictly construed against the Village because it is a taxing and revenue statute. See *Application of Rosewell*, 127 Ill. 2d 404, 408-409 (1989). We disagree. As the trial court found and as the Village points out, the preamble to the ordinance does not refer to taxation or revenue, but instead cites its home rule power to protect public safety, the problems and costs associated with individuals driving while impaired, Skokie police department's policy of seizing and impounding a motor vehicle when a driver is arrested for driving under the influence and towing the vehicle in interests of public safety and to safeguard the driver's property, and the time and costs incurred by the police for the seizure and impoundment of motor vehicles. The ordinance specifically refers to the $500 that an owner of an impounded vehicle must pay to regain possession as an "administrative and public safety fee." Skokie Code of Ordinances § 106-144(a), Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008). Therefore, we find that the $500 required to obtain release of the vehicle is clearly intended as a fee, and it is not a taxing or revenue measure. As the ordinance is not a revenue statute, ordinary rules of statutory construction apply.

¶16 We next turn to the specific language of the ordinance at issue on appeal. Section 106-143, entitled "Seizure and impoundment procedures," provides:

"(a) Whenever a police officer has reason to believe that a motor vehicle is subject to seizure and impoundment pursuant to Section 106-142, above, the police officer shall order that the vehicle be seized and impounded. The Skokie Police Department shall utilize the services of a private towing company. If towed, the motor vehicle must be impounded and stored in a secure facility owned, leased, or operated by the private towing company.

(b) The police officer shall inform the person being arrested for the offenses identified in Section 106-142, or any owner of the vehicle at the scene of the arrest, of the circumstances, rights and obligations related to the:

(1) Seizure and impoundment of the vehicle;

(2) Owner's right to retrieve the vehicle by payment of the administrative and public safety fee to the Village and towing and storage fees and costs to the private towing company; and

(3) Availability of posting a bond in the full amount of the administrative and public safety fee and to request a hearing before an administrative hearing officer to determine whether or not the seizure and impoundment was proper.

(c) The police officer shall allow for another properly licensed and otherwise fit person to drive the vehicle, if insured, from the scene of the arrest if that person is the owner, or is authorized by the owner, and such person is present at the scene prior to the arrival of the tow truck. The police officer shall not be under any duty or requirement to:

(1) Inform the person being arrested that he or she may contact another

person to remove the vehicle from the scene of the incident;

(2) Allow a driver being arrested to make or send a telephone call, electronic message or other attempt to contact a person to drive the vehicle from the scene of the arrest; and

(3) Initiate such call, message or contact another person on behalf of the arrestee." Skokie Code of Ordinances § 106-143, Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008).

¶17 In addition, section 106-142 provides in pertinent part:

"(a) A motor vehicle that is driven, used, or operated, by a person in connection with any of the following violations shall be subject to seizure and impoundment by the Village:

(1) Driving a motor vehicle under the influence of alcohol *** as prohibited in Section 5/11-501(a) of the Illinois Vehicle Code, 625 ILCS 5/11-501(a) ***;

***

(c) In the event a motor vehicle is seized and impounded pursuant to this Division, the owner of the motor vehicle shall be liable to the Village for an administrative and public safety fee of five hundred dollars ($500.00), in order to cover the costs incurred by the Village in ensuring that the motor vehicle is properly removed from the scene of the incident and the vehicle, and personal property enclosed therein, is secured and safeguarded. ***

***

(e) The administrative and public safety fee is separate and distinct from, and in

addition to, any fees or costs owed by the owner to a private towing company for the towing and storage of the vehicle." Skokie Code of Ordinances § 106-142, Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008).[1]

¶18 According to plaintiff's interpretation, subsection 106-143(c) creates a "drive away" right in that the police "shall allow for another properly licensed and otherwise fit person to drive the vehicle, if insured, from the scene of the arrest if that person is the owner, or is authorized by the owner, and such person is present at the scene prior to the arrival of the tow truck[.]" Plaintiff contends that the "circumstances, rights, and obligations" referred to in subsection 106-143(b)(1), *i.e.*, that the arresting officer "shall inform the person being arrested for [driving under the influence of alcohol], or any owner of the vehicle at the scene of the arrest, of the circumstances, rights and obligations related to the *** [s]eizure and impoundment of the vehicle," includes this "drive away" right, and the trial court erred in holding to the contrary. According to plaintiff, the ordinance provides contradictory directions as subsection (c) directs that an officer "shall not be under any duty or requirement to" to inform the arrestee that he may contact another person to remove the vehicle, while subsection (b) requires the police to advise the arrestee of the "drive away" right available. Plaintiff further argues that when an arrestee is also the owner of the vehicle, the officer is obligated to advise the owner of the "drive away" right.

¶19 In reading section 106-143 as a whole and in the context of other provisions of the Village's ordinance scheme related to impoundment (*Crittenden*, 2012 IL App (1st) 112437, ¶ 81), we disagree with plaintiff's contentions that the ordinance is contradictory and vague on its

[1] Similarly, section 106-144(a) provides that the owner of an impounded vehicle may regain possession by paying the $500 "administrative and public safety fee" or by posting a bond in that amount. Skokie Code of Ordinances § 106-144, Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008).

face. We find that an officer's obligation in section 106-143(b), to inform arrestees of the "circumstances, rights and obligations" related to the seizure and impoundment of the vehicle, the owner's right to retrieve the vehicle by paying the required fees and towing costs, and the option of posting a bond, are limited and modified by subsection (c), which specifically directs that an officer has no duty or obligation to inform arrestees that they may contact another person to remove the vehicle from the scene or allow the arrestee to make a call while at the scene. Moreover, the specific notice requirements relating to seizure and impoundment are further elucidated in section 106-146, the plain language of which states that the Village must provide written notice to the owner within five business days of the seizure and impoundment, unless the owner has already retrieved the vehicle within that time. Skokie Code of Ordinances § 106-146, Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008). Indeed, the circumstances may be such that it would be unsafe to permit an intoxicated driver at the scene to contact someone to retrieve the vehicle. As the administrative hearing officer observed, the ordinance gives an officer discretion to decide the most appropriate course of action based on the circumstances presented. Accordingly, we find that the ordinance's requirement that an officer must inform arrestees of the circumstances, rights, and obligations related to an impoundment does not extend to an obligation to inform arrestees that they may contact another person to drive the vehicle away from the scene. We see no contradiction or ambiguity in this reasonable interpretation of the ordinance.

¶20 Based on our analysis of the statutory language, we also disagree with plaintiff's contention that when the arrestee is also the owner of the vehicle, he is entitled to be informed, while at the scene of arrest, that he may contact another person to come to the scene in order to retrieve the vehicle. The ordinance contains no such provision. Under section 106-143(b)(1)-(3),

an officer is obligated to inform a licensed, insured owner of the vehicle who is present at the scene of arrest of the "owner's right to retrieve the vehicle by payment of the administration and public safety fee to the Village and towing and storage fees and costs to the private towing company," and the option of posting a bond and requesting a hearing. Further, section 106-143(c) provides that an officer is obligated to allow an owner (not an arrestee) who is present at the scene and otherwise licensed, insured, and fit to drive, to drive the vehicle from the scene. Other than this exception, however, the ordinance does not provide any different rights for owners who are being arrested for driving under the influence than for drivers who are not owners.

¶21 We believe this construction of the ordinance is consistent with other provisions. *Crittenden*, 2012 IL App (1st) 112437, ¶ 81. For example, sections 106-93(j) and 106-95(c) provide that when the police impound a vehicle "[w]hen a driver of a vehicle is in violation of Section 106-142," then the vehicle "is impounded pursuant to" the section related to vehicle seizure and impoundment and notice "shall be provided as stated in" that section. Skokie Code of Ordinances § 106-93(j), Ordinance No. 02-6-C-3104 (adopted Feb. 4, 2008); Skokie Code of Ordinances §106-95(c), Ordinance No. 08-2-C-3593 (adopted Feb. 4, 2008). As noted, section 106-146 provides for written notice to the owner within five business days. Accordingly, other sections of the ordinance scheme expressly provide that when the police impound a vehicle because a driver is intoxicated, the procedures for impoundment and notice of impoundment are dictated by, predictably, the section of ordinances related to seizure and impoundment, that is, sections 106-142, 106-143, 106-144, and 106-146.

¶22 With regard to plaintiff's "as-applied" challenge, we similarly conclude that he has failed to establish that, as applied to him, the ordinance is unconstitutional. Plaintiff argues that the

ordinance provided him with the right to contact someone to come to the scene of the arrest and drive the vehicle away. However, as mentioned, the ordinance does not provide drivers who are being arrested for driving under the influence, even if they are also owners, the right to contact someone while at the scene to drive the vehicle away. Nor does the ordinance obligate the arresting officer to inform a driver at the scene that he may contact someone or allow him to make a telephone call. Plaintiff was given the proper notice as called for by the ordinance. The record reflects that he was informed of the impoundment after he was arrested and taken to the police station.[2] As no other eligible driver was present at the scene when plaintiff was arrested, the police properly seized and impounded his vehicle pursuant to ordinance.

¶23 In arguing that his due process rights were violated because the police failed to notify him that he could contact someone to retrieve the vehicle at the scene, plaintiff also analogizes the circumstances to *Miranda* warnings or a deprivation of the right to counsel. Along the same lines, plaintiff contends that the ordinance in question should be scrutinized for vagueness to the same exacting extent as cases involving criminal statutes or ordinances.

¶24 Although plaintiff's vehicle was impounded because he was arrested for a criminal offense (625 ILCS 5/11-501 (West 2008)), we find his analogy to *Miranda* or other constitutional rights and situations involving the imposition of criminal penalties unconvincing. The ordinance at issue clearly does not entail the imposition of criminal penalties. Rather, it involves the impoundment of a vehicle in the interest of public safety when an individual is arrested for drunk driving. We measure the ordinance with the same degree of tolerance for vagueness as is applicable to civil ordinances. *Wilson*, 2012 IL 112026, ¶ 23. As we have found, the ordinance is public safety legislation enacted to facilitate and recoup costs associated with

[2] We note that plaintiff raises no allegation or claim that he did not receive the written five-day notice provided for in section 106-146.

removing vehicles from the road that might otherwise become traffic hazards and to safeguard them for their owners. As such, the ordinance is civil in nature rather than criminal. "Pursuant to their community-caretaking function, police have authority to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience." *People v. Nash*, 409 Ill. App. 3d 342, 348 (2011). See 625 ILCS 5/4-203 (West 2008) (upon a violation of section 11-501, "the arresting officer shall have the vehicle which the person was operating at the time of the arrest impounded for a period of not more than 12 hours after the time of arrest"); *People v. Jaudon*, 307 Ill. App. 3d 427, 436 (1999) (holding that regulating the possession and transportation of firearms served a legitimate governmental interest and the related impoundment ordinance did not violate the substantive due process rights of the vehicle owner). The right asserted by plaintiff is not found under the ordinance, Illinois statute, or constitutional law, and as stated, plaintiff was afforded the notice called for by the ordinance scheme. For these reasons, plaintiff's "as-applied" challenge to the ordinance's constitutionality fails.

¶25 CONCLUSION

¶26 For the reasons stated above, we affirm the circuit court's order granting the Village's motion for summary judgment.

¶27 Affirmed.