

FILED
COURT OF APPEALS
DIVISION II
OCT 11 1991
PM 1:56
STATE OF WASHINGTON
BY _____
CLERK

NO. 37958-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KENNETH W. BLAKE

Plaintiff,

CITY OF BONNEY LAKE, a Municipal Corporation

Defendants.

APPELLANT'S BRIEF

Richard F. DeJean
Attorney for Petitioner
P.O. Box 867
Sumner, WA 98390
(253) 863-6047
WSBA #2548

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR.....	1
<i>Issues Pertaining to Assignments of Error</i>	
No. 1	1
No. 2	1
No. 3	1
II. STATEMENT OF THE CASE	1
III. SUMMARY OF ARGUMENT	3
IV. ARGUMENT.....	4
Issue No. 1 and Issue No. 2	4
Issue No. 3	7
V. CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Boss v. Spokane</i> , 63 Wn. 2d 305, 387 P. 2d 67	5

Statutes

	<u>Page</u>
RCW 46.55.085	1, 2, 3, 4, 5, 6, 7, 8
RCW 46.61.570(2)	1, 7
RCW 46.48.300	6
RCW 46.55.010	7
RCW 46.61.570	7

I. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Trial Court erred in its Order Granting Defendant's Motion for Partial Summary Judgment, dated April 25, 2008.

Issues Pertaining to Assignment of Error:

ISSUE NO. 1: Could the Court ignore the plain provisions of RCW 46.55.085 requiring notice to the owner of vehicles prior to the removal of these vehicles and justify the actions of the removing authority, the police, by holding that notice subsequent to the removal provided justification for the removal of the vehicles, and, therefore, no liability for conversion?

ISSUE NO. 2: Could the Court dismiss the Plaintiff's cause of action for conversion of his vehicles where the question of the title to the property on which the vehicles were parked was at issue?

ISSUE NO. 3: Were the vehicles "unauthorized vehicles" within the meaning of RCW 46.55.085 and RCW 46.61.570(2)?

II. STATEMENT OF THE CASE

Kenneth Blake, Plaintiff herein, has owned property within the City of Bonney Lake for a period in excess of 40 years. When he purchased the property it was a repair shop for motor

vehicles, a garage. Mr. Blake is a mechanic by trade as well as a commercial truck driver. He operated a garage from this facility. This appeal is concerned with the Order Granting Defendant's Motion for Partial Summary Judgment entered April 25, 2008. (CP 31-32) In this Order, the Court dismissed the Plaintiff's claim for conversion including claims for "loss, costs, fees or damages recoverable under the hearing provided by RCW 46.55.120". (CP 31-32) There were other causes of action which went to trial by jury and on which a judgment was entered 6/13/2008 from which no appeal is taken. The only issue involved with this appeal was the towing by the City of Bonney Lake of vehicles belonging to Kenneth Blake without giving the notice mandated by RCW 46.55.085. Kenneth Blake, Plaintiff, alleges that improper notice was provided to him prior to the towing of the vehicles. The City of Bonney Lake essentially does not dispute this but alleges that because the towing company, after the vehicles had been towed, provided Mr. Blake with notice of how the vehicles could be reclaimed, that this notice was sufficient to justify the towing/conversion of these vehicles.

The City of Bonney Lake had charged Mr. Blake with three prior citations for the presence of these vehicles upon his property, but had, in these prosecutions, proceeded under the "junk vehicle" ordinance. Mr. Blake had prevailed in Municipal Court on two of these citations and the parties had entered into a plea arrangement on the third. He was charged in March and September of 1997 and again in 2001. In the time immediately prior to the towing of the vehicles, he was again charged on July 22, 2005. At a time when the Plaintiff was appearing in front of the Bonney Lake Municipal Court for the fourth time regarding these vehicles, the City of Bonney Lake's police department had a survey done of Plaintiff's property boundaries and, rightly or wrongly, assumed that certain of Mr. Blake's vehicles were on the City's right-of-way. The Code Enforcement Officer, Denney Bryan, sent a memorandum dated September 6, 2005 to

the Bonney Lake Chief of Police and requested that the Chief “have one of your officers tag those vehicles that appear to be stationary in the ROW and removed”. (CP 33-47, 45) It is clear from this memorandum to the Chief of Police that there were no “tags” then present on these vehicles.

The City complied with one of these requests, that is, it towed the vehicles away on that very day, September 6, 2005, from Mr. Blake’s property at 9510 – 198th Avenue East (CP 1-21) but placed no notices on the vehicles. This clearly violated the provisions of RCW 46.55.085. The vehicles were towed pursuant to RCW 46.55 by Cascade Towing. (CP 1-21)

The City of Bonney Lake attempts to justify its actions by arguing to the Court that the towing company, Cascade Towing, provided notice to Mr. Blake subsequent to the towing of the vehicles and provided him with information as to how he could again obtain possession of these vehicles. (CP 1-21)

And that is the gravamen of this appeal: Could the City ignore the provisions of RCW 46.55.085 and deprive a citizen of his property without providing the notice called for in this statute and then justify its actions by providing notice subsequent to the removal at which time the property owner has not only been deprived of his property but has to pay costs of towing and storage to again regain possession of the property?

III. SUMMARY OF ARGUMENT

As can be seen from the memorandum from the Code Enforcement Officer, Denney Bryan, to the Chief of Police (CP 33-47, 45) the City had just completed a survey of Plaintiff’s property and believed that certain of his vehicles were on the right-of-way of 198th Court East. The Public Records Request by Kenneth Blake for “Quit Claim on title to right-of-way in front of 9510 – 198th Court East of Lot 36”, was answered by the City of Bonney Lake by providing a Quit Claim Deed by Kenneth and Bertha Simmons to the City of Bonney Lake for the “South

10” of Lot 36, Plat of Cedar Grove”. (CP 33-47, 42) Thus, we initially see that the City of Bonney Lake actually had only 10 inches of right-of-way to this street.

Secondly, as to the matter of towing, RCW 46.55.085 clearly provides for prior notice to the property owner which was not accomplished by the City of Bonney Lake. Not only did the City of Bonney Lake fail to give Mr. Blake notice but when Mr. Blake arrived home, just prior to the City beginning to tow the vehicles away, he asked the officer if he could move them the few feet that the City alleged they occupied of the right-of-way and he was refused this request. (CP 29-30)

As Mr. Blake stated in his declaration filed with the Court:

“The only notice I received prior to the towing of my vehicles alleged that the vehicles were ‘junk’ vehicles. I did not take any action on this, until I received citations from the Court, because I knew that the vehicles were not junk vehicles and knew that they had been proven to be such in the Bonney Lake Municipal Court. If I would have been advised that these vehicles were on the City’s right-of-way and shown proof of this, I would have immediately moved them as we are only talking about a few feet. To have allegedly sent me notices after they had been towed (and I only have one such notice) together with a towing bill that I could not pay is not in keeping with the prior notice requirement of the RCW. Again, if I would have been given the proper notice prior to the towing of these vehicles, I would have moved them the few feet required.” (CP 29-30)

The notice alleging the vehicles to be “junk” vehicles was notice pursuant to a City Ordinance and had no relation to RCW 46.55.085.

IV. ARGUMENT

Issue No. 1 and Issue No. 2:

RCW 46.55.085 is very explicit in what must be done in order to tow a person’s vehicle.

It states:

“A law enforcement officer discovering an unauthorized vehicle left within a highway right-of-way SHALL ATTACH to the vehicle a readily visible notification sticker. The sticker SHALL CONTAIN the following information:

- (a) The date and time the sticker was attached;
- (b) The identity of the officer;
- (c) A statement that if the vehicle is not removed within 24 hours from the time the sticker is attached, the vehicle may be taken into custody and stored at the owner’s expense;
- (d) A statement that if the vehicle is not redeemed as provided in RCW 46.55.120 the registered owner will have committed the traffic offense of littering – abandoned vehicle; and
- (e) The address and telephone number where additional information may be obtained.

(2) If the vehicle has current Washington registration plates, the officer shall check the records to learn the identity of the last owner of record. The officer or his department shall make a reasonable effort to contact the owner by telephone in order to give the owner the information on the notification sticker.”

Before the City of Bonney Lake could even begin the process of towing these vehicles it would have to prove to the Court that the vehicles were on “a highway right-of-way”. Plaintiff submits that with the response to the Public Records Request of Kenneth Blake for the documents establishing title to 198th, and with response that the City had only a right-of-way of 10 inches, that this initial requirement of proof was not met.

Secondly, it is abundantly clear from the statute that the legislature wants to provide some notice to the owner of property before it is removed from his/her possession. The statute is written in mandatory language. The officer “shall attach” a notification sticker, and the notification sticker “shall contain” certain information. RCW 46.55.085 was not complied with. The City of Bonney Lake had no legal right to tow these vehicles.

The decision in *Boss v. Spokane*, 63 Wn. 2d 305, 387 P. 2d 67, clearly demonstrates that the City of Bonney Lake converted the vehicles of Kenneth Blake. In *Boss*, the City of Spokane

towed an automobile owned by Martin Boss. After the impoundment “Mr. Boss did not reclaim his car after paying the tickets, although he was tendered a claim check of the towing company. Instead he brought the present action for the market value of the car at the time it was impounded.” During the trial, the City based its actions in towing Mr. Boss’s vehicle upon the following City Ordinance: “46.48.300 Removal of Vehicles by Police Officer. Whenever a peace officer finds a vehicle unattended in such a position that it constitutes an obstruction to traffic, blocks the use of a fire hydrant, provides a danger to travel... he is hereby authorized to remove and tow said vehicle.”

The Court then went on to discuss the City’s actions in towing the vehicle and said:

“The Appellants contend that the policy of the police department was a valid interpretation of this Ordinance, in that a vehicle parked over time is an ‘obstruction to traffic’ in the sense that it is a nuisance to the general public, who are entitled to the use of available parking space in the ordinary and customary manner. Such a construction would be a strained and unusual interpretation of the word ‘obstruction’. It is well established that City Ordinances must be interpreted according to the plain and ordinary meaning of the language used. Neither the ordinary meaning of the word nor its use in proximity to the terms ‘fire hydrants’ and ‘danger to travel’ indicates that ‘obstruction’ was intended to include the use of an automobile in such a manner as to inconvenience the public in finding a place to park. We conclude that the impounding of the vehicle was not authorized by the Ordinance and, therefore, amounted to a conversion of it by the Defendants.”

The City of Bonney Lake police either acted precipitously and ignored/overlooked the provisions of RCW 46.55.085 or decided to do what it had been unable to do in the Municipal Court of the City of Bonney Lake, and that is to remove these vehicles. In failing to provide the required notice, it acted outside of the law. The Trial Court’s decision should be reversed.

Issue No. 3:

The statutory authority relied upon by the City for the towing of these vehicles, Chapter 46.55 RCW, and specifically RCW 46.55.085, authorizes impoundment only if the vehicle is “an unauthorized vehicle”. And, RCW 46.55.010 defines an unauthorized vehicle as:

“Unauthorized vehicle means a vehicle that is subject to impoundment after being left unattended in one of the following public or private locations for the indicated period of time:

(b) On a highway and tagged as described in RCW 46.55.085”

First, we know that the vehicles were not appropriately tagged. Secondly, we know that the vehicle was not unattended and had every right to be where it was, even if the evidence might ultimately show that the vehicle was partially on the public right-of-way, because RCW 46.61.570(2) which describes how vehicles can legally be parked along a highway provides:

“RCW 46.61.570 Stopping, Standing or Parking Prohibited in Specified Places – Reserving Portions of Highway Prohibited.

(1) Except where necessary to avoid conflict with other traffic, or in compliance with law or the direction of a police officer or official traffic control device, no person shall

(a) Stop, stand or park a vehicle:

(1) On the roadway side of any vehicle stopped or parked at the edge or curb of a street;

(The statute then goes on to enumerate areas where parking is prohibited, none of which apply here.)

....

(2) Parking or standing shall be permitted in the manner provided by law at all other places except a time limit may be imposed or parking restricted at other places but such limitation and restriction shall be by city ordinance or county resolution or order of the Secretary of Transportation upon highways under their respective jurisdictions.”

V. CONCLUSION

It is, of course, hornbook law that a citizen cannot be deprived of his property without due process of law. The due process notices provided for in RCW 46.55.085 were not provided to Kenneth Blake. It will not do to ignore these provisions and then have the towing company provide notice, after the impound has occurred, and after towing and storage costs have been incurred, to advise the property owner that he/she can retrieve the vehicles by paying these costs. The Order Granting Defendant's Summary Judgment should be reversed.

DATED this 10th day of September, 2008.



Richard F. DeJean WSBA #2548
Attorney for Appellant

COURT OF APPEALS
DIVISION II

08 SEP 16 PM 1:55

STATE OF WASHINGTON
BY _____
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

KENNETH W. BLAKE)
)
Plaintiff,)
)
vs.)
)
CITY OF BONNEY LAKE, a municipal)
corporation)
)
Defendants.)

Court of Appeals Cause No. 37958-9-II

CERTIFICATE OF SERVICE

I, Brenda M. High, certify under penalty of perjury under the laws of the State of Washington that on September 12, 2008, I served the documents; namely, Appellant's Brief, to which this is attached to the party listed below in the manner shown:

Mary Ann McConaughy [] By United States Mail
800 Fifth Avenue, Suite 4141 [X] By Legal Messenger
Seattle, WA 98104-3175 [] By Facsimile
[] By Overnight Fed Ex Delivery

DATED this 12th day of September, 2008.

Brenda High
Brenda High
Legal Secretary for Richard F. DeJean