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No. 64672-9-I

King County Superior Court
Cause No. 09-2-17404-1

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KENT

Appellant

v.

RAYMOND MANN

Respondent

BRIEF OF RESPONDENT

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COMMERCIAL
COURT



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A. STATEMENT OF THE CASE

The Respondent's vehicle was stopped as a result of Kent Police Officer Brennan running respondent's plate and discovering that the registered owner of the vehicle was suspended in the second degree. The Respondent was the registered owner of the vehicle. Officer Brennan noted in his police report in regard to the impound that "Since his driving status was DWLS 2, I placed a 30 day hold on his vehicle." Brief of Appellant: Exhibit 1. The Respondent contested the impound in the Kent Municipal Court because of the mandatory nature of the impound and the failure of the officer to use discretion. The Honorable Pro Tem Jorgensen ruled that the impound was proper, that the officer used discretion but that the City of Kent's impound ordinance, because of its mandatory impound provisions, was invalid pursuant to the discretionary provisions of RCW 46.55.120 and ordered that Respondent's vehicle be released.

The Petitioner appealed this ruling to the King County Superior Court which also ruled in Respondent's favor holding that the City's impound ordinance is in violation of RCW 46.55 et. seq., as it mandates the term of impoundment and fails to allow for the use of discretion by the impounding officer. Brief of Appellant: Exhibit 6. The City of Kent sought review of this decision.

B. ARGUMENT

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws. Article XI Section 11 of the Washington State Constitution.

A city, town, or county that adopts an ordinance or resolution concerning unauthorized, abandoned, or impounded vehicles shall include the applicable provisions of this chapter. RCW 46.55.240.

The word shall creates an imperative obligation unless the opposite legislative intent can be discerned. State v. Sargent, 36 Wn. App. 463, 466 (Wash. Ct. App. 1984).

The City of Kent's impound ordinance violates Article XI Section 11 of the state constitution and is in conflict with RCW 46.55 et. seq. because of its failure to allow for discretion by a law enforcement officer and requires mandatory holding periods.

Kent Municipal Code (hereinafter KCC) 9.39.010 provides as follows:

This chapter shall be known and cited as the towing ordinance and shall supplement Chapter 46.55 RCW which is currently adopted in KCC 9.36.010 (Model Traffic Ordinance). In the event that a conflict exists between the

provisions of this chapter and Chapter 46.55 RCW, this chapter shall prevail.

KCC 9.39.030 in its applicable parts provides as follows:

A. Impoundment of vehicles authorized.

1. Whenever the driver of a vehicle is arrested for a violation of driving while license suspended or revoked (RCW 46.20.342) or operation of motor vehicle under other license or permit prohibited while license is suspended or revoked (RCW 46.20.345), as these provisions are currently enacted or hereafter amended, the vehicle is subject to impoundment at the direction of a law enforcement officer.

2. It shall be the responsibility of the owner or other person lawfully charged with possession of a vehicle to ensure that any person driving such vehicle has a valid license. It shall not be a defense to impoundment or to the payment of any of the costs of impound that the owner or other person lawfully charged with the vehicle was not aware that the driver's license was suspended, revoked, or otherwise invalid.

B. Impoundment periods.

1. If a vehicle is impounded because the driver is arrested for a violation of RCW 46.20.342 (1)(c) (driving while license suspended or revoked in the third degree) or 46.20.345, the vehicle shall be redeemable immediately pursuant to subsection (B)(6) of this section.

2. If a vehicle is impounded because the driver is arrested for a violation of RCW 46.20.342 (1)(a) (driving while license suspended or revoked in the first degree) or 46.20.342(1)(b) (driving while license suspended or revoked in the second degree) and the Washington Department of Licensing's records show that the driver has not been convicted of a violation of RCW 46.20.342(1)(a) or (b) or equivalent local ordinance within the past five (5) years, the vehicle shall be impounded for thirty (30) days.

[Note: The statutes, in their entirety, have been attached as Appendix 1. Only the relevant portions have been set forth above.]

A municipality's authority to impound a vehicle derives from chapter 46.55 RCW. See RCW 46.55.240(1). Under the statute, whenever a driver of a vehicle is arrested for an enumerated offense, such as driving with a suspended license, "the vehicle is subject to impoundment, pursuant to applicable local ordinance or state agency rule at the direction of a law enforcement officer." RCW 46.55.113; In re 1992 Honda Accord, 117 Wn. App. 510, 517 (Wash. Ct. App. 2003).

In the case of Impoundment of Chevrolet Truck, 148 Wn.2d 145, 150 (Wash. 2002) a Washington State Patrol regulation, which mandated troopers to impound every vehicle driven by one who was arrested for driving with a suspended or revoked license, was challenged on the basis that the regulation violated article I, section 7 of the Washington Constitution as well as the Fourth Amendment to the United States Constitution. Id at 149.

The Court sidestepped the constitutional issue and held that RCW 46.55.113, the statute that authorizes impoundment, does not require impoundment of every vehicle when its driver is arrested for driving with a suspended or revoked license; it merely authorizes individual

impoundments. Id at 155. The Court noted that courts have long held it is a constitutional requirement to consider reasonable alternatives to impoundment before impounding a vehicle. Id at 156 (citations omitted).

The Court held that the RCW 46.55.113 only empowers the State Patrol to impound vehicles under lawful circumstances. Id at 157. The Court noted that the State Patrol's mandatory-impoundment regulation would be statutorily authorized only if RCW 46.55.113 delegates authority to promulgate such regulations by necessary implication. Id. The Court found that there was no such delegation and invalidated the regulation. Id at 159.

The Court of Appeals was faced with a similar issue in the case of In re 1992 Honda Accord, 117 Wn. App. 510 (Wash. Ct. App. 2003). In Honda Accord the court was asked to determine the validity of a City of Warden Municipal Code section which mandated impoundment of a vehicle for 30 days when a driver had been arrested for driving while suspended in the first or second degree. Id at 517. The court held that in terms of their mandatory effect the Warden Municipal Code ordinance was nearly identical to the Washington State Patrol regulation that was invalidated in Chevrolet Truck. Id. The court noted that RCW 46.55.120(1)(a) permissively states the vehicle "may be held" for the

relevant period of time. The City's code affords no room for discretion as to the term of impoundment. Id. at 516. The court held that the mandatory provisions of the Warden Municipal Code contravened RCW 46.55.120(1)(a). Id. The court further noted that the record seemed to indicate that the officer and district court interpreted the city code as interpreting the city code with mandating impoundment without any consideration to any reasonable alternative to impoundment. Id. The court held In light of Chevrolet Truck, the impoundment pursuant to the Warden Municipal code violated chapter 46.55 RCW. Id at 518.

The KCC, as referenced above, indicates that when the city ordinance differs from RCW 46.55, that the ordinance shall prevail. KMC 9.39.010. Like the Warden Municipal Code the Kent Municipal Code KMC 9.39.030(A)(1) mirrors RCW 46.55.113 which does not mandate impoundment. The Kent ordinance, like the City of Warden ordinance, runs into trouble in section (B) of KMC 9.39.030 which mandates impoundment for set periods and leaves no room for discretion either by the court or the arresting officer. Therefore, the Kent ordinance, like both the City of Warden's ordinance and the State Patrol regulation, is invalid because it does not allow for the officer or court to determine if

there is any reasonable alternative to impoundment. This is exactly what the what Judge Pro Tem Jorgensen held:

“Okay. The issue that the Court is addressing is whether or not the specific conditions and specification of the Kent Muni Code, which mandates, not permissive, not discretionary, mandates a mandatory impound period of 30 days in this, but it also authorizes mandatory periods for I believe 90 days under HTO and other conditions is valid. And the Court finds that it is not. The fact that it is a mandatory period, clearly the language of the Kent Muni Code makes it – allows that this Court has no discretion, must impose a mandatory period if that is the basis for it. The existence of hardship release does not address – the Court finds that is not the issue. The issue is whether by reading 46.55.120, which clearly indicates that it needs to be – and that is the authority by which the legislature allows for impoundment, and although it does allow local and city ordinances, it does not allow the City to exceed its authority. And in this case, I am finding based on the case law and based on the express conditions of 46.55.120, that the City’s Code of mandatory periods exceeds the authority as authorized by the RCW. And as authority, I’m using both 1992 Honda Accord and in re: impoundment of Chevrolet truck.”

Furthermore, as shown in Brief of Appellant: Exhibit 1, it is clear that the officer did not consider any reasonable alternative to impoundment relying on the improper mandatory language in the city’s ordinance. Brief of Appellant: Exhibit 2 [Transcript page 23-34]

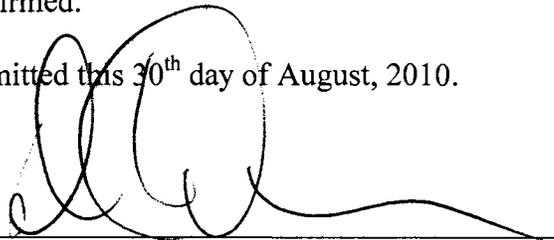
Finally, while it is correct to conclude that the Kent Municipal Court found that the officer used discretion when impounding Mr. Mann’s

vehicle, and while it equally correct that the Respondent did not appeal this finding, it is difficult to determine how the Court made that finding since the police report clearly states in its pertinent part, "Since his driving status was DWLS2, I placed a 30 day hold on his vehicle"; it very difficult to discern exactly where the discretion was used.

C. CONCLUSION

Since the Kent City Code mandates holding periods and doesn't allow for discretion, the City Code goes beyond the impound authority granted by the legislature and therefore its ordinance is invalid and the lower court should be affirmed.

Respectfully submitted this 30th day of August, 2010.

A handwritten signature in black ink, appearing to read 'DK', with a long horizontal flourish extending to the right.

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APPENDIX 1

RCW 46.20.342

Driving while license invalidated — Penalties — Extension of invalidation. (*Effective until January 1, 2011.*)

(1) It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state. Any person who has a valid Washington driver's license is not guilty of a violation of this section.

(a) A person found to be an habitual offender under chapter 46.65 RCW, who violates this section while an order of revocation issued under chapter 46.65 RCW prohibiting such operation is in effect, is guilty of driving while license suspended or revoked in the first degree, a gross misdemeanor. Upon the first such conviction, the person shall be punished by imprisonment for not less than ten days. Upon the second conviction, the person shall be punished by imprisonment for not less than ninety days. Upon the third or subsequent conviction, the person shall be punished by imprisonment for not less than one hundred eighty days. If the person is also convicted of the offense defined in RCW 46.61.502 or 46.61.504, when both convictions arise from the same event, the minimum sentence of confinement shall be not less than ninety days. The minimum sentence of confinement required shall not be suspended or deferred. A conviction under this subsection does not prevent a person from petitioning for reinstatement as provided by RCW 46.65.080.

(b) A person who violates this section while an order of suspension or revocation prohibiting such operation is in effect and while the person is not eligible to reinstate his or her driver's license or driving privilege, other than for a suspension for the reasons described in (c) of this subsection, is guilty of driving while license suspended or revoked in the second degree, a gross misdemeanor. This subsection applies when a person's driver's license or driving privilege has been suspended or revoked by reason of:

(i) A conviction of a felony in the commission of which a motor vehicle was used;

(ii) A previous conviction under this section;

(iii) A notice received by the department from a court or diversion unit as provided by RCW 46.20.265, relating to a minor who has committed, or who has entered a diversion unit concerning an offense relating to alcohol, legend drugs, controlled substances, or imitation controlled substances;

(iv) A conviction of RCW 46.20.410, relating to the violation of restrictions of an occupational driver's license, a temporary restricted driver's license, or an ignition interlock driver's license;

(v) A conviction of RCW 46.20.345, relating to the operation of a motor vehicle with a suspended or revoked license;

(vi) A conviction of RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(vii) A conviction of RCW 46.61.024, relating to attempting to elude pursuing police vehicles;

(viii) A conviction of RCW 46.61.500, relating to reckless driving;

(ix) A conviction of RCW 46.61.502 or 46.61.504, relating to a person under the influence of intoxicating liquor or drugs;

(x) A conviction of RCW 46.61.520, relating to vehicular homicide;

(xi) A conviction of RCW 46.61.522, relating to vehicular assault;

(xii) A conviction of RCW 46.61.527(4), relating to reckless endangerment of roadway workers;

(xiii) A conviction of RCW 46.61.530, relating to racing of vehicles on highways;

(xiv) A conviction of RCW 46.61.685, relating to leaving children in an unattended vehicle with motor running;

(xv) A conviction of RCW 46.61.740, relating to theft of motor vehicle fuel;

(xvi) A conviction of RCW 46.64.048, relating to attempting, aiding, abetting, coercing, and committing crimes;

(xvii) An administrative action taken by the department under chapter 46.20 RCW; or

(xviii) A conviction of a local law, ordinance, regulation, or resolution of a political subdivision of this state, the federal government, or any other state, of an offense substantially similar to a violation included in this subsection.

(c) A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked solely because (i) the person must furnish proof of satisfactory progress in a required alcoholism or drug treatment program, (ii) the person must furnish proof of financial responsibility for the future as provided by chapter 46.29

RCW 46.20.345

Operation under other license or permit while license suspended or revoked — Penalty.

Any resident or nonresident whose driver's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this title shall not operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and as permitted under this chapter. A person who violates the provisions of this section is guilty of a gross misdemeanor.

[1990 c 210 § 6; 1985 c 302 § 5; 1967 c 32 § 35; 1961 c 134 § 2. Formerly RCW 46.20.420.]

Notes:

Rules of court: Bail in criminal traffic offense cases -- Mandatory appearance -- CrRLJ 3.2.

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CERTIFICATE OF SERVICE OF BRIEF OF RESPONDENT

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DIVISION I
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I , Jack Orewiler of ACTION SPECIAL DELIVERY, do hereby certify that on the 31st day of August, 2010, I served a copy of the BRIEF OF RESPONDENT in City of Kent v. Mann, 64672-9-I, by delivering a copy to the following addresses:

Court of Appeals, Div I
600 University St
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Julie Stormes
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Dated this 31st day of August, 2010.

ACTION SPECIAL DELIVERY



Jack Orewiler