Arrowhead Justice Court
14264 West Tierra Buena Lane, Surprise, Arizona 85374
(602) 372-2000

Judge John C. Keegan

STATE OF ARIZONA **(Plaintiff)** **v.** **BRETT MATTHEW MECUM** **(Defendant)**	**File: TR 2009 130677** **Ruling on Defendant's motion to DISMISS WITH PREDIJUCE**

The Defendant moved to dismiss the criminal charges of criminal speed and reckless driving with prejudice. As a basis for his motion, he raises three constitutional issues. The State did not file a response. The Court grants the Defendant's motion because it finds the Defendant's first argument to be persuasive.

PROCEDURAL HISTORY

On May 6, 2009 the Defendant was arrested on charges of criminal speed and reckless driving that allegedly occurred on April 10, 2009. According to the citation, the evidence of speed was obtained by the photo enforcement system per A.R.S. § 41-1722.

On May 20, 2009 counsel for the Defendant filed a Motion to Dismiss with Prejudice. The motion was based on three points: the photo enforcement statute creates an unconstitutional disparity in enforcement; the arrest was selective and politically motivated; and the prosecution resulted from a policy change by the Maricopa County Attorney's Office (MCAO) and is a violation of the *ex post facto* clause of the United States Constitution. No responsive motion was filed by the State.

The court addresses these issues in reverse order.

I

ALLEGED *EX POST FACTO* VIOLATIONS

The Defendant claims the MCAO changes its policy concerning the prosecution of criminal allegations based on evidence obtained from highway photo enforcement cameras, and that doing so violated the *ex post facto* clause of the United States Constitution. An *ex post facto* law is an unfair statute that retroactively criminalizes conduct that was legal at the time of the event. Article I, section 10 of the U.S. Constitution prohibits states from passing *ex post facto* laws.

It has been widely reported in the press that the County Attorney publically announced concerns over the constitutionality of A.R.S. § 41-1722 and that his office would not seek criminal prosecution in accordance therewith. In this case, however, there is no statutory change involved. An internal change in departmental policy is not necessarily an unconstitutional change in enforcement. The Court does not find the Defendant's argument compelling that this prosecution is unconstitutional.

II

ALLEGED SELECTIVE AND POLITICAL PROSECUTION

The Defense alleges that the State's prosecution of the Defendant is politically motivated and selective.

The Court notes that other defendants stopped for similar offenses and speed by an officer on patrol are often cited and released on the side of the highway. This happens in spite of the immediate proximity in time of the offense and access to the means of the alleged offense, i.e., the vehicle. In this case, apparently a decision was made to arrest the Defendant at his place of employment nearly a month after the incident.

This action seems curious for two reasons. The first is the timing of the arrest considering the lack of immediate threat to public safety. The second is more nuanced. The operative statute, A.R.S. § 41-1722 states:

> B. Notwithstanding any other law, the civil penalty or *fine for a citation* or a notice of violation issued pursuant to this section is one hundred sixty-five dollars and is not subject to any surcharge except the surcharge imposed by section 16-954…. *(emphasis added noting that fines are only imposed for criminal offenses whereas civil penalties are imposed for civil traffic violations.)*

> D. Notwithstanding any other law, if a person is found responsible for a civil traffic violation or a notice of violation pursuant to a citation issued pursuant to this section, the department of transportation shall not consider the violation for the purpose of determining whether the person's driver license should be suspended or revoked…

An element of the offense of reckless driving is criminal speed. Since the method of determining the alleged speed according to the citation is by photo enforcement, both of the charges in this case are subject to this statute. Considering the speeding charge typically would be considered a lesser-included offense to reckless driving, the maximum penalty that may reasonably be imposed if the defendant were to be convicted would be a fine of $181.50, including all applicable surcharges, with no assessment of points against the Defendant's license.

Given that immediate public safety was not an issue, and the maximum penalty is only a nominal fine, the Defendant's arrest at his place of employment may have been neither appropriate nor proportional. That, however, does not mean that the State's action is prohibitively selective or political.

III

EQUAL PROTECTION CONCERNS

On December 9, 2008 this court ruled *sua sponte* on the constitutionality of A.R.S. § 41-1722. Arizona courts have consistently exercised judicial restraint by refraining from deciding hypothetical or abstract questions and questions not fully developed by true adversaries.[1] However, unlike the Federal Court system which is restricted in its ability to hear cases by U.S. Const. Art. III, § 1, cl. 1, Arizona's courts are not limited to deciding only "cases" or "controversies."[2]

Despite this policy of judicial restraint, some cases have proven to be too important for the courts to ignore because of a judicially crafted policy. The courts will make an exception to hear "a question of great importance or one which is likely to recur." [3] This position is consistent with Arizona's lack of a "case or controversy" requirement and the general policy that these types of issues are "solely a discretionary policy."[4]

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[1] *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) ("[The court] impose[s] restraint to insure that [Arizona] courts do not issue mere advisory opinions, that the case is not moot, and that the issues will be fully developed by true adversaries.").

[2] *Fraternal Order of Police v. Phoenix Employee Relations Board*, 133 Ariz. 126, 127, 650 P.2d 428, 429 (1982).

[3] *Fraternal Order of Police*, 133 Ariz. at 127, 650 P.2d at 429.

[4] *Big D. Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 562-63, 789 P.2d 1061, 1063-64 (1990).

The issue of speed cameras along Arizona's freeways certainly fits within the two exceptions to the court created policy of judicial restraint. In determining to rule *sua sponte* this Court addressed the issue as follows:

a. The issue of speed cameras along Arizona's freeways is of great public importance.

Speed cameras along Arizona's freeways are an aspect of everyday life for a vast majority of Arizonans. It is difficult to fathom a trip anywhere within the Phoenix metropolitan area without the omnipresence of the camera. If the statute authorizing the cameras is unconstitutional, the Arizona legislature, by enacting this statute, violates the equal protection rights of thousands of Arizonans every day. Such widespread infringement of equal protection rights on a daily basis must easily fit within the meaning of "great public importance." If such widespread infringement of rights of nearly a third of the population of the state annually were deemed insufficient, it is impossible to fathom an issue that would meet this exception.

b. The constitutionality of the speed camera program is an issue capable of repetition, yet evading review.

The constitutionality of the fines imposed by speed cameras is not only an issue capable of repetition, but is in fact, an issue that is repeated thousands of times everyday. When the City of Scottsdale was researching the implementation of speed cameras along the 101 Freeway, it estimated that it could issue between 1,500 and 2,500 tickets per day.[5] The Arizona Department of Public Safety estimates that their program will issue in excess of 1.8 million photo enforcement citations annually once the program is fully implemented.

Moreover, this issue is one which is not likely to be reviewed by a court in a proceeding fully developed by true adversaries. In order for this issue to be litigated in such a proceeding, the issue would have to be raised by the Defendant. Given the minimal amount of the fine, $181.50 (*i.e.,* $165.00 plus a mandatory surcharge for funding political campaigns), the fact that no points accrue to the Defendant's driving license (and hence, no insurance ramification), and the extraordinary cost of litigating such a complex constitutional issue, there is little or no incentive for a Defendant to take such action. Since citizens have no monetary or licensure incentive to enforce their constitutional right to equal protection, the Court has left it upon itself to ensure that these individual rights are protected by crafting this exception to the judicial restraint policy.

In the ruling of December 9, 2008 this Court stated:

> The Fourteenth Amendment to the Constitution of the United States states, in part: … nor shall any State deprive any person of life, liberty,

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[5] *"Cameras on Loop 101 get state approval," East Valley Tribune, December 22, 2005.*

> or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)*
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> Further, Article 2 of the Arizona State Constitution, Section 13 states: Equal privileges and immunities: *No law shall be enacted granting to any citizen*, class of citizens, or corporation other than municipal, *privileges or immunities which, upon the same terms, shall not equally belong to all citizens* or corporations. *(emphasis added)*
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> The clear meaning of these provisions of the Arizona and United States constitutions is that it is unconstitutional to create one set of laws that applies only to a particular class of defendant and not to other defendants based solely on the mechanism employed by the government. Given the not uncommon set of circumstances where two drivers are traveling on the same highway, at the same speed in excess of the speed limit, at the same time, in essentially the same location and are cited by the same agency into the same court, ARS § 41-1722 creates a distinction whereby one class of defendant is subjected to a significantly different array of penalties than another class of defendant based solely on the use of photo enforcement.
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> Now, therefore, it is the determination of this court that the provisions of ARS § 41-1722 are unconstitutional and unenforceable within the jurisdiction of this court.

It should be noted that this order addressed only the state program created in accordance with ARS § 41-1722 and did not address the programs typically implemented by local governments under the provisions of ARS § 28-654.

CONCLUSION

Consistent with this Court's previous ruling, this Court reaffirms the unconstitutionality of the operative statute in this case, ARS § 41-1722. The Defendant's motion to dismiss all charges is granted. In accordance with Rule 16.6.d of the *Arizona Rules of Criminal Procedure*, this Court further finds it is clear that the constitutions of the United States and the State of Arizona, and interests of justice require that this dismissal be with prejudice.

IT IS THEREFORE ORDERED THAT Counts A and B are dismissed with prejudice and that the bond that was posted be released.

June 1, 2009

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The Honorable John C. Keegan