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Opinion No. 10-17

Traffic Cameras

QUESTIONS

1. Do ordinances that create owner liability for traffic violations detected by surveillance camera conflict with state statutory law?
2. Are municipal fines for traffic violations detected by surveillance camera civil or criminal in nature for purposes of the constitutional protections that apply during court proceedings?
3. Does admission of photographic evidence from a traffic surveillance camera violate the Confrontation Clause?

OPINIONS

1. No. Tenn. Code Ann. § 55-8-198 specifically authorizes owner liability in such circumstances.
2. A federal court likely would conclude that such fines are civil in nature for purposes of federal constitutional law. Under state law, the Tennessee Court of Appeals has indicated that such a fine is civil for procedural and appellate issues, but that constitutional protections are triggered by the fine. Such protections likely include the prohibition on double jeopardy and the privilege against self-incrimination.
3. No. The Confrontation Clause embraces testimonial statements. Photographs are not testimonial statements.

ANALYSIS

In Op. Tenn. Att’y Gen. 08-178 (Nov. 26, 2008), this Office opined that the issuance of a citation for traffic violations based on photographic evidence from a camera does not violate the constitutional rights of the citizens of Tennessee to due process, to equal protection, and to privacy. This opinion was based in large part on the holding of the Tennessee Court of Appeals in *City of Knoxville v. Brown*, 284 S.W.3d 330 (Tenn. Ct. App. 2008) (holding that ordinance establishing red-light camera enforcement program was not ultra vires, did not violate due process by creating an impermissible presumption that owner was guilty party, did not violate

owner's right against self-incrimination, and did not violate owner's rights to equal protection), *perm. app. denied* Feb. 17, 2009. *Brown* remains good law. *See, e.g., City of Knoxville v. Kimsey*, No. E2008-00850-COA-R3-CV, 2009 WL 1325719 (Tenn. Ct. App. May 13, 2009) (citing *Brown* with approval, and rejecting constitutional challenges to red-light camera enforcement ordinance on due process and privilege against self-incrimination grounds).

We have been asked to further evaluate red light camera enforcement programs in light of three recent pronouncements by other courts. In *State v. Kuhlman*, the Minnesota Supreme Court invalidated an ordinance authorizing photo enforcement of traffic control signals on the ground that it conflicted with state statutory law, raising the question whether municipal ordinances in this state are similarly preempted by the Tennessee Code. *See Kuhlman*, 729 N.W.2d 577, 583-84 (Minn. 2007). Additionally, the United States District Court for the Eastern District of Tennessee, passing on Knoxville's Red Light Photo Enforcement Program, has observed *obiter dictum* that, if the penalty imposed is criminal, "then a panoply of federal constitutional rights, including the rights to confrontation and rights against self-incrimination, arise." *Williams v. Redflex Traffic Sys., Inc.*, No. 3:06-cv-400, 2008 WL 782540, at *4 (E.D. Tenn. Mar. 20, 2008), *aff'd on other grounds*, 582 F.3d 617 (6th Cir. 2009). In a related vein, the United States Supreme Court has held that affidavits reporting the results of forensic analysis are "testimonial" for purposes of the Confrontation Clause, posing the question whether photographic evidence derived from traffic cameras is susceptible to challenge under this constitutional provision. *See Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 (2009). We address these questions in turn.

1. The ordinance at issue in *Kuhlman* created only owner liability for red-light violations detected by an automated traffic enforcement system, but a Minnesota statute imposed liability on motor vehicle drivers for similar infractions. *Kuhlman*, 729 N.W.2d at 579-80. On this basis, the Minnesota Supreme Court held that the ordinance conflicted with the statute and hence was preempted. *Id.* at 584; *but see City of Davenport v. Seymour*, 755 N.W.2d 533, 542-44 (Iowa 2008) (holding the opposite, and noting the disagreement with *Kuhlman*).

Tennessee law is different. As presently constituted, Tenn. Code Ann. § 55-8-198 authorizes the use of traffic surveillance cameras and provides in pertinent part: "Except as otherwise provided in this subsection (e), the registered owner of the motor vehicle shall be responsible for payment of any notice of violation or citation issued as the result of a traffic light monitoring system." Tenn. Code Ann. § 55-8-198(e)(1). The subsection goes on to provide means by which a vehicle owner may avoid liability by demonstrating that the vehicle was in the care, custody, or control of another at the time of the violation, including circumstances in which the vehicle or its plates were stolen. *Id.* § 55-8-198(e)(2) & (3).

Because Tennessee statutory law specifically authorizes owner liability for violations detected by traffic light monitoring systems, local ordinances so providing are not susceptible to challenge on the preemption grounds identified by the *Kuhlman* court. As a general matter, municipal ordinances imposing liability for failing to obey the instructions of a traffic control device must be consistent with state law. *See* Tenn. Code Ann. § 55-10-307(a) (providing that incorporated municipalities may adopt by reference certain provisions of the Tennessee Code

relating to the operation of motor vehicles and “may by ordinance provide additional regulations for the operation of vehicles within the municipality, which shall not be in conflict with the provisions of the listed sections”); *see also id.* §§ 55-8-109, -110 (setting forth requirements for operation of vehicles consistent with traffic control signals). For reasons that we trust are apparent, this Office is unable to opine as to whether each of the various ordinances relating to traffic surveillance cameras adopted by municipalities throughout the state are otherwise consistent with the Tennessee Code. We observe, however, that the Tennessee Court of Appeals has found Knoxville’s red-light camera enforcement program to be consistent with state law, even though the pertinent ordinance was adopted prior to the enactment of Tenn. Code Ann. § 55-8-198. *See Brown*, 284 S.W.3d at 336.

2. The federal courts that have directly addressed municipal red-light camera ordinances have concluded that the fines imposed are civil in nature for purposes of federal constitutional law. *See Kilper v. City of Arnold*, No. 4:08cv0267, 2009 WL 2208404, at *13-19 (E.D. Mo. July 23, 2009); *Shavitz v. City of High Point*, 270 F. Supp. 2d 702, 713-17 (M.D.N.C. 2003), *vacated in part on other grounds by Shavitz v. Guilford County Bd. of Educ.*, 100 Fed. Appx. 146 (4th Cir. June 7, 2004); *see also Idris v. City of Chicago*, 552 F.3d 564, 566-68 (7th Cir. 2009) (rejecting due process challenge to red-light camera enforcement program, noting “no one has a fundamental right to run a red light or avoid being seen by a camera on a public street,” and “[i]t is enough to say that photographs are at least as reliable as live testimony, that the due process clause allows administrative decisions to be made on paper (or photographic) records without regard to the hearsay rule, and that the procedures Chicago uses are functionally identical to those it uses to adjudicate parking tickets. . . .” (citation omitted)). Noting that the enacting bodies indicated a preference for a civil label, these courts went on to consider whether the legislation was so punitive in purpose or effect that the proceeding or penalty should be considered criminal in nature, employing the seven-factor test set forth in *Hudson v. United States*, 522 U.S. 93, 99-100 (1997). *See Kilper*, 2009 WL 2208404, at *15; *Shavitz*, 270 F. Supp. 2d at 713. Because the sanctions at issue—relatively small fines—involved no affirmative disability or restraint, were not historically viewed as punishment, required no scienter, promoted public safety despite having a deterrent aspect and potential criminal label, and were not excessive in relation to the public safety purpose, the courts concluded that the fines were civil in nature. *See Kilper*, 2009 WL 2208404, at *15-17; *Shavitz*, 270 F. Supp. 2d at 714-16.

We consider these opinions to be well-reasoned, and likely to be followed by a federal court passing on a municipal ordinance adopted consistently with Tenn. Code Ann. § 55-8-198. In general, municipal courts possess jurisdiction to enforce ordinances mirroring a state criminal statute only if the maximum penalty prescribed by the ordinance is “a civil fine” not exceeding fifty dollars. Tenn. Code Ann. § 16-18-302(a)(2); *see also Town of Nolensville v. King*, 151 S.W.3d 427, 433 (Tenn. 2004) (holding that Article VI, section 14, of the Tennessee Constitution prohibits a municipal court judge from imposing fines in excess of fifty dollars for a violation of a municipal ordinance absent a valid waiver of the right). Additionally, Tenn. Code Ann. § 55-8-198 specifies that a traffic citation that is based solely upon evidence obtained from a surveillance camera is considered a non-moving violation, Tenn. Code Ann. § 55-8-198(a), which, as we have previously opined, “is similar to the issuance of a traffic ticket,” Op. Tenn. Att’y Gen. 08-178, at 4 (Nov. 26, 2008). In view of the evident preference for a civil label,

together with the modest fine that municipal courts are empowered to assess, we think it unlikely that a federal court would find a municipal red-light camera enforcement program in Tennessee to be so punitive in purpose or effect that it should be considered criminal in nature for purposes of federal law.

At the present juncture, state law is more expansive. In *Brown*, the Tennessee Court of Appeals considered whether the fine imposed by Knoxville's red-light camera enforcement program was criminal in nature. *Brown*, 284 S.W.3d at 336. In addressing the question, the court adopted the framework set forth in *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001), a case that considered whether a municipal monetary assessment was sufficiently punitive to fall within the ambit of the Fifty-Dollar Fines Clause, Tenn. Const. art. VI, § 14. *Davis* eschewed the seven *Hudson* guideposts, settling instead on an inquiry whether the "totality of the circumstances demonstrates that the statutory scheme truly envisions the pecuniary sanction as serving to remedy or to correct a violation." *Davis*, 54 S.W.3d at 265. The *Brown* court noted that *Davis* was not directly on point, since there was no issue as to whether the Fifty-Dollar Fines Clause was implicated, but nonetheless concluded that Knoxville's fine was punitive and deterrent, rather than remedial, in nature. *Brown*, 284 S.W.3d at 338. Accordingly, the court determined that the fine was civil "for procedural and appellate issues," but that "constitutional protections are triggered." *Id.* In a footnote, the court left open the question whether the privilege against self-incrimination is one such protection. *Id.* at 339 n.4.

Notwithstanding this holding, the *Brown* court specifically addressed whether Knoxville's red-light enforcement program violated due process by creating an "impermissible rebuttable presumption of guilt against the owner of a vehicle," and concluded that it did not. *Id.* at 338-39. Again, *Brown* remains good law. This Office therefore adheres to its earlier opinion that the issuance of citations for traffic violations based on photographic evidence from cameras does not violate due process. Op. Tenn. Att'y Gen. 08-178, at 5 (Nov. 26, 2008).

Brown nevertheless leaves open the question what constitutional provisions might be implicated by municipal red-light camera enforcement programs. On the assumption that the *Davis* analysis applies outside the context of the "unique" Fifty-Dollar Fines Clause, *Davis*, 54 S.W.3d at 257—a question over which the Tennessee Supreme Court has not passed—the case law suggests that the prohibition on double jeopardy and the privilege against self-incrimination might obtain. The *Davis* decision noted that "in the specific context of a 'civil' proceeding for a municipal ordinance violation, this Court has held that the imposition of a pecuniary sanction triggers the protections of the double jeopardy clause to prevent a second 'punishment' in the state courts for the same offense." *Id.* at 261. Similarly, *Brown* itself recognized that the privilege against self-incrimination might be implicated by a civil penalty having as its main purpose a deterrent or punishment effect, *Brown*, 284 S.W.3d at 339 n.4, and this recognition was repeated in *City of Knoxville v. Kimsey*, although the defendant there waived the privilege by failing to assert it upon proper grounds, *Kimsey*, 2009 WL 1325719, at *2. This prospect has some support in the pronouncements of the Tennessee Supreme Court. See, e.g., *City of Chattanooga v. Myers*, 787 S.W.2d 921, 926 (Tenn. 1990) ("A perusal of these cases shows that the decisions in some (e.g. no right against self-incrimination) may now be questionable, but the

clear rule to be gleaned from all of these cases is that, as far as general procedural matters and matters of appeal were concerned, these actions were considered civil in nature.”).

We observe, however, red-light camera enforcement programs adopted in accordance with Tenn. Code Ann. § 55-8-198 do not per se violate the privilege against self-incrimination. “A photograph of a vehicle passing through a public intersection is not testimonial evidence. . . .” *Sevin v. Parish of Jefferson*, 621 F. Supp. 2d 372, 382 (E.D. La. 2009). Introduction of such evidence thus does not violate the Self-Incrimination Clause because that provision protects an accused “only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.” *Id.* at 381-82; *Schmerber v. California*, 384 U.S. 757, 761 (1966). Moreover, the Tennessee Court of Appeals has determined that permitting vehicle owners to shift liability by establishing via affidavit that someone else was in control of their vehicle at the time of the violation does not amount to a violation of the privilege. *Brown*, 284, S.W.3d at 339.

3. To the extent that the procedural guarantee of the right to confrontation applies in proceedings “traditionally considered to be civil in nature,” but carrying a fine “intended to be punitive and a deterrent,” *id.* at 338, the admission of photographic evidence from a traffic surveillance camera does not, on its face, violate it. The Confrontation Clause covers “testimonial statements.” *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531 (2009); *State v. Cannon*, 254 S.W.3d 287, 301-303 (Tenn. 2008). Photographs are not. *Sevin*, 621 F. Supp. 2d at 383 (“Because a camera is not a witness that is amenable to cross-examination, and because a photograph of a vehicle is not a ‘testimonial statement,’ introduction of the Redflex photographs into evidence does not implicate the Confrontation Clause.”); *State v. Williams*, 913 S.W.2d 462, 465 (Tenn. 1996) (“Although the language is not identical, both the federal and state constitutional confrontation provisions are restricted, by their own terms, to ‘witnesses’ and do not encompass physical evidence or objects, such as photographs.”).

As an evidentiary matter, photographs must be properly authenticated to be admissible. *Williams*, 913 S.W.2d at 465. Pursuant to Tenn. R. Evid. 901, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.” Tenn. R. Evid. 901(b)(1). “Even if direct testimony as to foundation matters is absent . . . the contents of a photograph itself, together with such other circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate a photograph sufficiently to justify its admission into evidence.” *United States v. Rembert*, 863 F.2d 1023, 1027 (D.C. Cir. 1988) (internal quotation omitted) (cited with approval in *Williams*, 913 S.W.2d at 465). Although we are unable to comment on the authentication procedures followed by any particular municipal court, photographs of license plates made by an automated system are unlikely to pose a particularly high evidentiary bar.

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