The Supreme Court of Ohio

Village of Put-in-Bay,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	On appeal from the Sixth District Court
	)	of Appeals, Consolidated Case Nos.
Mark Mathys, *et al*,	)	OT-18-006 and 007
	)	
Defendants/Appellants.	)	

APPELLANTS' MERIT BRIEF

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STATEMENT OF THE FACTS

The State of Ohio levies an annual motor-vehicle tax upon the operation of vehicles on public roads.[1] When the vehicle owner pays the tax, the state licenses the relevant vehicle so it can be freely operated upon all public roadways. But now, Put-in-Bay ("PIB") claims that municipalities may independently (a) levy their own additional license taxes and (b) require the display of special local motor-vehicle licenses needed on local roads.

Ohio's intertwined motor-vehicle licensing and taxing structure shows that municipalities may not do this.

The statewide system is nuanced. In addition to the annual state tax mentioned above, a series of related statutory measures enable municipalities to levy modest "piggyback" license taxes. For instance, R.C. 4504.06 enables a city to impose a local motor-vehicle tax, but "such tax *shall* be at the rate of *five dollars* per motor vehicle."[2] And

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[1] *See e.g.*, R.C. 4503.02, ("An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles; planning, constructing, maintaining, and repairing public roads, highways, and streets; maintaining and repairing bridges and viaducts; paying the counties' proportion of the cost and expenses of cooperating with the department of transportation in the planning, improvement, and construction of state highways***")

[2] R.C. 4504.06 states, in part, "For the purpose of…planning, constructing, improving, maintaining, and repairing public roads, highways, and streets…the legislative authority of any municipal corporation may by proper legislation levy an annual license tax…upon

other statutes let municipalities raise a bit more piggyback revenue—but only in slight $5 increments.[3] As explained in our jurisdictional memorandum, the mechanics are that the local BMV collects the $5 fees and sends the moneys to the registrar who deposits the funds into an account with timely redistribution to the right municipalities.

This arrangement proves the point: Ohio has a singular statewide motor-vehicle licensing framework that no municipality may intrude upon absent statutory enablement. If this court adopts PIB's contention that municipalities may now reflexively claim the power to unilaterally tax and license motor vehicles, it will upend Ohio's familiar statewide framework. Traditionally, paying the statutory taxes levied under the state statutory scheme entitled the payor to a physical license that permits the person's vehicle to be operated upon all public roads in Ohio without further licensing. This is of practical necessity. Because vehicles are mobile, any other system would be impossible as every city could require cars used on their roads to get special licenses.

Despite this, PIB claims that villages and cities can make the owners of vehicles *already* licensed by the state pay for and display a *second* license like this:

---

the operation of motor vehicles on the public roads or highways. Such tax *shall be at the rate of five dollars per motor vehicle****"

[3]*See* R.C. 4504.17 (permitting an additional five-dollar tax in certain circumstances); R.C. 4504.171 (permitting another five-dollar increase), R.C. 4504.172 (same).

If this is upheld by this High Court, then all municipalities are free to effectively establish a mishmash of Municipal Toll Roads crisscrossing this state; legally accessible only by paying distinct local taxes in fluctuating amounts fixed by each random locality.

The ordnances at issue here, attached in the appendix, criminalizes operating certain vehicles on roads without the owner first paying for and displaying the above local PIB license. Citing their paid-for state licenses, appellants refused to give PIB any more money to operate their vehicles on local roads. The village prosecuted them, setting up a test of the ordinance. The trial court found the ordinance invalid and thus dismissed the prosecution, but the appeals court reversed 2-1, upholding the ordinance.

Under that decision, all municipalities can levy a patchwork of inventive motor-vehicle-license taxes with no principled limitation curbing this supposed power. Being a statewide concern, this court accepted jurisdiction.

It should now reverse and dismiss this flawed prosecution.

ARGUMENT

The dawn of the 20th century began the American love affair with vehicles. Henry Ford's ingenious assembly line shaped a new form of transportation promising upward socio-economic mobility for multitudes. The value was speed: cars could make man go

faster. This newfound freedom on the open road brought regulation. For example, in 1923, Cincinnati proposed an ordinance requiring speed governors that would shut off any car exceeding 25 miles per hour. Voters defeated this proposal with ads like this:

By the "speed governor war of 1923," cars had transformed society.

Widespread mobility created untold opportunity but it also tempted politicians to leverage society's dependence on cars by targeting captive car owners. Budgets could be balanced and pet projects funded by taxing motorists. Knowing this, state and local legislatures doubly subjected motorists to vehicle taxes.

This court ended this practice in 1925 by holding in *Firestone v. Cambridge* that municipalities may *not* levy taxes on vehicle owners in addition to taxes levied by the state for similar purposes:

> The assessment of an annual fee by a municipal ordinance, upon owners of motor vehicles residing in the municipality, for the privilege of operating such motor vehicles upon the streets thereof, for the declared purpose of producing a fund to be used for the cleaning, maintenance, and repair of the streets of the municipality, to which use it is thereby appropriated, though denominated a license fee, is an 'excise tax.'
>
> *No municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes*.

Firestone v. Cambridge, 113 Ohio St. 57 (1925), syllabus.[4]

Though significant, *Firestone* limited only municipalities: the state legislature still could—and frequently did—target motorists to satisfy general obligations, particularly during the Great Depression. So, Ohioans took counter-measures. In 1947, voters adopted Ohio Const. Art. XII, Sec. 5a via initiative petition. It states that:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges *and other* ***statutory*** *highway purposes*, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

Section 5a plainly dictates that all moneys derived from fees or taxes "relating to registration, operation, or use" of vehicles must be expended strictly for *statutory* highway purposes. This "reflects the will of the state's citizens to have money obtained

[4] All emphasis in this brief is supplied by appellants.

from taxes, fees, and licenses relating to the operation of motor vehicles and motor-vehicle fuel expended exclusively for road projects, highway improvement, and other similar costs such as the enforcement of traffic laws." *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, ¶19. This benefits motorists two-fold by (1) forbidding lawmakers from abusively targeting motorists as captive revenue sources and (2) ensuring that expenditure of licensing revenues is for "statutory highway purposes," chiefly improving roadways for motorists.

Inclusion in §5a of the phrase "other *statutory*…purposes" implies that the other permitted purposes enumerated in §5a are themselves statutory purposes. If not, then placement of the term "*other*" before "statutory" would be nonsensical. The meaning is that any fee or tax relating to the use, operation, or registration must be for a statutory purpose. Of logical necessity, therefore, any such fee or tax must be exacted *by statute*. Ergo, any putative fee or tax levied by ordinance is invalid unless the measure is itself enabled by statute—such as in the case of the piggyback taxes.

The net result is that the state legislature wholly controls taxes relating to the use, operation, or registration of motor vehicles. Otherwise, the statutory piggyback-tax scheme outlined above is superfluous and municipalities could through taxation forbid what state motor-vehicle license permit.

I. Because Ohio licenses vehicles for use on all public roadways in exchange for payment of an annual statutory tax on vehicles, no municipality in this state may levy an additional local tax for similar purposes—otherwise, localities could negate or attach additional strings to statewide licenses.

As shown on page five above, *Firestone's* syllabus states that no municipality in this state has power to levy a tax upon the operation of motor vehicles on public roads "in addition to that levied by the state for similar purposes." Thus, the threshold issue is whether PIB's ordinance violates this syllabus. Because the ordinance indisputably seeks to levy a tax upon the operation of motor vehicle on public roads in addition to that levied by the state for similar purposes, it is in fact a nullity under *Firestone*. We anticipate that PIB will respond that this court has overruled *Firestone sub silentio*. But PIB can offer no precedent respecting the licensing and taxation of motor vehicles overturning *Firestone*.

It is true that this court has opined in certain contexts that the General Assembly may not "impliedly" preempt local taxes,[5] but those cases aren't applicable to the situation of the licensing of motor-vehicles, which traditionally occupy a special place in the law. If municipalities may now unliterally create their own diverse array of motor-vehicle licensing programs by levying local taxes, then no intelligible limiting principle could curb such a runaway "power." Every municipality across this state could require a separate tax to be paid and license to be displayed. While this outcome seems absurd, it is PIB's argument. This court should reject PIB's approach and confirm *Firestone*.

[5] The General Assembly may generally restrict municipal taxation under Art. XIII, Sec. 6.

Overturning *Firestone* would render the piggyback-tax scheme superfluous as it would no longer serve any purpose because municipalities could, according to PIB, unilaterally levy taxes on vehicle owners without the $5 incremental limitations imposed by the Revised Code. Contrary to a nonbinding case cited below, *S.B. Carts, Inc. v. Village of Put-in-Bay*,[6] the state scheme is indeed an express restriction on municipalities. If not, then what is the $5 limitation stating that the municipal tax "shall be at the rate of five dollars per motor vehicle"? This verbiage acts as its own limitation: it is the General Assembly's way of permitting municipalities to raise reasonable revenue from drivers without tax-and-spend overkill. Stated differently, without the piggyback provisions, no municipality could raise revenue through motor-vehicle licensing taxes because *Firestone* otherwise act as a bar in light of the imposition of the state tax.

This brings us back to *S.B. Carts*, which rests on a flawed paradigm. The plaintiff framed the issue as being whether statutes such as R.C. 4504.06 expressly restrict municipalities from taxing vehicles. But under *Firestone*, this inquiry is immaterial because, once the General Assembly levies a tax on motor vehicles, then no municipality has power to levy an additional tax for similar purposes, which ends the analysis. Because vehicles are mobile and licensed by the state, it would defy all practicalities if every municipality in Ohio may now create local licensing schemes on top of the intricate

[6] 161 Ohio App.3d 691, 2005-Ohio-3065, 831 N.E.2d 1052 (6th Dist.).

statewide statutory system respecting the licensing and taxation of motor vehicles. Multilayered licensing cannot work in the motor-vehicle context.

Significantly, the state issues *licenses* in connection with its *taxation* regime. This is key because no municipality may, by ordinance, forbid what a state license permits. *State ex. rel. Morrison v. Beck Energy Corp*., 143 Ohio St.3d 271, 2015-Ohio-485, ¶24. In fact, this court has consistently held that a municipal-licensing ordinance conflicts with a state-licensing scheme and is thus invalid if the "local ordinance restricts an activity which a state license permits." *Id*. at ¶26. Here, the obtaining the state license permits open travel on public roads. Yet PIB's ordinance forbids appellants from precisely this privilege absent additional payment to PIB. Attaching such local strings to the state license is invalid. Again, appellants' state-issued motor-vehicle licenses permit their vehicles to be operated on all roadways in Ohio—including roads situated within PIB's territorial boundaries—without having to pay extra taxes for continued operation on local roads.

Once the state issues the license upon payment of the tax, the matter is complete because, "No municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes." *Firestone*, syllabus.[7] Doubtless, this court

[7] We anticipate that PIB will try to distinguish its ordinance from *Firestone* by claiming that its ordinance applies to vehicles "for hire." But it does not logically follow that levying a motor-vehicle tax on certain targeted vehicle owners somehow immunizes the ordinance from invalidity. And PIB can't dispute that appellants' supposed "for hire" vehicles are taxed by the state like all other vehicles. Thus, PIB's proposed distinction makes no constitutional difference here.

should reverse. Upholding this ordinance by affirming the decision below would require this court to reverse *Firestone* by holding that municipalities have a power to (a) levy motor-vehicle taxes in addition to those levied by the state for similar purposes and (b) require motorists to display special local vehicle licenses.

The outcome would be that the State of Ohio's issuance of a license plate under its nuanced and balance statewide statutory scheme respecting the taxation of motor vehicles can be nullified or regulated by additional municipal requirements. This would set negative precedent for motorists and greenlight municipalities to target motorists for revenue. Rather than sending this outdated message, this court should adopt appellants' first proposition of law, reverse the appeals court, and dismiss this prosecution. And as explained below, this court should also reverse under Ohio Const. Art. XII, Sec. 5a.

II. Under Ohio Constitution Art. XII, Section 5a, any moneys collected from taxes levied on motor vehicles must be expended solely for a *statutory* purpose, therefore, a statute—not an ordinance—must enable the expenditure, and hence the exaction, of a vehicle tax.

The text of §5a mandates that "no moneys" derived from the taxation of vehicles shall be expended for any purpose except for a statutory purpose enumerated in §5a. The idea is to prevent wasteful governmental expenditure of moneys derived from taxes on motor vehicles by ensuring that the resultant funds are spent on purposes benefiting motorists. Nothing in the text or structure of §5a makes this goal inapplicable to moneys derived from municipal ordinances. So, if municipalities are said to be unbound to §5a's

limitation that vehicle-tax moneys be expended solely for an enumerated *statutory* purpose, then this would thwart the policy objective of §5a and the syllabus of *Firestone*.

As explained throughout this brief, because the state licenses vehicles through a statewide taxation regime, no municipality may levy taxes on motor vehicles for similar purposes without statutory pre-enablement; therefore, the unilateral exaction of a vehicle tax by ordinance is void *ab initio* as the first "step in an unauthorized plan." *Beaver Excavating*, ¶13. The expenditure of funds gained from taxes levied by an ordinance necessarily springs from the ordinance itself and thus inherently involves a non-*statutory* expenditure except, for example, in the case of the statutory piggyback tax allowance. Thus, the initial exaction by the ordinance is itself invalid as stated above. Otherwise, if moneys derived from the levy of municipal license tax on vehicles may be expended for *non*-statutory purposes, then §5a could be defeated easily. It it is no answer for PIB to say here that its ordinance, §858.01, requires the licensing-tax funds to be used to repair streets within the village because the holding below is that ordinances are untethered from the restrictions of §5a. If so, then nothing caps the local taxation of motor vehicles nor limits the concomitant expenditures. Under the rationale below, PIB could amend its ordinance to redirect funds to be expanded for any purpose. This cannot be.

Next, the decision below relied upon the conclusory, *per curiam* opinion of *Garrett v. City of Cincinnati*, 166 Ohio St. 68 (1956), for the proposition that §5a is inapplicable to taxes on vehicles imposed by municipalities. But, upon scrutiny, *Garrett* is *dicta*. It

involved moneys derived from municipal *parking*-meter fees. Thus, *Garrett* should have been resolved on the narrow grounds that parking-meter fees do *not* implicate §5a because such fees are *not* "related to" the registration, operation, or use of motor vehicles. The taxes that trigger §5 are those that must be paid as a prerequisite to using, operating, or registering vehicles.[8] Because the motoring public is *not* required to pay *parking* fees to register, operate, or use their vehicles, §5a isn't implicated. Rather, parking fees are imposed in exchange for the service of a parking spot, which differs from requiring, subject to stiff criminal penalties, a tax to be paid as a precondition of travel on city streets.

But even if the rationale in *Garrett* is not *dicta*, that case was still wrongly decided because, as stated above, nothing in the text of §5a renders its limitations inapplicable to moneys derived from local taxes levied upon vehicles owners. Section 5a is unqualified in scope. It means what it says.

That is, no moneys derived from taxes relating to the registration, operation, or use of motor vehicles shall be expended except for *statutory* highway purposes. By logical implication, any tax on vehicles must be exacted by statute; not by ordinance. Thus, this court should overrule the statements in *Garrett*. To be sure, "*Stare decisis*…is *not* controlling in cases presenting a constitutional question." *State v. Bodyke*, 126 Ohio St.3d

[8] *Cf.*, *Ohio Trucking Assn v. Charles*, 134 Ohio St.3d 502, 2012-Ohio-5679, ¶16 (fee for obtaining certified driver's abstract did not trigger §5a because the process of certification was not necessary for the "general motoring public").

266, 2010-Ohio-2424, ¶37. Thus, contrary to PIB's jurisdictional memorandum, the *Galatis* test for overruling precedent is inapplicable here. *Id*.

CONCLUSION

This court should hold that Ohio municipalities may *not* levy all manner of individualized local taxes relating to the use, operation, or registration of motor vehicles in addition to vehicle taxes already levied by the state for similar purposes. Plus, municipalities are subject to the limitations of Art. XII, §5a.

If this court reaches a contrary opinion, then driving vehicles across Ohio could become impractical because each municipality could now be free to effectively trump statewide licensing by codifying their own unique regulatory schemes for using local roads. Local politicians could then target motorists to raise revenue to balance budgets, pay for pet projects, and any other imaginable expenditure—the very result that *Firestone* and Art. XII, §5a aim to prevent. This court should reverse.

Respectfully submitted,

/s/ Andrew R. Mayle

CERTIFICATE OF SERVICE

I e-mailed a copy of this brief to counsel for appellee at *bchojnacki@walterhav.com* and *sanderson@walterhav.com* on August 9, 2019.

/s/ Andrew R. Mayle

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio/Village of Put-in-Bay	Court of Appeals No. OT-18-006
Appellant	Trial Court No. 15CR46
v.	
Mark Mathys	
Appellee	
and	
State of Ohio/Village of Put-in-Bay	Court of Appeals No. OT-18-007
Appellant	Trial Court No. 15CR45
v.	
Islander Inn (Timothy Niese, Sr.)	**DECISION AND JUDGMENT**
Appellee	Decided: January 18, 2019

* * * * *

Susan Keating Anderson, Solicitor, Village of Put-in-Bay, and
Benjamin Grant Chojnacki, for appellant.

Andrew R. Mayle, for appellees.

* * * * *

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, Village of Put-in-Bay ("the village"), appeals from two judgment entries of the Ottawa County Court of Common Pleas granting the motions to dismiss of defendants-appellees, Mark Mathys and Islander Inn (collectively "appellees"). For the following reasons, we reverse.

I. Facts and Procedural History

{¶ 2} On May 1, 2015, the village issued a criminal citation to Mathys and Islander Inn for an alleged violation of Section 858.01 of the Codified Ordinances of the village ("Section 858.01"). Section 858.01 imposes a "license fee" upon "owners of vehicles used for the transportation of persons or property, for hire and for use in the Village." Mathys operates a business, Islander Inn, that makes vehicles for hire available for use in the village. On January 16, 2015, the village filed criminal complaints against Mathys and Islander Inn in the village's Mayor's Court pursuant to Mathys' alleged violation of Section 858.01. Pursuant to appellees' motions, the case was transferred to the trial court on May 1, 2015.

{¶ 3} Subsequently, on July 20, 2015, appellees filed two motions to dismiss the criminal complaints, arguing that Section 858.01 is unconstitutional. More specifically, appellees argued Section 858.01 is unconstitutional because (1) it violates Article XVIII, Section 13 of the Ohio Constitution, and (2) it violates Article XII, Section 5a of the Ohio Constitution. The village filed a memorandum opposing the motions to dismiss on

August 24, 2015. Appellees then filed a reply brief on September 11, 2015 arguing Section 858.01 was in conflict with a general law of the State of Ohio.

{¶ 4} Following a November 18, 2015 hearing, the trial court granted appellees' motions to dismiss. The trial court concluded that Section 858.01 "is for [a] similar purpose" as R.C. 4503.02, which levies an annual license tax on the operation of motor vehicles, and R.C. 4504.02, which enables counties to enact a tax of $5 per motor vehicle. (Decision & Jgmt. Entry at 2.) The trial court determined that because Section 858.01 is for a similar purpose as laws already enacted by the state, it is therefore impermissible pursuant to *Firestone v. Cambridge*, 113 Ohio St. 57 (1925). The trial court journalized its decision granting appellees' motions to dismiss in two January 17, 2018 decision and judgment entries. The village timely appeals. The cases were consolidated for purposes of appeal.

II. Assignments of Error

{¶ 5} The village assigns the following errors for our review:

> 1. The trial court committed reversible error by granting Defendant's Motion[s] to Dismiss Because the Underlying Ordinance is Unconstitutional.
>
> 2. The trial court committed reversible error by failing to apply the legal doctrines of res judicata and/or stare decisis to find that Section 858.01 of the Codified Ordinances of the Village of Put-in-Bay is a constitutional exercise of the Village of Put-in-Bay's taxing authority.

III. First Assignment of Error – Motions to Dismiss

{¶ 6} In its first assignment of error, the village argues the trial court erred in granting appellees' motions to dismiss. More specifically, the village argues the trial court erred in concluding Section 858.01 is unconstitutional.

{¶ 7} Section 858.01 provides, in pertinent part, as follows:

> (a) Owners of vehicles used for the transportation of persons or property, for hire and for use within the Village, shall pay by June 15 of each year, an annual, nontransferable vehicle license fee for each vehicle as follows:
>
> | | |
> |---|---|
> | (1) Buses and/or trolleys and/or self-powered trams | $300.00 |
> | (2) Tour train cars and/or towed tram car/unit | $225.00 |
> | (3) Taxicabs: | |
> | A. Motor-driven | $225.00 |
> | B. Horse-driven | $225.00 |
> | C. Pedicab bicycles | $50.00 |
> | (4) Bicycles | $15.00 |
> | (5) Motorized bicycle/mopeds | $37.50 |
> | (6) Golf carts/under-speed vehicles/low-speed vehicles | $50.00 |
> | (7) Rental motor vehicles/vehicles | $50.00 |

(b) All moneys and receipts which are derived from the enforcement of this section shall be credited and paid into a separate fund, which fund shall be known as the Public Service Street Repair Fund. All moneys and receipts credited to such Fund shall be used for the sole purpose of repairing streets, avenues, alleys and lanes within the Village of Put-in-Bay.

{¶ 8} "The constitutionality of a statute or regulation is a question of law to be reviewed de novo." *State v. Whites Landing Fisheries, LLC*, 6th Dist. No. E-16-065, 2017-Ohio-4021, ¶ 15, citing *Thorp v. Strigari*, 155 Ohio App.3d 245, 2003-Ohio-5954, ¶ 10 (1st Dist.). "When considering the constitutionality of a statute, [a reviewing court] 'presume[s] the constitutionality of the legislation, and the party challenging the validity of the statute bears the burden of establishing beyond a reasonable doubt that the statute is unconstitutional.'" *Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, ¶ 12, quoting *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, ¶ 18. Parties have a "heavy burden" when attempting to rebut the presumption of constitutionality. *Dayton* at ¶ 12, citing *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 10 (1989).

{¶ 9} At the trial court, appellees argued Section 858.01 is unconstitutional pursuant to the Home Rule Amendment. Article XVIII, Section 3 of the Ohio Constitution, known as the Home Rule Amendment, provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

{¶ 10} The parties dispute the appropriate analysis this court must employ in considering the Home Rule Amendment challenge to Section 858.01. Appellees urge us to follow the Supreme Court of Ohio's decision in *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, which outlined a three-step home-rule analysis. Those three steps are the following: (1) determine whether the ordinance at issue involves an exercise of local self-government or of local police power; (2) if the ordinance is an exercise of police power, review the statute under the four-part test announced in *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, syllabus, to determine whether the ordinance qualifies as a general law; and (3) determine whether the ordinance conflicts with the statute. *Concealed Carry* at ¶ 24-26. However, the Supreme Court expressly stated that "[i]f the ordinance is one relating solely to matters of self-government, 'the [three-step] analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.'" *Id.* at ¶ 24, quoting *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, ¶ 23. The power of taxation is among the grant of authority to exercise all powers of local government contained in the Home Rule Amendment. *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 227 (1919).

{¶ 11} This court previously considered a constitutional challenge to Section 858.01 in *S.B. Carts, Inc. v. Village of Put-in-Bay*, 161 Ohio App.3d 691, 2005-Ohio-3065 (6th Dist.). In that case, the parties disputed at the trial court level whether the assessment in Section 858.01 was a fee or a tax. The trial court concluded the assessment was a tax. *S.B.*

Carts at ¶ 5-7. On appeal to this court, the only two issues were (1) whether Ohio law prevented the village from imposing the tax upon businesses with vehicles for hire, and (2) whether the tax violated the Equal Protection Clauses of the Ohio Constitution and the United States Constitution. *Id.* at ¶ 9. Because this court construed Section 858.01 as a tax in the course of its analysis in *S.B. Carts*, we construe Section 858.01 as a tax here.

{¶ 12} Construing Section 858.01 as a tax, then, we need not engage in the complete three-step analysis outlined in *Concealed Carry*. Rather than a three-step home-rule analysis, the issue becomes one of preemption. The trial court relied on the Supreme Court's decision in *Firestone* for the proposition that "[n]o municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes." *Firestone* at syllabus. The trial court then concluded that because R.C. 4503.02 levies an annual license tax upon the operation of motor vehicles, R.C. 4504.02 enables counties to enact a tax of $5 per motor vehicle, and R.C. 4504.06 permits municipalities to levy an annual license tax upon the operation of motor vehicles on the public roads or highways where the county has not done so, Section 858.01 is for a "similar purpose" of a tax already levied by the state and, thus, is impermissible.

{¶ 13} However, more than 60 years after its decision in *Firestone*, the Supreme Court of Ohio issued its decision in *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599 (1998), which held that "[t]he taxing authority of a municipality may be preempted or otherwise prohibited only by an express act of the General Assembly." *Cincinnati Bell* at syllabus. This decision expressly overruled a line of cases applying the doctrine of

implied preemption that originated in *Firestone*, clarifying that the appropriate inquiry is one of express preemption. *Id.* at syllabus (overruling the Supreme Court's previous decision in *Cincinnati v. Am. Tel. & Tel. Co.*, 112 Ohio St. 493 (1925), upon which *Firestone* relied, and its decision in *Haefner v. Youngstown*, 147 Ohio St. 58 (1946), which relied on *Firestone*). While *Cincinnati Bell* did not expressly overrule *Firestone*, we agree with the village that *Firestone* does not contain an accurate recitation of the current law in Ohio. *See New York Frozen Foods, Inc. v. Bedford Heights Income Tax Bd. of Review*, 150 Ohio St.3d 386, 2016-Ohio-7582, ¶ 29 ("the preclusive power of state law is confined to those limitations that are expressly stated in the state legislation—there is no implied preemption of local tax law"). Instead, we rely on *Cincinnati Bell* and the doctrine of express preemption. Our inquiry, then, is whether the General Assembly has acted to expressly preempt or prohibit the ability of a municipality to impose a tax on a business that operates vehicles for hire.

{¶ 14} Following *Cincinnati Bell*, the General Assembly enacted R.C. 715.013, which provides:

> (A) Except as otherwise expressly authorized by the Revised Code, no municipal corporation shall levy a tax that is the same as or similar to a tax levied under Chapter 322., 3734., 3769., 4123., 4141., 4301., 4303., 4305., 4307., 4309., 5707., 5725., 5726., 5727., 5728., 5729., 5731., 5735., 5736., 5737., 5739., 5741., 5743., 5747., 5749., or 5751. of the Revised Code.

Appellees do not allege that Section 858.01 is the same as or similar to any of the statutes enumerated in R.C. 715.013. Moreover, we have examined these provisions of the Revised Code and do not find any express statutory prohibition of the tax imposed by Section 858.01.

{¶ 15} Further, the statutes cited by the trial court similarly do not expressly preempt or prohibit Section 858.01. Though R.C. 4504.06 seems similar, at first blush, by permitting a municipal corporation to "levy an annual license tax * * * upon the operation of motor vehicles on the public roads or highways" at the rate of $5 per motor vehicle, this statute makes no mention of a tax imposed on a *business* operating a vehicle-for-hire company. By the plain language of Section 858.01, it applies to businesses based on the size of their vehicle-for-hire fleets, and it is not an annual license tax of the type contemplated in R.C. 4504.06. *See S.B. Carts* at ¶ 12 (concluding that "[w]hile the legislature of this state authorized certain vehicle-license taxes * * *, it has not acted affirmatively to limit a municipality's authority to impose a special tax on vehicles for hire," and finding Section 858.01 to be "a valid exercise of the village's taxing power"). Thus, we conclude, as we did in *S.B. Carts*, that Section 858.01 is a valid exercise of the village's taxing power.

{¶ 16} Appellees next argue that even if we were to find Section 858.01 to be a valid exercise of the village's taxing power under the Home Rule Amendment, the

ordinance is nonetheless unconstitutional under Article XII, Section 5a of the Ohio Constitution, which provides:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

Appellees assert that because no Ohio statute authorizes the village to assess the tax under Section 858.01, it is therefore invalid under Section 5a.

{¶ 17} In *Garrett v. Cincinnati*, 166 Ohio St. 68 (1956), the Supreme Court of Ohio explained that Section 5a "is a limitation only on the use of state-imposed fees, excise and license taxes and is not applicable to fees imposed by municipal corporations." *Id.* at 69. Thus, because Section 858.01 is tax imposed by a municipality, Section 5a does not operate to limit it. Accordingly, we reject appellees' argument that Section 5a provides an alternate ground of affirmance of the trial court's decision.

{¶ 18} Having concluded that Section 858.01 is a valid exercise of the village's taxing power, the trial court erred when it granted appellees' motions to dismiss. Therefore, we sustain the village's first assignment of error.

IV. Second Assignment of Error – Res Judicata and Stare Decisis

{¶ 19} In its second assignment of error, the village asserts the trial court erred when it failed to apply the doctrines of res judicata and/or stare decisis when it considered appellees' motions to dismiss. However, having determined in our resolution of the village's first assignment of error that the trial court erred in granting appellees' motions to dismiss, the village's second assignment of error is, therefore, moot and we need not address it.

V. Disposition

{¶ 20} Based on the foregoing reasons, the trial court erred when it granted appellees' motions to dismiss as Section 858.01 is a valid exercise of the village's taxing power. Having sustained the village's first assignment of error, which rendered moot the village's second assignment of error, we reverse the judgments of the Ottawa County Court of Common Pleas and remand the matter to that court for further proceedings consistent with this decision. Pursuant to App.R. 24, costs are assessed to appellees.

Judgments reversed; cause remanded.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Susan D. Brown, J. _____ _____
JUDGE

Betsy Luper Schuster, J.
CONCUR. _____
JUDGE

Jennifer Brunner, J. _____ _____
CONCURS IN PART AND JUDGE
DISSENTS IN PART.

Judges Susan D. Brown, Betsy Luper Schuster, and Jennifer Brunner, Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

BRUNNER, J., concurs in part and dissents in part.

{¶ 21} I concur with the majority in reversing the trial court's decision, but I respectfully dissent from the majority's decision on the basis for reversal. I would remand

the matter to the trial court with instructions that it vacate its decision as to the state constitutional question and rather determine whether the ordinance, Section 858.01 of the Codified Ordinances of the Village of Put-in-Bay ("Section 858.01"), applies to appellees. I would instruct the trial court that it must strictly construe the ordinance against the Village of Put-in-Bay (the "village"), because it imposes a criminal penalty for violation.

{¶ 22} Even through our review is de novo, we are bound by the same law as the trial court, that is, to avoid constitutional questions if matters can be settled with a legal analysis. *Hall China Co. v. Pub. Util. Comm.,* 50 Ohio St.2d 206, 210 (1977) ("Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary. *State, ex rel. Herbert, v. Ferguson* (1944), 142 Ohio St. 496."). In short, the question of whether the assessment of Section 858.01 is a fee or a tax need not be considered if the ordinance does not apply to appellees.

{¶ 23} In this such analytical posture, I would remand for the reason that the trial court held a hearing and is in the best position to know whether additional facts need to be adduced, and, thereby, to determine the facts on which a legal ruling must be based. Appellees dispute whether the law applies to them factually, legally, and constitutionally. When parties dispute whether their actions were sufficient to satisfy specific terms "in either a civil or criminal trial, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. * * * On appeal a reviewing court must defer to the determination of the [trier of fact] as to such issues, because it was in the best position to observe the witness' demeanor, voice inflection and mannerisms."

(Citations omitted.) *Savoy Hospitality, LLC* v. 5839 *Monroe St. Assocs. LLC*, 6th Dist. No. L-14-1144, 2015-Ohio-4879, ¶ 28. And since the Supreme Court of Ohio in *Cincinnati Bell Tel. Co. v. Cincinnati,* 81 Ohio St.3d 599 (1998) did not overrule its longstanding decision, *Firestone v. Cambridge,* 113 Ohio St. 57 (1925), barring application of Section 858.01 based on the preemption doctrine, I hold great concern summarily treating *Firestone* as overruled and no longer applicable under any circumstance, especially since Section 858.01 imposes a criminal penalty for failure to comply with it.

{¶ 24} In conducting statutory interpretation of criminal laws we are bound under the rule of lenity (now codified for state statute in R.C. 2901.04(A)). "This court has stated that the rule of lenity requires that a court 'not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous.' *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 38." *State v. Stevens*, 139 Ohio St.3d 247, 2014-Ohio-1932, ¶ 12. It is apparent that the state of the law on state constitutional Home Rule Amendment as applied to Section 858.10 contains such ambiguity that we cannot first resolve it as an appellate court unless specific facts are found and the law applied to them; and then the matter must be construed according to the rule of lenity in this criminal law context. *See also Rewis v. United States*, 401 U.S. 808, 812 (1971). The rule of lenity applies to municipal ordinances:

> In the criminal context, the rule of lenity provides that statutes defining offenses or penalties shall be strictly construed against * * * The

> "touchstone" of the rule of lenity is "statutory ambiguity." * * * If a statute is not ambiguous, the rule of lenity does not apply. *United States v. Johnson*, 529 U.S. 53, 59, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000) ("Absent ambiguity, the rule of lenity is not applicable to guide statutory interpretation.").

(Citations omitted.) *Columbus v. Mitchell*, 10th Dist. No. 16AP-322, 2016-Ohio-7873, ¶ 6. Because "statutory ambiguity" necessarily involves not only the criminal municipal ordinance of the unincorporated statutory village, Put-in-Bay, but also the application of the state constitution to the validity of the ordinance and its relationship to state statutes relating to motor vehicles, lenity applies.

{¶ 25} While some would say that resolving the tension between these enactments is our role, I do not agree with the majority that we can simply say *Cincinnati Bell* overruled *Firestone,* when the Supreme Court did not, itself, say so. Taking all of these enactments together, which is necessary to answer the question, I find a lack of clarity about whether the ordinance applies to appellees. As such, the rule of lenity requires strict construction against the village. It is more appropriately the trial court, first making factual findings and thereafter applying the ordinance to appellees, that should make this determination. In doing so, it must strictly construe Section 858.01 against the village, because the ordinance requires a criminal penalty. That the trial court has previously found the ordinance to be a tax and this Sixth District Court of Appeals performed an

analysis using that characterization does not bind the trial court from considering the ordinance based on its application to these appellees.

{¶ 26} Rather than to resolve state constitutional questions, I would reverse the trial court's decision, remand and instruct the trial court to use strict construction in keeping with the rule of lenity to determine if Section 858.01 applies to appellees. Rather than interpret anew the state constitution, we should first apply its more basic principles to ensure a constitutionally sound criminal proceeding. Because the trial court is in the best position to do that, I would remand with instructions that it proceed consistent with this opinion.

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article XII. Finance and Taxation (Refs & Annos)

OH Const. Art. XII, § 5a

O Const XII Sec. 5a Vehicle-related revenue to be used only for highway purposes from certain taxes relating to vehicles for other than highway and related purposes

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

(Initiative petition, adopted eff. 1-1-48)

Const. Art. XII, § 5a, OH CONST Art. XII, § 5a
Current through Files 1 to 9, and 11 to 14 of the 133rd General Assembly (2019-2020).

End of Document

17.

Print

Put-in-Bay, OH Code of Ordinances

CHAPTER 858
Rental Vehicles

858.01 License fees; deposit into Public Service Street Repair Fund.

858.02 Notice of traffic laws; use of seat belts in golf carts; reflective material requirements for golf carts.

858.99 Penalty.

CROSS REFERENCES

Use of seat belts required - see TRAF. 438.29

Commercial and heavy vehicles - see TRAF. Chs. 440, 442

Bus routes - see TRAF. 440.12

Bus stops - see TRAF. 452.10

Misconduct involving buses - see GEN. OFF. 642.30

Taxicabs - see B.R. & T. Ch. 866

858.01 LICENSE FEES; DEPOSIT INTO PUBLIC SERVICE STREET REPAIR FUND.

(a) Owners of vehicles used for the transportation of persons or property, for hire and for use within the Village, shall pay by June 15 of each year, an annual, nontransferable vehicle license fee for each vehicle as follows:

(1) Buses and/or trolleys and/or self-powered trams	$300.00
(2) Tour train cars and/or towed tram car/unit	$225.00
(3) Taxicabs:	
A. Motor-driven	$225.00
B. Horse-driven	$225.00
C. Pedicab bicycles	$50.00
(4) Bicycles	$15.00
(5) Motorized bicycle/mopeds	$37.50
(6) Golf carts/under-speed vehicles/low-speed vehicles	$50.00
(7) Rental motor vehicles/vehicles	$50.00

(b) All moneys and receipts which are derived from the enforcement of this section shall be credited and paid into a separate fund, which fund shall be known as the Public Service Street Repair Fund. All moneys

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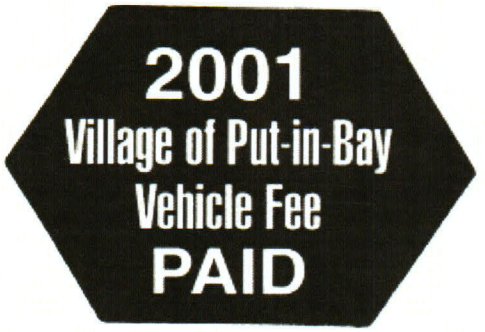
and receipts credited to such Fund shall be used for the sole purpose of repairing streets, avenues, alleys and lanes within the Village of Put-in-Bay.

(Ord. 645-95. Passed 12-14-95; Ord. 928-08. Passed 4-7-08; Ord. 1007-11. Passed 4-11-11; Ord. 1039-11. Passed 5-14-12.)

(c) A Vehicle Fee Paid document shall be exhibited in a prominent place on each bus/trolley/self powered tram, tour train car and/or towed tram car/unit, taxi cab, bicycle, motorized bicycle/moped, rental motor vehicle and golf cart/under- speed vehicle/low-speed vehicle car at all times.



(d) In addition to any other penalties imposed by this chapter, the Fiscal Officer is authorized, directed and empowered to collect all license fees, charges, and penalties imposed by this chapter which are not paid when due by a civil action at law, or by other appropriate proceedings, in any court of competent jurisdiction in the name of the Village from any owner of a vehicle used for the transportation of persons or property for hire, or any other person who is liable to pay the fees, charges, and penalties imposed by this chapter. If legal action is taken to collect any amount owned under this chapter the Village shall be entitled to recover the cost of such legal action from the person responsible, including reasonable attorney fees.

(Ord. 1153-17. Passed 5-15-17.)

858.02 NOTICE OF TRAFFIC LAWS; USE OF SEAT BELTS IN GOLF CARTS; REFLECTIVE MATERIAL REQUIREMENTS FOR GOLF CARTS.

(a) Ohio R.C. 4513.262, which requires the installation of seat belts in passenger cars, shall apply to golf carts sold, rented, leased or operated within the Village limits, except that this section shall require a seat belt for each person on the golf cart.

(b) Each person on a golf cart shall be required to fasten the seat belt.

(c) Each owner or operator of a business which rents or leases golf carts shall post a sign in legible lettering, in a conspicuous place within that area of the place of business to which customers requesting to rent or lease golf carts are directed enter into such agreement, which sign shall state as follows:

"NOTICE"

"Pursuant to Ohio law a golf cart is a motor vehicle, and when operated on public streets and highways is subject to all traffic laws governing the operation of a motor vehicle. Golf carts operated on public streets and highways shall be operated only by persons having a valid driver's license.

Each person on a golf can is required to wear a fastened seat belt while the vehicle is in operation.

"Put-in-Bay Village Ordinance, Section 858.02."

(d) All owners or operators of businesses which rent or lease golf carts shall comply with the provisions of division (b) of this section by July 11, 1996.

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(e) Each owner or operator of a business which rents or leases golf carts shall place on or near the steering wheel of each golf cart to be rented or leased a sticker/sign which, states as follows:

"THIS GOLF CART IS A LICENSED MOTOR VEHICLE. OHIO MOTOR VEHICLE LAWS APPLY EQUALLY TO AUTOMOBILES AND GOLF CARTS, INCLUDING:

DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

NO OPEN CONTAINERS ON GOLF CARTS

NO UNDERAGED DRIVERS OF MOTOR VEHICLES

YOU MUST HAVE A VALID DRIVERS LICENSE TO OPERATE THIS VEHICLE

POSSIBLE PENALTIES FOR VIOLATIONS INCLUDE $1,000 AND/OR 6 MONTHS IN JAIL

(f) All owners or operators of businesses which rent or lease golf carts, in addition to the lighting requirements for golf carts, shall attach to the perimeter of all sides of the roof of the golf cart, if a roof is installed, strips of alternate reflective material, which reflective material on the rear is to be red in color, on the sides is to be yellow in color, and on the front is to be white in color. All reflective material strips to be applied are to be a minimum of 18 inches in length and one inch in width. The reflective strips are to be mounted so as to be visible from a distance on not less than 500 feet to the rear when illuminated by the lawful lower beam of headlamps during the time from sunset to sunrise, and at any other time when there are unfavorable atmospheric conditions, or when there is not sufficient natural light to render discernible persons, vehicles, and substantial objects on the roadway at a distance of 1,000 feet. All owners or operators of businesses which rent or lease golf carts shall comply with the provisions of this section by July 15. 2012.

(g) A business license shall not be issued to any business which does not comply with this section.

(Ord. 659-96. Passed 6-13-96; Ord. 1007-11. Passed 4-11-11; Ord. 1039-12. Passed 5-14-12; Ord. 1042-12. Passed 6-11-12.)

858.99 PENALTY.

(a) Whoever violates Section 858.01 is guilty of a misdemeanor of the fourth degree and shall be fined not more than two hundred fifty dollars ($250.00) or imprisoned not more than 30 days, or both. A separate offense shall be deemed committed for each rental vehicle for which the vehicle license fee provided for in Section 858.01 remains unpaid.

(Ord. 645-95. Passed 12-14-95.)

(b) Whoever violates Section 858.02 is guilty of a minor misdemeanor and shall be fined not more than one hundred fifty dollars ($150.00).

(Ord. 659-96. Passed 6-13-96; Ord. 1007-11. Passed 4-11-11; Ord. 1039-12. Passed 5-14-12.)

20.