IN THE OTTAWA COUNTY COMMON PLEAS COURT

State of Ohio/Put-in-Bay	)	Case No. 15 CR 046
	)	
Plaintiff,	)	Judge Winters
	)	
vs.	)	**DEFENDANT'S MOTION TO DISMISS BECAUSE THE UNDERLYING ORDINANCE IS UNCONSTITUTIONAL**
	)	
Mark Mathys,	)	
	)	
Defendant.	)	

Defendant is charged with no paying a fee or tax levied by Put-in-Bay Ordinance §858.01. That ordinance is unconstitutional:

> "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. City of Cambridge, 113 Ohio St. 57, 148 N.E. 470 (1925), syllabus.

Hence, no fee is required to be paid, and therefore, the prosecution for nonpayment must be dismissed with prejudice.

Ordinance 858.01 states in its entirety 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:	

Under this provision "moneys derived from fees, excises, or license taxes relating to" the operation or use of vehicles shall be expended for a ***statutory*** purpose. This means that a ***statute*** must enable the expenditure. That is, §5a gives the state General Assembly the exclusive power to *expend* monies derived from fees, excises, or license taxes relating to operation or use of vehicles. By logical implication then, only the General Assembly may *levy* such fees or taxes since it would make no sense for a municipality to levy a fee, excise, or license tax if the moneys derived from such a fee, excise, or tax could not be expended. So, in truth, no municipality has the power to levy fees *on motor vehicles* unless the state legislature enables it. Here, because no statute expends the fees or taxes collected under the village's ordinance (only the ordinance makes the expenditure), the taxes or fees imposed under the ordinance may not be levied in the first place.

Indeed, this concept explains why R.C. 4504.06 exists: absent statutory enablement of the five-dollar fee per vehicle, no motor vehicle tax or fee may be levied in the first place. If a bigger fee could be imposed unilaterally, R.C. 4504.06 and the entirety of Chapter 4504—relating to "Local Motor Vehicle License Tax"—would be pointless.[4] This court should avoid an outcome that construes any part of a statute, let alone an entire statutory scheme, as meaningless.[5]

The meaning of Chapter 4504 is that, in its absence, no municipality may impose a fee in addition to that imposed by the state under Chapter 4503. A statute must always

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[4] Similarly, R.C. 4504.10 "Preemption of right to levy" would be nonsensical if the village's ordinance were upheld. R.C. 4504.10 states that the General Assembly imposing a state tax does not preempt a local vehicle tax enabled under Chapter 4504. This means that all other local taxes are preempted. Otherwise, why mention that those local taxes levied under Chapter 4504 are not preempted?

[5] *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 929 N.E.2d 448, 2010-Ohio-2550, ¶21. ("Our role...is to evaluate a statute "as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.")

enable a levy on the use of motor vehicles and provide for the expenditure. Here, the moneys derived under §858.01 indisputably "relate to" the operation or use of vehicles since the ordinance *makes it a crime to operate certain vehicles absent payment of the fee*. Yet the moneys derived from any payments collected under the ordinance are not expended for *statutory* purposes. Rather, *the ordinance* provides for the expenditure, hence, the ordinance violates Art. XVIII, Sec. 13 and Art. XII, Sec. 5a.

Article XVIII, Sec. 13 and Article XII, Sec. 5a work in harmony. If the General Assembly imposes a fee or tax on motor vehicles, then only that fee or tax may be imposed. *Firestone*, supra. ("***No municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes.***") Otherwise, every municipality could have its own separate fee or tax, which would create absolute chaos for motorists in this state. A municipality may impose a vehicle tax in addition to that which is imposed under R.C. 4503.02 only if the state enables it. A prime example is R.C. 4504.06.

In Chapter 4504, the state enacted statutes permitting counties or municipalities to levy an additional five-dollar fee per motor vehicle beyond what the state already levies.

Again, this statutory enablement—and its limitation of five dollars—would serve no purpose if the village's ordinance were upheld because then municipalities could just unilaterally impose additional fees relating to the use or operation of motor vehicle with impunity and also expend the moneys derived from the fee or tax for no *statutory* purpose whatsoever. Indeed, why stop at $50? Or $225? Or $300? Why not just say every vehicle owner must pay $500 per vehicle and the city can use it for whatever it wants? Upholding the village's ordinance would have no outer limit. It is unconstitutional.

III. *S.B. Carts* is inapposite.

The village will no doubt cite *S.B. Carts v. Put-in-Bay*[6] and insist that the Sixth District upheld §858.01 already. The village will also likely argue that *S.B. Carts* bar further challenges under the doctrine of res judicata. The village would be wrong.

First, res judicata does not apply in criminal cases, where the risks are categorically different than in civil cases.

Second, *S.B. Carts* did not involve challenges under either Art. XVIII, Section 13 or under Art. XII, Sec. 5a. Thus, *S.B. Carts* does not control these challenges.[7]

In fact, *S.B. Carts* did not even apply the syllabus of *Firestone v. City of Cambridge*. ("No municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes.") This law is directly from a Supreme Court syllabus, and therefore, this court must apply the syllabus law over the *S.B. Carts* decision:

> All trial courts and intermediate courts of appeal are charged with accepting and enforcing the law as promulgated by the Supreme Court and are bound by and must follow the Supreme Court's decision.[8]

This is especially true here, where the *S.B. Carts* opinion does not even involve the same constitutional provisions asserted by defendant in this case.

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[6] 61 Ohio App.3d 691, 31 N.E.2d 1052, 2005 -Ohio- 3065.

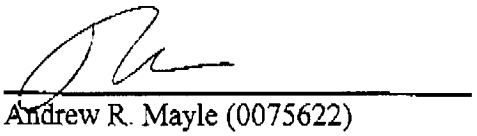
[7] *State ex. rel. Gordon v. Rhodes*, 158 Ohio St. 129, 131, 107 N.E.2d 206 1952 ("a reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication.")

[8] *State v. Browning*, 2001 WL 823648, *2, quoting *World Diamond, Inc. v. Hyatt Corp.* (1997), 121 Ohio App.3d 297; *Cf., Regain v. Scioto Beverages Company*, 10th Dist., 1979 WL 209044, *3, (" It is not the province of this court, an intermediate court of appeals, to overrule the numerous Supreme Court decisions to this effect upon the grounds that the Supreme Court has adopted an unconsitutional common law doctrine, even if we were in agreement that such common law doctrine be unconstitutional. An intermediate court of appeals has no jurisdiction to overrule prior decisions of the Supreme Court of Ohio. Rather, such a court of appeals is bound by such decisions and must follow them.")

CONCLUSION

The underlying ordinance is unconstitutional, and therefore, this case should be dismissed with prejudice.

Respectfully submitted,



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A true and accurate copy of the foregoing was sent to the following on July 15, 2015 via ordinary mail:

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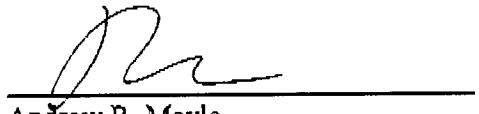
315 Madison Street, 2nd Floor
Port Clinton, Ohio 43452



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