

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF MONROE**

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LAWRENCE KRIEGER,

Plaintiff/Petitioner,

vs.

**PLAINTIFF/  
PETITIONER'S REPLY  
MEMORANDUM  
OF LAW**

CITY OF ROCHESTER,

Index No. 2013/6121

Defendant/Respondent.

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Although this is a memorandum of law, it makes more sense to elaborate the factual issues in the form of a continuous discussion instead of the point-by-point format demanded of an affirmation. It will thus address the city's factual claims first, leaving the discussion of legal issues to the end.

The city's factual argument is that red light violations are dangerous—indeed, that they are “very dangerous and contribute[] to many accidents in the City of Rochester” (Joseph affidavit, 1, par. 6; similarly in Richards and McIntosh affidavits). The locations for the red light cameras were “chosen because of the accident history, traffic volume and red light violations at those intersections, and for other safety related reasons” (McIntosh affidavit, 2, par. 11; similarly in Richards affidavit). According to the city, studies in other jurisdictions have shown the effectiveness of such cameras, and data from the first few years of the city's red light operations supposedly bears out the effectiveness of the scheme (City's Ex. 11, esp. 612).

Every one of these assertions is dubious. To begin with, the city offers no evidentiary support whatsoever for its claim that red light violations are “very dangerous.” What data is

available suggests that red light violations are minor factors in the overall highway traffic safety picture. The excerpts from the most recent official report of traffic accidents in Monroe County, including Rochester, which are attached to the reply affirmation for the plaintiff/petitioner as Exhibit A, show that disregard of traffic control devices accounted for less than five percent of all traffic accidents for the years 2009-2011 (Ex. A, Table 6[P], page 4 of 7). Anecdotal accounts and conclusory claims from representatives of the traffic-control and red-light-camera industries, such as those found in some of the bill jackets, do not have any probative value. Neither do the equally conclusory statements of city officials, whether those officials are the Mayor or those with less exalted titles. This is simply not a major problem, and no evidence has been submitted to show that it is.

It should be noted that the issue here is not whether or not the city should be able to prevent drivers from running red lights. The city can do this by enforcing the law as it stood before the red light camera scheme was created. It is whether or not the public is endangered because this form of enforcement is ineffective. Such a justification is found in *Matter of Rosenthal v Hartnett* (36 NY2d 269, 272-273 [1975]), for example, where the legislature found that congestion in the criminal courts made enforcement of traffic laws in New York City all but impossible. It is not found here, in spite of the assertion in the bill jacket for another law stating that conventional enforcement has been ineffective. (Since there continue to be accidents caused by disregard of red lights in spite of the cameras, the same could be argued of this form of enforcement, too.)

Certainly it is more expensive for the city to use police officers instead of the “cost-effective” automatic system now deployed. But cost-effectiveness is not the same as impracticality. In the end, then, it comes down to the fact that the city finds it cheaper and indeed

more profitable to use the cameras than it does to use its police department, a fact substantiated by the affidavit of Jeff Eichner (p.11-12<sup>1</sup>). That economic concern, and not the need to enforce traffic laws, is the only state interest at stake.

The plaintiff/petitioner submits that he has shown the lack of a rational basis for this legislation, which limits due process rights but does not respond to a genuine public safety problem. Moreover, there is no proof that red light cameras can or do alleviate that problem. Christopher Delaney, who created the sole document found in the record that sets out some evidentiary basis for the supposed benefits of the red light camera scheme, does attempt to consider even the factors that go against the city's position (see p. 613), but he does not weigh all the factors that would be necessary for proper analysis of the statistics. As a result his document is of little or no weight.

Delaney's methodology was to compare the one- or two-year period since the installation of each particular camera with the one- or two-year period before the installation (p. 610). Since the cameras were installed at different times this makes it impossible to compare the change in accident rate at the relevant intersections with the change in accident rates within the city as a whole. He is reduced to conceding that "the reductions at red light camera intersections were likely influenced by a general downward trend in collisions citywide" (p. 613). Unfortunately, there is no way to determine with any precision the extent to which this took place, and this is surely an important question.

It can be shown, however, that the injury crash rate per mile of highway in the City of Rochester dropped by more than sixteen percent from 2010 to 2011, the last year for which statistics are available (Ex. A, page 7 of 7). This is part of a general trend, apparent from this and the preceding page in the official records, where accidents in Rochester and the inner suburbs

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<sup>1</sup> All references not otherwise identified are to Bates numbers in the city's exhibit package.

have declined and those in the outlying towns and villages have remained steady or have increased. The table provided by the city shows that injury collisions at the camera-enforced intersections have decreased by 32 percent and collisions overall declined by fourteen percent (City's Ex. 11, p. 612). At least half of the decline in injury causing accidents would thus be accounted for by factors other than the use of cameras.

Considering the city's raw numbers in more detail, injury-producing right-angle collisions fell by 36 percent and injury-causing collisions caused by disregard of a traffic signal decreased by 42 percent, figures which may or may not be statistically significant in light of the small numbers (36 to 23 and 26 to 15 accidents), especially when allowance is made for the overall decline in accidents. (If injury accidents declined by 16.67 percent regardless of enforcement changes, the 36 "pre-camera" right angle and 26 signal-disregard accidents would be expected to decline to 30 and 21 or 22 even without additional enforcement.)

The most common unintended consequence of red-light camera schemes has been a rise in rear-end collisions, a fact noted by Mr. Delaney (p. 610-611). His figures, however, show a decline in rear-end collisions comparable to the overall decline in accidents at these intersections. What is more, the data shows a significant decline in serious accidents not related to red light violations which is somewhat larger than the overall drop. Assuming that right angle collisions and collisions caused by disregarded traffic control devices are separate categories, 25 out of the 87 total pre-installation injury collisions were caused by other factors. (These include rear-end collisions.) After installation, 21 out of a total of 59 injury collisions were caused by other factors. This is close to a 20 percent decline and it cannot be attributed to the cameras at all.

The confusing patterns shown in the city's figures points to another problem, the failure of the report to apply the statistical methodology needed to make a proper evaluation of the raw

data. None of these deponents is qualified as an expert. The role played by various factors in highway accidents is not within the competence of the ordinary police officer, for example. The plaintiff/petitioner will grant that Sergeant Joseph has had extensive experience in assessing the cause of the accidents he has investigated, but this does not mean that he has the knowledge of statistics and statistical analysis that would enable him to give probative opinion evidence as to the effect of the red light camera scheme on the overall accident rate in the city and/or at intersections where red light cameras are installed. Neither does Delaney, and this further weakens his evidence.

There is, for one thing, no use of a control set of intersections. No valid assessment of the effect of a traffic enforcement device can be made without a comparison between the subject intersections and those where the enforcement device is not in use. This would be no different from conducting a drug test where no control group was used. Because of this, there is no basis for any conclusion about the effectiveness of the cameras one way or the other.

The other major problem with the city's statistics is that they fail to correct for the statistical problem called "regression to mean." This is essentially the failure to account for the random variation of accident rates, which is accentuated by choosing locations where accident rates have been high. These are likely to experience a drop in accidents as "things even out" over time. As one study included in the city's exhibit package states:

The accident history of an intersection during the "before period" is an important clue to what would have been its safety performance during the "after" period. However, that same accident history may also be one of the reasons that that particular intersection was selected for treatment. This factor makes prediction of safety performance during the "after" period subject to bias called "regression to the mean" (RTM) (City's Ex. 13, 28 [715]).

As one of the scholarly papers attached to the affirmation on behalf of the plaintiff/petitioner states,

RTM occurs when safety measures are implemented at sites where there have previously been large numbers of crashes. When such large numbers have wholly or partly been due to random variation, decreasing accident numbers can be expected even without any safety measures. When RTM occurs, the effectiveness of safety measures will therefore be overestimated (Ex. B, 898 [2]).

The affidavits submitted by the city confirm that the intersections chosen for camera installation were those with high accident rates, and thus the problem of RTM bias should have been taken into account.<sup>2</sup>

As that same paper shows, correction for RTM bias virtually eliminates the supposed beneficial effects of red light camera; there is a correlation between failure to account for RTM bias and a finding that red light cameras are an effective tool. Much of the improvement credited to the use of cameras, in other words, is caused by the normal ups and downs of accident incidence at any given intersection, combined with a tendency to “cherry pick” locations for cameras when accident rates at that site happen to be high. (Since the city has been installing cameras gradually, monitoring accident rates along the way, this problem may well be exacerbated here.) A later paper by the same author modifies this stance, but she concludes that the only statistically significant decrease in injury-producing accidents was found in the case of right-angle collisions (Ex. C, 88 [13]).<sup>3</sup> Correcting for RTM bias still removes all other apparent benefits.

In short, the effectiveness of red light camera overall is dubious at best. Another extensive study, of which only excerpts are attached for reasons of economy, concluded that “*there is no evidence that the RLC program is decreasing accidents*” and that data showed not only that the

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2 The City of Columbus reports submitted by the defendant lack probative force because they show the same lack of control and failure to correct for RTM bias.

3 The papers by Alena Erke (now Alena Høye), plaintiff/petitioner’s Exhibits B & C, make reference to the Iowa and Texas studies reproduced in the city’s exhibit package.



camera-enforced intersections did not benefit from an overall decline in accidents but that accidents at those intersections went up (Ex. D, 48 [5]).

Factually, then, the proof shows no significant safety issue caused by red light violations, which account for less than five percent of traffic accidents in Monroe County, and no proof that conventional enforcement is ineffective. There is no proof that the red light cameras in the City of Rochester have played any role in reducing the accident rate, which has been declining overall, and the use of cameras has not been clearly shown to have any real effectiveness in reducing accidents anywhere. There is no doubt that the affiants all *believe* that by installing these cameras they have helped resolve a serious safety issue. The proof, however, does not substantiate that belief.

Just how insignificant the problem of red light running is can be shown by one more fact. It is accepted by all concerned that the revenue from the program is just under four million dollars a year. At \$50.00 a ticket this translates to something close to 80,000 tickets a year. According to the city's own numbers, there were 41 collisions involving disregard of a traffic signal at the relevant intersections over a one-year period (for 18 intersections) or a two-year period (for ten). Thus, running a red light resulted in an accident in something less than 0.05 percent of the cases. More to the point, perhaps, is the fact that even if the city's statistics were reliable, camera-enforced intersections saw a reduction of only 22 accidents, while more than 350 times as many people were ticketed for accident-free violations. Correct for the general decline in accidents and the disparity is even more vast.

Every accident is unfortunate, of course, but the question here is whether it is worth surrendering some of the essential elements of due process because of this statistically insignificant danger which at best was reduced by the slightest of percentages. Indeed, the

contrast between the huge number of car owners who are fined under the law and the minuscule number of accidents at those intersections makes any statistical comparison completely valueless.

And there is no doubt that due process considerations are present here. These are not resolved simply by arguing that the enforcement method is an effective one, it should be added; both the Nazis and the Communists were very effective at controlling street crime, but the price for that degree of security would be far too high for a free society to tolerate.

This is a reply memorandum, and as such it is limited to the issues raised in the city's response. As far as legal arguments go the city has, in fact, provided very little to which a reply is truly needed. Counsel contends that the red light camera scheme should be interpreted as civil rather than as quasi-criminal because "the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other *valid*, our plain duty is to adopt that which will save the Act" (*Blodgett v Holden*, 275 US 142, 148 [1927], cited in *Nat'l Fed. of Indep. Bus. v Sebelius*, 132 S Ct 2566, 2593-2594 [2012]). But this misconstrues the principle involved. What constitutes a quasi-criminal statute in New York is well defined, as is what constitutes a civil one, and the standards have been set out in the plaintiff/petitioner's prior papers. They do not, of course, bear on the subjective intentions of the drafters or the labels put on the law, but neither do they permit a court to consider a quasi-criminal statute to be a civil one simply because that is the only way to find the statute constitutional. This would not be a "possible interpretation."

Counsel also appears to argue that because the prosecution of red light camera tickets goes through an administrative procedure "as a civil liability program" the scheme imposes only civil liability. This is surely backwards. It is the nature of the offense and of the penalty that establish the civil, quasi-criminal, or criminal nature of the proceeding, not the forum in which it




is enforced. It is certainly true that the state can impose civil penalties. This does not mean that it has done so here.

What is most striking about the memorandum of law is what it does not say. At no point does the city consider the case law concerning quasi-criminal penalties or the problems with vicarious liability raised by the plaintiff/petitioner. While comparing the instant scheme to parking enforcement the city makes no mention of *People v Hildebrandt* (308 NY 397 [1955]), which distinguished between parking violations and moving violations and declined to apply the rules pertaining to the first in the case of the second.

The plaintiff/petitioner's case thus remains largely unrefuted. This law does not respond to any social need and the city has not shown that it actually accomplishes any social end. Public safety is not advanced by this program, only the public fisc. The diminution of due process rights that results—the creation of vicarious quasi-criminal liability, the use of testimonial evidence that is not in any effective sense subject to cross-examination, and the unavailability of any evidence that might prove exculpatory—is unjustified by any rational public purpose. We are not made safer by this law. We are merely kept under closer examination. It is and should be held to be unconstitutional.

Dated: September 18, 2013  
Rochester, New York



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