International Municipal Lawyers Association

75th Annual Conference

New Orleans, LA

Title: Legal Trends and the Future of the Road Safety Camera Industry

by

Presenter: **George J. Hittner**

Presenters Title: **General Counsel**

Presenters Office: **American Traffic Solutions, Inc.**

©2010 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 75th Annual Conference, held October 10-13, 2010 in New Orleans, LA. IMLA assumes no responsibility for the policies or positions presented in this report or for the presentation of its contents.

George J. Hittner
George.hittner@atsol.com
(480) 443-7000

American Traffic Solutions, Inc.
7681 E. Gray Road
Scottsdale, Arizona 85260
Main: (480) 443-7000
Fax: (480) 596-4501
www.atsol.com

Legal Trends and the Future of the Road Safety Camera Industry

by

George J. Hittner

Annual Conference
International Municipal Association Lawyers
New Orleans, LA
October 10-13, 2010

I. Introduction

Red-light running and speed have been common causes of motor vehicle crashes and injuries. The primary responsive approach to red light running and speed has been traditional police traffic enforcement, which has gradually given way to automated cameras to work with and supplement police enforcement methods. Intersection safety cameras have been used as early as 1969, and in the United States, the number of programs has grown exponentially since the late 1980's. Intersection safety cameras and speed safety cameras offer the unique potential for traffic enforcement all day, every day, and have produced the sought after effect of discouraging drivers from running red lights and speeding and thereby preventing the injuries associated with such traffic violations.

Statistically, the numbers prove the success of the programs. For instance, a Texas study of 56 intersections in 26 cities suggests intersection safety cameras are effective traffic safety countermeasures and help reduce the frequency of crashes. Collisions decreased 30 percent at intersections with cameras.[1] In Arizona, angle crashes decreased by 42 percent at 10 intersections in Phoenix, and left-turn crashes decreased by 45 percent at 14 intersections in Scottsdale.[2]

[1] Texas A&M- Texas Transportation Institute Yearly Report, November 2008.
[2] The Impact of Red Light Cameras on Safety in Arizona, March 2007, Page 1219.

Historically, intersection safety cameras and speed enforcement programs faced little opposition, and have not seen the amount of litigation, constitutional challenges and general public outcry that are prevalent today. This paper reviews the legal challenges to road safety camera programs, the more prevalent constitutional arguments, and the different ways that States approach and enforce their road safety camera programs.

II. 5th, 6th, 7th, 8th Circuit Opinions

A. Private Investigation License, 5th Circuit Ruling

The 5th Circuit rendered a decision in favor of photo enforcement vendors when it affirmed a U.S. district court's dismissal of a lawsuit claiming that American Traffic Solutions, Inc. and Redflex Traffic Systems, Inc. were required to have a private investigators license in order to operate intersection safety cameras in the State of Texas.[3] Lawsuits alleging vendors are required to have a private investigator license to operate have been common in many states, including Florida, Tennessee, and Louisiana.

In this case, the court found that the Plaintiff's lacked standing to bring the lawsuit, because the Plaintiff's interest in evading the law could not create the requisite standing. The Plaintiff was asking the court to protect an interest that is not protected---his interest in running a red light, but Plaintiff failed to allege sufficient facts to show causation between their purported privacy injury and ATS's non-requirement to obtain a private investigators license.

Plaintiff's bare allegation that ATS collected evidence without a license, without alleging any facts to demonstrate how ATS's lack of license contributed to any invasion of their privacy, did not provide standing for the claim in federal court. Of note, the Texas department that issues private investigators licenses stated that neither ATS nor Redflex had to have a license.

B. Civil or Criminal? 6th Circuit Court Ruling

On March 29, 2010, the 6th Circuit Court affirmed a U.S. District Court's dismissal of a lawsuit that alleged traffic citations issued as part of a road safety camera program violated motorists' constitutional rights. The lawsuits alleged the program was criminal in nature and violated due process rights.[4] Plaintiff sought declaratory and injunctive relief invalidating the ordinance in its entirety as violative of both the federal and state constitutions. The Court held that the district court had accurately set forth the two-part test for determining whether the enforcement scheme is civil or criminal, finding that the district court had applied

[3] *See, Bell v. American Traffic Solutions, Inc*., No. 09-10722 (5th Cir. March 23, 2010).
[4] *See, Mendenhall v. City of Akron and Nestor Traffic Systems, Inc*., No. 09-3061 (6th Cir. March 29, 2010).

the law property and articulated the reasons supporting the conclusion that the enforcement scheme is civil in nature.

Plaintiffs also argued that the ordinance failed to provide constitutionally adequate due process when the competing interests of the government and the individual are balanced. However, the Court pointed out that the district court found the ordinance provided for a notice of the citation, an opportunity for a hearing, provision for a record of the hearing decision, and the right to appeal an adverse decision.

The concern over the enforcement of these tickets being treated as criminal or civil has been a commonly voiced argument against the enforcement of these violations.

C. Due Process, 7th Circuit Court Ruling

The issue at hand in a 7th Circuit court ruling was whether issuing citations to vehicle owners (or lessees) without evidence of who was actually driving the vehicle at the time of the violations is constitutionally permissible. The Court rejected the violator's argument that Chicago's road safety camera program offended their due process rights and acclaimed the prudence of the city's system.[5]

Here, Plaintiffs contended that vicarious liability offends the substantive component of the due process clause. However, the court pointed out that substantive due process depends on the existence of a fundamental liberty interest-and "no one has a fundamental right to run a red light or avoid being seen by a camera on a public street".[6] Only state action that impinges on fundamental rights is subject to evaluation under substantive due process. The Court found that it is entirely rational to fine the owner rather than the driver. "A system of photographic evidence reduces the costs of law enforcement and increases the proportion of all traffic offenses that are detected". The Court ruled that "(f)ining the owner will cause owners to take more care when lending their cars, and often they can pass the expense on to the real wrongdoer". [7]

Also important, the court held that the fact that Chicago's road safety program raised revenue does not condemn it. "Like any exaction, a fine does more than just raise revenue: it discourages the fined activity". The court also held that "photographs are at least as reliable as live testimony, and that the due process clause allows administrative decisions to be made on paper (or photographic) records without regard to the hearsay rule". [8]

---

[5] *See, Idris v. City of Chicago, Illinois, et al*, No.08-1363 (7th Cir. January 5, 2009).
[6] *Id.*
[7] *Id.*
[8] *Id.*

D. Establishment of an Administration Tribunal, 8th Circuit

In a ruling out of Missouri,[9] the State's Supreme Court held that the City of Springfield did not have the legal authority under state law to establish an administrative tribunal to hear appeals of red light violations captured by the Intersection Safety Cameras.

In this case, Springfield had created an administrative system to prosecute violations of Springfield city code section 106-161, a municipal ordinance. If the owner of the vehicle that ran the red light chooses to have a "court date," the proceeding is overseen by a hearing examiner, not a municipal judge. The Court held this violates the statutory requirement that "violations of municipal ordinances be heard and determined only before divisions of the circuit court."[10] Section 479.010. The only administrative procedure that the legislature set up for violations of municipal ordinances such as this is for parking and other nonmoving violations; even then, this administrative procedure is allowed only in the cities of Kansas City and St. Louis.

This holding called for an official reaction, to stress that the Court Opinion did not base its ruling on the legality or constitutionality of the use of intersection safety cameras, but only ruled the Springfield program invalid because the City did not have statutory authority to establish an administrative tribunal for the adjudication of the Intersection Safety Camera violations. The former Missouri Supreme Court Judge issued a legal memorandum to clarify what the Missouri Supreme Court decision in the *Belt* case meant. Eventually, because of the substantial mischaracterization of the decision by the media, a few weeks after issuing the opinion in the *Belt* case, the Court took the unprecedented measure of having its Communication Counsel issue a statement to the press that made it clear the Court's decision in the *Belt* case did not say that the "cameras, tickets or the process was unconstitutional." Eventually, it was understood by the media and public the *Belt* case was not really about Intersection Safety Cameras after all.

III. Rights to and Invasion of Privacy

The right to privacy is a highly debated area relative to road safety cameras. Many opponents of the cameras will argue that the presence of the cameras and the potential of being photographed violates the drivers right to privacy. However, as it is well established by case precedent, driving is a regulated activity on public roads. By obtaining a license, a motorist agrees to abide by certain rules, such as to obey traffic signals. Neither the law nor common sense suggests drivers should not be observed on the road or have their violations documented. Intersection safety camera systems can be designed to photograph only a vehicle's rear license plate, not vehicle occupants, depending on local law. Only vehicles driven by motorists who violate the law are photographed.

---

[9] *See, City of Springfield, Missouri v. Adolph Belt*, No. SC 90324 (8th Cir. March 2, 2010).
[10] *Id.*

The Supreme Court has ruled that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” In *Katz v. United States*, 389 U.S.347 (1967), Justice Harlan issued a concurring opinion articulating the two-part test later adopted by the U.S. Supreme Court as the test for determining whether a police or government search is subject to the limitations of the Fourth Amendment: (1) governmental action must contravene an individual's actual, subjective expectation of privacy; and (2) that expectation of privacy must be reasonable, in the sense that society in general would recognize it as such.

To meet the first part of the test, the person from whom the information was obtained must demonstrate that they, *in fact*, had an actual, subjective expectation that the evidence obtained would not be available to the public. In other words, the person asserting that a search was conducted must show that they kept the evidence in a manner designed to ensure its privacy.

The first part of the test is related to the notion "in plain view". If a person did not undertake reasonable efforts to conceal something from a casual observer (as opposed to a snoop), then no subjective expectation of privacy is assumed. The second part of the test is analyzed objectively: would society at large deem a person's expectation of privacy to be reasonable? If it is plain that a person did not keep the evidence at issue in a private place, then no *search* is required to uncover the evidence.

Generally, when a person commits a driving violation on a public roadway, that is not a protected, private action. As discussed above in the 5th Circuit *Bell* case, the interest in running a red light is not a “legally protected” interest.

Intersection safety camera warning signs are clearly posted in advance of the intersection to ensure motorists are aware that they are in use. A violation is mailed out and includes a link to view the video tape and photo of the incident along with detailed data. When you choose to travel on public streets, you have a responsibility to operate a vehicle in a safe manner and abide by all traffic laws. The technology is simply one tool available to the City to ensure that drivers are acting in a safe and responsible manner for themselves and those utilizing public streets and sidewalks.

IV. Yellow Light Timing

Various opponents to intersection safety cameras claim red-light running can be solved without cameras by lengthening the time of the yellow light. However, research shows that changes in yellow light timing can sometimes help influence the number of red-light violations, the results are minimal and short-lived compared with the outcomes that intersection safety cameras provide.

Intersection safety cameras reduce red-light running crashes more so than adjustments to amber time, as the cameras have been a proven method of modifying driver behavior.

A study was done to measure the effectiveness of yellow light timing vs. intersection safety cameras. Results showed that yellow timing changes reduced red- light violations by 36 percent. However, intersection safety cameras further reduced red light violations by 96 percent beyond levels achieved by the longer yellow timing. This study shows that the provision of adequate yellow signal timing reduces red-light running, but longer timing alone does not eliminate the need for better enforcement, which can be provided effectively by intersection safety cameras. [11]

The *Manual on Uniform Traffic Control Devices* (US Department of Transportation, 2006) indicates that yellow intervals should range from approximately 3 to 6 seconds and that longer intervals should be reserved for approaches with higher traffic speeds. Although there is no universal practice for selecting the duration of the yellow signal phase, many state and local transportation agencies follow guidelines published by the Institute of Transportation Engineers (ITE, 1985) that consider site-specific criteria including traffic speeds and intersection geometry.

An evaluation in British Columbia, Canada, found a "69 percent reduction in red light violations 1 month after the introduction of intersection safety cameras, and a 38 percent decline after 6 months (Chen et al., 2001). A review of intersection safety camera studies concluded that cameras generally reduce red light violations by about 40 to 50 percent (Retting et al., 2003)." [12]

The strong effects of intersection safety cameras after having increased the duration of yellow signal timing provides evidence that providing additional yellow timing does not eliminate the need for or the potential benefits of intersection safety camera enforcement.

V. Program Considerations:

A. Driver versus Registered Owner Liability

There is a broad spectrum of opinions from both the vendors in the industry, as well as from the recipients of violations, whether the driver or the registered owner of the vehicle should be liable for the driving violation. In 22 of the 25 states with photo enforcement, vehicle owners are issued violations. The fines are

[11] R. Retting, S. Ferguson, C. Farmer, *Reducing Red light Running Through Longer Yellow Signal Timing and Red Light Camera Enforcement: Results of a Field Investigation*, (2007), Insurance Institute for Highway Safety, *at* http://www.stopredlightrunning.com/pdfs/ReduceRedLt_IIHS_.pdf

[12] *Id*.

treated as a civil infraction and no points are assessed or reports submitted to insurance agencies. However, owners have the option in many of these programs to transfer liability to the actual driver.

In Oregon for example, owners who were not driving at the time of a violation can sign and return a 'certificate of innocence' along with a photocopy of their driver' license to have the citation dismissed. [13]

In Arizona, California, and Colorado, all citations are issued to the driver of the vehicle. This requires that images are taken from both the front and the rear of the vehicle to capture the driver image as well as the license plate image. The fines are typically much higher and points assessed against the driver of the vehicle.

U.S. Court of Appeals for the 7th Circuit affirmed in a landmark opinion that a photograph of the rear of the vehicle only was constitutional (many other Federal and State Appellate Courts have also ruled similarly). [14]

When it comes to how Courts rule, the rulings favor photographing the license plate only. Photographing the rear of the offending vehicle and issuing the citation to the registered owner has never been ruled unconstitutional by any court in the United States. Additionally, the safety results from a "rear-only" program are equal to, or better than, the results where a photograph is taken of the driver.

Programs where the driver is photographed still result in the citation going to the registered owner similar to if only the rear of the offending vehicle is photographed. Under both types of programs, the registered owner has the right to contest the citation in court.

A common argument against the inclusion of a driver photograph is that requiring photographs of the driver fosters more governmental intrusion than is necessary to accomplish the same public safety goals. Often it is posed that to photograph a driver requires a separate camera system facing the driver as he/she approaches the intersection, which doubles the cost to the taxpayer to produce the same public safety goals.

While some States take the drivers photograph, rear-only intersection safety camera programs are a consistent, objective and fair way to use the combination of education and law enforcement to modify bad driving behavior. By capturing only the plate, the government mutes arguments of race, age and gender profiling as well as claims related to invasion of privacy.

B. Manned/Mobile or Unmanned/Fixed Operation

Another program consideration is whether to operate the speed safety camera equipment with or without an officer present. All intersections safety camera programs operate unmanned, as well as fixed locations; however, most mobile photo speed safety programs are operated by a trained technician out of a

[13] Carolie J. Rodier, Susan A. Sheheen, Ellen Cavanagh, *Automated Speed Enforcement in the U.S.: A Review of the Literature on Benefits and Barriers to Implementation* (July 2007).
[14] *See, Idris v. City of Chicago, Illinois, et al*, No.08-1363 (7th Cir. January 5, 2009).

stationary vehicle that moves along locations. The photo safety camera does not need to be operated from a vehicle. Scottsdale, Arizona for instance, operates fixed site unmanned speed cameras along with mobile cameras. There are safety concerns for the operator of the manned speed safety vehicles, and the trend is moving toward keeping the mobile vans unmanned.

Recently, mobile units seem to be the more frequently chosen option. Their mobility allows the cities to expand the reach of the program by moving the cameras around different locations. Scottsdale, Arizona uses its mobile units around its residential streets but uses its fixed cameras in the city's most crash-prone intersections. [15]

VI. Conclusion

Road safety camera programs are growing increasingly more prevalent in cities and counties, and have a proven track record of reducing crashes, deaths and injuries. Despite efforts to derail the programs, cities across North America are signing up to help make their cities safer for all drivers.

[15] Carolie J. Rodier, Susan A. Sheheen, Ellen Cavanagh, *Automated Speed Enforcement in the U.S.: A Review of the Literature on Benefits and Barriers to Implementation* (July 2007).

George J. Hittner

(480) 443-7000
George.hittner@atsol.com

George Hittner joined ATS in October 2008 as General Counsel and Vice President for Governmental Relations. A Houston native, George previously served as the statewide campaign manager for the 2002 successful re-election campaign of the former Texas Supreme Court Chief Justice. Additionally, he worked for then-Governor George W. Bush's 1998 successful re-election campaign, in the Texas State Legislature for a former State Senator, and served as a White House appointee at the United States Department of Labor. Prior to joining the Department of Labor, George was employed in both the litigation and employment law sections in the Houston office of Haynes and Boone, L.L.P.

George's position in the photo safety solutions industry has provided him with a front row seat to not only the company's corporate litigation portfolio, but also to the national legislative intricacies pertaining to photo enforcement programs. He is a Texas A&M graduate, obtained his law degree and Master of Public Affairs from the University of Texas at Austin, and has a Master of Business Administration from the University of Virginia's Darden School of Business. George, an Eagle Scout, is active on both the local and national levels of the Boy Scouts of America, is the founder and a member of the board of the Houston Firefighters Foundation, and was a founding member of the Houston Police Foundation. He has been recognized as a Rising Star by Texas Monthly Magazine and has served as a lecturer on the subjects of American government and politics.