

In the wake of the passage of the state law pertaining to so-called “red light traffic cameras,” [See Acts 2008, Public Chapter 962, effective July 1, 2008, codified at Tenn. Code Ann. § 55-8-198 (Supp. 2009)], numerous local governments have passed ordinances enacting regulatory schemes regarding use of this modern police tool. Although there have been recent moves in the General Assembly to severely restrict the use of surveillance cameras to enforce traffic laws, it appears that an outright ban will not be imposed. Assuming some use of the camera systems will remain, municipalities can expect numerous and varied court challenges to their use. This article will briefly explore some possible challenges, and an appropriate municipal response based on cited case law.

A. Privilege Against Self-Incrimination Issue

1. Defendants may assert that use of surveillance camera photographs and video evidence constitutes a violation of a defendant’s *Fifth Amendment* privilege against self-incrimination. This assertion has been raised previously in Tennessee and other jurisdictions and been repeatedly rejected.

2. A defendant does not have to testify. He is free to remain silent, and therefore there is simply no basis for asserting any violation of the *Fifth Amendment* privilege against self-incrimination. This argument was raised in City of Knoxville v. Brown, 284 S.W.3d 330; 2008 Tenn. App. LEXIS 436 (Tenn. Ct. App. 2008), where the defendant claimed the Knoxville traffic camera ordinance required him to violate his *Fifth Amendment* privilege against self-incrimination by forcing him to establish that someone else was driving the vehicle. In rejecting this argument, the Brown court explained that the language in the Knoxville ordinance does not make the *driver* of the vehicle liable, but rather, it is the *registered owner* of the vehicle who is responsible for the red light violation, regardless of who was actually driving. The Brown stated “[s]imply because vehicle owners are permitted to shift liability by establishing someone else was in control of their vehicle at the time of the violation does not amount to a fifth amendment violation.” Brown, at 339.

3. Other courts have also flatly rejected this argument in red-light camera cases involving a violation of a city ordinance, or cases arising out of red-light camera cases where plaintiffs have alleged their civil rights were violated and filed suit under 42 U.S.C. §1983. In Sevin v. Parish of Jefferson, 621 F.Supp.2d 372, 381-82; 2009 U.S. Dist. LEXIS 40805 (E.D. La. 2009), the plaintiffs filed suit against a local governmental entity and the surveillance camera company under 42 U.S.C. §1983 alleging numerous deprivations of their constitutional rights, to include a *Fifth Amendment* violation of the privilege against self-incrimination. The Sevin court found their arguments meritless and stated the following:

The Supreme Court has interpreted the *Self-Incrimination Clause* to “protect an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.” Schmerber v. California, 384 U.S. 757, 761; 86 S.Ct. 1826; 16 L.Ed.2d 908 (1966). This protection does not extend to evidence that is demonstrative, physical, or real. [citations omitted] A photograph of a vehicle passing through a public intersection is not testimonial evidence, [citation omitted], and its introduction into evidence is therefore not barred by the *Fifth Amendment*.

Sevin, at 381-82.

4. In addition, because these cases are *civil* ordinance violation cases, the *Fifth Amendment* privilege against self-incrimination has no application. See Ware v. Lafayette City-Parish Consolidated Govt., 2009 U.S. Dist. LEXIS 97836 (W.D. La. 2009) where the Magistrate Judge states:

Because the ... [red light camera] programs are civil, non-punitive regulatory schemes, which do not impose criminal penalties, the protections provided under the *Fifth* and *Sixth Amendments* do not apply in these civil proceedings. ...

[T]he *Fifth Amendment* ... protection against self-incrimination [is] not violated in the context of the civil proceedings established by the challenged Ordinances. As noted by the United States Supreme Court, “the *Fifth Amendment* does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment ‘does not preclude the inference where the privilege is claimed by a party to a civil cause.’” [citation omitted]

Furthermore, the Fifth Circuit has held that the *Fifth Amendment* prohibition against self incrimination has no application in a civil case where no one seeks to compel the litigant to testify; if the litigant ‘voluntarily does not tell what he know[s], [h]is silence may well count against him as against any other civil litigant.’ [citation omitted] ...

Further, the Ordinances do not compel the presentation of incriminating testimony, instead allowing the submission of an affidavit identifying the driver of the photographed vehicle, evidence of simultaneous emergency vehicle operation, and evidence regarding the camera and the photograph produced thereby, rendering it unnecessary for the vehicle owner to testify. [citation omitted] ...

The *Fifth Amendment* only prohibits the state from compelling testimony that might tend to incriminate. [citation omitted] The Ordinances do not compel any testimony at all.

Ware, at .

B. Confrontation Clause Issue

5.. Defendants may assert that allowing the City to use the surveillance camera photographs and video evidence constitutes a violation of a defendant's *Sixth Amendment* rights under the "Confrontation Clause." This assertion has also been raised previously in Tennessee and other jurisdictions and found meritless.

6. In State v. Williams, 913 S.W.2d 462; 1996 Tenn. LEXIS 1 (Tenn. 1996), the defendant was convicted of robbing a convenience store. The robbery was caught on tape through use of a videotape surveillance camera within the store which was activated by the store clerk. During the subsequent police investigation, the store clerk viewed a pre-trial lineup that included the defendant but was unable to identify the defendant or anyone else in the line-up as the robber. At trial, the store clerk testified about the robbery, but was unable to identify the defendant as the person who committed the crime. But the State produced fifteen still photographs taken by the videotape surveillance camera during the robbery, and when shown the photographs, the store clerk testified the photos accurately depicted the scene inside the store at the time of the robbery. The photos were then introduced into evidence. Upon this evidence, the jury convicted defendant, and he appealed asserting a violation of both his federal constitutional *Sixth Amendment* right to confront witnesses against him, and the analogous State constitutional

right to confrontation under Article I, § 9 of the Tennessee Constitution, by the State's use of the photographs from the videotape surveillance camera. In rejecting these claims, the Tennessee Supreme Court stated:

Resolution of this issue requires only an examination of the text of the constitutional provisions in question. The *Sixth Amendment to the United States Constitution*, which is applicable to the states through the Fourteenth Amendment [*citing Pointer v. Texas*, see fn 7], provides that “in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the *witnesses* against him [emphasis in original].” The corresponding provision of the Tennessee Constitution provides “that in all criminal prosecutions, the accused hath the right ... to meet the *witnesses* face to face.” *Tenn. Const. art. I, § 9* [emphasis in original]

Although the language is not identical, both the federal and state constitutional confrontation provisions are restricted, by their own terms, to “witnesses” and do not encompass physical evidence or objects, such as photographs. [citations omitted]

Indeed, we have previously held that the confrontation clause provides two types of protection for criminal defendants: the right to physically face the witnesses who testify against the defendant, and the right to cross-examine witnesses. *State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn. 1992); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51; 107 S.Ct. 989, 998; 94 L.Ed.2d 40, 53 (1987). Accordingly, we conclude that introduction of the surveillance photographs into evidence did not violate the defendant's federal or state constitutional right to confrontation.

Williams, at 465.

7. In the Sevin case, the defendant asserted that use of red light surveillance camera evidence in the form of photographs and a video deprived him of his *Sixth Amendment* right to confront witnesses against him because the traffic camera could not be cross-examined. In rejecting this argument, the Sevin court stated:

As the plain text of the Clause suggests, its application is limited to “*witnesses* against the accused – in other words, those who bear testimony.” [emphasis in original; and citing *Crawford v. Washington*, 541 U.S. 36; 124 S.Ct. 1354; 158 L.Ed.2d 177; 2004 LEXIS 1838 (2004)]; see also *Davis v. Washington*, 547 U.S. 813, 821; 126 S.Ct. 2266; 165 L.Ed.2d 224 (2006) (“A critical portion [of the holding in *Crawford*] is the phrase ‘testimonial statements.’ Only statements of this sort cause the declarant to be a ‘witness’ within the meaning of the *Confrontation Clause*.”) [citation omitted] ... Because a camera is not a witness that is amenable to cross-examination, and because a

photograph of a vehicle is not a “testimonial statement,” introduction of the Redflex photographs into evidence does not implicate the *Confrontation Clause*. [citation omitted] ... Plaintiffs’ argument to the contrary is meritless.

Sevin, at 382-83.

C. Impermissible Rebuttable Presumption / Burden of Proof Issue

8. Defendants may assert that the civil regulatory scheme regarding use of the red light surveillance cameras creates an impermissible rebuttable presumption of guilt and unconstitutionally shifts the burden of proof to a defendant, in violation of his “due process” rights. This assertion has been raised previously in Tennessee and other jurisdictions and been repeatedly rejected.

9. This argument was raised by the defendant in City of Knoxville v. Brown, 284 S.W.3d 330; 2008 Tenn. App. LEXIS 436 (Tenn. Ct. App. 2008), where the defendant claimed the Knoxville traffic camera ordinance created an impermissible rebuttable presumption of guilt against the owner of the vehicle, which according to the defendant, could only be rebutted by the owner setting forth in an affidavit who was actually in control of the vehicle at the time the vehicle was used to run a red light. The Brown court disagreed with this characterization, stating:

What Defendant fails to acknowledge is that [the Knoxville city code section] makes the owner of the vehicle responsible for a red light violation, regardless of who was driving the vehicle. At all times the City has the burden of proving every element of its case. This is so regardless of who was driving the vehicle. The City Code merely permits the responsible vehicle owner to shift responsibility for the violation to the actual driver of the vehicle in certain circumstances. This does not mean that the owner of the vehicle was not in violation of the City Code. Since the City at all times must establish the necessary elements of its case by the requisite burden of proof, we reject Defendant’s argument that [the Knoxville city code section] violates his due process rights.

Brown, at 338-39. *See also* Idris v. City of Chicago, 2008 U.S. Dist. LEXIS 3933 (N.D. Ill. 2008) (establishing liability through the use of photographs taken by automated cameras rather than tickets from absent police officers does not alter the constitutionality of the procedure

available to alleged red light violators); *affirmed by Idris v. City of Chicago*, 552 F.3d 564; 2009 U.S. App. LEXIS 42 (7th Cir. 2009).

10. In *Idris v. City of Chicago*, 552 F.3d 564; 2009 U.S. App. LEXIS 42 (7th Cir. 2009), the red light violator also raised a due process assault on the Chicago red light camera ordinance, and the United States Court of Appeals for the 7th Circuit dismissed rejected this challenge. The reasoning of the *Idris* court follows:

Plaintiffs contend that vicarious liability offends the substantive component of the *due process clause*, but that argument is a dud. Substantive due process depends on the existence of a fundamental liberty interest, [citation omitted], and no one has a fundamental right to run a red light or avoid being seen by a camera on a public street. The interest at stake is a \$90 fine for a traffic infraction, and the Supreme Court has never held that a property interest so modest is a fundamental right. ...

Is it rational to fine the owner rather than the driver? Certainly so. A camera can show reliably which cars and trucks go through red lights but is less likely to show who was driving. That would make it easy for owners to point the finger at friends or children – and essentially impossible for the City to prove otherwise. A system of photographic evidence reduces the costs of law enforcement and increases the proportion of all traffic offenses that are detected; these benefits can be achieved only if the owner is held responsible.

This need not mean that the owner bears the economic loss; an owner can insist that the driver reimburse the outlay if he wants to use the car again (or maintain friendship). Legal systems often achieve deterrence by imposing fines or penalties without fault. Consider, for example, a system that subjects to forfeiture any car used in committing a crime, even though the owner may have had nothing to do with the offense. *Bennis v. Michigan*, 516 U.S. 442; 116 S.Ct. 994; 134 L.Ed.2d 68 (1996), holds that such a system is constitutional, because it increases owners' vigilance. Similarly, *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125; 122 S.Ct. 1230; 152 L.Ed.2d 258 (2002), holds that it is constitutional to evict a tenant from public housing because of a guest's misbehavior; the threat of eviction induces owners to exercise control over their guests (and not to invite people whose conduct they will be unable to influence). *United States v. Boyle*, 469 U.S. 241; 105 S.Ct. 687; 83 L.Ed.2d 622 (1985), offers yet another example. The Court held it proper to impose penalties on a taxpayer whose return is false, even when an attorney or accountant is responsible for the error; the Court concluded that the threat of a penalty will cause taxpayers to choose their advisors more carefully – and, when the taxpayer is the victim of an expert's blunder, a malpractice suit will shift the expense to the person whose errors led to the exaction. Fining a car's owner is rational for the same reasons: Owners will take more care when lending their cars, and often they can pass the expense on to the real wrongdoer.

That the City's system raises revenue does not condemn it. Taxes, whether on liquor or on running red lights, are valid municipal endeavors. Like any other exaction, a fine does more than raise revenue: It also discourages the taxed activity. A system that simultaneously raises money and improves compliance with traffic laws has much to recommend it and cannot be called unconstitutionally whimsical.

Idris, 552 F.3d at 566.

11. The Idris opinion concerned a *substantive due process* challenge, but a *procedural due process* challenge has also been turned away by courts. In the Ware case, *supra*, the plaintiff red light violators asserted that the city red light camera program violated their *Fourteenth Amendment* right to procedural due process by impermissibly shifting the burden of proving their innocence to the registered vehicle owner. In that case, the city ordinance in question created a rebuttable presumption that a vehicle's registered owner was the violator; in other words, unless an owner comes forward with evidence to rebut the presumption, civil liability would be imposed on the owner. In passing on the constitutionality of this procedure, the federal Magistrate Judge stated:

Such civil presumptions do not contravene the constitutional protections of due process. [citation omitted] ... [T]he Supreme Court has long held that, on their face, systems that impose civil liability on owners of vehicles for their negligent operation by those entrusted with their use, ... , are not contrary to the notions of due process. [citation omitted] To the contrary, "[i]t is not unknown, or indeed uncommon, for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it." [citation omitted] ...

Likewise, the fact that the photographs constitute *prima facie* evidence of a violation presents no constitutional issue. "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes ... dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous." [citations omitted]

The presumption of one fact from the evidence of another fact does not constitute a denial of due process, "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." [citation omitted] Moreover, there is no ground for holding that due process of law has been denied "[i]f a legislative provision, not unreasonable in itself, prescribing a rule of

evidence, in either a criminal or civil case, does not shut out from the party affected a reasonable opportunity to submit to the ... [fact finder] in his defense all of the facts bearing upon the issue” [citation omitted]

In this case, the Ordinance does not create an unreasonable inference of one fact from proof of another. It is entirely rational to presume that a vehicle is being driven by its registered owner or a third person to whom the owner has intrusted the vehicle and for whom the owner may be responsible. The Ordinance does not deny a vehicle owner a reasonable opportunity to present evidence to the contrary. ... [T]he Ordinance provides a registered owner ample opportunity to identify a third party driver for whom he or she is not responsible. Accordingly, the Ordinance provides no basis for a procedural due process claim on these grounds.

Ware.