

VIRGINIA:

IN THE GENERAL DISTRICT COURT OF HENRICO COUNTY

CRAIG S. COOLEY
and
ESTHER J. WINDMUELLER,

Applicants

v.

HONORABLE LAWRENCE G. SPRADER
Clerk of the Henrico General District Court,

Respondent.

VERIFIED PETITION FOR A WRIT OF PROHIBITION

COME NOW Craig S. Cooley and Esther J. Windmueller, after being duly sworn, and state as follows:

1. Both applicants, Craig S. Cooley and Esther J. Windmueller, are licensed attorneys and members of the Virginia State Bar.
2. Each regularly practices in the Henrico General District Court representing clients charged with violations of traffic regulations and criminal offenses, including those referenced in newly enacted Virginia Code Section 46.2-206.1 (Exhibit 1 attached)
3. Virginia Code Section 46.2-206.1 had an effective date of July 1, 2007 and is to be applied only to Virginia residents. [Exhibit 2 attached – general explanation as prepared by the Office of the Executive Secretary of the Supreme Court.

4. That Code section assesses “civil remedial fees” as additional punishments upon Virginia residents convicted of violating certain traffic regulations and traffic related misdemeanors.

5. While the stated purpose of the statute purports to be “to generate revenue from drivers whose proven dangerous driving behavior places significant financial burdens upon the Commonwealth”, two things are clear:

A. The statutory “civil remedial fees” bear no rational relation to the sum of the Commonwealth’s actual loss or “financial burden”; and

B. Whatever, if any, financial burden is created by a Virginia resident committing any of the enumerated penalized acts, it is indistinguishable from such burden created by a non-resident.

6. Therefore, as created and as applied, the classifications (resident vs. non-resident) do not bear a reasonable relation to the purpose of the law and therefore violate the Equal Protection Clause.

7. Pursuant to Virginia Code Section 46.2-206.1 the initial one-third of the “civil remedial fee” would be collected by the Clerk of the assessing Court.

8. Respondent, the Hon. Lawrence G. Sprader is Clerk of the Henrico General District Court, is required therefore to collect these unconstitutionally assessed fees from any Virginia resident so situated.

LEGAL BASIS OF PETITION

Where a statute sets forth classifications of persons, some of which classes are subject to be impacted by the statute while others are not, the reasonableness of the classification rests on whether it embraces all of the

classes to which it relates. The basis of a classification must have a direct relation to the purpose of the law, and must present a distinction which renders one class, in truth, distinct or different from another class. Estes Funeral Home v. Adkins, 266 VA 297, 304 (2003).

Virginia Code Section 46.2-206.1 distinguishes Virginia residents to be assessed onerous civil remedial penalties while failing to assess any such penalty to non-residents who have been convicted of the identical offense. Certainly if such a conviction established “proven dangerous driving behavior [which] places significant financial burdens upon the Commonwealth”, there is no distinction between those same financial burdens created by non-residents committing the identical offense.

The classifications (resident vs. non-resident) set forth by the statute are not based on real differences. The distinction drawn between these two “classes” does not in reality render one class (resident) different than the other (non-resident). Thus the statute violates the Equal Protection Clause.

“A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 2322; 129 L. Ed.2d 304, 323 (1994), quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922).

There are four categories of denial of equal protection: 1) singling out members of a protectable group for unequal treatment; 2) laws or policies that make irrational distinctions among people; 3) selective prosecution; and 4) the

singling out of an individual or a group by public officers in abuse of their power to retaliate for the exercise of constitutional rights by that individual or group. Costello, John, L., *Virginia Criminal Law and Procedure*, 3d ed. Matthew Bender & Company, 2002, citing *Esmail v. Macrane*, 53 F.3d 176, 178-79 (7th Cir. 1995).

The penalty involved in Virginia Code §46.2-260.1 specifically refers to its purpose as “to generate revenue from drivers whose proven dangerous driving behavior places significant financial burdens upon the Commonwealth.” However, such fees are only assessed against Virginia residents operating motor vehicles on Virginia highways. Unlike the provisions of Virginia Code §15.2-1716, which authorize localities to obtain reimbursement for the costs of responding to any accident or incident for which a person was convicted of driving under the influence, reckless driving, driving on suspended, or leaving the scene of an accident, the provisions of §46.2-206.1 are merely for the purposes of “generating revenue” and thus not rationally related to the behavior of Virginia residents convicted of those offenses. Furthermore, the final clause of the statute, relating to total points, could include Virginia residents whose point accumulation is based solely on offenses occurring in an entirely different state.

It is apparent that the benefits construction and maintenance of public highways in Virginia are not limited to Virginia residents. The I-95 corridor alone is the major route for interstate traffic in the eastern United States. A study done for the Virginia Department of Transportation in 2003 noted that

the majority of the traffic along the I-95 corridor in Hanover County and the Town of Ashland was interstate and inter-regional. Kimley-Horn and Associates, Inc., *I-95 Corridor Study Including Route 802, Route 54, and Route 30 Interchanges*, July 2003 http://www.virginia.gov/projects/resources/final_rpt.pdf7/1/07. Another study conducted for the Virginia Department of Transportation showed that 38% of all the vehicles observed at twelve Virginia observation sites had Maryland tags. Vanasse Hangen Brustlin, Inc. *Morning Commuter Traffic Crossing American Legion Bridge*, April 2004 <http://www.virginiadot.org/projects/resources/nova-amlegiombridge.pdf7/1/07>. Certainly this data demonstrates that a sizeable portion of drivers who may place significant financial burdens upon the Commonwealth are not Virginia residents. Accordingly, the statute cannot be held to be constitutional under the rational basis standard.

In the case of *Williams v. Vermont*, 472 U. S. 14; 105 S. Ct. 2465; 86 L.Ed2d 11 (1985), the United States Supreme Court struck down a Vermont statute which granted credit for sales tax paid to a reciprocating state on cars purchased by present Vermont residents, but denied credit for sales tax paid by those who purchased and registered their cars outside of the state before becoming Vermont resident, as being violative of the Equal Protection Clause. The Court reasoned:

This Court has many times pointed out that in structuring internal schemes “the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.” It has been reluctant to interfere with legislative policy decisions in this area. An exemption such as that challenged here “will

be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose.”

We perceive no legitimate purpose, however, that is furthered by this discriminatory exemption. As we said in holding that the use tax base cannot be broader than the sales tax base, “equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.” A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation. In the present case, residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants – at least among those who used their cars elsewhere before coming to Vermont. Having registered a car in Vermont they are similarly situated for all relevant purposes. Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for the maintenance and improvement of Vermont’s roads. The purposes of the statute would be identically served, and with an identical burden, by taxing each. The distinction between them bears no relation to the statutory purpose. As the Court said in *Wheeling*, appellants have not been “accorded equal treatment, and the inequality is not because of the slightest difference in [Vermont’s] relation to the decisive transaction, but solely because of [their] different residence.” 472 U.S. at 22-23, 105 S. Ct. 2465; 86 L. Ed.2d at 19-20, *citing and quoting inter alia*, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-527 (1959). *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983). *See generally Schweiker v. Wilson*, 450 U.S. 221, 234-235 (1981). *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 [**2472] (1963). *n7 WHY v. Glassboro*, 393 U.S. 117, 118 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-572 (1949); *Zobel v. Williams*, 457 U.S. 55, 61 (1982); *Texaco, Inc. v. Short*, 454 U.S. 516, 540 (1982).

As with the tax in *Williams*, the civil penalty at issue was created to pay for the maintenance and improvement of Virginia’s roads. If it applied to only those offenses occurring on Virginia highways, by both residents and non-residents alike, it certainly would be rationally related to the purpose for which it was created. However, as written, it applies to only residents of Virginia, excluding non-residents, despite the fact that both would have been operating

motor vehicles on Virginia highways at the time. Furthermore, under the statute, and in light of the Uniform Compact, Virginia Code § 26.2-489 *et. seq.*, it would appear that residents will be assessed up to \$700 annually even for offenses not occurring on Virginia highways by the Commissioner of Motor Vehicles if they amass more than eight (8) demerit points on their records for offenses occurring after July 1, 2007.

As stated by the Virginia Supreme Court in 2003 in *Estes Funeral Home v. Adkins*, 266 Va. 297, 304:

The reasonableness of a classification rests on “whether it embraces all of the classes to which it relates.” *City of Newport News v. Elizabeth City County*, 189 Va. 825, 841, 44 S.E.2d 56, 65 (1949). The basis of a classification “must have a direct relation to the purpose of the law, and must present a distinction which renders one class, in truth, distinct or different from another class.” *Id.* Stated differently, equal protection requires only that “the classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments not be so disparate, relative to the difference in classification, as to be wholly arbitrary.” *City of Portsmouth v. Citizens Trust Co.*, 216 Va. 695, 698, 222 S.E.2d 532, 534 (1976) (quoting *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954)); *accord Tuckahoe Ass’n*, 257 Va. at 116, 510 S.E.2d at 241

The classifications in Virginia Code Section 46.2-206.1 are feigned distinctions. The distinctions drawn have no relevance to the purpose for which the classifications were made and are wholly arbitrary.

For each of the reasons set for the above, Virginia Code Section 46.2-206.1 is violative of the Equal Protection Clause of the Fifth and Fourteen Amendments of the Constitution of the United States. Therefore, enforcement

of its provisions and the assessment and collection of its civil remedial fees are unconstitutional and should be prohibited.

PRAYER AND RELIEF

Wherefore, the applicants, after being duly sworn, do respectfully petition this honorable Court to issue a writ of prohibition and thereby enjoin and prohibit the respondent from assessing and collecting the civil remedial fees set forth in Virginia Code Section 46.2-206.1.

Respectfully submitted and sworn to:

Craig S. Cooley

And

Esther J. Windmueller

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State of Virginia
City of Richmond, to-wit:

I, a Notary Public, do hereby certify that the foregoing Verified Petition for a Writ of Prohibition was executed, in my presence, by Craig S. Cooley, on this _____ day of July, 2007.

Notary Public

My commission expires: _____
Notary Reg. No. _____

State of Virginia
City of Richmond, to-wit:

I, a Notary Public, do hereby certify that the foregoing Verified Petition for a Writ of Prohibition was executed, in my presence, by Esther J. Windmueller, on this _____ day of July, 2007.

Notary Public

My commission expires: _____
Notary Reg. No. _____

Portions of the "Legal Basis" set forth in this petition were adopted from a draft Motion to Dismiss authored by Corinne J. Magee, Esquire.

CERTIFICATE OF SERVICE

I do hereby certify the foregoing Verified Petition for a Writ of Prohibition was hand delivered to the Respondent, the Honorable Lawrence G. Sprader, Clerk of the Henrico General District Court, 4301 Parham Road, Richmond, VA 23832, on this _____ day of July, 2007.

Craig S. Cooley

VIRGINIA:

IN THE GENERAL DISTRICT COURT OF HENRICO

IN THE MATTER OF A PETITION FOR A WRIT OF
PROHIBITION DIRECTED AGAINST THE CLERK
OF THE GENERAL DISTRICT COURT OF HENRICO COUNTY

NOTICE

COMES NOW Craig S. Cooley and Esther J. Windmueller, both attorneys licensed to practice in the Commonwealth of Virginia, pursuant to Virginia Code Section 8.01-644 and on behalf of all future and prospective clients and similarly situated residents of Virginia to give notice of their intention to apply to the Judges of this honorable Court for a writ of prohibition to bar assessment and collection of "Civil Remedial Fees" unconstitutionally directed by Virginia Code Section 46.2-206.1. A copy of the petition for writ of prohibition is attached.

Please take notice that we will appear before the Judges of the General District Court on July 24, 2007 at 8:45 A.M. to make application for the writ of prohibition.

Respectfully submitted,

Craig S. Cooley

Esther J. Windmueller

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CERTIFICATE OF SERVICE

I hereby certify a true copy of the foregoing Notice was hand-delivered to the Office of Clerk of the General District Court, Hon. Lawrence G. Sprader, Clerk of Henrico Courthouse, 4301 Parham Road, Richmond, VA 23273 and the Office of Wade Kizer, Esquire, Commonwealth's Attorney, 4301 Parham Road, Richmond, VA 23273, this ____ day of July, 2007.

Craig S. Cooley

Exhibit 1

Virginia Code Section 46.2-206.1 provides:

§46.2-206.1 Imposition of certain additional fees on certain drivers.

A. The purpose of the civil remedial fees imposed in this section is to generate revenue from drivers whose proven dangerous driving behavior places significant financial burdens upon the Commonwealth. The civil remedial fees established by this section shall be in addition to any other fees, costs, penalties imposed pursuant to the Code of Virginia.

B. The civil remedial fees established by this section shall be assessed on any resident of Virginia operating a motor vehicle on the highways of Virginia, including persons to whom Virginia driver's licenses, commercial driver's licenses, or learner's permits have been issued pursuant to this title; and person operating motor vehicles without licenses or whose license has been revoked or suspended.

C. The court shall assess a person with the following fees upon each conviction of the following offenses:

1. Driving while his driver's license was suspended or revoked pursuant to § 18.2-272, 46.2-301, 46.2-302, 46.2-341.21, or 46.2-391 shall be assessed a fee to be paid in three annual payments of \$250 each;

2. Reckless driving in violation of Article 7 (§46.2-852 et. seq.) of Chapter 8 or aggressive driving in violation of §46.2-868.1 shall be assessed a fee to be paid in three annual payments of \$350 each;

3. Driving while intoxicated in violation of §18.2-266, 18.2-266.1, or 46.2-341.24 shall be assessed a fee to be paid in three annual payments of \$750 each;

4. Any other misdemeanor conviction for a driving and/or motor vehicle related violation of Title 18.2 or this title that is not included in one of the preceding three subdivision shall be assessed a fee to be paid in three annual payments of \$300 each; and

5. Any felony conviction for a driving or motor vehicle-related offense under Title 18.2 or this title, shall be assessed a fee to be paid in three annual payments of \$1,000 each.

D. For the purposes of subsection C:

1. A finding of guilty in the case of a juvenile and a conviction under a substantially similar valid local ordinance of any locality of the Commonwealth shall be a conviction.

2. The fees assessed under subsection C shall be implemented in a manner whereby no convictions for offenses committed prior to July 1, 2007, shall be considered.

E. The court shall collect, in full, the first annual payment of the fee imposed under subsection C at the time of conviction and shall order the person assessed a fee to submit the second annual payment to the Department within 14 calendar months of the date of conviction and the third annual payment to the Department within 26 months of the date of conviction. When transmitting conviction information to the Department the court shall also transmit notice that a fee has been imposed under this section and the deadline upon which the second and third annual payments must be submitted to the Department. The court shall order suspension of the driver's license or privilege to drive a motor vehicle in Virginia as provided in § 46.2-395 of any person failing to pay the first annual payment of the fee assessed under subsection C.

F. For all convictions reported to the Department for which fees are established under subsection C, the person assessed the fee shall submit the second annual payment to the Commissioner within 14 calendar months of the date of the conviction and the third annual payment within 26 months of the date of conviction. The Commissioner, or his designee, shall establish guidelines, policies, or procedures to notify every person assessed a fee pursuant to subsection C of the second and the third annual payments. If the person fails to make such payment, the Commissioner shall suspend his driver's license or privilege to operate a motor vehicle in Virginia. No license shall be reissued or reinstated until all fees assessed pursuant to this section have been paid and all other reinstatement requirements as provided in this title have been satisfied.

G. In addition to any fees set forth in subsection C, any person whose driver's record with the Department shows a balance of eight or more driver demerit points on July 15 shall be assessed a fee of \$100 plus \$75 for each demerit point in excess of eight, but not greater than \$700, provided that only those demerit points attributable to offenses which occurred on or after July 1, 2007 shall be used to calculate and assess such fees.

H. The Commissioner, or his designee, shall assess the fees set forth in subsection G annually, beginning on July 15, 2007.

I. The Commissioner, or his designee, shall establish guidelines, policies, or procedures to notify every person assessed a fee pursuant to subsection G. If any assessment made under subsection G remains unpaid 60 days following the date on which the notice of assessment was mailed, the Commissioner shall suspend the driver's license or privilege to drive a motor vehicle in Virginia of the person against whom the assessment was imposed. No license shall be reissued or reinstated until all fees assessed pursuant to this section have been paid and all other reinstatement requirements as provided in this title have been satisfied.

J. In the event that a person disputes a conviction on his driver's record based on identity, if the person presents the Department a certified copy of a petition to a court of competent jurisdiction seeking to vacate an order of such conviction, the Department shall suspend the imposition of the assessment. Such suspension shall be valid for one year from the date of the commencement or until 30 days after an entry of a final order or such petition, whichever occurs first.

K. Funds collected through the imposition of the fees as provided for in this section shall be used to pay the Department's cost in imposing and collecting such assessments as provided in the general appropriation act, and any remainder shall be deposited into the Highway Maintenance and Operating Fund.