



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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JUDGES

July 10, 2018

RETIRED JUDGES

LETTER OPINION

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Tawana Jean Cooper
6920 Braddock Road, #B175
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Pro Se Defendant

Re: City of Fairfax v. Tawana Jean Cooper, Case No. MI-2018-261

Dear Mr. Kassabian and Ms. Cooper:

At 7:13 P.M. on August 26, 2017, at the intersection of Fairfax Boulevard and Germantown Road in the City of Fairfax, a sedan bearing a Virginia license plate made a right turn on a red light without stopping. The movement of the vehicle was captured by photo and video as part of the City of Fairfax's "Respect Red Enforcement Program" and resulted in the issuance of a Notice of Violation to the defendant, Tawana Jean Cooper. See Camera Log Report. Much litigation ensued, culminating in the subject matter of this Memorandum Opinion.

Now before the Court is a matter of first impression in the Commonwealth of Virginia: Is the red light camera program constitutional under the United States and Virginia Constitutions? Specifically, the Defendant asserts that the red light camera program violates her rights under the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment to the United States Constitution, as well as her rights under Article 1, Section 8 and Article 1, Section 11 of the Virginia Constitution.

OPINION LETTER

For the reasons set out below, the Court denies the Defendant's constitutional challenges to the red light camera program. Specifically, the Court finds that Fairfax City Code Section 98-21, which implements the "traffic light signal photo-monitoring system" authorized under Virginia Code Section 15.2-968.1, is constitutional.¹ Va. Code Ann. § 15.2-968.1.

Factual Background

A. The Event

As stated above, at 7:13 P.M. on August 26, 2017, a red light camera took photographs of a red sedan travelling westbound on Fairfax Boulevard and turning right on a red light without stopping, at the intersection of Fairfax Boulevard and Jermantown Road. The camera took photographs of the vehicle as it approached the light as well as when the vehicle turned. The photographs captured the license plate of the vehicle as well as the speed at which the vehicle was travelling, which was 18 mph.

B. The Notice of Violation²

The City of Fairfax ("City") sent a Notice of Violation ("Notice") regarding a failure to stop at a red light based upon the red light camera recordings. The City mailed the Notice to the registered owner of the vehicle, Tawana Jean Cooper, on August 31, 2017. The Notice contained the following information about the violation: (1) date and time; (2) location; (3) direction of vehicle at time of violation; (4) vehicle Speed; (5) and the citation number. In addition, the Notice contained the following statement:

The City of Fairfax has a red light photo enforcement program in effect to reduce the number of red light violations. Please take notice that the vehicle described and pictured herein was photographed failing to stop for a red light traffic signal in violation of City of Fairfax Code Section 98-21. As the registered owner of the vehicle, you are responsible for paying this civil penalty. Unless you elect to go to court, a civil penalty in the amount of \$50.00 must be paid by the due date shown on this notice.

PAYMENT OF THE PENALTY AMOUNT FOR THE VIOLATION WILL NOT RESULT IN POINTS ASSESSED BY DMV AND CANNOT BE USED TO INCREASE YOUR INSURANCE RATES.

¹ The City of Fairfax is only one of a number of Virginia jurisdictions which have implemented red light camera programs pursuant to Virginia Code Section 15.2-968.1. According to the City's brief, these include Albemarle County, City of Alexandria, Arlington County, City of Chesapeake, City of Falls Church, City of Newport News, City of Norfolk, City of Petersburg, City of Richmond and City of Virginia Beach. *See* City of Fairfax Br. 2.

² This Opinion uses the term "Notice of Violation" and "Summons" interchangeably.

You must pay or contest this citation by the due date noted below. If you appear in court, the maximum amount you can be charged is \$50.00.

Please note that recorded images do constitute evidence of a violation of City of Fairfax Code Section 98-21.

Notice of Violation. The Notice also advised Ms. Cooper as follows: "You can view full color video and images and pay online at: <http://www.public.cite-web.com>" and provided a citation number and PIN number. Notice of Violation. The Notice also contained a "Certificate" that was "Sworn to or Affirmed By" Officer Paige Bagot that read as follows:

I am a duly authorized law enforcement officer employed by or under contract with the City of Fairfax. Based on inspection of the recorded images shown above, the motor vehicle was operated in violation of Fairfax Code Section 98-21 as evidence[d] by the above images.

Notice of Violation. Finally, the Notice included a form for requesting a court hearing or paying the citation.

On November 20, 2017, the Defendant returned the bottom portion of the form by mail. She signed the form under the statement: "I hereby request a date to appear in Fairfax District Court to contest the liability assigned to me by this citation." Notice of Violation.

C. The General District Court Trial

On January 25, 2018, the Defendant was tried before the General District Court and found guilty. Pursuant to the Fairfax City code provision, the trial judge assessed a "civil penalty" of \$50. The Defendant noted her appeal.

D. The Circuit Court Trial

On April 4, 2018, the matter came before this Court for a *de novo* trial. Officer Paige Bagot testified on behalf of the City of Fairfax. She indicated that the red light camera was working properly, that she had reviewed the photographs and video associated with the incident, and that her review indicated that the vehicle registered to the Defendant had made a right turn on red without coming to a complete stop at the intersection of Fairfax Boulevard and Jermantown Road. The Court reviewed the video of the event, which was entered into evidence, along with still photographs. *See* Trial Exs. 1 and 2. On cross-examination, the officer indicated that she did not know who was driving the vehicle. The officer indicated that she issued the ticket to the registered owner of the vehicle, Ms. Cooper. The Defendant was given the opportunity to testify and asserted her Fifth Amendment privilege. The Defendant moved to dismiss the case and raised various constitutional challenges to the city code provision, which were argued and denied by the Court. (These matters are discussed in detail, below.) The Court entered judgment for the City and imposed a \$50 civil penalty. The Court entered a Final Order on April 7, 2018.

E. Defendant's Motion to Reconsider

On April 16, 2018, the Defendant filed a timely motion for reconsideration (“Motion to Reconsider”) and also sought suspension of the Court’s Final Order. The motion asserted that the City Code Section 98-21 was facially unconstitutional, asserting violations of the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment of the United States Constitution, and Article 1, Section 8 and Section 11, of the Virginia Constitution. The Defendant’s Memorandum cited the following reasons in support of the Defendant’s assertions:

- It deprives defendants of their right to be personally served.
- It deprives defendants of their right to “clear and adequate” notice.
- It deprives defendants of their privilege against self-incrimination.
- It deprives defendants of the presumption of innocence and shifts the burden of proof from the City of Fairfax to the defendants.
- It deprives defendants of their right to a fair trial because it uses as evidence against defendants the fact that they did not file an affidavit indicating that they were not the drivers of the vehicles.
- It presumes the defendants’ guilt.
- It enables a trier of fact to be unfair and biased against defendants.
- It allows the City to use as a witness an officer who has no personal knowledge that the defendants were the operators of the vehicles in question.

Further, the Motion to Reconsider asserted that Section 98-21 also violated the Fourteenth Amendment’s Equal Protection clause because it treated defendants in a red light camera case different than those ticketed by an officer for a moving violation.

On April 23, 2018, the Court entered a Suspending Order in order to consider the Defendant’s claims and set a briefing schedule for the City to file its position with respect to the Motion. The City timely filed its brief on May 23, 2018 and the Court took the matter under advisement. It is now ripe for decision.

The Statutory Framework

A. Virginia Code Section 15.2-968.1

Fairfax City Code Section 98-21 was enacted pursuant to authorization provided by the General Assembly in Virginia Code Section 15.2-968.1³. Given the constitutional issues now

³ That section, in its entirety, reads as follows:

§ 15.2-968.1. Use of photo-monitoring systems to enforce traffic light signals.

A. The governing body of any county, city, or town may provide by ordinance for the establishment of a traffic signal enforcement program imposing monetary liability on the operator of a motor vehicle for failure to comply with traffic light signals in such locality in accordance with the provisions of this section. Each such locality may install and operate traffic light signal photo-monitoring systems at no more than one intersection for every 10,000 residents within each county, city, or town at any one time, provided,

however, that within planning District 8, each such locality may install and operate traffic light signal photo-monitoring systems at no more than 10 intersections, or at no more than one intersection for every 10,000 residents within each county, city, or town, whichever is greater, at any one time.

B. The operator of a vehicle shall be liable for a monetary penalty imposed pursuant to this section if such vehicle is found, as evidenced by information obtained from a traffic light signal violation monitoring system, to have failed to comply with a traffic light signal within such locality.

C. Proof of a violation of this section shall be evidenced by information obtained from a traffic light signal violation monitoring system authorized pursuant to this section. A certificate, sworn to or affirmed by a law-enforcement officer employed by a locality authorized to impose penalties pursuant to this section, or a facsimile thereof, based upon inspection of photographs, microphotographs, videotape, or other recorded images produced by a traffic light signal violation monitoring system, shall be prima facie evidence of the facts contained therein. Any photographs, microphotographs, videotape, or other recorded images evidencing such a violation shall be available for inspection in any proceeding to adjudicate the liability for such violation pursuant to an ordinance adopted pursuant to this section.

D. In the prosecution for a violation of any local ordinance adopted as provided in this section, prima facie evidence that the vehicle described in the summons issued pursuant to this section was operated in violation of such ordinance, together with proof that the defendant was at the time of such violation the owner, lessee, or renter of the vehicle, shall constitute in evidence a rebuttable presumption that such owner, lessee, or renter of the vehicle was the person who committed the violation. Such presumption shall be rebutted if the owner, lessee, or renter of the vehicle (i) files an affidavit by regular mail with the clerk of the general district court that he was not the operator of the vehicle at the time of the alleged violation or (ii) testifies in open court under oath that he was not the operator of the vehicle at the time of the alleged violation. Such presumption shall also be rebutted if a certified copy of a police report, showing that the vehicle had been reported to the police as stolen prior to the time of the alleged violation of this section, is presented, prior to the return date established on the summons issued pursuant to this section, to the court adjudicating the alleged violation.

E. For purposes of this section, "owner" means the registered owner of such vehicle on record with the Department of Motor Vehicles. For purposes of this section, "traffic light signal violation monitoring system" means a vehicle sensor installed to work in conjunction with a traffic light that automatically produces two or more photographs, two or more microphotographs, video, or other recorded images of each vehicle at the time it is used or operated in violation of § 46.2-833, 46.2-835, or 46.2-836. For each such vehicle, at least one recorded image shall be of the vehicle before it has illegally entered the intersection, and at least one recorded image shall be of the same vehicle after it has illegally entered that intersection.

F. Imposition of a penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made part of the operating record of the person upon whom such liability is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. No monetary penalty imposed under this section shall exceed \$50, nor shall it include court costs. Any finding in a district court that an operator has violated an ordinance adopted as provided in this section shall be appealable to the circuit court in a civil proceeding.

G. A summons for a violation of this section may be executed pursuant to § 19.2-76.2. Notwithstanding the provisions of § 19.2-76, a summons for a violation of this section may be executed by mailing by first class mail a copy thereof to the owner, lessee, or renter of the vehicle. In the case of a vehicle owner, the copy shall be mailed to the address contained in the records of the Department of Motor Vehicles; in the case of a vehicle lessee or renter, the copy shall be mailed to the address contained in the records of the lessor or renter. Every such mailing shall include, in addition to the summons, a notice of (i) the summoned person's ability to rebut the presumption that he was the operator of the vehicle at the time of the alleged violation through the filing of an affidavit as provided in subsection D and (ii) instructions for filing such affidavit, including the address to which the affidavit is to be sent. If the summoned person fails to appear on the date of return set out in the summons mailed pursuant to this section, the summons shall be executed in the manner set out in § 19.2-76.3. No proceedings for contempt or arrest of a person summoned by mailing shall be instituted for failure to appear on the return date of the summons. Any summons executed for a violation of this section shall provide to the person summoned at least 30 business days from the mailing of the summons to inspect information collected by a traffic light signal violation monitoring system in connection with the violation.

H. Information collected by a traffic light signal violation monitoring system installed and operated pursuant to subsection A shall be limited exclusively to that information that is necessary for the enforcement of traffic light violations. On behalf of a locality, a private entity that operates a traffic light signal violation monitoring system may enter into an agreement with the Department of Motor Vehicles, in accordance with the provisions of subdivision B 21 of § 46.2-208, to obtain vehicle owner information regarding the registered owners of vehicles that fail to comply with a traffic light signal. Information provided to the operator of a traffic light signal violation monitoring system shall be protected in a database with security comparable to that of the Department of Motor Vehicles' system, and used only for enforcement against individuals who violate the provisions of this section. Notwithstanding any other provision of law, all photographs, microphotographs, electronic images, or other personal information collected by a traffic light signal violation monitoring system shall be used exclusively for enforcing traffic light violations and shall not (i) be open to the public; (ii) be sold or used for sales, solicitation, or marketing purposes; (iii) be disclosed to any other entity except as may be necessary for the enforcement of a traffic light violation or to a vehicle owner or operator as part of a challenge to the violation; or (iv) be used in a court in a

pending action or proceeding unless the action or proceeding relates to a violation of § 46.2-833, 46.2-835, or 46.2-836 or requested upon order from a court of competent jurisdiction. Information collected under this section pertaining to a specific violation shall be purged and not retained later than 60 days after the collection of any civil penalties. If a locality does not execute a summons for a violation of this section within 10 business days, all information collected pertaining to that suspected violation shall be purged within two business days. Any locality operating a traffic light signal violation monitoring system shall annually certify compliance with this section and make all records pertaining to such system available for inspection and audit by the Commissioner of Highways or the Commissioner of the Department of Motor Vehicles or his designee. Any person who discloses personal information in violation of the provisions of this subsection shall be subject to a civil penalty of \$1,000 per disclosure. Any unauthorized use or disclosure of such personal information shall be grounds for termination of the agreement between the Department of Motor Vehicles and the private entity.

I. A private entity may enter into an agreement with a locality to be compensated for providing the traffic light signal violation monitoring system or equipment, and all related support services, to include consulting, operations and administration. However, only a law-enforcement officer employed by a locality may swear to or affirm the certificate required by subsection C. No locality shall enter into an agreement for compensation based on the number of violations or monetary penalties imposed.

J. When selecting potential intersections for a traffic light signal violation monitoring system, a locality shall consider factors such as (i) the accident rate for the intersection, (ii) the rate of red light violations occurring at the intersection (number of violations per number of vehicles), (iii) the difficulty experienced by law-enforcement officers in patrol cars or on foot in apprehending violators, and (iv) the ability of law-enforcement officers to apprehend violators safely within a reasonable distance from the violation. Localities may consider the risk to pedestrians as a factor, if applicable.

K. Before the implementation of a traffic light signal violation monitoring system at an intersection, the locality shall complete an engineering safety analysis that addresses signal timing and other location-specific safety features. The length of the yellow phase shall be established based on the recommended methodology of the Institute of Transportation Engineers. No traffic light signal violation monitoring system shall be implemented or utilized for a traffic signal having a yellow signal phase length of less than three seconds. All traffic light signal violation monitoring systems shall provide a minimum 0.5-second grace period between the time the signal turns red and the time the first violation is recorded. If recommended by the engineering safety analysis, the locality shall make reasonable location-specific safety improvements, including signs and pavement markings.

before the Court, there are three aspects to the statute that require discussion: (1) the public safety purpose of the statute; (2) the due process protections provided by the statute; and (3) the limited and civil consequences for a red light camera violation.

1. The public safety purpose of the statute

The purpose of a statute is often relevant to a court's determination regarding the constitutional rights associated with its enforcement. *See, e.g., Deaner v. Commonwealth*, 210 Va. 285, 289 (1969) ("The implied consent of one who operates a vehicle on the public highways of Virginia to take a blood test, in [the] event he be charged with drunk driving, is not a part of the penalty or punishment inflicted for drunk driving. It is a measure flowing from the police power of the state designed to protect other users of state highways.").

In the instant case, the statute authorizing localities to adopt a traffic light signal photo-monitoring system is clearly designed to enhance public safety by reducing the running of red lights at particular intersections. This is illustrated by the requirement that a locality considers a set of factors directly related to safety when considering potential intersections for installation of a monitoring system, including the accident rate for the intersection, the number of red light violations at the intersection, the difficulty experienced by law enforcement officers in apprehending violators, and the risk to pedestrians where applicable. *See* Va. Code Ann. § 15.2-968.1(J). It is also illustrated by the requirement that the locality conduct a "public awareness"

L. Any locality that uses a traffic light signal violation monitoring system shall evaluate the system on a monthly basis to ensure all cameras and traffic signals are functioning properly. Evaluation results shall be made available to the public.

M. Any locality that uses a traffic light signal violation monitoring system to enforce traffic light signals shall place conspicuous signs within 500 feet of the intersection approach at which a traffic light signal violation monitoring system is used. There shall be a rebuttable presumption that such signs were in place at the time of the commission of the traffic light signal violation.

N. Prior to or coincident with the implementation or expansion of a traffic light signal violation monitoring system, a locality shall conduct a public awareness program, advising the public that the locality is implementing or expanding a traffic light signal violation monitoring system.

O. Notwithstanding any other provision of this section, if a vehicle depicted in images recorded by a traffic light signal photo-monitoring system is owned, leased, or rented by a county, city, or town, then the county, city, or town may access and use the recorded images and associated information for employee disciplinary purposes.

Va. Code Ann. § 15.2-968.1.

program prior to or coincident with the implementation or expansion of the monitoring system, *see id.* at (N), and that the locality also place “conspicuous” signs within 500 feet of the intersection. *See id.* at (M).

2. The due process protections required by the statute

One of the Defendant’s principal complaints about the red light camera system is that it violates her constitutional due process rights. Thus, it is worth examining in some detail the six procedural protections which the statute requires a locality to imbed in its ordinance.

First, even before a summons is issued, the statute requires the intervention of a law enforcement officer employed by the locality to review and certify that the photographic or video evidence obtained by the monitoring system indicates that the violation took place. *See id.* at (C) and (I). Further, the statute requires that the monitoring system take at least two photos or videos of the vehicle, and that “at least one recorded image shall be of the vehicle before it has illegally entered the intersection, and at least one recorded image shall be of the same vehicle after it has illegally entered that intersection.” *Id.* at (E).

Second, while the statute does provide for the summons initially to be sent by mail to the owner, lessee, or renter of the vehicle, it prohibits “proceedings for contempt or arrest of a person summoned by mailing” to be instituted for failure to appear on the return date for the summons. *Id.* at (G). Rather, it requires the locality to re-issue the summons pursuant Virginia Code Section 19.2-76.3, which provides for personal or substitute service under Virginia Code Section 8.01-296. If the person then fails to appear, the summons must again be re-issued, this time to be served by a law enforcement officer. *See id.* Thus, an alleged violator will potentially receive the summons three times.

Third, the statute requires that in addition to mailing the summons, the locality must provide the owner, lessee, or renter of the vehicle “a notice of (i) the summoned person's ability to rebut the presumption that he was the operator of the vehicle at the time of the alleged violation through the filing of an affidavit as provided in subsection D and (ii) instructions for filing such affidavit, including the address to which the affidavit is to be sent.” *Id.* at G.

Fourth, the statute requires that the person summoned be given “at least 30 business days” from the time of the mailing to inspect the information collected by the monitoring system. *Id.*

Fifth, while the statute does create a presumption that the owner, lessee, or renter of a vehicle was the person operating the vehicle, the presumption is “rebuttable.” *Id.* at (D). The statute provides two ways the presumption can be rebutted, either by affidavit or by testimony. *See id.* It also provides that the presumption can be rebutted by presentation of a certified copy of a police report showing that the vehicle involved was reported stolen prior to the date of the violation. *See id.*

Sixth, the statute provides an alleged violator the opportunity to contest the violation in the General District Court: “[s]uch presumption [of operation] shall be rebutted if the owner, lessee,

or renter of the vehicle ... testifies in open court under oath that he was not the operator of the vehicle at the time of the alleged violation.” *Id.* at (D). Further, the statute provides for an appeal to the Circuit Court: “[a]ny finding in a district court that an operator has violated an ordinance adopted as provided in this section shall be appealable to the circuit court in a civil proceeding.” *Id.* at (F).

3. The statute limits the consequences of a violation

Finally, the statute places significant limitations on the consequences of a violation: any penalty imposed is not deemed a conviction and is not made part of the operator record for the person against whom the penalty is imposed, nor may it be used for motor vehicle insurance purposes. *See id.* at (F). Further, the statute limits the monetary penalty to \$50 and prohibits imposition of court costs. *See id.*

B. Fairfax City Code Section 98-21

Pursuant to the authorization provided by the General Assembly, the City of Fairfax enacted Code Section 98-21. That ordinance precisely tracks the requirements and parameters of Virginia Code Section 15.2-968.1⁴. In particular, it affords the owner, lessee or renter of a vehicle the rights and protections set out in the statute and limits the consequences of a violation to a \$50 penalty. In addition, a violation under the ordinance is not made part of the owner’s, lessee’s, or renter’s driving record, does not constitute an operator conviction, and does not impact on motor vehicle insurance.⁵

⁴ The Court would note, however, that the City ordinance does not contain the following language that appears in the statute: “Any finding in a district court that an operator has violated an ordinance adopted as provided in this section shall be appealable to the circuit court in a civil proceeding.” Va. Code Ann. § 15.2-968.1(F). The Court does not find this difference to be material or significant since the statute makes clear that the findings of the district court are appealable to the circuit court, which is precisely what brings the matter before this Court today.

⁵ The ordinance reads in its entirety as follows:

Sec. 98-21. - Use of photo-monitoring systems to enforce traffic light signals; penalty.

(a) For purposes of this section, “owner” means the registered owner of a vehicle on record with the department of motor vehicles. “Traffic light signal violation monitoring system” means a vehicle sensor installed to work in conjunction with a traffic light that automatically produces two or more photographs, two or more microphotographs, video, or other recorded images of each vehicle at the time it is used or operated in violation of Code of Virginia, §§ 46.2-833, 46.2-835; or 46.2-836, as amended, which are incorporated by reference in section 98-1. For each such vehicle, at least one recorded image shall be of the vehicle before it has illegally entered the intersection, and at least

one recorded image shall be of the same vehicle after it has illegally entered that intersection.

(b) The city manager or the city manager's designee may install and operate traffic light signal violation monitoring systems at no more than ten intersections in the city for the purpose of imposing monetary liability on the operator of a motor vehicle for failure to comply with traffic light signals in the city in accordance with the provisions of this section.

(c) The operator of a vehicle shall be liable for a monetary penalty imposed pursuant to this section if such vehicle is found, as evidenced by information obtained from a traffic light signal violation monitoring system, to have failed to comply with a traffic light signal within the city.

(d) Proof of a violation of this section shall be evidenced by information obtained from a traffic light signal violation monitoring system authorized pursuant to this section. A certificate, sworn to or affirmed by a law enforcement officer employed by the city authorized to impose penalties pursuant to this section, or a facsimile thereof, based upon inspection of photographs, microphotographs, videotape, or other recorded images produced by a traffic light signal violation monitoring system, shall be prima facie evidence of the facts contained therein. Any photographs, microphotographs, videotape, or other recorded images evidencing such a violation shall be available for inspection in any proceeding to adjudicate the liability for such violation pursuant to this section.

(e) In the prosecution of an offense established under this section, prima facie evidence that the vehicle described in the summons issued pursuant to subsection (d) above was operated in violation of this section, together with proof that the defendant was at the time of such violation the owner, lessee, or renter of the vehicle, shall constitute in evidence a rebuttable presumption that such owner, lessee, or renter of the vehicle was the person who committed the violation. Such presumption shall be rebutted if the owner, lessee, or renter of the vehicle (i) files an affidavit by regular mail with the clerk of the general district court for the city that he or she was not the operator of the vehicle at the time of the alleged violation or (ii) testifies in the general district court for the city, under oath that he or she was not the operator of the vehicle at the time of the alleged violation. Such presumption shall also be rebutted if a certified copy of a police report, showing that the vehicle had been reported to the police as stolen prior to the time of the alleged violation of this section, is presented, prior to the return date established on the summons issued pursuant to this section, to the general district court for the city adjudicating the alleged violation.

(f) Imposition of a penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made a part of the operating record of the person upon whom such liability is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. No monetary penalty imposed pursuant to this section shall exceed \$50.00, nor shall it include court costs.

(g) A summons for a violation of this section may be executed pursuant to Code of Virginia, § 19.2-76.2, as amended. Notwithstanding the provisions of Code of Virginia, § 19.2-76, as amended, the summons for a violation of this section may be executed by mailing by first class mail a copy thereof to the address of the owner, lessee, or renter of

the vehicle as shown, in the case of vehicle owners, in the records of the department of motor vehicles or, in the case of the vehicle lessees or renters, in the records of the lessee or renter. Every such mailing shall include, in addition to the summons, a notice of (i) the summoned person's ability to rebut the presumption that he was the operator of the vehicle at the time of the alleged violation through the filing of an affidavit as provided in subsection (e) and (ii) instructions for filing such affidavit, including the address to which the affidavit is to be sent. If the summoned person fails to appear on the date of return set out in the summons mailed pursuant to this section, the summons shall be executed in the manner set out in Code of Virginia, § 19.2-76.3, as amended. No proceedings for contempt or arrest of a person summoned by mailing shall be instituted for failure to appear on the return date of the summons. Any summons executed for a violation of this section shall provide to the person summoned at least 30 business days from the mailing of the summons to inspect information collected by a traffic light signal violation monitoring system in connection with the violation.

(h) Information collected by a traffic light signal violation monitoring system installed and operated pursuant to this section shall be limited exclusively to that information that is necessary for the enforcement of traffic light violations. On behalf of a locality, a private entity that operates a traffic signal violation monitoring system may enter into an agreement with the department of motor vehicles, in accordance with the provisions of subdivision B21 of § 46.2-208, to obtain vehicle owner information regarding the registered owners of vehicles that fail to comply with a traffic signal. Information provided to the operator of a traffic signal violation monitoring system shall be protected in a database with security comparable to that of the department of motor vehicles' system, and used only for enforcement against individuals who violate the provisions of this section. Notwithstanding any other provision of law, all photographs, microphotographs, electronic images, or other personal information collected by a traffic light signal violation monitoring system shall be used exclusively for enforcing traffic light violations and shall not (i) be open to the public; (ii) be sold or used for sales, solicitation, or marketing purposes; (iii) be disclosed to any other entity except as may be necessary for the enforcement of a traffic light violation or to a vehicle owner or operator as part of a challenge to the violation; or (iv) be used in a court in a pending action or proceeding unless the action or proceeding relates to a violation of Code of Virginia, §§ 46.2-833, 46.2-835, or 46.2-836, as amended, or is requested upon order from a court of competent jurisdiction. Information collected under this section pertaining to a specific violation shall be purged and not retained later than 60 days after the collection of any civil penalties. If the city does not execute a summons for a violation of this section within ten business days, all information collected pertaining to that suspected violation shall be purged within two business days. The city shall annually certify compliance with this section and make all records pertaining to such system available for inspection and audit by the commissioner of highways or the commissioner of the department of motor vehicles or his designee. Any person who discloses personal information in violation of the provisions of this subsection shall be subject to a civil penalty of \$1,000.00 per disclosure. Any unauthorized use or disclosure of such personal information shall be

grounds for termination of the agreement between the department of motor vehicles and the private entity.

(i) A private entity may enter into an agreement with the city to be compensated for providing the traffic light signal violation monitoring system or equipment, and all related support services, to include consulting, operations and administration. However, only a law enforcement officer employed by the city may swear to or affirm the certificate required by subsection (d) of this section. The city shall not enter into an agreement for compensation based on the number of violations or monetary penalties imposed.

(j) When selecting potential intersections for a traffic light signal violation monitoring system, the city shall consider factors such as (i) the accident rate for the intersection, (ii) the rate of red light violations occurring at the intersection (number of violations per number of vehicles), (iii) the difficulty experienced by law enforcement officers in patrol cars or on foot in apprehending violators, and (iv) the ability of law enforcement officers to apprehend violators safely within a reasonable distance from the violation. The city may consider the risk to pedestrians as a factor, if applicable.

(k) Before the implementation of a traffic light signal violation monitoring system at an intersection, the city shall complete an engineering safety analysis that addresses signal timing and other location-specific safety features. The length of the yellow phase shall be established based on the recommended methodology of the Institute of Transportation Engineers. All traffic light signal violation monitoring systems shall provide a minimum 0.5-second grace period between the time the signal turns red and the time the first violation is recorded. If recommended by the engineering safety analysis, the city shall make reasonable location-specific safety improvements, including signs and pavement markings.

(l) The city shall evaluate the traffic light signal violation monitoring system on a monthly basis to ensure all cameras and traffic signals are functioning properly. Evaluation results shall be made available to the public.

(m) The city shall place conspicuous signs within 500 feet of the intersection approach at which a traffic light signal violation monitoring system is used. There shall be a rebuttable presumption that such signs were in place at the time of the commission of the traffic light signal violation.

(n) Prior to or coincident with the implementation or expansion of a traffic light signal violation monitoring system, the city shall conduct a public awareness program, advising the public that the city is implementing or expanding a traffic light signal violation monitoring system.

(o) Notwithstanding any other provision of this section, if a vehicle depicted in images recorded by a traffic light signal photo-monitoring system is owned, leased, or rented by a county, city, or town, then the county, city, or town may access and use the recorded images and associated information for employee disciplinary purposes.

Analysis of the Constitutional Issues

A. This is a civil proceeding, not a criminal proceeding

The Defendant asserts that this a criminal proceeding and, therefore, she is entitled to all of the constitutional rights afforded an individual in a criminal proceeding. The Court makes two findings with respect to this issue. First, the Court finds that the proceeding is civil, not criminal. Second, the Court finds that even if the proceeding is criminal in nature, the City's ordinance is constitutional.

With respect to the first issue, the City asserts, and this Court agrees, that Section 98-21 is a civil statute, which imposes a civil penalty in a civil proceeding. The City argues that Section 98-21 is analogous to other statutes that are civil in nature despite the penalties that may be imposed for violations. The City cites *Deaner v. Commonwealth*, 210 Va. 285 (1969), in support of this proposition. See *City of Fairfax Br.* at 3.

The issue in *Deaner* was whether an individual arrested for DWI had a right to consult with his attorney prior to having a blood sample taken. Given the Defendant's claim in *Deaner* that his constitutional rights were violated, the Supreme Court stated that "[w]e must first determine whether the proceeding, for revocation of the license of one who refuses to submit to a blood test after having been charged with operating a vehicle under the influence of alcohol, is a criminal proceeding, or a civil and administrative procedure." *Deaner v. Commonwealth*, 210 Va. 285, 287 (1969). In holding that the proceeding was civil, not criminal, the Supreme Court noted that the statute "shows none of the indicia of a criminal prosecution." *Id.* at 288.

That is true here as well. No arrest is made and the Defendant is not detained. Initial contact by the City is made by mail, not by personal service or by an arrest. The locality is prohibited from initiating an arrest or a contempt proceeding if the individual fails to appear pursuant to the mailed summons. A Defendant can rebut the presumption that he or she was the operator of the vehicle simply by submitting by mail the appropriate affidavit. If the presumption is not rebutted, the City cannot seek or obtain more than a \$50 penalty, and the Court cannot impose court costs. The penalty cannot appear on the operator's driving record or be used for insurance purposes. The statute provides for an appeal "in a civil proceeding." Va. Code Ann. § 15.2-968.1(G).

The fact that the instant case has a few of the procedural characteristics of a criminal case does not convert a civil proceeding into a criminal one. As the Supreme Court noted in *Deaner*:

The fact that the procedure for trial and appeal is the same as for misdemeanors is simply the course the General Assembly directs be followed. An administrative and civil proceeding is not converted into a criminal action merely because the procedural steps preliminary to trial, and incident to appeal, are the same as in a misdemeanor case.

Deaner at 290.

The City also relies on *Wilson v. Commonwealth*, 23 Va. App. 443 (1996). See *City of Fairfax Br.* at 3. In *Wilson*, the Court of Appeals addressed the question of whether the Double Jeopardy Clause prohibited the state from prosecuting the Defendant for driving on a suspended or revoked license where his vehicle was previously impounded administratively for 30 days and, after the impoundment period, the Defendant had to pay \$350 in removal and storage costs. The Court held that it did not implicate the Double Jeopardy Clause. The Court applied the test set out in *Ursery v. United States*, 518 U.S. 267 (1996):

First, the court must decide whether the legislature intended the sanction to be criminal or civil. Secondly, even if the legislature intended the sanction to be civil, the court must examine whether the sanction is “so punitive in form and effect as to render [it] criminal despite [the legislature’s] intent to the contrary.”

Wilson v. Commonwealth, 23 Va. App. 443, 452 (1996) (citation omitted).⁶ The Court held that the legislature did not intend the impoundment to be criminal and, further, that the “remedial purposes of the administrative impoundment far outweigh any incidental punitive effects that may be felt by the defendant.” *Id.* at 454 (citation omitted). That “remedial” purpose was “to prevent Wilson from violating the law again and to ensure the safety of the Commonwealth’s citizens.” *Id.* at 451.

Here, like in *Wilson*, the General Assembly clearly intended the statute to be civil, not criminal. They did so both explicitly,⁷ and implicitly.⁸ Moreover, the clear purpose of both the statute and the ordinance is to protect community safety by discouraging the running of red lights. This is illustrated by Section (j) of Section 98-21, which focuses on the criteria for the city to consider in selecting a location for the camera monitoring system.⁹

⁶ See also *Hudson v. United States*, 522 U.S. 93, 99 (1997); *Bevis v. City of New Orleans*, 686 F.3d 277, 280 (5th Cir. 2012).

⁷ See Virginia Code Section 15.2-968.1(F): “Any finding in a district court that an operator has violated an ordinance adopted as provided in this section shall be appealable to the circuit court *in a civil proceeding.*” Va. Code § 15.2-968.1(F) (emphasis added). In addition, the statute states that a violation is not deemed to be a conviction. *Id.*

⁸ This included the following: limiting the penalty to \$50, precluding the imposition of court costs, and prohibiting the collateral consequences – such as increased insurance rates and a negative impact on an individual’s driving record – commonly associated with traffic infractions or misdemeanor driving violations.

⁹ “When selecting potential intersections for a traffic light signal violation monitoring system, the city shall consider factors such as (i) the accident rate for the intersection, (ii) the rate of red light violations occurring at the intersection (number of violations per number of vehicles), (iii) the difficulty experienced by law enforcement officers in patrol cars or on foot in apprehending violators, and (iv) the ability of law enforcement officers to apprehend violators safely within a

Therefore, the Court concludes that the red light camera program imposes a civil penalty in a civil proceeding, not a criminal penalty in a criminal proceeding. This conclusion is consistent with the judgment reached by numerous courts in other jurisdictions that have examined this issue and have found similar ordinances to be civil in nature. *See, e.g., Bevis v. City of New Orleans*, 686 F.3d 277 (5th Cir. 2012); *Kilper v. City of Arnold*, No. 4:08cv0267 TCM, 2009 U.S. Dist. LEXIS 63471 (D. Mo., July, 23, 2009); *Morales v. Par. of Jefferson*, 13-486 (La. App. 5 Cir. 04/30/14); 140 So. 3d 375; *Krieger v. City of Rochester*, 978 N.Y.S.2d 588 (N.Y. Sup. Ct. 2013).

Having concluded that the ordinance imposes a civil penalty rather than a criminal penalty, the Court now turns to the implications of that finding. As the United States Supreme Court said in *U.S. v. Ward*, 448 U.S. 242, 248 (1980):

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to “any criminal case.” Similarly, the protections provided by the Sixth Amendment are available only in ‘criminal prosecutions.’ Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. *See, e.g., Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); *United States v. Regan*, 232 U.S. 37, 47-48 (1914) (proof beyond a reasonable doubt required only in criminal cases.)

U.S. v. Ward, 448 U.S. 242, 248 (1980). *See also Kilper* at 38 (“In essence, the parties’ positions on whether or not Plaintiffs’ federal due process rights were violated depend on whether the [red light camera] Ordinance violation proceeding is characterized as civil or criminal in nature . . .”).

Thus, the finding that the City’s ordinance imposes a civil penalty rather than a criminal penalty largely resolves the Defendant’s constitutional challenges. Nevertheless, the Court will analyze each of the Defendant’s constitutional challenges *as if the ordinance was criminal*. Even when examined with this assumption, and for the reasons stated below, the Court finds no constitutional violation under either the United States or Virginia constitutions.¹⁰

reasonable distance from the violation. The city may consider the risk to pedestrians as a factor, if applicable.” Fairfax, Va., City Code, pt. II, ch. 98, art. 1, § 98-21(j) (2005).

¹⁰ *See, e.g., Sevin v. Par. of Jefferson*, 621 F. Supp. 2d 372, 379 (D. La. 2009), which concerned a red light camera ordinance in Louisiana: “The Court finds it unnecessary to wade into the constitutional thicket because it is plain that the plaintiffs’ claims are meritless irrespective of how the ATSE [Automated Traffic Signal Enforcement Ordinance] is classified. In other words, the plaintiffs have not shown that the ATSE is unconstitutional even if, as they argue, it should be considered a criminal ordinance.”

Before addressing the specific constitutional challenges to the City's ordinance, the Court would note that, although the challenge before the Court is specifically addressed to the constitutionality of the City's ordinance, what is really at issue is the constitutionality of the statute which authorizes the ordinance. A comparison of the statute and the ordinance demonstrates that the ordinance does what the statute permits, *and no more*. Thus, what is really at issue in this case is the constitutionality of the statute and, when the constitutionality of a statute is challenged, certain well-established principles of law apply. *See Moses v. Commonwealth*, 27 Va. App. 293 (1998):

"Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption is one of the strongest known to the law." *Harrison v. Day*, 200 Va. 764, 770, 107 S.E. 2d 594, 598 (1959).

Moses v. Commonwealth, 27 Va. App. 293, 298-99 (1998).

The Court would also note that the Defendant in the instant case is making a facial constitutional challenge to the City ordinance. However,

[f]acial challenges are disfavored because they create a risk of "premature interpretation of statutes on the basis of factually barebones records"; they "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" and they invalidate an entire law that was passed through the democratic process.

Toghill v. Commonwealth, 289 Va. 220, 227-228 (2015) (citations omitted).

A successful facial challenge to a statute can only be mounted by a defendant "showing first that the statute in question is unconstitutional as applied to him and that the statute in question would not be constitutional in any context." *Id.* (citation omitted). If "a statute is constitutional as applied to a litigant, he or she lacks standing to assert a facial constitutional challenge to it, and the statute is not facially unconstitutional because it has at least one constitutional application." *Id.* *See also Chianelli v. Commonwealth*, 64 Va. App. 632, 643-44 (2015). Thus, the Court analyzes the Defendant's constitutional challenges on an "as applied" basis and would only reach the question of facial constitutionality if it were to find the City's ordinance to be unconstitutional as applied to this Defendant.

B. The Defendant received constitutionally sufficient notice and service

The Defendant argues that the City "misuses" Virginia Code Section 19.2-76.2 by mailing the summons to her. Def.'s Mem. at 4. She argues that this code provision authorizes service by mail for parking and trash ordinance violations but "says absolutely nothing about traffic

infractions and moving violations.” Def.’s Mem. at 4. However, Virginia Code Section 15.2-968.1(G) specifically authorizes the execution of a summons for a violation of this nature “pursuant to Section 19.2-76.2.” The two statutes – 19.2-76.2 and 15.2-968.1 – must be read together and not in isolation.¹¹ When read together, the mailing of the summons is clearly lawful and authorized.

Moreover, the mailing of the summons is only the first of several steps in providing notice. In the event that there is no appearance pursuant to the mailing, the City is prohibited from initiating an arrest or a contempt proceeding. Rather, the City must then proceed to obtain service as set forth in Virginia Code Section 19.2-76.3, which requires personal service or substituted service pursuant to Virginia Code Section 8.01-296. *See* Va. Code Ann. § 15.2-968.1(G); Fairfax, Va., City Code, pt. II, ch. 98, art. 1, § 98-21(g) (2005). In the event that there is no appearance pursuant to this service, the summons must be executed pursuant to Virginia Code Section 19.2-76, which provides for personal service by a law enforcement officer. *See* Va. Code Ann. § 19.2-76.3. Thus, the owner of a vehicle may potentially receive three separate notices of a violation, the last one being by a law enforcement officer. In the instant case, the summons was mailed to the registered owner of the vehicle, i.e., the Defendant, and she returned by mail the form requesting a hearing.

With regard to the issue of notice, the Notice of Violation set forth the essential elements of the violation: (1) date and time of the violation; (2) location of the violation; (3) direction of the vehicle at the time of the violation; (4) vehicle speed; and (5) the citation number. Further, the Notice of Violation sent to the Defendant included three photographs of the vehicle, including: one that clearly showed the license plate of the vehicle; one that showed the vehicle before entering the intersection; and one that showed the vehicle after entering the intersection. In addition, the Notice of Violation notified the Defendant that she had the option of either paying the citation amount (\$50) or contesting it by requesting a court hearing. Finally, the summons contained a sworn certification by a law enforcement officer indicating that she had inspected the recorded images shown in the Notice of Violation and determined that the vehicle was operated in violation of Code Section 98-21. In addition, both the statute and ordinance required that the notice of violation be accompanied by a notice of the procedure to rebut the presumption that the owner of the vehicle was the operator of the vehicle, including instructions for the filing of an affidavit. *See* Va. Code Ann. § 15.2-968.1(G); Fairfax, Va., City Code, pt. II, ch. 98, art. 1, § 98-21(g) (2005).

Further, both the statute and ordinance provided for at least a 30 day period from the time of the mailing to the due date for payment. This was to provide the recipient of the summons an opportunity to inspect information collected by the monitoring system. In the Defendant’s case, the mailing date was August 31, 2017 and the due date was November 30, 2017, a period of

¹¹ When discussing statutory construction, the Virginia Supreme Court has looked to certain sections of American Jurisprudence to describe the connected relationship between statutes: “In 50 Am. Jur., Statutes, § 349, pp. 345, 346, 347, it is said: ‘Under the rule of statutory construction of statutes in pari materia, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement.’” *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957).

approximately 90 days, or three times longer than what was required by statute. *See* Notice of Violation.

Given the foregoing, the Court finds that the notice provided to the Defendant was constitutionally sufficient and that the means by which the Defendant received notice was also constitutionally sufficient.¹² Here, the Defendant received notice through the first notification mechanism authorized by statute. That notice provided the Defendant detailed information as to both the nature of the violation and the procedural options available to the Defendant to contest the violation. The Defendant then availed herself of one of these options, specifically to contest the violation at an evidentiary hearing, both in General District Court and, subsequently, in Circuit Court. Due process and constitutional notice requirements under the Fifth and Sixth Amendments to the United States Constitution were fully satisfied in this manner,¹³ as were Article 1, Section 8¹⁴ and Article 1, Section 11¹⁵ of the Virginia Constitution.

C. The Defendant's privilege against self-incrimination was not violated

The Defendant asserts that her privilege against self-incrimination was violated because Fairfax City Code Section 98-21, consistent with Virginia Code Section 15.2-968.1, permits the

¹² Other Virginia code provisions provide for violations to be noticed by the issuance of summons. *See, e.g.*, Va. Code Ann. § 15.2-2209 (zoning violations); Va. Code Ann. § 15.2-2157 (on-site sewage violations). Other statutes provide for summons to be issued by mail. *See* Va. Code Ann. § 19.2-76.2. City of Fairfax Br. 5.

¹³ *See, e.g., Krieger v. City of Rochester*, 978 N.Y.S.2d 588, 601 (N.Y. Sup. Ct. 2013) (“The hallmarks of due process are provided by the current red light camera program, namely notice and a chance to be heard. More specifically, the notice of liability provides sufficient detail of the allegations, as amplified by an opportunity to view the video of the alleged infraction via the Internet, and the matter is set for a hearing at which time the owner is given a chance to contest the alleged infraction.”). Here, too, the Defendant has received notice, an opportunity to review the evidence, and the opportunity to be heard and contest the violation.

¹⁴ Article 1, Section 8 of the Virginia Constitution states in relevant part: “That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.” Va. Const. art. I, § 8.

¹⁵ Article 1, Section 11 of the Virginia Constitution states in relevant part: “That no person shall be deprived of his life, liberty, or property without due process of law . . . and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged” Va. Const. art. 1, § 11.

Defendant to file an affidavit or testify that she was not the operator of the vehicle at the time of the violation. The Court finds this argument to be without merit.

There is nothing in the statute or ordinance that requires a defendant to file an affidavit or to testify, let alone be a witness *against* herself. Indeed, precisely the opposite is true. The ordinance provides a defendant two powerful mechanisms to defeat an alleged violation: submission of an affidavit or sworn testimony. When a defendant exercises either option, the presumption that the owner was the operator of the vehicle is not merely undermined or challenged but stands “rebutted.” Far from violating the Defendant’s privilege *against* self-incrimination, the statute and ordinance guarantees the Defendant a privilege *for* self-exoneration.

It appears to be the Defendant’s argument that a defendant who does not submit an affidavit or testify at trial, after having been given the explicit opportunity to do so, is in effect being forced to admit her guilt. That argument has no merit. The fact that an owner of a vehicle can exculpate herself by submitting the affidavit does not mean that the owner of a vehicle who does not submit the affidavit thereby inculpates herself. Rather, the failure to submit the affidavit (or to testify, for that matter) has no evidentiary significance.

Therefore, the Court finds that the Defendant’s privilege against self-incrimination was not violated or burdened by operation of the statute or ordinance.¹⁶

D. The ordinance does not deprive the Defendant of due process of law

The Defendant makes a number of arguments in support of her claim that she was deprived of due process. She asserts: (1) that she was denied the presumption of innocence; (2) that the ordinance shifts the burden of proof from the City to the Defendant; (3) that she was denied her right to fair trial because the ordinance uses her failure to file an affidavit as evidence against her; (4) that the ordinance presumes that the defendant is guilty; (5) that the ordinance permits the trier of fact to be “unfair and biased”; and (6) that it impermissibly allows the City to use as a witness an officer without personal knowledge of the violation. *See* Def.’s Mem.

The Court does not find any of these assertions to be meritorious.

First, while it is true that the ordinance creates a presumption that the owner of a vehicle was the operator of the vehicle at the time of the violation, it is explicitly a “rebuttable” presumption. Fairfax, Va., City Code, pt. II, ch. 98, art. 1, § 98-21(e) (2005). In other words, the ordinance first sets out the circumstances constituting a *prima facie* case.¹⁷ It then sets out three distinct

¹⁶ *See, e.g., Sevin v. Par. of Jefferson*, 621 F. Supp. 2d 372, 382 (D. La. 2009) (citation omitted), rejecting a similar privilege against self-incrimination claim as a matter of law: “The statute simply provides that a defendant who alleges that he was not the driver ‘has the responsibility’ to present a sworn statement, which indicates that it is the defendant’s burden to come forward with such evidence.”

¹⁷ “In the prosecution of an offense established under this section, *prima facie* evidence that the vehicle described in the summons issued pursuant to subsection (d) above was operated in

ways the presumption can be rebutted.¹⁸ As the Virginia Court of Appeals recently noted in *Parker v. Commonwealth*, 2017 Va. App. LEXIS 243 (2017), “Virginia’s criminal and traffic statutes are rife with *prima facie* proof mechanisms, many of which the Commonwealth’s courts have held to constitute permissive inferences.” *Parker v. Commonwealth*, 2017 Va. App. LEXIS 243, 12 (2017). The Court then proceeds to cite several examples of such proof mechanisms. *Id.* at n.3.¹⁹

In *Dooley v. Commonwealth*, 198 Va. 32 (1956), the Supreme Court upheld a statute that provided that police radar readings were *prima facie* evidence of a car’s speed:

Defendant’s contention that the Act contravenes the due process clause of the Constitution is, in our view, without merit. The general rule is that the test of the constitutionality of statutes making proof of a certain fact *prima facie* or presumptive evidence of another fact is whether there is a natural and rational evidentiary relation between the fact proven and the fact presumed. Where such

violation of this section, together with proof that the defendant was at the time of such violation the owner, lessee, or renter of the vehicle, shall constitute in evidence a rebuttable presumption that such owner, lessee, or renter of the vehicle was the person who committed the violation.” Fairfax, Va., City Code, pt. II, ch. 98, art. 1, § 98-21(e) (2005).

¹⁸ “Such presumption shall be rebutted if the owner, lessee, or renter of the vehicle (i) files an affidavit by regular mail with the clerk of the general district court for the city that he or she was not the operator of the vehicle at the time of the alleged violation or (ii) testifies in the general district court for the city, under oath that he or she was not the operator of the vehicle at the time of the alleged violation. Such presumption shall also be rebutted if a certified copy of a police report, showing that the vehicle had been reported to the police as stolen prior to the time of the alleged violation of this section, is presented, prior to the return date established on the summons issued pursuant to this section, to the general district court for the city adjudicating the alleged violation.” Fairfax, Va., City Code, pt. II, ch. 98, art. 1, § 98-21(e) (2005).

¹⁹ *Parker* involved an assertion by the defendant that Virginia Code § 46.2-384 violated due process because it stated that the portion of a DMV transcript relating to a prior conviction “*shall be prima facie evidence of the facts stated therein* with respect to the prior offense.” *Parker* at *8. (Emphasis in Original.) The Court rejected this claim: “Code § 46.2-384’s *prima facie* language ... constitutes a permissive inference that does not violate due process because it does not shift the burden of proof onto appellant. At most, it ‘does no more than shift the burden of going forward with the evidence.’ By presenting the transcript, the Commonwealth satisfied its burden of production and created an inference that appellant had been convicted of the crimes reported on the transcript. The Commonwealth obligated appellant to produce some evidence contesting that inference, but it retained ‘the ultimate burden of proof beyond a reasonable doubt.’” *Id.* at *13 (citations omitted).

evidentiary relation exists and where the presumption is found to be both reasonable and rebuttable it does not violate the due process amendment.

Dooley v. Commonwealth, 198 Va. 32, 34 (1956) (citations omitted).²⁰

The *prima facie* proof mechanism in the instant case is drawing of an evidentiary connection between the ownership of a vehicle and its operation by that owner. That is a “natural and rational evidentiary relation between the fact proven and the fact presumed,” which is both “reasonable” and “rebuttable.” *Id.* at 34-35.²¹

In sum, the use of a rebuttable presumption in the city ordinance does not offend the Defendant’s Due Process rights.²² As to the Defendant’s related due process arguments, they are essentially variations of the same assertion that the Defendant’s rights were violated by the ordinance’s use of a rebuttable presumption. The ordinance did not shift the burden of proof,

²⁰ See also *Lindsey v. Commonwealth*, 293 Va. 1, 6 (2017): “The Due Process Clause, however, does not prohibit the use of a permissive inference. A permissive inference is ‘a procedural device that shifts to a defendant the burden of producing some evidence contesting a fact that may otherwise be inferred, provided that the prosecution retains the ultimate burden of proof beyond a reasonable doubt.’”

²¹ See also *State v. Dahl*, 87 P.3d 650, 656 (Or. 2004) (“[I]t was rational for the legislature to assume that registered owners commonly drive their own cars [O]f all the conceivable purposes for which a person might register ownership of a vehicle in Oregon . . . use of the vehicle for transportation exceeds all others.”).

²² Similar arguments have been rejected by other courts that have addressed the constitutionality of red light camera programs. See, e.g., *Sevin v. Par. of Jefferson*, 621 F. Supp. 2d 372, 383-84 (D. La. 2009) (“The plaintiffs next claim that the ATSE [Automated Traffic Signal Enforcement Ordinance] violates their due process rights because it provides that the equipment owner’s affidavit ‘is *prima facie* evidence of the alleged violation’*** Plaintiffs’ argument rests on the assumption that the ATSE establishes a mandatory presumption and that the presumption will consistently be applied in a way that relieves the State of its burden of proof. Nothing in the ATSE compels that reading, however. The ATSE provides that an affidavit from the owner of the camera equipment ‘is *prima facie* evidence’ of a violation. Relevant Louisiana jurisprudence indicates that this language must be construed as establishing a permissive presumption.”). See also *State v. Dahl*, 87 P.3d 650, 656 (Or. 2004) (“Having considered defendant’s statutory and constitutional arguments, we hold that the state validly relied on the presumption [in the Oregon photo radar statute] to prove that defendant committed a traffic violation.”)

which remained with the City; nor did it undermine the presumption of innocence; nor did it render the trial unfair.

Finally with respect to due process, the Defendant claims that her trial was rendered unfair because an officer without personal knowledge was permitted to testify at trial. The Court finds this argument to be without merit. The officer's testimony was consistent with her certification and was very limited in nature. She verified that the camera was working properly, that she reviewed the photographs and video of the incident, and that her review indicated that the vehicle registered to the Defendant had made a right turn on red without coming to a complete stop at the intersection of Fairfax Boulevard and Jermantown Road. She also indicated that she issued the citation to the Defendant. The Court itself examined the photographs and the video and drew its own conclusion that the vehicle in question turned right on red without coming to a complete stop. Moreover, the officer acknowledged that she was not present at the time of the incident and did not know who was driving the vehicle. The testimony of the officer did not constitute a due process violation.

E. The Defendant's Equal Protection rights under the Fourteenth Amendment were not violated

The Defendant also asserts that her Fourteenth Amendment Equal Protections rights were violated because a red light camera violation is treated differently than other traffic infraction moving violations. The Court finds this argument to be without merit.

The first question to resolve is whether, in fact, the Defendant is treated differently than other individuals who receive traffic tickets. The City makes the salient point that a defendant who receives a Notice of Violation pursuant to City Code Section 98-21 is given proper notice and a full opportunity to contest the violation:

Section 98-21 provides an absolute right to request a trial regarding a violation of the ordinance. Respondent in choosing to exercise that right, just like in any other traffic matter, appears in court, has the right to an open and public trial, maintains the presumption of innocence unless and until guilt is proved beyond a reasonable doubt, forces the City to present sufficient evidence to establish the violation beyond a reasonable doubt, has the right to confront and cross-examine the law enforcement officer who monitored and reviewed the recorded image(s) and issued the civil summons, has the right to review any recorded and/or video images) prior to trial and has right to object to the admission of any evidence offered against respondent. Additionally, and consistent with any other traffic matter tried in the district court or circuit court on appeal, respondent has the right to testify and offer any relevant evidence on his or her behalf. Moreover, respondent has the right not to testify, and consistent with what occurred in the case at hand, has an absolute right to remain silent.

City of Fairfax Br. 10.

The most that could be argued is that: (1) the Court relies on a photograph and video taken by an automated camera system rather than an eyewitness police officer or the officer's

dashboard camera; (2) initial notices are sent by mail instead of hand-served by a police officer; and (3) the ordinance provides the rebuttable presumption described above. The Court is not persuaded that any of these differences rise to a cognizable Equal Protection challenge.

First, the standard governing this review is clearly whether there is a rational basis for disparate treatment. “[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.” *Heller v. Doe*, 509 U.S. 312, 319 (1993). “[T]he Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” *Nordlinger v. Hahn*, 505 U.S. 1, 21 (1992). In fact, the classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Commc’ns*, 508 U.S. 307, 313 (1993).

Second, the clear purpose of the statute and ordinance is to protect public safety at certain specific intersections. The factors to be considered all relate to public safety.²³ The use of an automated camera system that identifies individuals who run a red light is a rational and reasonable means to address the danger posed.

Third, as described above, a defendant charged with a red light camera violation is given the full array of procedural rights that are afforded to other individuals charged with traffic infractions. This is true even though the actual penalty for a red light camera violation is objectively less serious than the penalty for other traffic infractions. For example, unlike a ticket for running a red light issued by an officer who witnesses the infraction, a red light camera violation does not constitute an operator conviction, does not impact on insurance, does not require payment of court costs, and is limited to \$50.

Fourth, as to the reliance on photographs and video obtained by the automated system, the Court relies on such evidence routinely in a variety of litigation contexts. This includes crime scene photographs, dashcam and body camera video, and surveillance photos and video. Moreover, there was no objection in the instant case to the admission of either the photographs or video of the vehicle.

Fifth, the Court finds no significance in the fact that the notice of violation is initially sent by mail, given that no enforcement action can be taken against a vehicle owner until and unless the notice of violation is served by a law enforcement officer.

²³ “When selecting potential intersections for a traffic light signal violation monitoring system, the city shall consider factors such as (i) the accident rate for the intersection, (ii) the rate of red light violations occurring at the intersection (number of violations per number of vehicles), (iii) the difficulty experienced by law enforcement officers in patrol cars or on foot in apprehending violators, and (iv) the ability of law enforcement officers to apprehend violators safely within a reasonable distance from the violation. The city may consider the risk to pedestrians as a factor, if applicable.” Fairfax, Va., City Code, pt. II, ch. 98, art. 1, § 98-21(j) (2005).

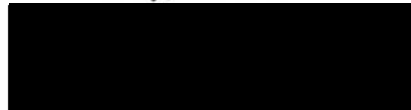
Finally, as to the presumption issue, the Court would note that the presumption can be readily and conclusively rebutted, and does not even require an appearance in court. In contrast, a defendant charged with other traffic infractions like speeding or running a stop sign or an illegal lane change, cannot rebut the charge simply by submitting an affidavit.

In sum, the Court finds that to the extent there was any disparate treatment of this Defendant by virtue of having been charged with a violation of the red light camera program rather than other traffic infractions, there is a “rational basis” for the disparate treatment. Therefore, the Court finds that there is no Equal Protection violation.

CONCLUSION

For the foregoing reasons, the Defendant’s motion for reconsideration is DENIED, and the suspension of the Final Order shall be lifted. An Order, in accordance with this opinion, will be issued today.

Sincerely,



Randy I. Bellows
Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CITY OF FAIRFAX)
VERSUS)
TAWANA JEAN COOPER)

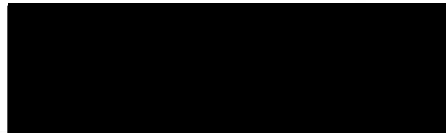
CASE NUMBER MI-2018-0000261
APPEAL – FAIL TO COMPLY WITH
TRAFFIC SIGNAL

ORDER

For the reasons stated in the Letter Opinion issued on July 10, 2018 in this case, the Defendant's Motion to Reconsider is **denied**.

The suspension of the final order in this case is hereby vacated.

Entered on July 10, 2018.



JUDGE RANDY I. BELLOWS