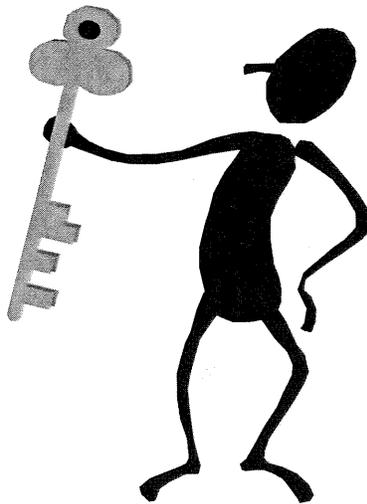


**What Would You Do Next?
Municipal Rulings from the Bench**

Supporting Materials

August 6, 2010



Presented by
Judge Jim Petersen

Tennessee Municipal Judges' Conference
2010 Annual Meeting
Franklin, Tennessee

**WHAT WOULD YOU DO NEXT?
SUPPORTING MATERIALS FOR 2010 JUDICIAL CONFERENCE**

Problem I. WINDOW TINTING

A. STATE STATUTE

55-9-107. Motor vehicle windows with tinting, reflecting or sun screen material.

(a) (1) It is unlawful for any person to operate, upon a public highway, street or road, any motor vehicle in which any window that has a visible light transmittance equal to, but not less than, that specified in the Federal Motor Vehicle Safety Standard No. 205, codified in 49 CFR 571.205, has been altered, treated or replaced by the affixing, application or installation of any material that:

(A) Has a visible light transmittance of less than thirty-five percent (35%); or

(B) With the exception of the manufacturer's standard installed shade band, reduces the visible light transmittance in the windshield below seventy percent (70%).

(2) Any person who installs window tinting materials in this state for profit, barter, or wages or commissions is defined as a "professional installer" for the purposes of this section; and it is unlawful for a professional installer to apply tinting materials to any motor vehicle so as to cause that motor vehicle to be in violation of this section.

(3) All professional installers of window tinting materials shall supply and shall affix to the lower right corner of the driver's window an adhesive label, the size and style of which shall be determined by the commissioner of safety, that includes:

(A) The installer's business name; and

(B) The legend "Complies with *Tennessee Code Annotated*, § 55-9-107."

(4) All professional installers of window tinting materials shall supply each customer with a signed receipt for each motor vehicle to which tinting materials have been applied that includes:

(A) Date of installation;

(B) Make, model, paint color and license plate number and state;

(C) The legend "Complies with *Tennessee Code Annotated*, § 55-9-107, at date of installation"; and

(D) The legend "This receipt shall be kept with motor vehicle registration documents."

(5) The owner of any vehicle in question has the burden of proof that the motor vehicle is in compliance with this section.

(6) (A) The restrictions of this subsection (a) do not apply to any of the following motor vehicles:

(i) Any motor vehicle model permitted by federal regulations to be equipped with certain windows tinted so as not to conform to the specifications of subdivision (a)(1)(A) with respect to those certain windows;

(ii) Any motor vehicle bearing commercial license plates or government service license plates that are used for law enforcement purposes, for those windows rearward of the front doors; and

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(iii) Any motor vehicle that is registered in another state and meets the requirements of the state of registration.

(B) This subdivision (a)(6) shall not be construed in any way to exempt the front door windows of any motor vehicle of any kind from the specifications of subdivision (a)(1)(A).

(b) (1) Notwithstanding the provisions of subdivision (a)(1) to the contrary, any person with a medical condition that is adversely affected by ultraviolet light may submit a statement to the commissioner from that person's physician certifying that the person has a medical condition that requires reduction of light transmission in the windows of the person's vehicle in excess of the standards established in subsection (a). The commissioner shall submit the certified statement to the department's medical review board for evaluation. If the review board finds the exemption warranted, it shall recommend that the commissioner authorize the exemption, and the degree of tinting exemption that is appropriate. The commissioner shall then supply a certificate or decal, indicating the degree of exemption, to the applicant who shall display it in the motor vehicle.

(2) Any applicant aggrieved by a decision of the medical review board or the commissioner may appeal in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. The appeal may be made to the chancery court of the county where the aggrieved applicant resides at the option of the applicant.

(c) It is probable cause for a full-time, salaried police officer of this state to detain a motor vehicle being operated on the public roads, streets or highways of this state when the officer has a reasonable belief that the motor vehicle is in violation of subdivision (a)(1), for the purpose of conducting a field comparison test.

(d) It is a Class C misdemeanor for the operator of a motor vehicle to refuse to submit to the field comparison test when directed to do so by a full-time, salaried police officer, or for any person to otherwise violate any provisions of this section.

(e) The commissioner of safety shall establish a standardized method and procedure by which law enforcement officers can readily, and with reasonable accuracy, conduct a field comparison test to determine if a motor vehicle's window."

Problem 2: OFFICER CAN NOT REMEMBER

A. Refreshing Recollections from written reports.

Excerpt from "how to beat your ticket" website.

The officer is required to testify from "independent recollection." You also need to ask to see what it is the officer is reading even if you received the officer's copy of the citation through subpoena. The judge will likely allow the officer to use his notes to refresh his memory if the officer tells the court that he will require the notes to testify. This will now start the wheels in motion for a dismissal since the 6th Amendment to the Constitution guarantees you the right to be confronted with the witnesses against you. The officer and his testimony, not the citation, are the witnesses against you. If the officer has no independent recollection he is considered incompetent to testify.

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B. Rule of Evidence 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703 relating to opinion testimony by expert witnesses.

C. Case of Graham v. Mohr

In the case of *Graham v. Mohr*, 2002 Tenn. App. LEXIS 175, 2002, *the trial court disallowed the testimony of an officer who admitted that he could not independently recollect an accident, and that the accident report he had previously written did not refresh his independent recollection. In affirming the trial court's exclusion of the testimony of the officer, the court wrote:*

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Tenn. R. Evid. 602. The questioning of Officer Stack demonstrated that the witness lacked a present recollection of his investigation. Officer Stack repeatedly stated that he had no personal recollection of the circumstances of the accident - one that he had investigated more than two years prior. At one point, Officer Stack asserted that he "vaguely" remembered the conditions at the accident scene; however, upon being asked if he remembered the conditions *apart from his report*, Officer Stack replied, "if I totally answered yes, I remember the conditions, I wouldn't be telling the truth and I'm not going to do that. I don't truly remember the conditions." Officer Stack candidly admitted that, to his knowledge, there was nothing that would refresh his memory. Since the officer repeatedly denied having any recollection of the events of April 23, 1998 - and since he was unable to refresh his recollection by reviewing his report - it is evident that Officer Stack lacked the requisite personal knowledge to testify. Simply stated, the officer had no admissible relevant evidence to offer with respect to this litigation. Therefore, the trial court correctly excluded his testimony as it is in compliance with this section."

Problem 3: EXCESSIVE NOISE ORDINANCES

A. HARSHAW CASE

CITY OF KNOXVILLE v. LUMARI HARSHAW
COURT OF APPEALS OF TENNESSEE, AT KNOXVILLE
2003 Tenn. App. LEXIS 352

While on patrol, Officer Gerald Thomas George ("the Officer") heard a "thumping bass noise" coming from a vehicle "at least 100 yards" away. The Officer stopped the vehicle and issued a citation for violation of section 18-5 of the City of Knoxville noise ordinance ("Ordinance") to the driver, Lumari Harshaw ("Defendant"). The Trial Court found Defendant violated the Ordinance. Defendant appeals claiming the City of Knoxville ("City") failed to prove an element of the charge, specifically that the noise was "audible to a person of normal hearing sensitivity more than fifty (50) feet from [the] vehicle." We affirm.

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Background

On May 17, 2001, the Officer was on patrol sitting underneath a large tree on Riverside Drive when he heard a "thumping bass noise" coming from a vehicle "at least 100 yards" away. The Officer stopped the vehicle and issued Defendant, the driver of the vehicle, a citation for violation of section 18-5 of the City noise ordinance. Defendant stipulated at trial that the Officer first heard the noise from a distance of 100 yards. The City also produced evidence that Defendant had received another citation for violation of the City noise ordinance, from a different police officer, approximately fifteen minutes prior to receiving the citation at issue in this case. The City, however, produced no proof regarding the appropriate punishment for violation of the Ordinance.

The Ordinance states, in pertinent part,:

Sec. 18-5. Noise from motor vehicle audio equipment.

Consistent with other provisions of this chapter, and in addition thereto, no person shall use or operate any radio, tape player, record player, compact disc player or any similar device in or on a motor vehicle located on the public streets of the city, property owned by or leased to Knoxville's community development corporation, or within a public park, within a public parking lot or on any other public premise within the city, which is audible to a person of normal hearing sensitivity more than fifty (50) feet from such vehicle, . . . Words and phrases need not be discernible for said sound to be 'audible', and said sound shall include bass reverberation. Knoxville, Tenn., Ordinance 0-507-98, § 1 (1998).

The Trial Court found that "if a police officer can hear the sound 100 yards away, there is no question that a person of average hearing could have heard this noise within 50 feet of it . . ." The Trial Court held Defendant violated the Ordinance. Because no proof regarding punishment was presented, the Trial Court did not order Defendant to pay a fine, but only assessed Defendant costs. Defendant appeals.

Discussion

Although not stated exactly as such, Defendant raises one overall issue on appeal: whether the evidence presented by the City was sufficient to establish a violation of the Ordinance.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Procedurally, cases involving violation of city ordinances [are] civil in nature. . . . They are not criminal prosecutions, but are merely penal actions having as their object the vindication of domestic regulations. They are governed by rules in civil cases . . ." *Metro. Gov't of Nashville & Davidson County v. Allen*, 529 S.W.2d 699, 707 (Tenn. 1975) (citations omitted). *Accord, e.g., City of Chattanooga v. Davis*, 54 S.W.3d 248, 259 (Tenn. 2001). Defendant agrees that the City had the burden of proving Defendant's violation of the municipal ordinance only by a preponderance of the evidence. See *Sparta v. Lewis*, 91 Tenn. 370, 23 S.W. 182, 184 (Tenn. 1891).

Defendant correctly argues the Ordinance contains four elements that the City has the burden of proving. Defendant then argues the City failed to produce any direct or circumstantial evidence [*5] to meet one of those elements, namely that the noise be audible to a person of normal hearing sensitivity more than fifty feet from the vehicle. Defendant argues that since the City's only

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witness, the Officer, did not testify he had normal hearing, and no other proof was introduced showing the Officer had normal hearing, the City failed to produce any direct evidence as to this element. Defendant also argues the City failed to produce any circumstantial evidence as to this element. Although the Officer testified he heard the sound from approximately 100 yards away, Defendant claims this evidence is not relevant to whether the sound was audible to a person of normal hearing sensitivity more than fifty feet from the vehicle. We disagree.

The Tennessee Rules of Evidence defines relevant evidence as "^{HN4} evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

The City produced evidence that the Officer heard the sound from a distance of approximately 100 yards, six times the distance required in the Ordinance. Just as jurors "are [*6] not required to set aside [their] common knowledge . . . [and] are permitted to weigh the evidence in the light of [their] common sense, observations and experience," a trial judge when acting as the trier of fact need not suspend his or her common sense. Tenn. Pattern Jury Instructions - Civil § 15.04 (1997). *See also High v. Lenow*, 195 Tenn. 158, 258 S.W.2d 742, 746 (Tenn. 1953) (stating "clearly the members of the jury have a right without evidence being offered to take into consideration their judgment from their ordinary experiences in life . . .").

We believe this evidence that the Officer heard the sound from a distance of approximately 100 yards away does tend to make the existence of the fact in question, that the sound was audible to a person of normal hearing sensitivity more than fifty (50) feet from the vehicle, more probable than it would be without this evidence. Therefore, the evidence that the Officer heard the sound from approximately 100 yards away was relevant. No evidence was produced to the contrary.

Defendant also argues that "normal hearing sensitivity" is a medical term and that the existence of "normal hearing sensitivity" is beyond the realm of knowledge of a layperson. Thus, Defendant argues, expert opinion evidence is necessary to prove the noise was "audible to a person of normal hearing sensitivity more than fifty (50) feet from [the] vehicle." We again disagree.

The term "normal hearing sensitivity" is not defined in the Ordinance. As such, basic rules of statutory construction require us to ascertain and give effect to the intention and purpose of the legislative body as "ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." Carson Creek Vacation Resorts, Inc. v. State Dep't of Revenue, 865 S.W.2d 1, 2 (Tenn. 1993). We believe the natural and ordinary meaning of this language discloses both the intention and purpose of the legislative body in enacting this ordinance. The legislative body made the policy decision that if a noise is loud enough for those individuals with normal hearing, which by the natural and ordinary meaning of the language would be the hearing ability held by a majority of the population, to hear the sound more than fifty (50) feet from [*8] the vehicle, the noise is too loud and is prohibited by the ordinance. Defendant's reply brief cites to cases from other states holding that noise levels capable of producing hearing loss are not a matter of common knowledge. While it likely is true that what noise levels are capable of producing hearing loss is not a matter of common knowledge, this contention does not apply to the instant case. The case at hand is not concerned with whether the noise heard by the Officer was capable of producing hearing loss. Rather, the instant case is concerned only with whether the noise was *audible* to a person of normal hearing sensitivity from a distance of more than fifty feet from the vehicle. Stated another way, would it be heard by most people at more than fifty (50) feet. Given the evidence presented, we find Defendant's position that expert testimony is necessary to establish whether this noise was audible to a person of normal hearing sensitivity from more than fifty (50) feet from the vehicle to be unpersuasive.

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Defendant argues the Trial Court speculated the noise would be "audible to a person of normal hearing sensitivity more than fifty (50) feet from [the] vehicle," as no [*9] evidence was produced regarding the Officer's hearing capacity. The Trial Court was not required to suspend common sense. The noise was heard by the Officer from a distance six times greater than that required under the Ordinance. As already discussed, this evidence was relevant, and in the absence of any evidence to the contrary preponderates in favor of a finding that the noise was "audible to a person of normal hearing sensitivity more than fifty (50) feet from [the] vehicle."

The evidence preponderates, however slightly, in favor of a finding that the noise was "audible to a person of normal hearing sensitivity more than fifty (50) feet from [the] vehicle." The only evidence produced at trial on this issue showed the noise was audible to the Officer from a distance *six times greater* than the distance required under the Ordinance. No evidence was produced to the contrary. The evidence does not preponderate against the Trial Court's findings, and, therefore, these findings are presumed correct. As we have held this evidence is relevant because it had a tendency to make it more probable that this noise would be heard by a person of normal hearing sensitivity more than fifty [*10] (50) feet from the vehicle, and as this was the only evidence presented to the Trial Court on this issue, the City met its burden of proving this element by a preponderance of the evidence. We, therefore, hold that the evidence presented by the City was sufficient to establish a violation of the Ordinance. We affirm the Trial Court's holding that Defendant violated the Ordinance.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellant, Lumari Harshaw, and his surety.

MICHAEL SWINEY, JUDGE

Miller v. Memphis, 181 Tenn. 15

The complainant Lee Miller filed his original bill under the declaratory judgment statute, in which he alleged that a certain ordinance of the City of Memphis is invalid, the same requiring a permit for the operation of music boxes, commonly spoken of as "juke" boxes. The complainant alleges that he leases these music machines to various persons in the City of Memphis and elsewhere and that they are operated by an electric current; that they play selections of music automatically upon the insertion of a coin placed in a slot by customers; that he has paid State, County, City, and Federal Government privilege taxes; that he held licenses issued by the City of Memphis to operate machines for 1943, a separate license being issued for each machine; but in April, 1943, the City passed an ordinance which imposed an additional requirement, in that it required, as a prerequisite to the installation and operation of a machine, the securing of a permit from the Chief of Police at a cost of two dollars for each permit and making it unlawful to operate it otherwise. It is further alleged that some permits were granted and some denied; that he was advised that no more blank forms for applications for permits would be given him and no further permits would be issued. The validity of the ordinance is assailed on the following grounds: (1) said ordinance is in violation of the due process clause of the Constitution of the United States (Section 1 of the Fourteenth Amendment) and that it violates Article 1, Section 8, of the Constitution of Tennessee; (2) that the ordinance is *ultra vires* and not fairly referable to the police power of the municipality; (3) that said ordinance is unreasonable and deprives complainant of the lawful right to operate his business, etc.; (5) that it vests the City of Memphis with power to impair the revenue of the State, Coun-

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ty, and Federal Government; (6) said ordinance abridges the privileges and immunities of complainant and other citizens; and (7) that it is "unreasonable, arbitrary, discretionary, oppressive, and unequal in its application to persons and citizens". The prayer of the bill is that defendants be enjoined from enforcing the ordinance.

The Chief of Police and Commissioner of Public Safety who were made parties defendant demurred to the bill on the ground that no relief is sought against them. The City of Memphis demurred upon the following grounds:

"The payment of the taxes for the privilege of operating said mechanical music machines does not preclude the City of Memphis from making reasonable regulations pertaining to their use and operation.

"(A) Nor does the ordinance in regulating the use and operation of said mechanical music machines violate any constitutional rights of complainant or others similarly situated.

"(B) Nor does the regulation imposed thereby violate any constitutional rights and privileges of complainant, or others similarly situated, in that it may impose some additional burden or requirements upon the exercise of the privilege of operation of said machines.

"The provisions in Section Six (6) to Sixteen (16) of said ordinance are not invalid because the requirements made therein are designed to and do protect the safety, health, general welfare, peace and morale and do not violate any provisions of the Constitution of the United States or of the State of Tennessee."

The Chancellor sustained the demurrers and dismissed the bill, holding that the ordinance was neither invalid nor unreasonable and that it did not violate the Constitution of the United States or of the State of Tennessee, that the Court had no jurisdiction to enjoin the enforcement of a penal law, and that complainant had not exhausted his remedy by appeal to the City Commission as provided by the ordinance.

Complainant has appealed and the several assignments of error raise the single question as to the authority of the City of Memphis to regulate the operation of musical machines or "juke boxes" by requiring a permit of the owner or lessor. Complainant contends (1) that the ordinance is unconstitutional for the reasons above mentioned; (2) that it is not based upon any statutory authority; and (3) that it is not within the general police power of the municipality. The defendants by demurrer challenge the correctness of complainant's contention and insist that it is a valid ordinance; that it is based upon an express statute, and, moreover, is a valid exercise of authority under the general police power.

Before discussing the legal question involved we should give attention to the pertinent sections of the ordinance that is assailed. Section 1 makes it unlawful for "any person to set up or operate within the city limits of Memphis any mechanical amusement device without first obtaining a permit from the Chief of Police," etc. Section 2 defines a mechanical amusement device as follows:

"'Mechanical Amusement Device' shall mean any machine or device which, upon the insertion of a coin, slug or token in any slot or receptacle attached to said machine or connected therewith, operates or which may be operated for use as a game, contest or amusement or which [*20] may be operated for the playing of music or may be used for any such game, contest or amusement and which does not contain a pay-off device for the return of slugs, money, coins, checks, tokens or merchandise."

Section 4 makes it unlawful for any owner or operator of such a device to cause, permit, or allow same to be located, operated, or maintained within six hundred feet of the nearest street entrance to or exit from any public playground or public or private school of elementary or high

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school grades. Section 5 provides for making application to the Chief of Police for such permit and that the applicant shall give the following information:

"(a) Name of applicant;

"(b) Place where said mechanical amusement device is to be placed, maintained to be operated or operated; and, if said mechanical amusement device is to be placed, maintained to be operated or operated in connection with any other business or calling, the character of said business or calling;

"(c) The number of mechanical amusement devices placed, maintained to be operated, or operated then in the place where said mechanical amusement device is to be placed."

Section 6 requires the payment of two dollars for each application and it shall be renewed annually. Section 8 provides that the Chief of Police shall "cause to be investigated the statements as set forth in the application." Section 10, that the Chief of Police may, "in exercise of sound discretion, if he deems that *the applicant for said permit is not of good moral character*, deny said permit, and he may, likewise, in his discretion, deny said permit *if the place of business wherein the mechanical amusement device is to be operated does not bear a good reputation.*" (Italics ours.) Section 16 confers upon the Chief of Police the power to suspend or revoke said permit if in his opinion "*it is deemed necessary for the protection of minors or any member of the public,*" etc. (Italics ours.) Section 18 provides that such device shall not be operated between the hours of twelve o'clock p. m. and eight o'clock a. m., and makes it unlawful for it to be operated in such manner "that the sound created, emitted or transmitted, etc., shall be audible to persons on any public street or highway or upon any adjoining premises."

We readily agree with the contention made by counsel that a municipality has no inherent authority to enact ordinances whose validity and enforcement rests upon general police powers. All powers of a municipality are derived from the State, but it cannot be doubted that the State may delegate its authority, or some portion of it. "The police power primarily inheres in the state, but if the state constitution does not forbid, the legislature may delegate a part of such power to the municipal corporations of the state, either in express terms or by implication, . . ." McQuillin on Municipal Corporations (2 Ed.), Vol. 3, sec. 949, p. 108. Whether or not there should be a regulation of a particular business, or restriction upon the use of property, must rest largely within the sound judgment and discretion of municipal authorities. "It is axiomatic that the regulation must have a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power." In dealing with the powers of a municipality to enact such legislation, the courts have been compelled to avoid placing restrictions on the reasonable exercise of this power, for the reason that it is difficult "to circumscribe with accuracy an orbit within which such power may safely move." McQuillin, (2 Ed.), Vol. 3, Sec. 946, pp. 100, 101. In *Chattanooga v. Norman*, 92 Tenn., 73, 77, 20 S. W., 417, 419, the Court held that as to the necessity of such legislation "the lawmaking power is the judge, and, if not in violation of a fundamental law, or unreasonable, they are everywhere upheld." (Citing cases.)

The primary question in every case, touching the validity of such legislation, is (1) has the municipality express or implied authority to act, and (2) does the ordinance promote the public health, morals, safety, convenience, and comfort of the general public, and advance the general welfare? As to the authority of the City of Memphis to pass the ordinance in question, Sec. 4, Chapter 121, Private Acts of 1937, provides that "the Board of Commissioners . . . shall have authority to prohibit and regulate by ordinance *the making of unnecessary noises*, (etc.) . . . by any automobile, . . . bus, (etc.) or *by any radio, phonograph, musical instrument, or other sound devices*," etc. Section 4. (Italics ours.) We think the "juke box" falls within the above classification and may be made the

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subject of regulation.

It is next insisted that the ordinance is an improper and invalid exercise of the police power thus granted, that it is an arbitrary classification, and does not promote the health, morals, and comfort of the public, etc. Moreover, the argument is advanced that the City has not undertaken to regulate the radio, which at times emits very loud noises, including selections of music that are unearthly. We think the necessity for regulating "juke boxes" and similar mechanical devices is a matter that addresses itself to the discretion of the legislative authority of the City. The Court cannot substitute its own judgment for that of the Council or Board of Commissioners as to these matters. As was said in *Chattanooga v. Norman, supra*, "The lawmaking power is the judge," and, we might add, it is the best judge of the injurious effects of noises by "juke boxes" and other mechanical musical devices at certain places, as well as during certain hours of the day and night. We must take cognizance of the fact that within the City of Memphis there are many churches, schools, and other cultural centers, and it is not unreasonable that the Board of Commissioners should so regulate "juke boxes" as to preserve quietude in these places. The mere fact that there is no ordinance regulating radios has no bearing upon the question before us. It is proper to observe, however, that radios are not used for making music in public dance halls, beer joints, and similar places, where persons assemble to engage in the "jitterbug" and other hilarious nightclub performances. Moreover, the radio does not have a "nickel-in-the-slot" attachment whereby the customer is enabled to secure some choice selection at will.

It is no argument against the validity of an ordinance that it regulates a lawful business. Any business that is illegal has no right to exist under any circumstances. There are many classes of business, entirely lawful, that need close supervision and intelligent regulation. When such regulation is fairly and reasonably imposed by proper authority, it is not a violation of the due process clause of the Constitution. The argument is advanced by counsel that the ordinance is invalid for the reason that authority is conferred upon certain city officials whereby they are enabled by taxation and regulation to impair the revenues of the State, County, and Federal Government. We think this is unsound. The small stipend for a permit cannot be considered a tax upon business. It is only incidental to the manner of regulation and is not unreasonable.

It is earnestly urged that, since the State, County, and Federal Government have exacted a privilege tax of complainant to operate "juke boxes," the ordinance is invalid because it creates an additional privilege by requiring a permit. The case of *Robinson v. Mayor of Franklin, 20 Tenn., 156, 161, 34 Am. Dec., 625*, is cited in support of this contention. In that case the by-laws of the City, which imposed a heavy penalty for failure to take out a liquor license, were held to be invalid. It was said, "A corporation can pass no by-law inconsistent with the constitution and laws of the State" (citing authorities). In the instant case we fail to find wherein the ordinance in question is in conflict with State or Federal authority. It imposes no heavy penalty and the payment of two dollars for a permit is not a privilege tax within the meaning of our tax laws. It is true there is a restriction upon the owner and operator in that he must be a person of good character and the instrument must be operated in a reputable place, which is not an unreasonable restriction. The assignment presupposes that the City will enforce the ordinance in a capricious and oppressive manner. We think the contrary presumption should be indulged. The State has imposed a privilege tax upon many kinds of business, such as pawnshops, junk dealers, secondhand furniture dealers, and liquor dealers, which are also made subject to reasonable regulation by municipalities. All persons who engage in such businesses, as well as complainant in the instant case, must take notice, when they pay a privilege tax and other taxes, that they are subject to regulation. In the case of *Craig v. Mayor and Aldermen of Town of Gallatin, 168 Tenn., 413, 417, 79 S. W. (2d), 553, 554*, cited by complainant's counsel, it

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was held that an ordinance requiring pool rooms to remain closed during the hours of six p. m. and seven a. m. was unreasonable and oppressive. The ordinance was held invalid upon the ground that the State having conferred rights and privileges upon a person to do business, a municipality could not destroy such rights by "unreasonable and oppressive ordinances." No fault can be found with the principle thus announced. In the instant case there is only a reasonable limitation upon the right. No one has a constitutional right to operate any mechanical musical device, including a "juke box," in such a way as to disturb a congregation of worshipers, an educational assemblage, or patients in a hospital whose comfort and welfare may require peace and quietude. A reasonable regulation of such instruments in this regard cannot be regarded as an unjust and unlawful limitation upon the right to do business.

The assignments of error are overruled and the decree of the Chancellor is affirmed.

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Problem 4: COMMERCIAL DRIVERS LICENSES (CDLs)

**METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, v.
DARYL K. STARK
COURT OF APPEALS OF TENNESSEE, AT NASHVILLE
2008 Tenn. App. LEXIS 58
OPINION**

This is an appeal by the appellant, involving the sentence imposed upon defendant's violation of the municipal traffic ordinances in Davidson County. Defendant was issued a ticket for speeding, and the citation states that the defendant was driving 80 mph in a 55 mph zone.

Defendant appealed from the General Sessions Court Judgment against him to the Circuit Court.

A hearing was held in Circuit Court and the citation officer testified that the citation was issued to defendant on June 2, 2006, after observing [*2] the defendant's vehicle approaching him at a high rate of speed. He testified that he was in an unmarked vehicle, and defendant was passing other traffic. He testified that he used his radar gun and clocked the defendant at 80 mph, and that the speed limit in the area was 55.

He pulled defendant over, and explained that his radar gun was calibrated daily, and that it was accurate even if it was used while he was in motion. He further testified that a couple of miles before the area where he clocked defendant, the speed limit was 70 mph.

Defendant testified that he lived in Bowling Green, Kentucky, and that he was on vacation traveling with his family. He testified that it was dark when he was pulled over, and it was just 2-3 miles past where he had seen a 70 mph speed limit sign, so he had his cruise control set on 70 mph, and that he never saw a sign changing the speed limit to 55 mph.

He testified that he worked for UPS as a delivery driver and trainer, and that he taught other drivers about safety, speed, etc. He testified that he believed the speed limit was 70 mph where he was pulled over, but admitted that he was not very familiar with the interstate system in Nashville, and could [*3] have missed a sign. He further testified that he had a commercial driver's license.

At the conclusion of the proof, the Trial Court commented that the traffic officer had an "impeccable" reputation, but that one was still guilty of speeding even if it was done by mistake. The Court observed that it could be seen how a person might miss the speed reduction, and the Court also empathized with the impact this would have on defendant's CDL. ¹ The Court mentioned traffic school as an option, but the Metro attorney stated that their position was that a person with a CDL could not attend traffic school due to the federal legislation that prevented people with CDLs from being able to mask traffic violations, and asked that a \$ 50.00 fine and court costs be imposed against defendant.

1 Commercial Driver's License.

Defendant's attorney argued, that since he was in his personal vehicle, he should be allowed to attend traffic school, and the Trial Court agreed to allow defendant to attend traffic school, and stated that the citation would be dismissed once that was completed and the court costs paid.

The issue on appeal is whether a trial court may allow a defendant to attend traffic school and have [*4] his citation dismissed when the defendant possessed a CDL?

Metro argues that the Court's Judgment was improper because defendant possessed a CDL, and state and federal regulations prohibit the holder of a CDL from attending traffic school in lieu of punishment, or otherwise "masking" the citation or having it deferred. Defendant did not file a brief on appeal.

**WHAT WOULD YOU DO NEXT?
SUPPORTING MATERIALS FOR 2010 JUDICIAL CONFERENCE**

Tenn. Code Ann. § 55-10-301(b) gives the trial court the discretion to order a traffic law violator to attend a driver education course, and it states:

Any person violating any of the provisions of chapters 8 and 9 of this title and parts 1-5 of this chapter may be required, at the discretion of the court, to attend a driver education course approved by the department of safety in addition to or in lieu of any portion of other penalty imposed; provided, that the course is approved by the department, . . .

This statute goes on to state, however, that *subsection (b)* "shall not apply to any person who holds a Class A, B, or C license and is charged with any violation, except a parking violation, in any type of motor vehicle." *Tenn. Code Ann. § 55-10-301(c)*. Class A, B, or C licenses are defined in *Tenn. Code Ann. § 55-50-102* as those issued for the operation of vehicles weighing more than 26,000 pounds, and are those typically referred to as "commercial" drivers' licenses.

Metro argues that *subsection (c)* was added to bring the state law into compliance with federal regulations found at title 49, part 384 of the Code of Federal Regulations, governing "State Compliance with Commercial Drivers License Program". Specifically, *49 C.F.R. § 384.226*² states:

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the driver's record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

While *Tenn. Code Ann. § 55-10-301* does not specifically state that it was enacted to bring Tennessee law into compliance with these federal regulations, other sections of the traffic/drivers' license statutes do specifically reference the federal regulations. *See, e.g., Tenn. Code Ann. § 55-50-401*.

**2 49 C.F.R. § 384.103 states that the regulations
in that part apply to all states.**

The federal regulation is clear. The State cannot mask or defer imposition of judgment to prevent a CDL driver's conviction for any type of traffic violation (besides parking) in any type of motor vehicle from appearing on the driver's record, whether the offense was committed in the driver's home state or different state. *49 C.F.R. § 384.226*. Likewise, *Tenn. Code Ann. § 55-10-301(c)* makes clear that a trial court should not utilize that statute to allow a commercial license holder to attend traffic school in lieu of other punishment.

Based upon the state and federal laws addressing this issue, the Trial Court erred in allowing the defendant to attend traffic school and in holding his traffic violation would be dismissed upon completion of traffic school. Defendant holds a commercial driver's license, which prevented the Trial Court from allowing him to benefit from this type of judicial diversion. Apparently, the Trial Court was influenced by the fact that defendant was driving a personal vehicle at the time of the violation, but the state and federal law make clear that this is of no consequence.

Accordingly, we reverse the Judgment of the Trial Court and remand for the entry of an appropriate Judgment in compliance with State and federal law.

The cost of the appeal is assessed to Daryl K. Stark.

HERSCHEL PICKENS FRANKS, P.J.