In the

Supreme Court of the United States

CLARENCE WARD,

Appellant,

v.

VILLAGE OF MONROEVILLE, OHIO,

Appellee.

No. 71-496

Washington, D. C.
October 17, 1972

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v.	:	71-496
VILLAGE OF MONROEVILLE, OHIO, Appellee.	:	

Washington, D. C.
Tuesday, October 17, 1972

The above-entitled matter came on for argument at 1:54 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BERNARD A. BERKMAN, ESQ., 1320 The Superior Building Cleveland, Ohio, 44114, for the Appellant.

FRANKLIN D. ECKSTEIN, ESQ., 110½ Myrtle Avenue, Willard, Ohio, 44890, for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-496, Ward against the Village of Monroeville.

Mr. Berkman.

ORAL ARGUMENT OF BERNARD A. BERKMAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. BERKMAN: Mr. Chief Justice, and may it please the Court:

This case raises squarely the question of the continuing vitality of the mayor's court system in the dispensation of roadside justice in Ohio.

Specifically, the issue here is whether a mayor, charged with the financial and law enforcement responsibilities for the village of which he is executive and administrative head, can serve as an impartial judge and fact-finder in criminal proceedings without violating the due process clause of the Fourteenth Amendment.

The facts which give rise to this issue are briefly stated.

Actually, the petitioner was convicted of a couple of traffic offenses in the mayor's court.

In Monroeville, he was convicted of offenses which are violations of ordinances of that incorporated village.

Monroeville is a small, unchartered, incorporated village in Northwestern Ohio, in Huron County, through which

a main truck and auto highway, State Route 20, runs. It carries a considerable amount of truck traffic and, from time to time, Public Utilities Commission State officials conduct safety checks at its village boundaries in cooperatio with village councilmen.

The record reveals that in some instances when these safety checks occur up to 20 arrests per day happen.

In this particular instance, the petitioner was convicted of failure to comply with the lawful order of the police in which it was contended that he did not stop within a reasonable period of time after having been waved down in order to participate in one of these PUC traffic checks.

And secondly, he was charged with failure to produce a driver's license upon request of a police officer, and an altercation which occurred after he did stop his truck somewhat up the road, during which an episode of shooting of mace, and so on, occurred.

Petitioner was tried. He interposed the defense. He was convicted and fined the maximum of $50 cost in each case.

The constitutional question which is here presented was preserved by affidavit to disqualify the mayor as judge, a motion to dismiss the prosecution, or in the alterna tive, to certify to a proper court.

In all of these instances, petioner was frustrated, and a number of events occurred during the course of the trials, and both trials ultimately in the Court of Appeals were consolidated so that they are here presented.

A number of rather aberrant episodes occurred during which the mayor sought to shift the burden of going forward to the accused, appeared somewhat surprised and amazed that defense counsel would even challenge the credibility of a uniformed officer under oath, abandoned to the police officer witness the right to determine whether he need answer questions put to him by defense counsel, and, as a layman and non-lawyer, relied rather substantially and heavily upon the prosecutor's legal advice.

At a hearing conducted on the affidavit to disqualify, some additional information of relevance and importance to the constitutional question here presented, emerged. It was demonstrated that from the years 1964 through 1968, the five previous years prior to the conviction, that of the total number of -- total amount of money in the village's general fund, in each year somewhere between 36% and 51% of all the general revenues of the village came from fines assessed in the mayor's court.

In addition, it appeared that in 1959, at a time when the village was concerned that the jurisdiction of mayor's courts was to be lessened, the alarm that the village

had with respect to the fact that the lessening of jurisdiction of mayor's courts would somehow or other affect adversely its fiscal position, is demonstrated by Village Ordinance 59-9 in 1959, in which an expert was hired, at least partially in concern over the fact that the decrease in the jurisdiction of the mayor's court would involve some increased tax responsibilities or curtailed services for the members of the village.

That ordinance is reproduced in our brief, and also appears in the Appendix.

As a matter of State law, and as a part of the hearing, a number of other important constitutional facts were developed in the case below.

In the first place, it was established, and the law of Ohio is clear on the subject, that the mayor is the chief law enforcement officer of the village, with the power to hire, fire and supervise the police chief and all the members of the police force. He has the powers of the sheriff and is to enforce the peace within his boundaries.

And, in this instance, he had the power to do and did actually appoint the police chief who was the principal witness against the accused in this case and had, as a matter of fact, to determine the credibility of his employee.

Now, it is true that there is some approval required of counsel in this instance, but the principal responsibility

and the chief law enforcement officer, I think, without question, is the mayor who sits as the judge in these kinds of cases.

The Ohio Revised Code, Section 73715-18, 73330 in 1905.20, make very clear his position as chief law enforcement officer in the village.

In addition, it was developed, and the law is also clear that the mayor is the chief executive of the village for financial responsibility for its fiscal condition.

He is required to report its fiscal condition and in the event that there are excess expenditures or expenditures which are improper, he is required to enforce it, and Ohio Revised Code Section 73332 and 73333 make that abundantly clear.

Q Does the record show what the mayor salary was?

MR. BERKMAN: No, it does not.

We do not contend that his salary was dependent upon the outcome of a particular case, except that it is demonstrated that it was taken from the general fund.

Q The salary is a matter of local decision, isn't it? It is not determined by State law?

MR. BERKMAN: Yes, that's right.

Q And it would probably be just a few hundred

dollars in a village like this, wouldn't it?

MR. BERKMAN: I would imagine.

It was also developed that the mayor is not a lawyer, not subject to the cannons of judicial ethics and yet required by law to make procedural and evidentiary rulings under Ohio Revised Code, Section 293815, and that inasmuch as he was not a lawyer, the person from whom he sought his legal advice was the village solicitor who happened to be the prosecutor in this case.

Q Isn't that apt to be true of almost any non-lawyer, traffic judge, you know, regardless of whether he has some executive position?

MR. BERKMAN: Mr. Justice Rehnquist, I think you are quite right. I think that that in itself would not be an unusual fact.

Our contention is that, coupled with all of the other factors which keep the tribunal from seeing the situation in a neutral manner, add to the situation in which he is obtaining all of his information, including the matters of admissibility of evidence, and so on, from a source which is biased in one direction in the case.

Q You are not claiming that the absence of a lawyer, a law trained man, as the judge, is a violation of due process, standing alone?

MR. BERKMAN: That is not our particular

consideration.

As a matter of fact, what we are saying is that the entire composite of circumstances under the statutory scheme which is established in mayor's courts as both executives in charge of the function of their village and also to sit as a neutral and detached magistrate in criminal matters, is in itself a denial of due process.

All of these factors add together to create the consitutional infirmity of which we complain.

Q Did you have a right, an unrestricted right, for de novo trial?

MR. BERKMAN: Well, I think that it is now clear that under the 1970 amendments, at least, which followed the case as it was tried initially by some two years, that there is under Section 19--

Q Was there at the time?

MR. BERKMAN: -- I think not. I think that the county court's appeal was a matter of law. And, as a matter of fact, there was a good deal of additional skirmish, or issue, taken at the Court of Appeals level and at the Ohio Supreme Court --

Q Let's assume there was, for the moment, that there could have been an appeal from this conviction, unrestricted de novo trial, with the first trial having no significance in that later trial, would that make any differen

in your case?

MR. BERKMAN: We think that it would not make any difference because of the fact that we contend that it is not necessary to go through an unconstitutional trial in order to get a constitutional one.

Our position is that they have to go through two trials before you get --

Q Are you in favor of all these traffic court situations that absolutely have to be absolutely a constitutional trial?

MR. BERKMAN: Well, we think --

Q It would withstand all kinds of constitutional --

MR. BERKMAN: I don't think we need to stretch that far, Mr. Justice White, because so far as we are concerned, at least in these kinds of cases the bare minimum amount of due process -- and we know that in different kinds of circumstances, this Court has applied different standards of due process.

But we say this, regardless of whether or not an individual is entitled to a jury trial, regardless of whether or not an individual is entitled to counsel, regardless of whether he is entitled to witnesses, and all of the other aspects that get together in due process, we think that at very minimum, even in traffic offenses, even in petty

matters, that an impartial tribunal, unquestioned because of his role in other matters, is a basic essential.

Q How much of a fine could there have been in this case?

MR. BERKMAN: In this case, the maximum was imposed. It was $50.

Q Could it have been transferred to another court?

MR. BERKMAN: As a matter of fact, it could not because under the rule if the fine exceeds $50, then and under those circumstances the individual who is on trial is entitled to trial by jury in a court of record.

Q If the fine could be more than $50?

MR. BERKMAN: Yes.

Q And here it couldn't be more than $50?

MR. BERKMAN: That's right.

Q What would the court of record be, the county court or --

MR. BERKMAN: The courts that have concurrent jurisdiction which are courts of record in Ohio and municipal courts and county courts.

Q And the county courts were created back in the '50's, weren't they?

MR. BERKMAN: Back in 1957, as a result of the legislative abolition of the judges in peace courts.

Q And would there be a municipal court with jurisdiction over Monroeville?

MR. BERKMAN: I think not, but the county courts have jurisdiction where the municipal courts do not.

Q This system is not in any way peculiar to Monroeville, Ohio, but it is the system to be found in all of the non-chartered, incorporated villages throughout the State, isn't it?

MR. BERKMAN: Yes, it is set out in Section 1905, Chapter 1905 of the Ohio -- and there are, I would imagine, hundreds of such mayoral courts. Their jurisdiction is limited to consideration of criminal cases under their villages ordinances and moving traffic violations that occur within their borders.

So that, in fact, they also have jurisdiction over State statutory violations involving moving vehicular traffic.

Q But, again, their power to punish is limited even for violation of those State laws, isn't it?

MR. BERKMAN: To the extent that the accused actually has a right to and seeks a jury trial, but, Your Honor, I would point out that there are a number of tactical and financial reasons why somebody would decide why he ought not to have a jury trial. And in those instances the court has jurisdiction to hear such cases.

Q But with a limited power to punish, doesn't it?

MR. BERKMAN: No, I find no such statutory limitation and it is our contention that traffic manslaughter is, indeed, in the jurisdiction of the court if the accused does not seek a jury trial.

Q So the mayor can put people in jail?

MR. BERKMAN: I think he can, and, as a matter of fact, Section 1905.30 specifically indicates that particularly in the event of the non-payment of a fine, the individual is to be incarcerated.

And that appears specifically in the statute.

As I read its jurisdiction, I think that traffic manslaughter, driving while intoxicated, all of which carry penalties, including imprisonment, would be within the court's jurisdiction, subject only to the provision that if an individual seeks a jury trial, he can have it somewhere else. That is in the court of record.

The due process issue was preserved at each level of appeal and the Huron County Court of Appeals consolidated both cases and affirmed the conviction and the Supreme Court by a 5 to 2 decision, in Ohio, did the same.

Certiorari was granted and the issue is now before us.

I think that it is not necessary to belabor the

point that a neutral, detached, impartial judge-factfinder is essential to minimum standards of due process in fair hearings, both in criminal and non-criminal cases.

I would only point out that an impartial judge, as a requirement of fair hearings, is as old as the history of courts, as old as the judicial practice itself.

The whole point, it seems to me, of letting somebody have the power to adjudicate a decision between two competing parties is the hope that the judge will act in a way which goes straight down the middle and be neutral and determine the result on the basis of the evidence and not on the basis of his own self-interest.

Q Would it be a violation of due process if you had a judge appointed by the mayor?

MR. BERKMAN: Judges appointed by the mayor?

I think that it might not violate due process under such circumstances so long as the judge takes an oath and performs his office.

Q What if the mayor appointed judges under the statute to serve at the pleasure of the mayor?

MR. BERKMAN: Well, I think we might run into a question, depending upon the entire aggregate of circumstances under those concerned.

Q But what you want is some other person?

MR. BERKMAN: It seems to us that we are asking too

much of a system and too much of an individual under the intertwining system in which he must wear the hat of policeman and the hat of impartial judge and the hat of the administrator of the village, to give not only justice but the appearance of justice, to which we think that every motorist and every individual who comes within the jurisdiction of that court is entitled.

Q Is this the same scheme that we have had here in both Tumey and Dugan?

MR. BERKMAN: Well, I think that the situation has changed insofar as statutes are concerned with respect to Tumey. Since that time, the jurisdiction of the mayor's court has been whittled away so that it no longer involves county-wide jurisdiction, as I have indicated in response --

Q No longer, I gather from what you said earlier, that the mayor gets any part of his compensation from the fines.

MR. BERKMAN: Right. Those are two distinctions in the fact that we present to you now, as distinguished from Tumey.

Q And also in Tumey, if I am not mistaken, there was no right to a trial de novo?

MR. BERKMAN: That's right. That's right.

Q Is this situation more like Dugan than it was like -- ?

MR. BERKMAN: We think it is less like Dugan than it is Tumey. As a matter of fact, we think that Dugan is not applicable at all because the Dugan case involved a chartered municipality and a commission form of government in which it was conceded and stipulated by all the parties that the person designated the mayor in that case was not the chief executive officer as mayor is in this case, and that really all he was was a member of a commission of five persons.

Q That commission, though, exercised the authority of the municipality. So he was one of five.

MR. BERKMAN: I believe, Mr. Justice Rehnquist, that he was not in any way involved in the executive operation of the city. Really, that executive responsibility was deposited in the city manager.

Q Wasn't the manager responsible to the commission?

MR. BERKMAN: I think he was, but the actual administrative or executive function was confined in the hands of the city manager, rather than the commission itself.

Q All members of the council there shared the responsibility for financing the municipality.

MR. BERKMAN: Yes, I think that is correct, but I think that the individual role of the person who sat as the mayor was subject to at least the checks and balances that the

charter system gave under those circumstances.

And, as a matter of fact, a great deal of time and attention in that opinion, a short one, was devoted to the distinction between the charter system and the mayoral system which we had in Tumey and which appears presently before this Court.

I call it to the Court's attention only in addition to Tumey and Dugan which are at the core of this Court's concern.

In re Murchison which I think finishes the job which was begun in Tumey to indicate that the appearance as well as the actual form of justice has got to appear.

Now, in order to excuse the kind of system that we have had in Ohio, some arguments have been made by respondent, some arguments have been made by legislators, and I think that there are basically three.

The first is that this is the minimus and that the kind of damage that can be done to an accused in this kind of court is something that really ought to be overlooked in the interest of expediency of operating a court and so on.

Q Do you really have to argue that, counsel, now that you are here?

MR. BERKMAN: We think that the grant of certiorari in this case has been an indication that that is not an argument that is necessary to deal with, and if the

Court feels we ought not, we will move on to our next contention which is a contention that is made that with respect to infliction of substantial -- that no substantial damage can be inflicted, in a response to a question from Mr. Justice Stewart, I have indicated that there are grave consequences,

I would like to add one more to that which has not been brought out and that is that under Ohio's point system for the accumulation of points to revoke a driver's license Ohio Revised Code, Section 4507.40, twelve points are necessary to take away a driver's license.

The petitioner in this case is a truck driver. He drives a truck for a living.

The events of which he was convicted under the lists of points per violation, that appear in that statute, would give him six points.

And a mayor's court, although it is not a court of record, for purposes of giving reports to the Bureau of Motor Vehicles in Ohio, is, indeed, a court of record for at least that limited purpose.

And, so, as a result of this conviction, half of the necessary points to take away his driver's license, in this court occurred.

Your case, Bell v. Burson, in 402 U.S., I think, indicates the importance, particularly to a wage-earner on the

road of having his driver's license, and we would add that point.

I think we have dealt with our contention in response to a question from Mr. Justice White with respect to the appeal de novo, but when we add that the appeal de novo is a rather peculiar animal in Ohio,and the one that you will be considering in this case has within it a couple of contradictions that cause me concern,to think that it isn't a fresh slate on which is written the new trial.

Our answer would stand that we think that you don't have to have two trials in order to get one that is constitutional.

Q If you should not prevail here, may he then seek de novo under new dispensation in Ohio?

MR. BERKMAN: That's a knotty question which I don't understand the answer to, particularly in view of the fact that during the course of our appeal that new right and our contention was made available to us, but I would only urge that even under the present statutory law the Section 1905.30 provides for incarceration and/or bond, and also 1905.24, very curiously, provides that the appeal, even the appeal de novo, which is referred to in the next section, cannot be even docketed unless a transcript of the proceedings below is presented to the court.

I ask for what purpose, if this is a de novo

hearing, is a transcript necessary to be prepared, and how is that to be used, either to influence the court above or to be used as a judicial admission in the taking of testimony or --

Q Is there a transcript of the magistrate's here?

MR. BERKMAN: Well, I refer the Court respectfully to Section 1905.24, which makes that a condition --

Q The point is, is it not, that there isn't a transcript in these matters.

MR. BERKMAN: Well, there isn't, except --

Q When it is not a court of record --

MR. BERKMAN: No, it isn't a court of record.

Q How come they have a transcript?

MR. BERKMAN: Well, I presume that the parties can make private arrangements but there is no statutory arrangement.

Q That's what I mean.

MR. BERKMAN: I point out only the difficulties in the application of the de novo --

Q Do you know what the practice is?

MR. BERKMAN: The practice, I believe, is that there is -- ordinarily, the practice is that there is no appeal from these kinds of cases.

Q Right. But do you know what the practice is

when there is an appeal?

MR. BERKMAN: I am sorry, this is the only appeal.

Q It is a new -- isn't it?

MR. BERKMAN: Yes, it is new since June of 1970.

Q You don't think it means just a transcript of the docket entries, or something?

MR. BERKMAN: Because the original papers are also referred to, Your Honor, and I am not sure. It is unclear.

Also the word "trial" is used in that statute and I only suggest that merely calling something de novo does not solve all the problems that may emerge in dealing with the question.

An argument is also made that the provisions of Ohio Revised Code, Section 2937.20, which provides for disqualification from bias is a protection against excesses in the mayor's court and we tried that in this case,and I am here to report to you that it didn't work successfully unless you feel that every $50 fine needs to come to this Court in order to have ultimate adjudication.

What we are saying, basically, is that there is a difference between individual bias and secemic interest. And, we are saying that this particular statute is designed to deal with the mayor who happens to be the brother-in-law of the opposing party, or something of that kind, but does

not deal with the inherent secemic problems, and, therefore, cannot be handled in every case in a way which permits that kind of disqualification.

I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Berkman.

Mr. Eckstein.

ORAL ARGUMENT OF FRANKLIN D. ECKSTEIN, ESQ.,

ON BEHALF OF THE APPELLEE

MR. ECKSTEIN: Mr. Chief Justice, and may it please the Court:

My name is Franklin Eckstein. I am the Solicitor for the Village of Monroeville, Ohio.

I would like to first say there are a lot of questions about trial de novo.

I am just a country lawyer and I would like to say that, although I hesitate to differ with opposing counsel, there was a right to trial de novo at the time of Ward's case.

It was in the Common Pleas Court.

But Ward did not have the right to a trial de novo for the reason that he had brought in a court stenographer.

And a rule then was the same as a rule today, although you go to the county court or a municipal court. That rule is,once you bring in a stenographer and all of the others, it is reduced to a record.

You have the right to appeal on questions of law, but not on questions of fact.

And, back then, as today, if you don't bring in your stenographer, and you go before the mayor, the mayor prepares his docket form,which is a single piece of paper.

No evidence or testimony, other than the mayor's finding of guilty, is on that piece of paper. And you go to the county court or the municipal court where you have a complete new trial of the facts as well as the law.

Q Now, let's get that sorted out.

Could this particular petitioner have gotten a true de novo trial as a matter or right here?

MR. ECKSTEIN: He could not in his first case because he brought in a stenographer.

And what I will call a second case where he did not bring one in and simply --

Q The second case was the other --

MR. ECKSTEIN: That was failure to produce a driver's license. It was related and we consolidated in the Court of Appeals.

In that case, he could have had a trial de novo, if he had chosen.

And, that would be the same rule of law today.

Q What's the difference between the two?

MR. ECKSTEIN: Well, what happened, Mr. Justice --

Q I know, but what's the difference between the rule?

You say he brought in a stenographer?

MR. ECKSTEIN: The rule was that if you bring in a court reporter and the testimony and the written evidence is reduced to a writing, when you appeal from the mayor's court you only get a review of the questions of law. You do not get a review of the questions of fact.

If you leave the stenographer home, which is a tactical decision, then if you lose you can start all over in the county court or municipal court.

And the Ohio Legislature wanted to keep this system.

In 1970, before the Ohio Court of Appeals, now the question they asked us would we prepare supplemental briefs on a question of whether or not appeal from mayor's court and to county pleas court was --

Q The questions of law would be like the sufficiency of the evidence?

MR. ECKSTEIN: Yes, Your Honor.

Q You just didn't take the evidence over again, that's all.

MR. ECKSTEIN: That's correct.

Q I see.

MR. ECKSTEIN: But to go back --

Q And you say that's true also now, since 1970?

MR. ECKSTEIN: I would hesitate to differ with any interpretation but I practiced in county courts and municipal courts, as well as mayor's courts, in the surrounding communities, and this is the practice rule.

Q There was a change in the law in 1970, but you say in this respect the law is the same.

MR. ECKSTEIN: The only difference was the court you went into on appeal. Because of an amendment to the Ohio Constitution, they made that appear to be doubtful whether you could appeal the Common Pleas Court; the Legislature not waiting on a decision in our case by the Ohio Supreme Court amended that law.

But as recently as 1970, they kept the system, although they changed the courts.

Q So while the 1970 law does talk about a trial de novo, you are telling us that when in fact you had a stenographer in the mayor's court it may not be a trial de novo?

MR. ECKSTEIN: It was not a trial de novo.

Q Even though the Legislature is calling it that?

MR. ECKSTEIN: Well, the provisions, if you read the provisions, that's the way it worked out. And in

our practice, that's the way it was.

Q What does the court on appeal do if there is a conflict in the evidence?

MR. ECKSTEIN: It is an appeal, Mr. Justice White.

In other words, the judge, the county court judge who could have heard Ward's case -- it would have been a Common Pleas judge -- would have heard the evidence and wouldn't have been, I don't think, influenced by the fact that the mayor had found the man guilty or -- of course, if he's not guilty, there wouldn't be any further prosecution.

But I don't think that a county court judge would have been influenced.

Q No, no. The question is when there is a transcript, as you say there was in the first case.

What does the Common Please Court do if there are conflicts in the evidence on the cold record?

MR. ECKSTEIN: I see. Well, I presume it would be up to him as the reviewing judge to decide --

Q Well, it isn't a new trial if he doesn't decide it.

MR. ECKSTEIN: No, it is not a new trial. It is just a review of questions along. It would be only a question of evidence --

Q If you are going to consider the sufficiency

of the evidence, you have to know what the facts are.

And if the facts are disputed, do you decide the facts on a cold record, or do you -- that isn't much of a de novo trial, is it?

MR. ECKSTEIN: No, not when there is a transcript.

Q Do you know whether they have developed any clearly erroneous type of rule?

MR. ECKSTEIN: Not that I know of.

Q Mr. Eckstein, you mentioned the tactical decision that a litigant faces in deciding whether or not to bring a stenographer with him to the mayor's court.

What sort of tactical considerations would lead him to bring a stenographer with him?

MR. ECKSTEIN: Well, if he felt that he would not get a favorable decision, in that particular mayor's court, he could bring in a stenographer to preserve a record so that he could go to the county clerk and perhaps with a very minimal effort, in terms of time, present his written briefs, perhaps, and get a reversal.

But that would be all the greater reason that a defendant would want to bring in --

Q Well, there might be another reason akin to the argument we heard earlier today in the antitrust case. Just the presence of the stenographer might lead to a fairer trial by the mayor, may it not?

MR. ECKSTEIN: I think that that could be a possible consideration.

Q If you have a trial de novo, may the judge in the court of record or the jury impose a higher sentence or more severe sentence?

MR. ECKSTEIN: No, they would not be able to.

And in this case, maximum fine would have been $50. You'd have to follow the ordinance, and there would have been no right to a jury trial. It would have been tried to a judge.

Q Tell me, Mr. Eckstein, if Mr. Ward fails on this appeal, would he have an opportunity for trial de novo?

MR. ECKSTEIN: No. Not under Ohio law.

He brought in a stenographer and he forfeited that right when he brought the stenographer in.

Q How about on the second offense?

Or is that not before us?

MR. ECKSTEIN: That has been merged into the second offense.

The failure to ask for a complete retrial of the facts in that case, in my estimation, would have waived the right.

I would just like to point out that --

Q What is the difference between the trial

de novo and an appeal?

MR. ECKSTEIN: Well, as we view it in the case of mayor's courts, an appeal would only be where you have the transcript, and the question would be a question of whether or not the law had been properly applied to the facts as they appear in the transcript.

Whereas, trial de novo, as we understand it, is a complete retrial, and introduction of evidence and everything else.

Q Isn't this an anomaly of an appeal from a non-judicial officer?

MR. ECKSTEIN: All I can say, Mr. Justice, is that I believe that the Legislature, in wanting to keep this court system, wanted to provide every protection they reasonably could and still keep the system.

It is,indeed,a unique situation.

I would like to point out to the Court that the first time that affidavit for prejudice was filed at a Monroeville mayor's court, that the mayor granted the motion of the defendant, and he did certify the cases to the Huron County Court.

Now, from beginning to end, the constitutional question -- and in raising the question on the affidavit, the mayor said, "Yes, you're right."

He certified the county court, and the case sat

over there for about four months, until December 17, 1968, when the county court judge discovered the grounds for the transferral, and decided he did not have original jurisdiction to hear the case and sent it back to Mayor Salisbury.

So, in the first instance, the mayor, I think, bent over backwards to be fair. Unfortunately the county court did not send back the second case involving the driver's license until January, so that they were not tried together before Mayor Salisbury.

Q You say "bent over backwards." He might have done what was right.

MR. ECKSTEIN: Well, the point was, Mr. Justice, that once the county court judge returned the case to him he felt obligated to go forward under Ohio law.

Q Why?

MR. ECKSTEIN: Well, the county court did not have original jurisdiction in that instance to hear that case because of the fact that the fine was less than $50, and the basis for the motion in the county court judge's opinion was not well taken. That was the constitutional question.

Q What is the basis -- i.e., let's just say that there was personal prejudice on the part of the mayor.

Then, what substitute judge would he have had?

The mayor of another town, county judge, or --

MR. ECKSTEIN: I don't see how they could have done other than have a substitute county court judge hear the case, because I can't -- I've not had, personally, that experience, but I don't see how they could appoint a mayor --

Q Why would they have to have a substitute judge? They could have a substitute civilian.

MR. ECKSTEIN: Well, under the system --

Q The mayor wasn't a lawyer. He wasn't a judge. They could have gotten a substitute non-lawyer, like the deputy mayor or a member of the council.

MR. ECKSTEIN: Well, I think --

Q Or any other civilian.

MR. ECKSTEIN: Possibly the president of council, who assumes the role of mayor when the mayor is out of town or resigns --

Q Or the head of the hospital, or some obstretician.

MR. ECKSTEIN: That's a question I simply can't answer, I am sorry.

Q It is just not clear under the Ohio law.

But because you suggest in your brief that he could have filed --

MR. ECKSTEIN: My suggestion was that he should have based it on other facts.

Q All right, but if he had, and if it had been valid, now my question is: what would have happened? And you don't know the answer. You say --

MR. ECKSTEIN: In this case, I don't see how it could have been other than a county court judge, but possibly it could have appointed president of council it said.

Q Because in this case, the county court judge apparently said I have no jurisdiction in this case, even though the mayor had disqualified himself.

MR. ECKSTEIN: Yes, that's right.

But, in this particular case, I would like to briefly point out that facts of life in a small town simply aren't the way they are claimed to be by the counsel for Ward.

I think that the mayor's executive responsibility is greatly overstated.

It is true that the statute says that the mayor is to report to council on financial status of the town, because in point of fact the only one who has any idea at all about what's going on in town is the clerk-treasurer, who is usually the only full-time salaried official in the town, other than the street department men and the policemen.

Q In this town, the mayor gets no salary at all

MR. ECKSTEIN: He receives a couple hundred dollars a year.

And, as a footnote, he was right, the case didn't make him any richer or poorer. And he retired like most of them usually do after they have had enough of being mayor. It did not lead on to any great political career and he didn't pick any political or financial plums during the time he was mayor.

But, really, a small village does not resemble the Federal Govermment at all, in terms of domination of the legislative by the executive branch.

Q Does the record show what the population of Monroeville is?

MR. ECKSTEIN: The population is 1300, Your Honor.

Q It is in Huron County?

MR. ECKSTEIN: Huron County.

And, as a point of fact, of course, you can prove anything with statistics. It is true the village did have traffic fines, and made up a third to a half of the general fund.

Of course, the general fund is only about one-fifth of the budget of the village because you have street fund, electric fund, water fund, sewer fund, and certainly these other funds contribute important services to the people in the village.

So it is a question of relativity, it seems to me. If you look at the flow of traffic through town, I think that you recognize when you have a heavy volume of traffic there are more apt to be convictions because there are more offenses.

It is true the Public Utilities Commission does run these safety checks. The testimony was they run about one a month.

Now, if the village were in the position of wanting to make money, it seems to me, they would be asking them to do a lot more of these safety checks.

Q Are you going to distinguish all of this you are talking about from Tumey?

MR. ECKSTEIN: I think, Your Honor, in Tumey, you had a very remarkable situation where the mayor's court had county-wide jurisdictions, the fines were in the thousands of dollars, the marshal kept 15%, the prosecuting attorney, 10%; and the special policemen, 15% of the fine.

They were interested in the outcome. The mayor kept the costs. He was interested in the outcome, and in paying the costs of the people who were doing the law enforcement.

They were going from a small village into a big city to enforce the prohibition law. And that was set up by the legislature simply because they couldn't get it enforced

any other way.

Now, today, in a mayor's court, this man has jurisdiction only over offenses within his own boundaries, within a municipal corporation.

If the fine is over $50, the person has the right to trial by jury, which means you go into the county court.

And if you waive the jury trial and go ahead and have the county --

Q Isn't it true that the magistrate is a member of the bar, an elected magistrate. And you can still get a jury trial in any other State?

MR. ECKSTEIN: I am sorry. I didn't understand the question.

Q The fact that you can get an appeal or a new trial does not interfere with some people consider to be your right to be tried by impartial judicial officer.

MR. ECKSTEIN: Well, I would simply like to suggest Your Honor, that --

Q Well, this man is not a judicial officer, is he?

MR. ECKSTEIN: He does have a limited judicial function, just as he has a limited executive function, just as he has a limited legislative function, believe it or not.

Q Could this man be an obstetician?

MR. ECKSTEIN: He sure could.

This man is a truck driver.

Q Could the magistrate be a truck driver?

MR. ECKSTEIN: Yes.

Q This magistrate was?

MR. ECKSTEIN: Yes, he was, in fact.

Q And that's an impartial, judicial officer?

MR. ECKSTEIN: Well, Your Honor --

Q Yes or no?

MR. ECKSTEIN: In this particular instance, I would say that the man was less partial because of a lot of things that got into newspapers over the six months waiting period. Some of them very unfavorable, like this --

Q I am saying,without anything to do with this case, or anything, is a truck driver your idea of an impartial,judicial officer?

MR. ECKSTEIN: I don't see why he couldn't be just as impartial as a man --

Q Is that your idea of what it is? Is that your idea?

MR. ECKSTEIN: I can't say butwhat he could be as impartial as a lawyer could be.

Q Impartial, judicial officer.

MR. ECKSTEIN: Within the limited judicial function.

Q I guess you don't get the truck drivers

I've run across.

Q Well, in any event, he was elected by the voters of Monroeville, was he not, to this position?

MR. ECKSTEIN: Yes, he was.

I would like to point out the mayor does not have the power to levy taxes. The mayor does have the authority to appoint policemen, but as was testified to below, and is the practice, safety committee of council goes through the candidates. They have the mayor appointed, but council must approve the man.

Council mus t appropriate the money for the salaries. Council must buy all the equipment for the policemen.

And it is up to the village clerk to keep the council informed as a practical matter with respect to what is going on financially, and, I think, if you take a look at what actually happened below the facts are susceptible to different interpretation.

Now, this truck driver got confused. What happened was he granted the motion first time around. Six months later, it bounced back. He had a hearing. He started to open court and counsel for Ward was interrupting him about renewing a motion and the mayor said, "I can't granc it now."

Then the prompter was read into the record, and the mayor didn't know what he was doing -- I'll admit that --

He then proceeded upon enter of plea of not guilty to ask Ward, "Do you have anything to offer in the way of testimony?"

This proves, in my estimation, that the man was confused, which is unfortunate, but I don't think it is fair to say that the mayor put the burden of proof on defendants. All mayors put the burden of proof on defendants

The same way with what happened in the course of the trial. The mayor couldn't see that we were going to end up in U.S. Supreme Court. He didn't know all the questions about what was the process of procedure charging under ordinances, or what was going on with respect to the facts of the case. He thought they were going up blind alleys wasting time and he got mad and he lost his temper and he challenged counsel for Ward, with respect to cross-examining the policeman.

I would say that the mayor in this case did lose his temper. He did act poorly, but I don't think counsel for Ward is right to say that what we have here is a man who is above reproach, but the system put him in this bad spot.

I think you've got a man here who listened to six months of stuff in the newspapers, because this was a very remarkable case for a small town, and the facts were distorted. There was a base that was used, although

it was widely reported that it was mace -- that other facts were distorted.

The mayor came with pretrial knowledge that was improper and the mayor in the course of the trial lost his conduct. I don't think it is fair to say that all mayors necessarily are in the same category as this one mayor with respect to this one man.

And all I can say is that there is no denying the fact that this mayor did a bad job in the handling of this case, and maybe there is argument there for consideration by this Court, but I don't think that we can make the leap in logic and say that all mayors always place a burden of proof on defendants, or that they all tend to defend policemen, because they aren't responsible for the policemen.

Q I don't understand Mr. Berkman to be making that argument. In fact, I rather understood him to be emphasizing that his attack is upon the system, as such. Recognizing that the system may in some cases grant very, very fair trials, in other cases unfair trials, but that the system itself is constitutionally invalid. That's what I thought --

MR. ECKSTEIN: What I am saying is I don't think that argument is right.

What I am saying is that in this case, I think the system is okay, but I think in this particular case they

should have filed an affidavit for prejudice based on the facts of the mayor's prior knowledge. The mayor certainly knew about this -- Ward was a resident of Monroeville and the mayor certainly had the kind of pretrial knowledge that I think would have been a basis for a valid affidavit for prejudice for interest.

Q As I understand it, you can't tell us what, under the law of Ohio, would have happened if the mayor had said, "Yes, you are right. I am prejudiced."

MR. ECKSTEIN: All I can say is I would presume it would be tried by county court judge appointed for that special purpose or they would appoint some other civilian.

Q But the law is not clear, as I understand it?

MR. ECKSTEIN: There is no provision in the law, as I have read it, to say who must then take the spot of the mayor.

I think another question that is worthy of consideration is what would happen if mayors' courts are abolished. I think that the State of Ohio has indicated through the Legislature they want to keep them because of the fact that they do serve the purpose of allowing defendants to have a hearing, in any event, before a mayor and not have to miss work and go and appear before a magistrate,who does have court, like municipal court or

county court during the day.

Mayors are part-time employees as far as being mayor is concerned. They have court session in the evening because they work during the daytime. In fact, you could argue that more people would be apt to post bond and forfeit it rather than miss work and appear before municipal court judge or county court judge.

Q Couldn't you elect a local village judge, or a magistrate,if you wanted to call him that, in the same way they elect the mayor and the city council, and do it at the same time with no great burden?

MR. ECKSTEIN: Depending upon the holding of this Court and a change in the State laws you could, Your Honor, but not under the existing laws.

Q I wasn't speaking of the existing law. You were saying this was impossible of solution.

MR. ECKSTEIN: I was assuming that if the mayor's court system, per se, is held to be unconstitutional, that people would have to go immediately to county court for relief or municipal court.

Q Until some other program were set up.

MR. ECKSTEIN: Depending upon the grounds for the --

Q How many county judges are there in Huron County?

MR. ECKSTEIN: Believe it or not, there are only two, Your Honor. It is not a very large county.

Q Does either one of them live in Monroeville, or hold court in Monroeville?

MR. ECKSTEIN: The court is held in Willard, Ohio, where I practice, a town of about 6,000. The other session is in the county seat, Norwalk, Ohio, a town of about 12,000, 11,000.

Q And only daytime sessions?

MR. ECKSTEIN: And these judges hold court during the daytime.

Q And not at all at night?

MR. ECKSTEIN: No.

Q How does the Village of Monroeville get its legal advice on a daily basis. Do they just go to anybody they want to?

MR. ECKSTEIN: It is in State law. They retained counsel for a period of up to two years, under contract.

I must say that the financial officer who knows what's going on -- more often than not goes to the State Auditor's office, rather than to come to counsel. That's one of the many bones of contention. But they receive their advice from the solicitor, when they ask, or from the State Auditor, or prosecutor, or whomever they consult.

But I think that this is a unique situation. The

mayor presides also over the sessions of council. Council is where the real power is in the small municipality. They have the power to tax. They have the power to spend.

And the mayor's executive responsibility is limited if you look at the executive powers vested in the clerk-treasurer and the marshal, street department, whoever else gets appointed.

In small towns, as a matter of fact, the mayor does not run the town. It isn't an executive office similar to large cities or similar to the Federal Executive.

I think that if you review the proceeding that actually went on, that it is susceptible to more than one interpretation, and I would just respectfully urge the Court to consider that whether or not the defendant fully availed himself of all the rights that the State law provided with respect to trial de novo, which I say did exist and with respect to an affidavit for prejudice based on other grounds, and I respectfully submit that the mayor does not pick any great financial or political fruits from being mayor.

In point of fact, I represent five municipalities between 1,200, 1,300, and 8,000, that have mayor's courts, and we've had twelve mayors in the last four years, -- I have practiced law four years -- and only one was defeated for reelection. Most of them serve as mayors for a couple of years and quit because of the hassle and the pay of a couple

hundred dollars a year.

They don't find innocent people guilty just to get revenue for the city, and I guess, in closing, what I would like to say is, I don't think this case is at all like Tumey, and if the Court should find, though, that the operation of the Monroeville mayor's court resembles Tumey, I don't think that it is fair to conclude that all mayor's courts have a high revenue in the mayor's court, or that all mayors conduct themselves the way this mayor did. He was provoked. There was six months publication in magazines and newspapers, locally, about this particular event and what had transpired and, I think -- I can't argue with the fact that the mayor acted improperly at some points in the hearing, lost his temper, and was not the fair and impartial judicial officer he should be.

But I don't think that's grounds for finding that in a substantial number of cases that other mayors --

Q Are you conceding then that,as applied, this statute worked an injustice or that this conviction should be reversed?

MR. ECKSTEIN: No, I think that if the defendant had filed an affidavit for prejudice and had cited the facts to show --

Q You seem to have said in plain words that the mayor in this case acted improperly.

MR. ECKSTEIN: I think that if you look at the fact that the mayor lost his temper, and -- of course, on the findings of fact, I think, that he made, as far as the findings are concerned, I don't think the outcome would have been changed -- that's not relevant.

I think the mayor's losing his temper --

Q He had prior knowledge of the case from having investigated it?

MR. ECKSTEIN: No, not from having investigated it, but in a small town when the newspapers pick up these kinds of events and they are republished over six months, and when newspapers are published, in some cases, to distort facts, I think that he comes to trial with a kind of prior knowledge it isn't right.

Q Did he -- was he responsible for the arrest?

MR. ECKSTEIN: No, he was not, and the mayor is not in charge of police. It may say in statutes that he is the chief conservator of peace. I don't know what that means.

The mayor does not set schedules for policemen to work. He doesn't tell the policemen how to do their job. The real authority is the safety committee of council which is responsible for all expenditures, and is really responsible for the hiring of police. They are the ones who govern what the police --

Q Who is responsible for bringing charges?

MR. ECKSTEIN: The charges are always brought by policemen or by people who have witnessed events.

Q Can he direct those charges be dismissed? I suppose the mayor can, as a judge.

MR. ECKSTEIN: I suppose so. I would presume that he would have that right, if he felt that the thing were clearly illegal and the affidavit were clearly improper.

Q Can he direct that charges be brought?

MR. ECKSTEIN: I don't think that the mayor -- I know in none of the five towns I represent that he can. I don't think that the mayor can direct that charges be brought. I think that it is up to the chief of police to decide how to enforce law. The only thing the mayor can do is what he did in this case, which is, he says if there is a clearcut violation, arrest people, and if there is not a clearcut violation, forget it.

But I don't think the mayor is deeply involved in law enforcement.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Eckstein.

Do you have anything further, Mr. Berkman?

REBUTTAL ARGUMENT OF BERNARD A. BERKMAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. BERKMAN: A couple of comments.

The fact that the judge in this case was a truck driver and the defendant was a truck driver, I think,

is not the kind of trial by one's peers that was intended.

I would only say that I misspoke in my principal arguments with respect to the use of the word "mace." The record specifically says "teargas" and I think there is no constitutional difference.

Q What's it all about?

MR. BERKMAN: There was apparently an altercation after the attempt by the village constable to flag down the accused.

This occurred at a parking lot near a restaurant some 1700 feet beyond the point at which the individual was flagged down.

His defense was that he had a loaded truck and that he could not stop immediately and it was not safe to stop his truck there and he pulled into the first location off the berm where his truck could reasonably stop.

At that point, the village constable now -- or at the time of the hearing, the chief of police of the city, took chase in his automobile. An altercation took place there, during which time, Mr. Ward was hit with teargas from the police officer's cannister.

Q The mayor wasn't there. He had nothing to do with that at all.

MR. BERKMAN: No. I would point out a couple of things.

This Court has a rare opportunity to determine for itself what -- or I should say, has a rare opportunity because it has already been determined whether or not the financial responsibilities of the mayor are such that they involve him in that kind of activity.

In Tumey, the very same statutes that we have here with respect to the mayor's responsibility, were considered and the court so fined. Their numbers have been changed with a renumbering system, but the language, I have checked and it is identical with respect to the responsibilities of the mayor for the financial affairs of the city.

Q The facts were quite different with respect to his salary, and so on.

MR. BERKMAN: Yes. I am only talking about this particular aspect of his financial responsibility which was an issue here.

I would also urge with respect to the necessary neutrality, necessary detachment, which is required; although we have not taken a position that separation of powers is compelled against the State, we do say that this Court has drawn a line between judiciary action and police action in certain areas. And we have called the Court's attention in our brief to Coolidge v. New Hampshire in which one of the principal points dealt with the importance of a neutral and detached judicial officer required to issue

a warning.

And in Shadwick v. Tampa last term, 407 U.S., this Court, in distinguishing between whether or not a clerk could issue an arrest warrant, made it very clear the neutrality and detachment a judicial officer requires severance and disengagement from activities of law enforcement.

So, it seems to me to be an easy move from the issuance of warrants to a situation where a determination is not being made in the threshold issue of probable cause, but really the ultimate determination of guilt or innocence, how much more important is it to make sure that the judicial and the police officers are not intertwined in that way.

We would urge that in the event that mayor's courts should be abolished,or the statutory provision dealing with them should be dealt with appropriately by this Court, no great inconvenience would occur.

We are ready to stipulate that some way could be found in order to take bond forfeitures and pleas of guilty.

Our contention is that when you have a dispute that court is of no use if we are going to concern ourselves with minimal standards of due process.

We think that the county courts which have concurrent jurisdiction are available and can set up some kind of a night procedure or some kind of procedure for bond

forfeitures, and so on, to adapt to the convenience of the population.

Q You wouldn't expect us, as a matter of due process, to tell them what hours of the day --

MR. BERKMAN: Oh, no. I am only responding to the policy suggestion that there might be some difficulty if this Court did its constitutional duty and struck down this --

Q You are telling us that the Court should hold that the mayor can't try a contested case as distinguish from a non-contested case, that it will go to the county court?

MR. BERKMAN: There are a couple of alternatives, Mr. Chief Justice.

One is that it might go to the county court or it might do as it has done in 1957, as a result of this Court's decision in Tumey.

In striking down the justice of the peace courts who were paid on the fee system, decried by the court in Tumey, it set up an entirely new court system in order to handle the traffic --

Q Thirty years after Tumey, it did that?

MR. BERKMAN: Sometimes the decisions of this Court reach Ohio slowly, Mr. Justice, and I think that's an example of it, but they cited in the legislative history

that this was the reason for doing it.

Q Do you have any knowledge, Mr. Berkman, as to how, why and how great an impact a decision in your favor in this case would have. In other words, in how many States does this or a similar system exist?

MR. BERKMAN: In our brief, we have listed in one of the footnotes approximately 13 or 14 other States which have this kind of system.

I think they are probably less now, and their number is dwindling. There was a time, I think, when some 40 States had something similar. They are not all identical, of course, but something similar. I think there are now some 13 States, which we have listed in our brief,which do have some --

Q Giving judicial power to the mayor of the municipality.

MR. BERKMAN: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:53 o'clock, p.m., the case was submitted.)