

NUMBER 05-332

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

HEATHER ROBERSON

VERSUS

TOWN OF POLLOCK

AMY, J., dissenting.

I respectfully dissent from the majority opinion. In my view, the trial court erred in failing to sustain the Town of Pollock's exception of no cause of action as the plaintiff's petition constitutes a collateral attack on the underlying criminal conviction.

Reference to the plaintiff's petition reveals the following statements:

Plaintiff, along with all other individuals who were improperly arrested, is therefore entitled to have her conviction set aside, notification to the Louisiana Department of Public Safety and Corrections that the conviction has been set aside, and a refund of the fine paid to the Town of Pollock.

.....

WHEREFORE, plaintiff prays:

- I. For judgment setting aside all convictions for traffic offenses that resulted from citations for traffic violations by the law enforcement personnel of the Town of Pollock along the portion of Highway 165 improperly annexed into the corporate limits of the Town of Pollock by Ordinance No. 8-30-95.
- II. For judgment ordering that notice be given to the Louisiana Department of Public Safety and Corrections that the convictions have been set aside.
- III. For judgment against defendant, the Town of Pollock ordering it to refund the fines paid by all individuals who were improperly issued citations and arrested under Ordinance 8-30-95 from December 4, 1995 until the present, together with legal interest thereon.

- IV. For judgment against the defendant, the Town of Pollock for such damages as are reasonable in the premises, with legal interest thereon from date of judicial demand until paid.
- V. For judgment awarding plaintiff, as representative party, reasonable expenses of litigation, including attorney's fees and costs of court.

Along with her request for general damages and attorney's fees, the plaintiff forthrightly asks that her conviction be set aside and that the amount of the fine be refunded to her. This is a collateral attack on a criminal proceeding in a civil suit. Such a collateral attack on an underlying criminal proceeding is impermissible. *Duke v. State, Dept. of Public Safety*, 424 So.2d 1262 (La.App. 3 Cir. 1982), citing *Gardner v. State, Dept. of Public Safety*, 198 So.2d 184 (La.App. 3 Cir. 1967); *State v. Free*, 321 So.2d 50 (La.App. 3 Cir. 1975), writ denied, 325 So.2d 272 (La.1976). The United States Supreme Court has noted that, even in 42 U.S.C. § 1983 cases, a collateral attack on a criminal conviction in a civil proceeding is not permissible. See *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994). Rather, the conviction must first be invalidated before pursuit of that type of civil remedy is appropriate. *Id.*

The propriety of the plaintiff's conviction of the traffic offense could have been raised at the trial level or on direct review. See La.Code Crim.P. art. 912.1(C)(1); Uniform Rules - Courts of Appeal, Rule 4-3. Instead, the plaintiff admits that she paid the fine. Thus, she waived the opportunity to raise the type of objection to the ordinance that was later considered by the court in the *Kennedy* and *Garza* matters.

As I find that this case turns on the cause of action issue and I would reverse the trial court's ruling on this point, I do not reach the remaining assignments of error.

For these reasons, I dissent.