STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS CHARLES FELTON JONES,

APPELLANT.

APPELLATE CASE NO. 2020-000108

FINAL REPLY BRIEF OF APPELLANT

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I. The State's concession that Appellant's rights were violated and request that this court decide the case on as-applied grounds rather than on constitutional grounds will result in protracted case-by-case litigation of the scope of the ordinance, putting a chilling effect on the free exercise of rights guaranteed by the First Amendment to the United States Constitution. Appellant has demonstrated the facial invalidity of the ordinance and the ineffectiveness of the savings clause in Part D of the ordinance. In such a case, United States Supreme Court precedent requires the ordinance to be overturned, whether or not the case can be decided on narrower grounds.

Respondent concedes that Appellant's First Amendment right to criticize police was violated by Greenville County Ordinance § 15-10. Initial Brief of Respondent at 4. However, Respondent asks the Court not to consider Appellant's facial challenge to the law which made the violation of his rights possible. Instead, Respondent asks the court to limit its decision to a very specific set of facts, wherein the questioned ordinance pays lip service to Constitutional protections and the defendant is on his own property. Initial Brief of Respondent at 7-10.

For all the reasons stated in his prior brief, Appellant contends that the Part D savings clause relied upon by Respondent is nothing but a restatement of the obvious and thus ineffective at limiting or guiding the discretion of police officers in enforcing a vague and overbroad ordinance. More than ineffective, it is incapable of clarifying or narrowing the ordinance. Indeed, it failed altogether to stop Appellant from being arrested, indicted, tried, and convicted for questioning police on his own property, which the State only now concedes was unlawful. What was done to Appellant in the past can be done to him in the future and to others.

Respondent argues that because the ordinance itself contains language purported to exclude protected speech from criminal sanction, Appellant's arrest was "neither valid nor consistent with the express language of the ordinance." Initial Brief of Respondent at 9. Courts have repeatedly

held that the right to criticize police is protected speech. See State v. Perkins, 306 S.C. 353, 354-55 (1991). Appellant's arrest would have been unlawful with or without the existence of the ordinance's purported "savings clause."

Respondent makes a great deal of the fact that Appellant was speaking from his own property. However, Appellant's right would have been violated just the same whether he was standing in a public right-of-way or, unless he were breaking another law, on someone else's property.

In conceding that Appellant's rights were violated, Respondent seeks to insulate the ordinance from further review in this instance. Respondent urges the Court not to address the constitutionality of the ordinance because it is unnecessary to rendering a decision. Initial Brief of Respondent at 9-10. In support of this proposition, Respondent cites Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339 (1892); Burton v. United States, 196 U.S. 283 (1905); Siler v. Louisville & N.R. Co., 213 U.S. 175 (1909); In re McCracken, 346 S.C. 87 (2001); Morris v. Anderson Cnty., 349 S.C. 607 (2002); and Riverwoods, LLC v. Cnty. of Charleston, 349 S.C. 378 (2002).

Appellant respectfully contends that these precedents do not mandate the result requested by Respondent or support its position that the court must refrain from acting here. Chicago & G.T. Ry. Co. v. Wellman involves a "friendly" suit brought to test the constitutionality of the legislature. The Supreme Court held that wherever

> in pursuance of an honest and actual antagonistic assertion of rights . . . there is presented a question involving the validity of any act of any legislature . . . and the decision necessarily rests on the competency of the legislature to so enact, the court **must**, in the exercise of its solemn duties, determine whether the act be constitutional or not.

143 U.S. at 345 (emphasis added). Appellant's case is not a "friendly" suit. It is the result of "an honest and actual antagonistic" criminal trial wherein he challenged the competency of the Greenville County Council to prohibit certain speech, as against the protections of the First

Amendment. As such, Appellant respectfully submits that the merits of his constitutional challenge must be considered.

Burton, similarly, is misapplied. The Supreme Court did not rule on the scope of Senatorial immunity provided by Article I, §6 of the United States Constitution, because it found the District Court below lacked jurisdiction and, notwithstanding, should have directed a verdict of acquittal. See id., 196 U.S. at 295. In so deciding, the Court noted that "it is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Id. However, the question of a sitting Senator's immunity to prosecution is distinguishable from a citizen's right to exercise the rights protected by the First Amendment. The immunity question raised in Burton involved weighty matters of Senatorial representation for the states and what guarantees protected a state's right to be represented in Congress. But, because the case could be decided and the right guaranteed inviolate on the narrower grounds, the Supreme Court did not reach the question. The Court has repeatedly held, however, that the First Amendment must be protected by a "breathing space," such that when a challenge to an enactment is brought on those grounds, it cannot be ignored simply because an appellant also pleads for relief on narrower grounds in the alternate. See Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). Because of this, Appellant maintains that deciding the constitutional question is "absolutely necessary" to deciding the case, lest the free exercise of the right be chilled. Unlike Burton, deciding the question on narrower grounds, here, leaves the right diminished.

In Siler v. Louisville & N.R. Co., the Supreme Court held that a state railway commission was not permitted to set a maximum rate by the state's own enabling law and that because of this, the constitutional questions raised by plaintiffs need not be reached. See id., 213 U.S. at 193, 197. Similarly, in Riverwoods, the South Carolina Supreme Court dealt with the twin issues of whether

a Charleston County tax exemption violated the Enabling Act and whether the exemption violated a state constitutional provision. 349 S.C. at 383. Because the Court found that the exemption did indeed violate the Enabling Act, it declined to rule on the constitutional question as being unnecessary to the disposition of the case. Id. at 387. The Siler v. Louisville & N.R. Co. Court held that "[w]here a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." 213 U.S. at 193. This case is different from both Siler and Riverwoods. The chilling effect caused by the continued validity of the Greenville County ordinance is an important reason to reach the constitutional questions he has raised, and this case cannot be decided without reaching the constitutional question.

The South Carolina Supreme Court found in In re McCracken that the constitutional issues were not preserved, as they were not raised and ruled upon at trial; therefore, the Court declined to rule on them. 346 S.C. at 92. Similarly, in Morris v. Anderson Cnty., the appellants moved at trial, by way of a motion for summary judgment, to declare the South Carolina Tort Claims Act's cap on governmental liability unconstitutional. 349 S.C. at 651. The Court found that a denial of summary judgment was not a final order and declined, in its discretion, to reach the constitutional issue so as not to issue an advisory ruling "on a constitutional issue which may never arise." Id. This case offers no such opportunity for an advisory opinion. Appellant is a real defendant with a real First Amendment injury that has been raised and litigated at trial.

These cases urge judicial restraint and economy and discourage courts from issuing advisory opinions where a constitutional issue is not preserved or ripe for review. Similarly, they encourage judicial restraint where rights can be vindicated or protected with less intrusive means than reaching a constitutional question. However, none of these cases involved a First Amendment

question and the "breathing space" it is due. Appellant's conviction may indeed be overturned on an as-applied challenge, but the continued enforcement of the ordinance will chill the free exercise of his and the community's rights in the future. An as-applied adjudication of this issue would not prevent the same violation from happening in the future.

Not only are there important reasons to reach the broader issues Appellant has raised but, reaching those issues is, in fact, following the path of judicial restraint and economy. Without reaching the issues now, further challenges to the validity and scope of the ordinance will continue to come up, creating confusion and consuming additional judicial resources unnecessarily.

Furthermore, Appellant directs the court's attention to Citizens United v. FEC for the proposition that where First Amendment rights are at issue and a facial challenge to a provision of law has been made, the court must consider the broader claim. See id., 558 U.S. 310, 336 (2010).

The State's proposed case-by-case challenges of the ordinance, will chill the free exercise of the very right it violates. Such challenges, brought individually, repeatedly, and over the course of years, would "create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." Id., 558 U.S. at 327. The Supreme Court noted that it, like all courts, was bound as well by the First Amendment and found that it must decline to engage in this protracted chilling process. See id. First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech." Id. (internal quotations omitted).

Based on a search of the office's database, from the time of Appellant's arrest to the end of 2020, the Greenville County Public Defender's Office has been assigned 212 cases arising from Greenville County Ordinance § 15-10. Presumably, many more people have been arrested and convicted for the offense in magistrate's court, with private counsel, or worse, without an attorney.

While the case-by-case as-applied challenges the State urges are making their separate ways through the courts and while the courts are making finer and finer adjustments to the scope of the ordinance, the ordinary citizens of Greenville County must guess at what is prohibited and risk the consequences of arrest and conviction, or they must seek prior permission from the government for critical speech, or they must simply stifle themselves in the face of the police. All three are intolerable under our First Amendment jurisprudence.

As in Citizens United, "the ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." 558 U.S. at 336.

Conclusion

For the foregoing reasons, and for the reasons previously offered in his brief, Appellant respectfully asks this court to set aside his conviction, reverse the lower court, and find Greenville County Ordinance § 15-10 unconstitutional, facially and as-applied.

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ATTORNEYS FOR APPELLANT

This 1 day of March, 2021.

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Certificate of Counsel

The undersigned hereby certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

John Christopher Shipman
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ATTORNEY FOR APPELLANT

Andre Ta Nguyen
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ATTORNEY FOR APPELLANT

This 1 day of March, 2021.