

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM AIKEN COUNTY

Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Case No. 2013-002188

City of Aiken,

Respondent,

v.

Larry Daniel Smith,

Appellant.

INITIAL BRIEF OF APPELLANT

Suzanne Higgins Hayes
Assistant Public Defender
Post Office Box 2247
Aiken, SC 29802
803-642-1732
Attorney for Appellant

RECEIVED

MAR 03 2014

S.C. SUPREME COURT

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF CASE.....4

STATEMENT OF FACTS.....5

ARGUMENT

The trial court failed to rule the City of Aiken Ordinance Article 1,
Section 22-3(B) unconstitutional because it is vague and
overbroad.....6

The City Ordinance of Failure to Comply is unconstitutional because
the Ordinance violates the Constitution of South Carolina and in
addition the Constitution of the United States.....10

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Southern Bell Telephone and Telegraph Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333, (1985)..... 6

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed 2d 903 (1983)..... 6, 7

Smith v. Goguen, 415 U.S. 566 (1974)..... 7

Plummer v. City of Columbus, 414 U.S. 2, 94 S. Ct. 17, 38 L.Ed. 2d 3 (1973)..... 7

Massachusetts v. Oakes, 491 U.S. 576, 109 S. Ct. 2633, 105 L.Ed. 2d 493 (1989)....8

Beachfront Entertainment, Inc. d/b/a Bert’s Bar, John Elder, Mary Lynn Sheppard, and Cole Charles v. Town of Sullivan’s Island, 379 S.C. 602, 666 S.E.2d 912.....10

Rules

Article 1, Section 22-3(B), Aiken Code of Ordinances.....4, 6, 11

Constitutional Provisions

U.S. Const. amend. IV.....10

S.C. Const. art. 1, § X.....10

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO FIND THE CITY OF AIKEN
ORDINANCE ARTICLE 1, SECTION 22-3(B) UNCONSTITUTIONAL
BECAUSE OF ITS VAGUE AND OVERBREATHNESS?

2. DID THE TRIAL COURT ERR IN FAILING TO FIND THE CITY OF AIKEN
ORDINANCE ARTICLE 1, SECTION 22-3(B) UNCONSTITUTIONAL
BECAUSE IT VIOLATES THE SOUTH CAROLINA CONSTITUTION AND
THE UNITED STATES OF AMERICA CONSTITUTION?

STATEMENT OF THE CASE

On January 17, 2013, the police were called to Appellant's residence. As Appellant approached the police they ordered him to place his hands where the officer could see them, even though his hands were in full view the entire time. Appellant was arrested under a City of Aiken Ordinance Failure to Comply, Article 1, Section 22-3(B).

A jury trial was held on May 17, 2013 in the Aiken Municipal Court. The Appellant's Attorney, Suzanne Higgins Hayes made pretrial motions requesting the court to find the Failure to Comply Ordinance as unconstitutional based on the fact that the Ordinance is vague and overbroad. Also, to further consider that it violates the State and Federal Constitution. The court agreed that the Ordinance needed better wording but denied the motion. Tr. 8, lines 29-35, Tr. 9, lines 37-43. During cross examination of Officer Dowdy he could not give an explanation of a lawful or unlawful order. Tr. 32, 39-45, Tr. 33, 23-43. The Jury convicted Appellant of Failure to Comply and was sentenced to 30 days and given credit for time served. Tr. 74, lines 40-45. The Appellant filed a Motion for a New Trial Motion. The New Trial Motion which was heard on June 14, 2013 and denied by the trial judge. On June 21, 2013 the Appellant filed a timely Appeal.

On July 29, 2013 Oral Arguments were heard by Honorable Doyet A. Early III in Common Pleas Court in Aiken County. Counsel were each instructed to submit a Proposed Order within 30 days for him to sign. On September 27, 2013 the City of Aiken's Order was filed with the Clerk of Court. The Appellant filed a timely Notice of Appeal on October 9, 2013 to the Supreme Court of South Carolina.

STATEMENT OF FACTS

Aiken City Police Department were dispatched to a home in the City of Aiken regarding a man with a “Mack 10”. Tr. 22, lines 44-45, Tr. 23, lines 1. Women were claiming he had a gun. Officer Dowdy saw Appellant but did not see a gun, but could see his hands. Tr. 24, lines 35-43. He was told to keep his hands where the officer could see them. He had view of Appellant’s hands at all times. Tr. 25, lines 28 – 33. Cpl. Griswold approached and attempted to kick to Appellant to attempt to have him lose his balance. Appellant approached the Officer Griswold that kicked him. Tr. 26, lines 1- 21. Officer Dowdy then tased Appellant. Tr. 27, line 5. He was later charged Failure to Comply.

ARGUMENT

- I. The trial court failed to find the City of Aiken Ordinance Article 1, Section 22-3(B) unconstitutional because it is vague and overbroad.

Relevant Facts

Appellant was charged with the Failure to Comply under a City of Aiken Ordinance. Article 1, Section 22-3(B) reads: “It shall be unlawful for any person to willfully fail to refuse to comply with a lawful order or direction of a city public safety officer, while such officer is about the duties of his office within the city or upon properties owned by the city”. The ordinance facially is unconstitutional based on its vagueness and overbreadth.

Discussion

A City Ordinance is considered constitutional because it is created by a legislative body. Southern Bell Telephone and Telegraph Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). If an Ordinance is deemed to be vague and/or overbroad it can be declared unconstitutional. A criminal statute is unconstitutionally vague on its face [when] it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L. Ed. 903, 909. (1983). The purpose of the void-for-vagueness doctrine is to avoid laws that prevent individuals from having actual notice of what the law requires, and more importantly to avoid laws that allow for arbitrary enforcement by police officers because the legislature has not provided “minimal guidelines to govern law enforcement. Id. At 358, 103 S.Ct. 1855, 1858, 75 L.

Ed. 903 (Citing *Smith v. Goguen*, 415 U.S. 566 (1974)). A person is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. If the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction was placed on the ordinance. *Plummer v. City of Columbus*, 414 U.S. 2, 94 S.Ct. 17, 38 L. Ed. 2d 3 (1973).

A statute is vague when it does not define what conduct is against the law. “To survive a vagueness challenge a statute must satisfy two criteria. First, the statute must provide sufficient notice of the conduct prohibited. Second, the statute must also not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement”. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L. Ed. 903, 909. (1983). If the statute fails both of these prongs then the statute is vague and deemed to be unconstitutional.

The first prong is was there sufficient notice of the conduct that was prohibited. Does this statute give a citizen fair notice of what is prohibited? The Failure to Comply statute gives no guidance as to what a “lawful” request is, nor does it place any restrictions on the “request” of a police officer. A citizen cannot clearly be on notice when he or she is breaking the law. This statute is silent to the aspect that a request could be made by a police officer and the person ignores the request and immediately thereafter gets arrested for Failure to Comply. The Ordinance gives no guidance to citizens or public safety officers as to what this law actually prohibits. Therefore, it fails the first prong of the Void for Vagueness doctrine.

The second prong is that statute must also not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement. This statute allows so

much interpretation by Public Safety Officers that it encourages arbitrary and discriminatory enforcement. The officers are not instructed as to what a lawful order is so they believe that anything they request a citizen to do as long as it is within the law it must be a lawful order and if the individual does not do as the officer requested he can arrest you for Failure to Comply. This Ordinance provides law enforcement authority to charge individuals with additional charges for no apparent reason, for example because the individual failed to place his hands above his head. This could simply be the individual made the officer mad or was more difficult than they figured the arrest should have been so they add additional charges. It allows them to go into areas that are believed to be high crime areas and ask individuals questions if they do not comply then they could be charged with a crime and later searched. This is clearly arbitrarily and discriminatory enforcement.

This city ordinance should be declared Unconstitutional because it fails the Void for Vagueness Doctrine.

Overbreadth is a judicially created doctrine designed to prevent the chilling of protected speech and conduct. An Overbroad statute is not void ab initio, but rather voidable, subject to invalidation notwithstanding the defendant's unprotected conduct out of solicitude to the *U.S. Const. amend. I* rights of parties not before the court.

Massachusetts v. Oakes, 491 U.S. 576, 583, 109 S. Ct. 2633,2638, 105 L.Ed. 2d. 493,501 (1989). In addition to this ordinance being vague, the ordinance is overbroad due to its lack of precision. Overbreadth can apply to speech and conduct which could be a violation of the Failure to Comply ordinance because it could apply to something you may say to a police officer that may turn into a criminal offense if the officer chooses to

make that decision. This ordinance allows police to charge citizens engaging in their legal rights with a criminal act should the officer insist they comply.

- II. The City Ordinance of Failure to Comply is unconstitutional because it violates the Constitution of South Carolina and in addition the Constitution of the United States.

Discussion

The South Carolina State Constitution Article 1, Section 10 gives the people of the State of South Carolina the right to be protected from unlawful searches and seizures and the right to privacy. This right is also guaranteed under the Fourth Amendment of the United States Constitution. The City of Aiken's Ordinance Failure to Comply you are required to comply with every request a public safety officer makes. If this Ordinance is deemed to be constitutional then it flies in the face of our state and federal constitution because it could reasonably lead to a violation of First, Fourth and/or Fifth Amendments of The U.S. Constitution and a violation of the State Constitution. To determine the validity of a local ordinance the Court's inquiry is twofold: (1) Did the local government have the power to enact the local ordinance, and if so (2) is the ordinance consistent with the constitution and general law of this state. Beachfront Entertainment, Inc. d/b/a Bert's Bar, John Elder, Mary Lynn Sheppard, and Cole Charles v. Town of Sullivan's Island, 379 S.C.602, 605, 666S.E.2d 912, 913. You could argue that the City did not have the power to enact this local ordinance because there are several state statutes that could cover what the City of Aiken is trying to accomplish with this Ordinance. For example Resisting Arrest, Failure to Stop for Blue Lights, Disorderly Conduct, and Giving False information to a Police Officer. However, when a city legislature creates an Ordinance it is to be deemed constitutional because it is simply drafted by a legislative body. However, under the second part of this requirement the ordinance must be consistent with

the constitution and general law of this state. The answer to this part of the inquiry is no, the Ordinance violates Article 1, section 10 of our South Carolina State Constitution. This Ordinance requires you to comply with any request made by a public safety officer assuming the request is lawful which is not defined which gives to much discretion to law enforcement. If you do not comply with request you will be arrested. This violates your constitutional rights to unlawful seizures because you could be walking down the street in the City of Aiken and a public Safety officer stops you and asks you for your identification. If you refuse you will be placed under arrest for Failure to Comply and searched which could lead to additional charges. If you are outside the city limits of Aiken you are entitled to ignore the police if you choose. You are not required to comply with every little request that is made of you just because they are police officers. The City of Aiken's Ordinance Failure to Comply is more restrictive than the South Carolina and Federal Constitution. The state and federal constitutions guarantee our right to be protected from this conduct by law enforcement. You should be free to move throughout the State of South Carolina and not have to worry about being charged with a criminal act because a city has placed more restrictions on an individual than the state has.

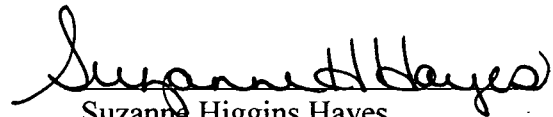
This Ordinance should be deemed Unconstitutional. The Ordinance violates the State and Federal Constitution by allowing the City of Aiken Public Safety Officers to charge people with criminal charges when our State and Federal Constitution guarantee our right to be free from unlawful searches and seizures.

CONCLUSION

Appellant respectfully requests this Court to declare the City of Aiken's Ordinance Section 22-3(B) Failure to Comply Unconstitutional because the Ordinance is Vague and Overbroad. The Ordinance also violates the United States Constitution and the South Carolina Constitution and does not comply with the general laws of South Carolina. This Ordinance should be found Unconstitutional because of the above arguments. The Appellant respectfully requests the court to vacate his conviction of this charge.

Respectfully submitted,

February 26, 2014



Suzanne Higgins Hayes
Assistant Public Defender
Post Office Box 2247
Aiken, SC 29802
(803)-642-1732
Attorney for Appellant

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 03 2014

Appeal from Aiken County

Court of Common Pleas

S.C. Supreme Court

Doyet A. Early III, Circuit Court Judge

CITY OF AIKEN,

RESPONDENT,

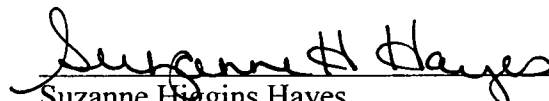
V.

LARRY DANIEL SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Paige E. Tiffany, Esquire, at Post Office Box 1177, Aiken, SC 29801, this 26th day of February, 2014.


Suzanne Higgins Hayes
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me

This 26th day of February, 2014.


Kathy Bowles
Notary Public for South Carolina

My Commission Expires: 12-10-2020