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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

APPEAL FROM AIKEN COUNTY
Doyet A. Early III, Circuit Court Judge
Patrick Sullivan, City of Aiken Judge

THE CITY OF AIKEN,

RESPONDENT,

V.

LARRY DANIEL SMITH,

APPELLANT

Appellate Case No. 2013-002188

RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA)
2)
3 COUNTY OF AIKEN)

IN THE AIKEN MUNICIPAL COURT

4)
5 THE CITY OF AIKEN)
6)
7 PLAINTIFF(S))

8)
9 VS)

10 LARRY SMITH)
11)
12 DEFENDANT(S))
13)
14)

JURY TRIAL TRANSCRIPT
TICKET NOS.: 72184GA; 72185GA

15 THE COURT

16
17 *The City versus Larry Smith. Mr. Smith's present*
18 *represented by Suzanne Hayes and present for the*
19 *City is Solicitor Paige Tiffany. Ms. Hayes I believe*
20 *we have a motion from you?*

21 COUNSEL FOR DEFENSE

22
23 Yes, Your Honor. I have a motion in regards to the
24 city ordinance under failure to comply

25 §22-03. I believe this city ordinance is invalid in
26 regards to it is overbroad and vague. There is no definition in the
27 ordinance to what a lawful order is so that in of itself makes the case
28 makes the statute overbroad and vague. Um...there is a case that was
29 heard in the Court of Appeals of South Carolina. It is not binding on
30 this court. It is persuasive because the issue was argued a Fourth
31 Amendment seizure. The issue in regards to the failure to comply
32 ordinance was not preserved for the record but the Court of Appeals
33 did kind of cite in their brief notes at the very back of the court case
34 of what they thought this ordinance was, but because it wasn't

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preserved in the brief in regards to the actual appeal they couldn't actually make a ruling that was binding on the court. They did state that under the Aiken ordinance an arrest for failure to comply with an officer's lawful order appears to be overbroad and vague. This alone is not dispositive of the issue on appeal because they didn't challenge the ability of it in trial but they do state that they believe it is overbroad and vague. Um..there's also another court case *State v. Burton*, which was heard in the Court of Appeals in regards to a person ignoring a police officer, who in turn then ...um..he was in a phone booth. They were doing a warrant search trying to find some people. They were going around the, I think it was like a mini mart, asking people for IDs and this guy was in a phone booth. They asked him for his ID. He ignored them several times. The officer new reached in put his hand in his pocket and it ended up turning into resisting arrest, attempted murder and all that. Uh..the Court of Appeals said the court case should have been granted in directed verdict because failing to ignore an officer is not a reason for an arrest and detainment. On Page 9, in the court that I gave you, it says an individual's refusal to cooperate with questioning during a police citizen encounter, without more, does not furnish the minimal level of objective justification needed for detention or seizure. However, the case was overturned in the Supreme Court because that issue was not preserved in the record, but the analysis by the

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Court of Appeals is still correct and the court is saying it's still valid. The only reason they couldn't uphold it was because they didn't preserve it on the record because I believe the defendant was pro se so he didn't know how to but it wasn't preserved for the record so the State Supreme Court said they overturned it for that purpose. It wasn't because the analysis was wrong. It's just that it wasn't preserved. Um..so and then also the State..City of Myrtle Beach had imposed a helmet law in regards to motorcycles. In the City of Myrtle Beach there was a person who was cited for the helmet law. They fought that city ordinance saying that it was invalid because it's more restrictive than the State law. The Supreme Court of South Carolina ruled that that ordinance was invalid because you cannot put more restrictions on people in a city that the State...you can't be more restrictive in the State law so it has to comply. Here you in the City of Aiken you have to comply with the officer's lawful order. We're not really sure what a lawful order is but if you go outside the city limits if a police officer just says for instance says stop you don't have to stop, but in the City of Aiken if a police officer asks you to stop because they feel like it you're running the risk of being arrested for failure to comply with a lawful order, which is more restrictive than the State of South Carolina rules and the constitution allows. So I would ask the court to rule the statute, or the ordinance failure to comply, to be invalid.

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THE CITY

Your Honor, I would from what I understand
is your motion you're not applying your case law
to these specific facts.

COUNSEL FOR DEFENSE

No, I'm challenging the ordinance.

THE CITY

Challenging the statute on its face. Um... Your
Honor obviously the City of Aiken has a right
to pass ordinances for the welfare of its citizens
and that is in the South Carolina Constitution and in their case law
I mean in our statutes. Um...I don't think it's very hard to
separate the facts of this case from the ordinance itself. The facts
in this case I think you know there would be in South Carolina
anyone would state that failure to comply was illegal in this manner
and the specific facts being that um..he had been there's evidence
witnesses stating that he had a machine gun. That he was pointing
it at people. The machine gun was inside the house at the time
and that he was approaching the officer and the house when they
told him to stop, show your hands. He didn't want them to get
access to the machine gun again and when he didn't comply with
that order then that was what violated the ordinance. Um...you
know I can't argue with the fact that somebody that had not being
suspected of some sort of criminal activity can be stopped and
arrested just for not stopping; however, in this situation there was
not only suspected criminal activity but reported criminal activity

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of pointing and presenting a machine gun and in that situation
obviously the officers had every right to tell them to show his
hands and to stop where he was to keep um..everyone in the
vicinity safe and that was a reasonable and a lawful order which
was disregarded and so I would say that the ordinance is completely
constitutional in this manner.

THE COURT

In this situation was Mr. Smith cited under (a) or
(b)?

COUNSEL FOR DEFENSE

I believe (b).

THE CITY

(b) Your Honor, um..failure to comply because
he wasn't under arrest when he was told to stop,
show your hands.

THE COURT

He was never told he was under arrest?

THE CITY

No, he had not...it's my understanding that...

THE COURT

Okay, I just wanted to be sure that I understood.

THE CITY

It's my understanding that when at that moment
he was just trying to gain control of the situation.

Show your hands, make sure there's no machine
gun on him basically and he responded you know f...you and went
toward the officer in an aggressive manner with clenched fists and
at that point the officer backed up and another officer came and took
him down um...

THE COURT

And where did this occur?

1 THE CITY He was in the roadway on Union Street when he
2
3 was first asked to show his hands and to stay where
4
5 he was. I suppose he was coming toward his home
6
7 when he was approaching the officer.
8
9 THE COURT But he was not in his yard, his porch, or his house?
10
11 He was in the road.
12
13 THE CITY He was in the middle of Union Street when he was
14
15 first approached Your Honor.
16
17 THE COURT And Public Safety was responding ...
18
19 THE CITY To reports to a man ...
20
21 THE COURT A machine gun.
22
23 THE CITY ...with a machine gun pointing it at three women
24
25 in a house. Later on the machine gun was
26
27 retrieved and it was loaded Your Honor.
28
29 THE COURT And the defendant was in the house with the
30
31 machine gun or was he in the roadway or the yard
32
33 or...
34
35 THE CITY When they first got the call they said three women
36
37 said were trapped in the house. The defendant had
38
39 pointed a machine gun at us. Meanwhile, they had
40
41 crawled out of the window of the house and had escaped into the
42
43 front yard. The defendant at that point had left the house, apparently
44
45 left the machine gun in the house, and was in the roadway when the
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officers arrived. Um..at that point it was already ascertained where
this machine gun was and if there was any uh...danger to either of
the victims, or the officers, or the defendant at that point.

THE COURT

All right, and your motion Ms. Hayes is based
upon that 22-03(b) is just...

COUNSEL FOR DEFENSE

I'm not arguing any of the facts of the case.

THE COURT

Right.

COUNSEL FOR DEFENSE

My argument states it's invalid ...

THE COURT

It's purely on (b) saying it's too broad and there's
no definitive information provided.

COUNSEL FOR DEFENSE

Yes, there's no...right and it has nothing to do with
this case. This is just it's unbased that anybody.

There doesn't even have to be crime afoot. If the
officers say stop they can arrest you if you don't stop. You don't have
to, I mean, that's just you're giving the police so much power.

THE COURT

Understood.

THE CITY

Your Honor, I would argue that that wouldn't be
a lawful order. A lawful order would be one in
which you know obviously there is some scenario
in which the officer's need compliance in order to for the safety and
welfare of the community and this would be one of them.

THE COURT

Ms. Tiffany took the words out of my mouth. I was
going to ask that question about lawful order.

1 COUNSEL FOR DEFENSE Well, my argument is there's no definition to
 2
 3 determine what's lawful and what's unlawful.
 4

5 THE COURT Granted.

6
 7 COUNSEL FOR DEFENSE That gives the officers a great you know...

8
 9 THE COURT Granted and I think all this stems from
 10
 11 like 1976 that home rule act is what put all this in
 12
 13 motion today if my memory serves me correct.
 14

15 THE CITY If the facts of this matter of this particular case were
 16
 17 such that there was a casual encounter in which no
 18
 19 criminal activity was afoot then you know I think
 20
 21 that would be a very sound argument that it's very too broad and
 22
 23 unconstitutional but until such time as the officers of the City of Aiken
 24
 25 try to arrest somebody for not you know answering a casual question
 26
 27 then that doesn't really apply..
 28

29 THE COURT We're done..fine. All right. Ms. Hayes I agree that
 30
 31 the um...the ordinance could probably use some
 32
 33 attention but I'm concentrating on a lawful order
 34
 35 and from what I can ascertain, and I understand that I'm comparing
 36
 37 apples to oranges by viewing some of the facts of the case but it was
 38
 39 it appears clear that they were acting not only issuing a lawful order
 40
 41 but within their duties in responding to a call.
 42

43 COUNSEL FOR DEFENSE And I...

44
 45 THE COURT I'll agree that Council could revisit this and
 46

1 of those issues in that pre-shift meeting with the other supervisors.
2
3 **Conduct roll call training and then when the shift starts um...I serve as**
4
5 a back up roll. I'm not one of the people that dispatch generally
6
7 assigns a call to as the primary officer. My job is basically to provide
8
9 back up to the other officers that are working, make sure that things
10
11 are going the way they should. I approve a lot of paperwork,
12
13 scheduling, school requests, time off, time sheets. So I'm out there...
14
15 Q: You're kinda like the boss. You're kinda like the boss.
16
17 A: Yes. I have a shift lieutenant but uh...you know the sergeants
18
19 pretty well take care of the nuts and bolts so to speak the day in and
20
21 day out.
22
23 Q: But you were called out to on January 17th, 2013. Is that correct?
24
25 A: Correct. I was actually here actually approving some time sheets I
26
27 believe. Um..we got a call to go to 231 Union Street and what got
28
29 my attention initially was the dispatcher that was working that night
30
31 had a sense of urgency in his voice and we listen to their voices
32
33 40 hours a week so I know what his tone of voice is. I know his
34
35 demeanor but in this particular call he had he had a sense of
36
37 urgency and I felt like there was something going on. This was an
38
39 in progress call. This wasn't a burglar alarm. This wasn't a routine
40
41 call. Dispatch said that they received a call from 231 Union Street
42
43 from a frantic female and the female told our dispatcher that there was
44
45 a male in her house, and we weren't given a name at the time, with a
46

1
2
3 "Mack 10". Most people wouldn't know what that is. When he
4 said Mack 10 I thought well that's a little unusual because we don't
5 see that very often. A Mack 10 is a little submachine gun probably
6 about that long. Has a stick magazine about that long kind of a
7 rectangular steel box looking thing. So obviously our concern when
8 we get to work is we want to go home at the end of the shift so if you
9 just shoot about five or six blocks directly that way and turn right
10 you'll be on the 200 block of Union Street. And I know this side
11 of town very well. I was assigned this side of town when I was a
12 patrol officer so I can pretty much get to within two or three
13 houses uh...just by telling me the address. I know pretty much
14 where to go even if it's in a neighborhood this side of town. So
15 I knew if I went down Edgefield Avenue and parked between
16 Fairfield and Edgefield that if I just turned right on Union I would
17 be very close to the house.
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31 Q: That's in the City of Aiken isn't it?

32
33 A: Correct. It's right here in the middle of downtown. So what I did was
34 I drove down to Edgefield Avenue between Fairfield Street and
35 Union Street. At that point I turned my headlights off, put the car in
36 park, turned it off, closed my door real quiet. I didn't want anybody
37 to know I was there because this type of call we don't want to just
38 pull up in front of the house. If we go to a gun call that's a whole
39 other level of safety issues. Um...and we have to keep that kind of
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thing in mind so in this case I wanted to use the darkness to my
advantage and just try to approach it on foot um..where I would be
safe or where I would have the advantage to be hopefully as safe as I
could be. So when I started walking from my car and started
walking down Union Street I saw three females and the defendant
out in the roadway on Union Street and they were up under ..there
was a street light somewhere within proximity to where they were
so they were fairly easy to see and there was obviously some sort
of a um..some sort of a conflict.

Q:

Could you hear what they were saying?

A:

No, I was still probably from here to the sidewalk out front when I
realized that that's probably where I needed to be. That's
approximately where the house should be but it was obvious there
was a conflict between the male and the female. The females were
kinda grouped together keeping their space from him and he was
by himself and there was some talk back and forth.

Q:

So what did you do next?

A:

At that point, as I got closer, the females were probably um...
probably 30 feet closer to me than the defendant so my first concern
was where is the gun and the reason I asked that was they said he's
got a gun. He's got a gun. That's all I kept hearing. He's got a gun.
I could see his hands. I could tell he did not have a gun so my
concern at that point was if it was a Mack 10 it's not easily

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concealable but it could be concealed. It's not that big. Um..I wanted
to make sure I could see his hands so that would not be an issue and
then one of them said he must have put it back in the house. Now at
this point he's out in the road, so what I did was I got between the
defendant and the house to eliminate his path back to the house if
indeed he did put a gun back in the house. I certainly didn't want him
getting back to it if he had gotten rid of it. At this point we're a
couple minutes into the call and other officers are starting to you know
come around the corner and are getting pretty close. As a matter of
fact Cpl. Griswold at this point was pretty close too. Um..so at this
point my main concern was just making sure he can't get...he had a
sweatshirt on. Make sure it wasn't up under his sweatshirt. I don't
know where it is. Chances are it's not on him. I felt reasonably
comfortable that it probably was not on him but I wanted to make
sure I could see his hands. So at that point he turned around and put
his focus on me so I'm between the house and him and I said stay
right there, keep your hands where I can see them and he replied,
"F..you," and at that point he walked toward me. I don't know what
his intention was because it never happened but he walked ...and I've
been doing this for a long time. I've dealt with a lot of people. At that
point he looked like if I had to guess he was either going to walk
through me and go into the house or it was like an aggressive type of
walking toward me. He was mad. His fists were clenched and so I

1 when we can. We don't like to fight with people. I don't know
2
3 ~~Mr...I didn't know Mr. Smith prior to that night and I don't know~~
4
5 what he's physically capable of so at that point I used a taser on
6
7 Mr. Smith to de-escalate the situation. It worked. He went down
8
9 and we got him handcuffed.
10
11 Q: What kind of state was Mr. Smith in? How was he acting? What
12
13 did he smell like?
14
15 A: He smelled heavily of liquor. Um...I'm guessing it was liquor. I've
16
17 smelled it for years on calls. Um...had very vulgar language. Called
18
19 us a lot of expletives. Um...was heavily intoxicated. He was drunk
20
21 in my opinion.
22
23 Q: Was he very loud as well?
24
25 A: Oh yeah. He was yelling at us, cussing. It was creating quite a
26
27 scene.
28
29 Q: So when you first approached the situation you asked him to stop and
30
31 put his hands ..put his hands where they could see them.
32
33 A: Uh-huh. That's exactly what I said. Keep your hands where I can
34
35 see them and stay right there or reverse stay right there and show me
36
37 your hands one of the two. I wanted to make sure he stayed put and I
38
39 could see his hands.
40
41 Q: Did he comply with that order?
42
43 A: No.
44
45 Q: Um..nothing further from Sgt. Dowdy, Your Honor.
46

1 A: Correct. Correct.
2
3 Q: But your testimony today is that he was screaming and yelling
4
5 several obscenities.
6
7 A: Yes, ma'am.
8
9 Q: And you didn't feel that that was necessary to put in your report?
10
11 A: I think we had enough obscenities in the report already.
12
13 Q: Just one?
14
15 A: Yes, ma'am.
16
17 Q: Is that against the law to say a bad word?
18
19 A: When you're drunk in the street it is.
20
21 Q: Um...and you ..was it you that tasered Mr. Smith?
22
23 A: Ma'am?
24
25 Q: Did you...are you the one that tasered Mr. Smith?
26
27 A: Yes, ma'am.
28
29 Q: Okay. You saw his hands.
30
31 A: Correct.
32
33 Q: Could he have hidden a Mack 10 in his hands?
34
35 A: No.
36
37 Q: Did he ever reach for anything?
38
39 A: Hub-uh.
40
41 Q: So you said Mr...Officer Griswold had kicked him in the leg and he
42 was down?
43
44
45 A: No. He went about halfway down. It buckled his knee and then he
46

1 A: Correct.
2
3 Q: Did you attempt to try to physically restrain him before you tased
4
5 him?
6
7 A: No, ma'am.
8
9 Q: But he had always showed you his hands. You could always see his
10 hands. They were always in your line of vision?
11
12
13 A: Correct.
14
15 Q: And he never had a weapon?
16
17 A: No, ma'am.
18
19 Q: And he never...
20
21 A: Not on his person.
22
23 Q: ...reached for a weapon.
24
25 A: Huh-uh.
26
27 Q: Or reached for anything?
28
29 A: No.
30
31 Q: Yet he didn't comply?
32
33 A: Correct.
34
35 Q: What exactly was your order?
36
37 A: Stay right there and show me your hands.
38
39 Q: Can you give me an example of what an unlawful order would be?
40
41 A: Your defendant's actions. Walking toward me in an aggressive
42 manner.
43
44
45 Q: An unlawful order.
46

1 THE CITY
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7 THE COURT
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11 COUNSEL FOR DEFENSE
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19 THE COURT
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23 SGT. DOWDY
24
25 THE COURT
26
27 COUNSEL FOR DEFENSE CONTINUING CROSS EXAMINATION
28
29 Q: Can you give me an example of what...an unlawful order?
30
31 A: So if I was trying to give someone an unlawful order?
32
33 Q: Yes, that's exactly what I'm asking.
34
35 A: I suppose if I told someone to do something that would break a law
36
37 or an ordinance.
38
39 Q: If you tell someone to do something do you expect them to do what
40
41 you ask?
42
43 A: It depends on the type of encounter.
44
45 Q: And you claim that Mr. Smith was intoxicated?
46

1 A: Heavily.
2
3 Q: Did you do any type of field sobriety test that would prove that he
4
5 was intoxicated?
6
7 A: It's only done in a DUL.
8
9 Q: Okay, is it against the law to drink alcohol?
10
11 A: No, ma'am.
12
13 Q: I have no further questions. Thank you.
14
15 THE COURT Redirect Ms. Tiffany?
16
17 THE CITY ON REDIRECT
18
19 Q: Officer did you conduct a search for the Mack 10?
20
21 A: Correct.
22
23 Q: And did you find a weapon?
24
25 A: We did not find a Mack 10 but we did find a rifle yes.
26
27 Q: And was it loaded?
28
29 A: It was.
30
31 Q: Um..Officer when you told him to stop and show him your hands uh...
32
33 were you concerned for your safety?
34
35 A: Yeah and I want to I guess so the jury understands this a little
36
37 better, you know, this wasn't my first or second day. I'm
38
39 working on 17 years and prior to coming here I was a paramedic
40
41 so I've been dealing with the public next month 21 years. Um..
42
43 so I can get a pretty good read on people pretty quickly. I can
44
45 tell the calls that are going to go well and I can tell the ones that are
46

1 going to go south pretty quick for the most part. So when Mr.
2
3 Smith approached me after I told him to stop and show his hands
4
5 he wasn't just walking toward me like he wanted to talk to me. He
6
7 was walking toward me like he wanted to knock my head off and
8
9 it's just that simple and that's why Cpl. Griswold did what he did
10
11 because it was obvious to him, I would imagine, there was a
12
13 problem and that's the reason the action that I took. The reason I
14
15 used a taser, although you see a lot of bad media and things in the
16
17 press, it is the safest thing that we had that night to de-escalate the
18
19 situation and it worked exactly like it should have. He didn't get
20
21 hurt. I didn't get hurt and Cpl. Griswold didn't get hurt.
22

23 Q: Nothing else, Your Honor.

24
25 THE COURT

Nothing further from the defense?

26
27 COUNSEL FOR DEFENSE ON RECROSS

28
29 Q: I just have one quick question. You said you did find the gun?

30
31 A: Yes, ma'am.

32
33 Q: Was it anywhere near Mr. Smith?

34
35 A: It was on the back of the property toward the rear of the property.

36
37 Q: So it was on the back rear of the property.

38
39 A: Yes, ma'am.

40
41 Q: Your testimony is he was in the roadway.

42
43 A: Correct.

44
45 Q: No further questions.
46

don't discuss the case among yourselves.

[JURY EXITING COURTROOM] Motion Ms. Hayes?

COUNSEL FOR DEFENSE

Yes, Your Honor. At this point the defense would like to motion for a directed verdict based on the State has not identified Mr. Smith as the actual defendant that they arrested that night and I do not believe that they have proved enough facts to prove that Mr. Smith is guilty of disorderly conduct or failing to comply with a lawful order. I also would renew my motion to declare the failure to comply is an invalid ordinance.

THE COURT

So noted. Ms. Tiffany?

THE CITY

Your Honor, I would just like to note that the testimony of the two officers positively identifying the defendant as Mr. Smith on several occasions as the person they arrested that night um...and that we have proven each and every element of both charges in which he is on trial for today and the motion should be denied.

THE COURT

And your previous argument on the constitutionality...

THE CITY

Oh, indeed Your Honor, thank you.

THE COURT

All right. The Court's going to deny the motion for directed verdicts of not guilty. Now whether each and every element has been proven by the City of

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course will be up to the jury but there is a degree of evidence there
and for the jury to make a determination on it. The Court again denies
the motion by the defense insofar as the constitutionality of the
ordinance. Anything else?

COUNSEL FOR DEFENSE

Nothing from the defense, Your Honor.

THE CITY

I'll just ask if the defendant's going to take the
stand because we have his prior criminal record.

THE COURT

Ms. Hayes?

COUNSEL FOR DEFENSE

Your Honor, the defendant is going to take the stand
and I would argue that Mr. Smith's criminal history,
his major criminal history, is over 20-years-old and
would not be able to be used against him.

THE COURT

What kind of issue are we talking about Ms.
Tiffany?

THE CITY

He has as assault and battery convicted in 1986,
seven years confinement; assault and battery with
intent to kill in '84, seven years confinement;
unlawful possession of sawed-off rifle 1989, five years suspension
90 days confinement, 52 months probation. Those are just the ones
that are popping out right now Your Honor. He also has an
assault and battery with intent to kill two sentences in 1976, four
years. I think he has a pretty extensive prior criminal history of
violence Your Honor.

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wasn't never in no road unless they knocked me out and dragged me in
the road because when they got on top of me they knocked all the wind
out of me. I woke up in Aiken County Detention Center.

Q: Nothing further, Your Honor.

THE COURT Redirect Ms. Hayes?

COUNSEL FOR DEFENSE Nothing from the defense.

THE COURT You can step down Mr. Smith. Thank you.

MR. SMITH Yes, sir.

THE COURT Anything further from the defense?

COUNSEL FOR DEFENSE The defense rests, Your Honor.

THE COURT Ladies and gentlemen of the jury we're going to
take another brief break. We have a legal motion
to dispense with and then I'll bring you back in we
will I'll allow the two parties to address you in closing arguments. So
if you would excuse us for a moment please. Don't discuss the case.

[JURY EXITING COURTROOM]. Ms. Hayes?

COUNSEL FOR DEFENSE Your Honor, at this time the defense would renew
the directed verdict motion based on the facts and
all the evidence that a reasonable jury would not
find the defendant guilty of these charges based on all the evidence
and testimony and I also again renew my motion that the failure to
comply ordinance is invalid.

THE COURT Same arguments Ms. Tiffany?

1 THE CITY
2 Yes, Your Honor.
3 THE COURT
4 ~~All right. Same decision by the Court. No motion~~
5
6 to dismiss based on entertainment value of
7
8 testimony?
9 COUNSEL FOR DEFENSE
10 I don't know if that's [inaudible].
11 THE COURT
12 I must say Mr. Smith that was some excellent
13
14 testimony.
15 MR. SMITH
16 Sir, I just come in and tell the truth.
17 THE COURT
18 I have not heard somebody's story told like that in
19
20 quite some time. I must commend you.
21 THE CITY
22 In fact I think I'd like to come over and
23
24 [inaudible]. You're a great story teller.
25 THE COURT
26 He's good. I was right there. Um...I suppose
27
28 both of you would like to address the jury in
29
30 closing?
31 COUNSEL FOR DEFENSE
32 Yes, Your Honor.
33 THE CITY
34 Yes, Your Honor.
35 THE COURT
36 Uh..then let's take a moment and go ahead and
37
38 work on charges. Any suggestions?
39 THE CITY
40 [inaudible] Your Honor.
41 THE COURT
42 I think the way it's gone I'll just caution them
43
44 that because a weapon was involved that has
45
46 nothing to do with these charges.

1 STATE OF SOUTH CAROLINA) IN THE AIKEN MUNICIPAL COURT
 2)
 3 COUNTY OF AIKEN)
 4)
 5 THE CITY OF AIKEN)
 6 PLAINTIFF(S))
 7)
 8 VS) PRE-TRIAL MOTION TRANSCRIPT
 9) TICKET NOS: 72184GA; 72185GA
 10 LARRY SMITH)
 11 DEFENDANT(S))
 12)
 13)
 14)

15 THE COURT Continue Ms. Hayes if you would.
 16)
 17 COUNSEL FOR DEFENSE Yes, Your Honor. At this time the defense
 18)
 19 would motion for a new trial in the case in
 20)
 21 regards to *State v. Larry Smith* in regards to
 22)
 23 all pre-trial motions, directed verdict motions, and after trial for directed
 24)
 25 verdict motions in regards to the failure to comply charge. I would also
 26)
 27 like to put on record that I believe that this statute is also in regard being
 28)
 29 in violation of the 8th and the 14th amendment in regards to a right to a
 30)
 31 fair trial and unconstitutional and his due process rights. I just wanted
 32)
 33 to renew that motion and request a new trial in regards to those motions
 34)
 35 that were made during trial.
 36)

37 THE COURT Ms. Tiffany?
 38)
 39 THE CITY Your Honor, I only recall one motion
 40)
 41 made that the ordinance that issue the fail to
 42)
 43 comply as unconstitutional due to being
 44)
 45 overbroad. I'd like to restate for the court that um...that the question
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vagueness or [inaudible] rests on the constitutional principle that the procedure of due process requires fair notice and proper standards for adjudication. Um...the City's position would be that the defendant obviously had fair notice that he would have to comply with the lawful order of a police officer in asking him to put his hands in the air and stop. Um..moving forward on a police officer who is trying to make a lawful arrest is indeed a lawful order and this situation it is not unconstitutional then. Um..the constitution [inaudible] is the practical criteria for fair notice to those who the law applies. Um...any reasonable person would determine that a lawful order from an officer who is asking you to put your hands up and to stop because he wants to place you under arrest is indeed a lawful order and it's not vague or unreasonable whatsoever
Your Honor.

THE COURT


All right. Motion by the defense denied.
I will say I did spend a little time looking it up. There was from a Richland County case. Richland County versus an individual named Kyzer and then some type of oil company in regards to an ordinance and it was some kind of zoning stuff. Just a little bit off when I say... I think the higher court ruling was that uh...unless it could be deemed ..let me see palpably, capricious, and arbitrary that the Court will hold the same position.
Anything further?

COUNSEL FOR DEFENSE

Nothing from the defense, Your Honor.

THE COURT

All right, we'll step down.

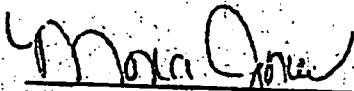


PATRICK D. SULLIVAN
ASST. MUNICIPAL COURT JUDGE

CERTIFICATION

I, Mona Jones, do hereby certify that the above and foregoing contains a true and correct transcription of the *City of Aiken v. Larry Smith*.

Certified to on this the 6th day of July, 2013.



Mona Jones, Legal Transcription
at North Augusta, South Carolina

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1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2013-CP-02-01419

3

4

5 CITY OF AIKEN,
6 Plaintiff,

6

7 -vs-

TRANSCRIPT OF RECORD

7

8 LARRY DANIEL SMITH,
9 Defendant.

8

9

10

11 Heard on Monday, July 29, 2013

11

12 Aiken, South Carolina

12

13 BEFORE:

14

15 THE HONORABLE DOYET A. EARLY, III

15

16

17 APPEARANCES:

18

Counsel on Behalf of the State:
Paige E. Tiffany, Esq.

19

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Counsel on Behalf of the Defendant:
Suzanne Hayes, Esq.

21

22

23

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29804-5232

24

25

1 THE COURT: And how long was he --

2 MS. HAYES: He is sentenced to three years on that
3 charge, Your Honor.

4 THE COURT: So he's currently doing a three-year
5 sentence?

6 MS. HAYES: That is correct.

7 THE COURT: And you have filed this motion saying that
8 the ordinance is unconstitutional because it's vague and
9 overbroad.

10 MS. HAYES: Yes, Your Honor.

11 THE COURT: And that the trial judge agreed with that
12 but he did not order a new trial.

13 MS. HAYES: No, he did not. He actually agreed with
14 me when I made the motion and said he was going to still
15 deny my motion in regards to it being unconstitutional.
16 So, I made the new trial motion. He denied that as well,
17 and we are here today in regards to that.

18 THE COURT: What if I find it to be unconstitutional?
19 Where are we going to -- what does that do?

20 MS. HAYES: It would invalidate the ordinance and we
21 would ask that Mr. Smith's conviction be vacated. We are
22 arguing that this ordinance on its face is
23 unconstitutional.

24 THE COURT: Well, it says: It shall be unlawful for
25 any person to willfully fail or refuse to comply with a

1 lawful order or direction of a City public safety officer
2 while such officer is about the duties of his office
3 within the City or upon properties owned by the City.

4 Yes, ma'am?

5 MS. HAYES: Your Honor, we feel that this ordinance is
6 very vague and overbroad. The issue with vagueness of the
7 statute, vagueness is for the clarity of the law. There's
8 nowhere in this ordinance or in the Hood book that defines
9 what a lawful order is or an unlawful order.

10 THE COURT: Or a direction.

11 MS. HAYES: Or a direction of the -- of an officer.
12 During trial, I actually asked the arresting police
13 officer if he could give me an example of what a lawful
14 order was. And he looked at me and said he didn't
15 understand what I was asking him.

16 So to me at that point, if the officers don't have any
17 specific direction on what a lawful order is how is a
18 regular person on the street supposed to know if they're
19 behaving lawfully or unlawfully when the officers don't
20 even understand what a lawful order or an unlawful order
21 is.

22 It seems to me it's an extra power given to the police
23 officers to make a discretion if they feel the person that
24 they're encountering isn't complying or doing what they
25 want them to do, add an extra charge to punish them. As

1 far as --

2 THE COURT: Are you familiar with any other city that
3 has such an article or ordinance?

4 MS. HAYES: I believe North Augusta has the same
5 ordinance, Your Honor, but I have never had a chance to
6 argue that issue in that court.

7 THE COURT: Anything else?

8 MS. HAYES: In regards to the overbroad-ness, this
9 pretty much can turn a lawful issue, somebody acting out
10 on the street if a police officer, you're walking down a
11 sidewalk, a police officer asks you for your name and you
12 ignore them, that could turn into a potentially criminal
13 charge where they can go to jail.

14 Now I don't -- we don't see that. There was a state
15 in Massachusetts versus Oaks where there was a state
16 statute in regards to adults taking nude pictures of
17 minors was a criminal activity. It didn't exactly specify
18 anything. There was a man who took a partially-nude
19 picture of his daughter in regards to a modeling issue.
20 He was convicted. The courts in that case said that that
21 was an overbroad statute because it could turn a parent
22 taking a picture of their naked infant in a bathtub or out
23 swimming in a pool, it turns a normal activity into a
24 criminal activity.

25 Also if the City enforces an ordinance that violates

1 the constitution or state constitution, it could
2 invalidate it where a police encounter enters -- or, let
3 me re-word that. Police encounters a regular citizen on
4 the side of the street and they ask them to do something,
5 like take your hands out of your pocket, and they fail to
6 do that, that could be failure to comply which they have
7 had that issue and --

8 THE COURT: What did they tell this man to do or not
9 to do. What did they direct him to do or order him to
10 do?

11 MS. HAYES: The police claim that they alleged
12 (verbatim) him to raise his hands and he didn't. His
13 hands were visible at all times. There was no weapons.
14 They testified to that.

15 THE COURT: He just didn't raise his hands.

16 MS. HAYES: The officers claim he did not. So they
17 charged him.

18 THE COURT: He didn't violate any law by not raising
19 his hands, he violated the statute for not following the
20 direction and/or order to raise his hands.

21 MS. HAYES: That is correct.

22 THE COURT: Anything else?

23 MS. HAYES: No, Your Honor. We believe that this
24 ordinance violates the constitution and it's overly broad
25 and vague and we would ask that the Court rule that it is

1 unconstitutional.

2 THE COURT: Thank you. Ma'am?

3 MS. TIFFANY: May it please the Court. Your Honor,
4 this incident occurred on January 17th, 2013 when Sergeant
5 Dowdy with the Aiken Department of Public Safety responded
6 to a report of a man who was intoxicated in the City
7 limits of Aiken, had a machine gun and was pointing it at
8 three individuals in a home on Union Street.

9 When he did respond to that location, spotted the
10 Defendant in the street arguing with three women, he
11 approached and said please get your hands in the air. And
12 hands in the air -- and his testimony, he wanted to make
13 sure that, first of all, he didn't have a machine gun or
14 anything else in his hands, and also he didn't want him to
15 go back to the residence and get the machine gun if he
16 didn't have it with him at that point.

17 At that point the Defendant did charge him. Did not
18 raise his hands but took an aggressive stance and charged
19 the officer. Fortunately there was another officer on the
20 scene that was able to take him down in the back with a
21 thrust kick. Sergeant Dowdy ended up tazing the Defendant
22 and --

23 THE COURT: And they charged him with what?

24 MS. TIFFANY: They charged him with disorderly conduct
25 and failure to comply for not raising --

1 THE COURT: They charged him with resisting arrest?

2 MS. TIFFANY: I do not believe there was a resisting
3 arrest --

4 THE COURT: Hold on a second.

5 THE BAILIFF: The judge wanted to speak to you.

6 THE COURT: Is he standing right there?

7 THE BAILIFF: He's finished.

8 THE COURT: Tell him I'll be there in about ten
9 minutes.

10 THE BAILIFF: Okay.

11 THE COURT: They charged him with resisting arrest?

12 MS. TIFFANY: They did not, Your Honor, because he was
13 not under arrest at the time.

14 THE COURT: Ma'am?

15 MS. TIFFANY: He was not under arrest at that time.
16 It happened so quickly. He said that -- he said, show me
17 your hands and then he charged him. And he got tazed and
18 then he was placed under arrest at that point.

19 THE COURT: But he was charged.

20 MS. TIFFANY: He did not resist after he was tazed
21 because he couldn't literally. He was incapacitated.

22 THE COURT: Well, tell me about this statute.

23 MS. TIFFANY: Your Honor, you know, it depends if
24 she's challenging it facially it's unconstitutional. A
25 facial challenge is obviously the most difficult to mount

1 successfully because the challenger has to establish that
2 under no set of circumstances could the act be valid. The
3 moving party has to show that the statute is
4 unconstitutional as applied to him in those circumstances.

5 And I would say -- submit to you, Your Honor, that in
6 these circumstances the statute is completely
7 constitutional, that the officer had every right to tell
8 the Defendant to raise his hands for his own protection.
9 And that's even under Terry V. Ohio.

10 Just because it's vague doesn't mean it's
11 unconstitutional. It has to be so vague that no
12 reasonable person can understand what the statute says and
13 what is illegal in this situation. I think in -- any
14 reasonable person would understand that when an officer is
15 approaching a dangerous situation he tells you to put your
16 hands in the air, that that is a lawful order. And then
17 that is one that anybody can understand. It's not vague
18 whatsoever under those circumstances.

19 The due process obviously has to give some, a person
20 of ordinary intelligence fair notice that the
21 contemplating conduct is forbidden. And I think it is
22 fair notice that in a situation where there's a reported,
23 you know, loaded machine gun, an officer comes up to you
24 and says, put your hands in the air, that that is fair
25 notice and that there's nothing vague or unconstitutional

1 about that situation.

2 And I'm quoting several times from the Mount Pleasant
3 case that is, was most recently applied to this statute.
4 Let's see which one it is.

5 THE COURT: There's a Mount Pleasant case that applies
6 to the same type of statute?

7 MS. TIFFANY: Well, it's quoted several times about --
8 oh, here it is -- about the vagueness and overbroad-ness.
9 Town of Mount Pleasant versus Clemente, 401 SC 515. It's
10 a 2010 case. It actually had to do with the relationship
11 --

12 THE COURT: That's the --

13 MS. TIFFANY: That's the Texas holding case, Your
14 Honor.

15 THE COURT: Uh-huh.

16 MS. TIFFANY: It did, you know, have a good deal of
17 discussion about vagueness and the constitutionality of a
18 statute.

19 It said that the mere fact that it may be difficult to
20 determine whether certain conduct falls within the statute
21 does not render it unconstitutionally vague. Furthermore,
22 simply because a statute contains an undefined term does
23 not make it vague. You can -- it can be measured by
24 common understanding or practice. And that's a South
25 Carolina case as well, Curtis v. State.

1 Your Honor, I would like to submit to you that the
 2 judge in this case did not agree that this statute was
 3 unconstitutionally vague. He agreed that it probably
 4 could use some work but that it was, did not meet the
 5 standards of unconstitutional under these circumstances.
 6 And also when the officers -- she did ask the officer what
 7 an unlawful order was and he did respond, well an unlawful
 8 order would be one where you're asking somebody to do
 9 something that was illegal. That's my recollection of
 10 that exchange, but we do have transcript of the trial.

11 THE COURT: Thank you. Anything else, ma'am?

12 MS. TIFFANY: No, sir.

13 THE COURT: Ms. Hayes, anything?

14 MS. HAYES: Nothing, Your Honor.

15 THE COURT: All right. Ladies, how about do me
 16 proposed orders within 30 days? Thank you.

17 MS. TIFFANY: Thank you, Your Honor.

18 MS. HAYES: Thank you, Your Honor.

19 END OF CASE: 11:34 A.M.

20 ** **

21 CERTIFICATE OF REPORTER

22 STATE OF SOUTH CAROLINA)

23 COUNTY OF AIKEN)

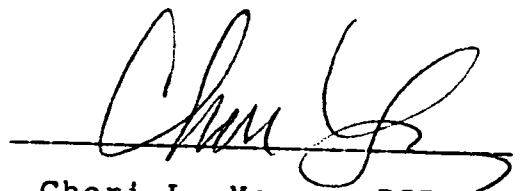
24 I, Cheri L. Young, Registered Professional Reporter
 25 and Official Court Reporter for the State of South

1 Carolina, Second Circuit-At Large, do hereby certify that
2 the foregoing proceedings were written stenographically by
3 me using computer-aided translation; further, that the
4 foregoing is a true, accurate and complete record, to the
5 best of my skill and ability, of all the proceedings had
6 and evidence introduced in the hearing of the captioned
7 case, relative to appeal, in the Court of Common Pleas for
8 Aiken County, on the 29th day of July, 2013.

9 I do further certify that I am neither of kin,
10 counsel, nor interest to any party hereto.

11 I have hereunder set my hand this Saturday, the 14th
12 day of December, 2013.

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Cheri L. Young, RPR
Official Court Reporter

Rev. 9/10

STATE OF SOUTH CAROLINA
UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF Aiken VERSUS
 FIRST NAME URRY MIDDLE NAME DANIEL LAST NAME SMITH
 STREET AND NO. 231 Union St CITY Aiken STATE SC ZIP CODE 29801
 STATE LICENSED DRIVER'S LICENSE NO. 002571182 COL. YES NO DFR. LIC. CLASS
 VEH. LIC. NO. _____ STATE: _____ MAKE OF VEH. YEAR _____ COMB. YEL. ALTO. M/FR. YEL. COMB.
 HAZ. MT. MOPED MTR/VCL OTHER
 YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT.
 NAME OF TRIAL COURT Faith & Candy STREET AND NO. 251 Calhoun St NW
 DATE OF TRIAL 11/17/13 TIME OF TRIAL _____ CITY Aiken STATE SC ZIP CODE 29801
 VIO. COURT SECTION NO. _____ VIO. SECTION NO. _____ VIO. SECTION NO. _____
 OWNER OF VEHICLE Faith & Candy DATE OF ARREST 09/17/13
 ADDRESS OF OWNER _____ DATE OF VIOLATION 09/17/13
 BAIL DEPOSIT 500 NAME OF ARRESTING OFFICER A. D. DOWDY RANK Sgt
 DESCRIPTION OF VIOLATION Failure to Yield (COUNTY) Aiken NUMBER 2
 DATE BAIL RECD. BY _____ BADGE NO. 378 TROOP _____
 CASE BEFORE: MAGISTRATE MUN. COURT JUDGE
 CIRCUIT COURT FAMILY COURT FEDERAL COURT
 NAME OF TRIAL COURT Faith & Candy TIME OF VIOLATION 2:30 PM WEATHER _____
 IF DIFFERENT FROM ABOVE: _____ DISTANCE IN FEET FROM INTERSECTION 231 Union St
 DEFENDANT: DID NOT APPEAR APPEARED
 DISPOSITION: GUILTY NOT GUILTY
 NOLLS PROSEC. FORGOTTEN SIGN PLED NOLLS CONTENDERS
 TRIAL BY: TRIAL JUDGE JUROR CITY Aiken
 VERDICT OF TRIAL: GUILTY NOT GUILTY DATE OF TRIAL IF ANY _____
 COMMITTED TO: _____ VEHICLE SEIZURE ALIAS RESULT OF COLLISION OFFENSE CODE 94 B.A. LEVEL _____
 CERTIFIED CORRECT: _____ DATE _____

72184 GA

DRIVERS RECORD COPY
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13-18820

9

STATE OF SOUTH CAROLINA)
 COUNTY OF AIKEN)
 City of Aiken,)
 Respondent,)
 vs.)
 Larry Daniel Smith,)
 Appellant.)

IN COMMON PLEAS COURT
 FOR THE SECOND JUDICIAL CIRCUIT
 Civil Number 2013-CP-02-01419

ORDER

Case Number 2013-CP-02-014
 Citation Number 72184 GA
 Offense: Failure to Comply

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 L. L. URSULA, Clerk of Court
 Notary for Aiken County, South Carolina do hereby
 bind the foregoing instrument a true and correct copy
 original documents which have been filed in my of

SEP 27 2013

38

[Handwritten signature]
 L. L. URSULA, Clerk of Court
 Aiken County, S.C.

Larry Daniel Smith was convicted in the City of Aiken Municipal Court under the City Ordinance Failure to Comply. A Motion for a New Trial was denied by the Trial Judge. The Defendant filed a timely appeal which was heard by this Court on August 29, 2013. Suzanne Hayes, Esq. represented the Appellant and Paige E. Tiffany, City Solicitor represented the Respondent.

FACTUAL HISTORY

On January 17, 2013, Sgt. Dowdy of Aiken Department of Public Safety responded to an urgent call from a hysterical female located at 231 Union Street in reference to a man in her house threatening her and her companions with a loaded machine gun. As Sgt. Dowdy approached the house he observed three females keeping their distance from a male in a yellow sweatshirt standing in the roadway in front of the residence, later identified as the Appellant. The females were yelling that the Appellant had a gun so as he approached the Appellant, Sgt. Dowdy ordered him to show his hands and remain still. The Appellant responded by yelling an expletive and charged the officer in an aggressive manner with his fists clenched. Cpl. Griswold, with Aiken Department of Public Safety, attempted to halt the Appellant's forward progress towards Sgt. Dowdy with a take-down maneuver. The Appellant then turned and approached

FILED 9-27-2013
[Handwritten signature]
 L. L. URSULA
 Clerk of Court
 Aiken County, S.C.

[Handwritten initials]
 MCE
 #1

Cpl. Griswold in the same aggressive manner. Sgt. Dowdy then deployed the Taser X26 to gain control of the Appellant who was then placed under arrest and charged with Pointing and Presenting a Firearm, Disorderly Conduct and Failure to Comply. The Appellant plead guilty to the weapons charge and received a three year sentence in General Sessions Court and requested a jury trial for his Municipal Court charges. A jury found him guilty of both counts on July 9, 2013, and the Appellant was sentenced to 30 days in jail for each count but was given credit for time served. The Appellant has challenged the constitutionality of the Aiken City Code, Chapter 22, Article I, Section 22-3(b) which reads: "It shall be unlawful for any person to willfully fail or 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 Appellant has claimed that the City's Ordinance for Failure to Comply is vague and/or overbroad.

LAW/ANALYSIS

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). In addition, the Court possesses a very limited scope of review in cases involving a constitutional challenge to a statute. Joytime Distrib. & Amusement v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (per curium). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Last v. MSI Const. Co., 305 S.C. 349, 352, 409 S.E.2d 334, 336 (1991) (citations omitted). The party seeking to invalidate the statute has the burden of proving beyond a reasonable doubt that the statute violates some provision of the constitution. State v. White, 348 S.C. 532, 537, 560 S.E.2d 420, 422 (2002).

DAE
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Further, our State Supreme Court reaffirmed their position in State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012), "When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." State v. Gaster, 349 S.C. 545, 549-50, 564 S.E.2d 87, 89-90 (2002). "This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution." State v. White, 348 S.C. 532, 536-37, 560 S.E.2d 420, 422 (2002).

VAUGENESS

Appellant argues that the City Ordinance for Failure to Comply is unconstitutional on its face. Specifically Appellant argues that the provision is unconstitutionally vague. In determining whether a statute is vague, the Court held in City of Greenville v. Bane, 390 S.C. 303, 702 S.E.2d 112 (2010):

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional."

City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473-74 (1999)

(quoting State v. Albert, 257 S.C. 131, 134, 184 S.E.3d 605, 606).

The Court in Town of Mount Pleasant v. Chimento, 401 S.C. 522 (2012) stated:

"A statute's constitutionality [for vagueness] is judged on an objective, not subjective, basis. *E.g.*, City of Greenville v. Bane, 390 S.C. 303, 308, 702 S.E.2d 112, 114 (2010) (issues are whether the statute's terms are "sufficiently defined to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt"). Moreover, in many cases, it is "up to the police . . . to determine just where [a statutory] line is drawn," for example, where the issue is obscenity, loitering, disturbing the peace, or driving under the influence. The fact that an officer must make a judgment call does not render a statute unconstitutionally vague, any more than does the fact that a determination of guilt ultimately turns on the evidence (i.e., facts and circumstances) adduced at trial."

The Court in Town of Mount Pleasant v. Chimento, *supra*, also stated that one whose conduct clearly falls within the statutory proscription does not have standing to raise a void-for-vagueness challenge. They found that the respondents lacked standing to challenge the statute but also noted that a person of reasonable intelligence would understand the statute to prohibit the activity therein. The conduct of the Appellant in this case was clearly a violation of the City Ordinance. When an officer is attempting to gain control of a potentially deadly situation in which a suspect is belligerent, intoxicated and reported to have in his possession a loaded machine gun, an order to halt and show his hands is the type of lawful order an ordinary person of reasonable intelligence would understand needed to be followed.

The mere fact that it may be difficult to determine whether certain conduct falls within the statute does not render it unconstitutionally vague. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32, 83 S. Ct. 594, 9 L.Ed.2d 561 (1963). Furthermore, simply because a statute contains an undefined term does not automatically make the statute vague, Lansdell v. State, 25 So.3d 1169, 1176 (Ala.Crim.App.2007), and words in the statute may be "measured by common understanding a practices," see Curtis, 345 S.C. at 572, 549 S.E.2d at 599.

A statute can be challenged as vague on its face or as applied. An as-applied challenge requires the moving party to show that the statute cannot be constitutionally applied to the defendant under the particular facts of the case. Chapman v. United States, 500 U.S. 453, 467-468, 111 S. Ct. 1919, 114 L.Ed.2d 524 (1991). A facial challenge, on the other hand, is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987). Thus, if the moving party fails to show that the statute is unconstitutional as applied to him, any facial challenge must necessarily fail because there is at least one circumstance where the statute would constitutionally apply. People v. Stuart, 100 N.Y. 2d 412 (2003), 797 N.E.2d 28, 765 N.Y.S.2d 1; see also City of Chicago v. Morales, 527 U.S. 41, 78 n. 1, 119 S. Ct. 1849, 144 L.Ed.2d 67 (1999) (Scalia, J., dissenting) ("[A] facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as applied challenge.")

The Appellant's argument fails on the first prong of the vagueness analysis. As a reasonable intelligent person, the Appellant should have understood that the Ordinance would prohibit him from failing to stop and show his hands to an officer of the law and instead aggressively approach him with his fists clenched. The authority to give lawful orders to control a potentially dangerous situation is an essential requirement for law enforcement.

OVERBREADTH

The Appellant also argues that the City Ordinance is unconstitutional because it is overbroad. The Overbreadth doctrine is referred to as "manifestly strong medicine" that is



employed "sparingly, and only as a last resort." Massachusetts v. Oaks, 491 U.S. 576, 109 S. Ct. 43 2633 (1989) quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. 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 First Amendment rights of parties not before the court.

Overbreadth is a challenge predicated on the First Amendment, and cannot be used except where the statute arguably suppresses protected speech or conduct. State v. Newman, 384 S.C. 395, 683 S.E.2d 268 (2009).

State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012). In discussing the overbreadth doctrine, the United States Supreme Court ("USSC") has stated:

"According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional — particularly a law directed at conduct so antisocial that it has been made criminal — has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed."

Aiken's City Ordinance which prohibits a person from failing to comply with a lawful order or direction of a police officer is not a danger to a person's First Amendment rights and is



therefore not subject to the overbreadth doctrine. There is not a substantial risk that the Ordinance will prevent citizens from Constitutionally protect speech and conduct.

Based on the foregoing, Appellant has failed to show this Court how the Aiken City Code, Chapter 22, Article I, Section 22-3(b) as applied to the Appellant is unconstitutional, therefore, IT IS ORDERED that the Appellant's Appeal be, and hereby is, DENIED, and that the Appellant's conviction be AFFIRMED.

August , 2013

Sept 5




Doyet A. Early, III
Presiding Judge Common Pleas Court
Second Judicial Circuit

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 29, 2014



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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Aiken County
Court of Common Pleas
Doyet A. Early III, Circuit Court Judge

CITY OF AIKEN,

RESPONDENT,

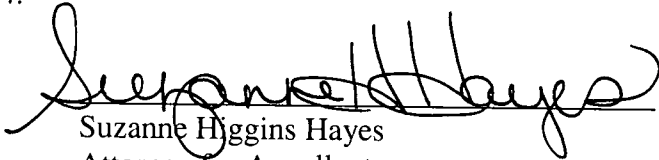
v.

LARRY DANIEL SMITH,

APPELLANT

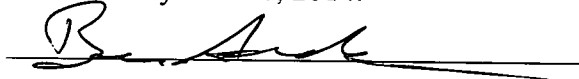
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Record on Appeal in the above referenced case has been served upon Paige E. Tiffany, Esquire, at Post Office Box 1177, Aiken, SC 29801, this 30th day of June, 2014.


Suzanne Higgins Hayes
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me

This 30th day of June, 2014.



Notary Public of South Carolina

My Commission Expires: 4/2/24