THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. Supreme Court

APPEAL FROM AIKEN COUNTY

Common Pleas Court

The Honorable Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2013-002188

The City of Aiken .....Respondent,

v.

Larry D. Smith .....Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On January 14, 2013, Sgt. Dowdy of Aiken Department of Public Safety responded to a call from 231 Union Street in the City of Aiken from a frantic female who told the dispatcher that there was a male in her house with a "Mack 10." Sgt. Dowdy described the "Mack 10" as a little submachine gun with a stick magazine and a rectangular steel box. (R. p. 9, lines 42-46; R. p. 10, lines 1-10). As Sgt. Dowdy approached the residence he saw three females standing under the streetlight in front of the house. (R. p. 11, lines 7-13). They were yelling, "He's got a gun! He's got a gun!" (R. p. 11, lines 39-43). Sgt. Dowdy saw a man later identified as the Appellant coming towards him. Sgt. Dowdy stated he could see his hands but couldn't be sure the gun wasn't nearby or even underneath his sweatshirt. So, he ordered the Appellant to, "Stay right there and keep your hands where I can see them!" The Appellant responded by yelling, "F...you" and walked aggressively towards him with clenched fists. (R. p. 12). Cpl. Griswold with Aiken Department of Public Safety had arrived on the scene and attempted to halt the Appellant's forward progress towards Sgt. Dowdy with a take-down maneuver. The Appellant then turned and approached Cpl. Griswold in the same aggressive and threatening manner. (Appendix p. A-1, lines 5-21). Sgt. Dowdy then deployed the Taser X26 to gain control of the Appellant. The Appellant smelled heavily of liquor, was using very vulgar language and appeared heavily intoxicated. (R. p. 13, lines 1-21). A loaded rifle was later located hidden towards the rear of the property. (R. p. 17, lines 25-29; R. p. 18, lines 29-39). The Appellant was ultimately charged with Pointing and Presenting a Firearm, Disorderly Conduct and Failure to Comply. The Appellant plead guilty to the weapons charge and was sentenced to three years in jail, but requested a jury trial for his Municipal Court charges of Disorderly Conduct and

Failure to Comply. A jury found him guilty of both counts on May 17, 2013, and the Appellant was sentence to 30 days in jail for each count and given credit for time served.

During pretrial motions the Appellant's attorney, Suzanne Higgins Hayes requested the court to find, "the City's [Failure to Comply] Ordinance invalid in regards to it is overbroad and vague on its face. She also asked the court to rule the statute or the ordinance, Failure to Comply to be invalid because, "it is more restrictive than the State of South Carolina rules and Constitution allows." (R. p. 1, lines 23-29; R. p. 3, lines 31-46). The court denied her motions stating that according to the facts of the case, the officers were not only issuing a lawful order, but were acting within their duties responding to a call. (R. p. 8, lines 29-42). The Appellant filed a Motion for a New Trial which was heard by the court on June 14, 2013, which was also denied. One June 21, 2013, the Appellant filed a timely Appeal.

The Honorable Doyet A. Early III heard Oral Arguments on July 29, 2013, and requested both Counsels to submit a Proposed Order within 30 days. On September 27, 2013, the Order denying the Appeal 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.

STANDARD OF REVIEW

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 Construction 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).

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).

ARGUMENT

I. DID THE TRIAL COURT ERR IN FAILING TO FIND THE CITY OF AIKEN ORDINANCE ARTICLE 1, SECTION 22-3(B) UNCONSITUTIONAL BECAUSE IT IS VAUGE AND OVERBROAD?

The City of Aiken's Ordinance for Resisting Arrest/Failure to Comply is not unconstitutional for being vague and/or overbroad. The entire ordinance found in Aiken City Code, Chapter 22, Article I, Section 22-3 reads as follows:

Sec. 22-3. - Resisting arrest; failure to comply with order of public safety officer.

(a) It shall be unlawful for any person to oppose or resist, whether passively or actively, arrest by any officer of the city's public safety department, who has identified himself as an officer of the law or who is identifiable by uniform as an officer of the law, after such officer announces the person is under arrest and offers him a copy of the applicable arrest warrant, if there is one, or announces the crime for which such person is charged.

(b) 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. Aiken City Code, Chapter 22, Article I, Section 22-3(b)

In determining whether a statute is vague, this 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 (1993), (quoting State v. Albert, 257 S.C. 131, 134, 184 S.E.3d 605, 606 (1971).

This Court in Town of Mount Pleasant v. Chimento, 401 S.C. 522, 737 S.E.2d 830 (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's Resisting Arrest/Failure to Comply 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. National Dairy Corp., 372 U.S. 29, 32, 83 S.Ct. 594 (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 and practices," see Curtis v. State, 345 S.C. 557, 572, 549 S.E.2d 591 (2001).

It is important to note that the City's Resisting Arrest/Failure to Comply Ordinance has two sections making it a violation to resist arrest or to willfully violate a lawful order of an officer in the performance of his official duties. The officer in this case did not have the opportunity to say the words, "You are under arrest," so he could not charge the defendant with section (a). Before placing someone under arrest a law enforcement officer has a duty to investigate and also make the scene safe. Therefore, the legislative body added Section 22-3 (b) Failure to Comply and when taken in conjunction with Section 22-3 (a) Resisting Arrest, encompasses the wide range of situations officers encounter leading up to and in conjunction with an arrest.

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 (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 (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, 797 N.E.2d 28, 765 N.Y.S.2d 1 (2003); see also City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849 (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. Any reasonable person would have understood that when asked by a law enforcement officer who while securing a dangerous situation and in an attempt to effectuate an arrest, gives an order to "Stop and show your hands," for the safety of himself and those around him, that it is a lawful order. The authority to give lawful orders to control potentially dangerous situations is an essential requirement for law enforcement.

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. 2633 (1989) quoting Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908 (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. Neuman, 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 protected speech and conduct.

II. 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?

The Appellant argues that the City of Aiken is unconstitutional because it prohibits conduct that is preempted by Statute and also constitutes an unlawful search and seizure. Neither of these issues were ruled upon by the lower court and therefore have not been preserved for consideration. The Court of Appeals refused to review on suppression a motion where defendant relied on memorandum without elaboration and the trial court did not rule on the issue of a Franks violation. State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003). An appellant's "failure to request a more explicit ruling constitutes a waiver to any objection to the judge's general ruling." State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992), citing State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

An issue must be raised to and ruled upon by the circuit court in order to be considered on appeal. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002).

Even if the issue had been ruled upon by Judge Early, the City Ordinance is, nonetheless, not preempted by State law and is consistent with both the constitution and the general law of the State and Nation.

This Court in Foothills v. Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008) reiterated the standard set forth in Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) and Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000) by stating, "A two-step process is used to determine whether a local ordinance is valid. First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks the power to regulate the field, and the ordinance is invalid. *Id.* If, however, the municipality had the power to enact the ordinance, the court must then determine whether the ordinance is consistent with the Constitution and the general law of the State. *Id.*

Appellant argues that the City of Aiken is preempted by State law because, "it could be argued that there are several state statutes that could cover what the City of Aiken is trying to accomplish with this Ordinance." However, the Court in Foothills stated, "To preempt an entire field, 'an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way.' " Bugsy's, 340 S.C. at 94, 530 S.E.2d at 893. In addition, citing Town of Hilton Head Island v. Fine Liquors, Ltd, 302 S.C. 550, 397 S.E.2d 662 (1990) the Court stated, "Furthermore, 'for there to be a conflict between a state statute and a municipal ordinance both must contain either express or implied conditions which are inconsistent or irreconcilable with each other . . . If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.' " *Id.*

Because the Appellant admits that there is not a state statute that is inconsistent or irreconcilable with the City of Aiken Ordinance, under the analysis cited above, no conflict exists, and both laws stand. Therefore, we must turn our attention to the second prong of the test,

"whether the ordinance is consistent with the Constitution and the general law of the State." Foothills v. Greenville, *supra*.

The Appellant argues that the City of Aiken Ordinance violates Article 1, Section 10 of the South Carolina State Constitution which protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated.

The Fourth Amendment of the United States Constitution is applicable to the states through the Fourteenth Amendment and also guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV & XIV; State v. Burton, 356 S.C. 259, 589 S.E. 2d 6 (2003). The Court in United States v. Burton, 228 F.3d 524 (4th Cir. 2000), stated that law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or another public place, by asking him if he is willing to answer some questions. Further, 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 encounter with the Appellant went far beyond refusal to cooperate with questioning. The Aiken Department of Public Safety Officer had "reasonable suspicion supported by articulable facts that criminal activity may be afoot" allowing the police officer to elevate the "police-citizen" encounter into an investigatory stop or detention. United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct 1581, 1585 (1989). Therefore, the officer issued a lawful order with the intent to secure the scene, identify the suspect, and place him under arrest.

The Appellant argues that the term "lawful order" is not sufficiently defined, yet the Supreme Court of the United States uses the term "lawful" in Terry v. Ohio, 392 U.S. 1, 27, 88

S.Ct. 1868, 1883 (1968). "Once a basis for a *lawful* investigatory stop exists, a law enforcement officer may protect himself during the stop by conducting a search or frisk for weapons if he has reason to believe that the suspect is "armed and dangerous." [emphasis added].

In addition, the South Carolina Code of Laws uses the term "lawful order" in Section 56-5-740. It states, "No person shall willfully fail or refuse to comply with any *lawful order* or direction of any police officer, fireman or uniformed adult school crossing guard invested by law with authority to direct, control or regulate traffic." [emphasis added].

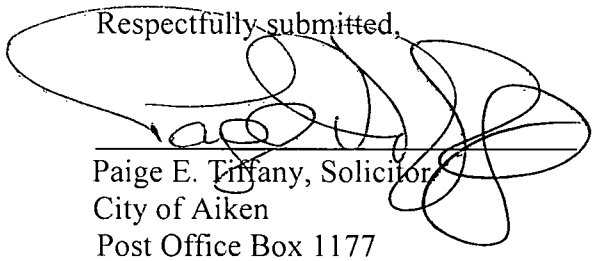
In addition, the Court recognized in State v. Kirven, 279 S.C. 541, 309 S.E.2d 749 (1983) that there is a common law crime of "interference with a police officer" that is distinguished from the statutory crime in South Carolina Code of Laws Section 16-5-50. The City of Aiken has the authority to prohibit conduct within the parameters of a common law offense.

CONCLUSION

Respondent respectfully requests this Court to deny Appellant's request to declare City of Aiken's Ordinance Section 22-3 (b) unconstitutional for being vague and overbroad. In addition, to find that the Ordinance does not violate the United States Constitution nor the South Carolina Constitution and complies with the general laws of South Carolina. Therefore, Mr. Smith's conviction should be upheld.

July 17, 2014

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

July 17, 2014

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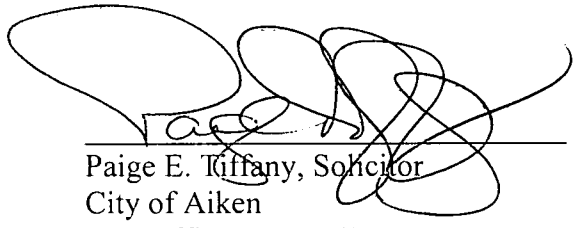
PROOF OF SERVICE

I hereby certify that I have served the Final Brief of the Respondent with Supporting Citations of Authority on the Appellant Larry D. Smith, addressed to his attorney of record, Suzanne Higgins Hayes, P.O. Box 2247, Aiken, SC 29802, via United States Mail, postage prepaid, on this 17th day of July, 2014.



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