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S.C. Supreme Court

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.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

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) UNCONSITUTIONAL 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 FACTS

Aiken Department of Public Safety was dispatched to Appellant, Larry Smith's residence on January 14, 2013. There were three females that claimed Larry Smith had a gun. R. p. 11, lines 41-42. Sgt. Dowdy approached scene and noticed Mr. Larry Smith in the roadway. He noticed that Mr. Smith did not have a gun in his hands because he could see his hands. The gun they had described was a Mack 10 and Sgt. Dowdy testified that it is not easily concealable, but could be. R. p. 11, lines 43-45, p.12, line 5. Mr. Smith's hands were in view of the officer at all times and he never attempted to reach for a weapon. R. p. 14, line 29-40.

Mr. Larry Smith Was charged with the City Ordinance of Failure to Comply §22-03(b). A Jury Trial was held regarding his charge of Failure to Comply. During Pretrial Motions the Appellant's attorney made the Motion to declare the City Ordinance void because it was vague and overbroad and that it violated the laws of South Carolina and the Constitution. R.p. 1-3. The court agreed with the Appellant that the Ordinance needed some attention but denied the motion. R.p. 8, lines 29-41. The Jury Trial was held and the Appellant was convicted. There was a New Trial Motion heard and was denied by the court. A timely appeal was made to the Circuit Court on July 29, 2013. The court heard oral arguments and asked both sides to submit orders. On September 27, 2013 an Order was filed with the Clerk of Court denying the Appellant's appeal. The Appellant made a timely appeal 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). The court looks to see if the ordinance neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct. Second where a statute imposes criminal penalties, the standard of certainty is higher. Kolender, Chief of Police of San Diego, ET AL. v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L. Ed 2d 903(1983).

ARGUMENTS

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.

Appellant was charged with the Failure to Comply under a City 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 vagueness and overbreadth.

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. City of Greenville v. Bane, 390 S.C. 303, 702 S.E.2d 112 (2010). When a statute or ordinance contains a vague enforcement standard and fails to give fair and adequate notice of the type of conduct that is prohibited is unconstitutional. The void-for-vagueness doctrine requires that a personal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender, Chief of Police of San Diego, ET AL. v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L.Ed. 2d 903 (1983). This City Ordinance fails on both of these prongs for the void-for-vagueness doctrine. The first prong is that the statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. This ordinance fails that prong because the ordinance claims you must comply with a lawful order given by a law enforcement officer in their line of duty. Nowhere is "lawful order" defined. This gives

law enforcement the power to tell individuals to comply with every request by a police officer or you are in jeopardy of being charged criminally under this City Ordinance. This ordinance limits your freedom of movement with the threat of law enforcement to stop individuals when they choose to. This goes along with the second prong of to encourage arbitrary and discriminatory enforcement. This statute vests complete discretion in the hands of the law enforcement officer to determine what a lawful order is and if the person complied with their request. For example, if a young male was walking down the street and law enforcement told him to stop and he does not stop now he has violated the Failure to Comply ordinance and is now subject to being searched and arrested by the law enforcement officer. This ordinance gives the law enforcement to much discretion when enforcing and using this city ordinance.

Even if a person whose conduct may not be vague, overbroad or otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And 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, 39 L. Ed. 2d 3 (1973). The respondent argues that Mr. Larry Smith did not have standing because his behavior violated the statute so he does not standing to challenge this ordinance on its face. The respondent uses the Town of Mount Pleasant v. Robert L. Chimento et al, 401 S.C. 522, 737 S.E.2d 830 (2012) to make this argument valid. In that case the activity that was prohibited was gambling in a place that is used as a place for gaming. The individuals in this case were found playing Texas Hold'em in a rental home. The statute clearly defines what a place of gaming is

and what gambling is. The statute that Mr. Larry Smith was charged under was whether client obeyed a lawful order or not. There no definition that specifically defines what a lawful order is. This leaves it up to the discretion of law enforcement and is not consistent every time. This make the City Ordinance invalid because it is vague and overbroad. Mr. Larry Smith does have standing to bring this challenge because the behavior that is prohibited is not defined so it is unclear whether Mr. Smith's conduct was behavior that actually is prohibited by this particular ordinance.

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.

This Ordinance is invalid because it is vague and overbroad and should be declared as such.

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.

The trial court denied the motion of the appellant asking the court to invalidate the ordinance for being in violation of the Constitution. Both motions were made and the judge denied all motions. R.p.3, lines 40-46 p.8, lines 29-41. The argument was made at the oral arguments in Circuit Court and the Order signed by Judge Doyet Early denied the appeal by the appellant claiming that Appellant had not proven that it was nconstitutional. Order filed September 27, 2013. This issue has been preserved and should be considered by this court.

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. A Municipal Ordinance is a legislative enactment and is presumed to be constitutional. Southern Bell Telephone and Telegraph Co. v. City of Spartanburg, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). The burden is on the party that is challenging the ordinance. *Id.* 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, 666 S.E.2d 912, 913 (2008). The first prong of the test is did the government have the power to enact the local ordinance? A legislative body has power to enact local ordinances so this

ordinance does pass the first prong of the test. The second prong questions is the ordinance consistent with the constitution of and general laws of this state. This particular ordinance is not consistent with the constitution or general law of this state. In the City of Aiken you are required to comply with any lawful order or any request made of you by law enforcement. If you step out of the City limits and are approached by a county sheriff or highway patrol and they request you to stop because they want to question you, you are not required to stop. There is nothing in the laws of South Carolina, State Constitution, or Federal Constitution that states you must stop and follow every request made by law enforcement. If this City Ordinance is declared valid then it puts those citizens who fail to follow every request that a City of Aiken Law Enforcement Officer at risk of being charged criminally under the Failure to Comply Statute. These burdens unduly limit the citizen's freedom of movement throughout the state. George Jensen Aakjer, III, Leight Anderson et. al. v. City of Myrtle Beach, City of Myrtle Beach Municipal Court, 388 S.C. 129, 694 S.E.2d 213 (2010). The Constitution of the United States and the State of South Carolina have given its citizens great freedoms, but allowing the City of Aiken police to make random requests of its citizens then it is infringing on rights granted to them by the Federal and State government and would make this Ordinance Unconstitutional on its face.

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,

August 27, 2014

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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that this Final Reply Brief Of Appellant complies with Rule 211(b), SCACR.

August 27, 2014

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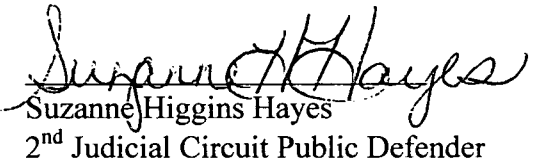
PROOF OF SERVICE

I hereby certify that I have served the Record on Appeal, Second Appendix to the Record on Appeal, and the Final Reply Brief of Appellant on the Respondent City of Aiken, addressed to the attorney of record, Paige Tiffany, P.O. Box 1177, Aiken, SC 29802, via United States Mail, postage prepaid, on this 3rd day of September, 2014.



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