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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS CHARLES FELTON JONES,

APPELLANT.

APPELLATE CASE NO. 2020-000108

INITIAL BRIEF OF APPELLANT

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II. Whether the court erred when it denied Appellant's motion to find Greenville County Ordinance § 15-10 unconstitutionally vague on its face either because the terms of the ordinance are so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application; or because the terms of the ordinance authorize or even encourage arbitrary and discriminatory enforcement?

III. Whether Greenville County Ordinance § 15-10 is preempted by state law?

IV. Whether the court erred when it denied Appellant's motion to find that Greenville County Ordinance § 15-10 was unconstitutional as applied to the defendant because he was punished for criticizing police?

STATEMENT OF THE CASE

Appellant was indicted for a single count of Resisting Arrest with Assault and a single count of Interfering with a County Law Enforcement Officer by a Greenville County Grand Jury on August 20, 2019. The indictment alleged the offense was committed on July 21, 2018. Indictment R. *. On January 14, 2020 Appellant was called to trial before the Honorable Robin B. Stilwell and a jury. Tr. 1. Appellant was represented by Andre Ta Nguyen and Jacob Goldstein. The State was represented by Julia Virginia Hendricks. Tr. 1.

Prior to trial, Appellant moved to dismiss the charges against him because the Greenville County Ordinance pursuant to which he was charged was unconstitutionally overbroad and vague, in violation of the First and Fourteenth Amendments to the United States Constitution and the Due Process Clauses of the United States and South Carolina Constitutions. U.S. Const. amend. V; S.C. Const. art. I, § 3. Tr. 4, l. 15-Tr. 10, l. 14. Appellant also submitted a written motion outlining his objections to the ordinance. Appellant relied primarily upon the case of City of Houston v. Hill, 482 U.S. 451 (1987), for overbreadth, and upon the cases Town of Honea Path v. Flynn, 255 S.C. 32, 176 S.E.2d 564 (1970), and Hill v. Colorado, 530 U.S. 703 (2000), for vagueness. At the end of the State's case, Appellant renewed his motions and also moved to have the ordinance invalidated as applied. Tr. 115, ll. 17-20. The trial judge denied all the motions. Tr. 119, ll. 12-16. Appellant did not put on a case-in-chief.

At the conclusion of the trial, Appellant was found guilty of Interfering with a County Law Enforcement Officer and not guilty of Resisting Arrest with Assault. Tr. 150. Appellant was sentenced to 30 days and a fine of $1,000, provided that upon the service of 10 days (weekend time) and payment of $500, plus costs and assessments, the balance was suspended. Tr. 154.

Appellant served Notice of Appeal on January 21, 2020. This appeal follows.

STATEMENT OF THE FACTS

Appellant was arrested on July 21, 2018, by Deputy Jonathan Cooper of the Greenville County Sheriff's Department for resisting arrest with assault (S.C. Code Ann. § 16-9-320(B)) and hindering a county law enforcement officer (Greenville County Ordinance § 15-10). Tr. 68-70; 90-92. That ordinance states:

> It shall be unlawful for any person within the unincorporated area of [Greenville] [C]ounty to commit an assault, battery or by any act, physical or verbal, resist, hinder, impede or interfere with any law enforcement officer in the lawful discharge of his or her duty, or to aid or abet any such act.

Greenville County Ordinance §15-10.

Appellant's arrest was based on an interaction between himself and Deputy Charles Lancaster, of the Greenville County Sheriff's Department. Tr. 68; 90-92. Deputies Lancaster and Cooper initiated a traffic stop on Shontona Enicha Williams outside Appellant's house. Tr. 66; 87-88. Appellant came out from the rear of his house and approached the traffic stop. Tr. 66-67; 88-91. Deputy Lancaster testified that he requested Appellant to back up, as Appellant approached. Tr. 66; 68; 89; 92. This claim was challenged on cross examination, when Deputy Lancaster was unable to identify a recorded instance of asking Appellant to back away until the moment immediately before Appellant's arrest. Tr. 99-101.

Deputy Lancaster testified that he wanted Appellant to back away because a large group of people were standing nearby. Tr. 66; 68; 89; 92. The deputies disagreed about the size of the crowd. Deputy Cooper testified that "there was approximately 20 to 30 subjects." Tr. 67, ll. 6-7. Deputy Lancaster testified there were "five to ten, maybe more." Tr. 89, l. 18. Appellant disagreed about the size of the crowd as well. State's Exhibit #2 – Lancaster Body-Worn Camera ("BWC") 4:14.

Appellant peacefully asked the officers why Williams was pulled over. Tr. 68; 90-91. Deputy Lancaster responded that Williams failed to use her turn signals while making turns. State's

Exhibit #2 – Lancaster BWC 1:55, 2:30. At this point, Deputy Lancaster inquired if Appellant needed anything. State's Exhibit #2 – Lancaster BWC 2:47. Appellant informed Deputy Lancaster that he and Williams were friends and that Williams was staying at his house for the night. State's Exhibit #2 – Lancaster BWC 2:55-3:01. Appellant informed Deputy Lancaster that he and the other deputy were at his property. State's Exhibit #2 – Lancaster BWC 2:59. During this time, Appellant took a few steps back. State's Exhibit #2 – Lancaster BWC 3:08.

Williams and Deputy Cooper discussed the traffic stop. State's Exhibit #2 – Lancaster BWC 3:15-4:10. As this was happening, more officers arrived pursuant to an earlier call for back up. State's Exhibit #2 – Lancaster BWC 4:10. At this time, Appellant stated, "they know damn well there was no big group of people out here." State's Exhibit #2 – Lancaster BWC 4:14. Deputy Lancaster appeared to become agitated and demanded that Appellant go away or be arrested for interfering. State's Exhibit #2 – Lancaster BWC 4:17. Deputy Lancaster eventually admitted, on cross-examination, that he heard Appellant's statement and that at that point he wanted Appellant to go away. Tr. 102, ll. 1-18. Appellant refused, stating that it was his house. State's Exhibit #2 – Lancaster BWC 4:18. Both deputies proceeded to arrest him for "interfering," eleven seconds after his critical statement. State's Exhibit #2 – Lancaster BWC 4:25.

Deputy Cooper testified that Deputy Lancaster, at some point between the start of the traffic stop and Appellant's arrest, informed Appellant that "recording is fine but step away, you're too close, you're interfering." Tr. 68, ll. 11-12.

Deputy Lancaster later testified that:

> I remember giving him multiple verbal warnings of look, you can go over there, you don't need to be questioning what we're doing here, this is, essentially a crime scene, we're investigating a crime that occurred, you need to go back over to where you came from. You don't need to be asking us any questions at this time.

Tr. 91, ll. 11-18. On cross-examination, however, Deputy Lancaster was unable to identify a single recorded instance of asking Appellant to go away or informing Appellant that he was too close until seconds before his arrest. Tr. 99-101.

Deputy Cooper testified concerning the Sheriff's Department's policies and procedures regarding proximity of bystanders. Tr. 71. Deputy Cooper testified that interference is committed whenever any bystander's presence distracts him from the crime scene or investigation. Tr. 71, ll. 10-15. Deputy Cooper testified later that "interfering is when a defendant, person, whoever, if they take my attention away from the investigation. So therefore, hindering me from doing my job." Tr. 72, ll. 21-24. On cross-examination, Deputy Cooper admitted that, in his view of the law, no physical contact was necessary to commit interference, that mere presence could constitute the offense. Tr. 81, ll. 13-18. Deputy Cooper testified that Appellant's "walking up and talking" loud enough to be heard constituted the offense, because:

> I'm now having to take my attention off just [Williams] and now trying to run everything on my computer so on and so forth. Well now, I have some random person just walking up that I don't know from Adam. So therefore, my attention is divided away from what I need to be doing.

Tr. 83, ll. 18-24. Deputy Lancaster also testified that physical presence is enough for interfering. Tr. 102-03.

STANDARD OF REVIEW

A facial challenge is an attack on a statute itself rather than a particular application and requires the challenger to show that the legislation is unconstitutional in all applications. State v. Legg, 416 S.C. 9, 13-14, 785 S.E.2d 369, 371 (2016). An as-applied challenge claims that the "application of the statute in the particular context in which [the challenger] has acted . . . [was] unconstitutional." Doe v. State, 421 S.C. 490, 503, 808 S.E.2d 807, 813 (2017). However, "finding [an ordinance] unconstitutional as applied . . . does not affect the facial validity of that provision." Id. Instead, "[t]he practical effect . . . is to prevent its future application in a similar context, but not to render it utterly inoperative." Id. at 503, 514.

"In criminal cases, an appellate court sits to review only errors of law . . . ." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "Appellate courts review questions of law de novo." State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012). The constitutionality of an ordinance is a matter of law. See Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000). "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).

Where the government criminalizes constitutionally protected speech and conduct, the reviewing court must apply strict scrutiny. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); see State v. Green, 397 S.C. 268, 276, 724 S.E.2d 664, 668 (2012). Similarly, where a vague criminal sanction threatens to inhibit protected speech or conduct, a stringent test will apply. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982); Town of Honea Path v. Flynn, 255 S.C. 32, 39, 176 S.E.2d 564, 567.

ARGUMENT FOR FACIAL CHALLENGES

I. Greenville County Ordinance § 15-10 is unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, § 2 of the South Carolina Constitution because the ordinance makes unlawful a substantial amount of constitutionally protected conduct, chilling the exercise of free expression.

Relevant Facts

Greenville County Deputies made a traffic stop in Appellant's yard. Tr. 66; 87-88. The driver had intended to stay the night with Appellant. State's Exhibit #2 – Lancaster BWC 2:55-3:01. Defendant came out of the house to question the officers who had stopped his friend. Tr. 68; 90-91. The deputies called for back-up, saying that a large crowd was gathered nearby. Tr. 66-67; 88-91. One officer claimed that there were twenty to thirty people. Tr. 67, ll. 6-7. The other claimed that there were five to ten. Tr. 89, l. 18. Appellant continued to ask questions of the officer, peacefully and without being arrested. Tr. 68, 90-91. But when back-up arrived, Appellant was incredulous, and he spoke out. "They know damn well there was no big group of people here," he stated. State's Exhibit #2 – Lancaster BWC 4:14. Seconds later, Appellant found himself under arrest. Deputy Lancaster admitted to hearing the criticism and then deciding to arrest appellant. Tr. 102, ll. 1-18. It was only when Appellant decided to speak out about what he considered an overblown police response that the nature of his interaction with the deputies changed. When he started criticizing, Appellant was immediately elevated from concerned citizen to wrongdoer in the eyes of the police.

Prior to trial, Appellant moved to dismiss the charges against him because the Greenville County Ordinance pursuant to which he was charged was unconstitutionally overbroad, impinging his right to free speech in violation of the state and federal Constitutions. U.S. Const. amend. I; U.S. Const. amend. XIV; S.C. Const. art. I, § 2. Tr. 4, l. 15 – Tr. 10, l. 14. Appellant also submitted

a written motion outlining his objections to the Greenville County Ordinance. As to the overbreadth doctrine, Appellant relied primarily upon the United States Supreme Court decision in City of Houston v. Hill, 482 U.S. 451.

Discussion

The trial court erred by not finding Greenville County Ordinance § 15-10 unconstitutionally overbroad on its face. The decision is controlled by the reasoning in City of Houston v. Hill, 482 U.S. 451. In that case, the United States Supreme Court invalidated a Houston ordinance which prohibited speech which interfered with police "in any manner." Id. at 462-63. In so doing, the Court held that because the ordinance was not limited to fighting words or even obscenity, it was necessarily overbroad and unconstitutional. Id. The same reasoning was applied persuasively in two United States District Court cases invalidating similar ordinances in Columbia and Turbeville. McCoy v. City of Columbia, 929 F. Supp. 2d 541, 547 (D.S.C. 2013); Baker v. Cannon, No. 2:15-cv-01471-DCN, 2016 U.S. Dist. LEXIS 132987 (D.S.C. Sep. 28, 2016). The Greenville County Ordinance is effectively identical to, if not broader than, those challenged and voided in these cases. Appellant argues that the same result should have been reached in his case.

Overbreadth Doctrine Overview

The First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, prohibits governments from making any law abridging the freedom of speech. Criminal ordinances which "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." City of Houston v. Hill, 482 U.S. at 459.

The overbreadth doctrine exists to give force to the constitutional protections of the First Amendment of the United States Constitution and Article I, § 2 of the South Carolina Constitution.

As such, its applicability is not dependent upon the individual litigant before the court but rather on the nature of the government's enactment and its effect upon the free exercise of the right generally. The overbreadth doctrine "is predicated on the sensitive nature of protected expression: persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." New York v. Ferber, 458 U.S. 747, 768 (1982); State v. Green, 397 S.C. at 276-77, 724 S.E.2d at 668.

Thus, because the doctrine exists to protect the freedom of speech itself, rather than the narrow interests of a single person, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. at 612. This is true even if the challenger's own conduct could have been punishable. See New York v. Ferber, 458 U.S. at 769.

Courts have cautioned against the excessive application of the overbreadth doctrine to invalidate statutes and ordinances. See Broadrick v. Oklahoma, 413 U.S. at 613. As such, only those ordinances which are "substantially overbroad" should be overturned pursuant to facial challenges. See City of Houston v. Hill, 482 U.S. at 458.

> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.

New York v. Ferber, 458 U.S. at 772. "[T]he crucial question . . . is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972).

There is authority, however, to suggest that where a statute or ordinance regulates "pure speech," then the necessity for "substantial overbreadth" may be lessened. In Broadrick v. Oklahoma, the United States Supreme Court discussed the difficulty in determining when a law may be properly voided on its face. The Broadrick Court conceived of a spectrum ranging from "conduct" through "expressive conduct" to "pure speech." The need to show "substantial overbreadth" lessens as the challenged prohibitions move from "conduct" to "pure speech." As the Court summarized it:

> [T]he plain import of our cases is . . . that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

413 U.S. at 615-16.

Taken together, the decisions in City of Houston v. Hill, New York v. Ferber, Broadrick v. Oklahoma, and Grayned v. City of Rockford, stand for the proposition that where a government attempts to regulate certain conduct which may coincidentally impinge protected expression, a challenger must show that the law sweeps in so much protected expressive conduct beyond what may be legitimately prohibited that the law is constitutionally intolerable and incapable of being saved by construction or limitation. At one end of the spectrum, propounded in Broadrick, a law may coincidentally sweep in some protected conduct but not enough to chill the exercise of the

right in general. In such instances, where the risk of widespread violation of the right is minimal, case-by-case litigation may be sufficient to protect the rights of individuals and of the citizenry. Further along the spectrum, a law may sweep in so much protected conduct as to have a chilling effect on the general exercise of the right by the public at large. In such instances, the court may reason that case-by-case litigation is insufficient to ensure the free exercise of the right by the public and facially invalidate the law.

Further still along the spectrum are laws which directly prohibit speech. Broadrick stands for the proposition that, in those circumstances, where a law directly, and not merely coincidentally prohibits speech, the need to engage in "judicial prediction" is obviated or at least greatly attenuated. Consequently, the need to demonstrate "substantial overbreadth" is too.

As is the case where "pure speech" is at issue, special scrutiny is to be paid when criminal sanctions are imposed on protected conduct. "In the First Amendment context, criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held invalid even if they also have legitimate application." State v. Ramsey, 311 S.C. 555, 560, 430 S.E.2d 511, 515 (1993) (internal citations omitted). Consequently, a law which attempts to regulate protected speech by way of criminal sanctions is doubly suspect and overbreadth even less tolerable. See Town of Honea Path v. Flynn, 255 S.C. at 40, 176 S.E.2d at 567 ("The vice of unconstitutional vagueness becomes aggravated where a statute operates to inhibit the exercise of individual freedoms effectively guaranteed by State and Federal Constitutions.").

While the United States Supreme Court has cautioned against the excessive use of the overbreadth doctrine, it has also held that First Amendment guarantees are an especially sensitive area of law in which a court may act with greater latitude in order to guarantee the amendment's

integrity and free exercise. In Broadrick v. Oklahoma, the United States Supreme Court characterized this area of protection around the First Amendment as a "breathing space," holding that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." 413 U.S. at 611-612; accord NAACP v. Button, 371 U.S. 415, 466 (1963); State v. Green, 397 S.C. at 276, 724 S.E.2d at 668.

Governments are restricted in what they may legitimately do in this "breathing space." Even well-defined prohibitions may run afoul of the Constitution. In Herndon v. Lowry, the United States Supreme Court held that:

> The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.

301 U.S. 242, 258 (1937).

In Shelton v. Tucker, the United States Supreme Court noted that it had decided, in a series of cases, that even where the government's purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. 479, 488 (1960) (citing, inter alia, Schneider v. State, 308 U.S. 147, 161 (1939) ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."). "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose." Shelton v. Tucker, 364 U.S. at 488.

The United States Supreme Court has further held that, "in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest . . . . Free expression must not, in the guise of regulation, be abridged or denied." Grayned v. City of Rockford, 408 U.S. at 116-17.

Overbreadth Doctrine Application

In reviewing an overbreadth challenge to an ordinance on its face, a court must, as a preliminary matter, determine if the ordinance comprehends a substantial amount of constitutionally protected conduct. If so, the court must consider the overbreadth in context of the legitimate sweep of the ordinance and in context of the area of protection surrounding First Amendment freedoms. In the context of a criminal ordinance abridging protected conduct, the Constitution will tolerate much less overbreadth than in other contexts. If the criminal ordinance burdens more protected conduct than strictly necessary to achieve a compelling interest of the county, the ordinance must be invalidated. See State v. Green, 397 S.C. at 276, 724 S.E.2d at 668; Broadrick v. Oklahoma, 413 U.S. at 611-12.

The United States District Court for the District of South Carolina has invalidated two ordinances which are similar, but even narrower than Greenville County Ordinance § 15-10: one from the Town of Turbeville and another from the City of Columbia. Baker v. Cannon, No. 2:15-cv-01471-DCN, 2016 U.S. Dist. LEXIS 132987; McCoy v. City of Columbia, 929 F. Supp. 2d. 541.

The Turbeville ordinance stated that "[i]t shall be unlawful for any person or persons willfully to approach nearer than twenty (20) feet to any town employee for the purpose of interfering or stopping that employee from carrying out his/her duties." Baker v. Cannon, No. 2:15-cv-01471-DCN, 2016 U.S. Dist. LEXIS 132987, at *3. The Columbia ordinance stated that "[i]t

shall be unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties." McCoy v. City of Columbia, 929 F. Supp. 2d at 546. The Greenville Ordinance is substantially similar to both, in that it prohibits any person from "resist[ing], hinder[ing], imped[ing], or interfer[ing]" by "any act, physical or verbal." Greenville County Ordinance § 15-10(b). However, Greenville County's is broader than either due to the specific inclusion of speech and "any act" and due to the lack of a "for the purpose of" requirement.

In Baker v. Cannon, the District Court held that "[s]ince the term 'interfere' in the [ordinance] governs speech as well as physical conduct, is not restricted to obscene language or fighting words, and gives officers 'unfettered discretion' to make arrests for mere words, the court concludes that it is unconstitutionally overbroad." No. 2:15-cv-01471-DCN, 2016 U.S. Dist. LEXIS 132987, at *25. The Greenville County Ordinance, by including "interfere" is identical in effect to the Turbeville ordinance and, like the Turbeville ordinance, ought to be voided on its face. The McCoy v. City of Columbia court noted that the overbreadth issue was a close question before invalidating the ordinance on vagueness grounds. 929 F. Supp. 2d at 552. While Columbia's ordinance may have presented a close question, Greenville County's broader ordinance does not.

Both Baker v. Cannon and McCoy v. City of Columbia relied on City of Houston v. Hill, 482 US 451, in analyzing the overbreadth question. In substantive effect, the language of the Houston ordinance is identical to the Greenville County Ordinance. The City of Houston ordinance, invalidated by the United States Supreme Court read, "[i]t shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." City of Houston v. Hill, 482 U.S. at 455 (emphasis added). The Greenville County Ordinance includes similar prohibitions as well as the "in any manner/ by any act" provision. Significantly, the Greenville

County Ordinance goes even further than the Houston ordinance, because the Greenville County Ordinance specifically includes speech, whereas the Court had to construe the provisions of the Houston ordinance in order to find that it reached First Amendment protected conduct.

The trial court erred by not finding the Greenville County Ordinance unconstitutionally overbroad on its face. City of Houston v. Hill controls this decision, just as it did in the City of Columbia and Town of Turbeville cases, and the same result should have been reached. Like the Greenville ordinance, the Houston ordinance "[was] not limited to fighting words nor even to obscene or opprobrious language, but prohibit[ed] speech that 'in any manner . . . interrupt[s]' an officer." Id., 482 U.S. at 462-63. The Court held that "[t]he Constitution does not allow such speech to be made a crime." Id.

The Greenville County Ordinance, like the Houston ordinance "criminalizes a substantial amount of constitutionally protected speech and accords the police unconstitutional discretion in enforcement." Id., 482 U.S. at 466. The City of Houston Court recognized that, while there is a presumption of constitutionality and while it may be difficult to draft precise laws, the Court has "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." Id. at 465-66. This is in keeping with the Court's longstanding policy on dragnet laws. "[I]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." Id. at 466 (quoting United States v. Reese, 92 U.S. 214, 221 (1876)).

"The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." City of Houston v. Hill, 482 U.S. at 466. "The ordinance's plain language is . . . violated scores of times daily, yet only some individuals—those chosen by the

police in their unguided discretion—are arrested." Id. For this same reason, the Greenville County Ordinance is constitutionally intolerable. "Far from providing the 'breathing space' that 'First Amendment freedoms need . . . to survive,' the ordinance is susceptible of regular application to protected expression." Id. (internal citations omitted).

The legitimate sweep of the Greenville County Ordinance is attenuated by the general law of the state which already forbid assaults and batteries of any kind, resisting arrest, resisting arrest with assault, throwing bodily fluids on a police officer, threatening a police officer, and hindering a police officer in making arrests for civil rights violations. Cf. Part IV, infra, on preemption; see also City of Houston v. Hill, 482 U.S. at 460 (discussing the limited scope of Houston's ordinance in light of Texas state law). The only remaining parts of the ordinance, not superseded by state law, relate only to speech and protected conduct.

What constitutes physical or verbal resisting, impeding, or interfering is not defined. County officers are given unfettered discretion to define the terms for themselves. They have settled on a subjective definition which depends upon whether someone divides their attention. Tr. 72, ll. 21-24; Tr. 83, ll. 18-24. This definition, of course, is not in the Greenville County Ordinance or any case law construing it. Rather, it seems to come from the Greenville County Sheriff Department's internal policies. Tr. 71. More importantly, law enforcement has used this latitude to make the law it enforces. Unsurprisingly, it has settled on a definition of interference that, like Houston's ordinance, prohibits even the merest interruption. Such wide-ranging latitude is inconsistent with every principle of the overbreadth doctrine. Analyzed under the more government-friendly rubric for "expressive conduct," the Greenville County Ordinance fails for substantial overbreadth. This, combined with the extra scrutiny due to criminal sanctions and to "pure speech" makes it unsalvageable.

The Greenville County Ordinance's prohibition on verbal interference necessarily impinges constitutional speech. The freedom to criticize, question, or oppose law enforcement officers in the line of duty is a fundamental right and "is one of the principal characteristics by which we distinguish a free nation from a police state." State v. Perkins, 306 S.C. 353, 354-55, 412 S.E.2d 385, 386 (1991). In order to be punishable under the law, such speech must be shown "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." City of Houston v. Hill, 482 U.S. at 461. Here, the record shows that Appellant was arrested for being an inconvenience and an annoyance. There were no allegations that his actions were likely to lead even to unrest. Tr. 102, ll. 1-18; State's Exhibit #2 – Lancaster BWC 4:17. Far from a narrowly tailored ordinance prohibiting only such speech and protected conduct as strictly necessary to prevent serious substantive evils, the Greenville County Ordinance gave license to the county officers to make an arrest where no other law would have permitted it, for the supposed crime of being a pest. Knowing that others have been arrested for inconveniencing or annoying police officers chills the free exercise of the rights of the citizenry. As such, the Greenville County Ordinance is substantially overbroad, not narrowly tailored, and ought to be invalidated on its face. The trial judge erred by not granting Appellant's motion.

Savings Clause

The Greenville County Ordinance includes a savings clause or exemption to immunize it from appellate review. Part (d) states that "[t]his section shall not apply to constitutionally protected conduct such as the peaceful questioning or protesting of government action." Greenville County Ordinance § 15-10(d). However, this does nothing to redress the overbreadth problems previously raised.

First, the savings clause does no more than restate the obvious, that, indeed, the United States Constitution is the supreme law of the land. That was equally true in the City of Houston, the City of Columbia, and the Town of Turbeville where courts have invalidated similar ordinances as the one at issue here. The clause does nothing effectively to narrow the scope of the enforceable portions of the ordinance or limit the discretion of law enforcement, as demonstrated by Appellant's case. The terms of the Greenville County Ordinance still authorize a police officer to make arrests based on protected speech and conduct. Second, and more importantly, such a caveat does not transform a dragnet into an ordinance that is "narrowly drawn and [that] represent[s] a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. at 611-12. Instead, what Greenville County has attempted to do is create a blanket prohibition while paying lip-service to the Constitution.

The very manner in which Greenville County has attempted to save this ordinance from scrutiny demonstrates that it is neither narrowly-drawn nor a considered legislative judgment. The County adopted an ordinance, the essential terms of which had been struck down on numerous occasions, then put a disclaimer on it. However, the government may not relieve itself of its duty so easily. The unfettered discretion of county police officers is as wide and unfettered as ever, and the savings clause does not address the dragnet concerns posed in the City of Houston v. Hill decision. Instead of taking direction from the United States Supreme Court and starting from the ground up to craft carefully an ordinance to meet what it thought was a compelling need left unaddressed by the South Carolina General Assembly, the County simply added an asterisk to an already void law, as if restating the applicability of the First Amendment in Greenville County did

anything to relieve the government's burden to act within the law or to address the substantive problems previously identified with the ordinance.

As such, Greenville County Ordinance § 15-10(d) is insufficient to insulate the rest of the ordinance from review, and the ordinance should be voided for overbreadth.

II. Greenville County Ordinance § 15-10 is unconstitutionally vague in violation of the Due Process Clauses of the United States and South Carolina Constitutions, because the terms of the ordinance are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application and because the terms of the ordinance authorize or even encourage arbitrary and discriminatory enforcement.

Relevant Facts

Prior to trial, Appellant moved to dismiss the charges against him because the Greenville County Ordinance pursuant to which he was charged was unconstitutionally vague in violation of Due Process clauses of the state and federal constitutions. U.S. Const. amend. V; S.C. Const. art. I, § 3. Tr. 4, l. 15 – Tr. 10, l. 14. Appellant also submitted a written motion outlining his objections to the ordinance. As to vagueness doctrine, Appellant relied primarily upon Hill v. Colorado, 530 U.S. 703 and Town of Honea Path v. Flynn, 255 S.C. 32, 176 S.E.2d 564.

Discussion

Vagueness Doctrine Overview

The overbreadth doctrine requires a delicate balancing of many factors which can often result in "close questions." See McCoy v. City of Columbia, 929 F. Supp. 2d at 553. The vagueness doctrine, however, when applied to an ordinance implicating protected speech, is stricter and does not result in so-called close questions. See id. An ordinance is void for vagueness if it either "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. at 733.

The United States Supreme Court summarized the justification for the doctrine as follows:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. at 108-09.

As with challenges based on overbreadth, the United States Supreme Court has shown a greater tolerance for vagueness in civil enactments than in criminal. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. at 498. As with the overbreadth doctrine, a criminal statute or ordinance is subject to more scrutiny than a business regulation or civil penalty. Id. at 498-99. Similarly, where a law "threatens to inhibit the exercise of constitutionally protected rights . . . . a more stringent vagueness test should apply." Id.

In 1970, following the same principles, the Supreme Court of South Carolina invalidated a Town of Honea Path ordinance, similar to the one at issue here. In so doing, the Court relied on the following from 21 Am. Jur. 2d *Criminal Law* § 17:

> The requirement that crimes be defined with appropriate definiteness, which has been referred to as a fundamental common-law concept, is now generally held to be an essential element of due process of law. The underlying principle is that all are entitled to be informed as to what the state commands or forbids and no one should be required, at peril of life, liberty or property, to speculate as to the meaning

> of penal statutes. And no obedience may be exacted to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. The indefiniteness may be as to what acts are prohibited, or as to what acts are excepted from the prohibition.
>
> The standard of certainty required is higher in statutes punishing for offenses than in the case of those depending primarily upon civil sanctions for enforcement. And it is especially high where the offense lies in an area affecting freedom of expression.
>
> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. It is also violated by a statute so vague as to make criminal an innocent act, or to prohibit expressions protected by First Amendment guaranties of freedom of speech and press."

Town of Honea Path v. Flynn, 255 S.C. at 38-39, 176 S.E.2d at 566-67.

The Court further relied on the following from 16 Am. Jur. 2d *Constitutional Law* § 552:

> It is a general principle of statutory law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Town of Honea Path v. Flynn, 255 S.C. at 39, 176 S.E.2d at 567.

Vagueness Doctrine Application

The Town of Honea Path ordinance provided that:

> It shall be unlawful for any person to assault, resist, abuse or in any manner, by word or act, interfere with a police officer or any other officer or employee of the City in the discharge of his duty or to aid or abet any such assault, resistance, abuse or interference . . . .

Id. at 38, 566.

In light of the constitutional provisions cited, the Supreme Court of South Carolina found that it "[could] not help but conclude that the ordinance . . . [was] unconstitutional and void insofar as it attempt[ed] to make 'abuse' of, or 'interference' with any officer 'in any manner, by word or act' a penal offense." Id. at 39, 567.

The Court reasoned that the terms "assault" and "resist" may have been precise enough to "connote some affirmative physical action," but the term "abuse" was undefined. Id. at 39-40, 567. "One's view as to what that term was intended to mean or connote would likely vary considerably, depending upon whether the viewpoint was that of the alleged abuser or the person allegedly abused." Id. at 40, 567.

Further, the Honea Path ordinance, similar to the Greenville County Ordinance, made it a criminal offense to interfere with an officer "in any manner, by word or act." As with the term "abuse," the term "interfere" was not defined in the ordinance. "Aside from any invasion of the constitutional guaranties of freedom of speech, just what kind of word or words would amount to interference with an officer is not at all indicated by the ordinance." Id.

The Greenville County Ordinance, in relevant part is substantially identical. The County Council's stated purpose was to "to make it unlawful and to provide a penalty for interfering with any county law enforcement officer in the lawful discharge of his or her duty." Greenville County Ordinance § 15-10(a) (emphasis added). The Greenville County ordinance makes it "unlawful . . . to commit an assault, battery or by any act, physical or verbal, resist, hinder, impede or interfere with any law enforcement officer in the lawful discharge of his or her duty . . . ." Greenville County Ordinance § 15-10(b) (emphasis added).

In Town of Honea Path v. Flynn, the Court found not only that such terms failed to warn a citizen of the requirements of the law but also that such undefined terms made the ordinance ripe for abusive and discriminatory enforcement. 255 S.C. at 40, 176 S.E. 2d at 567. As with the overbreadth doctrine, the vagueness doctrine does not turn on the rightfulness of the challenger's actions, but rather on the tolerability of vague laws in our constitutional order. In fact, the Town of Honea Path Court noted that there was some evidence that the appellant offered "some slight

physical interference or resistance," which if proved beyond a reasonable doubt would have been sufficient to support a conviction under the Town of Honea Path ordinance. Id. The fact that Flynn's conviction could have been based on such an understanding by the jury, however, was not enough to save the ordinance from scrutiny, because it nevertheless authorized or encouraged unfair enforcement. Id.; see also Hill v. Colorado, 530 U.S. at 732.

On this point, the Supreme Court of South Carolina reasoned as follows:

> To allow police officers, or other officers actively engaged in assigned duties, the discretion to arrest and prosecute those whom they feel have made inappropriate remarks upon a charge of interference would, we think, invite gross abuses of discretion and impose unfair penalties and burdens upon the citizenry. The facts of the instant case rather forcefully demonstrate the fundamental reasons why the particular ordinance is constitutionally invalid. It is true that there was some evidence on the part of the prosecution, expressly contraverted by the appellant, to the effect that appellant offered some slight physical interference or resistance. But it is not contended that he physically harmed or injured either of the officers or even attempted to do so. The record as a whole rather strongly indicates the probability that there would have been no arrest and no charges against the appellant but for the verbal disagreement between him and the Town police officers as to the proper disposition of the bottled beverages. Under these circumstances the conviction under this ordinance may well have rested upon nothing more than mere words uttered by the appellant which were not pleasing to the local police officers who obviously did not like anyone questioning or challenging their authority. In view of the probability that the conviction of the defendant rested upon the foregoing provisions of Ordinance No. 102, which are herein declared invalid, such conviction must be set aside.

Town of Honea Path v. Flynn, 255 S.C. at 40, 176 S.E.2d. at 567-568 (emphasis added); accord City of Houston v. Hill, 482 U.S. at 454 n.2 (noting that "there is a possibility of abuse where convictions under an ordinance frequently turn on the resolution of a direct conflict of testimony as to 'who said what.'") (internal citations omitted).

The same reasoning in Town of Honea Path v. Flynn applies just as well here. In both cases, there was challenged testimony that the Appellant had assaulted or stricken a police officer. The Supreme Court of South Carolina discounted the testimony in the Town of Honea Path case.

The trial jury discounted the testimony in Appellant's case, acquitting him of assaulting a police officer while resisting arrest. The Supreme Court found that there was a probability that Flynn's questions are what led to his arrest. The same probability exists in Appellant's case. Equally, in both cases, the convictions for interfering with an officer may well have rested upon nothing more than critical words uttered by the defendant. The facts in Appellant's case make this more than a mere possibility, as the deputies did not deem Appellant's conduct criminal until he voiced criticism for their handling of the traffic stop. State's Exhibit #2 – Lancaster BWC 4:14. Therefore, the Greenville Count Ordinance equally fails "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. at 732. As such, the trial judge erred, and the ordinance ought to be invalidated on its face for vagueness.

Savings Clause

As previously addressed, the Greenville County Ordinance includes a savings clause. The terms of the clause are more relevant to the overbreadth question. However, Appellant would reiterate that the clause does nothing more than restate the applicability of the First Amendment in Greenville County. The First Amendment applied to the Town of Honea Path when its ordinance was challenged just as it does in Greenville County now. The clause adds nothing to the Greenville County Ordinance and is insufficient to save it from scrutiny. The clause does nothing to address the vagueness of the ordinance. It does not give clarity or definition to the ordinance or effectively limit and guide the discretion of law enforcement. Therefore, the Greenville County Ordinance ought to be voided for vagueness, in spite of the clause.

III. Greenville County Ordinance § 15-10 is preempted by the General Assembly's adoption of §§ 16-3-600, et seq.; 16-3-1040; 16-5-50; 16-9-320; and 24-13-470 of the South Carolina Code of Laws.

The issue of preemption is necessarily involved in determining the legitimate sweep of Greenville County Ordinance § 15-10 and thereby in determining the issue of narrow-tailoring. City of Houston v. Hill, 482 U.S. at 460. Because the general law of the state already regulates most of what the ordinance attempts to address, the ordinance's redundancy curtails its legitimate sweep and aggravates its overbreadth.

Determining whether a local ordinance is preempted is a two-step process. The first step is to determine whether the county had the power to enact the ordinance. If it did, the second step is to determine whether the ordinance is inconsistent with the Constitution or general law of the state. See S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 394-95, 629 S.E.2d 624, 627 (2006); S.C. Code Ann. § 4-9-25.

Discussion

South Carolina Preemption Doctrine

The state preempts an area of legislation by "manifesting a legislative intent that no other enactment can touch upon the subject in any way." The Town of Hilton Head Island, S.C. v. Fine Liquors, Ltd. and the The State of S.C. Alcoholic Beverage Control Commission, 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990). Generally, there is no conflict between a local ordinance and a state statute when the local ordinance is merely additional regulation. For there to be a conflict between a local and a state enactment both must contain express or implied conditions which are inconsistent or irreconcilable with each other. These conditions must be more than mere differences in detail. If either enactment is silent where the other speaks, there can be no conflict between them. If there is no conflict, both enactments are valid. Id., at 553, 664.

The Supreme Court of South Carolina has recognized three types of pre-emption: express, implied, and conflict pre-emption. "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." S.C. State Ports Authority v. Jasper Cty., 368 S.C. at 398, 629 S.E.2d at 628. Implied preemption occurs "when the state statutory scheme so thoroughly and pervasively covers the subject as to occupy the field or when the subject mandates statewide uniformity." Id. "Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." Id. at 401, 630 (citing 56 Am. Jur. 2d *Municipal Corporations* § 392 ("[I]mplied conflict preemption occurs when an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute.")).

Application

At the outset, Appellant concedes that Greenville County has power to act. Pursuant to South Carolina Code § 4-9-25, the County Council has the power to enact ordinances on "any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them." However, this power extends only so far as those ordinances are "not inconsistent with the Constitution and general law of the state." Id. As such, Greenville County Ordinance § 15-10 is preempted both by implication and by conflict.

As stated above, Greenville County Ordinance § 15-10 makes it unlawful "to commit an assault, battery or by any act, physical or verbal, resist, hinder, impede or interfere with any law enforcement officer in the lawful discharge of his or her duty. . . ."

The General Assembly, however, has exhaustively catalogued every manner of assault and battery, making no distinctions between classes of victims. See S.C. Code Ann. § 16-3-600, et seq.

In addition to the various assaults and batteries forbidden against any person, the General Assembly created a special offense for throwing bodily fluids on police officer. See S.C. Code Ann. § 24-13-470. Furthermore, the General Assembly has made it a crime to hinder or interfere with a police officer in carrying out an arrest or the service of legal process. See S.C. Code Ann. § 16-9-320(A). Additionally, the General Assembly has an added penalty for doing the same while assaulting or injuring the officer. See S.C. Code Ann. § 16-9-320(B). Similarly, but more specifically, the General Assembly has made it a crime to hinder an officer in making an arrest for offenses against civil rights. See S.C. Code Ann. § 16-5-50. The General Assembly has also made it a crime to threaten a police officer or his family when the threat is related to his professional responsibilities. See S.C. Code Ann. § 16-3-1040; State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996); State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997).

The pervasiveness of these penal statutes indicates that the Assembly has covered the field. The counties may not then supervene the judgment of the General Assembly and take it upon themselves to add or subtract from its decision on the appropriate general law for the state. Moreover, what the General Assembly does not forbid in its legislation, it permits. Counties may not take it upon themselves to forbid what the state has permitted. Therefore, a county may not limit the scope of physical interaction with police officers in contravention of that which the state permits.

As to verbal interaction with police, the General Assembly has made it a crime to threaten physical harm to police in the line of duty. A county may not forbid what is permitted by the general law of the state or permit what is forbidden. As people in South Carolina are protected by the First Amendment to the United States Constitution and Article I, § 2 of the South Carolina Constitution, and as the General Assembly is presumed to act in accordance with the same, it may

not forbid more speech than necessary to accomplish its compelling interests. By making it unlawful to communicate threatening language to a police officer, it has necessarily permitted every other kind of speech. The counties, then, must also permit every other kind of speech.

Therefore, because the ordinance is superfluous to the general law of the state, Greenville County Ordinance § 15-10 is not necessary to achieve a compelling governmental interest.

ARGUMENT FOR AS-APPLIED CHALLENGE

IV. Greenville County Ordinance § 15-10 is unconstitutional as applied to Appellant.

Though Appellant contends that the Greenville County Ordinance is unconstitutional on its face, Appellant also contends that the Greenville County Ordinance as applied to him violated *his* rights to free speech protected by the state and federal constitutions.

Relevant Facts

At the end of the State's case in chief, Appellant moved for a directed verdict on the basis that Greenville County Ordinance § 15-10 was unconstitutional as applied to Appellant. Tr. 115, l. 17 – Tr. 116, l. 17. Appellant argued that mere presence and questioning of an officer are not constitutionally punishable under the state or federal Constitution. Appellant relied upon Charleston v. Mitchell for the proposition that mere presence or inaction in response to a police command is insufficient to support a conviction for hindering an officer. 239 S.C. 376, 394-95, 123 S.E.2d 512, 521 (1961), *rev'd on other grounds sub nom.* Mitchell v. Charleston, 378 U.S. 551 (1964).

Discussion

In a facial challenge to the constitutionality of a statute or ordinance, the challenging party claims the governmental regulation is unconstitutional in all its forms. In contrast, in an as-applied challenge, the challenging party contends, that while the regulation may be constitutionally enforced in some contexts, it is unconstitutional as applied to his conduct. Doe v. State, 421 S.C. 490, 503.

Application

The State presented evidence in its case in chief that Greenville County deputies arrested Appellant due to nothing more than his physical presence and his asking questions. Tr. 102-103.

Deputy Cooper testified to internal policies and procedures regarding proximity of bystanders as the basis of interference. Tr. 71. Deputy Cooper claimed the crime of hindering a county officer can be committed merely by causing an officer to divert his attention from something else. Tr. 72. l. 21-24. Deputy Lancaster claimed on direct examination that he told Appellant, "you don't need to be questioning what we're doing here," although this was not recorded on body camera. Tr. 91, ll. 14-15.

The First Amendment, however, permits Appellant to observe and question police behavior, even if he may subjectively distract or annoy or inconvenience a police officer in doing so. "The First Amendment protects a significant amount of verbal criticism and challenge directed at police offers." City of Houston, 482 U.S. at 461. Verbal criticism aimed at police can only be limited where it is "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

There is no evidence in the record to suggest that Appellant posed a danger of anything more than inconvenience or annoyance to the deputies. There is no indication that Appellant created a danger of anything resembling unrest, much less an actual substantive evil that could legitimately be unlawful. All the evidence shows that Greenville County law enforcement arrested Appellant under Greenville County Ordinance § 15-10 because they found his presence and questioning of their authority to be a personal nuisance, even though his actions were protected by the state and federal Constitutions. Therefore, the ordinance was applied to Appellant unconstitutionally.

Furthermore, the deputies' claim that Appellant's physical presence was distracting to them and thus a basis for his arrest is tenuous, at best. On direct examination, both deputies emphasized

that they asked Appellant to go away and told Appellant he was too close several times before the moment of arrest. Tr. 68, l. 11-12; Tr. 91, l. 11-18. On cross examination, Deputy Lancaster was unable to point to any recorded instance of his or Deputy Cooper's asking Appellant to go away until mere seconds before the arrest. Tr. 99-100. If the deputies' main concern had been Appellant's physical presence or proximity, the deputies would have, as they falsely alleged to have done, asked Appellant to step back well before the moment of arrest.

The moment of arrest was the only time the deputies asked Appellant to stand back. This moment is constitutionally significant because immediately preceding the demand to step back, as back-up deputies were arriving, Appellant made a statement, criticizing police, that agitated and annoyed Deputy Lancaster. "They know damn well there was no big group of people here," Appellant was recorded to say on the deputy's body worn camera. State's Exhibit #2 – Lancaster BWC 4:14. This was the true basis for Appellant's arrest. Deputy Lancaster admitted on cross examination that he heard Appellant's statement and admitted that that was the moment he wanted Appellant gone. Deputy Lancaster's demeanor was calm until that very moment; he had no issues with Appellant until that very moment. But, when Appellant voiced his criticism, Deputy Lancaster decided that Appellant needed to be punished in violation of Appellant's constitutional rights.

Deputy Lancaster told Appellant to get back as a pretense for arresting him. Seconds later, he and Deputy Cooper arrested Appellant. Greenville County Ordinance § 15-10 was the pretext for the arrest, but Appellant's critical remark was the reason. The Constitution will not let such a conviction stand.

CONCLUSION

For the foregoing reasons, appellant respectfully asks this Court to set aside his convictions, reverse the lower court, and find Greenville County Ordinance § 15-10 unconstitutionally overbroad and vague on its face, preempted by state law, and unconstitutional as applied to the Appellant.

(100727)

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Greenville County Public Defender Office

ATTORNEY FOR APPELLANT

(102854)

Andre Ta Nguyen
Greenville County Public Defender Office

ATTORNEY FOR APPELLANT

This 24th day of August, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
AUG 24 2020
SC Court of Appeals

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS CHARLES FELTON JONES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Thomas Charles Felton Jones, at 111 B Street, Greenville, SC 29611, this 24th day of August, 2020.

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ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of August, 2020.

Meredith J. Wilson (L.S)
Notary Public for South Carolina
My Commission Expires: January 30, 2022