STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2020-000108

The State, Respondent,

vs.

Thomas Charles Felton Jones, Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The State concedes the Greenville County Ordinance in question in this appeal was unconstitutionally applied to Appellant based on the unique and specific facts of this case. Additionally, the State asks this Court not to address the constitutionality of the ordinance as it is unnecessary to this Court's decision.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STANDARD OF REVIEW

In reviewing a challenge to the constitutionality of a statute or ordinance, an appellate court has a "very limited" scope of review. State v. Harrison, 402 S.C. 288, 292, 741 S.E.2d 727, 729 (2013). As with other legislative enactments, ordinances are accorded a presumption of constitutionality which the attacking party has the burden of overcoming." Centaur, Inc. v. Richland Cty., 301 S.C. 374, 377, 392 S.E.2d 165, 167 (1990) (internal citation omitted); see Powell v. Hargrove, 136 S.C. 345, 350, 134 S.E. 380, 382 (1926) ("[An appellate court] must sustain the validity of the legislative enactment, if it is possible to do so by any reasonable construction of the Constitution, even though the Court might differ with the Legislature as to the propriety of the legislation."). "Constitutional constructions . . . are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-334 (1997). Importantly, an ordinance should not "be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt[,]" and the party challenging the validity of the statute has the heavy burden of proving its unconstitutionality. In re Care & Treatment of Lasure, 379 S.C. 144, 147, 666 S.E.2d 228, 229 (2008); see State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("Appellants have the burden of proving the statute unconstitutional.").

ARGUMENT

I. The State concedes the Greenville County Ordinance in question in this appeal was improperly applied to Appellant based on the unique and specific facts of this case. As a result, Appellant's conviction should be reversed. Additionally, the State asks this Court not to address the constitutionality of the ordinance as it is unnecessary to this Court's decision.

Appellant contends the trial court erred in allowing the prosecution of Appellant under Greenville County Ordinance § 15-10. The State agrees that under the unique and specific facts of this case, the ordinance was improperly applied to Appellant. The ordinance was improperly applied to Appellant's actions as he was on his property, and his mere presence or criticism of the officer's decisions was insufficient to trigger application of the ordinance, based on the direct limiting language of the ordinance.

The Greenville County Ordinance in question reads in full:

> § 15-10 INTERFERING WITH A COUNTY LAW ENFORCEMENT OFFICER.
>
> (a) Purpose. The purpose of the section is 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.
>
> (b) Prohibition. It shall be unlawful for any person within the unincorporated area of county 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.
>
> (c) Penalty.
>
> > (1) A violation of this section shall constitute a misdemeanor and shall be punished within the jurisdictional limits of magistrate's court.
> >
> > (2) Each day or portion thereof during which any violation of the provisions of this section is committed or continued shall constitute a separate offense.

> **(d) Exceptions. This section shall not apply to constitutionally protected conduct such as the peaceful questioning or protesting of government action.**
>
> (e) Severability. If any section, subsection, or clause of this section shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections and clauses shall not be affected thereby.
>
> (f) Effective date. This section shall take effect upon the date of its adoption.

Greenville County Ordinance § 15-10 (emphasis added).[1]

Appellant challenges the constitutionality of this ordinance. "As with other legislative enactments, ordinances are accorded a presumption of constitutionality which the attacking party has the burden of overcoming. Our decisions have generally applied this presumption even when an ordinance is challenged on First Amendment grounds." Centaur, Inc. v. Richland Cty., 301 S.C. 374, 377, 392 S.E.2d 165, 167 (1990) (internal citation omitted).

The South Carolina Supreme Court recently considered the difference in a facial challenge and an "as applied" challenge to the constitutionality of a statute[2]:

> "A facial challenge is an attack on a statute itself as opposed to a particular application." Consequently, in analyzing a facial challenge to the constitutional validity of a statute, a court "considers only the text of the measure itself and not its application to the particular circumstances of an individual."
>
> One asserting a facial challenge claims that the law is "invalid *in toto*—and therefore incapable of any valid application." This type of challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid."

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[1] Located at https://codelibrary.amlegal.com/codes/greenvillecounty/latest/greenvilleco_sc/0-0-0-5669#JD_15-10

[2] Appellant makes both a facial challenge to the ordinance as a whole as well as an "as applied" challenge to its application to Appellant based on the specific facts of this case. The State asks this Court to reverse based solely on the improper application of the ordinance to Appellant. Additionally, the same analysis and considerations apply whether it is a state statute or a county ordinance involved.

> Thus, "[u]nless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality."

Doe v. State, 421 S.C. 490, 502–03, 808 S.E.2d 807, 813 (2017) (internal citations omitted). The Court continued an explained an "as applied" challenge:

> In an "as-applied" challenge, the party challenging the constitutionality of the statute claims that the "application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." However, "finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision." Instead, "[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative."

Id. at 503, 808 S.E.2d at 813-814 (internal citations omitted).

Additionally, the United States Supreme Court has recognized that the freedom of speech also includes a freedom to criticize or question officials and police. The Court has stated: "Speech is often provocative and challenging. . . . [F]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless 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, 69 S. Ct. 894, 896, 93 L. Ed. 1131 (1949). "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." City of Houston, Tex. v. Hill, 482 U.S. 451, 461, 107 S. Ct. 2502, 2509, 96 L. Ed. 2d 398 (1987). Further, our United States Supreme Court has stated: "[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." City of Chicago v. Morales, 527 U.S. 41, 53, 119 S. Ct. 1849, 1857, 144 L. Ed. 2d 67 (1999).

Additionally, because Appellant was on his own property at the time, he had significantly more rights than a person in a public space. Our case law has long established the sanctity of one's

home and the right of the owner to use the property and enjoy the property as he sees fit with little limitations. See e.g., U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); Entick v. Carrington, 95 Eng. Rep. 807, 817 (C.P. 1765) (A case our United States Supreme Court has recognized as monumental in its holding that "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."); United States v. Karo, 468 U.S. 705, 729, 104 S. Ct. 3296, 3310, 82 L. Ed. 2d 530 (1984) ("The owner of property , of course, has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes."); see also, State v. Counts, 413 S.C .153, 776 S.E.2d 59 (2015) (finding the South Carolina Constitution under Article I, section 10, provides a heightened right of privacy compared to the United States Constitution, and finding reasonable suspicion required to conduct a "knock and talk" because of the heightened right to privacy in one's home in South Carolina).

Under the specific and limited facts of this case, the application of the ordinance to Appellant improperly limited his right to freedom of speech and his right to freely be on his property. The relevant facts are as found in the two bodycam videos played for the jury. Officer Cooper and Lancaster pulled over a driver for failing to put on her turn signal. She pulled up next to the house of Appellant with whom she was purportedly staying that night. After she was out of the car and interacting with the officers, Appellant walked up from beside or behind the house. He had a cell phone in his hands with the flashlight turned on, presumably video recording the interaction. Officer Lancaster called for backup as Appellant walked up, indicating they have a pretty big group of people with them. Appellant questioned the officer and the need for backup

and the officer noted Appellant just walked up and that there are "a couple people over there." Appellant then questioned more about the reason for the stop. After asking if Appellant needs anything, Officer Lancaster is informed that Appellant lives at the house where the stop has occurred.

Appellant took a step back, without request from Officer Lancaster, as the officer also moved over. The interaction continued for over a minute without Appellant moving or the officer indicating any concern or displeasure about where Appellant was standing. As backup arrived, Appellant made a comment about the need for backup. Appellant did not move from the location where he stood and did not have any interaction at all with Officer Cooper who was the officer conducting the traffic stop of the woman visiting Appellant. Officer Lancaster asked Appellant if he needs to be here, and Appellant reminded him that it is his house and his property he is standing in. The officer told him he can move to the front of the house or he can be arrested for interference. Appellant indicated he is going to stay there on his property. The officers attempted to make an arrest, Appellant resisted, but Appellant was ultimately subdued. (State's Exhibits 1 and 2).

Significantly, Appellant never moved from the spot where he stood and where both officers seemed comfortable with him standing. The officers never asked him to move farther away or to a different location until he questioned the need for backup. Officer Cooper questions the woman stopped, discusses with her the expiration of her insurance and the suspension of her license, and discusses where she was coming from and going that night. It is only after Appellant commented on the arrival of backup that Officer Lancaster demanded he move. The arrest does not appear to have been related to any physical or other interference with Officer Cooper's ability to conduct the traffic stop, especially in light of the fact the investigation was first interrupted when Officer Lancaster announced he was placing Appellant under arrest.

Based on the explicit language of the ordinance, in particular subsection D, the arrest of Appellant for violation of the ordinance was neither valid nor consistent with the express language of the ordinance. The ordinance specifically prohibits application to "constitutionally protected conduct such as the peaceful questioning or protesting of government action" and this logically seems like it would be even more applicable when the person is standing in his own property. As a result, the State asks this Court to declare the arrest of Appellant for violation of the ordinance invalid and reverse his conviction and sentence.

Further, the Court should not address the constitutionality of the ordinance because it is unnecessary to rendering a decision. The United States Supreme Court has indicated the determination of the constitutionality of an act is "only in the last resort." Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 345, 12 S. Ct. 400, 402, 36 L. Ed. 176 (1892). "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Burton v. United States, 196 U.S. 283, 295, 25 S. Ct. 243, 245, 49 L. Ed. 482 (1905). "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." Siler v. Louisville & N.R. Co., 213 U.S. 175, 193, 29 S. Ct. 451, 455, 53 L. Ed. 753 (1909).

The South Carolina Supreme Court has stated: "it is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required." In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001); see also, Morris v. Anderson Cty., 349 S.C. 607, 610–11, 564 S.E.2d 649, 651 (2002) (refusing to issue "an advisory ruling . . . on a constitutional issue" finding to do so "would violate our firm policy of declining to reach constitutional issues unless necessary to the resolution of the appeal before us."). "The Court will avoid, when possible, passing upon the constitutionality of an Act of the Legislature." Sanders v. Anderson Cty., 195 S.C. 171, 10 S.E.2d

364, 364 (1940). This Court has found that where a ruling on one issue is dispositive, "we therefore refrain from ruling on the constitutional questions raised." Riverwoods, LLC v. Cty. of Charleston, 349 S.C. 378, 387, 563 S.E.2d 651, 656 (2002).

In the instant case, the State concedes, and this Court should find, the ordinance was applied improperly to Appellant, especially in light of subsection D and the specific and unique facts of this case where it appears the arrest was either for being merely present or for exercising his First Amendment right to criticize the officers while standing on his own property. As a result, the Court need not address—and the State asks the Court not to address in this case—the facial challenges to the constitutionality of the Greenville County Ordinance.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Appellant's conviction and sentence for violation of the Greenville County Ordinance be reversed based on the circumstances of this case and the improper application of the ordinance.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 2, 2021

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Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge
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The State, Respondent,

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by having a copy emailed to his counsel of record, John Christopher Shipman and Andre Ta Nguyen, at the email addresses provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 2nd day of February, 2021.

CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

Caroline Collins

From: Caroline Collins
Sent: Tuesday, February 2, 2021 10:05 AM
To: Nguyen, Andre; cshipman@greenvillecounty.org
Cc: William Blitch
Subject: The State v. Thomas Charles Felton Jones (2020-000108)
Attachments: JONES Thomas - Initial Brief of Respondent and Designation of Matter - 2020-000108 (02479933xD2C78).PDF

Good Morning Mr. Nguyen and Mr. Shipman,

Attached please find the copies of the Initial Brief of Respondent and Designation of Matter in The State v. Thomas Charles Felton Jones (2020-000108). These documents will be submitted to the Court of Appeals today via the AIS One Drive System. In addition, a hard copy will be placed in today's mail.

If you will, please reply to this email to confirm receipt.

Thank you

Caroline Collins
Administrative Coordinator
South Carolina Attorney General's Office
P: (803) 734-3723