2000

Salt Lake City v. Will Savage : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

SALT LAKE CITY,	:	
Plaintiff-Respondent	:	
vs.	:	Case No. 14000
WILL SAVAGE,	:	
Defendant-Appellant	:	

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty in Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ernest Baldwin, Presiding.

STEPHEN R. McCAUGHEY
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102
Telephone: 532-5444
Attorney for Appellant

VERNON B. ROMNEY
Attorney General, State of Utah
State Capitol
Salt Lake City, Utah
Attorney for Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction on a charge of loitering in violation of Section 32-1-17 (5) Salt Lake City Ordinances 1965, as amended.

DISPOSITION IN THE LOWER COURT

Appellant was convicted of loitering in Salt Lake City Court, the Honorable Judge Paul Grant presiding. The decision was affirmed on appeal in the Third District Court of Utah, the Honorable Judge Ernest F. Baldwin, Jr., presiding. A motion for dismissal on constitutional grounds was heard but overruled by the Court.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the conviction on the constitutional grounds that the section of the ordinance under which he was convicted is void for vagueness and overbreadth.

STATEMENT OF FACTS

During the early morning of November 28, 1974, appellant drove his vehicle into the parking lot of the Tri-Arc Travel Lodge, 161 West 2nd South, where he offered to help a police officer who was at that time assisting a waitress in starting her car. His assistance not being required, appellant drove his vehicle out of the parking lot but returned shortly thereafter. The police officer, Mr. Lowder, noted the license number of the appellant's car and checked that number with the Utah Bureau of Information. The Bureau informed the officer that the vehicle was registered to one Joe Van.

Officer Lowder and another officer, Mr. York, noticed the same vehicle parked by the southwest corner of the hotel approximately fifteen minutes after it had left the parking lot. Officer Lowder stationed Officer York near the car and proceeded to the second floor where he observed appellant approach a coke machine on that floor and then proceeded down a staircase. The officer followed appellant to his car. Appellant was asked to step out of the car by the officer. The officer then proceeded without asking appellant for identification or an explanation of his presence,

to pat down appellant. The search produced no weapons. Another officer, Mr. Boelter, assisted officer Lowder at this time. He removed appellant's wig whereupon officer Lowder recognized appellant as someone other than Joe Van. Officer Lowder asked appellant what he was doing in the hotel to which appellant responded that he stopped to get a coke and meet a female acquaintance. Testimony of officer York indicated appellant possessed a can of coke when questioned. Officer Lowder then placed appellant under arrest for loitering. Appellant was found guilty of loitering in the Third District Court of Utah, Judge Ernest F. Baldwin, Jr., presiding. He appeals from that conviction.

ISSUE PRESENTED FOR REVIEW

The sole issue presented to the Court is whether Section 32-1-7 (5) Salt Lake City Ordinances 1965, as amended, is void for vagueness and overbreadth.

ARGUMENT

POINT I

SECTION 32-1-7 (5) SALT LAKE CITY ORDINANCES 1965, VIOLATES DUE PROCESS BECAUSE IT DOES NOT GIVE UNEQUIVOCAL WARNING TO CITIZENS OF A RULE WHICH IS TO BE OBEYED.

The ordinance under which appellant was convicted provides:

> Section 32-1-17. Loitering. It shall be unlawful for any person to loiter in Salt Lake City. A person is guilty of loitering when he:
>
> (5) Loiters, remains or wanders in or about a building, lot, street, sidewalk, or any other public or private place without apparent reason

and under circumstances which justify suspicion that he may be engaged in or about to engage in a crime and:

(a) upon inquiry by a peace officer, refuses to identify himself by name and address; or

(b) after having given his name and address by inquiry of a police officer refuses or fails to give a reasonably credible account of his conduct and purpose.

It is a well established principle of due process that a law must give fair notice of the offending conduct. To be consistent with the requirements of due process a penal ordinance must contain certain ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the ordinance. Winters vs. People of State of New York, 333 U.S. 507 (1948).

The United States Supreme Court in Papachristou vs. City of Jacksonville, 405 U.S. 156, 162 (1972), has stated that a penal law is void for vagueness when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. United States vs. Harriss, 347 U.S. 612, 667, 74 S. Ct. 808, 812, 98 L. Ed. 989." See Palmer vs. City of Euclid, 402 U.S. 544 (1971). In Papachristou, supra , the Court ruled unconstitutional a Jacksonville city ordinance which punished "common night walkers," persons "wandering or strolling around from place to place without any lawful purpose or object" on the grounds that such ordinance did not give fair notice of proscribed conduct and encouraged arbitrary and erratic arrests and convictions.

In Shuttlesworth vs. City of Birmingham, 382 U. S. 87, 90 (1965), the Court stated that if it were to read literally the city ordinance which makes it an offense to "so stand, loiter or walk upon any street or sidewalk . . . as to obstruct free passage over, on or along said street or sidewalk" and further provides that "it shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by a police officer to move on," the ordinance would be unconstitutional. Speaking for the majority of the Court, Mr. Justice Stewart stated:

> Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birminham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on the beat.' Cox vs. Louisiana, 379 U. S. 536, 579, 13 L. Ed. 2d 471, 501 85 S. Ct. 453.

In Shuttlesworth the Court held that since the trial court may have found the defendants guilty by literally applying the unconstitutionally broad terms of the ordinance, the conviction could not stand. The Court noticed, however, that the ordinance was not necessarily unconstitutional on its face if the state courts construed the ordinance narrowly to punish only those persons who did not obey the request of the officer to move from the corner "though it requires no great feat of imagination to

envisage situations in which such an ordinance might be unconstitutionally applied. "Supra at 91.

In People vs. Berck, 300 N. E. 2d 411, the New York Court of Appeals declared unconstitutional a loitering statute almost identical verbatim to the ordinance now challenged. The New York statute provided:

> Section 240. 35. Loitering--A person is guilty of loitering when he:
>
> (6) Loiters, remains or wanders in or about a place without apparent reason and under suspicion that he may be engaged or about to engage in crime, and upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.

The Court stated in Berck, supra, at 413:

> The statute in the case before us is not informative on its face and utterly fails to give adequate notice of the behavior it forbids. The statute contains two substantive elements: (1) loitering 'in or about a place without apparent reason,' (2) under circumstances which 'justify suspicion' that a person 'may be engaged or about to engage in crime.' Certainly, in light of our decision in People vs. Diaz, 4 N. Y. 2d 469, 470, 176 N. Y. S. 2d 313, 314, 151 N. E. 2d 871, 872, supra--in which we held unconstitutionally vague an ordinance penalizing lounging or loitering 'about any . . . street corner . . . Dunkirk'--the first element standing alone could not possible be held to give sufficient notice of the conduct proscribed. The second element -- that the loitering be done under circumstances which justify suspicion that a person is engaged in or about to engage in crime is similarly obscure. Assuredly, there are no commonly understood set of suspicions circumstances of which all citizens are aware and to which applicability of the statute is

> restricted. In other words, this additional language does not condemn any identifiable act or omission or restrict the operation of the statute to a particular place or a clearly defined set of circumstances but, rather, it merely indicates that a person may be held for loitering if suspicion of criminality happens to be created in the mind of the arresting officer. In short, as we declared in the Diaz case (4 N. Y. 2d, at p. 471, 176 N. Y. S. 2d at p. 315, 151 N. E. 2d at p. 872), the statute fails not only 'to point up the prohibited act, either actual or threatened' but to advise the citizen in sufficiently clear and unambiguous terms of the distinction between 'conduct calculated to harm and that which is essentially innocent.'

The standards set forth in Papachristou, supra, Shuttlesworth, supra, and Berck, supra, are clear. A penal law must give fair notice to men of reasonable intelligence of conduct to be avoided. In order for an ordinance to give such notice it must clearly articulate the prohibited act and advise persons of conduct proscribed and that which is essentially innocent.

The Salt Lake City ordinance section now challenged makes it unlawful to "wander in or about a building, lot, street, sidewalk, or any other public or private place without apparent reason," thus making common night-time strolls unlawful if the arresting officer deems such conduct "suspicious" and is not satisfaied with the "reasonably credible account" tendered . . . an explanation which is forced to be given in order to avoid arrest. Innumerable circumstances similar to evening constitutionals could be "suspicious loitering" under this ordinance; window shopping, jogging, or everday movements exercised by practically the entire populace.

The ordinance in question violates the due process clause under the 14th Amendment in that the ordinance lacks any standard of ascertainable guilt necessary to prevent arbitrary police action. The ordinance makes criminal, activities which by modern standards are normally innocent. The lack of definiteness of the ordinance allows the police net to be cast so large that men are caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offense. The section of the ordinance in this case is therefore void for lack of sufficient notice of conduct to be avoided.

POINT II

SECTION 32-1-17 (5) IS UNCONSTITUTIONAL BECAUSE IT PLACES UNFETTERED DISCRETION IN THE HANDS OF POLICE AND PROSECUTION.

The ordinance places virtually unfettered discretion in the hands of the police and thus encourages arbitrary and discriminatory enforcement.

In Papachristou, supra, 170, the Supreme Court pointed out the infirmities of an ordinance which punishes "walking or strolling about without any lawful pupose" when it stated:

> Those generally implicated by the imprecise terms of the ordinance--poor people, non-conformists, dissenters, idlers--may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and and discriminatory enforcement of the law.

The ordinance now challenged contains no guidelines governing the determination as to whether a person is engaged in suspicious loitering. The ordinance leaves to the sole discretion of the police officer the determination of what constitutes suspicious loitering. Enforcement of the ordinance depends entirely upon whether the arresting officer is satisfied with the "reasonably credible account" given to him to avoid arrest as was the case in People vs. Boeck, supra. Certainly what one person considers "suspicious loitering" may be considered totally innocent by another. Similarly, the inascertainable standard as to what constitutes a "reasonably credible account" of one's conduct may be construed in innumerable variance by different police officers.

Thus, the United States Supreme Court in Papachristou, supra, and Shuttlesworth, supra and the New York Court of Appeals in Berck, supra, stated that the requirement that an offender "give a satisfactory account" of his conduct is not sufficiently certain to satisfy due process requirements since what may be satisfactory to one officer may be unsatisfactory to another, and even the word "satisfactory" is not susceptible to any standard of exactness for it can include legal or moral satisfaction. 25 A. L. R. 3d 841.

In City of Seattle vs. Drew, 70 Wash. 2d 405, 411, 423 P. 2d 522, 525, the Supreme Court of that state found an ordinance which made it unlawful for any person "wandering or loitering abroad, or abroad under other suspicious circumstances at night, to fail to give satisfactory account of himself upon demand of a police officer" to be unconstitutional as violative

of due process as imposing sanctions upon conduct that may not manifest unlawful purpose. The court further stated:

> As we interpret the cases dealing with loitering ordinances, the right of law enforcement officers to inquire of persons wandering abroad at night is limited to those persons whose conduct gives the officer reason for alarm that they are engaged in unlawful activity. The crime, however, cannot be the failure to give answers satisfactorily to the officer.
>
> If the ordinance means that the legality of a person's actions depends upon the opinion of a policeman, it would be unconstitutional. City of Portland vs. Goodwin, 187 Or. 509, 426, 210 P. 2d 577 (1949).

Thus, whether a person is hauled off to jail or is allowed his freedom depends entirely upon the whim of the officer in determining what is suspicious loitering and what constitutes a "reasonably credible account" of a suspect's conduct or purpose.

In ruling unconstitutional subsections (3) and (6) of Section 17-2-16 Salt Lake City Ordinances which provided punishment for "Every person who roams about from place to place without any lawful business" or every person who wanders the street at late or unusual hours of the night, without any visible or lawful business, the court in Decker vs. Fillis, 306 F. Supp. 613 (1969) stated:

> The provisions . . . would penalize economic condition of status, render mere lawful presence on the street or in other public places in the absence of 'business' there a crime, and certainly chill the liberty of lawful movement, presence andphysical status by such an overbreadth of prohibition as to literally cover almost any person loit-

in the nighttime. The differentiation among those to be prosecuted or not prosecuted is left entirely to the police without reasonable guidelines between lawful or unlawful status or conduct. They violate substantive due process under the 14th Amendment. Goldman vs. Knecht, 295 F. Supp. 897, 908 (D. Colo. 1969); Hughes vs. Rizzo, 282 F. Supp. 881 (E. D. Pa. 1968); Territory of Hawaii vs. Anduhe, 48 F. 2d 171 (9th Cir. 1931); Smith vs. Hill, 285 F. Supp. 556 (E. D. No. Car. 1968). See Powell vs. Texas, 392 U. S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968); Robinson vs. California, 370 U. S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

Because the challenged section of the ordinance encourages an arbitrary and discriminatory enforcement of the law due to a lack of any ascertainable standards governing arrest and conviction under the ordinance, the ordinance renders fair even-handed administration of justice a virtual impossibility. It should therefore be declared unconstitutional.

POINT III

SECTION 5 OF THE ORDINANCE UNDERCUTS THE CONSTITUTIONAL REQUIREMENT THAT ARRESTS ARE LAWFUL ONLY UPON A SHOWING OF PROBABLE CAUSE.

Under Section 5 a person may be arrested on suspicion only. Probable cause as a means by which some standards of enforcement may be employed to prevent arbitrary and discriminatory arrests are dispensed with by the ordinance. As the Supreme Court stated in Papachristou, 405 U. S. , at 169:

> We allow our police to make arrests only on 'probable cause,' a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on mere suspicion, like arresting a person for investigation, is foreign to our

> 'suspicious' persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest.

Similarly, the court found in Berck, supra, at 415, that the lack of probable cause was equally inherent in the ordinance section under its consideration. That ordinance section was practically identical verbatim with the one now challenged and was declared unconstitutional.

The courts in both the Berck, supra p. 415, and Drew, supra p. 526, noted rejection by the American Law Institute of a loitering provision (Model Penal Code Section 250.12 [Tent. Draft No. 13, 1961]) very much like the Salt Lake ordinance now challenged.

Tentative Draft No. 13 provided:

> A person who liters or wanders without apparent reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself of his conduct and purpose.

The institute adopted instead a much more tightly drawn provision (Model Penal Code Section 250.6 [Proposed Official Draft, 1962]) in order "to save the section from possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause." (Comment p. 227, to Model Penal Code Section 250.6 [Proposed Official Draft, 1962]).

> The ordinance adopted by the Institute provides: Model Penal Code, Section 250.6 [Proposed Official Draft, 1962]: "A person commits a violation if he loiters

> or prowls in a place, at a time, or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor the opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

The revised ordinance adopted by the Institute has recently been upheld as constitutional in State vs. Ecker, 17 Cr. L. 2001, where the Florida Supreme Court held that the new ordinance, identical to the Model Penal Code Section 250.6 above, was a constitutional replacement to the ordinance struck down in Papachriston, supra.

Lacking the requirement of prabable cause to arrest, the ordinance enables law enforcement officials to harass so-called undesirables. For example, in People vs. Williams, 55 Misc. 2d 774, 776, 286 N.Y.S. 2d 575, 577, (New York City Crim. Ct. 1967), the court commented that:

> These defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times in New York City . . . This Court of

> its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, 'the girls' were arrested after 9:30 p.m., too late to be arraigned, night courts had been adjourned, then kept overnight in a cell. In the morning they were brought to Court and released because offenses for which they had been arrested could not be proven to have been committed by them.

The Fourth Amendment requires that arrests be predicated upon probable cause, Beck vs. Ohio, 379 U. S. 89 (1964); Henry vs. United States, 361 U. S. 98 (1959); Palmer vs. Euclid, 402 U. S. 544 (1971). The Salt Lake Ordinance section permits arrests and convictions for suspicion or for possible crime based on circumstances less compelling than the reasonable stop and frisk factors which are required to sustain a mere on-the=scene frisk. Terry vs. Ohio, 392 U. S. 1 (1968).

The ordinance flies in the face of these well established authorities and should be found to be unconstitutional as a violation of appellants Fourth Amendment guarantees.

POINT IV

THE ORDINANCE SECTION SERVES NO STATE INTEREST CONSISTENT WITH THE FOURTH & FIFTH AMENDMENT. THE ORDINANCE FURTHER VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellant recognizes the right of a police officer to stop and question a person, but a person's silence cannot be used as an idependent source giving rise to probably cause for arrest. Davis vs. Mississippi, 394 U. S. 721, 727, n. p. 6.

The United States Supreme Court in Davis vs. Mississippi, supra, held that police have no right to compel an answer from a citizen stopped for questioning. This is what, in fact, the ordinance now challenged compels. In Davis, supra p. 726, the Court noted the violation of appellant's Fourth Amendment rights by dragnet procedures employed to take fingerprints from scores of individuals. The Court stated:

> . . . But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizure would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed 'arrests' or investigatory detentions.

In Terry vs. Ohio, 392 U. S. 1 (1968), the Supreme Court specifically rejected the concept that the Fourth Amendment is not involved where the conduct of officers amounts to something less than a technical arrest or a full-blown search. Thus, under Terry, supra, Fourth Amendment restrictions must be followed and under Davis, supra, the officer cannot require an answer even in an "investigatory detention."

Section 32-1-17 (5) violates the Fifth Amendment because "it punishes a person who fails to identify himself . . . or give an account

of his . . . conduct and purposes." Berck, supra 415. Under the ordinance a person is given the choice of not answering an officer's questions and being arrested for that silence and incriminating himself by tendering a statement which the officer deems not be a "reasonably credible account."

Because the ordinance allows an officer to by-pass the Fourth Amendment requirement of probable cause for a search or seizure and further requires a person to incriminate himself through silence, contrary to Davis, the ordinance violates the Fourth and Fifth Amendments.

The ordinance further violates constitutional rights guaranteed under the Fourteenth Amendment by restricting the free movement of citizens through the State of Utah.

The ordinance touches upon the inalienable rights of citizens to do what he will and when he will, so long as his course of conduct is not inimical to himself or the general public of which he is a part. Thus, the court in Hawaii vs. Anduha, (1931, CA 9 Hawaii) 48 F. 2d 171, found that while it cannot be questioned that legislation against the obstruction of public streets and highways, whether caused by idlers or loiterers, is proper, a regulation as broad as the one challenged is wholly unnecessary for that purpose. The challenged ordinance in that case provided that any person who habitually loafed or loitered or remained idle on any public

street or highway or in any public place was guilty of a misdemeanor. As the facts of this case indicate, the loitering ordinance has been enforced in as broad a manner as the ordinance declared void in Anduha, supra. There is no legitimate public interest requiring an ordinance as broad as this one.

The courts in State vs. Caez, 81 NJ Super 315, 195 A. 2d 496, and Decker vs. Fillis, supra, holding a loitering and vagrancy ordinance invalid for vagueness, cited with approval the decision in Hawaii vs. Anduha, supra, as standing for the proposition that no ordinance may unreasonably or unnecessarily interfere with a person's freedom, whether it be to move about or to stand still. 25 A.L.R. 3d 856, 846.

The Salt Lake City Ordinance section prohibits merely standing about in any public or private place if the officer determines in his own mind that such conduct is "suspicious," and the person is either unable to give a "reasonably credible account" of his conduct or fails to identify himself by name and address. Thus, whether a person remains for twenty seconds or twenty minutes in a particular spot, makes no difference the way the ordinance section is worded. A person may be subjected to an investigatory stop and questioning for totally innocent behavior and may suffer the indignation of arrest and incarceration by refusing to identify himself or give what the officer, at that time and with no guidelines to aid him by which the conduct of the individual may be ascertained determines in his own mind to be a "reasonably credible account of his conduct."

Such an intrusion into individual liberty is certainly abhorent to the Constitution and the basic principles upon which this country was founded, that is the freedom to do as one wishes so long as the conduct is not inimical to others.

As the Court pointed out in Anduha, supra, p. 173, to loiter is to consume time idly or to waste time. These words have no sinister meaning and imply no wrongdoing or misconduct on the part of those engaged in the prohibited practices. It is common knowledge that the majority of mankind spend goodly parts of their waking hours in idling time away, and much of that time is spent in public as well as private places. The ordinance section now challenged includes "loitering" in private places. Certainly an ordinance which allows this breadth of police action, whereby police could arrest someone for loitering around his own home if that person refused to identify himself or give a reasonably credible answer, is unconstitutional as a deprivation of inherent liberties afforded by the Fourth, Fifth, and Fourteenth Amendments to the Constitution.

CONCLUSION

The ordinance now challenged violates due process because it does not give a person of "reasonable intelligence" unequivocal warning of proscribed conduct. The ordinance now challenged does not comport with the due process standard set out in Papachristou, supra, Shuttlesworth, supra, and Berck, supra. The Berck case involved an ordinance practically

[illegible] declared unconstitutionally

void for vagueness. The cases cited above have held that a penal ordinance must contain an ascertainable standard by which illegal conduct and totally innocent behavior may be judged.

Section 32-1-17 (5) contains neither an unequivocal warning to citizenry or conduct to be avoided nor does it contain an ascertainable standard by which a person's conduct may be judged. The section is clearly unconstitutional as a violation of due process.

The ordinance section now challenged places unfettered discretion in the hands of police and prosecution. The ordinance section allows a peace officer to arrest an individual if he determines the person to be wandering or standing in any public or private place so as to arouse suspicion, and either fails to identify himself or cannot tender a reasonably credible explanation of his conduct. The Supreme Court of the United States in cases cited by appellant has repeatedly declared unconstitutional ordinances of this nature whereby the arresting officer determines what is "suspicious" and what constitutes a "reasonably credible" account of a suspect's conduct.

The ordinance section does not provide for government by clearly defined laws but rather for goverment by the moment-to-moment conclusions drawn by police officers with no standard by which conduct may be judged. The facts of this case further indicate the arbitrary and discriminatory fashion in which this ordinance is enforced. Because of its overbreadth the ordinance encourages erratic and arbitrary arrests.

Appellant was removed from his car, searched, and had his wig removed by officers even before being asked to produce identification. After tendering an explanation of his conduct and purposes, appellant was arrested for loitering. Certainly thepublic policy argument against such treatment by officers encouraged by the ordinance section are compelling. The police cannot be armed with such an ordinance which has been shown to be used as a harassing technique. See People vs. Williams, supra.

Section 32-1-7 (5) violates Fourth, Fifth, and Fourteenth Amendment guarantees.

The ordinance section unconstitutionally dispenses with the requirement that arrests be founded on probable cause and instead, allows arrest upon any conduct which a police officer considers suspicious coupled with the failure of a suspect to produce identification or give a reasonably credible account of his conduct and purposes. Whether an explanation is reasonably credible is again an individual decision by the officer with no standards by which the conduct may be judged. The ordinance therefore violates the Fourth Amendment.

Under Davis, supra, and Drew, supra, a person cannot be subjected to arrest by his silence. To so subject citizens to arrest by remaining silent violates the Fifth Amendment as stated in Davis, supra, and Drew, supra. The ordinance now challenged does exactly that which is prohibited. The ordinance thus flies in the face of well recognized principles of law and should be declared unconstitutional.

The ordinance further violates the privileges and immunities

clause of the Fourteenth Amendment be unreasonably and unnecessarily restricting freedom, whether it is the freedom to move about or stand still. The courts in State vs. Caez, supra, and Decker vs. Fillis, supra have cited Hawaii vs. Anduha, supra, as standing for the proposition that no ordinance may unreasonably or unnecessarily interfere with a person's freedom. Whether a person can move about or merely stand still depends upon the individual officer's assessment of that person's conduct, an assessment for which no ascertainable standards have been established to aid in determining the supposedly suspicious conduct. The ordinance therefore restricts movement and other personal freedoms by its breadth. Therfore, the ordinance should be declared unconstitutionally void for vagueness and overbreadth.

Respectfully submitted,

STEPHEN R. McCAUGHEY
Attorney for Appellant