

2000

Vivian Allgood v. Delmar Larson, The City of Salt Lake : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Vivian Allgood v. Delmar Larson, The City of Salt Lake*, No. 14094.00 (Utah Supreme Court, 2000).
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IN THE SUPREME COURT OF THE STATE OF UTAH

VIVIAN ALLGOOD,

Plaintiff-Respondent,

vs.

Case No. 14094

DELMAR LARSON, Sheriff of Salt
Lake County and THE CITY OF
SALT LAKE,

Defendants-Appellants.

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BRIEF OF DEFENDANT-APPELLANT SALT LAKE CITY CORPORATION

An appeal from an Order granting the relief
requested in a Habeas Corpus Proceeding in
the Third Judicial District Court, Salt Lake County,
State of Utah, Honorable Stewart M. Hanson, Sr., Presiding.

FILED
AUG 8 - 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SALT LAKE,

Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT SALT LAKE CITY CORPORATION

NATURE OF CASE

This case is an appeal from a decision ruling that the imposition of a jail sentence for violating Sec. 32-3-3 of the Revised Ordinances of Salt Lake City, Utah, 1965, as amended, is in conflict with State law.

DISPOSITION IN THE LOWER COURT

The Third District Court held that Salt Lake City could not impose a jail sentence for trespass as defined in Sec. 32-3-3 of the Revised Ordinances of Salt Lake City, Utah, 1965, as amended. The District Court ordered the petitioner released from custody under a Writ of Habeas Corpus, after she had been found guilty of the charge of trespass in the city court.

RELIEF SOUGHT ON APPEAL

The defendant-appellant Salt Lake City seeks to have this court reverse the lower court and hold the State statutes grant to the city power to impose a penalty of imprisonment for violation of Sec. 32-3-3, Revised Ordinances of Salt Lake City, Utah, 1965, as amended.

FACTS

Petitioner was arrested for trespassing by a police officer on the night of November 16, 1974, at Burningham's Truck Plaza, 2100 South 900 West, Salt Lake City, after she had admitted to a police officer she was not a truck driver and that she did not have written permission to be on the lot.

She was charged with the offense of trespass in violation of Section 32-3-3, Revised Ordinances of Salt Lake City, Utah, 1965, as amended, in a criminal complaint signed November 18, 1974. Petitioner was tried before City Judge Maurice D. Jones on December 12, 1974, and the case was then taken under advisement. December 17, 1974, the court found the petitioner guilty as charged and she was sentenced by Judge Jones, January 15, 1975, to serve six months in jail. Execution of said sentence, however, was stayed until February 15, 1975, to enable petitioner to present the court with a medical doctor's evaluation as to her physical condition. On January 21, 1975, petitioner appealed for a trial de novo in the Third Judicial District Court. On March 11, 1975, the court on its own motion ordered the appeal dismissed and remanded the case to the city court for execution of sentence because of the defendant's failure to appear.

Petitioner then filed a Petition for a Writ of Habeas Corpus dated April 8, 1975, and a hearing was scheduled and held April 10, 1975 before Judge Stewart M. Hanson, Sr. At that time the District Court held that the City's trespass ordinance was in conflict with a state criminal trespass statute, basing its opinion on the premise that the City cannot impose a greater jail sentence imposed under its separate enabling power than that provided by State law under the State Criminal Code. The court therefore ordered the petitioner freed from custody. (R-7).

This appeal was filed May 8, 1975, and the matter is now before the Supreme Court, pursuant to Art. VIII, Sec. 9 of the Utah Constitution. (R-10).

ARGUMENT

SECTIONS 10-8-84 AND 10-8-50, UTAH CODE ANN. 1953, SPECIFICALLY GRANT UTAH CITIES THE POWER TO PROVIDE FOR AND PUNISH THE OFFENSE OF TRESPASS BY FINE OR IMPRISONMENT OR BY BOTH SUCH FINE AND IMPRISONMENT; THUS, SALT LAKE CITY'S TRESPASS ORDINANCE IS NOT IN CONFLICT WITH STATE LAW SINCE THE LEGISLATURE HAS GRANTED SPECIFIC POWERS TO THE CITY TO ENACT ITS TRESPASS ORDINANCE AND TO PROVIDE FOR PUNISHMENT BY IMPRISONMENT.

The City ordinances in question provide in part that it is:

“ . . . unlawful for any person to take down any fence, or to let down any bars, or to open any gate so as to expose any enclosure, or to ride, drive, walk, lodge, or camp or

sleep upon the premises of another without the permission of the owner or occupant thereof.” 32-3-3, *Revised Ordinances of Salt Lake City, Utah*, 1965, as amended. (Reproduced as Exhibit “A” of this brief.)

The State Legislature has specifically granted power to the City to prohibit criminal trespass. Section 10-8-50, *Utah Code Ann.* 1953, states that cities have the power to:

“ . . . provide for the punishment of trespass and such other petty offenses as the board of commissioners or city council may deem proper.” (Emphasis added).

In conjunction with this specific grant of power to punish the offense of trespass, the Legislature also provided:

“They (cities) may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter . . . and may enforce obedience to such ordinances with such fines or penalties as they may deem proper; provided, that the punishment of any offense shall be by fine in any sum less than \$300 or by imprisonment not to exceed six months, or by both such fine and imprisonment.” Sec. 10-8-84, *Utah Code Ann.* 1953. (Emphasis added).

In accordance with these statutes, the City adopted Section 26-1-8, *Revised Ordinances of Salt Lake City, Utah*, 1965, which provides:

“Whenever no other penalty is prescribed any person convicted of violating any provision of any ordinance in these revised ordinances, or ordinances hereafter enacted, shall be punished by a fine in any sum not exceeding two hundred ninety-nine dollars, or by imprisonment in the city jail for a period not longer than six months, or by both such fine and imprisonment.”

Thus, it is clear that the State Legislature granted to the City, not only broad powers to define and prescribe crime and anti-social conduct as long as such city ordinances were not repugnant to law, but also granted to the cities specific powers to deal with the offense of trespass. Therefore, the City trespass ordinance and the jail sentence imposed by Judge Jones for a violation thereof, is clearly legal and within the powers vested in the City by State law.

Further, it is to be noted that this court has, on numerous occasions, held that the cities may legislate in the same areas as the State where, as here, the Legislature has given either a specific or a general grant of authority; it has stated:

“It is a well-established principle in this state that the city has the right to legislate on the same subject as a state statute where either the general police power or express grant of authority is conferred upon the municipalities.” Cases cited therein. *Salt Lake City v. Allred*, 20 U.2d 298, 437 P.2d 434, 436 (1968).

One of the decisions on which this court based its holding in *Allred, supra*, was *Salt Lake City v. Kusse*, 97 U.113, 93 P.2d 671 (1939). In *Kusse, supra*, the defendant was convicted of violating a city

ordinance prohibiting the driving of an automobile while under the influence of intoxicating liquor. The defendant there claimed that the City had no authority to pass an ordinance prohibiting driving an automobile while under the influence of intoxicating liquor since the State had already passed a statute to that effect. The court held that the grant of general police power to cities, (under Sec. 15-8-84, *Revised Statutes of Utah*, 1933, which is identical to the present Section 10-10-84, *Utah Code Ann.* 1953, quoted in part above), authorized the City to pass an ordinance to prevent driving under the influence of intoxicating liquors. Addressing itself to the issue of whether the cities have the right to legislate in an area covered by State statute, this court in *Kusse, supra* adopted the following test:

“ ‘In determining whether an ordinance is in “conflict” with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.’ Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.” State v. Carran, 133 Ohio St. 50, 11 N.E.2e 245, 246.

“The statute, as well as the ordinance, in the case at bar, is prohibitory, and the difference between them is only that the ordinance goes farther in its prohibition—but not counter to the prohibition under the statute. The city does not attempt to authorize by this ordinance what the Legislature has forbidden; nor does it forbid what the Legislature has expressly licensed, authorized, or required. * * * Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail.” *Id.* at p. 673.

Thus, the court concluded that in determining whether an ordinance is in conflict with the laws of the State, the test is whether the ordinance permits or licenses that which the State forbids or protects or vice versa. In the instant case, the ordinance in question clearly meets this test in that it neither permits that which the statute forbids nor does it forbid that which the statute specifically allows.

Allred, supra, and *Kusse, supra*, clearly establish as the law of this state that cities may legislate on the same subjects as those covered by State statutes and are precluded from doing so, only if expressly prohibited by statute or if the ordinance is inconsistent with the general law. In the instant case, not only are there no prohibitions precluding the City from enacting its trespass ordinance, but as has been shown, the Legislature has granted the City specific power to provide for and punish by imprisonment the offense of trespass.

The most significant Utah case dealing with the issue of whether an ordinance is in conflict with general law is *State v. Salt Lake City*, 21 U.2d 318, 445 P.2d 691 (1968). This court held in that case that a Salt Lake City ordinance regulating the licensing of non-profit social clubs was in violation of Art. XI, Sec. 5 of the Utah Constitution which limits the powers of cities to:

“ . . . the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations *not in conflict with general law*. . . . ” *Id.* at p. 693.

In finding that a conflict did exist, the court expanded the test announced in *Kusse, supra*, as follows:

“There is a relevant distinction which should be observed: where the legislature imposes the requirement of doing some affirmative action, such as obtaining a license or charter, upon a citizen, it may be implied that the legislature intended that the cities and counties shall not require him to do more. In contrast, *where the legislature prohibits the citizens from doing some act, there is no basis to imply that the legislature intended that cities and counties should not add additional prohibitions*. This concept is in accordance with *Salt Lake City v. Kusse*, where this court in commenting on various tests to determine whether there is a conflict between the statute and the ordinance quoted with approval the following:

‘ . . . the city does not attempt to authorize by this ordinance what the legislature has forbidden; *nor does it forbid what the legislature has expressly licensed, authorized or required* . . . ’ ” (Emphasis added) *State v. Salt Lake City, Supra* at p. 694.

It seems plain from the above holding that the placing of additional prohibitions along side a statute already prohibitive in nature is clearly permissible, even in the face of a constitutional provision restricting the passage of local law “in conflict with general law.” It is clear in the instant case by applying the above test that since the trespass statute in question prohibits the doing of some act, then the City is authorized to “add additional prohibitions in the enactment of its ordinance.”

The Supreme Court of Kansas in addressing this same issue in *Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975) upheld a municipal ordinance dealing with certain uses of hand guns and knives as not being in conflict with state law where the ordinance was more restrictive and stringent than the state law dealing with the same subjects.

The only remaining question in this appeal then is the alleged conflict arising from the fact that the City has been given specific authority to impose a jail sentence while the State Code provides that criminal trespass is an infraction for which no jail sentence may be imposed. See, Sections 76-6-206, 76-3-205, *Utah Code Ann.* 1953.

However, both the City ordinance and State statute have as a common purpose, the control of trespass and are closely related in terms, language and intent. The mere fact that the ordinance in question imposes a stricter penalty than that provided by State law, by itself, is not enough to vitiate the ordinance. Regarding this point, McQuillin states:

“Where the unlawful act may be an offense both the state and the municipal corporation, decisions exist to the effect that the penalty of the ordinance, where it is not otherwise limited to such extent, may be greater than that provided in the state statute. . . . Clearly, of course, a statutory penalty may be exceeded or increased by the penalty of an ordinance where power to impose such penalty by ordinance has been expressly given.” (Emphasis added) 5 McQuillin, *Municipal Corporations*, §17.15, p. 328, 329 (3rd Ed.).

In *City of Columbus v. Molt*, 36 Ohio St.2d 94, 304 N.E.2d 245 (1973), the Ohio Supreme Court held that the city ordinance for reckless operation of a motor vehicle which imposed a stricter penalty than that provided for under state law for the same offense was upheld as valid and not in conflict with the general laws of the state.

In an earlier case, *Village of West Jefferson v. Robinson*, 1 Ohio St.2d 113, 205 N.E.2d 382 (1965), the Ohio Supreme Court held the words “general laws” to mean “statutes setting forth police, sanitary or other similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.” *Id.* at p. 386. This definition of “general laws” was based on the holding in the case of *Village of Struthers v. Sokol*, *supra*, which was adopted and cited as the law of this state in *Salt Lake City v. Kusse*, *supra*. Thus, the ordinance in question is not in conflict with the general laws of this state as set forth by this test since those statutes granting municipalities enforcement power are not considered “general laws.” The above test allows for differences in the enforcement of police and sanitary regulations on municipal levels from those prescribed by the state.

In *Struthers v. sokol*, *supra*, the court addressed the issue of whether or not a liquor ordinance which imposed a greater penalty than a state statute dealing with the same subject, was in conflict with general law. The court reiterated its holding in *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917), which:

“ . . . affirmed the right of a city to regulate the speed of motor vehicles, notwithstanding Section 12604, General Code, had already made provisions covering the same general subject. It was pointed out in that case that a different penalty was prescribed by the ordinance than that prescribed by the statutes of the state, and that fact was held to be unimportant and not to create a conflict between the statute and the ordinance.” *Struthers* at p. 520.

In holding there was not a conflict between the city ordinance and the state statute, the Ohio Supreme Court held in *Struthers*, *supra*:

“No real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa. There can be no conflict unless one

authority grants a permit or license to do an act which is forbidden or prohibited by the other. No act is either expressly or inferentially permitted or licensed by either of the ordinances, or the statutes. On the contrary, all acts referred to are forbidden and penalties imposed for violations. * * * *In one of the ordinances a slightly heavier penalty provided for a second offense, but it has been repeatedly held in many of the states, including the state of Ohio, that this is no valid objection. * * * It has repeatedly been held that the punishment of an act defined as a crime under a state law does not preclude further punishment as a misdemeanor under a municipal ordinance.*” *Id.*, at p. 521 (Emphasis added).

The Ohio Supreme Court in finding that there was no conflict between the ordinances and state law, upheld the validity of the ordinance where it imposed a greater penalty than that provided in state law for the same offense.

It is respectfully submitted that this court should rule that the trespass ordinance and the penalty ordinance, as drafted, are within the powers granted to Salt Lake City by the State Legislature and that the ordinances in question are not in conflict with the general laws of the State of Utah.

CONCLUSION

Therefore, Sections 10-8-50 and 10-8-84, *Utah Code Ann.* 1953, grant to the City, specific power to draft the ordinances in question and provide for the punishment of trespass in the form of fines or imprisonment, or by both such fine and imprisonment. This court should rule the ordinances valid as drafted and in harmony with the intent and express statement of the Legislature and not in conflict with the general laws of the State.

RESPECTFULLY SUBMITTED,

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APPENDIX "A"

Sec. 32-3-3. Trespass. (1) It shall be unlawful for any person to take down any fence, or to let down any bars, or to open any gate so as to expose any enclosure, or to ride, drive, walk, lodge, or camp or sleep upon the premises of another without the permission of the owner or occupant thereof.

(2) It shall be unlawful for any person to drive or park any motor vehicle, motorcycle or motor-driven cycle upon any city owned property not designated for vehicular traffic or parking without permission of the board of commissioners of Salt Lake City.

(3) It shall be unlawful for any person to operate any type of motor vehicle (including but not limited to motorcycles, trail bikes, dune buggies, motor scooters or jeeps) upon the private property of another, without first obtaining the written permission of the person in lawful possession of the property or, if the property is unoccupied, the owner of such property.

(4) It shall be unlawful for any person to operate any type of motor vehicle (including but not limited to motorcycles, trail bikes, dune buggies, motor scooters or jeeps) upon any public property, except dedicated streets, highways or alleys, without first obtaining the written permission of the public entity which is in possession of such property or, if the property is unoccupied, the public entity which owns such property.

(5) Every person who operates any type of motor vehicle upon the private property of another or upon any public property, except as hereinabove provided, at all times while so operating such motor vehicle shall maintain in his possession the written permission required by the two preceding subsections, except that, if the same document grants permission to two or more persons, a person named in such document need not have it in his possession while another person named in the same document, riding in the same group and not more than three hundred feet from said person, has such document in his possession.

(6) This article does not prohibit the use of such property by the following:

(a) Emergency vehicles:

(b) Vehicles of commerce in the course of normal business operations;

(c) Vehicles being operated on property devoted to commercial or industrial purposes where such operation is in conjunction with commercial or industrial use and permission for such operation is implied or expressly given by the person in possession of said property;

(d) Vehicles operated on property actually used for residential purposes where such vehicles are there at the express or implied invitation of the owner or occupant;

(e) Vehicles being operated on public or private parking lots where permission to do so is implied or expressly given by the person in possession of such lot.