2001

Fred H. Buhler v. Verl Stone : Petition for Rehearing

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

FRED H. BUHLER,
Plaintiff-Appellant,

vs.

VERL STONE, Utah County Commissioner, MACK HOLLEY, Utah County Sheriff, and UTAH COUNTY,
Defendants-Respondents.

Case No. 13715

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appeal from the Judgment of the 4th Judicial District Court, in and for Utah County, State of Utah, Honorable Allen B. Sorensen, Judge

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Pursuant to Rule 76(e), Utah Rules of Civil Procedure, appellant respectfully petitions this Honorable Court for a rehearing and as grounds therefor shows the following points of error.

POINTS OF ERROR

POINT I.

THE SUPREME COURT ERRED IN FAIL-

ING TO FIND UTAH COUNTY ORDINANCE 1970-1 SO VAGUE AND UNCERTAIN AS TO VIOLATE DUE PROCESS.

It is a central tenet of constitutional law that "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." *Connally* v. *General Construction Company*, 269 U. S. 385, 391, 46 S. Ct. 126, 127 (1926). In that case, the Supreme Court of United States sought to determine whether a criminal statute was sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. At issue in the instant case is an ordinance adopted by Utah County which requires those owning real property in unincorporated areas to remove, "any unsightly or deleterious objects." Such language is so vague and uncertain that men of common intelligence must necessarily guess at its meaning.

Plaintiff realizes vagueness is a matter of degree and context. "There are limitations in the English language with respect to being both specific and manageably brief," *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL, CIO*, 13 U. S. 548, 578, 93 S. Ct. 2880, 2897 (1973) and that, "condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned* v. *City of Rockford*, 408 U. S. 104, 110, 92 S. Ct. 2294, 2300 (1972). Moreover,

plaintiff recognizes there are, "areas of human conduct where by the nature of the problems presented, legislatures simply cannot establish standards with great precision," *Smith* v. *Goguen*, 415 U. S. 566, 581, 91 S. Ct. 1242, 1251 (1974).

In determining whether the Utah County ordinance which requires removal of "any unsightly or deleterious objects" is too vague and uncertain it is necessary to examine whether the ordinance creates a standard of conduct which is capable of objective interpretation by those residents such as Buhler who must abide by it and those Utah County officials who must enforce it, and also by any judicial tribunal such as this Court which might review the removal and destruction of "unsightly property." On its face, the Utah County ordinance requires removal of "unsightly or deleterious objects" ten days after due notice. It is obvious that the use of such descriptive terms as unsightly and deleterious are illusory for these terms have no inherent, objective content from which ascertainable standards could possibly be fashioned. Even if one views these as did the Court in the light of context and purpose of the county ordinance; (which is ostensibly health and sanitation) there would still exist no meaningful standard. Plaintiff is at a loss to understand how the overall purpose of the ordinance can rectify the inherent vagueness of such subjective terms as "unsightly" or "deleterious." The total context of the ordinance is insufficient to eradicate the inherent subjectivity of such words as "unsightly" and "deleterious."

Like beauty, the content of unsightly exists only in the eye of the beholder. The subjectivity implied in the language of this Utah County ordinance permits county officials to enforce the ordinance with unfettered discretion and it is precisely this potential for arbitrary enforcement which is abhorrent to the Due Process Clause. Furthermore, because the ordinance contains no ascertainable standards for enforcement, judicial review can only be a meaningless gesture. There is simply no bench mark against which the validity of the application of this rule calling for the removal of "unsightly" objects can be tested. The Utah County ordinance taken within-context or taken out-of-context of any ostensible purpose of the ordinance still conforms to the classic definition of vagueness as stated by this Court itself in *State* v. *Packard*, 250 P. 2d 561 (1953) because the terms of this ordinance are so vague as to leave the individual to guess at its meaning.

The root of this vagueness doctrine is simply a rough idea of fairness. The Utah County ordinance is not fair to Buhler. It is not fair because in the final analysis, each individual has his own idea of what is "unsightly" and such ideas are as numerous as the opinions of man. The law requires that crimes be defined with more certainty than that. *State* v. *Musser*, 223 P. 2d 193 (1950).

POINT II.

THE SUPREME COURT ERRED IN FINDING THAT UTAH COUNTY ORDINANCE

1970-1 AFFORDED BUHLER AN OPPORTUNITY FOR A HEARING.

Buhler collected old automobiles and has acquired 261 old vehicles which he stores on his farm. An automobile dealer, of long standing in Utah County, testified that the automobiles had a value of $28,000, thus, the plaintiff was faced with a significant property interest which would be lost if the County removed and destroyed these vehicles.

The ordinance, requiring removal of Buhler's cars if they were "unsightly" made no provision for the holding of any kind of hearing to determine whether there was a valid basis for the removal of these so-called "unsightly" objects. Buhler had the dubious choice of testing the constitutionality of the ordinance or relinquishing all his property rights. The ordinance granted plaintiff no hearing; therefore, it was necessary for him to test its constitutionality.

Procedural due process of law requires that before valuable property rights, such as Buhler's, can be directly infringed upon by governmental action, that there must be notice and an opportunity to be heard. *Mullane* v. *Central Hanover Trust Company*, 339 U. S. 306, 70 S. Ct. 652 (1950); *Fuentas* v. *Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); *Bell* v. *Burson*, 402 U. S. 535, 91 S. Ct. 1586 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1011 (1970); *Boddie* v. *Connecticut*, 401 U. S. 371, 91 S. Ct. 780 (1971); *Board of Regents* v. *Roth*, 408 U. S. 564, 92

S. Ct. 2701 (1972). The failure of Utah County ordinance 1970-1 to provide any opportunity for a meaningful hearing prior to deprivation of property is in contravention of the minimum standards of procedural due process.

The opinion of the majority of the Court is that Buhler, by his bringing a suit, by having his trial and by the subsequent review of the Court was, therefore, given sufficient opportunity to be heard. Plaintiff respectfully submits that judicial review, being open as a last resort to him, was an insufficient remedy to the lack of procedural due process in the ordinance because there existed no provision for a hearing. An eventual attempt to vindicate one's property rights through judicial process will not substitute for the lack of any provision in the Utah County ordinance for a meaningful hearing.

POINT III.

THE PLAINTIFF'S INTERESTS WERE ADVERSELY AFFECTED BY THE ORDINANCE AND HIS CHALLENGE OF ITS CONSTITUTIONALITY IS NOT SIMPLY AN ABSTRACT EXERCISE.

The majority opinion of the Court says Buhler attacks the ordinance as, "an abstract proposition," and may not do so, "because it may unjustly effect someone else." The removal and destruction by the County of Buhler's automobiles was an imminent possibility. This case does involve mere abstractions in which Buhler seeks

to vindicate the constitutional rights of others. Rather, Buhler was confronted with a real and imminent threat of destruction of his property.

CONCLUSION

Appellant respectfully submits the Supreme Court erred in failing to find the Utah County ordinance 1970-1 so vague and uncertain that men of common intelligence must necessarily guess at its meaning. The Court also erred in finding the ordinance gave Buhler an opportunity for a hearing. Appellant respectfully submits that the majority opinion should be reconsidered and reversed.

Respectfully submitted,

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