

1980

Salt Lake City v. Michael Johnson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

SALT LAKE CITY,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16840
MICHAEL JOHNSON,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

AN APPEAL FROM A FINDING OF GUILT AND SENTENCE
ENTERED BY THE FIFTH CIRCUIT COURT IN AND FOR
SALT LAKE COUNTY, SALT LAKE DEPARTMENT
THE HONORABLE MELVIN MORRIS, JUDGE PRESIDING,
AND FROM THE AFFIRMANCE OF THAT FINDING AND
SENTENCE ON APPEAL ENTERED BY THE THIRD
JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, THE HONORABLE
BRYANT CROFT, JUDGE PRESIDING

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BRIEF OF APPELLANT

I

NATURE OF THE CASE

The Defendant-Appellant was found guilty of public intoxication under Revised Ordinances of Salt Lake City, 1965, §32-1-4, and appeals on the grounds that said ordinance is unconstitutionally vague on its face, and seeks a dismissal of the charge against him.

II

DISPOSITION OF LOWER COURT

The Third Judicial District Court in and for Salt

Lake County, State of Utah, entered a Minute Entry on December 10, 1979, and presented a final order on December 21, 1979, ruling against the Appellant on his appeal from the Fifth Circuit Court of Salt Lake County from the guilty judgment therein.

III

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the order denying his Motion to Dismiss, a declaratory judgment that the Revised Ordinances of Salt Lake City, 1965, §32-1-4 is unconstitutionally vague on its face, and a dismissal of the criminal action against the Defendant herein.

IV

STATEMENT OF CASE/STATEMENT OF FACTS

On December 23, 1978, the Defendant-Appellant, herein referred to as "appellant", was arrested in front of his home by the Salt Lake City Police Department for the offense of public intoxication. On December 26, 1978, the Plaintiff-Respondent filed a criminal Complaint against the Appellant in the Court below alleging a violation of the Revised Ordinances

of Salt Lake City, 1965, §32-1-4. On January 9, 1979, the Appellant filed a Motion to Dismiss, alleging that the ordinance under which Appellant was charged was and is unconstitutionally vague. The lower Court entered an Order denying the Appellant's Motion to Dismiss on May 3, 1979, and on May 3, 1979, the Appellant duly reserved his right to appeal the issue by filing a timely Notice of Preservation of Right to Appeal. On May 14, 1979, the Appellant was found guilty on the charge. The Appellant filed a timely Notice of Appeal on the denial of his Motion to Dismiss. On December 10, 1979, the Third Judicial District Court in and for Salt Lake County, State of Utah entered a Minute Entry ruling against the Appellant on this appeal. Apparently, the Court did not have access to the Reply Memorandum and the Request for Oral Arguments in this matter prior to the Court's ruling on December 10, 1979. Upon request, the Third Judicial District Court allowed oral arguments on December 21, 1979. At the conclusion of the oral arguments, a final order was presented which affirmed the judgment of the lower court.

V

ARGUMENT

§32-1-4 OF THE REVISED ORDINANCES OF SALT LAKE CITY, 1965, IS IN VIOLATION OF THE UNITED STATES CONSTITUTION IN THAT IT IS UNCONSTITUTIONALLY VAGUE ON ITS FACE

The crime of which the Defendant was charged in the above captioned matter was the crime of violating §32-1-4 of the Revised Ordinances of Salt Lake City, 1965, hereinafter referred to as "the ordinance."

The ordinance provides as follows:

"No person shall drink liquor in a public building, park or stadium or be in an intoxicated condition in a public place."

The Defendant concedes the constitutionality of the first part of the ordinance which provides that "no person shall drink liquor in a public building, park or stadium..." as being a permissible exercise of the police power and as being sufficiently clear so as to afford notice of what acts constitute a violation of the ordinance sufficient to satisfy the requirements of due process set forth in the United States Constitution.

The second part of the ordinance, which provides that "[no person shall] be in an intoxicated condition

in a public place", is in violation of the United States Constitution in that it is vague on its face and therefore denies due process to those accused of or found guilty of its violation.

It is a cardinal rule of constitutional law that all statutes and ordinances must meet a certain criteria of clarity before they may be enforced. The United States Supreme Court has reasoned that an arrest or conviction under a statute which does not afford the accused adequate notice of what acts do and do not constitute a violation of that statute is a denial of due process. Papachristou v. City of Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972); Lanzetta v. New Jersey, 306 U.S. 451 83 L. Ed. 888, 59 S. Ct. 618 (1939); Connally v. General Construction Co. 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926). The Court in Lanzetta noted for example:

. . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those

who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And 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." (footnotes ommitted)

In the instant case, the Defendant was charged with being in an intoxicated condition in a public place. Black's Law Dictionary, Fourth Edition, defines the word "intoxicated" as "affected by an intoxicant, under the influence of an intoxicating liquor." The citation in Black's Law Dictionary for that definition is Taylor v. Joyce, 4 Cal. Ap. No. 2 page 612, 41 P. 2d 967, 968 (1935).

In defining "intoxication", the Courts have attempted to provide the meaning of that term. In doing so, cases hold that the term "intoxication" is commonly understood by "a person of ordinary intelligence". However, when the Court in each of these cases defines the term "intoxication", several significantly different interpretations arise, both between themselves and with the definition of the

term established in Black's Law Dictionary. See, Findlay v. Tulsa, Okl. Cir., 561 P. 2d 980 (1977); Quittner v. Thompson, 309 F. Supp. 684 (1970); Clowney v. State, Fla. 102 So. 2d 619 (1958); McArthur v. State, Fla. 191 So. 2d 429 (1966); and State V. Painter, 134 S. E. 2d 638 (1964).

The mere consumption of a small amount of liquor may cause a person "to be affected by the intoxicant." And this is true no matter how minimal the effect or the influence.

The determination of what constitutes "public intoxication" is a determination of degrees. Clearly, only in extraordinary cases, would a person that has consumed one beer be arrested for public intoxication, and clearly only in extraordinary cases, would a person that has consumed a fifth of whiskey not be arrested for public intoxication. The problem area is between the one beer consumer and the one fifth consumer. Who makes the determination as to which persons are arrested from this category? The police officer on the street, and what criteria does he use? His own "common knowledge" of what a drunk is and does, without any clear objective standards from the statute.

The Utah State Legislature has, by establishing a plan for the distribution of alcohol to adults in the State of Utah, indicated an intent that consumption of alcohol in Utah by adults under certain conditions shall be a lawful activity. The conduct proscribed by the ordinance of appearing in public after consumption of a minimal amount of alcohol should not be deemed a criminal offense.

The ordinance provides no notice to citizens of Salt Lake City of what conduct is declared illegal. Given the above-described policy of the Utah legislature, that adults may drink alcoholic beverages within the state, a citizen might assume that it is legal to appear in public after consuming a small amount of alcoholic intoxicant. Given the ordinance, a citizen might assume that at some level of intoxication or at some level of disorderly or dangerous conduct, one who is intoxicated in public has violated the ordinance. But the ordinance does not make clear that some minimal level of intoxication is permissible in public in Salt Lake City, and does not give any indication of what level of intoxication or standard of conduct is a violation of the ordinance.

The ordinance leaves too much discretion to arresting officers to determine what level of intoxication or what quality or conduct renders a person in violation of the ordinance. That is an extraordinary subjective evaluation of another human being with plenty of room for error. Even if one comes in contact with another person who, for example, lacks a continuity of thought or of ideas, the ability of one person to know simply on that basis-without any other objective evaluation-that the other person acts in that manner totally because his brain is so far affected by potations of intoxicating liquor, is simply beyond the realm of ordinary, realistic human capability. This discretion leaves the door open for harassment by police officers of members of certain groups who are otherwise not engaging in any conduct which is either illegal or a danger to themselves or to others. The United States Supreme Court noted this danger inherent in vague statutes in the Papachristou case, *supra*.

Those generally implicated by the imprecise terms of the ordinance--poor people, nonconformists, 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 not standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure. Thornhill v. Alabama, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 1100, 60 S. Ct. 736. It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk...only at the whim of any police officer." (L. Ed. at page 120)

There are several methods Salt Lake City might use to proscribe public intoxication which would pass constitutional muster. The Utah State Legislature has set an example with its statutes prohibiting intoxication while operating a motor vehicle. The Legislature has provided that when the blood alcohol level of a driver reaches a certain point, the driver is conclusively presumed to be intoxicated and incapable of operating a motor vehicle. U.C.A., 1953, §41-6-44. Such an objective standard of intoxication puts all citizens and law enforcement officers of Utah on notice of exactly what conduct (consuming a certain, ascertainable amount of alcohol) will be a violation of Utah Law.

It might also be appropriate for the ordinance to provide that it is illegal to be in an intoxicated condition in public such that one is a danger to himself or a danger to others, or such that his conduct

constitutes disorderly conduct. For example, the California Penal Code §647 (f) provides:

Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:

* * *

(f) Who is found in any public place under the influence of intoxicating liquor, or any drug, ... or under the influence of any combination of any intoxicating liquor, drug, toluene or any such poison, in such a condition that he is unable to exercise care for his safety or the safety of others, or by reason of his being under the influence of intoxicating liquor, or any drug, ... or under the influence of any combination of any intoxicating liquor, drug, toluene or any such poison, interferes with or obstructs or prevents the free use of any street, sidewalk or other public way. (emphasis added)

Such an ordinance would put citizens, police, and prosecutors on notice of what conduct is unlawful which the present ordinance does not do.

VI

CONCLUSION

The criminal ordinance in dispute is a violation of the United States Constitution. It denies due process to persons arrested and/or convicted under the ordinance, for reason that the ordinance is vague on its face. Constitutional means exist by which Salt Lake City might remedy the evil it has sought to remedy by enacting the ordinance.

The Court should declare that the Revised Ordinances of Salt Lake City, 1965, §32-1-4 is unconstitutionally vague on its face, and is therefore void and unenforceable and should dismiss the charges against the Defendant herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian M. Barnard", written in a cursive style.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to Paul H. Maughan, Assistant City Attorney, City & County Building, Washington Square, Salt Lake City, Utah 84111 postage prepaid in the United States Postal Service this 5th day of March, 1980.

A handwritten signature in black ink, appearing to read "Brian M. Barnard", written over a horizontal line.

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