

1964

Orem City v. Dee Pyne : Plaintiff-Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Orem City v. Pyne*, No. 10211 (Utah Supreme Court, 1964).

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In the Supreme Court of the State of Utah

OREM CITY, a Municipal Corporation,
Plaintiff-Appellant,

vs.

DEE PYNE,

Defendant-Respondent.

CASE
NO. 10211

PLAINTIFF-APPELLANT'S BRIEF

Appeal from the Judgment of the Fourth District Court
for Utah County, Utah
Honorable Maurice Harding, Judge

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Clerk, Supreme Court, Utah

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In the Supreme Court of the State of Utah

OREM CITY, a Municipal Corporation,
Plaintiff-Appellant,

vs.

DEE PYNE,

Defendant-Respondent.

**CASE
NO. 10211**

PLAINTIFF-APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Defendant-Respondent was charged with the crime of a misdemeanor in the Orem City Court for failing to pay a license tax to Orem City for a retail sales used automobile business operated by him in Orem.

DISPOSITION IN LOWER COURT

In the Orem City Court the Defendant-Respondent was convicted and thereafter appealed his conviction to the Fourth Judicial District Court of Utah in and for Utah County claiming that the license ordinance was void as to him.

The Defendant-Respondent being entitled to a trial de novo entered a plea of "not guilty", but stipulated that during the time charged in the complaint he conducted a retail sales used car business within Orem City and made sales subject to the sales tax imposed by the State of Utah and had not paid any Orem City license tax.

Orem City Ordinance No. 26, passed by the City Council of Orem City May 22, 1961, and duly published in the Orem-Geneva Times on June 1, 1961, a newspaper of general circulation in Orem City, was introduced in evidence by stipulation of the parties. The Defendant-Respondent moved the Court for dismissal of the complaint solely on the ground that the ordinance is invalid in imposing any tax on his used car sales business on the basis that the ordinance is unreasonable, arbitrary, and discriminatory in its application to the Defendant-Respondent's business.

The Fourth Judicial District Court of Utah in and for Utah County on date of August 3, 1964, on the grounds that the ordinance is unreasonable, arbitrary, and discriminatory granted the motion and entered an Order of Dismissal in accordance therewith.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Appellant in this appeal requests the Court for an order reversing the lower court Order of Dismissal and declare Orem City Ordinance No. 26 valid and constitutional as against the Defendant-Respondent.

STATEMENT OF FACTS

There is no record of evidence other than stipulation by the parties that the Defendant-Respondent during the

time charged in the complaint conducted a retail sales used automobile business within Orem City and made sales subject to the sales tax imposed by the State of Utah and had not paid any Orem City license tax.

Orem City Ordinance No. 26 was introduced in evidence by stipulation of parties; that section 3 of said ordinance imposed a license fee on the Defendant-Respondent of one-tenth of 1% of the gross sales of Defendant-Respondent's business. The Defendant-Respondent moved for dismissal of the complaint on the grounds that the ordinance is unreasonable, arbitrary, and discriminatory in its application to the Defendant-Respondent's business.

APPELLANT'S POINT

THE COURT ERRED IN HOLDING THAT THE ORDINANCE WAS UNREASONABLE, ARBITRARY, AND DISCRIMINATORY IN ITS APPLICATION TO DEFENDANT-RESPONDENT'S BUSINESS AS GROUNDS FOR GRANTING THE ORDER OF DISMISSAL.

ARGUMENT

POINT 1

THE COURT ERRED IN HOLDING THAT THE ORDINANCE WAS UNREASONABLE, ARBITRARY, AND DISCRIMINATORY IN ITS APPLICATION TO DEFENDANT-RESPONDENT'S BUSINESS AS GROUNDS FOR GRANTING THE ORDER OF DISMISSAL.

Orem City Ordinance No. 26 is the ordinance in question held to be unreasonable, arbitrary, and discriminatory. The ordinance was enacted by the authority given to cities

by Section 10-8-30, Utah Code Annotated 1953, and Section 10-8-80, Utah Code Annotated 1953, to tax businesses for revenue purposes, provided, however, as it is set forth in Section 10-8-80, Utah Code Annotated 1953, that "all such license fees and taxes shall be uniform in respect to the class upon which they are imposed." Orem City Ordinance No. 26 specifically states that the purpose of the ordinance is to raise revenue.

Section 3 of Orem City Ordinance No. 26 levies a tax of 1/10 of 1% of the gross sales of businesses in Orem City engaged in selling tangible personal property where such sales are subject to Utah State sales tax, with a minimum of \$6.25 per quarter-year and a maximum of \$75.00 for the same period. The Defendant-Respondent being engaged in the sale of tangible personal property consisting of used automobiles comes under Section 3 of Orem City Ordinance No. 26. The question then of whether or not the ordinance is unreasonable, arbitrary, and discriminatory is to be determined by the law as to uniformity in respect to a class upon which a tax is imposed.

The general rule of law as stated by our own Supreme Court in the case of **Slater vs. Salt Lake City, et al**, 115 Utah 476, 206 P 2d 153, is as follows:

"Discrimination is the essence of classification and does violence to the constitution only when the basis upon which it is founded is unreasonable. In fixing the limits of the class, the legislative body has a wide discretion and this court may not concern itself with the wisdom or policy of the law. Our function is to determine whether an enactment operates equally upon all persons similarly situated. If it does then the discrimination is within permissible legis-

lative limits. If it does not, then the differentiation would be without reasonable basis and the act does not meet the test of constitutionality."

The test laid down by this case is that the ordinance must operate equally upon all persons similarly situated. Here, the Defendant-Respondent is in the retail used automobile sales business. No question is raised as to whether or not other retail used automobile sales businesses are taxed on a different basis. The ordinance treats used car dealers all alike. This principle is illustrated by the case of **Bradley vs. Richmond**, 227 US 477, 57 L ed. 603, 33 SC p 318. The United States Court had before it an appeal in which the Plaintiff in error was convicted in a lower court for violation of an ordinance forbidding the carrying on of a business of a private banker without a license. The case before the court upon the claim made in the State Court stated the ordinance denied both the equal protection and due process as guaranteed by the Fourteenth Amendment. The ordinance in question required all persons desiring to pursue certain businesses and occupations to pay a special license tax for the privilege of prosecuting such business. Many pursuits were named, among them real estate agents, commission merchants, brokers, auctioneers, private bankers, etc. The persons required to pay such special license tax were divided by the Finance Committee of the City Council into thirteen classes

The Plaintiff in error, who was in the banking business, claimed that the actual operation of the ordinance brought about an unjust and illegal discrimination in that he had been classified in such a manner as to subject him and his business to a higher tax as a condition of issuing

to him a license, than that required by that of many other private bankers. The court said that some private bankers were put into classes that subjected them to less taxation than the class into which the Plaintiff in error was placed is the only allegation which would tend to show discrimination, but there was evidence tending to show that the business done by the Plaintiff in error and ten other persons or firms was that of lending money at higher rates upon salaries and household furniture, while the kind of business done by others in the same general business was the lending of money upon commercial securities. Obviously, the burden was upon the Plaintiff in error to show an illegal and capricious classification. The State Court said that he had failed to show that these private bankers favored in the classification were doing the same business. The court affirmed the judgment of the lower court.

In *Sedalia ex rel. Bauman vs. Standard Oil Company*, 66 Fed. 2d 757, 95 ALR 1514, a U. S. Court decision, the court said:

“The appellee claims the ordinance is unreasonable because it discriminates between those who may sell gasoline and haul it in containers such as are described in the ordinance and others who haul it in containers of less size, and discriminates between those who may both sell and transport gasoline as described in the ordinance within the city and others who may sell it within the city, but transport it into, out of, or through the city and between those whose whole business is the sale and transportation of gasoline and others who sell other articles than gasoline.”

The court noted that it did not appear that there were

any other vendors of gasoline who transported it in any manner.

The court then said that the presumption of the validity of an ordinance, as in the case of other laws, may not be overthrown by the suggestion of discriminations that may never be proved.

The trial court had said that the ordinance was invalid for lack of uniformity in the operation because it omitted to impose a similar tax upon those who sold gasoline but did not transport it, and upon those who transported it in containers of less capacity than five gallons.

The U. S. Circuit Court of Appeals opinion in answer to this said:

“Assuming that there may have been others who sold or transported this commodity under these circumstances, the requirement of uniformity is met if the tax falls alike on all persons who are in substantially the same situation.”

The court then cited the case of **City of St. Charles vs. Schulte**, 305 Mo. 124, 264 SW 654, and quoted from the case as follows:

“The Legislature delegated to cities of the third class, as it was competent for it to do, authority to levy and collect a license tax on the vendors of soft drinks. Under this general power so delegated to it the City of St. Charles was not bound to levy the same amount upon all vendors of soft drinks. It could, in its discretion, divide them upon any reasonable basis into classes, as, for example, the volume of business done (*City of Aurora v. McGannon* [138 Mo. 38, 39 SW 469,] *supra*), or the specific character of the drinks sold (*In re Watson* [17 S.D. 486, 97 NW 463, 2 Ann.

Cas. 321,] *supra*,) and fix a different tax for each class (1 Cooley, Tax'n 4th Ed. 353). Upon the same principle peddlers have long been classified in this state for the purpose of taxation. Section 9259, R.S. 1919 Mo. St. Ann. 13318.

There can be no doubt but that, under well-settled principles, respondent was not bound to levy and collect a license tax upon vendors of all kinds of soft drinks, if it imposed a tax upon the vendors of any. It could in its discretion have imposed a tax upon those who engaged in selling near beers, without imposing any at all upon the vendors of other soft drinks. *Carroll v. Wright*, 131 Ga. 728, 63 S.E. 260; *Coca-Cola Co. v. Skillman*, 91 Miss. 677, 44 So. 985."

The court in the *Sedalia ex rel. Bauman vs. Standard Oil Company*, 66 Fed. 2d, 757, 95 ALR 1514, then went on to say:

"On this record it is not made to appear that there was not a reasonable basis for the classification adopted. The suggestion that the classification offends also against the Fourteenth Amendment to the Constitution of the United States is sufficiently met by what was said on that subject in *Campbell Baking Co. v. City of Harrisonville, Mo.* (C.C.A.) 50 F. 2nd. 670."

The case recognizes that even on the same type of business, namely soft drinks, it may be broken down into additional classes and not violate the law as to equality of treatment. The cases of *Hays vs. Commonwealth*, 55 SW 425; *State vs. Webber*, 113 SW 1054; *People vs. Smith*, 110 NW 1102; *In re Abel*, 77 Pac. 621; *State vs. Montgomery*, 43 Atlantic 13, all sustain this view.

The Orem City ordinance doesn't go this far. To compare we would say retail sales (1st class), soft drinks (1st

subclass), volume of drinks sold (2nd subclass). The Orem ordinance stops at the first class.

In the case of *Fredericksburg vs. Sanitary Grocery Co.*, 168 Va. 57, 190 SE 318, 110 ALR 1195, there was a subclassification of grocery stores, the effect of which was to put chain stores in a separate class. The defendant raised the questions of unreasonable classification so as to amount to discrimination, and unequal protection of the law. The court refused the contentions of the Defendant and quoted from the case of *McKenney vs. City Council of Alexandria*, 147 Va. 157, 136 SE 588 as follows:

"The general rule so far as classification of business for the purpose of taxation is concerned is that trades, occupations, professions and privileges may be classified for purposes of license or occupation taxes and different licenses may be imposed upon the various classes providing the classification is reasonable, (37 C.J. P 198, par. 52), and cases cited in headnote 24 including a number of Virginia cases, General classes may be divided into particular classes and licensed or taxed."

The court in the case of *Fredericksburg vs. Sanitary Grocery Co.* 168 Va. 57, 190 SE 318, 110 ALR 1195, after stating the general rule above, stated:

"It is not the function of this court in cases like the present to consider the propriety or unjustness of the tax to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

The court in the case of **Fredericksburg vs. Sanitary Grocery Co.** 168 Va. 57, 190 SE 318, 110 ALR 1195, as stated above sustained the classification of the grocery chain store into a separate class. This case along with the case of **Bradley vs. Richmond**, 227 US 477, 57 L ed. 603, 33 SCp 318, and the case of **Sedalia ex rel. Bauman vs. Standard Oil Company**, 66 Fed. 2 d 757, 95 ALR 1514, sustain classification and subclassification far in excess of the Orem City ordinance. These cases clearly support the position of Plaintiff-Appellant.

What is meant by classification or classes is well expressed by the case of **Bradley vs. Richmond**, 227 US 477, 57 L ed. 603, 33 SCp 318, when the U.S. Court said:

“In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored.”
(Underlining supplied)

In the case of **Bueneman vs. City of Santa Barbara**, 65 Pac. 2d 785, an ordinance of the City of Santa Barbara imposed a license fee of \$200.00 yearly on laundries maintaining distribution systems in the city without having a plant in the city, while laundries with plants in the city were exempted. The ordinance was held to be discriminatory. The business is laundries. Then there is a subclassification of the business known as laundries. This is the type of situation that the court in the case of **Bradley vs. Richmond**, 227 US 477, 57 L ed. 603, 33 SCp 318, had in mind when it said:

“In order to render the classification illegal, the party assailing it must show that the business dis-

criminated against is precisely the same as that included in the class which is alleged to be favored."

Another case similar to the California case just cited is that of **City of Douglas v. South Georgia Grocery Co.**, 179 SE 768, where the city ordinance had a provision assessing an occupation tax on grocery stores in two classes; one class of grocery sales on a cash-and-carry system where all are cash sales and no deliveries outside the store; one class of grocery store on a system of cash and credit sales with deliveries outside the store. The court held the classification to be discriminatory.

The natural question is why treat these two types of grocery stores differently. It would seem here that these two businesses are precisely the same or at least very similar. The Bradley case test. See also **Park City vs. Daniels**, 149 Pac. 1094.

In the three cases last cited, the courts held the ordinances to be discriminatory, but it is to be noted that it was in connection with a sub-classification of the same type of business. In the case of **Derst Baking Co. vs. Mayor and Aldermen of City of Savannah**, 179 SE 763, the court said that you cannot divide a business into its constituent elements, parts, or incidents and levy a separate tax on each or any element, part, or incident thereof.

The Defendant-Respondent in the case now before the Court is treated the same by the Orem City ordinance as all used car businesses are treated. There is not a division of the auto business into separate parts, elements, or incidents.

It is to be noted that all the cases that come before the courts are those where the two or more classes are the

same business; laundryman vs. laundryman as to location; soft drinks vs. soft drinks as to volume and character; grocery vs. grocery as to cash or credit; gasoline sales vs. gasoline sales as to transporting and location; bankers vs. bankers as to type of security dealt with; all a particular occupation or business that is sub-classified and subclassified. The business is precisely the same or at least very similar. Countless decisions recognize the sub-classification if a distinction can be found even in the same business. Where different unrelated businesses are the ones involved in the alleged discrimination, the courts recognize and accept the classification because they are different types of businesses.

Fundamentally, the Orem City ordinance has two levys—one at the rate of \$25.00 and one at one-tenth of 1% of the gross sales. The lower court observed that any businesses that were selling tangible, personal property at retail such as an implement dealer, an appliance shop, cement plant, creamery, photography shop, or in the sale of goods made in Japan, Hong Kong, Formosa, China, or India should be taxed on the same basis as the used car dealer or else the ordinance was discriminatory; in other words, the lower court in effect held that you could not have a sub-classification of retail sales businesses even though the businesses were different kinds of businesses, and even though the retail sales part of the business in those such as an appliance shop, cement plant, and photography shop were only a part of the business, and the main part of the business involved services or processing.

The legislative body is not required to make meticulous adjustments in an effort to avoid incidental hardships (**New York Rapid Transit Co. vs. New York**, 303 US 573,

58 S.Ct. 721). Unless the license tax is shown to be arbitrary and unfair, the courts will not interfere with the action of the legislative body.

The courts generally say the tax must apply equally to all members of a given class. The problem then comes down to what is meant by a given class. We submit that a classification based on "same occupation" would fit the court understanding of a given class. The problems of nearly all the cases involve classification within the occupation.

This was the question which gave the Utah Supreme Court concern in the case of **Slater vs. Salt Lake City et al**, 115 Utah 476, 206 P2d 153. The Court spoke of unwarranted exemptions. The Court said to permit sellers of coupons redeemable in photographs or works of art to sell their wares on the streets, and in the same enactment prohibit magazine sales on the streets was preferring one class over another because it was a different item sold.

This classification goes much farther than the soft drinks case cited in the forepart of this brief. The two cases are quite different. It would be hard to say that the two items sold on the street in the case of **Slater vs. Salt Lake City et al**, 115 Utah 476, 206 P 2d 153, should be treated differently. The Court was not considering a license fee case, but equality of use of the street. The Court said unless there is some substantial difference in the classes, one class of merchants should not be permitted to use the sidewalk for private gain and another class denied the same right. Equality of treatment rather than discrimination should be the object of the ordinance.

In the case before the Court, Defendant-Respondent is in the used car business. The ordinance does not make

classes within the used car business; all used car businesses are treated alike. The ordinance is even more fair in that the Defendant-Respondent being in retail sales is treated the same as others whose business is primarily in retail sales. Actually as to his own case, Defendant-Respondent must want a breakdown of retail sales business into different classes. Then we would run into what the court had said in the case of **New York Rapid Transit Co., vs. New York**, 303 US 573, 58 S. Ct. 721, cited above. Namely, the legislative body is not required to make meticulous adjustments in effort to avoid incidental hardships, and that administrative convenience may justify classification for the purpose of taxation.

Different retail sales businesses will each have advantages and disadvantages that the other doesn't have. How to weigh them would be most difficult. If the legislative body tried to do so, it would be faced with other person's judgment as to the distinction or difference contrary to its judgment. To use the words of an eminent jurist—to write a licensing ordinance that is precisely fair and equal to each taxpayer and business is probably beyond the ability of man; hypothetically if a perfect ordinance were written today, the shifting economic activity of tomorrow might cause it to be unfair. Our legislative enactments must be more stable of construction and we must all accept in the affairs of men the mere excellence of an approach to perfection.

There is no evidence in the record as to the nature of the business of oriental goods, or as to what was considered when the framers set oriental goods out, nor is there any evidence that they were arbitrary or capricious. The

U. S. Supreme Court in the case of **Bradley vs. Richmond**, 227 US 477, 57 L ed. 603, 33 SCp 318, pointed out that the burden is on the one complaining of the classification to show it to be illegal and capricious. On its face, oriental goods shows that it is an unusual business. In a community such as ours, the volume of business would be minor. Query, what if Defendant-Respondent were to argue Indian goods are not listed, it would point out the idea of small volume or a business of such smallness as not to merit even a classification. The presumption is with the framers of the ordinance. Our society is complex and diverse so that to frame an ordinance that treats everyone exactly alike is impossible of accomplishment.

Lastly, where a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, the Court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though other construction is equally reasonable. It is presumed that the legislative body intended not to violate the constitution, but to make a valid ordinance within the scope of its constitutional powers. Every presumption must be in favor of the constitutionality of the ordinance passed by the legislative body, and to justify a court in pronouncing legislation unconstitutional the case must be so clear as to be free from doubt and the conflict of the ordinance with the constitution must be irreconcilable.

In 12 American Jurisprudence, page 214, Section 521, the law as to the constitutionality of ordinances is summarized as follows:

"In accordance with the basic rules of constitutional law underlying court review of legislation assailed as unconstitutional, in those cases in which laws are attacked as violating the equality requirements of the Federal and State Constitutions there is a presumption in favor of a legislative classification, of the reasonableness and fairness of legislative action, and of legitimate grounds of distinction if any such grounds exist on which the legislature acted. Hence, when the classification in a law is called in question, if any reasonable state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

In 12 American Jurisprudence, page 218, Section 522:

"In the determination of what classification is within the range of discretion and what is arbitrary, regard must be had to the particular subject of action, the characteristics of the class as a whole must be looked to, and the classification is entitled to be tested by the conditions which usually and ordinarily exist. That similar ordinances have been adopted and sustained in other states is an indication that the classification is reasonable."

In the exercise of the undoubted right of classification, it may often happen that some classes are subjected to regulation and some individuals are burdened with obligations which do not rest on other classes or other individuals not similarly situated, but this fact does not necessarily vitiate an ordinance because it would practically defeat legislation if it were laid down as an invariable rule that an ordinance is void if it does not bring all within its scope or subject all to the same burdens.

The legislative body is entitled to the benefit of the

presumption that it acted reasonably. It is the burden of the Defendant-Respondent, which he has not carried, to prove otherwise.

CONCLUSION

We respectfully contend that the Court erred in holding that the ordinance was unreasonable, arbitrary, and discriminatory, and request the Court for an order reversing the lower court Order of Dismissal, and declare Orem City Ordinance No. 26 valid and constitutional as against the Defendant-Respondent.

Respectfully submitted,

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