1969

Salt Lake City Corporation v. Joe Wheeler, David Boyd, and Joe Jackson : Brief of Plaintiff-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation, *Plaintiff-Appellant,*

vs.

JOE WHEELER, DAVID BOYD and JOE JACKSON, *Defendants-Respondents.*

Case No. 11855

BRIEF OF PLAINTIFF-APPELLANT

Appeal from an Order of the District Court of Salt Lake County, Utah Honorable D. Frank Wilkins, Judge

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NATURE OF THE CASE

Salt Lake City has filed this appeal seeking to have this court uphold the constitutional validity of its ordinance allowing warrantless inspection of licensed beer taverns.

DISPOSITION IN THE LOWER COURT AND PREFACE

This matter was previously heard by the Honorable D. Frank Wilkins of the Third Judicial District

Court in and for Salt Lake County. The Salt Lake City Prosecutor and defendants' attorney orally agreed to have the cases of the three defendants-respondents consolidated for hearing before the said court to determine the constitutionality of a Salt Lake City tavern-inspection ordinance, which ordinance underpinned all of their convictions in the Salt Lake City Court. Although the record is sketchy, apparently the City Prosecutor did not wish to hold the two defendants-respondents on their charge of interfering with an officer, in the discharge of his official duties, if the court held the ordinance under which the police were acting unconstitutional. Therefore, counsel stipulated orally to the facts and submitted all three cases to the District Court based on the constitutionality of Section 19-4-6, *Revised Ordinances of Salt Lake City, Utah* (1965).

The District Court held the Salt Lake City ordinance unconstitutionally vague, broad and violative of the defendants-respondents' right of privacy.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant submits that the decision of the lower court should be reversed and that the ordinance should be declared constitutional in all regards.

FACTS

The defendants, David Boyd and Joe Jackson, were arrested December 29, 1968, for an alleged viola-

tion of Section 32-1-5, *Revised Ordinances of Salt Lake City, Utah* (1965); i.e., interfering with a police officer while in the performance of his lawful duties on December 26, 1968. On this date at approximately 2:15 a.m., the Salt Lake City police officer entered the Regal Lounge for the purpose of making an inspection of premises licensed as a Class "C" beer parlor. The defendants dashed a suspected glass of liquor from the officer's hands and were subsequently arrested, tried in the Salt Lake City Court and found guilty by Judge Melvin Morris on May 15, 1969.

The defendant, Joe Wheeler, was arrested for a violation of Section 19-4-6, *Revised Ordinances of Salt Lake City, Utah* (1965), for his actions on February 27, 1969, at approximately 8:30 p.m. On this date he refused to allow Salt Lake City police officers to make an inspection of the Regal Lounge, for which offense he was tried April 24, 1969, and found guilty May 8, 1969, by City Judge Melvin Morris.

The three defendants consolidated an appeal to the Third District Court, stipulated to the general facts and submitted the case to Judge D. Frank Wilkins on the constitutionality of Salt Lake City's inspection ordinance, Section 19-4-6, *Revised Ordinances of Salt Lake City, Utah* (1965) T-2. Judge Wilkins ruled the ordinance unconstitutional by finding that it is vague, overbroad and allows searches without a showing of probable cause and without a search warrant in violation of the Fourth Amendment.

ARGUMENT

POINT I

THE QUESTIONED ORDINANCE IS DEFINITE AND CLEARLY WORDED TO GIVE NOTICE TO A PERSON OF ORDINARY INTELLIGENCE OF WHAT CONDUCT IS REQUIRED OR PROSCRIBED; THEREFORE, IT DOES NOT VIOLATE CONSTITUTIONAL STANDARDS OF DUE PROCESS OF LAW FOR AMBIGUITY, VAGUENESS OR BROADNESS.

The test for vagueness and ambiguity is clearly set forth by many court decisions; a recent expression of the law has been made as follows:

> "A statute is void for vagueness when it forbids or requires the doing of an act in terms so vague that man of common intelligence must necessarily guess at its meaning and differ as to its application." *Rollings v Shannan*, 292 F.Supp. 850, 589 (1968), quoting *Zweckler v Koota*, 389 U.S. 241, 249 (1967).

The Salt Lake City ordinance in question reads as follows:

> "The police department shall be permitted to have access to all premises licensed or applying for license under this chapter, and shall make *periodic inspections of said premises* and report its findings to the board of commissioners." Section 19-4-6, *Revised Ordinances of Salt Lake City, Utah* (1965). (Emphasis added.)

It would be difficult to draft an ordinance which made more clear the expected conduct. Clearly, under the ordinance, the police are to be given access to the licensed premises for the purpose of an inspection.

The word "premises" is of clear and definite meaning to any intelligent persons, especially as limited by the word "licensed." These terms are further limited in their scope by definition to include only those areas of the building described in the license application. See Section 19-1-4, ***Revised Ordinances of Salt Lake City, Utah*** (1965); cf. Section 32-1-3, ***Utah Code Ann.*** (1953) and Section 32-1-3, ***Utah Code Ann.*** (1953), as amended. Therefore, the "licensed premises" is only as broad as the licensee made it and is clearly not ambiguous or indefinite.

The only other word which can raise any question of ambiguity or vagueness is "inspection." It is ludicrous to assert that the type of inspection the police could make must be defined in order that the tavern owner should know what conduct is required of him under the section. The word "inspection" has definite meaning and informs the party that he must allow the police in to "see or to view." See, 21 A. ***Words & Phrases***, 462. Since the inspection is limited to the "licensed premises," it is difficult to see how a more clear expression could be made, short of a check list of inspection written for each licensed premises. This personified legislation cannot be demanded of a legislative body.

The defendants have also maintained that the ordinance is defective for overbreadth in that the time of inspection has not been outlined. It is important to note that Salt Lake City has the absolute right and power to:

> ". . . license, tax, *regulate* or *prohibit* the sale of light beer . . ." Section 37-7-9, *Utah Code Ann.* (1953), as amended.

These taverns are required to close by 1:00 a.m., except during daylight savings time, at which time they may remain open until 2:00 a.m. Section 19-3-14, *Revised Ordinance of Salt Lake City, Utah* (1965). Many infractions of the State and City laws occur after those hours; to limit the right of inspection to only business hours would make the City's right and power of regulation largely illusory. The city has merely chosen to exercise its power of regulation by requiring the right to inspect, as a condition precedent to obtaining a license, rather than absolutely prohibiting the sale of beer. This is certainly within its discretion and clearly not an overly broad exercise of its power. Further, it is an exercise of a right to which the licensee has impliedly consented by seeking a license.

Other states have similar inspection requirements and an ordinance similar to our own, but one which specifically allowed inspections at any hour, has been successfully employed by our Sister State, New Jersey. *State v Zurawski*, 88 N.J.Super.488, 215 A.2d 564 (1965). Further, the writer has been unable to find any case which has invalidated a similar ordinance for

overbreadth. If the City has the right of warrantless inspection under the State statutes, that right cannot be limited simply to business hours.

However, if this court felt that the inspection should be limited to business hours, which is in effect how it has been employed, it should read "at reasonable times" into the ordinance. The Supreme Court has repeatedly allowed state courts to judicially interpret ordinances to keep them within constitutional bounds. See *Chaplinsky v New Hampshire,* 315 U.S. 568, 569 (1942). To so interpret the ordinance would fulfill this court's duty to use every reasonable presumption to uphold the constitutionality of a validly passed piece of legislation.

One could point out improvements which could be made in most any legislative enactment, but such possible improvements do not make the legislation invalid. Legislation is presumed constitutional and every reasonable presumption should be employed to sustain its validity; only upon a showing by clear and convincing evidence is a statute to be ruled unconstitutional. 2 Sutherland, *Statutory Construction,* §4106 (3rd Ed. 1943); *Gord v Salt Lake City,* 20 Ut.2d 138, 434 P.2d 449 (1967). This expression of statutory construction is further augmented by the State expression concerning the interpretation of criminal statutes in Section 76-1-2, *Utah Code Ann.* (1953), to-wit:

> "The rule of common law that penal statutes are to be construed strictly has no application to these revised statutes. The provisions of these statutes are to be construed according to *the fair*

import of their terms with a view to effect the object of the statutes and to promote justice." (Emphasis added.)

Therefore, the court should find that the ordinance is not defectively vague, indefinite or overbroad. It is well within the understanding of an average intelligent person and within the scope of statutory authority granted to Salt Lake City.

POINT II

THE ORDINANCE REQUIRING WARRANTLESS INSPECTIONS OF LICENSED PUBLIC BEER TAVERNS ON PAIN OF LICENSE REVOCATION IS A PROPER AND CONSTITUTIONAL EXERCISE OF CITY CONTROL.

The germane issue of the case before the bar is whether or not a city may constitutionally require a beer licensee to permit police inspection of his licensed premises without a search warrant. The lower court expanded and extrapolated the holding of two Supreme Court cases and ruled the ordinance unconstitutional: the cases are: ***See v Seattle,*** 387 U.S. 541, 18 L.ed. 2d 943, and ***Municipal Court v Camara,*** 387 U.S. 523, 18 L.ed. 2d 930, 87 S.Ct. 1727 (1967). These cases are markedly distinguishable from the case before the bar and not determinative of the germane issue. This fact was clearly explained in the 1969 Second Circuit case *Colonnade Catering Corp. v. U. S.*, 410 F.2d 197.

Here the Federal Government demanded the right to inspect liquor bottles believed to be refilled and resealed in violation of 18 *U.S.C.* §3731. The proprietor of a ballroom allowed free inspection of the dance hall area but refused the inspectors admittance to a locked closet stating that he had no key and demanding that the inspectors obtain a search warrant. The inspectors refused to obtain a warrant, and, under authority of 26 *U.S.C.* 5146b and 7606a, broke down the closet door.

The Circuit Court noted that these federal laws allowed warrantless searches in liquor inspection cases and distinguished the See and Camara cases on the exceptions noted in them by Justice White. The court further held the defendants gave their implied consent to allow inspection without a warrant. In so ruling, it reversed the lower court's supression of evidence and remanded the case to trial.

Significant to the Second Circuit in the Colonnade case, supra, and language which exempts the dicta and holding of See and Camara from being determinative in the case before the bar, is the following exception to warrant procedure noted by Justice White:

> "We therefore conclude that administrative entry, without consent, *upon portions of commercial premises which are not open to the public* may only be compelled . . . within the framework of a warrant procedure. We do *not* in any way imply that the business premises may not reasonably be inspected in many more situations than private homes, nor do we question such

accepted *regulatory techniques as licensing programs which require inspection prior to operating a business or marketing a product.*" *See v Seattle*, 387 U.S. at p. 545, 546; 18 L.ed.2d 947 (Emphasis added.); cited in *Colonnade Catering Corp. v. U. S.*, 410 F.2d at p. 200.

Here the Supreme Court exempts commercial premises open to the public from its holding and, also, licensing programs which require inspection prior to operating a business. The City ordinance in question fits into both of these express exceptions. First, the licensed premises subject of this appeal is quasi public in character, in that its patrons are invitees from the public at large. Secondly, the ordinance is a regulatory one where violations are reported to the Board of City Commissioners for the purpose of license revocation. Section 19-4-7, *Revised Ordinances of Salt Lake City, Utah* (1965). Thirdly, the ordinance in question allows warrantless inspections as a condition precedent for the operation of the business or marketing the product. Section 19-4-6, *Revised Ordinances of Salt Lake City, Utah* (1965).

Cities and states have long employed this type of an inspection requirement as a legitimate method of control over businesses involved in the distribution of intoxicating beverages. All authorities seem to agree that the distribution of alcoholic beverages is a business in need of special control. As stated by the New Jersey Court in *State v Zurawski*, 88 N.J. Super. 488, 215 A.2d 564, 566 (1965):

"From the earliest history of our State, the sale of intoxicating liquor has been dealt with by the Legislature in an exceptional way. Because of its *sui generis* nature and significance, it is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other administrative agencies cannot be indiscriminately applied."

This New Jersey Court further observed that the sale of intoxicating liquor is not a privilege guaranteed by any constitutional provision, but one subject to complete prohibition and/or regulation. See, *Crawley v Christensen,* 137 U.S. 86, 11 S.Ct. 113, 34 L.ed. 620 (1890). Therefore, it denied a motion to quash evidence seized under a law almost identical to the one under attack before this court. It said, "To do otherwise would thwart the legislative policy for strict control of a business said to be 'so prone to evils.'" Other courts have almost unanimously upheld similar ordinances and declined to suppress evidence seized under them. See, *Oklahoma Alcoholic Beverage Control Board v McCulley,* 377 P.2d 568, 570 (Okl. 1962) rehearing denied; *Boynton v State,* 64 So.2d 536 (Fla. 1953); *Gilber v Bloodgood,* 188 N.W. 84 (Wis. 1922); *Wibmer v State,* 195 N.W. 936 (Wis. 1923); *Solomon v Liquor Control Commission,* 212 N.E.2d 595 (Ohio 1965), rehearing denied; *Fischer v State,* 74 A.2d 34 (Maryland 1950); *Hurlen v Department of Liquor Control,* 136 N.E.2d 736, (Ohio 1955).

It is respectfully submitted the U. S. Supreme Court had these situations in mind, as well as others

noted in the Colonnade case, when it stated its caveat concerning warrantless searches of public places and those incident to license control. Supra at p. 8.

The rationale employed by the Supreme Court in *See* and *Camara* was that of protecting those areas of privacy where the party against whom the search was directed would not likely know the limits of the inspection power or the scope of permitted search. However, the U. S. Supreme Court stated it did not wish to require warrant procedure where to do so would frustrate a legitimate government interest. *Municipal Court v Camara,* 387 U.S. at 533, 18 L.ed.2d at 938.

In Colonnade, the Circuit Court agreed with the underlying rationale of the Supreme Court and held that the refilled and resealed bottles would have been removed; to require a warrant would have been disastrous to the government interest of protecting governmental revenue. Also important to the Circuit Court was the fact that the right of search and its scope was restricted by statute; thus, individual rights were protected. It was further noted that the liquor industry is a heavily regulated business and the court took judicial knowledge that, as such, the individuals charged knew the regulations affecting them and the scope of the inspectors' limited power; therefore, the warrantless search was reasonable and, further, since the proprietors chose to operate knowing of the government's inspection privilege, they were deemed to have impliedly consented to the warrantless search. The court said,

"The situation is substantially the same as if the dealer had knowingly entered into a contract waiving his right to privacy in those areas where he keeps and sells alcoholic beverages. Such a waiver with respect to subject matter in which the public has a special interest would be enforceable." *Colonnade Catering Corp. v U. S.*, 410 F.2d at p. 203.

For these reasons, the Second Circuit rightly distinguished See and Camara and upheld the warrantless search.

In the case before the bar, the above arguments are even more persuasive in favor of the City ordinance. Here the inspection is:

(a) Limited by ordinance to the "licensed premises"; i.e., that area described to the City in the licensee's application. Section 19-4-6, ***Revised Ordinances of Salt Lake City, Utah*** (1965).

(b) The area to be inspected is quasi public in that patrons for the tavern are openly solicited from the general public.

(c) The licensee applied for a license knowing of the City ordinance requiring inspections of the premises.

(d) The licensee is in the business of dispensing alcoholic beveraegs, a business subject to strict legislative control because it is "so prone to evils." ***State v*** *Zurawski*, 88 N.J. Super. 488, 215 A.2d 564 (1965).

(e) The governmental purpose of control and regulating the licensee would be completely frustrated

by requiring a warrant before inspection; this is especially true since a demand for inspection must ordinarily be made before a warrant may issue. *Municipal Court v Camara,* 387 U.S. at p. 539, 540; 18 L.ed.2d 941.

(f) The ordinance is not one of criminal search but regulatory in nature with the sanctions of license revocation for infractions. Section 19-4-7, *Revised Ordinances of Salt Lake City, Utah* (1965).

(g) This case is not a search of a private residence. *U. S. v Frisch,* 140 F.2d 660 (5th Cir. 1944).

(h) It is not a case to suppress evidence stemming from a search of private pockets or personal clothing. *Finn Liquor Shop, Inc., v State Liquor Authority,* 24 N.Y.2d 643, 249 N.E.2d 40 (1969).

There are many areas where warrantless search is not questioned. cf.: Border searches of one's baggage on entry into the U. S., 19 *U.S.C.* §1467, 1496, 1582; coal mine inspections, 30 *U.S.C.* §451-454; airport buildings, land and equipment inspections by C.A.B. 49 *U.S.C.* §1377; See also other examples noted in *Colonnade Catering Corp. v U. S.,* 410 F.2d at p. 204. The ordinance in dispute fits into the reasoning and purpose which allows warrantless inspections in these areas. This court should follow the well-reasoned opinion of the Second Circuit Court of Appeals, distinguish the See and Camara case, as expressly intended by Justice

White, and find the ordinance a valid exercise of the City police power of regulation over taverns.

CONCLUSION

Utah municipal corporations have the absolute right to either prohibit the sale of beer or control, license and regulate the businesses that sell it. Since the sale of beer is a privilege, the City may require, as a condition precedent to obtaining a license, the right to inspect the licensed premises, Further, it has part of its regulatory and police power the right to inspect the premises to find violations which may be grounds for license revocation.

Salt Lake City has drafted such an ordinance, which demands that licensed beer parlors allow warrantless inspections, in harmony with the statutory authority delegated by the State to it. The ordinance is clear to any reasonably intelligent person and requires the licensee to allow the police to inspect the licensed premises. It is clear and unambiguous in intent, meaning and scope; it is clearly not constitutionally vague, indefinite or overly broad.

This ordinance requires licensess to allow inspection of only "public" beer parlors; that is, those who openly solicit patrons from the general public for the purpose of selling alcoholic beverages. Traditionally there has been no question concerning this type of ordinance's validity in so far as the right of privacy and search and seizure warrants are concerned. Recent

Supreme Court decisions acknowledge this area as an exception to its expanded concept of warrant procedure, and since it would frustrate a legitimate governmental interest to require a search warrant, the warrantless inspection is constitutional. Further, the tavern, the licensees, consented to the warrantless inspection by seeking a license; thus, the ordinance and the inspections under it are valid.

Dated this 24th day of December, 1969.

Respectfully submitted,

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