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Scott v. First Jud. Dist. Ct., 131 Nev. Adv. Op. 101 (Dec. 31, 2015)

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Scott v. First Jud. Dist. Ct., 131 Nev. Adv. Op. 101 (Dec. 31, 2015)[1]

CONSTITUTIONAL LAW: STATUTE OVERBROAD AND VAGUE

Summary

The Court determined that Carson City Municipal Code ("CCMC") 8.04.050(1) is (1) unconstitutionally overbroad because it "is not narrowly tailored to prohibit only disorderly conduct or fighting words"[2] and (2) vague because it lacked sufficient guidelines and gave the police too much discretion in its enforcement.

Background

A Carson City sheriff's deputy pulled over a vehicle for running a stop sign at approximately 4:15 a.m. The vehicle had three occupants. The deputy began to question the driver and smelled alcohol coming from the vehicle. Before the driver answered, petitioner William Scott ("Scott"), who was a passenger in the vehicle interrupted the deputy. The deputy continued to question the driver when Scott interrupted him a second time and told the driver not to do anything the deputy said. After this second interruption, the deputy threatened Scott with arrest "for obstructing and delaying a peace officer" if he did not remain quiet. Scott again interrupted the deputy for a third time, which resulted in the deputy arresting Scott.

The State charged Scott with obstructing a public officer in violation of CCMC 8.04.050. Scott was convicted after a bench trial. Scott appealed his conviction to the district court arguing that CCMC 8.04.050(1) is unconstitutionally overbroad and vague because it restricts constitutional speech. The district court affirmed the conviction, concluding that CCMC 8.04.050 is constitutional because the deputy did not arrest Scott for his speech but for rather for his conduct.

Discussion

CCMC 8.04.050(1) is unconstitutionally overbroad

The municipal code at issue, CCMC 8.04.050, states:

> 1. It is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest any city officer or member of the sheriffs office or fire department of Carson City in the discharge of his official duties.

A statute is overbroad when it has a seemingly legitimate purpose but is worded so broadly that it also applies to protected speech.[3] The Court compared two United States Supreme Court cases that considered a statute similar to CCMC 8.04.050(1). The cases were *Colten v.*

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[1] By Adrian S. Viesca.
[2] City of Hous. v. Hill, 482 U.S. 451, 465 (1987).
[3] N. Nev. Co. v. Menicucci, 96 Nev. 533, 536, 611 P.2d 1068, 1069 (1980).

Kentucky, 407 U.S. 104 (1972) and *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987). The Court found *Hill* to more closely align with the statute at issue.

In *Hill*, the court found that the ordinance was facially invalid for two reasons.[4] First, the ordinance did not deal "with core criminal conduct, but with speech"[5] because it prohibited "verbal interruption of police officers."[6] Second, the statute was not limited to "fighting words" and instead criminalized all speech that interrupted a police officer.[7]

Here, like the statute in *Hill,* CCMC 8.04.050(1) prohibits any conduct that may "hinder, obstruct, resist, delay, [or] molest" a police officer, regardless of intent. The Court was not persuaded by the State's argument that Scott was arrested for his conduct rather than his speech. The same "verbal interruptions" that occurred in *Hill* also occurred here. Furthermore, CCMC 8.04.050(1) makes it unlawful to even "threaten" a police officer. Criminalizing mere threats further implicates speech as opposed to conduct.

Moreover, like the statute in *Hill*, CCMC 8.04.050(1) prohibits all speech that "hinder[s], obstruct[s], resist[s], delay[s], [or] molest[s]" a police officer. The court found that it was not "fighting words" when Scott told the that he was not required to cooperate with the deputy. Therefore, the Court concluded that the statute was unconstitutionally overbroad on its face.

CCMC 8.04.050(1) is unconstitutionally vague

Scott next argued that CCMC 8.04.050(1) is unconstitutionally vague because (1) ordinary people cannot tell what conduct or speech is prohibited and (2) its lack of guidelines allows the sheriff to enforce it in an arbitrary and discriminatory matter.

A criminal statute can be invalidated for vagueness if "(1) it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[8] Although the two prongs are similar, "[t]he first prong is concerned with guiding those who may be subject to potentially vague statutes, while the second—and more important—prong is concerned with guiding the enforcers of statutes."[9] Additionally, "[a] statute containing a criminal penalty is facially vague when vagueness permeates the text of the statute."[10]

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[4] *Hill*, 482 U.S. at 467.
[5] *Id.* at 460.
[6] *Id.* at 461.
[7] *Id.* at 462.
[8] State v. Castaneda, 126 Nev. 478, 481–82, 245 P.3d 550, 553 (2010) (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 18 (2010)).
[9] Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006).
[10] Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 507, 217 P.3d 546, 550 (2009) (recognizing that while the two-factor test for vagueness challenges applies to both civil and criminal statutes, criminal statutes are held to a higher standard).

CCMC 8.04.050(1) authorizes arbitrary and discriminatory enforcement

The Court concluded that CCMC 8.04.050(1) is unconstitutionally vague under the second prong—arbitrary and discriminatory enforcement. CCMC 8.04.050(1) lacks "specific standards" and allows sheriff's deputies to enforce the law in an arbitrary and discriminatory fashion.[11] Specifically, the court found that the municipal code is worded so broadly that sheriff's deputes have "unfettered discretion to arrest individuals for words or conduct that annoy or offend them."[12] The Court gave an example how a pedestrian could be arrested for hindering or delaying a sheriff's deputy by asking the deputy for directions while the deputy is directing traffic.

The Court concluded that vagueness permeated the text of CCMC 8.04.040(1) because the deputy has full discretion to determine what conduct violates the ordinance and at what point that conduct—including speech—reaches a level that "hinder[s], obstruct[s], resist[s], delay[s], or molest[s]" him or her in the discharge of their duties. Moreover, the prohibitions found in CCMC 8.04.050(1) are violated daily yet only some individuals are arrested.

The Court was not persuaded by the dissents reading of CCMC 8.04.050(1) to have "a core of constitutionally unprotected expression to which it might be limited," unlike the ordinance in *Hill*.[13] Further, despite the State's argument to the contrary, it is of no consequence that an adjudicative body can determine after the fact whether CCMC 8.04.050(1) was applied in an arbitrary or discriminatory fashion.[14] Therefore, the court concluded that CCMC 8.04.050(1) is unconstitutionally vague because it lacks sufficient guidelines and gives the sheriff too much discretion in its enforcement.[15]

Conclusion

CCMC 8.04.050(1) is unconstitutionally overbroad because it "is not narrowly tailored to prohibit only disorderly conduct or fighting words."[16] It is also unconstitutionally vague because it lacks sufficient guidelines and gives the sheriff too much discretion in its enforcement. The Court remanded the case to the district court with instructions to enter an order reversing Scott's conviction in part on the grounds that CCMC 8.04.050(1) is unconstitutional on its face and to determine whether Scott may properly be charged under the remainder of CCMC 8.04.050.

Dissent

CCMC 8.04.050(1) should be narrowly construed

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[11] *Silvar*, 122 Nev. at 293, 129 P.3d at 685.
[12] City of Hous. v. Hill, 482 U.S. 451, 465 (1987).
[13] *Id.* at 468.
[14] *See Hill*, 482 U.S. at 465–66.
[15] The Court did not address whether the ordinance failed the first prong of the test, whether a person of ordinary intelligence fair notice of what is prohibited because in *Castaneda*, a statute is unconstitutionally vague if it failed either prong of the vagueness test.
[16] *Hill*, 482 U.S. at 465.

The dissent concedes that CCMC 8.04.050(1) may be ambiguous but that the majority's decision ignores reasonable constitutional constructions rules that would resolve the overbreadth and vagueness claims. Moreover, by invalidating the ordinance, the dissent argues that analogous laws around the state are also unconstitutional. Before a law can be found unconstitutionally vague, "every reasonable construction must be resorted to, in order to save [the ordinance] from unconstitutionality."[17]

Here, there are two reasonable constructions that make CCMC 8.04.050(1) constitutional: (1) interpret it as applying only when physical conduct or fighting words interfere with an officer's job duties and (2) require an intent to interfere with an officer. This would substantially narrow and clarify the ordinance's meaning.

First, interpreting CCMC 8.04.050(1) to include core criminal conduct—physical assaults or fighting words—is consistent with the United States Supreme Court's decision in *Hill*. A reasonable reading of the words "hinder, obstruct, resist, delay, [or] molest" found in CCMC 8.04.050(1) can include physical conduct or fighting words. Additionally, the canon of construction *noscitur a sociis* ("it is known by its associates") should be considered[18] as it is entirely reasonable to construe the five verbs as only applying where there is core criminal conduct—physical interference with an officer or spoken fighting words.

Second, the dissenting justices in *Hill* determined that the ordinance at issue did not have a mens rea term but that a Texas statute required all criminal laws to mandate some form of culpability.[19] Similarly, here, CCMC 8.04.050(1) also lacks a mens rea term. Additionally, Nevada, like Texas, requires that "[i]n every crime or public offense there must exist a union, or joint operation of act and intention."[20] The dissent argues that the Court should construe CCMC 8.04.050(1) pursuant to NRS 193.190 and conclude that "[i]t is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest," only if the person commits a physical act or speaks fighting words, and has an intent to interfere with an officer's duties.

Therefore, constructing the statute in this way would resolve the overbreadth and vagueness claims because the ordinance would only come into operation when the right to expression "is 'minuscule' compared to" the public's interest in a functioning police force.[21] Furthermore, this construction would narrow the application of CCMC 8.04.050(1) to those acts that are proven to violate NRS 193.190.

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[17] State v. Castaneda, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotations omitted); *see also* Panama Ref. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("[W]hen a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserve to the meaning that destroys."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 66 (2012) ("An interpretation that validates outweighs one that invalidates . . . .").

[18] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012).

[19] *Hill* 482 U.S. at 473–74 (Powell, J., concurring in part and dissenting in part).

[20] NEV. REV. STAT. 193.190.

[21] Colten v. Kentucky, 407 U.S. 104, 111 (1972).