

POLICE CLAIM AUTHORITY TO BAN GAMBLER FROM PARK INDEFINITELY

James C. Kozlowski, J.D., Ph.D.

© 2005 James C. Kozlowski

To pass constitutional muster under the Due Process Clause, a criminal statute or ordinance must provide police with sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. Moreover, the criminal statute or ordinance must be sufficiently definite to provide adequate notice of the prohibited conduct.

In the case of *Travis v. State*, No. 34A05-0402-CR-98, 2004 Ind. App. LEXIS 1467, Stephen L. Travis appealed his conviction for criminal trespass in a public park. The facts of the case were as follows:

On September 2, 2002, Kokomo Police Officer Greg Baldini encountered Travis and other individuals in Studebaker Park "playing dice and gambling." After Travis started "to run his mouth," Officer Baldini "put him on trespass for Studebaker Park" and told him "not to come back." He also told Travis that if he returned to the park, he would be arrested for trespass. The officer then entered in the police record system that he had warned Travis for trespassing on that date.

Two days later, Officer Larkin Fourkiller, along with another officer, was patrolling Studebaker Park when he observed Travis sitting on a park bench. Officer Fourkiller checked with the dispatch and confirmed that Officer Baldini had warned Travis "for trespass" on September 2. After Travis identified himself, Officer Fourkiller arrested him for criminal trespass.

When asked to explain what placing someone "on trespass" meant, Officer Baldini testified as follows:

I do a report[;] obviously I notify him that at that time that he's put on trespass [and] not to come back. I do a report and it goes through our record system and then it goes to dispatch, a copy is faxed to dispatch . . . and then they enter it into the computer that he's warned for trespass on that date. We interpret "on trespass" to mean placing a person on a trespass list.

At Travis' trial on the charge of criminal trespass, the trial court asked Officer Baldini "what authority he had to place a citizen on the trespass list for a public park." In response, Baldini provided the following testimony:

I guess I don't know what, if there's an agreement or we've been given authority to put people on trespass in public parks and the public housing and I don't know if that's, I couldn't answer on how actually that transpires to be honest with you. I just know we can do it.

After conceding the fact that Officer Fourkiller had discovered Travis in Studebaker Park on September 4, 2002, Travis' lawyer argued that "Officer Baldini lacked authority to place Travis, or any citizen, on a trespass list for a public park." The trial court found that Travis' had raised a "very valid point":

[W]hen you were arrested for trespass you were not performing any illegal activity in the park... [I]f you were committing illegal activity... a city police officer would have the ability to cite you for trespass...
[W]hen you're not performing any illegal activity then the statute would be overly broad and unconstitutionally vague.

Even though the trial court acknowledged that Travis was not engaging in an illegal act at the time of his arrest for criminal trespass, the trial judge nonetheless found that "city police officers should have the ability to place individuals on trespass who are misusing or committing activities on public property." Accordingly, the trial judge found Travis guilty of criminal trespass and sentenced him to one year of informal probation. Travis appealed.

LEGAL BASIS FOR "TRESPASS LIST"?

On appeal, Travis asserted that "the State presented insufficient evidence as a matter of law to sustain his conviction" because "Officer Baldini lacked authority to place him on a trespass list and ban him from Studebaker Park."

As noted by the appeals court, "the Due Process Clause of the Fourteenth Amendment requires that a defendant be convicted by proof of guilt beyond a reasonable doubt." Accordingly, the appeals court had to "make certain that the proof at trial was, in fact, sufficient to support the judgment beyond a reasonable doubt." Specifically, the appeals court would "sustain a conviction only when each material element of the charge is supported by evidence in the record from which a rational trier of fact could have found guilt beyond a reasonable doubt."

As cited by the appeals court, the applicable definition of "criminal trespass" under state law was as follows:

A person who, not having a contractual interest in the property, knowingly or intentionally enters the real property of another person after having been denied entry by the other person or that person's agent, commits criminal trespass, a Class A misdemeanor. Ind. Code § 35-43-2-2(a)(1)

On appeal, Travis conceded that he did "not have a contractual interest in Studebaker Park" and he "knowingly entered the park on September 4 after Officer Baldini, an agent of the City of Kokomo, had told him not to return." Travis, however, reiterated his contention that "Officer Baldini lacked authority to place him on a trespass list and ban

him from the park.” Absent any legal authority to ban him from the park, Travis maintained that he had “lawfully entered the park on September 4.” Under such circumstances, Travis argued that “the State did not prove an essential element of criminal trespass, namely, that he entered the park after having been denied entry by the park or its agent.” The appeals court agreed with Travis.

In reviewing the pertinent section of the state code which “sets forth the powers and duties of police officers” (Indiana Code Section 36-8-3-6), the appeals court found this particular “statute does not authorize police officers to place persons on a trespass list or ban persons from a public park.” Moreover, the appeals court noted that “the State directs us to no statute, and our research reveals none, which authorizes a police officer to take such action.”

As cited by the appeals court, “the relevant provisions of the City of Kokomo Municipal Code” prohibited gambling, i.e. “No person shall engage in any game of chance or in the use of any gambling device nor shall any person tell fortunes for pecuniary reward.” Further, the municipal code provided the following section authorizing “Persons acting unlawfully to be removed from park”:

No person shall remain within the park who does not abide by conditions adopted and posted by the Board for the preservation of good order and the protection of property within the park, and no person shall remain in . . . the park who does not abide by the instructions and directions of duly authorized park rangers, employees, or agents of the Board, in the lawful performance of their duties. Any person directed by a park ranger, employee, or agent of the Board to leave the parks, shall do so promptly and peaceably.

Moreover, under the municipal code, the appeals court found that that “a police officer is authorized to order a person to leave a city park when that person does not abide by park rules.” Specifically, the municipal code provided that “No person shall fail or refuse to comply with any other order lawfully given by any park personnel or law enforcement officer acting under the authority of the Board.” Further, the appeals court found that state law authorized a police officer to arrest a person who “commits a crime in a public park, as opposed to violating a park rule.”

Despite such authority to order a person to leave a park for violating park rules and arresting a person who commits a crime in a public park, the appeals court found no provision in state law or the municipal code which would “authorize a police officer to place a person on a trespass list or to ban someone from a park indefinitely.”

On appeal, the State argued that “the trespass statute by its provisions reflects that its prohibitions are permanent in nature.” Specifically, the State claimed the statutory definition of “criminal trespass” necessarily made permanent any oral or written denial of entry. Applying this reasoning to the facts of the case, the State maintained that Officer

FEBRUARY 2005 LAW REVIEW

Baldini's telling Travis to leave the park and not to return effected a permanent denial of entry.

In the opinion of the appeals court, the State could have established "all the elements of criminal trespass under [state law] Indiana Code Section 35-43-2-2(a)(1)... [i]f this case had involved a private property owner who had told Travis to leave his property and Travis had returned two days later." While a private property owner could ban a person from his property permanently, the appeals court noted "the powers of police officers [to ban a person from public property] are limited by statute."

Under the circumstances of this particular case, the appeals court reiterated its concern that no statute expressly authorized a police officer to prohibit a citizen from visiting a public park. Accordingly, the appeals court rejected the State's interpretation of the trespass statute because it "would confer powers on Officer Baldini beyond those expressly granted by statute."

In reviewing the facts of the case, the appeals court found Officer Baldini had "acted within his authority on September 2 when he told Travis to leave the park because he was gambling." Furthermore, the appeals court found the officer could have arrested Travis for criminal trespass had he refused to leave the park when told to do so.

In contrast to the situation on September 2, the appeals court found no legal basis for the criminal trespass arrest after "Travis legally entered the park on September 4." Specifically, in the absence of a statute or ordinance expressly authorizing police officers to prohibit a citizen from visiting a public park, the appeals court found "Kokomo police officers lack authority to place citizens on a trespass list or to ban citizens from the park indefinitely."

[T]he undisputed facts show that when Officer Fourkiller encountered Travis that day, Travis was sitting on a park bench and was not engaged in any illegal activity. Absent some illegal act on Travis' part, Officer Fourkiller had no legal grounds to arrest him. We conclude that the State failed to prove beyond a reasonable doubt that Travis entered the park after having been denied entry by the park or its agent, which is an essential element of criminal trespass. We can affirm a conviction only when each material element is supported by evidence from which the trier of fact could have found guilt beyond reasonable doubt. There was no factual or legal basis for Travis' arrest.

As a result, the appeals court reversed the conviction of the trial court which had found Travis guilty of criminal trespass.