

UNWRITTEN PARK TRESPASS POLICY UNCONSTITUTIONAL

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In the case of *Anthony v. State*, No. 06-05-00133-CR. (Tex.App. 6th Dist. 2006), plaintiff Lamar Anthony, Jr. was convicted of criminal trespass in a city park. The City of Henderson, Texas had an unwritten policy delegating the authority and discretion to its police officers to ban persons from public parks.

FACTS OF THE CASE

After receiving information that a suspect wanted on felony drug charges, was "in a vehicle that was inside Yates Park," several members of the Henderson Police Department were dispatched to that location. Apparently, at about the same time, Anthony rode with his cousin, Chris Hill, to Yates Park where they intended to play basketball. Officer Amber Tyson detained Hill's vehicle in the parking lot of the park.

Police Sergeant Bryan Pool testified that, when he arrived at the scene, Anthony was engaged in a conversation with Tyson and was "being a little loud" and did not appear to be willing to cooperate. According to Pool, Anthony was making a statement, such as "ya'll are always coming down here in our park harassing us and picking on us. Why can't ya'll just leave us the f**k alone and go to Lake Forest Park and do something over there."

Pool testified he turned toward Anthony and explained to him, "look, this is a city park. I am a representative of the City. Therefore, I have a right to say who comes in this park and who doesn't come in this park." Pool further testified that, because of his past experience with Anthony, he did not believe Anthony respected authority or understood what he had just said, so he told him: "You get your ass out of this park and you don't come back. If you do, I will take you to jail."

Pool testified that, when a person receives what the City describes as a "criminal trespass warning," there is no set time limit for that warning to expire, and it is effective "from now on." Approximately ten to fifteen minutes after Anthony's initial confrontation with Pool, the police department received an anonymous call that the drug suspect was possibly in a truck that was in Yates Park. Police officers were again dispatched to the park.

When Pool arrived in response to the second call, he observed Anthony standing in the entrance to the parking lot of Yates Park. Making good on his earlier promise, Pool then arrested Anthony for failing to heed Pool's earlier directive that Anthony stay out of the park and not come back. It was uncontested that Anthony was at the park during the park's regular hours of operation.

It was the City's unwritten policy to delegate authority to individual officers to issue "criminal trespass" warnings, banning individuals from the park. The City had no written criteria to guide police officers in exercising their authority to issue such warnings. Accordingly, it was left to the discretion of the individual police officer to determine who was banned from a park on a case

by case basis. The City manager, however, stated that he would overrule and officer's decision "if it was brought to his attention that an officer was being arbitrary or capricious." When asked whether this appeal procedure was in writing, the City manager testified "[n]ot to my knowledge." Moreover, the City manager testified that he had never had anyone "appeal" a warning.

Anthony was charged with criminal trespass, a misdemeanor offense. After the jury found Anthony guilty, the trial court assessed punishment at ten days' confinement in the county jail. Anthony appealed.

DUE PROCESS VIOLATION?

On appeal, Anthony contended that "the trespass policy of Henderson, on its face, violates the Due Process Clause of the United States Constitution." As cited by the appeals court, the Due Process Clause of the United States Constitution provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." Further, the appeals court noted that a statute or regulation is presumed to be constitutional. Accordingly, "a party challenging a statute on the basis that the statute violates the Due Process Clause of the Fourteenth Amendment bears the burden of demonstrating the statute's unconstitutionality."

In addressing Anthony's due process challenge to the City's trespass policy, the appeals court would first consider "whether Anthony had a protected liberty or property interest in Yates Park," i.e. substantive due process. Secondly, the court would consider whether the unwritten policy violated procedural due process.

SUBSTANTIVE DUE PROCESS

As described by the court, a "substantive due-process analysis" would consider the following: "(1) whether the plaintiff had a protected liberty interest, and (2) if the government deprived him or her of that interest capriciously and arbitrarily."

Anthony had argued that he had "both a liberty and property interest in Yates Park." Specifically, Anthony contended that the City's "unwritten policy deprives him of his constitutional rights of free speech, freedom of association, and right to travel." In addition, Anthony contended that "the freedom to loiter or associate for innocent purposes is part of the liberty protected by the Due Process Clause."

The appeals court agreed with Anthony that he "clearly had a liberty interest in the park." In so doing, the court noted that "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty" subject to constitutional protection under the Due Process Clause.

According to the court, Anthony had argued further that the liberty interest denied by the City's policy constituted a "fundamental right." If indeed a fundamental right was at issue, the court noted that "[d]enial of a fundamental right would require a compelling governmental interest" to satisfy the requirement of substantive due process.

If a fundamental right is involved, the State must show a compelling interest. Substantive due process forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest...

[M]erely having a liberty or property interest guaranteed by the Constitution is not equivalent to having a fundamental right. Not all rights secured by the Federal Constitution are fundamental rights but, only those which lie at the heart of the relationship between the individual and republican form of nationally integrated government."

Despite Anthony's contention to the contrary, the appeals court, however, determined that Anthony's "liberty interest in the park" was not a "fundamental right." Accordingly, in the absence of a fundamental right, the appeals court found "substantive due process merely requires a rational relationship between the regulation and the right being destroyed."

The test of whether a regulation which does not affect a fundamental right violates substantive due process is whether the government was acting in pursuit of permissible state objectives and, if so, whether the means adopted were reasonably related to accomplishment of these objectives.

Applying these principles to the facts of the case, the appeals court concluded that "[m]aintenance of order in a public park is a legitimate state objective, and there is a rational relationship between a policy allowing exclusion from the park of individuals who breach the peace and the maintenance of order in a public park." As a result, the appeals court held that the City's policy in this particular instance "does not violate substantive due process."

VAGUENESS DOCTRINE

As noted by the appeals court, the "vagueness doctrine" is also included in due process protection. Specifically, an unconstitutional denial of due process will result "where inherently vague statutory language permits selective law enforcement." Accordingly, to satisfy constitutional due-process requirements, "the statute or regulation must provide adequate notice of the required or prohibited conduct."

Although the regulation must give fair warning—in light of common understanding and practices—of the prohibited conduct, the regulation is not required to be mathematically precise. The regulation, though, must be defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement.

In this particular case, Anthony claimed the unwritten policy was inherently vague and the "vague statutory language permits selective law enforcement." The appeals court agreed. In so doing, the court noted in particular that the "unwritten policy at issue here is not premised on a violation of specific park rules."

The policy delegates complete discretion to the police officer, and there are no guidelines for the exercising of that discretion. A reasonable person would not have fair warning of what conduct would violate that regulation. Not only are the policy's prohibitions not clearly defined, the policy presents substantial risk of arbitrary and discriminatory enforcement. While there is no evidence Pool used this policy in a discriminatory manner, the policy presents significant risk it could be used in such a manner.

As a result, the appeals court held the “unwritten policy is unconstitutionally vague.”

PROCEDURAL DUE PROCESS

On appeal, Anthony had also contended that “the unwritten policy violates his right to procedural due process” because it allowed “police officers to exercise unfettered discretion to ban persons from public property intended for use by the general public.”

In response, the City claimed the court should presume the City had properly delegated authority to police officers, in the absence of evidence to the contrary, because “officers are expected to exercise that discretion within the bounds of their duties under the Texas Code of Criminal Procedure.” The appeals court rejected this argument. According to the court, a police officer's exercise of duties and powers... must be pursuant to policies and procedures that do not violate the due process of law.” And, at a bare minimum, the appeals court found procedural due process “requires a person who may be deprived of a liberty or property interest to be provided notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”

The appeals court also concluded that the City’s unwritten policy was “procedurally deficient and denies due process” because it included “no guidelines to the police officer in exercising his or her discretion to ban a person from the park.” In addition, the court found the unwritten policy violated procedural due process because “it contains no guidelines or procedures for the ‘appeal’ process.”

[U]nder the unwritten policy, the decision to exclude a person from the park is made before the person has a chance to present any evidence in his or her favor and without any evidence being presented against him or her. Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules. Further, due process ordinarily includes the right to confront witnesses. Most important, due process requires a neutral and detached hearing body or officer.

The City had contended that that “the appeal process satisfies any possible due process concerns.” Moreover, the City maintained that Anthony's due-process rights were not violated because he was arrested less than fifteen minutes after receiving the warning. The appeals court, however, found the City's appeal process is not adequate because “the decision has already been made without the ability to present evidence for or against the deprivation.”

Anthony was not informed of the appeal procedure. While Pool did not explicitly state his decision was final, his statements left an impression of finality. Pool, himself, testified he viewed the decision as effective from that point on. Last, there are no procedures in the appeal process for the presentation of evidence for or against a violation.

As result, the appeals court concluded that “the City's unwritten policy does not meet the requirements of procedural due process.”

The unwritten policy fails to provide an opportunity to be heard at a meaningful time and in a meaningful manner. The policy does not provide for a hearing or a neutral magistrate. Under the unwritten policy, a person is deprived of his or her property or liberty without evidence having been offered against him or her or the opportunity to present evidence on his or her own behalf.

CONCLUSION

While noting that “there is no evidence Pool intended to exercise his discretion in an oppressive manner,” the appeals court concluded that “the unwritten policy contains insufficient checks to prevent such discretion from being exercised in an oppressive manner.” As a result, the appeals court held that “the unwritten policy relied on by Pool is unconstitutional,” and, thus, “Pool lacked authority to ban Anthony from Yates Park under such policy.”

Although the City's unwritten policy does not violate substantive due process, the policy clearly violates procedural due process and is unconstitutionally vague. Because the unwritten policy of the City of Henderson gives police officers unfettered discretion to determine who should be excluded from Yates Park and fails to provide for any hearing, the policy, on its face, violates procedural due process. Further, the unwritten policy is unconstitutionally vague since the policy fails to give adequate notice of what conduct is prohibited.

Having found the evidence “legally insufficient to support a conviction for criminal trespass,” the appeals court reversed the judgment of conviction and rendered a judgment of acquittal for Anthony.