

NEUTRAL PARK CURFEW ORDINANCE CONSTITUTIONAL

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The case of *City of Cleveland v. McArdle*, 2014-Ohio-2140; 2014 Ohio LEXIS 1220 (May 28, 2014) described herein is the most recent decision in of a long line of court opinions arising from the Occupy Wall Street Movement. The Occupy Wall Street Movement began in New York City when hundreds of demonstrators occupied Zucotti Park from September to November 2011 to protest income disparity. Wide media coverage of the event in New York City inspired similar “Occupy” groups and demonstrations in many cities across the United States, including Cleveland. Like Zucotti Park in New York City, many of these long term demonstrations occurred in public parks governed by municipal ordinances specifying hours of operation and nighttime curfews. Individuals occupying or congregating in these public parks during prohibited hours would be potentially subject to charges of criminal trespass and arrest.

In this particular case, similar to many of the earlier “Occupy” court opinions, the Supreme Court of Ohio applied well settled principles of constitutional law to determine whether Cleveland’s Codified Ordinance 559.541 violated the free speech and assembly rights of the protesters. This particular city ordinance prohibited “any person from remaining in the Public Square area of downtown Cleveland between 10:00 p.m. and 5:00 a.m. without a permit issued by the Cleveland Department of Parks, Recreation, and Properties.”

OCCUPY ELSEWHERE

Around 10:00 p.m. on October 21, 2011, a group known as Occupy Cleveland engaged in a demonstration in the Public Square area of Cleveland. Police officers notified the group that they needed to leave the area because of the city's curfew. Several protesters, including Erin McCardle and Leatrice Tolls ("the protestors"), remained. McCardle was arrested and charged with criminal trespass, resisting arrest, and a curfew violation, under several Cleveland ordinances, including 559.541. Tolls was also arrested and charged with criminal trespass and a curfew violation. Each defendant moved to dismiss the charges, contending that the city's ordinance 559.541 establishing a curfew in the Public Square was unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

After a hearing, the Cleveland Municipal Court denied each defendant's motion to dismiss. The court of appeals, however, reversed the municipal court's judgment and remanded the cases. In so doing, the appeals court held the Cleveland ordinance violated the protestors' First Amendment rights to free speech and assembly. In the opinion of the appeals court the ordinance was content neutral, but Cleveland's interests were insufficient to justify its limit on speech and the ordinance was not narrowly tailored. As a result, the appeals court concluded that the ordinance was void on its face. (In other words, the ordinance was unconstitutional and thus void across the board, not just as it was being applied to a particular situation.) The state supreme court subsequently accepted Cleveland’s appeal to address the following question of law:

It is constitutionally permissible for a municipality to enforce a content-neutral time, place and manner restriction such as Cleveland Codified Ordinance

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559.541, where the ordinance is narrowly-tailored to advance a significant government interest that leaves open alternative channels of communication.

THE ORDINANCE

As cited by the state supreme court, Cleveland Codified Ordinance 559.541 entitled "Prohibited Hours in Public Square," which became effective on August 16, 2007, provided as follows:

No unauthorized person shall remain on or in any portion of the area known as the Public Square area between the hours of 10:00 p.m. to 5:00 a.m. Persons may be authorized to remain in Public Square by obtaining a permit from the Director of Parks, Recreation and Properties. Such permits shall be issued when the Director finds:

- (a) That the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare and safety;
- (b) That the proposed activity or use is not reasonably anticipated to incite violence, crime or disorderly conduct;
- (c) That the proposed activity will not entail unusual, extraordinary or burdensome expense or police operation by the City;
- (d) That the facilities desired have not been reserved for other use at the day and hour required in the application.

Within the context of the ordinance, in pertinent part, the "Public Square area" included the "quadrants and all structures (including but not limited to walls, fountains, and flower planters) located within the quadrants known as Public Square." The Public Square area, however, excluded "all dedicated streets, public sidewalks adjacent to dedicated streets and RTA bus shelters within this area, as well as the "Soldiers and Sailors Monument." An individual found to be in violation of the ordinance would be "guilty of a minor misdemeanor on the first offense."

As characterized by the state supreme court, "the ordinance establishes a curfew for the Public Square and authorizes a permit process through the city's Director of Parks, Recreation, and Properties." In this particular instance, no individual or group in the Occupy Cleveland movement had requested a permit.

LEVEL OF JUDICIAL SCRUTINY

As cited by the state supreme court, the First Amendment to the United States Constitution prohibits Congress from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Further, the court noted "City ordinances are brought within the scope of this [First Amendment] prohibition by the Fourteenth Amendment." (The Bill of Rights, including the First Amendment refers to Congress and applies to the federal government, the Fourteenth Amendment applies the Bill of Rights to States and local government.)

As described by the state supreme court, consistent with the First Amendment, “[a] government entity cannot exclude speakers from a public forum without a compelling state interest.” That being said, the court acknowledged “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” On the contrary, the court noted “expression protected by the First Amendment [is] subject to reasonable time, place, and manner restrictions.”

CONTENT NEUTRAL

As described by the state supreme court, a valid time, place and manner restriction under the First Amendment “may not be based upon the content, or subject matter, of the speech.” Accordingly, the court would subject a governmental regulation to “strict scrutiny” if the regulation “limits speech based upon what is being said.” Under the very demanding strict scrutiny standard of judicial review, the court would uphold a regulation limiting the specific content of speech “only if it is narrowly tailored to serve a compelling government interest.”

On the other hand, the court noted that a regulation would be subject to the less demanding judicial standard of “intermediate scrutiny” if a regulation is “content neutral.” Within this context, a “content neutral” regulation “does not regulate speech based on what is being said.”

In determining whether an ordinance regulating speech is content neutral, the state supreme court found “the government’s purpose is the controlling consideration.” Specifically, the court found a regulation is deemed content neutral when it serves purposes unrelated to the content of the speech. Moreover, according to the court, an otherwise content neutral regulation would remain so “even if it has an incidental effect on some speakers or messages but not others.”

In this particular instance, the court found the ordinance applied to “all persons regardless of their message or their activities.” Specifically, Cleveland’s ordinance prohibited all “persons from remaining in the Public Square between 10:00 p.m. and 5:00 a.m. without a permit.” Accordingly, the state supreme court found the ordinance “content neutral” because the prohibition did not “ban a specific message or a specific form of expression.”

That being said, the state supreme court acknowledged “a content-neutral regulation may still be unconstitutional if it does not survive intermediate scrutiny.” Specifically, to survive the intermediate-scrutiny test, the court found a content-neutral regulation must satisfy the following three constitutional requirements: it must serve a significant government interest, the regulation must be narrowly tailored to serve a significant government interest, and it must leave open ample alternative avenues of communication.

SIGNIFICANT GOVERNMENT INTEREST

To satisfy the significant government interest, the city argued that “public safety, conservation of public property, and preservation of public resources” were “issues of paramount concern.” In “analyzing the significance of the city’s interest,” the appeals court found Cleveland had failed to “present any testimony regarding a specific interest furthered by the ordinance.” Similarly, the protesters had argued that “the city failed to present evidence in support of their alleged

significant government interests and that the city's stated interests are not actually furthered by the ordinance.”

The state supreme court, however, noted “Cleveland's regulatory aims are presented on the face of the ordinance.” Specifically, the ordinance authorized the issuance of a permit unless doing so would negatively affect the following significant governmental interests: (1) unreasonably threaten public health, welfare, or safety, (2) be unreasonably likely to incite violence or other unlawful activity, (3) impose excessive financial or operational costs on the city, or (4) interfere with another reservation of the same facility.

In the opinion of the state supreme court, these stated exceptions to the curfew adequately explained “the original reason for the curfew—to safeguard public health, to protect against violence and criminal activity, to conserve city resources, and to preserve property.” Moreover, the court noted “the First Amendment does not require the government to demonstrate the significance of its interest by presenting detailed evidence.” On the contrary, the court found government is “entitled to advance its interests by arguments based on appeals to common sense and logic.”

Speech restrictions may be justified by reference to studies and anecdotes pertaining to different locales altogether or ...to justify restrictions based solely on history, consensus, and simple common sense.

Moreover, state supreme court found “Ordinances that relate to the interest of ensuring the safety of people using public forums have been consistently upheld.” Further, within the context of a significant government interest, the court noted “a traditional exercise of the state's police powers is to protect the health and safety of its citizens.” In the opinion of the court, Cleveland’s “curfew and permit requirements in Cleveland Codified Ordinance 559.541 address these issues.” Specifically, the court found “[t]he ordinance itself protects the safety of those wishing to use the square after hours and protects the city's investment in that property.”

The ordinance also protects the city's investment in the Public Square. Property preservation and aesthetic concerns have been held to be significant concerns when they concern urban spaces and public parks. A city's interest in preserving the quality of urban life is one that must be given high respect.

Accordingly, the state supreme court held that “the significance of these interests is well settled and justifies the time, place, and manner restriction here” because “the government interests that the city seeks to promote and protect through the ordinance have been consistently upheld as satisfying intermediate scrutiny.”

NARROWLY TAILORED

In this particular instance, the protesters had also argued that the city’s permit requirement in the ordinance was “not “narrowly tailored” to further the city’s significant governmental interests. The state appeals court had agreed. In the opinion of the state appeals court, the purpose of the permit requirement created an “unreasonable ban” and effectively eliminated “peaceful speech.”

In response, the city contended ordinance was “not a complete ban on speech.” On the contrary, the city stressed “the ordinance simply prohibits any person from remaining in the Public Square between 10:00 p.m. and 5:00 a.m.” As a result, the city claimed the ordinance allowed “unfettered and unrestricted access at all other times of day.” Moreover, consistent with the ordinance, the city reiterated the fact that [t]hose seeking to remain in the square during the hours limited by the ordinance, regardless of whether they wish to engage in speech or any other type of activity, may do so by obtaining a permit.”

As described by the state supreme court, “[a] regulation of the time, place, or manner of speech or expression must be narrowly tailored to serve the government’s legitimate content-neutral interests, but it need not be the least restrictive or least intrusive means of doing.” On the contrary, the court acknowledged that [t]he requirement to narrowly tailor the regulation of speech is satisfied so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” Accordingly, the state supreme court rejected the holding of the state appeals court that Cleveland’s ordinance was not narrowly tailored. In the opinion of the state supreme court, Cleveland Codified Ordinance 559.541 was indeed “narrowly tailored to serve its significant government interests.”

The city’s interests in safeguarding public health, protecting against violence and criminal activity, and preserving the Public Square would be achieved less effectively without the enactment and enforcement of Cleveland Codified Ordinance 559.541. The ordinance does not ban public expression within the square 24 hours a day. The limitation is on any activity during the late night and early morning hours, unless granted a permit.

ALTERNATIVE AVENUES OF COMMUNICATION

Having found the challenged ordinance served a significant governmental interest and was narrowly tailored, the state supreme court also considered “whether the ordinance leaves open alternative avenues of communication.” According to the state supreme court, “a challenged restriction on speech or expression need leave open only a ‘reasonable opportunity’ for the speaker to communicate his or her message. “

[T]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of particular community or setting.

In this particular instance, the state supreme court found “[t]he ordinance leaves open a reasonable opportunity for speech because it expressly excludes “all dedicated streets, public sidewalks adjacent to dedicated streets and RTA bus shelters within this area.” As a result, in the opinion of the court, “the protestors could have simply moved off the grass and onto the public sidewalk surrounding the Public Square.” In particular, the court noted that the protestors “had unrestricted access to the sidewalks adjacent to Public Square and had 17 hours in which they could have been in the square without a permit.” Accordingly, the state supreme court found

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ordinance allowed for “alternative channels of communication” sufficient to satisfy satisfies the intermediate-scrutiny test for constitutionality.

CONCLUSION

Having found the challenged ordinance was ‘content-neutral, narrowly tailored to advance a significant government interest, and allows alternative channels of speech,’ the state supreme court held the challenged ordinance was “constitutional under the First and Fourteenth Amendments to the United States Constitution.” The state supreme court, therefore, reversed the judgment of the appeals court.

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