

PEDOPHILE CLOWN BRINGS HIS ACT TO PLAYLAND

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In the case of *Hobbs v. County of Westchester*, No. 00 Civ. 8170 (S.D.N.Y. 8/13/2003), plaintiff Richard Hobbs was prohibited from performing his “busking act” at “Playland,” a 279 acre county recreational complex.

Owned and operated by Westchester County, Playland has the distinction of being America's first totally planned amusement park and prototype for today's successful theme parks. Dedicated as a National Historic Landmark in 1987, Playland has provided family fun since 1928. The park is highlighted by Art Deco structures and a distinct grass and flower covered mall. Often referred to as "Rye Playland", Playland is America's only government owned and operated amusement park.
(<http://www.ryeplayland.org/>)

In 2001, Hobbs requested a permit to perform at Playland. Hobbs’ busking activity included a clown act, giving away balloon sculptures, engaging in humorous social commentary, and accepting donations. Upon learning that “Hobbs had been convicted of sexual abuse of minors in 1978 and 1982,” the director of Playland refused to issue the requested permit because “it would constitute an unreasonable safety and security risk to allow Mr. Hobbs to have contact with children at Playland.”

In 2003, the County adopted the following Executive Order which, in part, prohibited anyone who had been “convicted of sexual abuse of children from performing an act in which they seek to interact with children in a County owned park”:

No individual known to have been convicted of a sexual offense against a minor shall be permitted to obtain a permit if the solicitation, performance, demonstration or other similar activity would entice a child to congregate around that person since the granting of such permit would involve an unreasonable risk to the safety and welfare of children.

Hobbs challenged the constitutionality of this Executive Order under the free speech guarantee of the First Amendment.

COMPELLING STATE INTEREST

“Although convicted felons do not enjoy the fully panoply of constitutional rights,” the federal district court acknowledged that these individuals are not totally deprived of their constitutional rights, including the free speech guarantee of the First Amendment. In this particular instance, the court noted that the County’s permit requirement to perform at Playland Park was a “restriction on the exercise of otherwise permissible First Amendment expression.” Accordingly, to “pass constitutional muster as a permissible

time, place and manner restriction,” the court would determine whether the County’s regulation of convicted felons was “narrowly drawn, objective, and content-neutral.”

Applying these principles to the facts of the case, the federal district court concluded that it was “permissible for the County to enact a narrowly drawn regulation specifically designed to protect children from pedophiles without running afoul of First Amendment guarantees.” In so doing, however, the court acknowledged that the regulation must offer “procedural safeguards” to Hobbs and others denied the opportunity to perform at Playland pursuant to the Executive Order. Although the Executive Order itself did not contain a procedure for judicial review of agency actions, the court acknowledged that state law would provide a procedure for judicial review to determine whether a “reasonable basis in fact” existed for any actions taken by the County pursuant to the Executive Order.

As noted by the federal district court, “since the Prohibition does implicate First Amendment rights, and is content based, it must withstand strict scrutiny.” In other words, to pass constitutional muster under the First Amendment, the Executive Order had to be “narrowly tailored to achieve a compelling state interest.” In this instance, the County’s clearly stated intent was to prevent “an unreasonable risk to the safety and welfare of children.”

In the opinion of the federal district court, there was “no question that protecting children from sexual predators constitutes a compelling state interest.” According to the court, [t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” Moreover, the court found the lifetime ban under the Executive Order to be “reasonable in light of the recognition in the cases that “the risk of recidivism posed by sex offenders is frightening and high.” In addition, the court noted that “contrary to conventional wisdom, most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following the release.”

TARGETED TO EVIL

Having found a compelling state interest, the court found further that the Executive Order was “narrowly tailored to target and eliminate no more than the exact source of the ‘evil’ it seeks to remedy.”

The Prohibition meets this [constitutional] standard because it applies, by its terms, only to individuals who have been convicted of a sexual offense against a minor, and specifically prohibits only “solicitation, performance, demonstration, or similar activity that would entice a child to congregate around that person”...

[T]he Executive Order can, in fact, be expected to alleviate the harm at which it is aimed “in a direct and material way.” The County’s “zero tolerance” policy surely will prevent performances of the type it seeks to

prohibit... [The] limitation on its reach supports the Court's finding that the regulation does "not substantially burden more speech than necessary."

Moreover, consistent with this regulation, the court noted that "a convicted pedophile is free to go to Playland Park, or any other Westchester County park, to distribute leaflets or speak publicly regarding matters of personal or public concern, provided his activities and speech are oriented toward adults and are not of a nature that would likely to 'entice a child to congregate around' him."

Hobbs had argued that the Executive Order was "unconstitutionally vague and ambiguous because the words, 'would entice a child to congregate around,' fail to provide a clear definition and/or explicit standards that would give a person of ordinary intelligence and opportunity to know what is prohibited." The court agreed that the regulation was required "to provide fair warning of what is illegal." Further, the court acknowledged that "vague statutes are prone to arbitrary and discriminatory application, and often cause persons to give up lawful and constitutionally guaranteed activities as they exercise an extra degree of caution in their attempts to avoid violating an unclear law."

On the other hand, the federal district court noted that "we can never expect mathematical certainty from our language." Accordingly, "absent a definition in the statute," as a general rule, "courts construe words in their plain and ordinary sense." In this particular instance, the federal district court found "the challenged language makes sufficiently clear that it prohibits all child-oriented performances." Specifically, the court noted the dictionary defined "entice" as "allure, attract, tempt, lead astray," all "commonly understood words." As a result, the court found that the Executive Order "may constitutionally be applied to deny Plaintiff the right to perform his act at Playland Park."

OUTRAGEOUS AWARD

On the same day the federal district court rendered its opinion, Westchester County Executive Andy Spano issued a press release praising the court's decision upholding "the county's right to bar known sexual predators from performing around children in county parks."

"My goal is to protect children, and this latest court ruling gives us the authority to do just that," said Spano. "Richard Hobbs – or anyone like him -- will not be allowed to perform his clown act to attract children at any county park. That is the most important part of the court decision, and we are very pleased."

Spano, however, said the county would appeal that portion of the ruling which had "awarded Richard Hobbs, a convicted pedophile, \$2,500. According to Spano, "[i]t would be outrageous to pay Richard Hobbs, a convicted pedophile, one cent," let alone "\$2,500 for 'loss of income' when he was banned previously. (Hobbs never performed at any county park.),"

UNCONSTITUTIONAL PROHIBITION

The federal district court had awarded Hobbs compensatory damages for the “effect of unconstitutional county ordinances” for the two year period prior to the County’s learning of Hobbs’ misdemeanor convictions for sexual abuse of children. Specifically, these damages were related to the County’s prior denials of Hobbs’ requests to perform his act at Playland in 1999 and 2000. The damage award reflected the amount of money the court determined Hobbs would have been able to solicit had he had the opportunity to perform at Playland over that two year period.

As characterized by the federal district court, these actions in 1999 and 2000 were taken “without any investigation and without offering any alternative venue, solely on the basis of Westchester County regulations that have been held unconstitutional.” In its initial opinion in this case, in December 2000, the federal district court had found the County’s regulations prohibiting the solicitation of “alms, subscriptions or contributions for any purpose” in any county park to be unconstitutional. In so doing, the court characterized the County’s total ban on solicitation anywhere at Playland as “a content based restriction on speech.” In the opinion of the court, the regulatory ban on solicitations was “not content neutral because it prohibits all speech related to begging.” Further, in the view of the court, the County had “not articulated a compelling state interest that makes such a restriction necessary.”

In addition to regulatory ban on solicitations in any county park, the director of Playland had also rejected Hobbs’ earlier requests to perform his busking act on the basis that “Playland was not a public forum for the exercise of free speech activities.” In its December 2002 opinion, the federal district court agreed that the amusement area of Playland Park was not a public forum. Accordingly, the court held the County could prohibit anyone from performing there. On the other hand, the court found “other parts of the park, which are removed from the amusement area, are no different from other public parks, which have consistently been held to be public fora in which the exercise of First Amendment rights may not be prohibited.”

As a result, pursuant to other provisions in the Executive Order, the court found that “the County cannot constitutionally prohibit all First Amendment speech in public forum areas that the County Executive or his delegate have chosen not to name ‘Designated Permit Zones’.” Moreover, the court held that the County could not constitutionally “subject such speech to the prior restraint of a license without clearly specified standards.”

[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

In so doing, however, the court recognized the general legal authority of the County to prevent any person (not just an individual who has been previously convicted of a crime)

from continuing an attempted “exercise his First Amendment rights in such a way as to create an unreasonable risk to property or safety or welfare of the general public.”