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Suspicious Person Ordinances - Due Process Standards; Columbus v. Thompson

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CRIMINAL LAW—SUSPICIOUS PERSON ORDINANCES—
DUE PROCESS STANDARDS

Columbus v. Thompson, 25 Ohio St. 26, 266 N.E. 2d 571 (1971).

DURING THE EARLY morning hours of December 20, 1968, an employee of the control tower of Port Columbus Airport noticed defendant and another person rolling tires through the parking lot at said airport. The men placed the tires beside an automobile which they then entered. They were in the car when the police, who had been called by the control tower employee, arrived. The officer questioned both men who answered that they were looking for a lost set of keys. Both men denied rolling the tires which were still beside the automobile. The officer was unable to discover any evidence of missing tires in the parking lot and there were no subsequent reports of tires having been stolen in said parking lot that morning. The police arrested both men and charged them with a violation of the Columbus, Ohio, suspicious person ordinance.¹ The arresting officer filed an affidavit stating that defendant:

did unlawfully loiter and wander about a public place, to wit: Port Columbus parking lot. . . . Sect. 2387.02 G without being able to give a reasonable and satisfactory account of himself, contrary to the ordinance of said city.²

At trial in the Municipal Court defendant moved to dismiss the officer's affidavit on the ground that the Columbus suspicious person ordinance was unconstitutional. This motion was denied and the defendant was convicted, sentenced to 60 days in the workhouse and fined \$100. The Court of Appeals affirmed the judgment of the Municipal Court and upheld the constitutionality of the ordinance. However, that Court certified the cause to the Ohio Supreme Court because of a conflict with another Ohio decision.³ Contrary to the holdings in a number of earlier

¹ Columbus, Ohio, General Offenses Code §2387.02 (1959):

It shall be unlawful for any suspicious person to be in this City. The following shall be deemed suspicious persons: . . . (g) Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself.

² City of Columbus v. Thompson, 25 Ohio St. 2d 26, 27, 266 N.E. 2d 571, 571 (1971).

³ City of Cleveland v. Forrest, 39 Ohio Op. 2d 203, 223 N.E. 2d 661 (Cleveland Mun. Ct., 1967).

Ohio cases considering similar ordinances,⁴ the court found the ordinance to be vague and indefinite, and therefore an unconstitutional denial of due process required under the Fourteenth Amendment.⁵

One of the earlier and more frequently cited cases construing such an ordinance in Ohio is *Morgan v. Nolte*⁶ which dealt with an ordinance based on RS §2108, the predecessor of Ohio Rev. Code Ann. §715.55 (B). In upholding the conviction of a "known thief" under the municipal ordinance the court said:

It is a mistake to suppose that offenses must be confined to specific acts of commission or omission. A general course of conduct or mode of life which is prejudicial to the public welfare may likewise be prohibited and punished as an offense.⁷

A similar result was reached in *City of Columbus v. McCrory*⁸ wherein an earlier Columbus suspicious person ordinance was found not to be a violation of due process.⁹ In *Welch v. City of Cleveland*¹⁰ the court emphasized that since the fundamental purpose of a suspicious person ordinance was crime prevention, the municipality, in its exercise of the

⁴ Cases cited notes 6, 8, 10, 12 *infra*. These cases upholding suspicious person ordinances such as the one under consideration are partially due to the existence of a section in the Ohio Revised Code authorizing municipal corporations to punish vagrants and suspicious persons. The Code section is Ohio Rev. Code Ann. §715.55:

Any municipal corporation may provide for: (B) The punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch stuffer, ball game player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself.

Many municipalities enacted ordinances consistent with this provision. The following are only a very few examples of these ordinances: Akron, Ohio, General Offenses Code §1179.01 (1960 as revised 1968); Cleveland, Ohio, Codified Ordinances §13.0935; Cincinnati, Ohio, Code of Ordinances §901-L5, §901-L6 (1956); Columbus, Ohio, General Offenses Code §2387.02 (1959); Dayton, Ohio, Code of General Ordinances §929 (1954).

⁵ *Supra*, note 2.

⁶ 37 Ohio St. 23 (1881).

⁷ *Id.* at 25.

⁸ 38 Ohio L. Abs. 142, 49 N.E. 2d 583 (Ct. App., 1942). The significant portions of the ordinance read:

Section 1183. Suspicious persons . . . (2) or found wandering about the streets either by day or by night, without being able to give a reasonable and satisfactory account of himself.

⁹ *Contra*, *City of Seattle v. Drew*, 70 Wash. 2d 405, 410, 423 P. 2d 522, 525 (1967) n. 6, where the Washington Court said that the Ohio Court in *McCrory* upheld the ordinance without any "underlying rationale" for their decision and that said decision is "an unfortunate deviation from the recognized limits of permissible municipal regulation."

¹⁰ 97 Ohio St. 311, 120 N.E. 206 (1917).

police power under the Ohio Constitution, may enact such an ordinance.¹¹ The court, however, did not discuss the question of whether the language of the ordinance was vague or indefinite.

In the case of *City of South Euclid v. Paladino*,¹² the municipal court, basing its decision on *Welch*, found that the South Euclid suspicious person ordinance had a reasonable relationship to the public safety and welfare and was therefore a constitutional exercise of the police power by the municipality. The court emphasized that the defendants had failed to allege or prove that the ordinance expressly contravened any specific provision of the Ohio Constitution, but rather had made a general attack on the constitutionality of the entire ordinance. In the absence of proof of any clear conflict, the court refused to find the ordinance unconstitutional. It should be noted that the defendants did not raise and the court did not consider the question of whether the language of the ordinance might be vague or indefinite. All of the above cases upholding suspicious person ordinances place great emphasis upon the benefit to the public of such provisions.

Even if there is great benefit to the general public from such ordinances, they must not infringe upon the constitutional rights of the individuals involved. Some courts therefore have required that there be additional conditions necessary to constitute the offense and avoid vagueness.¹³ This is a small step toward protection of the rights of the individuals by narrowing the applicability of the ordinance.

Greater efforts to achieve individual protection, not necessarily at the expense of public welfare, have resulted in a number of decisions which have found the typical suspicious person ordinance invalid. In *Cleveland v. Forrest*¹⁴ the defendant was charged under the Cleveland suspicious persons ordinance¹⁵ which prohibits persons from "wandering about the streets, either by day or by night, without being able to give a reasonable and satisfactory account of themselves." The court found that the ordinance under which the defendant was charged was a violation of

¹¹ *Welch v. City of Cleveland*, 97 Ohio St. 311, 120 N.E. 206 (1917). In *Welch* at 316, 120 N.E. at 207 the court concluded:

We regard that public policy most salutary and most humane which seeks to prevent crime from occurring rather than to punish it after it has occurred. This seems to be the fundamental purpose of the grant of power underlying the statute and the ordinance. We find no constitutional or statutory objection to the ordinance, and the same is therefore valid.

¹² 30 Ohio Op. 2d 560, 204 N.E. 2d 265 (South Euclid Mun. Ct., 1964).

¹³ *Ricks v. United States*, 228 A. 2d 316, 322 (D.C. Ct. App., 1967). Being a known thief or a narcotics violator were additional conditions in the offense considered by the court in upholding the ordinance.

¹⁴ *Supra*, note 3.

¹⁵ *Supra*, note 4. A woman standing near the defendant at a bus stop was taken to the police station after she had conversed with the occupants of a passing car. After boarding the bus, the defendant was arrested and charged with a violation of the Cleveland suspicious person ordinance.

the due process clause of the Fourteenth Amendment. Furthermore, the court emphasized that requiring a person to "satisfactorily account for his presence upon the public streets offends the right to silence guaranteed by the Fifth Amendment" and charging him with a crime without probable cause is a violation of the Fourth Amendment. Although this decision precipitated certification of *Thompson*¹⁶ to the Supreme Court of Ohio, there are probably more compelling grounds for invalidation of such ordinances by reason of their vagueness. In *Thompson*, the court considered persuasive *City of Columbus v. DeLong*¹⁷ which involved the vagueness of the term "wandering" as used in Sec. 2343.18 of the Ordinances of City of Columbus. While the ordinance in *DeLong* was applicable to prostitutes only, the court in *Thompson* concluded that the term "wandering about as it applies here to all citizens, is also too indefinite, restrictive and liberty depriving to satisfy due process requirements."¹⁸ The Supreme Court of Washington, considering the Seattle suspicious person ordinance said:

The impermissible vagueness is in these particular phrases: (1) "wandering or loitering abroad" (2) "abroad under other suspicious circumstances" and (3) "a satisfactory account of himself."¹⁹

Vagueness in an ordinance or statute precludes the reasonable individual from determining whether his conduct is proscribed,²⁰ and creates the possibility of abuse by public officials in the enforcement of the ordinance. In *Coates v. City of Cincinnati*²¹ the United States Supreme Court reviewed the convictions under the Cincinnati loitering ordinance²²

¹⁶ *Supra*, note 2.

¹⁷ 173 Ohio St. 81, 180 N.E. 2d 158 (1962). The ordinance provided:

No prostitute, lewd woman, or any female inmate of a disorderly house shall be found wandering about the streets or frequenting restaurants or bars where alcoholic beverages are sold or consumed, or in hotels or other places of public resort, or shall be employed as an entertainer or waitress in any such place in this city.

In *DeLong* at 82, 180 N.E. 2d at 159 the court concluded, "[T]he ordinance in controversy, as worded, is too indefinite, restrictive and liberty depriving to constitute a valid exercise of the police power."

¹⁸ *Supra*, note 2 at 31, 266 N.E. 2d at 574.

¹⁹ *Supra*, note 9 at 409, 423 P. 2d at 524.

²⁰ In *Commonwealth v. Carpenter*, 325 Mass. 519, 521, 91 N.E. 2d 666, 667, (1950), the court stated:

The vice of the ordinance lies in its failure to prescribe any standard capable of intelligent human evaluation to enable one chargeable with its violation to discover those conditions which convert conduct which is *prima facie* lawful into that which is criminal.

²¹ 91 S. Ct. 1686 (1971).

²² Cincinnati, Ohio, Code of Ordinances §901-L6 (1956):

It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and then conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings.

of a student demonstrator and other individuals picketing in a labor dispute. The Supreme Court of Ohio which earlier had affirmed the conviction in considering the ordinance found that:

The word "annoying" is a widely used and well understood word; it is not necessary to guess its meaning . . . the standard of conduct which it [the ordinance] specifies is not dependent upon each complainant's sensitivity.²³

In the course of its discussion of this finding by the Ohio Court, the United States Supreme Court stated:

But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.²⁴

The court in holding that the ordinance was unconstitutionally vague concluded:

The ordinance is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.²⁵

Therefore, an ordinance to avoid unconstitutional vagueness must specify some ascertainable standard of conduct which it purports to prohibit so an individual can refrain from that conduct in order to avoid criminal liability or at least be able to make a choice as to whether or not to engage in that prohibited conduct.

A vague ordinance or statute affords too much leeway for abuse of discretion by law enforcement officials and the courts. The *Coates* decision is also relevant to a consideration of the ordinance in the *Thompson* case with respect to the possibility of abuse of discretion in its application. Ordinances similar in wording to those involved in *Coates* and *Thompson* could contribute to erroneous judgment by an arresting officer due to the lack of sufficient standards for ascertaining whether one's conduct is criminal or not. In *Coates*, the court expressed its disapproval of such police discretion when it said:

The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable

²³ 21 Ohio St. 2d 66, 69, 225 N.E. 2d 247, 249 (1970).

²⁴ *Supra*, note 21 at 1688.

²⁵ *Supra*, note 21. In addition to the consideration of the violation of the due process standard of vagueness, the court held that the ordinance also violated the First Amendment right of peaceful assembly.

specificity toward the conduct to be prohibited. . . . It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.²⁶

The possibility of this abuse has been expressly recognized in a number of other decisions. In *Alegata v. Commonwealth*²⁷ the Massachusetts Supreme Court observed:

No statutory guidance is supplied or even hinted at as to what constitutes a satisfactory account. This leaves too much discretion in the hands of the police and the courts.²⁸

In an earlier case where the United States Supreme Court struck down a suspicious person ordinance for vagueness it was stated:

. . . [P]art of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of such a provision needs no demonstration.²⁹

Discretion stemming from vague ordinances is particularly susceptible to abuse, whether intentional or unintentional, with respect to certain underprivileged groups.

The persons arrested on "suspicion" are not the sons of bankers, industrialists, lawyers, or other professional people. They, like the people accused of vagrancy, come from other strata of society, or from minority groups who are not sufficiently vocal to protect themselves, and who do not have the prestige to prevent an easy laying-on of hands by the police.³⁰

²⁶ *Supra*, note 21 at 1688.

²⁷ 353 Mass. 287, 231 N.E. 2d 201 (1967). The court considered Mass. Gen. Law Ann. ch. 41 §98 which provides:

During the night time . . . [police officers] may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going. . . . Persons so suspected who do not give a satisfactory account of themselves . . . may be arrested by the police. . . .

²⁸ *Id.* at 291, 231 N.E. 2d at 205.

²⁹ *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965). The ordinance construed by the court was §1142 of the General Code of Birmingham of 1944 which provided:

It shall be unlawful for any person or any number of persons to stand, loiter, or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.

³⁰ Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960).

The defendant in *Palmer v. City of Euclid*³¹ was this type of individual.

In *Palmer*, the United States Supreme Court found that the Euclid suspicious person ordinance was unconstitutionally vague as applied to the defendant. Unfortunately, the court failed to examine the language of the Euclid ordinance and consider whether or not the ordinance was "unconstitutionally vague on its face," an omission Mr. Justice Stewart noted in his concurring opinion:

While I agree with the court that Euclid's "suspicious person ordinance" is unconstitutional as applied to the appellant, I would go further and hold that the ordinance is unconstitutionally vague on its face.³²

In *Coates* the court did consider the language of the Cincinnati loitering ordinance which prohibited annoying assemblies and found it to be unconstitutionally vague on its face. However, this consideration may be distinguished from the *Palmer* case because of the infringement upon the First Amendment right of assembly involved under the loitering ordinance in *Coates*.

In the absence of circumstances involving First Amendment rights, we are left without guidelines as to the conduct which may be made criminal by local suspicious person ordinances. Because of this lack of adequate standards, a case by case determination of criminal conduct under the various ordinances is necessary. In *Thompson* the defendant's conduct was questionable and the court found the ordinance unconstitutionally vague. We can only hope that this decision has a sufficient impact upon law enforcement officials and local courts to minimize the injury resulting from vagueness.

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³¹ 91 S. Ct. 1563 (1971). *Palmer* was arrested and charged with a violation of the Euclid suspicious person ordinance which makes criminal the act of:

any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself.

Id. at 1564. He had dropped a female companion off at an apartment building in suburban Euclid and was waiting in his automobile on the street when the police approached him. The police found *Palmer's* explanation for his activities to be unsatisfactory and therefore made the arrest.

³² *Id.* at 1564.