Speech: Ordinance Allowing Owners to Prohibit Loitering Within 50 Feet of Property Line is Unconstitutional

Bell v. City of Winter Park, No. 13-11499 (11th Cir. Mar. 20, 2014)

An ordinance passed by Winter Park, Florida which permits landowners to post "no loitering" signs pursuant to which City police may take enforcement action against those within 50 feet of the owner's property line has been struck down as being overly vague and overly restrictive on public speech.

In 2012, Winter Park, Florida adopted ordinance 2886-12, which created a new municipal code section making "unlawful for any person or persons to picket, protest or conduct any picketing or protesting activity within a buffer area of 50 feet from the property line of any dwelling unit" and to "picket, protest or conduct any picketing or protesting activity in any park, public street, public right-of-way, or on a sidewalk, where such activity impedes or interferes with the rights of others to travel on or in such areas in a safe manner, consistent with the traditional pedestrian, bicycle or motor vehicle use of such areas." Moreover, this ordinance also created another code section allowing residents to "post a 'no loitering' sign on the property of [their] residence . . . and an officer of the City may enforce this section against any person remaining in a public area, including a park, sidewalk, street, public right-of-way, after the sign is posted, [or] who loiters, stands, sits, or lies before or about the dwelling unit on which property the 'no loitering' sign is posted, or remains on public property within a [50 foot] buffer area . . . ." The ordinance was passed because the City "documented [a] series of protest or picketing activity specifically targeted against an individual residing in a single family home" and because in recent years "domestic tranquility has been disturbed" by picketing and protesting in residential neighborhoods.

Winnifred Bell (as well as two others) challenged the ordinance as an unconstitutional infringement of their freedom of speech, their free exercise rights, and as a violation of the Equal Protection Clause. The district court granted the city's motion to dismiss under FRCP 12(b)(6). The plaintiffs appealed only as to their free speech rights.

HELD: The Eleventh Circuit affirmed the district court's dismissal of the plaintiffs' challenge to the targeted picketing ban instituting a 50 foot buffer around residential homes, finding it a content-neutral, narrowly-tailored regulation. However, the Circuit reversed the district court on the provision preventing loitering on public streets by complaint of a resident because it granted private citizens unbridled discretion to invoke the City's authority to regulate speech in public fora.

DISCUSSION: Content-neutral regulations face intermediate scrutiny, meaning they need only serve a significant government interest, be narrowly-tailored to achieve the stated interest, and leave open amble alternative channels of communication. Notably, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Supreme Court upheld, similarly to the case at hand, a municipal ordinance that prohibited "focused picketing taking place

solely in front of a particular residence." The Eleventh Circuit therefore had no problem finding the Winter Park ordinance constitutional. In *Frisby* the government pursued the significant interest of "protecting the well-being, tranquility, and privacy of the home," narrowly-tailored the ordinance because it only limited protesting directed at a specific person, not the general public, and left open alternative channels of communication because the protestors could still go door-to-door disseminating their message or protest in other public places. The Winter Park ordinance had a nearly identical description and was upheld against constitutional challenge.

On the other hand, the Eleventh Circuit "harbored serious concerns" about the loitering provision. The issue here for the court was that the ordinance permitted private citizens to simply place a 'no loitering' sign on their property, at which point City officers – the machine of the state – would prevent others from loitering, standing, sitting, or lying before the property in question. For the Circuit Court the ordinance did not just allow a private individual to control his/her own property, it allowed an individual to employ all the power of the state to prevent any speech s/he does not like from taking place at all in public fora (streets, rights-of-way, sidewalks, etc.). The provision was content-neutral, but the problem was in the amount of discretion it granted private citizens to silence others. Moreover, the court pointed out that there was no definition provided for the term "remain" in the ordinance, leaving the court to query "How long must one stay in the same place to violate [the ordinance]? Five minutes? One minute? Citizens are left to wonder." This provision failed constitutional scrutiny and the Eleventh Circuit reversed the district court's dismissal.

http://www.ca11.uscourts.gov/opinions/ops/201311499.pdf (last accessed Apr. 3, 2014).

Trial Practice: Where New Facts Arose After Initial Decision, Appeal Is Not Barred by Res Judicata

Webb v. Town of St. Joseph, No. 13-30667 (5th Cir. Mar. 31, 2014)

The appellant in a colorful case (a $58,200 fine for failure to remove a mobile home from city property for 582 days) recently obtained a reversal because enough new facts had emerged to avoid a finding of *res judicata*.

In 2006, Ivan Webb obtained the consent of the St. Joseph, Louisiana Board of Aldermen (Board) to place a single mobile home on his father's property in St. Joseph. He then sought permission to put more mobile homes on the tract, which request was denied by the Board. He proceeded to place another trailer on the property nevertheless. In 2007 the Mayor's Court of St. Joseph found that Webb had violated a Town ordinance which provided that "no building or other structure shall be built or constructed in the Town of St. Joseph without there being obtained a permit from the Mayor and Board authorizing or approving the construction of such building or other