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Ordinances: Prohibition Against Noise that "Annoys" is Not Unconstitutionally Vague When Linked to "Reasonable Person" Standard

Munn v. City of Ocean Springs, No. 13-60806 (5th Cir. Aug. 18, 2014).

Relying on Supreme Court precedent, the Fifth Circuit has upheld, against a void for vagueness challenge, an ordinance which prohibits noise that would "annoy" people of "reasonable sensitivities." The inclusion of a reasonableness standard moderated the otherwise constitutionally-suspect phrase "annoys."

Stephen Munn's Purple Pelican bar and nightclub in Ocean Springs, Missouri features live music. In November 2011 three anonymous individuals complained separately about the noise coming from the club. The same officer responded each time. He first informed the club's security guard about the complaint and requested the music be turned down, and then he asked the bartender do the same. After the third complaint, he issued Munn a citation for violating the City's noise ordinance. Munn then wrote to the City's mayor and alderman, requesting that the ordinance be repealed because it was unconstitutionally vague and was being arbitrarily enforced. The City did not take Munn up on his request, whereupon Munn filed suit seeking to have the ordinance declared unconstitutional and enjoin its enforcement. The District Court denied Munn's motion for preliminary injunction and granted summary judgment for the City. Munn appealed.

HELD: The Fifth Circuit affirmed, agreeing that the ordinance was not unconstitutionally vague on its face.

DISCUSSION: Though Munn purported to challenge the entire ordinance, the Circuit Court determined the specific language at issue was the phrase "unreasonable noise" and which the ordinance defined as noise which "under the circumstances of time, place, and manner in which it is produced is audible or perceptible, *annoys*, disturbs, injures, or endangers the comfort, repose, health, peace or safety of a *reasonable person of normal sensitivities* . . . ." Munn relied on *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), for the proposition that the word "annoys" is amorphous and necessarily unconstitutionally vague. In *Coates*, the Supreme Court held an ordinance that prohibited three or more people from gathering on a sidewalk "and there conduct[ing] themselves in a manner annoying to persons passing by," was unconstitutionally vague because "[c]onduct that annoys some people does not annoy others." *Id*. at 614. Accordingly, Munn argued that "annoys" is a problematic term in all circumstances since it cannot be enforced with uniformity, but only with reference to a subjective standard.

The City countered that *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) evidenced that the Court recognizes that all language will be compromised to some extent because words are necessarily imprecise, but that with the exercise of some reasonable judgment by law enforcement, such practical limitations can be overcome. In *Grayned*, the Court held that an ordinance prohibiting people from standing outside a school and making "any noise or diversion which disturbs or tends to disturb the peace or good order of the school" was not overly vague.

Against these two seemingly contradictory precedents, the Circuit Court evaluated the ordinance at issue, and its specific prohibition against noise that "annoys . . . a reasonable person of ordinary sensibilities." For the Fifth Circuit, the insertion of this objective standard – the reasonable person – meant that the ordinance met the standard of due process since, in its view, "the problem with the ordinance in *Coates* was the subjective standard to which 'annoys' was attached." That constitutional infirmity did not exist in the Ocean Springs ordinance because the definition of "annoys" was tethered to the reasonable person standard.

The Court did take time, however, to note that what was worrisome in the case was the way the ordinance was applied to the Purple Pelican. The officer who cited Munn testified that he warned the establishment about the noise after the first anonymous complaint despite the fact that he himself did *not* think the music was unreasonably loud. Thus, while Munn might have been successful with an as-applied challenge, he did not pursue such an argument, preventing the Court from addressing that issue. The Court did note in dicta that the "objective standard established in the ordinance will only protect the constitutional rights of Ocean Springs's citizens if it is enforced in an objective manner" and warned that by failing to enforce the ordinance in such a manner "the City is exposing itself to a potentially different outcome."

http://www.ca5.uscourts.gov/opinions/pub/13/13-60806-CV0.pdf (last accessed August 28, 2014).