Cases



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Ordinance Limiting All Signs Except "Holiday Decorations" and "Public Art" Is Content Neutral

William Bowden, a resident of Cary, North Carolina wanted to express his unhappiness with water damage allegedly caused to his home by the Town. He scrawled the words "Screwed by the Town of Cary" in bright fluorescent orange paint across a 15-foot swathe of his home, in letters more than a foot tall. The Town notified him that his message violated the Town's sign ordinance, which prohibits fluorescent colors and limits signs to five square feet, with the exception of holiday displays and public works of art. He refused to remove the sign and sued on First Amendment grounds because the ordinance was not content-neutral.

The district court ruled for Bowen, finding that, because the ordinance made an exception for holiday decorations and public art, it necessarily required content-specific analysis to determine whether a given sign was exempt, triggering strict scrutiny review. The court enjoined enforcement of the ordinance and awarded Bowen more than $36,000 in attorney's fees. The Town appealed.

The Fourth Circuit reversed, finding the carry sign ordinance to be content-neutral.

The mere fact that a determination must be made as to whether a sign falls within the holiday decoration or public art exception does not invalidate the ordinance's content neutrality. The Court of Appeals reviewed its recent opinion in *Wag More Dogs, LLC v. Cozart*, 630 F.3d 359 (4th Cir. 2012), where it upheld a rule limiting the size of commercial signs while not so limiting other types of signs. That opinion had relied on the Supreme Court's treatment of content neutrality in *Hill v. Colorado* 530 U.S. 703 (2000), which eschewed a "formalistic approach" to assessing content neutrality and instead adopted a "more practical inquiry."

The Fourth Circuit stated that "content neutrality bars only one particular form of distinction—those made with a censorial intent..." In so holding, it aligned with the posture of the Seventh, Third, Sixth and Ninth Circuits--and departed from the absolutist approach taken by the Fifth, Eighth and Eleventh Circuits, which hold that content neutrality is absent if the ordinance requires any inquiry whatsoever as to content.

Under intermediate scrutiny, the Town's ordinance successfully met the requirement that it bear a reasonable relationship to its asserted purpose: traffic safety and aesthetics. The Cary ordinance placed reasonable time, manner and place restrictions "only on the physical characteristics of messages." It furthered a substantial governmental interest, was narrowly tailored, and left open ample alternate means of communication.

Reversed and remanded (including reversal of attorney's fee award). *Brown v. Town of Cary*, No. 11-1480 (4th Cir. Jan. 22, 2013).

NOTE: *John Baker of Greene Espel PLLP, Minneapolis, Minnesota, and other lawyers were part of team that filed an amicus brief on behalf of IMLA, Scenic America, the North Carolina League of Municipalities, the Virginia Municipal League, the South Carolina League, and the Maryland League, in support of the successful effort by the Town of Cary to overturn the judgment against it arising out of enforcement of its sign ordinance.*

Male Traveler's Bare Chest Protest of Airport Screening Is Protected Speech

In December 2010, Aaron Tobey passed through TSA passenger screening at the Richmond Virginia airport. Tobey showed his displeasure by disrobing to socks and running shorts, revealing the text of the Fourth Amendment written on his chest. Although he peacefully entered the scanning equipment and allowed himself to be imaged, he was arrested by airport officers for creating a public disturbance. After being detained for an hour, he was allowed to board a flight. The public disturbance charges were subsequently dropped.

Tobey sued various TSA and Richmond police officers, claiming violation of his First, Fourth and Fourteenth amendment rights. The District Court for the Eastern District of Virginia dismissed his Fourth Amendment claim because Tobey's behavior justified police action; his Fourteenth Amendment Equal Protection claim failed because he could point to no other disrobing or protesting passengers. However, the lower court refused to dismiss his First Amendment cause of action, questioning whether the officers' actions were motivated by a desire to squelch Tobey's political expression or were part of a TSA policy to prohibit such speech. The TSA defendants appealed on qualified immunity grounds, arguing that they had not violated a "clearly established" constitutional right.

The Fourth Circuit Court of Appeals affirmed, in a split decision. Mr. Tobey had plausibly set forth a claim that the TSA officers caused his arrest, violating his clearly established First Amendment rights.

In order to state a plausible First Amendment claim, Tobey had to demonstrate (1) that he was engaging in protected speech; (2) that he was seized as a result of his expression; and (3) the "temporal proximity" between his peaceful protest and arrest, unsupported by probable cause. Tobey alleged that his silent, nonviolent expression of disagreement with the TSA's screening policies was immediately followed by his arrest, a retaliatory response to his message. Defendants countered that the arrest was justified due to Tobey's "bizarre" and "disruptive" behavior.

The Fourth Circuit disagreed. "For us to hold today that it is reasonable to cause an arrest due to bizarre behavior would undermine the most basic tenets of our Constitution." The TSA's own

regulations did not clearly proscribe the behavior exhibited by Tobey; they merely prohibit any passenger from "interfering" with screening personnel or "attempt[ing] to circumvent" the security process, neither of which had occurred. Therefore, Tobey had set forth a plausible claim that his First Amendment rights were violated. (In so holding, the Court of Appeals essentially reversed the district court's dismissal of Tobey's Fourth Amendment wrongful seizure claim; however, that issue could be reexamined in subsequent proceedings).

The Appeals court was next required to determine if Tobey's rights were "clearly established" at the time of his arrest—would it be obvious to a reasonable officer that his actions were unlawful? In that regard, the majority found overwhelming precedent on Tobey's side: peaceful, silent, nondisruptive protest is resolutely protected in public places. The mere fact that Tobey had removed his shirt could not move protected speech into the realm of prohibited disruption; indeed, the TSA defendants conceded that if Tobey's message had been written on his t-shirt, they would have had no grounds to call for police action.

Noting Ben Franklin's admonition to the effect that those who give up liberty in exchange for safety deserve neither, the majority said "We take heed of his warning and are therefore unwilling to relinquish our First Amendment protections—even in the airport."

Circuit Judge Wilkinson strenuously objected, calling the result unwise and unfair. He questioned how TSA agents could be expected to discharge their duties under threat of suit for making close judgments while trying to protect the public. It was precisely this type of governmental function that had been granted the protection of qualified immunity for more than four decades: "I regret that a doctrine so essential to the performance of public functions has been reduced to hollow and formulaic recitations that signal only its demise." Wilkinson was particularly incensed at the proposition that Tobey's rights were "clearly established," noting that the passenger had cited "not one—not even one–case that would have afforded these agents anything resembling fair notice of what might be expected of them..."

Tobey v. Jones, no. 11-2276 (4th Cir. Jan. 25, 2013).

Driving In Tandem As Probable Cause For Drug Arrest?

In March 2010, an Arkansas trooper on Interstate 30 noticed Glen Allen driving an SUV at 75 miles an hour in a 70 mile per hour zone. The officer followed Allen, observing that the SUV appeared to be rented; it was new, clean, had untinted widows and no car dealership logo. The SUV was trailing a white minivan, which also appeared to be a rental. Both vehicles bore Texas plates.

The officer knew that the tandem formation could be indicative of drug transport and that Interstate 30 was a conduit for drugs from Texas. He pulled alongside the minivan to observe the driver and it swerved across the fog line. The officer initiated a traffic stop. Approaching the minivan, he saw several large bales covered by blankets in the back of the vehicle and detected a powerful smell of "green" marijuana. The minivan driver was arrested.

The officer broadcast news of the marijuana arrest, describing Allen and the SUV and saying that they were likely involved with the minivan. Another officer soon identified Allen's SUV and stopped him "for investigative reasons" to see if he had a connection to the minivan. When it was determined that both vehicles had been rented from the same Texas location on the same day, Allen was arrested on conspiracy to distribute.

Allen moved to suppress the evidence from each vehicle, arguing that law enforcement had no probable cause for either traffic stop. The district court found that Allen lacked standing as to the stop and search of the minivan; he had no reasonable expectation of privacy in that vehicle. It also found probable cause to stop Allen because he had been observed exceeding the speed limit by the first officer. Allen appealed.

The Eighth Circuit Court of Appeals affirmed the denial of Allen's motion to suppress. The Circuit Court made note of Allen's contention that speeding could not have been the basis for his being stopped; Allen argued that the first officer had not stopped him for speeding and had not mentioned speeding when he subsequently broadcast notice of the minivan and the marijuana arrest. But the Eighth Circuit found ample justification for Allen's stop on *Terry* grounds. A warrantless *Terry* stop is valid only if police have a "reasonable and articulable" suspicion that criminal activity is afoot. Police may draw "rational inferences" from specific facts and may rely on information "provided by other officers" or "known to the team" conducting the investigation.

Allen's fact situation provided Arkansas police with ample grounds for a *Terry* stop. The Eighth Circuit cited a Tenth Circuit opinion which upheld a stop and arrest on virtually identical circumstances: "Sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle." (citation omitted). *United States v. Glen Allen*, no. 12-1663 (8th Cir. Feb. 04, 2013).

Preference For In-State Teaching Experience Does Not Impair Interstate Travel

In 2006, Pennsylvania's Steel Valley School District hired Patrick Connelly as a sixth-grade teacher. Connelly had nine years of teaching experience, all in Maryland. He received credit for one year of experience and was given an annual salary approximating $39,000. Had Connelly's past teaching been in Pennsylvania, he would have been credited with nine years' experience and received about $8,500 more in starting salary. By the 2010-2011 school year, his salary was $22,000 less than if he had received the nine years' credit. He sued the District, asserting that its preference for in-state experience impaired his ability to travel interstate, an Article IV privilege and immunity applied to the States under the Fourteenth Amendment, and denied him equal protection.

The district court dismissed Connelly's case. It found the District's scheme legal because it was based on location of teaching experience, not residency. He appealed to the Third Circuit, which upheld the District's policy of not granting equal credit for out-of-state teaching experience.

A primary factor in the case was the applicable standard of review. Connelly argued that strict scrutiny applied