VIRGINIA: THE DISTRICT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA v. MARCIAL IBARRA HERNANDEZ	GC04009123-00
COMMONWEALTH OF VIRGINIA v. OSCAR MANUEL LAGOS MENDOZA	GC04009247-00
COMMONWEALTH OF VIRGINIA v. LUIS VARELA-GUSTAVO	GC04009248-00
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MOTION TO DISMISS

Come now the defendants, by counsel, and respectfully request that the Court dismiss the charge of loitering against each of them, on the grounds that the Prince William County loitering ordinance is unconstitutional on its face.

Prince William County Code Sec. 16-16, under which the defendants are charged, states as follows:

> Any person who remains or loiters on property, whether such property is publicly or privately owned, in such a manner as to impede or hinder the passage of pedestrians or vehicles, or in such manner as to interfere with or interrupt the conduct of business, or who remains or loiters on such property knowing that an offense is being committed, or under circumstances which justify a reasonable suspicion that such person may be engaged in, or is about to engage in, a crime, or with the purpose of begging, shall be guilty of a Class 1 misdemeanor; provided, however, that such person shall have first been instructed to move on by a law-enforcement officer and shall have failed or refused to comply with such instruction.

As set forth below, this ordinance is typical of loitering ordinances that have been struck down repeatedly by the courts, including the United States and the Virginia Supreme Courts. The ordinance is unconstitutionally vague, because it fails to give adequate notice as to what conduct is prohibited and encourages arbitrary enforcement. Portions of the ordinance also violate the Fourth Amendment by circumventing the probably cause requirement and the First Amendment freedom of speech.

ARGUMENT

A. Constitutionality of Loitering Ordinances Generally

A law is unconstitutionally vague if "men of ordinary intelligence must necessarily guess at its meaning." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Vague laws violate the due process clause of the Fourteenth Amendment. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). In general, the danger of vague laws is twofold: They fail to give

citizens reasonable notice of what conduct is prohibited, and thus "trap the innocent by not providing fair warning," and they vest unfettered discretion in the police, giving rise to a likelihood of arbitrary enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Accordingly, Virginia courts have employed a "two pronged test" in evaluating vagueness challenges: "First, the language of the statute must provide a person of average intelligence a reasonable opportunity to know what the law expects from him or her. Second, the language must not encourage arbitrary and discriminatory selective enforcement of the statute." *Gray v. Commonwealth*¸ 30 Va. App. 725, 732, 519 S.E.2d 825, 828 (1999). *See also Commonwealth v. Carter*, 21 Va. App. 150, 153-54, 462 S.E.2d 582, 584 (1995); *Coleman v. City of Richmond*, 5 Va. App. 459, 466, 364 S.E.2d 239, 243 (1988), *reh'g denied*, 6 Va. App. 296, 368 S.E.2d 298 (1988).

Loitering laws are notorious for their vagueness. Historically, such laws have allowed police to decide based on their own hunches and biases who should be allowed at large in a public place. "Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 166 (1972) (*quoting Winters v. New York*, 333 U.S. 507 (1948) (Frankfurter, J., dissenting)). The United States Supreme Court has repeatedly condemned such laws.

Most recently, in *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Court invalidated an ordinance prohibiting any person from "loitering"—"remain[ing] in any

one place with no apparent purpose"—with a known street gang member. Police officers were authorized to order such loiterers to disperse, and to arrest anyone who failed to obey a dispersal order. A plurality of the Court noted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." 527 U.S. at 53. Moreover, the ordinance failed to give adequate notice of what conduct was prohibited, because "[i]t is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" *Id.* at 57.

The ordinance's lack of notice was not cured by the fact that "loiterers [were] not subject to sanction until after they have failed to comply with an officer's order to disperse":

> [T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. . . . If the loitering is in fact harmless an innocent, the dispersal order itself is an unjustified impairment of liberty. . . . Because an officer may issue an order only after prohibited conduct ahs already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and impermissible applications of the law.

Id. at 58-59. Moreover, the requirement that defendants disobey an order to disperse was *itself* vague. "After such an order issues, how long must the loiterers remain apart? How far must they move?" *Id.* at 59. Thus, "the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance." *Id.*

A majority of the Court found that "[t]he broad sweep of the ordinance also violates the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 60 (internal quotation marks and citation omitted). Because law enforcement officers had virtually unfettered discretion to decide to issue a dispersal

order, the danger of arbitrary enforcement permeated the statute. "The ordinance is unconstitutional not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case." *Id.* at 71 (Kennedy, J., concurring) (emphasis in original).

The *Morales* holding had ample precedent. In *Papachristou v. City of Jacksonville*, *supra*, the Court invalidated an ordinance that prohibited, among other things, "wandering or strolling around from place to place without any lawful purpose or object." 405 U.S. at 156 n. 1. The Court struck the ordinance down as void for vagueness, both because it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden ... and because it encourage[d] arbitrary and erratic arrests and convictions." *Id*. at 162 (citations omitted). The Court emphasized that the "ordinance ma[de] criminal activities which by modern standards are normally innocent," such as walking about at night. "These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness." *Id.* at 164.

Similarly, in *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971), the Court considered an ordinance penalizing "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...." This ordinance was deemed "vague and lacking ascertainable standards of guilt." *Id*. at 545. *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (ordinance forbidding "any person to stand or loiter upon any street or sidewalk ... after having been requested by any police officer to move

on" did "not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Id*. (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (separate opinion of Black, J.); *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940) (in an anti-loitering and anti-picketing statute, the qualification " 'without just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation," because "the words themselves have no ascertainable meaning either inherent or historical").

B. The Prince William County Loitering Ordinance is Unconstitutional on Its face.

The present case falls squarely within the line of precedents invalidating loitering ordinances, and violates the First, Fourth, and Fourteenth Amendment.

1. Fourteenth Amendment Vagueness

The Prince William County ordinance makes it unlawful for a person to loiter "under circumstances which justify a reasonable suspicion that such person may be engaged in, or is about to engage in, a crime." By its very terms, the ordinance allows police to arrest individuals they deem "suspicious" without any actual wrongdoing. For this reason, similarly worded ordinances have been consistently struck down for vagueness. *See, e.g., State v. Muschkat,* 706 So.2d 429 (La.1998) (invalidating statute prohibiting "remaining in a public place in a manner and under circumstances manifesting the purpose to engage in [a drug offense]"); *Timmons v. City of Montgomery, Ala,*. 658 F. Supp. 1086 (M.D. Ala. 1987); *People v. Berck,* 300 N.E.2d 411 (N.Y. 1973).

Thus, the ordinance is unconstitutionally vague because it fails to give notice as to what conduct is prohibited. Circumstances that may be suspicious to a law enforcement officer may not even be apparent to a person simply standing in a public place. He is

subject to criminal penalty simply for standing, under circumstances which he may or not be aware, and which he may or may not understand to be “suspicious." Such a person cannot possibly conform his conduct to the requirements of the law, since the law does not address any particular conduct.

For this very reason, the Virginia Supreme Court struck down a Richmond loitering ordinance that prohibited loitering "under circumstances manifesting the purpose of engaging in prostitution." The court explained:

> Though the language of this ordinance is clear, the public is not adequately apprised of the behavior that is proscribed. Indeed, the statute essentially proscribes loitering with an unlawful intent; since loitering is not unlawful, the statute proscribes no illegal conduct. If no particular act is proscribed, those wishing to conform to the ordinance do not know what conduct to avoid.

Coleman v. City of Richmond, 5 Va. App. 459, 466-467, 364 S.E.2d 239, 244 (1988). The Prince William County Ordinance is even more vague than the one at issue in *Coleman*. Rather than simply prohibit loitering under circumstances indicating an intent to engage in prostitution, the Prince William County ordinance prohibits loitering under *any* suspicious circumstances. If the Richmond ordinance was unconstitutional, the Prince William County ordinance is exceptionally unconstitutional.

For similar reasons, the ordinance is also unconstitutional under the other prong of the vagueness test: It does not provide sufficient guidelines to law enforcement. The existence of a crime may be based solely on whether a police officer is suspicious. The ordinance does not even allow for a person standing about for innocent reasons to explain himself to the officer before he is ordered away or arrested. *Cf. Salt Lake City v. Savage*, 541 P.2d 1035 (Utah 1975) (upholding similar ordinance because it provided an “immediate out” if the suspect explained himself to the police officer).

The Prince William County Ordinance thus "permit[s] a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (internal quotation and citation omitted). It furnishes a convenient tool for " 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' " *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. at 97-98). As Justice Stewart has explained, "[a] policeman has a duty to investigate suspicious circumstances, and the circumstance of a person wandering the streets late at night without apparent lawful business may often present the occasion for police inquiry. But in my view government does not have constitutional power to make that circumstance, without more, a criminal offense." *Palmer v. City of Euclid*, 402 U.S. 544, 546 (1971) (Stewart, J., concurring).

2. Fourth Amendment Seizure

The Fourth Amendment prohibits arrests that are not based on probable cause. *U.S. v. Watson*, 423 U.S. 411 (1976). Where there is no probable cause, but only "reasonable suspicion" of a crime, law enforcement officers may *not* make an arrest, but may only make brief, investigatory stops. The Prince William County ordinance violates the Fourth Amendment by circumventing the probable cause requirement:

> It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense. Police are duty-bound to investigate suspicious

> conduct, and founded suspicion will support an investigative stop and inquiry. But more is required to justify arrest.

Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1986) (citations omitted). An arrest based purely on suspicion violates the First Amendment.

3. First Amendment

Unquestionably, requesting money in a public place "is a form of speech protected under the First Amendment." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). By prohibiting "loitering . . . with the purpose of begging," the Prince William County ordinance effectively bans completely this form of speech.

Prohibitions on begging – when not limited to "aggressive" panhandling or other particularized harms – have consistently been found unconstitutional. For example, in *Loper v. New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993), the court struck down an ordinance providing that "[a] person is guilty of loitering when he . . .[l]oiters, remains or wanders about in a public place for the purpose of begging." The court first noted that begging involves communication entitled to First Amendment protection:

> [Begging] usually involves some communication of that nature. Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.

999 F.2d at 699. The court went on to point out that a blanket ban on begging was not narrowly tailored to address intimidation, coercion, harassment and assaultive conduct associated with some begging. While an ordinance narrowly tailored to address those

particular kinds of conduct might have withstood scrutiny, the city had no legitimate interest in also banning peaceful begging.

The *Loper* court was not alone in determining that laws prohibiting peaceful begging are unconstitutional. *See, e.g., Benefit v. City of Cambridge*, 679 N.E.2d 184, 185 (Mass. 1997); *Ledford v. State*; 652 So.2d 1254 (Fla. App. 2 Dist.,1995). The portion of the Prince William County loitering ordinance that prohibits begging is unconstitutional on its face.

C. To the Extent That the Ordinance is Not Unconstitutional on its Face, it Must be Narrowly Construed.

The portion of the ordinance prohibiting loitering "in such a manner as to impede or hinder the passage of pedestrians or vehicles, or in such manner as to interfere with or interrupt the conduct of business" might be constitutional, but only if strictly construed. A court should "narrowly construe a statute where such a construction is reasonable and avoids a constitutional infirmity." *Virginia Soc. for Human Life, Inc. v. Caldwell*, 256 Va. 151, 157, 500 S.E.2d 814, 817 (1998). Certainly, the county may prohibit individuals from *actually* impeding traffic or *actually* interrupting business. The ordinance should be read only to prohibit this specific conduct, and the Commonwealth must be required to provide proof beyond a reasonable doubt that such interfering conduct took place. The ordinance should not be read to prohibit conduct that might, possibly, under certain circumstances impede or interfere. Such a construction would be unconstitutionally vague because it would not provide adequate notice as to what actual conduct is prohibited.

CONCLUSION

For the foregoing reasons, the defendants respectfully request the Court to dismiss the charges against them.

Respectfully submitted,

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