

IN THE CIRCUIT COURT SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA 95-1313
DIVISION: 55
(L.T. Case No.: MM95-1808, MM95-1764)

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING MOTION, AND, IF
FILED DISPOSED OF.

ROGER G. JOLLEY,
Appellant,

VS.

STATE OF FLORIDA,
Appellee.

FILED
MAY 15 PM 4:48
CIRCUIT COURT

On Appeal from the County Court
In and for St. Johns County, Florida
Honorable Peggy E. Ready, Division: 65

OPINION

Appellant, Roger G. Jolley, was convicted of Solicitation of Money in violation of City of St. Augustine Ordinance 95-12. He appeals from the Judgment and Sentence of guilt entered August 10, 1995 on the grounds that the ordinance is unconstitutional.

On March 14, 1995, the City of St. Augustine passed Ordinance 95-12 that prohibits street entertainment for the purpose of solicitation of money, donations, subscriptions, contributions or alms. "Street entertainment" is defined as "activities conducted in the City right-of-way which are not permitted by the City, such as, but not limited to, musicians, clowns, balloon manipulators, face painters, and portrait-scene artists." The ordinance does not prohibit "artistic performances not involving the acceptance of money, donations, contributions or alms." Also exempt from the ordinance is public speaking, distribution of written material, and solicitation for charitable, religious, or political causes.

Before enacting the ordinance the City of St. Augustine held public hearings at

which the City Commission heard testimony from witnesses, both for and against the ordinance. Some of these witnesses described the problems caused by street entertainers on St. George Street and the ordinance lists the purposes to be served by the regulation of street entertainers. These purposes are to avoid intimidation and harassment of visitors to the City by street entertainers who solicit money, to eliminate crowds that block pedestrian movement on St. George Street, and to promote access to places of business on St. George Street.

The First Amendment to the United States Constitution and Article 1, Section 4 of the Florida Constitution protect the rights of persons to express themselves. Wyche v. State, 619 So.2d 231 (Fla. 1993). The degree of protection afforded by the First Amendment depends upon whether the street entertainment prohibited by the ordinance is commercial or noncommercial speech. Commercial speech has been defined as speech which does no more than propose a commercial transaction. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 48 L. Ed. 2d 346, 96 S. Ct 1817 (1976), quoting Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 385, 37 L.Ed.2d 669, 93 S.Ct 2553 (1973). The practice of "barking" or approaching and soliciting customers for business purposes is commercial speech. Sciarrino v. City of Key West, 867 F.Supp 1017 (S.D. Fla. 1994).

The displaying of advertisements on an electric billboard on a vessel has been described as "expression related solely to the economic interests of the speaker and its audience" and therefore classified as commercial speech. Supersign of Boca Raton v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir 1985). However, the fact that speech is economically motivated, by itself, does not make such speech commercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 77 L.Ed.2d 469, 103 S.Ct 2875 (1983); Bigelow v. Virginia, 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct 2222 (1975).

In Goldstein v. Town of Nantucket, 477 F.Supp 606, 609 (D. Mass. 1979), the Court found that a street musician's acceptance of contributions from passersby during public performances did not diminish his First Amendment protections and did not broaden the town's ability to impose regulations on the use of its sidewalks for public expression. The Court in Goldstein cited the Supreme Court's decision in Va. St. Bd. of Pharm. v. Va. Cit.

Cons. Council, 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), in which the Court explained that speech "is protected even though it is carried in a form that is 'sold' for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money."

Even begging has been afforded First Amendment protection. See Ledford v. State, 652 So.2d 1254 (Fla. 2d DCA 1995); C.C.B. v. State, 458 So.2d 47 (Fla. 1st DCA 1984); Loper v. New York City Police Dept., 999 F.2d 699 (2d Cir. 1993).

The Court finds street entertainment for the purpose of solicitation of money, donations, subscriptions, contributions or aims is not commercial speech. This speech is not expression related solely to the economic interests of the entertainer and his or her audience. The performances may be economically motivated but there is no overt effort at solicitation other than a sign or receptacle for money and not every member of the audience pays for the performance. There is no suggestion in the record that street entertainers directly approach people in the manner of a barker. This expression proposes no commercial transaction because the audience is provided the entertainment whether they pay or not. There is nothing in the record that shows any commercial content in any of the performances. It is entirely entertainment.

The ordinance prohibits street entertainment on a designated portion of St. George Street, a public street. Because the ordinance regulates speech in a public forum, it is subject to strict constitutional scrutiny. The ordinance must be narrowly drawn to achieve a compelling governmental interest, the regulation must be reasonable, and the viewpoint neutral. Ledford v. State, 652 So.2d 1254 (Fla. 2d DCA 1995).

The ordinance does not achieve the purposes for which it is deemed necessary. The ordinance creates three categories of people - street entertainers who solicit money, street entertainers who solicit money for a religious, charitable, or political purpose, and street entertainers who play for free. It only prohibits only one category though all three categories perform in the same manner and all three categories produce the results the ordinance aims to prevent. For instance, it would be lawful under the ordinance to have one hundred street entertainers playing music on St. George Street without accepting donations and drawing a

crowd of hundreds of people. It would be unlawful if there were only one musician playing to one person and collecting money for a purpose other than a religious, charitable, or political one. This distinction bears no relationship to the particular interests the city has asserted.

The ordinance singles out a group of people and prevents those persons from exercising their free speech while it allows other persons to do the same thing in the same place if they solicit for charitable, religious, or political purposes or if they play for free. The ordinance makes this distinction no matter what effect the lawful performances may have on the flow of pedestrian traffic or access to places of business and no matter how intimidating those performers may be to visitors.

The ordinance is unconstitutionally vague. Whether or not the ordinance prohibits street entertainment depends upon how the money collected is to be spent. It leaves open to the police the task of differentiating between street entertainers who have as their purpose the solicitation of money for profit and those who solicit for charitable, religious or political causes. The ordinance provides no guidance to assist the police in making this determination.

City of St. Augustine Ordinance 95-12 is unconstitutional on its face. Appellant's conviction is reversed and his sentence vacated.

DONE AND ORDERED in Chambers at St. Augustine, St. Johns County, Florida, this 15th day of March, 1996.



Richard O. Watson, Circuit Judge

Copies to ~~DL~~ 3/15/96

Thomas E. Cushman, Esq.
Gregg Steinberg, Esq., Assistant State Attorney
Randall J. Silverberg, Esq.
Honorable Peggy E. Ready, County Court Judge

CIVIL

CODE SLIP TO CASHIER

Catalog Code	Description	Fees	Amou Dce
C50	Copies	\$1.00	4.00
C31	Additional Transfer of Lien	\$7.50	
C51	Certified Copies	2.00	
C34	Exec Serv Chrg-Foreign Jdgmnt	42.00	
C05	Fax Fee	\$1.80	
C06	Fax Tax	\$0.20	
C20	Foreclosure Sale Fee	70.00	
215	Gmshmnt-Reg Fee-Circuit Civil	\$103.00	
350	Gmshmnt-Filing Fee Circuit Civil	\$ 25.	
C23	Mediation-Circuit Civil=>\$50K	\$80.00	
C24	Mediation-Circuit Civil<=\$50K	\$40.00	
C21	Out Of State Attorney - Circuit Civil	\$100.00	
080	Partial Payment Fee	\$25.00	
C50	Record Search	2.00/yr	
243	Reopen Fee - Circuit Civil	\$50.00	
194	Sheriff Fee	\$20.00	
210	Subpoena Fee	2.00	
C50	Bond Approval	8.50	
NOTES:			
C59	Summons	10.00	
C58	Crossclaim	525.00	
			4.00

13:15 TRF
 13:15 TRF
 FL 20064-41037
 20-0005

501
 13-0054888

le

Entry Method: Swiped

\$ 1.00

13:34:15

Appr Code: 341554

and Date

SEE YOU!