Marquette Law Review

Volume 23
Issue 4 *June 1939*

Article 6

1939

Constitutional Law - Validity of Handbill Ordinance

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RECENT DECISIONS

Constitutional Law—Validity of Handbill Ordinance.—The defendant, member of a butchers' union, was picketing a store during a labor dispute. He distributed handbills containing a list of the strikers' grievances to passing pedestrians. The person receiving the handbill ordinarily threw it upon the sidewalk or upon the adjacent street. Defendant was prosecuted under a city ordinance which declared it "unlawful for any person . . . to circulate or distribute any circulars, handbills, cards, dodgers, or other printed matter . . . in or upon any sidewalk, street, or alley within the city of Milwaukee." The defendant contended that this was a violation of United States Constitution, Fourteenth Amendment, as to freedom of speech and freedom of the press. *Held,* Defendant's conviction affirmed. This was a reasonable restriction of the defendant's rights, and since the ordinance was not enforced in a discriminatory manner, it was constitutional. *City of Milwaukee* v. *Snyder* (Wis. 1939) 283 N.W. 301.

An ordinance may be unconstitutional because it is enforced in a discriminatory manner. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 Sup. Ct. 1064 (1885). In that case, an ordinance regulating the licensing and construction of laundries was enforced against Chinese and not against white persons.

There is nothing in the Fourteenth Amendment of the Federal Constitution referring to the freedom of speech or freedom of the press, but it has been well established that freedom of speech and freedom of the press mentioned in the First Amendment of the Federal Constitution are among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states. *Gitlow* v. *New York,* 268 U.S. 652, 69 L.ed. 1138 (1923); *Herndon* v. *Lowery,* 301 U.S. 242, 81 L.ed. 1066 (1936); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 80 L.ed. 660 (1935); *State of Alabama* v. *Patterson,* 287 U.S. 45, 77 L.ed. 158 (1932). This doctrine was reiterated in *Lovell* v. *City of Griffin* (Ga. 1938) 69 L.ed. 1138, where it was further said that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the Fourteenth Amendment.

The right of freedom of speech and freedom of the press is not an absolute right but is subject to the police power of the state. *Gitlow* v. *People of State of N. Y.,* 278 U.S. 652, 69 L.ed. 1138 (1923). *Whitney* v. *California,* 274 U.S. 357, 71 L.ed. 1095 (1925). However, the scope of the state's police power has been held by the United States Supreme Court not a mere pretext or "another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint," and to be sustained on the grounds of the police power. "Where the protection of the federal constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?" *Lochner* v. *New York,* 198 U.S. 45, 25 Sup. Ct. 539, 49 L.ed. 937 (1905).

The decision in the principal case is based on *City of Milwaukee* v. *Kassen,* 203 Wis. 383, 234 N.W. 352 (1931) where, under substantially the same set of facts, the same ordinance was held constitutional if not enforced in a discriminatory manner. The court adopted the interpretation of the ordinance as set out in *Mittleman* v. *Nash Sales Inc.,* 202 Wis. 577, 232 N.W. 527 (1930), where it was said that the purpose of the ordinance was to "prevent an unsightly, untidy, and offensive condition of the sidewalk."

The Wisconsin and the Nebraska Courts agree on the object, the interpretation, and the constitutionality of such a statute. Thus the Nebraska court has said that the object of such a statute is to "promote the cleanliness and safety of the municipality" and a reasonable police regulation is not invalid simply because it may incidentally affect the exercise of some right guaranteed by the constitution. *In re Anderson,* 69 Neb. 686, 96 N.W. 149 (1903).

The Michigan and Illinois courts do not agree with Wisconsin and Nebraska. In Michigan, an ordinance read "no person shall himself, or by another . . . circulate, distribute or give away circulars, handbills or advertising cards of any description upon any of the public streets and alleys of said city." Upon a set of facts similar to the principal case, the constitutionality of the ordinance was questioned, and it was held to be an unreasonable and unwarranted restriction of freedom of speech and the press. *People* v. *Armstrong,* 73 Mich. 288, 41 N.W. 275 (1889). This case was cited with approval and followed in *Chicago* v. *Schultz,* 341 Ill. 208, 173 N.E. 276 (1930).

The Wisconsin Supreme Court was aware of the Michigan and the Illinois decisions when the *Kassen* case, supra, was decided and in that connection said "the difference between the Illinois case is probably irreconcilable and proceeds from a difference in the interpretation of the ordinance." The Wisconsin court says that only such distribution as would litter up the streets or public property is prohibited and the Illinois court says that the ordinance would prohibit the distribution of all printed matter, including newspapers.

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Criminal Law—Forcibly Retaking Money Lost at Gambling.—The defendant was charged by information with having committed the crime of robbery by feloniously taking from another the sum of $198.00, accomplished by means of force and fear.

During the several months prior to the date of the alleged offense the defendant had frequented a gambling parlor and in all had lost approximately $1,000.00. On the night of the alleged robbery the defendant had gambled and lost $55.00

Under the method of "pay-off" in this particular place, the holders of winning tickets were required to cash them by presenting these tickets to one Whitcomb, who deducted four per cent as a discounting charge. Whitcomb moved back and forth between the gambling parlor and his shop across the hall and carried money from the former to the latter, sometimes in loose bills and other times in a tin box. He kept a separate fund in a box in his shop from which he paid the winners. It was from that box that the defendant took the sum of $198.00, which was its entire cash contents. It is undisputed that the defendant was armed with a pistol and that he accomplished his purpose by putting Whitcomb in fear.

The defendant was tried on his plea of not guilty and convicted of robbery in the first degree. He appealed from the judgment of conviction and from the order denying his motion for a new trial.

On appeal, *held,* reversed, the element of felonious intent essential to the crime of robbery is lacking even in the absence of a statute giving to the loser a right of action to recover money so lost, and even though the money reclaimed may not have been the identical money lost by him. *People* v. *Rosen* (Cal. 1938), 78 P. (2d) 727.