Michigan Law Review

Volume 55 | Issue 7

1957

Municipal Corporations - Police Power - Constitutional Validity of Curfew Ordinance

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MUNICIPAL CORPORATIONS — POLICE POWER — CONSTITUTIONAL VALIDITY OF CURFEW ORDINANCE — Appellant-petitioner was charged with a violation of a city ordinance[1] making it a misdemeanor to assist any minor under the age of seventeen to violate the curfew laws. The curfew ordinance prohibits minors under the age of seventeen from being in any public place between 10 P.M. and 5 A.M. unless accompanied by parent or guardian, or unless the presence of the minor is connected with and required by some legitimate business, trade, profession or occupation in which the minor is engaged. Petitioner moved to dismiss the complaint at the preliminary hearing on the grounds that the ordinance was an unreasonable interference with personal liberty and was therefore in violation of the Cali-

[1] Section 684a Chico Municipal Code.

fornia Constitution and the Fourteenth Amendment to the Constitution of the United States. Upon denial of this motion, petitioner sought a writ of prohibition which was also denied. On appeal, *held,* denial of writ of prohibition reversed. The coverage of the ordinance has no real or substantial relationship to its purpose of controlling juveniles during the late hours of the night and accordingly is an unconstitutional invasion of personal liberties.[2] *Alves v. Justice Court of Chico Judicial District,* (Cal. App. 1957) 306 P. (2d) 601.

Municipal corporations may enact regulatory ordinances in the exercise of their police power.[3] Quite often the exercise of this police power involves an impairment or restriction upon the personal liberty of individuals.[4] When a question involving individual liberty arises, the problem becomes one of reconciling the liberty of the individual with the welfare of the public generally.[5] A decision by the court[6] in such a case that the exercise of the police power is proper means that due process of law has been observed.[7] One of the requirements of due process of law with respect to these ordinances is that they must be reasonable, i.e., they must not be arbitrary or capricious, and they must have a reasonable tendency to protect and safeguard the public health, safety, morality and general welfare.[8] Whether these requirements have been met was the problem presented in the principal case. In approaching the problem the court refused to construe the "business activity" exception as meaning all legitimate conduct, noting that if that construction were proper it still would be of little effect since such activity, by the terms of the ordinance, would have to be "required" before it would constitute an exception.[9] After limiting the "business activity" phrase to economic employment, it was simple for the court to illustrate that many forms of socially acceptable conduct and amusement would be prohibited by this ordinance.[10] A ban so broad was not necessary to achieve the purpose of the ordinance and so it was found unconstitutional. Apparently, only two cases prior to

2 Although the court states that the reason for the unconstitutionality of the ordinance is the lack of a rational relationship, it would seem that the real reason is the arbitrariness and unreasonableness of the means selected to reach the desired end.

3 Clements v. McCabe, 210 Mich. 207, 177 N.W. 722 (1920); Lamere v. Chicago, 391 Ill. 552, 63 N.E. (2d) 863 (1945).

4 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §24.05, p. 449 (1949).

5 State v. Hill, 126 N.C. 1139, 36 S.E. 326 (1900).

6 A determination by the legislature (or city council) of what constitutes a proper exercise of the police power is not conclusive, for the courts are the final arbiters of what is reasonable under the circumstances. Meyer v. Nebraska, 262 U.S. 390 (1923); People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934).

7 Chambers v. Bachtel, (5th Cir. 1932) 55 F. (2d) 851.

8 Senefsky v. Huntington Woods, 307 Mich. 728, 12 N.W. (2d) 387 (1943); Graff v. Priest, 356 Mo. 401, 201 S.W. (2d) 945 (1947).

9 Had the court construed the "business activity" phrase to mean "legitimate conduct" the ordinance still might have been held "void for vagueness." See generally Lanzetta v. New Jersey, 306 U.S. 451 (1939); People v. O'Gorman, 274 N.Y. 284, 8 N.E. (2d) 862 (1937).

10 Such activities as going to or coming from library study, games, dances or other school activities were suggested by the court. Principal case at 605.

this one have considered the constitutionality of curfew ordinances as applied to minors.[11] A local Texas ordinance which prohibited persons under the age of twenty-one from being on the streets after 9 P.M. was held to be an unconstitutional invasion of personal liberties.[12] Although an exception was allowed for a minor seeking a physician, the court pointed out, as in the principal case, that there were many other legitimate reasons why a minor might be away from home at nine o'clock. In another case, however, an ordinance which prohibited minors under the age of sixteen from loitering or remaining on any public street after nine was upheld.[13] The court construed the ordinance to apply only to minors who were loitering and not to those who were in the process of going to and from places of legitimate activity.[14] Thus it would appear that the ordinance in that case was a loitering ordinance and not a general curfew law. Loitering ordinances have been generally upheld, but it is important to note that their prohibitions are usually directed not against mere idleness but against loitering for illegal or unlawful purposes.[15] Without this restriction to unlawful or illegitimate purposes it is doubtful that even a loitering ordinance would be upheld.[16] It is admittedly difficult to define

[11] In United States v. Gordon Kiyoshi Hirabayashi, (W.D. Wash. 1942) 46 F. Supp. 657, a curfew ordinance was upheld. The ordinance applied to those of Japanese ancestry in a particular military area. The court said that there must be extraordinary reasons to justify a curfew even in military areas, but that in this case such conditions could be said to have existed since Pearl Harbor.

[12] Ex parte McCarver, 39 Tex. Cr. R. 448, 46 S.W. 936 (1898).

[13] People v. Walton, 70 Cal. App. (2d) 862, 161 P. (2d) 498 (1945).

[14] Similar reasoning in upholding an ordinance can be found in Portland v. Goodwin, 187 Ore. 409, 210 P. (2d) 577 (1949). Here the ordinance made it unlawful for any person to roam or to be upon any street or public place between the hours of 1 and 5 a.m. without having and disclosing a lawful purpose. On re-hearing the court declared that it held the ordinance valid because the ordinance only prohibited going on the streets for unlawful purposes, and thus walking for social purposes and exercise was not prohibited.

[15] In Arizona v. Starr, 57 Ariz. 270, 113 P. (2d) 356 (1941), an ordinance prohibiting any person from loitering without a legitimate reason within 300 feet of public school grounds was upheld. The court noted that the ordinance did not exclude all loitering but only that which did not stem from legitimate reasons. The court found a desirable purpose in protecting school children from the possible corrupt influences exerted by those who loiter. Similarly, an ordinance which declared that every person who roams about from place to place without any lawful business is a vagrant, was held to be constitutional in In re Cutler, 1 Cal. App. (2d) 273, 36 P. (2d) 441 (1934). The court said there was an obvious distinction between idleness and roaming, especially roaming without any lawful business. Because of this latter qualification the ordinance was sustained. See, also, Guidoni v. Wheeler, (9th Cir. 1916) 230 F. 93; Portland v. Goodwin, note 14 supra.

[16] In St. Louis v. Gloner, 210 Mo. 502, 109 S.W. 30 (1908), an ordinance making it unlawful to lounge, stand and loaf around and about public streets during the day or night was held unconstitutional. The court said that although a city can regulate the streets it cannot do so in a way which interferes with the personal liberty of the citizen. And in In re McCue, 7 Cal. App. 765, 96 P. 110 (1908), in dicta the court said that it is not competent for the legislature to denounce mere inaction as a crime without some qualification. Finally, the case of Territory of Hawaii v. Anduha, (9th Cir. 1931) 48 F. (2d) 171, held that a statute providing that any person who should habitually loaf, loiter or idle on the street or public place should be guilty of a misdemeanor was invalid. The court in so holding frankly noted, at 173, "It is a matter of common knowledge, of which we must take judicial cognizance, that the majority of mankind spend a goodly part of

the extent to which an individual's freedom of locomotion may properly be limited in the interests of the general welfare.[17] It would seem, however, that since vagrancy and some types of loitering can be prohibited in the reasonable exercise of the police power,[18] a properly framed curfew ordinance should also be upheld.[19] If a serious threat of juvenile delinquency could be shown to stem from, or at least encouraged by, the presence of minors on the streets at night,[20] a carefully drafted curfew restriction which made appropriate allowance for necessary activity could well be sustained.[21]

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their waking hours in whiling or idling the time away, and much of that time is spent on public streets. . . ."

[17] Pinkerton v. Verberg, 78 Mich. 573, 44 N.W. 579 (1889); Ex parte Smith, 135 Mo. 223, 36 S.W. 628 (1896).

[18] See note 15 supra.

[19] See the comment on the proposed Philadelphia curfew law in 1 VILL. L. REV. 51 (1956).

[20] There seems to be no dispute that "minors" is a reasonable classification for regulatory purposes. People v. Walton, note 13 supra; Commonwealth v. Fisher, 27 Pa. Super. 175, affd. 213 Pa. 48, 62 A. 198 (1905).

[21] Numerous cities in Michigan have curfew ordinances although their constitutionality is not yet settled. For a sampling of the different types of these ordinances and the various conditions and exceptions they contain see CURFEW ORDINANCES, Michigan Municipal League, No. 3 (1950).