IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

RENETHA WYCHE

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

Case No.: 77,440

ON APPEAL FROM A CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

ANSWER BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

Renetha Wyche was the Appellant in the Second District Court of Appeal and is the Petitioner in this appeal. The State of Florida was the Appellee in the Second District Court of Appeal and is the Respondent in this appeal.

The City of Tampa's Loitering for Prostitution Ordinance, formerly Sections 24-61(A)(10) and, later, 24-96(j), City of Tampa Code, is presently codified as Section 14-76(2), City of Tampa Code. This Ordinance will be referred to in this brief as Section 14-76(2), City of Tampa Code, or as Tampa's Loitering for Prostitution Ordinance.

The City of Tampa's Loitering for Drugs Ordinance, which is at issue in Holliday v. City of Tampa and State of Florida, Supreme Court of Florida Case No. 78,170, formerly Section 24-43, City of Tampa Code, is presently codified as Section 14-62, City of Tampa Code. That Ordinance will be referred to in this brief as Section 14-62, City of Tampa Code, or as Tampa's Loitering for Drugs Ordinance.

STATEMENT OF THE CASE AND FACTS

The Respondent concurs with Petitioner's Statement of the Case. The Respondent also concurs with Petitioner's Statement of the Facts, with the following exceptions.

The Respondent disagrees with Petitioner's statement that the police officers beat her at the station when she would not talk about the robbery, that a booking picture showed that they blackened her eye and that they laughed when hospital staff removed her clothes. The Respondent also states the following facts from the arresting officers incident report and continuation letter.

The Petitioner was initially observed by the police officers at 9 p.m. on North Nebraska Avenue/East 12th Avenue, a high prostitution area, dressed in only a black lingerie lace "teddy," brown high heel shoes and a red head band. The officers then set up a position of surveillance and observed the Petitioner slowly walking north bound on the east side of North Nebraska Avenue. The Petitioner then attempted to flag down three vehicles. The Petitioner stopped at East 13th Avenue and approached a car and conversed first through the driver's window side then walked around the rear of the vehicle and conversed for several moments on the passenger side. The Petitioner then stepped away from the vehicle and again began walking slowly north bound on North Nebraska Avenue. The Petitioner then observed an individual(witness) as he **was** slowly driving his vehicle north bound on North Nebraska Avenue. The Petitioner began frantically waving her arms in an attempt to wave over the witness. The

witness stopped his vehicle in the north bound curb lane of North Nebraska Avenue and the Petitioner entered his vehicle. The witness then proceeded north bound until the officers activated their police lights at which time the witness pulled off the road at North Nebraska Avenue/East 21st Avenue. The officers interviewed both subjects. The witness informed the officers that he was driving on North Nebraska Avenue looking for a prostitute. He stated that he saw the Petitioner waving at him as he was driving north bound on North Nebraska Avenue. He said he stopped his vehicle and the Petitioner gat into his vehicle. He stated that he had "dated" the Petitioner before (sex for money) and that he planned to "date" her tonight. He stated that the Petitioner wanted to eat before they went somewhere and got very nervous when she observed the police behind his vehicle. He stated he saw the police lights and pulled off the road. The Petitioner stated to the officers that she was a known prostitute but she was only going to eat dinner with the witness. When the officers afforded the Petitioner an opportunity to explain her conduct, she told them she was going to a funeral.

SUMMARY OF ARGUMENT ON APPEAL

Section 14-76(2), City of Tampa Code **is constitutional.** The ordinance is neither vague nor overbroad. The ordinance is specific, clear and unambiguous such that men of reasonable understanding need not ***guess*** at its meaning and to provide police officers with guidelines to prevent arbitrary enforcement of the ordinance.

The ordinance is not overbroad. It is written sufficiently narrow so as not to encompass protected speech or associations, while serving as the City of Tampa's least intrusive means ta achieve the legitimate government goal of curbing illegal street level prostitution, which threatens our public safety and is a breach of peace.

The ordinance was patterned after Section 856.021, Florida Statutes, the State of Florida's loitering law. The **ordinance** is actually **more** narrowly written than the general loitering law because the ordinance proscribes a specific type af loitering, loitering for the purpose of prostitution. Furthermore, all the issues raised by Petitioner in this appeal have been resolved by this Court in State v. **Ecker**, 311 So.2d 104 (Fla. 1975), cert. denied 423 U.S. **1019, 96** S.Ct. 455, 46 L.Ed.2d 391 (1975), which found the State loitering law constitutional. Similarly, Section 14-76(2), City of Tampa Code, is constitutional.

ISSUE

WHETHER 14-76(2), CITY OF TAMPA CODE, IS CONSTITUTIONAL?

ARGUNENT

SECTION 14-76(2), CITY OF TAMPA CODE, IS CONSTITUTIONAL?

A. Presumption *of* Constitutionality and burden of proving unconstitutionality.

The State Courts of Florida have consistently held with every enactment of legislation, whether it be statewide or local, there is an accompanying presumption of constitutionality. In Scullock v. State, 377 So.2d 682 (Fla. 1979), this Court stated, "There is a presumption of constitutionality inherent in any statutory analysis..." Id. at 683. See also State v. Bales, 343 So.2d 9 (Fla. 1977); Gardner v. Johnson, 451 So.2d 477 (Fla. 1984); State v. Wilson, 464 So.2d 667 (Fla. 2d DCA 1985). Further, in State v. Gale Distributors, 349 So.2d 150 (Fla. 1977), this Court held:

> This court is committed to the proposition that it has a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with the Constitution. Id. at 153.

See also Smith v. Butterworth, 678 F. Supp. 1552 (M.D. Fla. 1988); Griffin v. State, 396 So.2d 152 (Fla. 1981); L.L.N. v. State, 504 So.2d 6 (Fla. 2d DCA 1987).

Because of this constitutional presumption, one asserting the unconstitutionality of a statute has the burden of demonstrating clearly that the statute is invalid. See Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974); Peoples Bank of Indiam

River County v. State Department of Banking and Finance, 395 So.2d 521 (Fla. 1981); Department of Business Regulation v. Smith, 471 So.2d 138 (Fla. 1st DCA 1985). As stated by this Court in State v. Ocean Highway and Port Authority, 217 So.2d 103 (Fla. 1968), to disturb legislative acts on constitutional grounds, "invalidity must be demonstrated beyond a reasonable doubt." Id at 105. Such is the presumption and burden which exists in this appeal.

In essence, not only does the burden rest on the petitioner making constitutional challenges, but the Court must also apply the accepted judicial **principle** of construing the wishes of the legislative body in a manner that would make the legislation constitutionally permissible. See State v. Ecker, 311 So.2d 104, (Fla. 1975), cert. denied **423** U.S. 1019, **96** S.Ct. 455, **46** L.Ed.2d 391 (1975); State v. Deese, 495 So.2d 286 (Fla. 2d DCA 1986).

B. Section 14-76(2) of the Tampa City *Code* is not unconstitutionally vague, and does not allow for arbitrary selective enforcement by the Tampa Police.

Undeniably, a statute or ordinance is vague when "men of common understanding and intelligence must necessarily guess at its meaning." State v. Rodriquez, 365 So.2d 157, 158, **159** (Fla. 1978); Scullock v. State, 377 So.2d 682 (Fla. 1980). "On the other hand, a statute is not void if its language conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices." Hitchcock v. State, 413 So.2d 741, 747, (Fla. 1982), citing United States v. Petrillo, 332 U.S. 1 (1947). *See* also State v. Wilson, supra.

In the landmark decision of Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), the United States Supreme Court noted the vice of vagueness to be not only the inability of the public to know what conduct is prohibited, but also the statute's failure to provide explicit standards for those who apply and enforce the law to prevent arbitrary and discriminatory enforcement. See also, Ciccarelli V. Key West, 321 So.2d 472 (Fla. 1975). The questions of adequate warning and arbitrary enforcement, therefore, are the key issues which must be resolved with respect to Tampa's Loitering for Prostitution Ordinance.

To draft a statute or ordinance with narrow particularity is to risk nullification by easy evasion of the legislative purposes; therefore, detailed specifications of the acts or conduct prohibited is not required. See Smith v. State, 237 So.2d 139 (Fla. 1970). By the same token, generality of terms within an ordinance do not, in and of themselves, render the statute vague. This Court in State v. Reese, 222 So.2d 732, 735 (Fla. 1969), stated that "lack of precision is not itself offensive to the due-process requirement" that a legislative act prohibiting certain conduct convey sufficient definite warning as to the prescribed conduct when measured by common understanding and practice. Therefore, the determination to be made is whether the statutory message is sufficient on its face to convey to the public and law enforcement officials, the types of conduct proscribed. Undoubtedly, there are instances in which arrests are made pursuant to a statutory provision, yet in violation of a constitutionally protected right, but this does not render the

statute unconstitutionally vague. This Court noted in the case of State v. Dye, 346 So.2d 538, 541 (Fla. 1977) citing Roth v. United States, 354 U.S. 476 (1957):

> ...The Constitution does not require impossible standards"; all that is required is that the language convey sufficiently definite warnings as ta the proscribed conduct, when measured by common understanding and practices..." That there may be marginal cases in which it is difficult to determine the side of the line upon which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense.

See also U.S. v. Harris, 347 U.S. 612 (1954). Stated simply, questions of vagueness are not synonymous with questions of guilt. The evidence of guilt in any particular case is irrelevant to a determination of the constitutionality of the statute on its face. That there may be marginal cases in which it is difficult to determine whether certain conduct is criminal is not sufficient reason to declare the ordinance unconstitutionally vague. This Court noted in the case of State v. Ecker, supra:

> While the statute might be unconstitutionally applied in certain situations, this is no ground for finding the statute itself unconstitutional.

In City of Milwaukee V. Wilson, 291 N.W.2d 452 (Wis. 1980), the Supreme Court of Wisconsin, in upholding as constitutional Milwaukee's loitering for prostitution ordinance, which is similar to Tampa's Loitering for Prostitution Ordinance and Loitering for Drugs Ordinance, stated:

> This is not to say that a person involved in constitutionally protected activities or other innocent conduct could not be arrested or charged under the city's ordinance. It is certainly conceivable that a police officer could mistakenly, or even willfully, arrest for loitering with intent to

> solicit for prostitution a person whose conduct was entirely innocent. But this would not be a proper application of the ordinance, and the fact that a law may **be improperly applied** or even **abused** does not render it constitutionally invalid. Id. at 458.

See also City of Seattle v. Slack, **784** P.2d **494,497** (Wash. **1989).**

Therefore, the question is not whether there are isolated instances of unconstitutional application; rather, **the** issue of vagueness concerns:

> (1) Whether the ordinance is sufficiently specific so that men of reasonable understanding need not guess at its meaning; and
>
> (2) Whether the ordinance has sufficient guidelines in that it does not permit arbitrary and **selective arrests** by **the** police.

Both criteria are satisfied with respect to the Loitering for Prostitution Ordinance in the Tampa City Code. The wording of the first sentence of Section 14-76(2) is clear and unambiguous. The offense defined consists of two essential elements: (1) The overt act of loitering in a public place and (2) under circumstances manifesting the purpose(intent) of inducing, enticing, soliciting, or procuring another to **commit** an act **of** prostitution. The element of intent gives meaning to the element of loitering and is a rational basis for proscribing such acts as harmful conduct. Both elements of the offense must be **proved.**

According to Black's Law Dictionary, **849** (5th **Ed. 1979),** "loiter" **is** defined: "To be dilatory; to be slow in movement; **to** stand around or move slowly about; to stand **idly** around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind." Although loitering has been held ta be a term of common usage with a meaning reasonably understood by men of common

intelligence, a prohibition of loitering alone would be unconstitutionally vague and overbroad, since individuals could stand or sit only at the caprice of police officers. Florida case law developed the requirement that a criminal enactment, when purporting to proscribe vaguely described activity, such as loitering, must modify or circumscribe the vaguely described activity by reference to specific or **non-vague conduct.**

This Court clarified the issue in the case of State **v.** Ecker, supra, in which the state loitering statute §856.021, Florida Statutes, was held constitutional. The Court held:

> **We readily recognize** that **if** the statute broadly proscribed loitering or idling without more...it would be unconstitutional. On the other hand, it is recognized that if a statute proscribes loitering that threatens public safety or a breach of the peace, it can withstand constitutional attack. Id. at 107.

Notably, Tampa's Loitering for Prostitution Ordinance, which is a mirror image of Tampa's Loitering for Drugs **Ordinance,** was challenged on similar constitutional grounds, in 1979, in the County Court of Hillsborough County, Thirteenth Judicial Circuit in State v. Davis, Case No. 79-8472, Division €3, rev'd State v. Davis, Case No. 79-8445, Circuit Court, Division E, cert. **denied,** Fla. 2d DCA, Case No. 80-1987. See attachment "B". In reversing a ruling by the County Court that the prostitution-loitering ordinance is unconstitutional, the Circuit Court held, in 1980, that the constitutional issues presented in State v. Davis had been resolved in State v. Ecker, supra, **and** other cases. In the present case, the Second District Court of Appeal of Florida,

in Wyche v. State, 573 So.2d 953 (Fla. 2d DCA 1991), held this same ordinance constitutional. The 2nd DCA in Wyche stated:

> On appeal, the defendant argues that the city ordinance prohibiting loitering for the purpose of prostitution is facially unconstitutional. Although a federal district court has held a similar Jacksonville ordinance unconstitutional, the Florida Supreme Court has repeatedly upheld a less specific state loitering statute. Section 856.021, Florida Statutes (1989); compare Johnson v. Carson, 569 F.Supp. 974 (M.D.Fla. 1983) with Watts v. State, 463 So.2d 205 (Fla. 1985) and State v. Ecker, 311 So.2d 104 (Fla.), cert. denied sub. nom., Bell v. Florida, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975). Even if we are not constrained to follow the supreme court's decision, we agree with the supreme court's analysis and uphold the facial constitutionality of this ordinance. Id at 954-955.

Similarly, Tampa's Loitering for Drugs Ordinance, Section 14-62, was held constitutional, in a previous case, in Rogers v. State, case no. 89-17884, Circuit Court, Division X, cert. denied, Fla. 2d DCA, case no. 90-02204. See attachment "C".

In terms of specificity, Tampa's Loitering for Prostitution Ordinance is much more explicit as to the conduct proscribed than that delineated within the State Loitering Statute which has consistently been upheld and certiorari denied by the United States Supreme Court. The Tampa City Code delineates with extraordinary detail how loitering with a manifested purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution is a crime; therefore, the ambiguity or generality which exists with loitering alone is not present in Tampa's Loitering for Prostitution Ordinance.

Additionally, there is no ambiguity with the element of intent. The overt act of loitering alone, is not punishable, nor is the unlawful intent of soliciting punishable. There must be a union of the overt act of loitering with the intent/purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution. Tampa's Loitering for Prostitution Ordinance clearly illustrates instances in which this intent *may* be manifested and which an observing police officer may use to help such officer establish probable cause that a violation of the ordinance has occurred or is occurring. These activities are:

> That such person is a known prostitute, **pimp,** sodomist, performer of fellatio, performer of cunnilingus, masturbation for hire or panderer and repeatedly **beckons** to, stops or attempts to stop or engages passers-by in conversation or repeatedly stops or attemps to stop motor vehicle operatars by hailing, waiving **of** arms or **any** bodily gesture for the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering or other lewd or indecent act. Section 14-76(2), City of Tampa Code.

Of course, these examples are not exclusive; but rather demonstrative of specific circumstances when the unlawful intent may be indicated.

Because of the ordinance's specificity with respect to the types of conduct indicating an unlawful intent, selective **and** arbitrary enforcement is not material as alleged. Section 14-76(2) does not make the accused's guilt or innocence depend on the subjective conclusions of the arresting **officer.** The U.S. **Supreme** Court said it best in the case **of** Terry V. Ohio, 392 U.S. 1, **21, (1968):**

> The police officer must be able to point to specific and articulate facts which taken together with rational inferences from those facts; reasonably warrant... [a finding that the accused is loitering and manifesting the purpose of illegally using, possessing, transferring or selling any controlled substance as that term is defined by Florida Statutes.]

Section 14-76(2), City of Tampa Code, is clear and unambiguous. It provides assistance to observing officers in determining whether said intent is manifested by a possible offender. The Code provision provides ascertainable standards governing arrest and conviction for even-handed administration of justice. The ordinance forbids loitering in a manner and under circumstances (some examples of which are specifically delineated) manifesting an unlawful purpose; the unlawful purpose being to induce, entice, solicit or procure another to commit an act of prostitution. The guilt or innocence of an accused are of no significance when a criminal ordinance or law is challenged on constitutional grounds; instead, the issue is the forewarning of prohibited conduct to the public and to law enforcement officials. In that light, Section 14-76(2) is sufficient in its guidelines to provide adequate warning and notice to these individuals. Section 14-76(2) of the Tampa City Code is not in violation of any due process mandate as enunciated within the Florida and United States Constitution.

C. Section 14-76(2) does not require self-incrimination.

The third sentence of the Loitering for Prostitution Ordinance states:

> No arrest shall be made for a violation of this paragraph unless the arresting officer first affords the person an opportunity to explain his conduct, and no one shall be convicted of violating this paragraph if it **appears** at trial that the explanation given was true and disclosed a lawful purpose.
> Section 14-76(2), City of Tampa Code.

That subsection is nearly identical to part of subsection (2) of the State Loitering law which provides:

> Unless flight by the person or other circumstance makes it **impracticable, a law** enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with **this** procedure or if it appears at trial that the explanation given by the persan is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.
> Section 856.021(2), Florida Statutes (1989).

The question of whether such provisions requires self-incrimination has been thoroughly reviewed **and** answered in the negative by State courts. This Court in State v. Ecker, supra at 110, stated:

> We recognize that a defendant cannot be required to "explain his presence and conduct," this being constitutionally prohibited. We hold the provision in the statute which affords a person charged thereunder an opportunity to explain his presence and conduct is an additional defense to the charge. Clearly, an accused cannot be compelled to explain his presence and conduct without first being properly advised under **Miranda** standards. If the accused voluntarily explains his presence and such explanation dispels the alarm, no charge can be made.

Also, this Court in State **v.** Rash, 458, So.2d 1201 (Fla. 5th DCA 1984) stated that:

> The criminal conduct [in the State Loitering Law and the Loitering for Prostitution Ordinance] has been completed prior to any question, request or other action by the

> police officers. Section 856.021(2) does go on to require that the suspect be given an on-the-spot opportunity to dispel the officer's probable cause to arrest by identifying himself and explaining his presence and conduct, but this is not an element of the crime. Id at 1204.

See also Watts v. State, 463 So.2d 205 (Fla. 1985); Hurst v. State, 464 So.2d 534 (Fla. 1985).

The third sentence of Tampa's Loitering for Prostitution Ordinance, therefore, simply affords an accused person an opportunity to explain his presence and conduct as an additional defense to the charge. The accused is not compelled to give such explanation.

D. The Loitering for Prostitution Ordinance does not improperly allow consideration of a prostitute's previous convictions or activities as a prostitute

Petitioner's argument, that the ordinance improperly allows evidence of a defendant's previous convictions as a prostitute, should not be considered by this Court since this issue was not presented to either the trial court or the Second District Court of Appeal. Since the issue was never properly raised in the correct forum, this Court should decline to address it. It is well settled law in this state that an issue must be presented to the trial court to preserve it for appellate review. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

In the district court, Petitioner raised three (3) issues for the court's consideration.

> 1. The trial court erred by denying the defense request to instruct on simple battery as a lesser included offense of battery on a law enforcement officer.

2. The ordinance against loitering for prostitution was unconstitutionally overbroad and vague and a violation of the equal protection doctrine; moreover, the evidence did not establish that Wyche was loitering for the purpose of committing prostitution.

3. The scoresheet scored too many prior felonies.

There was no motion or objection in the trial court addressing this evidentiary issue, nor was the issue presented in the district court, which Petitioner now seeks to raise in this Court. The Second District certainly did not address such an issue. See, Wyche v. State, 573 So.2d 953 (Fla. 2d DCA 1991).

The issue has not be preserved for appellate review. Whitted v. State, 362 So.2d 668 (Fla. 1978).

Respondent further submits Petitioner's argument on the merits must also fall. Section 90.404, Florida Statutes, provides, in pertinent part, as follows:

(2) Other crimes, wrongs, OK acts. -

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Thus, evidence of a defendant's prior convictions and criminal activities is not per se inadmissible. If the evidence is being offered for any reason other than to demonstrate bad character or propensity, it could be admitted.

Sub judice, one of the elements under the Loitering for Prostitution Ordinance that must be proven by the state beyond a reasonable doubt is that the circumstances demonstrates the defen-

dant was "manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution". In other words, the intent; of the defendant is an element of the offense. Under Section 90.404 other crimes, wrongs, etc., of the defendant can be used to prove that intent. Accord, Jensen v. State, 555 So.2d 414 (Fla. 1st DCA 1989), Jackson v. State, 545 So.2d 260 (Fla. 1989) Randolph v. State, 463 So.2d 186 (Fla. 1984), and Hudson v. State, 444 So.2d 598 (Fla. 4th DCA 1984). Evidence of an idividual's prior convictions for prostituion related offenses, therefore, is admissible to show the defendant's intent under the ordinance, and is clearly appropriate under Section 90.404, Florida Statutes.

Should this Court, however, decide that the portion of the ordinance which allows the use of this similar fact evidence is improper, the entire ordinance should not be invalidated. That portion can be logically severed from the ordinance without affecting the validity of the other portions of the enactment. When such severability is practical, the court should do so rather than invalidate the entire enactment. See, Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (Fla. 1990) and Delta Air Lines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984).

Respondent submits this issue is not properly before the Court since no objection was made in the trial court. Secondly, introduction of similar fact evidence is not precluded under Florida law but is specially recognized in Section 90.404, Florida Statutes.

E. The maximum six month penalty for loitering for prostitutian is legal.

The general penalty for violations of the City of Tampa Code, Section 1-6(a), City of Tampa Code, provides:

> It is unlawful for any person to violate or fail to comply with any provision of this Code and, where no specific penalty is provided therefor, the violation of any provision of this Code shall be punished by a fine not exceeding one thousand dollars ($1,000.00) or imprisonment far a term not exceeding six (6) months or by both such fine and imprisonment. Each day any violation of any provision of this Code shall continue shall constitute a separate offense.

Tampa's Loitering for Prostitution Ordinance, which carries this penalty provision which allows imprisonment for a term not to exceed six months, is constitutional.

It is stated as a general proposition in 5 McQuillin, Municipal Corporations § 17.15 (3rd Ed.) that:

> if [an] ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance penalty is void. The charter or ordinance penalty cannot exceed that of the state law. (Footnotes omitted.)

That general proposition was the controlling factor for the Court in Edwards v. State, 422 So. 2d 84 (Fla.2d DCA 1982). In that case, the City of Venice proscribed, by ordinance, certain conduct involving drugs which would constitute felonies under state law. The Court recognized that, in same respects, the Venice ordinance set penalties greater than the penalties prescribed by state law for the exact same offenses. **The Court** in Edwards found:

> Except in serious cases involving minimum mandatory sentences, state law grants a trial judge the discretion to withhold adjudication and order probation. § 948.01, Fla.Stat. (1981). Moreover, where drug charges are brought under sections 893.13(1)(e) or (1)(f), Florida Statutes (1981), the judge is authorized to require a violator to participate in a drug rehabilitation program in lieu of prison or probation. § 893.15, Fla.Stat. (1981). For the less serious violations of chapter 893, the judge also retains the discretion to decide whether or not to impose a fine. Yet, the Venice ordinance eliminates all of these options and requires a minimum mandatory sentence and a minimum fine for each violation. To this extent, the ordinance is invalid because it conflicts with state law. People v. Quayle, 122 Misc. 607, 204 N.Y.S. 641 (Albany County Ct.1924). In view of the severability clause contained therein, the balance of the ordinance can be sustained. Id. at 85-86.

The present case and Holliday v. State, Supreme Court of Florida Case number 78,170, however, do not fall under that general proposition from McQuillin Municipal Corporations and are distinguishable from Edwards.

The present case and Holliday involve city ordinances proscribing certain conduct not presently proscribed by state statute. The ordinances are completely different and distinct from any Florida Statute. The Petitioner opines that loitering for the purpose of prostitution is less serious than actual prostitution and, therefore, the City of Tampa's penalty for a violation of the ordinance is unconstitutional because it is more severe than the state law against prostitution, Section 796.07, Florida Statues (1989). Petitioner's opinion, however, is adverse to the controlling proposition regarding penalties for violations of municipal ordinances proscribing conduct not covered by state statute. This controlling proposition, which controls this issue

in the present case and in Holliday, is that a city ordinance proscribing certain conduct not proscribed by state statute, may provide a penalty greater than the penalty provided under state statute proscribing some different albeit related conduct. See McQuillin, Municipal Corporations, supra.

This controlling proposition is especially true in Florida where municipalities have been granted broad home rule powers by Chapter 166, Florida Statutes (1989), implementing Section 2, Article VIII, Constitution of the State of Florida. Specifically, Section 166.021(1), Florida Statutes (1989), provides:

> As provided in s.2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

Pursuant to those "Home Rule Powers", the Attorney General of Florida opined, in AGO 081-76, October 13, 1981, that

> In light of the broad home rule powers secured to municipalities by the Constitution and ch. 166, F.S., and in the absence of any constitutional or statutory provision expressly limiting the exercise of that power to adopt penalties for violations of municipal ordinances, I am constrained to conclude that no such constitutional or statutory limitations presently exist on their home rule power to impose penalties for violations of their ordinances. Therefore, in accordance with the dictates of s. 2(b), Art. VIII, State Const., and the Municipal Home Rule Powers Act, ch. 166, F.S., the limitations on or the severity of penalties imposed by municipal ordinances is left to the sound discretion of the legislative body of each municipality.

Further, in AGO 076-192, September 22, 1976, the Attorney General opined that:

> **Section** 775.15(1)(d), F.S., which establishes a time limitation on prosecutions of misdemeanors of the second degree and noncriminal violations, is not applicable to prosecutions for violations of municipal penal ordinances, since convictions for violations of such ordinances are expressly excluded from the statutory definitions of the terms "misdemeanor" and "noncriminal violation" contained in s. 775.08(2) and (3), **P.S.** In the absence of any statutory, charter, or ordinance time limitation on the prosecutions of violators of municipal penal ordinances, no lapse of time after the commission of an act declared by a municipal ordinance to be unlawful will bar a prosecution far the violation of that ordinance.

The general penalty provision in Section 1-6, City of Tampa's Loitering for Prostitution Ordinance, therefore, is conditional with the penalty provision in Section 1-6, City of Tampa Code, which allows imprisonment for a term not to exceed six months.

F. Section 14-76(2) is not unconstitutionally overbroad.

The Fourteenth Amendment to the United States Constitution prohibits infringement by government of certain fundamental and constitutional rights guaranteed to individuals. An overbroad statute is declared unconstitutionally defective if, **and** when, it extends authority beyond the reach of government into some of these protected areas. See Coates v. City of Cincinnati, 402 U.S. 611 (1971); News-Press Publishing Company, Inc. v. Firestone, 527 So.2d 223 (Fla. **2d** DCA 1988).

In determining overbreadth, this Court noted in Schultz v. State, 361 So.2d 416 **(Fla. 1978):**

> A statute is overbroad when legal, constitutionally protected activities are criminalized as well as illegal, unprotected activities, or when the legislature sets a net large enough

> to catch all possible offenders, and leaves it to the courts to step inside and determine who is being lawfully detained and who should be set free. **Id. at 418.**

See also State v. Ashcraft, 378 So.2d 284 (Fla. 1979); State v. Ferrari, 398 So.2d 804 (Fla. 1981).

In an effort to satisfy this constitutional requirement, the legislative body must balance the need of the public good and the degree of possible infringement on individual rights. The question, therefore, is whether in enacting Section 14-76(2) of the Tampa City Code, the City of Tampa overstepped its statutory authority by violating certain fundamental rights. This question must be answered in the negative.

The fact that a statutory provision violates some constitutional rights, does not ipso facto render the provision unconstitutionally overbroad. An overbroad statute is one that in a "real and substantial" way regulates and infringes upon expression or association that is guaranteed by the United States Constitutian. Such statutes cause people to avoid violating them, thus producing a "chilling effect" on the exercise of these fundamental rights. See Broadrick v. Oklahoma, 413 U.S. 601 (1973). Also, the United States Supreme Court, in New York v. Ferber, 458 U.S. 747 (1982), stated that:

> We have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." Broadrick, 413 U.S., at 613, 93 S.Ct., at 2916. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.. Id at 769.

Professor Laurence Tribe in his treatise on constitutional law said it best:

> Implicit in overbreath analysis is the notion that a law should not be voided on its face unless its deterrence of protected activities is substantial. Thus, the Supreme Court has not struck down on their face trespass, breach of the peace, or other ordinary criminal laws in which the number of instances in which these laws may be applied to protected expression is small in comparison to the number of instances of unprotected behavior which are the law's legitimate targets. A statute drafted narrowly to reflect a close nexus between the means chosen by the legislature and the permissible ends of government is thus not vulnerable on its face simply because occasional applications that go beyond constitutional grounds can be imagined. Tribe, *Am.* Const. Law, §12-25, referring to Cox v. Louisiana, 379 U.S. 559 **(1965).**

In the United States Supreme Court decision of Papachristou v. City of Jacksonville, supra, the Jacksonville loitering ordinance (which was identical to Florida's previous loitering statute) was held unconstitutionally vague and overbroad because it substantially infringed upon constitutional rights. The basis of the decision relied on the fact that the statute prescribed loitering **and** nothing more. Obviously, the degree of infringement in individual rights **was** great. In an effort to reconcile this unconstitutional infirmity, the Florida Legislature quickly enacted a new loitering statute (§856.021, Florida Statutes), which was subsequently held Constitutional by this Court in State **v.** Ecker, supra. The Court stated its reasons for holding the **new** statute constitutional as follows:

> We readily recognize that if the statute broadly proscribed loitering or idling without more, as in the manner of our previous

> statute, it would be unconstitutional. On the other hand, it is recognized that if a statute proscribes loitering that threatens public safety or a breach of the peace, it can withstand constitutional attack. Id. at 107.

The rationale of these decisions is distinguishable because in Papachristou, supra, the United States Supreme Court struck down the loitering ordinance because it prohibited loitering and nothing more; whereas, the loitering statute in Ecker, supra, concerned loitering which threatened the public peace and safety. Similar to the State loitering statute, Tampa's Loitering for Prostitution Ordinance prohibits loitering which threatens the public peace and safety. Certainly, loitering with the intent/purpose to induce, entice, solicit or procure another to commit an act of prostitution threatens the public peace and safety.

Tampa's Loitering for Prostitution Ordinance is also distinguishable from the Metropolitan Dade County ordinance which was held to be unconstitutionally overbroad in Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). The Dade County ordinance at issue in that case stated:

> A person commits the offense of loitering when he knowingly:
>
> * * * * * *
>
> Loiters in any place with one or more persons knowing that a narcotic or dangerous drug, as defined in Sections 893.01 and 893.15, Florida Statutes, is being unlawfully used or possessed. Id at 313.

The appellant in that case argued that the ordinance was unconstitutionally overbroad because it punished mere association

with any person known to be in possession of, or using, narcotics. The ordinance did not require any active participation in a substantive narcotics offense. Id at 314. Agreeing with the appellant and holding the ordinance unconstitutionally overbroad, the Court in Sawyer stated:

> The loitering ordinance before us punishes an individual not for his own criminal acts, but rather for his act of being in a public place **and** associating with individuals whom he knows to be engaged in criminal activity, i.e. drug use or possession. Both this court and the Supreme Court have recognized that under our system of justice punishment must be predicated only upon personal guilt. Id **at 316.**

Unlike the ordinance at issue in Sawyer, supra, however, Tampa's Loitering for Prostitution Ordinance is predicated only upon personal unlawful conduct. An accused person under Tampa's Loitering for Prostitution Ordinance is charged because of his unlawful conduct, not because of the unlawful conduct of somebody else. The unlawful conduct of an accused person under Tampa's Loitering for Prostitution Ordinance is that the accused person was loitering in a public place for the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution. It is the intent by a loitering person to induce, entice, solicit or procure another to commit an act of prostitution which will cause that person to be **charged** with violating Tampa's Loitering for Prostitution Ordinance.

The Loitering for Prostitution Ordinance is narrowly drawn so that it does not encompass protected speech or associations, unlike the ordinances that were ruled unconstitutionally overbroad

by the Courts in Johnson v. Carson, 569 F. Supp. 974 (M.D. Fla. 1983), Northern Virginia Chapter, ACLU v. City of Alexandria, 747 F. Supp 324 (E.D Va. 1990), In the Interest of E.L., Seminole County, Fla., case number 89-1876-CJA, on appeal State v. E.L., 5th DCA case number 90-0794, and State v. Calloway, Brevard County, Fla., case number 89-4717-CF-A, on appeal, State v. Calloway, 5th DCA case number 89-2606.

The ordinance at issue in Carson provided in part that:

> §330.107(a), it shall be unlawful and a class D offense for any person to loiter in or near any thoroughfare, street, highway, or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution, lewdness, or assignation.
>
> (b) Among the circumstances which may be considered in determining whether this purpose is manifested are that such a person (1) is a known prostitute, pimp, or sodomist; (2) repeatedly beckons to, stops or attempts to stop or engages passers-by in conversation; or (3) repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any bodily gesture."

The ordinance at issue in Alexandria, provided in part that:

> (a) It shall be unlawful for any person to loiter in a public place for the purpose of engaging in the sale, gift, distribution, possession or purchase of a controlled substance prohibited by section 18.2-248, 18.2-248.1 or 18.2-250 of the Code of Virginia (1950), as amended. Circumstances manifesting such purpose on the part of a person shall include: (1) the person is in the same general location for at least 15 minutes; (2) while in the same general location and in a public place, the person has two or more face-to-face contacts with other individuals; and ((3) each of such contacts (a) is with one or more different individuals, (b) lasts no more than two minutes, (c) involves actions or movements by the person consistent with an exchange of money or other small objects, (d) involves actions or movements by the person consistent with an effort to conceal an object appearing to be or to have been

exchanged, and (e) terminates shortly after the completion of the same apparent exchange. For purposes of this subsection, "same general location" shall mean an area defined as a circle with a radius of 750 **feet** and a center being the place where a person is first observed by a law enforcement officer.

The ordinances at issue in In the Interest of E.L. and **in** Calloway provide in part that:

> It shall be unlawful for any person to loiter in or near any public street, right of way, or place open to the public, or in or near any public or private place in the City of Sanford [City of Melbourne] in a manner **and** under circumstances manifesting the purpose to engage in drug related activities contrary to the provisions of Chapter **893**, of the Florida Statutes.

B. Section 21-21, Circumstances Manifesting such purposes enumerated.

Among the circumstances which may be considered as determining whether such purpose is manifest, are:

1. Such person is a known **unlawful** drug user, possessor, or seller. For purposes of this chapter, a "known unlawful drug user, possessor, or seller" is a person who has, within the knowledge of the arresting officer, been convicted in any court within this state any violation involving the use, possession, or sale of any of the substances referred to in Chapter 893.03, Florida Statutes, or 817.564 or such person has been convicted of any violation of any of the provisions of said chapters of Florida Statutes or substantially similar laws of any political subdivision of this state of any other state; or **person who displays** physical characteristics of drug intoxication or usage, such as "needle tracks"; or a person who possesses drug paraphernalia as defined in Section 893.145, Florida Statutes.

2. Such person is currently subject to an order prohibiting his/her presence in a high drug activity geographic area;

3. Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is then engaged in an unlawful drug-related activity, including by way of example only, such person acting as a "lookout";

4. Such person is physically identified by the officer as a member of a "gang" or association which has as its purpose illegal drug activity;

5. Such person transfers small objects or packages for currency in a furtive fashion;

6. Such person takes flight upon the appearance of a police officer;

7. Such person manifestly endeavors to conceal himself or herself or any object which reasonably could be involved in an unlawful drug-related activity;

8. The area involved is by public repute known to be an area of unlawful drug use and trafficking;

9. The premises involved are known to have been reported to law enforcement as a place suspected of drug activity;

10. Any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

The unconstitutional infirmity in those ordinances are not present in Tampa's Loitering for Prostitution Ordinance. First, in the ordinance in Carson, being a "known prostitute, pimp, or sodomist" was, by itself, a circumstance to consider in determining if the ordinance had been violated. The Court in Carson noted that:

> Thus, pursuant to §330.107(b), a person convicted of a prostitution related crime within the previous year can be arrested for merely loitering in a public place. Id. at 978.

In the ordinances in In the Interest of E.L. and Calloway, being a "known unlawful drug user, possessor or seller" was, by itself, a circumstance to consider in determining if the ordinance had been violated. The Court in In the Interest of E.L. stated:

> An individual who had been convicted of a drug offense 3 years ago is subject to arrest for being present on city streets, even though he is committing no other offense. Likewise, a person could be prosecuted for talking to an

individual in a car, if that car is registered to a person who is a "known unlawful drug user".

The Court in Calloway stated:

> Under this ordinance any person with a prior drug conviction could be prosecuted for simply standing on a street corner in a particular part of town.

Among the circumstances stated in Tampa's Loitering for Prostitution Ordinance, however, is that a person is a known prostitute, pimp, sodomist, performer of fellatio, performer of cunnilingus, masturbation for hire or panderer and such person exhibits other overt conduct for the purpose of inducing, enticing, soliciting ok procuring another to commit an act of prostitution. See attachment "A". The fact that a person is a known prostitute, etc. is not, by itself, a circumstance which may be considered in determining a person's intent under Tampa's Loitering for Prostitution Ordinance; and, a known prostitute, etc., with nothing more in terms of overt conduct under Section 14-76(2), is not subject to arrest under Tampa's Loitering for Prostitution Ordinance.

Second, the circumstances which could be used in determining intent under the ordinances in those cases were not specifically limited to unlawful conduct. For example, Section 330.107(b)(2) of the ordinance in Carson stated as a circumstance that a person "repeatedly beckons to, stops or attempts to stop or engages passers-by in conversation." That circumstance was not limited to the intent or purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitutian. The Court in Carson, supra, stated that:

> Other activities that could lead to arrest pursuant to §330.107 include a known prostitute window shopping, standing on a street corner waiting for a bus, or spending time idly. Brown v Municipality of Anchorage, 584 P.2d 35 (Alaska 1978); City of Detroit v. Bowden, 149 N.W.2d 771 (1971). Also, anyone standing on the street corner repeatedly talking to passers-by, even if they are old friends, could be violating the ordinance. Id. at 978.

The ordinances in In the Interest of E.L. and in Calloway listed ten circumstances which could be used in determining intent to engage in unlawful drug related activities. None of the circumstances, however, were limited to the intent or purpose of engaging in unlawful drug related activities. The Court in In the Interest of E.L. noted that:

> This ordinance would permit the arrest of a person far merely standing on a street corner in a **part** of town that law enforcement has unilaterally determined to be a "high drug activity geographic area".

The Court in Calloway observed that:

> One could be prosecuted for selling a parcel of food or any other small object for cash while on a public street. This ordinance would permit the prosecution of an innocent person waiting for a taxi cab in an area where illegal drug activity had taken place. It would even be possible for the state to **seek** conviction as a result of a person visiting a friend's home if the police had received information that the home had been the place of an earlier drug transaction.

The ordinance in Alexandria listed three circumstances which could be used in determining intent to engage in unlawful drug related activities, but none of the circumstances were limited to the intent or purpose of engaging in unlawful drug related activities. The Court in Alexandria precisely observed that:

> The ordinance does not require engaging in the seven circumstances with unlawful intent to partake in drug-related activities; rather, the ordinance provides that the occurrence of the seven circumstances manifests intent. The

> separate specific intent requirement is nullified by the provision that deems engaging in the enumerated behaviors as manifesting an unlawful purpose. By equating unlawful purpose with seven innocent activities that may be accomplished by persons lacking unlawful intent, the Alexandria ordinance criminalizes a substantial amount of constitutionally protected activities. Id. at 328.

The circumstances which may be considered in determining intent under Tampa's Loitering for Drugs Ordinance is strictly limited to loitering in a public place for specific, unlawful purpose or intent - inducing, enticing, soliciting or procuring another to commit an act of prostitution. Tampa's Loitering for **Prostitution** and Loitering for Drugs Ordinances complies with this Court's ruling, in Ecker, that loitering laws that criminalize loitering under circumstances which give rise to a justifiable belief that the public safety is threatened, are permissible. Loitering for the purpose/intent of inducing, enticing, soliciting or procuring another to commit an act of prostitution is clearly loitering that threatens public safety and is a breach of the peace. In B.A.A. v. State, 356 So. 2d 304, 306 (Fla. 1978), this Court found, in that particular case, where a police officer observed a juvenile approaching cars, a number of times, stopped at a traffic light and engaging the drivers in conversation, there were no "specific and articulable facts which **would** reasonably warrant a finding that the public peace and order were threatened or that safety of persons or property was jeopardized by the actions of the juvenile." Petitioner **draws** the extreme conclusion from that case that offers to commit prostitution do not create a reasonable alarm for public peace, order and public safety. Petitioner's conclusion in this regard is incredible in light of

Section 796.07, Florida Statutes, prohibiting prostitution and offers to commit prostitution, which has been a state statute since at least 1943. Also, prostitution related activities, including offers to commit prostitution, are vices which this state and country have historically fought against with their police resources, to protect the puplic peace, order and public safety.

In the present case, unlike B.A.A., the police officer gave specific and articu able facts showing the petitioner was loitering for the purpose of prostitution, which is a threat to the public peace, order and public safety. The decision in **B.A.A.** was limited to the facts in that particular case.

Under Tampa's Loitering far Prostitution Ordinance, therefore, innocent activities such as waiving of arms, engaging in conversation in public or exchanging of objects, with no intent to engage in prostitution related activities, do not fall within the ambit of Tampa's ordinance. Further, the ordinance prohibits specific loitering which threatens the public peace, order **and** public safety.

In City of Cleveland v. Howard, 532 N.E.2d 1325 (Ohio Mun. 1987), the Court, in upholding as constitutional Cleveland's loitering for prostitution ordinance, which is similar to Tampa's Loitering for Prostitution Ordinance and Loitering for Drugs Ordinance, stated:

> The gist of the defendant's free speech argument is that Section 619.11 authorizes the arrest of an individual, who happens to be known to the police as a prostitute or panderer, for such constitutionally protected activities as waving at or engaging in conversation with a passerby on a public street. **A** similar argument was rejected by

the Court of Appeals of New York in People v. Smith, supra. In disposing of the issue the court held, 44 N.Y.2d at 623, 407 N.Y.S.2d at 468, 378 N.E.2d at 1037-1038:

* * *

"***That defendant may have employed language and the public streets to ply her trade does not imbue her conduct with the full panoply of First Amendment protections. On the cantrary, the statute, by its terms, is limited to conduct 'for the purpose of prostitution***'--behavior which has never been a form of constitutionally protected free speech***"

The Smith court's rationale is equally applicable to Section 619.11. Defendant's First Amendment attack upon the ordinance is not well-founded and therefore cannot be sustained.

Accordingly, the Smith Court's rationale is equally applicable to Section 14-76(2), Tampa's Loitering for Prostitution Ordinance. Petitioner's First Amendment attack upon the ordinance in the present case is not well-founded and therefore should not be sustained.

Addressing the issue of overbreadth, the Court in Alexandria recognized that:

The overbreadth doctrine has been invoked in many challenges to state and local loitering statutes. An ordinance that prohibits loitering may survive an overbreadth challenge if the enactment requires scienter or specific intent to engage in an illicit act. Id. at 326-327. (citations omitted)

* * *

Numerous courts have rejected overbreadth challenges where the ordinance specifically required loitering for an unlawful purpose. Id. at 327. (citations omitted)

The Court in Alexandria found that:

None of the ordinances upheld resemble the Alexandria loitering ordinance which requires loitering for the purpose of engaging in unlawful drug-related activities and thereafter delineates seven circumstances that unequivocally manifest an unlawful purpose. Id. at 327.

Tampa's Loitering for Prostitution Ordinance is similar to, and in some cases even more narrowly tailored. than, other loitering for an unlawful purpose ordinances and laws contained in numerous municipal codes and state statutes, which the vast majority of State Supreme Courts and state lower courts, that have addressed this issue, have upheld **as** constitutional against a variety of constitutional attacks similar to those made herein. Tampa's Ordinance is patterned after the State of Florida's Loitering and Prowling Statute, and guidelines in the American Law Institute's Model Penal Code, Proposed Official Draft, Sections 250.6 and 251.2.

As accurately pronounced by the Court in State v. Evans, 326 **S.E.2d 303,307** (N.C. **App. 1985):**

> American courts have overwhelmingly upheld enactments such as G.S. §14-204.1 which include an element of criminal intent.

The Court in Evans, in considering the constitutionality of a North Carolina State Statute prohibiting loitering for the purpose **of** prostitution, which is drafted similar to Tampa's Loitering **fox** Prostitution Ordinance and Loitering for Drugs Ordinance, found:

> Our statute is functionally equivalent to these enactments, since intent or purpose ordinarily must be shown by circumstantial evidence. Accordingly, we hold that the statute is not void for overbreadth.

In People v. Pagnotta, 253 N.E.2d 202 (N.Y. Ct. **App.** 1969), the New York Court of Appeals upheld as constitutional a loitering for drugs statute which in part provided:

> A person who:
>
> Uses, resorts to or loiters about any stairway, staircase, hall, roof, elevator, cellar, courtyard or any passageway of a building for the purpose of unlawfully using or possessing any narcotic drug.

Is guilty of a misdemeanor.

The Court, in Paqnotta, held:

> We hold the statute in the present case is not too vague, and is a completely reasonable restriction upon the individual for the public good. The statute makes it illegal to loiter about any "stairway, staircase, hall, roof, elevator, cellar, courtyard or any passageway of a building for the **purpose** of unlawfully using or possessing any narcotic drug. The statute does not penalize mere loitering **as** did the statute in Diaz, but rather prohibits loitering for the purpose of committing the crime of unlawfully using or possessing narcotic drugs."

In the leading case of People v. Smith, 407 N.Y.S.2d 462 **(N.Y.** Ct. **App.** 1978), the New York Court of **Appeals, in** considering New York's loitering for prostitution statute which is similar to Tampa's Loitering for Prostitution Ordinance, quoted the state statute in question:

> Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passersby in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the **purpose** of prostitution, or of patronizing a prostitute, as those terms are defined in article two hundred thirty of the penal law, shall **be** guilty of a violation and is **guilty of a** class **B misdemeanor if such** person has **previously** been convicted **of** a violation of this section or of Sections 230.00 or 230.05 of the penal law. Id. at 464-65.

The Court held:

> The strength of defendant's assault on Section 240.37 is diminished greatly by the presence therein of an element lacking in **those** enactments struck **down and** declared void **for** vagueness. Id. at 466.
>
> * * *
>
> **...** That distinctive characteristic is the delineation of specific conduct, in addition to the loitering, which the arresting officer must observe. Thus, the statute explicitly limits its reach to loitering of a demonstrably harmful sore, i.e., loitering far the purpose of committing a specific offense. Id. at 466.

With respect to selective enforcement, the New York Court further noted:

> Section 240.37, likewise, is not invalid for vagueness because it details the prohibited conduct and limits itself to one crime. As a consequence, the police are precluded from speculating or groping for violations in a Serbonian bog of ambiguous behavior which sounded the death knell for the statutes condemned in Diaz and Berck. The section does not authorize an arrest or conviction based on simple loitering by a known prostitute or anyone else; rather, it requires loitering plus additional objective conduct evincing that the observed activities are for the purpose of prostitution. Id. at 466.

The Court later rejected the challenge of overbreadth:

> Finally, we reject the claim that the scope of Section 240.37 has a chilling effect of the exercise of First Amendment freedoms. Clearly, any criminal statute penalizes conduct and may, in the abstract, be said to impinge on speech or association in some fashion. But the protections afforded by the First Amendment are not absolute and the statute at issue here does not impermissibly sweep "within its prohibitions what may not be punished under the First and Fourteenth Amendments" (Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222, supra). That defendant may have employed language and the public streets to ply her trade does not imbue her conduct with the full panoply of First Amendment protections. On the contrary, the statute, by its terms, is limited to conduct "for the purpose of prostitution, or of patronizing a prostitute" - behavior which has never been a form of constitutionally protected free speech.

In another important case on this matter, People v. Superior Court of Santa Clara County, 758 P.2d 1046 (Cal. 1988), the Supreme Court of California thoroughly discussed the relevant issues in upholding as constitutional California Penal Code §647(d) which provides that any person:

> "[w]ho loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act" is guilty of a misdemeanor.

The Court, in Short v. City of Birmingham, 393 So.2d 518 (Ala. Ct. App. 1981), found Birmingham's loitering for prostitution ordinance constitutional. The Court in Short held that: (1) the ordinance created no unconstitutional presumption of guilt in view of fact that ordinance required proof of intent, which may be inferred from conduct; (2) the ordinance does not violate the Fifth Amendment because explicit standards for application by policemen are contained in ordinance; consequently, dangers of arbitrary and discriminatory enforcement are avoided; (3) the ordinance does not infringe upon First Amendment rights because the ordinance is limited to conduct "for the purpose of prostitution, or of patronizing a prostitute, or of soliciting for prostitution," and so was not overbroad.

The Supreme Court of Georgia, in Lambert v. City of Atlanta, 250 S.E.2d 456 (Ga. 1978), held that Atlanta's loitering for prostitution ordinance did not violate the equal protection and due process clauses in the United States and Georgia Constitutions - reversed on other grounds.

In City of Seattle v. Jones, 488 P.2d 750 (Wash. 1971), the Supreme Court of Washington upheld as constitutional the City of Seattle's loitering for prostitution ordinance.

In City of Seattle v. Slack, supra, the Supreme Court of Washington upheld as constitutional Seattle's loitering for Prostitution ordinance, which had been amended since the Jones decision.

In City of Tacoma v. Anderson and Luvene, Pierce County, Washington, *case* number 88-1-03205-1, the Court upheld as

constitutional Tacoma's loitering for drugs ordinance, which is nearly identical to the loitering for drugs ordinances found unconstitutional in In the Interest of E.L., supra, and Callaway, supra. ***See*** attachment "D." The Anderson and Luvene case has been appealed to the Supreme Court of Washington, answer brief due August 19, 1991.

In City of Akron v. Holley, 557 N.E.2d 861 (Ohio Mun. 1989), the Court upheld as constitutional Akron's loitering for **drugs** ordinance, which also is nearly identical to the ordinances ruled unconstitutional in In the Interest of E.L. and in Calloway.

Respondents herein respectfully submit that Tampa's Loitering for Prostitution Ordinance and Loitering for Drugs Ordinance are more specific and narrowly tailored than Tacoma's and Akron's loitering for drugs ordinances, and the ordinances in question in In the Interest of E.L. and in Calloway, for the reasons stated on pages 18 - 25 in this brief.

In City of Akron v. Massey, 381 N.E.2d 1362 (Ohio Muk. 1978), the Court upheld **as** constitutional Akron's loitering for Prostitution.

In City of Cleveland v. Howard, supra, the Court upheld as constitutional Cleveland's loitering for prostitution ordinance.

The Supreme Court of Minnesota, in State v. Armstrong, 162 N.W.2d 357 (Minn. 1968), upheld as constitutional Minneapolis' loitering for prostitution ordinance and lurking with intent to commit an unlawful act ordinance. The Court in Armstrong stated that:

> The offense defined by each of the two ordinances consists of two essential elements: (1) The act of lurking or loitering

and (2) a proved intent to commit an unlawful act, Whatever the arguable ambiguity or generality as to the element of "lurking" or "loitering," there is none whatever as to the element of intent. The element of intent gives meaning to the element of lurking or loitering and is a rational basis far proscribing such acts as harmful conduct. Both elements of the offense must, of course, be proved. The overt act of lurking or loitering, standing alone is not made punishable by the provisions of the ordinances under which defendant was charged. An unlawful intent, without more, is not made punishable. Because of this required union af overt act and unlawful intent, defendant is protected from punishment either for harmless conduct or for harmful conduct the criminality of which had not been fairly communicated to her. Id. at 360. (citations omitted)

The Court in State v. Tucson, 520 P.2d 1166 (Ariz. Ct. App. 1974), upheld as constitutional Tucson's loitering for the purpose of begging ordinance.

In City of South Bend v. Bowman, 434 N.E. 2d 104 (Ind. Ct. App. 1982), the Court upheld as constitutional South Bend's loitering for prostitution ordinance.

The Supreme Court of Wisconsin, in City of Milwaukee v. Wilson, supra, upheld as constitutional Milwaukee's loitering for prostitution ordinance. The Court in Wilson stated that:

> The defendant contends that Milwaukee Ordinance sec. 106.31(1)(g) is overbroad because it prohibits not only conduct which has as its purpose the solicitation of acts of prostitution, but also constitutionally protected activity which only appears to have such a purpose. She argues, for example, that a woman engaged in political canvassing would come within the terms of the ordinance if she repeatedly beckoned to and stopped pedestrians for political purposes. such conduct, she contends, could manifest to an observing police officer an intent to solicit for prostitution and therefore subject a person to arrest and fine for the exercise of her constitutional rights. Id. at 458.
>
> In pressing this argument, however, the defendant fails to take into consideration the requirement that a specific intent to accomplish the unlawful purpose manifested must be shown. Conduct which merely appears to have as its purpose solicitation for prostitution does not constitute a violation of the ordinance. There must also be demonstrated a specific intent to induce, entice, solicit or procure another to

commit an act of prostitution. Because of the added element of intent, one engaged in constitutionally protected activity could not properly be found guilty of a violation. Id. at 458.

The Supreme Court of Wisconsin in City of Milwaukee v. Nelson, 439 N.W.2d S62 (Wis. 1989), upheld as constitutional Milwaukee's loitering or prowling ordinance, which is nearly identical to Florida's loitering or prowling statute.

In Ford v. United States, 493 A.2d 1135 (D.C. Ct. App. 1985), the Court upheld as constitutional the District of Columbia's loitering for prostitution ordinance.

The Court of Appeals of Oregon, in City of Portland v. White, 495 P.2d 778 (Or. Ct. App. 1972), upheld as constitutional Portland's loitering and prowling ordinance, which is also nearly identical to Florida's loitering and prowling statute.

The Court of Appeals of Oregon, in Matter of D., 557 P.2d 687 (Or. Ct. App. 1976), appeal dism'd sub. nom D. v. Juvenile Department of Multnomah County, 434 U.S. 914 (1977), upheld as constitutional Portland's loitering for prostitution ordinance, which is similar to Tampa's Loitering for Prostitution and Loitering for Drugs Ordinances. The Court in Matter of D. observed that:

> Our holding that this ordinance is not unconstitutionally vague is supported by case law in other jurisdictions upholding similar and less specific ordinances. Id. at 690.

The Supreme Court of the United States dismissed the appeal in that case for want of a substantial Federal question. The Court in Evans, supra, in upholding North Carolina's loitering for

prostitution statute noted this dismissal of appeal by the U.S. Supreme Court as follows:

> The United States Supreme Court has approved a similar holding by dismissing for want of a **substantial** Federal question. Matter of D., **supra**. **Id.** at **307.**

See also City of Portland v. Storholt, 622 P.2d 764 (Or. Ct. **App.** 1981), City of Portland v. Levi, 779 P.2d 192 **(Or. Ct. App. 1989),** City of Portland v. Deskins, 802 P.2d 687 (Or. Ct. **App. 1990).**

In summary, all constitutional overbreadth problems could be resolved if an ordinance provided:

> It is a crime to stand in any public place, unless such standing is protected by the First and Fourteenth Amendments.

With such a provision, there would never be substantial infringement on individual rights; unfortunately, such an ordinance would be unconstitutionally vague. Obviously, a balance must be reached where there is both adequate notice and no substantial infringement of constitutional rights. This "balance" has indeed been met in Tampa's Loitering for Prostitution and Loitering far Drugs Ordinances, because while there is adequate notice as to proscribed conduct, the conduct which is proscribed is not fundamental in character. Furthermore, Tampa's Loitering for Prostitution Ordinance is written sufficiently narrow enough so as not to encompass protected speech or associations, while serving as the City of Tampa's least intrusive means to achieve the legitimate governmental goal of curbing illegal street level prostitution which is detrimental to the health, welfare and morals of the City.

The and **State** of Florida respectfully requests that these decisions, holding similar ordinances and laws constitutional, (under similar challenges made herein) be given considerable credence and deference in holding Section 14-76(2) of the **Tampa** City Code constitutionally sound.

ISSUE II

WHETHER **THE** EVIDENCE WAS SUFFICIENT TO SUPPORT A CONCLUSION THAT THE PETITIONER WAS LOITERING FOR THE PURPOSE OF PROSTITUTION?

ARGIJMENT

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONCLUSION THAT THE PETITIONER **WAS** LOITERING FOR THE **PURPOSE** OF **PROSTITUTION.**

The evidence before the trial court and the Second District Court of Appeal was clearly sufficient to find that the Petitioner was indeed loitering for the purpose of prostitution in violation of Section 14-76(2), City af Tampa Code. *The* State's evidence showed that the Petitioner was observed at 9 p.m. on North Nebraska Avenue and East 12th Avenue, a high prostitution area, wearing only a black "teddy" lace lingerie and high **heel shoes, waving,** yelling and flagging dawn cars for approximately thirty minutes. The Petitioner stopped one car and conversed with the driver, then later, by frantically waving her arms, stopped another car. The driver of the later car told the police officers he was driving on North Nebraska Avenue looking for a prostitute. He stated that he saw the Petitioner waving at him as he was driving north bound on North Nebraska Avenue. He said he stopped his vehicle and the Petitioner got into his vehicle. He stated that he had "dated" the Petitioner before (sex for money) and that he planned to date

her tonight. He stated that the Petitioner wanted to eat before they went somewhere and got very nervous when she observed the police behind his vehicle. He stated he saw the police lights and pulled off the road.

Based on this and other specific evidence, the jury in the trial court found the Petitioner guilty of loitering for the purpose of prostitution. The evidence in the present case, unlike the evidence in B.A.A., supra, was specific and articulable facts to reasonably warrant a finding that the Petitioner's actions threatened public peace, order and public safety. Accordingly, the evidence clearly proved the charged offense.

Further, the Court should not issue an order permanently abating Petitioner's convictions in the trial court ab initis.

CONCLUSION

WHEREFORE, based on the foregoing argument, reasoning and citation of authority, the and STATE OF FLORIDA requests that this Honorable Court affirm the decision of the Second District Court of Appeal and uphold as constitutional Tampa's Loitering far Prostitution Ordinance, Section 14-76(2), City of Tampa Code.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, Answer Brief of the Respondents, has been furnished, by U. S. mail, to Stephen Krosschell, Assistant Public Defender, P. O. Box 9000 - Drawer PD Bartow, Florida, 33830, on this 20th day of August, 1991.

PEGGY A. QUINCE
Assistant Attorney General
Of Counsel for Respondent
Tampa, Florida 33607

k:holliday.2

ATTACHMENT "A"

Section 14-76(2), City of Tampa Code

Loiter, while a pedestrian or in a motor vehicle, in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering or other lewd or indecent act. Among the circumstances which may be considered in determining whether this purpose is manifested are: that such person is a known prostitute, pimp, sodomist, performer of fellatio, performer of cunnilingus, masturbation for hire or panderer and repeatedly beckons to, stops or attempts to stop or engages passers-by in conversation or repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any bodily gesture for the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering or other lewd or indecent act. No arrest shall be made for a violation of this paragraph unless the arresting officer first affords such person the opportunity to explain this conduct, and no one shall be convicted of violating this paragraph if it appears at trial that the explanation given was true and disclosed a lawful purpose.

a. For the purpose of this paragraph, a "known prostitute, pimp, sodomist, performer of fellatio, performer of cunnilingus, masturbator for hire or panderer is a person who, within one (1) year prior to the date of arrest for violation of this paragraph, had within the knowledge of the arresting officer been convicted of violating any ordinance of the city or law of any state defining and punishing acts of soliciting, committing or offering or agreeing to commit prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering or other lewd or indecent act.
b. For the purpose of this paragraph and section 14-78, "any person" shall also include panderers or solicitors of sexual acts, commonly referred to as "johns" or "tricks," who loiter in a manner and under circumstances manifesting the purpose of participating in, procuring, purchasing or soliciting any sexual act for hire made illegal by state law. Among the circumstances which may be considered in determining whether this purpose is manifested are: that such person, while a pedestrian or in a motor vehicle, repeatedly beckons to, attempts to stop, engages or attempts to engage in conversation with any person by hailing, waving of arms or any bodily gesture for the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering or other lewd or indecent act.

(Ord. No. 89-238, § 2(24-61), 9-28-89)

attachment "B"

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

79-8445 E Circuit Criminal

YASHIA DAVIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 80-1987

Opinion filed May 27, 1981.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; J. Rogers Padgett, Judge.

Edwards S. Campbell, II, of LaBarbera and Campbell, Tampa, for Petitioner.

Joseph Spicola, Jr., City Attorney, and Steve M. Barbas, Assistant City Attorney, Tampa, for City of Tampa (Amicus Curiae).

PER CURIAM.

Certiorari denied.

BOARDMAN, A.C.J., and OTT and DANAHY, JJ., CONCUR.

A TRUE COPY
TEST:

CLERK DISTRICT COURT OF APPEAL
SECOND DISTRICT

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I HEREBY CERTIFY that the foregoing is a true and correct copy of the original as appears of record in my office.

WITNESS my hand and official seal this ..... day of ..... A.D. 19..

JAMES F. LANIER, JR., CLERK

By ..... D.C.

OPINION NOW FINAL
Date June 12, 1981
Your Case No. 79-8445 E
Clerk, Second District
Court of Appeal

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL DIVISION.

STATE OF FLORIDA,
Appellant,
vs.
YASHIA DAVIS,
Appellee.

CASE NO. 79-8445
DIVISION E

This is an appeal from a ruling of the County Court of Hillsborough County, the Honorable Perry A. Little, Judge, finding unconstitutional Chapter 24, Article V, Section 24-96(j) of the Tampa City Code.

The thrust of the attack on this section by Appellee is that said section is unconstitutionally overbroad and vague. This Court, however, finds that the issues on appeal here have been resolved in State v. Ecker, 311 So.2d 104, and State v. Sawyer, 346 So.2d 1071, and the cases cited therein, and the decision of the County Court is therefore reversed.

DONE and ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 6th day of October 1980.

J. ROGERS PADGETT, JUDGE OF THE CIRCUIT COURT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STATE OF FLORIDA

VS.

YASHIA DAVIS

CASE NO. 79-8472

DIVISION "B"

ORDER

THIS CAUSE having come on to be heard on the Defendant's Motions to Dismiss the charge of Loitering For The Purpose of Engaging in Prostitution in violation of Tampa City Ordinance 24-96 (j) and the court having heard arguments from counsel and having examined case citations offered for consideration and being otherwise advised in the premises, it is thereupon

ORDERED and ADJUDGED that the charge against the Defendant is dismissed on the grounds that Tampa City Ordinance Section 24-96 (j) is unconstitutional because it delegates unbridled discretionary power to police to determine who is or is not to be arrested and is subject to arbitrary application and enforcement because of vagueness contrary to the Constitution of the State of Florida and the Fourteenth Amendment of the United States Constitution.

It is well settled law in this State that any attempt by a legislative body to make certain acts criminal offenses must describe the conduct in such a manner that any ordinary person will know with certainty what conduct is prohibited. State v. Hopis 257 So2d 17; State v. Baleo 356 So2d 306 Fla. 1978.

It also appears to this court that there is a distinct possibility that constitutionally protected activities could subject one to arrest under Section 24-96 (j) if a defendant is unable to satisfy an officer that a particular act was not

EXHIBIT A

designed to entice, induce or solicit for prostitution. The Florida Supreme Court has stated in Shultz v. State, 361 So2d 416 that:

> "A Statute is overbroad when legal constitutional protected activities are criminalized as well as illegal, unprotected activities, or when the legislative set a net large enough to catch all possible offenders and leave it to the courts to step inside and determine who is being lawfully detained and who should be set free"

While it would be an ideal situation to have the City of Tampa free of all undesirable persons and prostitutes in particular, it does not appear that the Constitution of the State of Florida and the Constitution of the United States will allow the City of Tampa to make it a crime for such person to walk or stand or ride in or near thoroughfare or place open to the public.

DONE and ORDERED in Chambers at Tampa, Florida this 7th day of October, 1979.

Perry G. Little
COUNTY JUDGE

Copies to:

ATTORNEY ED CAMPBELL
620 E. Madison
Tampa, Florida

Mr. Marcelino Huerta
Assistant State Attorney
Courthouse Annex
Tampa, Florida 33602

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ANTHONY TYRONE ROGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 90-02204

Opinion filed January 30, 1991.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Susan C. Bucklew, Judge.

Judge C. Luckey, Jr., Public Defender, and Daniel R. Kirkwood, Assistant Public Defender, Tampa, for Petitioner.

Robert A. Butterworth, Attorney General, Tallahassee, Peggy A. Quince, Assistant Attorney General, and Tyron Brown, Assistant City Attorney, Tampa, for Respondent.

PER CURIAM.

Petition for writ of certiorari denied.

THREADGILL, A.C.J., and PARKER and ALTENBERND, JJ., Concur.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

ANTHONY T. ROGERS
Appellant/Defendant

VS:

STATE OF FLORIDA
Appellee

DIVISION: "X"

CASE NO: 89-17884

TRIAL COURT CASE:

89-10934MMAWS

ORDER AFFIRMING TRIAL COURT
APPEAL FROM COUNTY COURT
Hillsborough County Florida
The Honorable James D. Arnold, County Judge

This court holds that Section 24-43, City of Tampa Code (Manifesting the Purpose of Illegally Using, Possessing or Selling Controlled Substances) is constitutional and a proper law enforcement tool. Appellant's, Anthony Tyrone Rogers, conviction is affirmed.

In arguing that the Ordinance is unconstitutional, Appellant raises four issues:

1. The Ordinance is vague
2. The safeguard contained in Section 24(c) affording the person an opportunity to explain his conduct is not an adequate safeguard and subjects a person to self incrimination.
3. The Ordinance is subject to arbitrary enforcement by police officers.
4. The Ordinance is overbroad.

A vague statute has been described as "one which is constitutionally infirm because its language is so unclear or ambiguous that persons of reasonable intelligence must guess at what conduct is proscribed." State v. Ferrari, 398 So.2d 804, 807 (Fla. 1981). The language of section 24-43, Tampa City Code, is not unclear or ambiguous on its face. In fact, it specifically sets out the proscribed conduct and what the purpose of the conduct must be. However, because the Ordinance does impact First Amendment rights, it requires a higher level of scrutiny. The Florida Supreme Court performed this scrutiny in State v. Ecker, 311 So.2d 104 (Fla. 1975) on a very similar statute, section 856.021, Florida Statutes, (loitering and prowling). The Court found that under "circumstances where peace and order are threatened or where the safety of persons or property is jeopardized" an arrest under that statute is justified. Ecker at 109. The Tampa City Council must have enacted this Ordinance (Manifesting the Purpose of Illegally Using, Possessing or Selling Controlled Substances) because of a legitimate concern for the safety of citizens and property in areas where the proscribed conduct is occurring. The specific language of the Ordinance coupled with the legitimate concerns for the safety of the public are sufficient to allow the Ordinance to withstand a challenge that it is unconstitutionally void for vagueness. In making this analysis, this court has been mindful of the judicial principle of construing an Ordinance enacted by a legislative body as constitutional if a fair construction will so allow.

Written into section 24-43(c), Tampa City Code, is a provision that prohibits an arrest unless the arresting officer affords a suspect an opportunity to explain his conduct and further allows that no one will be convicted under the Ordinance "if it appears at trial the explanation was true and disclosed a lawful purpose." The Appellant contends that the Ordinance thus requires a suspect to choose between his constitutional privilege against self incrimination and being arrested.

The safeguard is virtually identical to the provisions contained in Florida Statute 856.021 which was upheld as constitutional in State v. Ecker, 311 So.2d 104 (Fla. 1975). There is a difference between affording a suspect an opportunity to explain his behavior and compelling self incrimination. The Ordinance does not compel self-incrimination, nor does the Ordinance make criminal failure to explain the conduct. Any criminal conduct has been completed prior to the police giving a suspect an opportunity to explain. See State v. Rash 458 So.2d 1201 (Fla 5th DCA 1984). For the above reasons and when balanced against the presumption of constitutionality, this argument is not persuasive.

As is true with any loitering statute or ordinance, there may be instances where the application of the Ordinance is uncertain or selective. However, the United States Supreme Court has held that so long as the general conduct against which the statute is directed is made plain, it does not violate due process that the application of the statute may be uncertain in some cases. Roth

v United States, 354 U.S. 476, 491-92 (1957); Hygrade Provision v Sherman, 266 U.S. 497, 502 (1925). The fact that police officers might occasionally abuse the Ordinance is not sufficient to invalidate the Ordinance on either First Amendment or due process grounds. The Ordinance is sufficiently definite to allow judges and juries to administer it fairly and therefore is constitutional.

Finally, Appellant argues section 24-43, Tampa City Code, is overbroad and encompasses otherwise innocent conduct within its parameters, infringing on the First Amendment and due process rights of the citizens of Tampa. The circumstances which may be considered under the Ordinance are limited to loitering in a public place for the specific and unlawful purpose of selling drugs. Therefore innocent activities such as waiving of arms at passing cars or talking to passersby, without the intent to deal in drugs are not covered by the Ordinance. The Ordinance prohibits loitering that threatens public safety (the selling, using or possessing of drugs) and when balanced against the infringement it creates on individual rights, it withstands constitutional over-breath problems.

Judicial construction requires judges to give preference to a statutory construction that saves a statute from a constitutional challenge rather than defeats it, Schultz v State 361 So.2d 416 (Fla. 1978). A similar statute, Florida Statute 856.021 (Loitering and Prowling) was held constitutional in State v. Ecker 311 So.2d 104 (1975). An almost identical Ordinance, Section 24-96(j), City of Tampa Code, (Loitering for Purposes of Prostitution) was held

constitutional in State v. Davis, Case 79-8472 Division B, rev'd State v Davis, Case No. 79-8445, Circuit Court Division E. This same Ordinance was held constitutional by the undersigned court while sitting as a county court judge in State v. Hess, Case 84-8635. Therefore this court holds that section 24-43, City of Tampa Code, is constitutional and affirms the trial court's conviction of Appellant/Defendant Anthony Tyrone Rogers pursuant to that Ordinance.

DONE and ORDERED this 9 day of July, 1990 in Tampa, Hillsborough County, Florida.

Susan C. Bucklew
Circuit Judge

cc: James D. Arnold, Circuit Judge
Dan Kirkwood, Assistant Public Defender
Tyrone Brown, Special Assistant State Attorney
James Barton, Assistant State Attorney

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

CITY OF TACOMA,

Plaintiff/Respondent,

vs.

HENRY ANDERSON
JOHN LUVENE
CHARLES WOODS,
Defendants/Appellants

NO. 88-1-03205-1

OPINION OF THE COURT

The appellants have appealed from the decision of the Honorable Hal D. Murtland of the Tacoma Municipal Court declaring that Tacoma Municipal Ordinance No. 24167 (Loitering For the Purpose of Engaging in Drug Related Activity) is not unconstitutionally vague or overbroad and that the emergency clause of that ordinance is valid.

The appellants were individually charged with violating Tacoma Municipal Ordinance No. 24167. Appellants Luvene and Woods filed motions to dismiss based on the constitutionality of the ordinance and the fact the emergency clause was invalid. The motions were denied on October 21, 1988. Appellants Luvene and Woods were found guilty by the court based on a stipulation to submit the facts in the police report for the court's judgement. Appellant Anderson was not a party to the motion to dismiss. Anderson was also found guilty after stipulating to the admissability of the police report for the court's judgement. All three appellants filed a notice of appeal to this court pursuant to the Rules of Appeal for courts of Limited Jurisdiction (RALJ).

(CP-19)

The Court will first address the issue of whether or not the emergency clause is valid as stated in the ordinance such that the Tacoma City Council could bypass the right to referendum found in Article 2 §1(b) of the Washington Constitution and Article 2 §12 of the Tacoma City Charter.

The appellants claim that Article 2 §1(b) of the Washington Constitution allows the citizens of the state to have submitted for their approval or rejection any law or part of a law passed by a lawmaking body. Article 2 §1(b) states in relevant part:

> (b) Referendum. The second power reserved by the people is, the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, . . .

The Tacoma City Charter has a referendum provision contained in Article 2 §12 which provides in pertinent part:

> "Every ordinance shall, within ten days after its passage, be published once in the official newspapers of the City. Ordinances passed as emergency measures....shall take effect immediately after a publication. Ordinances granting a franchise, or privilege, or authorizing the issuance of revenue bonds in an amount exceeding $5,000,000.00, shall not become effective until after the expiration of thirty days from the date of publication. All other ordinances shall take effect only after the expiration of ten days from publication, subject always to the provisions to this charter concerning referendum."

The Washington Supreme Court has ruled that a legislature may bypass the referendum power and pass emergency legislation. State ex rel Hamilton v. Martin, 173 Wn.2d 249, 23 P.2d 1 (1933). The emergency clause of Tacoma Municipal Ordinance 24167 §2 of the ordinance. It states:

> That time is of the essence in this matter because the City's drug problems are increasing rapidly, causing immediate and imminent danger to the public health and safety and to property in the area where drug use is taking place; therefore, an emergency is hereby declared to exist, making necessary the passage of this ordinance and its taking effect immediately upon publication.

Whether ordinances are truly emergent and exceptions to the referendum provisions is a judicial question. Swartout v. Spokane, 21 Wn. App. 665, 586 P.2d 135 (1978). The guidelines used in making this determination were set out in Hamilton supra; at 257.

> We have always held to the rule that the legislative declaration of the facts constituting the emergency is conclusive, unless, giving effect to every presumption in its favor, the court can say that such legislative declaration, on its face, is obviously false and a palpable attempt at dissimulation. . .
>
> It is also well settled, both here and elsewhere, that, in determining the truth or falsity of a legislative declaration of a fact, the court will enter upon no inquiry as to the facts, but must consider the question from what appears, upon the face of the act, aided by its judicial knowledge.

The Court, in applying the above guidelines concludes that the legislative declaration that Tacoma's drug problems are increasing rapidly and causing imminent danger to persons and property is not false and is not a palpable attempt at dissimulation. The Court disagrees with appellants' claim that the emergency clause is conclusory. The Court can and does rely on its own judicial knowledge to conclude that an alarming and increasing number of drug cases have been filed in the Superior Court of Pierce County in recent years. The Court is aware that much of the drug activity centers in and around the City of Tacoma. The Court is also aware that many of the crimes that come before this court have increasingly become drug related. Crimes such as murder, assault,

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burglary, theft and prostitution have increased steadily with the alarming use and sale of drugs in recent years. The Court has also reviewed the records of public hearings held before the City Council concerning the proposal and passage of the drug loitering ordinance. The Court is satisfied that they provided the City Council with the evidence to conclude that an emergency existed.

The Court finds that the facts alleged in Section 2 of the ordinance are of sufficient gravity as to create an emergency requiring immediate effective legislation.

The appellants' next challenge is that the ordinance is unconstitutionally vague on its face and that it is overbroad. Appellants also claim that the ordinance is unconstitutionally vague as applied to appellant Anderson.

The ordinance at bar states:

> LOITERING FOR THE PURPOSE OF ENGAGING IN DRUG-RELATED ACTIVITY.
>
> A. It is unlawful for any person to loiter in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the purpose to engage in drug-related activity contrary to any of the provisions of Chapters 69.41, 69.50, or 69.52 of the Revised Code of Washington.
>
> B. Among the circumstances which may be considered in determining whether such purpose is manifested are:
>
> 1. Such person is a known unlawful drug user, possessor, or seller. For purposes of this chapter, a "known unlawful drug user, possessor, or seller" is a person who has, within the knowledge of the arresting officer, been convicted in any court within this state of any violation involving the use, possession, or sale of any of the substances referred to in Chapter 69.41, 69.50, and 69.52 of the Revised Code of Washington, or such person has been convicted of any violation of any of the provisions of said chapters of the Revised Code of Washington or substantially similar laws of any

political subdivision of this state or of any other state; or a person who displays physical characteristics of drug intoxication or usage, such as "needle tracks"; or a person who possesses drug paraphernalia as defined in Section 8.29 of the Official Code of the City of Tacoma;

2. Such person is currently subject to an order prohibiting his/her presence in a high drug activity geographic area;

3. Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is then engaged in an unlawful drug-related activity, including by way of example only, such person acting as a "lookout";

4. Such person is physically identified by the officer as a member of a "gang," or association which has as its purpose illegal drug activity;

5. Such person transfers small objects or packages for currency in a furtive fashion;

6. Such person takes flight upon the appearance of a police officer;

7. Such person manifestly endeavors to conceal himself or herself or any object which reasonably could be involved in an unlawful drug-related activity;

8. The area involved is by public repute known to be an area of unlawful drug use and trafficking;

9. The premises involved are known to have been reported to law enforcement as a place suspected of drug activity pursuant to Chapter 69.52 of the Revised Code of Washington;

10. Any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

The concept of vagueness is an adjunct of the constitutional requirement of due process. The Due Process clause of the Fourteenth Amendment requires specificity in penal statutes so that citizens have fair notice of what conduct is forbidden by an ordinance or statute.

Also, due process requires that an ordinance or statute must contain sufficient standards to guard against arbitrary enforcement of the law. Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1885 (1983), Seattle v. Rice, 93 Wn.2d 723, 612 P.2d 792 (1980).

The Tacoma drug loitering ordinance is not unconstitutionally vague. The ordinance is clear and unambiguous as to the conduct it forbids. The ordinance forbids loitering in a manner and under circumstances manifesting an unlawful purpose, the unlawful purpose being, to engage in drug-related activity contrary to the provisions of RCW chapters 69.41, 69.50, or 69.52. The ordinance is comparable in approach to prostitution loitering ordinances upheld by the Washington Supreme Court. Seattle v. Slack, 113 Wn.2d 850 (1989), Seattle v. Jones, 79 Wn.2d 626, 488 P.2d 750 (1971), State v. VJW, 37 Wn. App. 428, 680 P.2d 1068 (1984). The term "purpose" has been defined by the Washington Supreme Court to mean intent. Jones, supra. The ordinance only punishes conduct which manifests an intent to engage in drug-related activity. The ordinance is sufficiently clear so that men of reasonable understanding are not required to guess at its meaning.

The ordinance provides adequate guidelines to avoid arbitrary enforcement and subjective determinations of criminality by police officers. The listing of circumstances are not exclusive and do not constitute crimes in themselves. The circumstances can be considered by police along with other conduct to determine whether an unlawful purpose or intent to engage in drug activity is present.

The appellants fail to explain why the court should not examine the factual situations in each case in determining the validity of the ordinance. The Court, when examining the cases of Luvene and Woods,

concludes that each case is a hard core violation of the ordinance. The facts of the cases were set forth in the respondent's brief and a transcript of defendant Anderson's case was contained in the appellant's brief. There appears to be no dispute between the parties concerning the facts. The facts are as follows:

CHARLES WOODS: On August 31, 1988, members of the Crack House Abatement Team were checking the area of Firemen's Park at 800 South "A" Street, an area known for high drug activity, particularly frequented by drug users and other chemical dependents. The officer observed Mr. Woods "shooting up" a companion, the hypodermic needle stuck into the companion's right arm, and being held by Mr. Woods. As the officers approached and identified themselves, Mr. Woods jumped up in a startled manner and threw the hypodermic to the ground. Both subjects were placed under arrest for violation of the Drug Loitering Law. The officers, following the arrest, also discovered the bottom of a pop can which is commonly used to prepare certain drugs, including heroin, prior to injection. The puncture wound on Mr. Woods' companion corroborated the officers' observations.

JOHN LUVENE: On August 26, 1988, police officers conducted a surveillance of the intersection of 14th and "J", in the Hilltop area of Tacoma, which is reported to be a street-drug-trafficking area, based upon numerous telephone complaints by citizens, as well as police observation and arrests. Over the course of approximately one hour surveillance, Mr. Luvene was observed, initially in the company of two and subsequently several others, flagging vehicles, consistent with "drive by" drug trafficking.

Mr. Luvene, based on the officers' experience with drug trafficking arrests, acted as "tout" and lookout. Mr. Luvene was observed flagging down a driver, then motioning to one of his companions, who approached the vehicle, while Mr. Luvene stood by, his actions being consistent with that of a lookout, while his companion pulled out a clear plastic bag containing at least ten pieces of what appeared to be rock cocaine, passing some to the occupant of the vehicle who then passed U.S. currency to the seller. Subsequently, Mr. Luvene was observed acting in the manner of a lookout on behalf of another companion who lit a pipe commonly used to smoke crack cocaine, in the manner commonly used to ignite rock cocaine. This glass pipe was later found on Mr. Luvene's companion. Mr. Luvene departed the area briefly, but returned at the time that the arrest team was arresting Mr. Luvene's companions.

HENRY ANDERSON, JR.: On September 22, 1988, Detectives of the Career Criminal Unit were working a surveillance in the area of the Olympus Hotel in Tacoma, a high drug trafficking area. Mr. Anderson was observed over a 2 hour period making contact with several people. Also during this period of time, Mr. Anderson was constantly looking around and appeared very nervous. When Mr. Anderson was observed making contact with other subjects, he was observed making several exchanges. Mr. Anderson had been observed in the area by Detectives on numerous prior occasions. On such prior occasions he was also observed making exchanges. Mr. Anderson was known to Detectives as a drug offender with prior narcotics convictions. Mr. Anderson was arrested by Detectives in the lobby of the Olympus Hotel.

The Court is convinced that the conduct of appellants Wood and Luvene violated the hard core of the ordinance. The conduct clearly

manifested an intent to engage in drug-related activity. The activities of appellant Anderson are not as clear as the others in regards to manifesting an intent to engage in drug-related activity, thus this is clearly the most difficult case. Mr. Anderson was a known drug offender, he was observed in a high drug trafficking area, and was also observed making several exchanges over a two hour period. While Mr. Anderson's behavior may create reasonable suspicion that he was engaging in drug activity, the officers' report does not sufficiently articulate an intent to engage in drug activity. Specifically, while the police articulate that they observed Mr. Anderson making several exchanges, they do not say anything about the exchanges themselves that caused them to believe that Mr. Anderson was engaging in drug activity. The ordinance is, therefore, unconstitutionally vague as it applied to the acts of Mr. Anderson.

The appellants claim that the ordinance is unconstitutionally overbroad. A law is overbroad if it sweeps within its prohibitions constitutionally-protected free speech activity under the First Amendment. Seattle v. Huff, 111 Wn.2d 923, 767 P.2d 572 (1989), O'Day v. King County, 109 Wn.2d 796, 749 P.2d 142 (1988). However, because the ordinance at bar regulates conduct and not pure speech, the ordinance will not be overturned unless the overbreadth is "real and substantial." Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973), State v. Regan, 97 Wn.2d 47, 640 P.2d 725 (1982).

The court must limit itself to the justiciable cases before it. The Court has concluded that the conduct of appellants, Woods and Luvene, constituted hard core violations core of the Ordinance and that their conduct manifested an intent to engage in drug-related activity. There is no question that loitering is protected activity. Slack,

supra. However, there is no constitutional right to loiter for illegal purposes. State v.Dixon, 78 Wn.2d 796 (1971). The facts of the cases before the court clearly suggest that the ordinance is not overbroad. The Court does not believe that it can consider hypothetical situations which would suggest that the ordinance is overbroad in its application: although the Court can conceive of such situations, the Court will not void a legislative enactment merely because all of its possible applications cannot be anticipated. State v. Worrell, 111 Wn.2d 357 (1988). The Court's ruling on overbreadth is limited to justiciable facts of the cases presently before it.

The Court holds that Tacoma Municipal Ordinance No. 24167 is not unconstitutionally vague or overbroad as to appellants Woods and Luvene and that the emergency clause is valid. The convictions of the appellants Woods and Luvene are affirmed. The court further holds that the ordinance is unconstitutional as applied to appellant Anderson for the above stated reasons. The conviction of appellant Anderson is, therefore, reversed. Done in Open Court this 21st day of September 1990.

James P. Healy, Judge

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