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FILED
SID J. WHITE
DEC 27 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RENETHA WYCHE,

Petitioner,

vs. : Case No. 77,440

STATE OF FLORIDA,

Respondent.

_____.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE FACTS

Petitioner strenuously objects to Respondent's reference to the arresting officer's incident report and continuation letter. Answer Brief of Respondent at 2-3, 42-43. This items were not introduced as evidence, are not in the record on appeal, and, to this date, undersigned counsel has not seen them. This Court should entirely disregard any conclusions that Respondent draws from these items, particularly regarding the sufficiency of the evidence.

ARGUMENT

The end, beginning, and middle of Respondent's argument was that ordinance 14-76(2) requires proof of intent. As both Petitioner and the excellent brief of the amicus curiae pointed out, however, the ordinance does not require proof of intent. "The ordinance itself states that it prohibits loitering which manifests but does not prove a purpose of prostitution." Amicus Curiae Brief of Florida Association of Criminal Defense Lawyers at 12. The ordinance was carefully drafted to require proof only of circumstances. Circumstances are obviously fairly easy to prove beyond a reasonable doubt. If these circumstances are proved beyond a reasonable doubt, then the accused loiterers are guilty of violating this ordinance, even if they in fact entirely lack a criminal intent. Such a result cannot be squared with substantive due process or with the First Amendment.

In effect, although it does not say so, Respondent asks this Court to give the ordinance a limiting construction by requiring proof of intent. Such a construction would do violence to the very careful drafting of the ordinance. It would effectively be two-faced, because it would allow the Tampa city attorney to claim to this and other courts that intent *is* required and yet allow Tampa police and juries -- who must use the actual ordinance language -- to arrest and convict without proof of intent and solely on proof of circumstances which look suspicious.

Moreover, while a limiting construction requiring proof of intent would certainly be necessary, it would hardly be sufficient. It would not address the chilling First Amendment effects that the ordinance has on anybody walking the streets of Tampa in a remotely suspicious manner. It also would not address the problem that, the more the ordinance is interpreted in a constitutionally proper fashion to require proof of actual intent and of actual acts which carry out this intent, the more superfluous it becomes. An actual intent to prostitute, coupled with overt acts which carry out this intent, is prostitution which section 796.07(3), Florida Statutes (1987), already forbids. Moreover, it does so with a lesser penalty than the Tampa ordinance does and without egregious First Amendment implications.

> (3) It is also unlawful in the state:
> (a) To offer to commit, or to commit, or to engage in prostitution, lewdness, or assignation.
> (b) To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation with himself or herself. . . .

> (d) To aid, abet, or participate in the doing of any of the acts or things enumerated in subsection . . . (3) of this section.

Id.

As several courts have previously found, this and other state statutes already adequately address the evils targeted by ordinance 14.76(2). Petitioner pointed out in her initial brief that every case rejecting the First Amendment overbreadth issue in this context has completely ignored this fact that existing laws already deal appropriately with the evil in question without infringing the First Amendment. Not surprisingly, Respondent also completely ignored this argument.

Significantly, although Respondent discussed at length acts which might carry out the evil intent, Respondent carefully did not ask this Court for an additional limiting construction requiring proof of an overt act which carries out the evil intent. Respondent claimed instead that loitering itself is an overt act. Answer Brief of Respondent at 9. Respondent then defined loitering as, among other things, "to be dilatory; to be slow in movement: to stand around or move slowly about; . . ." Id. at 9. Given this definition of loitering, Respondent's claim that loitering is an overt act was nonsensical. Standing around is patently not an overt act. In fact, standing around is constitutionally protected. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

In the criminal context, an overt act is one which clearly indicates that the actor has an evil intent. Robbers commit overt acts when they walk into stores and pull out guns. All of the

circumstances listed in the ordinance, however, are essentially innocent and generally are not overt acts. The ordinance therefore allows convictions of crime without proof of overt acts. As discussed in Issues I and III of Petitioner's Initial Brief, this violates substantive due process and unduly implicates the First Amendment.

Respondent's decision not to ask for a limiting construction requiring proof of overt acts which carry out the evil intent was extremely significant because it revealed the true purpose of this loitering ordinance. Tampa police are doubtless frustrated on occasion because they cannot prove that a person has committed an act which carries out an intent of prostitution, even though the act may be suspicious. This is particularly true when many tourists come to town for events like the Super Bowl, because the police want to get prostitutes off the streets for these events, Consequently, the City of Tampa passed this ordinance as a short-cut to nip prostitution in the bud before any overt act has actually occurred. The ordinance does not require proof of any actual acts but merely of circumstances which might make it look like a crime is about to occur. Because of the many First Amendment implications, cities cannot pass loitering ordinances to nip crime in the bud in this manner. Papachristou, 405 U.S. at 171.

Petitioner also cited Terry v. Ohio, 392 U.S. 1, 21 (1968), as articulating the proper standard for violations of this ordinance. Answer Brief of Respondent at 12-13, This citation of Terry illustrated how the Tampa ordinance is intended and used to arrest and

convict people for crimes that have not occurred yet. The Terry standard determines when a police officer has a founded suspicion to stop a person for questioning. It does not allow the officer to arrest the person when no probable cause exists, and it certainly does not give the proper standard for determining proof of crime beyond a reasonable doubt. Yet, Respondent implies that Terry provides the proper standard for determining when the person has violated the prostitution loitering ordinance. In other words, if the finder of fact can find beyond a reasonable doubt that the police officer justifiably had a founded suspicion under Terry, then the person is guilty. This idea stands the laws of search and seizure, due process, and proof beyond a reasonable doubt totally on their respective heads.

As the district court did below, Respondent also argued that the ordinance is less vague than the statewide loitering ordinances which this Court has previously approved. As Petitioner pointed out in her initial brief, however, this argument overlooked the fact that Florida's loitering ordinance requires proof of an objective fact -- that the public safety is threatened. State v. Ecker, 311 So.2d 104 (Fla. 1975). When the public safety is not threatened, then Florida law requires specific proof of a specific crime, such as prostitution, instead of nonspecific proof of loitering. B. A. A. v. State, 356 So.2d 304 (Fla. 1978).

The practical reasons for this distinction are clear. In the typical loitering case under Ecker, people are likely to get hurt if the officer does not intervene. For example, if an officer sees

a man with a gun hiding behind a hedge near a broken window of a building, the officer needs to intervene or the building's occupants could be injured. In other words, the officer must act to preserve the public safety.

These considerations do not apply to a prostitution loitering ordinance. Prostitution, while perhaps not victimless, is not a crime that is likely to cause immediate physical injury. Consequently, prostitution is like all other crimes. However suspicious the watching officers might be, they cannot stop a suspected prostitute without a founded suspicion, cannot arrest without probable cause, and cannot convict unless all reasonable doubts are gone. Tampa's loitering ordinance is a blatant attempt to pre-empt this constitutionally mandated chain of proof and to allow convictions without proof beyond a reasonable doubt and even without probable cause that a crime has occurred.

Finally, the amicus has pointed out that Petitioner framed this issue primarily with respect to the rights of prostitutes. The amicus observed, however, that the Tampa ordinance "also affects the First Amendment rights of all citizens, especially those who happen to live or be in an area of 'high prostitution activity.'" Brief of amicus at 8. Petitioner agrees with this observation and agrees with the amicus's argument on this point. Specifically, Petitioner agrees that

> Section [14-76(2)] is also substantially overbroad because it is not limited to activities by known prostitutes. Nothing in Section [14-76(2)] requires the police to arrest only known prostitutes. It is not hard to imagine an arrest based on conduct delineated in [14-

76(2)] by a person who is not a known prostitute, but who is in an area or on a corner known for prostitution activity. All persons could be subject to an arrest under section [14-76(2)] if they engaged in conduct similar to the circumstances listed in [14-76(2)] or a person engaged in such conduct in an area known for prostitution.

Brief of amicus at 14.

~~CERTIFICATE OF SERVICE~~

I certify that a copy has been mailed to Peggy A. Quince, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, and to Tyron Brown, Sixth Floor, City Hall, 315 E. Kennedy Boulevard, Tampa, FL 33602, (813) 223-8996, on this 23rd day of December 1991.

Respectfully submitted,

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