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

OLIVER HOLLIDAY)
)
Petitioner,)
)
)
vs.)
)
CITY OF TAMPA and)
STATE OF FLORIDA,)
)
Respondents.)
_____)

Case No.: 78,170

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

ANSWER BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

Oliver Holliday was the Petitioner in the Second District Court of Appeal and is the Petitioner in this appeal. The City of Tampa was the Respondent in the Second District Court of Appeal and the City of Tampa and State of Florida are the Respondents in this Appeal.

The City of Tampa's Loitering for Drugs Ordinance, formerly Section 24-43, City of Tampa Code, is presently codified as Section 14-62, City of Tampa Code. This Ordinance will be referred to in this brief as Section 14-62, City of Tampa Code, or as Tampa's Loitering **for** Drugs Ordinance.

The City of Tampa's Loitering for Prostitution Ordinance, which is at issue in Wyche v. State, **Case** No. 77,440, formerly Section 24-96(j), City of Tampa Code, is presently codified as Section 14-76(2), **City** of Tampa Code. That Ordinance will be referred to in this brief as Section 14-76(2), City of Tampa Code, or as Tampa's Loitering for Drugs Ordinance.

STATEMENT OF THE CASE AND FACTS

**Respondents, City of Tampa and State of Florida, accept
Petitioner's Statement of the Case and Facts.**

SUMMARY OF ARGUMENT ON APPEAL

Section 14-62, 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 to achieve the legitimate government goal of curbing illegal street level drug trafficking, 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 of loitering, loitering for the purpose of illegally dealing in drugs. 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 14-62, City of Tampa **Code**, is constitutional.

ISSUE

WHETHER 14-62, CITY OF TAMPA CODE, IS
CONSTITUTIONAL?

ARGUMENT

SECTION 14-62, 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 Indian

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 14-62 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. Rodriguez, 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 Drugs 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** to 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 far Drugs Ordinance in the Tampa City Code. The wording of paragraph (a) of Section 14-62 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 of illegally using, possessing, transferring or selling any controlled substance as that term is defined by Florida Statutes.

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 to 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 8856.021, 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, Section 14-76(2), City of Tampa Code, former Section 24-96(j) of the Tampa City Code, which is a mirror image of the 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 B, 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. The Second District Court of Appeal of Florida, recently **held**, in Wyche v. State, 573 So.2d 953 (Fla. 2d DCA 1991), on appeal Wyche v. State, Supreme Court of Florida case number 77,440, that same ordinance constitutional. The Court 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 356.021, 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.

Similarly, Section 16-62 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 Drugs 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 illegally using, possessing, transferring or selling any **controlled substance** is a crime; therefore, the ambiguity or generality which exists with loitering alone is not present in **Tampa's Loitering for Drugs 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 illegally using, possessing, transferring or selling a controlled substance. Tampa's Loitering for Drugs 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:

- (1) The person is a known illegal user, possessor or seller of controlled substances, or the person is at a location frequented by persons who illegally use, possess, transfer or sell controlled substances; and
- (2) The person repeatedly beckons to, stops, attempts to stop or engage in conversation with passers-by, whether such passers-by are on foot or in a motor vehicle, for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, **transfer**, or buy any controlled substances; or
- (3) The person repeatedly passes to or receives from passers-by, whether such passers-by are on foot or in a motor vehicle, money, objects or written material for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer or buy any controlled substance.

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 14-62 **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 14-62, 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 of which are specifically delineated) manifesting an unlawful purpose; the unlawful purpose being to illegally **use**, possess, transfer or sell any State defined controlled substance. 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 14-62 is sufficient in its guidelines to provide adequate warning and notice to these individuals. Section 14-62 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 14-62 does not require self-incrimination.

Subsection (c) of the Loitering for Drugs Ordinance *states*:

No arrest shall be made for a violation of subsection (a) unless the arresting officer first affords the person an opportunity to explain his conduct, and no one shall be convicted of violating subsection (a) if it appears at trial that the explanation given **was** true and disclosed a lawful purpose.

Section 14-62(c), 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 person 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 Drugs Ordinance] has been completed prior to any question, request or other action by the police officers. Section 856.021(2) docs 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).

Subsection (c) of Tampa's Loitering for Drugs 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. Section 14-62 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 14-62 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 Constitution. 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 overbreadth 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 Drugs Ordinance prohibits loitering which threatens the public peace and safety. Certainly, illegal drug trafficking is a dangerous threat to the **public peace and safety**.

Tampa's Loitering for Drugs 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 Drugs Ordinance is predicated only upon personal unlawful conduct. An accused person under Tampa's Loitering for Drugs 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 Drugs Ordinance is that the accused person was loitering in a public place for the purpose of illegally using, possessing, transferring or selling a controlled substance. It is the intent by a loitering person to illegally deal in a controlled substance which will cause that person to be charged with violating Tampa's Loitering for Drugs Ordinance.

The Loitering for Drugs 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 Drugs 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 laitering 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, possessar 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 far 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 Drugs Ordinance, however, is that a person is a known illegal drug dealer and such person exhibits other overt conduct far the purpose of illegally dealing in drugs. See attachment "A". The fact that a person is a known illegal drug dealer is not, by itself, a circumstance which may be considered in determining a person's intent under Tampa's Loitering for Drugs Ordinance; and, a known illegal drug dealer, with nothing more in terms of overt

conduct under Section 14-62, is not subject to arrest under Tampa's Loitering for Drugs 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 soliciting prostitution. 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 for 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 - illegal drug dealings. Loitering for the purpose or intent of engaging in unlawful drug dealings is clearly loitering that threatens public safety or is a breach of the peace. Under Tampa's Loitering for Drugs Ordinance, therefore, innocent activities such as waving of arms, engaging in conversation in public or exchanging of objects, with no intent to deal in illegal drugs, do not fall within the ambit of Tampa's ordinance.

In City of Cleveland v. Howard, 532 N.E.2d 1325 (Ohio Mun. 1987), the Court, in upholding as constitutional Cleveland's

loitering **far** 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:

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"***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***'--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 14-62, Tampa's Loitering for Drugs 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)

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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 Drugs 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 for 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. Paqnotta, 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 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 sort, i.e., loitering for 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 on 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 Calloway, 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 Drugs Ordinance is 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 Mun. 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 within 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 for 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 **of** 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 562 (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 dismissed 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. Dcskins, 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. The City of Tampa submits that this "balance" has indeed been met, 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 Drugs 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 drug trafficking which is detrimental to the health, welfare and morals of the City.

The City of Tampa 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 14-62 of the Tampa City **Code** constitutionally sound.

CONCLUSION

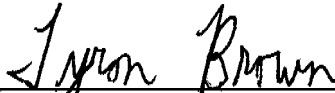
WHEREFORE, based on the foregoing **argument**, reasoning and citation of authority, the **CITY OF TAMPA** and **STATE OF FLORIDA** requests that this Honorable Court affirm the decision of the Second District Court of Appeal and uphold **as** constitutional Tampa's Loitering for Drugs Ordinance, Section 14-62, City of Tampa Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, Answer Brief of the Respondents, has been furnished, by hand delivery, to Gary O. Welch, Assistant Public Defender, 801 E. Twiggs, 5th Floor, Courthouse Annex Tower, Tampa, Florida, 33602, on this 9th day of August, 1991.



PEGGY A. QUINCE
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Sec. 14-62. Manifesting the purpose of illegally using, possessing or selling controlled substances.

(a) It is unlawful for any person to loiter in a public place in a manner and under circumstances manifesting the purpose of illegally using, possessing, transferring or selling any controlled substance as that term is defined in F.S. § 893.02. Among the circumstances which may be considered in determining whether such a purpose is manifested are the following:

- (1) The person is a known illegal user, possessor or seller of controlled substances or the person is at a location frequented by persons who illegally use, possess, transfer or sell controlled substances; and
- (2) The person repeatedly beckons to, stops, attempts to stop or engage in conversation with passers-by, whether such passers-by are on foot or in a motor vehicle, for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer or buy any controlled substances; or
- (3) The person repeatedly passes to or receives from passers-by, whether such passers-by are on foot or in a motor vehicle, money, objects or written material for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer or buy any controlled substance.

(b) In order for there to be a violation of subsection (a), the person's affirmative language or conduct must be such as to demonstrate by its express or implied content or appearance a specific intent to induce, entice, solicit or procure another to illegally possess, transfer or buy a controlled substance.

(c) No arrest shall be made for a violation of subsection (a) unless the arresting officer first affords the person an opportunity to explain his conduct, and no one shall be convicted of violating subsection (a) if it appears at trial that the explanation given was true and disclosed a lawful purpose.

(d) For the purpose of this section, a "known illegal user, possessor or seller of controlled substances" is a person who, within one (1) year prior to the date of arrest for violation of this section, has within the knowledge of the arresting officer been convicted of illegally manufacturing, using, possessing, selling, purchasing or delivering any controlled substance.

(Ord. No. 89-238, § 2(24-43), 9-28-89)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

79-8445

Eminent Criminal

ZASHIA 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
THIS IS TO CERTIFY THAT THE FOREGOING IS A
TRUE AND CORRECT COPY OF THE ORIGINAL OF
THE MATTER OF ZASHIA DAVIS vs. STATE OF FLORIDA
FILED IN THE DISTRICT COURT OF APPEAL, SECOND
DISTRICT, TAMPA, FLORIDA, ON MAY 27, 1981.
JUDY L. THOMAS, CLERK

OPINION NOW FINAL
Date June 18, 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,

CASE NO. 79-8445

vs.

DIVISION E

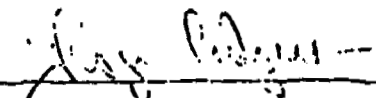
YASHIA DAVIS,

Appellee.

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 HILLS-
BOROUGH COUNTY, FLORIDA

SEARCHED
SERIALIZED
INDEXED
FILED
OCT 10 1980
FBI - TAMPA



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. Lopez 257 So2d 17; State v. DeLeo 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

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 27/
day of October, 1979.

Perry A. 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.

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)
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)
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)

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

DIVISION: "X"

VS:

CASE NO: 89-17884

STATE OF FLORIDA
Appellee

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 guesa 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 overbreath 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

FILED
IN COUNTY CLERK'S OFFICE

AM SEP 24 1990 P.M.

PIERCE COUNTY, WASHINGTON
TED RUTT, COUNTY CLERK
DEPUTY

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,

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 Luvane 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 Luvane, 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
James P. Healy, Judge

PRESENTED BY
AND APPROVED:

Dino G. Sepe

Dino G. Sepe
Attorney for Appellants

PRESENTED BY
AND APPROVED:

Cheryl F. Carlson

Cheryl F. Carlson
Attorney for Respondent


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

STATE OF FLORIDA, :
Appellant, : CASE NO. 79-8445
vs. : DIVISION E
YASHIA DAVIS, :
Appellee. :

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 HILLS-
BOROUGH COUNTY, FLORIDA

FILED IN THE CIRCUIT COURT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
ON OCTOBER 10 1980
BY CLERK OF COURT
J. ROGERS PADGETT, JUDGE
COURT REPORTER
COURT REPORTER
COURT REPORTER



STATE OF FLORIDA

VS.

YASHIA DAVIS

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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. Lopez 257 So2d 17; State v. Daleo 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

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 persons 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 7/
day of October, 1979.

Perry A. Little
COUNTY JUDGE

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