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No. 91827-9

**SUPREME COURT
OF THE STATE OF WASHINGTON**

CITY OF LAKEWOOD,

Respondent,

Vs.

ROBERT W. WILLIS,

Petitioner.

RESPONDENT'S RESPONSE TO AMICUS

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ORIGINAL

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I. INTRODUCTION

Pursuant to this Court's letter Order dated January 12, 2016, the City of Lakewood responds to the amicus briefs filed by the American Civil Liberties Union of Washington (ACLU), Washington Defender Assoc. (WDA), and the Seattle/King County Coalition on Homelessness.

For the reasons that follow, none of the issues raised by these amicus merit reversal of the decisions below.

II. POINTS AND AUTHORITIES

Many of the points raised by the amicus briefs contain arguments which are unsupported by the record, were not raised below or are not borne out by current legal authority. The singular issued raised by Mr. Willis stemming from the Pierce County Superior Court proceedings which remains intact through review by the Court of Appeals and raised in the Petition for Review to this Court is whether the provisions of Lakewood Municipal Code 9A.04.020A violates the First Amendment. With the exception of one issue raised by the ACLU on the impact of the United States Supreme Court's decision in *Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218, 2230, 192 L. Ed. 2d 236 (2015) each of the claims of amicus fall outside these contours.

A. The Eighth Amendment Claims are not Viable.

For the first time in this case's multi-year history has a claim been asserted that the provisions of Lakewood's Code violates the Eighth Amendment. This is simply incorrect and too late to raise.

This Court has emphatically stated,

This Court has recognized that it need not address issues raised solely by an amicus or issues not raised at the trial court unless it is necessary to reach a proper decision.

Seeley v. State, 132 Wn.2d 776, 808 n.20, 940 P.2d 604 (1997).

Before both the Superior Court and the Court of Appeals, Mr. Willis identified two federal constitutional provisions upon which he based his challenges: the First Amendment and the Fourteenth Amendment. The Eighth Amendment was not one of them. Under the rule summarized in *Seeley*, an Eighth Amendment challenge is not viable.

Even if it were, the claim fails on the merits. The provisions of the Eighth Amendment apply to the states through the Fourteenth Amendment. An Eighth Amendment challenge looks to two factors for a proportionality review. *Graham v. Florida*, 560 U.S. 48, 59-60, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The first is whether the sentence imposed for the crime is "unconstitutionally excessive." *Id.* The second is whether using categorical rules to define constitutional standards for certain classes

of crimes or offenders. *Id.* at 60. The first prong is unworkable in the facts or the law while the second is inapplicable.

Lakewood's Code proscribed a violation of the Begging in Restrictive Areas Code as a misdemeanor, which carries up to 90 days in jail and/or a \$1,000.00 or both. LMC 9A.4.030. Mr. Willis received a suspended sentence of 90 days jail, all suspended and a \$1000 fine, with all but \$250.00 suspended. (CP 87-88¹). Both this Court and the Court of Appeals have recognized a sentence of this nature will not present an Eighth Amendment issue. *See, Wahleithner v. Thompson*, 134 Wn.App. 931, 143 P.3d 321 (2006)(multiple gross misdemeanors imposed consecutively); *see also, State v. Smith*, 93 Wn.2d 329, 342, 610 P.2d 869 (1980)("...indeed there is no case which has even suggested that a deferred sentence or probation could fall within the constitutional prohibition.").

Similarly, Lakewood's classification of this offense does not present a constitutional issue. In an analogous context, this Court has already recognized that laws against public disorder and disorderly conduct bear a rational relationship to the ends sought to be attained, and are within the legitimate exercise of the police power and do not violate either the Fifth Amendment to the United States Constitution or Art. 1, § 3

¹ The judgment & sentence is not included in the record on appeal. This is from the trial transcript.

of the Washington Constitution. *City of Seattle v. Hill*, 72 Wn.2d 786, 797, 435 P.2d 692 (1967).

Even if the issue were properly brought before this Court, there is no constitutional infirmity towards the enactment of this offense of the sort identified by amicus.

B. Several Claims Raised by the ACLU Rely on a Mistaken Reading of the Record.

The ACLU, like Mr. Willis has done throughout the course of this case, has relied on a number of assumptions without factual support from the record. Chief among these are (1) the classification of the area as a “street” (ACLU Amicus Br. at p. 15-17); and (2) it claims that the “jury was instructed on the entire Ordinance rather than a constitutionally valid subset of it.” (*Id.* at p. 11 fn. 3). A closer examination of the record belies these claims.

Because this challenge was raised for the first time on appeal, the sole record to proceed upon is the transcript of the jury trial (reproduced at CP 35-90). Neither the jury instruction nor the police report (reproduced as exhibits to Mr. Willis’ supplemental brief) are included in the appellate record. The trial transcript includes the following description of the location of this offense:

Q. It was what information did you have at the time of the dispatch of your call.

[Objection made and overruled]

A. A citizen called 911 to complain of an individual aggressively begging and banging on their car.

Q. What did you do?

A. I was in the area of Pacific Highway and Gravelly Lake, so I responded to that intersection, which was the northbound I-5 exit to Gravelly Lake Drive.

Q. Can you walk the jury through what you observed at that time?

A. I was coming from the north. I-5 runs north/south, but in Lakewood it actually runs east/west. So I was coming from the north – bless you – southbound. And I saw an individual who was on the northbound ramp of I-5 at the intersection facing southbound towards traffic. As I was driving up I pulled over to the right and activated my lights, my two overhead lights, because there is no shoulder, to not be rear ended by cars, and parked my car, and then I saw that individual actually walk from the shoulder, across the fog line out to a car, so it was actually in the lane of travel, or in the exit lane.

* * *

Q. All right. When you saw that individual, you saw that he actually entered the lane of travel on foot?

A. Yes he did.

(Clerks Papers at 56-57; Emphasis added).

And, Mr. Willis on direct examination confirmed the location as being the “exit on I-5 coming off of Gravelly Lake going north...” (CP 74)

Thus, to the extent that there is a claim that this location has ever been described so as to classify it as a public forum for First Amendment purposes, the record on this point does not support that claim. The Court of Appeals could not have erred by “not making a more careful examination of the forum question,” (ACLU Amicus at p. 18); because the testimony adduced at trial is otherwise. As the foregoing excerpts illustrate, the emphasis has been ramp-related. The only question mirroring the Code language is that posed to Officer Valhe whether the location in question was used to enter and exit public roadways (which he answered in the affirmative).² (CP 59). And, no claim has ever been asserted that the Court of Appeals forum determination relative to freeway ramps is somehow legally incorrect. Unpublished Opinion at p. 5.

The ACLU similarly misunderstands the record when it comes to the jury instruction given. Neither the proposed instructions, nor the as-given instructions appear in the record on appeal. The record does contain the colloquy relative to the instructions. (Clerks Papers at 76-78). As the colloquy suggests, the initial proposed instruction contained each of the restrictive areas, but was then reduced to two: freeway ramps and

² “On and Off Ramps,” are defined in the Code as those “areas commonly used to enter and exit public highways from any city roadway or overpass.” LMC 9A.4.020(J).

intersections.³ The record simply does not support the claim that the “jury was instructed on the entire Ordinance rather than a constitutionally valid subset of it.” (*Id.* at p. 11 fn. 3).

This distinction is important because this Court has recognized that appellate review is generally limited to questions presented before and determined by an intermediate appellate court. *Peoples Nat'l Bank v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973)(citation omitted). At both the Superior Court level and the Court of Appeals, the primary challenge asserted by Mr. Willis was to the on/off ramp prong, but failed to attack with particularity any of the other prongs. (*See e.g.*, CP 3 (emphasizing ramp language in Code); Appellant’s Brief at p. 8 (“In this case, the ordinance is regulating speech in a public forum because the N/B I-5 exit to Gravelly Lake Drive SW is accessible by everyone and is a public thoroughfare.”)).

The challenge to-date has not focused on the other areas set forth in the Code.

³ Not only were the jury instructions omitted from the designation of the record below, but the Municipal Court’s instructions, closing arguments and jury deliberation were not transcribed. (CP 83). Neither was voir dire nor the opening statements. (CP 53). Indeed, the only municipal court filings which appear in the Clerk’s Papers are those which Mr. Willis attached to his RALJ Brief (CP 15-32) and the notice of appeal (CP 1).

C. The Post-Reed v. Town of Gilbert Cases are Distinguishable on Their Facts.

Since the decision by the United States Supreme Court in *Reed v. Town of Gilbert*, almost a year ago, courts across the country have revisited their solicitation-based regulations. Although many have been held to be unconstitutional, it is necessary to understand why. It is only through an understanding of the rationales of the deciding courts that one appreciates that Lakewood's Code passes constitutional muster where many others have recently failed. The short answer to all to this issue is that these cases have evaluated the restrictions as regulating speech in a public forum, and thus, subject to strict scrutiny.

The decision in *Thayer v. City of Worcester*, Case No. 13-40057-TSH, 2015 U.S. Dist. LEXIS 151699 (D. Mass. Nov. 9, 2015) is typical of this framework. The *Thayer* Court accepted the premise that the nature of the forum controlled the level of scrutiny. It then concluded “[i]n this case, the Plaintiffs seek to engage in free expression in areas which have been recognized as traditional public forums, i.e. city sidewalks, streets, traffic islands and medians[,]” and concluded that strict scrutiny applied. *Id.*, 2015 U.S. Dist. LEXIS 151699 at *33-34. Because strict scrutiny applied, it then reached the issue of whether the ordinances were content

neutral, with an emphasis on how the municipality focused on the definition of panhandling.

The Court in *McLaughlin v. City of Lowell*, No. 14-10270-DPW, 2015 U.S. Dist. LEXIS 144336 (D. Mass. Oct. 23, 2015) conducted a similar forum analysis. There, the Court highlighted the fact that the municipal ordinance covered solicitation on sidewalks and in parks, and applied strict scrutiny. *Id.*, 2015 U.S. Dist. LEXIS 144336 at *10.

The Seventh Circuit Court of Appeals granted reconsideration after *Reed* in the decision of *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015). Its decision, spanning seven paragraphs rested on the parties' agreement that the ordinance stands or falls on the answer to the question whether it is a form of content discrimination, with *Reed* answering that question in the affirmative. However, this recognition necessarily presupposes that the forum is a public forum entitled to strict scrutiny.

Whatever one may think of Lakewood's Code, for First Amendment purposes, the starting point for analysis is a categorization of the forum. *City of Seattle v. Huff*, 111 Wn.2d 923, 926, 767 P.2d 572 (1989). Simply because one calls an area of pavement a "street," does not make it so. A more critical examination of the area in question is necessary, as one court stated, in the context of a different freeway-based free speech challenge, about whether such locations are public forums,

[The location] on the Interstate 5 freeway ... is not as compatible with the nature of expressive activity expected at a traditional public or designated public forum, such as assembly, debating, and protesting, as would be, for instance, a public square or park, because [the location] is located on the shoulder of a major freeway with high-speed vehicular traffic.

San Diego Minutemen v. Cal. Bus., Transp. & Hous., 570 F. Supp. 2d 1229, 1250 (S.D. Cal. 2008)(citing, *Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001)).

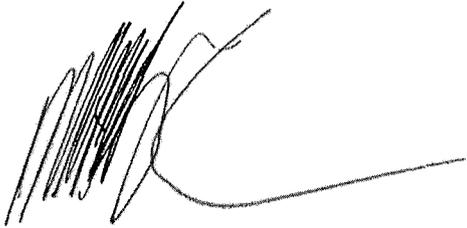
Granted, in some cases, the forum analysis will be easier than it will be in others. Where traditional public forums, such as those present in the regulations at issue in *Reed* and the cases cited by the ACLU, the outcome was dictated by evidence that the forum was determined to be a traditional public forum. But simply calling a location a “street” in a brief does not make it so. Facts presented through testimony and other evidence aid in the formulation of the proper lens through which a Court can properly evaluate a challenge. Here, the facts necessary to trigger a heightened standard are simply lacking.

Without those facts, it is difficult, if not impossible, to square the challenges asserted against Lakewood’s Code and limiting the utility of *Reed* and its progeny to the case at bar.

CONCLUSION

None of the issues raised by amicus merit reversal of the decision
below.

DATED: February 3, 2016.

By: 

Matthew S. Kaser, WSBA #32239
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on the following individuals by the following indicated methods:

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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this 3rd day of February, 2016 at Lakewood,
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Please find the Respondent's Response To Amicus for City of Lakewood vs. Robert Willis Case No. 91827-9 from Matthew S. Kaser, WSBA #32239.

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