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Recent Cases: Constitutional Law — Freedom of Speech — Conviction for Speaking After Having Been Wrongfully Denied License To Do So

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Constitutional Law—Freedom of Speech—Conviction for Speaking After Having Been Wrongfully Denied License To Do So

Defendant, a Jehovah's Witness, was convicted of conducting a public meeting in a city park without first obtaining the license required by city ordinance. Defendant maintained that he had applied for such license, but had been wrongfully denied it. The New Hampshire Supreme Court held the ordinance valid, and the conviction binding, notwithstanding the wrongfulness of the refusal to grant the license. Upon appeal to the United States Supreme Court, *held:* conviction affirmed. The refusal to grant the license was a wrongful contravention of purely ministerial powers conferred by the ordinance; but such wrongfulness was no defense to defendant's violation of the ordinance by proceeding with the speech. His only remedy would have been a mandamus action.[1]

This holding brings to attention the disparity between the legal effect of (1) an unconstitutional statute; (2) an invalid court order; and (3) an invalid refusal to grant a permissive license.

Courts have pronounced the rule that a statute unconstitutionally proscribing the exercise of free speech may be violated with impunity.[2]

[1] Poulos v. New Hampshire, 345 U.S. 395 (1953), affirming 97 N.H. 352, 88 A.2d 860 (1952).

[2] Thomas . Collins, 323 U.S. 516 (1944); De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

An invalid court order, however, must be obeyed pending appeal; and sanctions may be imposed for its violation.[3]

In the instant case the Court affirmed the lower court's refusal to apply the rule regarding unconstitutional legislation to an unconstitutional act by an official acting under a valid ordinance. All the cases cited by the lower court as authority for its position involved licensing of business activity.[4] To argue from cases involving licensing of a business to cases involving licensing of speech, religion, and assembly is to ignore the preferred position conferred on those freedoms by the First Amendment[5] and made binding upon the states by the Fourteenth.[6]

In this case the Court stressed that the ordinance is constitutional because it has been interpreted to confer only "ministerial" powers.[7] Yet the licensing officials, in an unconstitutional usurpation of power, were exercising discretionary power; and it is for resisting that usurpation that the defendant is being punished. It appears that, under the guise of a purely ministerial ordinance designed only to present information about the use of parks, a city may force an individual to shoulder the burden of a mandamus proceeding before allowing him the exercise of a fundamental constitutional right.

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[3] United States v. United Mine Workers, 330 U.S. 258 (1946).

[4] State v. Orr, 68 Conn. 101, 35 Atl. 770 (1896); Malden v. Flynn, 318 Mass. 276, 61 N.E.2d 107 (1945); Commonwealth v. Gardner, 241 Mass. 86, 134 N.E. 638 (1922); Commonwealth v. McCarthy, 225 Mass. 192, 114 N.E. 287 (1916); Commonwealth v. Blackington, 24 Pick (41 Mass.) 352 (1837); State v. Stephens, 78 N.H. 268, 270, 99 Atl. 273, 275 (1916); Lipkin v. Duffy, 118 N.J.L. 84, 191 Atl. 288 (Sup. Ct. 1937). Also see City of Prichard v. Richardson, 245 Ala. 365, 17 So.2d 451 (1944); Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So. 627 (1897); Kielkopf v. Denver, 19 Colo. 325, 35 Pac. 535 (1894); City of Montpelier v. Mills, 171 Ind. 175, 85 N.E. 6 (1908); City of Jordan v. Bespales, 86 Minn. 441, 90 N.W. 1052 (1900); State v. Nagle, 91 A.2d 397 (Me. 1952); State v. Skinner, 119 S.W.2d 82 (Mo. App. 1938); State v. Myers, 63 Mo. 324 (1876); State v. Jamison, 23 Mo. 330 (1856); State v. Snipes, 161 N.C. 242, 76 S.E. 143 (1912). Contra: Prather v. People, 85 Ill. 36, 38 (1897); Zanone v. Mound City, 11 Ill. App. 334, 339 (1882); Fosset v. Rock Island Lumber Co., 76 Kan. 428, 92 Pac. 833, 835 (1907).

[5] Thomas v. Collins, 323 U.S. 516, 550 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[6] Burstyn v. Wilson, 343 U.S. 495, 500 (1952); McCollum v. Board of Education, 333 U.S. 203, 210 (1948); Craig v. Harney, 331 U.S. 367, 372 (1947); Everson v. Board of Education, 330 U.S. 1, 15 (1947); Murdock v. Pennsylanvia, 319 U.S. 105, 108 (1943); Bridges v. California, 314 U.S. 252, 263 (1941); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Schneider v. Irvington, 308 U.S. 147, 160 (1939); Near v. Minnesota, 283 U.S. 697, 707 (1931); 2 Crosskey, Politics and the Constitution 1083-1158 (1953). Contra: Twining v. New Jersey, 211 U.S. 78, 96 (1908); Maxwell v. Dow, 176 U.S. 581 (1900); Presser v. Illinois, 116 U.S. 252, 265 (1886).

[7] Cantwell v. Connecticut, 310 U.S. 296 (1940); Note, 28 Neb. L. Rev. 618 (1949).