STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Benjamin L. Ratliffe,

Defendant-Appellant,

v.

City of Madison

Plaintiff-Respondent

DECISION AND ORDER

Case No. 10 CV 2130

I. FACTS

The parties have agreed that this case would be decided on the Stipulated Facts submitted to the municipal court. Those facts provide in relevant part as follows: On March 21, 2009, at 1:05 p.m. State Street Neighborhood Police Officer Chanda Dolsen of the City of Madison Police Department observed Benjamin Ratliffe and a group of individuals standing around a small portable table that was set upon the sidewalk on a business corner of the 400 block of State Street. State Street is a traditional public forum. Mr. Ratliffe was publicly displaying and distributing literature with the aid of the table on behalf of the International Socialist Organization to educate the public about Socialism and to garner donations for the organization. Books and literature were displayed on the table. Underneath the table, on the sidewalk, were several backpacks or bags, and a plastic container with a blue lid. Two people were nearby distributing newspapers for a $1.00 donation.

On the 400 block of State Street, the paved area closest to the store fronts is free and clear of permanent structures, while the paved area closest to the curb contains permanent fixtures such as poster kiosks, trees, light posts, signs, bike racks and large city planters. The table was

placed on the paved surface area closer to the curb than the storefront, directly adjacent to a poster kiosk.

Ratliffe was cited by Officer Dolsen for "Vending Without a Permit." The ordinance was subsequently amended to a violation of MGO 10.25(1), "Placing Articles on Sidewalk or Terrace:" with a forfeiture of $172 with the agreement of the defendant.

The only permit available from the City that would allow Ratliffe to place a table or other merchandise or items on the sidewalk in this location and in this manner at this time of day is a Street Use permit under §10.056 of the Madison General Ordinances. A permit granted under §10.056 would permit a person to use the street for purposes other than ordinary uses, such as special events. Neither Ratliffe, nor the other members of the International Socialist Organization who were standing around the table, held a street use permit from the City. There was no "special event" on State Street on March 21, 2009, so no permits were issued to any other groups for any street festival, sidewalk sale or another event on the street and sidewalks of that part of State Street that would allow for the placement of a table or booth or other display in this location on the sidewalk.

It is common knowledge that street musicians often perform on State Street in hopes of collecting tips in a hat, open guitar case, or some other container on the sidewalk.

II. PROCEDURAL POSTURE

This is an appeal of the Madison Municipal Court decision in an ordinance violation case. In Municipal Court, Ratliffe filed a motion to dismiss alleging several constitutional First Amendment violations. The parties stipulated to the facts and exhibits pertinent to the motion,

and submitted briefs to the municipal judge. In a written decision dated February 1, 2010, the municipal court denied Ratliffe's motion to dismiss.[1]

III. STANDARD OF REVIEW

An appeal of a municipal court decision under Wis. Stat. §800.14(5) is a review of the record and transcript, comparable to an appeal from a circuit court trial under Wis. Stat. § 805.17(2). *Village of Williams Bay v. Metzl,* 124 Wis. 2d 356, 361, 369 N.W.2d 186 (Ct. App. 1985). Questions of law are reviewed *de novo.* In this case, the parties stipulated to the facts. As a result, there are essentially no disputed issues of fact. Consequently, the questions before this Court are questions of law, and questions regarding the application of stipulated facts to law. The "appellate courts owe no deference the trial court's resolution of issues of law." *Id.* at 360.

IV. THE ORDINANCE

10.25 MERCHANDISE, ETC., NOT TO BE PLACED ON SIDEWALK OR TERRACE.

(1) Unlawful to place articles on sidewalk. Except as permitted in other provisions of these ordinances, no person shall place or deposit on any sidewalk or terrace or in any roadway any cask, box, crate, wood, stone, plank, boards, goods, wares, merchandise, ashes, bottles, cans or other substances or materials.

(2) Merchandise not to be left on sidewalk. It shall be lawful, however, for any person to place and leave for a period not exceeding two (2) hours of the twenty-four (24) on the outer edge of the sidewalk in front of his store or building, dry goods, wares or merchandise for purposes of loading and

[1] Pursuant to Wis.Stats. §806.04(11), in all cases involving constitutional challenges, the attorney general must be given an opportunity to be heard. *Kurtz v. City of Waukesha,* 91 Wis. 2d 117, 103 (1979). On February 3, 2011, Ratliffe notified the Attorney General's office of his challenge. By letter dated February 18, 2011, the Attorney General's office advised this court that it would be not be appearing in this proceeding, but reserved the right to appear if the issue is raised on appeal.

unloading, such exception to be applicable only to premises in business districts, in actual use for merchandizing purposes.

(3) Planting of shrubbery on terraces prohibited. No person shall plant or maintain or cause to be planted or maintained on any terrace between the sidewalk and curb on any street in the City of Madison any plant or shrub in excess of twenty-four (24) inches in height or within a distance of twenty-four (24) inches from the back of the curb unless necessary to control erosion of the soil. Any plants or shrubbery planted or maintained on any terrace contrary to the provision of this ordinance shall be removed. The enforcement of this ordinance shall be under the supervision of the Police Department and the Neighborhood Preservation and Inspection Division of the Department of Planning and Community and Economic Development. Upon default of any person ordered to remove said plants or shrubbery, the Department of Planning and Community and Economic Development may cause said plants or shrubbery to be removed. The cost of removal shall be assessed against the lot adjoining the terrace upon which the plants or shrubbery were located as provided in Section 28.04(12)(e)4 of the Madison General Ordinances. Prosecution under this section shall not bar the City from causing the plants or shrubbery to be removed, nor shall the City's removal of the plants or shrubbery bar prosecution hereunder.

V. INTERPRETATION OF THE ORDINANCE

Ratliffe's first argument, which was not addressed by the municipal court, is that MGO §10.25 was not intended to apply to Ratliffe's tabling activities. Ratliffe asserts that reading the ordinance as a whole, and to avoid absurd results, the ordinance should not be interpreted to cover his use of a table. According to Ratliffe, the ordinance makes it unlawful for any person to place articles on the sidewalk, including "any substances or materials;" and it specifically lists "wares," merchandise" and other items that restaurants and store fronts commonly send in and out, such as bottles and cans. Subsection 2 creates an exception, allowing any person to place

"dry goods, wares or merchandise" on the sidewalk "in front of his store or building" in a business district for the purposes of loading and unloading for merchandising purposes, and for no longer than two hours. MGO §10.25(2). Subsection 3 regulates the planting of shrubbery in the area between the sidewalk and the streets, and threatens the cost of removal "against the lot adjoining the terrace upon which the plants or shrubbery were located". MGO §10.25(3). Thus, Ratliffe concludes that MGO §10.25 was designed to regulate only conduct of the persons owning a store front or other building. He devises various examples where the literal reading of the ordinance could be construed to yield absurd results, such as children playing hopscotch on the sidewalks, which requires leaving a chalky "substance" on the sidewalk to draw the boxes and numbers, as well as the placement of a stone on the sidewalk.

Subsection 1 of the ordinance does not restrict itself to store owners. On its face, it says "no person shall place or deposit....merchandise... or other substances or materials." The next two subsections, however, specifically apply to property owners. Subsection 2 grants an exception to subsection 1 for a two hour period to allow merchandise to be loaded and unloaded on "the outer edge of the sidewalk in front of *his store.*" Subsection 3 restricts the planting of shrubbery and imposes the cost of removal of any such unlawful plant or shrub on "the lot adjoining the terrace upon which the plants or shrubbery were located."

This Court concludes that, on its face, the ordinance applies to Ratliffe's conduct of placing a table on the sidewalk to display his literature. Under well-settled rules of statutory construction, if the ordinance is not ambiguous, it is not necessary to look into the intent behind the enactment. "We have repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court of Dane County*, 2004 WI 58, ¶ 45, 681 N.W. 2d 110 (2004). There is

nothing to suggest that the common council intended the ordinance only to apply to store owners, and in fact, it is counterintuitive that the ordinance would only apply to storeowners and not other individuals. It is more absurd to permit pedestrians to leave their wares in front of a store, but to prohibit storeowners from doing so. Thus, this Court concludes that the plain language of the ordinance encompasses Mr. Ratliffe's use of a table.

VI. THE CONSTITUTIONALITY OF THE ORDINANCE

The constitutionality of a statute is question of law. *Wisconsin Medical Society, Inc. v. Meyer,* 2010 WI 94, ¶36, 787 N.W.2d 22. Although statutes are presumed constitutional, when a statute infringes on the exercise of First Amendment rights, the burden of establishing its constitutionality is on its proponent. *City of Madison v. Baumann*, 162 Wis. 2d 660, 668 (1991) (*quoting Wisconsin Action Coalition v. City of Kenosha*, 767 F. 2d 1248, 1252 (7th Cir. 1985)). To evaluate the constitutionality of the City's ban, therefore, the Court must first determine whether Ratliffe's placement of a small portable table on the city sidewalk is subject to First Amendment scrutiny. If the First Amendment is found to apply, then the Court must determine whether the prohibition satisfies the time, place or manner test set out in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989). *Ward* provides that the City may restrict speech in a public forum, so long as the restriction is (1) content and viewpoint neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels of communication. *Id.*

A. Application of the First Amendment to Tables

Political speech is a primary object of the First Amendment. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 410-11, 120 S.Ct. 897 (2000) (Thomas, J. dissenting) (*citing*

Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434 (1966); *Whitney v. California,* 274 U.S. 357, 375, 47 S.Ct. 641 (1927) (Brandeis, J., concurring)). The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depend upon the free exchange of political information. *Id.* The United States Supreme Court established in *Lovell v. City of Griffin,* 303 U.S. 444, 452, 58 S.Ct. 666 (1938), that the distribution as well as publication of literature is entitled to First Amendment protection.

There can be no doubt that at the time he received his citation, Ratliffe was exercising his First Amendment rights to engage in political speech. He is a member of the International Socialist Organization. In that capacity, he was displaying and making available to the public literature as well as books. Newspapers were available for a $1.00 donation. There was also a tub under the table presumably containing pamphlets and other materials to be distributed to the public to advise them of the organization's ideals.

The parties have stipulated, as they must, that sidewalks constitute a classic setting for the robust exercise of First Amendment rights and thus enjoy the status of a traditional public forum. *See generally Frisby v. Schultz,* 487 U.S. 474, 480, 108 S.Ct. 2495 (1988); *See also Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954 (1993). In *Snyder v. Phelps, et. al.* 562 U.S. ___, (slip opinion March 2, 2011), the United States Supreme Court reiterated the importance of the public street as a traditional public forum, noting, "Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection." *United States* v. *Grace,* 461 U. S. 171, 180, 103 S.Ct. 1702 (1983). "[W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that "'[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate." *Frisby,* 487 U. S. at 480.

The sanctity of public streets as a traditional public forum is especially true for State Street in Madison, Wisconsin which connects the State Capitol to the state's largest public university. There are no cars on State Street and it is a designated as pedestrian mall. When regulating First Amendment activity in a public forum like State Street the government has a difficult burden to carry. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948 (1983).

A question of first impression, however, which has not been resolved in this State or by the United States Supreme Court[2] is whether the use of a table to facilitate speech implicates the First Amendment. *See generally One World One Family Now, Inc. v. State of Nevada,* 860 F.Supp. 1457, 1462 (D. Nev. 1994) (noting a division among the courts over whether portable tables fall within the constitutional protections of expressive activity). In *A.C.L.U. of Nevada v. City of Las Vegas,* 466 F.3d 784, 799 (9th Cir. 2006), the Ninth Circuit Court of Appeals held that the erection of tables in a public forum is expressive activity protected by our Constitution to the extent that the tables facilitate the dissemination of First Amendment speech. "We agree that use of portable tables is analogous to access to newsracks—similarly temporary structures used to disseminate speech-related materials—which is protected by the First Amendment. *Id. See* City of *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 108 S.Ct. 2138 (1988); *See also International Caucus of Labor Committees v. City of Montgomery,* 111 F.3d 1548 (11th Cir. 1997) (applying the usual time, place and manner restrictions of the First Amendment to portable tables).

[2] But see, *Nixon v. Shrink Missouri Government PAC,* 528 U.S. at 412, n.2 (2000). "Not surprisingly, the Courts of Appeals have followed our lead and concluded that the First Amendment protects, for example, begging, shouting obscenities, *erecting tables on a sidewalk,* and refusing to wear a necktie."(J. Thomas, dissenting) (emphasis added)

Although there is some case law to the contrary,[3] this Court concludes that the prohibition of the placement of a table to aid in political speech does implicate the First Amendment. Notably, at oral argument, the attorney representing the City conceded the point. Just as a news rack is not a necessary prerequisite to newspaper distribution, a news rack, like a table, facilitates the freedom to speak, write, print or distribute information or opinion. *Schneider v. State of New Jersey*, 308 U.S. 147, 160-61, 60 S.Ct. 146 (1939); *See also People v. Krebs*, 54 Misc. 2d 578, 282 N.Y.S 2d 996 (1967) (distributing literature, buttons and flags asserting vigorous dissent from American policy in Vietnam and placing a table on the sidewalk incident to such distribution is a clear and proper exercise of a First Amendment Right).

B. Time, Place, Manner Analysis

Simply because a situation implicates the First Amendment, however, does not mean that there has been a First Amendment violation. Even in a public forum the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065 (1984)).

i. Content Neutrality

The principal inquiry in determining content neutrality in speech cases generally, and in time, place or manner cases in particular, is whether government has adopted a regulation of speech because of disagreement with the message it conveys. *Ward*, 491 U.S. at 791. There is

[3] For instance, in *Int'l Caucus of Labor Committee v. Metropolitan Dane County*, 724 F. Supp. 917, 921 (S.D. Fla. 1989), the court found that political display tables, unlike newsracks, were not entitled to First Amendment protection).

no evidence that the ban on anything on the sidewalk, including portable tables, has anything to do with the message that is being conveyed. The ban theoretically applies to anyone regardless of the message. Ratliffe asserts MGO § 10.25(1) is a content-based restriction because there is another regulation, MGO §9.13(6), which is an exception to MGO §10.25. This exception allows certain street vendors to obtain a license to sell hand-crafted items and personally prepared foods, potentially with the aid of a table. However, the exception does not regulate the message or require the City to determine the message. Rather, the exception applies to the method of production of the items sold: hand-made and individually produced items, regardless of content. Hence, this Court concludes that MGO§10.25(1) is content-neutral and thus is constitutionally valid if it is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.[4] *Ward*, 491 U.S. at 781.

ii. Narrowly Tailored to Further a Significant Governmental Interest

The next inquiry is whether the ordinance is "narrowly tailored to further a significant governmental interest." Although the City claims that the ordinance furthers pedestrian safety and community aesthetics, the record in this case is devoid of any evidence to support that conclusion. This Court is guided by the Seventh Circuit Court of Appeals' analysis in *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Circ. 2002). In that case, the ordinance banned peddling of books on public property within 1,000 feet of the United Center, a sports arena in Chicago. Weinberg wanted to sell his books on the public sidewalk. In finding that the ordinance was not narrowly tailored to further a significant governmental interest, the Court acknowledged that the "City has a legitimate interest in protecting its citizens and ensuring that its streets and

[4] Content-based statutes must be narrowly tailored to serve a compelling government interest and the least restrictive means of achieving that interest. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 120 S.Ct. 1878 (2000). Content-neutral statutes need not be the least restrictive alternative. *Ward*, 491 U.S. at 798.

sidewalks are safe for everyone." *Id.* at 1038. However, the Court found that these legitimate interests were not furthered by applying the ordinance to Weinberg. Although the City presented testimony from police officers about the potential for traffic congestion, the Court noted that the video of Weinberg selling his books "shows no interference with any pedestrian traffic nor any congestion along the sidewalk." *Id.* The Court also reasoned that the ordinance contained other inconsistencies, leaving open such activities as leafleting, newspaper sales, and street performances. Finally, the Court concluded that the ordinance burdened substantially more speech than is necessary. *Id.* at 1040.

Like *Weinberg*, applying MGO § 10.25(1) to Ratliffe does not further the City's interests. There is no evidence that Ratliffe's small portable table impeded pedestrian flow any more than the permanent kiosk right next to the table. The photos do not support that there were crowds gathered impeding that flow. Further, if pedestrian flow or aesthetics were the real issue, the City would not have in place exceptions for certain street vendors and would not permit street musicians to perform and place their hats and musical instruments down without incident.

Additionally, MGO § 10.25(1) burdens more speech than is necessary to achieve the City's goals of aesthetics and pedestrian safety. The ordinance neither considers the duration an item is placed on the sidewalk nor requires that the item actually interfere with aesthetics or foot traffic. If Ratliffe were to place a bag of additional pamphlets between his feet, he would be in violation of MGO § 10.25(1). Writing on the sidewalk in nonpermanent chalk is similarly prohibited. Because the ordinance burdens speech that does not interfere with the City's interests, this Court cannot conclude that the ordinance is narrowly tailored to further those interests.

iii. Ample Alternative Channels for Communication

This Court also concludes that there are not ample alternative methods of communication available for Ratliffe. The City asserts that Ratliffe could either stand on the corner and distribute his literature or stand on the corner wearing a sign with his message. Not only is the suggestion that he stand on the corner and wear a sign disingenuous, it would seriously limit the items he could distribute. In *Wexler v. City of New Orleans*, 267 F. Supp. 2d. 559, 568 (E.D. La. 2003), the Court stated:

> The City of New Orleans argues that the plaintiffs have ample alternatives because they could sell their books from a bag or a van. However, the Court finds that there is no other reasonable method for the plaintiffs to display an array of books other than by using a table. In fact, a table is one of the least bothersome ways of selling books on the sidewalk because it is relatively small and easy to remove. Tables are neither permanent nor affixed to the sidewalk. It is impractical and borderline absurd to consider that 'an ample alternative' would be for the plaintiffs to carry their books in a bag or sell them out of a van. In fact, the use of a table may be the only reasonable method for his form of expression to take place.

This Court is also not persuaded by the City's assertion that Ratliffe could obtain a Street Use Permit and thus he has available an ample alternative. The Street Use Permit is available for "special events." This would require an application identifying the name, address and phone number of the applicant; the full name and business or headquarter address of the organizational entity; the name, address and telephone number of the person or persons who would be responsible for conducting or managing the street; the exact date or dates of the "event" with the beginning and ending times; an accurate description of the portion of the street proposed for use; the estimated number of persons; the proposed use of the street, etc. MGO §10.056(4) In addition, Ratliffe would be required to pay an application fee of $50 for one day or $150 for several days in the same location. He would have to apply fourteen days in advance. A shorter

period would be permitted only if there is sufficient time for the Staff Commission to hold a public meeting. MGO §10.056(4)(a)12(b). After the application is received and reviewed, the Staff Commission has twenty-one days to decide. For applications filed fewer than 14 days prior to the "event", the decision to approve or deny shall be made no fewer than five calendar days before the proposed "event." §10.056(5)(f).

The Street Use Permit is designed for "special events" where large numbers of people are expected. It is not meant as the mechanism to permit individuals to disseminate political literature. Such a permitting scheme runs afoul to Ratliffe's right to engage in spontaneous and anonymous speech. *See generally Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080 (2002) (ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violates the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills). Furthermore, the Street Use Permit alternative adds a substantial cost for the regular use of a portable table in political speech on State Street.

Ultimately, Ratliffe must choose between carrying his materials at all times or paying a fee and applying for permission to hold a "special event." Regarding the latter, Ratliffe's speech can be neither spontaneous nor persistent; he must schedule his speech in advance and limit his speech to "special event" dates and times. These options may be less onerous than receiving a fine under MGO § 10.25(1), but they are not ample alternative channels.

VII. CONCLUSION

This Court concludes that MGO §10.25(1) as applied to Ratliffe under these circumstances is unconstitutional. THERFORE IT IS ORDERED that this case is dismissed.

This is the final decision in this case and is subject to appeal.

Dated this 14th day of March, 2011.

BY THE COURT

Julie Genovese
Circuit Court Judge, Br. 13

Cc: Asst. City Attorney Lara Mainella
Attorney Andrea J. Farrell