IN THE SUPREME COURT OF OHIO

OHIOANS FOR CONCEALED CARRY, INC., et al.	:	CASE NO.: 07-0960
Plaintiffs - Appellees	:	On Appeal from the Sandusky County Court of Appeals, Sixth Appellate District
v.	:	
CITY OF CLYDE, OHIO, et al.	:	Court of Appeals Case No. S-06-039 S-06-040
Defendants-Appellees	:	

BRIEF OF AMICI CURIAE THE OHIO MUNICIPAL LEAGUE AND NUMEROUS OHIO MUNICIPALITIES URGING REVERSAL ON BEHALF OF APPELLANT THE CITY OF CLYDE, OHIO

STEPHEN L. BYRON #0055657 (COUNSEL OF RECORD)
Byron & Byron Co., L.P.A.
Interstate Square Bldg. I, Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303
Fax: (440) 953-1427
sbyronlaw@aol.com

JOHN GOTHERMAN #0000504
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
(614) 221-4349
Fax: (614) 221-4390
jgotherman@columbus.rr.com

COUNSEL FOR AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE

FILED
DEC 07 2007
CLERK OF COURT
SUPREME COURT OF OHIO

JOHN C. MCDONALD #0012190
STEPHEN J. SMITH #0001344
MATTHEW T. GREEN #0075408
Schottenstein, Zox & Dunn Co., L.P.A.
250 West Street
Columbus, Ohio 43215-2538
(614) 462-2700
Fax: (614) 462-5135
jmcdonald@szd.com
ssmith@szd.com
mgreen@szd.com

BARRY W. BOVA #0041047
817 Kilbourne Street, P.O. Box 448
Bellvue, Ohio 44811
(419) 483-7119
Fax: (419) 483-7224
bbova@clydeohio.org

COUNSEL FOR APPELLANTS
THE CITY OF CLYDE, et al.

DANIEL T. ELLIS #0038555
Lydy & Moan
4930 Holland Sylvania Road
Sylvania, Ohio 43560
(419) 882-7100
Fax No. (419) 882-7201
dellis@lydymoan.com

L. KENNETH HANSON, III #0064978
Firestone, Brehm, Hanson, Wolf, Young, LLP
15 West Winter Street
Delaware, OH 43015
(715) 363-1213
Fax No. (740) 369-0875

COUNSEL FOR APPELLEES
OHIOANS FOR CONCEALED CARRY, INC. et al.

MARC DANN # 0039425
Attorney General
WILLIAM P. MARSHALL #0038077
Solicitor General
ELISE PORTER #0055548
Deputy Solicitor

FRANK M. STRIGARI #0078377
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
Fax No. (614)
wmarshall@ag.state.oh.us

COUNSEL FOR INTERVENOR-APPELLEE
OHIO ATTORNEY GENERAL MARC DANN

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF AMICUS INTEREST 2

STATEMENT OF THE FACTS AND THE CASE 2

LAW AND ARGUMENT 2

AMICI'S PROPOSITION OF LAW NO. 1: R.C. 2923.126 is not a general law under Ohio's Home Rule Amendment. 2

AMICI'S PROPOSITION OF LAW NO. 2: A municipality's authority to regulate its own parks is a power of local self government, which cannot be limited or diminished by the General Assembly. 6

CONCLUSION 11

APPENDIX i - Amici Municipalities

APPENDIX ii - *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2007 Ohio 1773

APPENDIX iii - *Warren v. Virgil Owens* (June 27, 1997), Trumbull County Court of Appeals Case No. 96-T-5480

APPENDIX iv - *State v. Collins* (September 28, 1998), Butler County Court of Appeal Case No. CA98-01-007

TABLE OF AUTHORITIES

Page

CASES

Akron v. Scalera (1939), 135 Ohio St. 65, 19 N.E.2d 279 4
American Financial Services Corporation v. City of Cleveland, 112 Ohio St. 3d 9
170, 2006 Ohio 6043, 858 N.E.2d 776 4,9,11
Bank of Toledo v. Toledo (1853), 1 Ohio St. 622, 662 6,7
Canton v. State, 95 Ohio St.3d 149, 2002 Ohio 2005, 766 N.E.2d 963 5
Chance v. B.P. Chemicals, 77 Ohio St.3d 17,24 1996 Ohio 352, 670 N.E. 2d985 6
City of Canton v. State, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 693 4
City of Cincinnati v. Baskin, 112 Ohio St.3d 279, 2006-Ohio-6422, 859 N.E.2d 514 4
City of Fremont v. Keating (1917), 96 Ohio St. 468, 118 N.E. 114 4
City of Youngstown v. Evans (1929), 121 Ohio St. 342, 168 N.E. 844 4
Cleveland Electric Illuminating Company v. Painesville (1968), 15 Ohio St.2d
125, 239 N.E.2d 75 10
Fondessy Enterprises, Inc. v. City of Oregon (1986), 23 Ohio St.3d 213,
492 N.E.2d 797 4
Heppel v. City of Columbus (1922), 106 Ohio St. 107, 140 N.E. 169 4
Linndale v. State, 85 Ohio St.3d 52, 1999-Ohio-434, 706 N.E.2d 1227 4
Middleburg Heights v. Ohio Bd. of Bldg. Standards (1992), 65 Ohio St.3d
510, 1992 Ohio 11 605 N.E.2d 66 4
Norwood v. Horney, 110 Ohio St. 3d 353, 2006 Ohio 3799, 853 N.E.2d 1115 6
Ohioans for Concealed Carry, Inc. v. City of Clyde, 2007 Ohio 1773, 1,6
Perrysburg v. Ridgeway (1923), 108 Ohio St. 245, 140 N.E. 595 3
State v. Collins (September 28, 1998), Butler County Court of Appeal
Case No. CA98-01-007 8
State ex rel. Board of Comm'rs v. Tablack, 86 Ohio St. 3d 293, 1999 Ohio
103, 714 N.E.2d 917 11
State, ex rel. Canada v. Phillips (1958), 168 Ohio St. 191 9
State, ex rel. White, v. City of Cleveland (1932), 125 Ohio St. 230, 181 N.E. 24 8
Village of Struthers v. Sokol (1923), 108 Ohio St. 263, 140 N.E. 519 3,4
Warren v. Virgil Owens (June 27, 1997), Trumbull County Court of Appeals
Case No. 96-T-5480, ... 8

OHIO CODES

R.C. 9.68 5
R.C. 2901.01(C)(1) 5
R.C. 2911.21, et seq. 8
R.C. 2923.16 5
R.C. 2923.126 1,2,5,6
R.C. 2923.126(B)(2) 5

OHIO CONSTITUTION

Ohio Constitution Article XVIII, Section 3 3,4,6,9,12

INTRODUCTION

The state legislature seeks to control who is permitted to enter into a municipal park, and under what conditions; this is a power it manifestly lacks the Ohio Constitution.

While City of Clyde has unquestionably used its police power to enforce its exercise of local self-government, and provided a criminal penalty for a violation of it's park rules, that exercise police power is merely incidental to its ownership and control of the municipal parks. Additionally, given the uneven application of R.C. 2923.126 throughout the state of Ohio, and the absence of any discernable state-wide interest in who is permitted in a municipal park, the validity of the Clyde ordinance should be upheld, and the lower court's judgment should be reversed.

Accordingly, the amici curiae, including the Ohio Municipal League and the numerous municipalities joining herein (see "Appendix i"), respectfully request this court to reverse the judgment of the Sixth District Court of Appeals in *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2007 Ohio 1773, ("Appendix ii"), and enter judgment for the appellant. The state government is not authorized to control the park properties of Ohio's municipalities; it could not set the hours of operation of those parks, nor could it dictate who is permitted to the exclusive use of certain facilities (e.g. playing fields or pavilions) at various times. And the state cannot do indirectly (through the exercise of police powers) what it lacks the authority to do directly - establish rules for who is permitted in the city's parks, and under what circumstances the public is permitted to enter onto municipally owned property.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League (the "League") is an Ohio non-profit corporation composed of a membership of more than 750 Ohio cities and villages. The League was formed in 1952 by city and village officials who saw the need for a statewide association to serve the interests of Ohio municipal government. The purpose of this organization is to improve municipal government and administration, and to promote the general welfare of the residents of Ohio.

The Leage is joined on this brief by the municipalities identified in "Appendix i", all of which have an interest in being able to control their parks and other municipally owned properties without unlawful interference from the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

The amici curiae adopt the statement of the facts presented by the City of Clyde, and incorporate the same herein.

LAW AND ARGUMENT

AMICI'S PROPOSITION OF LAW NO. 1: R.C. 2923.126 is not a general law under Ohio's Home Rule Amendment.

The amici curiae join in the City of Clyde's argument that the state's concealed carry law, R.C. 2923.126, is not a general law of the state. Consequently, there is no conflict between the Clyde ordinance and the state law, and the Clyde's ordinance is valid.

Article XVIII, Section 3

The principal source of municipal authority is Article XVIII, Section 3 of the Ohio Constitution. This section provides:

> Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

There are two clauses to this paragraph, each requiring its own method of analysis. First, the municipality has the authority "to exercise all powers of local self government." This will be discussed in greater depth as a part of the Amici's Proposition of Law Number 2, below.

Second, municipalities have the power "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The significance of this language is that the municipality receives its police powers directly from the constitution, without any need for further legislative action. *Perrysburg v. Ridgeway* (1923), 108 Ohio St. 245, 140 N.E. 595, paragraphs 1 and 3 of the syllabus.

Conflict, Not Preemption

The well established legal test for determining whether a local police provision impermissibly conflicts with a general law of the state was established in paragraph 2 of the syllabus of *Village of Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519: "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the

ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Id.*

The test of "conflict," as opposed to "preemption," has been the proper test under Article XVIII, Section 3, of the Ohio Constitution for about 90 years. *City of Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422, 859 N.E.2d 514; *American Financial Services Association v. City of Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776; *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 693; *Linndale v. State*, 85 Ohio St.3d 52, 1999-Ohio-434, 706 N.E.2d 1227; *Middleburg Heights v. Ohio Bd. of Bldg. Standards* (1992), 65 Ohio St.3d 510, 1992 Ohio 11; 605 N.E.2d 66; *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 492 N.E.2d 797; *Akron v. Scalera* (1939), 135 Ohio St. 65, 19 N.E.2d 279; *City of Youngstown v. Evans* (1929), 121 Ohio St. 342, 168 N.E. 844; *Heppel v. City of Columbus* (1922), 106 Ohio St. 107, 140 N.E. 169; *City of Fremont v. Keating* (1917), 96 Ohio St. 468, 118 N.E. 114.

Because municipalities receive their police power directly from the constitution, the legislature lacks the power to "preempt the field." See, e.g., *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 215, 492 N.E.2d 797, 799; *Akron v. Scalera* (1939), 135 Ohio St. 65, 66, 19 N.E.2d 279. The conflict analysis allows a municipality to legislate in any field, even if the legislature has enacted laws regulating the field, provided the municipal legislation does not prohibit what the state has expressly permitted, and vice versa. *Struthers, supra.*

General Law

The limit on municipal regulation prohibits a conflict with the "general laws" of the state. Consequently, as a part of the "conflict" analysis, there must be a consideration of whether or not the state law at issue is a "general law" of the state.

The test for whether a state statute is a "general law" was established in *Canton v. State*, 95 Ohio St.3d 149, 2002 Ohio 2005, 766 N.E.2d 963, at its syllabus:

> To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

As Clyde's merit brief cogently argues, R.C. 2923.16 runs afoul of the second prong of the *Canton* test, in a manner reminiscent of the legislation at issue in the Canton case. The Ohio General Assembly has enacted legislation which applies differently throughout the state, depending upon what person or entity owns or is using the property. See R.C. 2923.126(B)(2) and R.C. 2901.01(C)(1). Under the statute, a <u>municipality</u> purportedly cannot exclude concealed weapons from a municipal park, but if a <u>highschool</u> baseball game is being played at that very same park, the "school activity" converts the park into a gun-free zone. This cannot be considered a statute which "operates uniformly," if that phrase is to retain any semblance of its ordinary meaning, when guns may or may not be permitted a any given location.

The lower court's decision relied on the enactment of R.C. 9.68, which the court found expressed the legislature's "clear intent that the concealed carry laws have a general and uniform operation throughout Ohio." *Ohioans for Concealed Carry*, *supra*, at ¶12. The asserted intent of legislature, however, simply does not square with the actual legislation.

R.C. 2923.126 does not operate uniformly throughout Ohio, and is therefore not "general law." Thus, there can be no "conflict" between the state law and the local ordinance, and the local ordinance is valid under Article XVIII, Section 3 of the Ohio Constitution.

The lower court's decision should be reversed.

AMICI'S PROPOSITION OF LAW NO. 2: A municipality's authority to regulate its own parks is a power of local self government, which cannot be limited or diminished by the General Assembly.

Property Ownership

Could the State of Ohio pass a law which would allow a person with a permit to carry a concealed weapon to enter upon private property without the owner's consent? Of course not.

One of the fundamental incidents of ownership is the owner's right to exclude others from the owner's property. See, *Chance v. B.P. Chemicals*, 77 Ohio St.3d 17, 24, 1996 Ohio 352, 670 N.E. 2d 985 ("*** as one of the incidents of absolute ownership, appellants have the right to exclude others"), citing *Bank of Toledo v. Toledo* (1853), 1 Ohio St. 622, 662.

As stated in *Bank of Toledo*, *supra*:

> According to a standard elementary author, '**property consists of those things which belong to us by that exclusive right which enables us to exclude all others from having any thing at all to do with them**;' and in defining property, the author adds: 'Property, **considered as an exclusive right to things**, contains not only a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them.' Rutherforth's Institutes, p. 20; Puffendorf's Laws of Nature, p. 220.)

Id., at 662. (Emphasis added.)

As this court has recently reiterated in *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006 Ohio 3799, 853 N.E.2d 1115:

> The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are *derivative* -- mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore *trusts* of civil power, to be exercised for the public benefit. * * * Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection -- the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right,* which it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges * * * which are created by law and conferred upon a few * * *. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, were evidently designed to protect the right of private property as one of the primary and original objects of civil society * * *." (Emphasis sic.) Bank of Toledo, 1 Ohio St. at 632.
>
> ***
>
> There can be no doubt that the bundle of venerable rights

> associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.

Id., at 362-363. (Emphasis in original.)

A municipality, as the fee simple owner of its park property, has the authority to exclude persons from its property. Provided that proper notice is given, a municipality's rules for admission to its parks could be prosecuted under Ohio's trespass statute, R.C. 2911.21, et seq.

> It is well established that a trespass can occur on public land. *Adderley v. Florida* (1966), 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242. Additionally, in Ohio, it is no defense to a criminal trespass charge that the land or premises involved were owned, controlled, or in the custody of a public agency. R.C. 2911.21(B).

Warren v. Virgil Owens (June 27, 1997), Trumbull County Court of Appeals Case No. 96-T-5480, at footnote 1 ("Appendix iii"); see, also *State v. Collins* (September 28, 1998), Butler County Court of Appeal Case No. CA98-01-007 ("Appendix iv").

Stated differently, the authority of the municipality to exclude persons carrying concealed weapons from municipal parks does **not** arise from the municipality's exercise of its police power; rather, it arises from the city's corporate **ownership** of its property.

In *State, ex rel. White, v. City of Cleveland* (1932), 125 Ohio St. 230, 181 N.E. 24, at paragraph 1 of the syllabus, this court held: "A municipality, in so far as it acts in a proprietary capacity, possesses the same rights and powers and is subject to the same restrictions and regulations as other like proprietors." Based upon this concept, if the general assembly cannot compel a private property owner to accept concealed weapons on it property, it lacks the authority to interfere with a municipality's ownership rights.

Power of Local Self Government

As noted above, Article XVIII, Section 3 of the Ohio Constitution is composed of two distinct grants of authority: 1) "to exercise all powers of local self government" and 2) "to adopt and enforce within (the municipality) such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The first grant of authority, as a matter of proper English sentence construction and precedent, is not subject to the "conflict" analysis. *State, ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, at paragraph 4 of the syllabus ("The words 'as are not in conflict with general laws' found in Section 3 of Article XVIII of the Constitution, modify the words 'local police, sanitary and other similar regulations' but do not modify the words 'powers of local self-government.")

Consequently, a municipality's authority is supreme when it is exercising a power of "local self government," as opposed to a "police power." As this court noted in *American Financial Services Corporation v. City of Cleveland*, 112 Ohio St. 3d 170, 2006 Ohio 6043, 858 N.E.2d 776:

> If an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.

Id., at ¶ 23.

No Extraterritorial Impact

The use and operation of a municipal parks is emphatically a matter of local self

government, as the state's interests in the matter approach nonexistence.

In *Cleveland Electric Illuminating Company v. Painesville* (1968), 15 Ohio St.2d 125, 239 N.E.2d 75, this court identified that a balancing test is performed to determine if a matter is properly a matter for the state legislature (and, consequently, not a matter to be regulated by municipal government):

> Thus, even if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local self government to a matter of general state interest.

Id., at 29.

Thus, under *Painesville*, the courts apply a balancing test between the interests of the municipality and need of the state for uniform law.

In this case there is no discernable state interest, and the applications of rules within a park have absolutely no "extraterritorial impact." If a person wants to enter a municipal park, that person must follow the municipality's rules and regulations. If the park rules and regulations are not acceptable to the would-be park user, that person may seek recreational opportunities elsewhere. It's quite clear, given the discussion under the first proposition of law, that "uniformity" of regulation is not a serious state interest, given the disparate treatment of properties based upon who the owner or user of the property is. The balance, in this case, comes down in favor of park ownership and operation being exclusively a matter of local self government.

This case is easily distinguishable from an attempt by a municipality to exercise authority

over a park district, which has been created by state law. *Cf., State ex rel. Board of Comm'rs v. Tablack*, 86 Ohio St. 3d 293, 1999 Ohio 103, 714 N.E.2d 917 (municipalities sought to remove themselves from park district in a manner contrary to that permitted by statute). No other political subdivisions are impacted by Clyde's park regulations. Clyde's regulation of its own property applies exclusively within the city limits and, most narrowly, upon municipal property within the municipality.

This is also not a case where the municipality is attempting to regulate the conduct of persons, within the entire municipality, in a manner which differs from the state's exercise of police power. Cf., *American Financial Services Corporation v. City of Cleveland, supra* (city sought to control banking industry within the municipality). If any properly licensed person desires to carry a concealed weapon within the municipal limits of the City of Clyde, in conformance with the terms of the state law, the licensee remains free to do so - provided he or she doesn't enter the municipality's parks. Assuming that there is proper notice of the park regulations,[1] the licensee is subject to no further police regulation than if a private property owner prohibited the carrying of concealed weapons on certain premises.

CONCLUSION

The amici curiae, the League and numerous municipalities, urge this court to reverse the

---

[1] Of course, a municipality must comply with due process and equal protection requirements, applicable to all state action. These limits, however, are of a constitutional and not statutory nature.

judgment of the court below. Municipalities have the constitutional authority to set rules and regulations regarding the use of their parks and other municipally owned property. The state government has no authority to strip that authority.

If this court allows the state legislature to dictate the control and use of municipally owned property, Article XVIII, Section 3 of the Ohio Constitution will have, effectively, become a nullity. No subject matter, however local, will be outside the control of the general assembly. The mere incantation of "statewide concern," coupled with some type of a state-issued permit, will preclude any municipal regulation of the subject matter. This result is neither consistent with the purposes of the Home Rule Amendment nor the precedents of this court.

Respectfully submitted,

_____

STEPHEN L. BYRON (0055657)
Counsel for Amicus Curiae
Ohio Municipal League
and on behalf of the amici curiae
municipalities identified in "Appendix i"

CERTIFICATE OF SERVICE

A copy of the within *Brief of Amici Curiae the Ohio Municipal League and Numerous Ohio Municipalities Urging Reversal on Behalf of Appellant the City of Clyde, Ohio* has been mailed regular U.S. mail on the ____ day of December, 2007 to:

John C. Mcdonald
Stephen J. Smith
Matthew T. Green
Schottenstein, Zox & Dunn Co., L.P.A.
250 West Street
Columbus, Ohio 43215-2538

Barry W. Bova
817 Kilbourne Street, P.O. Box 448
Bellvue, Ohio 44811

Daniel T. Ellis
Lydy & Moan
4930 Holland Sylvania Road
Sylvania, Ohio 43560

L. Kenneth Hanson, III
Firestone, Brehm, Hanson, Wolf, Young, LLP
15 West Winter Street
Delaware, OH 43015

Marc Dann
William P. Marshall
Elise Porter
Frank M. Strigari
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

_____
STEPHEN L. BYRON (0055657)
Counsel for Amicus Curiae
Ohio Municipal League

AMICI MUNICIPALITIES

The following municipalities are also amici curiae in this case:

City of Beachwood

City of Cincinnati

City of Dublin

City of Kettering

Village of New Albany

Orange Village

City of Shaker Heights

City of Toledo

APPENDIX i

AMICI MUNICIPALITIES

The following municipalities are also amici curiae in this case:

City of Beachwood

City of Cincinnati

City of Dublin

City of Kettering

Village of New Albany

Orange Village

City of Shaker Heights

City of Toledo

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Ohioans For Concealed Carry, Inc., et al.
Appellants
v.
City of Clyde, et al.
Appellees

Court of Appeals Nos. S-06-039
S-06-040

Trial Court No. 04-CV-769

DECISION AND JUDGMENT ENTRY

Decided: April 13, 2007

* * * * *

Daniel T. Ellis and L. Kenneth Hanson, for appellants;
Marc E. Dann, Attorney General of Ohio, Sharon A. Jennings, Senior Deputy Attorney General, Holly J. Hunt and Frank M. Strigari, Assistant Attorneys General, for intervenor/appellant, Ohio Attorney General.

Barry W. Bova, for appellees.

* * * * *

SKOW, J.

{¶ 1} Appellants, Ohioans for Concealed Carry, Inc., and James J. Stricker, Jr., appeal the Sandusky Court of Common Pleas' grant of summary judgment to appellees, the city of Clyde, Ohio, and its solicitor, mayor, vice-mayor, city manager, chief of

police, councilmen, clerk-treasurer, and the Sandusky County Sheriff. The Ohio Attorney General filed a brief as an intervenor-appellant. On December 12, 2006, the Ohio Legislature passed H.B. 347, amending the concealed carry laws at issue. Due to the passage of H.B. 347, we reverse and instruct the trial court to enter summary judgment in favor of appellants.

{¶ 2} Appellants filed a complaint seeking injunctive and declaratory relief from Clyde Codified Ordinance 2004-41. Clyde enacted the ordinance on May 18, 2004, after the Ohio Legislature passed H.B. 12, otherwise known as the "concealed carry laws." Those laws, R.C. 2923.11 et seq., allow individuals to obtain licenses to carry concealed handguns and provide a procedure for procuring licenses. R.C. 2923.126 prohibits licensees from carrying concealed handguns in certain places; however, the statute does not specifically list municipal parks. Clyde's ordinance prohibited persons from carrying "any deadly handgun" within the confines of "any City Park," irrespective of whether a person possesses a license for a concealed handgun issued pursuant to the concealed carry laws. The penalty for a violation of Ordinance 2004-41 was a misdemeanor of the first degree.

{¶ 3} The trial court granted a preliminary injunction to prohibit enforcement of Ordinance 2004-41 pending the outcome of a hearing. Appellants argued that Clyde's ordinance invalidly conflicted with Ohio's concealed carry laws. Specifically, they argued that Clyde's ordinance was an exercise in police power that conflicted with the general law of concealed carry. On September 1, 2006, this court decided *City of Toledo*

v. Beatty, 6th Dist. No. L-05-1319, 2006-Ohio-4638, which involved a city of Toledo ordinance nearly identical to Clyde's Codified Ordinance 2004-41. In *Beatty*, we held that Toledo's ban on concealed weapons on city parks was an exercise of police power. However, we also held that Ohio's concealed carry laws were not "general" laws pursuant to *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005. Therefore, we concluded that Toledo's ban on concealed weapons in city parks did not conflict with Ohio's concealed carry laws, and we upheld the validity of the Toledo ordinance.

{¶ 4} The trial court granted summary judgment for appellees on the controlling precedent of *Beatty*. However, by consent of the parties, the trial court continued the temporary injunction and entered a stay of its order pending appeal. Thus, Ordinance 2004-41 has remained unenforced.

{¶ 5} Appellants filed a timely notice of appeal and now raise the following assignments of error:

{¶ 6} "A. THE TRIAL COURT ERRED IN HOLDING THAT R.C. 2923.126 IS NOT A GENERAL LAW.

{¶ 7} "B. THE TRIAL COURT ERRED IN HOLDING THAT OHIO'S CONCEALED CARRY LAW DOES NOT PREEMPT CLYDE CODIFIED ORDINANCE 2004-41."

{¶ 8} On December 12, 2006, while this appeal was pending, the Ohio Legislature passed H.B. 347 over Governor Taft's veto. The bill affects 31 different

statutes, most of which comprise the concealed carry laws. The bill also added R.C. 9.68, which states in pertinent part:

{¶ 9} "(A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. *Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.*

{¶ 10} "(B) In addition to any other relief provided, the court shall award costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section." R.C. 9.68(A), (B) (emphasis added).

{¶ 11} In *Beatty*, we found a conflict between R.C. 2923.126(C), which allows individual employers, owners or occupiers of land to decide whether to allow a properly licensed person to carry a concealed weapon on their property, and R.C. 2923.16(B), which prohibits properly licensed persons from carrying concealed weapons into certain defined areas. We concluded that because "R.C. 2923.126(C) prohibits that which R.C.

2923.126(A) permits * * * R.C. 2923.126(A) does not have uniform application to all citizens of the state, and as such is not a general law." As such, we upheld the validity of the Toledo ordinance prohibiting properly licensed persons from carrying concealed weapons into city-owned parks.

{¶ 12} R.C. 9.68 became effective March 14, 2007. The emphasized language quoted supra indicates the Ohio Legislature's clear intent that the concealed carry laws have general and uniform operation throughout Ohio. Since, pursuant to R.C. 9.68, no law, other than the United States Constitution, Ohio Constitution, state law, or federal law, may interfere with the right to "keep and bear arms," local ordinances which further restrict the places in which a person may legally carry a concealed weapon are invalid. Therefore, Clyde Codified Ordinance 2004-41 is pre-empted by R.C. 9.68 and 2923.126, and summary judgment must be entered in appellants' favor. Appellants' assignments of error are well-taken.

{¶ 13} For the foregoing reasons, the judgment of the Sandusky County Court of Common Pleas is reversed. This matter is remanded for the trial court to enter summary judgment in favor of appellants. Appellants' motion to file supplemental authority is moot. Appellee, the city of Clyde, is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Sandusky County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, P.J. _____

William J. Skow, J. _____
CONCUR.

_____
JUDGE

_____
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

AMICI MUNICIPALITIES

1 of 100 DOCUMENTS

The following municipalities are also amici curiae in this case:

Cited
As of: Dec 02, 2007

City of Beachwood

City of Cincinnati

City of Dublin

City of Kettering

Village of New Albany

Orange Village

City of Shaker Heights

City of Toledo

CITY OF WARREN, Plaintiff-Appellee, -vs- VIRGIL OWENS, Defendant-Appellant.

ACCELERATED CASE NO. 96-T-5480

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

1997 Ohio App. LEXIS 2819

June 27, 1997, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Criminal Appeal from Warren Municipal Court, Case No. 96 CRB 786.

DISPOSITION: JUDGMENT: Affirmed.

COUNSEL: STANLEY A. ELKINS, WARREN CITY PROSECUTOR, Warren, OH, (For Plaintiff-Appellee).

ATTY. RHONDA L. GRANITTO, Warren, OH, (For Defendant-Appellant).

JUDGES: HON. DONALD R. FORD, P.J., HON. JUDITH A. CHRISTLEY, J., HON. WILLIAM M. O'NEILL, J. FORD, P.J., CHRISTLEY, J., concur.

OPINION BY: WILLIAM M. O'NEILL

OPINION

OPINION

O'NEILL, J.

This is an accelerated calendar appeal submitted to this court on appellant's brief.

Appellant, Virgil Owens, appeals from the judgment and imposition of sentence rendered by the Warren Municipal Court upon a finding that appellant was guilty of criminal trespass, a violation of Warren City Ordinance 541.05. For the reasons that follow, the judgment of the trial court is affirmed.

On March 19, 1996, at approximately 1:00 a.m., appellant was standing at the rear of one of the housing units comprising the Trumbull Metropolitan Housing Authority (TMHA). Appellant was approached by Officer Greg Coleman of the Warren City Police Department whereupon appellant attempted to walk away.

Officer Coleman identified appellant from a "Trespass [*2] List" and arrested him for criminal trespass. Officer Coleman was following a procedure implemented by TMHA whereby a police officer could issue a trespass notice to individuals who were involved in some type of criminal activity or some other activity that was unlawful on TMHA property. The names of these individuals were then placed on a "Trespass List" and these individuals were subject to arrest for criminal trespass if they subsequently entered TMHA property without proper authorization. TMHA keeps a file on all criminal trespassing notices it issues. Fred L. Raines, security manager of TMHA, and the liaison between TMHA, the Warren Police Department, and the tenants of the complex, verified that appellant received three trespass notices before his arrest on March 19, 1996. The notices, issued to appellant on April 3, 1992, May 17, 1994, and August 24, 1994, stated:

> "YOU, VIRGIL OWENS ***, are hereby advised NOT TO ENTER UPON ANY LANDS AND/OR PREMISES OWNED BY THE TRUMBULL METROPOLITAN HOUSING AUTHORITY ***. Any violation of this

> notice will result in prosecution for the charge of Criminal Trespass."

On May 2, 1996, following a bench trial, appellant was found guilty [*3] of criminal trespass. He was fined 525.00 and sentenced to thirty days in jail. His thirty-day jail sentence was suspended and he was placed on one year probation on the condition that he stay off TMHA property unless otherwise authorized.

At trial, appellant did not present any evidence in his defense. However, appellant did raise the Constitutional issue of whether he could be restricted from entering TMHA property. Although this argument was not raised in a formal motion, which would have been the better practice, the Constitutional issue was brought before the trial court and is now properly before this court. Appellant asserts, in his sole assignment of error, the following:

> "The Warren City Trespass Ordinance, as it is enforced in the areas of the Trumbull Metropolitan Housing Authority, is an unconstitutional exercise of police power, in violation of Appellant's right to the freedom of travel and movement."

Appellant states that he is not challenging the constitutionality of the City of Warren's criminal trespass statute, but, rather, is challenging its enforcement in the TMHA vicinity. Appellant argues that the Warren City Ordinance as applied to him violates his "right [*4] to travel, freedom of movement, the simple right of one human being to walk upon a public sidewalk, across a yard and up to another human being's front door."

At this point it is worth noting that appellant has never challenged the Warren City Police Department's justification for stopping appellant from his travel on and through TMHA property. [1] Rather, appellant seems to argue that he has an absolute right to travel and move about without regard to the conflicting rights of property owners to prohibit his presence on their property. Otherwise, appellant argues, all citizens, in fear of violating a criminal trespass law, would have to examine property records or leases in order to conduct their everyday affairs. Appellant's argument is devoid of merit.

> 1 It is well established that a trespass can occur on public land. *Adderley v. Florida (1966), 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242.* Additionally, in Ohio, it is no defense to a criminal trespass charge that the land or premises involved were owned, controlled, or in the custody of a public agency. *R.C. 2911.21(B).*

[*5] In discussing the constitutionality of a criminal trespass ordinance, the Second Appellate District in *Dayton v. Gigandet (1992), 83 Ohio App. 3d 886, 615 N.E.2d 1131* stated:

> "'Trespass' is a broad general word meaning any violation of law resulting in injury or damage to another. Its meaning is restricted in criminal law by other facts to which its application is directed. For example, every unauthorized entry onto another's property is a trespass. One who goes upon the premises of another without invitation, express or implied, and for *his or her own purpose,* is a trespasser. The unlawful act of a trespasser is the basic element in many crimes as in burglary with intent to commit a theft.
>
> "In this case, the trespass is recognized for what it is -- an unlawful act -- and to make the purpose of the ordinance clear it requires notice to the offender by actual communication, by posting, by fencing or other enclosure, or in a manner prescribed by law. Under the ordinance, anyone who recklessly enters or remains on the premises of another in the face of the required notice is guilty of the crime of trespassing. Notice to a criminal is unusual and removes any doubt as to the [*6] clarity of the city ordinance.
>
> "There is nothing vague or indefinite in the language of the ordinance. It is undisputed that appellant entered and after repeated notices and demands remained on the premises *for her own purpose.* It is not necessary to rely on the presumption of constitutionality. *Dayton v. S.S. Kresge Co. (1926), 114 Ohio St. 624, 151 N.E. 775*; *State v. Saurman (1980), 64 Ohio St. 2d 137, 18 Ohio Op. 3d 367, 413 N.E.2d 1197.*" (Emphasis *sic.*) *83 Ohio App. 3d at 890.*

As in *Gigandet,* there is no doubt that appellant was without privilege to enter TMHA property. Appellant was repeatedly warned not to enter TMHA property. Consequently, appellant was on notice that he was subject to arrest for his trespass onto TMHA property. Furthermore, appellant's conviction for criminal trespass is

sufficiently supported from the record and does not unconstitutionally infringe on appellant's right to the freedom of travel and movement.

JUDGE WILLIAM M. O'NEILL

FORD, P.J.,

CHRISTLEY, J.,

concur.

AMICI MUNICIPALITIES

The following municipalities are also amici curiae in this case:

Cited
As of: Dec 02, 2007

City of Beachwood

City of Cincinnati

City of Dublin

City of Kettering

Village of New Albany

Orange Village

City of Shaker Heights

City of Toledo

STATE OF OHIO, Plaintiff-Appellee, - vs - TITO COLLINS, Defendant-Appellant.

CASE NO. CA98-01-007

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, BUTLER COUNTY

1998 Ohio App. LEXIS 4547

September 28, 1998, Decided

DISPOSITION: [*1] Judgment affirmed.

COUNSEL: John F. Holcomb, Butler County Prosecuting Attorney, Lee A. Oldendick, 216 Key Bank Bldg., 6 South Second Street, Hamilton, Ohio 45011, for plaintiff-appellee.

R. Dean Snyder, 5127 Pleasant Avenue, Fairfield, Ohio 45014, for defendant-appellant.

JUDGES: POWELL, P.J. WALSH, J., concurs. KOEHLER, J., dissents without opinion.

OPINION BY: POWELL

OPINION

OPINION

POWELL, P.J. Defendant-appellant, Tito Collins, appeals a decision of the Butler County Court of Common Pleas denying his motion to suppress evidence. We affirm.

On September 25, 1997, appellant was indicted by a Butler County Grand Jury and charged with possession of cocaine, possession of marijuana, criminal trespass, and resisting arrest. Appellant filed a motion to suppress evidence found during a search incident to his arrest. A hearing on appellant's motion to suppress was held on October 17, 1997.

At the suppression hearing, the state presented the testimony of Officer Dennis Orender of the Hamilton Police Department. On July 31, 1997, Officer Orender was patrolling an area around Welliver and Walnut Streets. He stated that all of the property in the area in question belonged to the Butler Metropolitan [*2] Housing Authority (BMHA). Officer Orender stated that he observed appellant and another individual conversing on the sidewalk and in the grass by a telephone or light pole in a courtyard area. He testified that they were approximately ten feet from the nearest street. Officer Orender asked appellant to step over to his vehicle. Officer Orender stated that he intended to arrest appellant for criminal trespass. Officer Orender said that he had previously personally warned appellant not to enter BMHA property. During a pat-down search, cocaine was discovered. Appellant was then arrested. The trial court denied appellant's motion to suppress. The court found that the officer called appellant over to arrest him for trespass and that the search was incident to that arrest. On October 17, 1997, appellant entered a plea of no contest to the charges and was sentenced to five years of community control and a $ 2,000 fine.

In his sole assignment of error, appellant argues that the trial court erred by denying his motion to suppress. In reviewing the trial court's decision, the weight of the evidence and the credibility of the witnesses are primarily questions for the trier of fact. *State* [*3] *v. French (1995), 104 Ohio App. 3d 740, 747, 663 N.E.2d 367.* A reviewing court is bound to accept findings of fact made by the trial court if they are supported by competent, credible evidence. *State v. Guysinger (1993), 86 Ohio App. 3d 592, 594, 621 N.E.2d 726.* However, a reviewing court determines as a matter of law, without deferring to the trial court's conclusions, whether the facts found by the trial court meet the applicable legal standard. *State v.*

Klein (1991), 73 Ohio App. 3d 486, 488, 597 N.E.2d 1141.

The right of police officers to search incident to an arrest is a well-established exception to the warrant requirement of the Fourth Amendment. *Chimel v. California (1969), 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685.* A warrantless arrest for a misdemeanor is valid if the arresting officer is able to reasonably conclude from surrounding circumstances that an offense has been committed. *Cleveland v. Murad (1992), 84 Ohio App. 3d 317, 616 N.E.2d 1116.* Conduct which does not amount to an offense beyond a reasonable doubt may supply officers with a reasonable basis for arrest. *State v. Reymann (1989), 55 Ohio App. 3d 222, 563 N.E.2d 749.* The reasonableness of an officer's basis for arrest is determined by whether a reasonable police officer under similar [*4] circumstances would have concluded that the defendant committed a crime suitable for arrest. *Id.* The kind and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest. *Gerstein v. Pugh (1975), 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54.*

The United States Supreme Court has held that a search is properly upheld as incident to a valid arrest even if the ordinance upon which the arrest was based is later determined to be unconstitutionally vague. *Michigan v. DeFillippo (1979), 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343.* The actual arrest need not precede the search as long as the fruits of the search are not used to support probable cause for the arrest. *Rawlings v. Kentucky (1980), 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633.*

The trial court correctly found that the search of appellant was incident to his valid arrest. It is well-established that a trespass can occur on public land. *Adderley v. Florida (1966), 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149.* It is no defense to a criminal trespass charge that the land or premises involved were owned, controlled, or in the custody of a public agency. *R.C. 2911.21(B).* See also, *City of Warren v. Owens, 1997 Ohio App. LEXIS 2819* (June 27, 1997), [*5] Trumbull App. No. 96-T- 5480, unreported (defendant constitutionally convicted of criminal trespass for being on public housing property after being warned not to enter).

Appellant argues that the state did not prove that he did not have permission to enter BMHA from some person or persons unknown. However, that was not the state's burden at the hearing on the motion to suppress. The state merely needed to show that the officer believed that he had probable cause to arrest appellant. *Michigan v. DeFillippo*; *Rawlings v. Kentucky.*

The officer testified that appellant was in an area which was BMHA property. Appellant had been previously warned by the arresting officer that he was not allowed on BMHA property. Therefore, that officer could have reasonably concluded that an offense had occurred which provided him with probable cause to arrest. We find that the trial court correctly ruled that the search was incident to a valid arrest. Therefore, appellant's assignment of error is overruled.

Judgment affirmed.

WALSH, J., concurs.

KOEHLER, J., dissents without opinion.