IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

FREDERIC BAUMANN,	) **CIVIL ACTION**
Plaintiff-in-Certiorari,	) **FILE NO.: 07CV-1062**
vs.	)
CITY OF CUMMING,	)
Defendant-in-Certiorari,	) **ORDER**
-and-	)
HONORABLE CHARLES R. SMITH,	)
Respondent-in-Certiorari.	)

FORSYTH COUNTY GEORGIA
FILED IN THIS OFFICE
AUG 01 2007
Douglas Sorrells
CLERK SUPERIOR COURT

The above-styled action comes before the Court after Fredric Baumann, Plaintiff-in-Certiorari, was convicted by the Municipal Court for the City of Cumming, Georgia, of violating a local parade and demonstration ordinance (hereinafter referred to as "Ordinance"). Baumann petitioned the Superior Court on May 24, 2007, seeking the issuance of a *Writ of Certiorari* pursuant to O.C.G.A. § 5-4-1, et. seq. The Court issued a *Sanction* on May 24, 2007 prior to the filing of the *Petition for Writ of Certiorari* as required by O.C.G.A. § 5-4-6(b).[1]

On June 22, 2007, the Defendant-in-Certiorari, City of Cumming, filed an *Answer*. On June 25, 2007, the Respondent-in-Certiorari, Honorable Charles R. Smith, filed an *Answer*.

[1]Although the *Sanction* was signed and filed by Superior Court Judge David L. Dickinson, the undersigned Judge shall preside over this case and consider the merits of the action as the case was assigned a random case number and the issuance of a *Sanction* by Judge Dickinson was handled by Judge Dickinson in his capacity as presiding Judge when the *Sanction* was requested by Baumann.

Thereafter, on June 25, 2007, pursuant to the *Writ of Certiorari* filed on May 24, 2007, the City of Cumming Municipal Court forwarded to this Court the certified pleadings and proceedings from below.

The Court conducted a noticed hearing on July 16, 2007, whereupon counsel for the Baumann and the City of Cumming appeared. The Honorable Charles R. Smith did not appear.

STANDARD OF REVIEW

The scope of review is limited to all errors of law and this Court is charged with determining whether the judgment below was sustained by substantial evidence. O.C.G.A. § 5-4-12.

ANALYSIS

Prior to the July 16, 2007 hearing Baumann filed an *Exception to Respondent's Answer* (herein after referred to as "Exception"). The *Exception* challenges Judge Smith's responses to the *Petition for Writ of Certiorari*. The purpose of an *Exception* is to specify defects in the *Answer* but not to controvert truth of facts alleged in the *Answer*. West v. State, 103 Ga. App. 71 (1961). The latter is the function of a traverse. Id. Therefore, the Court will consider the *Exception* under the lens of reviewing the *Answer* for defects.

A. Petitioner's Exception to Respondent's Answer

Specifically, the Petitioner excepts to the *Answer* claiming that the *Answer*: (1) admits that the ordinance is not applicable to Baumann; (2) fails to adequately refute Plaintiff's asserted errors of law; and (3) fails to otherwise "alter" or supplement the record from below with sufficient evidence to support a finding that Baumann could reasonably have been found guilty of the offense charged.

With respect to the first exception, the Court agrees with the Petitioner that Judge Smith's *Answer* does appear to admit that "[t]he Ordinance does not apply to the type of activity in which Mr. Baumann engaged - peaceable distribution of religious literature on a public sidewalk." [See *Petition for Writ of Certiorari* at p. 5 and Respondent's *Answer* at p. 6]. However, this is not a "defect" in that it is merely an averment made by the Respondent

and this Court will not require a party to amend an averment in a verified pleading. Accordingly, while the admission by the Respondent might be helpful to the Petitioner it does not rise to a defect. Moreover, because the Petitioner filed an *Exception* compared to a *Traverse*, the *Answer* can be construed as conclusive as to recitals of facts contained therein. See Bembry v. Johnson, 152 Ga. App. 422 (1979)(this concept has been limited somewhat, however, in that traverse no longer required to be filed in lieu of exception).

With respect to Petitioner's exception that the *Answer* fails to adequately refute Plaintiff's asserted errors of law, the Court notes that the harm to the Petitioner where exception is not taken is that facts alleged in the *Answer* are admitted and the Superior Court is authorized to consider those facts pled in the *Answer* as admitted. The Petitioner argues that the mere denials by Respondent without citation to case law to explain Respondent's legal reasoning amount to unsupported denials. The Court does not agree. The test for the sufficiency of an *Answer* in a certiorari proceeding appears to be whether it sufficiently verifies the factual situation upon which the alleged errors are predicated. Herault v. Department of Human Resources, 137 Ga. App. 446 (1976). Here, the *Petition for Writ of Certiorari* at pages two (2) through four (4), paragraphs "a" through "y," sets forth the alleged relevant procedural and factual background. The *Answer* admits and denies, to various degrees, the allegations of these factual averments alleged by the Petitioner and also adds additional allegations of findings of facts by the trial court. Additionally, the record from below is before the Court. It appears that the specificity with which the *Answer* admits/denies the averments in the *Petition for Writ of Certiorari* becomes less important where the whole record is before the Court and the only ground of error urged is that the evidence is insufficient to support the decision - a more general claim of error. See id. That is, the more specific the claim of error, the more specific the *Answer*. See id. The *Answer* constitutes a verification or denial, from the record or otherwise, of material assertions in the petition. For these reasons, the Court finds that the *Answer* is sufficient.[2]

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[2]The Court is mindful of the fact that in a certiorari proceeding although the filing of Respondent's initial response is referred to as an *Answer*, it is not an *Answer* in the typical sense. "The return, sometimes called an answer, is a formal transcript of the record, or so much of it as the writ requires, and a statement, where proper or necessary, of relative matters not appearing in the record. It is the only proper pleading of respondent to the writ, and even though called an answer is not to be confused with an answer as in pleading . . . Occasionally, the return is called the answer, as is the case in

Finally, the Petitioner excepts to the *Answer* on the basis that it fails to otherwise "alter" or supplement the record from below with sufficient evidence to support a finding that Baumann could reasonably have been found guilty of the offense charged. The Respondent should not alter the record below. Nor should the Respondent be required to supplement the record below with additional or new findings of fact. The Answer may, where necessary, provide relative matters not appearing in the record but it does not necessarily follow that it must contain such matters not appearing in the record. Instead, the Respondent has an opportunity to appear at the hearing and testify and present evidence as to the findings of facts below. The Respondent failed to appear at the noticed hearing. Therefore, the Court cannot consider anything averred by the Respondent in his *Answer* that does not otherwise appear in the record from below. This does not mean, however, that the Court should strike or otherwise not consider the *Answer*.

Even if the Court agreed with the Petitioner that the *Answer* was defective in some manner as alleged, the remedy is not to strike the *Answer* as orally argued by Petitioner but, instead, the Respondent would be directed to perfect the *Answer*.[3] O.C.G.A. § 5-4-9. There being no defects in the *Answer*, the Court will proceed to consider the merits of the *Petition for Writ of Certiorari*.

B. Petitioner's Motion to Strike Answer of Defendant-in-Certiorari

Following the July 16, 2007 hearing, the Petitioner filed a motion seeking to strike the City of Cumming's *Answer* on the basis that: (1) only a Respondent in a certiorari proceeding is permitted to file an *Answer*; (2)

Georgia under the statute there in force, but in the sense in which the term is used in pleading, no answer is made in proceedings by certiorari, but the hearing is had on the writ and the return as previously defined, the return constituting both answer and evidence. . . . The return or answer must constitute a verification or denial, from the record or otherwise, of material assertions in the petition." Herault, 137 Ga. App. at 447-448 (quoting 14 C.J.S. Certiorari sec. 114, p. 249). The *Answer* in this case does in fact verify and deny allegations made in the Petition for *Writ of Certiorari*.

[3]During the hearing the Court inquired as to Petitioner's allegations that the City of Cumming's counsel drafted the Respondent's Answer in violation of O.C.G.A. § 5-4-8. The Court determines that the Respondent did not draft the Answer in violation of this code provision.

Defendant's counsel admitted during the hearing that there was no basis in law upon which a Defendant in certiorari could file an *Answer*; and (3) the correct pleading vehicle through which to controvert Petitioner's claims was through an exception or traverse to the Respondent's *Answer*. The Court agrees with Petitioner. O.C.G.A. § 5-4-7 provides: "The answer to the writ of certiorari shall be filed . . . within 30 days after service thereof on the respondent . . . ." The statute speaks in terms on a singular *Answer* and only in terms of the Respondent. Additional code sections illustrate that only the Respondent is permitted to file an *Answer*. For example, O.C.G.A. § 5-4-8 states that "[t]he answer shall not be written or dictated by either of the *parties* . . . ." (Emphasis supplied). The "parties" to the *Petition for Writ of Certiorari* are the Plaintiff/Petitioner and the Defendant and this is supported by language appearing in O.C.G.A. § 5-4-9 which provides that "[t]he petitioner or defendant in certiorari may traverse or except to the answer of the *respondent* . . . ." (Emphasis supplied). Accordingly, there being no authority upon which to find that the Defendant could properly file an *Answer*, the Court **STRIKES** the City of Cumming's *Answer*.

Nor will the Court construe the purported *Answer* of the City of Cumming as an exception or traverse to Respondent's *Answer* because it was not filed within the fifteen (15) day period following the Respondent's filing of his *Answer*. Here, the City of Cumming filed the pleading before the filing of the *Answer* so it could not be reasonably concluded that the purported *Answer* seeks to challenge defects or factual allegations in the Respondent's *Answer*.

C. Petition for Writ of Certiorari

The Order complained of states as follows: "The Defendant is adjudged guilty of the ordinance of the City of Cumming being violated and is sentenced to 2 days in jail and is given credit for time already [sic] served. This April 24th 2007." The Petitioner appears to make both an "as applied" and "facial" challenge to the constitutionality of the Ordinance.

With respect to the "as applied" challenge, the Petitioner claims that the Ordinance does not apply to him thereby necessitating reversal of conviction and expungement of his criminal record related to this conviction. Also, Baumann alleges various procedural errors below which he claims violated his due process rights. Again, it appears that the Respondent has

expressly admitted that the ordinance does not apply to the Plaintiff.[4] The inquiry must end at this point as there is not a contested question of fact or law as to whether Baumann should have been prosecuted under an alleged violation of the Ordinance. Therefore, the Court **SUSTAINS** the *Petition for Writ of Certiorari* and **REVERSES** the conviction.

The question then becomes whether the Petitioner's record should be expunged. If an individual believes that his criminal records are inaccurate or incomplete the individual may request the agency having custody of the records to purge,[5] modify, or supplement them and to notify the "center" of such changes. The term "center," as used in O.C.G.A. § 35-3-37 (b), is defined as "the Georgia Crime Information Center" ("GCIC"). O.C.G.A. § 35-3-30 (1.1). If the local agency does not provide the remedy sought by the individual, then the individual may, within 30 days, appeal to the superior court for an order directing the local agency to expunge, modify or supplement the record. Upon such appeal, the superior court is required to conduct a hearing wherein it applies a *de novo* standard of review. If during the hearing the court finds that the record is inaccurate, incomplete or misleading, the court is required to enter an order remedying the situation by directing the local agency official to appropriately modify, supplement, or expunge portions of the arrest record. Given that this present Order requires the reversal of the Petitioner's conviction, the Petitioner shall first make application to the agency having custody of the record of conviction to expunge the conviction record and if said agency fails to do so, then, the Petitioner may seek relief from the Superior Court pursuant to O.C.G.A. § 35-3-37. The issue of expungement, not being ripe for determination by this Court, it is hereby **DENIED**.

Because the Court has concluded that the "as applied" challenge ends with the recognition that the Ordinance does not apply by the Respondent's

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[4]As the Court has thoroughly discussed earlier in this Order, the *Answer* should not be striken. Even if it is striken or otherwise ignored due to an alleged defect, the Petitioner's claim as to the applicability of the Ordinance to him would be unchallenged and given the extremely limited record from below, the Court would be compelled to sustain the Petition for Writ of Certiorari and reverse the conviction.

[5]The heading of this code section does not use the term "expunge." Additionally, it also uses the term "purge" and "expungement" interchangeably. For consistency purposes, this memo will use the term "expungement."

own admission, then, the Court need not address the merits of the alleged due process violations as those issues are moot.[6]

While the Plaintiff can raise a facial challenge with respect to the Defendant's Ordinance, any interest he had in a court declaration of unconstitutionality has become moot. The case has been narrowed substantially due to a mootness consideration limited to Plaintiff's request for reversal of the conviction and expungment. Petitioner's claim is very specific: "4. The verdict of the lower court is without evidence to support it, is decidedly against the weight of evidence, and is contrary to law and principles of justice and equity. Petitioner specifically assigns error as follows: A. The City ordinance under which Mr. Baumann was convicted does not apply to him, necessitating reversal of his conviction and expungement of his record. . . ."[7] Thereafter, the Petitioner asserts four very specific arguments in support of his claim that the Ordinance does not apply to Baumann. That is, the constitutional challenges arise under the specific claim that the Ordinance does not apply to Baumann.

It is well settled that a court considering a constitutional challenge to a statute or ordinance should not address its constitutionality unless absolutely necessary.[8] If the case can be decided on other grounds, the court should do so. All statutes and ordinances are presumed to be constitutional and this

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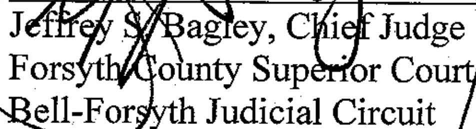
[6]The Court does find the Respondent's *Answer* to be internally inconsistent and self-contradictory due to the Respondent's Answer with respect to paragraph 2(a)(ii) of the *Petition for Writ of Certiorari* wherein the *Answer* denies the allegation therein that "[t]he Ordinance does not apply to the type of activity in which Mr. Baumann engaged - peaceable distribution of religious literature on a public sidewalk." Later in his *Answer*, the Respondent admits the very same averment which appears at paragraph 4(A)(2) in the *Petition for Writ of Certiorari*. Given the function of the *Answer* to the *Writ of the Petition for Certiorari*, and the fact that the Respondent failed to appear at the writ hearing, the *Answer* is to be construed against the Respondent given the Petitioner's exceptions to the *Answer*.

[7]There are no additional "B," "C," etc., subsections in the Petition for Writ of Certiorari. The remaining sub-paragraphs numbered one through four fall underneath sub-section "A." This indicates that the Petitioner considers his constitutional claims a supporting argument to the claim that the Ordinance should not apply to Baumann.

[8]See, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988)(it is a "fundamental and longstanding principle of judicial restraint . . . that courts avoid reaching constitutional questions in advance of the necessity of deciding them"); see also Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341-356 (1936)(Brandeis, J., concurring)(courts have a duty to avoid deciding constitutional questions unless strictly necessary).

Court should defer to the legislature unless a constitutional question squarely presents itself and there are no other grounds upon which to decide the case.[9] Here, with the admission in Respondent's *Answer* that the Ordinance did not apply to the Petitioner, the Court need not, and indeed should not, address the constitutionality of the Ordinance as that claim is now moot.

So ORDERED, this 1st day of August, 2007.



Jeffrey S. Bagley, Chief Judge
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[9] See, e.g., Old South Duck Tours v. Mayor & Aldermen of City of Savannah, 272 Ga. 869 (2000)(ordinance under constitutional attack carries with it a presumption of constitutionality); Copeland v. Young, 133 Ga. App. 54 (1974)(city ordinances are presumptively valid); McDonald v. Town of Ludowici, 17 Ga. App. 523 (Ga. App. 1916)(ordinance will be presumed to be valid and burden of establishing invalidity is on challenger); and Hamilton v. North Ga. Elec. Membership Corp., 201 Ga. 689 (1946)(in considering validity of ordinances, courts are inclined to sustain rather than to overthrow them).

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