

IN THE SUPERIOR COURT OF FORSYTH COUNTY,
STATE OF GEORGIA

FREDERIC BAUMANN,
Plaintiff in Certiorari

CASE NO. 07CV-1062

vs.

Municipal Court No. 07-04-372

CITY OF CUMMING,
Defendant in Certiorari

FORSYTH COUNTY GEORGIA
FILED IN THIS OFFICE

and

MAY 24 2007

HONORABLE CHARLES R. SMITH,
Respondent in Certiorari

Raquel Sorelle
CLERK SUPERIOR COURT

PETITION FOR WRIT OF CERTIORARI

The petition for writ of certiorari of Frederic Baumann shows to the Court the following:

1. On the 24th day of April, 2007, there came to be tried in the Municipal Court for the City of Cumming, Georgia, before the Honorable Charles R. Smith, Judge, the case of *City of Cumming vs. Frederic Baumann*, case number 07-04-372.
2. The petitioner comes now and presents this his petition for certiorari within thirty days from the final determination of said case, and enumerates the assignments of error as follows:
 - a. The City parade and demonstration ordinance (attached as **Exhibit A**), under which Mr. Baumann was convicted, does not apply to him, necessitating reversal of his conviction and expungement of his record.
 - (i) The Ordinance is inapplicable to groups of persons numbering less than three.
 - (ii) The Ordinance does not apply to the type of activity in which Mr. Baumann engaged – peaceable distribution of religious literature on a public sidewalk.
 - b. Mr. Baumann was prejudiced by grave procedural errors below in violation of his due process rights.
 - (i) Mr. Baumann was given no notice that he would stand trial on April 24, 2007.
 - (ii) Mr. Baumann was not given an opportunity to obtain counsel for his trial, and there is no indication that Mr. Baumann was even informed of his right to counsel, whether privately obtained or appointed.

- (iii) The proceedings below deprived Mr. Baumann of a reasonable time to prepare his case.
 - (iv) Subsequent to his arrest and prior to his trial, the City failed to provide Mr. Baumann with a copy of the relevant ordinance under which he was arrested (despite requests made by Mr. Baumann for such a copy), thereby prejudicing Mr. Baumann's ability to prepare adequate defenses.
 - (v) The City failed to establish beyond a reasonable doubt that Mr. Baumann's peaceful distribution of leaflets constituted a violation of the ordinance in question.
- c. The City's Ordinance requiring one person to first obtain permission from the City, in the form of a permit, to peaceably distribute religious literature on a public sidewalk violates the Free Speech Clause of the First Amendment to the United States Constitution, as it is not narrowly tailored and operates as a prior restraint.
 - d. The City's Ordinance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it fails to provide reasonable notice of what conduct is prohibited, fails to define "demonstrate" or "other activity," vests police officers with unbridled discretion in its enforcement, and can be applied to include any speech activity at all.
 - e. The City's Ordinance is unconstitutionally overbroad and invades areas of protected freedoms by requiring one person to obtain a permit before peaceably distributing religious literature in a public forum.
 - f. The City's Ordinance violates the Free Exercise Clause of the First Amendment to the United States Constitution in that it places a substantial burden on Mr. Baumann's religious exercise that cannot satisfy strict scrutiny.
3. The relevant procedural and factual background is as follows:
- a. Frederic Baumann is a follower of the Gospel of Jesus Christ and has a sincerely held religious belief that he is commanded by God to share the Gospel message with those who have not experienced its life-changing results.
 - b. As a result, Mr. Baumann regularly engages in constitutionally protected speech in public fora, including sidewalks.
 - c. Pursuant to his sincerely-held religious beliefs, on April 22, 2007, Mr. Baumann felt compelled to go to the location of the Taste of Forsyth festival taking place at the City of Cumming Fairgrounds.

- d. Upon reaching the fairgrounds, Mr. Baumann stood on the public sidewalk outside of the fairgrounds, at Gate C, passing out Gospel tracts detailing the plan of salvation and urging readers to accept Jesus Christ as their personal Savior.
- e. Mr. Baumann remained upon the public sidewalk during the entire time of his ministry; he did not block, hinder, impede, or prevent anyone from entering or exiting the festival, or from passing by on the public sidewalk, which measures at least ten feet in width.
- f. Mr. Baumann also did not use any amplification devices or raise his voice, he did not speak unless spoken to other than saying "thank you" if a person took a religious tract, and he did not conduct any type of commercial activity.
- g. Mr. Baumann distributed religious literature by himself, until another gentleman came who also distributed religious literature.
- h. At approximately 1:00 p.m., Mr. Baumann was approached by City of Cumming Chief of Police Mike Eason.
- i. Chief Eason demanded that Mr. Baumann leave the area, and said that if he did not, he would be arrested for "demonstrating without a permit."
- j. Mr. Baumann politely inquired of Chief Eason as to whether he possessed a constitutional right to distribute religious literature on a public sidewalk.
- k. Chief Eason replied: "Well, I guess he wants to get arrested."
- l. Chief Eason then advised City police officer John Coffman, who had been called to the area outside of Gate C at Chief Eason's request, to place Mr. Baumann under arrest for demonstrating without a permit, which Officer Coffman did.
- m. Mr. Baumann was placed in a marked patrol car and transported to the City of Cumming Police Department for booking. True and accurate copies of the Police Incident Report and the Citation/Accusation-Summons are attached hereto as **Exhibits B** and **C**, respectively.
- n. Mr. Baumann, age 67, had not previously been arrested in his life.
- o. Mr. Baumann was incarcerated from Sunday, April 22, 2007, through Tuesday, April 24, 2007.
- p. At no time while incarcerated was Mr. Baumann shown a copy of the City ordinance

under which he was arrested (despite requests by Mr. Baumann for such a copy).

- q. At no time while incarcerated was Mr. Baumann afforded an opportunity to obtain counsel.
 - r. At no time did Mr. Baumann knowingly waive his right to counsel.
 - s. While incarcerated, Mr. Baumann requested use of his reading glasses so that he could read his Bible; this request was denied.
 - t. While incarcerated, Mr. Baumann repeatedly requested permission for exercise time to offset a heart condition that causes chest congestion when he remains sedentary; these requests were denied.
 - u. On April 24, 2007, Mr. Baumann was brought before the City of Cumming Municipal Court without any notice and without counsel.
 - v. At no time while incarcerated or while being brought by the jailor to the Court was Mr. Baumann notified that he was about to be tried, or would face the possibility of conviction and sentencing at what turned out to be his trial on April 24, 2007.
 - w. At the trial, Mr. Baumann issued a plea of not guilty, and moved the Court to dismiss the charges against him based on his constitutional rights to peaceably distribute religious literature in a public forum.
 - x. Based solely on the brief testimony of Chief Eason, the Court found Mr. Baumann guilty of violating the City's parade and demonstration ordinance under which he was arrested, and sentenced Mr. Baumann to time already served. True and accurate copy of the Court's Order and the Police Citation Disposition are attached hereto as **Exhibits D and E**, respectively.
 - y. The City Attorney was also not informed that Mr. Baumann was to be tried on April 24, 2007.
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.**
 - 1. **The Ordinance is inapplicable to groups of persons numbering less than three.**

The City's parade and demonstration ordinance under which Mr. Baumann was convicted applies solely to "private organizations or groups of private persons," defined in the ordinance as "any firm, partnership, corporation, association, or group of individuals more than three in number, or their representatives, acting as a unit." The plain wording of the ordinance proves it is clearly intended to apply to groups of persons, not individuals. The facts show that Mr. Baumann was peaceably distributing religious literature by himself on the date of his arrest, until another person came to also distribute religious literature. Whether alone or with another person, Mr. Baumann still did not violate the terms of the City's ordinance because the ordinance is inapplicable to groups of persons numbering less than three. Because the facts demonstrate that Mr. Baumann does not fall within the category of a private organization or a group of private persons as defined in the Ordinance, the City's application of the Ordinance to Mr. Baumann was incongruous.

2. The Ordinance does not apply to the type of activity in which Mr. Baumann engaged – peaceable distribution of religious literature on a public sidewalk.

Section 2 of the Ordinance delineates the type of activity for which a permit is expressly required:

Every private organization or group of private persons who wishes to use public property or public roads within the municipal limits of Cumming, Georgia, for private purposes in holding a parade, assembly, demonstration, road closing, or other activity is hereby required to have a permit from the City for the privilege of engaging in any such activity within the City, unless such a permit is prohibited under State law or the activity is otherwise exempted by law, ordinance, or other valid regulation.

The above-stated facts clearly demonstrate that Mr. Baumann's activity could not reasonably fall with the category of a parade, assembly, demonstration, or road closing. The clear wording of the ordinance shows that it applies to activities such as parades that necessitate road closings due to large

numbers of people – not to individuals. In addition, any attempt to encompass Mr. Baumann’s peaceable distribution of religious literature in a public forum within the language of the ordinance addressing “other activities” illustrates the unconstitutionally vague nature of the ordinance, represents an arbitrary and capricious exercise of power under the color of law, and symbolizes an unconstitutional infringement of Mr. Baumann’s constitutional rights, as discussed below.

3. Mr. Baumann was prejudiced by grave procedural errors violating his due process rights.

A cursory examination of the prior proceedings illustrates a host of procedural due process deficiencies:

- Mr. Baumann was given no notice that he would stand trial on April 24, 2007. In fact, it was his first appearance before the judge after being incarcerated for two days. *In re Murchinson*, 349 U.S. 133, 134 (1955) (“[D]ue process requires as a minimum that an accused be given a public trial *after reasonable notice of the charges...*”) (emphasis added). See also, GA. CODE ANN. § 17-4-24.
- Mr. Baumann was not given an opportunity to obtain counsel for his trial, and there is no indication that Mr. Baumann was even informed of his right to counsel, whether privately obtained or appointed. Though this case concerns a municipal ordinance, violation of the ordinance can result in a sentence of incarceration. CITY ORDINANCE, at Section 7. Consequently, proceeding to trial without affording Mr. Baumann a chance to obtain counsel, receive appointed counsel, or obtain a formal waiver of counsel results in the proceedings and outcome being unconstitutional. See, *Person v. Ohio*, 488 U.S. 75, 84 (1988) (“[T]he right to be represented by counsel is among the most fundamental rights...[L]awyers in criminal courts are necessities, not luxuries”); *Perry v. Leekes*, 488 U. S. 272, 268 (1989) (“[A] Defendant has the right to the aid of counsel at each critical stage of the adversarial process”); *Mitchell v. State*, 225 Ga. App. 520, 521, 498 S.E.2d 271 (1997) (holding that where a non-indigent defendant appears for trial without counsel, “the judge has a duty to delay the proceedings long enough to ascertain whether the Defendant has acted with reasonable diligence in obtaining an attorney’s services and whether the absence of an attorney is attributable to reasons beyond the Defendant’s control”).
- The proceedings below deprived Mr. Baumann of a reasonable time to prepare his case. See, e.g., GA. CODE ANN. Sec. 17-4-24 (“A reasonable time shall be given to the defendant and the prosecutor for the preparation of the case. In no event shall the

defendant be forced to attend the hearing without the aid of counsel if there is a reasonable probability of his securing counsel without too great delay"); UNIFORM RULE OF THE SUPERIOR COURT 33.2(A) and (B) ("A Defendant shall not be called upon to plead before having an opportunity to retain counsel, or if the Defendant is eligible for appointment of counsel, until counsel has been appointed or the right to counsel waived....A Defendant without counsel shall not be called upon to plead to any offense without having reasonable time to consider the decision").

- Subsequent to his arrest and prior to his trial, the City failed to provide Mr. Baumann with a copy of the relevant ordinance under which he was arrested (despite several requests made by Mr. Baumann for such a copy), thereby prejudging Mr. Baumann's ability to prepare adequate defenses.
- The City failed to establish beyond a reasonable doubt that Mr. Baumann's peaceful distribution of leaflets constituted a violation of the ordinance in question. All elements of a crime must be proved beyond a reasonable doubt in order to justify a conviction. *Solomon v. State*, 113 Ga. App. 16, 117, 147 S.E.2d 467 (1966); *Christoffel v. United States*, 338 U.S. 84, 89 (1990). The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates to the early years of our nation and is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

4. The ordinance under which Mr. Baumann was convicted violates numerous constitutional guarantees, including the Free Speech and Free Exercise Clauses of the First Amendment, and the Due Process Clause of the Fourteenth Amendment.

The City's Ordinance requiring one or two persons to first obtain permission from the City to peaceably distribute religious literature in a public forum violates the Free Speech Clause of the First Amendment to the United States Constitution, for it is not narrowly tailored and operates as a prior restraint:

- Mr. Baumann's peaceable distribution of religious literature is undisputably protected speech under the First Amendment, entitled to heightened judicial protection. *Capitol Square Review & Advisory Bd. V. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression"); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 ("The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses....This form of religious activity occupies the same high estate under the First Amendment as do

worship in the churches and preaching from the pulpits.)

- Additionally, the public sidewalk where Mr. Baumann engaged in speech activities outside of the Forsyth County Fairgrounds is a traditional public forum, an area which affords individuals who engage in protected speech, such as Mr. Baumann, special protection. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939)) (Traditional public fora are places such as streets, parks, and sidewalks, “which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions”). *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) (“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum”).
- The ten-day advance notice provision contained in the Ordinance, *see* Ex. A, p. 6, unconstitutionally restricts a substantial amount of Mr. Baumann’s speech that does not interfere with the City’s asserted interests, and impermissibly discourages Mr. Baumann’s future speech (due to the ordinance’s burdensome procedural requirements). *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994) (under impermissible nine-day notice requirement scheme. “[b]oth the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers. Moreover, because of the delay caused by complying with the permitting procedures, [i]mmediate speech can no longer respond to immediate issues”) (citations and internal quotation omitted) (emphasis added). *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (“The five-day notice requirement restricts a substantial amount of speech that does not interfere with the city’s asserted goals of protecting pedestrian and vehicle traffic, and minimizing inconvenience to the public”) (emphasis added); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (“It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted...by use of a statute providing a system of broad discretionary licensing power, or...the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute”); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1965) (striking down city permit scheme which made enjoyment of protected speech rights contingent on “the uncontrolled will of an official”).
- An ordinance such as the City’s cannot be narrowly tailored and serve the City’s asserted interests when it requires a small number of peaceful leafleters to first obtain a permit before engaging in such activity. The evidence shows that Mr. Baumann did not engage in any of the “targeted evils,” such as obstructing the orderly flow of traffic or implicating health or safety concerns of the public, that the City seeks to prevent through its ordinance. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (“A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy”). *Grossman*, 33 F.3d at 1205-08 (holding that ordinance requiring permit for any organized demonstration in a public park was not narrowly tailored to serve city’s interests where ordinance was applied to groups of six to eight peaceful protesters carrying signs in a public park) (emphasis added).
- The City’s scheme requiring one or two people to obtain a permit to peaceably hand

out religious literature on a public sidewalk simply cannot advance the stated goals of the ordinance. See, *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (holding that regulation requiring a permit for two or more people speaking together in any above-ground areas of the Metro was not narrowly tailored because “it is clear that many of these activities would not interfere meaningfully with WMATA's asserted interests”) (emphasis added); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (The government must not “regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals”); *United States v. Grace*, 461 U.S. 171, 181 (1983) (concluding that statute banning displays had an “insufficient nexus with any of the public interests that may be thought to undergird [the statute]”).

The City's Ordinance also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it fails to provide reasonable notice of what conduct is prohibited, fails to define “demonstration” or “other activity,” vests police officers with unbridled discretion in its enforcement, and can be applied to include any speech activity at all:

- The Ordinance fails to provide reasonable notice of what conduct is prohibited since there is no way Mr. Baumann could have known that peaceful distribution of religious literature on a public sidewalk would constitute a criminal act under City's ordinance. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (“[A] regulation is impermissibly vague if, by its terms, it fails to provide adequate notice of its scope, and sufficient guidance for its application”); *Ricks v. District of Columbia*, 414 F.2d 1097, 1100 (D.C. Cir. 1968) (“Fluid language which sweeps citizens under the penumbra of penal legislation without warning is abhorrent. The imposition of criminal liability for behavior which a person could not reasonably understand to be prohibited offends the most rudimentary considerations of fairness”).
- Under the City of Cumming's scheme, a police officer is impermissibly given the discretion to ban protected free speech activity in a traditional public forum in violation of the due process clause. See *Papachristou*, 405 U.S. at 170 (“Where, as here, there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law”).

Further, the City's Ordinance is unconstitutionally overbroad and invades areas of protected freedoms by requiring one person to obtain a permit before peaceably distributing religious literature:

- The Ordinance is overbroad in that it prohibits Mr. Baumann's religious speech on a public right of way despite the fact that this speech does not implicate security or safety concerns, nor does it obstruct the orderly flow of traffic – interests that are supposed to be furthered by the Ordinance. See *NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (under overbreadth doctrine, restrictions on speech cannot “sweep

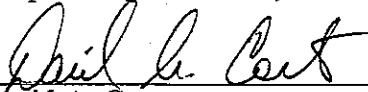
unnecessarily broadly and thereby invade the area of protected freedoms”); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (holding that a regulation is void if it “does not aim specifically at evils within the allowable area of [government] control but...sweeps within its ambit other activities that in ordinary circumstances constitute an exercise” of protected rights); *Cox v. City of Charleston, S.C.*, 416 F.3d 281, 285 (4th Cir. 2005) (sustaining facial overbreadth challenge to city permit scheme that applied to “groups as small as two or three in a public forum”).

The City’s Ordinance also violates the Free Exercise Clause of the First Amendment to the United States Constitution in that it places a substantial burden on Mr. Baumann’s religious exercise that cannot withstand strict scrutiny.

- Mr. Baumann’s peaceful distribution of religious literature is an activity that is a part of his religious exercise. *Employment Division v. Smith*, 494 U.S. 872, 886-87 (1990) (“[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim”). By placing the exercise of Mr. Baumann’s religious beliefs subject to citation, arrest, and jail, the City has placed a substantial burden on Mr. Baumann’s exercise of religion. *Smith*, 494 U.S. at 877 (“the ‘exercise of religion’ often involves not only belief and profession but the performance (or abstention from) physical acts”); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“Governmental imposition of such a choice [between following the precepts of her religion and being punished or abandoning those precepts and avoiding punishment] puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Sunday worship”).
- The City’s prohibition of and penalty on the practice of such physical acts, which include free speech activities such as speaking and leafleting, under arrest and prosecution violates the right to free exercise as applied to Mr. Baumann. *Sherbert*, 374 U.S. at 404 (“direct restraint or punishment...[and] indirect discouragements undoubtedly have the same coercive effect upon exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes”). Additionally, because the City has applied the Ordinance in a discriminatory manner by impermissibly excluding religious speech and religious speakers, they have violated the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against government hostility which is masked, as well as covert”).

WHEREFORE, the premises considered, petitioner prays a writ of certiorari, directed to the Honorable Charles R. Smith, judge aforesaid, requiring him to certify and send up all the proceedings in said case to the Superior Court of Forsyth County, Georgia, within 30 days of the service of said writ, that the errors alleged to have been committed may be considered and corrected.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was sent by first class mail, postage prepaid, to Kevin Tallant, Solicitor for the City of Cumming, at MILES, MCGOFF & MOORE LLC, 320 Dahlonge Street, Suite 200, Cumming, Georgia 30040, to the Honorable Charles R. Smith, Judge for the City of Cumming Municipal Court, at 301 Veterans Memorial Boulevard, Cumming, GA 30040, and to Robin Looper, Clerk of Court for the City of Cumming Municipal Court, at 301 Veterans Memorial Boulevard, Cumming, Georgia, 30040, this 24th day of May, 2007.



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