Jim Weinberg

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

MURIEL M. PATCH SUSAN O. KIRKPATRICK SUSAN WELLS Plaintiffs, v. STACEY L. BURCIN A.E. CLARKE Defendants.	))))))))))))	Civil Action No. 87-0689-R

FINAL ORDER

This matter is before the Court on the plaintiffs' motions for judgment notwithstanding the verdict (j.n.o.v.) or, alternatively, for a new trial, pursuant to Fed. R. Civ. P. 50(b) and 59. The plaintiffs also renew their motion to join Henrico County as a necessary party pursuant to Fed. R. Civ. P. 19.

The plaintiffs alleged that Henrico Ordinance 693 is unconstitutional as it has been applied to them. Their claim of selective enforcement was tried to a jury, and the jury returned a verdict for the defendants. For the reasons stated from the bench, the plaintiffs' motion for j.n.o.v. or, alternatively, a new trial on the selective enforcement issue is DENIED.

For the reasons set forth in the accompanying memorandum opinion, the plaintiffs' motion for j.n.o.v. or, alternatively, a new trial on the grounds that the sign ordinance is unconstitutional is DENIED. Consequently, the plaintiffs' request for injunctive relief is DENIED.

The Court having heard the plaintiffs' argument for joining Henrico County as a defendant in this action DENIES the plaintiffs' motion for the reasons stated from the bench. Given the Court's ruling on the constitutionality of the ordinance, joining the County at this late date would be an unnecessary exercise.

Since all issues in this matter have been resolved, the Clerk is instructed to close this case and remove it from the docket of the Court.

Let the Clerk send a copy of this final order to all counsel of record.

Richard L. Williams
UNITED STATES DISTRICT JUDGE

DATE

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MEMORANDUM OPINION

This matter is before the Court on the plaintiffs' constitutional challenge to Henrico County's sign ordinance (Ordinance No. 693, amending Chapter 22 of Henrico's Code) and their request for injunctive relief. The ordinance prohibits the posting of signs on public right-of-ways and requires the securing of a permit for posting signs on private property.[1] The plaintiffs question the constitutionality of both the absolute prohibitions of signs on public right-of-ways and the permit system. They claim the ordinance infringes their First

[1]The plaintiffs have asserted that the sign ordinance does not govern their "tables." Under § 22-3 of the ordinance, "sign" is defined as "any structure... or any numeral, letter, word... or other representation used as, or in the nature of, an announcement, advertisement, direction, or designation..." The plaintiffs' tables are "things" which display words and are in the nature of an announcement or direction. The tables certainly appear to be an announcement because they are aimed at a specific audience to make them aware of specific events, concepts, and biblical admonishments.

Amendment rights of free speech, press, and free exercise of religion as well as their Fourteenth Amendment right to the Equal Protection of the laws. Their claim that the ordinance was selectively enforced against them in violation of the Equal Protection Clause was tried to a jury, and the jury returned a verdict for the defendants. Here the Court addresses those issues not settled by the jury's verdict. For the reasons set forth below, the ordinance is constitutional as applied to the plaintiffs. Consequently, their request for injunctive relief is denied.

The constitutionality of prohibiting the posting of signs on public property is well settled. In Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), a group supporting a politician for Los Angeles' City Council challenged a similar ordinance after Vincent's campaign signs were removed from public property. In rejecting the Vincent supporters' arguments that the ordinance was facially unconstitutional and overbroad, the Supreme Court held:

> [T]he substantive evil--visual blight--is not merely a possible by-product of the activity [of posting signs], but is created by the medium of expression itself. In contrast to Schneider [where the Court struck down an ordinance prohibiting handbilling on the streets], therefore, the application of the ordinance in this case responds precisely to the substantive problem which concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

466 U.S. at 810. The plaintiffs assert that they are distinguishable from the Vincent plaintiffs because they remove their signs when their protest ends. In Vincent, however, the Court was not concerned with the City's cost in removing the signs, as the plaintiffs argue. The issue in Vincent and here is visual blight. While posted, the plaintiffs' signs are no different than the political posters in Vincent.

Even if the Court were to hold that the right-of-way on a public road is a public forum, the ordinance is still constitutional under Vincent. The Los Angeles' ordinance's goals were much like those advanced by Henrico County in § 22-104 of the ordinance--safety and aethetics. Additionally, in Vincent and here, the plaintiffs have other alternative means of communicating their message. The Henrico ordinance does not prohibit the use of hand-held signs on a public right-of-way. Given the County's legitimate interests served by the ordinance, the ordinance's facial viewpoint neutrality, and the availability of alternative means of communication, the ordinance is constitutional. Vincent, 466 U.S. at 815.

The plaintiffs also challenge the permit system required by the ordinance as a prior restraint on speech. Those seeking a permit to post a sign on private property must include on their application "the wording of the sign or advertisement." Ordinance, § 22-104(b). The plaintiffs suggest that this requirement vests too much discretion with county officials. These officials are left free to reject sign permit applications based on the content of the sign, allege the plaintiffs. At trial, the jury considered the plaintiffs' claim that, as part of a plan of selective enforcement, their sign permit applications had been rejected because of the content of their signs. The jury's verdict for the defendants is supported by ample evidence in the record that their permits were rejected for procedural deficiences. The substantive content of their signs was never considered. (See the testimony of Daniel W. Moore.) In at least one instance, the plaintiffs' application was rejected for failure to comply with the fifteen foot set back required in residential areas. This requirement is consistent with the County's interest in maintaining traffic safety. Hence, the ordinance's permit system as applied to the plaintiffs is constitutional.

Moreover, the Fourth Circuit, on several occassions, has upheld permit systems which seek to distinguish between commerical and non-commericial speech. See Naegele Outdoor Advertising v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Goergia Outdoor Advertising, Inc. v. the City of Waynesville, 833 F.2d 43 (4th Cir. 1987); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 43 (4th Cir. 1987). The county has an interest in regulating the content of commericial speech. See Cental Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 562-65 (1980); Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 770-771, n.24 (1976)(The differences between commercial speech and other forms of speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired...[T]he greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statments for fear of silencing the speaker. Hence the prohibition against prior restraints is inapplicable in this context.) And the ordinance is designed to facilitate the County's interest.[2] However, non-commericial speech is not subject to content scrutiny. Once the language submitted on a sign permit application is identified as "non-commericial," the County's inquiry is over, under the provisions of the ordinance.

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[2]The ordinance speaks to the County's need in the application process for knowing the content of proposed signs. Section 22-104(b)(5)(c) prohibits any sign "which makes use of words including but not limited to "STOP," "CAUTION," or any other words, phrases, symbols or characters which may interfere with, mislead or confuse." Similarly, section 22-104(b)(5)(e) provides that "no sign shall contain wording which is misleading or false..." At trial Mr. Daniel W. Moore testified that the application for a sign containing profanity or vulgarity may also be rejected on the basis of its content. If indeed such a sign permit was rejected for this reason alone, the ordinance may come under closer First Amendment scrutiny. That issue, however, is not before the Court in this case.

Henrico Ordinance No. 693, § 22-104(b)(7). Hence, on the face of the ordinance, there is no prior restraint on non-commericial speech such as that presented by the plaintiffs. See Major Media of the Southeast v. City of Raleigh, 729 F.2d 1269, 1271 (4th Cir. 1986)(upholding a similarly structured and applied sign ordinance).

Moreover, the ordinance does not suffer from vagueness because it does not define "commericial" and "non-commercial" speech. No codification of these terms is necessary since the Supreme Court has defined them with sufficient precision in Central Hudson Gas, 447 U.S. at 561. Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269, 1272-73 (4th Cir. 1986). The plaintiffs also contend that the Henrico ordinance is vague in making a distinction between "attended" and "unattended" signs. The ordinance does not use these words to draw a distinction but defines with precision the signs it governs. Henrico Ordinance No. 693, § 22-104(b)(1) and (7).

At trial, plaintiffs also argued that Henrico's ordinance is unconstitutional on its face because it is overbroad. They contend that the ordinance's permit system is not content neutral, reaches protected as well as unprotected speech and does not provide for "procedural safeguards that reduce the danger of suppressing constitutionally protected speech as required by Southeastern Promotions v. Conrad, 420 U.S. 546, 559 (1975). To some extent these issues have been addressed in the proceeding discussion of the facial validity of the statute. Otherwise, there is some question as to whether this issue is properly before the Court.

The plaintiffs amended complaint challenges the Henrico ordinance as it has been applied to them. Both paragraphs 42 and 44 of the amended complaint speak of the effects of the ordinance on the plaintiffs. In no respect were sections 22-104(b)(5)(c) and 22-104(b)(5)(e), the sections challenged as being overbroad, applied to them. Even accounting for the facts that the plaintiffs filed their amended complaint pro se and that the ordinance is challenged on First Amendment grounds, there is no basis for construing the plaintiffs' complaint to include vagueness and overbreadth challenges. For the Court to seize the initiative and decide a claim not set forth in the complaint would be a violation of the limited jurisdiction of this Court.

Even if the Court were to rule on the merits of the overbreadth claim, the issue is well settled in this circuit. See Naegele Outdoor Advertising v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Georgia Outdoor Advertising, Inc. v. the City of Waynesville, 833 F.2d 43 (4th Cir. 1987); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 43 (4th Cir. 1987). The ordinance regulates the placement of signs on private property. Hence, the cases relied on by the plaintiffs which address licensing schemes in public forums are inapplicable. See e.g., Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

The plaintiffs also allege that Henrico's ordinance infringes their free exercise of religion. To prove such a claim, the plaintiffs must demonstrate that an ordinance, "neutral on its face may, in its application, nonetheless offend[s] the constitutional requirement for governmental neutrality" because "it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). As part of their religious practice, the plaintiffs seek reconciliation with those who "hold something against them." (Supp. to Plaintiffs' Brief at 14.) To facilitate this reconcilation, the plaintiffs post tables in obedience to Habakuk 2:2, Isaiah 30:8, 58:1, Jeremiah 50:2, and Ezekiel 2:3-8, 3:4-11. The plaintiffs contend that Henrico's ordinance "unduly burdens the free exercise of religion" because the ordinance works to prohibit the posting of their signs on public and private land.

Although the sign ordinance has forced the plaintiffs to reduce the number of signs they post, the ordinance does not rise to the level of an "undue burden." The plaintiffs can still communicate their message and seek reconciliation with those who may have "ought against" them. (Supp. to Plaintiffs' Brief at 14) They can hold as many signs as they wish, and if a visible site can be found, they can post signs on private land in compliance with the ordinance. The burden placed upon the plaintiffs in this case simply is not as great as that placed upon the plaintiffs in Sherbert v. Verner, 374 U.S. 398 (1963) and Thomas v. Review Board of the Indiana Employment Security

Division, et al, 450 U.S. 707 (1981), the cases the plaintiffs rely upon. In Sherbert, the plaintiff, a Seventh Day Adventist, refused to work on Saturday, the Sabbath Day of her faith; was fired; and was denied unemployment benefits. Similarly in Thomas, the plaintiff, a Jehovah's Witness, refused to work in the armaments factory to which his employer transfered him. When he quit his job, he too was denied unemployment benefits. In defining what constitutes an undue burden, the Supreme Court held "[w]here a state... denies [an important] benefit because of the conduct mandated by religious belief, thereby putting substantial pressure on the adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." Here, the plaintiffs do not face such a choice. They can carry on their religion and not run afoul of the ordinance. Unlike the plaintiffs in Sherbert and Thomas, they do not have to chose between not complying with the ordinance and violating their religious beliefs. They can still hold their tables and not violate the statute. The ordinance allows them to practice their religion and communicate with whom they wish.

Moreover, even if the ordinance was deemed to place an undue burden on plaintiffs' religious practices, the Supreme Court "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." Sherbert, 374 U.S. at 403, quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961). "[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of the important social duties or subversive of good order, even when the actions are demanded by one's religion." Braunfeld, 366 U.S. at 603-04. See also, Heffron v. International Society for Kishna Consciousness, Inc., 452 U.S. 640, 649-56 (1981).

Consequently, the plaintiffs' challenge to the Henrico County sign ordinance fails. The ordinance is a legitimate time, place, and manner restriction that is content neutral as applied to the plaintiffs, narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels of communication. Heffron, 452 U.S. at 654-55. Additionally, Henrico's sign ordinance does not place an undue burden on the plaintiffs' religious practices, and it furthers Henrico County's interest in public safety and aethetics. Therefore, the Court denies the plaintiffs' request for injunctive relief.

Let the Clerk send a copy of this memorandum opinion to all counsel of record.

Richard L. Williams

DATE

UNITED STATES DISTRICT JUDGE