DOUGLAS GERRY MAYER, Appellant v. THE STATE OF TEXAS, Appellee

No. 05-07-00695-CR
COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS
2007 Tex. App. LEXIS 9133
November 20, 2007, Opinion Filed

MEMORANDUM OPINION

The City of Grand Prairie, Texas (the "City") cited Appellant Douglas Gerry Mayer on October 18, 2005 for violating the high grass and weeds ordinance. In two issues, he claims the City violated his due process rights by not properly putting him on notice of a high grass and weeds violation and by allowing an arbitrary enforcement of an unconstitutionally vague ordinance. We affirm.

On April 7, 2005 the City sent Mayer a "High Grass and Weeds Notification." The notification read in relevant part:

> The City of Grand Prairie, Code Enforcement Division, has designated April through November 2005 as high grass and weeds season. As part of high grass and weed season, vacant unimproved land, or property in which a structure is present, where grass and weeds have been allowed to grow in excess of twelve (12) inches in height will be a violation of the City of Grand Prairie Code of Ordinance, Chapter 29-115. . . . This is your **ONLY NOTICE** that this condition must be corrected within seven (7) days, or the City shall follow the procedures outlined in the ordinance.
>
> 1. Failure to correct the violation within the prescribed time period may result in a citation fine not to exceed $ 2000.00. Each day the violation continues shall be considered a separate offense punishable by a $ 2000.00 fine.
>
> 2. Failure to correct the violation within the prescribed time period shall result in the City of Grand Prairie abating the nuisance and charging ownership for expenses incurred. . . .
>
> . . .
>
> This is the only written correspondence you will receive for a 12 month period from the date of this notice regarding high grass and weeds on the above property. . . . (emphasis in original).

When Randy Reagins, the code enforcement officer for the area, later observed the property on April 15, 2005, the grass and weeds were above twelve inches. He issued a work order for the City to mow the property but did not issue a citation. On August 25, 2005, he observed another violation and again issued a work order to mow the property but did not issue a citation.

After observing high weeds and grass on October 18, 2005, Reagins issued Mayer a citation for violation of Grand Prairie Code Ordinance 29-114. This ordinance provides "[i]t shall be unlawful for any person having a possessory or ownership interest in any property, . . .within the city to allow grass, weeds, rubbish, brush or other objectionable, unsightly, or unsanitary matter to grow to a

height greater than twelve (12) inches on an average. . . ." GRAND PRAIRIE, TEX., CODE OF ORDINANCES ch. 29, art. VI, ß 29-114 (Apr. 20, 2004).

A municipal court jury found him guilty of violating the ordinance and assessed a $ 2,000 fine. He filed a motion for new trial, which the court denied. Mayer then filed a notice of appeal with the County Criminal Court of Appeals. The court issued an opinion concluding the City provided Mayer with proper notice, and the ordinance is not unconstitutionally vague. This appeal followed.

In his first issue, Mayer asserts the City violated his due process rights of notice because it "used a generic, broad and ambiguous letter as to a high weeds season as their formal notice of a violation." In his motion for new trial, he argued the ordinance is unconstitutionally vague for various reasons. The reference to notice in his motion for new trial is one sentence in which he claims "the ordinance is vague because at no time does the ordinance set out criminal penalties and criminal sanctions that may be pursued for a violation within the ordinance and there is not notice that such action within this section of the code is a violation of criminal law."

Texas Government Code section 30.00014(b) states the appellate court shall determine each appeal from a municipal court of record conviction and each appeal from the state on the basis of the errors set forth in appellant's motion for new trial. *TEX. GOV'T CODE ANN. ß 30.00014(b)* (Vernon Supp. 2007). Thus, to preserve an issue on appeal from a municipal court, he must raise the identical point in his motion for new trial. *Lambert v. State, 908 S.W.2d 53, 53 (Tex. App.--Houston [1st Dist.] 1995, no writ)*. Mayer did not specifically argue in his motion for new trial that his due process rights were violated because the "High Grass and Weeds Notification" did not provide him proper notice. Because his issue on appeal is not identical to the issue argued in his motion for new trial, he has failed to properly preserve his issue for review.

Even if we concluded his broad argument regarding notice properly preserved his issue for review, the City provided proper notice of the violation prior to his October 18, 2005 citation. In order to satisfy constitutional due process requirements, the statute or regulation must provide adequate notice of the required or prohibited conduct. *Anthony v. State, 209 S.W.3d 296, 306 (Tex. App.--Texarkana 2006, no pet.)*. An ordinance is unconstitutionally vague when a person who is regulated by it is exposed to a risk or detriment without fair warning as to the nature of the proscribed conduct. *J. B. Adver., Inc. v. City of Carrollton, 883 S.W.2d 443, 449 (Tex. App.--Eastland 1994, writ denied)*.

Mayer complains the "generic, broad and ambiguous letter as to a high grass and weeds season" he received on April 7, 2005 was not adequate notice of a violation. We disagree. The "High Grass and Weeds Notification" stated that grass and weeds allowed to grow in excess of twelve (12) inches in height would be a violation of ordinance 29-115. It further provided "[t]his is your **ONLY NOTICE** that this condition must be corrected within seven (7) days" or the City would issue a citation not to exceed $ 2,000. It also plainly stated "[t]his is the only written correspondence you will receive for a 12 month period from the date of this notice regarding high grass and weeds on the above property."

The notice establishes that Mayer's property was violating the ordinance at the time of the letter and further provided him a time frame for correcting the problem. If he failed to do so, the notice explicitly stated the possible consequences. Although the City could have issued a citation immediately on April 15, 2005, it provided Mayer several opportunities to maintain his property. Specifically, the City posted a notice on the property regarding the high grass and weeds and issued work

orders on April 15, 2005 and August 25, 2005 for a contractor to mow the property. Therefore, when he received citation on October 18, 2005, we cannot conclude the City violated his due process rights of notice. We overrule his first issue.

In his second issue, Mayer asserts the City violated his due process rights when it enacted an unconstitutionally vague ordinance and allowed authorities to arbitrarily enforce it. In construing an ordinance, a court's primary duty is to carry out the intentions of the municipal legislative body. *Bolton v. Sparks, 362 S.W.2d 946, 951 (Tex. 1962)*. The same rules apply to the construction of municipal ordinances as apply to the construction of statutes. *Mills v. Brown, 159 Tex. 110, 316 S.W.2d 720, 723 (Tex. 1958)*.

When we review a challenge to the constitutionality of a statute, we begin with the presumption that the statute is valid, and the legislature did not act unreasonably or arbitrarily in enacting it. *Lawrence v. State, 211 S.W.3d 883, 890 (Tex. App.--Dallas 2006, pet. filed)*. The party challenging the constitutionality of a statute bears the burden of proving the challenged statute is unconstitutional. *Id.* We will uphold a statute if it can be reasonably construed in a manner that will render it constitutional. *Id.*

When *First Amendment* rights are not implicated, a criminal statute is unconstitutionally vague when it fails to give a person of ordinary intelligence reasonable notice of what is prohibited or required and fails to establish determinate guidelines for law enforcement. *Id.* Thus, a statute is void for vagueness if its prohibitions are not clearly defined. *Id.* Although a statute is not impermissibly vague because it fails to define words or phrases, it is invalid if it fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *State v. Holcombe, 187 S.W.3d 496, 498 (Tex. Crim. App. 2006)*. We uphold a vagueness challenge only if the statute is impermissibly vague in all its applications. *Id.*

Mayer argues the language within the ordinance is vague because it does not give fair warning as to the nature of the prohibited conduct. Although he does not specify the alleged problematic language, we conclude based on arguments during trial that Mayer contends the phrase "to grow to a height greater than twelve (12) inches *on average"* is vague. We disagree. An ordinance is vague if a person of ordinary intelligence must guess at its meaning. *Toma v. State, 126 S.W.3d 528, 529 (Tex. App.--Houston [1st Dist.] 2003, pet. ref'd)*. Although the ordinance does not define "average," a person of ordinary intelligence would understand it to mean a person must not allow weeds and grass on his property to grow higher than twelve inches. *See Rice v. State, 195 S.W.3d 876, 881 (Tex. App.--Dallas 2006, pet. ref'd)* (court interprets ordinance in accordance with the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results). To insinuate a code enforcement officer must measure the property, then measure the height of the grass or weeds, and make a mathematical calculation to determine whether they are higher than twelve inches on average, would be an absurd, unintended result. *Id.* Therefore, we conclude the ordinance's plain language is not unconstitutionally vague.

Mayer also asserts the City arbitrarily enforced the ordinance against him because it does not provide explicit standards for those responsible for enforcing it. As noted above, the plain meaning of the ordinance provides explicit standards for its application. If grass and weeds are higher than twelve inches on a person's property, he is in violation of the ordinance. Further, Mayer has failed to cite to any evidence that Officer Reagins singled him out for violating the ordinance or that code enforcement officers differed in their application of the statute. *See, e.g., Hall v. State, 137 S.W.3d 847, 855 (Tex. App.--Houston [1st Dist.] 2004, pet. ref'd)* ("The presumption is always that a prose-

cution for violation of criminal law is undertaken in good faith and in a nondiscriminatory fashion to fulfill a duty to bring violators to justice."). Thus, his argument is without merit. We overrule Mayer's second issue.

Having overruled both of Mayer's issues, we affirm the court's judgment.

MICHAEL J. O'NEILL

JUSTICE

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