CITY OF WICHITA, Appellee, v. DAVID L. HUDSON, Appellant

No. 63,738
Court of Appeals of Kansas
792 P.2d 1077
May 18, 1990, Filed

OPINION

David Hudson, defendant, appeals his conviction for failure to cut, destroy, or remove all rank grass, weeds, or growths of vegetation over 18 inches high as required by section 7.40.060 of the Code of the City of Wichita, Kansas. Hudson contends section 7.40.060 is unconstitutionally vague because the Code does not sufficiently define "rank grass, weeds or other vegetation."

Section 7.40.060 of the City Code states in part:

"(a) Rank grass, weeds or other vegetation over eighteen inches in height upon any lot or piece of land or upon the streets and alleys in front of and abutting upon any such lot or piece of land within the city is declared a public nuisance. It is unlawful for the owner of any such lot or piece of land to permit rank grass, weeds or other vegetation in excess of eighteen inches in height to exist and remain on said owner's land or upon the streets and alleys in front of and abutting upon any such lot or piece of land owned by said owner."

Weeds are defined in section 7.40.010 as "unwanted and obnoxious growths of vegetation including broad leaf plants and grasses."

This court's standard of review when addressing the constitutionality of a statute is well established:

"When reviewing the constitutionality of a statute this court must presume the statute is constitutional; all doubts must be resolved in favor of the statute's validity; and before a statute may be stricken down, it must be clearly shown that it violates the Constitution. It is the court's duty to uphold the statute under challenge, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done." *Lakeside Village Improvement Dist. v. Jefferson County, 237 Kan. 106, Syl. para. 2, 697 P.2d 1286 (1985)*.

Legislation is unconstitutionally vague when a person cannot reasonably understand that his or her contemplated conduct is within the scope of that proscribed by the legislation. *Hearn v. City of Overland Park, 244 Kan. 638, 640, 772 P.2d 758*, cert. denied *U.S. , 107 L. Ed. 2d 503, 110 S. Ct. 500 (1989)*.

"The test to determine whether a criminal statute is unconstitutionally vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." *Keim v. State, 13 Kan. App. 2d 604, 606, 777 P.2d 278 (1989)*.

Two inquiries are appropriate to determine whether an ordinance is void for vagueness: (1) whether the ordinance gives fair warning to those persons potentially subject to it; and (2) whether

the ordinance adequately guards against arbitrary and discriminatory enforcement. *State v. Weniger, 9 Kan. App. 2d 705, 708, 687 P.2d 643*, rev. denied *236 Kan. 877 (1984)*.

A statute is not unconstitutionally vague simply because it is difficult to determine if a particular fact situation falls within the language of the statute. *Hearn, 244 Kan. at 641*. A statute is not invalid for vagueness where it uses words of commonly understood meaning. *244 Kan. at 642*. The key to the test for vagueness is a common-sense determination of fundamental fairness. *244 Kan. at 642*.

Where, as in the present case, the legislation does not limit constitutionally protected conduct, the legislation should be upheld unless it " is impermissively vague in all of its applications.'" *244 Kan. at 641*. Thus, the party challenging the legislation must establish that it is unconstitutional on its face, that is, it is incapable of any valid application. The challenger must establish that it is vague in the sense that no standard of conduct is specified at all. *244 Kan. at 641*.

A common sense reading of the City's weed ordinance indicates that the ordinance sufficiently warns persons potentially subject to it. Although the ordinance does not include a detailed listing of the plants that constitute weeds and other vegetation, it does use language commonly understood. The ordinance is clearly limited to vegetation over 18 inches in height. Further, the definition of weeds limits the application of the ordinance to "unwanted and obnoxious growths," thus eliminating the possible application of the ordinance to decorative, well-tended vegetation. When the ordinance is read as a whole it clearly conveys the warning that lots with overgrown grass and vegetation are proscribed.

Additionally, the ordinance adequately guards against arbitrary and discriminatory enforcement. Some discretion is placed in the City to determine whether vegetation exceeding 18 inches in height is unwanted and obnoxious. However, the ordinance is narrowly drawn and provides adequate guidelines for and constraints upon those that enforce it. The ordinance is tailored to prevent vegetation that the City considers undesirable from a public health standpoint. It does not authorize the City to randomly determine that flowering bushes and decorative grasses over 18 inches in height must be cut or destroyed.

The City's weed ordinance is not so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Hudson has failed to establish that the ordinance is incapable of any valid application. The standard of conduct set forth in the ordinance sufficiently conveys the conduct proscribed. As such, the ordinance is not unconstitutionally vague and Hudson's due process rights were not violated by his conviction under the ordinance.

Affirmed.