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Opinion No. 06-043

Constitutionality of Bills Prohibiting Picketing, Protesting, or Demonstrating at Funerals

QUESTION

Are the provisions of H.B. 2625/S.B. 2731 and H.B. 2627/S.B. 2660, making it a misdemeanor to picket, protest, or demonstrate at a funeral or memorial service, constitutional?

OPINION

Although this Office cannot answer this question with absolute certainty, we believe that these bills, as drafted, are constitutionally defensible.

ANALYSIS

House Bill 2625/Senate Bill 2731 and House Bill 2627/Senate Bill 2660 each would create the criminal offense of interfering with a funeral or memorial service. As drafted, H.B. 2625/S.B. 2731 provides that

> (a) A person commits the offense of interfering with a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, if such person acts to obstruct or interfere with such commemorative service or makes any utterance, gesture or display in a manner offensive to the sensibilities of an ordinary person. Picketing, protesting or demonstrating at a funeral or memorial service shall be deemed offensive to the sensibilities of an ordinary person.
>
> (b) The provisions of this section shall only apply to acts within one thousand feet (1000 ft.) of a funeral or burial,

> funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person.
>
> (c) A violation of this section is a Class C misdemeanor.

H.B. 2625, 104th Gen. Assembly, 2d Reg. Sess. (Tenn. 2006). The other bill under consideration, H.B. 2627/S.B. 2660, contains exactly the same language, with the exception that the distance limitation in subsection (b) is 500 feet instead of 1,000.

As an initial matter, we believe that the statute, as drafted, probably would withstand a challenge that the statute is unconstitutionally vague. "[A] statute is void for vagueness if the conduct which it prohibits is not clearly defined." *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972)). The proposed statute might be attacked on the ground that a person of ordinary intelligence would have difficulty determining in advance what constitutes an utterance, gesture, or display that would be considered offensive. *See, e.g., State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994) (presenting unsuccessful vagueness challenge to statute criminalizing placement of anonymous phone calls in offensive or repetitious manner without legitimate purpose).

Where the language of the statute permits, however, the courts are "duty bound to adopt a construction which will not run afoul of constitutional limitations." *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994) (citing *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn.1990)). The proposed statute clearly explains that the act of "[p]icketing, protesting or demonstrating at a funeral or memorial service shall be deemed offensive to the sensibilities of an ordinary person." H.B. 2625 & 2627, 104th Gen. Assembly, 2d Reg. Sess. (Tenn. 2006). Inasmuch as the statute makes clear that picketing, protesting, or demonstrating at a funeral or memorial service is *per se* offensive and, thus, prohibited, the statute is not unconstitutionally vague. A person arrested for picketing, protesting, or demonstrating at a funeral or memorial service cannot viably claim that he did not realize this conduct was prohibited by the statute. At least with regard to the activities of picketing, protesting, and demonstrating, the proposed statute "delimits the proscribed offense with sufficient clarity to enable . . . citizens to conform their conduct to the dictates of the law." *State v. Lakatos*, 900 S.W.2d at 701. The proposed statute, however, would also proscribe other activities that do not involve picketing, protesting, or demonstrating, but which constitute making an "utterance, gesture or display in a manner offensive to the sensibilities of an ordinary person." A more serious issue of vagueness arises as to these activities, although the standard that they may not be "offensive to the sensibilities of an ordinary person" gives the prohibition a fairly clear extent and may, as a practical matter, be the

only way to reach the innumerable acts, statements, and gestures that would detract from the dignity and solemnity that the State has a legitimate interest in fostering.[1]

The more difficult analysis relates to whether the proposed statute would withstand a First Amendment challenge. After carefully considering the provisions of these bills, however, we continue to believe that the proposed statute is defensible. For purposes of our analysis, we recognize that the proposed statute places limitations on the right of citizens to picket on the public streets of Tennessee, "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S. Ct. 2495, 2500, 101 L. Ed. 2d 420 (1988). We further observe that the statute applies to the activities of picketing, protesting, and demonstrating without regard to the content of the message being advocated by the picketer, protestor, or demonstrator. Although the bill's language initially suggests that the statute is aimed only at speech that might be offensive to the listener, the bill later clarifies that the proposed statute's prohibitions apply to any picketing, protesting, or demonstrating at a funeral or memorial service. Thus, upon reflection, we believe the statute to be content-neutral. We construe the proposed statute to apply to all picketers, protestors, and demonstrators at funerals, burials, viewings, memorial services, and funeral processions, regardless of their message.

Under these circumstances, the United States Supreme Court has indicated that the appropriate level of scrutiny is "whether the ordinance is 'narrowly tailored to serve a significant government interest' and whether it 'leave[s] open ample alternative channels of communication." *Frisby v. Schultz*, 487 U.S. at 482, 108 S. Ct. at 2501 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983)). We have no difficulty in recognizing and articulating the significant government interest that would be served by the proposed statute. As observed by the Kansas Attorney General, when asked to opine on the validity of similar legislation,

> preserving the integrity and sanctity of funerals is a legitimate government interest. According to long-standing tradition and custom in the state of Kansas, a funeral or memorial service is a solemn and often sad occasion calling for quiet times of grieving and contemplative remembrance of the departed. Historically, there is an expectation on the part of those attending a funeral that

[1] The only activities defined as "offensive to the sensibilities of an ordinary person" are "[p]icketing, protesting or demonstrating at a funeral or memorial service." No specific reference is made in the second sentence of subsection (a) to the other events encompassed in the first sentence, such as the funeral home viewing and funeral procession. While we assume the intent of the second sentence is to include all of the events mentioned in the first sentence, it would be useful to clarify this by expanding the second sentence to mirror the first.

> the solemnity of the occasion will be maintained. . . . The state of Kansas has a legitimate and abiding interest in providing its bereaved citizens a reasonable margin of space and time surrounding funerals and memorial services within which to pay last respects to friends and loved ones.

Op. Kan. Att'y Gen. No. 92-64 (May 18, 1992) (citations omitted).

We echo the sentiments of the Kansas Attorney General and would further add that funeral services almost invariably incorporate some level of religious worship by friends and family of the deceased, an activity that in itself deserves protection. The laws of the state of Tennessee have long sought to protect the sanctity of such events. *See, e.g.*, Tenn. Code Ann. § 46-2-105 (providing that "[n]o person shall . . . interfere, by words or actions, with any funeral procession or any religious exercises); Tenn. Code Ann. § 55-8-183 (regulating orderly conduct of funeral processions).

Moreover, we believe that the proposed statute is narrowly tailored to serve this legitimate government interest while leaving open ample alternative channels of communication. As drafted, the bills do not seek to prohibit citizens from picketing, protesting, or demonstrating on the public streets of Tennessee. Other public streets remain available for citizens to express their views through picketing, protesting, or demonstrating. The statute only prohibits these activities at funerals, burials, viewings, memorial services, and funeral processions. Stated another way, the statute only prohibits picketing that is focused on a particular funereal event. *See Frisby v. Schultz*, 487 U.S. at 482, 108 S. Ct. at 2501. Inasmuch as the statute's prohibition is of a limited nature, preserving ample alternative channels of communication, we conclude that the proposed statute is defensible against a First Amendment challenge.

Although we believe these bills are defensible as written, we do not mean to imply that they are completely invulnerable to attack. As already mentioned, were it not for the clarifying language that specifically prohibits the activities of picketing, protesting, and demonstrating at funerals and memorial services, the bill would be more vulnerable to attack on the ground that the prohibition against offensive utterances, gestures, and displays is too broad and vague to be enforced. Additionally, there is no assurance that, if asked to rule on the statute's constitutionality, a court would uphold the distance requirement contained in subsection (b). We have been unable to locate any caselaw dealing with this specific type of limitation as to funerals. Obviously, the shorter the distance, the less difficulty the courts will have in upholding the legislation. Recent news articles describe Kentucky legislation that contains only a 300-foot distance requirement, while a Massachussetts statute establishes a 500-foot distance requirement. *See* Mass. Gen. Laws ch. 272, § 42A (West 2000). In *Burson v. Freeman*, 504 U.S. 191, 210,

112 S. Ct. 1846, 1857, 119 L. Ed. 2d 5 (1992), the United States Supreme Court declined to second-guess the Tennessee Legislature's determination that a 100-foot distance limitation was required for campaign activities taking place near polling places on election day. At best, the courts might similarly defer to the distance requirement proposed in the subject legislation. It should be noted, however, that the constitutionality of the distance requirement depends to a large degree upon the government interest sought to be protected. While the State could argue that a 1,000-foot distance is required to preserve the integrity and sanctity of funeral services, the degree to which the courts will defer to the Legislature's determination remains uncertain.

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