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**CRIMINAL COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY**

People v. James¹
(decided January 18, 2005)

Charity James was charged with parading without a permit² and disorderly conduct,³ due to her alleged involvement in protests that took place during the 2004 Republican National Convention in New York City.⁴ Defendant James made a motion to have all

¹ 793 N.Y.S.2d 871 (N.Y. Crim. Ct. 2005).

² N.Y.C. Admin. Code § 10-110 (2005) states, in pertinent part:

a. Permits. A procession, parade, or race shall be permitted upon any street or in any public place only after a written permit therefor has been obtained from the police commissioner. Application for such a permit shall be made in writing, upon a suitable form prescribed and furnished by the department, not less than thirty-six hours previous to the forming or marching of such procession, parade or race. The commissioner shall, after due investigation of such application, grant such permit subject to the following restrictions:

1. It shall be unlawful for the police commissioner to grant a permit where the commissioner has good reason to believe that the proposed procession, parade or race will be disorderly in character or tend to disturb the public peace; . . .

4. Special permits for occasions of extraordinary public interest, not annual or customary, or not so intended to be, may be granted by the commissioner for any street or public place, and for any day or hour, with the written approval of the mayor; . . .

c. Violations. Every person participating in any procession, parade or race, for which a permit has not been issued when required by this section, shall, upon conviction thereof, be punished by a fine of not more than twenty-five dollars, or by imprisonment for not exceeding ten days, or by both such fine and imprisonment.

³ N.Y. Penal Law § 240.20(5) (McKinney 2005) states: “A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [h]e obstructs vehicular or pedestrian traffic.”

⁴ *James*, 793 N.Y.S.2d at 872.

charges against her dismissed.⁵ James alleged that Administrative Code section 10-110 was unconstitutional because “the statute amounts to an impermissible prior restraint on constitutionally protected freedoms of speech and assembly.”⁶

On August 31, 2004, James was arrested behind a police barricade on Seventeenth Street and Fifth Avenue in Manhattan.⁷ Her arrest was due to her alleged involvement in “unlawful protests” that took place during the Republican National Convention.⁸ According to the accusatory instrument, and the deposition of the arresting officer, James was one of more than 100 people that were on Seventeenth Street and Fifth Avenue on August 31, 2004.⁹ James was not in the possession of a permit allowing the 100 or more people to be there and the arresting officer had no knowledge of the existence of a permit.¹⁰ Furthermore, the accusatory instrument stated that her presence on the street caused a “public inconvenience” by not allowing traffic to go by and/or through the street.¹¹ James neither denied that she was among the 100 or more people walking on Seventeenth Street and Fifth Avenue, nor did she argue that she

⁵ *Id.*

⁶ *Id.*; U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); N.Y. CONST. art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech”); N.Y. CONST. art. I, § 9(1) (“No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof”).

⁷ *James*, 793 N.Y.S.2d at 872-73.

⁸ *Id.* at 872.

⁹ *Id.* at 873.

¹⁰ *Id.*

¹¹ *Id.*

had a permit.¹²

“ ‘Prior Restraint’ is defined as a governmental restriction on speech or publication before its actual expression.”¹³ Administrative Code section 10-110 allows the police commissioner to approve and issue permits for parades, processions and races to any group that has properly applied for such permit within at least thirty-six hours before the parade, procession or race is to begin.¹⁴ The statute also provides that the police commissioner may issue a “special permit” for a parade, procession or race that has an “extraordinary public purpose,” thus waiving the usual permit application process.¹⁵ James argued that the discretion left to the police commissioner allows the commissioner to exert prior restraint, by not issuing permits for parades to those groups that the commissioner does not agree with or finds unfavorable.¹⁶

Upon James’s motion, the court was asked to decide two issues: first, whether the accusatory instrument against James was facially sufficient pursuant to Criminal Procedure Law Sections 100.40 and 170.30; second, whether Administrative Code section 10-110 is constitutional or a “prior restraint on constitutionally protected freedoms of speech and assembly and an unconstitutionally selective enforcement of the laws.”¹⁷ Concluding that Administrative Code

¹² *James*, 793 N.Y.S.2d at 875.

¹³ *Id.* at 876.

¹⁴ N.Y.C. Admin. Code § 10-110(a) (2005).

¹⁵ N.Y.C. Admin. Code § 10-110(a)(4) (2005).

¹⁶ *James*, 793 N.Y.S.2d at 876.

¹⁷ *Id.* at 875-76; N.Y. CRIM. PROC. LAW § 100.40 (McKinney 2005) (describing the requirements for an accusatory instrument to be facially sufficient); N.Y. CRIM. PROC. LAW § 170.30 (McKinney 2005) (detailing the grounds for dismissal of an accusatory instrument

section 10-110 was constitutional under both the United States and New York Constitutions and that the accusatory instrument was facially sufficient in accordance with New York Criminal Procedure Laws, the court ruled against the defendant on both issues.¹⁸

The Criminal Court for the City of New York, New York County denied James' motion to find Administrative Code section 10-110 invalid under both the United States and New York Constitutions.¹⁹ The court reasoned that since Administrative Code section 10-110 is a "content-neutral ordinance," it does not need to adhere to the *Freedman* safeguards.²⁰ All that is necessary to ensure that the public's First Amendment rights are not violated by a permit statute allowing prior restraint is that reasons are specified as to why a permit application may be denied: "explanations for denial," and limits as to the time allowed for processing permit applications.²¹ According to the court in this case, "Administrative Code § 10-110 . . . [and] 38 RCNY § 19 clearly comport[] with all of these requirements."²² Therefore, the court decided that Administrative Code section 10-110 is not an exercise of impermissible prior restraint of the freedoms of speech and assembly granted to the public, under both the United States Constitution and the New York State Constitution, by the police commissioner. The court came to this decision despite the discretion that the statute provides to the

upon a defendant's motion).

¹⁸ *James*, 793 N.Y.S.2d at 878, 874-75.

¹⁹ *Id.* at 878.

²⁰ *Id.* at 877.

²¹ *Id.* at 878.

²² *Id.*

police commissioner in his determination of what groups and organizations may obtain a permit to hold a parade, procession, or race on the streets of New York City.

According to the United States Supreme Court, “[a]ny system of prior restraint of expression . . . [bears] a heavy presumption against constitutional validity.”²³ In *Freedman v. Maryland*,²⁴ the constitutionality of a Maryland statute that required an exhibitor to present a film to the State Board of Censors prior to showing it in a theater was challenged.²⁵ Freedman argued that the statute was an unconstitutional prior restraint on freedom of expression due to the censorship board’s ability to bar the showing of a film without any judicial participation, unless the exhibitor chooses to initiate a lengthy judicial appeal in the Maryland courts.²⁶ The Supreme Court laid out three procedural safeguards which are required, in order for a law allowing prior restraint to be found constitutional.

The safeguards presented by the Supreme Court in *Freedman* require first that there be a stipulated period of time within which a license may be given or restrained.²⁷ If there is to be a period of restraint, it must be limited to a “preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.”²⁸ Second, judicial review for such restraint must be available

²³ *James*, 793 N.Y.S.2d at 876 (quoting *Bantam Books Inc., v. Sullivan*, 372 U.S. 58, 70 (1963)).

²⁴ 380 U.S. 51 (1965) (holding that a censorship statute in Maryland was unconstitutional because it was a prior restraint on expression without appropriate safeguards to ensure against violation of the right of expression).

²⁵ *Id.* at 52.

²⁶ *Id.* at 54-55.

²⁷ *Id.* at 59.

immediately to the party being restrained in order to “minimize the deterrent effect of an interim and possibly erroneous denial of a license.”²⁹ Finally, the burden of going to court to have a party’s freedom of expression restrained and the burden of proof that such restraint is valid because the type of expression that is going to be exhibited is criminal, is on the entity enforcing the prior restraint.³⁰ “[O]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.”³¹

About forty years later, in 2002, the Supreme Court revisited the issue of prior restraint in *Thomas v. Chicago Park District*.³² The issue in *Thomas* was whether the requirement of a permit for events consisting of fifty or more people on park grounds was consistent with the First Amendment and in accord with the safeguards of *Freedman*.³³ Thomas and the Windy City Hemp Development Board were seeking a permit to hold a rally advocating the legalization of pot.³⁴ The ordinance being challenged in *Thomas* provided that the decision to grant or deny a permit application was to be made within fourteen days, an application could be denied for one of thirteen reasons, the reason for denial of a permit was to be made in writing to

²⁸ *Id.*

²⁹ *Freedman*, 380 U.S. at 59.

³⁰ *Id.* at 58.

³¹ *Id.*

³² 534 U.S. 316 (2002).

³³ *Id.* at 317.

³⁴ *Id.* at 319-20.

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the applicant and suggest ways for the application to be corrected.³⁵ Furthermore, the statute provided for appeal first to the General Superintendent of the Park District within seven days and then to a trial court, if desired.³⁶ Still, Thomas and the organization that supported the legalization of marijuana brought suit against the park district for its denial of a permit application on the basis that the “ordinance was unconstitutional on its face.”³⁷ Both the district court and the Court of Appeals for the Seventh Circuit found in favor of the park district.³⁸

The Supreme Court explained that it was not necessary to apply the *Freedman* safeguards in *Thomas* because the permit system being challenged was a “content neutral time, place and manner regulation of the use of a public forum” as opposed to the “subject-matter censorship” at issue in *Freedman*.³⁹ According to the Court, the permit system at issue was not focused on speech, but all activity taking place in the park, and is seeking to “coordinate multiple uses of limited space . . . to prevent uses that are dangerous, unlawful, or impermissible.”⁴⁰ The Supreme Court has required that “a time, place, and manner regulation contain adequate standards to guide the official’s decision and render it subject to effective judicial review.”⁴¹ Therefore, pursuant to the Supreme Court’s decision in *Thomas*, when a permit system is content neutral, the First Amendment

³⁵ *Id.* at 318-19.

³⁶ *Id.* at 319.

³⁷ *Thomas*, 534 U.S. at 320.

³⁸ *Id.*

³⁹ *Id.* at 322.

⁴⁰ *Id.*

guidelines set forth in *Freedman* need not apply.

In *MacDonald v. Safir*,⁴² the United State Court of Appeals for the Second Circuit was asked to determine the constitutionality of New York City Administrative Code section 10-110, the same statute at issue in the *James* case.⁴³ The Second Circuit held that the lower court's decision, in holding the statute constitutional, was not supported by the facts presented.⁴⁴ MacDonald was a member of the Million Marijuana March Organization, an organization that sought to legalize marijuana.⁴⁵ New York City Administrative Code section 10-110 gave the guidelines for the issuance of a permit for a parade, procession or race to be held on the streets of New York City.⁴⁶ MacDonald argued that the statute was unconstitutional for several reasons.⁴⁷ First, MacDonald argued that too much discretion was given to the police commissioner in issuing a permit.⁴⁸ Next, there was no specified period of time for the police commissioner's denial or granting of a permit.⁴⁹ Third, the statute did not include any process for judicial review of a denial within a reasonable amount of time.⁵⁰ Fourth, the police commissioner was not required to specify why a permit application was denied.⁵¹ Finally, no burden was

⁴¹ *Id.* at 323.

⁴² 206 F.3d 183 (2d Cir. 2000).

⁴³ *Id.* at 186.

⁴⁴ *Id.* at 196.

⁴⁵ *Id.* at 186.

⁴⁶ N.Y.C. Admin. Code § 10-110.

⁴⁷ *MacDonald*, 206 F.3d at 187.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

placed on the commissioner to support denial of a permit application should the matter progress to litigation.⁵²

MacDonald argued that the statute gave the police commissioner “unbridled discretion” in the issuance of permits, mainly because the commissioner was the one who would determine if a certain “proposed procession, parade or race will be disorderly in character or tend to disturb the public peace.”⁵³ However, the district court decided to dismiss the claims against the commissioner simply based on the words of the statute; this was unacceptable.⁵⁴ The circuit court explained that in determining whether the enactment and enforcement of a particular statute leads to a violation of the First Amendment, the deciding court must look beyond the text of the ordinance.⁵⁵ Should the words of Administrative Code section 10-110 be taken on their face, “unless constrained by administrative construction or by well established practice, [they] appear to afford the Commissioner exactly the sort of discretion that has been found to violate the First Amendment.”⁵⁶

The district court did find, and the circuit court agreed, that Administrative Code section 10-110 was, in fact, a “prior restraint on speech” because permission to hold a parade, procession or race, must be granted in the form of a permit by the police commissioner.⁵⁷ It was up to the court to determine whether, as presented in the

⁵² *MacDonald*, 206 F.3d at 188.

⁵³ *Id.* at 191 (citing N.Y.C. Admin. Code §§ 10-110(a)(1)).

⁵⁴ *Id.* at 193.

⁵⁵ *Id.* at 191.

⁵⁶ *Id.* at 192.

⁵⁷ *MacDonald*, 206 F.3d at 194.

statute, it was a permissible prior restraint. To make that determination, a court would have to look to the Supreme Court's decision in *Freedman*. The circuit court remanded the decision regarding whether or not the statute met the *Freedman* requirements to the lower court upon further proceedings.⁵⁸ Without further evidence as to the level of discretion given to the police commissioner in the granting or denial of permits for parades, processions and races, the circuit court was unable to determine whether the statute amounted to unconstitutional prior restraint.⁵⁹

In *People v. Taub*,⁶⁰ the New York Court of Appeals held a Buffalo ordinance regarding the use of sound amplification equipment on public streets unconstitutional as an infringement of First Amendment rights.⁶¹ The ordinance at issue required that a permit be requested at least five days prior to the scheduled date of use.⁶² "Such a long delay could cast a chill over the freedom of speech in a number of areas by rendering its subject matter stale if not entirely moot."⁶³ Especially in the political arena, the timing of the sharing of ideas, opinions and criticisms is of the utmost importance and the meeting of a requirement cannot trump constitutional rights.⁶⁴ While the ordinance does provide for review of the denial of a permit, the review provided for is only administrative and there is no time limit included in the ordinance,

⁵⁸ *Id.* at 194-95.

⁵⁹ *Id.* at 195.

⁶⁰ 337 N.E.2d 754 (N.Y. 1975).

⁶¹ *Id.* at 755.

⁶² *Id.* at 757.

⁶³ *Id.*

this can be contrasted with Administrative Code § 10-110 at issue in *James* which provides for judicial review and limits the time allowed for review of a denial of a permit.⁶⁵

The Buffalo ordinance also required that the “nature of the subject matter to be broadcast” be included in the permit application.⁶⁶ This is a form of prior restraint.⁶⁷ The “excessive discretion” being given to the police, implying that a denial can be issued simply because the police do not agree with the subject matter for the requested permit.⁶⁸ In other words, the Buffalo ordinance was content-based, while Administrative Code § 10-110 was found to be content-neutral and therefore constitutional.⁶⁹

The New York Court of Appeals has stated that “[t]he use of streets and other public places for the exercise of the right to free speech and peaceable assembly . . . has ‘from ancient times, been a part of the privileges, immunities rights, and liberties of citizens.’ ”⁷⁰ The exercise of these rights has given rise to consistent tension between the citizens and the government who try to maintain safety and order for the public at large.⁷¹ “[T]he power of the State to infringe on the freedoms embodied in the First Amendment is a limited one, defined not by mere rationality of purpose, but by a more

⁶⁴ *Id.*

⁶⁵ *Taub*, 337 N.E.2d at 757; *James*, 793 N.Y.S.2d at 878.

⁶⁶ *Taub*, 337 N.E.2d. at 757.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *James*, 793 N.Y.S.2d at 877.

⁷⁰ *Taub*, 337 N.E.2d at 755 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939)).

⁷¹ *Id.*

stringent requirement of real necessity.”⁷²

Both the First Amendment to the United States Constitution and the New York State Constitution provide, although using different wording, that the freedoms of speech, assembly, and petition are granted to the public.⁷³

The First Amendment’s guarantee of ‘the freedom of speech, or of the press’ prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the ‘evils’ of the printing press in 16th-and 17th-century England.⁷⁴

Essentially, the framers of the Constitution intended to ensure that a governing official would not be able to pass judgment on speech or publication content before it was dispensed to the public.⁷⁵ If this were allowed, it would result in “a scheme conditioning expression on a licensing body’s prior approval of content [that] ‘presents peculiar dangers to constitutionally protected speech.’ ”⁷⁶ In order to determine whether a government is administering an unconstitutional prior restraint on freedom of expression, a deciding court, both federal or state, must now look to whether the permit statute is content neutral or subject-matter specific. That determination is

⁷² *Id.*

⁷³ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); N.Y. CONST. art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech”); N.Y. CONST. art. I, § 9(1) (“No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof”).

⁷⁴ *Thomas*, 534 U.S. at 320.

⁷⁵ *Id.*

made by looking to the language of the statute itself.⁷⁷ Even if the language of the statute is content-neutral, the courts are aware that they must be mindful of the fact that the application of the statute by the licensing body may not be not content-neutral.⁷⁸ Therefore, there is no single, generalized classification for content-neutral and a separate classification for content-based statutes. Instead, these cases must be decided on a case-by-case basis.

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⁷⁶ *Id.* at 321 (quoting *Freedman*, 380 U.S. at 57).

⁷⁷ *Id.* at 322.

⁷⁸ *Id.* at 323.

