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CITY COURT OF NEW YORK
CITY OF ROCHESTER

People v. Griswold[1]
(decided August 17, 2006)

In May of 2004, the City Council of Rochester, New York, enacted section 44-4 of the City Code in response to a perceived increase in number and aggressiveness of panhandlers in certain neighborhoods.[2] Intended to "protect persons from threatening, intimidating or harassing behavior, to keep public places safe and attractive . . . [and to] provide for the free flow of pedestrian and vehicular traffic,"[3] the ordinance prohibits aggressive panhandling in public places or other selected locations.[4] On April 25th, 2006, a passing police officer observed Kevin Griswold standing on a sidewalk, holding a sign which read "Homeless. Hungry. Please Help."[5] Griswold was arrested for violating Rochester City Code section 44-4(H).[6]

At trial, the court sided with Griswold and found that the city ordinance was unconstitutional under both article I, section 8 of the

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[1] 821 N.Y.S.2d 394 (Rochester City Ct. 2006).

[2] PROCEEDINGS OF THE COUNCIL OF THE CITY OF ROCHESTER 2004, 134, *available at* http://www.cityofrochester.gov/main/docs/council/2004Proceedings.pdf (President Giess and Finance and Public Safety Committee Chairman Douglas of the City Council stating the intent of section 44-4, May 18, 2004).

[3] ROCHESTER, N.Y. CITY CODE § 44-4(A) (2007), *available at*: http://www.cityofrochester.gov/main/docs/council/2004Proceedings.pdf.

[4] *Id.* at § 44-4(C)-(H).

[5] *Griswold*, 821 N.Y.S.2d at 397.

[6] *Id.*; ROCHESTER, N.Y. CITY CODE § 44-4(H) states: "No person on a sidewalk or alongside a roadway shall solicit from any occupant of a motor vehicle that is on a street or other public place."

New York State Constitution[7] and the First Amendment of the United States Constitution[8] for having unduly burdened Griswold's right to free speech.[9] In reviewing the ordinance under the First Amendment and in light of the circumstances surrounding Griswold's arrest, the court determined that the restrictions placed on Griswold were most likely content-based, due to the Act's focus on begging,[10] thereby casting a pallor of presumptive invalidity over the regulation.[11] The court, however, stopped short of making such a distinction as the ordinance failed to survive even the less stringent scrutiny applied to content-neutral restrictions.[12]

The *Griswold* court assumed for the purposes of its decision that the ordinance was content-neutral.[13] According to the court, the City of Rochester "failed to satisfy its burden of showing that its legitimate interests 'would be achieved less effectively' " without the ordinance."[14] Questioning both the effectiveness of the ban and the importance of the state interest, the court found that the city allowed for a number of other activities to occur which could arguably have an equal or greater effect on traffic flow than would panhandling.[15]

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[7] N.Y. CONST. art. I, § 8 states in pertinent part: "Every citizen may freely speak . . . and no law shall be passed to restrain or abridge the liberty of speech . . . ."

[8] U.S. CONST. amend. I states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

[9] *Griswold*, 821 N.Y.S.2d at 398.

[10] *Id.* at 400.

[11] *Id.* at 399.

[12] *Id.* at 401.

[13] *Id.*

[14] *Griswold*, 821 N.Y.S.2d at 402 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

[15] *Id.* at 402-03.

Further, the court determined that Griswold's behavior at the time he was arrested did not fall under the ambit of conduct that the City Council found to be offensive to government interests.[16] His act of silently standing and holding a sign was considered neither harassing nor an impediment to vehicular or pedestrian traffic.[17] As a result, Griswold was swept up and arrested according to an overbroad regulation. The court therefore held that "as applied to defendant, Section 44-4(H) violates the First Amendment because it is not narrowly tailored to meet Rochester's legitimate and substantial objectives of preventing unsafe and threatening speech and maintaining traffic flow."[18]

With respect to the New York State Constitution, the *Griswold* court found that the ordinance did not pass the heightened scrutiny demanded by the New York State Court of Appeals, which requires that the state prove a law is no broader than necessary to achieve the government's interest where a law impinges on an individual's freedom of expression.[19] While the court agreed that Rochester had a valid interest under the state constitution in promoting traffic flow and curbing harassment and intimidation, the city failed to show that the law was narrowly tailored to promote those interests.[20] The court found the law worked to prohibit speech which did not offend a legitimate interest of the city.[21]

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[16] *Id.* at 402.
[17] *Id.*
[18] *Id.* at 403.
[19] *Griswold*, 821 N.Y.S.2d at 405 (citing Time Square Books, Inc. v. City of Rochester, 645 N.Y.S.2d 951, 956 (App. Div. 4th Dept. 1996)).
[20] *Id.*
[21] *Id.*

Additionally, the court agreed with the defendant's constitutional arguments, but it disagreed with the defendant's contention that New York State law preempted the Aggressive Panhandling Act.[22] The court found that while state law criminalized activities similar to that of the city ordinance, there was no intent that the state law be intended as exhaustive and therefore prohibiting any local legislation; thus, the city ordinance does not conflict with the state law in any way.[23]

It is well settled that the First Amendment requires that any restriction on protected forms of speech be approached with skepticism. Solicitation of donations has been recognized as a form of protected speech by the Supreme Court.[24] However, the First Amendment's protection is not absolute. The Supreme Court has identified several factors which weigh on the degree of protection to be afforded to speech, and likewise the extent to which governments may legislate.

The state may, at times, restrict public property from certain uses, thereby restricting otherwise protected speech. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,[25] the Supreme Court found that a public school district's restriction on a union's use of an interschool mail system pursuant to a collective bargaining agreement with a competing union was constitutional.[26] The Court held that

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[22] *Id.* at 406.

[23] *Id.*

[24] *See* Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) ("[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech.").

[25] 460 U.S. 37 (1983).

[26] *Id.* at 48.

while the school mail service was public property, it was not traditionally regarded as a public forum, nor was it given that patina by any affirmative state action and was therefore subject to a less stringent standard of review.[27] In such a case, the government is able to limit the use of property to its intended purpose and to the exclusion of all other forms of expression, so long as the restriction is reasonable and is not purely a reaction to a particular message.[28]

Action restricting expression in a traditionally public forum is greeted with greater suspicion by the Court.[29] Should the legislation affect traditional public forums, such as a street corner or park, the government is subject to a more stringent standard.[30] Here, too, the Supreme Court has made a distinction, finding two discrete forms of restriction, each requiring a different degree of scrutiny.[31] Restrictions which are "content-based" impose limitations on the very message being delivered, while "content-neutral" restrictions limit the time and place of speech, regardless of the message contained.[32]

The least stringent test is applied to restrictions that are content-neutral, that is, restrictions that do not impede a particular message but rather only the time, place, and manner of their

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[27] *Id.* at 46-47.
[28] *Id.* at 46.
[29] *Id.* at 45.
[30] *Perry*, 460 U.S. at 45.
[31] *Id.*
[32] *Id.*

delivery.[33] Content-neutral restrictions are constitutional if the government can show that the law is "narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels of communication."[34] However, in *Ward v. Rock Against Racism*, the Court clarified that the law "need not be the least restrictive or least intrusive means."[35] The government bears the burden of showing that the interest would be less effectively promoted absent the regulation.[36]

Should the state undertake to restrict expression based on the content of the message itself, the restriction is presumed invalid, with the state bearing a significant burden of proof.[37] For a content-based restriction to be held constitutional, the state must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[38] Unlike content-neutral restrictions, which have some leeway in the breadth of their effect, content-based restrictions are subject to stricter scrutiny and do not enjoy as charitable an analysis.[39]

Though the federal constitution offers substantial protections against undue restrictions on expression, it represents only the minimum protection that must be afforded with respect to protection

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[33] *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

[34] *Id.* at 63. The Court held that " 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47.

[35] *Ward*, 491 U.S. at 798.

[36] *Id.* at 799.

[37] *See Renton*, 475 U.S. at 46-47.

[38] *See Perry*, 460 U.S. at 45.

[39] *See Renton*, 475 U.S. at 46-47.

offered by state governments. The New York State Court of Appeals has many times asserted that article I, section 8 of the New York State Constitution, the New York State corollary to the First Amendment of the United States Constitution, provides greater protection than its counterpart.[40]

To be held constitutional under article I, section 8, the State must demonstrate that a regulation which indirectly affects protected speech was designed to carry out a legitimate and important government purpose and that it is not overbroad in its application.[41] In *People ex rel. Arcara v. Cloud Books, Inc.*, the defendant, an adult bookstore, challenged a New York Public Health Law which provided for the closure of the defendant's book store for a period of one year after it was believed that its patrons were engaging in illicit sexual activity on the premises.[42] Upon remand from the Supreme Court, which found no First Amendment violation, [43] the New York Court of Appeals determined that the statute implicated the defendant's rights under article I, section 8 of the New York State Constitution.[44]

The court determined that the law burdened a protected right of the defendant's, and therefore a determination on the State

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[40] *See, e.g.*, Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1277 (N.Y. 1991) (finding New York State Constitution article I, section 8 was written to provide broader protections than the First Amendment); People ex rel. Arcara v. Cloud Books, Inc., 503 N.E.2d 492, 494 (N.Y. 1986) ("New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community.").

[41] *See Arcara*, 503 N.E.2d at 495.

[42] *Id.* at 493-94.

[43] *Id.* at 493; *see also* Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).

[44] *Arcara*, 503 N.E.2d at 495.

constitutionality of the provision was required.[45] Though the state was able to articulate an important government interest in curtailing illegal sexual activity on the defendant's premises,[46] the court did not agree that the government met its burden of demonstrating that its action with respect to the defendant was not overbroad.[47] The court found that had the State shown that "other sanctions, such as arresting the offenders, or injunctive relief,"[48] which would have otherwise left the expressive nature of the bookstore unrestrained, were insufficient to affect the goals of the state, the government's burden would have been met.[49]

Both the First Amendment and article I, section 8 of the New York State Constitution appear as mirror images in the textual sense.[50] However, upon interpretation, the New York Court of Appeals has afforded greater protection to speech under the New York State Constitution in certain instances.[51] Where the Supreme Court has declined to expand protections because of the varied opinions of the states, the Court of Appeals has brought otherwise unprotected speech under the aegis of the New York State Constitution.[52] Despite the differences in what is deemed protected

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[45] *Id.*

[46] *Id.* at 494.

[47] *Id.* at 495.

[48] *Id.*

[49] *Arcara*, 503 N.E.2d at 495.

[50] *See supra* notes 7-8 and accompanying text. The provisions, being nearly identical, do not betray any differences in the protections offered.

[51] *See Immuno AG*, 567 N.E.2d at 1278 ("[T]he 'protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by' the Federal Constitution." (quoting O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 281 n.3 (N.Y. 1988))).

[52] *See Arcara*, 503 N.E.2d at 494.

speech, the tests applied under both constitutions are essentially the same.[53] Content-based regulations are subject to strict scrutiny.[54] Yet, content-neutral regulations are attributed greater deference by the courts if they narrowly implicate an important or significant government interest.[55]

It cannot be doubted that the *Griswold* court has applied the analytical principles set out by both the Supreme Court and the New York Court of Appeals largely in the manner intended. However, the *Griswold* court appears to give short shrift to a key government interest and motivating factor behind the ordinance. While it is certainly true that traffic flow and physical safety issues resulting from the exploits of the most flagrant transgressors were major concerns of the Rochester City Council, a review of the Council's intent also reveals a concern that panhandlers in general have an adverse effect on economic vitality of the city by reducing the attractiveness of the city to tourists, consumers and businesses.[56] Yet, the *Griswold* court did not entertain the possibility that economic vitality is a significant government interest under both the federal and

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[53] *See id.* at 495.

[54] *See Time Square Books*, 645 N.Y.S.2d at 955 ("Under the State Constitution, like the Federal Constitution, government regulation of speech that is aimed at the message conveyed must clear a high hurdle to withstand challenge."); *see also Perry*, 460 U.S. at 45 (finding that the state must demonstrate that a "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" for a content-based restriction to be valid).

[55] *See Arcara*, 503 N.E.2d at 495 (holding that a content-neutral restraint is valid under the New York State Constitution if it is "designed to carry out a legitimate and important State objective" and is "no broader than needed to achieve its purpose"); *see also Perry*, 460 U.S. at 45 (finding content-neutral restraints are valid so long as they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication").

[56] ROCHESTER, N.Y. CITY CODE § 44-4(A) (explaining the Council's legislative intent).

state constitutions nor did it counter the City Council's panhandler findings. If the detrimental effect to Rochester's economic well-being was considered a significant interest, Griswold's actions arguably could be within the scope of the law and result in a finding that the ban was not overbroad. However, if such was the case, there is the distinct probability that the City of Rochester would still face the more difficult challenge of meeting the strict standards applied to content-based restrictions.[57]

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[57] *Griswold*, 821 N.Y.S.2d at 400.