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Supreme Court, Appellate Term, First Department, People v. Bull

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Supreme Court, Appellate Term, First Department, People v. Bull

Cover Page Footnote

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Schwartz: Freedom of Speech
SUPREME COURT OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

People v. Bull¹
(decided August 11, 2004)

Michele Bull, along with ten other defendants, was convicted of loitering in violation of New York Penal Law Section 240.35 (4).² Defendants argued that New York Penal Law section 240.35 (4), which prohibits groups from being disguised or masked in public, infringed on their First Amendment³ rights to anonymous speech.⁴ On appeal from the criminal court, the Supreme Court's Appellate Term affirmed the conviction holding that Section 240.35 (4) does not infringe on any First Amendment rights to anonymous speech.⁵

The incident for which defendants were convicted took place at a May Day demonstration in Union Square Park.⁶ The

¹ 784 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004).

² N.Y. PENAL LAW § 240.35(4) (McKinney 2005) which states:

Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities.

³ U.S. CONST. amend. I which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁴ *Bull*, 784 N.Y.S.2d at 272.

⁵ *Id.*

⁶ *Id.* at 271.

defendants, joined by others, assembled in a group, covered their faces with bandanas, and shouted epithets and political slogans in protest.⁷ These actions were clearly prohibited by Penal Law Section 240.35 (4) which makes a person guilty of loitering when that person congregates in a public place in a mask or disguise.⁸

The court relied upon *Church of the American Knights of the Ku Klux Klan v. Kerik*,⁹ which held that New York's anti-mask law was not enacted for the purpose of suppressing freedom of expression, but rather, to aid the governmental interests of deterring violence and apprehending wrongdoers.¹⁰ The American Knights requested a parade permit to hold a demonstration on the steps of the New York County Courthouse.¹¹ After the police department instructed the American Knights that they would violate the statute if they wore masks, the Knights sought an injunction for permission to demonstrate while wearing their trademark masks.¹²

The court in *Kerik* explained the history of the New York anti-mask law to illustrate the necessity of the regulation. The law arose during the "Anti-Rent era" which involved conflicts between landlords and tenants of vast manorial estates in the years 1839 to

⁷ *Id.* at 271-72.

⁸ N.Y. PENAL LAW § 240.35(4).

⁹ 356 F.3d 197 (2d Cir. 2004).

¹⁰ *Id.* at 205.

¹¹ *Id.* at 200.

¹² *Id.* at 200-01.

1865.¹³ The legislation was deemed necessary for the prevention and punishment of crime:

Some anti-renters formed bands of so-called "Indians," disguised in calico gowns and leather masks, who forcibly thwarted landlords' efforts to serve farmers with process or to conduct distress sales After [an] offense, or other and higher crime has been perpetrated, the disguise is laid aside, and even eye witnesses upon the spot, may not be able to identify the guilty.¹⁴

The court explained that the disclosure of the Knights identity did not implicate their First Amendment rights even if a member was less willing to participate in the demonstration as a result.¹⁵ Moreover, the court held that the right to anonymous speech did not include a right to conceal one's identity.¹⁶ "While the *First Amendment* protects the rights of citizens to express their viewpoints, however unpopular, it does not guarantee ideal conditions for doing so" ¹⁷ Therefore, the court held that the right to anonymous speech was not even implicated because the Knights still had an opportunity to express their views, although the manner in which they communicated those views was altered for the benefit of public safety.¹⁸

¹³ *Id.* at 203.

¹⁴ *Kerik*, 356 F.3d at 204.

¹⁵ *Id.* at 209.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

The *Kerik* decision was distinguished from that of *NAACP v. Alabama*¹⁹ where the United States Supreme Court acknowledged a right to anonymous speech.²⁰ The holdings of *NAACP* and its progeny were not extended to permit the concealment of a person's face while demonstrating because the strong need for safety and regulation during such a potentially dangerous situation outweighed the need for protection of the demonstrators.²¹ Although it has been found that anonymity is crucial in private or confidential circumstances, it is not as critical for the expression of ideas as in *People v. Bull* and *Kerik*. The court in *Kerik* explained this difference when it stated, "mask wearing at entertainment events does not pose the same security risks as mask wearing in other circumstances."²²

In *NAACP*, the Attorney General of Alabama sought to enjoin the NAACP in Alabama from conducting further activities due to its failure to file its corporate charter with the Secretary of State.²³ The State also moved for the production of documents, including a list of the names and addresses of NAACP's members.²⁴ The NAACP failed to comply, claiming that Alabama could not constitutionally compel disclosure.²⁵

The Supreme Court agreed with the NAACP, holding that the production order infringed on the members' right of

¹⁹ 357 U.S. 449 (1958).

²⁰ *Kerik*, 356 F.3d at 208.

²¹ *Id.* at 209.

²² *Id.* at 210.

²³ *NAACP*, 357 U.S. at 451.

²⁴ *Id.* at 453.

association. The Court recognized the importance of the freedom to associate as well as the freedom of anonymity in one's association.²⁶ The Court stated:

[C]ompelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.²⁷

Similarly, the Supreme Court in *Buckley v. American Constitutional Law Foundation*²⁸ held that requiring petitioner circulators to wear identification badges stating their name and status violated the First Amendment.²⁹ The Court rejected the argument that the badge served as a way for the public to identify, and the State to detain petitioners who engaged in misconduct.³⁰ In addition to discouraging participation in the petition process, the Supreme Court found that, "[t]he injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest."³¹ Therefore, it found

²⁵ *Id.* at 454.

²⁶ *Id.* at 462.

²⁷ *Id.* at 462-63.

²⁸ 525 U.S. 182 (1999).

²⁹ *Id.* at 200.

³⁰ *Id.* at 198.

³¹ *Id.* at 199.

that this requirement acted as a restraint on communication and was thus, invalid.³²

Moreover, in the United States Supreme Court case, *Consolidated Edison Co. v. Public Service Commission*,³³ the Court found that the New York Public Service Commission violated Consolidated Edison's First Amendment rights by limiting the way it could express its viewpoint on an important controversial issue.³⁴ Consolidated Edison placed information expressing its beliefs on the benefits of nuclear power inside the monthly bills sent to its customers. The commission sought to bar the company from distributing such information,³⁵ but the Supreme Court held that the restriction on bill inserts was unconstitutional in that it prohibited Consolidated Edison from participating in an important public debate.³⁶

However, before the case of *Consolidated Edison Co.* went up to the Supreme Court, the New York Court of Appeals had already decided that restricting the billing inserts did not infringe upon Consolidated Edison's First Amendment rights.³⁷ The Court of Appeals reasoned that the New York Public Service Commission prohibited only one means of expression, leaving Consolidated Edison with an opportunity to convey its message by

³² *Id.* at 200.

³³ 447 U.S. 530 (1980).

³⁴ *Id.* at 533.

³⁵ *Id.* at 532-33.

³⁶ *Id.* at 535.

³⁷ *Consol. Edison Co. v. Pub. Serv. Comm'n*, 390 N.E.2d 749, 755 (N.Y. 1979).

various other methods.³⁸ The court further asserted that the restriction was imposed for the benefit of utility consumers who had no choice but to come in contact with the informational insert, since it was mailed with the consumer's monthly bill.³⁹ Therefore, the court held that the ban was not only constitutional, but that it supported an important governmental interest in protecting the privacy rights of consumers.⁴⁰

In comparing the First Amendment guarantee of freedom of speech and that provided by the New York Constitution, the key difference lies in the language of both. The New York State Constitution expressly provides that, "[e]very citizen may freely speak, write and publish his sentiments on all subjects," whereas the First Amendment only restrains the government from making laws "'abridging the freedom of speech.'" ⁴¹ Thus, New York's Constitution provides a right to freedom of speech, while the Constitution of the United States only promises no interference from the government respecting freedom of speech.

The scope of free speech protected under New York's Constitution has been found to be broader than that protected under federal law.⁴² "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

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *People v. Schrader*, 617 N.Y.S.2d 429, 435 (N.Y. Crim. Ct. 1994).

⁴² *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 494-95 (N.Y. 1986).

community.”⁴³ However, the courts in New York, as well as the United States Supreme Court, have never found that the right to anonymous speech comprises a right to conceal one’s appearance or identity in a public display of expression.⁴⁴ The right of freedom of speech is always secondary to maintaining the safety and health of the public; therefore, regulating the expression of ideas which involves potentially dangerous conduct will not be deemed unconstitutional when balanced against the governmental interest in safety.⁴⁵

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⁴³ *Id.* at 494.

⁴⁴ *Kerik*, 356 F.3d at 209.

⁴⁵ *Id.*