Opinion No. 89-33

December 6, 1989

OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Mark L. Pickering, Senior Trial Prosecutor, Office of the District Attorney, Fifth Judicial District, 101 West Mermod, P.O. Box 1448, Carlsbad, NM 88220

QUESTIONS

Are there constitutional problems with the Carlsbad curfew ordinance?

CONCLUSIONS

Yes.

ANALYSIS

The Carlsbad curfew ordinance makes it unlawful for any minor under age 17 "to be upon any street, alley, road or public place within the city" between the hours of midnight and daylight on Saturday and between 11:00 p.m. and daylight on all other days. The ordinance does not apply to a minor accompanied by a parent or guardian or a person over age eighteen authorized by the parent or guardian or to a minor who "may be performing an errand of necessity, or who may be attending church services or other church meetings or attending any proper or legitimate play, show or other exhibition with his or her parent, guardian or some authorized person over the age of eighteen years, or who shall have written authority from such parent or guardian for the performance of necessary services or to attend such play, show or exhibition." Carlsbad, N.M., Code § 23-11 (1976). Violation of the curfew ordinance is punishable by a fine of $300 or 90 days imprisonment or both, id. § 1-6, but we understand that the provision for imprisonment would not apply to violations handled through the children's court.

We have reviewed the ordinance and conclude that it is unconstitutionally vague and overboard.

Vagueness

As a threshold matter, a vagueness challenge must be made by the proper party. The general rule is that the constitutionality of legislation can be attacked only if the challenger demonstrates that the law, as applied to him, affects his constitutional rights. State v. Casteneda, 97 N.M. 670, 678, 642 P.2d 1129, 1137 (Ct. App. 1982) (statute was not vague as applied to defendant because it proscribed acts that were clearly

applicable to defendant's conduct); State v. Marchiondo, 85 N.M. 627, 630 515 P.2d 146, 149 (Ct. App.) (plaintiffs had no standing to challenge on vagueness grounds portion of statute under which they had not been charged), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973). A person whose conduct was clearly prohibited by the Carlsbad curfew ordinance would not have standing to challenge the vagueness of the ordinance as it might be applied to the conduct of others. City of Milwaukee v. K.F., 145 Wis.2d 24, 33-34, 426 N.W.2d 329, 333 (1988).

We believe, assuming the standing requirements are met, that the Carlsbad ordinance is vulnerable to challenge on vagueness grounds. A law that "forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application" violates the constitutional guarantee to due process of law. State v. Segotta, 100 N.M. 498, 499, 672 P.2d 1129, 1130 (1983); State v. Silva, 86 N.M. 543, 546, 525 P.2d 903, 906 (Ct. App.) (quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926)), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974). An impermissibly vague law fails to establish reasonable standards for determining guilt or innocence and is open to arbitrary enforcement. Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971) (holding vagrancy ordinance that prohibited "loitering" unconstitutional because it condemned as criminal acts which no reasonable person would consider wrong). A law must give adequate notice of what is prohibited. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 550, 603 P.2d 285, 289 (1979). See also AG Op. No. 89-03 (1989) (finding certain provisions of Albuquerque Clean Indoor Air Ordinance unconstitutionally vague).

The Carlsbad ordinance does not define the terms "errand of necessity," "proper or legitimate play, show or other exhibition" and "necessary services." In Allen v. City of Bordentown, 216 N.J. Super. 557, 524 A.2d 478 (Law Div. 1987), the court construed a curfew ordinance that contained an exception for minors "upon an emergency errand or upon legitimate business." The court concluded that those terms were vague and rendered the ordinance void:

An "emergency errand" could be one required for the purpose of securing immediate medical assistance for an injured parent or one merely designed to correct a social omission, such as the failure to deliver a promised gift. The first is surely an "emergency errand" but most would think the second is not. That determination, however, is subjective....

The same must be said of the words "legitimate business." The word "legitimate" is not defined. Does it mean business permitted by law? Is business "legitimate" because the minor so believes? Who is to say what is "legitimate business?" Again, the definition will be supplied by a police officer on a subjective basis permitting the discriminatory enforcement of the ordinance.

216 N.J. Super. at 564-65, 524 A.2d at 482. In our opinion, the cited terms in the Carlsbad ordinance are susceptible to the same criticism. The term "necessary" has different meanings depending on the context in which it is used: "[i]t may import

absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." Black's Law Dictionary 928 (5th ed. 1979). Whether something is considered necessary or a necessity varies from person to person. The term "proper," as usually defined, is even more subjective. See Black's Law Dictionary 1094 (5th ed. 1979) ("[t]hat which is fit, suitable, appropriate, adapted, correct. Reasonably sufficient").

In Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd without opinion, 535 F.2d 1245 (3d Cir.), cert. denied, 429 U.S. 964 (1976), the court concluded that an exception to a curfew ordinance allowing minors to be on the streets in cases of "reasonable necessity" was not unconstitutionally vague. The potential for arbitrary enforcement was alleviated in that case, however, because the exception required prior notice of the facts establishing reasonable necessity from the minor's parent or guardian to the police. Thus, unlike the Carlsbad ordinance, it was clear that the standard applied depended on the parents' view of "reasonable necessity." See also Allen v. City of Bordertown, 216 N.J. Super. at 564, 524 A.2d at 482 (disagreeing with Bykofsky; phrase "reasonable necessity" is less instructive than the law requires).

Without further guidance from the Carlsbad ordinance, it is impossible to know what constitutes a necessary errand, a proper or legitimate play or a necessary service. Such determinations are wholly subjective and may differ significantly from person to person. Thus, the terms are open to varying applications and arbitrary enforcement, and they fail to provide constitutionally adequate notice of what the law prohibits.

Overbreadth

A statute is overboard if it "draws within its ambit conduct protected by the First and Fourteenth Amendments." State v. Silva, 86 N.M. at 547, 525 P.2d at 907. See also State v. Gattis, 105 N.M. 194, 197, 730 P.2d 497, 500 (Ct. App. 1986) (unconstitutionally overboard statute "not only forbids conduct constitutionally subject to proscription but also sweeps within its ambit those actions ordinarily deemed to be constitutionally protected"). Even a government's legitimate and substantial purposes cannot be effected through legislation that broadly stifles fundamental personal liberties when less drastic means are available. Shelton v. Tucker, 364 U.S. 479, 488 (1960). See also United States v. Abeyta, 632 F. Supp. 1301, 1307 (D.N.M. 1986) (constitutionally protected conduct may a be punished only if the government demonstrates that application of a statute will advance a compelling governmental interest and that the statute embodies the least restrictive means by which the governmental interest can be vindicated).

Contrary to the rule applied to vagueness claims, a law may be challenged on grounds of facial overbreadth even though the party's own conduct might constitutionally be regulated. In re J.M., 768 P.2d 219, 224 (Colo. 1989) (rules of standing are broadened to permit party to assert overbreadth of statutes which may chill the constitutionally protected expression of third parties); State v. Brecheisen, 101 N.M. 38, 43, 677 P.2d 1074, 1079 (Ct. App.) (acknowledging that in some instances overbreadth attacks are

permissible by individuals with no personal constitutional claim, but finding those exceptions inapplicable), cert. denied, 101 N.M. 11, 677 P.2d 624 (1984). To be invalidated on its face, a statute or ordinance must be substantially overboard. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) ("there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court"); New York v. Ferber, 458 U.S. 747, 769 (1982); City of Milwaukee v. K.F., 145 Wisc.2d at 40-41, 426 N.W.2d at 336.

Among the rights affected by curfew regulations are freedom of speech, freedom of religion, right to associate and right to travel. Johnson v. City of Opelousas, 658 F.2d 1065, 1072 (5th Cir. 1981). The constitutional rights of children and adults are not co-extensive, however, and states have broader authority to regulate the activities of children. McCollester v. City of Keene, 586 F. Supp. 1381 (D.N.H. 1984). In Bellotti v. Baird, 443 U.S. 622, 634 (1979), the Supreme Court stated that "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing" justify limitations on the freedoms of minors that would be unconstitutional if placed on adults.

Courts are divided on whether the Bellotti factors apply to curfew statutes. If a court finds that they do, it generally will apply a more liberal standard in evaluating restrictions on the constitutional rights of minors. See, e.g., In re J.M., 768 P.2d 219 (Colo. 1989) (concluding that, in light of Bellotti factors as applied to a curfew ordinance, minor's liberty interest was not a fundamental right and upholding the ordinance as having a rational relation to the state's interest in protecting children and the public, reducing juvenile crime and enforcing parental control of their children); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989) (finding that a minor's right of intracity travel is not a fundamental right and applying rational relationship test to uphold ordinance). But see City of Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988) (interest of municipality in protecting youths and curtailing juvenile crime meets strict scrutiny standard requiring a compelling state interest). Cases in which the court finds that the Bellotti factors do not apply usually are those that conclude that the ordinance in issue affects fundamental rights and is unconstitutional. See, e.g., Johnson v. City of Opelousas (Bellotti_____ factors did not apply to overly broad restrictions imposed on fundamental rights of minors); Water v. Barry, 711 F. Supp. 1125 (D.D.C. 1989) (liberty interests of minors are fundamental and were unconstitutionally stifled by ordinance; Bellotti factors did not justify treating rights of adults and minors differently); McCollester v. City of Keene (Bellotti_____ factors did not justify extensive curtailment of juveniles rights).[1]

New Mexico courts have not ruled on what standard should be used to evaluate curfew laws affecting minors. We note, however, that the Carlsbad ordinance contains defects that have invalidated similar ordinances and is not as narrowly drafted as the curfew laws that have been upheld. The ordinance prohibits all minors, including emancipated minors, from being upon "any street, alley, road or public place" during curfew, with some exceptions. Aside from church services and plays, shows or other exhibitions, the ordinance effectively prevents minors from participating in other legal or protected

activities during curfew hours, such as political and other meetings, school functions, employment and travel by motor vehicle interstate, because, to gain access to those activities, minors necessarily would be "upon" a street, alley, road or public place. Those activities are not included in the objectionable conduct sought to be prohibited by the ordinance, and the goals of the ordinance can likely be achieved without inhibiting them. Compare S.W. v. State, 431 So.2d 339 (Fla. Dist. Ct. App. 1983) (finding unconstitutional ordinance that prevented minors from engaging in lawful activities); Allen v. City of Bordentown, 216 N.J.Super. 557, 524 A.2d 478 (Law Div. 1987) (same); In re Mosier, 59 Ohio Misc. 83, 394 N.E.2d 368 (Ct. C.P. 1978) (same) with Bykofsky v. Borough of Middletown, 401 F. Supp. 1243 (M.D. Penn. 1975) (upholding curfew statue with many exceptions that allowed minors to engage in legal activities); In re J.M., 768 P.2d 219 (Colo. 1989) (upholding ordinance which allowed minor to engage in any activity as long as he traveled directly to and from the activity); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989) (upholding ordinance with exception for minors traveling between home and place of employment, church, municipal or school function).

Even in City of Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (Wis. 1988), which, contrary to the trend in other cases, upheld a broadly worded curfew ordinance, the court emphasized that the ordinance did not reach activities outside its ambit. The court upheld the ordinance, which prohibited minors during curfew hours from congregating, loitering, wandering, strolling or standing in or upon public streets and places, as applied to minors attending a dance, but insisted that the ordinance could not be applied validly to a minor walking directly home from work or waiting for a bus:

such activities are certainly not within the proscription of the ordinance, the purpose of which... is to prevent the undirected or aimless activity of minors during curfew hours.

145 Wis.2d at 48, 426 N.W.2d at 339.[2] In contrast, the Carlsbad ordinance, on its face, is not limited to aimless or undirected activity, but applies to any minor "upon" the streets of the municipality unless he or she is within one of the limited exceptions specified in the ordinance.

In summary, we conclude that the Carlsbad ordinance probably is unenforceable. The ordinance is open to challenge on grounds of vagueness and overbreadth because certain of its terms are so imprecise that they give inadequate notice about what is proscribed and the ordinance is phrased so broadly it unnecessarily prevents minors from engaging in lawful and constitutionally protected activities.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

n1 The court in Bykofsky observed that, in addition to protecting the rights of minors subject to curfew laws, "[t]he Constitution protects the right of parents to direct their children's upbringing and family autonomy against state interference." 401 F. Supp. at 1262. Some courts have concluded that curfew statutes impermissibly interfere with parental rights. See McCollester v. City of Keene, 586 F. Supp. at 1386 (ordinance restricts parents' protected liberty interests in family and child rearing by usurping parental discretion in supervising a child's activities); Allen v. City of Bordentown, 216 N.J. Super. at 574, 524 A.2d at 487 (ordinance interferes with rights of parents to have their children exercise fundamental constitutional rights). But see Bykofsky, 401 F. Supp. at 1264 (ordinance with numerous exceptions constituted only a minimal interference with parents' rights); In re J.M., 768 P.2d at 223 (controlling minor's freedom during curfew hours reinforces parental authority and encourages parents to take an active role in supervising their children).

n2 The court in City of Milwaukee also found it noteworthy that children accompanied by their parents or other specified adults were not subject to the curfew restrictions. 145 Wis.2d at 46, 426 N.W.2d at 339. However, most curfew statutes reviewed by courts have contained similar exceptions, including those found unconstitutional. See, e.g., Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981). Thus, we conclude that this feature alone is not sufficient to cure an otherwise invalid ordinance.