

3-1037

846

Record No. 1428

In the
Supreme Court of Appeals of Virginia
at Richmond

JOE BENSON, Plaintiff in Error,

v.

CITY OF NORFOLK, Defendant in Error.

FROM THE CORPORATION COURT, PART TWO, OF CITY OF NORFOLK

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 1428

JOE BENSON, Plaintiff in Error,

versus

CITY OF NORFOLK, Defendant in Error.

*To the Honorable Chief Justice and Associate Justices of the
Supreme Court of Appeals of Virginia:*

Your petitioner, Joe Benson, hereinafter called the defendant, respectfully represents that he is aggrieved by a final judgment of the Corporation Court of the City of Norfolk, Virginia, Part Two, entered on the twenty-sixth day of May, 1933, wherein your petitioner was sentenced to confinement in the City Jail for a term of thirty days and to pay a fine of Fifty Dollars. For the reasons hereinafter given, your petitioner asks that the said judgment be set aside, the warrant dismissed or a new trial awarded him.

STATEMENT OF THE CASE.

It will appear from the transcript of record accompanying this petition that on the twenty-eighth day of February, 1933, the defendant was arrested under a city warrant which charged him with the violation of Section 483 of the Code of the City of Norfolk, to-wit: "Failing to move on when told to do so by a police officer." (R., 1.) This Section reads as follows:

"Sec. 483. Authority of police to require persons on street to move on.

“Any person or persons, vending or hawking goods, wares, or merchandise, or loitering or standing on any of the streets or ways of the City, shall, when required so to do by any member of the police force, move on, or any group of persons standing shall separate and move on, and cease to occupy such position on the street or way, under penalty of not less than three nor more than fifty dollars for each offense, and in addition, in the discretion of the Police Justice, may be confined in jail not exceeding thirty days.” (R., 5, 6.)

When the case was called for trial the defendant moved to quash the warrant upon the ground that the section of the City Code in question was unconstitutional, in that there were no rules laid down to guide the police officer in requiring persons standing upon the streets of the City of Norfolk to move on. This motion of the defendant was overruled by the Court (R., 5, 6). During the progress of the trial the above ordinance was the only ordinance introduced in evidence by the City of Norfolk (R., 6). After the verdict of the Jury, the defendant moved for a new trial upon the ground that the ordinance in question was void. (R., 7.) This motion of the defendant was likewise overruled by the Court and judgment entered on the verdict. (R., 7.)

ASSIGNMENTS OF ERROR.

1. The Court erred in overruling the defendant's motion to quash the warrant upon the ground that the ordinance was unconstitutional.
2. The Court erred in overruling the defendant's motion for a new trial, the motion being based upon the invalidity of the ordinance.

The sole question presented to the Court is whether or not Section 483 of the Code of the City of Norfolk is void. It has been held valid by the two judges of the Corporation Courts of the City of Norfolk. A similar ordinance, and insofar as standing or loitering upon the streets goes, an ordinance exactly the same as the one in question, has recently been held to be void by the Judge of the Hustings Court of the City of Richmond, Part One. (Copy of Richmond ordinance attached to the petition.)

The test, of course, of the validity of the ordinance is not what has been done but what may be done under it. However, during the past year the writer of this petition is not aware of any arrests having been made under this ordinance in

Norfolk except of several white and negro people whose political and economic beliefs do not happen to coincide with the opinions of the police officers.

It will be noted from the ordinance that the right to require a person or persons standing upon the street to move on is vested solely in the police officer. No judge or other conservator of the peace has such authority. If, therefore, a conservator of the peace of the City of Norfolk were to be walking along the streets and were to come upon a crowd of people completely blocking the street and sidewalk and requested them to separate so that he might pass by, and they refused to do so, they would not be guilty of violating this ordinance. If such conservator of the peace requested a police officer to require a crowd to move and the police officer failed to do so, the persons blocking the street would not be guilty of a violation of this ordinance, nor would the police officer be derelict in the performance of his duty under this ordinance in refusing to require the people to move on. In other words, the discretion vested in the police officer is solely an arbitrary discretion. He may see one person standing upon the sidewalk for a brief period and require him to move on, whereas standing near the same person may be a crowd of people completely obstructing traffic and the police officer need not require them to move on.

The gravamen of the offense is refusing to obey a police officer, and the people using the streets and sidewalks of Norfolk are completely subject to the whim and caprice of police officers.

There is no denial of the right of the City of Norfolk to regulate in a reasonable manner the use of its streets, but in doing this it should lay down rules applicable to all persons alike, and for the violation of which all persons alike might be arrested; and if and when a police officer saw these rules being violated, it would be his positive duty to make arrests.

We are of the opinion, as was the Judge of Hustings Court of the City of Richmond, Part One, that the case of *Thompson vs. Smith*, 155 Virginia 367, is controlling, and that it sustains the contention of the defendant that the ordinance in question is void. It would seem that an ordinance granting to heads of departments discretionary powers should be more readily upheld than the ordinance under consideration. Yet in the above case the Court said:

“It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers

or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government, whether state or municipal, to determine and declare what the law shall be, and the legislative branch of the government may not divest itself of this function or delegate it to executive or administrative officers."

There are but few cases dealing specifically with a statute or ordinance similar to the instant one. We call the Court's attention, however, to the case of the *People of the State of New York, Respt.*, vs. *I. Silvan Galpern, Appt.*, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785, which is somewhat in point. The statute in that case, however, under which the defendant was convicted made it a breach of the peace for one who "congregates with others on a public street and refuses to move on when ordered by the police". This statute was applicable to cities having a population of more than half a million.

The City of Norfolk, in the Corporation Court, relied mainly upon the case of *City of Chariton vs. Fitzsimmons*, (Iowa) 54 N. W. 146. We quote the syllabus in that case to show that the ordinance involved there was in no wise similar to the ordinance under which this defendant was convicted:

"An ordinance of a city prohibiting the collection and marching of crowds and processions, and the making of noise with musical instruments and otherwise on the streets and sidewalks, so as to obstruct travel, frighten horses, interfere with business, or disturb others, is not unreasonable and invalid because it makes it the duty of the mayor or city marshal first to order the offenders to desist, and provides that 'the failure or refusal of any person or persons to promptly obey such order' is a misdemeanor, since the gravamen of the offense is the commission of the prohibited acts, and not the disobedience to such order."

The defendant further contends that the ordinance should be held void upon the ground that it is unreasonable. The General Assembly of Virginia has never conferred upon the City of Norfolk specific power to pass the above ordinance. It was passed under Section 11 of the Charter of the City of Norfolk (Acts of Assembly 1918), giving the City the right to "regulate" the use of the streets. This being the case, the question of the reasonableness of the ordinance is, of course, subject to review by the courts. *Stein vs. Rich-*

mond 2 Virginia Law Reg., (N. S.), 829; McQuillin on Municipal Ordinances, Section 182; *Danville vs. Hatcher*, 101 Virginia 523.

Assuming that the gravamen of the offense is standing upon the sidewalks of the City of Norfolk (and certainly its validity could not be sustained upon any other ground) then the Council of the City of Norfolk has attempted to make that unlawful which has always been lawful in the State of Virginia. It will be noted that there are no exceptions incorporated in this ordinance. Therefore, if a person having an engagement to meet a friend at a certain street corner and be waiting there to fill the engagement and a police officer directed him to move on, the person would be compelled to do so. If two or more people be engaged in conversation on a sidewalk or street of the City of Norfolk and a police officer directed them to move on, they would be compelled to do so; or if a person were waiting for a street car or bus and were directed to move on by a police officer, he would have to do so.

It will be kept in mind that we are not dealing with the right of the City to pass an ordinance prohibiting people from impeding traffic; nor are we dealing with an ordinance prohibiting disorderly conduct upon the streets and ways of the City of Norfolk. Surely, however, a person should not be prohibited from standing upon a street or sidewalk of the City of Norfolk when by so doing he is in no wise interfering with the rights of others to the use of the sidewalk or street. The right to stand upon a sidewalk or street has been a right exercised in common by the people of this State and before Norfolk is permitted to take it away, the City should be required to secure specific power from the people of the State through their representatives in the General Assembly.

For the foregoing reasons your petitioner prays that a writ of error and *supersedeas* may be awarded him, in order that the said judgment, for the causes of errors aforesaid, before you may be caused to come, that the whole matter in the said judgment contained may be re-heard, and that the judgment may be reversed and annulled.

Counsel for the Plaintiff in Error adopts this petition as his opening brief.

JOE BENSON,
By ERNEST S. MERRILL,
Counsel.

I, Ernest S. Merrill, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the judgment complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

Given under my hand this fourteenth day of July, 1933.

ERNEST S. MERRILL.

I, Ernest S. Merrill, Counsel for the defendant, the plaintiff in error, do hereby certify that I have on the fourteenth day of July, 1933, personally delivered a copy of this Petition for a Writ of Error and *Supersedeas* to Johnathan W. Old, Jr., Assistant City Attorney for the City of Norfolk, who represented the City at the trial of this case. I do not desire a personal hearing before the Court or any Judge of the Court.

ERNEST S. MERRILL.

Dated at Norfolk, Virginia, July 14th, 1933.

Received July 17, 1933.

M. B. W.

Writ of error granted and *supersedeas* awarded, but this order shall not operate to discharge the accused from custody or relieve him of bail if on bail.

E. W. HUDGINS.

7/31/33.

Received August 1, 1933.

M. B. WATTS, Clerk.

EXHIBIT (With Petition).

The following is a copy of the Richmond City Ordinance referred to in the petition, which Judge John L. Ingram of Hustings Court of the City of Richmond, Part One, held invalid March 27, 1933.

“That any person or persons loitering or standing on the street, sidewalk, or curb, shall move on or separate when required so to do by any member of the police force, and cease to occupy such position on the street, sidewalk, or curb, under

the penalty of not less than three nor more than fifty dollars for each offense, and, in addition, in the discretion of the police justice, may be confined in jail not exceeding thirty days."

(Section 41, chapter 48, Richmond City Code.)

RECORD

VIRGINIA:

Pleas before the Corporation Court of the City of Norfolk, Number Two, on the 26th day of May, 1933.

Be It Remembered, that heretofore, to-wit: On the 28th day of February, 1933, Officer T. J. Murden of the Norfolk Police Department, who swore out a warrant against Joe Benson, in the following words and figures, to-wit:

WARRANT FOR VIOLATION OF CITY ORDINANCE.

Commonwealth of Virginia,
City of Norfolk, to-wit:

To any of the Police Officers of the City of Norfolk:

Whereas Off. T. J. Murden, Norfolk Police Depart., of the City of Norfolk, has this day made complaint and information on oath, before me, R. B. Spindle, Jr., Police Justice of said City, that on the 24th day of Feb., 1933, in said City Joe Benson, hereinafter called accused, did unlawfully violate the ordinances of the City of Norfolk, in that he did Vio. Sec. 483 City Code, to-wit: failing to move on when told to do so by a police officer (On Appeal), and whereas I see good reason to believe that an offense has been committed:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and take before the Police Justice of said City, in the Police Court thereof, the body of the said accused to answer said complaint, and to be further dealt with according to
page 2 } law;

And moreover, upon the arrest of the said accused, by virtue of this warrant, I command you in the name of Commonwealth of Virginia, to summon to appear at the same time and place to testify as witnesses on behalf of the City of Norfolk touching the matter of said complaint,

the following persons: W. I. Bagnell, 614 Brambleton Ave., H. L. Spratley, 801 B. Ave., E. M. Revel, 620 Brewer St., H. J. Griffith, 909 Wood St., Offs. Murden, T. J., Marsha, T. J., and have there and then this warrant with your return thereon.

Given under my hand and seal this 28th day of Feb., 1933.

R. B. SPINDLE, JR.,
Police Justice. (Seal)

Upon hearing the evidence on the foregoing charge, the above mentioned accused is found guilty as charged in said warrant, and I do therefore adjudge that he be confined in the jail of the City of Norfolk for the term of and do pay a fine of \$25.00 and \$2.00 costs incident to said prosecution and conviction as provided by law.

On motion of said defendant an appeal is granted to the next term of the Corporation Court of the City of Norfolk, No. 2, to-wit, the first Monday in March, 1933, and the witnesses above named were severally duly recognized each in the sum of One Hundred (\$100.00) Dollars, payable to the Commonwealth of Virginia, for their appearance before said

Court to give evidence on said charge and not to
page 3 } depart hence without leave of said court.

Given under my hand this 28th day of Feb., 1933.

R. B. SPINDLE, JR.,
Police Justice.

And now at this day, to-wit: In said Court on the 24th day of March, 1933.

This day came the defendant, and also came the Attorney for the City of Norfolk, and thereupon came seven lawful men, from which panel the City of Norfolk and the defendant each struck one, leaving the following jury, to-wit: T. W. Thomas, J. H. Anderson, W. S. Barnes, R. G. Hill and G. Powers, who were sworn to well and truly try the issue joined, and having heard the evidence and argument of counsel, returned a verdict in the following words: "We the jury find the defendant guilty as charged in the warrant and impose a fine of fifty dollars and thirty days in jail." Thereupon, the said defendant moved the Court to set aside the verdict of the jury and grant him a new trial, the further hearing of which motion is continued until the 28th day of March, 1933.

And afterwards; In said Court on the 26th day of May, 1933.

This day again came the defendant, and also came the Attorney for the City of Norfolk, and the motion page 4 } for a new trial, heretofore made on the 24th day of March, 1933, having been fully heard by the Court, is overruled, to which action of the Court in overruling said motion, the defendant, by counsel, duly excepted. Whereupon, it is considered by the Court that the said defendant be confined in the City Jail for the period of thirty days and fined the sum of Fifty Dollars, and be required to pay the costs of his prosecution. Thereupon, the said defendant, by counsel, moved the Court for time in which to apply for a writ of error to the foregoing judgment, which motion, having been fully heard by the Court, is sustained, and it is ordered that the execution of the foregoing judgment be and the same is hereby suspended for the period of sixty days. Thereupon, the said Joe Benson, 533 W. 36th St., with Fannie Davis, 1043 E. Olney Road, as surety, were each duly recognized in the penalty of One Hundred Dollars, conditioned that the said Joe Benson shall appear before this Court sixty days from this date.

And now, on this day, to-wit: In the said Court on the 7th day of July, 1933.

This day, within the time prescribed by law, the defendant tendered his Certificates of Exception Numbers 1 and 2; And it appearing to the Court that the City of Norfolk, by and through the Assistant City Attorney, has had reasonable notice of the time and place at which said Certificates of Exception were to be tendered to the page 5 } Court, the same were signed and made a part of the record in this case.

The following are the Certificates of Exception referred to in the foregoing order:

CERTIFICATE OF EXCEPTION NUMBER ONE.

The Court hereby certifies that before the trial of this case was begun the defendant moved to quash the warrant upon the ground that the ordinance upon which the warrant was based was unconstitutional; and it was agreed between the attorney representing the City of Norfolk and the at-

torney representing the defendant that the warrant charged a violation of the following ordinance of the City of Norfolk, which was in force and effect at the time of the violation thereof alleged in said warrant:

“Sec. 483. Authority of police to require persons on street to move on.

And person or persons, vending or hawking goods, wares, or merchandise, or loitering or standing on any of the streets or ways of the City, shall, when required so to do by any member of the police force, move on, or any group of persons standing shall separate and move on, and cease to occupy such position on the street or way, under penalty of not less than three *more* than fifty dollars for each offense, and in addition, in the discretion of the Police Justice, page 6 } may be confined in jail not exceeding thirty days.”

The Court, being of the opinion that said ordinance was constitutional, overruled the defendant's motion to quash the warrant, to which action of the Court the defendant expected.

Teste: This 7th day of July, 1933.

JAMES U. GOODE, Judge.

CERTIFICATE OF EXCEPTION NUMBER TWO.

The Court hereby certifies that during the trial of this case the following ordinance was the only ordinance introduced in evidence by the City of Norfolk for the purpose of maintaining the charge set forth in the warrant:

“Sec. 483. Authority of police to require persons on street to move on.

Any person or persons, vending or hawking goods, wares, or merchandise, or loitering or standing on any of the streets or ways of the City, shall, when required so to do by any member of the police force, move on, or any group of persons standing shall separate and move on, and cease to occupy such position on the street or way, under penalty of not less than three nor more than fifty dollars for each offense, and in addition, in the discretion of the Police Justice, may be confined in jail not exceeding thirty days.”

The Court further certifies that there was sufficient evidence to prove beyond a reasonable doubt that the defendant was one of a group of persons standing on a sidewalk } walk of the City of Norfolk, and refused to move on when required to do so by a police officer of said City.

And the Court further certifies that after the jury had rendered its verdict the defendant moved for a new trial, which was later argued, upon the ground that the ordinance introduced in evidence was unconstitutional; but the Court overruled said motion, to which action of the Court the defendant excepted.

Teste: This 7th day of July, 1933.

JAMES U. GOODE, Judge.

page 8 } Virginia:

In the Clerk's Office of the Corporation Court of the City of Norfolk, Number Two.

I, W. L. Prieur, Jr., Clerk of the aforesaid Court, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of City of Norfolk, plaintiff, vs. Joe Benson, defendant, lately pending in said Court.

I further certify that said copy was not made up and completed until the Assistant City Attorney for the City of Norfolk had had due notice of the making of the same and the intention of the defendant to take an appeal therein.

Given under my hand this 7th day of July, 1933.

W. L. PRIEUR, JR., Clerk.

Fee for this record, \$9.75.

A Copy—Teste:

M. B. WATTS, C. C.

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