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Constitutional Law—Due Process and Police Power—Criminal Statutes

Miles A. Lance

Judge Van Voorhis, dissenting, argued that *Smith v. California* served to render Section 1141 unconstitutional. In view of the clear demonstration in *Shapiro* of the legislature's intent to dispense with *scienter*, a construction reading into the statute a requirement of *scienter* exceeded judicial power.

Despite the dissent, the decision does not shock. If there is a possible construction which will uphold the statute, the Court should adopt it. The earlier decisions in the Appellate Division afford good evidence that the construction is not strained. Further, if the statute is clear on its face, the court need not attempt to determine the intent of the legislature. Absent the *Shapiro* decision, it is extremely unlikely that a legislative intent contrary to the holding of the Supreme Court would have been considered. Certainly, if the statute were stricken, it would have been reenacted as now interpreted. The only objection open is the impact of the decision upon the defendants. The disposition of the case does not, however, deny them their day in court on the question of *scienter*. If they have objection, it is only upon the grounds that they have been deprived of the benefit of a fortuitous gap in the law.

Bd.

DUE PROCESS AND POLICE POWER— CRIMINAL STATUTES

The enactment of a criminal statute must be a reasonable exercise of the police power under the Fourteenth Amendment of the United States Constitution.[65] For a court to uphold a statute making certain conduct criminal, it must find some clear and reasonable connection between the statute and the promotion of health, comfort, safety and welfare of society.[66]

In *People v. Bunis*,[67] the defendant was the owner of a bookstore in which coverless magazines were sold. An information filed against the defendant in the City Court of Buffalo charged him with a violation of Section 436-d of the New York Penal Law.[68] The City Court dismissed the information on the grounds of stare decisis, noting that the supreme court,[69] sitting in another county, had held the same statute unconstitutional as an arbitrary and unreasonable exercise of the police power. An appeal from the dismissal was taken to the Supreme Court, Appellate Term,[70] the State contending that this statute was a lawful use of the police power in that its purpose was to prevent bookdealers, such as the defendant, from tearing off the covers of magazines, returning the

65. While there is some indication that the scope of the police power under art. 1, § 6 of the New York Constitution is narrower than under the Fourteenth Amendment, it is not now relevant to make a distinction; See Opinions of the Attorney General (1959) at 96.

66. Cf. Trio Distr. Corp. v. City of Albany, 2 N.Y.2d 690, 163 N.Y.S.2d 589 (1957); Defiance Milk Products v. DuMond, 309 N.Y. 537, 132 N.E.2d 829 (1956); People v. Gillson, 109 N.Y. 389, 17 N.E. 343 (1888).

67. 9 N.Y.2d 1, 210 N.Y.S.2d 505 (1961).

68. N.Y. Penal Law § 436-d:

Any person who knowingly sells . . . any magazine . . . from which the cover or title page has been removed . . . is guilty of a misdemeanor.

69. People ex rel Bunis v. Simmers, 13 Misc. 2d 1097, 181 N.Y.S.2d 388 (Sup. Ct. 1958).

70. 24 Misc. 2d 561, 205 N.Y.S.2d 517 (Sup. Ct. 1960).

covers for full credit to the publisher, and then reselling the magazines without covers at a reduced price to the public.[71] This legislative purpose, it was contended, was proper because the statute protected not only the owners of the returns but also the public from unscrupulous sellers of such merchandise who did not have the legal title to it. The defendant contended that the purpose of the statute was only to protect the publisher, and furthermore that it arbitrarily and unreasonably prohibited lawful conduct.

The supreme court accepted the State's contention. The court indicated that the statute was not so broad as to prohibit the lawful business of a second hand bookdealer completely but only to prevent him from dealing in second hand material where the cover page had been removed. The court rejected the previous supreme court decision[72] on the grounds that the presiding judge in that case incorrectly found that the purpose of the statute was to confer an economic benefit on publishers, and therefore, it had no public purpose.

On appeal to the Court of Appeals, a unanimous Court upheld the position of the defendant. The statute, in forbiding "any" person from selling "any" coverless magazine, thereby prohibited lawful conduct, the prohibition of which had no connection with the public welfare. The Court held that the legislature may not validly make criminal the doing of an act, which is innocent in itself, merely because such act may be part of an illegal scheme. The statute must be narrower in scope and directly attack the illegal scheme to defraud publishers.

It is apparent from reading the statute that it is overbroad, regardless of whether the legislative intent in passing the statute was proper or not, and that the Supreme Court made its error in this particular, as it did not construe a penal statute with sufficient strictness.[73]

This case then gives at least two possible reasons for holding a criminal statute to be an abuse of the police power, and if read in connection with *People v. Munoz*,[74] decided by the Court of Appeals a week later, it indicates the elastic meaning of the phrase, "reasonable connection between the statute and the promotion of health, comfort, safety and welfare of society." These two cases also illustrate the overlapping areas between the concepts of the unreasonable use of the police power and the unconstitutionality of a statute due to vagueness.

In the *Munoz* case the defendant, having had a pocket knife in his pocket, was convicted in Magistrates' court of violating Section 436-5.2 of the New York City Administrative Code.[75] The defendant appealed to the Appellate

71. N.Y. State Legis. Annual (1956) at 25.
72. Supra note 69.
73. Cf. People v. Shifrin, 301 N.Y. 445, 94 N.E.2d 794 (1950). Accord, People v. Estreich, 297 N.Y. 910, 79 N.E.2d 742 (1948).
74. 9 N.Y.2d 51, 211 N.Y.S.2d 146 (1961).
75. New York Admin. Code § 436-5.2:
(a) Legislative findings. It is hereby declared and found that the unlawful use by persons under twenty-one years of age in public places of knives . . . is a menace to the public health, peace, safety and welfare. . . .

Part of the Court of Special Sessions,[76] contending primarily that the statute was unconstitutionally vague and an arbitrary and unreasonable abuse of the police power. The Court of Special Sessions affirmed the defendant's conviction, holding that subdivision (b), read with the exceptions enumerated in subdivision (c), is clearly understandable when the language is given its ordinary and usual meaning. The court disposed of the police power issue by indicating generally that there was a reasonable relation between the statute and the public welfare. The court also held that every presumption is in favor of constitutionality in construing a statute.[77]

On appeal the Court of Appeals reversed the defendant's conviction upon the grounds that the statute was too vague in that it did not define what articles were specifically prohibited, nor did it distinguish between sexes. According to the Court, it was uncertain whether a minor female who was carrying a knitting needle would fall within the statute. The Court held that carrying a penknife was not connected with any moral guilt standing alone; therefore, a person in possession of such an instrument would not have knowledge of this moral wrong without being told. Under such circumstances, it would be imperative for the statute to be specific in outlining the acts rendered criminal.

The State contended that since the statute excludes instances where the instrument is carried under circumstances that tend to establish lawfulness, not however to include amusement or self defense, it is sufficiently specific. The Court, in rejecting this contention, said that the language only rendered the statute more vague, since when analyzed it prohibits what is lawful only if it is unlawful; that the statute implied that the defendant is to be exonerated if he can prove no criminal intent, notwithstanding that no criminal intent is required for the offense.

On the police power issue, the Court held that although a statute may render conduct criminal without requiring a specific or general intent, there must be some reasonable relationship between public safety, health, morals or welfare and the act prohibited, and that no such reasonable relationship existed here. This holding was apparently premised on the argument that if this statute were specifically to require criminal intent it would be constitutional. However, such intent cannot be presumed from the possession of innocent articles alone.

(b) It shall be unlawful for any person under the age of twenty-one years to carry . . . in any public place . . . any . . . knife or sharp pointed or edged instrument which may be used for cutting or puncturing.

(c) Such person shall not be in violation . . . if his possession is necessary for his employment . . . or if such possession is for use while he is engaged in or returning from a place of hunting . . . and wherever required, is also carrying a currently valid license . . . or if such person is a duly enrolled member of the Boy Scouts of America . . . and such possession is necessary to participate in the activities of such organization . . . or if the said knife or instrument is carried under circumstances that tend to establish that its possession is for a lawful purpose, not however to include self-defense or amusement.

76. 22 Misc. 2d 1078, 200 N.Y.S.2d 957 (1960).

77. Cf. Church v. Town of Islip, 8 N.Y.2d 255, 203 N.Y.S.2d 869 (1960); Wiggins v. Town of Somers, 4 N.Y.2d 215, 173 N.Y.S.2d 579 (1958).

Legislative presumptions to be valid must have enough basis in human experience so that the presumption has some fair relationship or natural connection with the fact on which it rests.[78]

Chief Judge Desmond and Judge Dye dissented on the ground that this statute does not go as far as statutes which make criminal the selling or possession of an imitation pistol,[79] or the sale of fireworks,[80] and that the legislative purpose premising the statute was valid in that it was to prevent gang wars and the like. On the vagueness issue, the dissenting Judges followed the reasoning of the lower court in saying that the statute, although general in coverage, was specific in its exceptions, so that there could be no question as to what instruments were prohibited, or who was prohibited from carrying them.

It would seem that the Court of Appeals was in error in part in declaring this statute void for vagueness, and that the dissenting Judges were correct. The language, if read in its ordinary meaning, obviously includes anyone under twenty-one and any sharp pointed instrument. The vaguest exception to the general coverage is where a minor can exonerate himself if circumstances tend to show lawful purposes, except for amusement or self defense. But it would seem that the language of the statute is sufficiently certain in the constitutional sense, since it gives a person a reasonably certain standard of conduct to follow.[81] However, this last provision, together with the law on statutory presumptions, can be looked upon as making the statute arbitrary and unreasonable, as was also indicated in the Court's opinion. It will also be noted that this statute could be held unconstitutional on the pure holding of the *Bunis* case. A blanket prohibition of the carrying of a knife, even when used for amusement purposes, is arbitrary and unreasonable, irrespective of the effect of statutory presumptions.

The Court in *People v. Merolla*,[82] also decided this term, passed upon issues similar to those in the *Munoz* case. In the *Merolla* case, the relevant statute was Section 7 of the Waterfront Commission Act.[83] The defendant was convicted under this statute in the Court of Special Sessions, after he was observed by investigators in a pier loading area making contacts with longshoremen. Nine of the twelve men so contacted gave him money. Upon being questioned, the defendant stated that he was selling shoes, but he could not give specific names of purchasers, nor could this story be verified at the trial.

78. Cf. Speiser v. Randall, 357 U.S. 513 (1958); Tot v. United States, 319 U.S. 463 (1943).
79. New York City Admin. Code § 435-5.0(g).
80. N.Y. Penal Law § 1894-a.
81. Cf. Roth v. United States, 354 U.S. 476 (1957); Boyce Motor Lines. v. United States, 342 U.S. 337 (1952).
82. 9 N.Y.2d 62, 211 N.Y.S.2d 155 (1961).
83. N.Y. Unconsol. Laws § 9932 (McKinney 1961):
No person shall without satisfactory explanation, loiter upon any . . . waterfront facility or within 500 feet thereof. . . .

The defendant appealed to the Appellate Division[84] which affirmed the conviction without opinion.

On appeal to the Court of Appeals, the defendant contended that the statute was unconstitutionally vague, specifically in the phrases "loiter," "without a satisfactory explanation" and "within 500 feet."

The Court held that although the term "loiter" is one of common and accepted meaning,[85] it is not enough standing by itself to indicate the prohibited conduct, unless in any given statute its scope is narrowed to refer to a restricted public area.[86] In this case the Court construed "loiter" to mean lingering about waterfront facilities for a purpose unconnected with lawful waterfront business or related activity. The Court also held that the phrase "without satisfactory explanation" did not render the statute vague but in fact served to restrict the scope of the statute to the advantage of the defendant by imposing a procedural condition rather than adding a substantive element to the offense.[87] The Court refused to consider the constitutionality of the third phrase, "within 500 feet." Considering the actual length of the pier and waterfront area, the defendant alleged that such a distance would of necessity encompass the public streets, and that such a statute would clearly fall under the rule of *People v. Diaz*.[88] Since the defendant was arrested within the waterfront area and not in the streets, the Court refused to pass on a constitutional issue prematurely.[89]

Although in *Merolla*, the Court was passing on specific word content as opposed to general vagueness, it would seem that the phrase "without satisfactory explanation" is closely akin to the phrase "carried under circumstances that tend to establish that its possession is for a lawful purpose," which was held to be unconstitutionally vague in *Munoz*.

Here again is the added factor that carrying a penknife is in itself not unlawful; whereas, loitering in a waterfront area, especially under the specific construction given to this language by the Court, is a type of offense which is an evil and considered a criminal offense in itself. A second factor is the form of the words. The words "without a satisfactory explanation" give the defendant a procedural release; whereas, the words in the *Munoz* statute are stricter in that circumstances affirmatively must show lawful purposes. It is easier to

84. 11 A.D.2d 799, 205 N.Y.S.2d 978 (2d Dep't 1960).

85. Accord, People v. Johnson, 6 N.Y.2d 549, 190 N.Y.S.2d 694 (1959); People v. Bell, 306 N.Y. 110, 115 N.E.2d 821 (1953).

86. In People v. Diaz, 4 N.Y.2d 469, 176 N.Y.S.2d 313 (1958), the Court of Appeals held invalid a statute prohibiting loitering in public streets; In People v. Jonhson, supra note 85, a statute prohibiting loitering about public schools was upheld; In People v. Bell, supra note 85, a statute prohibiting loitering about railroad stations and subways was upheld. For a good discussion of the interrelationship of the Diaz, Johnson and Bell cases, see 9 Buffalo L. Rev. 95 (1959).

87. People v. Bell, supra note 85.

88. Supra note 86.

89. People v. Faxlanger, 1 N.Y.2d 393, 153 N.Y.S.2d 193 (1956).

explain a person's presence on a waterfront facility than to show extrinsic circumstances tending to prove lawful possession of a penknife.

It is apparent from this discussion that in some instances the courts may be able to apply the rules as to vagueness, overbroadness and abuse of the police power to the same set of facts. The courts may also apply some of the rules to the exclusion of the others where all of them could apply. In most cases the tendency is to attack the most obvious defect in the statute, rather than discuss all the possible reasons for invalidity. Of course, in some of these cases there will be no unanimous agreement as to what the paramount defect is.

M. A. L.

CONTRACTS

NEW PROMISE MADE UPON PAST CONSIDERATION NOT ENFORCEABLE

In *Arden v. Freydberg*,[1] an insurance agent, at the request of defendants, devised and submitted a plan for corporate life insurance policies to defendants' corporation. Subsequent to the submission of the plan defendants orally promised plaintiff that the policies would be written by him. The plan as prepared by plaintiff was adopted by defendants' corporation, but the insurance was written through an employee of the corporation who was made an insurance agent for that sole purpose. Plaintiff brought an action for damages in an amount equal to the commissions and renewal commissions he would have received, if defendants had placed the plan with him.

The trial court's judgment for the plaintiff was reversed by the Appellate Division.[2] The Court of Appeals, in a 4-3 decision affirming the Appellate Division, stated that the oral promises made by the defendants subsequent to submission of the plan by plaintiff did not afford adequate consideration to create an enforceable contract. Consideration which consists of services already performed is generally held to be insufficient to support a promise.[3]

The majority found that at the time the request was made by defendants, there was no accompanying promise, express or implied, to obtain the insurance from the plaintiff. Therefore, in the opinion of the majority, if a contract was created, one could be found only on the defendants' subsequent promises, which were not binding because they were supported by past consideration.

The dissent took the view that the conduct of the parties from the initial request to the final acceptance disclosed the creation of a unilateral contract.[4] At the time the request for the submission of the plans was made, a promise to place the insurance with plaintiff could be implied. The performance by

1. 9 N.Y.2d 393, 214 N.Y.S.2d 400 (1961).
2. 11 A.D.2d 1, 201 N.Y.S.2d 151 (1st Dep't 1961).
3. Axelrod v. 77 Park Ave. Corp., 225 App. Div. 557, 234 N.Y. Supp. 27 (1st Dep't 1929); Blanshan v. Russell, 32 App. Div. 103, 52 N.Y. Supp. 963 (3d Dep't 1898), aff'd, 161 N.Y. 629, 55 N.E. 1093 (1899).
4. On unilateral contract, see 33 Colum. L. Rev. 463 (1933).