

REL: July 12, 2019

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-1147

Ellen Haver Hermann

v.

City of Tuscaloosa

Appeal from Tuscaloosa Circuit Court
(CC-17-2909)

McCOOL, Judge.

Ellen Haver Hermann appeals her conviction for a violation of § 17-18 of the Municipal Code of Tuscaloosa ("the Code") and her resulting fine of \$250. For the reasons set forth herein, we reverse and render a judgment for Hermann.

Facts and Procedural History

On May 1, 2017, Jared Crowder, a police officer with the Tuscaloosa Police Department, responded to a call alleging that Hermann was "stopping traffic" at the entrance to an office complex in which an abortion clinic is located. (R. 13.) The office complex is located in Tuscaloosa just off Jack Warner Parkway, a four-lane divided roadway, and is accessible from Jack Warner Parkway by a two-lane, private drive that connects to Jack Warner Parkway at a traffic signal. Upon arriving at the office complex, Crowder observed a vehicle stopped on the private drive, waiting at the traffic signal to access Jack Warner Parkway, and observed Hermann "standing at the passenger window" (R. 10) and "handing [a pamphlet] in the window in the car." (R. 13.) According to Crowder, Hermann was "[m]aybe ... 10 yards" from Jack Warner Parkway as she distributed the pamphlet. (R. 21.) It was undisputed that Hermann was not soliciting funds from the occupants of vehicles on the private drive but, instead, was merely providing pamphlets "just to inform people about the abortion office and ... just to let them know that there's help available and that kind of thing." (R. 41.)

CR-17-1147

Specifically, Hermann, who had distributed pamphlets at this location on other occasions, testified that she "stand[s] on the public right-of-way" (R. 54) and that,

"[b]asically, I just, you know, might have a little sign sitting on the ground next to me and just wave and say, good morning. I have a pamphlet in my hand. And people will stop and say, you know, why are you out here, what are you doing, or different things like that."

(R. 46-47.) If the occupant of a vehicle on the private drive questions Hermann about her objective, Hermann engages in a "very brief" conversation with the occupant and provides the occupant with a pamphlet. (R. 48.) However, Hermann testified that her distribution of pamphlets has never prevented vehicles on the private drive from exiting the office complex or otherwise impeded traffic on the private drive. (R. 48-49.) Consistent with Hermann's testimony, Crowder testified that Hermann's conduct on May 1, 2017, had no effect on traffic exiting Jack Warner Parkway onto the private drive (R. 18-19), that Hermann was not prohibiting the vehicles with which she engaged from exiting the private drive "[o]ther than her arm being in the window" of the vehicle as she distributed a pamphlet (R. 18), and that he did not observe the vehicles with which Hermann engaged blocking other

CR-17-1147

vehicles from exiting the private drive. (R. 23.) Nevertheless, it was undisputed that Hermann did not have a permit authorizing her to distribute pamphlets to the occupants of vehicles on the private drive. Thus, Crowder issued Hermann a citation for violating § 17-18 of the Code, which provides:

"No person shall stand on a highway or roadway or occupy space immediately adjacent to a highway or roadway for the purpose of soliciting employment, business, or contributions from the occupant of any vehicle nor for the purpose of distributing any article, unless otherwise authorized by official permit of the City of Tuscaloosa."

On August 8, 2017, Hermann was convicted in the Tuscaloosa Municipal Court of violating § 17-18. Hermann appealed to the Tuscaloosa Circuit Court ("the trial court") for a trial de novo and, before trial, filed a motion to dismiss in which she argued that § 17-18 is unconstitutional. The trial court entered an order indicating that it would take Hermann's motion under advisement on the date set for trial, but, on the day of trial, the trial judge stated that he "want[ed] to hear evidence" before ruling on the motion to dismiss. (R. 93.) Thus, the case proceeded to trial, where the evidence established the facts set forth above. Following

CR-17-1147

the admission of evidence, the trial court heard the arguments of counsel, during which Hermann's counsel argued that § 17-18 is unconstitutional and argued that, regardless, § 21-27 of the Code authorized Hermann to distribute pamphlets, without a permit, to the occupants of vehicles on the private drive. On July 19, 2018, the trial court entered an order denying Hermann's motion to dismiss and a judgment finding Hermann guilty of violating § 17-18 and ordering her to pay a \$250 fine and court costs. Hermann filed a timely notice of appeal.

Standard of Review

"The ore tenus standard of review generally applies to judgments entered following a bench trial." R & G LLC v. RCH IV-WB, LLC, 122 So. 3d 1253, 1256 (Ala. 2013). However, ""[w]here the evidence before the trial court was undisputed the ore tenus rule is inapplicable, and [this Court] will sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts."" Williams v. State, 3 So. 3d 285, 289 (Ala. Crim. App. 2008) (quoting Ex parte Jackson, 886 So. 2d 155, 159 (Ala. 2004), quoting in turn State v. Hill, 690 So. 2d 1201,

CR-17-1147

1203 (Ala. 1996), quoting in turn Stiles v. Brown, 380 So. 2d 792, 794 (Ala. 1980)). In this case, the facts giving rise to Hermann's conviction are undisputed. Thus, we review the evidence de novo and afford no presumption of correctness to the trial court's application of the law to those facts.

Discussion

On appeal, Hermann argues (1) that § 17-18 is unconstitutional and (2) that, even if § 17-18 is not constitutionally deficient, her distribution of pamphlets on May 1, 2017, to the occupants of vehicles on the private drive was authorized by § 21-27. Because we find Hermann's second argument persuasive, we pretermit any discussion of the constitutionality of § 17-18.

As noted previously, § 17-18 provides:

"No person shall stand on a highway or roadway or occupy space immediately adjacent to a highway or roadway for the purpose of soliciting employment, business, or contributions from the occupant of any vehicle nor for the purpose of distributing any article, unless otherwise authorized by official permit of the City of Tuscaloosa."

(Emphasis added.) Thus, there is no question that Hermann's distribution of pamphlets to the occupants of vehicles on the private drive would not have violated § 17-18 if Hermann had

CR-17-1147

first obtained a permit from the City of Tuscaloosa ("the City"). Indeed, the City concedes that § 17-18 "allows ... Hermann to solicit or distribute materials to motor vehicles at this very location if she obtains a permit pursuant to [§ 21-27] of the Code."¹ (The City's brief, at 16.) Hermann argues, however, that § 21-27 authorized her to distribute pamphlets to the occupants of vehicles on the private drive without first obtaining a permit. Under the specific facts of this case, Hermann is correct.

Section 21-27, which provides the process for obtaining a "special event permit," sets forth the following definitions relevant to this case:

"Demonstration. Any demonstration, picketing, pamphleteering, leafleting, march or other event organized or held primarily for purposes associated with First Amendment free speech and shall not include any purely commercial speech or for profit event.

"....

¹The City actually cites § 2-27 of the Code as the ordinance pursuant to which Hermann can obtain a permit, but that appears to be a typographical error that was intended to be a citation to § 21-27. Section 2-27 merely provides the beginning and ending dates of the City's fiscal year, and there is no ordinance in the Code other than § 21-27 that provides an avenue for obtaining a permit to engage in the type of conduct set forth in § 17-18.

"Minor event demonstration. A demonstration of fewer than twenty (20) people on public property that is not within ten (10) feet of a major arterial road. A minor event demonstration shall be conducted in a manner that does not substantially inhibit the flow of pedestrian traffic upon the sidewalks and any signage shall not be affixed, placed or installed on public property.

". . . .

"Public property. Any streets, sidewalks, parkways, highway, roads, rights-of-way, parks, medians, and all spaces dedicated to the public use.

"Special event. Any concert, demonstration, marathon, march, memorial, parade, race, walk or any such other activity of gathering of persons, animals, or vehicles upon public property as organized primarily for the purpose of amusement, athletic competition, charity, numeration, demonstration, education or entertainment."

§ 21-27(a) (emphasis added).

Section 21-27(b) provides:

"Permit required. It shall be unlawful for any person to organize or hold, assist in organizing, or holding, or take part, or participate in a special event as defined herein without a special event permit. Provided however, that a minor event demonstration shall not require a permit."

(Emphasis added.)

Thus, although a "demonstration" as defined by § 21-27(a) is a "special event" that requires a permit pursuant to § 21-27(b), the City has expressly carved out an exception to the

permit requirement for a "minor event demonstration." On appeal, Hermann argues that her distribution of pamphlets on May 1, 2017, to the occupants of vehicles on the private drive constituted a "minor event demonstration" as defined by § 21-27(a). Thus, Hermann argues that, pursuant to § 21-27(b), she was not required to obtain a permit authorizing her to distribute the pamphlets to the occupants of vehicles on the private drive. Under the specific facts of this case, we agree.

As noted in the definitions quoted above, a "minor event demonstration" is (1) a demonstration (2) of fewer than 20 people (3) on public property (4) that is not within 10 feet of a major arterial road. As to the first element -- whether Hermann's distribution of pamphlets constituted a demonstration -- § 21-27 defines a "demonstration" to include "pamphleteering ... primarily for purposes associated with First Amendment free speech and shall not include any purely commercial speech or for profit event." § 21-27(a). It is undisputed that, on May 1, 2017, Hermann was distributing purely informational pamphlets about abortion and that she was neither soliciting money nor otherwise engaging in commercial

CR-17-1147

speech. Thus, Hermann's distribution of pamphlets constituted a "demonstration" as defined by § 21-27(a). As to the second and third elements -- whether Hermann's demonstration consisted of fewer than 20 people and occurred on public property -- it is also undisputed that Hermann was the sole demonstrator and that her demonstration occurred on the public right-of-way adjacent to the private drive. (The City's brief, at 17; R. 75.) As to the fourth element -- whether Hermann's demonstration occurred within 10 feet of a major arterial road -- the Code does not define "major arterial road" or identify which roads in Tuscaloosa qualify as such a road. However, even if we assume, as the City does, that Jack Warner Parkway is a major arterial road, Crowder testified that Hermann was 10 yards, i.e., 30 feet, from Jack Warner Parkway when he observed her distributing pamphlets to the occupants of vehicles on the private drive. Thus, even if Jack Warner Parkway is a major arterial road, Hermann's demonstration did not occur within 10 feet of a major arterial road. Accordingly, because the undisputed evidence indicates that Hermann's distribution of pamphlets constituted a demonstration of fewer than 20 people on public property that

CR-17-1147

is not within 10 feet of a major arterial road, Hermann's conduct constituted a "minor event demonstration" as defined by § 21-27(a). Therefore, pursuant to § 21-27(b), Hermann was not required to obtain a permit for her May 1, 2017, "minor event demonstration."

As we noted previously, the City concedes that § 17-18 "allows ... Hermann to ... distribute materials to motor vehicles at this very location if she obtains a permit pursuant to [§ 21-27]." Thus, the City concedes that Hermann's May 1, 2017, distribution of pamphlets constituted a violation of § 17-18 only because Hermann did not first obtain a permit pursuant to § 21-27. However, the plain language of § 21-27 expressly states that Hermann was not required to obtain a permit for her May 1, 2017, "minor event demonstration." Thus, the City's prosecution of Hermann's distribution of pamphlets on the basis that she failed to obtain a permit is unjustifiable; the City cannot prosecute Hermann for violating the permit requirement of § 17-18 when the very ordinance that provides the permitting process expressly states that Hermann's conduct did not require a permit. Accordingly, because the City alleged that Hermann's

CR-17-1147

conduct violated § 17-18 only because she failed to obtain a permit pursuant to § 21-27 and because § 21-27 expressly provides that Hermann's conduct on May 1, 2017, did not require a permit, we hold that, under the specific facts of this case, Hermann's conduct did not violate § 17-18 and that her conviction therefore cannot stand.

We note that, although Hermann's "minor event demonstration" did not require a permit, the City nevertheless argues that § 21-27 "does not authorize [Hermann] to approach vehicles on the roadway to distribute materials in violation of [§] 17-18." (The City's brief, at 16.) However, nothing in § 21-27 prohibits a participant in a "minor event demonstration" from distributing pamphlets to the occupant of a vehicle. In fact, § 21-27 provides that a "minor event demonstration" includes the distribution of pamphlets on "public property," which, by definition, includes streets, parkways, highways, and roads. § 21-27(a). Thus, if the City intended to draft § 21-27 to prohibit a participant in a "minor event demonstration" from distributing pamphlets to the occupants of a vehicle, it failed to do so.

Conclusion

CR-17-1147

The City concedes that Hermann's distribution of pamphlets on May 1, 2017, to the occupants of vehicles on the private drive would not have violated § 17-18 if she had obtained a permit pursuant to § 21-27. However, § 21-27 expressly states that Hermann was not required to obtain a permit for her "minor event demonstration." The City cannot punish Hermann for failing to obtain a permit for conduct the City has expressly provided does not require a permit. Accordingly, under the specific facts of this case, we reverse Hermann's conviction and render a judgment in her favor.

REVERSED AND JUDGMENT RENDERED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.