[Cite as *Niles v. Leonard*, 2010-Ohio-6447.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CITY OF NILES,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0022**
- vs -	:	
ROBERT M. LEONARD	:	
Defendant-Appellant.	:	

Criminal Appeal from the Niles Municipal Court, Case No. 09 CRB 00436.

Judgment: Affirmed in part, reversed in part, and conviction vacated.

Terry A. Swauger, Niles City Prosecutor, 15 East State Street, Niles, OH 44446 (For Plaintiff-Appellee).

Kara A. Stanford, Blair & Latell Co., L.P.A., 724 Youngstown Road, Niles, OH 44446; *Patrick E. Parry*, The Urban Co., L.P.A., 434 High Street, N.E., P.O. Box 792, Warren, OH 44482-0792 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Robert M. Leonard, appeals from the judgment of the Niles Municipal Court. At issue is whether the trial court erred in denying his motion to dismiss and, if not, whether his conviction is supported by the manifest weight of the evidence. For the reasons discussed below, we affirm the trial court's decision on appellant's motion to dismiss; appellant's conviction, however, is reversed and vacated.

{¶2} Appellant has operated an outdoor amphitheater business located at 325 Youngstown-Warren Road since 2005. On April 16, 2009, appellee, the City of Niles ("City") enacted Ordinance No. 06-09 regulating "loud and raucous" noise within the city. The ordinance prohibits any loud and raucous noise that can be clearly heard beyond the borders of the property which is the source of the sound. Prior to the enactment of Ordinance No. 06-09, the City had a noise ordinance regulating noises which exceeded a specific decibel level.

{¶3} On May 24, 2009, appellant was cited for violating Ordinance No. 06-09 as a result of noise generated by live music performed at his amphitheater. On May 24, 2009, City of Niles police officer Lt. David Smathers was dispatched to appellant's place of business based upon some seven calls originating from the neighborhood in which appellant's amphitheater is located. After apprizing appellant of the requirements of the Ordinance No. 06-09, appellant was cited. Appellant had never been cited under the previous enactment.

{¶4} On July 31, 2009, appellant moved to dismiss the citation asserting the retroactive application of Ordinance No. 06-09 was both constitutionally and statutorily prohibited. Appellant further argued that the ordinance violated his free speech rights as it is not "content neutral" and it provides for no "alternative avenues of communication." The motion was subsequently denied.

{¶5} On October 21, 2009, the matter proceeded to a bench trial at which the City offered the testimony of Lt. Smathers. Smathers testified that, upon investigating the complaint, he traveled through the neighborhood from where the calls originated. He testified the music from appellant's amphitheater could be clearly heard in the

neighborhood and, in fact, was reverberating off the residences in the area. Notwithstanding these points, Smathers testified that he considered himself a reasonable person and that he was not annoyed, disturbed, or injured by the noise emanating from the borders of appellant's property.

{¶6} On November 5, 2009, the trial court found appellant guilty of violating Ordinance 06-09. On January 8, 2010, appellant was sentenced, which entailed a $25 fine plus costs. Appellant now appeals assigning two errors for our review. His first assignment of error provides:

{¶7} "The trial court erred to the prejudice of defendant-appellant Leonard in overruling defendant-appellant Leonard's motion to dismiss."

{¶8} Under this assignment of error, appellant asserts Ordinance No. 06-09 is unconstitutional and advances several arguments in support of his position. As he challenges the constitutionality of the ordinance, it is necessary to underscore that "[a]ll legislative enactments enjoy a presumption of constitutionality,' and 'the courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.'" *State ex rel. Purdy v. Clermont Cty. Bd. of Elections* (1996), 77 Ohio St.3d 338, 345, 1997-Ohio-278, quoting *State v. Dorso* (1983), 4 Ohio St. 3d 60, 61.

{¶9} With this in mind, appellant first contends the ordinance, applied retroactively to his pre-existing land use, is unconstitutional because it deprives him of his property without due process of law. We do not agree.

{¶10} Appellant was cited with violating Niles City Ordinance No. 06-09, which provides, in relevant part:

{¶11} "No person shall make, continue, or cause to be made or continued any loud and raucous noise that is plainly audible upon the public streets, in any public park, in any parking lot, in any school or public building or ground thereof, in any church or hospital or grounds thereof, or in any occupied business establishment or occupied residential dwelling of another. Ord. No. 06-09, Sec. 2(1).

{¶12} The ordinance sets forth guidelines empowering authorities to regulate noise volume coming from specific places within the City of Niles. The General Assembly has specifically granted any municipal corporation in the state the ability to enact such "noise ordinances." R.C. 715.49 provides, in relevant part:

{¶13} "(A) Any municipal corporation may prevent riot, gambling, *noise* and disturbance, and indecent and disorderly conduct or assemblages, preserve the peace and good order, and protect the property of the municipal corporation and its inhabitants." (Emphasis added.)

{¶14} Appellant, however, asserts Ordinance No. 06-09 is unconstitutional as applied to him because it prohibits him from using his land in a way that was formerly lawful under a previous ordinance. Because he was never cited under the City's prior noise ordinance, appellant maintains the enforcement of the ordinance against him undermines long-established constitutional and statutory protections enjoyed by a landowner with vested property rights.

{¶15} Appellant's argument misinterprets the clear purpose of Ordinance No. 06-09. The language of the ordinance indicates it was enacted to regulate "loud and raucous noise," not to eliminate outdoor concerts or the playing of live music altogether. The ordinance, accordingly, does not preclude appellant from using his land in the same

fashion as he used it under the City's prior noise ordinance. Appellant is still entitled to have live musical performances at his amphitheater without any restrictions on the type of music or the time of day the music can be performed. Ordinance No. 06-09 is therefore not a land use restriction, but a valid exercise of the statutory authority bestowed on the City via R.C. 715.49(A).

{¶16} Appellant next argues the ordinance is unconstitutionally overbroad, adversely impacting his First Amendment right to free speech as applied.

{¶17} To determine whether a regulation violates the First Amendment, a court must first consider whether it regulates speech content or regulates merely the time, place, and manner of speech conduct. See, e.g., *State v. Snyder*, 155 Ohio App.3d 453, 462, 2003-Ohio-6399. Generally, a regulation aimed directly at the content of speech is likely to be held invalid unless necessary to protect a compelling state interest and it is narrowly drawn to meet that interest. See *State v. Tarbay*, 157 Ohio App.3d 261, 264, 2004-Ohio-2721. Alternatively, regulations not aimed at content, but on protecting "content-neutral" interests are generally upheld unless the restrictions unduly constrict the flow of free speech. See, e.g., *Perry Educ. Assn. v. Perry Local Educ. Assn.* (1983), 460 U.S. 37, 45. Such "time, place, and manner" restrictions will survive constitutional scrutiny if they are ""*** justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."" (Citations omitted.) *City of Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A.* 89 Ohio St.3d 564, 567, 2000-Ohio-488, quoting *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 791.

{¶18} Here, appellant asserts Ordinance No. 06-09 is an unconstitutionally overbroad regulation because it is neither content neutral nor allows for reasonable alternative avenues of communication. We shall address these arguments in turn. With respect to the content neutrality of the regulation, appellant contends the ordinance arbitrarily exempts a variety of noisy activities from its application, yet deems other noisy activities illegal. By way of example, appellant notes:

{¶19} "Section 2(3)(g) provides an exemption allowing the professional baseball team in the city, a for-profit business, to make loud and raucous noise, including the playing of loud music throughout the game, between the hours of 8:00 a.m. and midnight on any day. However, Appellant-Leonard's for-profit business may never make any loud and raucous noise simply because the business is an entertainment establishment playing music and not a sporting event."

{¶20} Appellant misreads the ordinance. Section 2(3)(g) exempts:

{¶21} "*** Parades, fireworks displays, sporting events or fund-raising activities conducted for the benefit of an organization determined to be tax exempt under Section 501(c) of the Internal Revenue Code that are held in areas not zoned as residential, except that such events shall be limited to the hours between 8:00 a.m. and midnight on any day;"

{¶22} For-profit professional baseball games are not generally played for the benefit of tax-exempt organizations and nothing in the record indicates the professional team in Niles plays for such beneficiaries. Appellant's analogy is therefore off-point and fails to reveal a lack of evenhandedness in the applicability of the ordinance.

{¶23} Appellant next contends the ordinance is not a content-neutral regulation because it improperly differentiates between loud and raucous noise generated by a private person or business and such noise created by activities conducted on city and school athletic property, exempting the latter but not the former. In essence, appellant contends the exemption serves no governmental interest or specific public good. Again, we disagree.

{¶24} The ordinance specifically exempts:

{¶25} "Activities on or in city and school athletic property or facilities and on or in publicly owned or leased property or facilities, provided that such activities have been authorized by the owner or lessee of such property or facilities, or by the owner's authorized agent;"

{¶26} Initially, appellant's argument presupposes the exemption is based upon the content of the noise issuing from the city's or the schools' athletic properties. This assumption is both unnecessary and unwarranted. The language of the exemption indicates it is premised upon the nature of the place where the activity is conducted, not the content of the noise. To the extent appellant asserts the ordinance operates to unconstitutionally regulate speech based upon its content, his argument is rejected. We therefore hold the decision to exempt the city's properties and schools' athletic properties is a content-neutral regulation.

{¶27} We also reject appellant's contention that the exemption serves no governmental purpose or public good. The city's properties or properties leased by the city are "public places" or, using the idiom of constitutional law, traditional "public fora." Public forums are those places "which 'have immemorially been held in trust for the use

of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Assn. v. Perry Local Educators' Assn*. (1983), 460 U.S. 37, citing *Hague v. CIO* (1939), 307 U.S. 496. Exempting public fora from the ordinance's application clearly serves a significant governmental interest and is consistent with long-standing First Amendment jurisprudence.

{¶28} Similarly, school sporting events and other activities which take place on athletic property (e.g., pep-rallies, commencements, band practices) are traditional gatherings of a school community. Such events bring together students, faculty, friends, and family from present to past to cheer and gather for a common cause. Although such property may be sometimes private, it is almost invariably open to the general public. Given these points, it is clear exempting the noise issuing from (or in) such fora serves a significant governmental interest. The exemption within the ordinance is accordingly proper and, as discussed above, is justified without reference to the content of the speech being regulated.

{¶29} Appellant next argues Ordinance No. 06-09 is unconstitutional because it fails to leave open alternative channels of communication. Again, we disagree.

{¶30} Appellant is not barred from operating his amphitheater; he is merely prohibited from making "loud and raucous noise that is plainly audible upon the public streets." Although appellant may find this standard qualitatively difficult to meet, this argument is different (and shall be addressed below) from completely closing alternative avenues of communication. Appellant may still conduct concerts and, depending on the nature of the concert, the noise coming from his amphitheater could fall within a safe-

harbor exemption. In operating his business, however, appellant is simply not permitted to make or cause to make raucously loud noise during non-exempt concerts. Although the ordinance restricts certain modes of expression, it keeps open "reasonable alternative avenues of communication."

{¶31} Appellant's final argument under his first assigned error contends the ordinance is unconstitutionally void-for-vagueness.

{¶32} The vagueness doctrine is a challenge to the definiteness of a statute or ordinance. See, e.g., *United States v. Harriss* (1954), 347 U.S. 612, 617. "The underlying principle is that no [person] shall be held criminally responsible for conduct which he [or she] could not reasonably understand to be proscribed." Id. Notwithstanding this principle, the Supreme Court of the United States has observed the "*** prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for 'in most English words and phrases there lurk uncertainties.' *Robinson v. United States* (1945), 324 U.S. 282, 286." *Rose v. Locke* (1975), 423 U.S. 48, 49-50. A party claiming an enactment is void for vagueness "*** must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law." *State v. Anderson* (1991), 57 Ohio St.3d 168, 171.

{¶33} As discussed above, the ordinance prohibits "*** any loud and raucous noise that is plainly audible upon the public streets ***." The ordinance defines "Loud and Raucous Noise" as:

{¶34} "*** any sound that, because of its volume, level, duration and character, annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities."

{¶35} "Plainly Audible" is defined as "*** any sound that can be clearly heard beyond the borders of the property which is the source of the sound by a person with normal hearing using ordinary auditory senses without artificial enhancement."

{¶36} Appellant asserts the foregoing standards permit arbitrary enforcement of the ordinance because they do not provide a degree of definiteness to place a person of ordinary sensibilities on notice of what is criminally prohibited. We do not agree.

{¶37} The ordinance prohibits noises which (1) judged by a reasonable person, are annoying, disturbing, etc., and (2) can be heard by a person with "normal hearing" using "ordinary auditory senses" beyond the borders of the property from which the noise issues. Noise ordinances incorporating the so-called "reasonable person" standard, such as Ordinance No. 06-09, have been regularly upheld on void-for-vagueness challenges.[1] See *Columbus v. Kendall*, 154 Ohio App.3d 639, 643, 2003-Ohio-5207; *State v. Cornwell*, 149 Ohio App.3d 212, 215-216, 2002-Ohio-5178; *Village of Kelleys Island v. Joyce* (2001), 146 Ohio App.3d 92; *Edison v. Jenkins* (June 7, 2000), 5th Dist. No. CA893, 2000 Ohio App. LEXIS 2599; *State v. Boggs* (June 25, 1999), 1st Dist. No. C-980640, 1999 Ohio App. LEXIS 2871. In determining whether a noise is "loud and raucous," the ordinance incorporates "an objective standard by which to judge the offending conduct *** and specific factors to be used in judging the

1. It is also worth noting that the Supreme Court of the United States has observed the phrase "Loud and Raucous Noise," while abstract, uses terms which have acquired "*** through daily use *** a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Kovacs v. Cooper* (1949), 336 U.S. 77, 79.

offending conduct." *State v. Brundage*, 7th Dist. No. 01-CA-07, 2002-Ohio-1541, 2002 Ohio App. LEXIS 7284, *9.

{¶38} Further, the phrases "normal hearing" and "ordinary auditory senses" are akin to the reasonableness standard which has been accepted by the weight of authority in Ohio. *Jenkins*, supra, at *5. (Holding "[a] 'person of ordinary sensibilities' suggests a reasonableness standard.") Thus, the definition of "plainly audible" also builds an objectively quantifiable measurement into Ordinance No. 06-09, thus narrowing the scope of its operation. *Kent v. Boyer* (Oct. 9, 1998), 11th Dist. Nos. 97-P-0107 and 97-P-0108, 1998 Ohio App. LEXIS 4833, at *7.

{¶39} Even though the standards of the ordinance may be flexible and the police retain some, perhaps considerable, discretion in interpreting violations, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, supra, at 794. Given the objective character of the standards set forth in the ordinance, we hold it is sufficiently definite so as to prohibit arbitrary or subjective enforcement by the authorities. Therefore, the trial court did not err in overruling appellant's void-for-vagueness challenge.

{¶40} Appellant's first assignment of error is without merit.

{¶41} For his second assignment of error, appellant asserts:

{¶42} "The trial court erred to the prejudice of defendant-appellant Leonard by convicting him of violating Niles City Ordinance No. 06-09 against the manifest weight of the evidence.

{¶43} An appellate court considering a challenge to the weight of the evidence reviews the entire record, "*** weighs the evidence and all reasonable inferences,

considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶44} Upon a trial to the bench, the City called Lt. David Smathers, the officer who issued the citation. He testified he was sent to appellant's place of business at approximately 12:20 a.m. on May 25, 2009 based upon the receipt of "at least" seven calls to the Niles Police Department. Although Lt. Smathers' testimony implied the calls were from residents complaining about the noise coming from appellant's establishment, no evidence was submitted as to the content of the calls. Furthermore, Lt. Smathers testified he did not personally receive any of the calls.

{¶45} Upon his arrival, Lt. Smathers testified he could hear the music from appellant's establishment "reverberating off of the houses in the area and all the streets involved." After the lieutenant arrived at appellant's place of business, he testified:

{¶46} "I went over and spoke with [appellant] about the new Noise ordinance that we have, and he told me he was aware of the Noise Ordinance and he basically thought it was unconstitutional and if I had to give him a citation, or something, that he had no hard feelings and to give him the citation. At the time I didn't have a summons with me. So, I went to the station, continued on some other calls, and I came back about 1:00 [a.m.], and gave him the citation for the Noise Ordinance."

{¶47} Although the music could be heard in the surrounding neighborhood, Lt. Smathers testified he, as a reasonable person, did not find the music annoying, disturbing, injurious, or dangerous to his health, comfort, or safety. This was the only

evidence in the record relating to the quality of the sound coming from appellant's establishment.

{¶48} To prove that appellant violated Ordinance No. 06-09, the City was required to prove that appellant, via his amphitheater, caused loud and raucous noise to be made that was plainly audible upon the public streets. As discussed above, loud and raucous noise means any sound that, because of its volume, duration, and character annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities." The phrase "plainly audible" means the noise can be clearly heard beyond the borders of the property from which it issues by one with normal hearing using ordinary auditory senses.

{¶49} The record indicates the City established that the noise coming from appellant's establishment was "plainly audible." The only evidence relating to the nature and character of the noise, however, was the lieutenant's testimony that the music was *not* "loud and raucous" pursuant to the ordinance. The City failed to subpoena any caller to testify to the contrary and therefore it failed to submit any evidence, let alone any credible evidence, on this element of the charge. Even had the officer testified that the calls received by dispatch were complaints arising from, e.g., the annoying or disturbing character of the noise, such evidence would have been inadmissible hearsay offered to "prove the truth of the matter asserted." Evid.R. 801(C). Without some competent evidence that the music was "loud and raucous" as defined by Ordinance No. 06-09, the City failed to meet its burden of production. Even viewing the evidence most favorably to the prosecution, the City did not meet the essential elements of the charge.

{¶50} Although appellant challenges the weight of the evidence, such an analysis presupposes the City offered a quantum of evidence sufficient to establish the charge. Because the City failed to meet this initial threshold, the trial court's judgment must be reversed and appellant's conviction vacated.

{¶51} Appellant's second assignment of error is sustained.

{¶52} For the reasons discussed in this opinion, we affirm the judgment of the trial court as it relates to appellant's pre-trial motion to dismiss; the judgment of conviction, however, is reversed because the state failed to introduce sufficient evidence to support the charge. We therefore affirm the trial court in part, reverse the trial court in part, and vacate appellant's conviction.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

DIANE V. GRENDELL, J., concurs in judgment only, with a Concurring Opinion.

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DIANE V. GRENDELL, J., concurs in judgment only, with a Concurring Opinion.

{¶53} I agree with the majority's holding that Leonard's conviction was against the manifest weight of the evidence and its disposition reversing and vacating Leonard's conviction. However, I respectfully disagree with the majority's decision to rule on the constitutionality of Niles City Ordinance No. 06-09. Since this case can be resolved solely on the basis of the manifest weight issue, this court should limit its review to that issue. Therefore, I do not concur in the majority's decision to address the constitutionality issue and the majority's substantive analysis of that issue.