

FILED

03/25/2024

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA Case Number: DA 24-0096

Case No.: DA 24-0096

FILED

MAR 25 2024

Bowen Greenwood
Clerk of Supreme Court
State of Montana

JOHN D RUNKLE,

Appellant, DEFENDANT

v.

STATE OF MONTANA

Appellee, PLAINTIFF

~~FILED~~

~~MAR 13 2024~~

~~Bowen Greenwood
Clerk of Supreme Court
State of Montana~~

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Nineteenth Judicial District Court
County of Lincoln
Cause No. DC 22-113
Honorable Matthew J. Cuffe Presiding

Appearances:

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Cases:

Nye, 283 Mont. at 513, 943 P.2d at 101;

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Joslyn, 208 Mont. at 505, 678 P.2d at 668.

State v. Woods, 221 Mont. 17, 22, 716 P.2d 624, 627 (1986)

Grayned v. City of Rockford (1972), 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222

Darian B. Taylor, Annotation, Class-of-One Equal Protection Claims based upon law enforcement actions, 86 A.L.R. 6th 173 1.

Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004)

Willowbrook, 52 U.S. at 564, 1210 S. Ct. at 1074-75

ISSUES PRESENTED

Is the ordinance as written unconstitutionally vague thereby violating Appellant's due process rights under the fourteenth amendment?

Was Appellant's fourteenth amendment due process rights violated by the selective enforcement of the ordinance?

Did the illegal acts of County Commissioner Bennett violate Appellants due process rights under the fourteenth amendment?

STATEMENT OF THE CASE

In July of 2022, Appellant traveled to the Kootenai Falls recreation area (hereafter "Falls") located on county property between the towns of Libby and Troy Montana.

Appellant setup his licensed and insured mobile food trailer in the parking area of the Falls and began to serve food and non alcoholic drinks via Appellant's mobile food license.

As testimony demonstrates, the county issued the license without any restrictions as to usage on any county property. In fact, there were no restrictions as to movement and placement of the trailer on any county property as demonstrated by testimony of the individual who issued the license, Dustin Webb.

At some point law enforcement was contacted by County Commissioner Jerry Bennett complaining that Appellant had not received "permission" from the Board per County ordinance.

Law enforcement showed at the Falls and had a lengthy discussion with Appellant whereupon Appellant produced his mobile food trailer license to the law enforcement officer whereupon Appellant insisted that he had "permission" by any legal definition of the word and by the fact that the "Board" oversees the issuance of the licenses and therefore permission had already been granted.

The law enforcement office Deputy Sheriff Hyslop called the County Attorney who informed him that apparently I was in violation of the ordinance and to issue a citation but told Deputy Sheriff Hyslop that he was not to force me to leave.

Deputy Sheriff Hyslop left after issuing a citation for violating Lincoln County Ordinance 2018-04(3)(13) regarding commercial use of park property.

A few days later in July 2022, Appellant was once again at the Falls operating his mobile food trailer.

Sheriff Darren Short was contacted by dispatch and was sent to the Falls where he discussed the situation regarding permission and Appellant's permissions. Although Sheriff Darren Short never ordered Appellant to leave

the premises, Appellant agreed to leave and have the courts determine the validity of Appellants permission and the constitutionality of the ordinance.

It is noteworthy that the Sheriff agreed with Appellant (and testified thereto) that the county was “splitting hairs” over this issue.

STATEMENT OF FACTS

- I. In 2021, Appellant was issued a mobile food trailer license after satisfying all requirements thereto. That license was issued *without* restrictions. The license was in full force and effect on the day the citation was issued.
- II. County Commissioner Jerry Bennett owned and leased a building on the county property known as “Trailhead Bar and Grill” to a tenant named Candy Clark.
- III. County Commissioner Jerry Bennett along with owning and leasing a building on county property was also the County Commissioner overseeing that district in violation of his ethical duties due to financial conflict of interest.
- IV. County Commissioner Jerry Bennett also illegally and without written agreement of the other County Commissioners, turned over complete control of the Falls to his tenant who is neither an elected official, nor a county employee.

- V. County Commissioner Bennett also illegally allowed his tenant to collect rents on county property and to keep the rental income for herself.
- VI. County Commissioner Bennett was the ONLY complainant to law enforcement regarding Appellant's presence at the Falls parking lot.
- VII. County Commissioner Bennett profited financially from his building and Appellant's presence would jeopardize his relations with his tenants and possibly his profits.
- VIII. County Commissioner Bennett contacted law enforcement to complain about Appellants presence
- IX. Law enforcement subsequently issued a citation to Appellant although the Sheriff Darren Short agreed with Appellant that the county was "splitting hairs" over this issue.
- X. Appellant agreed to vacate the premises and have the courts decide as to whether or not Appellant had "permission" and whether the language of the ordinance was clear and Appellant voluntarily left the premises and has remained off the premises ever since then.
- XI. On December 19th, 2023 Appellant had a jury trial in the 19th Judicial District in Lincoln County Montana where a jury found him guilty of violating the ordinance.
- XII. Appellant then brings this instant appeal to the Montana Supreme Court

SUMMARY OF THE ARGUMENT

The ordinance as written is constitutionally vague, so much so as to even demonstrate flip flopping the position from one of the jurors after a very misleading opening statement by the prosecution.

The ordinance requires “permission” from the Board but makes no specificity as to those licensed to commercially operate in the county where that license has been issued “without restriction.” The license by definition is permission and without specifically excluding permitted and licensed mobile food trailers from operating at a county park or recreation area, the ordinance is unconstitutionally vague and should be overturned as such.

Additionally, the enforcement of the ordinance is selective, as demonstrated that as County Commissioner Bennett testifies to, the county neither requires permission from other vendors, nor do they enforce the ordinance against them. In fact, Commissioner Bennett testified that he (unbelievably) has turned over control and enforcement of the Kootenai Falls recreation area to his tenant. As Appellant’s appearance at the Falls is a financial threat to both County Commissioner Bennett and his tenant, the County selectively enforced the ordinance against Appellant but not against any of the other vendors located and operating openly at the Falls. In fact, County Commissioner Bennett has allowed his tenant to extort “rent” from the vendors that the *tenant allows* at the Falls.

The tenants allowance of these vendors occurs (of course) without Board approval, without permission from the Board and with absolutely no compliance with the ordinance. In fact, none of the other vendors that are allowed to completely violate the ordinance aren't even licensed as Appellant is. Even though the other vendors have no license, never received permission or Board approval, they are allowed to operate commercially at the Falls with the approval of the tenant who thereby illegally collects rent from those vendors and keeps the proceeds. There is no written contract from the Board to allow a sublease to the tenant to collect rent on county property, nor was one ever requested. The ordinance is never enforced unless someone like Appellant is seen as a financial threat to County Commissioner Bennett and his tenant Candy Clark. The retaliatory nature of the county by County Commissioner Bennett is obvious and his admissions in open court as a witness are despicable.

Appellant had filed a Motion to Dismiss on grounds that the ordinance was unconstitutionally vague but that Motion was denied by the District Court (Appellant Motion to Dismiss on file herein).

STANDARDS OF REVIEW

A vagueness challenge to a statute or ordinance may be raised on two different bases: (1) because the statute is so vague that it is rendered void on its

face; or (2) because it is vague as applied in a particular situation. See *Nye*, 283 Mont. at 513, 943 P.2d at 101; *Martel*, 273 Mont. at 149, 902 P.2d at 18; *City of Choteau v Joslyn* (1984), 208 Mont, 499 505, 68 P.2d 665, 668.

“A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.” *State v. Woods*, 221 Mont. 17, 22, 716 P.2d 624, 627 (1986); *Joslyn*, 208 Mont. at 505, 678 P.2d at 668. No person should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties. *State v.*

In *Grayned v. City of Rockford* (1972), 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, the Supreme Court articulated the following relevant values which vague statutes offend:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Second, ***if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.*** *Grayned*, 408 U.S. at 108-09, 92 S.Ct. at 2298-99, 33 L.Ed.2d at 227-28 (footnotes omitted).

A selective enforcement claim is a species of equal protection. Equal protection theories based on selective enforcement are different than, but similar to, “class of one” equal protection claims. *Darian B. Taylor, Annotation, Class-of-One Equal Protection Claims based upon law enforcement actions*, 86 A.L.R. 6th 173 1.

Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (Internal quotations and citations omitted), see also *Willowbrook*, 52 U.S. at 564, 1210 S. Ct. at 1074-75 (holding plaintiff could assert and plead her equal protection claim as a class of one by alleging intentional but differential treatment of similarly situated individuals without a rational basis for difference in treatment, without alleging the Seventh District Circuit Courts “alternative theory” of ill will). *Taylor*, 86 A.L.R. 6th 173, 2

ARGUMENT FOR CONSTITUTIONAL VAGUENESS

The ordinance as written is unconstitutionally vague. The ordinance that Appellant was charged with is Lincoln County Montana Ordinance for Park Rules 2018-04(3)(13) which states as follows:

“No person or group shall use these lands for any commercial purpose without prior permission from the Board and meeting any necessary insurance or liability requirements.”

The ordinance lacks specificity as to licensed vendors who have already received permission from the Board. As the County Commissioners oversee all the administrative departments of the County, MCA 7-5-2101. (*Demonstrating that the Board operates as Chief Executive Officer of the Counties in all administrative duties not prohibited by law.*) Appellant had already received “permission” de facto from the Board by the very issuance of the license and without language to the contrary specifically exempting licensed mobile food trailers, any confusion in the language of the ordinance demonstrates the vague and incomplete way the ordinance was written.

Not only was Appellant not convinced that the language of the ordinance banned Appellant from the county owned property, this confusion is also demonstrated during the jury voir dire of the only individual that Appellant questioned. The pertinent part of the testimony is as follows (Voir dire of juror Holter, testimony Pages 61-62):

MR. RUNKLE: Mr. Holter, I think you're number three. Can you get the microphone? I believe you said, uh, if someone showed up without permission and was operating a business at the falls, you would see that as a problem wouldn't you? That it would cause some kind of chaos or something along those lines/

MR. HOLTER: That's not exactly what I said. Just that –

MR. RUNKLE: Okay, I don't' remember what you said verbatim, but it was —

MR. HOLTER: Yeah, it was in regards to —

MR. RUNKLE: Okay

MR. HOLTER: — you know, playing by the rules, so.

MR. RUNKLE: Right. Do you know what the definition of a license is?

MR. HOLTER: Not. I do not at this time. Not off the top of my head.

MR. RUNKLE: Okay. Does anyone in here, can define what a license is?

NO RESPONSE

MR. RUNKLE: Okay. If I told you now — and this is important, because questions left out of a couple of important questions.

what if someone showed up at the falls with fully licensed and insured food trailer and sold food and that license had no restrictions, would, would you find that Permissible?

MR. HOLTER: Yes.

The prosecutor's voir dire of the jury failed to inform the jury that Appellant was fully licensed and insured, rather the prosecutor implied that

Appellant just showed up without any permissions of any kind and started selling food.

Regardless of what the juror may have ultimately voted to find the Appellant guilty, it is obvious that initially the issue is confusing to Appellant and other parties. In fact, the prosecutor's misleading of the jury during his questioning is disturbing and probably at the very least has probably violated an ethical standard to not mislead a jury. (Appellant will not go further into the misleading statements made by the prosecutor during the voir dire of the jury but invites the court to read that portion of the testimony Pages 49-54)

The very essence of the definition of a license is that it gives one permission to do a certain act. In this case, Appellant was granted a license that had no restrictions on it to operate on county property.

Dustin Webb works for the Lincoln County Environmental Health Department and reluctantly testifies and admits to the fact that Appellants mobile food trailer license had no restrictions on the license (Testimony of Dustin Webb, Pages 97-98).

Q. Okay, just to sum up, so I'm straight on this. There are no restrictions in the county rules, statutes, guidelines or anything, that restrict my mobile food trailer in the county isn't that correct?

A. That, that is not what I said. I said I am unaware. I didn't — I have not read any ordinances that would specifically exempt you from setting up anywhere.

Q. Okay so as far as you know there are no restrictions on my movement Of the trailer in the county?

A. Correct.

The county environmental officer that issued the license, Dustin Webb is unaware of any county restriction that any statute, rule, guideline or anything that is written that would restrict Appellants use of the licensed trailer on county property because there are none.

Additionally, the top law enforcement officer in the county, Sheriff Darren Short admitted that the county was "splitting hairs" over this issue.

Darren Shorts testimony in pertinent part is as follows (Testimony of Darren Short, Page 164) :

Q. Okay, Um, I also recall during that conversation, I had stated probably with a little animus that, uh, that they were – the County was really splitting hairs over this issue. Do you recall that?

A. I believe you said something like that?

Q. And did you agree with me on that?

A. I said that's not really my call, but – yes

Even though Sheriff Short may have given somewhat contradictory testimony as to whether a crime had been committed, Sheriff Short, as demonstrated above, agreed with Appellant that the county was "splitting hairs" over Appellant's supposed crime. (Testimony of Darren Short, Page 164)

The Montana Supreme Court have previously stated that a statute is void on its face "if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *State v. Brogan* (1995), 272 Mont. 156, 168, 900 P.2d 284, 291 (citing *State v. Crisp* (1991), 249 Mont. 199, 202, 814 P.2d 981, 983). "No person should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties." *Brogan*, 900 P.2d at 291. *State v. Nye*, 283 Mont. 505, 513 (Mont. 1997)

In this case, the Appellant was convinced that permission had already been given to Appellant by virtue of an unrestricted license (Testimony of Dustin Webb, Pages 97-98) and the ordinance in question did not specifically restrict licensees with unrestricted licenses or even mention licensees. Not only was the Appellant not convinced, neither was juror "Holter", nor was the top law enforcement officer in the County, Sheriff Darren Short who agreed with Appellant that the County was "splitting hairs."

ARGUMENT FOR SELECTIVE ENFORCEMENT

The ordinance was also selectively enforced against Appellant which is demonstrated by the testimony of Jerry Bennett. During Jerry Bennett's testimony, Bennett admits that not only do the other vendors that operate the Falls not have Board approval, none of those vendors had charges brought against them, none of those vendors were licensed and none of those vendors were asked to cease operations.

Bennett's testimony in pertinent part states the following:

Q. Okay, but now, at this time, and ever since I can recall, you will occasionally have vendors selling their trinkets inside of the, um, inside of the guardrails in the park area; is that right/

A. Outside – well inside the guardrails but not –

Q. Inside the guardrails.

A. In the parking lot, yes.

Q. So, would you – so, they're doing commercial vending at the park?

A. Yes.

Again in pertinent part (P 115, lines 21-25)

Q. Okay - And, but those people don't, aren't licensed, right? But they have permission from the owner of the Trailhead Bar and Grill, or the, the person leasing it?

A. The person leasing it, yes.

County Commissioner Jerry Bennett, under cross examination makes some startling admissions. Not only was the enforcement of the ordinance against Appellant selectively enforced, County Commissioner Bennett had a financial interest in allowing other vendors, clearly in violation of the ordinance, to operate for his tenants profit.

1. County Commissioner Bennett makes changes to a commercial lease on a major county recreation area without approval of the Board, without amending in writing the terms of that county commercial lease for his tenant (and possibly his own) financial benefit. (Bennett Testimony, P 112 - 113)
2. County Commissioner Bennett admits that he owns the building where the tenant (who he turned control of the park over to) operates. (Bennett testimony P 113, lines 3-5)
3. Commissioner Bennett admits that other vendors operate commercially at the Falls and the only permission they have is from his tenant (concessionaire). (Bennett testimony, P 115-116)

4. Commissioner Bennett also admits that he allows his tenant to defraud the county by collecting rents on county property and then pocketing those funds. (Bennett testimony P 116) County Commissioner Bennett also admits that by allowing his tenant to illegally collect rent on county property, it helps his tenant "pay her bill." Here a pertinent part of that cross examination should be emphasized:

Bennett testimony Page 116:

Q Is she allowed to collect rent on county property?

A. I gave her permission, yes

Q. You gave her permission, but that money isn't turned over to the county?

A. No Well –

Q. Okay, hmm.

A. – It helps her pay her bill.

It is clear that the County (where County Commissioner Bennett operates as Chief Executive of his district of which the Falls is under) has selectively enforced the ordinance in question and against Appellant.

The County Commissioner was the ONLY complainant to law enforcement and as testified to by County Commissioner Bennett, other vendors

are allowed to operate without a license, without permission, without Board approval and without insurance.

The County and especially the district under the control of County Commissioner Jerry Bennett selectively enforced the ordinance against Appellant in a situation where the County commissioner had a financial interest and personally allowed not just a few but *all* other individuals to operate who clearly did not comply with the requirements of the ordinance. *Willowbrook*, 52 U.S. at 564, 1210 S. Ct. at 1074-75

A selective enforcement claim is a species of equal protection. Equal protection theories based on selective enforcement are different than, but similar to, “class of one” equal protection claims. *Darian B. Taylor, Annotation, Class-of-One Equal Protection Claims based upon law enforcement actions*, 86 A.L.R. 6th 173 1.

Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (Internal quotations and citations omitted), see also *Willowbrook*, 52 U.S. at 564, 1210 S. Ct. at 1074-75 (holding plaintiff could assert and plead her equal protection claim as a class of one by alleging intentional but differential treatment of similarly situated individuals without a rational basis for difference in treatment, without alleging the Seventh District Circuit Courts “alternative theory” of ill will). *Taylor*, 86 A.L.R. 6th 173, 2

Previous cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 102 L. Ed. 2d 688, 109 S. Ct. 633 (1989). In so doing, the Supreme Court has explained that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co., supra*, at 445 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 62 L. Ed. 1154, 38 S. Ct. 495 (1918)).

In this case, the imposition of the charges against Appellant were not only intentional but arbitrary as no other vendor had either complied with the ordinance requirements, nor requested or received "permission" from the Board.

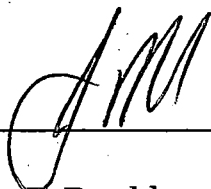
CONCLUSION

The vagueness of the ordinance created such a lack of clarity between not only Appellant but a juror and Sheriff Darren Short. The ordinance is vague and had it intended to restrict licensed vendors with unrestricted access to county property, the ordinance would (or should) have so stated.

Additionally, Appellant has demonstrated clearly that the ordinance was selectively enforced against him by demonstrating on multiple occasions that the person administering county property in that district (Jerry Bennett) refused, failed or for indirect personal financial gain, did not request enforcement of the ordinance against other individuals. Appellant was the ONLY person that the County Commissioner for that district complained to law enforcement about thereby violating Appellant's due process rights under the Fourteenth Amendment as well as other violations of Appellant's rights.

Given the vagueness of the ordinance and the selective prosecution of Appellant, the conviction should be reversed and the ordinance deemed unconstitutional.

Respectfully submitted this 1st day of March, 2024
11/24



John D Runkle,
Appellant in propria persona

CERTIFICATE OF SERVICE

I certify that I filed this

Petition

Motion

Other APPELLANT'S OPENING BRIEF
[Name of document]

with the Clerk of the Montana Supreme Court and that I have mailed or hand delivered a copy to each attorney of record and any other party not represented by counsel as follows:

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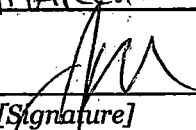
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DATED this 11th day of MARCH, 2024.


[Signature]

JOHN D. RUNKLE
[Print name]



CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's opening brief is printed with proportionally spaced Times New Roman typeface of 14 points; is double spaced and does not exceed 10,000 words.

Dated this ^{12th} day of March, 2024
11th



John D Runkle

Appellant in propria persona