2003 WL 164476 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
January 3, 2003

*1 The Honorable John M. Knotts, Jr.
Senator
District No. 23
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Knotts:
You have forwarded to this Office a copy of Section 26-143 of the Municipal Code of the Town of South Congaree which deals with "Illegal Drugs or Controlled Substances." You question whether such ordinance conflicts with general state law regarding illegal narcotics. It is our opinion that such ordinance does in fact conflict with state law and would be held by a court to be invalid.

Law/Analysis

Section 26-143 provides as follows:
Section 26-143 Illegal or Controlled Substances

Any person or persons possessing, using, or exchanging illegal drugs or controlled substances in a public place, or gathering in a public place for the purpose of using or exchanging in any manner illegal drugs or controlled substances.

a. As used in this section, the term "public place" shall include all areas, buildings and other places open to or serving the general public, whether upon privately owned or publicly-owned property. The term "public place" shall also include any automobile or other motor vehicle.

b. Any person found guilty of violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by the maximum fine able to impose by Section 14-25-65 (S.C. Code of Laws) without indictment by grand jury or be imprisoned for a term of not more than thirty (30) days.

In an opinion, dated May 23, 1995, this Office recognized the guidelines for determining the validity of a municipal ordinance. Therein, we stated that
[a]ny municipal ordinance adopted pursuant to Section 5-7-30 [of the Code of Laws of South Carolina] is presumed to be valid. Town of Scranton v. Willoughby, 306 S.C. 421, 412 S.E.2d 424 (1991). Within the limits of a municipality, an ordinance has the same force as does a statute. McCormick v. Cola. Elec. St. Ry. Light and Power Co., 855S.C. 455, 675S.E. 562 (1910). Any ordinance must be demonstrated to be unconstitutional beyond all reasonable doubt. Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985).

As the South Carolina Supreme Court emphasized in Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 574, 524 S.E.2d 404 (1999),
[a] municipal ordinance is a legislative enactment and is presumed to be constitutional. Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998). The burden of proving the invalidity of [the ordinance] is on the party attacking it....

Keeping in mind the presumption of validity and the high standard which must be met before an ordinance is declared invalid, we note that, while this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state statutes. Thus, we have recognized that an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction. Op. Atty. Gen., April 21, 1998.

*2 In Hospitality Assn. of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113, 116 (1995), our Supreme Court recognized the test for resolving the issue of the validity of a local ordinance vis vis state law. There, the Court stated that [d]etermining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.

320 S.C. at 223.

Further, the Court has deemed the authority of a municipality to enact ordinances pursuant to its police power to be quite broad. Section 5-7-30 provides that a municipality may enact
regulations, resolutions, and ordinances not inconsistent with the Constitution and general law of this State including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order and good government in it....

In Barnhill v. City of North Myrtle Beach, 333 S. C. 482, 511 S.E.2d 361 (1999), the Court declared that "[u]nder this section, municipalities enjoy a broad grant of power regarding ordinances that promote safety." Citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.E. 550, 397 S.E.2d 662 (1990). The Barnhill Court emphasized that "[t]he exercise of a municipality's police power is valid if it is not arbitrary and has a reasonable relation to a lawful purpose." Id.

In addition, the Court has spoken at length concerning the standards by which an ordinance is ascertained as in conflict with state law. The Hospitality Assn. case, for example, noted that
[a] local government ordinance conflicts with a state law when its conditions, express or implied, are inconsistent and irreconcilable with the State law. City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991); Town of Hilton Head v. Fine Liquors, Ltd. [supra%u].

320 S.C. at 227. Further, our Supreme Court has observed that "[i]n order for there to be a conflict between a state statute and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict." Barnhill v. City of North Myrtle Beach, 333 S.C., supra at 486, 511 S.E.2d, supra at 363, citing Wright v. Richland Co. Sch. Dist. Two, 326 S.C. 271, 486 S.E.2d 740 (1997); Fine Liquors, supra%u.

Similarly, the South Carolina Court of Appeals has provided the following additional guidance when scrutinizing whether particular local ordinances are consistent with state law:
*3 [w]here an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict.

Wrenn Bail Bond Serv., Inc. v. City of Hanahan, 335 S.C. 26, 29, 515 S.E.2d 521, 522 (1999) (citation omitted). "As a general rule, 'additional regulations to that of [the] State law does not constitute a conflict therewith." Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990) (quoting Arnold v. City of Spartanburg, 201 S.C. 523, 536, 23 S.E.2d 735 740 (1943)....

McKeown v. Chas. Co. Bd. of Zoning Appeal, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct. App. 2001). In McKeown, the Court of Appeals distinguished regulations by local authorities through licensing or criminalizing certain conduct by local ordinance from local zoning requirements. In the context of reviewing a zoning ordinance which prohibited restaurants serving alcoholic beverages within a certain distance of residential use, the McKeown Court stressed that [l]ocal governments may not criminalize conduct that is legal under a statewide criminal law. Martin v. Condon, 324 S.C. 183, 188, 478 S.E.2d 272, 274 (1996); see Connor v. Town of Hilton Head Island, 314 S.C. 251, 254, 442 S.E.2d 608, 609 (1994) (holding a municipality may not prohibit conduct that is not unlawful under State criminal laws governing the same subject). Enforcement of the local ordinance, however, applies to land use restrictions, not licensing. We follow the reasoning of our Supreme Court in Bugsy's, Inc. v. City of Myrtle Beach, [340 S.C. 87, 530 S.E.2d 890 (2000)] wherein it explained:

Although [Myrtle Beach] Ordinance 96-56 provides criminal penalties for its violation, it does not criminalize the operation of video game machines. It merely provides criminal penalties for violation of provisions of the zoning ordinance. So long as businesses comply with the requirements of the zoning ordinance, they can operate video game machines. Accordingly, unlike Martin [v. Condon], Ordinance 96-56 does not criminalize activity which is legal statewide.

Bugsy's, 340 S.C. at 96, 530 S.E.2d at 894-95 (footnote omitted; emphasis added). In this case, the county has not criminalized a class of conduct in Charleston County; rather through its regulation of land use, it has prohibited businesses from selling beer and alcoholic beverages within 500 feet of residential areas. Although its zoning ordinances may impact businesses desiring to sell beer and alcoholic beverages, the County has not criminalized activity which is legal statewide.

347 S.C. at 209, 553 S.E.2d at 487. Thus, in McKeown, the reason the Charleston ordinance did not fall was that it

*4 ... merely restricts land use within the municipality. It does not criminalize or directly conflict with the state licensing provision applied by the Department of Revenue for issuing beer and wine sales permits throughout the State.

Id. See also, City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) [a local government may not forbid what the legislature expressly has licensed, authorized or required]; Diamonds v. Greenville Co., 325 S.C. 154, 480 S.E.2d 718 (1997) ["Ordinance 2727 has the effect of making it unlawful to appear nude in public, even if no state law addressing the same subject are violated in the process. For this reason, the ordinance cannot stand]....

Turning now to the specific ordinances in question, it is important to note that Section 26-143 imposes criminal penalties for "possessing, using or exchanging drugs or controlled substances in a public place, or gathering in a public place for the purpose of using or exchanging in every manner illegal drugs or controlled substances." Because criminal penalties are involved, it should be recognized that Art. VIII, § 14 of the State Constitution provides that

[i]n enacting provisions required or authorized by this article, [Article VIII, providing for Home Rule] general law provisions applicable to the following matters shall not be set aside: ... criminal laws and the penalties and sanctions for he transgression thereof....

In City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991), the Supreme Court interpreted Art. VIII, § 14 in the context of a municipal ordinance which provided for a mandatory sentence of 30 days for simple possession of marijuana and removed the discretion of municipal judges in North Charleston to impose punishment and suspend sentences for such offense. There, the Court held that the North Charleston ordinance was void under Art VIII, § 14. In the Court's words,

Article VIII of the South Carolina Constitution deals generally with the creation of local government. Article VIII, § 14 limits the powers local governments may be granted by state law by providing that, among other things, local governments may not attempt to set aside state "criminal laws and the penalties and sanctions in the transgression thereof...." The question is whether City Code § 13-3, in denying offenders under the ordinance the possibility of paying a fine after being found guilty of simple possession of marijuana, sets aside a criminal penalty established by state law. We hold that it does.

The legislature has provided parameters within which local governments may enact ordinances dealing with the criminal offense of simple possession of marijuana. This legislation occupies the field as far as penalties for this offense are concerned. Local governments may not enact ordinances that impose greater or lesser penalties than those established by these parameters. City Code § 13-3 exceeds the parameters established under state law by denying offenders the opportunity to pay a fine and thus avoid a jail sentence. The City has attempted to set aside a penalty the legislature has found to be appropriate to punish persons guilty of simple possession. Accordingly, we hold City Code § 13-3 violates the strictures of Article VIII, § 14 of the South Carolina Constitution.

*5 In earlier opinions of this Office, we have concluded that local ordinances which impose lesser penalties than State law for the possession and sale of drugs and narcotics are void. For instance, in Op. Atty. Gen., Op. No. 3677 (December 20, 1973), we addressed the issue of the validity of an ordinance for which state law "imposed greater penalties for identical unlawful acts...." There, we stated that

[s]ince the State, by the passage of the unlawful drug act of 1971, has imposed greater penalties for identical unlawful acts, it is my opinion that the Gaffney City Code imposing lesser penalties is not valid.

As you know, no city is empowered to enact an ordinance that is in conflict with state law. A criminal ordinance imposing a penalty for an act covered by state law imposing a materially greater penalty would be in conflict with that state law. This distinction is made more important by the fact that the United States Supreme Court has recently held that a defendant may not be convicted for the same act by both the city and the state. This being true, a conviction under a city ordinance would constitute an effective bar to subsequent prosecution under the state law.

The material difference does not appear so obvious when the subject is one of barbiturates or other drugs that are not in the heroin-cocaine-LSD category. In other crimes, the importance can be seen with greater clarity. If, for example, a city decided to pass an ordinance making it a violation of municipal law to break and enter with intent to steal and impose a $100 or 30-day penalty therefor, a defendant could escape the possible maximum sentence applicable under state law by pleading guilty to the charge made under the municipal ordinance.

In summation, it is the opinion of this Office that Gaffney Code Section 14-13.1 is invalid in any particular in which it parallels state criminal law providing a penalty more severe than that provided under municipal law.

See also, Op. Atty. Gen., Op. No. 88-16 (February 16, 1988) [quoting McQuillin Municipal Corporations (3d. Ed.) Vol. 6, § 23.07 that "Ordinances lowering or relaxing statutory standards relative to offenses are void as in conflict with state law and policy."]

This same analysis and reasoning would control with respect to the ordinance which you have presented for our review. Such ordinance prohibits "possessing, using, or exchanging illegal drugs or controlled substances in a public place...."

However, the penalty for such offense is the "maximum fine able to impose by Section 14-25-65 (S.C. Code of Laws) without indictment by grand jury or be imprisoned for a term of not more than thirty (30) days." Obviously, the punishment under State law for similar offenses which include trafficking, possession with intent to distribute or even possession is for greater, even as much in certain instances of a maximum of 25 years. The ordinance, in effect, sharply curtails the punishment under State law for many of the same drug offenses.

*6 Likewise, the second portion of the ordinance relating to "or gathering in a public place for the purpose of using or exchanging in any manner illegal drugs or controlled substances" is also suspect. The elements of the municipal offense closely overlap with state offenses such as attempt and conspiracy, again offenses which impose much more severe punishment. In addition, we note the entire ordinance could also present serious vagueness problems.

The Attorney for the Town of South Congaree points out that "[t]he way we have been using this Code Section (Ordinance 26-143) is when we find small amounts of illegal drugs instead of making General Sessions charges we have been using this Code Section."

The Attorney notes that the "Council has approved this Code Section and the procedure has worked well. Obviously, when we have significant amounts of illegal drugs we are using the state statutes and moving forward in General Sessions."

However, on its face, the South Congaree Ordinance is in no way limited to offenses involving "small quantities" of drugs. Based on its language, the Ordinance covers even drug trafficking in a "public place." See, S. C. Code Ann. Secs. 44-53-370 and 44-53-375.

Moreover, except for first offense simple possession of marijuana, possession of even minute quantities of drugs, including cocaine, crack, LSD, and heroin are offenses within the jurisdiction of the Court of General Sessions. In addition, the amount of the drugs in question does not necessarily dictate the charges brought. If there is other evidence, such as an attempt to sell to a law enforcement officer, even possession of quarter ounce of marijuana can result in a charge of possession with intent to distribute, a General Sessions offense. In other words, even though this may not be currently occurring, the Ordinance could result in General Sessions drug offenses being transformed into summary court offenses. As such, this is precisely the situation Art. VIII, § 14 of the Constitution was designed to prevent.

Conclusion

It is our opinion that the ordinance in question violates Art. VIII, § 14 of the State Constitution and conflicts with state law. The ordinance imposes penalties which are less than those imposed by state law for the same or similar offenses, and the fact that the ordinance deals only with a "public place," as defined, is not controlling. Accordingly, we are of the opinion that a court would find the ordinance to be void as in conflict with existing state law.
Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

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