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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 514

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA,

Respondent

SUPPLEMENTAL BRIEF FOR RESPONDENT.

This brief is respectfully submitted to this Court by and with the consent of the Court first had and obtained on, to wit, March 2, 1940.

The purpose of this brief is to supply the Court with authoritative answers to certain propositions raised by the Court from the bench during the course of the oral argument of this cause, for the State feels that in all fairness to the Court citations of authority should be made available to the Court with respect to these propositions which were not covered in the original brief.

I.

WHETHER THE PETITIONER WAS LOITERING *WITHOUT A JUST CAUSE OR LEGAL EXCUSE THEREFOR* WAS AN EXCULPATORY FACT, THE BURDEN OF PROOF OF WHICH WAS UPON HIM.

It is to be remembered that the petitioner in this case was charged with having offended Section 3448 of the Code of Alabama, 1923. That Section provides as follows:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

It will be noted that Section 3448 charges two offenses, first, going near to or loitering about the premises or place of business of another for the purpose or with the intent of infuencing, etc. other persons not to have business dealings with or be employed by such person and, second, picketing the works or place of business of such other person for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise of such other person. During the course of the oral argument, the question was raised with respect to whether or not the State had presented sufficient evidence to prove the first offense, to wit, that the Petitioner did go near to or loiter about the premises of another, etc.

The record, shows without dispute that petitioner, Byron Thornhill, was on the premises of the Brown Wood Preserving Company (R. 9, 10). We thus have a clear showing that petitioner did go near to or loiter about the premises or place of business of another person, firm or corporation.

The record next reveals that Thornhill approached one Clarence Simpson, a former employee of the Brown Wood Preserving Company, who was attempting to return to work in response to a notice posted by the company requesting their employees to return, and stated to him that "they were on a strike and did not want anybody to go up there to work" (R. 10). It appears that thereupon Clarence Simpson went away and did not attempt to return to work. It thus appears that a person was influ-

enced or induced by Petitioner not to be employed by the Brown Wood Preserving Company, for the law presumes that every person intends to do what he does and that the natural and probable consequences of his acts were intended.

Jacobs v. State, 17 Ala. App. 396, 85 So. 837;

Reid v. State, 18 Ala. App. 371, 92 So. 513;

Weeks v. State, 24 Ala. App. 198, 132 So. 870;

certiorari denied 222 Ala. 442, 132 So. 871;

Worrell v. State, 24 Ala. App. 313, 136 So. 737, cert. den. 223 Ala. 425, 136 So. 738.

It is submitted therefore that the State has met the burden of showing that Thornhill was loitering for the purpose or with the intent of influencing or inducing other persons not to be employed by the Brown Wood Preserving Company.

It is true that no evidence was presented by the State tending to show that Byron Thornhill was loitering or that he did go near to the premises of the Brown Wood Preserving Company "without a just cause or legal excuse therefor." It is submitted, however, that whether Thornhill was loitering with or without a just cause or legal excuse was an exculpatory fact, the burden of proof of which was upon the defendant rather than the State.

In a very early case (*Owens v. State*, 74 Ala. 401) the Supreme Court of Alabama, in a prosecution for trespass after warning under Section 4419 of the Code of Alabama of 1876, which provided that:

> "Any person who, *without legal cause or good excuse*, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so, is guilty of a misdemeanor, and, on conviction, must be fined not more than $100; and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than three months." (Emphasis supplied)

considered the question of whether the burden was upon the State to prove that the trespass had been done "without legal cause or good excuse." The court concluded that the following charge requested by the defendant was rightly refused:

> "The State must show by the whole evidence, beyond a reasonable doubt, first, that the defendant had been warned, within six months next preceding the time that the State elected to proceed against the defendant, not to trespass upon McCall's land; second, that the defendant knowingly entered upon said McCall's land, and, third, *that he entered upon said McCall's land without a legal cause or good excuse.*" (Emphasis supplied)

Mr. Justice Stone, speaking for the Supreme Court of Alabama, concluded:

> "The third charge asked by defendant was rightly refused. If the act of warning, and trespass within six months afterwards was sufficiently proved, it was not necessary the State should go further and prove the act was done without legal cause or lawful excuse. This was defensive matter, the proof of which rested with the defendant, unless the testimony which proved the act proved also the excuse — Hadley v. State, 55 Ala. 31."

In a later case, *Bailey v. State*, 161 Ala. 75, 49 So. 886, the defendant was charged with having violated Section 4730 of the Code of Alabama of 1896, as amended by General Acts of 1907, page 636, providing as follows:

> "Section 4730. Any person, who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and *without just cause*, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured; and any person, who with

> intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, *without just cause*, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service or to cultivate such land, or refund such money, or pay for such property *without just cause* shall be prima facie evidence of the intent to injure his employer or landlord or to defraud him." (Emphasis supplied)

It was contended that the Legislature should have defined "just excuse" for the reason that there was no criterion laid down by the statute by which one could regulate his actions so as to know that he was abiding by the law and it was argued that, in the absence of such a definition, the statute denied to the defendant due process of law.

The court, in treating this contention, concluded:

> "It seems to us that, if the Legislature had attempted this, (a definition of "just excuse")

> the result would have been more restrictive upon the defendant than was the leaving of the determination of this question to court and jury; *for, 'just cause' is defensive matter brought forward by the accused,* necessarily depending, for sufficiency, upon the peculiar facts of each case and the wider the latitude in respect thereto the more advantageous the situation of the accused." (Emphasis supplied)

Numerous other cases have been decided by the appellate courts of Alabama, on similar propositions, a number of which are collated in the opinion of the Court of Appeals in *Folmar v. State*, 19 Ala. App. 435, 97 So. 768.

In the Folmar case the defendant was convicted of having violated Section 7423 of the Code of Alabama, 1907, which provided as follows:

> "Any person who sells or conveys any personal property upon which he has given a written mortgage, lien or deed of trust, and which is then unsatisfied in whole or in part, without first obtaining the consent of the lawful holder thereof to such sale or conveyance must, on conviction, be fined not more than $500 and may also be imprisoned in the county jail or sentenced to hard labor for not more than six months, one or both, in the discretion of the jury."

The defendant excepted to the following portion of the oral charge of the court:

"Now, then, the next question is that this must have been without obtaining the consent of the lawful holder thereof. And is there any evidence to show that W. B. Folmar & Sons consented to the sale of this cotton. My understanding of the rule of law is that the question of consent would be upon the defendant; if he had the consent of W. B. Folmar & Sons, it would be his duty to show that he had the consent, and it is not necessary for the state, to make out its case, to show by each member of the firm of W. B. Folmar & Sons separately that they did not give their consent. I think, if the defendant had the consent of them, it would be be incumbent upon him, as a defense in the case, to show that consent."

The Court of Appeals, in treating the charge, states:

"The oral charge of the court correctly states the law. The burden was not upon the state to show that the holder of the mortgage did not consent to a sale of the mortgaged property. The state, having proven the mortgage, the existence of the debt, and the sale of the mortgaged property by the defendant, discharged the burden resting upon it, and the burden was then on the defendant, if he relied upon that defense, to introduce evidence to show that the mortgagee consented to a sale of the mortgaged property. In the case of Freiberg v. State, 94 Ala. 91, 10 South. 703, the defendant

was convicted for selling or giving liquor to a minor without the consent of the parent, or the person having the management or control of the minor. The court held that the burden was on the defendant to prove the consent, and not the prosecution to prove the want of it. In a prosecution for unlawfully riding on a train without the consent of the train operators, it was held that the burden of proving the negative averments that the defendant was not in the employ of the railroad company, and that he was riding without authority from the engineer or conductor, was not upon the state; such facts being peculiarly in the knowledge of the defendant. Gains v. State, 149 Ala. 29, 43 South. 137.

"In prosecutions for engaging in certain occupations without a license, where a license is required, it has been held that it does not devolve on the state to show that the defendant had no license, but on the defendant to show affirmatively that he had. Bibb v. State, 83 Ala. 84, 3 South. 711; Porter v. State, 58 Ala. 66. The general rule is that:

> " 'Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' Farrall v. State, 32 Ala. 557; Greenleaf on Ev. (16th Ed.) p. 154, Section 79."

It is submitted, therefore, in view of the above quoted authorities, that the Court of Appeals of Alabama was not in error in concluding that the evidence presented by the State justified the conviction of loitering under the statute, it being particularly noted that not only did petitioner not present evidence of just cause or legal excuse but on the contrary when, after having filed his motion to exclude the evidence because of the insufficiency thereof, he was queried by the Court with respect to whether he insisted upon this ground of the motion, replied, through counsel, that he did not do so in as much as it was necessary for him to be convicted in order to test the constitutionality of the statute (R. 13, 14).

II.

IF THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF LOITERING BUT SUFFICIENT TO SUSTAIN CONVICTION OF PICKETING, THE GENERAL JUDGMENT RENDERED BY THE COURT IS PROPERLY REFERABLE TO THE COUNT SUSTAINED BY THE EVIDENCE.

Assuming for the purpose of argument that the State did not meet the burden of proof with respect to the offense of loitering, it is submitted that there is adequate evidence to support a finding that this petitioner was picketing the works or place of business of the Brown Wood Preserving Company for the purpose of hindering, delaying or interfer-

ing with or injuring the lawful business or enterprise of such company as was charged in the third count of the complaint filed in the Circuit Court of Tuscaloosa County (R. 5). It is to be noted that the judgment entry of the Circuit Court of Tuscaloosa County, sitting without a jury, is general in form, in that, it is recited that the defendant, Byron Thornhill, is "guilty of loitering and picketing as charged in the complaint." (R. 9)

The rule has many times been stated by the appellate courts of Alabama that where there is a general judgment of guilt under an indictment or complaint charging several offenses, if the evidence is sufficient to sustain a convicton under one count of the indictment or complaint but not under another count, the judgment is referable to the count sustained by the evidence. *Watson v. State*, 20 Ala. App. 372, 374, 102 So. 492, cert. den. 212 Ala. 330, 102 So. 494 (where the defendants were jointly indicted for burglary and grand larceny, the indictment containing two counts, and a general verdict of guilty was rendered against the defendants after proof of grand larceny only. It is to be particularly noted that the judgment entry recites, after verdict of guilty as charged in the indictment is shown, that "it is, therefore, ordered and adjudged by the court that the defendant, Frank Watson, is guilty as charged in the indictment, of burglary," etc. and that the Court of Appeals treated the words "of burglary" in the judgment entry as "mere surplusage." The Supreme Court evidently accepted this treat-

ment as correct for, as noted, certiorari was denied without further opinion, 212 Ala. 330).

Corrunker v. State, 19 Ala. App. 500, 98 So. 363 (where defendant was tried upon an affidavit containing two counts, one charging the sale of prohibited liquors and the second, possession of prohibited liquors, and the evidence justifying conviction under one of the counts only, the Court of Appeals sustaining the judgment held that the general verdict of guilty was referrable to that count.)

See also Williams v. State, 27 Ala. App. 227, 169 So. 337;

Osborne v. State, 25 Ala. App. 276, 144 So. 599;

Redwine v. State, 28 Ala. App. 95, 179 So. 390;

Myrick v. State, 20 Ala. App. 18, 100 So. 455;

Cleveland v. State, 20 Ala. App. 426, 103 So. 707, cert. den. 212 Ala. 635, 103 So. 711;

Haney v. State, 19 Ala. App. 79, 95 So. 57

It is submitted therefore, that since the evidence introduced by the State permitted no other conclusion but that petitioner was picketing the works or place of business of the Brown Wood Preserving Company and since it appears, in view of

the rule that the law presumes that every person intends to do what he does (authorities supra) that this petitioner intended to hinder, delay, interfere with or injure the lawful business or enterprise of the Brown Wood Preserving Company, this Court should conclude that the evidence was sufficient to justify a conviction of picketing and that, even assuming for the purpose of argument that the State did not make out its case with respect to loitering, the general judgment entry of the Court is properly referable to count three of the complaint charging picketing and supported by the evidence.

III.

VALIDITY OF JUDGMENT ENTRY.

While what has been said hereinabove is upon the assumption that the judgment entry is in all respects valid, we feel that in as much as the questions put by members of the Court during the course of the oral argument directed attention to the judgment entry, and since it does not appear that either the Court of Appeals or the Supreme Court considered in their opinions the sufficiency of the judgment entry, we should call the Court's attention to the case of *Burt v. State,* 159 Ala. 134, 48 So. 851, which deals with a judgment entry in which the defendant was convicted of two different offenses based upon one single act or one course of conduct, one transaction. In that case, the Supreme Court of Alabama held that there can be but one conviction of the offender for a single act, though that act

should be in violation of one or more penal statutes. While the Burt case may not here be of determining importance, in view of the questions put by members of this Court we feel it to be our duty to bring to the Court's attention this ruling of the Alabama court for the reason that the judgment entry in the instant case seems to convict the defendant of two offenses based upon a single act, in that, the defendant has been found guilty of loitering and picketing and a sentence has been imposed upon him requiring that he pay a fine of $100 and costs (R. 8)

IV.

CASES CITED BY PETITIONER.

Handbill Cases.

During the course of argument, counsel for petitioner strongly contended that the so-called "handbill cases" (*Schneider v. State*, No. 11; *Young v. People of California*, No .13; *Snyder v. City of Milwaukee*, No. 18 and *Nichols v. Commonwealth of Massachusetts*, No. 29) are persuasive authority with respect to the position taken by petitioner that a sovereign state is without authority to regulate or prohibit picketing or loitering.

In each of the handbill cases, this court reversed the holding of the state court on the ground that the ordinance in question amounted to or could be applied as a prohibition of the distribution of handbills on the streets.

The Los Angeles code provision in question provided, Sec. 28.01:

> "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any streetcar, or throw, place or attach any handbill into or upon any automobile or other vehicle."

Appellant was convicted of violating this ordinance by distributing handbills, of which he still had more than 300 in his possession, to pedestrians on a public sidewalk.

The ordinance in question in the city of Milwaukee provided:

> "It is hereby made unlawful for any person * * * to circulate or distribute any circulars, handbills, cards, posters, dodgers, or other printed or advertising matter * * * in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the city of Milwaukee * * *."

The petitioner in this case along with sixteen others, was convicted of violating this ordinance by acting as a picket in front of a meat market where a strike was in progress and of passing out handbills to pedestrians concerning the same. Many of the bills were in fact thrown on the street by the persons receiving them.

The Worcester, Massachusetts ordinance provided:

> "No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description."

The pamphlets distributed on the street in this case announced a meeting in connection with the administration of state unemployment insurance.

The ordinances in the Los Angeles, Milwaukee and Worcester cases this Court held to be general prohibitions and consequently void. It had no difficulty in arriving at that conclusion. The court discussed certain restrictions that might be imposed on the freedom of the press. It reiterated the right referred to in the Griffin case to suppress obscene and immoral literature. It further pointed out that a municipality may enact regulations in the interest of public safety, health, welfare or convenience, but in doing so it may not abridge the constitutional right of free speech and freedom of the press. It stated a person "could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a munici-

pality of the power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct does not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, to print or distribute information or opinion."

The Town of Irvington, New Jersey, ordinance was somewhat broader in its scope than that involved in the other three cases. It provided:

> "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matters, or call from house to house in the Town of Irvington without having first reported to and received a written permit from the Chief of Police or the officer in charge of police headquarters."

The applicant for a permit was required to supply information concerning himself and the permit was then granted in the discretion of the police officer to proper persons. The petitioner in this case was distributing circulars of a religious sect and accepting contributions to make it possible that additional booklets could be placed in the hands of others. The activity carried on in this case differed from that in the other cases only by the distribution being on private premises while in the other cases the distribution complained of was on a public street and resulted in littering the same. The court points out here that if there is not an absolute prohibition of the distribution of published material it

at least results in censorship and prelicensing by the police.

In our judgment, the pivotal point of these cases is that the littering of the street itself was not thought by the court to be sufficient ground for such drastic measures prohibiting or interfering with the distribution of handbills. The court holds the prevention of the littering of streets, the single public benefit to be obtained to be of minor importance as compared to the matter of preserving the freedom of the press and freedom of speech. Mr. Justice Roberts, speaking for the court says:

> "Any burden imposed upon the city authorities in clearing and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."

It is submitted, however, that the end involved in this case, the Thornhill case, is the protection of the property of the community from ultimate destruction and that Section 3448 is a direct enactment to this end. Moreover, the statute is not directly aimed at a suppression of the right of freedom of speech or freedom of press but is directed to other activities as well. Indeed, it may be likened to the ordinance of the City of Boston, Massachusetts, considered in *Davis v. Massachusetts*, 167 U. S. 43, of which this Court spoke in *Hague v. C. I. O.*, 307 U. S. 496, stating that the court would recognize the difference between an ordinance directed "solely at

the right of speech and assemblage" and one "addressed as well to other activities", concluding the former to be unlawful and the latter justifiable.

Senn v. Tile Layers Union

301 U. S. 468.

During the course of the argument, petitioner read the following from the case of Senn v. Tile Layers Union:

> "Members of the Union might without special statutory authorization by a state make known the facts of a labor dispute for freedom of speech is guaranteed by the federal constitution."

From this quotation counsel drew the conclusion that the Court had determined that the right to picket was guaranteed by the Fourteenth Amendment.

Counsel failed, however, to read the sentence immediately following the foregoing quotation, in which the Court said:

> "The state may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets."

It is respectfully submitted that Section 3448 merely regulates the methods and means of pub-

licity, in that, it simply provides that a person may not loiter or go near to the premises or place of business of another without just cause and legal excuse for the purposes set forth in the statute and it further provides that a person may not picket the works or place of business of another for the purpose of hindering, delaying, interfering with or injuring the lawful business of such person. It is respectfully submitted that this is a justifiable exercise of the police power of the Legislature of the State of Alabama directed to a justifiable end.

CONCLUSION.

It is, therefore, respectfully submitted that it having been shown that this petitioner was properly convicted of the offenses charged under Section 3448 of the Code of Alabama, 1923, the sole question presented for decision is as to the constitutionality of that section. In this regard, may we again respectfully insist that the Legislature in enacting Section 3448 was seeking to give effect to the pronouncement of the Constitutional Convention of Alabama of 1901, as expressed in Section 35 of the Constitution of Alabama of 1901, that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, by restricting the places at which loitering or picketing could be carried on and the purposes for which loitering or picketing could be conducted. It is respectfully insisted that in so regulating loitering and picketing the Legislature of Alabama offended no constitutional provision, for

again we say that neither counsel for petitioner nor the writers of this brief have succeeded in finding a single judicial statement that the right to loiter or the right to picket is guaranteed by either the Fourteenth Amendment of the Constitution of the United States or of any other phase of the Constitution of the United States.

Respectfully submitted,

THOS. S. LAWSON,
Attorney General of Alabama,

WILLIAM H. LOEB,
Assistant Attorney General of Alabama,
For the State of Alabama.