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The City's Appellate Practice: Some Recent Cases

In this space I periodically discuss the extensive appellate practice of the Law Department's Appeals Division. The division continues to handle a large and diverse caseload in state and federal appellate courts that address difficult questions of law. In this article, I will focus on cases recently handled by lawyers in the Appeals Division that raise significant issues for the residents of New York City involving speech and criminal justice.

Speech

Religious Services in Schools

Attorneys of the Appeals Division have recently defended the city in several cases arising from regulation of the exercise of several forms of speech on city property. The most recent and perhaps the most significant of these involves the holding of religious services in public schools.

In Bronx Household of Faith v. Board of Education of the City of New York, —F.3d—, 2011 U.S. App. LEXIS 11107 (June 2, 2011), a panel of the U.S. Court of Appeals for the Second Circuit upheld, by a 2-1 vote, a regulation of the city's Department of Education that prohibits the use of public school facilities for religious worship services. This was the most recent development in a long-standing legal dispute between the city and the Bronx Household of Faith, a Christian church, which claims that the city's policy violates its free-speech rights because other community organizations are permitted to meet in public schools.

The church had been conducting weekly worship services at P.S. 15 in the Bronx since 2002, when it obtained a preliminary injunction against an earlier version of the rule, prohibiting use of school facilities for "religious services or religious instruction." That policy was enjoined based on the holding of the U.S. Supreme Court in Good News Club v. Milford Central School, 533 U.S. 98, 109 (2001), that "the teaching of morals and character from a religious standpoint" could not be barred in public schools when "social, civic and recreational meetings…and other uses pertaining to the welfare of the community" were otherwise permitted.

After the Education Department revised the rule to prohibit use of school property for "religious worship services, or otherwise using a school as a house of worship," Bronx Household of Faith sought a permanent injunction against enforcement of that rule, which the District Court granted. Bronx Household of Faith v. Board of Education of the City of New York, 01 Civ. 8598 (SDNY 2007) (Preska, J.). In reversing and vacating the injunction, the Second Circuit distinguished between "free expression of a religious point of view," which the Education Department rule does not prohibit, and a particular event or activity, i.e., the conduct of religious services, which is covered by the revised rule. 2011 U.S. App. LEXIS 11107 at *15. The court explained that a worship service is a "collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion," which "has the effect of placing centrally, and perhaps even of establishing, the religion in the school." Id. at *16-17.

Indeed, the court noted, the Education Department's rules "expressly permit[] use of school facilities by 'religious clubs for students that are sponsored by outside organizations,'" as provided in Good News Club. 2011 U.S. App. LEXIS 11107 at *25. But the Education Department, in the court's view, could reasonably conclude that the use of public schools for Sunday worship services would make them appear to be "state-sponsored Christian churches." Id. at *35-36. This appearance was reinforced by "the fact that school facilities are principally available for public use on Sundays," creating "an unintended bias in favor of Christian religions, which prescribe Sunday as the principal day for worship services." Id. at *34-35. Accordingly, the court held that the prohibition of religious worship services was justified by the risk that permitting the regular conduct of those services in public schools would violate the Establishment Clause.

There are now more than 60 religious congregations that hold Sunday worship services in New York City public schools. Attorneys for the Bronx Household of Faith have announced that they will appeal the decision to the Second Circuit en banc or seek certiorari to argue their case before the U.S. Supreme Court.

Billboard Advertising

Appeals Division attorneys have also recently defended the city's regulation of commercial speech. In OTR Media Group Inc. v. City of New York, an outdoor advertising company (OAC) challenged in state court the provisions of the city's Zoning Resolution, local law and regulations of the city's Department of Buildings (collectively, the "arterial advertising regulations") that prohibit off-site commercial advertising (billboards that do not advertise on-premises businesses) within 200 feet and within view of the city's larger public parks and roadways.

The city's arterial advertising ban was first enacted in 1940 to address the visual clutter caused by the proliferation of billboards throughout the city. However, enforcement efforts failed because OACs sometimes obtained permits for on-

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premises signs but then used the permits for off-premises advertising. Moreover, the earlier schedule of fines was insubstantial compared to the revenues generated from advertising signs.

The challenged amendments to the enforcement program, enacted during the past decade, were designed to address these limitations. Prior to the state court challenge, the arterial advertising regulations had withstood a challenge in federal court, which ended when the Second Circuit held that the regulations do not restrict the commercial speech rights of OACs under the First Amendment to the U.S. Constitution or the New York State Constitution. Clear Channel Outdoor Inc. v. City of New York, 594 F.3d 94 (2010).

Plaintiff OTR Media Group Inc.

(OTR), an OAC, claimed in its state court action that the arterial advertising regulations impermissibly infringed on the rights of free speech, equal protection and freedom from excessive fines guaranteed by the New York State Constitution. The Supreme Court granted defendants' motion for summary judgment dismissing the complaint, and the Appellate Division affirmed. OTR, —AD3d—, 2011 NY Slip Op 2803, 920 N.Y.S.2d 337 (1st Dept. April 7, 2011).

In rejecting OTR's free speech claim, the Appellate Division, First Department, explained that the state Constitution "does not afford heightened free speech protections to commercial speech," and that state courts analyze restrictions on commercial speech using the four-part test articulated by the U.S. Supreme Court in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980): if "the expression is protected by the First Amendment" and "the asserted governmental interest is substantial," the court decides whether "the regulation directly advances the governmental interest asserted" and "is not more extensive than is necessary to serve that interest." Applying that test in OTR Media, the Appellate Division upheld the arterial advertising regulations "because they directly advance the stated governmental interests of promoting traffic safety and preserving aesthetics, and are narrowly tailored to achieve those interests."

The Appellate Division further held that the revised regulations and schedule of fines do not violate OTR's right to equal protection. The court noted that the city's program applies equally to signs on private property and to those on public property belonging to the Metropolitan Transportation Authority and other governmental entities, to the extent of the city's jurisdiction. Furthermore, the court held that the Buildings Department penalty schedule is rationally related to the achievement of the city's legitimate purposes, because "the record clearly establishes that increased penalties were necessary to deter violations by OACs in particular." Finally, the Appellate Division rejected OTR's challenge under the Excessive Fines clause of the state Constitution, holding the clause inapplicable because "the penalties serve only a remedial purpose and are intended to secure compliance." Attorneys for OTR have withdrawn their appeal of the Appellate Division ruling.

Vending Rules

Another recent case involving speech rights in which Appeals Division attorneys successfully defended the city arose from the regulation of vending in city parks. In Dua v. New York City Dept. of Parks & Recreation, plaintiffs, vendors of expressive matter such as books and artwork, petitioned in state court for a preliminary injunction against enforcement of rules of the city's Department of Parks and Recreation (DPR), set forth at 56 Rules of the City of New York §§1-05(b)(2) and (b)(3) (the "Vending Rules"), which limit the vending of such matter in city parks. The Supreme Court, New York County, denied plaintiffs' application, and the Appellate Division, First Department, affirmed. Dua, —A.D.3d—, 2011 NY Slip Op 4112, 2011 N.Y. App. Div. LEXIS 4032 (1st Dept. May 17, 2011).

DPR promulgated the Vending Rules because of concerns about the proliferation of expressive-matter vendors in certain parks. The rules are intended to prevent congestion, preserve the aesthetic integrity of the parks' design, and ensure that the parks are available to the public for recreational activities. The Vending Rules generally allow expressive-matter vendors to operate anywhere in the city's parks if they comply with certain requirements, such as positioning their display stands to maintain a pedestrian path and to avoid blocking park furniture, plants, or gratings. However, in certain popular and heavily used locations, Union Square Park, Battery Park, the High Line, and portions of Central Park, expressive-matter vendors are permitted to vend only in 100 specifically designated spots, which are allocated on a "first come, first served" basis, with one vendor allowed in each spot.

Expressive-matter vendors may always vend in any other city park or in the non-designated areas of Central Park, as well as on city sidewalks. Before being challenged in state court, the Vending Rules had withstood a federal court challenge when the U.S. District Court for the Southern District of New York declined to enjoin them under the First Amendment to the U.S. Constitution, concluding that "the revisions appear to be reasonable, content-neutral time, place and manner restrictions that are narrowly tailored to advance a significant government interest while leaving open ample alternative channels for expressive activity." Lederman v. N.Y. City Dept. of Parks & Rec., 2010 U.S. Dist. LEXIS 71425 (SDNY, July 16, 2010).

In their state court challenge to the Vending Rules, plaintiffs argued that their free speech rights under the New York State Constitution had been abridged. However, the Appellate Division, in affirming the Supreme Court's denial of a preliminary injunction, concluded that plaintiffs had not demonstrated a likelihood of ultimate success on the merits. The court applied the standard established in Central Hudson,

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447 U.S. at 566, and concluded that the Vending Rules are "content neutral" and constitute "part of a comprehensive scheme which governs time, place, and manner rules for all vendors under the Parks Department's jurisdiction."

The court emphasized the city's "significant interest in preserving and promoting the scenic beauty of its parks, providing sufficient areas for recreational uses, and preventing congestion in park areas and on perimeter sidewalks." The court considered the rules concerning the four parks to be narrowly tailored to promote this substantial government interest, because the vendors had "open, ample alternative means of communication" in other parks.

The court further held that plaintiffs had not established the other prerequisites for a preliminary injunction, the prospect of irreparable harm and a balance of equities in their favor, given that vendors foreclosed from the designated sites could sell their wares on public sidewalks or non-designated park areas. No further appeal is pending, and the Vending Rules are in effect.

Post-Conviction DNA Testing

DNA testing has revolutionized certain aspects of our criminal justice system, making possible in some instances the precise identification of criminal actors. It has also raised the legal question as to when and under what circumstances a person convicted of a crime is entitled to access to evidence for DNA testing. Attorneys of the Appeals Division have participated in a case of first impression in the Second Circuit regarding this question.

Plaintiff Frank McKithen was convicted in 1993 in state court of attempted murder for stabbing his wife, and is serving a lengthy prison sentence. In 2001, while in prison, he filed a motion under Criminal Procedure Law §440.30(1-a)(a), which established the standard in New York state for granting an application for post-conviction forensic DNA testing of evidence. That motion was Mr. McKithen's first attempt to obtain access to DNA evidence on the knife that was recovered from the crime scene and identified by Mrs. McKithen as the weapon used by her husband. Mr. McKithen claimed that the blood on the knife was not his wife's (or his own). His application was denied.

Thereafter, Mr. McKithen commenced an action in U.S. District Court for the Eastern District of New York against the Queens County District Attorney under 42 U.S.C. §1983, claiming that he had been deprived of a constitutional right to access DNA evidence. The District Court granted Mr. McKithen's motion for summary judgment, concluding that such a right exists under the Due Process clause of the 14th Amendment. McKithen v. Brown, 565 F.Supp.2d 440 (EDNY 2009) (Gleeson, J.), rev'd, 626 F.3d 143 (2d Cir. 2010).

While the District Attorney's appeal to the Second Circuit was pending, the U.S. Supreme Court held, in District Attorney's Office for the Third Judicial District v. Osborne, —U.S.—, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009), that a person convicted of a crime has no unconditional constitutional right to obtain access to post-conviction DNA testing. Following Osborne, the Second Circuit reversed the District Court's ruling in McKithen and granted the District Attorney's motion for summary judgment.

The Second Circuit followed the Supreme Court's holding in Osborne that a person convicted of a crime has a "'liberty interest in demonstrating his innocence with new evidence under state law,'" but that such an interest is limited, because the prisoner has already been found guilty at trial. McKithen, 626 F.3d at 151, quoting Osborne, 129 S. Ct. at 2319. Thus, in light of Osborne, the right of access to DNA testing depends on the strength of the evidence on which the prisoner's conviction was based and the efficacy of the state's procedures in assessing that evidence.

The Second Circuit explained that "the lower federal courts are to defer to the judgment of state legislatures concerning the process due prisoners seeking evidence for their state court post-conviction actions, and '[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.'" McKithen, 626 F.3d at 153, quoting Osborne, 129 S. Ct. at 2320.

Regarding Mr. McKithen's attack on the New York statute as facially inadequate, the court concluded that "McKithen cannot demonstrate that New York's procedures sink to that level of fundamental inadequacy." The court explained that the New York statute, allowing DNA testing based on a "reasonable probability" that its availability at trial would have resulted in a verdict more favorable to the defendant, set forth a more liberal standard than the "clear and convincing" standard. Therefore, the Second Circuit held that "the process afforded by [Criminal Procedure Law section] 440.30(1-a)(a) is constitutionally adequate" to vindicate Mr. McKithen's limited right of procedural due process. McKithen, 626 F.3d at 151, 153.

The Second Circuit also rejected Mr. McKithen's claim that denial of access to post-conviction DNA testing violated an "Eighth Amendment right to be free from punishment on the basis of actual innocence." The court explained that, even assuming he had such a right, "[t]he case against Mr. McKithen—specifically, the uncontradicted eyewitness testimony against him and the identification of the weapon—is simply too strong to hold that DNA testing would produce evidence either necessary or sufficient to support a constitutional actual innocence claim in federal court." McKithen, 626 F.3d at 155.

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