CALIFORNIA VS. BOST, 1988

"…Simple beach nudity is not indecent exposure…Fair notice must be given before a citation is issued..."

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MARY ANN HULSE
COUNTY CLERK OF PLACER COUNTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER
APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	NO. 75689
	)	(Muni.Ct.No.CR1-2947)
Plaintiff & Respondent,	)	
	)	OPINION
vs.	)	
ERIC JOHN BOST,	)	
Defendant & Appellant.	)	

Eric John Bost (Bost) appeals his conviction after court trial of violating Section 4322 of Title 14 of the California Administrative Code ("Section 4322"), prohibiting nudity within the state parks. Bost contends that his conviction must be reversed because Section 4322 unconstitu- tionally infringes his right to "skinny dip"; because the policies adopted by the state parks with respect to enforcement of the statute as applied in Bost's case render its enforcement arbitrary and discriminatory; and because Bost's conduct was not prohibited by the statute and administrative policies concerning its enforcement. We conclude that long-standing and well- publicized policies concerning nudity in the State Park System define and limit conduct prohibited by Section 4322 and that Bost's activities were not in violation of that section. Accordingly, we shall reverse.

Section 4322 of Title 14 of the California Administrative Code provides:
"No person shall appear nude while in any unit of the State Park System except in authorized areas set aside for that purpose. The word nude as used herein means unclothed or in such a state of undress as to expose any part or portion of the pubic or anal region or genitalia or any portion of the breast at or below the areola thereof of any female."

Violation of that administrative regulation of the state park system is made punishable as a misdemeanor by Section 5008 of the California Public Resources Code.

After public hearings conducted by the State Park System on the question of whether and what areas of the state parks should be set aside as "clothing optional" areas of the state parks, the then Director of the California Department of Parks and Recreation, Russell W. Cahill, adopted a policy that, "No clothing optional beaches will be designated within the California State Park System at this time. During the public meeting process, it became clear to me that the public is extremely polarized on this issue. It also became clear that there is a serious concern on the part of clothing optional beach opponents about the extra costs of patrolling beaches so designated. [P] Proponents' arguments that a few miles of beach be set aside for their use were pervasive (sic). However, serious opposition from legislators, county supervisors and local governing bodies leads me to believe that designating such areas will focus opponents' attention upon what seems to be a victimless crime at worst, and certainly an innocuous action. [P]

The cost of extra services argument is a good one. Therefore, it shall be the policy of the Department that enforcement of nude sunbathing regulations within the State Park System shall be made only upon the complaint of a private citizen. Citations or arrests shall be made only after attempts are made to elicit voluntary compliance with the regulations. This policy should free up enforcement people to concentrate on other pressing duties."[1]

The "Cahill Policy" has remained the enforcement policy of the State Park System throughout the State of California. The policy has been widely disseminated and is well known within the public, and particularly among those who enjoy nude sunbathing at the state parks. In addition, while the Department has declined to designate specific areas as clothing optional as permitted by the provisions of Section 4322, a number of locations within various state parks have, by custom and practice, become known and accepted as areas where clothing optional activities are tolerated. Indeed, evidence introduced at the trial suggests that the Department has, if not overtly encouraged, at least knowingly failed to discourage in any way individual and organized nude activities at various locations within the State Park System over the years.

The Bear (sic)[2] Cove area has become well known as a location within Folsom State Park where clothing optional activities can take place with the knowledge and without complaint from enforcement authorities except as specified by the Cahill policy. For example, approximately one month before Eric Bost was arrested at Bear Cove, the Department of Parks and Recreation acquiesced in the holding of organized "National Nude Weekend" activities at Bear Cove.

The availability of clothing optional facilities in various areas of the state park, including the Bear Cove area, has been featured in a number of widely available private publications. In addition, though the Department of Parks and Recreation has not officially designated any "clothing optional" areas within the State Park System, an official publication of a sister state agency lists areas within several state parks as being available for clothing optional activities. The "California Coastal Access Guide" published by the California Coastal Commission of the State of California, lists four "clothing optional" locations in four separate state parks, though not including Bear Cove. The listings do not include references to the prohibition of Section 4322 and, indeed, are put forth in inviting terms, describing the locations as, "sandy, clothing optional beach", "popular clothing optional beach", "popular sunbathing beach; clothing optional", and, simply, "clothing optional."

In addition to the testimony of Mr. Bost, who indicated his awareness of the general acceptance of nudity at the Bear Cove area of Folsom State Park and, in general, of the tolerance of clothing optional activities throughout the State Park System, the testimony of a number of other individuals active in individual and organized nude activities was introduced to establish that innocent nude sunbathing and swimming is at least tolerated, if not encouraged, in various areas of the state parks.

Bear Cove, part of the popular Granite Bay recreation portion of Folsom, is a rather secluded area of beach located in a cove which, while accessible from the water, is not easily visible to those passing by on the water or by land. Because of this seclusion, it has become a popular location for nude sunbathing and swimming. Because of this seclusion, these innocent activities of nude sunbathers and swimmers has attracted little private or public attention or criticism.

On Saturday, August 10, 1985, Mr. Bost was on the Bear Cove beach dressed only in a pair of scuba diving boots. A park ranger entered Bear Cove in a boat, spoke with a number of nude recreators and ultimately approached Bost. The ranger stated that there had been complaints concerning the Bear Cove activities that day and directed Bost, as he had others, to dress or that a citation would be issued. In fact there had been a single complaint by a passing fisherman. Appellant complied, dressed and left the area.

Bost returned to Bear Cove on August 11 and was again swimming, nude at the Bear Cove area.[3] The same ranger again approached the area and Bost. The ranger advised Bost that he had been warned yesterday and then, without further warning, cited him for violation of Section 4322 and asked him to dress. No complaint had been received of the activities of appellant or of any others at the Bear Cove area on that Sunday. A number of other nude sunbathers present on Sunday were warned and told to dress. Evidence was also introduced of one individual who received a citation on Sunday who had not received a previous warning either on Sunday or on the previous Saturday.

Bost's citation led to trial before the municipal court and the conviction from which he appeals.

We deal first with Bost's contention that Section 4322 violates his constitutionally protected right to nude sunbathing. Bost refers us to Williams v. Kleppe (1976) 539 Fed.2d 803. There, a Federal Circuit Court upheld a national park regulation prohibiting nude activities on the Cape Cod Seashore National Park. In upholding the regulation, however, the court recognized some constitutionally cognizable interest in nude bathing where such activities had been historically conducted in secluded areas where the conduct was unlikely to be offensive to passers-by. (Williams v. Kleppe, supra, 539 Fed.2d at 807, citing Williams v. Hathaway (1975) 400 Fed.Supp.122, 127.) Appellant does not contend, nor could he based upon any authority we have found, that the right to engage in nude activities in the state parks or elsewhere is a fundamentally protected right. While we do not mean to equate nude sunbath- ing with activities such as seductive nude dancing or other purposeful public displays of nudity involving sexuality, the cases upholding regulation of the latter activities recognize that there are legitimate state interests in prohibiting nudity which might be offensive to others in public places. (Crownover v. Musick (1973) 9 Cal.3d 405; 107 Cal.Rptr. 681; Eckl v. Davis (1975) 51 Cal.App.3d 831, 124 Cal.Rptr. 685). We conclude that the potential that simple nude sunbathing or swimming activities may be offensive to the sensibilities of other state park users is sufficient to warrant the prohibition of such activities within the State Park System. Section 4322 is a valid and constitutional exercise of the police power of the state.

We will address Appellant's contentions concerning the interpretation of Section 4322 and the policies concerning its enforcement together, as their resolution raises common issues.

We note, first, that Appellant has made no contention, nor is there any evidence, that his prosecution was grounded on enforcement policies that singled him out for prosecution based on some constitutionally prohibited basis. Absent such evidence, the fact that certain persons, including Appellant, are cited for violation of Section 4322 while others are not, is not grounds for reversal of his conviction. (See, for example, Murgia v. Municipal Court (1975) 15 Cal.3d 286, 124 Cal.Rptr. 204, Oyler v. Boles (1962) 368 U.S. 448, 456, 7 L.Ed.2d. 446, 453.) Appellant's contentions concerning "arbitrary and discriminatory enforcement" are more appropriately seen as a challenge to the section as being rendered unconstitutionally vague due to the application of the enforcement policy of the Department of Parks and Recreation as typified in this case. The contention has substantial merit.

It is a fundamental component of due process, protected both under Article 1, Section 7, of the California Constitution and the Fourteenth Amendment to the United States Constitution, that there must be a certain level of definiteness in criminal statutes. (Burg v. Municipal Court (1983) 35 Cal.3d 257, 198 Cal.Rptr. 145.) "Today it is established that due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." (ibid.)

In order to meet the first test of definiteness, a statute must give fair notice of what conduct it seeks to prohibit. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (Connelly v. General Construction Company (1926) 269 U.S. 385, 391; 46 S.Ct. 126, 127; 70 L.Ed. 322. It is evident that the prohibitory language of Section 4322 itself gives at least reasonably fair notice of the total prohibition of nudity in the state parks, except in authorized areas. Passing for the moment, the question of "authorized areas", we note that the statute, without more, is sufficiently clear and precise to warn people of common intelligence of the conduct it prohibits. To end the analysis of the problem here, as respondent suggests, however, would impermissably ignore the uncontroverted evidence of the long-standing tolerance and encouragement of nude activities in certain areas of various state parks.

The due process requirement of precision is intended to provide ordinary individuals with knowledge of what it is the state seeks to prohibit them from doing. "The notice provided must be such that prosecution does not 'trap the innocent' without 'fair warning' (Grayned v. City of Rockford (1972) 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222.)" (Burg v. Municipal Court, supra, 35 Cal.3d at 271; 198 Cal.Rptr. at 153.) While the usual problem is the vagueness of statutory language, we conclude that where long-standing and well publicized official policies of the state expressly permit or encourage activities which are technically unlawful, prosecution based upon such conduct offends basic notions of due process.

Courts routinely refer to external indicia of precision, including announced administrative policy, to interpret otherwise vague statutes with the precision necessary to avoid their unconstitutionality. (See, for example, Pennisi v. State Fish and Game (1979) 97 Cal.App.3d 268; 158 Cal.Rptr. 683; Burg v. Municipal Court, supra, 35 Cal.3d 257, 272; 198 Cal.Rptr. 145, 154; County of Nevada v. McMillan (1974) 11 Cal.3d 662, 673; 114 Cal.Rptr.345.)

In Pennisi, for example, the court considered evidence of well publicized policies of the Fish and Game department concerning methods of measuring fish net mesh to determine their legality to clarify the language of a purportedly vague statute providing for civil and criminal penalties.

In Burg, the Supreme Court looked to external evidence acquainting the public with the effects of drinking on determined blood alcohol levels in holding that the provisions of subsection (b) of Vehicle Code section 23152, prohibiting driving with a blood alcohol level of .10% by volume, provided fair notice of the conduct prohibited. Among the external indicia of notice relied on by the court was the common Department of Motor Vehicles driver information pamphlet.

These cases demonstrate that apparently vague statutory language can be given meaning so as to provide fair notice by reference to external indicia of meaning, including broadly disseminated enforcement policies. We believe that similar external indicia, when in the form of well publicized and widely known policy statements and practices, can create sufficient confusion in the mind of a reasonable person as to what conduct is actually prohibited by the state so as to render enforcement of an otherwise clear Penal statute violative of due process in particular circumstances.

Before declaring a statute unconstitutional, however, we are obligated to ascertain if it is subject to definition consistent with legislative intent that avoids its unconstitutionality. (Pryor v. Municipal Court (1979) 29 Cal.3d 238; 158 Cal.Rptr. 330; People v. Soto (1985) 171 Cal.App.3d 1158; 217 Cal.Rptr. 795.) As we have just noted, such interpretation may make reference to external indicia. with its enforcement is entitled to great weight. (California Welfare Rights Organization v. Bryan (1974) 11 Cal.3d 237, 113 Cal.Rptr. 154; Pennisi v. State Fish and Game Department, supra, 97 Cal.App.3d 272, 284, 158 Cal.Rptr. 683, 687.) We believe that the statutory language and policies can be harmonized to arrive at a statutory construction consistent with legislative intent and due process notice requirements.

Applying these rules to the statute in question we reach several conclusions. First, we conclude that, though the 1979 Cahill policy eschews an intention on the part of the Department to designate clothing optional beaches, the subsequent enforcement practices and policies of the Department have resulted in the designation of certain areas as "clothing optional", Bear Cove is such an area. Secondly, we conclude that the department has availed itself of the discretion granted it by the legislature to make the clothing optional use of these beaches conditioned upon the absence of citizen complaint to law enforcement officers. We also conclude that a reasonable construction of this policy which is consistent with legislative intent and the policies and practices established at the trial is that a warning to discontinue nude activities cannot be construed to be a ban "forever" of the future pursuit of nude activities at the state park. We find that the policy contemplates that an individual may return to the same location on a subsequent day after a complete cessation of nude activities on request of an enforcement officer.

This construction meets the two elements of due process notice required by Burg and similar cases. By reading the long-applied policy as a conditional designation of clothing optional beaches, the public receives fair notice that clothing optional activities like "skinny dipping" are permitted only at recognized locations within the state parks, unless a request for cessation of such activities is made by an enforcement officer upon public complaint. Upon such warning, the activity must stop for the day. By prohibiting the activity for the balance of the day, it is likely that the skinny dipper and complaining party will not encounter one another again, thus serving the purpose of the "Cahill policy" in a rational, easily understandable way.

This construction also fairly advises law enforcement and prosecutors of how the law is to be enforced. So long as the activity takes place in a traditionally recognized area, it is legal unless and until a complaint from a member of the public is received. Upon such complaint, a warning is to be issued and, if not heeded, a violation has occurred. Further activities of a person so warned are prohibited for the balance of the day, but activities on later days are proscribed only if preceded by a new public complaint and renewed warning.

For these reasons, we conclude that the conduct which Appellant engaged in on Sunday, August 11, 1985, was not in violation of Section 4322 and that, accordingly, his conviction must be reversed.

Dated: February 22, 1988
GILBERT, P.J.
I concur: [4] COUZENS, J.

Footnotes:

1 The evidence concerning the adoption of policies their dissemination and public awareness of the policy were not controverted at the trial. So too, the essential facts surrounding Mr. Bost's arrest were not in substantial dispute.

2. The record does not tell us if the choice of this area was an intended pun.

3. Perhaps establishing a use of the phrase "double dipping" outside of the area of public retirement.

4. By stipulation of the parties at oral argument, this matter was submitted to a two judge panel of the court.