

***Silvar v. Dist. Ct.*, 122 Nev. Adv. Op. 25, 129 P.3d 682 (2006)<sup>1</sup>**

**CONSTITUTIONAL LAW – VOID FOR VAUGNESS DOCTRINE &  
OVERBREADTH DOCTRINE**

**Summary**

Lani Lisa Silvar (“Silvar”) was arrested in Clark County, Nevada for violating Clark County Ordinance (“CCO”) 12.08.030. While Silvar was standing on the corner of Fremont and Atlantic Street, a Las Vegas Metropolitan Police Department detective approached her in an unmarked vehicle. Silvar entered the detective’s vehicle and allegedly asked the detective if he was “dating,” a term synonymous with seeking prostitution. After the detective responded in the affirmative, Silvar became nervous and attempted to exit the vehicle. The detective identified himself and gave Silvar an opportunity to explain her actions. Silvar responded that she was working as a prostitute, recognized the detective from a previous solicitation arrest, and decided not to proceed.

The detective arrested Silvar and she was charged with loitering for the purpose of prostitution in violation of CCO 12.08.30 which states:

It is unlawful for any person to loiter in or near any public place or thoroughfare in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting for or procuring another to commit an act of prostitution.

Among the circumstances which may be considered in determining whether such purpose is manifested are that such person repeatedly beckons to, stops, attempts to stop or engages persons passing by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture. No arrest shall be made for a violation of this section unless the arresting officer first affords such person an opportunity to explain such conduct, and no one shall be convicted of violating this section if it appears at trial that the explanation given was true and disclosed a lawful purpose.<sup>2</sup>

Silvar moved to dismiss the complaint against her arguing that CCO 12.08.30 was unconstitutionally vague and overbroad. The Las Vegas Justice Court dismissed the complaint on that basis. The district court reversed and remanded, upholding the constitutionality of the ordinance. Silvar appealed.

The Nevada Supreme Court found that the ordinance was unconstitutionally vague and overbroad and therefore void.

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<sup>1</sup> By Melissa Waite

<sup>2</sup> Clark County Ordinance 12.08.30.

## **Issue and Disposition**

### **Issue**

Is Clark County's prostitution loitering ordinance unconstitutionally vague and overbroad?

### **Disposition**

Yes. Clark County's prostitution loitering ordinance is unconstitutionally vague and overbroad. The ordinance is unconstitutionally vague because it fails to provide notice such that a person of ordinary intelligence would understand what conduct is prohibited and because the ordinance lacks specific standards. The ordinance is unconstitutionally overbroad because it criminalizes conduct that is constitutionally protected and because it contains no specific intent element.

## **Commentary**

### **State of the Law Before *Silvar***

While the Nevada Supreme Court has not previously considered the precise issue of the constitutionality of a prostitution loitering ordinance, the court has articulated standards for determining the constitutionality of an ordinance which is vague or overbroad. The court in *Sheriff Washoe County v. Burdg* articulated the void-for-vagueness doctrine finding that a statute is unconstitutionally vague if it, "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."<sup>3</sup> The court in *City of Las Vegas v. District Court* articulated the overbreadth doctrine stating that the doctrine, "provides that a law is void on its face if it 'sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of' protective First Amendment rights, such as the right to free expression or association."<sup>4</sup>

Additionally, the court has considered the constitutionality of other loitering ordinances. In *State v. Richard*, the court held that certain state and municipal loitering laws, which criminalize loitering on private property when an individual has no "lawful business with the owner or occupant thereof" were unconstitutionally vague.<sup>5</sup> The court reasoned that the statute and ordinances were void for vagueness because they failed to inform the public of what conduct was prohibited and they "fail to provide law

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<sup>3</sup> 118 Nev. 853, 857, 59 P.3d 484, 487 (2002) (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)).

<sup>4</sup> 118 Nev. 859, 863 n. 14, 59 P.3d 477, 480 n.14 (2002) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)).

<sup>5</sup> 108 Nev. 626, 629, 836 P.2d 622, 624 (1992).

enforcement officials with proper guidelines to avoid arbitrary and discriminatory enforcement.”<sup>6</sup>

## **Other Jurisdictions**

Many other jurisdictions have considered the constitutionality of prostitution loitering ordinances.

### **A. Unconstitutionally Vague Due to Lack of Adequate Notice of Prohibited Conduct**

The Ohio Court of Appeals in *Cleveland v. Mathis*, held that a prostitution loitering ordinance was void for vagueness.<sup>7</sup> The court pointed to the fact that the ordinance listed circumstances that "may" be considered in determining whether an individual manifested a purpose to engage in, solicit, or procure sexual activity for hire.<sup>8</sup> Additionally, the court recognized that the ordinance used the word ‘among’ which indicates there were other circumstances to form the basis of an arrest and conviction.<sup>9</sup> The court concluded that this statute impermissibly allowed factors other than those enumerated in the ordinance to be considered and thus was void because it did not give an ordinary person notice of what conduct was prohibited.<sup>10</sup>

### **B. Unconstitutionally Vague Due to Lack of Adequate Law Enforcement Guidelines**

The Supreme Court of Alaska in *Brown v. Municipality of Anchorage*, struck down a prostitution loitering ordinance in part because a formerly convicted prostitute could be convicted for loitering without committing any other overt act.<sup>11</sup> The court concluded that, even though such loitering suggests the intent to engage in prostitution, this was not an adequate guideline.<sup>12</sup> The ordinance’s vagueness left too much discretion in the hands of the police, who could apply it arbitrarily.<sup>13</sup>

In *Wyche v. State*, the Supreme Court of Florida found that the entire list of suggestive circumstances listed in a prostitution loitering ordinance was not exhaustive and “leaves much to individual officers’ discretion,” which “encourages the arbitrary and discriminatory enforcement of the law.”<sup>14</sup> Further, the court reasoned that, “Many innocent people saunter on the streets and call to friends.”<sup>15</sup> Because this type of

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<sup>6</sup> *Id.*

<sup>7</sup> 136 Ohio App. 3d 41, 45, 735 N.E. 2d 949, 952 (Ohio App. 1999).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 584 P.2d 35, 37 (Alaska 1978). *See also* Gates v. Municipal Court, 185 Cal. Rptr. 330 (Cal. 1982) (a city ordinance proscribing loitering for purpose of soliciting an act of prostitution left enforcement to subjective and potentially arbitrary evaluation of law enforcement officers was unconstitutionally vague).

<sup>12</sup> *Brown*, 584 P.2d at 37.

<sup>13</sup> *Id.*

<sup>14</sup> 619 So.2d 231, 237 (Fla. 1993).

<sup>15</sup> *Id.*

behavior would be included under the ordinance, the court found the ordinance was unconstitutionally vague.

In *Coleman v. City of Richmond*, the Court of Appeals of Virginia found a prostitution loitering ordinance which did not require an overt act of solicitation or prostitution resulted in a situation where an officer may arrest someone on a mere suspicion of future criminality.<sup>16</sup> The court concluded that the ordinance vested too much discretion in the officers who enforce the ordinance and the ordinance allowed for arbitrary and discriminatory enforcement. As a result, the ordinance was void for vagueness.

#### C. Unconstitutionally Overbroad Due to Prohibition of Constitutionally Protected Conduct

The court in *Wyche*, held that an ordinance which allows for arrest and conviction for loitering under circumstances merely indicating the possibility of such intent, such as beckoning to passersby and waving to motorists is unconstitutionally overbroad.<sup>17</sup> The court reasoned that these activities frequently occur without any intent to engage in criminal activity. The court found that “[t]he ordinance affects and chills constitutionally protected activity.”

Similar ordinances likewise have been invalidated by numerous other courts based on the ordinances' potential for punishing innocent conduct.<sup>18</sup>

#### D. Unconstitutionally Overbroad Due to Lack of Specific Intent

A majority of the prostitution loitering ordinances that have been upheld and found not to be unconstitutionally overbroad require the element of specific intent. For example, a California statute that required loitering to occur “with the intent to commit prostitution” was upheld.<sup>19</sup> Similarly, an Ohio ordinance that required that loitering be done “for the purpose of engaging in soliciting or procuring sexual activity for hire” was also upheld.<sup>20</sup> Finally, a Seattle ordinance was upheld which provides that a loitering

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<sup>16</sup> 5 Va. App. 459, 466, 364 S.E.2d 239, 243 (Va. App. 1988).

<sup>17</sup> 619 So.2d at 235-36.

<sup>18</sup> See e.g., *Johnson v. Carson*, 569 F. Supp. 974 (D.C. Fla.1983) (a municipal ordinance prohibiting loitering for the purpose of prostitution, which prohibited constitutionally protected as well as unprotected conduct, was unconstitutionally overbroad. “[A]nyone standing on the street corner repeatedly talking to passers-by, even if they are old friends, could be violating the ordinance.”); *Profit v. City of Tulsa*, 617 P.2d 250, 251 (Okla. 1980) (An ordinance was found unconstitutionally overbroad where “acts required to be done in conjunction with being a known prostitute or pimp are otherwise not criminal in most situations. The ordinance reaches beyond conduct which is calculated to harm and could be used to punish conduct which is essentially innocent.”); *Christian v. City of Kansas City*, 710 S.W.2d 11, 13 (Mo. Ct. App. 1986) (“If the circumstances which allegedly reflect one's illicit intentions were held to be well grounded in constitutional jurisprudence, this court would have to condone potential arrests and convictions for ... window shopping, waiting on the corner for a bus, waving to friends, or hailing a taxicab.”).

<sup>19</sup> *People v. Pulliam*, 73 Cal. Rptr. 2d 371, 376 (Ct. App. 1998) (upholding Cal. Penal Code § 653.22).

<sup>20</sup> *City of Cleveland v. Howard*, 532 N.E.2d 1325, 1326 (Ohio Mun. Ct. 1987) (upholding Cleveland Codified Ordinances § 619.11).

violation occurs when a person “intentionally solicits, induces, entices, or procures another to commit prostitution.”<sup>21</sup>

### **Effect of *Silvar* on Current Law**

The court’s opinion in *Silvar* provides an excellent framework for evaluating questions of constitutionality of ordinances or statutes that are potentially vague or overbroad.

The *Silvar* court noted that prostitution and soliciting are still unlawful acts under other applicable Clark County ordinances. However, because the prostitution loitering ordinance is unconstitutional and therefore void, Clark County now lacks an enforceable prostitution loitering ordinance.

### **Unanswered Questions**

If Clark County desires an effective prostitution loitering ordinance, a new ordinance must be enacted. The court advises that an example of a prostitution loitering statute that adequately satisfies constitutional vagueness and overbreadth concerns is found in N.Y. Penal Law § 240.37(2). This statute states:

Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article two hundred thirty of the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.<sup>22</sup>

Although it remains to be seen whether Clark County will enact a new prostitution loitering ordinance, this provision can offer guidance in drafting such an ordinance and demonstrates the level of detail necessary to avoid issues of vagueness and overbreadth.

### **Conclusion**

Clark County’s prostitution loitering ordinance is unconstitutionally vague because it fails to provide notice such that a person of ordinary intelligence would understand what conduct is prohibited and because the ordinance lacks specific standards. Further, the ordinance is unconstitutionally overbroad because it criminalizes conduct that is constitutionally protected and because it contains no specific intent element.

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<sup>21</sup> City of Seattle v. Slack, 784 P.2d 494, 496 (Wash. 1989) (upholding Seattle Mun. Code 12A.10.010(B)).

<sup>22</sup> N.Y. PENAL LAW § 240.37 (2) (McKinney 2006).