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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001493-MR

JACOB GINGERICH; EMANUEL YODER;
AND LEVI ZOOK APPELLANTS

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NOS. 07-T-02681; 07-T-02873; 07-T-03789;
08-XX-00003; 08-XX-00004; AND 08-XX-00005

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2009-CA-001046-MR

MENNO ZOOK; DAVID ZOOK; ELI ZOOK;
MOSE YODER; LEVI HOSTETLER; JACOB
GINGERICH; AND DANNY BYLER APPELLANTS

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NOS. 08-T-00609; 08-T-00637; 08-T-00737; 08-T-01006; 08-T-01074;
08-T-01134; 08-T-01224; 08-T-01309; 08-T-01383; 08-T-01459; 08-T-01525;
08-T-01526; 08-T-01532; 08-T-01713; 08-T-01774; 09-XX-00002; 09-XX-00003;
09-XX-00004; 09-XX-00005; 09-XX-00006; 09-XX-00007; 09-XX-00008;
09-XX-00009; 09-XX-00010; AND 09-XX-00011

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Multiple parties bring these appeals as a result of their convictions[2] of violating KRS 189.820, which requires that a slow-moving vehicle (SMV) emblem, a fluorescent yellow-orange triangle with a dark red reflective border, be displayed on their horse-drawn buggies. Appellants are members of the Old Order Swartzentruber Amish religion, and argue that KRS 189.820 is unconstitutional because it interferes with their ability to freely exercise their religion.

As members of the Old Order Swartzentruber Amish, Appellants follow a strict religious code of conduct, or Ordnung, which regulates everything from hairstyle and dress to education and transportation. Among the tenets of the Swartzentruber Amish Ordnung are the beliefs that extravagant displays of "loud" colors should be avoided, as well as the use of "worldly symbols." More specifically, it is believed that the use of loud colors is splashy, garish, and suggestive of vanity, and that the use of worldly or secular symbols encroaches upon their spiritual relationship with God and serves as an indication that the user's

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Because Appellants concede that they failed to display the SMV emblem, and the facts surrounding their charges are not at issue, this appeal will not address those specifics.

trust in God has strayed to the world at large. Appellants argue that KRS 189.820 prevents them from freely exercising their religious beliefs by requiring them to display the SMV emblem in direct violation of their Ordnung.

The district court evaluated Appellants' constitutional claims under strict scrutiny analysis and found that although the statute substantially burdened Appellants' sincerely held religious beliefs, the Commonwealth had sufficiently shown that the statute furthered a compelling governmental interest through the least restrictive means possible. Appellants then appealed their convictions to the Graves Circuit Court.[3] Appellants again argued the unconstitutionality of KRS 189.820, and presented two main arguments to the circuit court for consideration: 1) the statute at issue violates their rights of free speech and free exercise of their religion; and 2) the statute has been selectively enforced against only members of the Swartzentruber Amish. The circuit court disagreed with both arguments and affirmed the convictions of the district court. However, instead of applying the compelling governmental interest/least restrictive means analysis, the trial court instead relied on its findings that the statute is generally applicable to all slow-

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[3] Although the Appellants appealed to the Graves Circuit Court in two separate actions, the issues are essentially the same. Therefore, this Court will not differentiate between the two underlying circuit court actions, but will instead address the arguments as if they had been presented to the trial court in one consolidated action by all Appellants. We recognize that the trial court's former order (entered July 10, 2008; affirming the judgments of the district court) failed to address the argument of selective enforcement, since that argument had not been presented to the court. Nonetheless, were we to hold that Appellants were successful in establishing a prima facie showing of selective enforcement, such a holding would rightfully affect the parties of both appeals. We further recognize that the trial court's later order (dated May 14, 2009; affirming the judgments of the district court) incorporated by reference its former order.

moving vehicles, the statute is not aimed at particular religious practices, and the statute does not contain a system of particularized exemptions. These appeals followed.

The First Amendment of the U.S. Constitution states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This right to freely practice one's religion, also known as the Free Exercise Clause, is extended to the states by the Fourteenth Amendment. Additionally, the Kentucky Constitution lists "the right of worshipping Almighty God according to the dictates of [one's] conscience[]" as an inherent and inalienable right. Ky. Const. § 1. Furthermore, section 5 of the Kentucky Constitution states:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Ky. Const. § 5

The Free Exercise Clause boasts a lengthy history of interpretation and application. The U.S. Supreme Court first determined "whether religious belief

can be accepted as a justification of an overt act made criminal by the law of the land" in 1879. *Reynolds v. United States*, 98 U.S. 145, 162, 25 L. Ed. 244 (1878). The Mormon party in *Reynolds* argued that a law against polygamy unconstitutionally stifled his right to freely exercise his sincerely held religious belief that failure to practice polygamy would result in eternal damnation. *Id.* at 161-162. The Court held that a neutral law which inadvertently impacted certain religious practices was constitutional. *Id.*

In the 1960s, the neutral applicability view of *Reynolds* evolved into a broader view of the Free Exercise Clause by application of strict scrutiny analysis, also known as the "compelling state interest" standard. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (U.S.S.C. 1963) (holding that the statute disqualifying unemployment compensation claimant from benefits, absent a compelling state interest, because of her religiously based refusal to work on Saturdays, imposed an unconstitutional burden on the free exercise of her religion). The application of strict scrutiny analysis continued for some time, reaching its zenith in the landmark case of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). The Court in *Yoder* held that the legitimate social concerns of Wisconsin's compulsory education law, namely the welfare of children and society, were not upset by creating an exception with respect to the Amish. *Id.*

After *Yoder*, the Court once again narrowed its view of the Free Exercise Clause to a rational relation test and reinstated the holding that neutral laws of

general applicability do not implicate the constitutional provision. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 873, 110 S. Ct. 1595, 1597, 108 L. Ed. 2d 876 (1990) (upholding a state law prohibiting the use of peyote, despite the use of the drug as part of a religious ritual within the Native American Church, without utilizing strict scrutiny analysis). Following the holding of *Smith*, Congress passed the Religious Freedom Restoration Act ("RFRA") in 1993, as an attempt to reinstate the prior test of compelling state interest/least restrictive means. In response, the Court held the RFRA to be an unconstitutional reach of Congress' powers of enforcing the Constitution, effectively restoring the rational relation test of *Smith*. *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). Specifically, it was held that the RFRA usurped the Court's authority to determine what constitutes a constitutional violation. *Id.* Thereafter, Congress enacted the Religious Land Use and Institutionalized Persons Act (" RLUIPA"), which imposed the strict scrutiny test in situations where the alleged substantial burden is imposed by a federally funded program or where the alleged substantial burden would affect certain areas of commerce. 42 U.S.C.A. § 2000cc-1; *see also Spratt v. Rhode Island Dept. Of Corrections*, 482 F.3d 33 (1st Cir. 2007). Thus, Kentucky has only applied strict scrutiny analysis as directed by RLUIPA, under those specific circumstances. *See, e.g., Harston v. Commonwealth of Kentucky Transp. Cabinet*, 2011 WL 744542 (Ky. App. 2011)(2010-CA-000615-MR)(not final).

Appellants' first argument to this Court is that the circuit court erred by failing to apply strict scrutiny analysis when determining whether KRS 189.820 was constitutionally valid. In support of this argument, Appellants maintain that the Kentucky Constitution offers broader protection for religious freedom than does the U. S. Constitution, and therefore requires strict scrutiny analysis of religious burdens.

Appellants point to multiple cases in which they argue the Court's implicit use of strict scrutiny analysis. We first note that this Court is not in the habit of applying implicit tests, but rather explicit ones. If Kentucky Courts had intended strict scrutiny analysis to apply in cases alleging violation of the Free Exercise Clause, they could have plainly stated so. More notable though is that the cases to which Appellants cite concern laws of comprehensive application, such as compulsory education and prohibition of snake and reptile use during religious services. In contrast, KRS 189.820 does not infringe upon Appellants' right to exercise their religion by restricting their religious worship rituals or enforcing compulsory conduct to which they are conscientiously opposed. Instead, the statute serves as a condition to utilizing a certain privilege: the use of state roads. Just as the Kentucky Supreme Court has previously held that "driving an automobile is not a fundamental constitutional right, but a legitimately regulated privilege," so also is the use of public roads. *Commonwealth v. Howard*, 969 S.W.2d 700, 702 (Ky. 1998). Further, the use of a vehicle and the use of public roads are not acts of religious worship. "Full and free enjoyment of religious

profession and worship is guarantied [sic], but acts which are not worship are not." *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972, 976 (1942) (citation omitted). KRS 189.820 is a neutral law of general applicability, and therefore does not invoke strict scrutiny analysis.

Regulations such as minimum driving age, speed restrictions, and SMV emblems are created, and enforced, to ensure *everyone's* safety. Considering the narrow, hilly, winding state roads in Graves County and Kentucky in general, small dark buggies being operated at low speeds present a hazard to themselves as well as others. Because use of the SMV emblem, other than on a slow-moving vehicle, is prohibited, the emblem is widely recognized as a cautionary indicator of a slow-moving vehicle. *See* KRS 189.830. The existence of alternative methods of alerting drivers to the presence of a slow-moving vehicle does not make Kentucky's requirement of the SMV emblem unconstitutional. Additionally, any public confusion regarding the exact message of the emblem does not detract from its effectiveness as an alert. In this instance, the Commonwealth's objective of ensuring public safety through the most effective means possible overshadows any encumbrances on religious practice. Accordingly, the trial court's refusal to find KRS 189.820 unconstitutional was appropriate.

Assuming arguendo that strict scrutiny is the appropriate analysis in this case, KRS 189.820 would still pass constitutional muster. Clearly, the compelling reason of the government is to promote highway safety for everyone who uses the roads. The argument that the Commonwealth failed to show such an

interest is unreasonable. Obviously a certain amount of common sense must be applied in these situations. Headlights; bright reflective colors on road signs, lane lines, and guard rails; and street lights all play a significant role in keeping our roadways safe for everyone. The SMV emblems serve as an alert to other vehicles. KRS 189.820 can only advance the interest of safety if it is respected and followed by those within the Commonwealth.

Appellants argue[4] that the Commonwealth has implicitly recognized that the SMV emblem is not necessary for roadway safety because it is not required for other vehicles, namely bicycles. Appellants also argued that bicycles, which are specifically exempted from the SMV emblem requirement of KRS 189.820, are much less visible on a roadway, implying that they are, therefore, at a greater risk of injury. We do not agree. Although we will concede that bicycles, by virtue of their compact size, are likely less visible, we do not agree that bicycles create the same amount of danger to other motorists as a large buggy or a piece of farm machinery. We therefore reject Appellants' argument that the bicycle exemption creates a showing of legislative belief that the SMV emblems do not promote roadway safety.

Appellants propose the use of reflective tape as a less restrictive alternative to the SMV emblem. However, the reflective tape can only be seen when it is engaged by headlights. Accordingly, the reflective tape would offer no protection to buggy operators or other motorists during dawn, dusk, and the

[4] This argument was made by counsel for Appellants at the oral arguments held on March 24, 2011.

daylight hours. Statistics were presented to the Court that a greater number of buggy-related accidents take place at dusk, a time when most motorists have not yet engaged their headlights. Certainly, the low level of visibility is a major contributing factor to this high number of accidents. Nonetheless, Appellants argue for a buggy marker that will provide them with even less visibility. The trial court was not convinced that a small black and white rectangle strip of tape is an equally effective alert on a small dark buggy as a large orange and red triangle. Accordingly, we see no way in which the Commonwealth's goal of road safety, with respect to slow-moving vehicles, can be achieved through less restrictive means.

This Court is not in the business of tenaciously restricting religious practices. Indeed, the freedom to express and exercise one's religious beliefs is held in high esteem. However, such practices cannot infringe on the rights and safety of the public at large. If we were to grant an exception to the Amish, we would be placing a greater importance on their ability to freely exercise their religion over the significant safety interests of both the Amish and the public at large. To do so would completely frustrate the legislature's intent when it enacted KRS 189.820. The trial court was correct in refusing to find KRS 189.820 to be unconstitutional.

Appellants also argue that the trial court erred by not imposing upon the Commonwealth a burden of production to rebut Appellants' claims of selective enforcement. We not agree. In order to succeed on a claim of selective

enforcement, a claimant must show that: 1) they were singled out by a government official as a person of an identifiable group; 2) that the official's motivation was primarily or partially discriminatory in purpose or intent; and 3) that the action had a discriminatory effect. *See United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996). "Discriminatory purpose" implies that the official acted *because of* the adverse effects his or her action would have upon an identifiable group. *See McCleskey v. Kemp*, 481 U.S. 279, 298, 107 S. Ct. 1756, 1770, 95 L. Ed. 2d 262 (1987). "Discriminatory effect" is established by a showing that the law was enforced against the claimant, but not similarly situated individuals outside of the identifiable group. *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1487. Once a claimant has successfully shown discriminatory effect and discriminatory purpose, the government then bears the burden of producing evidence which rebuts the inferences. *See United States v. Avery*, 137 F.3d 343, 356 (6th Cir. 1997). However, the claimant retains the ultimate burden of proving discrimination. *Id.*

Kentucky appellate courts have long recognized that the trial court is in a "superior position to judge [witnesses'] credibility and the weight to be given their testimony." *See, e.g., Kotas v. Commonwealth,* 565 S.W.2d 445, 447 (Ky. 1978). In support of their claim of selective enforcement, Appellants presented civilian testimony that non-Amish slow-moving vehicles had been observed on Graves County roadways without the SMV emblem. The Graves Circuit Court discounted the credibility of this witness. Additional testimony was presented that

a non-Amish civilian had been stopped, while operating a slow-moving vehicle without the SMV emblem, and had not received a citation. The trial court noted that the slow-moving vehicle was large in size, was painted with bright colors, and was being followed by a pickup truck engaging its emergency flashers. The court also discounted the safety risk of the uncharged operator's vehicle, compared to "a small dark buggy, being operated at low speeds." Lastly, Appellants presented evidence that only two prosecutions under KRS 189.820 had occurred outside of Graves County in 2006. In response to this, the court noted that it had not been informed of the distribution of Old Order Swartzentruber Amish communities across the Commonwealth.

Given the evidence presented to the trial court, and the weight given by the trial court, the Appellants were not successful in establishing a prima facie showing of discriminatory effect and discriminatory purpose. Accordingly, the trial court's dismissal of that claim was proper.

For the foregoing reasons, the July 10, 2008, and May 14, 2009, judgments of the Graves Circuit Court are affirmed.

ALL CONCUR.

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