OHIO INTERSTATE HIGHWAY ADVERTISING PROHIBITION HELD UNCONSTITUTIONAL

Ghaster Properties, Inc. v. Preston

89 Ohio L. Abs. 16, 20 Ohio Op. 2d 51, 184 N.E.2d 552 (C.P. 1962)

Property owners brought a proceeding to enjoin the Director of Highways from enforcing the sections of the Ohio Revised Code [1] which prohibit outdoor advertising signs within 660 feet of the right of way of an interstate highway, and for a declaratory judgment as to whether such sections are constitutional under the Ohio and federal constitutions. The action was consolidated for trial with two actions by the Director of Highways for an order to abate as a nuisance, under authority of the above sections, several billboards located on interstate highways. The Court of Common Pleas for Allen County held that the statutes in question were unconstitutional and void under sections 1 and 19 of article I of the Ohio Constitution and void under section 1 of the fourteenth amendment to the Constitution of the United States. The court reasoned that the restriction on the use of property without compensation constituted an unwarranted taking because the use of the land for advertising purposes had been disrupted and the evidence failed to show that the statute had any relation to highway safety. The Ohio statutes were, therefore, an unconstitutional exercise of the state's police power in violation of substantive due process.[2] The court also found that the statutes denied the owners equal protection of the law as guaranteed under the Ohio and federal constitutions.[3]

One of the prime motivating forces in the adoption of anti-billboard statutes is the provision in the Federal Highway Act of 1958 for a cash bonus of one half of one percent of the federal contribution to the interstate highway cost for states which adopt statutes under authority of their police powers restricting advertising in the manner required in the act.[4] An alternative method of regulation under the act provides federal funds

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[1] Ohio Revised Code §5516.01 to §5516.05 inclusive and §5516.99.

[2] Ghaster Properties, Inc. v. Preston, 89 Ohio L. Abs. 16, 20 Ohio Op. 2d 51, 184 N.E. 2d. 552 (C.P. Allen County, 1962). Studies conducted on the influence of advertising devices have been inconclusive and show if anything that the relationship between advertising devices along highways and accidents thereon is neglible. *Id* at 22, 184 N.E. 2d at 557.

[3] The statute forbids advertising on the interstate routes, but excepts from the prohibition signs advertising the sale or lease of the property upon which the signs are located, signs indicating the name of the business or profession conducted on the property, and signs identifying goods produced, sold, or services rendered on such property. Ohio Rev. Code, §5516.02 (Supp. 1962). The court found that this was not a reasonable classification, citing Central Outdoor Advertising Co. v. Village of Evendale, 54 Ohio Op. 354, 124 N.E. 2d 189 (C.P. 1954), in support of its decision.

[4] Federal Highway Act of 1958, 72 Stat. 904, 23 U.S.C. §131 (1958).

for acquiring advertising rights providing the cost does not exceed five percent of the cost of the right of way for such projects.[5]

The Ohio statute seeks to regulate advertising by the exercise of the police power. Traditionally the use of the police power must have some reasonable relation to the promotion, preservation, or protection of the safety, health, morals, or general welfare of the public.[6] If such a relationship does not exist, the exercise of the police power may operate to deprive the owner of his property without due process of law.[7]

Cases concerned with the exercise of the police power with respect to outdoor advertising date from the turn of the century.[8] The early restrictions usually related to public safety, health, or morals, and the decisions gave safety rationales preferred treatment.[9] Over the years, general welfare considerations have been increasingly employed in assessing the validity of such land use restrictions.[10] Gradually the courts began to show willingness to predicate the validity of police regulation, at least in part, upon aesthetic considerations.[11] Some courts stated that such considerations might be utilized along with other factors justifying its use.[12] Others added that aesthetic purposes could not be a primary motivating factor.[13] Only the courts in a few states indicated that they would

[5] *Ibid.*

[6] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917).

[7] St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911); Thomas Cusack Co. v. Chicago, *supra* note 6; Passiac v. Patterson Bill Posting Co., 72 N.J.L. 285, 62 Atl. 267 (1905).

[8] *Ibid., In re* Wilshire, 103 Fed. 620 (C.C. Cal. 1900); Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920, 34 L.R.A. (n.s.) 998 (1911); City of Rochester v. West, 29 App. Div. 125, 51 N.Y.S. 482 (1898); *aff'd,* 164 N.Y. 510, 58 N.E. 673 (1900).

[9] St. Louis Gunning Advertising Co. v. St. Louis, *supra* note 7, held that an ordinance regulating size, location, and construction was permissible since fire and high winds were a hazard, waste matter accumulated around such structures and light and air were obstructed endangering health, and that billboards served as shelter for criminals and immoral sexual acts. See also Thomas Cusack Co. v. Chicago, *supra* note 7.

[10] General Outdoor Advertising Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930); *In re* Opinion of Justices, 103 N.H. 268, 169 A.2d 762 (1961) (discussed *infra*).

[11] General Outdoor Advertising Co. v. Dep't of Public Works, 289 Mass. 149, 193 N.E. 799 (1935); *appeal dismissed,* 296 U.S. 543 (1935); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); Murphy, Inc. v. Westport, 131 Conn. 292, 40 A.2d 177, 156 A.L.R. 568 (1944); General Outdoor Advertising Co. v. Indianapolis, *supra* note 10.

[12] Barney and Casey Co. v. Town of Milton, 324 Mass. 440, 87 N.E.2d 9 (1949); Kranz v. Town of Amherst, 192 Misc. 912, 80 N.Y.S.2d 812 (1948); Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex Civ. App. 1948); Conner v. City of University Park, 142 S.W.2d 706, (Tex. Civ. App. 1940).

[13] Hitchman v. Oakland Township, 329 Mich. 331, 45 N.W.2d 306 (1956); Frischkorn Construction Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946); Wolverine Sign Works v. City of Bloomfield Hills, 270 Mich. 205, 271 N.W. 823 (1937).

have held regulations valid on aesthetic grounds alone if it had been necessary.[14] The statements were only dicta in most of the cases since it was seldom necessary to use the aesthetic basis alone.

The New Hampshire Supreme Court in a recent advisory opinion[15] concerning advertising regulation on interstate highways took a more generous view of the reasons for enacting such provisions by finding that the general welfare of the state would be improved by the promotion of tourism, through increasing the attractiveness of roadside scenery. However, aesthetic considerations were held not to furnish the sole ground for the exercise of the police power. The court assumed that a reasonable relationship to safety existed without stating supporting reasons, other than that the confusion and distraction of billboards would increase the likelihood of accidents. The court could just as easily have reasoned that the signs were an augmenting factor in highway safety by diverting attention sufficiently to reduce "highway hypnosis."

Since it was an advisory opinion, the absence of litigating parties could account for the court's cursory examination of all the relevant facts. As a result, the court used aesthetic grounds to be considerable extent in formulating its decision despite its efforts to avoid it. It appears that courts will still require that the prohibition of highway advertising have some relationship to the safety, health, morals, or general welfare of the public in order to meet the standards of due process. However, aesthetic considerations will be molded to fit into the requirements in order to constitute a valid reason for the exercise of the police power of the state.

The court in the principal case expressly rejected the argument that aesthetic considerations could form the sole basis for a state validly exercising its police power.[16] Since economic interests are not given substantial

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[14] City of Miami Beach v. Ocean and Inland Co., 147 Fla. 840, 3 So. 2d 364 (1941); State v. City of New Orleans, 154 La. 271, 97 So. 440 (1923); General Outdoor Advertising Co. v. Dep't of Public Works, *supra* note 11 at 187, 193 N.E. 2d at 816; Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S. 2d 374 (1940).

[15] *In re* Opinion of Justices, *supra* note 10.

[16] Ghaster Properties, Inc. v. Preston, *supra* note 2. The federal courts have not been confronted by the problem directly. General Outdoor Advertising Co. v. Dep't of Public Works, *supra* note 11; Churchill and Tait v. Rafferty, 32 R.I. 580 (1915), *appeal dismissed,* 248 U.S. 591 (1918). The Supreme Court in Berman v. Parker, 348 U.S. 26 (1954), gave some encouragement to supporters of beauty as a basis for state regulation by way of dicta in the opinion of Justice Douglas. However, several cases have stated that regulation of rights with respect to land by restricting the character of its use must have a substantial relationship to public safety, health, morals, or general welfare. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Euclid v. Ambler Realty Co., *supra* note 6.

Since these two cases, the Supreme Court has required a substantial nexus between the regulation and the object to be served by such exercise of the police power only with respect to preferred constitutional values. Such rights were recognized in Jones v. Opelika, 316 U.S. 584 (1942), and consisted of rights such as freedom of speech, of the press, and of the exercise of religion. The Court does not stringently apply the due process of equal protection clauses of the fourteenth amend-

protection by stringent application of either the due process or equal protection clauses of the fourteenth amendment,[17] these interests have received more protection under state constitutions because courts are not bound to construe analogous state constitutional protections of property rights in the same fashion. This is rejected in the result reached by the court. Therefore, the court followed Ohio precedent by holding that due process under the Ohio Constitution required more than aesthetic reasons alone to sustain the statute's validity.[18]

The enunciation of the purposes of prohibiting regulation also seems to aid the courts in upholding their constitutionality. Legislative preambles serve as an expression of legislative judgment which should not be overturned by substitution of judicial determinations unless manifestly unreasonable. Several statutes in which such elaboration was present were held valid,[19] and the courts have held that the relation of the prohibition to highway safety was primarily for legislative determination.[20] The Ohio statute constitutionally could not give any enunciation of its purpose as an introduction to the code sections. The court, however, did not apply the rule that such zoning restrictions are to be liberally construed.[21]

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ment to state regulation of economic interests since Nebbia v. New York, 291 U.S. 502 (1934), in which the Court states that in order to strike down the regulation as unconstitutional, it must be shown to be arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. *Id.* at 539. See also West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Thus, the Court requires a lesser standard with respect to prohibitions involving property rights, i.e. a rational nexus between the purpose of the regulation and the regulation itself. Berman v. Parker, *supra,* this note. The distinction between the rational and substantial basis is clearly expressed by Mr. Justice Jackson in West Virginia State Board of Education v. Barnette, 319 U.S. 625 (1942) at 639. Consequently, the Supreme Court would have little difficulty in upholding the statute on review since the decision is incorrect in terms of *stare decisis* on the federal question.

But the common pleas court combined state and federal constitutional issues in deciding the principal case. Consequently, ultimate review by the United States Supreme Court may be precluded by the insulating effect of the comingling of issues. An independent state ground supporting the result may prevent granting of certiorari by the Court even when alternative federal questions are presented. Herb v. Pitcairn, 324 U.S. 117 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Eustis v. Bolles, 150 U.S. 361 (1893). See also *The Untenable Nonfederal Ground in The Supreme Court,* 74 Harv. L. Rev. 1375 (1961).

[17] *Supra,* note 16.

[18] Pritz v. Messer, *supra* note 11; Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925); Criterion Service v. City of East Cleveland, 55 Ohio L. Abs. 90, 88 N.E.2d 300, *appeal dismissed,* 152 Ohio St. 416, 89 N.E.2d 495 (1949).

[19] New York State Thruway v. Ashley Motor Court, 10 N.Y.2d 151, 176 N.E. 2d 566 (1961); *In re* Opinion of Justices, *supra* note 10.

[20] *Ibid.* The court in New York State Thruway Authority v. Ashley Motor Court, *supra,* note 19 did not address itself to aesthetic considerations since it constituted but one of the purposes enunciated in the statute. Legislative judgment was an important factor in the court's decision upholding the New York prohibition of advertising.

[21] Criterion Service v. City of East Cleveland, *supra* note 18, at 93, 88 N.E.2d

The second major problem involved in the Ohio statute is the issue of equal protection of law as guaranteed under the Ohio and federal constitutions. Since the statute exempts from prohibition certain classes of advertising devices, it creates a differing status between different abutting landowners.

The court in *Central Outdoor Advertising Co. v. Village of Evendale*[22] found that such a distinction is unreasonable since advertising devices which are accessory to or part of the main business conducted on the premises and advertising as a business have the same purpose of attracting attention, the one being as likely to do so as the other. Another court has taken a similar position as to this type of billboard advertising classification.[23] However, the Supreme Court of the United States in analogous cases[24] has indicated that it would uphold similar classifications. In the case of *Railway Express Agency, Inc. v. New York*,[25] the Supreme Court made a virtually conclusive ruling on such a classification, holding that a similar distinction between advertising devices was no denial of equal protection of the laws. In the notable case of *General Outdoor Advertising Co. v. Department of Public Works*,[26] the Massachusetts court found a fundamental difference in classes of billboards which were very similar to the classification in the Ohio statute. However, the court did not clarify its reasoning to any illuminating extent. Ohio precedent concerning such classification is not in step with the decision of the Supreme Court of the United States.

Another significant point wholly rejected by the court in the instant case, is that the construction of the highway created the valuable advertising interest in the land abutting the road. Defendant alleged that plaintiffs suffered no loss in terms of value since the value was created by the state. In balancing public and private interests, the manner in which the expectation arose seemingly is a relevant factor and was recognized as such in *New York State Thruway Authority v. Ashley Motor Court*,[27] although it was not determinative of the case. In addition, plaintiffs might not have had a loss as a result of their bargain if no road existed adjacent to their

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at 302. ". . . only in the event of clear and convincing proof that the terms of such ordinance are unreasonable, oppressive, and confiscatory will a court intervene." See also Urmstrom v. City of North College Hill, 114 Ohio App. 213, 175 N.E.2d 203 (1961).

[22] *Supra* note 3.

[23] Triborough Bridge and Tunnel Authority v. B. Crystal and Son, 2 App. Div. 2d 37, 153 N.Y.S.2d 387 (1956).

[24] Metropolitan Co. v. Brownell, 294 U.S. 580 (1935); Patsone v. Pennsylvania, 232 U.S. 138 (1914); Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912).

[25] 336 U.S. 106 (1949). New York City forbade any advertising vehicle on the streets, but exempts vehicles which had business notices or advertisements of the owner's products and which were not used mainly for advertising. The Court held that this provision did not render the regulation a denial of equal protection of the law. Local authorities have great leeway in traffic regulation and the equal protection question may be determined by "practical considerations based on experience."

[26] *Supra* note 11, at 211-212, 193 N.E. at 828.

[27] *Supra* note 19, at 153, 176 N.E.2d at 569.

property at the time of purchase. Thus, little or no bargained for consideration in anticipated future profits from advertising was included in the purchase price of the land. If this be so, the restrictions do not deprive plaintiffs of any reasonable original expectation, but merely eliminate a prospective windfall resulting from the fortuitous location of the highway. Thus, plaintiff's loss does not seem so great as originally alleged.

The status of regulations concerning advertising remains an open question in the light of numerous conflicting cases and the varying provisions of state statutes regulating outdoor advertising. A legislature which enunciates the purposes of its regulatory statute provides the court with an easier basis for upholding the validity. The courts in other states seem to permit more of a reliance upon aesthetic considerations than does Ohio. The trend seems to indicate that these considerations will form the basis of regulation by the use of police power to a greater extent in the future. The liberal viewpoint of the United States Supreme Court leads to the conclusion that equal protection of law will not serve as a substantial basis for negating a statute's different treatment of similar, but not identical, economic interests. As stated in the Highway Research Board analysis of outdoor advertising along highways: "The capacity to promote, preserve, or protect the public health, public safety, public morals, public welfare, public comfort and convenience in keeping with the declared policy will determine the validity of such regulation." Problems concerning due process and equal protection of law will serve as increasingly insignificant bars in upholding the validity of outdoor advertising regulation along interstate highways if the trend of increasing permissibility of legislative regulation in the public interest continues.

The Ohio courts will be faced with these problems in the considerations of the principal case. The court should reverse the decision in the instant case since the statute's validity could be sustained by liberally construing the regulation and by permitting aesthetics to serve only as one factor in the proper exercise of the police power. The court may make itself a front runner in leading the trend toward more liberal interpretation of the reasons for the valid exercise of the police power.[28]

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[28] This case will be heard by the Supreme Court of Ohio on May 13, 1964.