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STATE OF KANSAS

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May 7, 1974

Opinion No. 74- 138

Honorable Al Schmidt
Municipal Judge
Municipal Court
Council Grove, Kansas 66846

Dear Judge Schmidt:

I apologize for the delay in writing after our telephone conversation some weeks ago. I hope this response will not be untimely, despite the delay.

We discussed the terms of Ordinance No. 1479 of the City of Council Grove. Section 1 thereof states thus:

> "Unlawful acts. It shall be unlawful for any person to loiter, idle, wander, stroll, or play in or upon the public streets, alleys, parks, play grounds or other public grounds, places of amusement, entertainment, vacant lots, or other unsupervised places between the hours of 1:00 o'clock A.M. and 6:00 o'clock A.M.
>
> "It shall be unlawful for any minor under the age of 21 years to drive, operate or ride as a passenger in or on any motor vehicle, wagon, trailer, bicycle or any other instrument of locomotion upon the public streets, alleys, parks or other public grounds in the City of Council Grove, Morris County, Kansas, between the hours of 1:00 o'clock A.M. and 6:00 o'clock A.M.: Provided, however, that the provision of this section shall not apply to a minor accompanied by his parent, guardian, or other adult person whom having the care and custody of the minor, or where the minor is upon an emergency errand or legitimate business directed by his parent, guardian or other adult person having the care and custody of the minor."

An ordinance imposing a curfew is enacted under the police power of the city. The scope of that power is described in Grigsby v. Mitchum, 191 Kan. 293, 380 P.2d 363 (1963):

> "Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, or involve an injury to a person, or deprive a person of property within the meaning of the Fourteenth Amendment to the Constitution of the United States. Nevertheless, it is well settled that an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and if it is not unreasonable or arbitrary." [Emphasis supplied.]

In determining the reasonableness of an ordinance, the court should weigh the benefits to be derived from the ordinance, the hazards or evils which it is supposed to protect against or prevent, against the effect of the ordinance upon the persons against whom it is applied.

Under the first paragraph of section one, it is unlawful for "any person," regardless of his or her age, to walk upon the public streets, alleys, parks, play grounds and other places between the hours of 1:00 A.M. and 6:00 A.M. In a number of cases, much attention is given to the precise meanings of the words such as "loiter," "idle," and the like.

As I read this paragraph, it prohibits any person from walking on the streets and walks of the city after the designated hour, even though that person be walking, or "strolling," as the ordinance puts it, from his home to his place of employment or back. No matter what good reason a citizen might have for walking upon the streets of the city during the hours in question, the ordinance in fact prohibits him from walking upon the streets and public ways of the city for any purpose whatever. In my research, I have found no reported decision of any court which upholds such a broad restriction upon the freedom of movement of citizens of any city in the United States. In 5 McQuillin, Law of Municipal Corporations, § 19.30, the writer states thus:

> "Liberty of the person, secured against the federal government by the Fifth Amendment and against state governments including municipal corporations by the Fourteenth Amendment and by express provisions of state constitutions, includes liberty to be or go where one pleases,

> subject to not violating property and personal rights of other persons, and subject also to governmental restrictions constituting due process of law."

In very special and emergency circumstances, such as in instances of natural disaster, riot or other similar emergencies, the courts are prone to uphold broad curfew regulations. However, I know of no case in which a court has upheld a broad, total and permanent restriction upon walking upon the public streets and ways of an entire city during designated hours. I would respectfully suggest that the first paragraph of this ordinance is void in its entirety, for the reason that it imposes a total prohibition against the movement of persons upon the streets and ways of the city during designated hours, with no exceptions made whatever or any other provision stated whereby the prohibition is subject to any reasonable exceptions and conditions. It is, I believe, a clearly unreasonable and total prohibition, which is unconstitutional under the constitutions of both the State of Kansas and the United States.

The second paragraph of section one imposes a restriction different from that of the first paragraph. It prohibits any "minor under the age of 21 years" to drive or be a passanger in any motor vehicle, or other means of conveyance, including a bicycle, upon the public streets of the city between 1:00 A.M. and 6:00 A.M., again, for any purpose whatever, unless the minor is accompanied by parent, guardian or other person having care and custody of the minor, or where the minor is "upon an emergency errand" or "legitimate business" directed by the person having his custody.

I would point out that since 1970 when this ordinance was enacted, the Legislature has lowered the age of majority to eighteen, and that the term "minor" as used in state statutes applies only to persons under the age of eighteen. I will assume, however, for the purposes of these comments, that the ordinance applies to any person under the age of twenty-one, according to its express language.

The major exception in this state permits minors to be abroad in means of conveyance on the streets of the city when on "legitimate business directed by his parent, guardian" or other custodian. Presumably, if a minor has employment of his own, such as a paper route, he conducts that employment at the direction of his employer, and not as "directed by his parent . . . ." In Alves v. Justice Court of Chico Judicial District, 306 P.2d 601 (Dist. Ct. App., Calif. 1957), the court made the following comments which are pertinent here:

> "[T]he conclusion appears inescapable that the ordinance in question is invalid. There can be no question but that the purpose and intent in the enactment was the same as in the Walton case -- a better control of juveniles during the late hours of the night. But to accomplish that purpose the ordinance completely prohibits all minors actually going to or coming from, or being at night classes, library study, games, dances or other school activities, church functions or the theater, to cite but a few examples. True, the ordinance would preclude aimless loitering by minors in public places during the hours set forth, but it would also make unlawful many other activities by minors which otherwise would be entirely lawful . . . . [T]he general right of every person to enjoy and engage in lawful and innocent activity while subject to reasonable restriction cannot be completely taken away under the guise of police regulation. Any regulation to the contrary will be stricken down as an arbitrary invasion of the inherent personal rights and liberties of all citizens. Thus, since it cannot be said that prohibition against the mere presence of a minor on a street or in a public place between the designated hours for a purpose other than required by his business, or unless accompanied by a parent or legal guardian, has any real or substantial relationship to the primary purpose of the statute, it therefore constitutes an unlawful invasion of personal rights and liberties, and for that reason is unconstitutional." 306 P.2d at 605.

The courts will uphold reasonable municipal restrictions designed to prevent minors from tarrying and staying unnecessarily upon the streets and public ways, and which do not restrict those minors who are using the streets and public ways while actually in the process of going to or from places of business or amusement or otherwise. The second paragraph of section one imposes a broad and total prohibition against any and all vehicular traffic by minors alone whether as operators or as passengers, except upon emergencies or "legitimate business" directed by their legal custodian. The term "legitimate business" in itself is vague and ambiguous, and questionable as a standard or guide to the enforcement of the ordinance.

Generally speaking, and again, except in special circumstances such as riot or natural disaster, the courts have refused to uphold curfew ordinances which impose total prohibitions against vehicular travel by minors, and which is not more narrowly drawn

to prohibit only unnecessary loitering or idling at late hours upon the streets. On this basis, I would again respectfully suggest that this paragraph is likewise overbroad and thus, unconstitutional in imposing unreasonable restrictions upon freedom of movement and travel which are not reasonably related to the problems which the city presumably seeks to deal with, the loitering and idling of minors at late hours in particular places in the city.

It is always difficult to attempt to predict or anticipate how an appellate court might decide a particular case. However, I have tried to set out above the general guidelines which the courts have generally tended to follow in reviewing municipal curfew ordinances. As indicated above, when a curfew restriction seeks to impose total prohibitions against travelling upon the public streets and ways during specific hours, such as section one of Ordinance No. 1479 does, both as to all persons in the first paragraph, and as to minors specifically in the second paragraph, the weight of reported judicial authority is that such restrictions are overbroad and, essentially, unreasonable. I believe that the Kansas Supreme Court would conclude likewise.

I hope that these comments will be helpful to you. Again, I regret the delay in responding to your call. If you should have further questions, I will make every effort to deal with them much more promptly.

Yours very truly,

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