

Content Neutral Ordinance Does Not Infringe Upon First Amendment Rights

Kleinman et al. v. City of San Marcos, ___ F.3d ___ (5th Circuit, February 10, 2010)

Appellant Kleinman operates a chain of novelty stores in Texas. When a new store opens, Kleinman holds a charity event and allows the public to pay money for the opportunity to smash a junked car. After the event, Kleinman commissions local artists to paint the car. The car is then filled with dirt and used as a planter. In this instance, the artists painted the exterior with scenes of life in San Marcos and the words “make love not war” and cacti were planted inside it.

A San Marcos ordinance prohibits junked cars from being visible to the public. The ordinance deems junked cars to be a public nuisance. Kleinman was ticketed several times and sought injunctive relief from a municipal court order requiring him to remove the car from public view. Kleinman asserted that the order violated his First Amendment rights in so far as the car constituted protected expression. Following a bench trial, the district court determined that enforcing the ordinance against the car-planter did not violate the First Amendment. Kleinman appealed the district court’s judgment to the Fifth Circuit Court of Appeals.

On appeal, while admitting that the car-planter met the ordinance’s definition of a “junked vehicle,” Kleinman argued that the car-planter was “visual art” fully protected by the First Amendment and that San Marcos’ ordinance could not prohibit the car-planter’s public display based on content. He also argued that, to the extent the car-planter contained both expressive and non-expressive elements, the ordinance did not survive the intermediate scrutiny test established by the U. S. Supreme Court in *United States v. O’Brien*, 391 U.S. 367 (1973).

The Fifth Circuit surveyed recent cases addressing the First Amendment’s intersection with functional objects that contain arguably some expressive content, like the car-planter in this case. The Fifth Circuit determined that, “when the expressive component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation.” It further concluded that the car-planter is a “utilitarian device, an advertisement and ultimately a junked vehicle.”

The Fifth Circuit then went a step further and applied the intermediate scrutiny test that the Supreme Court set forth in *O’Brien*. The *O’Brien* test rests on the principle that when conduct contains both “speech” and “non-speech” elements, a valid governmental interest in controlling the non-speech element may justify incidental limitations on certain First Amendment rights. A regulation is constitutional under *O’Brien* if: (1) the regulation is within the government’s constitutional power; (2) it furthers an important governmental interest; (3) that interest is unrelated to the suppression of free expression; and (4) an incidental restriction on any First Amendment rights is no greater than is necessary to further the government’s interest. In applying the test in this case, the Fifth Circuit found that:

- 1) Regulating junked vehicles clearly falls within San Marcos’ police powers and is constitutional;
- 2) Protecting the community’s health and safety from problems created by abandoned vehicles are important governmental interests;

- 3) The ordinance is a content-neutral health and safety ordinance and not intended to regulate speech; and
- 4) The ordinance achieves San Marcos' legitimate interests with incidental restrictions on protected expression.

These types of cases often arise in the nuisance arena, where in the course of trying to eliminate a junk yard in a residential area or a remove a dangerous structure, an owner will assert that a city is infringing on a variety of the owner's civil rights. With respect to an owner's right to free expression, this will usually be a losing argument. However, cities would be wise to review their nuisance codes to ensure that they are content-neutral and focused on prohibiting conduct and its effects, and not on expression per se.