DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DAVID JOSEPH WATROUS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-1065

August 11, 2021

Appeal from the County Court for Lee County; James R. Adams, Judge.

Kathleen A. Smith, Public Defender, and Bill Burchfield, Assistant Public Defender, Fort Myers, for Appellant.

Monica M. Kovecses and Carrie Ann Wozniak, of Akerman, LLP, Orlando, and Diane G. DeWolf of Akerman, LLP, Tallahassee (substituted for Carrie Ann Wozniak as counsel of record), for Amici Curiae, Southern Legal Counsel, American Civil Liberties Union of Florida, and Florida Rural Legal Services.

Ashley Moody, Attorney General, Tallahassee, and Chelsea N. Simms, Assistant Attorney General, Tampa, for Appellee.

LABRIT, Judge.

David Watrous appeals the constitutionality of his conviction for violating Fort Myers's panhandling ordinance. While Mr. Watrous's case could present a panoply of problems, the State concedes to all the potential issues before us—the type of speech, the forum, and the kind of regulation. As a result, this case turns on whether the State can overcome strict scrutiny. But the State concedes—and we agree—that it cannot overcome such scrutiny. Because we conclude that the county court erred in denying Mr. Watrous's motion to dismiss, we reverse his conviction and sentence.

Factual Background

This case started when a police officer saw Mr. Watrous "actively begging" for money at the Rosa Parks Bus Station. And the State charged Mr. Watrous with violating Fort Myers's panhandling ordinance. *See* Fort Myers, Fla., Fort Myers City Code, ch. 54, § 54-297 (2019). Mr. Watrous moved to dismiss that charge, arguing that it violated the First Amendment of the United States Constitution. The trial court held a hearing where the parties disputed the constitutionality of the ordinance. In an order that followed, the trial court denied the motion, finding that the

ordinance was a content-neutral regulation of a traditional public forum that passed intermediate scrutiny.

Analysis

We review a trial court's determination of the constitutionality of a statute or ordinance de novo. *State v. Hosty*, 944 So. 2d 255, 259 (Fla. 2006). While there are several factors that can alter the course of a First Amendment analysis (type of speech, forum, etc.), the parties agree that Mr. Watrous was charged for violating a content-based regulation of protected speech in a traditional public forum. *See, e.g.*, *Schmidter v. State*, 103 So. 3d 263, 270 (Fla. 5th DCA 2012) (explaining that restrictions of speech in a nonpublic forum are subject to less scrutiny than restrictions of speech in a traditional public forum); *Kortum v. Sink*, 54 So. 3d 1012, 1016 (Fla. 1st DCA 2010) (noting that regulations of certain types of speech, like commercial speech, are subject to less scrutiny). Under those parameters, the legality of Mr. Watrous's conviction turns on whether the State can overcome strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Strict scrutiny "requires the [State] to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 171. And

as the State recognizes here, strict scrutiny is almost always the end of the State's case. *See id.* at 163 (explaining that laws subject to strict scrutiny are "presumptively unconstitutional").

Below, the State posited promoting the "economy" and "the flow of travel," "preventing nuisance," and "public safety" as government interests justifying the panhandling ordinance and the charge against Mr. Watrous. The State concedes and we agree that none of these interests are compelling in this context. *See Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882, at *5 (M.D. Fla. Aug. 5, 2016) (concluding that the city failed to overcome strict scrutiny where it "admit[ted] that no compelling governmental interest support[ed] [the city's panhandling ordinance]"); *see also State v. Catalano*, 104 So. 3d 1069, 1079 (Fla. 2012) (concluding that preventing nuisances and traffic safety are generally not considered compelling state interests). Likewise, Mr. Watrous's conviction is, at best, hypothetically related to those interests because there is no record evidence that, for example, Mr. Watrous was impeding traffic or endangering the public.

We accept the State's concession that it cannot withstand strict scrutiny in this instance, and we see no reason to continue to infringe on Mr. Watrous's First Amendment rights. Accordingly, we reverse the order denying Mr. Watrous's motion to dismiss and Mr. Watrous's judgment and sentence for violating Fort Myers, Fla., Fort Myers City Code, ch. 54, § 54-297 (2019). *See Szabo v. State*, 798 So. 2d 912, 913 (Fla. 2d DCA 2001).

Reversed.

KELLY and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.