

1976 WL 30569 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 28, 1976

*1 Section 17-18 of the Easley City Code stating that ‘It shall be unlawful for any person to loiter or loaf on the streets of the city or around any public place after 12:00 Midnight’ is violative of the due process clause of the Fourteenth Amendment of the United States Constitution because the ordinance is too vague and broad to meet the constitutional standard of certainty and is too indefinite for enforcement.

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QUESTION PRESENTED

Does Section 17-18 of the Easley City Code violate the United States Constitution?

CITATION OF AUTHORITIES

Akron v. Effland, 112 Ohio App. 15, 174 N.E.2d 285, 25 A.L.R. 3rd 836-848

Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964)

Baker v. Binder, 274 F. Supp. 658 (D.C.Ky. 1967)

Model Penal Code, Proposed Official Draft, section 250.6, American Law Institute (1962)

Papachristou v. Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972)

People v. Diaz, 4 N.Y. 2d 469, 176 N.Y.S. 2d 313, 151 N.E. 2d 871

Seattle v. Drew, 70 Wash. 2d 405, 423 P.2d 522 (1967)

DISCUSSION

Even though the United States Supreme Court has recognized that there is an obvious governmental interest in preserving public order, the United States Supreme Court has consistently invalidated vagrancy-loitering statutes when the statute is so indefinite that it fails to:

‘give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,’ . . . and because it encourages arbitrary and erratic arrests and convictions. Papachristou v. Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972). (citations omitted).

When construed literally, it appears that Section 17-18 of the Easley City Code is overly broad in that the ordinance prohibits loitering ‘after 12:00 Midnight’ without stating the time at which loitering ceases to be a violation. Since every

minute of the day falls within the scope of the term 'after 12:00 Midnight,' the ordinance fails to adequately apprise one of when his conduct is forbidden by the ordinance.

Section 17-18 of the Easley City Code also fails to set forth any ascertainable standard of guilt by which the police can judge the suspected person's conduct. Thus the ordinance fails to adequately distinguish between innocent conduct and criminal conduct. Literal enforcement of the statute would allow one to be arrested if he was simply window shopping or standing on a public street. In this vein, the courts have consistently struck down statutes similar to the ordinance in question. See [People v. Diaz](#), 4 N.Y. 2d 469 176 N.Y.S. 2d 313, 151 N.E. 2d 871; [Baker v. Binder](#), 274 F. Supp. 658 (D.C.Ky. 1967); [Akron v. Efland](#), 112 Ohio App. 15, 174 N. E. 2d 285 (1960); and [Seattle v. Drew](#), 70 Wash. 2d 405, 423 P.2d 522 (1967) as discussed in 25 A.L.R.3rd 836, 841.

*2 The failure of Section 17-18 to provide any standards of enforcement also presents possible Fourth Amendment problems. In [Papachristou v. Jacksonville](#), *supra*, the United States Supreme Court recognized that the lack of defined standards leaves room for exercise of unfettered discretion on the part of the police. The exercise of such discretion may conflict with the mandate of the Fourth Amendment of the United States Constitution requiring that persons be arrested only after a determination that there is probable cause to believe that the suspect has committed a criminal offense. If the ordinance fails to define the crime, then it is questionable that a probable cause determination can properly be made.

CONCLUSION

It appears that in order for a loitering statute to pass constitutional muster it must be drafted in such a manner that it:

- (1) adequately defines the offense of loitering;
- (2) specifies the types of loitering which are prohibited so as to distinguish between innocent conduct and criminal conduct; and
- (3) sets forth standards for the enforcement of the ordinance.

See generally [Model Penal Code, Proposed Official Draft, section 250.6, American Law Institute \(1962\)](#) as discussed in 25 A.L.R. 3rd 836, 839.

It appears that Section 17-18 of the Easley City Code fails to meet the standards of certainty and specificity discussed above. It is the opinion of this Office that Section 17-18 is unconstitutional.

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