

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-13-006

Appellee

Trial Court No. TRD 1202258

v.

Thomas Varsel

DECISION AND JUDGMENT

Appellant

Decided: May 2, 2014

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, for appellee.

Ralph C. Buss and Frank Krajenke, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Following a bench trial, defendant-appellant, Thomas M. Varsel, appeals the court's verdict finding him guilty of violating R.C. 2911.84, operating a motor vehicle while wearing earplugs. For the reasons that follow, we affirm the May 15, 2013 judgment of the Fulton County Court of Common Pleas.

I. BACKGROUND

{¶ 2} Thomas Varsel is a resident of Monroe, Michigan. On August 18, 2012, he was stopped by an Ohio Highway Patrol Officer while driving his motorcycle in Fulton County, Ohio. He was issued a citation under R.C. 4511.84 which prohibits drivers from wearing earplugs while operating a motor vehicle. Varsel contested the citation. He filed two motions to dismiss, which the trial court denied, and the matter proceeded to trial.

{¶ 3} At trial, Varsel, who worked as a noise vibration harshness technologist for Ford Motor Company, admitted that he was wearing foam earplugs at the time he was stopped. He testified that these earplugs – which he described as “noise reducing hearing protection” – protect his ears against the sound of the wind when he rides his motorcycle. He said that without the earplugs, he experiences a drumming in his ear, which progresses to a ringing as he accelerates, and then further progresses to the point where he cannot hear at all. He explained that with the earplugs in, he is able to hear sirens and traffic noises.

{¶ 4} Eric Healy, Ph.D, provided expert testimony on Varsel’s behalf. Dr. Healy, an Ohio State University professor who teaches hearing science and researches the operation of the auditory system, took measurements of the sound pressure levels resulting from wind noise at various speeds and he assessed the potential for that wind noise to damage human hearing. He determined that at 45 miles per hour, the wind creates a decibel level of 115—a level comparable to that of a jackhammer. At 65 miles per hour, the decibel level rises to 130, roughly the level produced by a jet engine. He

testified that exposure to that noise level has been demonstrated to cause permanent hearing damage. He explained that the use of earplugs has been shown to mitigate that damage and has also been shown to increase a person's ability to detect other sounds such as emergency signals.

{¶ 5} On cross-examination, Dr. Healy conceded that the best protection against the potential hearing loss caused by the wind noise would be not to drive a motorcycle. Varsel acknowledged that he owns a vehicle other than a motorcycle.

{¶ 6} The court found Varsel guilty, indicating that "the court is impressed with defendant's case but is not persuaded a constitutional violation occurred." It imposed a \$37.00 fine plus court costs. Varsel appeals that decision and assigns the following errors.

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED
WHEN IT DID NOT FIND OHIO REVISED CODE SECTION 4511.84
VOID FOR VAGUENESS AND OVERBROAD[.]

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT
ERRED WHEN IT FOUND THE STATUTE NOT A VIOLATION OF
THE COMMERCE CLAUSE.

THIRD ASSIGNMENT OF ERROR: THE COURT ERRED
WHEN IT FOUND THE EFFECT OF THE STATUE [SIC] NOT A
VIOLATION OF APPELLANT'S RIGHT TO MOVEMENT AND
TRAVEL[.]

FOURTH ASSIGNMENT OF ERROR: THE COURT ERRED
WHEN IT FOUND THE EFFECT OF THE STATUE [SIC] IS NOT A
VIOLATION OF APPELLANT’S RIGHT BODILY INTEGRITY [SIC][.]

II. LAW AND ANALYSIS

{¶ 7} R.C. 4511.84 provides, in part:

(A) No person shall operate a motor vehicle while wearing earphones over, or earplugs in, both ears. As used in this section, “earphones” means any headset, radio, tape player, or other similar device that provides the listener with radio programs, music, or other recorded information through a device attached to the head and that covers all or a portion of both ears. “Earphones” does not include speakers or other listening devices that are built into protective headgear.

(B) This section does not apply to:

- (1) Any person wearing a hearing aid;
- (2) Law enforcement personnel while on duty;
- (3) Fire department personnel and emergency medical service personnel while on duty;
- (4) Any person engaged in the operation of equipment for use in the maintenance or repair of any highway;
- (5) Any person engaged in the operation of refuse collection equipment.

{¶ 8} Before trial, Varsel filed two motions to dismiss. In his first motion, he argued that R.C. 4511.84 is unconstitutional under the Fifth and Fourteenth Amendments and violates the constitutional right to bodily integrity. He also argued that the statute unlawfully restricts interstate travel. The court denied the motion, recognizing that the operation of a motorcycle is a voluntary activity with its own rules. It explained: “Given that the operator sits above the motor, the state has determined that further interference with the operator’s ability to hear sounds relating to safety, i.e., sirens, horns, other traffic, should be regulated. Such regulation does not violate defendant’s Fifth and Fourteenth Amendment rights and a constitutional right to bodily integrity.”

{¶ 9} In Varsel’s second motion, he argued that R.C. 4511.84 is void for vagueness. The court denied that as well, finding that “‘earplug’ has such an accepted definition that a person of ordinary intelligence would know that placing foam in ears to reduce noise, and, ability to hear, is forbidden.”

{¶ 10} Varsel’s appeal of the trial court’s verdict raises the issues that were previously addressed in his motions to dismiss.

A. First Assignment of Error: Vagueness and Overbreadth

{¶ 11} All legislative enactments enjoy a presumption of constitutionality. *State v. Dorso*, 4 Ohio St.3d 60, 61, 446 N.E.2d 449 (1983). Courts must apply all presumptions and pertinent rules of construction so as to uphold the constitutionality of a challenged

statute or ordinance. *Id.* Where a statute is challenged for vagueness, “we are obligated to indulge every reasonable interpretation favoring the ordinance in order to sustain it.”

Id.

{¶ 12} “Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it.” *Viviano v. Sandusky*, 2013-Ohio-2813, 991 N.E.2d 1263, ¶ 13 (6th Dist.), citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). To survive a challenge under the void-for-vagueness doctrine, the statute must meet three requirements. It must (1) provide fair warning to the ordinary citizen of what conduct is proscribed, (2) preclude arbitrary, capricious, and discriminatory enforcement, and (3) not impinge upon constitutionally protected rights. *Id.* at ¶ 15, citing *Grayned* at 108-09.

{¶ 13} Varsel complains that the statute defines “earphones” yet it fails to define “earplugs.” He recognizes that Merriam-Webster defines “earplug” as:

- 1: an ornament inserted in the lobe of the ear especially to distend it
- 2: a device of pliable material for insertion into the outer opening of the ear (as to keep out water or deaden sound).

{¶ 14} (<http://www.merriam-webster.com/dictionary/earplug>, accessed April 22, 2014). However, he claims (1) that he understood what he was wearing to be “hearing protection;” (2) the statute does not define what frequencies are to be filtered out; (3) the statute does not describe what materials an earplug is made of (e.g., wood, cotton, cloth,

resin, rubber, sponge, plastic); and (4) the statute appears to recognize that some operators of motor vehicles (such as refuse collection and road repair workers) are in need of ear protection while not affording the same protection to drivers of motorcycles. He then makes the strained argument that the first definition of “earplug” may render it unlawful to wear earrings while driving.

{¶ 15} At trial, Varsel made a concentrated effort to avoid using the word “earplugs” and described them instead as “foam hearing protection devices.” They were marked as an exhibit and admitted into evidence, thus we have had occasion to view them. They are two pieces of malleable foam, connected by a plastic string, each about a half of an inch long. One end is slightly larger than the diameter of the opening of an average person’s ear and the diameter gradually becomes slightly larger, forming a triangle appearance. The foam can be manipulated to fit into the opening of the ear and after it is inserted, the foam expands to close any remaining space. In fact, the “hearing protection devices” are, in our view, precisely what Merriam-Webster describes in the second dictionary definition of “earplug.”

{¶ 16} Turning to the three-part analysis to be applied in a void-for-vagueness challenge, under the first prong, “an ordinance must be comprehensible to a person of ordinary intelligence, to the extent that it would inform such a person of the activities it proscribes.” *Viviano*, 2013-Ohio-2813, 991 N.E.2d 1263 at ¶ 16. We see no reason why

a person of ordinary intelligence would not understand the meaning of the word “earplug.” It is used in the statute in the same way as it is defined in the dictionary and referred to in common usage.

{¶ 17} Moving to the second prong, “the ordinance must preclude arbitrary, capricious, or discriminatory enforcement. An ordinance cannot leave what constitutes a violation open to interpretation by relying on the enforcing body to use ‘common sense.’” *Id.* at ¶ 18. We find that the language in the statute is precise and leaves no discretion as to its application and enforcement.

{¶ 18} Under the third prong, “it must be determined whether the challenged statutory language unreasonably impinges upon or inhibits fundamental constitutionally protected freedoms.” *Cleveland v. Broyles*, 83 Ohio Misc.2d 50, 55-56, 679 N.E.2d 66 (Mun. 1996). Certainly, if Varsel’s expert is correct that exposure to wind sound can damage hearing – which seems entirely plausible – Ohio’s law prohibiting drivers from wearing earplugs forces people to make a choice: either refrain from driving a motorcycle or drive your motorcycle while accepting the risk that your hearing may be damaged. But there is no constitutional right to travel by motorcycle and the state has its own sufficiently compelling interest in the restriction: to protect citizens from the possible harm that can be caused by a driver whose ability to perceive the sounds of sirens, traffic, voices, etc. is limited. We therefore find that the statute does not unreasonably impinge on a constitutionally protected right.

{¶ 19} We also find Varsel’s overbreadth challenge unavailing. A statute may be overbroad ““if in its reach it prohibits constitutionally protected conduct.”” *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 528, 709 N.E.2d 1148 (1999), quoting *Grayned*, 408 U.S. at 114, 92 S.Ct. 2294, 33 L.Ed.2d 222. Varsel’s claim does not implicate a constitutionally protected activity, thus the overbreadth doctrine has no application to his challenge.

{¶ 20} Varsel’s void-for-vagueness and overbreadth arguments fail and we find his first assignment of error not well-taken.

B. Second Assignment of Error: Commerce Clause

{¶ 21} Varsel argues that motorcyclists engage in commerce in the state of Ohio and that the prohibition against allowing motorcyclists to wear earplugs excessively burdens interstate commerce.

{¶ 22} Generally speaking, highway regulation has been left to states and localities. *State v. Bradley*, 12th Warren No. CA89-09-052, 1990 WL 36720, * 2 (Apr. 2, 1990), citing *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 184-185, 58 S.Ct. 510, 82 L.Ed. 734 (1938). The traffic laws they enact must be applied both to intrastate and interstate traffic. *Id.* In determining the validity of a state statute affecting interstate commerce, a balancing analysis must be performed. *Id.* at * 3. “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are incidental, it will be upheld unless the burden imposed is clearly excessive in relation to the putative local benefits.” *Id.*, citing *Pike v.*

Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The nature of the local public interest will be considered, as will be whether that interest could be promoted with a lesser impact on interstate activities. *Id.* Where traffic laws are concerned, it has been recognized that there is a substantial state interest in promoting the health, safety and welfare of the citizens of Ohio by reducing the number of highway fatalities. *Id.* “The local purpose and objective of highway safety far outweighs any incidental burden on interstate commerce which may be created.” *Id.*

{¶ 23} In this case, we understand that Varsel believes that the state does not fully appreciate that permitting motorcyclists to wear earplugs would filter out wind sound, allowing them to hear other traffic noises more clearly and reducing hearing damage to riders. Perhaps he is right that allowing motorcyclists to wear earplugs would be the more provident course. But that is a policy consideration better left to the legislature and it does not render the statute an unconstitutional violation of the commerce clause.

{¶ 24} We find Varsel’s second assignment of error not well-taken.

C. Third Assignment of Error: Right to Movement and Travel

{¶ 25} Varsel next argues that the statute violates his right to movement and travel. We find no merit to this argument. While we do not disagree that Varsel has a right to interstate travel, we disagree that the statute unduly restricts that right. It merely requires that he refrain from wearing earplugs while operating a motor vehicle in this state.

{¶ 26} “The right of a citizen to operate a motor vehicle upon the highways of this state is not a natural or unrestricted right, but a privilege which is subject to reasonable regulation under the police power of the state in the interest of public safety and welfare.” *State v. Starnes*, 21 Ohio St.2d 38, 45, 254 N.E.2d 675 (1970), quoting *Blow v. Commr. of Motor Vehicles*, 164 N.W.2d 351 (S.D. 1969). As the Ohio Supreme Court explained in *State v. Hoover*, 123 Ohio St. 3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, ¶ 26:

The state has the right under its sovereign power to control automobile traffic by reasonable regulations of the circumstances under which its citizens may be licensed to operate a motor vehicle and to adopt appropriate provisions to insure competence and care on the part of licensees, to protect others using the highways; and any appropriate means adopted does not deny to a person subject to its provisions any constitutional rights under the Constitution of the United States or the state of Ohio. (Internal citations and quotations omitted.)

{¶ 27} In *State v. Stuber*, 3d Dist. Allen No. 1-02-13, 2002-Ohio-3394, the Third District Court of Appeals held that prohibiting the defendant from driving without a valid driver’s license did not prevent him from engaging in interstate travel. The court commented that “[d]riving a motor vehicle on a public roadway is only one form of travel” and that appellant was free to travel by “walking, running, taking a bus, a train, a

bicycle or an airplane”— any other means other than by driving a motor vehicle. *Id.* at ¶ 11. In the present case, Varsel is permitted to travel by any means he wishes; he just cannot do so while wearing earplugs.

{¶ 28} We find his third assignment of error not well-taken.

D. Fourth Assignment of Error: Right to Bodily Integrity

{¶ 29} Varsel’s final argument is that the effect of the statute violates his right to bodily integrity. He claims that prohibiting him from wearing earplugs to guard against damage to his ears caused by wind noise amounts to egregious government interference that shocks the contemporary conscience.

{¶ 30} Substantive due process protections have been afforded only in certain fundamental realms, relating to “marriage, family, procreation, and the right to bodily integrity.” *Peoples Rights Org., Inc. v. Montgomery*, 142 Ohio App.3d 443, 491, 756 N.E.2d 127 (12th Dist.2001), quoting *Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114. The protection of substantive due process exists to ensure ““the right to be free [from] state intrusions into [the] realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience.”” *Id.*, quoting *Lillard v. Shelby Cty. Bd. of Edn.*, 76 F.3d 716, 725 (6th Cir.1996).

{¶ 31} Just as courts have found no substantive due process violation in the requirement that a person wear a seatbelt or a motorcycle helmet, we find no violation in prohibiting a person from placing an object in his or her ears which may restrict his or her

ability to hear while operating a motor vehicle. *See, e.g., State v. Batsch*, 44 Ohio App.3d 81, 82, 541 N.E.2d 475 (11th Dist.1988); *State v. Stouffer*, 28 Ohio App.2d 229, 233, 276 N.E.2d 651 (10th Dist.1971).

{¶ 32} We find Varsel’s fourth assignment of error not well-taken.

III. CONCLUSION

{¶ 33} Although Varsel has raised some interesting policy considerations in his challenge to the R.C. 4511.84 requirement that the operator of a motor vehicle refrain from wearing earplugs, the statute violates no constitutional rights. We find Varsel’s four assignments of error not well-taken and affirm the May 15, 2013 judgment of the Fulton County Court of Common Pleas. The costs of this appeal are assessed to Varsel pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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