

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

DON E. KARNS)
)
and)
)
NATHAN MAGNUSEN,)
)
Plaintiffs)
)
v.)
)
CITY OF HAMPTON, VIRGINIA,)
a body politic and corporate,)
)
TERRY SULT,)
individually and in his official capacity)
as Police Chief)
of the City of Hampton,)
)
and)
)
LT. JIM FORBES, individually and in)
his official capacity as Police Officer of)
the City of Hampton,)
)
and)
)
OFFICER WADE TAPLIN, individually and in)
his official capacity as Police Officer of)
the City of Hampton,)
)
Defendants.)
)

Case No. _____

COMPLAINT

COME NOW the Plaintiffs, Don E. Karns and Nathan Magnusen, by and through their attorney, and allege and aver as follows:

Introduction

1. Plaintiffs seek relief for redress of the deprivation of rights secured to them by

the First and Fourteenth Amendments to the United States Constitution and Va. Const. Art. I, § 12.

2. Plaintiffs are entitled to immediate injunctive and declaratory relief preventing Defendants from enforcing an unconstitutional ordinance that violates Plaintiffs' fundamental rights under the Constitutions of the United States and Virginia.

3. Plaintiffs further seek relief pursuant to Va. Code § 57-2.02, concerning political subdivisions of the Commonwealth that act to substantially burden a person's free exercise of religion.

Jurisdiction and Venue

4. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343, as it is an action seeking redress under the laws and statutes of the United States for the deprivation of rights secured by the Constitution and laws of the United States.

5. This Court has jurisdiction to enter a declaratory judgment in favor of the Plaintiffs under 28 U.S.C. §§ 2201-2202.

6. Pursuant to 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over Plaintiffs' claims arising under the Virginia Constitution and Va. Code § 57-2.02, as said claims are so related to Plaintiffs' claims arising under the United States Constitution as to form part of the same case or controversy.

7. Venue properly lies in the Eastern District of Virginia under 28 U.S.C. §1391(b), as the Defendants reside within this District within the Commonwealth of Virginia, and a substantial part of the events giving rise to this action occurred within this District. Venue is proper in this division pursuant to Loc. Civ. R. 2(a)(5).

Parties

8. Plaintiff, Don E. Karns, is an adult citizen and resident of the State of Virginia.

9. Plaintiff, Nathan Magnusen, is an adult citizen and resident of the State of Virginia.

10. Defendant City of Hampton is a body politic and corporate created and existing under the laws of the Commonwealth of Virginia. In all respects set forth in this Complaint, Defendant City of Hampton acted under color of the law of the Commonwealth of Virginia.

11. Defendant Terry Sult is the Police Chief of the City of Hampton. He is sued in his individual and official capacities. In all respects set forth in this Complaint, Defendant Sult acted under color of the law of the Commonwealth of Virginia.

12. Defendant Lt. Jim Forbes is a police officer for the City of Hampton. He is sued in his individual and official capacities. In all respects set forth in this Complaint, Defendant Forbes acted under color of the law of the Commonwealth of Virginia.

13. Defendant Wade Taplin is a police officer for the City of Hampton. He is sued in his individual and official capacities. In all respects set forth in this Complaint, Defendant Taplin acted under color of the law of the Commonwealth of Virginia.

Factual Allegations

14. Plaintiffs are itinerant evangelists who regularly engage in free speech activities on sidewalks and streets as an expression of their sincerely-held religious beliefs.

15. Plaintiffs' sincerely-held religious beliefs compel them to proclaim the Gospel of Jesus Christ and preach the Word of God to the masses.

16. On or about September 6, 2013, the Plaintiffs engaged in the sharing of their Christian faith at Hampton Bay Days, an event that has been regularly held in the City of Hampton, Virginia. Plaintiffs were using small amplifiers to moderately increase the volume of their respective voices to a reasonable, non-disruptive level so that their message would be audible within several feet of its presentation. Amplification of their voice is required for the effective communication of their message due to the ambient sound of the festival atmosphere.

17. Although the Plaintiffs lawfully conducted themselves at all times, they were approached by Lieutenant Forbes and Officer Taplin, who threatened to arrest and or issue a criminal summons to them if they did not stop using the amplifiers. When the Plaintiffs failed to comply, Plaintiff Karns was issued a summons for “loud noise” in violation of Ordinance No. 12-0036 (Code § 26-29 - hereinafter referred to as “The Noise Ordinance”). Plaintiff Magnusen was arrested for not producing a license or identifying himself to the satisfaction of the police officers, transported to Hampton City Jail, and subsequently issued a summons for operating a sound device without a permit in violation of Code § 26-29.

18. On October 22, 2013, Plaintiffs were convicted in the General District Court for the City of Hampton, Virginia of operating a sound device without a permit. Both convictions were appealed to the Circuit Court for the City of Hampton, and both cases were nolle prossed on February 14, 2014.

19. Under the ordinance, sound amplification devices “shall not be operated in any of the city’s public parks or recreation areas, unless pursuant to a permit obtained from the director of parks and recreation for a live band performance.” Ordinance No. 12-

0036 (Code § 26-29). The term “public park and recreation area” is not limited to city parks and permanent recreation areas, but also “include[s] public streets, public rights of way and the grounds of all public buildings in the city when they are subject to a Special Events Permit.” (Code § 26-38). The term “live band performance” means “the playing of any amplified musical instrument or any radio, tape recorder, tape deck and like or similar instrument to which an accessory speaker or amplification equipment is attached; the amplification of the voice when singing; or the organized playing of any instrumental ensemble, whether amplified or not; but such term shall not include the playing of a single unamplified instrument.”

20. A Special Event Permit was issued for Hampton Bay Days pursuant to an application made to the Department of Parks and Recreation by Terry Anderson, President of Hampton Bay Days, Inc., on or about January 4, 2013. Such permit was issued by the Department of Recreations Special Events Office on September 6, 2013 by Cyndi Masterstaff, an employee of the Department of Recreations, Special Events representative and onsite contact for the day of the event. (*see attached* Special Event Permit, Exhibit A.)

21. The Special Event Permit as approved brought a substantial area of downtown Hampton under the regulatory scheme pursuant to §26-38, requiring any potential “live band performance” to complete a permit process to legally amplify sound as regulated by §26-29. Under the terms of the ordinance, no other form of sound amplification is permitted within the boundaries of the Special Event. Specifically, as listed in the application, the requested downtown boundaries of the event were: Hampton River to the east; Franklin Street to the west; Lincoln Street to the North, and Hampton River to the

South. Further, the regulatory scheme imposed pursuant to the Special Permit was for a three day period, commencing Friday September 6, 2013 at noon and ending Sunday September 8, 2013 at 6:30 p.m. During such time, Hampton police enforced the regulatory scheme established pursuant to § 26-29, only allowing amplified sound within the Special Event boundaries by individuals possessing a permit as authorized by § 26-28; the section entitled “Live Band Performances” under the Hampton City Ordinance.¹

22. On September 5, 2014, the Plaintiff Magnusen engaged in the sharing of his Christian faith at the Hampton Bay Days event, in Hampton, Virginia, using a small amplifier to moderately increase the volume of his voice to a reasonable, non-disruptive level so that his message would be audible within several feet of its presentation. Amplification of his voice was required for the effective communication of his message due to the ambient sound of the festival atmosphere.

23. Although Plaintiff Magnusen lawfully conducted himself at all times, he was approached by police officers, who threatened to arrest and or issue a criminal summons to him if he did not stop using the amplifier. When Plaintiff Magnusen failed to comply, he was issued a summons for “loud noise” in violation of Ordinance No. 12-0036 (Code § 26-29).

24. An Order of Nolle Prosequi as to this charge was entered in the General District Court for the City of Hampton on October 15, 2014,

First Cause of Action

¹ At the General District Court hearing held on October 22, 2013, both Lt. Forbes and Officer W. Taplin repeatedly testified that the amplification, whether it be speech, non-singing vocal communication, or *any* sound irrespective of decibel level, within the Special Permit zone was illegal under the Special Event statutory scheme. (see Transcript of Proceedings page 26:5-10; 27:11-25 and 28:1; 28:5-16. 62:9-14.) Interestingly, Lt. Forbes indicated that even non-electronic amplification by any device would conceivably be in violation of the statutory scheme if done without a City issued permit. (*Id.* 29:24-30:8)

The Ordinance, as applied, violates the U.S. Const. Amend. 1 – 42 U.S.C. § 1983

25. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

26. Under 42 U.S.C. § 1983, “every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

27. Plaintiffs’ proclamation of their religious beliefs to passersby on a public sidewalk in the City of Hampton constitutes speech and expression that is protected by the First Amendment to the United States Constitution.

28. Plaintiffs’ proclamation of their religious beliefs to passersby on a public sidewalk in the City of Hampton constitutes the free exercise of religion that is protected by the First Amendment to the United States Constitution.

29. The public streets and sidewalks of the City of Hampton constitute traditional public forums.

30. Defendants’ application of the noise ordinance (Code § 26-29) of the City of Hampton to require Plaintiffs to cease using sound amplification devices without a permit (which said permit was only available to “live band performances”) denied the Plaintiffs the ability to effectively communicate their message on the street, and violated the First Amendment to the United States Constitution in the following particulars, including but not limited to:

a. Defendants' requirement that Plaintiffs turn off their sound amplification devices in the absence of a permit was not the least restrictive means of furthering a compelling government interest.

b. Defendants' application of the ordinance to require Plaintiffs to turn off their sound amplification devices in the absence of a permit failed to provide reasonable alternative avenues for Plaintiffs' expression.

31. In adopting and enforcing the Ordinance against Plaintiffs, the Defendants have acted and continue to act under the color of the law of the Commonwealth of Virginia.

32. The Ordinance is the official policy of Defendants.

33. These actions of the Defendants under the circumstances as stated have effectively deprived the Plaintiffs of the right to the free exercise of their religion as guaranteed by the First Amendment to the United States Constitution.

34. Plaintiffs are entitled to relief under 42 U.S.C. § 1983 for the deprivation of their First Amendment rights caused by the Defendants.

Second Cause of Action

The Ordinance is unconstitutional on its face.

35. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

36. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble"

37. The due process clause of the Fourteenth Amendment protects the rights contained in the First Amendment from interference by state governments.

38. Lt. John Forbes was the Hampton police officer in charge of all police services and security at the event of September 6, 2013,² and was the officer who oversaw and enforced the statutory scheme resulting in the criminal charges being brought against Defendants Karns and Magnusen. Lt. Forbes testified at the General District Court hearing of this case held on October 22, 2013 that “to amplify any noise” without a permit within the Special Permit zone would be illegal.³ (See attached Copy of Transcript of Hampton General District Court hearing held on October 22, 2013, Exhibit C)

39. Any abuses which loud-speakers create can be controlled by narrowly drawn statutes.

40. Section 26-29 is not a reasonable, narrowly tailored means of regulating the volume, time, or location of sound amplification devices. It requires a speaker to complete a permit application, agree to abide by whatever terms and conditions that the director of parks and recreation may impose, pay a \$500 deposit, and receive a permit. Such permit must be obtained during regular business hours from the Department of Recreations office. As such, the ordinance prohibits spontaneous or anonymous use of sound amplification devices in the regulated locations, in this case the city sidewalks and streets of the City of Hampton, regardless of whether the sound volume is reasonable and non-disruptive.

² Transcript of proceedings Hampton General District Court Oct. 22, 2013, page 14:24; 19:7.

³ *Id.* Page 28:15

41. In addition, the ordinance imposes a prior restraint upon the use of sound amplification devices in public parks and on public sidewalks, places that are traditional public forums at which the First Amendment's protection is most robust.

42. Clearly, the City of Hampton, in barring all amplified noise, with the exception of a "live band performance" pursuant to permit, does not have a legitimate interest in doing so. The application for Hampton Bay Days, as evidenced by their application for the permit, envisions a three day public, outdoor festival with fireworks, live musical performance and entertainment, beer and food being sold and more than 50 vendors. The complete ban of amplified speech in such an environment, with the exception of a "live band performance" pursuant to permit, clearly violated Plaintiffs' First Amendment right to have such speech regulated with precision.

43. The Ordinance is the official policy of Defendants.

44. Plaintiffs are entitled to relief for the deprivation of their rights caused by the Defendants.

Third Cause of Action

The Ordinance is unconstitutional on its face.

45. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

46. An ordinance may violate the freedom of speech by being unreasonable or overbroad (even if the ordinance is not impermissibly vague or content-based).

47. The requirement to abide by whatever conditions that the director of parks and recreation may set creates the potential for arbitrary enforcement of the Ordinance. The ability to arbitrarily restrict sound may mask impermissible viewpoint

discrimination.

48. In this case, the statutory scheme allows for no amplified sound with the boundaries of the Special Event, with the lone exception being for a “live band performance” pursuant to permit.

49. The Ordinance is the official policy of the Defendants.

50. Plaintiffs are entitled to relief for the deprivation of their rights caused by the Defendants.

Fourth Cause of Action

The Ordinance on its face violates Va. Const. Art. I, § 12.

51. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

52. Plaintiffs’ proclamation of their religious beliefs to passersby on a public sidewalk in the City of Hampton constitutes speech and expression that is protected by Va. Const. Art. I, § 12.

53. The public streets and sidewalks of the City of Hampton constitute traditional public forums.

54. The Ordinance, on its face, violates Article I, § 12 of the Constitution of Virginia in the following particulars, including but not limited to:

a. Portions of the Ordinance, including, but not limited to § 23-29, create a chilling effect on expression that is protected by Va. Const. Art. I, § 12.

b. Portions of the Ordinance, including, but not limited to § 23-29, are overbroad, allowing for the prohibition of constitutionally protected expression as well as expression that may be constitutionally proscribed.

55. Plaintiffs are entitled to relief for the deprivation of their rights caused by the Defendants.

Fifth Cause of Action

The Ordinance as applied violates Va. Const. Art. I, § 12.

56. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

57. Defendants' application of the noise ordinance of the City of Hampton to require Plaintiffs to turn down their sound amplification devices below a completely arbitrary level, without reference to ambient noise, during their attempts to communicate their messages on the Hampton streets violated Va. Const. Art. I, § 12, in the following particulars, including but not limited to:

a. Defendants' requirement that Plaintiffs turn off their sound amplification devices was not the least restrictive means of furthering a compelling government interest.

b. Defendants' application of the ordinance to require Plaintiffs to turn off their sound amplification devices failed to provide reasonable alternative avenues for Plaintiffs' expression.

58. Plaintiffs are entitled to relief for the deprivation of their rights caused by the Defendants.

Sixth Cause of Action

Injunctive Relief

59. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of their Complaint as if repeated verbatim.

60. The actual and threatened enforcement of the Ordinance against the Plaintiffs has prevented and will prevent the Plaintiffs from exercising their rights to free speech under the Constitutions of the United States and Virginia.

61. The restriction on the Plaintiffs' exercise of their constitutional rights constitutes irreparable harm.

62. Plaintiffs request that this Court enjoin the Defendants from enforcing the Ordinance.

Seventh Cause of Action

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202

63. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

64. There presently exists between Plaintiffs and Defendants an actual, justiciable controversy over whether Plaintiffs may use amplification devices to express their sincerely-held religious beliefs on the public streets and sidewalks of the City of Hampton without being subject to arbitrary enforcement, and whether the Ordinance is unconstitutional on its face and/or as applied to the Plaintiffs.

65. The Court should declare the respective rights and liabilities of Plaintiffs and Defendants regarding Plaintiffs' right to engage in constitutionally protected expression and the constitutionality of the Ordinance.

66. A judgment should be entered under 28 U.S.C. § 2201 declaring that the Ordinance is unconstitutional on its face and/or as applied to Plaintiffs and that Plaintiffs have the right to express their sincerely-held religious beliefs using amplification devices on the public streets and sidewalks of the City of Hampton under circumstances

including, but not limited to, those described herein.

Eighth Cause of Action

Violation of Virginia's Religious Freedom Restoration Act, VA. CODE ANN. § 57-2.02.

67. Plaintiffs reallege and reincorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

68. By requiring Plaintiffs to cease effective communication of their sincerely-held religious beliefs, Defendants substantially burdened Plaintiffs' religious exercise under VA. CODE ANN. § 57-2.02.

69. Defendants' actions in substantially burdening Plaintiffs' religious speech were not the least restrictive means of furthering any compelling government interest.

70. Plaintiffs are entitled to declaratory and injunctive relief under VA. CODE ANN. § 57-2.02.

Prayer for Relief

WHEREFORE, Plaintiffs pray judgment be entered against Defendants as follows:

a) That a preliminary injunction be entered forbidding the Defendants, their officers and agents from enforcing the Ordinance against Plaintiffs;

b) That a declaratory judgment be entered pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., declaring that the Ordinance is unconstitutional on its face and/or as applied to Plaintiffs under the First and Fourteenth Amendments to the United States Constitution;

c) That an order be entered permanently enjoining the Defendants, their officers, and agents from enforcing the Ordinance against Plaintiffs; and

d) That this Court award Plaintiffs nominal and compensatory damages in an amount to be determined at trial;

e) That this Court order Defendants to pay Plaintiffs' attorney fees pursuant to 42 U.S.C. § 1988, together with the costs of this litigation; and

f) Any and all such other and further relief as this Court may deem proper.

Respectfully Submitted,

Don E. Karns
Nathan Magnusen

By /s/ Steve C. Taylor
Counsel

Steve C. Taylor, Esquire
Law Offices of Steve C. Taylor, P.C.
133 Mount Pleasant Road
Chesapeake, VA 23322
757-482-5705

/s/ Don E. Karns
Plaintiff

/s/ Nathan Magnusen
Plaintiff

VERIFICATION OF COMPLAINT

I, Don E. Karns, a citizen of the United States and resident of the state of Virginia, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing Verified Complaint and the factual allegations therein, and the facts as alleged are true and correct.

/s/ Don E. Karns

Executed this ____ day of _____, 2015.

I, Nathan Magnusen, a citizen of the United States and resident of the state of Virginia, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing Verified Complaint and the factual allegations therein, and the facts as alleged are true and correct.

/s/ Nathan Magnusen

Executed this ____ day of _____, 2015.