

PREACHER TOO LOUD FOR COMMONS

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In the case of *Deegan v. City of Ithaca*, No. 04-4708-cv., 444 F.3d 135 (2d Cir. 2006), plaintiff alleged that his constitutional rights were violated when enforcement of municipal noise ordinances prevented from preaching in Ithaca Commons.

FACTS OF THE CASE

Kevin Deegan, a resident of West Seneca, New York, believes that he has a duty as a Christian to preach, and he has carried out that tenet of his faith for more than twenty years by speaking in raised voice to passers-by in public areas such as parks, malls, streets and sidewalks. In Deegan's view, that method of communication enables him to reach as many people as possible and stimulate dialogue about his religious beliefs. With that purpose, Deegan and three of his colleagues visited Ithaca Commons on October 9, 1999.

Ithaca Commons is a two block, "T" shaped public pedestrian mall located in downtown Ithaca with walkways, benches, a playground, storefront businesses, restaurants, several pavilions, and a water fountain with nearby seating. In addition to attracting patrons to the many businesses located on the Commons, the area serves as a general gathering place and a popular "hang out" for students from nearby colleges. Musicians and other entertainers perform regularly in the Commons, which is also the site of numerous community events, such as the Downtown Ithaca Chili Cookoff and Winterfest, Ithaca Festival Craft Show, M & T Bank Summer Concert Series, and the Apple Harvest Festival, which draw thousands of visitors and feature exhibitions, concerts, poetry readings, and dance, among other things. It has also been a forum for demonstrations and protests highlighted by speeches, music performances, marches, and open discussion concerning a variety of issues including nuclear weapons, environmental protection, animal rights, gay and lesbian rights, and campaign finance reform.

Shortly after Deegan and his colleagues positioned themselves in the middle of the "T" and began preaching, Deegan was approached by an Ithaca police officer who was responding to a noise complaint lodged by an employee of a nearby business; no one else complained about Deegan's preaching. The officer did not interview the complainant or other witnesses; rather, upon hearing Deegan and his companions, the officer advised him that their speech violated the Ithaca noise ordinance because it could be heard from 25 feet away in the Ithaca Commons area and further advised him to keep the volume of his speech lower. When Deegan asked whether he could relocate to a street corner outside of the Commons, the officer informed him that the ordinance applies anywhere in the city. At Deegan's request, the officer left to get a copy of the ordinance.

While the officer was away, Deegan heard a singing group 200 feet from his location and heard people talking who were more than 25 feet from him; they were left undisturbed and there is nothing in the record regarding complaints about other people. Although Deegan attempted to speak more softly, when the officer returned ten minutes after departing, he told Deegan that even the lower volume violated the ordinance. The officer provided Deegan with a copy of the

Ithaca noise ordinance. After reviewing the statute, Deegan voiced disagreement that its provisions required him to speak so low as not to be heard 25 feet away, but the officer informed him that he had to keep his voice at that level or face arrest. The officer described Deegan as delivering his speech "persistently and continuously" and speaking at the "top of his lungs."

Deegan chose not to communicate his message by speaking in a volume that carried no more than 25 feet or by circulating brochures, and he did not seek a permit to use amplified sound. Concluding that he could not communicate effectively and also comply with the ordinance, Deegan left Ithaca on October 9, 1999, never to return to preach because his subsequent request for permission to speak in a voice that is audible at a distance of more than 25 feet was denied by the City.

NOISE ORDINANCES

In pertinent part, Section 240-4 of the City of Ithaca Municipal Code entitled "Unreasonable Noise Prohibited" provided as follows:

A. No person shall intentionally cause public inconvenience, annoyance or alarm or recklessly create a risk thereof by making unreasonable noise or by causing unreasonable noise to be made.

B. For the purpose of implementing and enforcing the standard set forth in Subsection A of this section, "unreasonable noise" shall mean any sound created or caused to be created by any person which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of the public or which causes injury to animal life or damages to property or business. Factors to be considered in determining whether unreasonable noise exists in a given situation include but are not limited to any or all of the following:

- (1) The intensity of the noise.
- (2) Whether the nature of the noise is usual or unusual.
- (3) Whether the origin of the noise is associated with nature or human-made activity.
- (4) The intensity of the background noise, if any.
- (5) The proximity of the noise to sleeping facilities.
- (6) The nature and the zoning district of the area within which the noise emanates and of the area within 500 feet of the source of the sound.
- (7) The time of the day or night the noise occurs.

- (8) The time duration of the noise.
- (9) Whether the sound source is temporary.
- (10) Whether the noise is continuous or impulsive.
- (11) The volume of the noise.
- (12) The existence of complaints concerning the noise from persons living or working in different places or premises who are affected by the noise.

The City also had the following ordinance (§ 157-18. Amplified sound) which regulated amplified sound in Ithaca Commons :

Except by special permit ... no person shall operate or cause to be operated on Ithaca Commons any boom box, tape recorder, radio or other device for electronic sound amplification in a loud, annoying or offensive manner such that noise from the device interferes with conversation or with the comfort, repose, health or safety of others within any building or at a distance of 25 feet or greater.

Prior to trial, both Deegan and the City agreed that enforcement of these two noise ordinances prohibited “any noise that can be heard 25 feet away.”

TRIAL COURT

At trial, Deegan’s presented expert witness testimony from Thomas Katra, an expert in noise and noise measurement. The trial court made the following findings of fact based upon the expert’s measurements of noise levels in the Commons:

[T]he Court finds that Katra made his measurements in February at the same place and time of day as the October 9, 1999 incident in issue; that 56 decibels was the maximum noise level at which a person could speak and still be in compliance with the ordinance 50 percent of the time; that this decibel level is lower than that generated by the clicking of high-heeled boots, conversations between two or three people, a shop door opening and closing, a small child playing on a playground and a cellular telephone; that most normal human activity would be clearly audible at a distance of 25 feet; and that a spirited conversation between two people would be clearly audible at a distance of 25 feet.

Given the conditions at Ithaca Commons and Deegan’s mode of communication, i.e. preaching, Deegan’s noise expert testified that Deegan could not comply with the 25-foot restriction. Within the context of this particular case, both sides had agreed that “preaching” was defined as “speech that can be heard beyond twenty-five feet.” In the opinion of the trial court, the fact that Deegan could not preach without violating the noise ordinance was “not proof that he cannot reasonably make his message heard.” On the contrary, the trial court found “no evidence to

support a conclusion that Deegan's speech must be heard from more than 25 feet away in order to communicate his religious message.”

Since Deegan could still communicate his religious message, albeit in a more quiet tone of voice, the federal district (i.e., trial) court determined that Deegan had failed to establish that the noise ordinance violated the First Amendment. Accordingly, the federal district court entered judgment in favor of the City. Deegan appealed.

PUBLIC FORUM

As cited by the appeals court, the City of Ithaca Noise Ordinance identified twelve nonexclusive factors to be considered in determining whether noise is "unreasonable." Despite such "statutory considerations for determining whether noise is excessive or unreasonable," the appeals court found "the City and its enforcement authorities" had effectively replaced the twelve identified statutory factors with "a bright line rule restricting any noise — anywhere in the city at any time of the day or night — if it *'can be heard 25 feet away'*." (*Emphasis of court*) In the opinion of the appeals court, "[t]he ordinances do not on their face suggest such an application," i.e., "noise that is audible at a distance of 25 feet is illegal in the City of Ithaca." Yet, the appeals court found the City interpreted the noise ordinances to "prohibit any noise that can be heard 25 feet away." Moreover, the City's enforcement of this prohibition applied "to any type of noise, including speech, whether the noise is amplified or unamplified and whether in Ithaca Commons or in the city."

As noted by the appeals court, "Deegan's religious speech is fully protected by the First Amendment, applicable to the states through the Fourteenth Amendment." Further, the court noted that "[t]he government's authority to regulate speech or expressive conduct on property that has traditionally been open to the public for such activity, such as public streets and parks, is sharply circumscribed." In this particular, instance, the City had argued that Ithaca Commons was "not a public forum in the literal or true sense of that term," i.e., public streets and parks, due to "the proximity of residences [which] should be considered when evaluating restrictions on speech." The appeals court disagreed.

As characterized by the court, "the Commons is a classic public forum, as the term has developed in First Amendment jurisprudence, because it is the type of area traditionally available for public expression and the free exchange of ideas." Moreover, the court found the Ithaca Commons Rules expressly provided for the "public use of the area" to "promote the general welfare." Similarly, the court took note of a plaque in the Commons "commemorating and stating the purpose for Ithaca Commons" as an area "dedicated to the citizens of Ithaca as a public gathering place, commercial center and community focal point."

According to the appeals court, public use of an area is a primary factor in determining whether the property is a "public forum." In this particular instance, the court found it significant that "the Commons is used routinely for a wide array of community, educational, performing and other expressive events and activities." In the opinion of the court, "[t]his quality makes Ithaca Commons the type of area that has been described as a 'prototypical' or 'quintessential' public forum" wherein "[s]peech finds its greatest protection."

RESTRICTIONS TEST

On the other hand, the appeals court acknowledged that “government may impose reasonable restrictions on the time, place, or manner of protected speech,” even in a public forum like Ithaca Commons. As described by the court, such reasonable restrictions on protected speech must satisfy the following three part test articulated by the U.S. Supreme Court “to determine whether such restrictions interfere with rights guaranteed by the First Amendment”:

To withstand constitutional scrutiny, government restrictions must be (1) content neutral, in that they target some quality other than substantive expression; (2) narrowly tailored to serve a significant governmental interest; and (3) permit alternative channels for expression. This standard is commonly referred to as intermediate scrutiny. (noting that "we apply `intermediate scrutiny' to regulations of expressive activity that are not based on content").

Further, in a First Amendment challenge, the appeals court noted that “the government bears the burden of showing that its restriction of speech is justified under the traditional `narrowly tailored' test," i.e., “demonstrate that the interest served justifies the restriction imposed.” Moreover, the court found the nature of reasonable time, place, and manner restrictions will be dictated by the pattern of normal activities in a particular public place.

Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

In this particular instance, both sides agreed that “the subject noise ordinances restrict the volume of speech and not its content.” In describing the significant governmental interest served by the ordinances, the City “articulated its objective in regulating noise” as follows:

The purpose of this chapter is to preserve the public health, peace, welfare and good order by suppressing the making, creation or maintenance of excessive, unnecessary, unnatural or unusually loud noises which are prolonged, unusual and unnatural in their time, place and use and which are detrimental to the environment. It is also the purpose of this chapter to allow all residents of the City to coexist harmoniously in a manner which is mutually respectful of the interests, rights and obligations of all persons. City of Ithaca Municipal Code § 240-2.

In the opinion of the appeals court, Ithaca had “a legitimate interest in keeping sound from reaching a level that is unreasonably injurious or annoying or disturbing in furtherance of what the parties describe as the City's concern for ‘the comfort, repose, health and safety of anyone within its geographical limits’.” While acknowledging that “[t]he elimination of excessive noise is a substantial and laudable goal,” to pass the above described “intermediate scrutiny” test, the appeals court cautioned that “the content-neutral means of furthering the City's interest in protecting its citizens from unreasonable noise must avoid unnecessary intrusion on Deegan's

freedom of expression.” Further, the court noted that “[t]he ‘narrowly tailored’ standard does not tolerate a time, place, or manner regulation that may burden substantially more speech than necessary to achieve its goal, nor does it require that the least restrictive alternative available be used.”

TOO RESTRICTIVE

Applying these principles to the facts of the case, the appeals court found “the regulatory proscriptions of the Noise Ordinance and the Sound Amplification Rule embrace not only Deegan's protected speech, but the sounds that typify the Commons and the activities it is meant to facilitate.”

By targeting noise that is "unreasonable," Ithaca's noise regulations evince an intent to reach noise that exceeds what is usual and customary in a particular setting. The stipulated facts reflect that in addition to being a commercial center, the Commons is used regularly for festivals, performing events, exhibitions, political demonstrations, and recreational activities. These are not quiet pursuits that require a quiet atmosphere.

Defendants interpret "unreasonable noise" as sound that "can be heard" 25 feet from its source... [T]he decibel level of speech that would comply with the 25 foot rule was often lower than the decibel level generated by the foot steps of a person in high heeled boots, conversation among several people, the opening and closing of a door, the sounds of a small child playing on the playground, or the ring of a cell phone. These facts so vividly illustrate that the regulations as applied restrict considerably more than is necessary to eliminate excessive noise that we need hardly say more.

Accordingly, in the opinion of the appeals court, “a noise regulation that prohibits most normal human activity, including a spirited conversation by only two people, is not narrowly tailored to serve the City's interest in maintaining a reasonable level of sound, at least in a public forum like the Commons.” Moreover, the appeals court found that the City could not justify “even stricter regulation of Deegan's speech in the Commons, which is a public forum bustling with the sounds of recreation, celebration, commerce, demonstration, rallies, music, poetry, speeches, and other expressive undertakings.” According to the court, Deegan’s preaching was not “incompatible with these activities,” after “[t]aking into account the nature and purposes of the Commons along with its ambient characteristics.”

CONCLUSION

As a result, the appeals court held the noise regulations “as construed, applied and enforced” by the City “unreasonably burdened protected speech” and “violated Deegan’s First Amendment rights” under the circumstances of this case. The federal appeals court, therefore, remanded (i.e., sent back) the case to the trial court to enter judgment in favor of Deegan and award “appropriate relief.”