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State v. Sheldon

STATE CROSS BURNING STATUTE HELD UNCONSTITUTIONAL.

In *State v. Sheldon*, 332 Md. 45, 629 A.2d 753 (1993), the Court of Appeals of Maryland struck down the state's cross burning statute which prohibited the burning of religious symbols without first giving notice to the local fire department and obtaining the permission of the owner of the property on which the burning is to occur. In an unanimous decision, the court determined that the statute was intended to control the expression of ideas, as opposed to fires, and accordingly, held that the cross burning statute violated the First Amendment.

Brandon Forrest Sheldon and Thomas Eugene Cole were charged with violating Md. Ann. Code art. 27, § 10A (1957) ("§ 10A"), which proscribed the burning of any religious symbol on a property without the express consent of the property owner and notice to the fire department which serviced the area. Sheldon had ignited a cross on private property and Cole had burned a cross on public property, both without obtaining the required consent and giving proper notice. Sheldon and Cole moved to dismiss their indictments on the basis that § 10A violated the free speech clause of the First Amendment. The Circuit Court for Prince George's County granted their motions and dismissed the indictments. Prior to intermediate review of the matter, the Court of Appeals of Maryland granted certiorari.

Before addressing the constitutionality of § 10A, the court confronted the threshold issue of whether the act of cross burning constituted protected "speech" within the First Amendment. After reviewing several decisions of the Supreme Court of the United States, which recognized that expressive conduct could constitute "speech" if the conduct was intended to express a message and there was a high probability that the message would be understood, the court determined that cross burning was "speech" within the meaning of the

First Amendment. *Sheldon*, 332 Md. at 50-52, 629 A.2d at 756-57.

The court began its analysis of § 10A by reviewing the three recognized standards for evaluating whether expressive conduct is protected by the First Amendment. Under the first standard, a statute which is determined to be unrelated to the suppression of free expression must be evaluated by the lenient test enumerated in *United States v. O'Brien*, 391 U.S. 367 (1968). That test upholds the constitutionality of a statute if the statute is: 1) within the government's constitutionally granted powers to create; 2) in furtherance of an important governmental interest unrelated to the suppression of free expression; and 3) no more than is essential to further the government's interest. *Sheldon*, 332 Md. at 53, 629 A.2d at 758 (citing *O'Brien*, 391 U.S. at 377). Under the second standard, a statute is determined to be related to the suppression of expression, but also "content-neutral", if that statute is "justified without reference to the content of the regulated speech", *Id.* (quoting *Renton v. Playtime Theatre, Inc.*, 475 U.S. 41, 48 (1986)), and is subject to "reasonable time, place, or manner restrictions." *Sheldon*, 332 Md. at 54, 629 A.2d at 758 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Such a statute will be upheld under this second standard if it is "narrowly tailored to serve a significant governmental interest," and "leave[s] open ample alternative channels for communication of the information." *Id.* Finally, a statute which is determined to be only "content-based" is subjected to the third standard of strict scrutiny because it is "presumptively invalid". *Sheldon*, 332 Md. at 54-55, 629 A.2d at 758. Accordingly, this third standard focuses on the government's purpose in enacting the statute and places the burden upon the state to demonstrate that the statute is narrowly drawn to serve "a compel-

ling state interest.” *Sheldon*, 332 Md. at 55, 629 A.2d at 758 (quoting *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983)).

In its evaluation of § 10A, the court of appeals rejected the state’s contention that the statute was not content-based. Instead, the court found that the statute was enacted to protect against fires as opposed to regulating speech, and determined that the it required analysis under the strict scrutiny test as a content-based statute for two primary reasons. *Sheldon*, 332 Md. at 55, 629 A.2d at 759. First, the court found that the cross burning statute did not protect the community from fires any more than already existing arson and trespass laws which provided more severe penalties. *Sheldon*, 332 Md. at 56, 629 A.2d at 759. Second, the court determined that the legislative history of the cross burning statute revealed that the statute was enacted to express political disagreement with the burning of religious symbols. *Id.*

Before analyzing § 10A under the strict scrutiny test, however, the court reviewed the three recognized exceptions to the presumption that content-based regulations are constitutionally invalid, in order to determine if the cross burning statute fell within one of these exceptions. The first exception exists “when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” *Sheldon*, 332 Md. at 58, 629 A.2d at 760 (quoting *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538 (1992)). The second exception encompasses content-based statutes aimed at the “secondary effects” of the prohibited speech. *Id.* (quoting *Renton*, 475 U.S. at 48). Third, an exception applies to situations “where totally proscribable speech is at issue ... [and] there is no realistic possibility that official suppression of ideas is afoot.” *Sheldon*,

332 Md. at 59, 629 A.2d at 761 (quoting *R.A.V.*, 112 S.Ct. at 2547).

The court first rejected the state’s contention that § 10A fell within the second exception in that the statute was enacted to target only the secondary effect of fire prevention. The court reasoned that, as it had already determined, § 10A was preceded by more effective fire prevention laws and was not truly intended as a method of fire prevention, as its legislative history revealed. *Sheldon*, 332 Md. at 60-61, 629 A.2d at 761-62. In addition, the court stated that this cross burning regulation would prevent far fewer fires than regulations on leaf burning, barbeques, or bonfires, and thus, could not be taken as intending anything other than expressing political disagreement which such an act. *Sheldon*, 332 Md. at 61, 629 A.2d at 762.

The court also promptly dismissed the argument that the third exception to the invalidity of content-based statutes justified the cross burning statute because the state had failed to demonstrate that burning religious symbols was proscribable at all, much less as a particular type of speech unrelated to suppressing expression. *Id.* To the contrary, the court of appeals noted that § 10A was related to suppressing the expression of ideas and that both its legislative history and its insignificant contribution to fire prevention demonstrated that the state clearly intended to censor forms of expression by enacting the cross burning statute. *Sheldon*, 332 Md. at 62, 629 A.2d at 762.

After finding that none of the recognized exceptions justified Maryland’s content-based cross burning statute, the court of appeals subjected § 10A to the strict scrutiny test to determine its validity. The strict scrutiny test requires that a statute be upheld if it is “necessary to serve a compelling state interest and ... narrowly drawn to achieve that end.” *Id.* (quoting *Perry Educ. Assn.*, 460

U.S. at 45). As justification for the statute, the state argued that § 10A was valid because it protected society from bias-motivated threats and aided in the elimination of discrimination, both of which were compelling state interests. After noting that this argument by the state was a complete abandonment of its original assertions that § 10A was not content-based and instead only served the purpose of fire prevention, the court acknowledged society’s interest in protecting social welfare. *Sheldon*, 332 Md. at 62-63, 629 A.2d at 762-63. However, the court emphatically rejected the necessity of § 10A to further achieve this state interest, particularly in light of the existence of other statutes which dealt with the act and the fact that the cross burning statute still permitted the burning of religious symbols with proper permission. *Sheldon*, 332 Md. at 63, 629 A.2d at 763. In addition, the court concluded that § 10A failed to serve the state’s compelling interest because the statute merely forced bigoted individuals to find alternative ways of expressing their viewpoints. *Id.*

In *State v. Sheldon*, the Court of Appeals of Maryland has stringently adhered to our country’s constitutional foundation by striking down Maryland’s cross burning statute as unconstitutional. In so holding, the court has acted to prevent legislative encroachment upon free speech without the requisite showing of absolute necessity. Such a decision will dissuade hastily passed legislation resulting from public whim and protect citizens from the slow deterioration of their protected right to free speech.

- Kimberly A. Kelly