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Delinquency

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In **Hodgkins v. Peterson**, 2004 WL 99028 (7th Cir. (Ind.)), the Court reversed the decision of the district court and instructed the district court to permanently enjoin the enforcement of Indiana's revised curfew law, which had been passed by the Indiana General Assembly to be effective May 1, 2001.

The case originated with a 1999 challenge by a Marion County mother and her two minor children, along with a certified class of minors similarly situated, to Indiana's curfew law. The challenge had arisen from the 1999 arrest of mother's sixteen-year-old child for curfew violation when the child left a restaurant in Marion County with three friends shortly after 11:00 p.m. The child and his friends had stopped to eat after a school soccer game. At that time Indiana's curfew statute provided that children ages fifteen through seventeen could not be in a public place between 1:00 a.m. and 5:00 a.m. on Saturday or Sunday; or after 11:00 p.m. on Sunday, Monday, Tuesday, Wednesday or Thursday; or before 5:00 a.m. on Monday, Tuesday, Wednesday, Thursday or Friday. (I.C. 31-37-3-2) A child under the age of fifteen could not be in any public place after 11:00 p.m. or before 5:00 a.m. on any day. (I.C. 31-37-3-3) The curfew statute exempted children who were accompanied by their parent, guardian or custodian; accompanied by an adult specified by the child's parent, guardian or custodian; or participating in, going to or returning from lawful employment, a school sanctioned activity or a religious event. (I.C. 31-37-3-1) Violation of the curfew law constituted a delinquent act (I.C. 31-37-2-2) and could subject a parent to legal liability (knowingly or intentionally encouraging, aiding, inducing or causing a person under eighteen years of age to commit an act of delinquency). (I.C. 31-37-2-5) The child was arrested, handcuffed, tested for alcohol and drug use, taken to a curfew sweep processing site, and interviewed by a volunteer about his family, friends and personal life. The sheriff visited the mother at her home at 1:30 a.m. and told the mother to pick up her child at a local high school. The mother was also interviewed and asked personal questions by a community volunteer when the mother arrived at the high school to pick up her child. In this 1999 original challenge to the state curfew statutes, the statutes were found to be constitutionally flawed because they lacked any exceptions to First Amendment activity. See Hodgkins v. Goldsmith, 2000 WL 892964.

The Indiana General Assembly then passed a new statute, I.C. 31-37-3-3.5, which created an affirmative defense for those engaged in protected expressive First Amendment activity. The statute became effective on May 1, 2001. The exceptions to the curfew

statute, I.C. 31-37-3-1, were repealed. The affirmative defense statute included the following: (1) the child is accompanied by a parent, guardian or custodian; (2) the child is accompanied by an adult specified by the child's parent, guardian or custodian; (3) the child is participating in, going to, or returning from lawful employment, a school sanctioned activity, or a religious event; (4) the child is participating in an emergency involving the protection of a person or property from an imminent threat of serious bodily injury or substantial damage; (5) the child is participating in an activity involving the exercise of the child's United States or Indiana constitutional rights, such as freedom of speech or right of assembly; (6) the child is participating in an activity conducted by a nonprofit or governmental entity that provides recreation, education, training, or other care under adult supervision; or (7) the child is participating in interstate or international travel from a location outside Indiana to another location outside Indiana. The plaintiffs sought to preliminarily enjoin the enforcement of the new curfew law by the Mayor, the Sheriff and the Prosecutor of Marion County, alleging that the defense statute offered no real protection for children involved in First Amendment activity who still might be vulnerable to arrest before they could assert a defense. The plaintiffs also maintained that the new statute violated the Fourteenth Amendment by unlawfully denying parents the autonomy to allow their children to be unaccompanied in public places during curfew hours.

The District Court certified two classes: (1) all residents of Marion County who are under the age of eighteen; and (2) all parents and legal guardians of persons who are residents of Marion County and who are under the age of eighteen. The State of Indiana intervened as a matter of right to defend the constitutionality of the new statute. The District Court denied the plaintiffs' motion for a preliminary injunction in Hodgkins v Peterson, 175 F. Supp. 2d 1132, 1151 (S.D. Ind. 2001). With respect to the First Amendment claim, the district court found that the curfew statute did not reach a substantial amount of protected conduct, that there was only an incidental burden on minors' First Amendment rights and that the statute was narrowly tailored to serve the government's significant interests and left open alternative channels of communication. Id. at 1150-1151. Regarding the Fourteenth Amendment claims, the District Court held that parents do not have a fundamental right to allow minor children to be out in public without parental permission during curfew hours, and even if they did, the curfew law could survive strict scrutiny as it was narrowly tailored to serve compelling governmental interests.

Standard of review is whether findings of fact show clear error, legal conclusions are reviewed de novo.

The elements which must be shown by a party seeking a preliminary injunction are: (1) the plaintiff's case has a likelihood of success on the merits; (2) no adequate remedy at law exists; (3) the plaintiff will suffer irreparable harm if the injunction is not granted. The District Court found and the government did not dispute that elements two and three had been successfully established. The only issue on appeal was whether the plaintiffs were likely to succeed on the claim.

The revised curfew law did not require law enforcement officers to investigate affirmative defenses and therefore the law reached a substantial amount of protected First Amendment conduct and had a chilling effect.

The Court stated that youths should be expected to exercise their liberties, think for themselves and voice their opinions. A child's ability to worship, speak freely and associate is not simply an individual privilege, but it is a necessary means of allowing the child to become a fully enfranchised member of a democratic society. The Court followed other federal case law in concluding that children have First Amendment rights worthy of protection.

The plaintiffs argued that the affirmative defenses in the revised curfew law did not cure the constitutional defect found by the district court in previous curfew law. The plaintiffs argued that, rather than risk arrest, the plaintiffs will be discouraged from exercising their First Amendment rights during curfew hours. The Court determined that an intermediate level of scrutiny should be applied to its review of the revised curfew law. The Court found that government regulation of children's ability to be out in public at night was intimately related to expressive conduct. Religious practices, such as all night prayers, and political campaign speeches and late night sessions of the Indiana General Assembly, were listed by the Court as First Amendment activities in which children might participate during curfew hours.

In examining the revised statute, the Court opined that the lynchpin questions are (1) whether the curfew law furthers an important or substantial governmental interest, and (2) whether the restrictions imposed by the curfew law are no greater than essential to further that interest, i.e., whether the curfew law allows for ample alternative channels for expression. The Court agreed that the governmental interests in enforcing the curfew law are important and substantial. The district court had found that the affirmative defense sufficiently protected children's abilities to engage in First Amendment activity during curfew hours. The Court disagreed with the district court because children would still be subject to arrest while participating in First Amendment activity during curfew hours. A police officer has probable cause to arrest when facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed or is committing an offense. Once a police officer discovers sufficient facts to establish probable cause, the officer has no constitutional obligation to conduct a further investigation to discover exculpatory evidence. The officer has no duty to investigate the validity of any defense. Because the affirmative defense in the revised curfew law imposes no duty of defense investigation by the arresting officer, the revised curfew law protects only children whom the officer has actually seen participating in late night First Amendment activities. The Court opined that it was more likely that an unaccompanied child would come to the attention of a police officer while traveling to or from the late night First Amendment activity.

The Court found that, in addition, there was no adequate alternative channel of communication because there was no substitute for a child's presence at a public late night activity. The Court opined that the revised curfew law forcefully discouraged the

exercise of children's First Amendment rights. The Court stated that to condition the exercise of children's First Amendment activities on the willingness of an adult to chaperone them was to curtail them. The concrete possibility of arrest unduly chilled children's First Amendment rights and rendered the revised curfew statute unconstitutional.