

United States v. Doe, 968 F.2D 86 (D.C. Cir. 1992)

Eric Liebman

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United States v. Doe,

968 F.2D 86 (D.C. Cir. 1992).

Introduction

The United States of America brought criminal charges against the defendant, Diane Nomad, for violating a federal regulation which prohibited playing a musical instrument in a national park at a higher than prescribed decibel level. The District Court for the District of Columbia convicted the defendant of the offense. The Court of Appeals for the District of Columbia reversed, holding that the government failed to carry its burden of showing that the regulation in question was “narrowly tailored” to further the government’s interest in preventing excessive noise in a national park.

Facts

For several days in January of 1991, Diane Nomad and other protestors gathered in Lafayette Park, across the street from the White House, and chanted and beat drums as a means of expressing their opposition to the bombing of Iraq during the Gulf War. After demonstrating in this fashion for a week, the protestors received warnings from the United States Park Police that their actions were in violation of a federal regulation that prohibited the operation of a musical instrument in a national park in a manner that exceeded a noise level of 60 decibels.¹ After three such warnings were disregarded by the protestors, the officers arrested Nomad and the others for violating the regulation.

In the district court, Nomad argued that the regulation violated the First Amendment because it was overbroad. She asserted that the regulation prohibited more expressive conduct than was warranted by the government’s asserted interest in preventing excessive noise. The district court denied Nomad’s motion to dismiss, holding that the regulation was a reasonable time, place and manner restriction. Nomad was subsequently convicted of aiding and abetting the protestors in violating the regulation and this appeal followed.

Legal Analysis

The issue presented to the court of appeals was whether the decibel limit prescribed by the regulation was narrowly tailored to serve a significant governmental interest. The court of appeals began by acknowledging that beating a

1. The regulation provides, in pertinent part:

[t]he following are prohibited . . . [o]perating . . . an audio device, such as a . . . musical instrument, in a manner . . . [t]hat exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet . . .

36 C.F.R. § 2.12(a)(1)(i) (1991).

drum to protest a war was expressive conduct protected by the First Amendment. The court also noted that it was undisputed that Lafayette Park was a “quintessential public forum,” and therefore, the government’s ability to restrict expressive conduct there was very limited.

The court then identified a tripartite test established by the Supreme Court to ascertain the validity of a government regulation that restricts First Amendment protected speech in a public forum: First, the restrictions must not refer to the content of the regulated speech; second, the regulation must be narrowly tailored to serve a significant governmental interest; and third, the regulation must leave open alternative channels for communication of the information.

Applying this test to the instant case, the court first pointed out that the regulation was facially content neutral, as it prohibited the playing of all musical instruments with no indication of inconsistent application to particular types of expression. Therefore the regulation passed the first prong of the test. The court then turned to the second prong of the test, whether the regulation was narrowly tailored to serve a significant governmental interest.

Nomad asserted that the regulation was not narrowly tailored because it severely impaired speech rights in an area where the government explicitly permitted demonstrations because of its proximity to the White House. The government refuted this proposition with a two part argument. First, it asserted that it had a substantial interest in maintaining “the peaceful setting” in the nation’s parks. Second, it contended that it was not within the court’s authority to substitute its judgment for that of the Park service as to whether the regulation at bar should be applied to Lafayette Park.

The court first stated that whether a regulation was narrowly tailored was to be determined by a balancing test inquiring whether the restriction “burden[ed] more speech than [was] necessary to further the government’s legitimate interests.” Applying this test, the court first examined the government’s asserted interest. The court acknowledged that the government did have a legitimate interest in maintaining a tranquil atmosphere in certain circumstances.² However, the court noted that Lafayette Park was not a setting in which the government had a legitimate interest in maintaining tranquility. To the contrary, the court pointed out that Lafayette Park was in a crowded urban area and was exposed to passing traffic, tourists, street musicians and other disturbances endemic to the urban setting.

The court went on to hold that while the government may justifiably impose some sound volume restrictions upon persons in all public parks³, the regulation

2. The court noted that the Supreme Court, in *Frisby v. Schultz*, 487 U.S. 474, 477 (1988), identified the sidewalks in front of a persons home as a place in which the government has a significant interest in maintaining a peaceful atmosphere. *Doe*, 968 F.2d at 88. Additionally, the court of appeals recently recognized a substantial governmental interest in maintaining a tranquil atmosphere at the Vietnam Veteran’s Memorial wall. *Doe*, 968 F.2d at 88 (citing Appellee’s Brief at 11).

3. In so stating, the court referred to *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), in which a noise ordinance for Manhattan’s Central Park was upheld, and pointed out that the complete absence of such regulations would inflict upon citizens all types of unwanted noise (citing City Cou-

at bar was not narrowly tailored to serve the governmental interest in preventing excessive noise in Lafayette Park. In reaching this conclusion, the court pointed out that there was no evidence in the record to support the government's choice of a 60-decibel limit.

In further support of its conclusion the court pointed to evidence entered into the record by defense counsel which indicated that the regulation was substantially overbroad. This included evidence that a loud conversation may exceed 60 decibels at 50 feet and would thus be violative of the regulation. Defense counsel also demonstrated that generators in Lafayette Park operating at the time of the protest created noise in violation of the regulation. Because of this evidence produced by defense counsel, and the paucity of evidence produced by the government, the court concluded that the government failed to carry its burden of showing that its regulation was narrowly tailored.

Because the court held that the regulation was not narrowly tailored it was not necessary for it to reach the third prong: whether or not the regulation left open alternative methods of communication. The court also rejected the government's assertion that the Park Service was better suited than the court to establish such limits, stating that where constitutionally protected activity was involved, such deference to the Park Service was inappropriate.⁴

Conclusion

The Court of Appeals for the District of Columbia reversed Nomad's conviction, holding that the regulation was not sufficiently narrowly tailored to serve the government's interest in preventing excessive noise in Lafayette Park. The court reached this conclusion because there was no evidence to support the government's choice of a sixty decibel limit, and because noise in excess of sixty decibels was not normal but appropriate, given the location of Lafayette Park.

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ncil of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).

4. Henderson v. Lujan, No. 91-5258, slip op. at 10 (noting that court "cannot defer to [Park Service's] judgment on the constitutional question" of "narrow tailoring").

