

IN THE COUNTY COURT, SEVENTH  
JUDICIAL CIRCUIT, IN AND FOR  
ST. JOHNS COUNTY, FLORIDA

DIVISION: 66

STATE OF FLORIDA,

vs.

GREGORY ALAN TREVIOUS,  
CASE NO: 07000015MOMA

HELEN MARIA FLEDMAN SALA,  
CASE NO: 07000041MOMA.

JACK L. CHUITES,  
CASE NO: 07000067MOMA

Defendants.

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**ORDER ON DEFENDANT'S  
MOTION TO DISMISS**

This matter came before the Court for hearing on September 26, 2007, upon the Defendants' Motion to Dismiss. The Defendants have filed the same motion and these matters have been consolidated for the hearing on the motion. All three of the Defendants are challenging the constitutionality of City Ordinance 22-6 alleging that the ordinance is a violation of their constitutional rights of free speech or expression as guaranteed under the First and Fourteenth Amendments of the United States Constitution as well as comparable rights under Article 1 of the Florida Constitution.

On March 31, 2007, each of the Defendants was cited with violating City of St. Augustine Ordinance Section 22-6. Ms. Sala and Mr. Trevous were cited with selling or offering for sale framed quilts in the plaza and Mr. Chuites with selling or offering for sale leather items in the plaza. The plaza is the Plaza de le Constitution which is located in the heart of the City's historic district. At the hearing the Court had the benefit of reviewing the type of art or visual wares that the Defendants were selling or offering for sale. Ms. Sala and Mr. Trevous were selling framed quilts that were hand made by Ms. Sala. The quilts are not the traditional quilts

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one might see on a bed, but smaller ones with handcrafted and layered fabrics that are meant to be hung by a wooden rod or a frame to a wall. The ones presented in court depicted either women wearing hats or were of flowers. These quilts are made of various types of layered fabrics and are quite detailed. Ms. Sala testified that she is a "fiber artist" and she hand sews these works and they are meant to be hung with or without frames and that some of the small ones are glued onto cardboard prior to framing. Mr. Chuites described himself as an artist that works in leather. The work he was offering for sale consisted of leather masks and leather art pieces. The masks are not of a traditional type of one or two piece construction, but are made of numerous pieces of leather stacked on top of or joined together to make multi layered masks that are either painted or unpainted. The other pieces are typically about "frisbee" sized or a bit smaller and are made up of multiple layers of leather which are either painted or unpainted. Mr. Chuites testified that both his masks and his other leather art pieces are made to be displayed or hung on a wall. He testified that although it would be possible to wear his leather masks that was not the intended purpose and the one that was displayed to the Court had no nose holes to allow breathing.

City of St. Augustine's Ordinance 22-6 states in its entirety:

**Sec. 22-6. Prohibition of sale of merchandise and services on public property within historic preservation district HP-2 and HP-3.**

- (a) It is unlawful for any person to sell or offer for sale, compensation or donation, or rent or offer for rent, goods, wares, merchandise, food stuffs, refreshments, or other kinds of property or services upon the streets, alleys, sidewalks, parks and other public places within historic preservation zoning districts HP-2 and HP-3, except as otherwise set forth in this section.
- (b) The provisions of this section shall not apply to the sale or offer for sale of newspapers of general circulation. For the purposes of this section, "newspaper of general circulation" means a publication published at regular intervals, primarily for the dissemination of news, intelligence and opinions on recent events or newsworthy items of a general character, and reaching all classes of the public.
- (c) The provisions of this section shall not apply to persons selling or offering to sell goods, wares, merchandise, foodstuffs, refreshments and other kinds of property or services within the Plaza de la Constitucion and the San Marco Special Events Field pursuant to a permit issued by the city manager of the city upon written application and payment of a fee as established by the city manager.

- (d) The provisions of subsection (a) of this section shall not be construed as prohibiting the sale or offer for sale of merchandise and foodstuffs on the public sidewalks of an approved parade route or during city-sponsored or permitted special events, including, but not limited to, the Blessing of the Fleet, Fourth of July celebrations and New Year's celebrations. During such celebrations, persons wishing to sell merchandise or foodstuffs during a period no greater than four (4) hours before a scheduled event and two (2) hours after a scheduled event may apply for a permit to the city manager upon written application and payment of a fee as established by the city manager.

The pertinent language of the predicate clause to 22-6 contained in Ordinance 2000-09 reads:

WHEREAS the economic well-being of the City is, in many ways, dependent on heritage tourism; and  
WHEREAS, the City relies on a prosperous, stable merchant community for its tax base; and  
WHEREAS, in recent months, the commercial historic preservation districts of the City have been inundated with unlicensed merchants selling various goods, wares, merchandise and services along the streets and sidewalks of the City; and  
WHEREAS, the proliferation of such unlicensed merchants and vendors creates a visual clutter along the streets within the historic preservation districts and impedes the public safety by interfering with the orderly movement of pedestrians with the crowded commercial district; and  
WHEREAS, the State, City and private citizens have contributed greatly to the restoration and preservation of the historic districts; and  
WHEREAS, in order to maintain the aesthetic attractiveness of the historic districts of the City of St. Augustine, promote the public safety and orderly movement of pedestrians and protect the local merchant economy, the City Commission of the city of St. Augustine finds it necessary to restrict the sale of merchandise and services in public areas within the historic district; and...

This Court, in another case, had earlier found the current version of Section 22-6 constitutionally valid based on similar challenges as these being made by the Defendants herein. See State v. Jane Marjory Cole, Case No. MM00-2108. (St. Johns Co., Nov. 3, 2000); affirmed Cole v. State, Case No. CA01-426 (St. Johns County Circuit Court, August 13, 2003).

Facially, the Court finds the ordinance to be a constitutionally valid restriction on the Defendants' first amendment rights. The Court finds that the ordinance is content neutral in that it does not discriminate against one form of speech or expression based on its content. Further, the Court finds that the purpose for the ordinance's enactment as stated in its predicate clause,

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above, serves a legitimate governmental interest, that the ordinance is narrowly tailored to achieve those interest and that it leaves adequate alternative channels of communication open within the City of St. Augustine to those that wish to sell or offer for sale such "goods, wares and merchandise". These types of restriction on free speech or expression, as in the instant case, have been held as constitutionally permissible. City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2<sup>nd</sup> 29 (1986); Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); One World One Family Now v. City of Honolulu, 76 F. 3d 1009 (9<sup>th</sup> Cir. 1996); Horton v. City of St. Augustine, 272 F. 3d 1318 (11<sup>th</sup> Cir. 2001).

However, the Court finds that the ordinance is unconstitutional as applied to these Defendants. The City, initially, was granting licenses to various individuals that wanted to "sell or offer for sale" goods, wares, merchandise", etc. in the prohibited area. For the most part this meant the Plaza de la Constitucion. As the number of requests for permits grew, as did the number of merchants and artists selling goods in the plaza, so did the number of complaints the City was getting from downtown merchants, business people, residents and tourists alike. As a result, the City stopped issuing such permits which foreclosed most, but not all, merchants from selling their "goods, wares and merchandise" in the plaza. The City decided it would allow only four categories of "art" to be sold in the plaza; i.e. paintings or copies of paintings, photographs, prints or books and sculptures. The City seems to have based its decision to prohibit sales beyond the above on the Federal case of Bery v. City of New York, 97 F. 3d 689 (2d Cir. 1996). There visual artists moved for a preliminary injunction against New York City for an ordinance that prohibited visual artists from displaying or selling their work in public places throughout the city without first obtaining a permit. Because the City of New York only allowed the issuance of 853 permits the majority of artists seeking such permits were unable to obtain one. The Bery Court acknowledged that "visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. Id @ 695. The Court also acknowledged that those rights "are not lost merely because compensation is received", id @ 659, citing Riley v. National Federation of Blind of North Carolina, 487 U.S. 781, 801, 108 S. Ct. 2667, 2680, 101 L. Ed. 2d 669 (1988). The Court stated that although the crafts of jewelers, potters and silversmiths may at times have expressive content, that "paintings, photographs, prints and sculptures...always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment

protection.” (emphasis added). The Court went on to state that “Courts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times...id @ 696.

To truly understand the Bery case one must read the successor case of Mastrovincenzo v. City of New York, 435 F. 3d 78 (2d Cir. 2006). In Mastrovincenzo, unlicensed street vendors of clothing painted with custom designs challenged the City’s licensing requirement alleging, most simply, that their art work, even though on clothing, was no less subject to the full First Amendment protection as the art work of a painter, photographer or sculpture.<sup>1</sup>

In considering whether the Plaintiff’s painted clothing was the type of “art” or “expression” entitling it to the full protection of the First Amendment allowed to painters, photographers or sculptors, the Court gave guidance to other Courts. The Court there states “Because the most reliable means of resolving this difficult question is to examine objective features of the merchandise itself...[and] whether Plaintiff’s items, on their face, appear to serve predominantly expressive purposes”. id @ 91. This means on a case by case basis and not based on what the artist himself or herself might say about their merchandise. Once the Court has determined whether an item possesses expressive content, it should then consider whether that item also has a common non-expressive purpose or utility. If the Court finds that the dominant purpose is a common non-expressive purpose then the vendor has a lesser claim to protection under the first amendment. In other words, if a hat, jacket or other article of clothing is decorated with artwork should such clothing be considered as protection from the sun, wind, cold etc. or be considered “expressive merchandise”? Certainly, a difficult task. The Mastrovincenzo Court went on to hold that while the sale of clothing painted with graffiti is not necessarily expressive and entitled to First Amendment protection, that the sale of the Plaintiff’s clothing had a predominantly expressive purpose and merited such protection. This was so even though the Court found New York’s City’s vendor licensing requirement a content neutral restriction on speech narrowly tailored to achieve the City’s objective of reducing urban congestion.

In the instant case the City Attorney’s Office attempted to give law enforcement guidance on how to enforce Ordinance 22-6 subsequent to the City’s withdrawal of its licensing

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<sup>1</sup> The Court, in Mastrovincenzo, shows that the City, subsequent to Bery, consented to the Bery injunction and, in so doing, stipulated that it would no longer enforce its general vendor law licensing requirement against vendors of “any paintings, photographs, prints, and/or sculpture”. Id @ 81.

requirement for merchants in the plaza by sending out a memorandum to the St. Augustine Police Department stating:

What can be sold in the Plaza?

\_\_\_\_\_ Paintings or copies of paintings      \_\_\_\_\_ Prints/Books  
 \_\_\_\_\_ Photographs      \_\_\_\_\_ Sculpture (marble, wood, stone, sand, wire)

What may not be sold in the plaza

This list represents items actually observed for sale in the plaza and does not include all other items which may not be sold.

_____ Barbie dolls	_____ Jewelry
_____ Baskets	_____ Massage service
_____ Beanie babies	_____ Musical CD's
_____ Belts	_____ Necklaces
_____ Blankets	_____ Ornaments (even handpainted)
_____ Bracelets	_____ Pottery
_____ Clothing (even decorated)	_____ Purses
_____ Dog treats	_____ Quilts (even framed)
_____ Dolls	_____ Shoes
_____ Dreamweavers	_____ Spoons (even handpainted)
_____ Engraved coins	_____ Sunglasses
_____ Fudge	_____ Tickets to ghost tours
_____ Hats	_____ Wooden bowls

The City created the proverbial "slippery slope" when it chose to be so specific on what could and could not be sold in the plaza creating confusion among merchants and law enforcement alike. During questioning of one of the officers that cited Mr. Chuites the Court asked the officer if he would have cited Mr. Chuites if "sculpture" included "leather" along with marble, wood, stone, sand, and wire. He said he would have been unsure whether Chuites could be cited in that instance. Certainly, a sculpture could just as easily be made out of leather as it could marble, wood, stone, sand or wire. Is it any less a sculpture if it is made from some material not listed by the City? Is it any less a work of art not entitled to First Amendment protection?

The Court had the benefit of examining the Defendants art or merchandise and finds that the framed or hanging quilts offered for sale by Ms. Sala and Mr. Trevous and the masks and other leather wares offered for sale by Mr. Chuites have a predominantly expressive purpose. Moreover, the Court cannot find any non expressive purpose for the quilts offered by Sala or Trevous. Although the Court can find some non expressive use for the masks offered by

Chuites, if they were worn, the predominate purpose is artistic expression and, as such, the Court finds that Ordinance 22-6 as applied to the Defendants is an unconstitutional restriction of their freedom of speech or expression as guaranteed under the First and Fourteenth Amendments to the U.S. Constitution as well as the corresponding rights under Article 1 of the Florida Constitution.

**WHEREFORE** it is

**ORDERED AND ADJUDGED** that the Defendants' Motion to Dismiss is **GRANTED**.

The cases herein against the Defendants are **DISMISSED** and the Defendants are **DISHARGED**.

**DONE AND ORDERED** in Chambers at St. Augustine, St. Johns County, Florida this 10<sup>th</sup> day of October 2007.

  
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**CHARLES J. TINLIN**  
**COUNTY COURT JUDGE**

Copies furnished to: 10/10/07RS

Thomas E. Cushman, Esquire  
222 San Marco Ave  
St. Augustine, FL 32084-2723

Robin H. Upchurch, Esquire  
City of St. Augustine  
P. O. Box 210  
St. Augustine, FL 32084

IN THE COUNTY COURT, SEVENTH  
JUDICIAL CIRCUIT, IN AND FOR  
ST. JOHNS COUNTY, FLORIDA

CASE NO: 07000001MOMA

DIVISION: 66

STATE OF FLORIDA,

vs.

GREGORY ALAN TREVIOUS,  
Defendant.

**ORDER ON DEENDANT'S  
MOTION TO DISMISS**

This matter came before the Court for hearing on September 26, 2007, upon the Defendant's Motion to Dismiss. In his motion the Defendant alleges that City of St. Augustine Ordinance Section 22-10 is unconstitutional and violative of the Defendant's rights as guaranteed under the First and Fourteenth Amendments of the United States Constitution and those corresponding rights under Article 1 of the Florida Constitution.

On December 16, 2006, the Defendant was given a citation for a violation of City Ordinance 22-10 alleging that he was "observed displaying visual art for sale on St. George Street on the public sidewalk" in the area of 162 St. George Street. The type of visual art that the Defendant is alleged to have been displaying for sale consisted of numerous paintings displayed on and around a folding table. Section 22-10 of the City Ordinance reads in pertinent part:

**Sec. 22-10 Regulation of street performers.**

- (a) Intent. The City Commission of the City of St. Augustine finds that the existence in the city of street performers, as hereinafter defined, in the prohibited public area, as hereinafter defined, interferes with the public health, safety, and welfare of the pedestrian traffic, including residents and tourists by, among other things, attracting audiences which congest the prohibited public area. The city finds that the existence of the street performers in the prohibited public area further adversely affects the city's interests in the aesthetics incident to the oldest city in the United States and adversely affects the interest of residents and the regulated, code complaint businesses and



museums in the enjoyment of peace and quiet in their homes, businesses and museums. Also, the city finds that the existence of the street performers in the prohibited public area poses a safety risk to the public and passers-by by congestion and clutter in this area of St. Augustine. Therefore, it is the intent of the city to prohibit the street performers from performing in the prohibited public area of the City of St. Augustine but to permit them to have access to reasonable alternative avenues of communication throughout the city.

- (b) Definition. The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:
- (1) Perform or performance means acting, singing, playing musical instruments, pantomime, mime, magic, dancing, juggling, or the sale of visual art and wares, which means drawings or paintings applied to paper, cardboard, canvas, cloth or other similar medium when such art is applied to the medium through the use of brush, pastel, crayon, pencil, spray or other similar object, and the creation, display and/or sale of crafts made by hand or otherwise.
  - (2) Prohibited activity means any activity involving the use of fire, aerosol or spray paint.
  - (3) Prohibited public area means the pedestrian accessed public areas of St. George Street from Cathedral Place north to Orange Street and within fifty (50) feet of that section of St. George Street on the intersecting public lanes, streets or thoroughfares.
  - (4) Street performers means individuals who perform, as defined herein, on the streets of the City of St. Augustine.
  - (5) Other public areas means public streets, rights-of-way, sidewalks, parks, playgrounds, and all public ways except those portions of the streets and roadways intended for use by vehicular traffic within the city.
- (c) Prohibition. No street performers may perform in a prohibited public area. No street performer may perform a prohibited activity anywhere in the City of St. Augustine.
- (d) Permitted performances. Street performers may perform in all public area of St. Augustine except that area on St. George Street located between Orange Street to the north and Cathedral Place to the south, and within fifty (50) feet of this section of St. George Street on the intersecting public streets, lanes and thoroughfares.
- (e) Exceptions. A street performer shall not perform in a manner that interferes with the visibility of any motorist, or at or near intersections or passages in a manner which interferes with the

sight distance of any motorist traveling on or entering any thoroughfare in the city.  
(emphasis added).

The area in which the Defendant is alleged to have been displaying his art work for sale is in the prohibited area. The type of paintings that the Defendant is alleged to have displayed for sale falls within the definition of perform or performance under subsection (b)(1) above.

Section 22-10 of the City Ordinance has gone through several amendments over the years and this Court, as well as other Courts, found the ordinance unconstitutional as a violation of street performers' First Amendment (Free Speech) rights. [See State v. Jeffrey Masin, Case No. MM95-7165, et al (St. Johns County, March 15, 1996); Jolley v. State, Case No. CA95-1313 (St. Johns County Cir. Ct., March 15, 1996); Horton v. City of St. Augustine, Case No. 3:00-CV-671-J-25(A) (M.D. Fla., Oct 14, 2000)]. However, a subsequent amendment of the ordinance in 2000 was challenged before this Court by a street performer (musician) and this Court found the ordinance constitutionally permissible as a legitimate restriction of the Defendant's First Amendment rights. State of Florida v. Roger Graham Jolley, Case Nos. MM01-2333 and MM01-3124 (St. Johns County, July 18, 2001). This 2000 amendment was challenged by another street performer in Horton v. City of St. Augustine, 272 F. 3d 1318 (11<sup>th</sup> Cir. 2001)<sup>1</sup> and there, the Court found that the ordinance was not unconstitutionally vague on its face, was not overbroad, and was not an unreasonable time, place, and manner restriction of the Defendant's First Amendment rights.

The 2003 amendment to the ordinance which is being challenged in the instant case makes no significant changes (except for allowing certain parades by permit which does not apply to the Defendant). The prohibition of the "sale of visual art and wares" with which the Defendant is cited has not changed or been amended under the existing ordinance. Therefore, the Court, as it did in State v. Jolley, *id.*, finds that the present version of Section 22-10 is a constitutionally permissible restriction of the Defendant's constitutional rights as challenged.

The Court finds that Section 22-10 of the City's ordinance is content neutral. It does not discriminate against one form of speech or expression over another. Such a content neutral prohibition has been held to be constitutionally permissible. Cincinnati v. Discovery Network, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).

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<sup>1</sup> The Horton Court cited with approval this Court's findings in State v. Jolley @ 272 F. 3d 1318, 1334, FN 21.

Further, the ordinance is narrowly tailored to serve a significant governmental interests. Here, the interests that the City is attempting to serve are: (1) to prevent street performances (as defined) from interfering with the free flow of pedestrian traffic by attracting audiences which can congest these areas of St. George Street, the historic district's most populated pedestrian area; (2) to protect the aesthetics of the historic district of our nation's oldest city; (3) to ensure that business, historical properties and residences have unfettered ingress and egress to their businesses and homes; and (4) to protect the public against a safety risk from congestion and cluster in the area caused by street performers. Such governmental interest have been held to be constitutionally sound where a city seeks to protect those interests. One World One Family Now v. City of Honolulu, 76 F. 3d 1009 (9<sup>th</sup> Cir. 1996).

Additionally, the ordinance leaves open alternative channels of communication to street performers, like the Defendant. Section 22-10 of the City's ordinance applies only to the area of St. George Street between Cathedral Street to the south and Orange Street to the north and within 50 feet of any section of St. George Street that intersects with any public lane, street or thoroughfare. Therefore, unless the Defendant were to interfere with traffic within the City, he could set up his display of paintings for sale anywhere else in the city. Although he may argue that another section of the City's Ordinance, 22-6, would prevent him from doing so the City has previously exempted from enforcement the sale of paintings, prints or copies of paintings, photographs, books and sculptures. The City exempted this type of art as protected expression of free speech based on the Court's ruling in Bery v. City of New York, 97 F. 3d 689 (2d Cir. 1996) and sent out a memo to the City's law enforcement personnel not to enforce Section 22-6 against street performers or merchants selling or offering for sale those type of goods. (Memorandum dated March 23, 2007 regarding Section 22-6 from the City Attorney's Office to the St. Augustine Police Department).

The Defendant also argues that Section 22-10 is arbitrary and capricious in its definitions and vague in its prohibitions by prohibiting certain types of "visual art and wares" from being sold in the prohibited areas, but does not seem to prohibit others from being sold in the same area. He points out that the ordinance prohibits drawing or paintings "applied to paper, cardboard, canvas, cloth or to other similar medium" when such art is applied to the medium through use of "brush, pastel, crayon, pencil, spray, or other similar object." However, he argues that, the ordinance does not seem to prohibit the sale of art created by finger painting, artist's

knife, giclee or other unspecified method. He also points out that no mention is made of a prohibition of the sale of visual arts applied to wood, glass, leather, metal, ceramics or composites such as melamine.

In order to withstand a challenge for vagueness an ordinance must provide adequate notice to persons of common understanding of the behavior prohibited. It must provide "citizens, police officers, and Courts alike with sufficient guidelines to prevent arbitrary enforcement." City of Seattle v. Webster, 115 Wash. 2d 635, 645, 802 P. 2d 1333, 1339 (Wash. 1990), cert. denied, 500 U.S. 908, 111 S. Ct. 1690, 114 L. Ed. 2d 85 (1991). The Court finds that Section 22-10 defines the prescribed conduct with sufficient clarity and does not have terms that leaves one guessing at its meaning. The Horton Court agreed when it examined the ordinance's predecessor (Section 22-9) when applied to the sale of art, supra @ 1339-30.

**WHEREFORE**, based on the above it is

**ORDERED AND ADJUDGED** that the Defendant's Motion to Dismiss is **DENIED**.

**DONE AND ORDERED** in Chambers at St. Augustine, St. Johns County, Florida this

10<sup>th</sup> day of October 2007.

  
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CHARLES J. TINFLIN  
COUNTY COURT JUDGE

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Thomas E. Cushman, Esquire  
222 San Marco Ave  
St. Augustine, FL 32084-2723

Robin H. Upchurch, Esquire  
City of St. Augustine  
P. O. Box 210  
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