

[J-162A-2008; J-162B-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 116 MAP 2007
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Centre County Dated
v.	:	November 15, 2007 at No. CP-14-CR-
	:	1200-2007.
	:	
	:	
OMAR A. OMAR,	:	SUBMITTED: December 2, 2008
	:	
Appellee	:	

COMMONWEALTH OF PENNSYLVANIA,	:	No. 20 MAP 2008
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Centre County Dated
v.	:	January 25, 2008 at No. CP-14-CR-2020-
	:	2007.
	:	
	:	
DANIEL J. O'CONNOR,	:	ARGUED: December 2, 2008
	:	
Appellee	:	

DISSENTING OPINION

MADAME JUSTICE GREENSPAN

DECIDED: October 5, 2009

Although I agree with my colleagues that Pennsylvania's Trademark Counterfeiting Statute, 18 Pa.C.S. § 4119 (the "Statute"), is inartfully drafted, I cannot conclude that the Statute is so vague and overbroad that it ought to be deemed unconstitutional. This Court should not declare a criminal statute to be unconstitutional under the void-for-vagueness or overbreadth standards merely because the drafters utilized clumsy grammar, as is the case

here. This Court has an obligation to interpret a statute in a constitutional manner wherever possible. DePaul v. Commonwealth, 969 A.2d 536, 537 n.5 (Pa. 2009) (“we are required, whenever possible, to construe a statute in a manner that upholds its constitutionality”); Commonwealth v. Pure Oil Co., 154 A. 307, 309 (Pa. 1931) (holding that a court must, if reasonably possible, construe a statute so as to find the statute constitutional). Here, the majority fails to follow this clear mandate and the majority opinion is, in my view, inconsistent with this Court’s recent holding in the similar case of Malt Beverages Distrib. Ass’n v. Pa. Liquor Control Bd., 974 A.2d 1144 (Pa. 2009).¹ In my opinion, the majority’s failure in this case sets a dangerous precedent whereby a grammatical mistake by the General Assembly will result in a criminal statute, and convictions thereunder, being overturned. On this basis, I respectfully dissent.

It is the role of the Court to determine constitutionality and the role of the General Assembly to determine what particular language should be used to achieve its goal. As this Court noted in Reichley v. North Penn Sch. Dist.:

The adversarial judicial system is not an appropriate forum for analyzing whether this legislation works well or poorly, as intended or in ways unforeseen. If a statute does not work as expected, the legislature is the appropriate body to make the judgment and enact corrective legislation. That body has the competence to weigh the policy considerations and legislate initially and that body has the competence to reassess those considerations, the efficacy of the initial legislation, and the wisdom of continuing thereunder or changing course.

626 A.2d 123, 129 (Pa. 1993). It is a basic tenet of statutory construction that, when evaluating the constitutionality of a statute, a court must presume that the General

¹ Although Malt Beverages differs from the instant case in that Malt Beverages did not involve a constitutional challenge, that case and the language of the statute raised therein present issues similar to those presented in the instant case. Given the similarity of the question of statutory construction in Malt Beverages, its precedent should be followed in the instant case. See my discussion infra at n. 4.

Assembly did not intend to violate the Constitution of the United States or of Pennsylvania when it promulgated the statute. 1 Pa.C.S. § 1922(3); see also Pennsylvania Tpk. Comm'n v. Commonwealth, 899 A.2d 1085, 1094 (Pa. 2006) (holding that legislation duly enacted by the General Assembly will not be declared unconstitutional unless the legislation clearly, palpably and plainly violates the Pennsylvania and United States Constitutions). Again then, this Court should, whenever possible, construe a statute to uphold its constitutionality. DePaul, 969 A.2d at 546 (citing In re William L., 383 A.2d 1228, 1231 (Pa. 1978)). In my opinion, this principle is even more important in the context of evaluating a criminal statute which will be struck down if the statute is found to be unconstitutional.

Any doubt as to the constitutionality of a statute is to be resolved in favor of finding the statute to be constitutional. Commonwealth v. Bullock, 913 A.2d 207, 212 (Pa. 2006) (holding that the Crimes Against the Unborn Child Act was neither unconstitutionally vague nor overbroad); Reichley, 626 A.2d at 128 (reversing the order of the trial court holding Act 195 unconstitutional); see also Colville v. Allegheny County Ret. Bd., 926 A.2d 424, 433 (Pa. 2007) (noting that a reviewing court is precluded from construing a statute in a manner that would produce an absurd or unreasonable result). As a result of this presumption, the party challenging the constitutionality of the statute bears the significant burden to prove that the statute is unconstitutional. Harrisburg Sch. Dist. v. Zogby, 828 A.2d 1079, 1087 (Pa. 2003); Commonwealth v. Davidson, 938 A.2d 198, 207 (Pa. 2007). A party may successfully argue that a statute is unconstitutional by demonstrating that the statute is either void for vagueness or overbroad.

Under the void-for-vagueness standard, a statute will be found unconstitutional *only* if the statute is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Commonwealth v. Craven, 817 A.2d 451, 454 (Pa. 2003); Commonwealth v. Cotto, 753 A.2d 217, 220 (Pa. 2000). A statute will not be found unconstitutional if the statute defines the criminal offense with sufficient definiteness that

ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. Davidson, 938 A.2d at 207. A statute will not be deemed unconstitutionally vague if its terms, when read in context, are sufficiently specific. Cotto, 753 A.2d at 220 (citing Commonwealth v. Hendrickson, 724 A.2d 315 (1999) and concluding that the Juvenile Act was constitutional because, when read in the context of its elaborated legislative purpose, its language was not vague). That the General Assembly could have chosen clearer and more precise language equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague. United States v. Powell, 423 U.S. 87, 94 (1975).

Under the overbreadth standard, a statute will be found unconstitutionally overbroad only if it punishes lawful constitutionally protected activity as well as illegal activity.² Davidson, 938 A.2d at 208. Thus, in determining whether a statute is unconstitutional due to overbreadth, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Commonwealth v. Ickes, 873 A.2d 698, 702 (Pa. 2005) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)). The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. Davidson, 938 A.2d at 208. The United States Supreme Court has described application of the overbreadth doctrine as "strong medicine," only to be "employed sparingly" and as a "last resort."³ Id. (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (U.S. 1973)).

² A challenge to the constitutionality of a statute under the "overbreadth" doctrine is generally limited to a claim that the statute violates the First Amendment. Davidson, 938 A.2d at 208 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

³ Application of the doctrine is especially inappropriate here because a remedial bill meant to correct any alleged overbreadth in the Statute is pending before the General Assembly.

The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. § 1921(a); Davidson, 938 A.2d at 216. Where a statute is ambiguous, a Court *must* consider both the statute's plain language *and* the legislative intent underpinning the language. 1 Pa.C.S. § 1921(c); see also Carrozza v. Greenbaum, 916 A.2d 553, 564-65 (Pa. 2007) (listing factors that can be utilized to glean the legislative intent underpinning a statute); Pennsylvania Fin. Responsibility Assigned Claims Plan v. English, 664 A.2d 84, 87 (Pa. 1995) (noting that where a statute is unclear or susceptible to differing interpretations, courts must look to legislative intent).

Turning to a close reading of the Statute, the majority and concurrence conclude that the Statute is not ambiguous. They therefore decline to evaluate anything other than the plain meaning of the Statute's language. I disagree with their conclusion vis-à-vis ambiguity and with their interpretation of the Statute's language. As the litigants' varying interpretations of the Statute demonstrate, the Statute *is* subject to various interpretations. The Statute is not, as the majority and concurrence suggest, clear on its face. Depending on how the Statute is read, it may prohibit a broad class of activity or it may prohibit only the aforementioned activity in the context of a sale or distribution.

The question of statutory construction presented in this case is not unlike the question presented to this Court in the recent Malt Beverages case.⁴ In Malt Beverages,

⁴ In Malt Beverages, the litigants argued that a statute was ambiguous and subject to different interpretations but there was no constitutional challenge to a criminal statute. To the contrary, that case involved a mere divergence as to how a civil statute should be applied. In my opinion, the instant case is one of even greater gravity than Malt Beverages. Here, the challengers ask this Court to declare a criminal statute unconstitutional. If the challenge in Malt Beverages and the language of the statute at issue therein were sufficient to justify a finding of ambiguity in that case, a similar result is required in the instant case where the stakes are even higher.

this Court found ambiguity in a statute that contained a clause that could be read in either a limiting or an expansive manner. 974 A.2d at 1152 (“The crux of the dispute focuses on whether the two types of beer sales contemplated in Section 102 -- the sale of beer for on-site consumption and the sale of beer for carry-out purchases -- are independent alternatives or whether the sale of beer for takeout is contingent upon the sale of beer for consumption on the premises of the facility.”). Because the statute in Malt Beverages was subject to two different interpretations, the Court properly held that the statute was ambiguous and utilized legislative intent to interpret the statute. Id. at 1153 (“we find that each party’s interpretation of the statutory language is plausible and, therefore, the statute is ambiguous. As in all cases where a latent ambiguity in the statute exists, we resort to the canons of statutory construction to discover the Legislature’s intent.”).

The majority rejects such an approach here, even in the face of far more ambiguous language than was present in Malt Beverages. Like the statute at issue in Malt Beverages the Statute here is subject to at least two reasonable interpretations and is therefore ambiguous. Due to this ambiguity, we ought not to evaluate the language of the Statute in a vacuum but instead should evaluate the language of the Statute in light of the General Assembly’s intent. See Pennsylvania Fin. Responsibility Assigned Claims Plan, 664 A.2d at 87.⁵ If the challenge in Malt Beverages was sufficient to justify a finding of ambiguity, surely a similar finding is mandated here, in the context of a constitutional challenge to a criminal statute.

Pursuant to the language of Section 4119(a) of the Statute, any person who knowingly “manufactures, uses, displays, advertises, offers for sale, sells or possesses with

⁵ I am mindful of the general rule of construction that where the words of a statute are “clear and free from all ambiguity, the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. §1921(b). Notwithstanding the general rule, where, as here, the words of a statute are ambiguous a court may consider extrinsic evidence to determine legislative intent. 1 Pa.C.S. §1921(c).

intent to sell or distribute any items or services bearing or identified by a counterfeit mark” shall be guilty of the crime of trademark counterfeiting. 18 Pa.C.S. § 4119(a). Section 4119(i) of the Statute defines a “counterfeit mark,” in part, as any unauthorized reproduction or copy of a trademark. 18 Pa.C.S. § 4119(i).⁶ Section 4119(b) of the Statute states that a person who possesses more than 25 counterfeit items may be presumed to possess them with the intent to sell or distribute. 18 Pa.C.S. § 4119(b).

The majority applies a literal reading to the Statute, declares the Statute’s language to be unambiguous, and therefore does not evaluate legislative intent. The concurrence reaches the same conclusion. I cannot agree with their approach. This is not a case where a litigant has asserted ambiguity in a single, undefined term. Nor is this a case where ambiguity is alleged but two reasonable persons would not actually differ as to the interpretation of a statute. The instant case is one involving a complex Statute with unusual grammar and a clause that can be read either to limit the entirety of a statutory provision or to limit only one listed action. Here, the inartfully drafted Statute is indeed ambiguous and the latent ambiguity exists in the very structure of the Statute. There are, simply, two reasonable ways in which to read Section 4119(a) of the Statute. Therefore, an analysis of legislative intent is necessary to prevent an overly literal interpretation of the Statute

⁶ The Statute contains several relevant definitions. The term “counterfeit mark” is defined to include the following:

(1) Any unauthorized reproduction or copy of intellectual property.

(2) Intellectual property affixed to any item knowingly sold, offered for sale, manufactured or distributed or identifying services offered or rendered, without the authority of the owner of the intellectual property.

18 Pa.C.S. § 4119(i). The term “intellectual property” is defined as “[a]ny trademark, service mark, trade name, label, term, device, design or word adopted or used by a person to identify that person’s goods or services.” Id.

contrary to the drafter's intent and to prevent an improper invalidation of a criminal statute.
1 Pa.C.S. § 1921(b).

The majority, by its literal reading, rules that the General Assembly intended to prohibit any mere use of a recognized word or mark. To my mind, this reading is flawed. The legislative intent behind the Statute is clear. The General Assembly intended to criminalize only the *deceptive* use of a recognized word or mark in the context of a *sale or distribution*. The General Assembly's use of the term "counterfeit" emphasizes that only the *deceptive* use of a word or mark is prohibited. Moreover, there would be no reason for a presumption of an "intent to sell or distribute" in the instance of possession of 25 items if an intent to sell or distribute was not required for a violation of the Statute. When the Statute's sections are read comprehensively it becomes clear that both deception and a sale or distribution are required in order to violate the Statute.

Although appellate review of the Statute has been scant,⁷ the Superior Court has recognized the legislative intent that the Statute only be applied in the context of a sale or distribution. In Commonwealth v. George, 878 A.2d 881, 883-86 (Pa. Super. 2005), the Superior Court evaluated the Statute in the context of a sufficiency of the evidence challenge where the defendant was arrested displaying counterfeit videotapes on a public street. The defendant argued that the Statute did not apply because Section 4119(b) states that intent to sell may be inferred where a defendant possesses 25 counterfeit items, and the defendant argued that he possessed just 10 counterfeit videotapes at the time of his arrest. Id. at 885. In rejecting the defendant's argument, the Superior Court reasoned that although intent to sell could be inferred where a defendant possessed more than 25

⁷ See Commonwealth v. Crespo, 884 A.2d 960, 964-66 (Pa. Commw. 2005) (discussing the seizure of counterfeit items in the case where a defendant has been accused of a violation of the Statute); Commonwealth v. Sow, 860 A.2d 154, 154-55 (Pa. Super. 2004) (holding that the Statute is not preempted by federal law).

items, so long as the Commonwealth could demonstrate an intent to sell, the possession of fewer items was also illegal. *Id.* In so holding, the Superior Court implicitly ruled that the legislative intent of the Statute was for the Statute to apply only where trademark counterfeiting is done in the context of a sale or distribution.

Similarly, the Statute applies only in circumstances arising from *counterfeiting*. The Statute does not apply outside of this context, regardless of whether a recognized word or mark is used. The intent of the Statute is not to criminalize the mere use of a recognized word or phrase. To the contrary, the intent of the Statute is to prevent individuals from deceptively utilizing a recognized mark in the context of a sale or distribution.

Section 4119(a) of the Statute sets forth the requirements for a violation of the Statute. Pursuant to Section 4119(a), “[a]ny person who knowingly manufactures, uses, displays, advertises, distributes, offers for sale, sells or possesses *with intent to sell or distribute any items or services bearing or identified by a counterfeit mark* shall be guilty of the crime of trademark counterfeiting.” 18 Pa.C.S. § 4119(a) (emphasis added). Although the grammar of the Statute could be more precise, pursuant to Section 4119(a) of the Statute, use of a counterfeit mark is criminal only where a person intends to sell or distribute an item or service bearing that mark. Although the Statute mentions the use of a counterfeit mark, mere use of that mark is not sufficient to violate the statute. To violate the Statute, a person must use the mark and intend to sell or distribute items bearing that deceptive mark. The clause “with intent to sell or distribute” modifies all of the language preceding it.

Had the drafters inserted the clause “with intent to sell or distribute” earlier in the sentence, there could be no dispute that they intended only to prohibit deceptive use of a mark in the context of a sale or distribution. The following language would have been clearer and less ambiguous: “any person who, *with intent to sell or distribute any items or services*, knowingly manufactures, uses, displays, advertises, distributes, offers for sale,

sells or possesses any items or services bearing or identified by a counterfeit mark shall be guilty of the crime of trademark counterfeiting.” The drafters apparently selected an awkward location for the clause “with intent to sell or distribute,” but that poor choice should not invalidate the entire Statute.

The major distinction between the majority’s interpretation of the Statute and my own interpretation revolves around whether *all* use of protected terms or words is prohibited, or whether only the use of terms and words *in the context of sale or distribution* is prohibited. The majority interprets the statute only to prohibit the use of terms and words in the context of sale or distribution. The majority concedes that if the phrase “*with intent to sell or distribute*” is read to apply to the entire list of verbs in the definition of the offense in subsection(a), then the Statute properly limits its reach to unprotected activity. Majority Slip. Op. at 12.

The question then becomes whether the phrase “with intent to sell or distribute” modifies only the immediate words “sells or possesses” that precede the phrase, or whether the phrase modifies all the language of this sentence of the Statute. In other words, is it illegal to manufacture, use, display, advertise, distribute, or offer for sale an item bearing a protected mark-- or is it illegal to manufacture, use, display, advertise, distribute, or offer for sale an item bearing a protected mark only where that item is *intended to be sold or distributed*? The General Assembly could have drafted the Statute in a manner that would concretely resolve this question. The majority, rigid in their application of grammar rules to the detriment of realistic interpretation, holds that the phrase “with intent to sell or distribute” modifies only the immediate words “sells or possesses.”

The fact that it is unclear whether the phrase “with intent to sell or distribute” modifies only the immediate words “sells or possesses” or modifies all the verbs in the sentence demonstrates ambiguity in the Statute. The majority’s limiting interpretation, while perhaps consistent with strict grammar rules, is inappropriate here where the Statute is

ambiguous and the legislative intent is clear. Other requirements in the sentence, which clearly apply to all the enumerated verbs, are not set off clearly. For example, does the term “knowingly” modify only the word “manufactures” which immediately follows? If an end-user carries a counterfeit purse but has no knowledge that the purse is counterfeit, under the majority’s strict application of grammar rules, that user is subject to arrest because the term “knowingly” may only modify the verb “manufactures.” Plainly the legislature had no such intention. It is illegal to knowingly manufacture a counterfeit item, but certainly the other prohibited actions are also illegal only if done knowingly.

In my opinion, the Statute is ambiguous and common sense must be utilized in concert with a grammatical interpretation and the legislature’s intent in order to arrive at the Statute’s meaning. This common sense approach is crucial here where the alternative is to strike down a criminal statute unnecessarily. The Statute, while hardly a model of clarity, is neither unconstitutionally vague nor overbroad. Persons of ordinary intelligence need not guess at the meaning or application of the Statute. Nor does the Statute fail to describe a violation with sufficient definiteness. Simply stated, pursuant to the Statute it is criminal to make deceptive use of a recognized word or mark for the purpose of a sale or distribution. When the Statute is read in the context of the General Assembly’s clear legislative intent, as evidenced by the presumption of intent to distribute or sell set forth in Section 4119(b), it is clear that mere use of a mark is not criminalized. The grammar of the Statute, while somewhat unconventionally structured, nevertheless defines a violation sufficiently to pass void-for-vagueness and overbreadth review and it is not necessary to strike down the Statute.

Respectfully, we should be mindful that our role is to determine whether there exists any constitutional interpretation of the Statute when read in context of the legislative intent. Here, the Commonwealth offers a reading of the Statute that renders the Statute sufficiently well-drafted so as to be constitutional. The majority declines to adopt this reading and

offers no different constitutional interpretation. I do not believe we should decline a constitutional reading of the statute where one is possible. Any doubts as to the constitutionality of the Statute are to be resolved in favor of finding that it is constitutional.

Here, the General Assembly could have chosen more precise language equally capable of prohibiting trademark infringement. But that is not the inquiry before this Court. See Powell, 423 U.S. at 94. This Court should not declare the Statute to be unconstitutional because it could have been more artfully drafted. In my opinion, the majority erodes the standard for determining whether a statute is unconstitutional. The erosion is particularly inappropriate in the instant case, where it is clear that Appellees' conduct was illegal and prohibited under any reasonable interpretation of the Statute.⁸ Appellee Omar transported counterfeit Nike sneakers across state lines for resale. Appellee O'Connor was arrested selling counterfeit Penn State hats in a parking lot outside Beaver Stadium. Clearly, the conduct of these Appellees was a violation of Nike and Penn State's trademarks, and Appellees' behavior was illegal. That Appellees should have their convictions overturned due to overbreadth of the Statute, under the guise of invoking the protections of the First Amendment, has an aura of injustice.

Even more problematic is the precedent set by the majority opinion. Now that mere inarticulateness or poor grammar is the standard for declaring a statute unconstitutional, scores of serious criminal statutes may have to be declared unconstitutional. The opinion invites any defendant charged under a criminal statute to challenge the statute's constitutionality and suggests that such a challenge may be successful based upon the General Assembly's poor word placement. I believe this creates unwise precedent and, while I agree with the majority that the Statute is inartfully drafted, I cannot conclude that it

⁸ Had we been presented with a question of constitutionality *as applied*, i.e. as in the examples set forth by the majority and the trial court, the result *for that litigant* may have been different. Such a finding would not impinge the Statute's viability.

is so poorly drafted as to overcome the significant burden of proof required to demonstrate unconstitutionality. Based on the foregoing, I respectfully dissent from the majority and would hold that the Statute is constitutional.