

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

MICHAEL A. THOMPSON
Appellant,

v.

Appeal No. CRC 13-00022APANO
UCN 522013AP000022XXXXCR

STATE OF FLORIDA
Appellee.

Opinion filed November 25, 2013.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Robert Dittmer

Walter L. Grantham, Jr., Esquire
Attorney for Appellant

Michael J. Dema, Esquire
Assistant City Attorney
City of St. Petersburg
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Michael A. Thompson's appeal from a judgment and sentence entered after non-jury trial. After review of the record and the briefs, we affirm.

Background

On December 6, 2012 at 11:10 p.m. officers of the St. Petersburg Police Department made contact with approximately fifteen to twenty people in Williams Park, one of whom was the Appellant, Michael A. Thompson. The park closes at 11:00 p.m. The officers notified these individuals that they were in violation of City Ordinance 21-40; they had remained in the park after it closed. On February 6, 2013, Mr. Thompson, was charged by Local Ordinance Violation Information with Trespass in a City Park After Hours. The case proceeded to non-jury trial. The state presented one witness, the police officer who had contact that night with Mr. Thompson. At the conclusion of the State's case, Mr. Thompson through counsel moved for a Judgment of Acquittal arguing that Florida Statute § 810.09, *Trespass on property other than structure or conveyance*, was controlling and the state had failed to prove the required prior notice, proper posting, and a warning. The State responded that the involved municipal ordinance of the City of St. Petersburg was not in conflict with the statute and was a strict liability ordinance. The trial denied the motion ruling:

I don't find that there's a conflict between these. This is a specific language that you can't be at a park when it's closed. And it is strict liability in the sense that it's not really in conflict with other trespass statutes that require certain posting and/or knowledge. I don't find that there's a conflict there. You can't be in a park when it's closed. It's reasonable.

Mr. Thompson was found guilty and a fine was imposed. A Notice of Appeal was timely filed.

Standard of Appellate Review

Rulings on the constitutionality of an ordinance are subject to de novo review. *State v. J.P.*, 907 So2d 1101, 1107 (Fla. 2004). Such rulings present pure issues of law.

The appellate court is not required to defer to the judgment of the trial court.” *Lowe v. Broward County*, 766 So2d 1199, 1203 (Fla. 4th DCA 2000); *State, Dep't of Ins. v. Keys Title & Abstract Co.*, 741 So.2d 599, 601 (Fla. 1st DCA 1999), *rev. denied*, No. SC96906, 770 So.2d 158 (Fla. July 24, 2000).

The Issue

Does St. Petersburg City Ordinance 21-40, which in pertinent part provides “no person shall enter or remain upon Park Property at any time during which the park is closed,” conflict with Florida Statute § 810.09? Specifically, is the ordinance constitutional?

Legislative Powers of Municipalities

The Florida Constitution provides “[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for *municipal purposes* except as otherwise provided by law.” Fl. Const. Art. 8 § 2 (emphasis added). “*Municipal purpose*” means any activity or power which may be exercised by the state or its political subdivisions. § 166.021(2), Fla. Stat. (1973). “[T]he legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except ... [a]ny subject expressly preempted to state or county government by the constitution or by general law; ...” § 166.021(3), Fla. Stat.

The provisions of [§ 166.021] shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any

limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

§ 166.021(4), Fla. Stat. (1987).

Conflicts between Statutes and Ordinances

“[T]here are two ways that a [local] ordinance can be inconsistent with state law and therefore unconstitutional. First, a [local government] cannot legislate in a field if the subject area has been preempted to the State. ... Second, in a field where both the State and local government can legislate concurrently, a [local government] cannot enact an ordinance that *directly* conflicts with a state statute.” *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309, 314 (Fla. 2008) (emphasis added). In the present case preemption is not an issue. The question is the asserted conflict between the ordinance and the statute.

A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.” *Rinzler v. Carson*, 262 So.2d 661, 668 (Fla. 1972). “In general, an ordinance conflicts with a statute when the two rules cannot coexist. ... Stated otherwise, legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required. ... Generally under this definition, the fact that an ordinance imposes additional requirements on a person or business is not evidence of conflict.” *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1020 (Fla. 2nd DCA 2005) (internal citations omitted). Where there is no direct conflict between the two, appellate courts should indulge every reasonable presumption in favor of an ordinance's constitutionality. ... Conflict does not exist simply because the ordinance is more stringent than the statute or regulates an area not covered by the statute. *City of Kissimmee v. Florida Retail*

Federation, Inc., 915 So.2d 205, 209 (Fla. 5th DCA 2005) (internal citations omitted);
See City of Aventura v. Masone, 89 So.3d 233, 236 (Fla. 3rd DCA 2011).

The Present Case

Mr. Thompson was charged violating St. Petersburg City Ordinance 21-40, not with criminal trespass. St. Petersburg City Ordinance 21-40(1)(a) prohibits persons from entering or remaining in a city park from 11:00 p.m. until 30 minutes before sunrise.¹ The ordinance simply establishes the operating hours of city parks and a sanction for violating those hours of operation. Without question the enactment of the ordinance was a valid exercise of the lawful powers of a municipal government.² A violation of this ordinance is not a *crime*. *See* § 775.08 Fla. Stat. (1988). Such a violation certainly is not criminal trespass.

In contrast to the city ordinance, Florida Statute § 810.09, is a penal statute that makes it a crime to trespass on particular statutorily defined property after certain notice or with a particular intent.³ The words used by the legislature in that statute must be given their literal meaning. *See Spicer v. State*, 615 So2d 725, 726 (Fla. 2nd DCA 1993).

¹ The ordinance has been found constitutional in prior cases. *See State v. Baal*, 680 So2d 608, 610 (Fla. 2nd DCA 1996) (The ordinance is not unconstitutional on the basis of vagueness); *Lockett v. State*, 15 Fla. L. Weekly Supp. 1142a (Fla. 6th Jud. Cir. App. Ct. August 28, 2008) (The ordinance does not violate the Equal Protection Clause of the United States Constitution).

² *State v. Baal*, 680 So.2d 608, 610 (Fla. 2nd DCA 1996) (The ordinance is a valid and reasonable exercise of the police power of a governmental entity); *Cf. Downer v. State*, 375 So.2d 840, 844 (Fla.1979) (public access may be expressly limited to the extent necessary for orderly functioning of a public facility); *State ex rel. Nicholas v. Headley*, 48 So.2d 80, 81 (Fla.1950) (right of a citizen to use public streets not unconditional and absolute but may be controlled and regulated in the interest of the public good).

³ (1)(a) A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance:
1. As to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011; or
2. If the property is the unenclosed curtilage of a dwelling and the offender enters or remains with the intent to commit an offense thereon, other than the offense of trespass, commits the offense of trespass on property other than a structure or conveyance.

The statute does not apply to all real property or to situations other than specifically described in the statute; it has no direct or discernible application to city parks, municipal restrictions on the use of public property or the sanctions created and imposed for violating such use restrictions.

St. Petersburg City Ordinance 21-40 and Florida Statute § 810.09 address separate subjects. They authorize different sanctions for different conduct. Neither frustrates the purpose of the other. They can coexist and are not in conflict, surely not in direct conflict. Accordingly this court acting in its appellate capacity should indulge every reasonable presumption in favor of the ordinance's constitutionality.

Conclusion

St. Petersburg City Ordinance 21-40 does not conflict with Florida Statute § 810.09 and is constitutional. Accordingly, the trial court order denying the Appellant's Motion for Judgment of Acquittal and the Judgment and Sentence must be affirmed.

IT IS THEREFORE ORDERED that the order denying the Appellant's Motion for Judgment of Acquittal and the Judgment and Sentence are affirmed.

ORDERED at Clearwater, Florida this 25th day of November, 2013.

Michael F. Andrews
Circuit Court Judge

Raymond O. Gross
Circuit Court Judge

R. Timothy Peters
Circuit Court Judge

Copies furnished to:

Honorable Robert Dittmer
Walter L. Grantham, Jr., Esquire
Michael J. Dema, Esquire