Tolliver v. Blizzard, Police Judge.

(Decided May 16, 1911.)

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Appeal from Carter Circuit Court.

Municipal Corporations—Police Power—Ordinance—Under the police power a municipal corporation can prohibit the sale of those drinks only which are harmful and deleterious to the public, or public morals. Therefore, an ordinance that prohibits the sale of harmless drinks in an unlawful Interference with the liberty and property of the citizen and is void.

This appeal involves the validity of the following ordinance, enacted by the city council of Olive Hill, a city of the fifth class:

"The City Council of the City of Olive Hill, Kentucky, do ordain as follows:

"That it shall be unlawful for any person or persons, corporations or firms, on and after the 17th day of May, 1910, to sell or conduct or operate a place for the sale, barter or loan, by retail or wholesale of any proprietary or soft drinks, except lemonade, milkshake, soda water labeled pop and coco cola, within the city limits of Olive Hill, Carter County, Kentucky

"Any person conducting or operating a place for the sale of the above-described soft drinks, before commencing the business of above mentioned ,shall make his application in writing, and file with the clerk of said city, ten days before the meeting of said council, stating the kind of business he intends to engage in, the place and true name and address of applicant and all partners concerned in the intended business, said application to be read and acted upon by a majority of said city board, and the vote taken, yeas and nays, whether or not said license shall issue. The license fee for the sale of the above specified soft drinks, shall be five dollars per annum, payable in advance; the said city council reserves the right to reject or refuse to grant any or all licenses upon said application. If said council vote to grant said license, then the city clerk of said city shall issue said license upon the license fee being paid to him which he shall turn over to the treasurer of said city and take his receipt for the same. Said city council reserves the right to have said places of business that are licensed by them, inspected by some one appointed by said board at any and all times they may desire, using so much of the soft drinks, or any drinks found in such places, and have same analyzed, and if any committee or inspector find any of said drinks containing alcohol or any per cent., they reserve the right to revoke any or all of said licenses by first paying

back to said licensee his unearned money for the unexpired term of said license pro rata. Any or all other proprietary or so-called soft drinks, except what is mentioned in this ordinance, are by this ordinance prohibited from being sold in said city.

"Any person or persons, corporations, firms or individuals violating this ordinance, directly or indirectly, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined, not less than twenty-five dollars ($25) nor more than one hundred dollars ($100) for each offense, and each sale shall be deemed a separate offense. The city council reserves the right to revoke the license of any person or persons, corporations or firm convicted of violating this ordinance. All other ordinances of said city of Olive Hill, in conflict with this ordinance, shall be and are hereby repealed by this ordinance."

The question arises in the following manner:
Appellant conducts a restaurant and soft drink stand in Olive Hill, He holds a license from the county clerk of Carter County, authorizing him to sell soft drinks.

Among the drinks he sells are lemon sour3, lemon sodas and malt mead.

On May 19, 1910, appellee, G. W. Blizzard, as police

judge of Olive Hill, issued a warrant for appellant's arrest, charging him with a violation of the ordinance in question.

Alleging that the soft drinks which he was engaged in selling were non-intoxicating and that the ordinance in question was invalid for several reasons, and that appellee, unless restrained by the circuit court, would fine him and would continue to arrest and fine him for violating the ordinance, appellant brought this action in the Carter Circuit Court to obtain a writ of prohibition restraining appellee from trying him on the warrant referred to, or again arresting and trying him for violations of the ordinance in question .

The trial court being of the opinion that the ordinance was valid, sustained a demurrer to appellant's petition; and from an ordinance dismissing the petition, this appeal is prosecuted. .....

The method adopted by appellant for testing the ordinance in question is authorized by section 3639 of the 1 Kentucky Statutes, which provides:

"The validity or constitutionality of any city ordinance, by-laws or rules of the fifth class cities, shall be tried by a Writ of prohibition from the judge of the circuit court in which said city is located, with right of appeal by either party to the Court of Appeals."

The sole question before us, then, is: Is the ordinance valid?

In the light of the foregoing principles, let us examine the ordinance. It specifies certain soft drinks which may be sold; the sale of all other soft drinks is prohibited. Among the number might be enumerated several soft drinks that are absolutely

harmless. It will not do to say that the city council is the arbiter of public taste. It can not prescribe what harmless drinks shall, or shall not, be sold. Its power to prohibit is confined to those drinks which are harmful or deleterious to the public health and morals. The ordinance before us is not restricted in its application. It prohibits the sale of many harmless drinks, and is so broad in its scope and so discriminatory in its character as to constitute an unlawful interference with the liberty of the citizen, which includes not merely the right to acquire property, but the right to buy and sell it. That being true, we conclude the ordinance is unreasonable and void.

Judgment reversed and cause remanded for proceedings consistent with this opinion.