

CRIMINAL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK  
Part AR2A

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PEOPLE OF THE STATE OF NEW YORK,

-against-

ROGER MANNING,

Defendant.

DECISION  
AND  
ORDER

DOCKET #5N038025V

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LEBEDEFF, J.C.C.

Defendant is charged with disorderly conduct, in violation of 21 NYCRR Sec. 1051.3(d). At the time defendant was issued the appearance ticket, the regulation provided: "No person shall, on or about the New York City transit system:... (d) Entertain passengers by singing, dancing or playing any musical instrument."

The testimony adduced at trial reveals that defendant was playing an acoustic guitar on the subway platform of the BMT line at 59 St. and Lexington Ave. on February 6, 1985 at approximately 8:30 P.M. Defendant's repertoire includes both traditional and contemporary folk music. There was no testimony that defendant's performance caused a disturbance or that a crowd gathered and interfered with ingress and egress from the subway trains and platform. Defendant was issued an appearance ticket by a Transit Police Officer who observed him entertaining passengers by playing his guitar.

After trial, defendant moves to dismiss the charge against him on the ground 21 NYCRR Sec. 1051.3(d) is unconstitutional. The people did not respond through either the Office of the District Attorney or the Office of the State Attorney General. Both Offices had notice that the regulation's constitutionality is at issue.

Defendant asserts that his activity at the time and place in question was expressive activity, protected by the First and Fourteenth Amendments of the United States Constitution.

Constitution. The Supreme Court of the United States has repeatedly held that the Fourteenth Amendment has made applicable to the states the guarantees of the First Amendment. *Douglass v. City of Jeanette*, 319 U.S. 157 (1943). The First Amendment provides that "Congress shall make no law...abridging the freedom of speech." The First Amendment applies broadly to various forms of artistic expression, such as public performances of folk music. *Goldstein v. Town of Nantucket*, 477 F.Supp. 606 (D. Mass. 1979).

The right of a state to limit constitutionally protected expressive activity which occurs in a public place is sharply circumscribed. *Perry Education Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37 (1983). A pivotal question, for First Amendment analysis, is whether the place where the state seeks to prohibit expressive activity is a public place.

For First Amendment purposes, no distinction can be wrought between a subway platform and the public street. *People v. St. Clair*, 56 Misc.2d 326 (Criminal Ct. N.Y.Co. 1968). The State of New York has adopted the policy of deeming any rapid transit facility constructed by and at the expense of a city containing more than one million people a part of the public streets of that city. Rapid Transit L. Sec. 31(e). The court takes judicial notice of the fact that the subway stop at 59 St. and Lexington Ave. on the BMT line is now owned and operated by the New York City Transit Authority (NYCTA), a subsidiary of the Metropolitan Transportation Authority, a public benefit corporation. This court cannot see any constitutionally significant difference between those parts of the subway system which were built by and at the expense of the city and those parts which were built by private corporations and partially or wholly financed by the city. Whatever difference there once might have been was eliminated when the whole subway system became owned and operated by NYCTA.

The United States Constitution permits absolute prohibitions on particular types of expressive activity in public places only if narrowly drawn to accomplish a compelling governmental interest. *United States v. Grace*, 461 U.S. 171 (1983). The NYCTA had absolutely prohibited any entertainment by playing any musical

instrument anytime and anywhere in the transit system. The subway system is deemed a public street. The NYCTA's regulation would be constitutionally permissible only if narrowly drawn to accomplish a compelling governmental interest.

The NYCTA amended its regulation concerning disorderly conduct effective June 14, 1985. The regulation no longer places a prohibition on any kind of entertainment, but only on unnecessary noise created by sound production devices. 21 NYCRR Sec. 1050.7. If the previous regulation which included entertainment as disorderly conduct had served a compelling governmental interest, the NYCTA surely would have retained it when the regulation was amended. Clearly the abandonment of the absolute prohibition on entertainment leads to the sole conclusion that there is no compelling governmental interest supporting it.

Accordingly, the defendant's motion is granted and the charges against him are dismissed. This court finds that 21 NYCRR Sec. 1051.3(d) was unconstitutionally violative of the First and Fourteenth Amendments of the United States constitution.

Dated: New York, New York  
September 10, 1985



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