

EVERETT MUNICIPAL COURT, SNOHOMISH COUNTY, WASHINGTON

CITY OF EVERETT,

Plaintiff,

v.

CHRISSY DIANE BLUHM,

Defendant.

CASE NO. CRP 7006

CITY OF EVERETT,

Plaintiff,

v.

KYMBERLY JILL DAY,

Defendant.

CASE NO. CRP 7005

CITY OF EVERETT,

Plaintiff,

v.

BRIAN DANIEL GRANDLUND,

Defendant.

CASE NO. CRP 7000

CITY OF EVERETT,

Plaintiff,

v.

KENNY R. MARSHALL,

Defendant.

CASE NO. 112997

MEMORANDUM DECISION

1 **BACKGROUND**

2 At issue is the constitutionality of EMC Section 8.56.010, and its use to control the
3 homeless situation surrounding the Everett Gospel Mission.

4 The Court is well aware of the concerns of the City, residents and businesses in
5 the area, and the impact the situation has on the health and welfare of the area. The Court
6 is also aware of the proactive approach the Everett Police Department has taken in hopes of
7 dealing with the problem short of criminal charges. However, it is the Court's obligation to
8 review the statute in light of the dictates of the United States Constitution and the Constitution
9 of the State of Washington.

10 The facts of the four cases before the court are not in great dispute. Although only
11 Defendant Marshall raises a constitutional challenge to EMC 8.56.010, the ruling will affect all
12 of the parties.

13 EMC 8.56.010 outlaws "camping" in any park, on any street, or in any publicly owned
14 parking lot or publicly owned area. The law further states that "camping" is to "pitch, use or
15 occupy camp facilities for the purpose of habitation, as evidenced by the use of camp
16 paraphernalia." EMC 8.56.010. Camp paraphernalia "includes, but is not limited to, tarpaulins,
17 cots, beds, sleeping bags, blankets, mattresses, hammocks or cooking facilities or equipment".
18 EMC 8.56.030(c).

19 **DECISION**

20 A law is presumed constitutional. *State v. Pauling*, 149 Wn. 2d. 381, 386 (2003). The
21 presumption in favor of a law's constitutionality should only be overcome in exceptional
22 cases. *City of Seattle v. Eze*, 111 Wn. 2d. 22, 28 (1988). The burden of establishing the
23 invalidity of an ordinance rests heavily upon the party challenging the constitutionality.
24 *City of Seattle v. Webster*, 115 Wn. 2d. 635, 645 (1990). "Every presumption will be in favor
25

1 of constitutionality." *Id.*

2 The unlawful camping ordinance was enacted out of a concern that people were using
3 publicly owned property for living accommodations, which created risks to both the health and
4 safety of the land, as well as the people who may reside in the area and/or access the area.

5 The record supports these findings, and the court must, therefore, accept them. To that end,
6 the court is bound to construe the ordinance as constitutional if it can be done "without doing
7 violence to important rights." *City of Seattle v. McConahy*, 86 Wn. App. 557, 564, 937
8 P.2d 1133 (1997). See also, *Duckworth v. City of Bonney Lake*, 91 Wn. 2d 19, 26-27,
9 586 P.2d 860 (1978). The ordinance was enacted in response to a legitimate legislative health
10 and safety concern. Article XI, § 11 of the state constitution permits a municipality to enact
11 such an ordinance. *City of Seattle v. McConahy*, 186 Wn. App. at 564, *Baker v. Snohomish*
12 *County Department of Planning & Community Development*, 68 Wn. App. 581, 585, 841 P. 2d
13 1321 (1992), *review denied*, 121 Wash. 2d 1027, 854 P. 2d 1085 (1993).

14
15 A. The Right to Travel

16 In *Seattle v. McConahy*, the defendant, Sarah McConahy, was cited under the "Seattle
17 sitting ordinance," SMC 15.48.040, for sitting on the sidewalk in the University District. She
18 challenged the ordinance on several state constitutional grounds, including contending that the
19 ordinance violated her right to travel. With regard to this contention, the *McConahy* court
20 noted that:

21 ***The right to travel, including the right to travel within a state, is a***
22 ***fundamental right subject to strict scrutiny under the United States***
23 ***Constitution.*** *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958).
24 A law violates the right to travel if it penalizes migration from state to state, or makes
25 it impossible to move about a state. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250,
259, 94 S. Ct. 1076, 1082-83, 39 L. Ed. 2d. 306 (1974). [Emphasis supplied.]

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1 *Seattle v. McConahy*, 86 Wn. App. at 571.

2 The *McConahy* court further noted that:

3 Sweeping ordinances prohibiting eating, sleeping, sitting, or lying down in
4 public ***may also be so broad that they violate the right to travel if they***
5 ***make it impossible for homeless persons to live within the city.***
6 See *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).
7 [Emphasis supplied].

8 *Seattle v. McConahy*, 86 Wn. App. at 571.

9 The *McConahy* court concluded that the Seattle sitting ordinance did not
10 implicate the right to travel. This was because

11 unlike the ordinance in *Pottinger*, it [did] not exact a penalty for moving within
12 the state or prohibit homeless persons from living on the streets of Seattle.
13 Nor [did] it make it more difficult for people to migrate from state to state.
14 Instead, the ordinance ***restricts sitting or lying down during certain***
15 ***hours in some places to benches or parks which are out of pedestrian***
16 ***traffic and not in the path to retail areas.*** McConahy [could] still travel
17 around Seattle to access services and rest on benches or in parks.
18 [Emphasis supplied]

19 *Seattle v. McConahy*, 86 Wn. App. at 571.

20 The right to travel is a fundamental right guaranteed by the United States Constitution.
21 Applying the rationale set forth in *Seattle v. McConahy*, an ordinance which restricts the ability
22 of a person to engage in sleeping activities and/or make preparations to sleep in *any* park or
23 other publicly owned property, or on *any* sidewalk, street, alley, lane or public right-of-way,
24 or under *any* bridge or viaduct, or in *any* other public place to which the general public has
25 access is so broad that it violates the right to travel in that it makes it impossible for homeless
persons to live within the city.

22 B. Cruel and Unusual Punishment

23 The defense asserts that the code provisions make the status of being homeless a
24 criminal offense and that this is cruel and unusual punishment.

1 A state cannot punish a person for his or her status. *Robinson v. State of California*,
2 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). In *Robinson*, the court struck down a
3 California law that criminalized people for being addicted to narcotics. The *Robinson* court
4 held that punishing people based upon their status as a narcotics addict was cruel and
5 unusual punishment in violation of the 14th Amendment of the Constitution.

6 Significantly, until *Robinson*, all Eighth Amendment decisions addressed whether the
7 method of punishment was cruel and unusual, or whether a punishment was too excessive in
8 light of the nature of the crime, so as to make the severity of the sentence cruel and unusual.
9 *Robinson* placed substantive limits on who or what the government can criminalize.

10 In *Jones v. City of Los Angeles*, 444 F. 3d. 1118, 1120 (2006), the court addressed
11 whether a City of Los Angeles law criminalizing sitting, lying or sleeping on public streets and
12 sidewalks at all times and in all places within Los Angeles city limits violated the 8th
13 Amendment prohibition on cruel and unusual punishment. The *Jones* court noted that the
14 City
15

16 [C]ould not expressly criminalize the status of homelessness by making it a crime
17 to be homeless without violating the Eighth Amendment, nor can it criminalize
18 acts that are an integral aspect of that status. Because there is substantial
19 and undisputed evidence that the number of homeless persons in Los Angeles
20 far exceeds the number of available shelter beds at all times, including on the
21 nights of their arrest or citation, Los Angeles has encroached upon Appellants'
22 Eighth Amendment protections by criminalizing the unavoidable act of sitting,
23 lying, or sleeping at night while being involuntarily homeless.

24 *Jones v. City of Los Angeles*, 444 F. 3d 1118 (2006).

25 The *Jones* court further noted that

The involuntariness of the act or condition the City criminalizes is the critical
factor delineating a constitutionally cognizable status, and incidental conduct
which is integral to and an unavoidable result of that status, from acts or
conditions that can be criminalized consistent with the Eighth Amendment.

1 Accordingly, in determining whether the state may punish a particular
2 involuntary act or condition, we are guided by Justice White's admonition that
3 "[t]he proper subject of inquiry is whether volitional acts brought about the
4 'condition' and whether those acts are sufficiently proximate to the 'condition' for
5 it to be permissible to impose penal sanctions on the 'condition.'" *Powell*, 392
6 U.S. at 550 n. 2, 88 S.Ct. 2145 (White, J., concurring in the judgment); see also
7 *Bowers v. Hardwick*, 478 U.S. 186 202 n. 2, 106 S.Ct. 2841 92 L.Ed.2d 140 (1986)
8 (Blackmun, J., dissenting) (quoting and endorsing this statement in discussing
9 whether the Eighth Amendment limits the state's ability to criminalize homosexual
10 acts). The Robinson and Powell decisions, read together, ***compel us to conclude***
11 ***that enforcement of section 41.18(d) at all times and in all places against***
12 ***homeless individuals who are sitting, lying or sleeping in Los Angeles's***
13 ***Skid Row because they cannot obtain shelter violates the Cruel and***
14 ***Unusual Punishment Clause.*** As homeless individuals, Appellants are in a
15 chronic state that may have been acquired "innocently or involuntarily."
16 Robinson, 370 U.S. at 667, 82 S.Ct. 1417. ***Whether sitting, lying, and sleeping***
17 ***are defined as acts or conditions, they are universal and unavoidable***
18 ***consequences of being human. It is undisputed that, for homeless***
19 ***individuals in Skid Row who have no access to private spaces, these acts***
20 ***can only be done in public.*** [Emphasis supplied.]

21 *Jones v. City of Los Angeles*, 444 F. 3d 1118 (2006).

22 Applying *Jones*, a code provision which criminalizes sleeping activities, a universal
23 and unavoidable consequences of being human and/or making preparations to sleep, in *any*
24 *park* or other publicly owned property, or on *any sidewalk*, street, alley, lane, public right-of-
25 of way, or under *any* bridge or viaduct, or in *any* other public place to which the general
public, where no reasonable options are available for alternative shelter, violates the cruel
and unusual clause of the United States Constitution.

It is obvious to the Court that the homeless facilities in the City of Everett are
grossly inadequate and leave no reasonable alternative for a large segment of the homeless
population of Everett.

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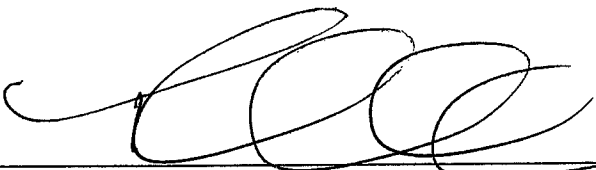
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1 **CONCLUSION**

2 For the foregoing reasons, Everett Municipal Code 8.56.010 in its application to the
3 homeless population of the City of Everett is declared unconstitutional.

4 Dated this 12 day of January, 2016.

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8 JUDGE TIMOTHY ODELL