The Burger Court Opinion Writing Database

Kolender v. Lawson

461 U.S. 352 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1983

Re: No. 81-1320, Kolender v. Lawson

Dear Sandra:

This will confirm my "join."

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 14, 1983

No. 81-1320 Kolender v. Lawson

Dear Sandra:

Please join me in your opinion. I am also writing briefly in concurrence. I hope to have my statement around shortly, perhaps before tomorrow's conference.

Sincerely,

WJB, Jr.

Justice O'Connor

Copies to the Conference

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1320

WILLIAM KOLENDER, ET AL., PETITIONER *v.* EDWARD LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April ——, 1983]

JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, Cal. Penal Code § 647(e), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth Amendment.[1] Merely to facilitate the

[1] We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." *Sibron* v. *New York*, 392 U. S. 40, 61 (1968). In *Sibron*, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See *Los Angeles* v. *Lyons*, —— U. S. ——, —— (1983); *Gomez* v. *Layton*, 129 U. S. App. D.C. 289, 394 F. 2d 764 (1968). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 15, 1983

Re: 81-1320 - Kolender v. Lawson

Dear Sandra,

I do not agree with your suggested holding that the statute involved here is facially void for vagueness and will dissent from a judgment of affirmance on that basis. Much of what I said about facial declarations on vagueness grounds in Smith v. Goguen in 415 U.S. is applicable here. As I see it, this statute has obvious non-vague applications; that is, there is a range of conduct that any reasonable person or law enforcement offical would know is forbidden by the statute. If this is the case, there is no basis for a facial declaration of unconstitutional vagueness. I shall write briefly to this effect.

Sincerely,

Byron

Justice O'Connor

Copies to the Conference

cpm

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: APR 11 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1320

WILLIAM KOLENDER, ET AL., PETITIONER *v.*
EDWARD LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April ——, 1983]

JUSTICE WHITE dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g.*, *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975); *United States* v. *Powell*, 423 U. S. 87, 92–93 (1975). If the actor is given sufficient notice that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974). The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." *Hoffman Estates* v. *Flipside*, 455 U. S. 489, 497 (1982). These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required be-

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Substantially rewritten

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1320

WILLIAM KOLENDER, ET AL., PETITIONER *v.* EDWARD LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April ——, 1983]

JUSTICE WHITE, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g.*, *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975); *United States* v. *Powell*, 423 U. S. 87, 92–93 (1975). If the actor is given sufficient notice that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974). The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." *Hoffman Estates* v. *Flipside*, 455 U. S. 489, 497 (1982).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 14, 1983

Re: No. 81-1320 - Kolender v. Lawson

Dear Sandra:

Please join me.

Sincerely,

T.M.

T.M.

Justice O'Connor

cc: The Conference

HAB

February 8, 1983

Re: No. 81-1320 - Kolender v. Lawson

Dear Sandra:

I was glad to be able to look over the proposed draft you sent along with your note of today. This is one of those cases where nearly every one of us is inclined to the same result but where we shall disagree on the road to that result. I think you have walked the tightrope very well, indeed.

I am prepared to join your opinion in this form. Bill Rehnquist, of course, will dissent. Others will agree as to the result but will not join the opinion. Why don't you let it circulate and see what happens? It should attract Lewis' vote and probably the Chief's, with WJB and TM possible joins. Then again, you may get everyone, other than Bill Rehnquist, once they see what you have written.

I took the liberty of discussing your draft with Alan Madans, my clerk who prepared the bench memorandum for me. I asked him to comment. He gave me a short memo. I send it on to you so that you may have the benefit of his observations. He tells me that he has discussed this with your clerk, who also has a copy of Alan's bench memo. I could go along with Alan's suggestions, but, as stated above, I would also join the opinion in its present form.

Sincerely,

HAB

Justice O'Connor

HAB

February 10, 1983

Re: No. 81-1320 - Kolender v. Lawson

Dear Sandra:

Would it not be better, on page 8, of your circulated opinion, last line, to affirm the "judgment" rather than the "decision"? I think this is what is usually done. It may be particularly indicated where we do not go along with everything said in the opinion below. This also would be in line with the final sentence of the opening paragraph on page 1.

Sincerely,

HAB

Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1983

Re: No. 81-1320 - Kolender v. Lawson

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 10, 1983

81-1320 KOLENDER v. LAWSON

Dear Sandra:

Please join me.

Sincerely,

Lewis

Justice O'Connor

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 13, 1983

Re: No. 81-1320 Kolender v. Lawson

Dear Byron:

Please join me in your dissent.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 16, 1983

Re: 81-1320 - Kolender v. Lawson

Dear Sandra:

Please join me.

Respectfully,

JPS

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 8, 1983

No. 81-1320 Kolender v. Lawson

Dear Harry,

I appreciate your willingness to "preview" this draft opinion. I will welcome your recommendations or suggestions.

Sincerely,

Sandra

Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 8, 1983

No. 81-1320 Kolender v. Lawson

Dear Harry,

I am grateful to you for reviewing my proposed draft. I also appreciate your clerk's comments. I plan to make a few minor changes in the draft and then I will circulate it and see what happens.

Sincerely,

Sandra

Justice Blackmun

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: FEB 9 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1320

WILLIAM KOLENDER, ET AL., PETITIONER *v.* EDWARD LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February ——, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who are loitering on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry* v. *Ohio*, 392 U. S. 1 (1968).[1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the due process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

I

Appellee Edward Lawson was detained or arrested on ap-

[1] Cal. Penal Code § 647(e) provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 10, 1983

No. 81-1320 Kolender v. Lawson

Dear Harry,

Thank you for your suggestion to substitute "judgment" for "decision" on page 8. I will do so on my next draft.

Sincerely,

Sandra

Justice Blackmun

Stylistic Changes Throughout
pp. 1, 6, 7, 9

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: APR 13 [illegible]

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1320

WILLIAM KOLENDER, ET AL., PETITIONER *v.*
EDWARD LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April ——, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry* v. *Ohio*, 392 U. S. 1 (1968).[1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

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pp. 6-7

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1320

WILLIAM KOLENDER, ET AL., PETITIONER *v.*
EDWARD LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May ——, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry* v. *Ohio*, 392 U. S. 1 (1968).[1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

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