Wild Bill Law
The Law Offices of William E. Weiss
130 Sutter St., 7th Floor, San Francisco, CA 94104

7/18/07

ANALYSIS AND COMMENTARY ON VILLEGAS V. CITY OF GILROY AND GILROY GARLIC FESTIVAL 07 C.D.O.S. 4695 (9TH CIR. 2007)

TOP HATTERS MOTORCYCLE CLUB BARRED FROM WEARING THEIR CLUB'S COLORS AT GARLIC FESTIVAL BY CITY OF GILROY, CALIFORNIA -UPHELD BY NINTH CIRCUIT COURT OF APPEALS

This case involves a subject near and dear to every motorcycle club-the wearing of the club's colors at public events. Colors can symbolize the club's philosophy or some other important aspect of its reason for being. Members proudly wear their colors to promote their sense of unity and identity and to tell the rest of the world what they stand for.

LEGAL ANALYSIS

This case involves two issues: whether the act of wearing the club's colors is sufficient to establish a violation of first amendment's right of freedom of expression and whether the club otherwise engaged in sufficient expressive activity to establish a violation of the first amendment's right to freedom of association. Its focus is on prohibition by a governmental entity i.e. the City of Gilroy and its Garlic Festival of a motorcycle club's members from entering a public event wearing their colors. This case does not discuss a private business barring the wearing of colors. That will be the subject of a future article.

The lawsuit was brought pursuant to a Federal law embodied in Title 42 United States Code section 1983.[1] That statute forbids a government employee or governmental agency from violating your Constitutional Rights while acting under color of law and provides a civil remedy (read lawsuit) for such violations. In this case it was alleged that the City of Gilroy and its Garlic Festival violated the First Amendment Rights of a motorcycle club named the "Top Hatters", by barring its members from wearing their colors into the Festival. They had paid an admission fee and entered wearing, as the court says," identical vests adorned with patches. The patches on the back of the vests depicted a skull with wings and a top hat. The vests also included the words 'Top Hatters' above the top hat, skull and wings and the word 'Hollister' below." The court record contained photographs of the vests. The festival promoters had an unwritten festival dress code to the effect that persons attending the festival were not permitted to wear gang colors, or other demonstrative insignia, including motorcycle club insignia. An off duty Gilroy police officer serving as the chair of security for the festival, directed another Gilroy police officer to escort the club members back to the gate. The security chair explained, at the gate, about the dress code policy and asked them to remove their vests. They refused, were refunded their admission fees and asked to leave, which they did.

The Top Hatters said their group's purpose was to ride motorcycles and raise money for charities. The club's articles of incorporation stated that the club's charitable purposes "are to promote good will and understanding among disparate community groups and to raise and distribute funds to other charitable organizations or to needy individuals." Villegas was a member of the group and he testified that the Top Hatters did not advocate any political, religious or other viewpoints. He further said that to him the skull represented the belief that underneath our skin all of us are alike. He said the wings represented freedom and the top hat represented members of the original Top Hatters Motorcycle Club. Another member testified that the skull represented death, the wings represented freedom and the top hat represented the original members who were still living. He denied the Top Hatters attached any particular meaning to the insignia. Finally, still another member of the club stated the insignia meant, "Whatever you want to interpret it as."

The case was dismissed by the district court judge, which was upheld by the court of appeal on two bases: 1. The act of wearing their vests "adorned with a common insignia simply does not amount to the sort of expressive conduct protected by the First Amendment right to freedom of speech; and 2. The defendants' refusal to

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[1] 42 U.S.C. § 1983 reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

permit the club's access to the festival only limited the plaintiffs' (the Top Hatters) access to a particular location; a location that had no relation to the purposes underlying their association with one another.

Why did this happen you wonder? I will go over the legal and factual analysis followed by commentary on where they went wrong and possible ways of dealing with this. This case creates headaches for motorcycle clubs but this article will suggest some potential strategies. Since I have handled many First Amendment cases I would be glad to write further columns about First Amendment issues if you are interested or talk to your club.

FREEDOM OF EXPRESSION

The club argued that their vests and insignia constituted expressive conduct worthy of First Amendment protection. The court found that it was unclear what message the club intended to convey by wearing their vests, thus there was no constitutional violation.

The First Amendment does not allow abridgement of speech if it is "imbued with elements of communication" *Spence v. Washington* 418 U.S. 405, 409 (1974) The U.S. Supreme Court found in *Spence* that in order to consider whether certain conduct rises to the level of First Amendment protection, the court should consider whether there was an intent to convey a particular message present and whether there was a likelihood that the message would be understood by those who viewed it. The court also stressed that the context may give meaning to the symbol.

The *Spence* case involved a person who put an upside down American flag in his apartment window with a peace symbol taped over the stars in the flag. Washington's "improper use" statute forbid the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. He testified without contradiction at his trial that he thus displayed his flag as a protest against then-recent actions in Cambodia and fatal events at Kent State University, and that his purpose was to associate the American flag with peace instead of war and violence. The Washington Supreme Court sustained the conviction, rejecting Spence's contention, among other things, that the improper use statute, on its face and as applied, contravened the First and Fourteenth Amendments. Held: The statute, as applied to Spence's activity, impermissibly infringed a form of protected expression.

The court was confronted with a case of prosecution for the expression of an idea through activity. One big difference was that the display of the flag was in Spence's private apartment and not on public property. In the Villegas case the Garlic Festival was clearly held on public property. The *Spence* court found: There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully [418 U.S. 405, 415] protesting the fact that it did not. Spence was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no

interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction was invalidated.

In the Top Hatter's case they relied on another appellate decision-*Sammartano v. First Judicial District Court* 303 F3d. 959 (9th Cir. 2002) for the proposition that a patch on a motorcycle club member's vest constitutes expressive conduct for purposes of First Amendment protection. That case stemmed from the March 2001 arrests of Scot Banks and Steve Dominguez when they appeared at the courthouse on a traffic citation and refused to remove their "Branded Few" motorcycle club jackets that bore a swastika in the insignia. Ten other bikers were arrested when they came to the men's hearing and also refused to take their jackets off. The 9th Circuit Court of Appeals there did not address the question of whether the wearing of the vests qualified as expression for purposed of the First Amendment and so it did not carry any weight with the court in the Top Hatter's case. While the decision in *Sammartano* definitely has some sexy facts on this issue the bottom line was it did not contain the holding that was needed to win.

EXPRESSIVE ASSOCIATION

The U.S. Supreme Court says that "implicit in the right to engage in activity protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political social, economic, educational, religious, and cultural ends." *Boy Scouts of America v. Dale* 530 U.S. 640, 647 (2000). In order to support a claim for expressive association, the "group must engage in some form of expression, whether it be public or private." *Boy Scouts* id. at 648. Further, the Supreme Court said you don't have to associate to disseminate a certain point of view to get First Amendment protection, you must simply be engaged in expressive activity that could be impaired in order to get First Amendment protection. When asked if the Top Hatter's advocated any political, religious or other viewpoints. Villegas testified "No." which is one big reason the court of appeal and the District Court found there was no evidence that the Top Hatter's were engaged in the form of expressive activity that was protected by the First Amendment. The court of appeal also said the Top Hatter's were not promoting their charitable purposes and that they could associate elsewhere outside the festival.

COMMENTARY

One giant misstep in this writer's opinion was the failure to challenge the dress code as unconstitutionally vague and overbroad. That analysis would mount what is called a facial attack on the dress code policy; that is, the rule was unconstitutional on its face (and maybe as how it was applied to the Top Hatters). This may be something to consider the next time such a controversy arises, as you know it will. The unwritten rule barred people from wearing "demonstrative insignia", including motorcycle insignia. The policy was unwritten so who knew what the rule was and whether its application was subjective? Could it be applied to a Boy Scout troop attending in their uniforms? How about a High School marching band in uniform? Arguably they are the kind of "demonstrative insignia" covered by the unwritten rule. There's enough wiggle room there to make the facial attack work but it was never developed.

The court of appeal mentions that the Top Hatter's had state law claims contained in their lawsuit but that once the Federal Constitutional issues were dismissed by the trial court the court declined to exercise jurisdiction over the state law claims and dismissed them. That was not appealed. There are state laws about discrimination and protected speech.

The court made rulings on whether the off duty Gilroy peace officer who was the festival security chair acted under of color of state law and whether the Gilroy Garlic Festival was a state actor for purposes of the civil rights law (42 U.S.C. § 1983). Because the appeals court affirmed the dismissal on the Constitutional issues it said it did not have to reach those issues. This writer won a 9th circuit case where the court extended the coverage of 42 U.S.C. § 1983 to an off duty sheriff's deputy who assaulted a person at a Fourth of July event. It is not clear from the appellate opinion where the Top Hatters went wrong on that one. Again, the thrust of the matter should be getting the club's testimony and facts to fit within the controlling cases that control interpretation of how the First Amendment is applied in these situations. It seems no one on the side of motorcycle clubs has developed and disseminated a plan to protect them from this kind of treatment. This writer wants to meet and work with MC clubs to do just that.

While it makes sense in such a lawsuit to argue that wearing the colors constituted "expressive activity"-why not hit all the angles-that issue is a tough way to go and would need to be developed differently to win. For example, many cases on the issue of First Amendment freedom of expression focus on whether "an intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*. id. at410-411.

Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. In a U.S. Supreme Court case called *Tinker v. Des Moines School District*, the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern - the Vietnam war. In the Spence case, his activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of Spence's point at the time that he made it.

I think you can see why this argument had a big burden to carry.

The reliance on the *Sammartano* case was also not strong enough to win. That case had similar but not identical facts-a MC club called the "Branded Few" were arrested for wearing their colors in the courthouse. The problem is the *Sammartano* case was decided on issues concerning preliminary injunctions and thus did not carry the kind of authoritative weight that could be used to support their case.

I did not see any attempts to argue discrimination of any kind so any chance to

press that issue was lost without argument.

The lawyers for the Top Hatter's argued that the judge erred when he ruled that because the club was not engaged in expressive conduct that they did not have the right to expressive association. They relied on a 1984 case that said the Hells Angels had a First Amendment right to freedom of association*. (United States v. Rubio* 727 F.2d 786 (9th Cir. 1984)) That case was decided before *Boy Scouts of America v. Dale* 530 U.S. 640 (2000), a U.S. Supreme Court case. The case the Top Hatter's relied on did not address the requirement of expressive activity as an incident to a claim of freedom of association so they lost on that. *Rubio* was a criminal case involving a search warrant authorizing the seizure of indicia of membership in the Hells Angels. The court of appeal said this violated Rubio's First Amendment right to freedom of association but said that would not necessarily prevent a criminal investigation. The court also did not analyze whether the Hells Angels engaged in sufficient expressive activity and contained no factual background and/or analysis of the Hells Angels nature and purpose.

Once again, there apparently was no attempt to develop an analysis or to present the Top Hatters in a way that would bring them within the coverage of the *Boy Scouts* case, which, because it is a United States Supreme Court case, trumps the court of appeals on the issues of freedom of expression as discussed herein.

These cases suggest that if a MC club planned to disseminate a certain point of view or promote the purpose of the group, then it may get First Amendment expressive association protection. Plans to attend a public event might be coupled with such action to provide a made to order constitutional protection based on the First Amendment. Why not re-visit club by-laws and organize events and public excursions to comply with recent case law? Sun Tzu says in his classic book, "The Art of War", to solve the problem before it happens and win the war before it starts. Why not require members to know what the club's symbols stand for and what ideas or philosophy the club promotes? Many private organizations require members to do just that as a condition of membership and this is reinforced when the members are initiated. If college fraternities require this of members why not MC clubs? Why not make clear the political or social or economic or educational or religious, or cultural ends of the club? If you want to protect your identity, then you must be clear what your identity is. If you want to project and protect your message, you must know what that message is and be prepared to stand up for it. We also have to be prepared to scrutinize these kinds of discriminatory rules and to challenge them on their face and as to how they are applied, a big mistake in the Top Hatter's case in this writer's humble opinion.

The dissection of the opinion and discussion of the problems with the arguments presented by the Top Hatter's lawyers is to initiate a discussion on ways to present such a case in the future when once again, some governmental entity or agency feels like discriminating against bikers. Hope is not lost but if you want Constitutional rights you have to fight for them. They are there but you have to get past hurdles placed in your path to get their protection.

Call me or e-mail me to discuss this further. Let's meet and start preparing arguments in advance to meet the challenges that confront MC clubs. It is ironic that our culture celebrates the type of people that populate MC clubs-individuals that will not go with the grain, who are independent and tough-and at the same time represses and punishes those who come from that mold.