

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-696

ERICK GARCIA

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 25, 2012

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CR-2010-602-1]

HONORABLE ROBIN F. GREEN,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

The appellant was cited for violating the Rogers, Arkansas, city noise ordinance. He was found guilty of that offense in district court, and took an appeal to circuit court. Appellant's appeal to circuit court was tried upon stipulated facts, and the only issue was whether the noise ordinance was constitutional. The circuit judge held that it was, and this appeal followed. Appellant argues that the trial court erred in not declaring the Rogers city noise ordinance unconstitutional. We affirm.

Section 18-24 of the Code of Ordinances for the City of Rogers generally prohibits unreasonably loud, disturbing, and unnecessary noises within the city. Section 18-26 sets out a nonexclusive list of noises that are absolutely prohibited in the absence of a permit:

- (1) The maintenance and operation of an outside loudspeaker or public address system transmitting music, advertising or speaking, except upon a permit issued by the chief of police; and notwithstanding the permit, any such loudspeaker or public address system shall not be operated in such a manner or at such volume as to annoy or disturb the quiet, comfort or repose of persons in any



office, hospital, dwelling house, hotel, motel or other type of residence or any person in the vicinity. The aforesaid noise, when permitted, shall be restricted to the hours from 8:00 a.m. to:

- a. 8:00 p.m. in residential zones, as delineated in chapter 14, article VI, zoning.
- b. 11:00 p.m. on all nights but Saturday and 12:00 [a.m.] on Saturday nights for commercial zones, as prescribed in chapter 14, article VI, zoning.

(2) The sounding of any horn or signal device on any automobile, motorcycle, bus or other vehicle while not in motion, except as a danger signal if another vehicle is approaching apparently out of control or, if in motion, only as a danger signal after or as brakes are being applied and deceleration of the vehicle is intended; the creation by means of any such signal device of any unreasonably loud or harsh sound; and the sounding of such devices for an unnecessary and unreasonable period of time.

(3) The playing of any radio, phonograph, musical instrument or any coin-operated music machine in such manner or in such volume during the hours between midnight and 7:00 a.m. as to annoy or disturb the quiet, comfort or repose of persons in any office or hospital or in any dwelling, hotel or motel or other type residence, or any person in the vicinity.

(4) Yelling, shouting, hooting, whistling or singing, or unnecessary screeching of tires, or unnecessary use of a noisemaking device on the public streets between the hours of 10:00 p.m. and 7:00 a.m. at any time or place so as to annoy or disturb the quiet, comfort or repose of persons in any hospital, dwelling house, hotel, motel or other type of residence, or of any person in the vicinity.

(5) The keeping of any animal or fowl which, by causing frequent or long continued noise, shall disturb the comfort or repose of any person in the vicinity unless kept in the course of the proper conduct of a legitimate business in a zone where such activity is permitted; and, notwithstanding such permitted exception, the keeping of animals, birds or fowl shall not be allowed to annoy or disturb the quiet, comfort or repose of persons in any hospital, dwelling house, hotel, motel or other type of residence, or of any person in the vicinity.

(6) The creation of any excessive noise on any street adjacent to any school, institution of learning, church or court while the same is in session, or adjacent



to any hospital, which unreasonably interferes with the workings or sessions thereof; provided, however, that in case of emergencies when the public health, safety or general welfare is in danger, necessary work may be done immediately by first securing a permit from the chief of police if this is obtainable, or if it is not first obtainable, the necessary work may be done and at the first opportunity reported to the chief of police, who shall issue a permit effective retroactively to the beginning of the emergency. Where underground repair or construction work is necessary adjacent to or in the vicinity of a school, an institution of learning, a church, a court or a hospital, the chief of police may issue a permit for the work, the work to be done at reasonable hours to be designated by the chief of police.

(7) The use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention, by the creation of noise, to any performance, show, sale or display of merchandise, shall be only by permit, and at no time shall the noise thereby created be in such manner and such volume as to annoy or disturb the comfort or repose of persons in any office, hospital, dwelling house, hotel, motel or other type of residence, or any person in the vicinity.

(8) At any hour of the day or night, the use, operation, or playing of any radio, stereo system, compact disc player, cassette tape player, or any other device capable of sound amplification on:

- a. Any motor vehicle located in any public right-of-way, public street or public property, at such a volume as to be plainly audible from a distance of 30 feet or more from said motor vehicle; or
- b. Any private property, at such a volume as to be plainly audible from a distance of 30 feet or more from said property's boundary line.

For purposes of subsection (8) of this section, the term "plainly audible" means clearly capable of being heard by a person of normal sensibilities using unaided auditory senses, at a volume level above that of a normal conversation. The term "plainly audible" does not include sounds which are just barely audible, but shall include without limitation or exclusion, with regard to music, detection of a rhythmic bass reverberating-type sound, beat or cadence.

Any ordinance adopted by a city, within its scope and power, is valid, and every reasonable presumption must be given in the city's favor that the ordinance is not arbitrary or unreasonable. *Feland v. State*, 355 Ark. 573, 142 S.W.3d 631 (2004). An ordinance is thus



presumed constitutional, and the burden of proving otherwise is upon the challenging party. *Id.* Furthermore, when the constitutionality of an ordinance is challenged on appeal, our review must be limited to those subsections of the ordinance that were violated by appellant's actions. *Laudan v. State*, 322 Ark. 58, 907 S.W.2d 131 (1995) (citing *United States v. Grace*, 461 U.S. 171, 175 (1983)). On this record, however, we cannot determine which subsections of Ordinance § 18-26 appellant was found to have violated. None of the judgments or other documents before us identify the specific section appellant was charged with and found to have violated; nor do the stipulated facts upon which this matter was tried, set out in their entirety as follows:

STIPULATIONS OF FACT

1. The [appellant] and his father, Miguel Garcia, operate a "special events center" at 1604 Acorn Drive, which is adjacent to a residential neighborhood north of West Hudson Road and East of North Dixieland Road in the City of Rogers.
2. At that "special events center," the owners rent the facilities out for dances, private parties, and various other celebrations.
3. On September 12, 2009, Rogers Police Officer John Alexander responded to several complaints from neighbors about loud music being played at 1604 Acorn Drive.
4. The Rogers Police had previously received complaints about loud music and noise emanating from this location, and the owners had been warned on several occasions.
5. Officer Alexander could clearly hear the music, even in his police car, when he turned onto Acorn Drive from North Dixieland Road, which is a distance of about two blocks away from the building where the music was being played.
6. The [appellant] has challenged the City of Rogers noise ordinance "on its face." A copy of that ordinance is attached to these stipulations.



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Depending on the circumstances, appellant could have been found to have violated several of the subsections of the ordinance, depending on the time of day, the source of the noise, and whether appellant was personally creating the noise or instead merely maintaining an outside loudspeaker system on the premises. We cannot speculate as to the subsection of the ordinance that appellant was found to have violated. *Laudan v. State, supra*. The burden of providing a record sufficient to show that reversible error occurred was on appellant and, under these circumstances, he has failed to do so. *See id.*

Affirmed.

GLOVER, J., agrees.

ROBBINS, J., concurs.