DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 520 West Colfax, Room 135 Denver, Colorado 80204	DATE FILED: September 3, 2020 4:28 PM CASE NUMBER: 2019CV34925
THE CITY AND COUNTY OF DENVER, Plaintiff-Appellant, v. JERRY RODRICK BURTON, Defendant-Appellee.	▲ COURT USE ONLY ▲
	Case No.: 19CV34925 Courtroom: 4G
ORDER ON APPEAL	

THIS MATTER comes before the Court on Plaintiff-Appellant City and County of Denver's ("City") appeal from a ruling of the County Court that the City's "camping ban" ordinance, D.R.M.C. § 38-86.2(b) (the "Ordinance") is unconstitutional. The appeal has been fully briefed. Having reviewed the parties' briefs, applicable case law, and the record below, the Court now finds and orders as follows.

I. THE CASE BELOW

Defendant was cited for violation of the Ordinance on April 29, 2019. Defendant pleaded not guilty and filed a motion to dismiss the citation. Defendant argued that the Ordinance violated the Eighth and Fourteenth Amendments of the United States Constitution and Article II, Section 20 of the Colorado Constitution both facially and as applied. (Court File "CF" p. 42.) The trial court held an extensive hearing on the motion to dismiss which spanned four days and included multiple witnesses and exhibits.

Following the hearing, the trial court issued its Order Concerning Motion to Dismiss. (CF pp. 1206-1216.) In its order, the trial court made the following findings of fact:

- Defendant was homeless when he was camping on public property. (CF pp. 1206-07.)
- Defendant was contacted by police and given the option of going to a homeless shelter. (CF. p. 1207.)

- Defendant received and offer of shelter, which he refused, and was subsequently cited for violation of the Ordinance. (Id.; CF p. 1211.)

- Defendant voluntarily took down his camp was therefore was not arrested. (CF. p. 1207.)

- Defendant, a homeless person, was not part of a suspect class because the Denver homeless population does not lack effective representation in the political process. (CF. p. 1210.)

- The City, in enforcing the Ordinance, was not motivated by a discriminatory purpose nor a desire to harm a "politically unpopular group" and thus there was no "animus" on the part of the City. (CF. p. 1211.)

- The City "has not had a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life." (CF. p. 1212.)

- Defendant "was not arrested and was allowed to load his possessions on a flat bed [sic.] truck." (Id.) The trial court thus concluded that Defendant was not placed in a position of danger as a result of the Ordinance's enforcement. (Id.)

- There was insufficient evidence presented at the hearing to conclude that the Ordinance facially violated the Fourteenth Amendment's right to bodily integrity. (Id.)

- There has been no shortage of homeless shelters in Denver since January 1, 2018, and the shelters operate at well below capacity on a nightly basis. (CF. p. 1214.)

Each of these findings has ample support in the record. Despite these findings, the trial court concluded that the Ordinance was facially unconstitutional under the Eighth Amendment of the U.S. Constitution based almost entirely on the reasoning in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). The trial court dismissed the case. The City now appeals that ruling.

II. STANDARD OF REVIEW

Appeals from final judgment and decrees of the county courts are heard by the district court based on the record made in the county court. C.R.S. § 13-6-310(1). In acting as an appellate court, the function of a district court is the same whether the case originates in a municipal court of record or county court, namely, to either review the decision on the record,

remand the case for a new trial with instructions, or direct that a trial *de novo* be had before the district court. *People v. Anderson*, 392 P.2d 844, 845 (Colo. 1972).

The district court, when it elects to act in its appellate authority, cannot alter or depart from the county court's findings of fact in any way. *Bovard v. People*, 99 P.3d 585, 589 (Colo. 2004). Further, if a district court reviews the case based on the county court record, its review is limited to the sufficiency of the evidence. *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1002 (Colo. 1998). Consideration of the evidence presented to the lower court must be viewed in the light most favorable to that court's judgment. *Schempp v. Lucre Management Group, LLC.*, 75 P.3d 1157, 1161 (Colo. App. 2003). The interpretation of a statute is a question of law, and the appellate court is not bound by the trial court's interpretation. *Pac. Life & Annuity Co. v. Colo. Div. Of Ins.*, 140 P.3d 181, 183 (Colo. App. 2006).

III. THE LEGAL FRAMEWORK

Defendant argues that the Ordinance is facially unconstitutional because it is overbroad and a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. In short, Defendant argues that the Ordinance is directed at the homeless and designed essentially to eradicate them from the streets of Denver. Defendant further argues that the Ordinance is unconstitutional as applied to his specific circumstance (and the circumstances of other homeless individuals).

A. Facial Challenge

"A facial challenge to a legislative [act] is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [act] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Under a facial challenge, a plaintiff must show, beyond a reasonable doubt, that a statute is unconstitutional in all its applications. *People v. Bondurant*, 296 P.3d 200 (Colo. App. 2012) *citing People v. Shell*, 148 P.3d 162, 172 (Colo.2006). If a statute is susceptible to alternate constructions, one of which is constitutional and the other of which is not, then the court is obligated to adopt the constitutional construction. *People v. Iannicelli*, 449 P.3d 387 (Colo 2019). Thus, if the Ordinance can be applied in a neutral manner in at least some circumstances, it is facially constitutional.

B. As Applied Challenge

In contrast to a facial challenge, "an as-applied challenge alleges that the statute is unconstitutional as to the specific circumstances under which a defendant acted." *People v. Ford*, 232 P.3d 260, 263 (Colo. App. 2009) *citing Sanger v. Dennis*, 148 P.3d 404, 410-11 (Colo. App. 2006). Here, the pertinent examination is how the Ordinance was enforced against Defendant. There is considerable scholarly debate as to whether there is a meaningful distinction between a facial and an as-applied challenge, and the two tests seem to blur the more one thinks about

them. *See e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan L. Rev. 236 (1994). As will be seen, the trial court below seems to have conflated the two tests in reaching his decision that the Ordinance was facially unconstitutional.

IV. ANALYSIS

A. The Ordinance is Facially Constitutional

The Eighth Amendment

> circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such, *e. g., Robinson v. California*, [370 U.S. 660 (1962).] We have recognized the last limitation as one to be applied sparingly.

Ingraham v. Wright, 430 U.S. 651, 667 (1977) (some internal citations omitted). Defendant argues that it is this third prohibition, the limitation on what can be criminalized, that applies here. Defendant maintains that the Ordinance unconstitutionally punishes his status as a homeless individual.

The Court is not persuaded for two reasons. First, the Ordinance is silent as to status. The Ordinance facially applies to anyone, homeless or not, who might decide to camp on public property within the City and County of Denver. Even if the Ordinance was passed expressly to drive homeless individuals away from the city, this does not matter for the purposes of analyzing its facial constitutionality. The trial court found that the Ordinance was facially neutral, and this Court agrees.

Second, the Ordinance does not criminalize status. It criminalizes an activity. That the activity is often engaged in by homeless individuals is beside the point. This is in contrast to the law at issue in *Robinson*, which outlawed drug addiction (as opposed to drug use). *Robinson v. California*, 370 U.S. 660, 666 (1962) (observing the law "is not one which punishes a person for the use of narcotics, . . . or for antisocial or disorderly behavior," but rather one that punishes "status"). The Ordinance, on its face, is not directed to "homelessness." Rather, it prohibits an activity often associated with homelessness, just like a law prohibiting drug possession prohibits an act often associated with addiction.

Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) does not compel a contrary result. To the extent *Martin* analyzed the facial unconstitutionality of the ordinance at issue there (which is unclear), the holding was limited to those situations where there was no available shelter for the cited individuals. As discussed above, Defendant was offered shelter and refused it.

B. The Ordinance is Constitutional as Applied to Defendant

In determining whether the Ordinance was unconstitutionally applied to Defendant, it is helpful to revisit the trial court's findings. (Citations for the following findings appear above and will not be repeated here.) Defendant was homeless when he was camping on public property. He was contacted by police and given the option of going to a homeless shelter. It was only after he refused shelter that he received a citation for violation of the Ordinance. In its enforcement of the Ordinance, the City was not motivated by a discriminatory purpose nor a desire to harm a "politically unpopular group," and thus there was no "animus" on the part of the City. The City does not have a custom and practice of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life.

"A plaintiff bringing an 'as-applied' challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act." *Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006). The circumstances under which Defendant was cited do not raise any constitutional infirmities based on the factual findings of the trial court, which enjoy ample record support. The record reflects that Defendant was not targeted based on his homeless status, and he was offered shelter which he refused. Only then was he cited.

Martin v. City of Boise, supra, actually is consistent with this result. *Martin* repeatedly emphasizes that its holding is limited to those situations where no alternative shelter is available.

> We hold only that so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public. That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.

Martin, 920 F.3d at 671 (internal quote marks, brackets and citations omitted). In the instant case, to repeat, Defendant was offered shelter, which was available to him, and he refused it. Even if *Martin* is good law, its holding simply does not apply here.

V. CONCLUSION

Defendant invites the Court to review the record below and find the Ordinance unconstitutional on numerous other grounds. The Court declines this invitation and limits its holding to the reasoning and grounds articulated by the trial court.

The trial court's order dismissing the case is REVERSED. This matter is REMANDED for trial on the merits.

ENTERED this 3d day of September, 2020.

BY THE COURT:

J. Eric Elliff
District Court Judge