Philly 'Gay'-Fest Protester's Free-Speech Case Revived

Christian evangelist was arrested, charged with hate crimes, faced decades in prison

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By Bob Unruh

A Christian evangelist's lawsuit against Philadelphia over police actions to restrict his free speech and religious expression has been reinstated by the 3rd U.S. Circuit Court of Appeals, which expressed in its opinion yesterday a grave concern about an "imbalance" in the jury instructions provided by the judge.

Michael Marcavage of ***Repent America*** sued the police and city in 2004 over seven specific instances in which he said officers and others violated his First Amendment rights to free speech and free expression of religion.

It was only a short time later that he and 10 other Christians, known as the Philadelphia 11, proclaimed the biblical Gospel message at the city's 2004 pro-homosexual "Outfest," were arrested and charged with hate crimes, facing a potential penalty of decades in jail.

The Philadelphia 11 included (Front, L-R) Arlene Elshinnawy, Susan Startzell, Lauren Murch, nancy major, Linda Beckman. (Back, L-R) Gerald Fennell, Mark Diener, Dennis Green, Michael Marcavage, James Cruse, Randall Beckman

The criminal charges eventually were dropped entirely, but the civil case seeking a repair in the city's police policies continued. During a 2006 trial, a jury concluded the city's officers had acted appropriately.

However, the 3rd Circuit said the courtroom process reaching that result was fatally flawed.

Specifically, the trial court misled jurors about the government's obligations, the appeals court said.

The court's jury instructions had included: "The defendants in this case claim that any restrictions on plaintiff's activity were restrictions on the time, place, and manner of that activity. I instruct you that the government may impose reasonable time, place, and manner restrictions on First Amendment activity to further significant governmental interests..”

The appeals court, however, noted the absence of an instruction telling jurors that the

government's ability to set those limits is, itself, limited.

"The Supreme Court held that such restrictions must be: (a) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve significant governmental interests, and (3) must leave open alternative channels for communications," the appeal decision said.

"The court did not inform the jury of the government's obligation to allow alternative channels of communications. In addition, the jury was not told that a time, place, and manner restriction must be both content-neutral and narrowly tailored."
The trial judge's instructions had included an emphasis on "public order," too.

"The First Amendment protects speech and other expressive activity in public spaces – all of the activities at issue in this have taken place in public fora," the judge had said. "However, the protections afforded by the First Amendment are not absolute. Principles of religious tolerance do not relieve an individual from complying with the laws of general applicability, so the right of free exercise does not relieve an individual of the right to comply with a valid and neutral law of general applicability. Even though First Amendment rights are to be guarded, they may still be regulated by the state. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order…

"In fashioning the charge, the court placed the burden on Marcavage to prove that the defendants' restrictions were content-based. … This belies the Supreme Court's oft-repeated pronouncement that 'when the government restricts speech, the government bears the burden of proving the constitutionality of its actions,'" the ruling said.

"Moreover, the court's failure to instruct on the obligation to provide an alternative channel for the speech was never corrected nor mitigated. That omission prevented the jury from determining whether the reasonable restrictions that were imposed allowed an alternative channel for Marcavage's speech. The error is significant because Marcavage contends that the police and city defendants required him to move to locations and that did not allow him an adequate opportunity to have his message reach his target audience… These are questions of fact that must be resolved," the appeals court said.

The trial court's instructions also "were not appropriately balanced."

Marcavage told WND he now has another opportunity for a jury to hear the facts of the case, be given proper instructions and make a determination.

He said he's just trying through the action to halt police harassment and interference with his Christian testimony.

"What we are trying to do, because of that ongoing issue, the pattern and practice of the Philadelphia police department stopping our testimony, is bring this civil lawsuit so that they would not continue to shut us down," he said.

A statement from the law firm working on the case, ***Shields & Hoppe, LLP***, noted that Marcavage for years has been involved in open-air preaching, distributing Gospel literature, sidewalk ministering and sidewalk counseling – all constitutionally protected activities.

But the original 2004 lawsuit cited seven different instances in which the city and members of its police department "violated his right to free speech and free exercise of his religious faith."

"There is no justification for silencing speech simply because it is considered to be 'unpopular,'" said Ted Hoppe, one of the attorneys. "Harassing and arresting Christians simply because they choose to exercise their First Amendment rights in a public place is unconstitutional."

The lawyers are affiliated with the Alliance Defense Fund.

(http://www.alliancedefensefund.org/main/default.aspx)