IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
July 19, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27315

RELEASED
July 19, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ANNA SALE, BY AND THROUGH HER NEXT FRIEND AND PARENTS, JUNE AND WILLIAM SALE; KATELYN GENEVIEVE KIMMONS, BY AND THROUGH HER NEXT FRIEND AND PARENT, REBECCA KIMMONS; CAROL FREAS, M.D.; LEALAH POLLACK, BY AND THROUGH HER NEXT FRIEND AND PARENT, CAROL FREAS; AND THE AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA,
Petitioners Below, Appellants,

V.

MAYOR JAY GOLDMAN, MAYOR OF THE CITY OF CHARLESTON; CHIEF JERRY RIFFE, THE CHIEF OF POLICE FOR THE CITY OF CHARLESTON; AND THE CITY OF CHARLESTON,
Respondents Below, Appellees,

CENTER FOR COMMUNITY INTEREST AND WEST SIDE NEIGHBORHOOD ASSOCIATION,
Intervenors Below, Appellees.

Appeal from the Circuit Court of Kanawha County
Honorable Charles E. King, Jr., Judge
Civil Action No. 98-C-781

AFFIRMED

Submitted: June 7, 2000
Filed: July 19, 2000

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE SCOTT did not participate.

JUDGE THORNSBURY sitting by temporary assignment.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syllabus point 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967).

2. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus point l, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

3. "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syllabus point 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).

4. "Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute." Syllabus point 2, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).

Per Curiam:

This appeal was brought by Anna Sale, by and through her next friend and parents, June and William Sale, petitioners below/appellants[1] (hereinafter collectively referred to as "the Sales"), from a final order of the Circuit Court of Kanawha County finding a curfew ordinance promulgated and enforced by the City of Charleston, et al., respondents below/appellees[2] (hereinafter collectively referred to as the "City"), constitutional and valid under the laws of this State.[3] After a careful review of the briefs and record in this case, we affirm the circuit court's order.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts underlying this appeal are generally not disputed by the parties. On December 1, 1997, the City, through its City Council, adopted a "Youth Protection Ordinance."[4] The purpose of the

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[1]The other parties named as petitioners below and appellants herein were: Katelyn Genevieve Kimmons, by and through her next friend and parent, Rebecca Kimmons; Carol Freas, M.D.; Lealah Pollock, by and through her next friend and parent, Carol Freas; and the American Civil Liberties Union of West Virginia.

[2]Other parties named as respondents below and appellees herein were: Mayor Jay Goldman, Mayor of the City of Charleston, and Chief Jerry Riffe, Chief of Police for the City of Charleston. Additionally, there were two intervenors below and appellees herein: City for Community Interest and West Side Neighborhood Association.

[3]As pointed out in the body of the opinion, the circuit court found one provision of the ordinance to be unconstitutional and provided a remedy for that provision.

[4]The terms of the ordinance were scheduled to be implemented on April 1, 1998. However, as a result of the proceedings underlying the instant appeal, the City of Charleston, by agreed order, postponed the ordinance's implementation pending the circuit court's resolution of this matter.

ordinance includes the protection of minors from criminal victimization and exposure to criminal activity.[5] The ordinance carries out its purpose by imposing a curfew on juveniles under the age of eighteen. The curfew becomes effective at 10:00 p.m. on Sunday, Monday, Tuesday, Wednesday, and Thursday nights, and lasts until 6:00 a.m. the following mornings. On Saturday and Sunday mornings, *i.e.*, Friday and Saturday nights, respectively, the curfew operates from 12:01 a.m. until 6:00 a.m. Numerous exceptions to these time limits include emergency situations and youngsters who are employed, emancipated, accompanied by their parents, or engaged in errands at their parents' direction. Further excluded from the curfew restriction are those minors who are exercising their constitutional right to freedom of speech, religion, and assembly and youth who are participating in activities sponsored by school, church, community, or government organizations. Finally, the ordinance allows affected individuals to apply for a permit to exempt them from the curfew's time limits for special circumstances not otherwise provided for therein, so long as the applicant has his/her parent's permission to participate or engage in the stated activity which has necessitated the exemption.

Violators of the curfew are subject to detention by law enforcement authorities and may

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[5]The purpose of the ordinance as set out in § 18-17(a) provides:

> The purpose of this ordinance is to protect juveniles from victimization and exposure to criminal activity by establishing a curfew for juveniles under the age of eighteen years in the City of Charleston. The Youth Protection Ordinance is intended to reinforce and promote the role of the parent in raising and guiding children, and promote the health, safety, and welfare of both juveniles and adults by creating an environment offering better protection and security for all concerned.

be adjudicated delinquent. According to the Sales, curfew violators may be transported to their homes or to a holding facility until their parents can pick them up. In addition, those individuals, who assist or acquiesce in the minor's disregard of the stated time limits and who are found guilty of this infraction are guilty of a misdemeanor and subject to a fine not to exceed $500 and/or a jail sentence of not more than thirty days.

Perceiving the imposition of a curfew to be an impermissible infringement of their constitutional rights, the Sales instituted this civil action in the Circuit Court of Kanawha County on March 24, 1998, seeking to enjoin enforcement of the ordinance. The Sales alleged that the ordinance operates to deprive them of their constitutional rights to equal protection, freedom of speech and association, due process, and freedom from unreasonable searches and seizures. Furthermore, the Sales complained that the ordinance violates W. Va. Code § 49-5-8(b) [1997].[6] In addition, at least one parent/appellant complained that the ordinance abrogated her constitutional right to parental privacy.[7]

Following discovery, the circuit court held a hearing in this matter on July 15, 1998. Thereafter, on May 20, 1999, the circuit court issued its decision, ordering:

> 1. That *Charleston City Code* § 18-17(d)(11) is

[6]Shortly after the occurrence of the events giving rise to the instant appeal, the Legislature rewrote W. Va. Code § 49-5-8. *See* W. Va. Code § 49-5-8(b) [1998] (changing circumstances under which juvenile may be taken into custody without satisfaction of statutory criteria from "warrant or court order" to "court order" only).

[7]The caption on the pleadings reveal only one person, Carol Freas, as bringing a cause of action individually as a parent.

unconstitutional insofar as the Charleston City Council delegated to the police chief its legislative authority to create exceptions to prohibitions of the curfew ordinance, giving unbridled discretion to the police chief to issue permits without providing any meaningful standards by which the police chief may exercise his or her authority.

2. That *Charleston City Code* § 18-17(d)(11) must be interpreted so as to eliminate any discretion on the part of the chief of police, by requiring him or her to issue a permit when a parent or guardian makes a determination that there is a reasonable necessity for his or her child or ward to be in a public place during curfew hours;

3. The ordinance does not violate juveniles' equal protection of the laws, even when subjected to strict scrutiny, and is not overbroad or impermissibly vague;

4. The ordinance does not interfere with parents' right to raise their children as they see fit, free from undue interference by the State;

5. The ordinance is not invalid because it does not provide for an arrest protocol;

6. The ordinance does not make parents criminally liable for the actions of their children;

7. The ordinance does not violate the Fourth Amendment right to be free from unreasonable search and seizure; and

8. The ordinance does not violate the provisions of W. Va. Code § 49-5-8(b).

Subsequent to the issuance of the circuit court's order, on May 24, 1999, the Sales moved the circuit court to continue the stay of the ordinance's operation to permit an appeal of the circuit court's decision to this Court. By order entered June 2, 1999, the circuit court denied the motion for a stay of the curfew's implementation. As a result of the circuit court's adverse rulings, the Sales similarly requested this

Court stay the ordinance's institution pending an appeal of the circuit court's decision on the merits. By order entered June 9, 1999, we denied the requested stay. The Sales then filed this appeal. We now consider the assignments of error.

II.

STANDARD OF REVIEW

This case presents an appeal from a final order of the circuit court denying injunctive relief to the Sales, and raises one statutory issue and several constitutional challenges to the curfew ordinance in question. This Court indicated in *Phillip Leon M. v. Greenbrier County Board of Education*, 199 W. Va. 400, 404, 484 S.E.2d 909, 913 (1996), that "[b]ecause interpretations of the West Virginia Constitution, along with interpretations of statutes and rules, are primarily questions of law, we apply a *de novo* review." *See also* Syl. pt. 1, *Chrystal R.M .v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). However, when, as here, an action is tried before a judge without a jury, the trial court's findings of fact "shall not be set aside unless clearly erroneous[.]" W. Va. R. Civ. P. 52(a). We have also held that

> [A] finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, in part, *In re Tiffany Marie S*., 196 W. Va. 223, 470 S.E.2d 177 (1996). *See also Woo v. Putnam County Bd. of Educ*., 202 W. Va. 409, 412, 504 S.E.2d 644, 647 (1998) ("Reversal of

a factual finding under the 'clearly erroneous' standard should not be done lightly.").

This Court is also reminded that "[w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967). *Accord* Syl. pt. 3, *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994). Further, as was held in Syllabus point 1, in part, of *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965), "[c]ourts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." *Accord* Syl. pt. 4, *Tony P. Sellitti Constr. Co. v. Caryl*, 185 W. Va. 584, 408 S.E.2d 336 (1991). It is with the above-mentioned standards in mind that we review the circuit court's order.

III.

DISCUSSION

A. Statutory Challenge Under W. Va. Code § 49-5-8

The Sales first contend that the curfew ordinance violates W. Va. Code § 49-5-8(b) [1997],[8] which establishes very specific and limited instances in which a law enforcement official may take a minor into custody without having a warrant or court order. The circuit court found that the ordinance did not violate this statute.

In support of this assignment of error, the Sales argue that because the ordinance authorizes Charleston City Police officers to take custody of juveniles who violate the ordinance, it contravenes the statute's clear intent to limit the instances in which a minor may be taken into custody without a warrant or court order. In response, the City asserts that the ordinance does not violate the statute because the statute pertains only to proceedings in which a juvenile petition has been filed and that it does not apply to other

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[8]W. Va. Code § 49-5-8(b) [1997] provides that

> [a]bsent a warrant or court order, a juvenile may be taken into custody by a law-enforcement official only if one of the following conditions exist: (1) Grounds exist for the arrest of an adult in identical circumstances; (2) emergency conditions exist which in the judgment of the officer pose imminent danger to the health, safety and welfare of the juvenile; (3) the official has reasonable grounds to believe that the juvenile has left the care of his or her parents, guardian or custodian without the consent of such person, and the health, safety and welfare of the juvenile is endangered; (4) the juvenile is a fugitive from a lawful custody or commitment order of a juvenile court; or (5) the official has reasonable grounds to believe the juvenile to have been driving a motor vehicle with any amount of alcohol in his or her blood.

proceedings involving minors.

In this Court's analysis of W. Va. Code § 49-5-8(b), we are guided by the legal principle that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). *See also Wriston v. Raleigh County Emergency Servs. Auth.*, 205 W. Va. 409, 417, 518 S.E.2d 650, 658 (1999) ("When this Court is called upon to construe a statute, our primary goal is to give effect to the intent of the Legislature." (citation omitted)). Moreover, "[i]n ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. pt. 2, *Smith*, 159 W. Va. 108, 219 S.E.2d 361. Additionally, our case law admonishes us that "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 3, *Smith*, *id.* *See also* Syl. pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908) ("A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith."). After a thorough examination of W. Va. Code § 49-5-8(b) and other pertinent statutes, we conclude that the ordinance does not violate W. Va. Code § 49-5-8(b) for two reasons.

First, we believe municipalities have the authority to create curfew ordinances pursuant to W. Va. Code § 8-12-5(44) [1989].[9] This statute grants municipalities general authority to create ordinances "[t]o protect and promote the public morals, safety, health, welfare and good order." *Id.* In addition, the authority of municipalities to create curfew ordinances is implicitly recognized in the specific statutory authority of counties to create curfew ordinances. W. Va. Code § 7-1-12 [1988] states, in relevant part:

> [i]n addition to all other powers and duties now conferred by law upon county commissions, such commissions are hereby authorized, by order duly entered of record, to adopt an ordinance which establishes a curfew for persons under eighteen years of age. It shall be unlawful for any person under eighteen years of age to violate any ordinance: Provided, That *whenever the county ordinance enacted hereunder conflicts with that of any municipality, the municipal ordinance shall prevail*.

(Emphasis added). Furthermore, in proceedings involving juveniles, the Legislature has specifically granted municipal courts authority to prosecute violations of curfew ordinances by juveniles. W. Va. Code § 49-5-2(d) [1998] directs that, "[no]twithstanding any other provision of this article, municipal courts have concurrent juvenile jurisdiction with the circuit court for a violation of . . . *any municipal curfew ordinance* which is enforceable." (Emphasis added).[10]

In view of the legislative recognition that municipalities may create curfew ordinances, we

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[9]W. Va. Code § 8-12-5 [1989] has been amended, but these changes do not affect the statutory language at issue herein. *See* W. Va. Code § 8-12-5 [1999].

[10]The prior version of this statute likewise granted municipal courts jurisdiction over municipal curfew violations. *See* W. Va. Code § 49-5-2(d) [1996].

do not believe the Legislature intended to prevent municipalities from enforcing such ordinances, which would be the necessary result were we to adopt the City's interpretation of W. Va. Code § 49-5-8(b). It is the "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990).

Second, we believe that the enforcement of the curfew in this case is consistent with the restrictions of W. Va. Code § 49-5-8(b). This statute authorizes a juvenile to be taken into custody without a warrant or court order only under certain specified conditions. One of these conditions is when "[g]rounds exist for the arrest of an adult in identical circumstances[.]"[11] *See* Syl. pt. 4, *State v. Ellsworth*, 175 W. Va. 64, 331 S.E.2d 503 (1985) ("Under both W. Va. Code, 49-5-8(a) and -8(b), the grounds for taking a juvenile into custody where the juvenile has allegedly committed a criminal act are the same as for the arrest of an adult."). Under this provision, a juvenile may be taken into custody without a warrant or court order for committing an offense in the presence of an officer, because an adult may be arrested without a warrant or court order for committing an offense in the presence of a police officer.[12]

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[11]This provision of W. Va. Code § 49-5-8(b) is nothing more than a recognition of the right of a police officer to take into custody, without a warrant or court order, anyone committing a felony or misdemeanor offense in the presence of the officer. *See State v. Farmer*, 193 W. Va. 84, 89 n.7, 454 S.E.2d 378, 383 n.7 (1994) ("[A] peace officer may arrest without a warrant if there are reasonable grounds for him to believe that a felony has been committed; however, a peace officer may only arrest without a warrant if a misdemeanor is committed in his presence.").

[12]We are aware that this provision applies only to the commission of an offense by a juvenile, which, if committed by an adult, would permit the arrest of the adult. However, the ordinance satisfies even this criterion because it creates a misdemeanor offense applicable to any adult who

(continued...)

See Syl. pt. 3, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974) ("A municipal police officer has no authority, at common law or by statute, to make a warrantless arrest for a misdemeanor of a person who does not commit such an offense in his presence."). Similarly, in the case *sub judice*, the ordinance authorizes the police to take into custody, without a warrant or court order, any juvenile who violates the ordinance in the officer's presence. This authority is not inconsistent with W. Va. Code § 49-5-8(b). Therefore, we find that the circuit court was correct in finding the ordinance did not violate the statute.

B. Due Process and Equal Protection Challenge

The Sales next argue that the ordinance violates the constitutional guarantees of due process and equal protection. We are urged by the Sales to analyze both of these constitutional guarantees under the "strict scrutiny" standard. The City requests this Court to apply the "rational basis" test.[13] In the proceedings underlying this appeal, the trial court resolved both constitutional issues against the Sales by utilizing a strict scrutiny analysis.

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[12](...continued)
participates in a juvenile's violation of the ordinance.

[13]There is a third level of constitutional review that is not involved in the issues presented by this case. *See* Syl. pt. 3, *Shelby J.S. v. George L.H.*, 181 W. Va. 154, 381 S.E.2d 269 (1989) ("Under equal protection principles, a statute which discriminates based on sex or illegitimacy must be substantially related to an important governmental objective. This test is one of intermediate scrutiny which rests between the 'rational basis' review and the 'strict scrutiny' test.").

As a preliminary matter, we note that under the strict scrutiny test, "[i]f the challenged [law] affects the exercise of a fundamental right or is based upon a constitutionally suspect criterion, the law will not be sustained unless the [government] can prove that the classification is necessary to the accomplishment of a compelling state interest." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995) (citations omitted). Pursuant to the rational basis test, a law "will be sustained so long as it 'is rationally related to a legitimate state interest.'" *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985)). We will separately determine whether strict scrutiny or rational basis is the appropriate test for each of the two constitutional challenges.

1. Due process challenge. The Sales contend that the ordinance infringes upon their "fundamental right to free movement and association [and] is therefore subject to strict scrutiny."[14] This is a due process argument. The United States Supreme Court has interpreted "the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507

[14]Although the Sales provide a statement in their brief that they have a fundamental right to association, this issue was not briefed. In a footnote in their brief, the Sales acknowledge that "[i]t is not entirely clear if simply association for purely social purposes is constitutionally protected as a fundamental right." We have held that "[a]ssignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981). Consequently, we will not address the issue of whether a fundamental right to association exists or is infringed by the ordinance.

U.S. 292, 301-02, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1, 16 (1993) (citations omitted). It has also been held that "constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S. Ct. 1322, 1329, 22 L. Ed. 2d 600, 612 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). *See Spradling v. Hutchinson*, 162 W. Va. 768, 253 S.E.2d 371 (1979) (finding an employment residency requirement unconstitutional because it infringed upon the federal constitutional right to travel). *But see Morgan v. City of Wheeling*, 205 W. Va. 34, 516 S.E.2d 48 (1999) (finding an employment residency requirement did not infringe upon the federal constitutional right to travel).

While the United States Supreme Court has recognized a general right to freedom of movement for adults, it has not specifically extended this right to juveniles. The City correctly acknowledges that the United States Supreme Court has specifically indicated that the right of freedom of movement for juveniles is subject to a different standard than that applicable to adults. In addressing a juvenile's interest in the freedom of movement during pretrial detention, the United States Supreme Court made the following observation:

> But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. . . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving

and promoting the welfare of the child."

Schall v. Martin, 467 U.S. 253, 265, 104 S. Ct. 2403, 2410, 81 L. Ed. 2d 207, 217-18 (1984) (quoting *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S. Ct. 1388, 1401, 71 L. Ed. 2d 599, 615 (1982)) (internal citations omitted).

Nevertheless, the Sales urge this Court to recognize that juveniles have a fundamental right to freedom of movement. In support of their argument, the Sales cite the decision in *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981). We do not, however, interpret *Johnson* as recognizing that juveniles have a constitutional right to freedom of movement. *Johnson*, invalidated the curfew ordinance at issue in that case, by applying the "overbreadth doctrine."

On the other hand, the City requests this Court to follow the decision in *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999), to find that juveniles do not have a constitutional right to freedom of movement. In *Hutchins*, a federal district court found that a curfew ordinance violated the appellees' fundamental right to freedom of movement. On appeal, the appellate court acknowledged that if juveniles had a constitutional right to freedom of movement, then the "government impingement on a *substantive* fundamental right to free movement would be measured under a strict scrutiny standard and would be justified only if the infringement is narrowly tailored to serve a compelling state interest.... But does such a substantive right exist?" *Hutchins*, 188 F.3d at 536 (internal citations omitted).

The court of appeals in *Hutchins* answered its rhetorical question by finding that juveniles

did not have a fundamental constitutional right to freedom of movement.

> We are rather doubtful that substantive due process, those constitutional rights that stem from basic notions of ordered liberty "deeply rooted in [our] history and tradition,". . . can be so lightly extended. On the other hand, we recognize that a hypothetical municipal restriction on the movement of its citizens, for example, a draconian curfew, might bring into play the concept of substantive due process.
>
> Be that as it may, there is an important caveat to bear in mind when considering potential extensions of substantive due process, which "has at times been a treacherous field.". . . The Supreme Court has warned us that our analysis must begin with a careful description of the asserted right for the more general is the right's description, *i.e.*, the free movement of people, the easier is the extension of substantive due process. . . . And the "doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.". . . For that reason we must ask not whether Americans enjoy a general right of free movement, but rather whatever are the scope and dimensions of such a right (if it exists), do minors have such a substantive right? Do they have the right to freely wander the streets--even at night? . . .
>
> We think that juveniles do not have a fundamental right to be on the streets at night without adult supervision. The Supreme Court has already rejected the idea that juveniles have a right to "come and go at will" because "juveniles, unlike adults, are always in some form of custody,". . . and we see no reason why the asserted right here would fare any better. That the rights of juveniles are not necessarily coextensive with those of adults is undisputed, and "unemancipated minors lack some of the most fundamental rights of self-determination--including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will.". . . While appellees claim that this reasoning obscures the difference between parental custody and governmental custody, appellees necessarily concede that juveniles are always in *some* form of custody. Not only is it anomalous to say that juveniles have a right to be unsupervised when they are always in some form of custody, but the recognition of such a right would fly in the face of the state's well-established powers of *parens patriae* in preserving and promoting the welfare of children. The state's authority over children's activities is unquestionably broader than that over like actions of adults . . . . And it would be inconsistent to

> find a fundamental right here, when the [Supreme] Court has concluded that the state may intrude upon the "freedom" of juveniles in a variety of similar circumstances without implicating fundamental rights. . . .
>
> Neither does the asserted right here have deep roots in our "history and tradition." As the District [Court] noted, juvenile curfews were not uncommon early in our history, . . . nor are they uncommon now . . . . That juvenile curfews are common is, of course, not conclusive in determining whether they comport with due process, but the historical prevalence of such laws is "plainly worth considering" in determining whether the practice "'offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental.'". . . In sum, neither history nor precedent supports the existence of a fundamental right for juveniles to be in a public place without adult supervision during curfew hours, and we decline to recognize one here.

188 F.3d at 538-39 (internal citations omitted)(footnote omitted).

We find the reasoning in *Hutchins* persuasive. Therefore, we decline to rule that juveniles have a constitutional right to freedom of movement. Accordingly, the rational basis test is the proper tool for determining whether the ordinance infringes upon the Sales' freedom of movement.[15]

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[15]Although we find it was error for the trial court to apply strict scrutiny to the due process and equal protections claims, we reach the same ultimate conclusion as the trial court, but for different reasons. As this Court held in Syllabus point 3 of *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965): "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." *See also Easterling v. American Optical Corp.*, ___ W. Va. ___, ___ S.E.2d ___, slip op. at 21 (No. 26566 Mar. 24, 2000) ("Although we have found that the circuit court committed error by dismissing Buckeye on personal jurisdiction grounds, the claim against Buckeye must nevertheless be dismissed because of lack of subject matter jurisdiction."); *Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996) ("An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support."); *McJunkin Corp. v. West Virginia*
(continued...)

Under the rational basis test, a law will be sustained so long as it "'is rationally related to a legitimate state interest.'" *Appalachian Power*, 195 W. Va. at 594, 466 S.E.2d at 445 (quoting *Cleburne Living Ctr., Inc.*, 473 U.S. at 440, 105 S. Ct. at 3254, 87 L. Ed. 2d at 320). The Sales concede that the City has a legitimate interest in the welfare of juveniles. However, the Sales assert that there is no "evidentiary nexus between juvenile curfews and the purported goals of reducing juvenile crime and victimization[.]" The record shows differently. During the lower court proceedings, the City presented sufficient evidence to justify infringing upon the movement of juveniles during specific periods of time. The City's evidence establishes that there was a 27.40% increase in juvenile violent crimes and drug offenses during the period 1993-1996. The City also provided the trial court with statistical evidence showing a summary of the number of juveniles arrested[16] and victimized by crime[17] in the City of Charleston for each

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[15](...continued)
Human Rights Comm'n, 179 W. Va. 417, 423, 369 S.E.2d 720, 726 (1988) ("Although the circuit court's ruling in this matter was based on the insufficiency of the evidence on the record, this Court may uphold the circuit court's ruling on the ground we have cited above."); *Longwell v. Hodge*, 171 W. Va. 45, 47, 297 S.E.2d 820, 822 (1982) ("We agree with the Circuit Court, and affirm its decision, although for different reasons than those expressed by the lower court.").

[16] NUMBER OF JUVENILE ARRESTS IN
THE CITY OF CHARLESTON
JULY 1, 1995 - OCTOBER 31, 1997

Time of day	Number of Arrests
12:00 a.m. - 12:59 a.m.	83
01:00 a.m. - 01:59 a.m.	50
02:00 a.m. - 02:59 a.m.	35
03:00 a.m. - 03:59 a.m.	20
04:00 a.m. - 04:59 a.m.	16
05:00 a.m. - 05:59 a.m.	9
06:00 a.m. - 06:59 a.m.	4
07:00 a.m. - 07:59 a.m.	2

(continued...)

[16](...continued)

08:00 a.m. - 08:59 a.m.	22
09:00 a.m. - 09:59 a.m.	17
10:00 a.m. - 10:59 a.m.	28
11:00 a.m. - 11:59 a.m.	44
12:00 p.m. - 12:59 p.m.	47
01:00 p.m. - 01:59 p.m.	57
02:00 p.m. - 02:59 p.m.	85
03:00 p.m. - 03:59 p.m.	89
04:00 p.m. - 04:59 p.m.	88
05:00 p.m. - 05:59 p.m.	83
06:00 p.m. - 06:59 p.m.	78
07:00 p.m. - 07:59 p.m.	105
08:00 p.m. - 08:59 p.m.	114
09:00 p.m. - 09:59 p.m.	89
10:00 p.m. - 10:59 p.m.	83
11:00 p.m. - 11:59 p.m.	68

[17] NUMBER OF JUVENILE CRIME VICTIMS
IN THE CITY OF CHARLESTON
JULY 1, 1995 - OCTOBER 31, 1997

Time of day	Number of Victims
12:00 a.m. - 12:59 a.m.	106
01:00 a.m. - 01:59 a.m.	77
02:00 a.m. - 02:59 a.m.	50
03:00 a.m. - 03:59 a.m.	27
04:00 a.m. - 04:59 a.m.	28
05:00 a.m. - 05:59 a.m.	11
06:00 a.m. - 06:59 a.m.	14
07:00 a.m. - 07:59 a.m.	28
08:00 a.m. - 08:59 a.m.	49
09:00 a.m. - 09:59 a.m.	104
10:00 a.m. - 10:59 a.m.	98
11:00 a.m. - 11:59 a.m.	118
12:00 p.m. - 12:59 p.m.	141
01:00 p.m. - 01:59 p.m.	119
02:00 p.m. - 02:59 p.m.	152
03:00 p.m. - 03:59 p.m.	153

(continued...)

hour of the day, from July 1, 1995, to October 31, 1997. There also was evidence demonstrating a reduction in juvenile arrests and victimization in selected cities which had implemented juvenile curfews. The Sales presented expert testimony disputing the effectiveness of curfews on juvenile crimes and juvenile victimization. However, the trial court did not find such testimony persuasive. Neither do we.

In sum, although the curfew ordinance infringes upon the freedom of movement of juveniles, it is rationally related to the City's legitimate interest in their welfare.

2. Equal protection challenge. The Sales further suggest that juveniles are unfairly discriminated against by the curfew ordinance because of their ages. Therefore, strict scrutiny should be used in examining the ordinance. This is an equal protection claim. We have held that "[t]he concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution[.]" Syl. pt. 3, in part, *Robertson v. Goldman*, 179 W. Va. 453, 369 S.E.2d 888 (1988). While we have recognized an equal protection guarantee under the state constitution, this Court has never recognized "youth" as a suspect classification for the purpose of a strict scrutiny analysis. As we have previously

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[17](...continued)

04:00 p.m. - 04:59 p.m.	193
05:00 p.m. - 05:59 p.m.	174
06:00 p.m. - 06:59 p.m.	195
07:00 p.m. - 07:59 p.m.	190
08:00 p.m. - 08:59 p.m.	224
09:00 p.m. - 09:59 p.m.	211
10:00 p.m. - 10:59 p.m.	174
11:00 p.m. - 11:59 p.m.	124

noted, "[t]he list of suspect criteria includes race, national origin, and alienage, and the scrutiny to be applied to laws that engage in such distinctions is the most exacting." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995) (citation omitted).[18] *See also Morgan v. City of Wheeling*, 205 W. Va. 34, 43, 516 S.E.2d 48, 57 (1999) ("Concerning suspect or quasi-suspect criteria, these categories include race, national origin, alienage, gender and illegitimacy, none of which are present here." (citation omitted)); *Israel by Israel v. West Virginia Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 461, 388 S.E.2d 480, 487 (1989) ("Classifications relating to race, alienage, or national origin have always been subject to strict judicial scrutiny[.]"). Although the Sales invite this Court to extend the realm of suspect classifications to include "youth," we decline to do so. Thus, the rational basis test is the proper legal principle for determining whether the ordinance unfairly discriminates against the Sales.[19]

While we have determined that the rational basis test applies to a claim of discrimination based upon youth, we need not apply the test to the Sales' claim because we deem it waived. The sum total of the Sales' purported equal protection argument that is contained in the brief is as follows: "The ordinance treats all minors the same even though an exceedingly small percentage commit crimes. The [E]qual Protection Clause forbids such a crude grouping when fundamental rights are at stake, and limiting the curfew's hours and providing exceptions does not diminish this shortcoming." This purported

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[18]We note that under the West Virginia Human Rights Act, W. Va. Code § 5-11-1, *et seq.*, age has been made a suspect criterion only for persons aged 40 years or older. *See* W. Va. Code § 5-11-3(k) [1998] (defining "[t]he term 'age' . . . [as] the age of forty or above").

[19]*See supra* note 15.

constitutional legal argument is unacceptable for the purpose of review by this Court. "Issues not raised on appeal or merely mentioned in passing are deemed waived." *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998).

C. *Vagueness Challenge*

The Sales additionally contend that the curfew ordinance is unconstitutionally vague[20] because it does not provide adequate notice as to what constitutes an offense and because it contains undefined terms.[21] In the seminal case *of State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974), this Court articulated the standard applicable when a law is challenged as being unconstitutionally vague. We held, in Syllabus point l, that "[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide

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[20]The Sales couch this argument in their brief in terms of a "vagueness and overbreadth" challenge. However, the brief does not articulate an "overbreadth doctrine" argument. In a footnote to their brief, the Sales state that "[v]agueness and overbreadth are related doctrines." While this may be true, the doctrines are independent of each other and require independent analyses. Because the Sales failed to provide a separate legal argument under the overbreadth doctrine, we will not address that issue in this appeal. *See Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. at 140 n.10, 506 S.E.2d at 583 n.10 (refusing to address arguments that were not briefed).

[21]The Sales also assign error to the ordinance's lack of a *mens rea* requirement. In response thereto, the City correctly points out that this issue was not presented to the trial court. Consequently, we will not address this issue for the first time on appeal. *See Shaffer v. Acme Limestone Co., Inc.*, ___ W. Va. ___, ___ n.20, 524 S.E.2d 688, 704 n.20 (1999) ("Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered.").

We also note that the Sales contend under their vagueness challenge that application of the ordinance "invites discriminatory enforcement." This argument is inappropriate and will not be considered because the challenge made to the ordinance by the Sales is a "facial" challenge.

adequate standards for adjudication." *Flinn,* 158 W. Va. 111, 208 S.E.2d 538. In Syllabus point 2 of *Flinn* we stated further "[s]tatutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute." *Id.*

In the case *sub judice*, the Sales argued to the trial court that the ordinance was vague and impinged upon guarantees under the First Amendment of the federal constitution, "because juveniles would not have a clear concept of what activities are encompassed by the [ordinance's] exception and what activities would not be encompassed by the exception."

The curfew ordinance in question contains various exceptions to its application, including one for First Amendment activity being engaged in by juveniles. The circuit court found that the ordinance was not unconstitutionally vague with respect to the First Amendment exception:

> Simply stated, any exception to a curfew ordinance that attempts to protect First Amendment rights is going to be somewhat vague, because the First Amendment is stated in general terms. It is through decisions of the courts that the limits of constitutional freedoms and limits of restrictions on those freedoms is determined. The Court cannot simply declare the ordinance unconstitutional because some, or even all, juveniles who may be affected by it are unaware of all of the limits and restrictions, as determined by court decisions. Stated differently, the fact that the ordinance may be vague because there are some gray areas does not render it unconstitutional in its entirety.

The circuit court supported its reasoning by relying on the decision in *Schleifer by*

Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998), *cert. denied, Schleifer ex rel. Schleifer v. City of Charlottesville*, 526 U.S. 1018, 119 S. Ct. 1252, 143 L. Ed. 2d 349 (1999). *Schleifer* involved a vagueness challenge to an ordinance that had a First Amendment exception "identical" to that provided by the City's ordinance in the instant case. In its rejection of the vagueness challenge, the appellate court in *Schleifer* held:

> We decline to punish the City for its laudable effort to respect the First Amendment. . . . A broad exception from the curfew for such activities fortifies, rather than weakens, First Amendment values. . . . If councils draft an ordinance with exceptions, those exceptions are subject to a vagueness challenge. If they neglect to provide exceptions, then the ordinance is attacked for not adequately protecting First Amendment freedoms. It hardly seems fitting, however, for courts to chastise elected bodies for protecting expressive activity. The Charlottesville ordinance is constitutionally stronger with that protection than without.

Schleifer, 159 F.3d at 853 (internal citation omitted) (footnote omitted).

We agree with the circuit court's reasoning and its reliance on *Schleifer*. The exception in the ordinance complained of states that it is not applicable to juveniles "[e]xercising First Amendment rights protected by the United States Constitution such as the free exercise of religion, freedom of speech, and the right of assembly." Undoubtedly there are gray areas in this exception, as attested to by the legion of judicial opinions in Anglo-American jurisprudence that have addressed First Amendment rights. The circuit court was, therefore, correct in finding that it is only through judicial case-by-case evaluations that the contours of the ordinance's First Amendment exception is to be tested and refined.

The Sales also contend that many of the terms in the ordinance are undefined, and therefore

the ordinance is unconstitutionally vague. Some of the terms complained of include: "errand," "direct route," "establishment," "owner/operator," "public place," and "remain." The circuit court found that many of the terms challenged by the Sales were, in fact, expressly defined by the ordinance. For those terms that were not in fact defined, the circuit court found that the terms were not vague. Upon review of the terms that the ordinance does not define, we agree with the trial court that persons of ordinary intelligence know what the terms mean.

D. Parental Rights Challenge

Lastly, it is argued by appellant Carol Freas (hereinafter referred to as "Dr.Freas"), that the ordinance unconstitutionally infringes upon her right to parental privacy, which includes the right to rear her child without undue governmental influence. It has been recognized "that a parent's right to rear their children without undue governmental interference is a fundamental component of due process[.]" *Qutb v. Strauss*, 11 F.3d 488, 495 (5th Cir. 1993) (citing *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968)). However, it has been equally recognized that: "Not every state restriction of a child's freedom derivatively abridges the fundamental rights of parents. The [United States] Supreme Court has rejected the view that parents possess an unqualified right to raise children that trumps any governmental regulation of their children's conduct." *Schleifer*, 159 F.3d at 852.

The circuit court relied upon the decisions in *Qutb v. Strauss* and *Schleifer v. Charlottesville* to find that the ordinance's intrusion upon Dr.Freas' parental rights were minimal. The circuit court found

> [t]he Charleston ordinance permits a juvenile to be or remain in a public place when accompanied by a parent, guardian or an adult who is 18 years of age, or older, who is authorized by the parent or guardian to take the parent's or guardian's place in accompanying the juvenile for a designated period of time and purpose. In this regard, the Charleston ordinance gives parents or guardians grater authority to permit their children to remain in public than did [the ordinance in *Qutb v. Strauss*], and is virtually identical to the [ordinance in *Schleifer by Schleifer v. City of Charlottesville*]. Further, when interpreted to eliminate the police chief's unbridled discretion to issue permits allowing juveniles to be in public places during curfew hours, and to allow parents or guardians to determine when reasonable necessity exists for juveniles in their care to be in public places during curfew hours, the ordinance does not interfere with parental rights.

We agree with the finding of the circuit court and the decisions in *Qutb* and *Schleifer* that, while the ordinance does impact on Dr. Freas' parental rights, the impact is too minimal to constitute an unconstitutional infringement upon such rights.[22]

[22]The Sales raise as a final issue that the ordinance violates the constitutional prohibition against unreasonable searches and seizures. However, this assigned error is terse and lacks any authority to support it. We, therefore, agree with the City that "the Appellants' 'argument' in support of this assignment of error is not much larger than a footnote, and should be deemed waived." *See Tiernan v. Charleston Area Med. Ctr., Inc*., 203 W. Va. at 140 n.10, 506 S.E.2d at 583 n.10 (refusing to address arguments that were not briefed).

IV.

CONCLUSION

In view of the foregoing, the judgment of the Circuit Court of Kanawha County is affirmed.

Affirmed.