In the

Supreme Court of the United States

LEWIS COLTEN,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

No. 71-404

Washington, D. C.
April 17, 1972

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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COMMONWEALTH OF KENTUCKY,

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Monday, April 17, 1972.

The above-entitled matter came on for argument at 11:01 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALVIN L. GOLDMAN, ESQ., 1692 Williamsburg Road, Lexington, Kentucky 40504; for the Appellant.

ROBERT W. WILLMOTT, JR., Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601; for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-404, Colten against Kentucky.

Mr. Goldman, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALVIN L. GOLDMAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GOLDMAN: Thank you.

Mr. Chief Justice, and may it please the Court:

The appellant in this case, Lewis Colten, was convincted under the Kentucky Disorderly Conduct Statute, Kentuekcy Revised Statutes 437.016. He was convicted under provision (f) of that statute, which can be found on page 2 of the brief.

The provision under which he was convicted would read as follows: "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

"Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

Two issues are presented in this case with respect to that provision. One, whether the Kentucky Court of Appeals' construction of that provision has rendered it unconstitutional under the Fourteenth Amendment. The other, whether the application of that statute to the facts in this case is

unconstitutional under the Fourteenth Amendment.

The proceeding under which Mr. Colten was convicted, under which he was convicted in the judgment from which this appeal is being taken, involves a two-step trial procedure. In Kentucky, misdemeanors carrying potential penalty of up to 12 months imprisonment, and up to $500 fine, can be tried in an inferior criminal court, as was Mr. Colten tried in an inferior criminal court in this situation, the Quarterly Court of Fayette County.

The only way an appeal can be taken from that inferior court is by filing for a trial de novo in the court of General jurisdiction, the Circuit Court.

This is what Mr. Colten did in order to bring his constitutional challenges, when he was convicted in the inferior court.

When he was tried the second time, he was again convicted, but this time the penalty imposed upon him was increased. That aspect of the act raises the third issue presented before this Court.

Q Now, what was the increase?

MR. GOLDMAN: In his case it was a five-fold increase in a monetary penalty, an increase from a $10 fine to a $50 fine. Another case pending before this Court on a petition for certiorari, the case is Bell vs. Commonwealth, No. 70-5304, involves a much more dramatic increase in penalty.

In that case, the man had been fined in Quarterly Court one dollar plus costs, costs being a statutory requirement in Kentucky. When he was retried in the Circuit Court, he received a penalty of a $500 fine and five months and 28 days imprisonment. That case also was brought under this Disorderly Conduct Statute.

Q Mr. Goldman, it may be of no significance: are the inferior court magistrates lawyers or laymen in Kentucky?

MR. GOLDMAN: In the particular court in which Mr. Colten and Mr. Bell were tried, the Court Commissioner is a lawyer. The situation with respect to the Quarterly Courts is that they are adjuncts of the County Court. The County Court is, for the most part, an administrative position. The County Judge is, in essence, the county administrator in Kentucky.

The vast majority of County Judges in Kentucky are not lawyers. In the case of Fayette County, he happens to be a lawyer; and in the case of Fayette County, the Quarterly Court Commissioner, who is appointed, is a lawyer. It is my understanding, though, that frequently the County Judges who are not lawyers try these cases themselves, and that where Commissioners are appointed, sometimes they are not lawyers.

Q Is Fayette County where Lexington is?

MR. GOLDMAN: Fayette County is the county in which Lexington is situated.

Q Are transcripts kept of these lower court trials?

MR. GOLDMAN: No, they are not. There is no provision for transcript. My conversations on that matter with the prosecuting attorney in Fayette County is that the defendant can secure a transcript by bringing his own court reporter, and then it's a matter of the court reporter's certification being acceptable to any court which is later to review the matter.

I would point out on that account that the appeal from the Quarterly Court is automatic -- strike that -- is not automatic, but is a matter of right. One does not have to apply for permission to appeal; one does not have to show grounds for appeal. One can appeal as a matter of right.

And I think that probably the reason for the rule being that way is a recognition that the nature of the Quarterly Court proceeding is such, the nature of the structure of the Quarterly Court is such that it is readily presumed that errors can and are frequently committed with respect to constitutional rights and even statutory rights; and, indeed, in the opinion of the Court of Appeals below, the court recognized specifically that the nature of these inferior court trials are such that all of the constitutional rights of a defendant are normally not protected.

Q Mr. Goldman, I gather from either the respondent's contention or yours that one can even plead guilty in the

Quarterly Court, and then appeal to the court of general jurisdiction on a trial de novo; is that correct?

MR. GOLDMAN: That is correct, Mr. Justice Rehnquist. The rule, the rule of the court does permit that.

I would point out, though, that to say to a defendant, "all you have to do is plead guilty" is to say to a defendant, "all you have to do is waive your Fifth Amendment rights." That there are decisions from this Court, I believe, with respect to the plea bargaining cases, suggesting that it is not proper for a court to accept a plea of guilty unless the court is satisfied that indeed the defendant is meaningfully and admitting his guilt, that where the defendant feels that he is not guilty, it is improper for a court to impose any form of pressure on the defendant to come before a court and falsely swear, falsely say in open court, "I am guilty."

Q But in this case, your client did not plead guilty in the Quarterly Court, did he?

MR. GOLDMAN: No, Your Honor, he did not.

Q He pleaded not guilty. Did he have a lawyer?

MR. GOLDMAN: He had a lawyer.

Q At the Quarterly Court?

MR. GOLDMAN: He had a lawyer at the Quarterly Court --

Q Was he a college student?

MR. GOLDMAN: Yes, Mr. Justice Stewart, he was a

college student.

Q Locally, there in Lexington?

MR. GOLDMAN: Locally, at the University of Kentucky. And counsel was provided for him, voluntary counsel through the American Civil Liberties Union.

Q Did the same witnesses testify at both trials?

MR. GOLDMAN: My understanding is that there were fewer witnesses at Quarterly Court. I was counsel in the trial de novo at Circuit Court. But there was one witness, it's my understanding, who -- my recollection, my co-counsel telling me -- that appeared at the Quarterly Court that did not appear. The police officer who testified at the Quarterly Court who did not testify at the Circuit Court. We did not choose to call that witness in the Circuit Court.

Q How long did it take you to try the case in the Circuit Court?

MR. GOLDMAN: The equivalent of approximately one day.

Q How long did it take in Quarterly Court? In this case.

MR. GOLDMAN: I don't think I can answer that question, with sufficient confidence. I have sat in on many Quarterly Court trials. I was present at the trial of Mr. Bell's case in Quarterly Court, the matter that's on petition of certiorari. That case took all of about ten minutes. Most trials in Quarterly Court run somewhere between 10 and 20

minutes.

Q Can you get a jury in Quarterly Court?

MR. GOLDMAN: You can. The Kentucky Constitution provides for a six-member jury. The jury is paid by the losing party. It's my understanding that in criminal proceedings, therefore, where the defendant is found guilty, the jury costs are appended to the other costs charged to him. And, for that reason, it's my understanding, that when one seeks a jury trial in the Quarterly Court, that person has to post a bond or some other form of security for the payment of the jury fee, which works out to be, I believe thirty dollars.

Q Your client didn't ask for a jury trial in the Quarterly Court?

MR. GOLDMAN: No, Your Honor, he did not ask for a jury trial. And the reason for that is that my client is a young man, who at that time had quite long hair, a rather long moustache, and as the trial judge in the Circuit Court remarked, in words or effect, "he dresses in the sort of way that's different from the general way in which we are used to seeing people dressed."

The nature of the typical juror's attitude in Fayette County is such that counsel felt that we could get a fairer trial from the court in this situation than from a jury.

Q And he didn't ask for a jury trial in the court of general jurisdiction?

MR. GOLDMAN: No. I might point out that the way the procedure is set up, when you go to Quarterly Court you have to affirmatively request a jury trial; in Circuit Court, the jury trial is the norm, and one specifically waives. In fact, there are a number of situations, including the Bell case, this companion case, in which the Court will reject the waiver of jury trial. Bell was tried by just the judge in Quarterly Court; he was tried by a jury because the court and prosecutor both insisted on a jury trial when it came for the trial de novo.

Q Did the Bell case arise from this -- from events occurring on the same day of Mrs. Nixon's visit to --

MR. GOLDMAN: No, Mr. Justice Stewart, the Bell case arose about 60 days later, as a result -- in relation to a campus demonstration connected with the Cambodian incidents. And --

Q At the University of Kentucky?

MR. GOLDMAN: It was at the University of Kentucky. It involved a crowd of students being dispersed by the State Police. Some of the same police officers were involved in the -- no, strike that. No. Bell was arrested when a curfew was imposed on the campus. And a group approached the State Police and said they wanted to go on their campus. And, in effect, submitted themselves to arrest as a form of protest against what they thought to be, what they contend in court to

be an unlawfully imposed curfew.

Q Well, we needn't go further into the Bell case. In any event, it didn't arise from anything related to these events, on the occasion of --

MR. GOLDMAN: No, it did not.

Q -- Mrs. Nixon's visit?

MR. GOLDMAN: No, it did not.

Q I see.

MR. GOLDMAN: Now, --

Q Mr. Goldman, in Kentucky, may a jury in the Circuit Court determine the sentence as well as guilt?

MR. GOLDMAN: The jury does determine the sentence as well as guilt in Kentucky.

Q Within the statutory limits?

MR. GOLDMAN: Within the statutory limits. The only control that the court has on the sentence, when there's a jury trial, is through the probationary proceeding.

In the Bell case, because the matter is still being litigated, the court has not reached the point of having the probationary issue addressed to it.

The facts out of which, surrounding the arrest of Mr. Colten are, I think, of some considerable significance. In the background we have initially a meeting of Mr. Colten and the officer who eventually took him into custody, Trooper Harlowe. At the airport terminal area, shortly before Mrs.

Nixon's plane departed.

At that time Officer Harlowe testified that Mr. Colten came up to him and said to him, "We're going to have a party out here." And Officer Harlowe replied, in effect, "Not over here you're not."

He said they then went off and conducted a scene somewhere nearby.

In this connection, he testified on cross-examination to the effect that he was offended by Mr. Colten's appearance, that, in substance, words of substance, he testified to the effect that he "thinks it's quite improper for a group of people looking like Colten looks to be hanging around an airport entrance where", in his words, "an awfully lot of important people are going in and out."

He did not make any arrest at that time.

Shortly thereafter, a group, the group that was at the airport, was departing along the access road. One of those departing was driving an automobile with an out-of-State license plate that had expired. Trooper Miller pulled the car that was driving with the out-of-State license off to the side of the road, pulled completely off to the side of the access road. Trooper Miller pulled in behind that car, and Mr. Colten, who knew the driver of the car that was pulled over, pulled over behind the Trooper's car.

He got out of the car. He learned that the car that

had been pulled over was to be towed away. There were a total of five passengers in that car. Mr. Colten had some room in his own automobile, and at least one of the police officers confirmed the testimony of the defense witnesses that Mr. Colten said, when told to leave by police officers, that he wanted to give a ride back to Lexington to these people.

The officer who apprehended Mr. Colten admitted that Mr. Colten indeed may have said that.

In any event, some other cars pulled over to the side, and there was a number of people, variously estimated from about 12 to 18, throughout the area where the cars were pulled over. One officer testified that there was, at one point at least, 15 persons in the access road.

The captain who was in charge of the detail out at the airport pulled up in the access road, blocking that road, got out of his vehicle, and told these people to leave: "Get in your cars and leave".

Other police officers stopped and similarly got out of their cars, went over to the crowd and said, "Leave; get in your cars and leave. You have no business here."

Q Does the evidence show that, except for the police officers, most of the members of the crowd or group were the same people that had the whooping and hollering party out at the airport?

MR. GOLDMAN: No. The evidence only shows that they

were people who were out at the airport. One of the individuals who testified for the defense, for example, had not known Mr. Colten until he accepted an offer of a ride in Mr. Colten's car, riding back to Lexington.

So it would appear that at least some of the people who pulled off to the side, who were there at the side, had nothing to do with --

Q It was not a regathering of the same group?

MR. GOLDMAN: No, it was not, Your Honor. There is -- at least the record does not indicate clearly one way or the other if anything in the --

Q How about Mr. Mendez? Had he been a member of the group?

MR. GOLDMAN: It's not clear in the record. Mr. Mendez and Mr. Colten knew each other, but where Mr. Mendez was is not revealed in the record.

Q They just knew each other.

MR. GOLDMAN: Now, at a point at which Mr. Colten was clearly off of the road, on the shoulder, Officer Harlowe came up to Mr. Colten and told him to leave. Colten, according to Officer Harlowe, said, "I want to stay around and see what happens."

On the constitutional issues, I think we're perfectly willing to argue the case strictly in terms of Mr. Colten having said nothing more than "I want to stand around and see what's

happening."

Officer Harlowe told Mr. Colten to leave several times, and then grabbed Mr. Colten and started to lead him toward the road.

At that point a group of other police officers came over, and the record is fairly clear that Mr. Colten was at that point roughed up.

I point that out, not in any effort to win any sympathy for Mr. Colten; after all, if he has any course for complaint about that, he has a civil action. But I think it is of significance in this case, because one of our contentions is that the interpretative gloss placed upon the statute by the Kentucky Court of Appeals renders it excessively vague and overbroad.

And this Court has frequently pointed out that one of the deficiencies, constitutional deficiencies of penal statutes, which are excessively broad and over-vague [sic], is that they provide an invitation to abuse by law enforcement authorities. And I think there is good evidence to suggest that in fact that is what happened here; that when we look at the situation realistically, what we have here is a group of people who cause these police officers to have a long, hard day of duty.

This was a group that, as the record showed, had been following Mrs. Nixon around. They were clearly not sympathetic

to Mrs. Nixon's presence. The police officers had just finished a long, hard day of duty. There is some indication in the record, the trial court gave some recognition that these police officers may not have felt too kindly to these individuals.

Q Who had been following Mrs. Nixon around? The police officers or --

MR. GOLDMAN: Well, both the police officers and these individuals who had been out at the airport.

Mrs. Nixon had a tour of the Lexington area, and this group had been going from place to place demonstrating in favor of their -- a gubernatorial candidate. The gubernatorial candidate being, in effect, a protest candidate; and they explained that the reason they were demonstrating for the gubernatorial candidate was to overtly ignore Mrs. Nixon's presence.

Now, the police officers, after this long, hard day, are confronted with a situation in which a fellow officer is issuing a citation, a group of these people are standing around, and they come over and do what, I think our experience tells us, is a normal police practice. That doesn't necessarily mean it's a constitutionally valid police practice.

They come up to the crowd. They don't say, "Get off the road"; they don't say, "Give the officer some clearance". The particular officer who was issuing the citation

did not complain about Mr. Colten to the captain, who came over to him to ask what was going on; he did not seek to arrest Mr. Colten, he did not ask anyone to arrest Mr. Colten. He, in fact, issued his citation without any serious problem.

Q Well, I thought he had to go back into Mendez's car in order to do it?

MR. GOLDMAN: He testified that he went back to his own patrol car, closed the window and proceeded to issue the citation.

Q I get it.

MR. GOLDMAN: There was some suggestion made by him that he had to do this because of Mr. Colten. Nevertheless, when his own captain came to him, after he went to his patrol car, and asked him what was going on, the captain's testimony shows nothing, nor does Trooper Miller's testimony show anything to the effect that Trooper Miller said "That man is interfering with me; I'm have a problem issuing the citation."

The fact is that Mr. Colten was convicted, not for interfering with the police officer, he was convicted for failure to disperse upon the, quote, "lawful", unquote, order of the police.

So we have a situation in which the police say "disperse", and this individual declined to disperse. He is thereupon arrested. I think that in most respects this case is really very close to recent decisions of this Court in

cases such as Papachriston and, I believe it's the Gooding case. The basic question is: What's the quality of life under our Constitution? To what extent is the presumption, under our Constitution, a presumption of lawfulness? To what extent is the presumption, under our Constitution, an authoritarian presumption? Does the citizen have to jump because a police officer addresses him and says "leave"?

Or is the burden upon the police and the prosecutor to show that: No, you were ordered to leave because there was a compelling need to order you to leave.

In this situation, I don't think the evidence shows any such compelling need to leave.

Q Haven't the courts sometimes said there is a constitutional right to privacy, the right to be let alone, the right not to be harassed?

MR. GOLDMAN: Yes. When there is such a constitutional right to be balanced against the constitutional rights of assembly and expression. Those rights have to be balanced. A police officer performing his duties, though, Mr. Chief Justice, I do not think has a claim to a right of privacy.

Q I wasn't thinking of the police officer, I was thinking about what you called overtly ignoring someone by following them around all day.

MR. GOLDMAN: Well, Mrs. Nixon -- the following of Mrs. Nixon --

Q Does it make a difference who it is?

MR. GOLDMAN: I think it does, Your Honor; I think it makes a difference what that individual is doing. Mrs. Nixon was engaged in a public event. And I think that demonstration, though it was not involved in the facts giving rise to this arrest, the arrest in no way had to do with the fact that they were following Mrs. Nixon. At least not directly. That was not the purported cause justifying the arrest.

But certainly that demonstration is an exercise, I think, in the most important sense of the freedom of expression.

If it please the Court, we would like to reserve whatever time we have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Goldman.

Mr. Willmott.

ORAL ARGUMENT OF ROBERT W. WILLMOTT, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. WILLMOTT: Mr. Chief Justice, and may it please the Court:

I think in this case that we need to go back to the facts. On this day, Trooper Miller, the trooper who stopped the Mendez car, his chief duties were to keep the access road to the airport free and clear of traffic, and to keep traffic moving on it.

Q He was a State Police officer or County or City?

MR. WILLMOTT: State Police. All the officers

involved in the --

Q Kentucky State Highway Patrol?

MR. WILLMOTT: Yes, sir; Kentucky State Police.

His commanding officer, Captain Mayes, testified that he gave verbal instructions as to the security, the traffic flow, not to let anybody stop on the road; I think this is normal precautions when you have a dignitary visiting.

And Trooper Miller pulled Mendez's car over solely because it had expired license plates. There was no cause for Colten to stop, but he did. He got out of his car, he proceeded up and asked Trooper Miller why he had stopped the Mendez car. Trooper Miller explained to him why he had done this, that the license plate was expired; then asked him to please leave as it was none of his concern.

Colten's reply was: "Well, I want to stay around to see what's going to happen." And he keeps badgering, in Trooper Miller's words, he became obnoxious to the point that Trooper Miller had to return to his cruiser in order to fill out the ticket.

Captain Mayes was in the next car to stop, the next police car to stop; he came up and tapped on Trooper Miller's car and asked him what the problem was, and did he have these people stopped? And Trooper Miller replied, "No, I've asked them to leave; I don't have them stopped."

And Captain Mayes said, "Well, I just wanted to

check"; and then he proceeded, along with, I believe it was Lieutenant Moberly who was in his car, proceeded to get out and express general directions to the crowd to please disperse, to leave.

And he testified that he saw appellant in the crowd, that he addressed these comments to. By this time there were some six to ten cars, which Colten himself testified were part of the procession, that had gone to the airport together and were leaving together; and people were getting out of their cars. They were standing in the roadway. The police cars were forced to park on the roadway. And I think that the access road, it must be understood, it is only a two-lane road, it is not very wide. There are fences on either side of it.

There was testimony that there were "No Parking" signs on the other side of the road. Now, today, there are "No Parking" signs on both sides of the road.

Q Does the record show the width of the road and the width of the shoulders?

MR. WILLMOTT: I think that the gravel portion of the shoulder was estimated at two feet. I don't think there's an actual width estimated; it's about 18 to 20 feet wide.

Q Was there a fence beside the shoulder where these cars were parked?

MR. WILLMOTT: Yes, Your Honor, there were,

immediately to the right. Colten testified that Trooper Harlowe, when he grabbed him by the arm, pushed him up against the fence.

Q Yes.

MR. WILLMOTT: So it's not more than, I would say, eight to ten feet from the shoulder to the fence.

Q From the edge of the blacktop to the fence, or from the edge of the shoulder to the fence? Or does the record show?

MR. WILLMOTT: I don't think the record shows a distance, a firm distance. The only thing I can give is an approximation from my own recollection.

Q Well, I understand that when the car was pulled off the road -- right?

MR. WILLMOTT: Yes, Your Honor.

Q And the State Trooper was behind him?

MR. WILLMOTT: Off the road.

Q And did the other cars come behind the State Trooper?

MR. WILLMOTT: Well, there's testimony --

Q Where was Colten's car?

MR. WILLMOTT: Pardon me?

Q Where was Colten's car?

MR. WILLMOTT: Colten stopped his car off the road behind Trooper Miller's car. Then Captain Mayes pulled his car

up on the surface, almost abreast with Trooper Miller's, the back of Trooper Miller's --

Q Well, my whole point was, at the time that the Captain came up, who was in the road?

MR. WILLMOTT: Colten was standing in the roadway, talking to Trooper Miller -- no, he was up by Mendez's car, and there was disputed testimony as to which --

Q Well, he wasn't blocking the road,was he?

MR. WILLMOTT: There is disputed testimony. His testimony is that he was standing by the right front fender, and the officer testified that he was variously in the road and off the road and walking around the cars.

Q Well, if it's a two-lane road, it's pretty hard for one person to block it, isn't it?

MR. WILLMOTT: Your Honor, by this time there were about six to ten cars with --

Q Well, where were those cars? That's what I was trying to get to.

MR. WILLMOTT: Well, they parked off the shoulder, in front of Mendez's car, and behind the police cars that stopped. Three more police cars were --

Q But they weren't in the roadway?

MR. WILLMOTT: No, Your Honor. The police cars --

Q What was blocking the roadway?

MR. WILLMOTT: The police cars were in the roadway.

Q And that's all that was blocking it?

MR. WILLMOTT: That and the crowd was in the roadway.

Q Crowd? How many people? I thought you said six or seven people.

MR. WILLMOTT: Well, it was 15, approximately 12 to 15 to 18 people.

Q And they were scattered all over the road?

MR. WILLMOTT: The testimony, depending on which side you look at it, puts them in the roadway or on the right side of the cars, some of them still in the cars.

Q But the Captain didn't find any fault with them until he asked the Lieutenant what was going on?

MR. WILLMOTT: Well, the --

Q And the Lieutenant told him, "That man there is what my trouble is"? And then he got arrested. Am I right?

MR. WILLMOTT: No. No, Your Honor. Because --

Q What was --

MR. WILLMOTT: -- Trooper Miller had his light flashing. He had a person sitting in the car. There was a car in front of him, a car in back of him. Captain Mayes got out of his car and asked him, "What's going on?" He said, "I've got this car stopped for a traffic violation,"and Captain Mayes said, "Are these people needed, or are they important, or what were these other people doing?"

And Trooper Miller said, "I don't know; I've asked

them to leave. I don't have them stopped." And by this time more people were getting out of their cars and Captain Mayes proceeded to attempt to clear the roadway.

Q Then how did Colten get arrested?

MR. WILLMOTT: Well, after Captain Mayes told the crowd some four or five times to please leave, Trooper Brown got out -- Trooper Brown was the third State Policeman in line,he got out and asked Colten two times to leave, and he kept telling him, "I'm going to stay around and see what happens."

And finally Trooper Harlowe came up to Colten and said, "Are you going to leave?" And he said, "Yes, I'm going to leave, but I want to see what happens first."

And then he grabbed him by the arm and says, "Now, are you going to leave?" He said, "Yes, but I want to see what happens first." And then he arrested him for --

Q Where did he grab him -- why did he grab him by the arm?

MR. WILLMOTT: I don't personally know why he grabbed him by the arm.

Q Did he deny that he slammed him up against the fence?

MR. WILLMOTT: I don't think he denied it.

Q Well, why did he have to hit him?

MR. WILLMOTT: I don't know that he hit him, Your

Honor. I think he grabbed him by his arm and was walking towards the fence, like; and I think that's why they went up against the fence. Maybe Colten was backing away from him. I don't --

Q Well, whether or not Colten was mistreated that day by the police has no bearing on the issues in this case?

MR. WILLMOTT: No, Your Honor.

Q That is, after the arrest.

MR. WILLMOTT: And I think that in this case we've got to apply the standards of vagueness and overbreadth to the actual facts. And appellant has made much of the fact that he feels his speech, freedom of speech, and freedom of assembly were stifled. I don't think there is any standing for him to allege that. I don't think that he has any freedom of assembly, freedom of speech in this case. The police were merely trying to clear the roadway. They were not persecuting appellant. He's raised much, all the way up here, about his appearance,and the fact that the police may have been down on him.

But I think that the exact opposite can be assumed from this record, by virtue of the fact that they told him ten times to please leave.

Now, it seems absurd that he didn't understand them, that he didn't realize that they were asking him to leave.

And several of the police officers testified that they asked him please to leave.

And he even states on his direct examination that "I know better than to interfere with a police officer in whatever he was doing so I hadn't said a word to the police officer."

Now, this is in contrast with the testimony of Trooper Miller, who said that: Colten comes up and is asking why he stopped the car. He's asked to leave.

Now, the statute, on its face, can be divided into three parts: the first part is, Was there an intent to cause a public inconvenience, annoyance, or alarm, or recklessly create a risk thereof?

Now, I don't think that there is any great alarm here, any great annoyance, no tremendous inconvenience. But the fact that Mrs. Nixon was at the airport, where we assume that there was a fairly substantial crowd or well-wishers wishing Mrs. Nixon a happy trip back, and that they were leaving the airport at this time.

Now, when you take six cars and pull them off on the shoulder, and three police cars in the roadway, so that only one lane is open, you've severely congested the traffic.

Now, the main objective of the police was that they wanted to break it up. They weren't trying to arrest anybody. They weren't looking to bust anybody. They just wanted to get

the traffic moving.

And I think the intent is clear, by Colten's stopping, by his continual refusal to leave.

Now, the second part of the statute is: did he congregate with others in a public place?

I think there's ample testimony in the record that the crowd was estimated from 12 to approximately 18 people, that they were standing in the roadway, that --

Q Did that 12 to 18 people include the policemen?

MR. WILLMOTT: No, Your Honor. There was testimony, I believe, of from 5 to 9 different policemen; there were four State -- five State Troopers there; four of them testified at the Circuit Court trial.

Q How many cars does the record show had pulled up to stop on the shoulder of the road?

MR. WILLMOTT: The defense -- or the civilian cars were estimated between 6 and 10. And there were three State Police vehicles. And there has to have been a County Police vehicle, because it was a County Police paddy wagon which they put him in. Now, that one came up later.

So there were approximately nine or ten vehicles there, with three of them being State Police cars.

And a public place is -- a highway is a public place; any place that the public travels on is defined as a public place.

And, finally, you have to look and see, did he violate a lawful order of the police to disperse. Now, the order of the police must be lawful. And I submit that in this case, the fact that they were trying to clear the road of traffic to provide a free-moving flow of traffic, just by necessity made this a lawful order. That the police have autonomous control of traffic. That's one of their primary responsibilities, is regulation and enforcement of --

Q Well, do you think arguing the Pearce point would increase the sentence?

MR. WILLMOTT: Yes, Your Honor.

Q Well, before you leave the facts, was this road, which at that time was being used for access to the airport by people who wanted to get there, or was it only used to people leaving the airport?

MR. WILLMOTT: It serves both. It is an entrance and exit from the airport. And other than a road that winds through a park, going out the back way, it's the only entrance to the Lexington Bluegrass Airport.

Q Does the record show anything about the volume of traffic in that airport, the frequency of people coming in, trying to catch an airplane?

MR. WILLMOTT: No, Your Honor, there is no testimony to that effect. There is testimony by the officers that the traffic at that time was very heavy, and the defense

testified that there was no traffic on the road at that time.

Finally, in the third part of the statute, I think it's clear that Colten refused to disperse after being so asked.

Now, this statute, Kentucky Disorderly Conduct Statute, is very similar to the statute in the Shuttleworth case. There the regulation had to do with regulating flow on the sidewalk. But the wording is essentially the same. And in that case the Alabama Supreme Court interpreted the Alabama Statute so as to make it constitutional. And I think in this case the Kentucky Legislature enacted this Disorderly Conduct Statute based on a statute similar to the Shuttleworth case, so as to make it constitutional.

Q But there's nothing in this record to show where Colten was standing when he was arrested. Is there?

MR. WILLMOTT: Yes, Your Honor. When he was physically placed under arrest, he was on the right side of the cars that had pulled off the road.

Q He wasn't on -- well, how did he get to the fence?

MR. WILLMOTT: Your Honor, he wandered all over.

Q I'm talking about when he was told to move and disperse --

MR. WILLMOTT: By which officer, Your Honor? He was told by four different officers.

Q The officer who arrested him for --

MR. WILLMOTT: He was told --

Q -- disobeying his order.

Q He was told several times to move, wasn't he?

MR. WILLMOTT: Ten times.

Q Right.

MR. WILLMOTT: At least ten times.

Q Well, I'm interested in the officer who arrested him for disobeying his order to move from what place?

MR. WILLMOTT: I believe the record will show that he was standing at the right rear fender of the Mendez vehicle.

Q Was that on or off the road?

MR. WILLMOTT: The Mendez vehicle was off the road.

Q Well, where was he? Off the road?

MR. WILLMOTT: He was standing by the right rear fender of the car. The car was off the road.

Q So he was off the road?

MR. WILLMOTT: Yes, Your Honor.

Q So he wasn't blocking traffic?

MR. WILLMOTT: No, sir, he was not out in the street. At that -- at the time Trooper Harlowe arrested him.

Q And he was arrested for not dispersing?

MR. WILLMOTT: Yes, Your Honor.

Q When he was convicted, of course, the judge said specifically he was convicting him for refusing to comply

with the lawful order to disperse.

MR. WILLMOTT: Yes, Your Honor.

Q I take it, under Kentucky law, a refusal to disperse following any of those instructions would have supported a conviction?

MR. WILLMOTT: I think it would, Your Honor.

In regard to the increase in punishment from the Fayette Quarterly Court to the Fayette Circuit Court, I think that the Pearce decision, as set forth in the opinion, applies to retrials in a case where a man secures a reversal and there were errors committed at the trial; his appeal is from errors.

Now, the spirit of Pearce seems to be that a person should not be in fear of following an appeal. Now, I think that the trial de novo system should not be governed by that. Because here there are no errors to appeal from, the judgment, the sentence, the plea, the evidence, nothing that was introduced at the Quarterly Court --

Q Is there a transcript of proceedings in the Quarterly Court here?

MR. WILLMOTT: No, Your Honor.

Q Just the transcript above?

MR. WILLMOTT: Just from the Circuit Court.

Q So you don't know whether the evidence was the same at both trials?

MR. WILLMOTT: I think it was more thorough in the

Circuit Court. I think there were more witnesses. Other than the fact that I think one of --

Q Then, ordinarily, I take it, the Quarterly Court proceedings are not transcribed?

MR. WILLMOTT: No, Your Honor. You must bring your own stenographer in if you wish a transcript.

Q And I suppose with a $10 fine, not very many people do that?

MR. WILLMOTT: No, Your Honor.

Q That was the fine here, $10?

MR. WILLMOTT: Ten dollars in the Quarterly Court. Yes.

There's nothing used in the Circuit Court --

Q May I just ask one more question? I take it that the Circuit Court -- is that your upper court?

MR. WILLMOTT: Yes, Your Honor.

Q I take it the Court knew -- this was a trial without a jury, was it? The Court knew that the sentence imposed in the Quarterly Court was $10, did they not?

MR. WILLMOTT: I am sure they did. Yes. Mrs. Wilson, in her closing argument, mentioned the $10 fine in the lower court. So whether he knew it from any other source or not, I am sure he got it from that.

Q He didn't say why he chose to impose a $50 rather than a $10 fine, did he?

MR. WILLMOTT: No, Your Honor. There is no explanation of why he increased it from $10 to $50.

Q Now, where Pearce applies, before you can do that, you do have to -- the judge does have to say why he's done it, and within the limits of the circumstances under which he may make the increase.

MR. WILLMOTT: And I think that is to show that there is a lack of any vindictiveness or that he is applying a penalty for the accused that --

Q Why don't you think that same requirement should apply in these cases?

MR. WILLMOTT: Because I think this is a whole new ballgame. As I say, in Kentucky, a man could walk in and plead guilty and say, "Your Honor, I'm sorry, I didn't mean to do that", and --

Q Or just plead guilty without saying even that, and yet get a trial de novo?

MR. WILLMOTT: Right. And he could, you know, offer mitigating circumstances and receive a suspended sentence. And to require the Circuit Court to try a man later on the same case on a not guilty plea, and be unable to impose any punishment whatsoever, defeats the whole purpose of a trial de novo system.

Q Well, what's the maximum that could have been imposed?

MR. WILLMOTT: Six months and $500.

Q And that's what happened in this other case that was mentioned?

MR. WILLMOTT: You mean the Bell case. I'm not familiar with that other than I've seen the brief in the case.

Q But he could have had a jury trial in any court if he had asked?

MR. WILLMOTT: If he had wanted it.

Q Then I suppose that Kentucky would have been obligated to give him one?

MR. WILLMOTT: In the Circuit Court, they would --

Q I mean in the judicial sense.

MR. WILLMOTT: The Circuit Court would have been bound by the Constitution to give him a jury trial.

Q You say it's a constitutional obligation?

MR. WILLMOTT: Yes, expressly by the state Constitution and statute.

Q They cannot waive the jury except at the consent of all parties, isn't that it?

MR. WILLMOTT: Right.

Q And the judge.

MR. WILLMOTT: It must be expressly waived in the Circuit Court.

But the purpose of the Quarterly Court is to serve as a court of convenience. That's where any traffic tickets

are paid, any misdemeanors. It's -- I would say that 85 percent of the cases are guilty pleas, which Brother Goldman said were disposed of in five minutes, ten minutes, if that long. The majority of the lower courts are adjuncts of the county court system, and Commissioners or the judges are not lawyers. In Lexington, we are fortunate enough to have a judge [sic;lawyer] as the Commissioner of the Quarterly Court.

But they just merely provide an outlet for speedy administration of justice. Now, if a person wishes a full-blown trial, he can either go through a short trial in Quarterly Court, or he may plead guilty and then just walk out the door and around the corner and file for his trial de novo in the Circuit Clerk's office.

I think that approximately half the States employ a trial de novo system. Some are tending to lean away from it, some are adhering to it. And I think that to hold that the trial de novo system is under the guidelines of North Carolina vs. Pearce would severely hamper this system.

Q And yet some States do so provide, provide that a more severe sentence cannot be imposed upon a new trial.

MR. WILLMOTT: Yes, Your Honor, there are.

Q And told us in a case argued earlier this term that it does not hamper their system. Those are referred to in the petitioner's brief, that's the reason I called them to your attention.

MR. WILLMOTT: But I think that in a trial de novo system that it is essential that the State and the accused start out at parity. That you're hamstringing the prosecution if there is a very low fine, or a suspended sentence, or a probated sentence. The prosecutor is not going to want to try a case where even a jury cannot impose any punishment. And this is either going to force the Quarterly Court out of existence, except to hear maybe guilty pleas, or it's going to result in the Quarterly Court handing down maximum sentences.

Q What if the courts would take it that Pearce wouldn't apply to petty offenses?

MR. WILLMOTT: I think that could be a distinguishing characteristic.

Q What would that do in Kentucky? Is the Quarterly Court involved with serious crimes?

MR. WILLMOTT: No, Your Honor. They sometimes may act as an examining trial or preliminary hearing.

Q Well, are they limited where they may impose punishment to ordinances or statutes which limit it to six months?

MR. WILLMOTT: I think they are limited to below 12 months.

Q Or 12. Well, that's not quite the line we've drawn on petty offenses, is it?

MR. WILLMOTT: No, Your Honor.

Q But under -- I suppose that they deal with a lot of statutes where the penalty is less than six months, the maximum penalty?

MR. WILLMOTT: Yes.

Q And also I suppose that whatever the authorized penalty, is jail often meted out in the Quarterly Court?

MR. WILLMOTT: In my personal experience, no, not in cases like this.

Q Is a jail sentence ever meted out in the Quarterly Court?

MR. WILLMOTT: No, Your Honor. It isn't for first offenders. Now, Brother Goldman will recite again to the Bell case --

Q This particular statute authorized what, a maximum of six months?

MR. WILLMOTT: Six months and $500 fine.

Q And he could have gotten six months?

MR. WILLMOTT: Yes, Your Honor.

Q And you might have said that's all right?

MR. WILLMOTT: Yes, Your Honor.

So, in conclusion, I would say that the appellant has no standing to question the constitutionality of the Disorderly Conduct Statute of Kentucky. He was not engaged in any protective activity. He was disrupting traffic. He was asked to leave by a policeman, by four policemen, ten

times.

They were not picking on him. They just wanted to get the traffic moving.

And also the trial de novo system used in Kentucky is outside the guidelines set down in North Carolina vs. Pearce. And the State and the accused should be started at parity in the trial de novo system.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Willmott.

You have a few minutes left, Mr. Goldman.

REBUTTAL ARGUMENT OF ALVIN L. GOLDMAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GOLDMAN: Thank you, Mr. Chief Justice.

Q Mr. Willmott suggested that if the Pearce doctrine is extended to petty cases or is construed as applying to petty cases that it will have a tendency to have these county courts give the maximum sentence in every case so as to avoid any problem. Do you think that's a possible reaction or not?

MR. GOLDMAN: I think the experience referred to when the Brice? case was argued here indicates to the contrary. If that were to be done, it would be, of course, self-defeating. The purpose of the Quarterly Court is for the convenience of the State, at least as much as, and I think more than, for the convenience of the defendant. And this would only in effect

force people or encourage people to exercise their appeal to the Circuit Court.

I don't think that's very realistic.

Mr. Justice White asked the question, well, what if we limit the Pearce decision to all but petty offenses. In the case of the Quarterly Court, jail is a realistic prospect, particularly in cases of public drunkenness, which is a common sort of case to come before the Quarterly Court; disorderly conduct cases, where it's a second or third offense, a Quarterly Court does mete out jail sentences.

Even if we're dealing with a much more narrow definition of petty offenses, I still would argue that the concept of due process is applicable whenever the government of the Commonwealth of Kentucky or the Government of the United States is acting vis-a-vis the citizenry. We're entitled, no matter how serious the penalty imposed, to a procedure that has inherent fairness. And I think, therefore, that when there is a purported --

Q Not a jury trial?

MR. GOLDMAN: Well, the jury trial in the Quarterly Court is available. We --

Q Well, I know, but is it constitutionally required -- a jury trial, is that constitutionally required under the statute?

MR. GOLDMAN: Had we asked for the jury trial, it

would be.

Q Under the State Constitution?

MR. GOLDMAN: Under the State Constitution.

Q Not Federal?

MR. GOLDMAN: No, I didn't say -- under the State Constitution it would be.

Q But not the Federal?

MR. GOLDMAN: Under the Federal Constitution, I think it would be, too; though this Court has not yet so held, in any of the cases.

Q It's held the opposite, hasn't it?

MR. GOLDMAN: This Court has held the opposite. I would hope some day this Court may reconsider that issue. Particularly in light of the fact that this Court has now held that a 12-man jury is not necessary. I think that puts the burden on the State, which may have influenced part of the decisions, which may cause this Court to rethink that issue.

Now,Mr. Justice Rehnquist asked my opponent whether in all of these orders to leave, under Kentucky law, Mr. Colten could have been convicted for failure to obey; and the question was asked in such a way as to: "he could under Kentucky law, could he not?" And I agree that the way the Kentucky Court of Appeals has construed this statute -- and we find that construction on pages 6a and 7a of the Jurisdictional Statement -- that the way it's construed the

statute, any failure to obey the police officer would subject Mr. Colten to a penalty under the statute, unless Mr. Colten could establish that his predominant intent was to assert a constitutional interest. And even then the Kentucky Court would balance their inconvenience to a police officer or some portion of the public against the asserted constitutional interest.

Q But what about someone who is, at the last minute -- as some of us do -- trying to get to that airport to catch a plane; isn't their right of some importance?

MR. GOLDMAN: Their rights were not hindered in this case --

Q Well, we don't know that --

MR. GOLDMAN: -- by Mr. Colten, Your Honor. I think that if Mr. Colten failed to obey an order as part of the crowd that was blocking the highway, to leave the highway, then he could properly be convicted. But Mr. Colten left the highway, he's been at the edge of the highway, and he -- there was an announcement to leave and he left the highway, he was off of the highway. So that he was not causing the blockage. The blockage was caused by a police patrol car which could have parked on the opposite shoulder.

Now, there's also a suggestion as to whether perhaps there was no parking here. I think the answer is that he was not convicted for failure to obey a no parking law; in fact,

the record, the best the record shows on any no parking requirements is that there may have been signs prohibiting parking on that side of the road prior to the group leaving the airport. That is, earlier in the day there may have been signs on both sides of the road. At the time the group left the airport, any "No Parking" signs, if there were any, were on the opposite side of the road, not where these cars were pulled off the road.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Goldman.

MR. GOLDMAN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Willmott. The case is submitted.

[Whereupon, at 12:00 o'clock, noon, the case was submitted.]

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