



GEORGIA SUPREME COURT DISCUSSES REQUIREMENTS OF ANTI-MASK STATUTE: Part One

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In light of the frequent protests and public demonstrations, law enforcement must be mindful of the constitutional requirements regarding laws that are typically enforced at such events. Part One of this article will discuss the constitutional requirements of Georgia's anti-mask statute as stated by the Supreme Court of Georgia. Part Two of this article will discuss the remaining challenges made by the defendant in the case discussed below.

In 1990, the Supreme Court of Georgia decided the *State v. Miller*ⁱ, in which the court upheld the Georgia anti-mask statute. The court held that there are elements provided in the "Statement of Public Policy" when the statute was enacted, that enable the statute to pass a Constitutional challenge.

In *Miller*, the defendant was arrested for violating OCGA § 16-11-38, the Georgia anti-mask statute, when he appeared in public wearing the traditional regalia of the Ku Klux Klan, which included a mask that covered his face. Miller admitted that he wore the mask, but argued that the statute was unconstitutional because it was vague, overbroad, and violated his freedom of speech and association under the First Amendment and the Georgia Constitution. Ultimately, the Supreme Court of Georgia granted certiorari.

The issues before the Court were as follows:

- (1) Whether the statute, as applied to his case, was unconstitutional because he engaged in protected symbolic speech under the First Amendment and the Georgia Constitution;
- (2) Whether the statute is unconstitutionally vague and overbroad;
- (3) Whether the statute violated his freedom of association under the First Amendment because it prevented him from anonymously proclaiming his message in order to avoid persecution; and
- (4) Whether the statute violated the Equal Protection Clause of the Fourteenth Amendment because it allowed the wearing of masks for holidays, balls, and theatrical productions, and therefore discriminated against the wearing of a mask for political purposes.

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Regarding the statute at issue, OCGA § 16-11-38, the Court examined both the statute and the General Assembly's "Statement of Public Policy" that was issued with the statute when it was enacted. The Court stated

[T]he "Anti-Mask Act," OCGA § 16-11-38 provides as follows:

(a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.

(b) This Code section shall not apply to:

(1) A person wearing a traditional holiday costume on the occasion of the holiday;

(2) A person lawfully engaged in trade or employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade or profession, or sporting activity;

(3) A person using a mask in a theatrical production including use of Mardi Gras celebrations and masquerade balls; or

(4) A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies.

The "Anti-Mask Act" was enacted along with a "Statement of Public Policy," which reflects the General Assembly's awareness of and concern over the dangers to society posed by anonymous vigilante organizations. It reads as follows:

All persons residing in the State are entitled to the equal protection of their lives and property.

The law protects all, not only against actual physical violence, but also against threats and intimidations from any person or group of persons.

The General Assembly cannot permit persons known or unknown, to issue either actual or implied threats, against [260 Ga. 671] other persons in the State.

Persons in this State are and shall continue to be answerable only to the established law as enforced by legally appointed officers. Ga.L.1951, p. 9 § 1, H.B. 12.ⁱⁱ

Issue One: Whether the statute, as applied to his case, was unconstitutional because he engaged in protected symbolic speech under the First Amendment and the Georgia Constitution?

The court then set out to examine the first issue. The Court started by examining the Constitutional principals that apply to this case. The Court stated

Freedom of speech is one of this nation's most treasured rights. "[T]he **First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust and wide-open.'**" *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 1165, 99 L.Ed.2d 333 (1988) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)). **"If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."** *Texas v. Johnson*, 491 U.S. 397, ---, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989). **The First Amendment is a broad umbrella that shelters all political points of view and shields a wide range of avenues for expression, including symbolic speech. The 1983 Constitution of Georgia provides even broader protection.**

However, conduct that may have some communicative element is not therefore immune from governmental regulation. Under the test enunciated in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968), **the government may regulate conduct that may have both speech and "nonspeech" elements if the regulation furthers a substantial governmental interest that is unrelated to the suppression of free expression; and the incidental restriction on First Amendment freedom is no greater than necessary to further the governmental interest.**ⁱⁱⁱ [emphasis added]

Thus, the statute will pass Constitutional muster if it **(1) furthers a substantial governmental interest (2) that is unrelated to suppressing free expression and (3) the restriction is no greater than necessary to further the governmental interest.**

The court then examined the current events at the time the statute was enacted and noted that public disguise was used as an effective tactic to enable persons to commit crimes of violence and intimidation. Particularly, the court stated

We know that "[p]ublic disguise is a particularly effective means of committing crimes of violence and intimidation. From the beginning of time the mask or hood has been the criminal's dress. It conceals evidence, hinders apprehension and calms the criminal's inward cowardly fear." M. Abram & A. Miller, "How to Stop Violence! Intimidation! In Your Community" (August 15, 1949). A nameless, faceless [260 Ga. 672] figure strikes terror in the human heart. But, remove the mask, and the nightmarish form is reduced to its true dimensions. The face betrays not only identity, but also human frailty.^{iv}

The Court noted that, in 1951, when the statue was passed, there was a period of increased harassment, intimidation and violence against minorities that was perpetrated by Klansmen and other "hate organizations." Further, during much of this violence and intimidation, the perpetrators wore

masks, which prevented the victims from being able to identify the suspects. In fact, the sponsor of the anti-mask statute testified before the General Assembly, that the “mask-wearing had helped to create a climate of fear that prevented Georgia citizens from exercising their civil rights.”^v

Thus, the court found that the Georgia anti-mask statute met the first requirement, particularly the statute **furthered a substantial government interest**. Specifically, the Court stated

The statute is intended to protect the citizens of Georgia from intimidation, violence, and actual and implied threats; it is also designed to assist law enforcement in apprehending criminals, and to restore confidence in law enforcement by removing any possible illusion of government complicity with masked vigilantes. The state's interests furthered by the Anti-Mask Act lie at the very heart of the realm of legitimate governmental activity. **Safeguarding the right of the people to exercise their civil rights and to be free from violence and intimidation is not only a compelling interest, it is the General Assembly's affirmative constitutional duty.** Ga. Constitution of 1983, Art. 1, Sec. 1. Para. 7.^{vi} [emphasis added]

The court then moved on to examine the second constitutional requirement: whether the statute was unrelated to suppressing free speech.

Regarding this, the Court stated

[T]hese interests are in no way related to the suppression of constitutionally protected expression. The statute is content-neutral. It proscribes a certain form of menacing conduct without regard to the particular message of the mask-wearer. To the extent that the statute does proscribe the communicative aspect of mask-wearing conduct, its restriction is limited to threats and intimidation, which is not protected expression under the First Amendment. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975); Gooding v. Wilson 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).^{vii} [emphasis added]

Thus, **the statute was content neutral in that it did not restrict constitutionally protected speech.**

The third constitutional requirement is that the statute be no more restrictive than necessary to further the government's interest. The court noted that the statute did not prevent the Klan from appearing in public in the robe, distributing literature to proclaim it's message, carrying a banner or flag, wearing it's insignia, or from soliciting new members. Rather, it only restricted speech that is not constitutionally protected, particularly threats and intimidation. Particularly, the court stated

The law restricts only unprotected expression--the communication of a threat; and regulates only the noncommunicative function of the mask, the concealment of the wearer's identity. In other words, the statute "seeks to proscribe conduct, not free speech, and '... that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct....' Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973)."

State v. Boone, 243 Ga. 416, 419, 254 S.E.2d 367, cert. denied Boone v. Georgia, 444 U.S. 898, 100 S.Ct. 206, 62 L.Ed.2d 133 (1979).^{viii} [emphasis added]

Thus, the statute met the three-part test required to comply with the First Amendment.

Part two of this series will discuss the remaining issues as noted above.

Key points for Georgia law enforcement:

For mask wearing to violate the anti-mask statute (OCGA 16-11-38), the officer must show the following:

The person must be wearing:

- (1) A mask, hood, or device to cover any portion of the face;**
- (2) Such that the person's identity is concealed;**
- (3) The person is on a public way or private property without permission of owner or occupier of the property; and**
- (4) The person is concealing their identity under circumstances that the person knows or should know that mask, hood or cover, causes reasonable apprehension of intimidation, threats or impending violence**

Further the mask is not a violation if it's for employment, sport activity, theatrical production, holidays, and emergencies (such as gas masks).

ⁱ 260 Ga. 669 (398 S.E.2d 547)(1990)

ⁱⁱ Id. at 549

ⁱⁱⁱ Id. at 549-550

^{iv} Id. at 550

^v Id.

^{vi} Id. at 550-551

^{vii} Id. at 551

^{viii} Id.