IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellant

vs.

BENNY TOVES GUERRERO
Defendant-Appellee

OPINION

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Supreme Court Case No. CRA99-025
Superior Court Case No. CF0001-91

Appeal from the Superior Court of Guam
Argued and submitted on March 8, 2000
Hagåtña, Guam

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BEFORE: BENJAMIN J. F. CRUZ, Chief Justice, PETER C. SIGUENZA, Associate Justice, and SEATON M. WOODLEY, III, Justice *Pro Tempore*.

SIGUENZA, J.:

[1] This is an appeal of the Superior Court's dismissal of an indictment upon motion of the Defendant, Benny Toves Guerrero. We find that the criminal statute at issue in this case, as applied to this Defendant, substantially infringes upon the Defendant's right to the free exercise of his religion as protected by the United States Constitution and the Organic Act of Guam. We conclude that the Religious Freedom Restoration Act may be applicable to Guam. Moreover, we hold that, even if it were not, in circumstances where a fundamental right is substantially infringed, the government must demonstrate both that the infringement is justified by a compelling interest and that it is the least restrictive means of achieving that objective. Therefore, we affirm the trial court's dismissal of the instant action.

BACKGROUND

[2] The facts of this case are relatively uncomplicated. On or about January 2, 1991, the Defendant, Benny Toves Guerrero (hereinafter "Guerrero"), was returning to Guam from Los Angeles, California via Honolulu, Hawaii. At the Guam International Airport, Guam Customs officers approached Guerrero and asked him if he was carrying any drugs. He replied that he was not in possession of any drugs; however, a search of his backpack resulted in the discovery of marijuana contained therein. Guerrero was placed under arrest and charged with the importation of an illegal substance. He was subsequently indicted on January 11, 1991, and charged with the Importation of a Controlled Substance (as a First Degree Felony), a violation of sections 67.23(d)(10), 67.89(a), and 80.33.7 of Title 9 of the Guam Code Annotated.

[3] Guerrero filed a Motion to Dismiss the Indictment on the basis that the statute under which he was

being prosecuted violates his right to freely exercise his religion as guaranteed by the Organic Act of Guam and the First Amendment of the United States Constitution. The trial court found that, for purposes of the matter before it, Guerrero was a legitimate member of the Rastafarian religion and had established that the use of marijuana is a necessary sacrament in the practice of the religion. The court then ruled that 9 GCA § 67.89 was inorganic as applied to this case, violating both the Organic Act of Guam and the Religious Freedom Restoration Act of 1993 ("RFRA").

[4] The court held that the RFRA, although declared unconstitutional in state and local jurisdictions, was still applicable to Guam because Guam is considered an instrumentality of the federal government. The court reasoned that because Congress continues to exercise plenary power over the territories and that the federal government possesses full and complete legislative authority over Guam; the island is a federal instrumentality. The court then applied the compelling interest standard that the RFRA advocates and found that the government had not demonstrated a compelling state interest to warrant the infringement of Guerrero's right to the free exercise of his religion by using marijuana as a sacrament. The government filed a timely appeal.

ANALYSIS

[5] Jurisdiction of this court is found pursuant to Title 8 GCA §§ 130.20(a)(5) and 130.60 (1993). The parties agree that the standard of review in this case is *de novo.* The issue of the constitutionality of a statute are reviewed *de novo. People v. Perez*, 1999 Guam 2, ¶ 6. Similarly, the issue of the interpretation of a statute is also reviewed *de novo. People v. Palomo*, 1998 Guam 12, ¶ 4.

The Organic Act of Guam provides that:

> No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of

> the people peaceably to assemble and to petition the government for redress of their grievances.

48 U.S.C.A. § 1421b(a) (1950). The provision is similar to the First Amendment of the United States Constitution which also states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[6] The offense for which Guerrero was indicted, Importation of a Controlled Substance, is found in Title 9 GCA § 67.89 (1996) which provides:

> Except for a person registered pursuant to § 67.95 of the Code or exempted pursuant to §§ 67.93 or 67.94 of the Code, it shall be unlawful and punishable as a felony of the first degree to import into Guam any controlled substance listed in Schedule I or II as per §§ 67.22 through 67.25 of this Code or any narcotic drug listed in Schedules III, IV or V as per §§ 67.26 through 67.31 of this Code, except that: . . . .

9 GCA § 67.89(a). Marijuana is classified as a Schedule I Controlled substance. See Title 9 GCA § 67.23 (1996).[1] Guerrero contends that this statute violates his constitutional and Organic Act right to the free exercise of his religion, Rastafarianism.

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[1]The statute provides:

> (a) The controlled substances listed in this Section are included in Schedule I . . . .
> (d) Any material, compound or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: . . .
>
> > (10) Marihuana . . .

9 GCA § 67.23(a) and (d)(10) (1996).

[7] We begin by observing that the United States Supreme Court has held that:

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, [and that] government may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.

Sherbert v. Verner, 374 U.S. 398, 402-403, 83 S.Ct. 1790, 1793 (1963) (citations omitted). But the Court has "rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'" *Id.* at 403, 83 S.Ct. at 1793 (citations omitted). "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Id.* (citations omitted).

[8] In *Sherbert*, the Supreme Court held that the disqualification of a member of the Seventh Day Adventist Church for unemployment benefits under the South Carolina Unemployment Compensation Act, because of her refusal to work on Saturday, imposed a burden on the free exercise of her religion. The Court arrived at its conclusion by considering whether there was some compelling state interest in the statute which justified the substantial infringement of the appellant's First Amendment right and found no such interest. *Id.* at 406-407, 83 S.Ct. at 1795.

[9] In the case of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972), the court reversed the conviction of an Amish farmer who had been convicted of violating Wisconsin's compulsory school attendance law. The Court found that the state had an interest regarding basic education, but held that the state interest is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those protected by the Free Exercise Clause of the First Amendment. *Id.* at 214, 92 S.Ct. at 1532 (citations omitted). The Court examined the Amish's interest in maintaining its community

structure and the state's interest in preparing citizens for effective and intelligent participation in the political system and in preparing self-reliant and self-sufficient participants in society. The Court then concluded that the state interests would not be sufficiently advanced by requiring the Amish school children, who were enrolled until the completion of a basic education, to attend school for an additional two years. *Id*. at 222, 92 S.Ct. at 1536.

[10] Thus, the Supreme Court had articulated a test that had been followed for almost thirty years which prescribed how Free Exercise challenges to a law were to be analyzed. First, it must be determined whether the free exercise of a person's religion is substantially burdened by the governmental regulation or law. If it is, then the government must demonstrate that some compelling state interest justifies the infringement and that the least restrictive means are used to accomplish that objective.

[11] In 1990, however, the Supreme Court decided the case of *Employment Division v*. *Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990), which held that the Constitution's Free Exercise Clause does not relieve an individual of the obligation to comply "with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879, 110 S.Ct. at 1600 (citations omitted). In other words, neutral, generally applicable laws, may be applied to religious practices even when not supported by a compelling governmental interest. *Id*. at 884-885, 110 S.Ct. at 1603.

[12] In *Smith*, the claimants sought review of a determination that their religious use of peyote, which had resulted in their dismissal from employment, was misconduct that properly disqualified them from receiving unemployment compensation benefits. Justice Scalia, writing the opinion of the Court, concluded after a survey of its decisions that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Id.* at

878-879, 110 S.Ct. at 1600. The Court found that the only instances where the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as the free of speech and of the press. *Id.* at 881-882, 110 S.Ct. at 1601-1602 (citations omitted). Finally, the Court declined to apply the *Sherbert* test to the statute at issue. It reasoned that the test was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. *Id.* at 884, 110 S.Ct. at 1603. But that has no relevance to "an across-the-board criminal prohibition on a particular form of conduct." *Id.* It acknowledges that the Court has sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, but that it has never applied the test to invalidate one. *Id.* at 884-885, 110 S.Ct. at 1603 (citations omitted). Thus, the Court held that the claimant's ingestion of peyote was prohibited under state law, and because that prohibition was constitutional, the state may, consistent with the Free Exercise Clause, deny the claimants unemployment compensation when their dismissal result from the use of the drug. *Id.* at 890, 110 S.Ct. at 1606.

[13] Justice O'Connor, with whom three other Justices joined, wrote a concurrence to the opinion. In Justice O'Connor's view, the ultimate reversal of the lower court's ruling was proper;[2] however, she criticized the Court's reading of the First Amendment and the disregard of its own consistent application of the free exercise doctrine to cases involving generally applicable regulations that burden religious conduct. She obtained the same result utilizing and respecting precedent. O'Connor observes that the First Amendment does not distinguish between laws that are generally applicable and laws that target particular religious practices. *Id.* at 894, 110 S.Ct. at 1608 (O'Connor, J., concurring in part). Further, to say that a person's right to free exercise has been burdened does not mean that he has an absolute right to engage

[2]Though the three joining Justices agreed with O'Connor on Parts I and II of the Opinion, they did not concur in the judgment.

in the conduct. *Id.* Under the jurisprudence of the First Amendment, the Court had recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. *Id.* (citations omitted). The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order. *Id.* at 895, 110 S.Ct. at 1609 (citations omitted).

[14] In response to the Court's rejection of the compelling governmental interest test in Smith, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) reestablishing the compelling interest test of *Sherbert* and *Yoder*, as the analytical framework governing all cases where the free exercise of religion is substantially burdened. *See United States v. Meyers,* 95 F.3d 1475, 1481-1482 (10th Cir. 1996); *see also United States v. Treiber, Bauer et al.*, 84 F.3d 1549, 1557-1559 (9th Cir. 1995).

[15] The RFRA is found in 42 U.S.C.A. §§ 2000bb *et seq*. (1999). Of relevance to the issues in this case are the following provisions of the RFRA:

> (a) Findings
>
> The Congress finds that–
>
> > (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
> > (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
> > (3) governments should not substantially burden religious exercise without compelling justification;
> > (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
> > (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interest.

> (b) Purposes
>
> The purpose of this chapter are–
>
> > (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> > (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C.A. § 2000bb (1993)(quotations in original).

[16] In addition, the Act provides:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person–
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest . . . .

42 U.S.C.A. § 2000bb-1(b) (1993).

[17] The RFRA also provides a section for a definition of certain terms as they are used in the Act and it provides, in pertinent part:

> (1) the term "government" includes a branch, department, agency, instrumentality, and office (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
> (2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
> (3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion . . .

42 U.S.C.A. § 2000bb-2 (1993) (quotations in original).

[18] Four years later, the U.S. Supreme Court, in the case of *City of Boerne v. Flores*, 521 U.S. 507, 512, 117 S.Ct. 2157, 2160 (1997), was confronted with the issue of the RFRA's applicability upon the decision by local authorities to deny a church a building permit. The Court held that the RFRA was unconstitutional as applied to the states under section 5 of the Fourteenth Amendment and reversed the

Fifth Circuit Court of Appeals finding to the contrary. The Court concluded that the RFRA represented "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534, 117 S.Ct. at 2171.

[19] Turning to the RFRA's applicability to Guam, it has been held that since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act, the Government of Guam is in essence an instrumentality of the federal government. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F. 2d 1285, 1286 (9th Cir. 1985) (holding that the negative implications of the commerce clause do not apply). However, the issue becomes muddled when one considers that Guam, being a territory, is specifically designated in the RFRA as a "State" for purposes of the Act. *See* 42 U.S.C.A. § 2000bb-2(2).

[20] Moreover, significant questions remain as to the constitutionality of the RFRA even to the federal government. It has been criticized as violating the doctrine of separation of powers, circumventing the arduous amendment process as contained in Article V of the United States Constitution, and even running afoul of the Free Exercise clause of the First Amendment itself.[3]

[21] However, we are of the opinion that disposition of this case does not necessarily entail an arduous exercise of statutory interpretation or the assessment of the merits of the arguments, pro and con, of the continued constitutionality of the RFRA. The rule which we announce today devolves from the recognition that this court sits as the highest tribunal in this jurisdiction and that Congress intends to allow Guam to develop its own institutions.

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[3] *See generally, United States v. Sandia*, 6 F. Supp. 2d 1278 (D. New Mexico 1997) (holding that the Supreme Court in *City of Boerne* struck down RFRA regardless of whether Congress enacted it pursuant to Article I or the Fourteenth Amendment); *In re Tessier*, 190 B.R. 396 (Bkrtcy. D. Montana 1995) (agreeing with *Smith* that the compelling interest test is judicially unmanageable and that only the legislature possesses the institutional structures sufficient to properly weigh the competing interests of sectarian worshipers and the secular sovereign); Edward J.W. Blatnik, *No RFAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 Colum. L. Rev. 1410 (1998).

[22] As earlier indicated, section 1421b(a) of the Organic Act parallels the First Amendment to the Constitution of the United States. Despite the similarity of the two provisions, this court can reach its own conclusions on the scope of the protections of section 1421b(a) and may provide broader rights than those which have been interpreted by federal courts under the United States Constitution.[4] We note that *Smith* had substantially altered the U.S. Supreme Court's standard for determining whether conduct was protected under the free exercise clause and that it is a much criticized opinion that had weakened First Amendment protections for religious conduct. *See Attorney General v. Desilets*, 636 N.E.2d 233, 235-236 (Mass. 1994). The approach we take is to construe Guam's Constitution, the Organic Act, and its concomitant protection of the Free Exercise of Religion, more broadly than the U.S. Supreme Court would the federal counterpart. *City of Mesquite*, 455 U.S. at 293, 102 S.Ct. at 1077; *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219 n. 4 (1975); *Cooper v. State of California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791 (1967). We have consistently demonstrated our willingness to apply our own interpretation of Guam's laws. *See Sumitomo v. Zhong Ye, Inc.*, 1997 Guam 8; *Fajardo v. Liberty House*, 2000 Guam 4; *Custodio v. Boonprakong*, 1999 Guam 5; *Borja v. Bitanga*, 1998 Guam 29; *and Holmes v. Territorial Land Use Comm'n.*, 1998 Guam 8. And we perceive no impediment to the adoption of the standards of the earlier First Amendment jurisprudence prior to *Smith* as the bar that must be cleared for purposes of Guam's constitution, the Organic Act.

[23] Therefore, even if the RFRA were not applicable to Guam, we would still hold that because the infringement of a fundamental right is involved, the government must prove that the infringement is justified

[4]*See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S.Ct. 1070, 1077 (1982) (holding that "a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); *see also, State v. Hawaii*, 520 P.2d 51 (1974) (noting that "[w]e have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted."); *and generally*, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Re. 489 (1977).

by a compelling governmental interest and that the statute is the least restrictive means of achieving that objective.

[24] Turning to the instant case, the government conceded in the proceedings below both the fact of the legitimacy of the Rastafarian religion and of the substantial infringement upon the Appellee's right to freely exercise his religion. The issue then is whether some compelling government interest exists and whether the least restrictive means of obtaining that objective are used. No evidence on this score was presented; rather, the government chose to rely upon its response to the motion. However, it did not designate that response as part of the record on appeal so this court is unable to make the evaluation of whether a compelling state interest is embodied in the instant statute or whether that interest is achieved by the least restrictive means.

[25] Additionally, the government's proposition that a criminal statute is a demonstration of a compelling interest, *per se*, with no less restrictive means of furtherance proves too much. Ostensibly, the government relies upon *Smith* as authority for the proposition. However, Smith's holding was that the compelling interest test was not to be used in analyzing a challenge of a neutral, generally applicable criminal statute. *Smith*, 494 U.S. at 885, 110 S.Ct. At 1603. As we read *Smith*, nowhere was it stated, as the government here argues, that a criminal statute is a *per se* demonstration of a compelling interest with no less restrictive means of furtherance. Instead, what is asked is whether the challenged statute is a neutral, generally applicable law; and, if it is, then the exacting demands of the compelling interest test should not be utilized.

[26] We are also critical of the government's disingenuous argument that the law was unsettled and that by making a record of the compelling governmental interest it would essentially render, as moot, its position that the RFRA was inapplicable. An appellate court can only decide the merits of any given case by the record that is preserved and presented to it on appeal. But neglecting to protect the record on the chance

that this court eventually would side with a particular party is a questionable tactic. We disagree with the government's argument that remand is the appropriate disposition of the appeal because the test which we have ultimately decided as appropriate to assess the Free Exercise claims was not what the government chose to pursue below. The government had before it the competing tests upon which an evaluation of the Free Exercise challenge would be analyzed and it should have protected the record with some evidentiary basis upon which this reviewing court could assess the merits and, ultimately, render an appropriate disposition of the instant case.

CONCLUSION

[27] Thus, we find that 9 GCA § 67.89(a), as applied to Guerrero, substantially infringed upon his right to the free exercise of his religion as protected by the United States Constitution and the Organic Act of Guam. Although we conclude that the Religious Freedom Restoration Act may be applicable to Guam; we would hold that, even if it were not, in circumstances where a fundamental right is substantially infringed, the government must demonstrate that the infringement is justified by a compelling interest and that it is the least restrictive means of achieving that objective.

[28] Therefore, we **AFFIRM** the trial court's dismissal of the instant action.

PETER C. SIGUENZA
Associate Justice

SEATON M. WOODLEY
Justice Pro Tempore

BENJAMIN J.F. CRUZ

Chief Justice