

The gray zone

Sbull; Police swear by city's novel 'drug-free' areas, but opponents remain resolute

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Warren Murphy has been banned before from the Northeast Portland neighborhood where he buys his crack.

The piece of paper from the police said that where he was arrested was a drug-free zone and that he could not go back for a year.

No matter. He went anyway. Bought his crack there. Has for years.

Portland's three original drug-free zones were the first of their kind in the nation, one in the middle of the city and another on the central east side, set in 1992, the third in North and Northeast Portland, set in 1997. Controversial the day the Portland City Council adopted them, they remain so today. Court challenges have changed them but have not killed them.

The City Council is scheduled to consider their renewal in February after a 90-day public-comment period ends. Mayor Tom Potter hopes to shift the boundaries of the zones, create a new one and raise the standards for evidence and oversight police use in the process.

Police and prosecutors swear by the zones, calling them a necessary tool for law enforcement and livability. Defense lawyers, rights advocates, and the dealers and addicts themselves say they are unconstitutional the way they are and, besides, don't really work.

Sitting in the back of a police cruiser last week, Murphy, 48, reminisced with officer Mark Zylawy Ñ universally known as "Z-Man" Ñ who was driving him to jail downtown yet again. This time, the charge was a parole violation on an earlier conviction for conspiracy to commit burglary, not for drugs. But Murphy said he had a crack pipe on him.

"So, Warren, what do you think about drug-free zones?" Zylawy asked, driving down Martin Luther King Jr. Boulevard.

"Don't know that much about them, actually," Murphy said. "Got excluded from one of them a couple years ago up in Northeast somewhere."

"Is that when I found you with that pipe that one time?" Zylawy asked.

"Yeah," Murphy said.

"Ever change your behavior at all, where you went or who you hung around with?" Zylawy asked.

"No, Z-Man. Uh-uh," Murphy said. "I still go where I want and do what I gotta do."

'An invaluable tool'

Zylawy has been a Portland cop since 1990, assigned almost exclusively in that time to an area of Northeast Portland long known for drug trafficking. Since 1997, it has been part of a drug-free zone.

“Having this as a drug-free zone is an invaluable tool for us,” Zylawy said. “Having the ability to see someone who is excluded and take them out of this neighborhood and away from their habit for a few hours or a few days can make a huge difference.”

Exclusions from a drug-free zone originally lasted 90 days, later becoming one year from the date of the exclusion once convicted. Returning to a zone while the exclusion was in effect meant an arrest. The period to appeal the exclusion was five days.

The City Council determined where to put the zones by examining Portland Police Bureau data that showed the highest concentrations of drug offenses. The zones don't get more police resources than places without such designations, but officers who work within the zones are more attuned to drug crimes.

The decision to implement the zones came at a time when Multnomah County was under a federal court order to reduce jail overcrowding, meaning low-level drug dealers often were turned back out on the street shortly after being booked into jail.

The first year, 1992, police targeted those selling drugs rather than those possessing drugs in Washington Park, the central east side from the Morrison Bridge to Lloyd Center and much of the area from the Willamette River west to Interstate 405.

The next year, the City Council broadened the ordinance to include anyone in possession. That same year, drug distribution arrests per square mile in the zone rose by 36 percent, reflecting the heightened enforcement, police and prosecutors said. In 1994, after expansion of the zones, arrests dropped by 80 percent, which law-enforcement officials contended showed lower levels of criminal activity. The City Council also removed the designation for Washington Park after drug arrests there dropped from 148 in 1990 to four in 1993.

“It's obvious if you look at it that there were plenty of people who decided it was in their best interests not to come back to those areas,” said Jim Hayden, Multnomah County deputy district attorney and a champion of the zones for more than a decade.

And yet each of the next two years, after the City Council expanded the definition of “drug-free” again to include those people police believed would buy and sell drugs, arrests in the central-city zone increased, first by 47 percent in 1995, then by 82 percent in 1996. The arrests again declined in six of the eight years that followed.

The City Council merged that zone with the central-east side zone in 2002.

‘Chronics’ aren't whole story

Geno Symington, 53, said statistics like that didn't much matter to him. If he needed drugs, he would go out and get them where he wanted, when he wanted.

“Drugs gonna be everywhere, so if you gonna say this is a drug-free zone, it's kinda like saying, like, can't nobody go nowhere,” he said, also from the back of Zylawy's patrol car one

day last week. He'd been arrested on a warrant for failure to appear in court on a theft charge.

Hayden discounted people like Murphy and Symington.

"I don't think the law is designed for these people," he said. "What about all the people who didn't come back to the zones? It's easy to be fooled by the chronics who do come back."

In 1995, pleased with the zones, the City Council authorized three prostitution-free zones from West Burnside Street to Northeast Sandy Boulevard to Northeast 82nd Avenue, then south to the city line.

In 1997, the City Council approved new drug-free zones in parts of inner North and Northeast Portland. In the years following the creation of the new zones, arrests for drug distribution and possession dropped like those in the original central-city zones.

Cities nationwide Ñ from Washington, D.C., to Baltimore, to Austin, to Seattle Ñ have adopted Portland's model since.

Jimmie Lee Shepperd, a heroin addict for many of his 59 years, said he notices the zones mostly when he tries periodically to kick his habit.

"I can go downtown, and I don't get solicited no more," he said. "None of that, 'You want something, man, you need something, man' kinda crap when I ain't got nothing but bus money in my pocket anyway. I'm sick of it.

"Still, it's unconstitutional as hell, though. Government can't tell me where I can and can't go."

Legal challenges numerous

The zones' legal history is murky and complex, in part because the law's targets and definitions continue changing.

"It's a moving target for opponents of the law because whatever the city puts out there will inevitably be changed," said Chris O'Connor, an attorney with Metropolitan Public Defender who has argued cases against the law.

In January 1997, Multnomah County Circuit Judge Janice Wilson dismissed a prostitution case, finding that the zone exclusion plus prosecution for the crime of prostitution violated Fifth Amendment protection against double-jeopardy. Two months later, county Circuit Judge Stephen Walker made a similar finding in a drug case. Other judges have made similar rulings.

In 2002, the Oregon Supreme Court found unanimously that the zones did not violate Fifth Amendment rights and could stand.

In between, county Circuit Judge Jean Kerr Maurer ruled in July 2000 that defendants lost their right to challenge the zones' constitutionality if they did not follow the city's appeal process.

And U.S. Magistrate John Jelderks tossed out a lawsuit in February 2001 that argued the zones were unconstitutional restrictions on a person's movement. Jelderks ruled that federal court involvement would interfere with the state's prosecution of the plaintiff, Glenn Cleveland White, an admitted former crack addict, on criminal trespass charges.

White, now 52, said in an interview this week that he had been arrested 122 times, mostly for zone violations. Trouble is, he said, he lives in a drug-free zone. And at the time, an exclusion from one drug-free zone applied to all existing drug-free zones.

"All of America should be drug-free, and all of America should be prostitution-free," he said. "Why should we need special zones?"

Two more rulings in 2002 — one by the Oregon Court of Appeals, the other by a Multnomah County judge — forced police to all but stop arresting people for criminal trespass in the zones and limited exclusions to only one zone. That November, the City Council voted to alter the law to conform with the rulings, including exclusion waivers for people who had legitimate needs to travel: court hearings, lawyer visits, work, mass transit, doctor's visits, going home. Such waivers, or variances, were placed in a box on the exclusion forms themselves. The period to appeal was extended to 10 days.

And then county Judge Michael Marcus got involved.

In December 2003, Marcus ruled that the appeal process for the exclusions was unconstitutional, holding that a standard of probable cause — an officer's belief that a crime was committed — to exclude a person from a zone was too low a standard of evidence.

He found also that the Portland Police Bureau reviewed exclusions only when an excluded person appealed within the 10-day window. According to data compiled by the city attorney's office, between 5 percent and 10 percent of an average of 2,000 cases a year are dismissed immediately after Police Bureau review, and another 9 percent are appealed — 1 percent of drug zone exclusions and 8 percent of those in prostitution zones. About a quarter of the appealed drug zone exclusions — 26 percent — are overturned, as are 36 percent of appealed exclusions in prostitution zones.

In response to Marcus' decision, the City Council voted unanimously to raise the evidence standard on appeal to a preponderance of the evidence, meaning that it is more likely than not that a crime occurred.

Then, earlier this year, Marcus affirmed the existence of the zones, denying O'Connor's constitutional challenge that the application of the law governing the zones was racially biased and violated the U.S. Constitution's equal-protection clause.

Public defender O'Connor presented evidence showing that of 838 drug-free-zone criminal counts brought against Metropolitan Public Defender's clients since the beginning of 2003, 490 — 58.5 percent — were brought against blacks. And of 4,015 cases county prosecutors brought in the same period alleging violation of zone exclusions, 2,566 — 63.4 percent — were brought against blacks.

Blacks make up 6.8 percent of Portland's population, according to the U.S. Census.

“Enough people have called me a racist that I’m comfortable just saying what I think now,” said Deputy District Attorney Hayden. “It’s preposterous. There is not nearly enough information or evidence presented and the judge has found this to call this a racist ordinance.”

Marcus said in court that he was sympathetic to O’Connor’s perspective but unmoved by his evidence.

Changes make ‘better law’

In the course of the case, which ended in April, Deputy City Attorney David Woboril and Hayden agreed to void any exclusions in which Portland officers seemed to deny the guaranteed right to travel by slashing through that section on exclusion forms or writing “n/a” in that space. They also agreed to ask the City Council to extend the appeal period to 15 days.

“All of that strengthens the ordinance, not weakens it,” Hayden said. “All the legal opinions and decisions do is give the citizens of Portland a better law.”

But Marcus also inveighed against the city’s insistence that those excluded from zones carry their exclusion papers with them at all times to prove they have waivers that allow them in.

“I cannot escape the irony,” Marcus wrote, “that Portland is uniquely sensitive to the threats that national ‘anti-terrorism’ measures pose to individual liberty but at the same time extraordinarily anxious to exploit the outer limits of lawful regulation to uphold a police officer’s decision to banish people suspected of drug activity on pain of criminal conviction based only on exclusion and presence.”

Or, as Rose Spears, board chairwoman for the Portland chapter of the social-advocacy group Oregon Action, said at a public meeting last week on the zones: “I just want to know how you’re going to allow a police officer to be judge, jury and executioner. What gives you the right?”

The meeting, held in the sanctuary at Emmanuel Temple on North Sumner Street, drew Mayor Potter, Woboril, Hayden, Police Chief Derrick Foxworth, all three of his assistant chiefs, public defenders and about 60 other Portlanders.

Potter and Foxworth said they were there to listen to public opinion, not to offer their own thoughts. Potter’s own plan includes redrawing the existing zone boundaries and adding a new drug-free zone along Southeast 82nd Avenue from Northeast Killingsworth Street south to Southeast Crystal Springs Boulevard. Another part of his plan voids the exclusion if a person is acquitted of the original drug or prostitution offense or the district attorney’s office drops charges.

Andrea Meyer, legislative director for the ACLU of Oregon, expressed concern that the validity of the exclusion was not tied to actual guilt for any other crime. Should the district attorney’s office drop the charges or lose the case, the exclusion would remain. Nothing in the law links an exclusion to successful prosecution.

Woboril said linking those events would cripple prosecutors. The district attorney's office is already down from 12 drug prosecutors in 1997 to seven today.

"They say they can't afford to take a case they might lose," he said.

The office already declines 20 percent of cases from drug-free zones, Woboril said, on the chance that a judge would drop the charges or that the defendant would win. In the cases it does take, Woboril said, Multnomah County prosecutors win a conviction or a guilty plea 95 percent of the time.

Tools readily available

White, the former crack addict whose federal suit a judge tossed out in 2001, came also to Emmanuel Temple, and with something to say.

"You can regulate making the meth stuff all prescription now, but you go into the stores in my neighborhood and they got crack pipes on the shelves and blunt papers for sale," he said. "C'mon now."

Near where White lives at Northeast Cleveland and Beech avenues, many bodegas and other stores sell a product called "rose-in-glass," which crack smokers readily convert into pipes.

"They're cheap, and they're right there on the shelves," Northeast Precinct Lt. Eric Brown said. "There's nothing to stop anybody from that."

And sometimes even the exclusion is not enough, either.

Driving his patrol car along Martin Luther King Jr. Boulevard, Zylawy saw a neighborhood crack addict he knew at a bus stop. She had a current exclusion from the zone, but riding the bus is a legal reason to be there.

"Let's sit and watch a minute," he said. "If she gets on the bus, we keep going, but if she's still there we'll get out and talk to her. I know if I search her, she'll have a crack pipe on her."

A few minutes went by. No bus. So Zylawy pulled up in front of her, just for small talk. She smiled at him, sucking on a cigarette, and said she was going to get on a bus, probably the next one. She wasn't sure just yet.

"This is a community neighborhood block," she said. "And I'm an American in this community. What you wanna bother me for?"

By the time Zylawy drove his patrol car around the block, she was gone.

"I'll see her again soon," he said. "You never go too far around here without running into somebody again."

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