IN THE SUPREME COURT OF FLORIDA

LAVERNE BOWDEN, *

Appellant, *

-vs- *

STATE OF FLORIDA, *

Appellee. *

---

*

WILLIAM RUSH WILLIAMS, *

Appellant, *

-vs- *

STATE OF FLORIDA, *

Appellee. *

CASE NO: ~~55,962~~ 57,670

CASE NO. 57,669

ON APPEAL FROM THE
CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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ANSWER BRIEF OF THE APPELLEE

PRELIMINARY STATEMENT

Appellants' Preliminary Statement is adopted by the Appellee.

STATEMENT OF THE CASE AND FACTS

Appellants' Statements of the Case and Facts are accepted by the Appellee.

ARGUMENT

POINT I

THE FLORIDA RICO STATUTE AS APPLIED SUB JUDICE IS NEITHER VAGUE NOR OVER-BROAD.

Appellants argue essentially that the Florida Rico Statute suffers from vagueness and overbreadth in that it has a chilling effect when applied to concepts of freedom of speech, press and association. We state preliminarily that for purposes of enhancing clarity of the issues involved, sub judice, Appellee has elected to address the various issues (as we view them) as separate sub-issues under this point.

A. WHETHER APPELLANTS HAVE STANDING TO CHALLENGE SECTION 943.46, FLORIDA STATUTES, ET SEQ.

While Appellants have understandably chosen not to address this particular issue, we feel it incumbent upon us to reach this issue before any other raised here. Appellee submits that Appellants have standing to challenge only those portions of Chapter 943, Fla.Stat., which directly affect them. Specifically, Appellants have standing to challenge only

Sections 943.461(1)(a)(22), 943.461(3) and (4), and 943.462(3) and (4) as these are the only provisions of the Act which directly affect them. As to other provisions of the Rico Act, Appellants lack standing to launch a constitutional attack. Jordan v. State, 334 So.2d 589 (Fla. 1976); State ex rel. Hoffman v. Vocelle, 31 So.2d 52 (Fla. 1947); Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979).

B. WHETHER SECTIONS 943.461(1)(a)(22)(3) and (4) and 943.462(3) and (4), FLA. STAT., ARE UNCONSTITUTIONALLY VAGUE.

In setting the appropriate standard to be employed when weighing challenges on grounds of vagueness, this Court in Brock v. Hardie, 154 So. 690 (Fla. 1934), opined:

> ". . . Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'"
> Brock, supra, at 694.

The relevant statutory provisions provide:

> "943.461 Definitions.--As used in ss. 943.46-943.465:
>
> (1) 'Racketeering activity' means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:
>
> (a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:
>
> * * *
>
> (22) Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.
>
> * * *
>
> (3) 'Enterprise' means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental, as well as other, entities.
>
> (4) 'Pattern of racketeering activity' means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct."

* * *

> "943.462 Prohibited activities and defense.--
> (3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.
>
> (4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsections (1), (2), or (3)."

It is, by now, axiomatic that any legislative enactment carries with it a strong presumption of constitutionality. State v. Bales, 343 So.2d 9 (Fla. 1977); Askew v. Schuster, 331 So.2d 297 (Fla. 1976); City of Miami v. Kayfety, 92 So.2d 798 (Fla. 1957). Further, all doubts as to the constitutionality of a statute must be resolved in favor of its constitutionality. Ison v. Zimmerman, 372 So.2d 431 (Fla. 1979); Hamilton v. State, 366 So.2d 8 (Fla. 1979); State v. Wershaw, 343 So.2d 605 (Fla. 1977). Finally, words of the Legislature are to be construed in their "plain and ordinary sense." Pederson v. Green, 105 So.2d 1 (Fla. 1958); Reino v. State, 352 So.2d 853 (Fla. 1977).

We do not wonder that Appellants claim the relevant statutory provisions are vague. We suggest, however, that if Appellants find them so, it is only because of the rather contorted method by which they attempt to obfuscate the meaning of

the language. The relevant subsections of Section 943.461, Fla.Stat., when read together with the provisions of Section 943.462(3) and (4) are not unconstitutionally vague. Indeed, when compared with their federal counterpart, the Florida provisions are substantially more precise. The federal statute, 18 U.S.C. §1962, has withstood attack on the ground that it is impermissibly vague on numerous occasions. See, United States v. Companele, 578 F.2d 352 (9th Cir. 1975); United States v. Field, 432 F.Supp. 55 (U.S. Dist.Ct., S.D., N.Y. 1977); United States v. Stofsky, 409 F.Supp. 609 (U.S. Dist. Ct., S.D., N.Y. 1973); United States v. White, 386 F. Supp. 882 (U.S. Dist.Ct., E.D., Wisc. 1974); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976); United States v. Brown, 555 F.2d 407 (5th Cir. 1978), reh.den., 599 F.2d 29, cert.den., 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978); United States v. Parness, 503 F.2d 430 (2nd Cir. 1974), cert.den., 95 S.Ct. 775, 42 L.Ed.2d 801; United States v. Costillano, 416 F.Supp. 125 (U.S.D.C. N.Y. 1975).

Though Appellants make much of comparing "gansters" to "racketeers," we fail to see how they have demonstrated that the sections of the Rico Act under which they were convicted suffer from vagueness. Indeed, Appellants rather appear to wander aimlessly, drawing ill-founded conclusions which lead to the

inevitable result that they have only succeeded in becoming lost in rhetoric. Those crimes, which are considered to be bases for "racketeering activity" are set out in Section 943.461, Fla.Stat. The term "pattern of racketeering activity" is more than adequately defined in subsection (4) of that section; similarly the term "enterprise" is defined in subsection (3). Section 943.462(3) and (4), the provisions under which Appellants were charged and convicted, make the proscribed conduct abundantly clear.

We are faced, then, with what is essentially a two-step process. In order that a defendant may be convicted of a violation of either subsection (3) or (4) of Section 943.462, Fla.Stat., it must be established beyond a reasonable doubt that the defendant has engaged in a pattern of racketeering activity, to-wit: has engaged in at least two instances of racketeering conduct (i.e., any of those crimes chargeable by indictment or information under the enumerated provisions of Florida Statutes appearing in Section 943.461), which incidents have the same or similar intents, results, accomplices, victims or methods of commission or which incidents are otherwise inter-related by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of the Act and that the last such incident occurred within five years after a prior incident of racketeering conduct. Only after the predicate crimes have been established

can the State move on to the second step of the procedure--establishing the RICO violation itself. Using the case at bar, the State must establish beyond a reasonable doubt, for a violation of subsection (3) of 943.463, e.g., (1) that the defendant was employed by or associated with an enterprise, (2) for the purpose of conducting or participating (directly or indirectly) in the enterprise through a pattern of racketeering activity.

C. WHETHER SECTION 943.461(a)(22) (3) and (4) AND SECTION 943.462 (3) and (4) ARE UNCONSTITUTIONALLY OVERBROAD.

The doctrine of overbreadth prohibits a statute from sweeping unnecessarily broadly and prohibiting activity which is constitutionally protected. See Shelton v. Tucker, 346 U.S. 479, 5 L.Ed.2d 231 (1960). Application of the concept has been limited to those cases wherein the statute in question seeks to regulate constitutionally protected speech. Gooding v. Wilson, 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972); Grayned v. City of Rockford, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973); State v. Bales, 343 So.2d 9 (Fla. 1977); State v. Allen, 362 So.2d 10 (Fla. 1978), footnote 4; Zuppardi v. State, 367 So.2d 601 (Fla. 1978), footnote 4, reh.den., March 7, 1979.

Without really saying how, Appellants contend that Section 943.46, et seq., Fla.Stat., is unconstitutionally overbroad. Basically, what we glean from Appellants' argument is that the Legislature, by passing the RICO statute and "tying" it to the predicate offenses enumerated in Section 943.461, Fla.Stat., the Legislature has cast an "undefined net large enough to endanger free speech, press and association." (See AB 17)

Again, we feel it appropriate to state that for our purposes here, the only relevant statutory provisions are Sections 943.461(a)(22)(3) and (4) and 943.462(3) and (4), Fla.Stat. Appellee submits that these statutory provisions are not overbroad. The predicate crimes sub judice were charged under Sections 847.011(1)(a), Fla.Stat., and 847.07(4)(c), Fla.Stat. Both statutes have been upheld against constitutional challenges on numerous occasions. See, P.A.B., Inc. v. Stack, 440 F.Supp. 937 (U.S.D.C., M.D. 1977); State v. Kraham, 360 So.2d 393 (Fla. 1978); Johnson v. State, 351 So.2d 10 (Fla. 1977); Mitchum v. State, 244 So.2d 159 (Fla. 3 DCA 1971); South Florida Art Theaters, Inc. v. State ex rel. Mounts, 224 So.2d 706 (Fla. 1969), all upholding the constitutionality of Section 847.011(1)(a); see also, State v. Aiuppa, 298 So.2d 391 (Fla. 1974); upholding the provisions of Section 847.07, et seq.

We further venture to point out that 18 U.S.C. §1962 has been held not to violate principles of due process. United States v. Amato, 367 F.Supp. 547 (U.S.D.C. N.Y. 1973).

Returning to the key question here, to-wit: whether the relevant provisions of the RICO Act are unconstitutionally overbroad as applied sub judice, the question must be answered in the negative. For all their protestations and ramblings, Appellants have failed to demonstrate to the contrary.

POINT II

THE RICO ACT IS NOT FACIALLY UNCONSTITUTIONAL.

Appellants' argument here is premised on an erroneous assumption. They assume, despite case law to the contrary, that obscenity is constitutionally protected. This Court has already addressed this question and rejected it. Tracey v. State,130 So.2d 605 (Fla. 1961). We point out, as we did in our argument under Point I, that the requisite predicate crimes must first be proven beyond a reasonable doubt before a defendant can be prosecuted under Chapter 947, Fla.Stat.

Appellants contend that Section 943.462(3), Fla.Stat., creates a strict liability crime in that it proscribes as unlawful any person's being associated with an "enterprise to participate directly or indirectly in such enterprise" (AB 18). Appellee suggests Appellants have misread subsection (3). What that provision does proscribe as unlawful is any person's being employed by, or associated with, an enterprise for the purpose of conducting or participating, directly or indirectly, in that enterprise through a pattern of racketeering activity or the collection of an unlawful debt. "Racketeering activity" is

defined in Section 943.461, Fla.Stat., as committing, attempting to commit, conspiring to commit, or soliciting, coercing or intimidating another to commit any crime chargeable by indictment or information under any of the enumerated provisions of Florida Statutes. One engages in a "pattern of racketeering activity" as provided under Section 943.461(4), Fla.Stat. Clearly, one employed by or associated with any enterprise must intend to conduct orparticipate in such enterprise through a pattern of what is already deemed illegal activity under Section 943.461(1), Fla.Stat.

Appellee submits that Appellants, having pled nolo contendere, admit the facts adduced and every conclusion favorable to the State reasonably and fairly inferable therefrom. Spinkellink v. State, 313 So.2d 666 (Fla. 1975). Whether the materials here involved are obscene is a question of fact. We contend that Appellants, by their plea, have already admitted that the materials were obscene. A question of fact is not properly reserved by a plea of no contest. Gissendanner v. State, 373 So.2d 898 (Fla. 1979). Accordingly, it becomes patently clear that Appellants have based their argument here on an erroneous assumption. Appellants ask "whatever became of due process and freedom of speech, press and association?" (AB 21) In response thereto, we answer--nothing! The United States Constitution and Constitution of the State of Florida still protect

those rights. It is simply that sub judice those rights are not being violated. The Constitution does not protect that which it does not guarantee. Obscenity, therefore, is not constitutionally protected.

POINT III

APPELLANTS HAVE IMPROPERLY RAISED QUESTIONS OF FACT.

Appellants state their third argument as follows:

> The applicable statute which defines as obscene erotic matter which is not otherwise obscene merely because it has been commercialized misreads Ginzburg v. United States, violated the objective standards of Miller v. California and infringes upon freedom of speech and press.

Clearly, from the wording of the point involved, Appellants seek to have this Court pass upon a question of fact. They presume that the erotic matter here involved is not otherwise obscene. We suggest that this is an evidentiary question which would more properly have been determined by the trier of fact had Appellants chosento go to trial to litigate the issue. On direct appeal from an adverse result such a question would, if properly preserved, be appropriate. Nevertheless, Appellants pled nolo contendere reserving the right to challenge the constitutionality of the RICO Act as applied through Chapter 847, Florida Statutes (R 726, 729). As we have previously pointed out, Appellants have not confined themselves to that narrow issue in their brief before this Court.

Indeed, the notices of appeal filed by Appellants individually indicate only an intention to appeal from the judgment and sentence (R 789, 790). In any case, we submit that our sole purpose here relates to the constitutionality of the statutory provisions under which Appellants were charged. Any questions relative to evidentiary matters or matters involving facts which may have been at issue had the case gone to trial, are not reserved upon a plea of no contest. Accordingly, such a question is not properly before this Court. Gissendanner v. State, 373 So.2d 898 (Fla. 1979).

CONCLUSION

WHEREFORE, Appellee submits that Sections 943.46(1)(a)(22)(3) and (4) and 943.46(2)(3) and (4) are constitutional and this Court should affirm the judgments and sentences below as Appellants have failed to demonstrate to the contrary.

Respectfully submitted,

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