IN THE SUPREME COURT OF THE STATE OF FLORIDA, FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT.

SUPREME COURT CASE NO: 65,384

DISTRICT COURT CASE NOS: 83-155
83-231

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JUL 5 1984
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By ______
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THE CITY OF DAYTONA BEACH,

Petitioner/Plaintiff,

vs.

LEONARD DEL PERCIO and
LAURA IRIS MOORE,

Respondents/Defendants.

______________________________/

JURISDICTIONAL BRIEF OF RESPONDENTS

Submitted by:

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ARGUMENT

ISSUE I

THE SUPREME COURT DOES NOT HAVE DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL PURSUANT TO ARTICLE V, SECTION 3(b)(3) OF THE CONSTITUTION OF THE STATE OF FLORIDA AND RULE 9.030(a)(2)(A)(iv), FLORIDA RULES OF APPELLATE PROCEDURE BECAUSE THE INSTANT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

The opinion of the Fifth District Court of Appeal in Del Percio v. City of Daytona Beach, 449 So.2d 323 (Fla. 5th DCA 1984) does not directly and expressly conflict with the decision of the Second District Court of Appeal in the case of Board of County Commissioners v. Dexterhouse, 348 So.2d 916 (Fla. 2d DCA 1977), affirmed 364 So.2d 449 (Fla. 1978), appeal dismissed 441 U.S. 918, 99 S.Ct. 2024 (1979), the decision of the Third District Court of Appeal in City of Miami Springs v. J.J.T., Inc., 437 So.2d 200 (Fla. 3d DCA 1983) or the decision of the First District Court of Appeal in Fillingim v. State, 446 So.2d 1099 (Fla. 1st DCA 1984), therefore, this Court does not have jurisdiction pursuant to Article V, Section 3(b)(3), Constitution of the State of Florida or Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

Article V, Section 3(b)(3) of the Florida Constitution states in the applicable section:

> "The Supreme Court may review any decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law."

Florida Rule of Appellate Procedure #9.030(a)(2)(A)(iv) states:

> "The discretionary jurisdiction of the Supreme Court may be sought to review decisions of District Courts of Appeal that expressly and directly conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law."

As stated by this Court in Jenkins v. State, 385 So.2d 1356 (Fla. 1980) and Gibson v. Malone, 231 So.2d 823 (Fla. 1970):

> "It is a conflict of decision not conflict of opinions or reasons that supply the jurisdiction for review by certiorari."

When comparing decisions it may be necessary to consult the record to some extent as stated in Gibson, supra and Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965).

In Board of County Commissioners of Lee County v. Dexterhouse, supra, the Second District Court of Appeal considered an ordinance which provided:

> SECTION 2. PROHIBITION
>
> 2.1 It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:
>
> A. To suffer or permit any female person while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof.

> 2.1(sic) It shall be unalwful for any female person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises,to expose to public view that area of the human female breast at or below the areola thereof.
>
> Dexterhouse at 917

The Dexterhouse opinion is distinguishable for the following reasons:

A) A vagueness challenge was not raised or ruled upon.

B) The Lee County ordinance did not use the phrase "any portion of the breast below the top of the areola".

C) The scope of the Lee County ordinance regarding types of establishment is not as broad. (See A-1 attached).

D) The Dexterhouse case involved declaratory and injunctive relief not a criminal type prosecution with specific facts: The Del Percio case involved a situation where no alcohol was being sold or consumed on the premises. The owner was arrested. In the Moore case the performer wore opaque tape which covered her areolae and that area directly below.

E) The Court in Dexterhouse did not have a record before it demonstrating that reasonable persons had to guess at the ordinance's proscription and differed as to its application.

The opinion of the Third District Court of Appeal in City of Miami Springs v. J.J.T., Inc., 437 So.2d 200 (Fla. 3d DCA 1983) is also distinguishable from the Del Percio ruling.

In Miami Springs the ordinance provided:

> "Sec.1(c). Regulation of the hours of business of licensees under beverage laws. Notwithstanding, the hours of business during which the sale of alcoholic beverages is permitted by the Miami Springs Code of Ordinances for businesses licensed under the beverage laws of the State of Florida to sell alcoholic beverages, the sale of alcoholic beverages and the consumption thereof on the licensed premises is prohibited during the hours when any 'sex related business activity or use' as defined herein takes place on the licensed premises."
>
> Sex-related business activity or use is defined, in part, as:
>
> > "commercial activity or use which takes place in taverns;...and places of public entertainment, ...wherein there is offered to the public for any type of consideration, sexual conduct... or the display of specified anatomical areas."
>
> In turn, specified anatomical areas are defined as:
>
> > "(i) less than completely and opaquely covered human or animal genitals, pubic region, buttocks or the female breasts below a point immediately above the top of the areola, and....
>
> Miami Springs at 201

The opinions in the Del Percio case and the Miami Springs case do not expressly and directly conflict for the same reasons discussed in the paragraphs lettered B, C, D and E above.

The decision in Fillingim, supra, is not as easily distinguished. In fact, the Fifth District Court of Appeal stated:

> Although we recognize a certain amount of conflict with Fillingim v. State, 446 So.2d 1099 (Fla. 1st DCA 1984) (corrected opinion; original opinion at 8 F.L.W. 2947) in that an ordinance similar in wording to that in the case sub judice was found constitutional, we do not perceive an express or direct

> conflict for certification because we have not ruled upon the same ordinance and because we have before us a record demonstrating that persons in our community have had to guess at the meaning of the ordinance's proseciption and differed as to its application. (Emphasis added).

Del Percio, supra, at 327

More specifically, the opinions in Fillingim and Del Percio, therefore, do not expressly and directly conflict in that:

A) The Leon County Ordinance did not use the phrase "any portion of the breast below the top of the areola".

B) The scope of the Leon County ordinance regarding types of establishments is not as broad.

C) The Fillingim case did not involve similar facts to the Del Percio and Moore cases where persons attempted to comply with the ambiguous wording of the ordinance.

D) The Court in Fillingim did not have a record before it demonstrating the persons in their community have had to guess as to the ordinance's proscription and differ as to its application.

Lastly, the decision in Fillingim does not expressly and directly conflict with the Del Percio opinion because the Fifth District Court of Appeal explained the distinguishing factors.

ISSUE II

THE SUPREME COURT DOES NOT HAVE DISCRETIONARY JURISDICTION PURSUANT TO ARTICLE V, SECTION 3 (b)(3), FLORIDA CONSTITUTION, TO REVIEW THE INSTANT DECISION ON THE GROUND THAT THE DISTRICT COURT BELOW EXPRESSLY CONSTRUED THE CONSTITUTION.

The Petitioner's argument that the District Court, by necessity, had to expressly construe the Constitution is without merit. The jurisdictional brief of Petitioner does not even state which portions of the State or Federal Constitution were construed or at what section of the opinion this occurred.

Article V, Section 3 of the Florida Constitution has been amended since the decision of Martin v. Board of County Commissioners of Lee County, 364 So.2d 449 (Fla. 1978) to state in the applicable section that the Supreme Court may review any decision of the District Courts of Appeal that expressly construes a provision of the State or Federal Constitution. This simply did not occur in this case.

In the instant case, the Fifth District Court of Appeal merely applied the clear rule of law that "when people of ordinary intelligence must necessarily guess at its meaning and differ as to its application the statute or ordinance violates the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution, 1968." Conway v. General Construction Company, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed 322 (1926). State ex rel Lee v. Buchanan, 191 So.2d 33 (Fla. 1966) Del Percio, supra, at 326.

The application of this clear principal of law to an ordinance based upon undisputed facts falls short of expressly construing a provision of the State and Federal Constitutions. As the Supreme Court of Florida stated in Rojas v. State, 388 So.2d 235 (1974):

> "Applying is not synonymous with construing. The former is not a basis for our jurisdiction while the express construction of a constututional provision is".

Id. at 236

Therefore, this Court does not have discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

CONCLUSION

The Fifth District Court of Appeal has construed an ordinance whose language is clearly distinguishable from the language construed by the Courts in the cases cited by Petitioner. The language of the Daytona Beach ordinance is much more vague than the wording of the ordinances construed by the other Courts. The scope and breadth of the Daytona Beach ordinance is also clearly greater than that of the other cases cited.

The most distinguishing factor is the presence of a record in the Del Percio case indicating that persons in Daytona Beach have had to guess at the meaning of the ordinance proscription and have differed as to its application even to the extent where learned trial and appellate judges could not agree as to what conduct in places were within the ordinance's scope. There is no express and direct conflict between the cases cited by Petitioner and the case sub judice. The Dexterhouse case, for example, was specifically limited to the scant facts of its record by this Court in its opinion in Martin v. Board of County Commissioners of Lee County, 346 So. 2d 450 (Fla. 1978).

Secondly, no section of the Florida or Federal Constitution was expressly construed rather than applied in the instant case.

Respondents respectfully request that this Court decline to take jurisdiction in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail/~~hand~~ to Reginald E. Moore, Esquire, Post Office Box 551, Daytona Beach, Florida 32015 this 2nd day of July, 1984.

Respectfully submitted,

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