O|A 3-5-85

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

THE CITY OF DAYTONA BEACH,

Petitioner,

vs.

LEONARD DEL PERCIO and
LAURA IRIS MOORE,

Respondents.

_____/

INITIAL BRIEF OF PETITIONER

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CITATIONS

STATEMENT OF THE CASES AND FACTS

The City of Daytona Beach, petitioner [hereafter City], enacted an ordinance prohibiting nudity in establishments dealing win alcoholic beverages [Appendix A].

> "Del Percio [respondent] is the part owner of Function Junction, a lounge in Daytona Beach. On November 20, 1981, he was present in the lounge when at approximately 7:50 p.m., the Function Junction stopped serving alcohol. Shortly thereafter, an employee of the lounge, Ms. Lois Young, appeared on stage, and danced without any covering over her breasts. Both Young and Del Percio were cited by Daytona Beach Police and given notices to appear. Del Percio subsequently filed a motion to dismiss raising the constitutionality of the ordinance, which was denied by the trial court. Del Percio then pleaded nolo contendere reserving his right to challenge the ordinance's constitutionality. On appeal, the circuit court affirmed without opinion his conviction, and he then filed a petition for writ of certiorari with this court pursuant to Florida Rule of Appellate Procedure 9.030(2)(B).
>
> On December 9, 1981, Moore [respondent] was left in charge of the Red Garter Club, a bar in Daytona Beach, by Mr. Chris Janise, the owner. While she was serving alcholic beverages to customers at the bar, an employee of the club, Ms. Judy Grimes, danced on the stage for fifteen to twenty minutes with nothing over her breasts except strips of opaque tape that covered the areolae. Like Del Percio, Moore filed a motion to dismiss challenging the constitutionality of the ordinance. She was found guilty of the charge in a non-jury trial and assessed a five hundred dollar ($500.00) fine or a ten day jail term."
>
> Del Percio v. City of Daytona Beach, 449 So.2d 323, 327 (5 DCA Fla. 1984).

Moore's conviction was affirmed by the Circuit Court. The Fifth District Court of Appeal declared the ordinance unconstitutional and reversed the convictions Del Percio v. City of Daytona Beach, 449 So.2d 323 (5 DCA Fla. 1984). The City petitioned this Court to review the decision of the Fifth District, which this Court granted.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING SECTION 5-25, CITY CODE, UNCONSTITUTIONALLY VAGUE.

The operative anatomical language of the ordinance that was found vague by the Fifth District Court of Appeal, contrary to the decisions of the County Court and Circuit Courts, is:

> "...any portion of her breasts below the top of the areola..."
>
> Section 5-25(b), City Code

The language other courts have found constitutional is:

> "...any portion of the breast below the top of the areola..."
>
> New York State Liquor Authority v. Bellanca 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed. 2d 357 (1981).

> "...that area of the human female breast at or below the areola thereof..."
>
> Bd. of Comm. of Lee County v. Dexter-house, 348 So.2d 916 (2 DCA Fla. 1977); affirmed Martin v. Bd. of Comm. of Lee County, 364 So.2d 449 (Fla. 1978); appeal dismissed; 441 U.S. 918, 99 S.Ct. 2024, 60 L.Ed. 2d 392 (1979), and Fillingim v. State, 446 So.2d 1099 (1 DCA Fla. 1984) and Grand Faloon v. Wicker, 670 F.2d 569 (11th Cir. 1982), cert. denied 103 S.Ct. 132 (1982), and Kruenger v. City of Pensacola, PCA 834066 (N.D. Fla. 1983) [Appendix C]

> "... the female breasts below a point immediately above the top of the areola...
>
> City of Miami Springs v. J.J.T. 437 So.2d 200 (3 DCA Fla. 1983).

No sensible reading will find any discernable difference in the various descriptions. In fact, the Fifth District Court of Appeal quite clearly understood the language when it emphatically stated:

> "The ordinance declares that any portion of the breast below the areola must not be exposed."
>
> Del Percio at p. 325 (emphasis from original)

The only vagueness demonstrated in the opinion below is not from the record, but comes from the opinions of County Judge McDermott which were not rendered in this cause (though in one case he had respondent Del Percio before him on another charge under the ordinance), and dictum from County Judge Josephson, who did not even have a topless case before him. The unusual personal characterization of these and other judges as learned, experienced, and reasonable [Ibid at p. 324] is a surprise "issue" not discernable from the record. Personal observations about the judges are irrelevant. The determination of vagueness must commence with the comprehension of those against whom the ordinance is being enforced.

Despite the desire of the Fifth District to review the many cases under the ordinances which were not appealed to it (but rather the decisions which were filed as supplemental authority), the facts of the instant cases revealed not one scintilla of evidence that the violations of the ordinance occurred due to lack of understanding by its violators.

Respondent Del Percio blatantly orchestrated an intentional violation by permitting a female to dance nude from the waist up. Respondent Moore, by her own testimony, demonstrated ignorance of the law.

> "THE COURT: Miss Moore, were you aware on December 9, 1981, of the City Ordinance that's now in question, this so-called topless ordinance?
>
> THE WITNESS: I knew that there was something trying to be done about it. Truthfully, I wasn't aware of the fact that any law had been passed whatsoever.

> I didn't know one way or the other whether it was something being tested or if it was -- had been passed that the dancers weren't allowed to do it anymore." Moore Transcript p. 41, l. 23. - p. 42, l. 9.

The Fifth District found that the ordinance did not give a person of ordinary intelligence fair notice that the contemplated conduct was prohibited by the statute. However, there is no factual evidence drawn from the record to support this contention.

Further, the Fifth District held that the ordinance encourages arbitrary and erratic arrests and convictions. Again, the record in these cases does not support this bold conclusion. Both defendants were not arrested, but were given notices to appear. Thus, there was a clear intent by the police to subject the defendants to the minimum imposition on liberty and property prior to conviction. It is hardly the image of high-handed law enforcement. As to the conviction of respondent Del Percio, his nolo contendere plea serves as an admission of his responsibility for the conduct of the person appearing nude above the waist in his bar. The trial court had no choice but to find him guilty as charged. Respondent Moore, was "hung" by her own words. In a classic case of when not to take the stand, Moore clearly established that she was the person in charge of the business where she was working, despite her transparent lies to the contrary. She claimed not to be employed there, but called the owner "...my boss" [Moore Transcript p. 29, l. 13]. She sold alcoholic beverages [Moore Transcript, p. 34, l. 22]. Also, the

dancer had only her areolae covered [Moore Transcript p. 6, l. 2-15]. Again a conviction was the only plausible conclusion the trial court could make from the facts.

Certainly the statement of the Third District put it succinctly: "[The] contention that the ordinance is void for vagueness is totally without merit." City of Miami Springs, supra, p. 205. Leon County's ordinance also sustained a similar attack. Fillingim, supra, p. 1104.

II. THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING SECTION 5-25, CITY CODE, UNCONSTITUTIONAL DUE TO OVERBREADTH.

The Fifth District Court of Appeal, contrary to the decisions of the County Court and Circuit Courts, has determined that the language of the ordinance is overbroad and thus unconstitutional. However, the court cites not one concrete example of the alleged overbreadth.

Starting with the facts of the instant cases, the ordinance was applied to people in charge of bars offering topless entertainment. Yet the Fifth District says such conduct should be proscribed [Ibid, at p.325.] The other cases under the ordinance cited by the Fifth District all involved topless or bottomless dancers or people in charge of bars where topless dancers performed. Certainly such conduct can be punished. Even a review of the other topless cases cited by the Fifth District construing other ordinances finds they were being applied to topless dancers and people in charge of topless bars, despite the fact that those ordinances contain prohibitions against nudity by all persons in bars.

There is no first amendment protection for nudity unless it coupled with expression. South Fla. Free Beaches v. City of Miami, 734 F.2d 608 (11th Cir. 1984). Thus an imposition of clothing standards for patrons or non-entertainment employees where alcoholic beverages are served must be afforded great deference Castlewood International Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979).

However, the Fifth District found that the instant ordinance should have applied different rules to 1) outside bars and 2) clothing that may permit a partial exposure of the lower portion of the breast [Del Percio, supra, at p.325.]

No case cited involved an outdoor bar, but it is difficult to see how the harm created by the mixture of alcohol and nudity, which is the target of the ordinance and which the Fifth District recognized as contrary to public welfare and crime prevention interests, is somehow eliminated by the removal of walls and a roof. A bar is a bar, and the problems generated by nudity and alcohol mixing can occur outside or inside a building.

The issue of clothing is much more complicated than the Fifth District opinion would imagine. Topless and bottomless dancing by paid employees is not the only sexual misconduct exploited in conjunction with the liquor business. Mud wrestling, wet tee shirt contests, amateur strip tease contests, lap dancing and similar devises are utilized for promotion. Tricks such as the one respondent Del Percio tried by alternating liquor sales and nudity will be resorted to in order to introduce lewd conduct into bars. Flesh colored "pasties" such as worn by the dancer in respondent Moore's case [Moore transcript, p.6, l.15] is an example of the lengths the proponents of these activities will go to attempt to avoid compliance with the law. Thus any effort to excise "acceptable, legitimate attire or conduct" (which are at worst

de minimus violations of the proscription and without constitutional protection) from the application of the ordinance will only result in permitting activity designed to excite the baser urges that the Fifth District believes should be restrained. [Ibid, at p.325.]

Nothing in the record indicates that such possible de minimus violations ever placed unsuspecting females in jeopardy of being deprived of liberty or property for such actions. As long as there are judges, juries, and law enforcement personnel subject to constitutional limitations on their powers, the citizenry will be protected from such absurd interpretations. It seems unavoidable that a few innocent people may be charged with any criminal activity prohibited by law, but the system corrects such errors.

That is why the 11th Circuit did not find the Cocoa Beach topless ordinance overbroad:

> "...the overbreadth of a measure must be both real and substantial, 'judged in relation to the [provisions's] plainly legitimate sweep'."
>
> Grand Faloon, supra p.573.
> (emphasis supplied)

Since "proscriptions in terms of place, type of conduct, and extent of exposure forbidden" are precisely the same in the instant ordinance and Leon County's, the overbreadth determination in the criminal prosecution under the latter ordinance is a reasoned decision unemcumbered by imagined enforcement misconduct not in evidence. Fillingim, supra p.325.

III. THE CITY OF DAYTONA BEACH IS EMPOWERED TO ENACT SECTION 5-25, CITY CODE.

The City of Daytona Beach enacted Ordinance 81-334 [Appendix A] which created Section 5-25, City Code, in accordance with Section 166.021, Florida Statutes (1983), as demonstrated in the legislative record which has evidence of police and public concerns. [Appendix B]

The ordinance clearly is a valid exercise of power.

Municipalities in Florida have constitutional home rule powers.

> "POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."
>
> Art. VIII, §2(b), Fla. Const.

These powers have been implemented by the Municipal Home Rule Powers Act, being Chapter 166, Florida Statutes (1983).

> "(1) As provided in s.2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, <u>except when expressly prohibited by law.</u>
>
> "(2) 'Municipal purpose' means any activity or <u>power which may be exercised by the state</u> or its political subdivisions.

"(3) The Legislature recognizes that pursuant to the grant of powers set forth in s.2(b), Art. VIII of the State Constitution, the legislative body of each municipality shall have the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:...

(c) "Any subject expressly preempted to state or county government by the Constitution or by general law..."

§166.021, Florida Statutes (1983)

"'Ordinance' means an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law."

§166.041(a), Florida Statutes (1983) (emphasis supplied)

There has been no state preemption in this field 4245 Corporation v. Division of Beverage, 371 So.2d 1032 (1 DCA Fla. 1978).

Certainly the ordinance is supported by the City's authority to exercise power under the 21st Amendment, United States Constitution. California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), demonstrated that whatever constitutional protection may exist for nude expression is lost when confronted with the need to regulate the consumption of alcoholic beverages. This power was specifically upheld in a prohibition on the exposure of female breasts where liquor was consumed. N.Y. State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981). The 21st Amendment power is one provided to Florida municipalities Fillingim v. State, 446 So.2d 1099 (1 DCA Fla. 1984).

Even the earlier cases, which mistakenly assumed a lack of 21st Amendment powers for Florida municipalities, found the general police power sufficient to uphold the Cocoa Beach and Lee County ordinance similar to the one at bar. Grand Faloon Tavern v. Wicker, 670 F.2d 943 (11th Cir. 1982); cert. denied 459 U.S. 859, 103 S.Ct. 132, 74 L.Ed.2d 113 (1982); Board of County Commissioners v. Dexterhouse, 348 So.2d 918 (2 DCA Fla. 1977), approved Martin v. Board of County Commissioners, 364 S.2d 449 (Fla. 1978), appeal dismissed 441 U.S. 918, 99 S.Ct. 2024, 60 L.Ed.2d 392 (1979).

More recently, without any specific invocation of the 21st Amendment, a similar ordinance was upheld for Miami Springs. City of Miami Springs v. J.J.T., 437 So.2d 200 (3 DCA Fla. 1983).

In fact in the instant cause, the Fifth District Court of Appeal upheld the City's power to legislate in this area:

> "So we agree with the City Commission that governmental control is proper under the police power and there is no first amendment violation here."
>
> Del Percio, supra, p.325.

CONCLUSION

Section 5-25, City Code, is a constitutional regulation of conduct under the 21st Amendment and the police powers. It is a legitimate prohibition of conduct which as written and applied in these cases is neither overbroad nor vague. The respondents were duly adjudged guilty of violating the ordinance, as their conduct fell clearly within the four corners of the prohibition. The City prays this Court quash the writ of certiorari of the Fifth District Court of Appeal, reinstate the orders of the County Court and the Circuit Courts declaring the ordinance constitutional, and reinstate the convictions of the respondents.

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by postal delivery to Eric A. Latinsky, Esquire, 326-1/2 South Beach Street, Suite 7, Daytona Beach, Florida, and Richard L. Wilson, Esquire, 1212 E. Ridgewood Street, Orlando, Florida 32803, this 17th day of December, 1984.

Frank B. Gummey III
Frank B. Gummey, III