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/Plaintiff,

vs.

LEONARD DEL PERCIO and
LAURA IRIS MOORE,

Respondents/Defendants.
_____/

JURISDICTIONAL BRIEF OF PETITIONER

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ISSUE I

THE SUPREME COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE INSTANT DECISION ON THE FACIAL VALIDITY OF SECTION 5-25(b)(d), CODE OF THE CITY OF DAYTONA BEACH, RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL, PURSUANT TO ARTICLE V, SECTION 3(b)(3), CONSITITUTION OF THE STATE OF FLORIDA, AND RULE 9.030(a)(2)(A)(iv), RULES OF APPELLATE PROCEDURE, BECAUSE THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

The instant jurisdictional question is before this Court because the decision in Del Percio v. City of Daytona Beach (Appendix A) of the 5th District Court of Appeal below, declaring Section 5-25(b)(d) of Petitioner's Code, as enacted by Ordinance No. 81-334 (Appendix B), facially unconstitutional because of vagueness and overbreadth, directly and expressly conflicts with the following decisions: The Third District Court of Appeal decision in the case of City of Miami Springs v. J.J.T., Inc., 437 So.2d 200 (3 DCA Fla. 1983), decided September 13, 1983, as to vagueness; the Second District Court of Appeal decision in the case of Board of County Commissioners v. Dexterhouse, 348 So.2d 916 (2 DCA Fla. 1977), affirmed 364 So.2d 449 (Fla. 1978), appeal dismissed 441 U.S. 918, 99 S.Ct. 2024 (1979), as to overbreadth; and the First District Court of Appeal decision in Fillingim v. State, 446 So.2d 1099 (1 DCA Fla. 1984), decided February 8, 1984, as to vagueness and overbreadth. This Court therefore has jurisdiction pursuant to Article V, Section 3(b)(3), Constitution of the State of Florida and Rule 9.030(a)2(A)(iv), Florida Rules of Appellate Procedure.

The Fifth DCA in the instant case realized that its decision conflicted with Fillingim, but determined that such conflict was not direct or express. The Court stated: "Although we recognize a certain amount of conflict with Fillingim v. State, ...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 proscription and differed as to its application." Del Percio at page 6.

Just as this Court stated in Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981) at page 1342, that "it is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under section 3(b)3," a statement by a District Court that no direct or express conflict exists with other district courts of appeal decisions also does not determine this Court's jurisdiction.

In Mobley v. State, 143 So.2d 821 (Fla. 1962), the issue of jurisdiction before the Supreme Court was whether the District Court's decision below in Mobley v. State, 133 So.2d 334 (2 DCA Fla. 1961), involving a regulation of the Game and Fresh Water Fish Commission conflicted with the Supreme Court's decision in Stephens v. Anderson, 79 So. 205 (Fla. 1918), which involved a municipal ordinance. The Court stated:

> "The District Court distinguished the Stephens case on the grounds that it involved a municipal ordinance rather than a regulation of an Administrative Board.

We find, however, when the similarity of the facts and pertinent statutes are considered, the distinction to be superficial, the two cases in direct conflict and jurisdiction in this Court." Ibid at page 823.

In Kyle v. Kyle, 139 So.2d 885 (Fla. 1692), this Court stated:

> "[J]urisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents. We have said that a conflict must be of such that if the latter decision and the earlier decision were rendered by the same Court, the former would have the effect of overruling the latter. Ansin v. Thurston, Fla., 101 So.2d 808." Ibid at page 887.

Applying the standards on conflict jurisdiction enunciated by this Court, the task is to determine the points of law in the cases cited to be in conflict and then to determine whether the points of law pronounced in the latter case if substituted for the points of law in the prior case or cases would change the results in the prior case or cases.

The issue before the Fifth District Court of Appeal in the instant case was whether Subsections (b) and (d) of Section 5-25 of the Code of The City of Daytona Beach were facially overbroad and vague, and therefore unconstitutional. Subsection (b) provided:

> "(b) No female person shall expose to public view any portion of her breast below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages."

Subsection (d) provided:

> "(d) No person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breast below the top of the

> areola or any simulation thereof within the establishment dealing in alcoholic beverages."

In considering the facial constitutionality of the cited subsections, the District Court pronounced two points of law in the case.

First, the Court pronounced that the language prohibiting females from exposing to public view any portions of their breasts below the top of the areola rendered the quoted subsections overbroad and therefore unconstitutional. The Court stated:

> "The Ordinance declares that any portion of the breast below the areola must not be exposed. We do not believe that the Ordinance was intended to control all forms of attire where this exposure may occur (such as mentioned above), but the Ordinance, as worded, does not make this clear. The Ordinance is overbroad because it also bars acceptable, legitimate attire or conduct." Del Percio at page 4. (Emphasis in original.)

Secondly and finally, the Fifth District pronounced that the language prohibiting female persons from exposing to public view any portion of her breasts below the top of the areola in an establishment dealing in alcoholic beverages was vague, and therefore unconstitutional. The Court stated:

> "We believe that the record before us in the case at bar shows that the Ordinance in question (particularly that portion dealing with exposure of the breast) omits certain necessary and essential provisions which would serve to impress the acts committed as being wrongful and criminal and 'the Courts are not at liberty to supply the deficiencies or undertake to make the ...[Ordinance] definite and certain." Del Percio at page 6. (Brackets included in the original.)

Succinctly stated, the Fifth District pronounced as points of law that an ordinance which provides that "no female person shall expose to public view any portion of her breast

below the top of the areola ...in an establishment dealing in alcoholic beverages" is facially overbroad and vague, and therefore unconstitutional.

In Fillingim, supra, Section 7(b) of the Ordinance construed by the Court provided:

> "It shall be unlawful for any female person, while on the premises of a commercial establishment at which alcoholic beverages are, or are available to be sold, dispensed, consumed, possessed or offered for sale or consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof or to employ any device or covering which is intended to give the appearance of or simulate such areas of the female breasts as described herein." (Emphasis supplied.) Ibid at page 1100.

The Fillingim Court held: "We reject also petitioners' contentions that the ordinance is overbroad or void for vagueness, and find that the ordinance sufficiently defines and describes its proscriptions in terms of place, type of conduct, and the extent of exposure forbidden." Ibid at page 1104. (Footnotes omitted.)

The language "...to expose to public view that area of the human female breast at or below the areola thereof..." in Fillingim, which was held not to be constitutionally overbroad or vague is practically indistinguishable from the instant language "...exposed to public view any portion of her breast below the top of the areola..." which the Fifth District in the instant case held to be unconstitutionally overbroad and vague. The points of law pronounced in the two cases are in direct and express conflict.

In City of Miami Springs, supra, the Third District Court of Appeal construed an ordinance which prohibited the sale

of alcoholic beverages and the consumption thereof on licensed premises during the hours "the female breast below a point immediately above the top of the areola" is displayed "to the public for any type of consideration." Ibid at page 201. Regarding the vagueness issue, the Court held: "J.J.T.'s contention that the Ordinance is void for vagueness is totally without merit."

The operative language in Miami Springs, "female breast below a point immediately above the top f the areola" when compared with the operative language in the instant opinion (Del Percio at page 1), "breast below the top of the areola" is indistinguishable. The operative language in the Miami Springs Ordinance is constitutionally clear, while the operative language in the instant case is constitutionally vague. The points of law regarding vagueness in the cited cases are in direct and express conflict.

In Dexterhouse, supra, the Second District Court of Appeal construed a Lee County Ordinance which provided:

> "It shall be unlawful for any female person while on the premises of a commercial establishment ...at which alcoholic beverages are offered for sale or consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof." Ibid at page 917. (Emphasis supplied.)

The Dexterhouse Court held: "We reject the contentions that the Ordinance is overbroad and violative of the constitutional guarantees of free speech and expression." Ibid at page 918. The Dexterhouse Ordinance is not unconstitutionally overbroad while almost identical language in the instant Ordinance is claimed to be. On the question of overbreadth, the point of law announced in the instant case is in direct and express conflict with the point of law pronounced in the Dexterhouse case.

ISSUE II

THE SUPREME COURT HAS 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.

In Martin v. Board of County Commissioners of Lee County, 364 So.2d 449 (Fla. 1978), this Court accepted "jurisdiction in this case regarding the constitutionality of a county ordinance prohibiting 'topless' dancing because the First Amendment to the Constitution of the United States was construed." Ibid at page 450.

In the instant case the District Court below held portions of Petitioner's Ordinance prohibiting topless conduct in establishments dealing in alcoholic beverages "vague, overbroad, not fairly enforceable, and thus unconstitutional." Del Percio at page 1. The District Court by necessity had to expressly construe the Constitution; thus this Court has discretionary jurisdiction pursuant to Article V, Section 3(b)3.

CONCLUSION

The Fifth District Court of Appeal construed an Ordinance containing language indistinguishable from the language construed by the First District Court of Appeal in Fillingim, the Second District Court of Appeal in Dexterhouse, and the Third District Court of Appeal in City of Miami Springs. In City of Miami Springs the language was held not to be unconstitutionally vague. In Dexterhouse the Ordinance's language was held not to be unconstitutionally overbroad. And in Fillingim, the language was held to be neither unconstitutionally vague nor unconstitutionally overbroad. The Fifth District Court of Appeal's decision in the instant case declaring the language to be unconstitutionally overbroad and vague expressly conflicts with the above cited decisions and therefore this Court has discretionary jurisdiction to review the instant case.

Finally, in declaring portions of Petitioner's Ordinance unconstitutional, the District Court below expressly construed the Constitution thereby vesting discretionary review jurisdiction in this Court.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand to Eric A. Latinsky, Esquire, 326 1/2 South Beach Street, Daytona Beach, Florida, 32014 this 11 day of June, 1984.

Reginald E. Moore

Reginald E. Moore