O/a 3-5-85

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

SUPREME COURT 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.

_____/

FILED
SID J. WHITE
FEB 12 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

REPLY BRIEF OF PETITIONER

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CITATIONS

STATEMENT OF THE CASE AND FACTS

The Respondents' Statement contains several matters which are neither supported by or cited to the record.

Respondents claim that the dancer, Judy Grimes, had tape covering "...the area of the breasts directly below the areola on each breast." (Respondents' Answer Brief, p. 1). However, the record of the trial reveals through the unrefuted testimony of the police officer who cited Respondent Moore:

> "Q. Was there a covering on her breasts?
> A. Yes, there was.
> Q. What kind of covering?
> A. I don't know what the material was. It was covering the pigmented part of the nipple.
> Q. From where you were sitting, did it look like she had her -- was other parts of her breasts exposed?
> A. Yes, sir.
> Q. Below the areola?
> A. Yes, sir.
> Q. Can you tell us the color of the tape that was used?
> A. It appeared to be flesh-colored."
>
> (Moore Transcript, p. 6, l. 3-15).

Respondents then claim that the owner of the bar corroborated Respondent Moore's story (Respondents' Answer Brief, p. 2). However, the owner refused to testify at trial, invoking his 5th Amendment privilege. (Moore Transcript, p. 43, l. 14 - p. 44, l. 21.)

ARGUMENT

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

The Respondents attempt to rely on the 1st Amendment, U.S. Constitution, and Article I, Section 4, Florida Constitution, which afford the same scope of protection. Department of Education v. Lewis, 416 So.2d 455, 461 (Fla. 1982). Their reliance is misplaced.

> "In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the 'added presumption in favor of the validity of the state regulation' conferred by the Twenty-first Amendment, California v. LaRue, 409 U.S., at 118, 93 S.Ct., at 397, we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts."
>
> New York State Liquor Authority v. Bellanca, 452 U.S. 714, 718, 101 S.Ct. 2599, 2602, 69 L.Ed.2d 357 (1981).

Respondents rely on cases all decided before Bellanca, supra, and which were available to the United States Supreme Court when it ruled. In fact Schad v. Mount Ephriam, 45 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), upon which Respondents primarily base their argument, was decided only three weeks before Bellanca, supra, by the same nine justices. Justice Stevens cited Schad, supra; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95

S.Ct. 1239, 43 L.Ed.2d 448 (1975); and Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), in dissent. Doran, supra, is also distinguished in the majority opinion.

There is no freedom of speech question left on the instant ordinance in light of Bellanca, supra, and Department of Education, supra, and any 1st Amendment vagueness test is inappropriate.

Respondents then cite several cases unrelated by facts, but then note two cases which are highly instructive. Marrs v. State, 413 So.2d 774 (1 DCA Fla. 1982), in a broad sweep prohibited the exposure of, among other things, breasts (without any specification of area or gender) in any commercial establishment. Certainly without anatomical guidance or distinction between male or female breasts, the ordinance had to fail. The 1st District Court of Appeal has clearly rejected the application of Marrs, supra, to the instant ordinance when it specifically compared Marrs in a subsequent ruling upholding the Leon County ordinance prohibiting exposure in bars of "...the area of the [female] human breast at or below the areola" as not void for vagueness and having sufficiently described its proscriptions. Fillingim v. State, 446 So.2d 1099, 1104 (1 DCA Fla. 1984).

More instructive perhaps is that Marrs, supra, relied on Steffens v. State ex rel. Lugo, 343 So.2d 90 (3 DCA Fla. 1977), which found unconstitutional as being void for

vagueness a City of Miami Springs ordinance which prohibited female breasts to be bare or covered in a variety of ways in any public business. The same Court has subsequently found an ordinance of the same municipality constitutional when it prohibited the display of "...female breasts below a point immediately above the top of the areola..." in bars as the instant ordinance does. City of Miami Springs v. J.J.T., 437 So.2d 200 (3 DCA Fla. 1983).

Respondents would urge upon this Court that it not join the 5th District Court of Appeal in deciding cases not appealed to it. A ruling from Orange County, dicta from County Judge Josephson in a "bottomless" case, and the confusing rulings of County Judge McDermott are simply not the cases in controversy before this Court. One must return to the language of the ordinance: "No female person shall expose to public view any portion of her breasts below the top of the areola..." and what the 5th District Court of Appeal said of it: "The ordinance declares that any portion of the breast below the areola must not be exposed." Del Percio v. City of Daytona Beach, 449 So.2d 323, 325 (5 DCA Fla. 1984). Any other interpretation is error, and erroneous interpretations not induced by vague language do not void an ordinance.

Respondent Del Percio pled nolo contendere to violating the prohibitions of the ordinance. He thus has lost his opportunity to explain to the trier of fact why he violated the ordinance. Any speculation as to what he found

vague in the ordinance is unsupported in the record. The fact is, with counsel present, Del Percio served liquor to patrons in the bar and then immediately thereafter presented a female dancer nude from the waist up. Nothing is vague about that.

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

Respondents concede that nudity without expression is not protected conduct. South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984); Moffett v. State, 340 So.2d 1155 (Fla. 1977). Yet they and the 5th District then argue that the instant ordinance may reach persons engaged in unprotected conduct, though no instances of such reach have occurred. What that argument ignores is that the ordinance would potentially reach the unprotected conduct of patrons and other non-entertainers in bars, not in any public place. The 5th District erroneously concluded that the ordinance was aimed at topless dancing Del Percio, supra, p. 325. The intent of the ordinance is clearly stated:

> "That actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public, and it is the intent of this ordinance to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages."

Ordinance No. 81-334, Section 2. (Emphasis supplied.)

If Bellanca, supra p. 2602, allows the broad powers of the Twenty-first Amendment to overcome any 1st Amendment protection topless dancing might have in other places, it

certainly allows prohibition of unprotected activity in the limited places permitting public consumption of alcoholic beverages.

Respondents argue different rules have been applied to patrons and dancers, but again they cannot support their claim. Enforcement must distinguish between de minimus violations and obvious ones. There is nothing in the record which demonstrates anything but flagrant violations in both the Moore and Del Percio cases. They can site no de minimus violations by dancers, and no flagrant violations by patrons.

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

Petitioner City's authority to enact Section 5-25, City Code, is derived from the 21st Amendment, U.S. Constitution, and its police powers.

> "The Twenty-First Amendment to the United States Constitution provides the source of the state's police power of regulation over the distribution or use of intoxicating beverages. We agree with petitioner's argument that the Twenty-First Amendment does not directly confer authority upon municipalities or counties to oversee conduct in licensed beverage premises; that authority is, however, derived from our state's constitution and statutes. See Article VIII, Section 2(b) and 5 (as to municipalities)..."
>
> Fillingim v. State, supra, p. 1102.

Since a Florida municipality may exercise any power that the state can [(Section 166.021(1) and (2), Florida Statutes (1983)], and can do so by enacting legislation [(Sections 166.021(3) and 166.041(a), Florida Statutes (1983)] unless there is an express preemption or prohibition, the 21st Amendment power resides in municipalities in Florida. State v. Redner, 425 So.2d 174 (2 DCA Fla. 1983); Fillingim, supra. In Florida a municipal ordinance absent preemption has the force of a state law.

The federal courts make no distinction of 21st Amendment powers afforded to states and municipalities. Municipal "topless" ordinances in Nebraska and Minnesota were upheld with no invocation of police powers Paladino v. City of Omaha, 471 F.2d, 812 (8th Cir. 1972); Blatnik Company v. Ketola, 587 F.2d 379 (8th Cir. 1978).

However, even if this authority is not recognized, one need look no further than the entire legislative history of the instant ordinance found in the record at Volume II, Supplemental Documents - Appendix to Response to Petition, March 22, 1983, to see that there was more than sufficient support for the exercise of police powers. In fact, the evidence is more voluminous and compelling than that in Grand Faloon, Inc., 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). Also it was presented to the legislative body at the time it deliberated upon adoption of the ordinance. In Grand Faloon the "legislative history" was produced after the fact at trial. Highlights of the instant legislative history are attached to Petitioner's Initial Brief (Appendix B).

IV. SECTION 5-25, CITY CODE, WAS APPLIED CONSTITUTIONALLY IN BOTH CASES.

A. RESPONDENT MOORE

The most strained construction of the instant ordinance and the kindest interpretation of Respondent Moore's actions find her guilty as charged. The dancer was topless under any construction by the unrefuted testimony of the officer at trial (Moore Transcript, p. 6, l. 3-15). Even accepting her protestations about not being a salaried employee, she was liable for the conduct in that bar because she was the only one selling the liquor.

> "It is well settled that one who, in violation of law, sells intoxicating liquors as the servant of another, is liable personally, as well as his principal, to indictment although he acted without compensation in making the sale."
>
> Hiers v. State, 52 Fla. 25, 41 So. 881 (Fla. 1906).

Moore, indicated to the officer she was in charge of the bar (Moore Transcript, p. 12, l. 18). She denied the statement at trial (Moore Transcript, p. 30, l. 17). The trier of fact did not believe her (Moore Transcript, p. 57, l. 9-13).

B. RESPONDENT DEL PERCIO

The Respondent cannot claim that the City failed to prove the facts against him; he proved them by pleading nolo contendere. The facts are that his patrons consumed alcohol in his licensed bar and without any separation of time or place he then provided a dancer nude above the waist. It is common knowledge that the effects of alcohol do not cease when one stops drinking it.

V. THE TRIAL COURT IMPOSED AN APPROPRIATE SENTENCE ON RESPONDENT MOORE.

The penalty imposed on Respondent Moore was appropriate for the violation. The trial court erred in failing to impose a similar sentence on Respondent Del Percio, despite a request from the City (Del Percio Transcript, February 19, 1982, p. 3, l. 6-12). It would appear appropriate that Del Percio be resentenced, or at a minimum both Respondents be resentenced.

VI. SECTION 5-25, CITY CODE, HAS NOT BEEN PREEMPTED BY SECTIONS 847.09 AND 847.03, FLORIDA STATUTES (1983).

Respondents' position on this matter is inconsistent with their admission in Argument III that the City is empowered to enact the instant ordinance under the police power.

The Third District answered this issue well:

> "We note that J.J.T. made no attack upon the ordinance on the ground that the Legislature preempted the field of obscenity in Section 847.09, Florida Statutes (1981). As the City Commission specifically stated, the ordinance in question does not attempt to ban obscene performances or activities, but instead reaches sex-related activities in liquor establishments whether obscene or not. Proof that one violated the ordinance would not require an inquiry into whether the performance or activity was obscene, and the legislative purpose announced in Section 847.09, namely, 'to make the application and enforcement of ss. 847.07-847.09 uniform throughout the state,' would not be offended by the city ordinance."

City of Miami Springs, supra, p. 204.

CONCLUSION

There is no 1st Amendment protection for nudity in bars when such conduct is prohibited under the 21st Amendment and police powers of a Florida Municipality. 1st Amendment standards for determining the constitutionality of an ordinance prohibiting that conduct is error.

Section 5-25, City Code, is not vague or overbroad and the instant convictions thereunder should be reinstated.

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CERTIFICATE 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 East Ridgewood Street, Orlando, Florida 32803, this 11th day of February, 1985.

Frank B. Gummey, III