66,573

SUPREME COURT OF THE STATE OF
FLORIDA

CASE NO.

STATE OF FLORIDA, ex rel., JOSE GARCIA PEDROSA,
as City Attorney of the City of Miami of the
State of Florida,

Petitioners,

vs.

FLORIDA LITERARY DISTRIBUTING CORPORATION,
a Florida corporation, et al.,

Respondents.

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

The Petitioner, Jose Garcia Pedrosa, as City Attorney of the City of Miami of the State of Florida, was the Plaintiff in the trial court and the Appellee below.

The Respondent, Florida Literary Distributing Corporation, was the Defendant, and the Appellant below.

This appeal arises out of reversal by the Third District Court of Appeal of an order enjoining the further sale of four magazines alleged to be obscene in each of the cases.

References to the Record on Appeal will be designated by the letter R. Reference to the Appendix attached hereto will be designated by the letter A.

STATEMENT OF THE FACTS AND CASE

The two actions below, which were consolidated before the Third District Court for appeal purposes, were commenced in the lower court as complaints for injunctive relief against Respondent and a total of eight (8) magazines (four in each Complaint) under the provisions of Section 847.011(8) Florida Statutes. (R. 1-6, 40-45). Temporary restraining orders, followed by temporary injunctions, were entered in both cases prohibiting Respondent from sale or distribution of the magazines pending final hearings on the merits of the Complaints. (R. 7-8, 9-10, 46-47, 48-49).

The final hearing on Petitioner's Complaint in Case No. 83-14697 was held on November 21, 1983. (Tr. I, 1-38). At the hearing, following the presentation of the Petitioner's case, Respondent moved for a directed verdict on the ground that Petitioner had failed to meet its burden of proof as a matter of law by virtue of its failure to elicit any testimony establishing the contemporary community standards of Dade County, Florida. (Tr. I, 27, et seq.) The trial court reserved ruling on the motion, but ultimately entered its Final Judgment granting Petitioner the permanent injunction sought in its Complaint. (Tr. I, 36; R. 35-36).

The final hearing on Petitioner's Complaint in Case No. 83-20846 occurred before the lower court on January 10, 1984. (Tr. II, 1-64). As in the prior case, following

Petitioner's presentation of its case, Respondent moved for a directed verdict on the ground that Petitioner had failed in its burden of proof as a matter of law by failing to elicit testimony, in this non-criminal, non-jury trial setting, of the contemporary community standards of Dade County, Florida, in order to allow the trier of fact to make a determination of the obscenity vel non of the magazines in question. (Tr. II, 40 et seq.) The Court also reserved ruling on this motion. (Tr. II, 49). The court refused, upon inquiry made by counsel for Respondent, to advise the parties as to whether or not it felt able to determine the contemporary community standards in Dade County, Florida, to enable it to make a valid decision on the obscenity vel non of the materials. (Tr. II, 53-61). Ultimately, the lower court entered its Final Judgment Granting Permanent Injunction, thereby according to Appellee the relief sought. (R. 37-39).

Respondent, then filed its Notice of Appeal from two Final Judgments entered by the lower courts. (R. 32, 60). Because of the similarity of issues presented in each case, the Third District Court of Appeals, upon motion, consolidated these cases for appellate purposes.

ARGUMENT

WHETHER THE DECISION OF THE THIRD DISTRICT COURT CONFLICTS WITH THE DECISION IN MARKS VS. STATE, 262 So.2d

> 479 (Fla. 3d DCA, 1972); MITCHUM V. STATE, 251 So.2d 298 (Fla. 1st DCA 1971); COLLINS V. STATE BEVERAGE DEPT., 239 So.2d 613 (Fla. 1st DCA 1970) AS TO WHETHER A MUNICIPALITY MUST PRESENT EXPERT TESTIMONY TO PROVE THAT MATERIAL IS OBSCENE.

This Court has jurisdiction to invoke its discretionary power in the instant case pursuant to the Fla.Const.Art. V., §3 (b) (3), Fla.R.App.P. Rule 9.030 (a)(2)(A)(iv), and Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The only issue before this Court is whether the City carried its burden of proof upon the issue of obscenity when it did not introduce expert testimony as to community standards and that respondent's motion for a directed verdict on that basis should have been granted.

Respondent's argument is an anomaly to the very words "contemporary community standards," a purposefully subjective standard defined as:

> . . . whether the dominant theme of the material as a whole . . . appeals to the prurient interest and in determining whether the material goes substantially beyond customary limits of candor and affronts contemporary community standards of decency, . . . Miller v. California, 413 U.S. 15,31 (1973). (Hereinafter Miller).

Community standards are an evaluation tool, code words for an affront to common decency as perceived by the trier of fact in a local community. See gen'l, Miller, Id., Paris Adult Theatres I v. Slaton, 413 U.S. 49 (1973), Davidson v. State, 288 So. 2d 484 (Fla. 1973).

> There are two elements to be considered when admitting expert testimony. First the subject must be beyond the common understanding of the average layman.
>
> Second the witness must have such knowledge as will probably aid the trier of facts in its search for the truth. (Citations and emphasis omitted) Buchman v. Seaboard Coast Line R. Co., 381 So.2d 229 (Fla. 1980).

Why would it be necessary to introduce expert testimony as to community standards as suggested by appellants when such materials are expressly and purposefully within the knowledge of the average person?

> Nor was it error to fail to require 'expert affirmative evidence that the materials were obscene when the materials themselves were actually placed into evidence (citations omitted). The films, obviously, are the best evidence of what they represent. Paris Adult Theatres I, supra, at 56.

Additionally, respondents completely disregard the evidentiary value of the police officer's statement that he believed the materials to be obscene under the Miller standards (T. I, 9-10; Tr. II, 16-18) and that the materials were hard-core pornography based upon his experience. (Tr. II, 16-17).

The officer's sworn affidavits (R. 1-6, 40-45) are sufficient to establish probable cause to issue a search warrant pursuant to the criminal provisions of §847.011 Fla.Stat., and nothing more is necessary for the issuance of a temporary restraining order in civil obscenity cases such as this. Ellwest Stereo Theatres Inc. v. Nichols, 403 F.Supp. 857 (USDC Fla. 1975); Fairvilla Twin Cinema II v. State, 353 So.2d 908 (Fla. 4th DCA 1977). Here, the officer's testimony before the Court was substantially the same as his affidavits in each of the cases (R. 1-6, 40-65 and Tr. I, 7; Tr. II, 13-15), and while his testimony was not introduced as that of an expert (Tr. I, 9; Tr. II, 12) it is valid and uncontroverted as to the officer's belief that the materials were obscene. This testimony shifts the burden of proof by a preponderance of the evidence under the civil standard when the materials themselves are also introduced into evidence.

Expert testimony in obscenity cases is used to prove that the materials have some literary, social, political or artistic value and that as a result the materials are not simply an appeal to prurient interests so that, by extension, the materials do not violate community standards. Appellees do not infer that expert testimony proving what is or is not acceptable to the community is not available but such testimony is not necessary when the defendant does not claim any of the redeeming factors (i.e. literary, social,

political, or artistic value) the police officer testifies, the materials are available for review, and the Court does not state its inability to discern the community standard. (Tr. I, 32-33; Tr. II, 58-63).

Respondents citing Golden Dolphin 2 Inc. v. State of Florida, Division of Alcoholic Beverages and Tobacco, 403 So.2d 1372 (Fla. 5th DCA 1981), argue that the state of law in Florida is or should be that the Plaintiff in a non-criminal non-jury setting, has an affirmative obligation to elicit, as an element of his burden of proof, and as a matter of law, testimony establishing contemporary community standards of the area, in order to allow the trier of fact to determine whether the materials in question are obscene within the meaning of those contemporary standards; however, appellants at the same time recognize that such proof is not constitutionally required (Appellants' Initial Brief, page 9). Respondents attempt to distinguish the obvious inference that the hearing officer in Golden Dolphin, in fact "affirmatively assert(s) his incapacity to discern community standards," Id. at 1374, and that Judge Sharp, in the dissent, disagreed with the majority's holding which would have required testimony on community standards in order to prove obscenity when such a statement is made:

> Absent a showing by the defense at trial that the judge trying the case is unaware of the community standards, I see no reason why the trial judge or hearing officer should not be able to make obscenity determination by

> examining the challenged activity and applying his own knowledge of the community standards. Trial judges, like juries, are deemed competent to know community standards and apply them in other contexts. No different rule should be evolved for obscenity cases without express guidance from our two Supreme Courts. Golden Dolphin, Id. at 1375 (Emphasis added).

Respondents also try to discount or distinguish the cases in conflict to wit; Marks v. State, 262 So.2d 479 (Fla. 3d DCA 1972), Mitchum v. State, 251 So.2d 298 (Fla. 1st DCA 1971) and Collins v. State Beverage Dept., 239 So.2d 613 (Fla. 1st DCA 1970) but each of these cases stands squarely for the proposition that:

> The Petitioner contends that the selling of the materials viewed by the Court could not be held to be in violation of the State in the absence of testimony that the magazines violated contemporary standards in the community. This argument is without merit . . . (citing Collins and Mitchum). Marks, Id. at 480.

In fact, in Marks the court states that the only evidence before the trial court were the magazines themselves, and in Collins, the concept of "autoptically obscene" - the materials speak for themselves - was set forth with approval, and without testimony on community standards in order to uphold the lower tribunals finding of obscenity.

> Similarly, we hold that the magazines before us are conclusive 'autoptical proof' of obscenity and filth; that there are no conceivable community standards which would permit the

> indiscriminate dissemination of these materials; that there is no alleviating artistic overtones; and that they are utterly without redeeming social importance. In other words, we hold that these magazines are 'hard-core pornography' and, as such, they speak for themselves. In our opinion, reasonable men could not differ as to their obscenity. There is no need, therefore, for the testimony of witnesses that the magazines are obscene under the standards recognized in the Roth case, supra. Collins, supra, at 616.

Based upon the foregoing, it is Petitioner's position that it was not necessary to present expert testimony upon the issue of contemporary community standards at the trials below.

CONCLUSION

Based upon the foregoing arguments and citations of law, this Court has jurisdiction to review the merits of this case. Petitioner requests that this Court issue a writ of certiorari based on conflict between the decision below and the decisions in Marks, supra, Mitchum, supra, and Collins, supra,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Petitioner on Jurisdiction, has been furnished to Joel Hirschhorn, Harry M. Solomon, 2766 Douglas Road, Miami, Florida 33133 this 31st day of January, 1985.

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