O/a 11-5-85

SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 66, 573

CITY OF MIAMI,

Petitioner,

vs.

FLORIDA LITERARY DISTRIBUTING CORPORATION, et al.,

Respondents.

CITY OF MIAMI'S BRIEF ON ~~JURISDICTION~~ merits

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INTRODUCTION

Does a Circuit Court Judge need an "expert" to determine whether material before him is obscene according to the standards of the community where he sits?

STATEMENT OF THE FACTS AND CASE

Petitioner commenced the two actions in the lower court as complaints for injunctive relief against respondents and a total of eight magazines (four in each complaint) under the provisions of Section 847.011(8), Florida Statutes (1981). (R 1-6, 40-45). Temporary restraining orders, followed by temporary injunctions, were entered in both cases prohibiting respondents from selling or distributing the magazines pending final hearings on the merits of the complaints. (R 7-8, 9-10, 46-47, 48-49).

Hearings took place on November 21, 1983 (T I, 1-38) and January 10, 1984 (T II, 1-64). Respondents moved for directed verdicts in both cases and argued that petitioner had not presented expert testimony to establish the community standards of the county. Both final hearings took place before Judges of the Eleventh Judicial Circuit, in and for Dade County, Florida. According to the Directory of Florida Judges, 1985. So. Miami Publishing Co. (So. Miami, 1984), the Honorable Joseph Nadler has presided in that

Court since 1980 and the Honorable David Levy, since 1978. Final judgments were entered permanently enjoining the sale or distribution of the subject magazines (R 35-36; 37-39).

The respondents appealed to the Third District Court of Appeal which considered both cases under Appeal Nos. 83-2877 and 84-253. The Third District opinion is reported at 400 So.2d 1028 (Fla. 3d DCA 1985). It holds that:

> ...absent a presentation to the trial court of testimony defining contemporary community standards of obscenity, the evidence was insufficient to support the trial court's ruling that the materials in question are obscene.
> Fla. Literary, at 1029.

This Court granted certiorari based on conflict between Florida Literary and Marks v. 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).

SUMMARY OF THE ARGUMENT

The petitioner in a civil, injunctive non-jury proceeding against obscene materials need not present expert testimony to prove that the materials are obscene pursuant to community standards. Marks v. State, supra; Mitchum, supra; Collins, supra. The Third District Court decision in

this case conflicts with stated Florida law and should be quashed.

ARGUMENT

PETITIONER IS NOT REQUIRED TO PRESENT EXPERT TESTIMONY IN INJUNCTIVE CIVIL PROCEEDINGS AGAINST AUTOPTICALLY OBSCENE MATERIAL ADMITTED INTO EVIDENCE BEFORE A LOCAL JUDGE.

The only issue briefed is whether the petitioner met the burden of proof on whether the challenged material was obscene. Respondents argue that it failed when the City did not introduce expert testimony as to community standards.

"Contemporary community standards," is defined in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, reh. den 414 U.S. 881, 38 L.Ed.2d 128, 94 S.Ct. 26

> . . . 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...'

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, Miller, Id., Paris Adult Theatres I v. Slaton, 413 U.S. 49 L.Ed.2d 446, 93 S.Ct.

2628, reh. den 414 U.S. 881, 38 L.Ed.2d 128, 94 S.Ct. 27; Davidson v. State, 288 So.2d 484 (Fla. 1973); United States v. One Reel of 35mm Color Motion Picture Film Entitled "Sinderella", 491 F.2d 956 (2d Cir. 1974).

The Third District never addressed or distinquished Marks v. State, supra, Mitchum v. State, supra, and Collins v. State Beverage Dept., supra. All of these cases hold 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, at 480.

In Marks the Court notes that the only evidence before the trial court were the magazines themselves. In Collins, the Court approves of the concept of "autoptically obscene:" the materials speak for themselves. There is no requirement of "expert" testimony on community standards to affirm the trial judge's 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, at 616.

Collins, supra, was followed by Art Theatre, Inc. v. State, 260 So.2d 267 (Fla. 3d DCA 1972) where the finding of obscenity was upheld. The Third District held "that the record is sufficient to sustain the finding of the trial judge that the films involved are hard-core pornography." Art Theatre, at 268. As in the case at bar, the trial Judge had viewed the challenged material; the police officers' explicit testimony described the material as obscene; the materials were introduced into evidence.

Unlike here, the Third District in Art Theatre upheld the Judge's refusal to listen to proferred defense testimony that the subject film did not violate contemporary community standards:

> The trial judge thought that such testimony would be nonsense and that his responsibility as a trier of fact did not require him to listen to nonsense. We need not discuss that proposition because we think that if the judge's conclusion was error, it was harmless error. The trial judge viewed the films and we have viewed the films; they are hard-core pornography.
>
> Art Theatre, at 269.

Mitchum v. State, supra, cites extensively from United States v. Wild, 422 F.2d 34 (2d Cir. 1970), cert. denied 402

U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, reh. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720. The holding of Wild, where the challenged material was before the trier of fact is:

> ...in the cases in which this Court has decided obscenity questions since Roth, [Roth v. United States, 354 U.S. 478, 77 S.Ct. 1304, 1 L.Ed.2d 1498] it has regarded the materials as sufficient in themselves for the determination of the question.
>
> Mitchum, at 300.

The Third District ruling in this case also inexplicably conflicts with its prior ruling in United Theatre of Fla. Inc. v. State, 259 So.2d 210 (Fla. 3d DCA 1972), where in following Mitchum, and Collins, supra, it upheld the trial judge's injunction:

> It has been held that testimonial evidence is not necessary to establish the obscenity of material which is 'hard core pornography;' ... We see no error in the trial court finding these movies obscene after viewing them and without the testimony of any witnesses. (Citations omitted.)
>
> United Theatre, at 212.

The Third District has reversed its position in United Theatre and Art Theatre, supra without any explanation or analysis.

Buchman v. Seaboard Coastline R.R. Co., 381 So.2d 229 (Fla. 1980) sets out the guidelines for the presentation of expert testimony:

> 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 omitted.)

Why would it be necessary to introduce expert testimony as to community standards when such materials are obviously within the knowledge of the average person, and certainly within the knowledge of a sitting Circuit Court Judge? Both Judges here had before them the subject magazines. In a similar situation, the Court in Paris Adult Theatres, supra, at 56, held:

> 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.

Petitioner presented the police officers' statements that they believed the materials to be obscene under the Miller standards (T I, 9-10; T II, 16-18) and that the materials were hard-core pornography based upon their experience. (T II, 16-17).

The officers' sworn affidavits (R 1-6, 40-45) are sufficient to establish probable cause to issue a search warrant pursuant to the criminal provisions of Section

847.011 Florida Statutes (1981), and no further evidence is necessary for the issuance of a temporary restraining order in civil obscenity cases. 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 officers' testimony before the Court was substantially the same as their affidavits (R 1-6, 40-65 and T I, 7; T II, 13-15). Although their testimony was not introduced as that of experts (T I, 9; T II, 12) the officers' belief that the materials were obscene was uncontroverted. Their testimony, together with the materials themselves shifted the burden of proof by a preponderance of the evidence to the respondents.

Expert testimony in obscenity cases is used to prove that the materials have some literary, social, political or artistic value and that the materials are not simply an appeal to prurient interests and are not in violation of community standards. Expert testimony is not necessary when the respondent does not claim that any of the redeeming factors (literary, social, political, or artistic value) apply to the challenged material; when the police officers testify that the materials before the Court are obscene; and the Court does not state its inability to discern the community standard. (T I, 32-33; T II, 58-63).

Respondents and the Third District cited Golden Dolphin 2 Inc. v. State of Florida, Div. of Alcoholic Beverages and

Tobacco, 403 So.2d 1372 (Fla. 5th DCA 1981). They argue that Florida law is or should be that petitioner, in a civil non-jury setting, has an affirmative obligation to present expert testimony to establish contemporary community standards. It is further argued that the trier of fact needs such testimony to determine whether the materials in question are obscene. There is, however, no such constitutional requirement. United States v. Various Articles of Obscene Merchandise, 709 F.2d 132 (2d Cir. 1983); Hamling v. United States, 418 U.S. 87, 104, 94 S.Ct. 2887, 2900 (1974).

In Golden Dolphin, the hearing officer "affirmatively asserts(s) his incapacity to discern community standards," Id. at 1374. 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 the 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, at 1375.

In Golden Dolphin the subject of the proceedings, a dance, was not presented to the hearing examiner. Community standards must come "from either the prior knowledge of the trier of fact or through knowledgeable witnesses "Golden Dolphin, at 1374. The decision also refers to a judge who "asserts his incapacity to discern community standards." Here, the material was before the Judges; police officers experienced in the field testified (not a bar patron). This case is totally different from Golden Dolphin.

It is evident that the trial Judges, both on the Dade Circuit Court bench since 1978 and 1980, are members of the community over which they preside. They are aware of the standards which prevail in Dade County. There was no attempt by respondents to show otherwise. The evidence is overwhelming in this case that the materials are autoptically obscene; that the arresting officers recognized them as obscene; and that there was no doubt in the Judges' minds that the magazines are obscene. The permanent injunctions prohibiting their sale or distribution should be upheld.

Even if it is assumed that expert testimony is required in a civil, injunctive proceeding, who is an expert on community standards on the issue of obscenity? What about members of religious orders or the clergy? If not, should

it be a panel of law-enforcement officers, teachers and students? Or of members of the City Commission? Why not some of the editors of the magazines seized, or the directors, or even actors, involved in "porno" films?

If we propose a psychologist or psychiatrist, should it be one whose career involves sex therapy, one trained in Freudian therapy?

It is obvious that the jump into ridiculous arguments is a short one indeed. Ridiculous because the definition of an expert witness does not fit the issues involved here. Obscenity is not beyond the common understanding of the average layman, the way a medical test or experiment would be. Secondly, how could testimony of an "expert" aid the trier of fact in his search for truth when the truth is staring at him in the Courtroom from page after page of explicit color photography? This Court should rule that under the facts of this case, the petitioner <u>may</u> use experts, not that it <u>must</u>.

CONCLUSION

Based upon the foregoing arguments and citations of authority the opinion of the Third District should be reversed and the final judgment of injunction should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing City of Miami's Brief on Jurisdiction, has been furnished to Joel Hirschhorn, P.A., c/o Harry M. Solomon, 2766 Douglas Road, Miami, Florida 33133 this 19th day of June, 1985.

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