SUPREME COURT OF FLORIDA

BELINDA McGUIRE, Petitioner,	)	
vs.	)	CASE NO. 66,925
STATE OF FLORIDA, Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the County Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

"PB" Petitioner's Initial Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts that portion of Petitioner's Statement of the Case and Facts dealing with the posture of the case, as found on page two (2) of Petitioner's initial brief.

On May 14, 1982 David Wayne Jowers, a park ranger at John MacArthur State Recreation Area, testified that there were notices posted at the park with the contents of Regulation 16D - 2.04(1)(c), Florida Administrative Code, (R 92-93). On that day he issued Belinda McGuire a citation when he saw that she was jogging topless (R 95-97). There were other individuals at the beach at that time, not all were nude (R 102).

Ranger Jowers testified that when he had visited other public beaches in the area as a private citizen he had never observed total exposure of female breasts (R 104-105). He stated he saw females wearing either one-piece suits or two-piece bikini type (R 105). He testified that the commonly accepted bathing attire for females consisted of breasts and genitals being covered (R 107). Ranger Jowers also testified that he would not want his family to observe topless females at the beach (R 111).

Sally Loomis, a resident at Water Glades Condominium adjacent to the MacArthur Recreation area, testified

that her sense of common decency was offended by nudity on a public beach (R 127-134). She testified that at other beaches she saw neither nudity nor toplessness (R 135). Irvin Lebershon, another resident of the Water Glades Condominium, testified that he did not "care" for nudity (R 138, 140). He, too, was offended by females without a top and did not see nudity at other beaches besides MacArthur Park (R 141, 143-144, 149).

Charles Andrew Hallden, Jr., a ranger at MacArthur Recreation area testified that he saw Petitioner jogging topless at the beach (R 161). He testified that he had never cited a woman for wearing a see-through bathing suit because he had never seen one (R 168). A see-through bathing suit would offend his family (R 168).

POINTS INVOLVED

POINT I

WHETHER REGULATION 16-D 2.04(1)(e) FLORIDA ADMINISTRATIVE CODE, IS FACIALLY UNCONSTITUTIONAL AND REPUGNANT TO THE FOURTEENTH AMENDMENT?

POINT II

WHETHER THE TRIAL COURT ERRED IN DEFINING FOR THE JURY INDECENT EXPOSURE?

POINT III

WHETHER THERE WAS EXCESS PROSECUTORIAL ZEAL IN THE CASE AT BAR?

SUMMARY OF THE ARGUMENT

POINT I.

The regulation in question is neither vague nor overbroad. The facial constitutionality of the regulation need not be addressed since the regulation does not involve constitutionally protected conduct. The regulation clearly proscribed Petitioner's conduct.

POINT II.

Petitioner has failed to preserve for appellate review any objection to the jury instructions given at trial. Moreover, the instruction, taken from the Standard Jury instructions, properly reflected the law.

POINT III.

The prosecutor acted properly, and did not stray from the permissible limits of argument. In any event, the harmless error rule would be applicable in the instant case.

ARGUMENT

POINT I

REGULATION 16-D 2.04(1)(e) FLORIDA ADMINISTRATIVE CODE, IS NOT FACIALLY UNCONSTITUTIONAL AND IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT.

Petitioner claims that her conviction should be reversed because the statute under which she was prosecuted is facially unconstitutional. She argues that it is vague and overbroad. Respondent disagrees.

Regulation 16-D 2.04(1)(e), Florida Administrative Code provides that in bathing areas under the supervision of the Department of Natural Resources all persons must be clothed in such a manner as to prevent indecent exposure. The regulation further provides that all bathing costumes must conform to commonly accepted standards at all times. Petitioner contends that the regulation in question is overbroad. However, the only argument that she makes with respect to overbreadth is that a nursing mother breastfeeding an infant "could run afoul of the proviso" (PB 16). She has argued also that since the regulation reaches "liberty interests of thousands of beachgoing people each day," the regulation can be challenged because it meets "the 'substantial amount of constitutionally protected conduct' test" (PB 10). She seems to equate

"numbers of people" with constitutionally protected conduct. However, there is no legal basis for such analysis.

"Facial challenges" are allowed, if and only if, the law under attack could punish both constitutionally protected conduct, as well as, unprotected conduct. Village of Hoffman Est. v. Flipside, Hoffman Est., ___U.S. ___, 102 S.Ct. 1186, 1191 (1982). Crucial then to the overbreadth analysis is the question of whether or not the conduct being regulated is itself protected. If a law does not reach a substantial amount of constitutionally protected conduct, a challenge based on overbreadth must fail. Id.

The conduct at issue herein is "indecent exposure of the person." Consequently, before Regulation 16-D 2.04(1)(e), Florida Administrative Code can be challenged for being overbroad, a determination must be made as to whether or not an individual has a constitutional right to exposure or nudity in an indecent manner. If such a right does not exist, Regulation 16-D 2.04(1)(e), Florida Administrative Code cannot be struck down as being overbroad.

In City of Seattle v. Buchanan, 90 Wash. 2d 584, 584 P 2d 918, at 922 (Wash. 1978), the Supreme Court of Washington held, en banc, that the

> . . . right to expose the body to the sun in public has not yet been recognized as a right so fundamental that the people must have meant to protect it when they adopted their constitutions.

In that case the defendant, too, had posed hypothetical situations wherein application of the ordinance making public exposure of genitals or female breasts might have been considered "overbroad." The situations posed were as follows:

> (1) a woman publicly nursing her baby;
>
> (2) a 10 year old running through the park wearing only cut-offs;
>
> (3) a woman strolling through the supermarket wearing a very scant bikini which did cover her nipples;
>
> (4) a woman going to the theater in a fashionable dress of transparent material in the bodice and cut in such a way as to make her breasts entirely visible at some angles;
>
> (5) a woman who has removed her bathing suit on a public beach and sunbathes with knees 12-to-18 inches apart.

Id., 922-923. The court there held that in the absence of a constitutional right a criminal law is not rendered unconstitutional by the fact that its application may be uncertain in exceptional cases, as long as the general area of conduct against which it is directed is made plain. Id., at 923. In upholding the ordinance against a challenge on overbreadth grounds the court there further noted that there is a difference between statutes regulating conduct and those regulating speech.

Similarly, in State v. Miller, 501 P.2d 363

(Hawaii 1972), the Supreme Court of Hawaii also rejected the argument that a statute regulating indecent exposure was overbroad. The court there concluded that the statute in question was intended to prevent offensive public conduct and that nude sunbathing was not constitutionally protected conduct. Id., at 366. Consequently, the court reasoned "summary invalidation . . . for overbreadth" was inappropriate.

More recently, the United States District Court for the Southern District of Florida likewise has held that nude sunbathing is conduct, rather than expression and merits little, if any, constitutional protection. South Florida Free Beaches v. City of Miami, Fla., 548 F.Supp. 53 (So. Dist. Fla. 1982). Citing to United States v. Hymans, 463 F.2d 615 (10th Cir. 1972) the court there noted that nude sunbathing in a national park constituted "indecent conduct." South Florida Free Beaches, supra, at 56. Thus, "nudity, like wearing long hair" is "individual conduct rather than expression" and as such it is not a fundamental right. This Court has held that since the beginning of civilization public nudity has been considered improper and as such, despite changing social values, it is constitutionally permissible to prohibit adult females from appearing on Florida's public beaches with openly exposed breasts. Moffett v. State, 340 So.2d 1155 at 1156 (Fla. 1976). Therefore, since the Regulation

at issue does not reach constitutionally protected conduct, Petitioner's overbreadth challenge must fail.

Petitioner has also argued that Regulation 16-D 2.04(1)(e) is facially vague because it contains no standard for determining what a suspect swimmer has to do to meet the requirement for a "commonly accepted bathing costume" and under the "indecent exposure" portion of the regulation "an arresting officer has unfettered discretion to decide indecency" (PB 12, 15-16). She argues that citizens are entitled to sufficient definiteness in criminal laws so that going to the beach does not carry a risk of imprisonment based on the officer's personal notion. Respondent disagrees.

In the absence of constitutionally protected conduct, as in the instant case, a challenge based on facial vagueness can be upheld, if and only if, the enactment is permissibly vague in all of its applications. Village of Hoffman, Est., supra, at 1191. In a situation such as the one before this Court, if the conduct at issue is clearly proscribed, vagueness as it may be applied to the conduct of others cannot be raised. Id. Consequently, the United States Supreme Court has held that before analyzing hypothetical applications of the law, a court should examine the complainant's conduct. Id.

Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined

> in the light of the facts of the case at hand. [Citations omitted] One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. [Citation omitted]

Id., footnote 7. Therefore, since the case at bar does not involve a First Amendment freedom, Petitioner's challenge on the grounds of vagueness must be analyzed in light of her conduct.

Petitioner was jogging at the beach wearing a bathing suit bottom and no top (R 95-97). Her breasts were exposed (R 102). The Regulation being challenged required the wearing of clothes so as to prevent indecent exposure and bathing costumes conforming to commonly accepted standards at all times. The issue, then, is whether or not Petitioner's conduct was proscribed by the Regulation.

It is well-established that where the language of a statute conveys a sufficiently definite warning to express the proscribed conduct when measured by common understanding and practices, no constitutional violation will occur. Morales v. State, 407 So.2d 230, at 231 (Fla. 3d DCA, 1982). Therefore, void for vagueness

> . . . simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.

City of St. Petersburg v. Waller, 261 So.2d 151 (Fla. 1972) (citing to U.S. v. National Dairy Products, 372 U.S. 29, 83 S.Ct. 594 (1963)). Is it reasonable, then, that a female jogging at the beach with bare breasts would or could not understand that such conduct was not prohibited under the regulation at issue? In light of the holding in Moffett, supra, the answer is a most emphatic "No!" for there the court held that since

> . . . the beginning of civilization public nudity has been considered improper . . . .
>
> (and)
>
> . . . the Legislature intended to prohibit adult females from appearing in public places, including Florida's public beaches, with openly exposed breasts.

Moffett, supra, at 1155-1156. Relying on State v. Magee, 259 So.2d 139 (Fla. 1972), this Court reasoned that "public decency" is a term of general understanding. Similarly, the Regulation at bar is one which is subject to general understanding and thus a person of common intelligence could discern that Petitioner's conduct was proscribed.

Since Petitioner's conduct was clearly proscribed, her arguments as to facial invalidity premised on the conduct of others must also fail. See Village of Hoffman, supra. Therefore, Petitioenr's hypotheticals as to the wearing of seashells and bathing suits of varying opaqueness

or transparencies and nursing mothers, etc., cannot and need not be reached by this Court. Nevertheless, the fact that "marginal" factual situations may arise under a statute or ordinance does not, in itself, render the enactment vague. City of St. Petersburg v. Waller, supra, at 157.

> To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. Impossible standards are not required.

Morales, supra, at 231 (quoting from Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972)). Therefore, in light of the foregoing the trial court was eminently correct in declaring Regulation 16-D 2.04(1)(e) constitutional.

POINT II

THE TRIAL COURT DID NOT ERR IN DEFINING FOR THE JURY INDECENT EXPOSURE.

Petitioner claims that it was reversible error to define indecent exposure for the jury as follows:

> . . . indecent exposure means in such manner as to be offensive to common decency or lewd or obscene.

(R 294-295). She argues that the court incorrectly stated the law to the jury and expanded the definition beyond precedent. This, however, is incorrect.

Moffett v. State, supra, equated the impropriety of public nudity, and in particular the baring of female breasts, with corruption of public morals and/or outrage of public decency. In addition, in State v. Magee, supra, this Court held that public decency and corruption of public morals are terms of common understanding. In light of the interpretation given by this Court to nudity and/or the baring of female breasts in Moffett, supra, and Magee, supra, the trial court was justified, and indeed, correct in defining indecent exposure as it did.

Moreover, it should be noted that the instruction given by the Court was taken directly from the Standard Jury Instructions promulgated by this Court (See R 289-290)

and that Petitioner waived her right to review by failing to object after the instructions were given. Fla.R.Crim.P. 3.390(d) specifically provides that no party may assign as error the giving of an instruction unless an objection is made prior to the jury retiring. In the instant case defense counsel specifically stated that there were no objections to the instructions, as given (R 343). Therefore, Petitioner has waived her right to appellate review.

POINT III

THERE WAS NO EXCESS PROSECUTORIAL ZEAL IN THE CASE AT BAR.

Petitioner claims that there was excessive prosecutorial zeal in the case at bar. She argues that questions relating to total nudity and what constituted offensive conduct to a family were improper and prejudicial. She also argues that the prosecutor's argument enlarged the jury's role. Respondent maintains the propriety of the prosecutor's conduct.

A rose is a rose whether called by any other name. Likewise bare breasts is mudity, regardless of strained differentiation between partial and total nudity. The instant case involved the prosecution of nudity as it pertained to a female exposing her bare breasts under a regulation which made it illegal to be not clothed and indecently exposed and which required bathing costumes commonly accepted. Consequently, the questions posed to the witness in which "nudity" at the beach in question was either mentioned or explored, were relevant and proper.

With respect to Petitioner's challenge to the prosecutor's argument, it should be noted that in Thomas v. State, 326 So.2d 413 (Fla. 1975) the Supreme Court held that a prosecutor's argument is not to be condemned merely because it appeals to the jury to perform its

public duty. It

> . . . will not be presumed that jurors are led astray to wrongful verdicts by impassioned eloquence . . . .

Id., at 415. The argument being challenged herein falls under this class of argument and as such no reversible error was committed.

It is well-established that a prosecutor is generally allowed a considerable degree of latitude in his closing argument to the jury, and all logical inferences and deductions from the evidence are permissible. Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied 459 U.S. 882, rehearing denied 459 U.S. 1060 (1982); Thomas v. State, 326 So.2d 413 (Fla. 1975). Juries are presumed to be composed of men and women of sound judgment and intelligence, and it will not be presumed that they were led astray to wrongful verdicts by the impassioned eloquence and illogical pathos of counsel. Paramore v. State, 229 So.2d 855 (Fla. 1969); Tyson v. State, 87 Fla. 392, 100 So. 254 (1924); James v. State, 334 So.2d 83 (Fla. 3d DCA 1976). The courts recognize "the increased degree of sophistication and intelligence which the modern jury possesses for its assessment of the evidence presented and the arguments of counsel." Wingate v. State, 232 So.2d 44, 46 (Fla. 3d DCA 1970). Furthermore, it is the trial court who is in the best position of experience and intimacy with the case, to determine whether the

jury would be so prejudiced by a prosecutor's comment as to render a verdict different from the one properly supported by the evidence. Thomas v. State, supra; James v. State, supra; Wingate v. State, supra. In the case sub judice, the trial court found no error in the comments complained of by Appellant on appeal.

Prosecutorial comments should be evaluated within the circumstances appearing in the record. Broomfield v. State, 436 So.2d 435 (Fla. 4th DCA 1983). This principle has been set forth by this Court in State v. Murray, 443 So.2d 955 (Fla. 1984), in which it embraced the harmless error standard set out by the United States Supreme Court in United States v. Hasting, ___U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Murray, 443 So.2d at 956. "[P]rosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.'" (citation omitted). Id.

Respondent maintains that the comments complained of were not error. Moreover, even should this Court disagree with Respondent as to the presence of error, the alleged error must be considered harmless in light of the entire record in this case.

CONCLUSION

THEREFORE, based upon the foregoing reasons and authorities cited herein, Appellee respectfully requests that the judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on the Merits has been furnished, by United States Mail, to JAMES K. GREEN, ESQUIRE, Green, Eisenberg and Cohen, Lawyers, 301 Clematis Street, Suite 200, West Palm Beach, Florida 33401 this 26th day of August, 1985.

Joan Fowler Rossin
Of Counsel

IN THE SUPREME COURT OF FLORIDA

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ADDITION TO CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on the Merits has been furnished, by United States Mail, to JAMES K. GREEN, ESQUIRE, Green, Eisenberg and Cohen, Lawyers, 301 Clematis Street, Suite 200, West Palm Beach, Florida 33401, and PROFESSOR BRUCE ROGOW, Nova University Law Center, 3100 S.W. 9th Avenue, Fort Lauderdale, Florida 33315, this 12th day of September, 1985.

Joan Fowler Rossin
Of Counsel