No Request Case

IN THE SUPREME COURT OF FLORIDA

JONI L. HICKS
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 75,742

APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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ISSUE

WHETHER SECTION 796.01, FLORIDA STATUTES, IS UNCONSTITUTIONAL BECAUSE IT IS SO VAGUE THAT IT FAILS TO GIVE A PERSON OF ORDINARY INTELLIGENCE FAIR NOTICE THAT HIS CONTEMPLATED CONDUCT IS FORBIDDEN BY THE STATUTE

The Respondent clearly misses the point in the Petitioner's argument that although the lower court had upheld Florida Statute 796.01, the terms "lewdness" and "ill fame" are both unconstitutionally vague according to decisions of the United States Supreme court. The Respondent contends that the lower court only had difficulty with the term "ill fame." The Respondent fails to address *many* of the cases presented by the Petitioner and instead focuses on older cases which were decided before the cases of Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), and Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). These cases articulate the United States Supreme court's test for the vagueness of a statute and were fully analyzed in the Petitioner's Initial Brief.

The Respondent begins its argument by saying that "prostitution," "lewdness," and "ill fame" are sufficiently defined by statute and case law and cites several cases purportedly in support of its position. A careful analysis of those cases shows that they simply do not apply. The Petitioner was charged with violating Florida Statutes 796.01. That statute uses the term "ill fare" as an element. What is ill fare? Neither Bell v. State, 289 So.2d 388 (Fla. 1973); Bell v. State, 369 So.2d 932 (Fla. 1979); State ex rel. Libtz v. Coleman, 177 So. 725 (Fla. 1937); Law v. State, 355 So.2d 1174 (Fla. 1978); nor Health Clubs, Inc. v. State ex rel. Eagan, 338 So.2d 1324 (Fla. 4th DCA 1976), answer this question. In fact, of those cases, only State ex rel.

Libtz v. Coleman, supra, even deals with 796.01. In Coleman, there was no vagueness issue presented. In fact, the court stated, "the sole question is the challenge to the sufficiency of the information to withstand an attack in habeas corpus proceedings." Coleman, 177 So. at 725.

The lower court in this case also cited Coleman as support but the Petitioner claims error in the application to the term of "ill fame." *See* State v. Warren, 558 So.2d 55, 56 (Fla. 2d DCA 1990). The Respondent apparently admits that "ill fame" is undefined (Respondent's Brief at 4); however, the Respondent asserts that case law has sufficiently defined the term. The Petitioner has already argued this pint in her Initial Brief and restate that the definitions of these vague terms must be written with sufficient specificity so that citizens are given fair warning of the offending conduct. See Papachristou v. City of Jacksonville, supra. Courts and lawyers struggle with this term and have not reached a precise definition, yet the Respondent argues that "ill fame" is clearly defined for a person of common intelligence.

The Respondent goes on to cite sister state cases while trying to define "ill fame" (Respondent's Brief at 4). According to the Respondent, the 1890 case of State v. Lee, 80 Iowa 75, 45 N.W. 545 (1890), clearly defines "house of ill fame" as a "bawdy house." What, indeed, is a "bawdy house?" What does "bawdy" mean? When was the last time someone referred to a house of prostitution as a bawdy house? Perhaps some polite farmer on an Iowa cornfield in 1890, but not in rmdern times. Defining "ill fame" as "bawdy" is circuitous reasoning. How would an ordinary rmdern citizen know what "bawdy" means? The same logic applies to "lewdness." The Respondent boldly states that "a house's reputation for prostitution or lewdness is not undefined."

(Respondent's Brief at 5) The problem here is that lewdness is not defined either.

Lewdness is defined in 796.07(1)(b) as *any* indecent or obscene act. What does "indecent" mean? There was no allegation of prostitution in this case; therefore, the Petitioner was charged under a theory of lewdness. What acts constitute lewdness? The legislature has a duty to define prohibited acts, and if it does not, then the courts have a duty to declare the statute unconstitutional as written.

The Respondent then relies upon King v. State, 17 Fla. 183 (1879), to support its argument. The Respondent tries to argue that the reputation of the establishment is what helps prove the element of "ill fame" and that the literal meaning of the words was adopted by the court in King. *Again*, just what does "ill fame" mean to a modern person? King was decided over 110 years ago and did not address the vagueness issue. Kolender v. Lawson, supra, and Papachristou v. City of Jacksonville, supra, were decided well after 1879; therefore, *any* rationale about the definition of "ill fame" must satisfy the tests articulated in Kolender and Papachristou. The Petitioner adamantly argues that King is no longer valid in light of these cases.

The Respondent also fails to realize that the Petitioner primarily relies on the United States Constitution as support for her arguments. The Respondent apparently argues that the legislature writes the laws and the courts interpret the laws by its citations on page six (6) of its Brief. That argument is obviously true, but when the legislature writes and maintains vague laws, the courts have a duty to insure that those laws are constitutional. The Respondent apparently tries to point out that this statute is constitutional because there exist defenses to it. would it not be

easier for everyone if the legislature simply rewrites this timeworn statute so that people clearly know what conduct is prohibited? Utilizing a statute such as this to prohibit the managing of a nude dancing establishment is absurd. If the legislature wants to prohibit the managing of a nude dancing establishment, then a specific statute should be written prohibiting that conduct. However, the house of ill fame statute is now used by police to prohibit distasteful but otherwise lawful activity.

The Respondent next argues that the intent of the statute is to punish those who operate notorious houses. (Respondent's Brief at 7) What is a notorious house? The Respondent then analogizes a notorious house with a brothel. If a brothel is a place where people go to solicit sex for money, then that analogy does not apply here. The Petitioner did not engage in managing a brothel. There was no sexual intercourse or oral sex alleged in this case, yet the Respondent calls the nude dancing establismt a "brothel." The semantic dance around "notorious house" and "ill fame" by defining the terms with "lewdness" and "immoral purposes" simply begs the question of just what is "ill fame" and "lewdness."

The Respondent relies too heavily on evidentiary rules needed to prove the statute rather than addressing the vagueness issue. Vagueness is a federal constitutional question. The United States Supreme Court is the ultimate arbiter of federal constitutional questions. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Moreover, the United States Constitution is the supreme law of the land. U.S. Const. Art. VI; Cooper v. Aaron, supra. Therefore, *any* decisions of the U.S. Supreme Court are controlling regarding a

vagueness challenge to a state statute and not state law. The state legislature may not create or maintain an unconstitutional statute. To insure this is why courts of law exist.

Many United States Supreme Court cases were cited by the Petitioner; however, the Respondent neither refutes the Petitioner's citation to authority nor does it cite any United States Supreme Court cases to refute the Petitioner's arguments other than Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Respondent cites Blockburger to bolster its argument that Carlson v. State, 405 So.2d 173 (Fla. 1981), declared the house of ill fame statute to be constitutional. In Carlson, the court addressed the constitutional question of double jeopardy and not vagueness. The primary focus was whether Carlson could be prosecuted *under* Florida's RICO statute, Section 943.462(3), after being convicted of keeping a house of ill fame for the same conduct. There was no vagueness challenge presented to the court in Carlson; therefore, the holding in Carlson is not applicable here. The Respondent did not refute any of the United States Supreme Court cases cited by the Petitioner dealing with vagueness. The Petitioner is not raising a double jeopardy challenge here, so Blockburger has no place in this appeal.

The Respondent also relies on the fact that the *court* in State v. Warren, supra, did not declare the statute unconstitutional as support for its argument. The Petitioner is now challenging the correctness of that decision; therefore, any reliance on Warren as support is tenuous at best. The Respondent's citations to archaic state cases do not refute or rebut any of the Petitioner's three (3) major arguments. The state cases attempt to define "lewdness" and "ill fame" by circular reasoning, i.e., lewdness is

indecency and indecency is lewdness. The Respondent cannot even cite a state case, other than Warren, decided after 1983 which is the year Kolender v. Lawson, supra, was decided, nor does the Respondent address Campbell v. state, 331 So.2d 289 (Fla. 1976), in which the Florida Supreme Court addressed the parameters of the Petitioner's vague as applied argument.

The Respondent claims that when the statute phibiting the abominable and detestable crime against nature was struck down in Franklin v. State, 257 So.2d 21 (Fla. 1971), the statute was "deliberately obfuscatory"; however, the Respondent claims that the house of ill fame statute is not obfuscatory. What is the difference between the quandary of a citizen trying to figure out the meaning of "abominable and detestable crime against nature" as opposed to the meaning of "house of ill fame?" This is at best a difference without a distinction if not a clear analogy.

The Respondent next urges this court to not start by striking down 796.01 if it desires to send a message to the legislature. The legislature obviously does not take a hint and must be forced to rewrite statutes after they are declared unconstitutional. The legislature has had nineteen (19) years, since the abominable and detestable crime against nature statute was struck down by Franklin in 1971, to review these archaic statutes but have not done so. The only alternative is for this court to start by striking this statute down as being unconstitutional and require the legislation to act on this one area of legislation.

The Respondent urges this court not to start such a precedent with this statute. If not this court, who? If not now, when? The Petitioner contends that the precedent has *already* begun with Franklin v. State. Nineteen (19) years ago, the Florida Supreme Court struck down a statute which was written

the same year the house of ill fame statute was written. The court in Franklin struck the statute down because of vagueness. The following year, Papachristou v. City of Jacksonville, supra, was decided which articulated the United States Supreme Court's test for vagueness. Today, this court a fortiori must strike down this timeworn statute and declare the term "lewdness" and/or "ill fame" to be insufficiently defined so as to give ordinary citizens fair notice of what conduct is prohibited. This statute is so obscure that the striking of it would not have any kind of "chilling effect" of the criminal justice system so as to prevent this court from acting immediately.

CONCLUSION

The district court's decision must be reversed and Section 796.01, Fla. Stat. (1987) must be forever stricken from the statute books. Furthermore, the terms "lewdness" and/or "ill fame" must be declared unconstitutional as being void for vagueness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Attorney General's Office, 2002 N. Lois, #700, Tampa, Florida 33607 by U.S. Mail delivery, this 13th day of September, 1990.

MANUEL A. MACHIN, ESQUIRE
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