0.a.10-4-90

IN THE SUPREME COURT OF FLORIDA

KATHLEEN DENISE WARREN
THOMAS GEORGE SECCHIARI
Petitioners,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 75,791

APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 Petitioners' 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 Petitioners 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 Petitioners' 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 Petitioners were charged with violating Florida Statutes 796.01. That statute uses the term "ill fame" as an element. What is ill fame? Neither Bell v. State, 289 So.2d 388 (Fla. 1973); Bellv. 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 Petitioners claim 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 Petitioners have already argued this point in their 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 modern times. Defining "ill fame" as "bawdy" is circuitous reasoning. How would an ordinary modern 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 problm 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 Petitioners were 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 Petitioners adamantly argue that King is no longer valid in light of these cases.

The Respondent also fails to realize that the Petitioners primarily rely on the United States Constitution as support for their 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 establishtwnt is absurd. If the legislature wants to pmhibit 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 Petitioners did not engage in managing a bmthel. There was no sexual intercourse or oral sex alleged in this case, yet the Respondent calls the nude dancing establishtwnt 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 Petitioners; however, the Respondent neither refutes the Petitioners' citation to authority nor does it cite *any* United States Supreme Court cases to refute the Petitioners' 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 Petitioners dealing with vagueness. The Petitioners are not raising a double jeopardy challenge here, so Bloc —— 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 Petitioners are 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 Petitioners' 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 Petitioners' vague as applied argument.

The Respondent claims that when the statute phibiting the abominable and detestable crime against nature was struck duwn 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 apposed 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 duwn 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 Petitioners contend 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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