O.A. 8-31-93 197

FILED
SID J. WHITE
JUL 21 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, SHIRLEY HOBBS, and JUDY MADSEN,

Appellants,

-vs-

CASE NO. 81,905

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Appellees.

_____/

BRIEF OF AMICUS CURIAE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GERALD B. CURINGTON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0224170

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-8253

COUNSEL FOR AMICUS CURIAE

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STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae accepts Appellees' Statement of the Case and of the Facts.

SUMMARY OF THE ARGUMENT

The amended permanent injunction challenged in this case was entered in order to end the disruption of clinic business and the harassment of its patients, both of which increased the medical risks to the patients. The injunction contains reasonable time, place and manner restrictions, which are content neutral, narrowly tailored to serve significant government interests, and leave ample alternative means of communication available to Appellants. The injunction is not overbroad or vague. It is a carefully crafted remedy designed to avert the disruption created by the pro-life activists.

The injunction does not violate the Appellants' right to equal protection, freedom of assembly, or exercise of religion. Appellants may not, behind a shield of religious freedom, trample upon the rights of others. The injunction properly balances the equities and protects the interests of the clinic and its patients, while safeguarding the pro-life activists' legitimate rights of free speech and serving the state's interests in public safety.

ARGUMENT I.

A.

THE AMENDED PERMANENT INJUNCTION DOES NOT COMPLETELY BAN RELIGIOUS AND PRO LIFE SPEECH IN A TRADITIONAL FORUM.

Appellants broadly assert that the amended permanent injunction (injunction) "completely bans all religious and pro-life speech in a traditional public forum." The public forum being Dixie Way (the highway) and adjoining sidewalk. (Initial Brief of Appellants, p. 14) Appellants then selectively quote the injunction by stating "'at all times on all days' pro life and Christian speech is prohibited on this public sidewalk and on the paved highway." (Initial Brief of Appellants, p. 16) Remarkably, Appellants leave out the pertinent time, place and manner restrictions contained in the relevant language of the injunction which provides:

> ORDERED AND ADJUDGED that the respondents . . . and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order . . . are permanently enjoined from engaging in the following:
>
> . . .
>
> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public-right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. . . .

Injunction, p. 6, par. (3) (emphasis added), and

> (5) At all times on all days in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. . . .

Injunction, p. 7, par. (5) (emphasis added).

The cited language of the injunction refutes Appellants' assertion that the injunction "completely bans all religious and pro-life speech in a traditional forum." Admittedly, however, the injunction does impose time, place, and manner restrictions on free expression in a public forum. Nevertheless, Appellants' selective language ignores the First Amendment test that this Court must consider, which is whether or not the above regulations constitute reasonable time, place and manner restrictions on free speech. Because Appellants' Argument I. fails to address the test this Court must apply and thus fails to enlighten the Court, Amicus Curiae submits that no further response to Argument I. A. is warranted.

ARGUMENT I.

B.

THE INJUNCTION DOES NOT CONSTITUTE CONTENT REGULATION. MOREOVER, IT IS THE LEAST RESTRICTIVE MEANS TO ACHIEVE THE STATE'S INTERESTS AND LEAVES AMPLE ALTERNATIVE MEANS OF COMMUNICATION AVAILABLE TO APPELLANTS.

Appellants have not challenged the factual findings contained in the injunction issued by the lower tribunal. The lower tribunal found, among other things, that despite an earlier injunction (which Appellants do not challenge): there had been continued interference with ingress to the clinic by protestors; that patients had to run a "gauntlet" and suffered a higher level of anxiety, stress, and hypertension which caused the patients to require a higher level of sedation; the protestors caused delay, increasing the risk to the patient either during the surgical procedures or during recuperation; that a doctor had terminated employment at the clinic because of the conduct of the protestors; that clinic telephone lines were jammed, making it impossible to summon an ambulance to transfer a patient should an emergency arise; and that patients and staff were stalked. The lower tribunal found that such conduct continued to impede and obstruct ingress to the clinic and interfered with the operation of the clinic. (Amended Permanent Injunction, pp. 1-5) In light of these findings, Amicus Curiae submits that the time, place, and manner restrictions are constitutionally permissible.

The parties agree[1] that free speech, even in a public forum, may be subject to reasonable time, place and manner restrictions if the restrictions are content neutral, narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. Fribsy v. Schultz, 487 U.S. 474 (1988).

Admittedly, the injunction does regulate the time, place and manner of the free speech of Appellants. It limits the time of some of Appellants' expression to certain hours on certain days. It limits the place of some of Appellants' expression to outside a thirty-six (36) foot or three hundred (300) foot buffer zone of the clinic or 300 feet of the residences of clinic staff, employees, owners or agents. It limits the manner of some of Appellants' expression to the exclusion of bull horns or auto horns, and vocal or amplified sound within earshot of the patients inside the clinic. Nevertheless, such restrictions are constitutionally permissible under the circumstances.

Appellants argue that such restrictions are not content neutral since the restrictions only apply to pro-life speech. Amicus Curiae submits that the order does not, on its face, apply only to pro-life speech, and any facial challenge by Appellants should be rejected. To the extent that Judge McGregor has interpreted the injunction to apply only to pro-life activists,

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[1] Initial Brief of Appellants, pp. 19, 27.

Amicus Curiae submits the injunction does not constitute content regulation.

A regulation that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages but not others. Ward v. Rock Against Racism, 105 L.Ed.2d 661 (1989), accord Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989). In the present case, the injunction serves the purpose of stopping the disruption of the business of the clinic and thus eliminates the increased medical risks of the patients. The injunction may only affect pro-life activists because they were causing the disruption of the clinic business and patient care, whereas the pro-choice activists were attempting to facilitate the business of the clinic and patient care. It is the conduct disruptive of the clinic that is being restricted rather than the pro-life viewpoint of Appellants.

As noted by Appellees, the Supreme Court of Washington, in Bering v. SHARE, 721 P.2d 918 (Wash. 1986), stated:

> Although only anti-abortion picketers are bound by the geographic restriction of picketing to Stevens Avenue, that in itself cannot be viewed as content regulation. The trial court imposed the place restriction in order to regulate the conduct of a particular group of persons before the court. A similar restriction which enjoined all picketers of any persuasion, regardless of their conduct, would have been overly broad. *See Beckerman v. Tupelo, Mississippi*, 664 F.2d 502, 507 (5th Cir. 1981) (citing *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736,

> 741, 84 L.Ed. 1093 (1940)). In short, the geographic restriction does not constitute content regulation proscribed by the First Amendment.

Id. at 925-926. The rationale of the Washington Supreme Court is applicable to the case at bar. There, the court was concerned that an injunction against pro abortion picketing would have been overly broad reasoning that one must look to the evil to be averted. In the present case, the specific evil to be averted was the disruption to the clinic and its patients and the resulting increase in medical risks to the patients and damage to the business interests of the clinic. There is no contention by Appellants, or factual record to suggest, that expressions or conduct by pro-choice activists disrupted the clinic or that the pro-choice activists were before the Court. Accordingly, the expressions or conduct of pro-choice activists are not within the specific evil to be averted and an injunction against them would be overly broad.

Under similar facts, the court in Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57 (3rd Cir. 1991), held that an injunction, that applied only to those persons who created and continued to create a threat of violence and intimidation, was content neutral where it limited the time, place and manner of anti-abortion protestors but did not regulate what they could say. Under such circumstances, application of the injunction to pro-choice activists would be overbroad and subject to challenge

by the pro-choice activists. See Beckerman v. City of Tupelo, Mississippi, 664 F.2d 502, 507 (5th Cir. 1981).

In the present case, the clinic faced continued harassment from pro-life activists, even after the trial judge had enjoined them from interfering with ingress and egress at the clinic and from harassing patients. The injunction simply moved the pro-life activists 36 or 300 feet down the road or sidewalk from where the pro-life activists may say whatever they want without affecting the content of their speech.

In view of the above, Amicus Curiae submits that the injunction does not constitute content regulation on its face or as applied.

Appellants next argue that the injunction is not narrowly drawn to serve the state's interests. The injunction moves the Appellants (and all those acting in concert with or on their behalf) away from the immediate vicinity of the clinic in order to abate the "gauntlet" to and from the clinic and thus diminish the stress, hypertension, anxiety and resulting increased medical risks to the patients of the clinic. This "buffer" zone is legally indistinguishable from the 12½ foot "free" zone upheld by the Ninth Circuit in Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988). The "free" zone in Portland was tailored to address threats, intimidation and assault of abortion clinic personnel and

patients that impeded the safe provision of medical care. Id. at 686. Although the injunction at issue in the present case extends to 300 feet, Amicus Curiae submits that, as in Portland, this Court should "decline to entertain quibbling over a few feet" and uphold the injunction as narrowly drawn.

In Northeast Women's Center, Inc. v. McMonagle, supra, the Third Circuit upheld as narrowly drawn an order that contained specific time restrictions on the activities of anti-abortion activists and limited the intrusion of sounds and images that were "observable to or within earshot of patients inside the center." The court specifically noted that the injunction was careful to permit expressive activity by the anti-abortion activists within the restrictions decreed. They were allowed to engage at all times in expressive activity near the clinic. The court noted that up to six activists could picket within 500 feet (on a designated side) and any number beyond the 500 feet, and they could sing or chant provided they could not be heard inside the clinic. Amicus Curiae submits that the injunction in the present case is just as appropriately and narrowly drawn to serve recognized governmental interests as in McMonagle and should similarly be upheld.

Moreover, this Court should not substitute its judgment for that of the trier of fact unless there is no competent or substantial evidence to support the findings of the trier of

fact, which Appellants have not argued or even suggested. Appellate courts are bound by a clear standard of review.

> Wide discretion rests in the trial court in granting, denying, or modifying injunctions. An appellate court will not interfere with the exercise of this discretion unless some abuse thereof is clearly made to appear, or unless the trial court's ruling is clearly improper. A presumption exists as to the correctness of the ruling of the trial court, and the burden is on the appellant to make error appear.

Duvallon v. Duvallon, 409 So.2d 1163 (Fla. 3d DCA 1982), rev. denied, 418 So.2d 1279 (Fla. 1982). Appellants must show a clear abuse of discretion. South Florida Limousines, Inc. v. Broward Cty. Aviation, 512 So.2d 1059 (Fla. 4th DCA 1987).

As in Portland and McMonagle, the clinic in this case faced continued disruption of the business of the clinic. In this case, the practical solution of moving the activists away from the immediate entrance and vicinity of the clinic, thus eliminating the "gauntlet" faced by the clinic's patients, was narrowly drawn to minimize the stress, anxiety and hypertension of the patients of the clinic and thus mitigate the increased health risks. At the same time, the injunction recognized the activists' right to exercise their legitimate First Amendment rights, without affecting the content of their speech, 300 feet down the road or sidewalk. Appellants are free to say whatever they wish, provided they say it 300 feet down the road. This court should not interfere with the trial court's findings or

exercise of discretion unless the trial court's ruling is clearly improper, which Amicus Curiae submits it is not, particularly when the injunction serves significant state interests as it does here.

In this case, there are a number of significant government interests which are served by the narrowly tailored injunction as already argued by Appellees. The injunction serves the female patients' right of choice, which is protected under the United States Constitution, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and right to privacy guaranteed under Art. I, § 23, Fla.Const. In re T.W., 551 So.2d 1186 (Fla. 1989). The injunction serves the government's interest in public safety. See Heffron v. Int'l Society for Krisha Consciousness, 452 U.S. 640, 650 (1981) (government's interest in public safety is sufficient to justify restricting distribution of religious material to an assigned location).

Appellants then argue that the injunction leaves no alternative channel for communication. Appellants' argument is reminiscent of the claims of Chicken Little and equally dubious. Appellants state the "flat ban on pro-life speech on that public sidewalk means that pro-life speech has no other alternative channel for communication." (Initial Brief of Appellants, p. 28) Appellants argue that if "the Appellants cannot exercise their constitutional rights to free speech on the public sidewalk or

public right of ways, then they cannot exercise these rights at all." (Initial Brief of Appellants, p. 30) Appellants overstate their case. The truth of the matter is that the injunction explicitly provides that the activists "may use, subject to other restrictions contained herein, [such as bull horns and sound amplification] the unpaved portion (the shoulder) on the south side of Dixie Way." They may also "enter the shoulder area of U. S. Highway One." (Injunction, p. 6, par. (3)) Thus, Appellants can exercise their constitutional right on the public right of ways and do have alternative channels of communication within 36 feet of the clinic property.

In fact, the practical effect of the injunction is to eliminate excessive noise directed towards the clinic, secure ingress and egress to the clinic, and enhance public safety while providing the activists areas in which they may demonstrate, and say whatever they want, without compromising the health of the clinic patients. The injunction allows peaceful picketing in a time, place and manner which does not physically interfere with the clinic operation. Activists may say what they want, provided they do not harass the clinic patients within the buffer zone. Accordingly, Appellants have ample alternative means of communication to exercise their freedom of speech.

In sum, the injunction creates reasonable time, place and manner restrictions on the appellants that are content neutral,

narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication for appellants.

ARGUMENT I.

C.

THE INJUNCTION IS NOT VAGUE.

Where the terms of the injunction are not so indefinite that men of common intelligence must necessarily guess at their meaning, the injunction is not void for vagueness. See Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Amicus Curiae has nothing to add to Appellees' argument on this point and simply submits that the terms of the injunction are sufficiently specific to be understood by Appellants and persons of common intelligence to put them on fair notice as to what they may and may not do. See Medlin, supra. Accordingly, the injunction is not void for vagueness, and it should be affirmed.

ARGUMENT I.

D.

THE INJUNCTION IS NOT OVERBROAD.

Amicus Curiae relies on his Argument I. B. and Appellees' argument.

ARGUMENT II.

THE INJUNCTION DOES NOT UNCONSTITUTIONALLY PROHIBIT APPELLANTS FROM FREELY ASSOCIATING WITH RELIGIOUS OR PRO-LIFE PERSONS.

The injunction creates reasonable time, place and manner restrictions on the Appellants as argued in Argument I. B. Just as those restrictions do not unconstitutionally impair Appellants' First Amendment rights to free speech, those restrictions also do not unconstitutionally impair Appellants' First Amendment right to freely associate. The injunction is "carefully circumscribed" as it affects Appellants' right to associate with religious or pro-life persons on the public sidewalk and highway, as required by Gilmore v. City of Montgomery, 417 U.S. 556 (1974), just as it is narrowly tailored to serve significant government interests. Again, Amicus Curiae relies on his Argument I. B. and Appellees' argument.

ARGUMENT III.

THE INJUNCTION DOES NOT VIOLATE APPELLANTS' RIGHT TO EQUAL PROTECTION BY DISCRIMINATING AGAINST ANY RELIGION.

The injunction, on its face, does not address the religion or the pro-life view of those enjoined, nor does it address the content of their speech. It does address the behavior of activists which disrupts the business of the clinic and increases the medical risks to the patients. It is such behavior which constitutes "the evil to be averted," as argued in Argument I. B.

Even as applied, the injunction has not targeted any religion, nor have Appellants identified any religion supposedly targeted. There is nothing in the injunction, on its face or as applied, that classified anyone on the basis of religion. Absent such classification, there is no violation of Appellants' right to equal protection. Appellants are free to exercise their religious beliefs subject to the time, place and manner restrictions, which are legally appropriate as already argued. As applied, it only targets behavior disruptive of the clinic.

Even assuming arguendo that there is a classification based on a "pro-life" viewpoint, that classification is not based on religion. The pro-life viewpoint might, by happenstance, arise from religious view, philosophical view, a view of natural law or any other secular view. Accordingly, a pro-life classification does not create a religious classification, and Appellants' right to equal protection has not been violated because of their religion.

ARGUMENT IV.

A.

THE INJUNCTION DOES NOT VIOLATE APPELLANTS' RIGHT TO FREELY EXERCISE THEIR RELIGION.

Amicus Curiae relies on Appellees' argument.

CONCLUSION

The amended permanent injunction dated April 8, 1993, is valid and should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GERALD B. CURINGTON
Assistant Attorney General
Florida Bar No. 0224170

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-8253

COUNSEL FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE** has been furnished to **MATHEW D. STAVER, ESQ.**, and **JEFFERY T. KIPI, ESQ.**, 1900 Summit Tower Boulevard, Suite 540, Orlando, Florida 32810, Counsel for Appellants; to **JAMES L. REINMAN, ESQ.**, 1825 South Riverview Drive, Post Office Box 639, Melbourne, Florida 32902, Counsel for Appellee Chandler; and to **GAYLE SMITH SWEDMARK, ESQ.**, 318 North Monroe Street, Post Office Box 669, Tallahassee, Florida 32302, Counsel for Appellee Miller, this 21 day of July, 1993.

GERALD B. CURINGTON