1983

State of Utah v. Heather S. Amicone : Brief of Respondent

#7

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent, vs. HEATHER S. AMICONE, Defendant and Appellant.	)	Case No. 19184

BRIEF OF RESPONDENT

Appeal from decision rendered by the
Third Judicial District Court for Salt Lake County,
Honorable Homer F. Wilkinson, presiding

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OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent, vs. HEATHER S. AMICONE, Defendant and Appellant.	)	BRIEF Case No. 19184

NATURE OF THE CASE

This case involves a challenge to the constitutionality of the mandatory seven day sentencing provision of the State's obscenity statute, Section 76-10-1204 Utah Code Annotated 1953, as amended.

DISPOSITION IN THE LOWER COURT

The appellant-Amicone pleaded guilty in Fifth Circuit Court to a charge of knowingly distributing obscene material in violation of the State's pornography statute, Section 76-10-1204, Utah Code Ann., 1953, as amended.

After pleading guilty, the Appellant-Amicone appealed her conviction to the District Court. The Honorable Homer F. Wilkinson affirmed Appellant-Amicone's plea of guilty to knowlingly distributing pornographic material, and the seven day

jail sentence imposed by the Circuit Court.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondent, State of Utah, seeks to have this Court uphold the constitutionality of the sentencing provisions of the State's obscenity statute and affirm the sentence of the Appellant-Amicone.

PRELIMINARY STATEMENT

The State of Utah, by and through the State's Attorney General, has requested the assistance of Salt Lake City in response to this appeal by Appellant. (See letter of the Attorney General attached as Appendix "A").

The thrust of appellant's argument on appeal is that the minimum seven day mandatory jail sentence required for those who knowingly distribute obscene material is unconstitutional. The statute provides:

> "Each separate offense under this section is a class A misdemeanor punishable by a minimum mandatory fine of not less than $100 plus $10 for each article exhibited up to the maximum allowed by law and by incarceration, without suspension of sentence in any way, for a term of not less than seven days, notwithstanding any provisions of section 77-35-17." Section 76-10-1204(2) Utah Code Ann.

Appellant-Amicone alleges that this statute constitutes a violation of the doctrine of separation of powers, cruel and unusual punishment, and a violation of the First Amendment. However, appellant cites no viable authority in support of her constitutional challenges. The state will respond to each of

issues infra.

STATEMENT OF THE FACTS

The facts of this case demonstrate the following:

1. On March 4, 1982, a Search Warrant for the film "Ms. Magnificence" was issued by the Honorable Robert C. Gibson, Judge of the Fifth Circuit Court.

2. The film "Ms. Magnificence" described in the Affidavit for Search Warrant was seized on March 4, 1982.

3. A Class A misdemeanor Information was filed againt Appellant-Amicone, in Circuit Court Salt Lake Department, Case No. 82 CRS 645, for knowingly distributing pornographic material, in violation of Section 76-10-1204, Utah Code Ann. 1953. (R-20).

4. On July 6, 1982, the appellant entered an informed and voluntary plea of guilty to the charge of knowingly distributing an obscene motion picture in violation of Section 76-10-1204 U.C.A. (R-3, 6-7).

5. Prior to appellant's plea of guilty, the full ramifications of the plea were explained, together with all possible penalties and the minimum mandatory fine and jail sentence. This voluntary plea of guilty complied with the requirements of Boykin v. Alabama, 395 U.S. 238 (1969). (R-6, 7).

6. The appellant argued, in connection with sentencing which occurred on August 30, 1982, that the minimum mandatory jail sentence required by 76-10-1204(2) was unconstitutional.

This argument was rejected by the Court and a fine of $1000 was imposed, together with one year in the County jail. The Court suspended all but seven days of the jail sentence. (R-3, 5-7).

7. On appeal to the Third District Court, Appellant-Amicone's argument was rejected in an opinion by the Honorable Homer F. Wilkinson. The Court held that the sentencing statute is "a valid legislative enactment, that it is not an intrusion into the judicial function by the Legislature nor is it a violation of the separation of powers doctrine." (R-60-62). Attached as Appendix "B".

8. Appellant then instituted this appeal before the Court.

ARGUMENT

SECTION 76-10-1204(2), UTAH CODE ANNOTATED, WHICH REQUIRES A MINIMUM MANDATORY JAIL SENTENCE FOR KNOWINGLY DISTRIBUTING OBSCENE MATERIAL IS CONSTITUTIONAL AND DOES NOT ABRIDGE ANY RIGHTS GRANTED BY THE CONSTITUTION OF EITHER THE UNITED STATES OR THE STATE OF UTAH.

A. THE MANDATORY SENTENCING REQUIREMENT OF §76-10-1204(2) DOES NOT VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.

The Appellant-Amicone has alleged that the statutory requirement of a minimum mandatory sentence is an intrusion into a judicial function by the legislature, and therefore a violation of the separation of powers doctrine. However, this argument has been almost universally rejected by the courts; this rejection is particularly true of matters not involving the death penalty.

Nearly seventy years ago the U.S. Supreme Court enunciated

the long standing principle in Ex Parte United States[1] that the matter of providing for crimes and their punishment is a legislative function. The Court cautioned against unwarranted judicial intrusion into the legislative area in the following language:

> "If it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments, and hence leave no law to be enforced." Id. at 42.

This principle has been strictly adhered to for decades by the courts of this country. In State v. Motley,[2] the Missouri Appellate Court rejected the defendant's contention that a state statute imposing a 10-year minimum mandatory sentence for narcotic sales, without the possibility of probation or a suspended sentence, usurped judicial functions in violation of the state's constitution. The court also rejected the contention that the court has inherent power to grant or deny probation to a convicted offender. The court noted that fixing punishment for a

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[1] 242 U.S. 27, 37 S.Ct. 72 (1916).

[2] 546 S.W.2d 435 (1976, Mo.App.).

crime defined by statute is the province of the legislature, not the courts.

The court concluded that there had been no usurpation of judicial authority and indicated that it would be a judicial invasion of legislative power for the courts to refuse to impose, at least, the minimum mandatory sentence. The court held:

> "Thus, the legislature by statutory enactment described crimes and prescribes punishment and for a court to refuse imposition of prescribed penalties by the device of indefinite suspension of sentence or similar means, would constitute judicial usurpation of legislative power. It is clear that contrary to defendant's contention there has been no usurpation of judicial authority here; indeed the opposite would occur if a court on conviction refused imposition or ordered indefinite suspension of sentence." Id. at 438. (Emphasis added).

In Banks v. State,[3] the Florida Supreme Court held that a minimum 25 year imprisonment for sexual battery was not excessive, cruel, or unusual; it specifically held it did not usurp judicial authority. Quoting an earlier Florida case, the Court said:

> "'The determination of maximum and minimum penalties to be imposed for violation of the laws remains a matter for the legislature.'" Id. at 470. (Emphasis added).

The Supreme Court of Florida has also held a mandatory minimum 3-year sentence for conviction of aggravated assault, where a firearm is used, to be constitutional. The Court held:

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[3] 342 S.2d 469 (Fla. 1977).

> "This Court has long held, and now reaffirms its holding, that where a sentence is one that has been established by the legislature and is not on its face cruel and unusual, it will be sustained when attacked on grounds of due process, equal protection, or separation of power theories. . . . We do not find the mandatory three-year sentence provision to be cruel or unusual." Sowell v. State, 342 S.2d 969 (Fla., 1977) (Emphasis added).

In Commonwealth v. Jackson,[4] the Supreme Court of Massachusetts held that a mandatory minimum jail sentence of one year for first time offenders is not unconstitutional. The Court so held and rejected contentions of: cruel and unusual punishment, denial of due process, equal protection and violation of separation of powers.

Referring to the separation of powers argument, the Court observed:

> "The ability to defer the imposition of sentence, although a valuable feature in our legal system, is not necessary to the very existence of a court, and, as such, is not an inherent power beyond statutory limitation.
>
> "The logic of this position is demonstrated by considering that in our tripartite system of government it is unquestionable that the Legislature has the authority to determine what conduct shall be punishable and to prescribe penalties. . . . Although it is the court's function to impose sentences upon conviction, it is for the Legislature to establish criminal sanctions and, as one of its options, it may prescribe a mandatory minimum term of imprisonment." Id. at 177 (Emphasis added).

This same Massachusetts law regarding a mandatory minimum

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[4] 344 N.E.2d 166 (Mass. 1976).

sentence was upheld as constitutional in McQuoid v. Smith.[5] Here, in a case upholding a mandatory one year sentence for carrying a fire arm, the court ruled this statute did not violate the Due Process Clause of the Fourteenth Amendment.

The State respectfully submits that the determination of the type of sentence to be imposed for criminal violation is a legislative matter. The seven day minimum and one year maximum jail sentence is well within the prerogative of the legislature. It, thus, does not violate the doctrine of separation of powers.

B. THE MANDATORY JAIL SENTENCE REQUIREMENT OF §76-10-1204(2) DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Appellant alleges that the sentence imposed here is cruel and unusual. In so doing the appellant relies heavily upon a recent Supreme Court decision, Solem v. Helm[6]. In Solem the Court held that the Eighth Amendment proscribed the imposition of a life sentence, under South Dakota's recidivest statute, without possibility of parole for a seventh non-violent felony. The court's holding was specifically limited to the circumstances of that case and did not address the "general validity of sentences without possibility of parole."[7]

The court in Solem held that criminal sentences must be

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[5] 556 F.2d 595 (1st Circuit, 1977).

[6] __ U.S. __ 77 L.Ed.2d 637 (1983).

[7] Id. footnote 24.

proportionate to the criminal offense involved. However, the Court also stressed the importance of deferring to the legislative enactment of criminal offenses and penalties. The court held:

> "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." Id. at 649. (Emphasis added).

The Court specifically did not overrule its earlier decision, Rummel v. Estelle,[8] where a life sentence for a third non-violent felony was upheld; rather the Court expressly limited its holding in Solem to the circumstances of that case. Further, the Court emphasized the role of legislatures in establishing sentences as follows:

> "We agree, therefore, that, '[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,'. . .
>
> * * *
>
> "[W]e do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under

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[8] 445 U.S. 263 (1980).

review is within constitutional limits. In view of the substantial defenence that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." Id. at 649, and footnote 16 (Emphasis added).

The Court listed the following criteria for determining whether the proportionality of a sentence for Eighth Amendment purposes constitutes cruel and unusual punishment: (1) the gravity of the offense, (2) sentences imposed on other criminals in the same jurisdiction, and (3) sentences for the same crime in other jurisdictions.[9] The sentence imposed upon the Appellant-Amicone meets each of these elements.

First, The gravity of unlawfully distributing obscene material of the crime is recognized by virtually all jurisdictions and punished accordingly. In Hunt v. State,[10] the Oklahoma Appellate Court addressed the issues of cruel and unusual punishment, and legislative purpose. The defendant was charged with the sale of obscene motion pictures, an offense similar to that of the Appellant-Amicone. In Hunt the defendant contended that the imposed sentence for distributing obscene material was excessive, cruel and unusual.

The Court rejected the argument and held:

"The appellant's seventh assignment of error is that the punishment imposed upon her was at the

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[9] Id. at 649, 650.

[10] 601 P.2d 464 (Okla. Cr., 1979).

> least excessive and could constitute cruel and unusual punishment. Title 21 O.S.1971, §1040.51, under which the appellant was charged, provides for a maximum punishment of 15 years' imprisonment and/or a fine of $25,000.00. She received a sentence of three years' imprisonment and a fine of $15,000.00. In her brief, the appellant asserts that Oklahoma is the only state in the United States providing for a possible sentence greater than seven years for an obscenity violation and that half the states have maximum punishments of one year or less. She also claims that 41 states impose a fine of $5,000.00 or less and 30 states impose a fine of $1,000.00 or less. While these data do indicate that Oklahoma's obscenity laws are severe, this is the sort of argument one would make to the Legislature in seeking to have the law changed, rather than to this Court in seeking to have a conviction under the law voided. Severe is not cruel. To constitute cruel and unusual punishment, a penalty must serve no valid legislative purpose. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Justice Marshall concurring. We believe that the penalty provided by Section 1040.51 indicates that Oklahoma Legislature's great concern to put a halt to obscenity traffic in Oklahoma. Clearly, this is a valid legislative purpose." Id. at 467. (Emphasis added).

The Court reduced the sentence to one year and $5,000 on other grounds.

The gravity with which Utah's Legislature views the distribution of obscene material and the maximum penalty imposed for the offense, is similar to the majority of other state jurisdictions, as referenced in Hunt, supra. The punishment of such an offense has repeatedly been held to be a valid legislative matter. As noted above, the constitutionality of Oklahoma's statute, which provides for up to 15 years imprisonment for selling obscene material, has been upheld

against a challenge alleging the sentence constituted cruel and unusual punishment, Hunt, supra.

Appellant continually attempts to discount the gravity of the admitted offense by referring to it as "minor", "not serious", and having no "specific victim". However the U.S. Supreme Court and the State legislature have determined otherwise.[11] The legislature has specifically provided that:

> "It is not a defense to prosecution . . . that the actor was a motion picture projectionist, usher, ticket-taker, . . . or otherwise was required to violate any provision of this part incident to his employment." Section 76-10-1208(2) (Emphasis added).

Further, the Appellant admitted responsibility for the film's exhibition. Her actions specifically included receipt of funds from customers, and the knowledge of what the film contained. Those actions were an integral part of the now admitted unlawful distribution of obscene material.

Owner's of businesses which exhibit explicit material do not make themselves easily available to answer for the showing of allegedly obscene material. The Legislature, well aware of this process, properly included all knowing participants in the distribution of obscene material and subjected them to a mandatory jail sentence when the offense is proven.

Second, mandatory jail sentences are also required under Utah law for: inducing the acceptance of pornographic material,

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[11] Paris, infra, Id. at 55-59 cited p. 18 herein.

76-10-1205(2); dealing in material harmful to minors, 76-10-1206(3) and (4); and indecent public displays, 76-10-1228, all Utah Code Annotated., 1953 as amended.

In addition, a review of sentences which have been imposed for criminal offenses of this statute is set forth in part C, of the State's brief, infra at 16-17.

Third, other jurisdictions impose similar or greater penalties to Utah's one year maximum sentence for the unlawful distribution of obscene material, Hunt, supra. Further, contrary to Appellant's assertion, Utah is not the only state which imposes a mandatory jail sentence for first time offenders. Tennessee provides for a mandatory 60 day incarceration without possibility of suspension for those convicted of distributing obscene material. A copy of Tennessee's statute is attached as Appendix "C".

It is therefore submitted, that the mandatory seven day jail term under Utah law is not constitutionally disproportionate to the crime involved when measured against the Solem criteria, nor does it constitute cruel and unusual punishment.

C. THE MANDATORY JAIL SENTENCE PROVIDED FOR IN SECTION 76-10-1204(2) DOES NOT VIOLATE THE PROVISIONS OF THE FIRST AMENDMENT.

The appellant contends that the mandatory jail sentence requirements of Utah law for the unlawful distribution of obscene material constitute a denial of due process and freedom of speech under the Utah and United States Constitutions. This contention

finds no support whatever in any legislative enactment nor in the authoritative pronouncement of any court.

The Supreme Court of the United States has consistently held that obscene material has absolutely no protection under the law. In Chaplinsky v. New Hampshire,[12] the Supreme Court observed:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Id. at 571, 572. (Emphasis added).

The Court held in Roth v. United States[13]:

> "We hold that obscenity is not within the area of constitutionally protected speech or press." Id. at 485.

And in the landmark obscenity case, Miller v. California,[14] the court held:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." Id. at 23.

It is true that material, before it is found to be obscene, enjoys constitutional protection. However, that protection ends

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[12] 315 U.S. 568, 62 S.Ct. 766 (1942).

[13] 354 U.S. 476, 77 S.Ct. 1304 (1957).

[14] 413 U.S. 15, 93 S.Ct. 2607 (1973).

... a determination or an unqualified admission that the material is obscene. There is no continuing protection beyond such determination to either the material or the exhibitor of the material, Miller, supra.

In the present case, the appellant admitted that the material, a motion picture entitled "Ms. Magnificence", was obscene and that she was guilty of its exhibition. Appellant's plea of guilty totally removed any "dim and uncertain line" which may have existed as to the obscenity of the material.

Appellant suggests that whether material is obscene is completely a matter of "guessing" on behalf of those who deal in such material. If such were the case, the obscenity legislation suggested in Miller v. California, supra and enacted by the Utah Legislature in 76-10-1201, et seq. U.C.A. would have been held unconstitutionally vague.

However, in State v. Haig,[15] this Court upheld the State's obscenity against constitutional challenges of overbreadth and vagueness. This finding was reaffirmed in State v. Pierren,[16] and in State v. Eagle Book.[17]

More recently, this Court addressed the issue of the constitutionality of the obscenity statute and the question of

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[15] 578 P.2d 837 (Utah, 1978).

[16] 583 P.2d 69 (Utah, 1978).

[17] 583 P.2d 73 (Utah, 1978).

punishment under Section 76-10-1204(2). The Court held:

> "Our statute thus complies fully with the requirements set out by the high Court. It does not offend against any constitutional provision. It is a valid statute and those who so flagrantly flout it must pay the penalty for doing so." State v. Piepenburg, 602 P.2d 702, at 704 (Utah, 1979) (Emphasis added).

Had the court imposed a more severe sentence of one year in jail the appellant's free speech challenge and all other constitutional challenges would have evaporated. Yet, the far more lenient sentence, seven days and $1000, is so challenged simply because it coincides with the minimum sentence specified in the statute. Appellant's contention is without merit, as evidenced by the lack of any authoritative precedent to support the assertion.

Argumentatively, appellant suggests to the Court that the mandatory jail sentence will result in the elimination of all protected material of a sexual nature, and that it also eliminates all judicial discretion in imposing sentences. This alarmist approach is totally unsupported and contradicted by fact. Many employees of the Studio Theatre have served mandatory jail sentences pursuant to the statute here under attack. Yet, there has been no indication that that establishment is inclined to show other than sexually oriented material.

For example, James Piepenburg, the defendant in State v.

Piepenburg,[18] was the president and a director of the corporation which operated the Studio Theatre. Piepenburg was charged and convicted under the same section of the state law at issue here, and he was sentenced to six months in jail with three months suspended.

Randy Taylor, former manager of the Studio Theatre, was also convicted and sentenced under this same statute and ultimately served 90 days in jail.[19] Other managers of this theatre have served jail sentences of 15 days and many other employees, like the appellant, have served the minimum mandatory jail term required by the statute.[20]

The foregoing demonstrates the fallacy of appellant's "chilling effect" argument. It also demonstrates that sentencing Courts use discretion in imposing sentences, which reflect various mitigating factors and responsibility for the particular offense involved.

The reasons for the existence and firm enforcement of obscenity legislation were pointed out in the landmark case of Paris Adult Theatre v. Slaton.[21] The Supreme Court, after

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[18] 602 P.2d 702, 705 (Utah, 1979).

[19] State of Utah v. Randy Taylor, 78 CRS 341.

[20] State of Utah v. Joyce Vigil, 79 CRS 983; State of Utah v. James A. King, 81 CRS 351; State of Utah v. Gary Lee Hill and Marilyn Oldroyd, CR 78-648.

[21] 413 U.S. 49 (1973).

rejecting the argument that showing pornographic films to "consenting adults" is immune from state regulation, made these incisive comments:

> "In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, . . . These include the interest of the public in the equality of life and the total community environment, the tone of commerce in the great city centers, and, possibly the public safety itself. . . . however, there remains one problem of large proportions aptly described by Professor Bickel:
>
> "'It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. . . . Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.' 22 The Public Interest 25-26 (Winter 1971).
>
> "As Mr. Chief Justice Warren stated, there is a 'right of the Nation and of the States to maintain a decent society . . . .,'" Id. at 58-59. (Emphasis added).

The State submits that the right to punish the distribution of obscene material extends to the right of the legislature to impose a mandatory penalty for such crime. Such a penalty does not violate the First Amendment.

CONCLUSION

Appellant-Amicone's conviction for a class A misdemeanor wa potentially punishable by a fine of $1000 and one year in jail.[22] Yet the Appellant was merely given seven days in jail

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[22] 76-3-204 and 76-3-301 Utah Code Ann., 1953.

ordered to pay a $1000 fine. Such a sentence can hardly be said to be excessive or disproportionate.

The legislature of the State of Utah has very clearly indicated the gravity with which it views the crime of distributing pornography. In addition to the mandatory minimum penalty for a first time conviction, the legislature has made subsequent obscenity offenses felonies, without possibility of suspension of sentence. Mandatory sentences, without suspension have also been mandated for other Utah crimes. Similar penalties have also been imposed by other jurisdictions.

The mandatory sentencing provision of 76-10-1204(2) Utah Code Ann., 1953 is fully constitutional and reflects the judgment of the legislature. It is respectfully submitted that the constitutionality of the statute should be upheld and the sentence of the Appellant be affirmed.

DATED this _____ day of September, 1983.

ROGER F. CUTLER
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APPENDIX "A"

RECEIVED
CITY ATTORNEY'S OFFICE
DATE 9/12/83

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Tax & Business Regulation Division

September 8, 1983

Roger F. Cutler
Salt Lake City Attorney
100 City and County Building
Salt Lake City, Utah 84111

Re: State of Utah v. Heather S. Amicone
Supreme Court No. 19183

Dear Roger:

As you may be aware, the defendant in the referenced matter has appealed to the Utah Supreme Court on the basis of the alleged unconstitutionality of Utah Code Ann. § 76-10-1204 (1953).

It is my understanding that your office represented the State in Circuit and District Courts pursuant to the authority of Utah Code Ann. § 76-10-1215 (1953). The defendant pleaded guilty in Circuit Court and subsequently appealed a mandatory jail sentence imposed by that court.

The Third District Court by Judge Wilkinson found the statute constitutional and this appeal followed.

I would be grateful if your office would continue to assist us in the handling of this matter at the Supreme Court including preparation of the brief and the presentation of oral arguments.

Sincerely,

David

DAVID L. WILKINSON
Attorney General

DLW:bab

cc: Geoffrey Butler

APPENDIX "B"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff/Respondent,

vs.

HEATHER S. AMICONE,

Defendant/Appellant.

DECISION

CRIMINAL NO. CRA 82-52

The above-entitled matter comes before the Court on appeal from the Fifth Circuit Court, Salt Lake Department from a plea of guilty entered by the defendant on the 6th day of July, 1982, before the Honorable Eleanor S. Lewis. Subsequent thereto on the 30th day of August, 1982, the Court sentenced the defendant to pay a fine of $1,000.00 with one year in jail, all but seven days of jail sentence to be suspended. Defendant's appeal is based on (1) the mandatory sentence requirement of the Utah Code Section 76-10-1201, et seq are unconstitutional incursions on judicial authority; (2) the mandatory sentence provision of the Utah Code Section 76-10-1201, et seq violate Article I, Section 24 of the Utah Constitution. Both parties have submitted a brief covering the questions of law, the Court having read the same and now being fully advised in the premises renders its decision.

The Court finds that Section 76-10-1204(2), Utah Code Annotated, 1953 as amended, is constitutional and is a valid legislative enactment, that it is not an intrusion into the judicial function by the Legislature, nor is it a violation of the separation of powers doctrine. See Commonwealth vs. Jackson, 344 N.E.2d 166, Mass. 1976; State vs. Motley, 539 S.W.2d 435, Mo. App. 1976; and McQuoid vs. Smith, 556 F.2d 595, 1st Cir. 1977. The Court further finds the mandatory jail sentence as imposed by Section 76-10-1204(2) is not a denial of due process and freedom of speech under the Utah or the United States Constitutions. See Miller vs. California, 413 U.S. 15, 93 S. Ct. 2607 (1973); Chaplinsky vs. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1943); and Roth vs. United States, 354 U.S. 476, 77 S. Ct. 1304 (1957). Based on the foregoing, the Court finds in favor of the plaintiff and against the defendant, and sustains the sentencing of the Circuit Court, and remands the matter back to the Circuit Court for imposition of the sentence.

Dated this 10th day of March, 1983.

/s/ Homer F. Wilkinson

HOMER F. WILKINSON, DISTRICT JUDGE

APPENDIX "C"

"(a) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production, peep shows or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

"(b) Notwithstanding any of the provisions of §§39-6-1001 - 39-6-1115, the distribution of obscene matter to minors shall be governed by §39-6-1131 et seq. In case of any conflict between the provisions of §§39-6-1101 - 39-6-1115 and §39-6-1131 et seq., the provisions of the latter shall prevail as to minors.

"(c) It shall be unlawful to hire, employ, or use a minor to do or assist in doing any of the acts described in subsection (a) with knowledge that a person is a minor under eighteen (18) years of age, or while in possession of such facts that he or she should reasonably know that such person is a minor under eighteen (18) years of age.

"(d)(1) Any person who violates the provisions of this section shall, upon conviction of the first such offense, be guilty of a misdemeanor and be punished by imprisonment in the county jail or workhouse for a period of sixty (60) days.

"(2) Any person who violates the provisions of this section and who has been convicted of one (1) prior violation of this section shall, upon conviction of the second such offense, be guilty of a misdemeanor and be punished by imprisonment in the county jail or workhouse for a period of eleven (11) months and twenty-nine (29) days.

"(3) Any person who violates the provisions of this section and who has been convicted of at least two (2) prior violations of this section shall, upon conviction of the third or subsequent

offense, be guilty of a felony and be punished by imprisonment in the penitentiary for a definite term of not less than two (2) years nor more than five (5) years.

"(e)(1) For purposes of this subsection, a Class A violator shall be any person sentenced under the provisions of subsection (d) who distributes obscene books, magazines, newspapers, pictures, drawings, photographs or other printed or written material when such obscene material represents twenty-five percent (25%) or less of the stock-in-trade, and inventory, and sales of such violator during any given twenty-four (24) hour period. A Class B violator shall be any other person sentenced under the provisions of subsection (d) who is not defined as a Class A violator. Upon application for sentencing as a Class A violator, as defined above, such violator shall have the burden of proving his classification.

"(2) The sentences imposed in subsection (d) of this section shall be mandatory for a Class B violator, and no Class B violator sentenced under the provisions of such subsection shall be eligible for suspension of sentence and probation, release on parole, or any other program whereby such person enjoys the privilege of supervised or unsupervised release into the community or whereby such person is released, permanently or temporarily, prior to the expiration of his sentence, including, but not limited to, participation in any programs authorized by §§41-21-208 or 41-21-227. Provided, further, no Class B violator sentenced under subsection (d) of this section shall receive good, honor or incentive time credit towards the expiration of such sentence as authorized by §§41-21-212, 41-21-214 or 41-21-228; nor shall such sentence expire in any other manner until it has been entirely served day for day. . . ."

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