IN THE COURT OF APPEALS 4/22/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01098 COA

MICHAEL BROWN AND TOMMY ANDERSON, INDIVIDUALLY AND DOING BUSINESS AS THE TERRACE LOUNGE A/K/A THE NEW TERRANCE LOUNGE A/K/A THE NEW A & B LOUNGE

APPELLANTS

v.

THE CITY OF GULFPORT, MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM L. STEWART

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

GAIL D. NICHOLSON

ATTORNEY FOR APPELLEE:

CITY ATTORNEY'S OFFICE

BY: JAMES HALLIDAY

NATURE OF THE CASE: CIVIL: ENJOINING OF PUBLIC NUISANCE

TRIAL COURT DISPOSITION: INJUNCTION ISSUED PROHIBITING APPELLANTS FROM OPERATING A LOUNGE AT 2119 PRATT AVENUE IN GULFPORT, MISSISSIPPI

MANDATE ISSUED: 7/22/97

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

KING, J., FOR THE COURT:

The Appellants appeal a judgment of the Chancery Court of Harrison County, which enjoined them from operating a nightclub in Gulfport. Aggrieved, the Appellants appeal and assign as error the following issues:

I. Did the court abuse its discretion by issuing the permanent injunction when a less severe remedy existed?

II. Does the permanent injunction violate the Eighth Amendment prohibition of excessive fines?

III. Does the permanent injunction constitute an unconstitutional taking?

FACTS

In 1988, the Appellants purchased a lounge, which was located at the intersection of Pratt Avenue and 22nd Avenue in the City of Gulfport. The area where the lounge was located was zoned as mixed residential and commercial. Loud music and the many patrons of the lounge often disturbed residents living within the area, and the residents frequently called and voiced their complaints to the police. Loud music, inadequate parking, violence, and excessive noise were among the complaints received by the police.

In an effort to eliminate many of the problems arising out of the lounge's operation, the City relaxed its policy, which prohibited reserve police officers from being employed at lounges, and allowed the Appellants to employ reserve police officers as security at the lounge. Despite implementation of this measure, the problems continued. So, the City filed a complaint in the Chancery Court of Harrison County alleging that the lounge constituted a common nuisance and requesting that the court prohibit its operation by issuing a permanent injunction. Trial was held, and the court found as a matter of law that the lounge had been operated as a public nuisance and enjoined the Appellants from operating the lounge. Appellants were further enjoined from operating any other business, in which beer or alcoholic beverages would be sold, dispensed, or consumed at the location.

ANALYSIS OF THE ISSUES AND DISCUSSION OF LAW

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ISSUING THE PERMANENT INJUNCTION WHEN A LESS SEVERE REMEDY EXISTED AT LAW?

The Appellants argue that the trial court abused its discretion by issuing the permanent injunction because a less severe remedy existed at law. Specifically, the Appellants suggest that the problems associated with the lounge's operation could be eliminated by limiting the club's hours of operation, posting no loitering signs, and adopting a noise ordinance. Appellants proposed remedies do address the excessive noise concern. However, the public's safety was also a concern. The record indicates

that the City introduced into evidence reports, which indicated that patrons of the lounge discharged weapons within the vicinity. Reports of assaults and batteries were also introduced into evidence. Although the reports were not made a part of the record on appeal, residents living within the vicinity of the lounge and members of the police department testified that guns were discharged within the vicinity of the establishment. Appellants' proposed remedies do not address the City's and court's concern for the safety of residents living within the vicinity of the lounge. Indeed, the City attempted to address this concern when it allowed the Appellants to hire reserve police officers as security. This effort proved futile.

In *Proby v. State ex rel. West*, the supreme court stated that the city had little choice but to seek an injunction when the police department's continued intervention failed to curtail obnoxious activities occurring at a lounge. *Proby v. State ex rel. West*, 498 So. 2d 792, 794 (Miss. 1986). Because violent activity continued to occur despite the presence of police officers within the vicinity, we find as the court did in *Proby*. This assignment of error lacks merit.

II.

DOES THE INJUNCTION VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION OF EXCESSIVE FINES?

The Appellants argue that the injunction constitutes an excessive fine, which is prohibited by the Eighth Amendment. Appellants are cognizant that the Eighth Amendment is generally applicable to criminal actions. However, the Appellants suggest that the tenet is applicable whenever excessive fines or penalties are imposed, regardless of the occurrence of a criminal act. We must disagree.

In *Powell v. Texas*, the United States Supreme Court said that the Eighth Amendment's primary purpose has always been considered to be directed at the method or kind of punishment imposed for the violation of criminal statutes. *Powell v. Texas*, 392 U.S. 514, 531-32, 88 S. Ct. 2145, 2154, 20 L.Ed 2d 1254, 1267 (1968). The injunction was not imposed for the purpose of punishing the Appellants. Appellants' operation of the lounge violated no criminal statute. The injunction was imposed to address a civil wrong. Therefore, the Eighth Amendment is not applicable.

III.

DOES THE PERMANENT INJUNCTION CONSTITUTE AN UNCONSTITUTIONAL TAKING?

Appellants argue that they have suffered a taking, which violates the Fifth Amendment, because the permanent injunction has left their property economically idle; therefore, just compensation is required. In support of their argument, Appellants cite *Lucas v. So. Carolina Coastal Council*, 120 L. Ed 2d 798, 815 (1992). In *Lucas*, the Supreme Court said that when the owner of real property has been called upon to sacrifice ***all*** economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Lucas*, 120 L. Ed 2d at 815. The permanent injunction proscribes the operation of a lounge, nightclub, bar, disco, or similar place of entertainment at the location. Appellants have not shown that the proscribed uses are the only economically beneficial uses for which the property is suited. Notwithstanding, the Appellants' failure to show that the injunction foreclosed ***all*** economically beneficial uses of the property, the *Lucas*

court acknowledged that a state may regulate property use without incurring an obligation to compensate through the lawful exercise of its police power. *Lucas,* 120 L. Ed 2d at 817. This principle has been followed by the Mississippi Supreme Court. *See Mississippi State Hwy. Comm. v. Roberts Enter.*, 304 So. 2d 637, 639 (Miss. 1974) (stating that restrictions imposed upon the use of property through the lawful exercise of the police power of the state do not require compensation); *see also Jackson Mun. Airport Auth. v. Evans*, 191 So. 2d 126, 133 (Miss. 1966) (explaining that property owner is not entitled to compensation when he is merely restricted in the use and enjoyment of his property). Because the injunction merely restricted Appellant's use of the property for a particular purpose, we find no violation of the Fifth Amendment's Taking Clause. This assignment of error lacks merit.

CONCLUSION

In conclusion, we find that the trial court did not commit manifest error by issuing the permanent injunction. However, the injunction not only proscribes the Appellants from operating a lounge, nightclub, disco, or similar business at the location, the injunction also proscribes the Appellants and future owners of the premises from operating any business which sells beer or alcoholic beverages. This restriction would encompass a convenience store that sold beer. The activities giving rise to the nuisance are less likely to occur if the Appellants chose to operate a convenience store that sold beer for consumption off of the premises.

An injunction is an equitable remedy, and it must be tailored to meet the exigencies of the situation. *Hall v. Wood,* 443 So. 2d 834, 841 (Miss. 1983). Moreover, in fashioning injunctive relief, the court should exercise caution and consider whether compliance with the injunction will result in undue hardship. *Id.* (explaining that expense and hardship to the party enjoined should be considered and because they may be substantial caution and restraint are advised). The present nuisance action arose because the Appellee was concerned about the safety of residents living within the vicinity and the general public. Specifically, the Appellee was concerned with the unlawful discharge of firearms and violent acts committed by patrons of the lounge. The Appellee was also concerned with eliminating excessive noise and traffic congestion within the vicinity. The consumption of beer or alcoholic beverages by patrons of the lounge contributed to the unlawful and violent activity, and the excessive noise was caused by loud music. An injunction which prohibits the Appellants and future owners of the property from operating a nightclub, disco, lounge, or similar establishment at the location and from selling and dispensing beer or alcoholic beverages for consumption on the premise would adequately address the Appellee's concerns without depriving the Appellant's and future owners of the ability to earn profit from the sell of beer or alcohol for consumption off of the subject premises. Because compliance with the present injunction might result in undue hardship, we are remanding this case to the trial court with instructions to narrowly tailor the injunction so that compliance will not result in the hardship described.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE TAXED TO THE CITY OF GULFPORT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, AND SOUTHWICK, JJ., CONCUR.

PAYNE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

THOMAS, P.J., HERRING AND HINKEBEIN , JJ., NOT PARTICIPATING.

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

I concur with the majority opinion except for the conclusion that Appellants should be allowed to sell beer if the establishment were converted from a lounge to a convenience store. It appears to me that if the police were not able to control the crowd and their noisy activities when the business was a lounge with an overcrowded parking lot, there is little prospect that the activities will stop in the parking lot of a convenience store. Therefore, I would affirm the chancellor's decision to prohibit the operation of any establishment which sells beer or alcoholic beverages. It is obvious the nuisance will not be abated if the majority's solution is followed. "What's in a name? That which we call a rose by any other word would smell as sweet."