RENDERED: AUGUST 31, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001805-MR
AND
NO. 1999-CA-000200-MR

DANNY'S INC. D/B/A THOROBRED II
AND THOROBRED IV; GOLD COAST, INC.
D/B/A THOROBRED III; C & H ENTERTAINMENT,
INC. D/B/A BABE'S; AND SHANNA TUTTLE — APPELLANTS/APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 97-CI-003235

JEFFERSON COUNTY FISCAL COURT — APPELLEE/APPELLANT

AND

NO. 1998-CA-001880-DG

CONNIE AYOTTE; DAVID R. BELL;
LILLIAN BLANDFORD; SHANNON BRATCHER;
ELIZABETH CASPER; JAMES COX;
BARBARA DZAGAN; VICKI LU EATON;
TAMMY FARMER; VICKKI FAVORS; AMY FORD;
DIVANNA GOMEZ; WENDY GONZALEZ;
MICHELLE HARDMAN; ISSHIA HARMON;
MARTY HEAVRIN; CHARLOTTE HOLDERMAN;
AMY JONES; ANGELLA M. JONES; JANICE
LORD; ERIN MARCUM; JENNIFER MORIN;
AMANDA MORRIS; TONIA MOURIZAK; MARCY
NICHOLSON; JENNIFER OAKLEAF; SHERRY
PRIDGEON; MARIA RHYNE; CAROLEEN SADLER;
LAURA WALCOTT; VICKY WARDRIP; JAVONDA
WEPPLER; SANDRA WILSON; and MELVINIA WOODBERRY — APPELLANTS

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 97-XX-000134

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, COMBS, AND McANULTY, JUDGES.

McANULTY, JUDGE: In the first of these consolidated appeals (1998-CA-001805-MR), the appellants consist of establishments which seek to present nude or nearly nude dancing while serving alcoholic beverages, or are performers at such establishments. They challenge, on constitutional grounds, Ordinance § 113.17 promulgated by the appellee Jefferson County Fiscal Court which regulates "Nude or nearly nude performances" in establishments licensed to sell alcoholic beverages. In the second case (1998-CA-001880-DG), the appellants are employed as entertainers and managers at such establishments in Jefferson County who were charged with violating Ordinance § 113.17. We granted discretionary review of their constitutional arguments. These two cases also were heard together in the circuit court.

Appellants argued below that the ordinance violated their First Amendment right to freedom of expression because it was overbroad and vague. The county attorney responded that the ordinance was fully within the county's authority to regulate the sale of alcoholic beverages under the Twenty-first Amendment to the United States Constitution. The trial court found that the issues were controlled by a line of cases beginning with

California v. LaRue, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972), which employed the Twenty-first Amendment to govern the issue of regulation of sexually explicit entertainment in establishments serving liquor.[1] The trial court further analyzed this case pursuant to the test used by the Supreme Court in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991). In Barnes, the Supreme Court applied its four-pronged test from United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), which analyzed encroachments upon the First Amendment, to a case involving a prohibition on nude dancing. In the case at bar, the trial court concluded that all of the prongs of the test were met and specifically found that the ordinance was not vague or overbroad.

Appellants claim that the trial court's conclusions were erroneous. Appellants first claim that the LaRue line of cases should not have been relied upon by the trial court because they were "all but overruled" by 44 Liquormart v. Rhode Island, 517 U.S. 484, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996). Appellants contend that the trial court thus erred in concluding that LaRue, and the cases which used the same analysis, were controlling.

Appellees, on the other hand, continue to urge that this case should be decided solely on the county's Twenty-first Amendment authority. The county argues that because of its

---

[1] The other cases in which the United States Supreme Court followed LaRue were New York State Liquor Authority v. Bellanca, 452 U.S. 714, 69 L. Ed. 2d 357, 101 S. Ct. 2599 (1981), and Newport v. Iacobucci, 479 U.S. 92, 93 L. Ed. 2d 334, 107 S. Ct. 383 (1986).

factual similarity this case falls within the ambit of LaRue. Appellees note that the state possesses extensive power to regulate the sale of alcohol, citing Alcoholic Beverage Control Board of Ky v. Woosley, Ky., 367 S.W.2d 127 (1963), and broad police power to restrict the kind of activities at issue in LaRue, including nude and nearly nude dancing. The county contends that this is not a First Amendment case, so that the trial court's examination of this case under the First Amendment was unnecessary and gratuitous.

The Supreme Court had held in LaRue that regulations prohibiting sexually explicit live entertainment, and which restricted some forms of expression which were within the First Amendment's protection of freedom of expression, were valid pursuant to states' authority under the Twenty-First Amendment to control intoxicating beverages. The Court held that the Twenty-first Amendment required an "added presumption in favor of the validity of the state regulation in this area." 409 U.S. at 188-119, 34 L. Ed. 2d at 352, 93 S. Ct. 390. However, in 44 Liquormart, the Supreme Court reconsidered this position, and held that it is clear that the text of the Twenty-first Amendment grants it no authority over other constitutional provisions. The Court stated:

> We are now persuaded that the Court's analysis in LaRue would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample

> authority to restrict the kind of "bacchanalian revelries" described in the LaRue opinion regardless of whether alcoholic beverages are involved. (Citations omitted.)

Id. at 515. The Court added that it did not question its holding in LaRue, but disavowed its reasoning insofar as it relied on the Twenty-first Amendment. Id. at 516.

We find no fault with the trial court's order insofar as the reference to LaRue and its progeny. Following the Supreme Court's construction in 44 Liquormart, the LaRue line of cases authorizes states to regulate nude and nearly nude dancing in places serving alcoholic beverages pursuant to their police powers. The trial court found that LaRue "involved a simple time, place and manner restriction supported by a reasonable relationship between the evil sought to be prevented and a narrowly tailored regulation to that end." We find that the trial court appropriately construed LaRue and did not incorporate its position regarding the Twenty-first Amendment which was disavowed in 44 Liquormart.

We disagree with appellees' contention, however, that this case does not concern the First Amendment. The nude dancing at issue herein is expressive conduct, although it only falls within the "outer ambit" of First Amendment protection. Barnes, 501 U.S. at 565-566, 115 L. Ed. 2d 504, 111 S. Ct. 2456; Erie v. Pap's A.M., 529 U.S. 277, 146 L. Ed. 2d 265, 278, 120 S. Ct. 1382 (2000). 44 Liquormart holds that the Twenty-first Amendment does not have presumptive power over the First Amendment or other constitutional amendments. Thus, we do not agree that legislative bodies have unbridled power to regulate conduct where

alcoholic beverages are sold. In the recent case of Pap's A.M., the Supreme Court held that government restrictions on public nudity should be evaluated under the framework established in O'Brien for content-neutral restrictions on symbolic speech. 529 U.S. at 289, 146 L. Ed. 2d at 278. In Barnes and Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), cited in 44 Liquormart as illustrative of the states' police power to regulate sexually explicit activity, the Supreme Court went through a First Amendment analysis of the regulations at issue. Thus, we believe that the trial court's examination of the ordinance pursuant to the First Amendment was necessary.

The O'Brien test is as follows:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, at 376-377 (footnotes omitted). The trial court concluded that the second and third factors above were met. Appellants have not challenged that ruling specifically. Appellants quarrel with the trial court's determination of the fourth factor — whether the regulation is no greater than is

necessary to the furtherance of the governmental interest. The real crux of appellants' arguments on appeal is that the ordinance's restriction on their freedoms is greater than is essential to further its purpose because the ordinance required coverage of more of the body than is minimally necessary.

We are unconvinced that the ordinance at issue is greater than necessary to achieve the governmental purpose in this case. The trial court found that the governmental interest was focused on the potentially negative impact of the activity in question, rather than its content. O'Brien requires only that the regulation further the interest in combating the secondary effects which the regulation is aimed at reducing. Pap's A.M., 529 U.S. at 301, 146 L. Ed. 2d at 285, 20 S. Ct. 1382. Presumably, the Fiscal Court did not think the purpose of the ordinance would be served by a lesser restriction. The Supreme Court states that legislative bodies must be given latitude to experiment with solutions to the problems before them. Id. We will defer to the judgment of the legislative body since appellants have not shown that the Fiscal Court went too far to achieve its ends. Moreover, the Supreme Court of Kentucky has concluded that the amount of clothing involved does not interfere with the message sought to be conveyed by dance performances. Hendricks v. Commonwealth, Ky., 865 S.W.2d 332, 336 (1993). The performers at the establishments in question are free to perform as before, but wearing the coverage called for in the ordinance. Therefore, we conclude that this ordinance satisfies the four-part test in O'Brien.

We do not agree that the ordinance is overbroad by potentially disallowing performances with serious artistic, literary or political content, since it does not prohibit all public nudity. Cf. Triplett Grille, Inc., v. City of Akron, 40 F.3d 129, 135-136 (6th Cir. 1994). Therefore, we do not find that the ordinance is overbroad as it is written.

Appellants' remaining claim is that Barnes established a minimum level of intrusion on the kind of performance at issue by requiring "pasties" and "g-strings" as "the bare minimum" of regulation acceptable, whereas the ordinance at issue required greater coverage. Barnes did not establish this as the bare minimum level of intrusion on public nudity that states may require. See Barnes, 501 U.S. at 562, 115 L. Ed. 2d at 515. Instead, the Court noted that the state of Indiana's regulation went no further than was necessary to achieve its purpose of preventing public nudity. The opinion did not hold that a state could not go any further than "the bare minimum."

* * * * *

In the third appeal which was consolidated herein (1999-CA-000200-MR), the Jefferson County Fiscal Court appeals the trial court's order which denied a temporary injunction restraining the establishments, performers and managers herein from violating Ordinance § 113.17 during the pendency of these appeals on the basis that such violation constitutes a public nuisance. The propriety of issuing a temporary injunction is a matter addressed to the sound discretion of the trial court. CR 65.04; Cyprus Mountain Coal Corp. v. Brewer, Ky., 828 S.W.2d 642,

645 (1992). In order to grant such relief, the trial court must (1) find that the party seeking relief has shown irreparable injury, (2) weigh the equities involved, and (3) determine that a substantial question has been presented. Id. The trial court correctly found that appellants have made no showing of an irreparable injury in this case. Furthermore, we find no error in the trial Court's balancing of equities. Accordingly, we affirm the trial Court's denial of a temporary injunction.

ALL CONCUR.

BRIEF FOR APPELLANTS DANNY'S, INC. D/B/A THOROBRED AND THOROBRED IV; GOLD COAST, INC. D/B/A THOROBRED III; C & H ENTERTAINMENT, INC. D/B/A BABE'S; AND SHANNA TUTTLE:

C. Michael Hatzell
Hatzell & Groves
Louisville, Kentucky

BRIEF FOR APPELLEES/APPELLANT JEFFERSON FISCAL COURT:

I.G. Spencer, Jr.
Assistant Jefferson County Attorney

N. Scott Lilly
First Assistant Jefferson County Attorney

Walker C. Cunningham
Assistant Jefferson County Attorney
Louisville, Kentucky