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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001039-MR

ANTHONY CURRY D/B/A
INTERSTATE NEWS & TOBACCO — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 02-CI-00915

CITY OF RICHMOND, KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

NICKELL, JUDGE: Anthony Curry, d/b/a Interstate News and Tobacco appeals from a judgment enjoining him from operating an adult business in violation of a

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

local ordinance. Curry argues that he was denied due process of law because the judgment was issued more than three years after trial by a judge who did not preside over the bench trial and that the case was rendered moot by the enactment of a subsequent ordinance. We affirm.

In 2001, the City of Richmond, Kentucky, enacted Ordinance No. 01-30, restricting the location of adult businesses to I-2 zoning districts. In 2002, Curry applied for a license to operate a business at 161 North Keeneland Drive, which is located in a B-3 zoning district. Curry represented to the City Manager, David Evans, that he intended to operate a standard bookstore and movie rental business including a few items of an adult nature. Based upon his representations, Evans issued Curry a business license and certificate of occupancy.

Shortly thereafter, Evans received numerous complaints from the public about the operation of an adult bookstore on Keeneland Drive. Evans made an inspection visit and discovered non-sexual material on the shelves near the front and rear entrances, but the majority of the store was devoted to adult movies, magazines, and sex toys. The City's Code Enforcement Office thereafter obtained an administrative search warrant, which was executed by Richard Boneta, Director of Codes Enforcement, and two code enforcement officers.

Boneta documented the inventory and nature of the store. The display area of the store consisted of 714 square feet devoted to adult material versus 288

square feet devoted to non-sexual material. This figure did not include the area occupied by the installation of 14 peep show booths for the viewing of adult movies. A second administrative search was conducted in 2004. The adult nature of the business was still prevalent and had expanded via installation of a mini-theater for the viewing of adult movies.

The City filed suit against Curry to enjoin him from operating his business in violation of Ordinance No. 01-30.[2] In 2004, the City enacted Ordinance No. 04-20, which amended Ordinance No. 01-30 to encompass a more restrictive definition of adult establishment.[3] The case went to trial in 2005. Judge

[2] Ordinance No. 01-30 defined the term "Adult Establishment" as "any commercial establishment, business, or service, which offers, as its principal or predominant stock or trade, sexually oriented material, devices, paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded, or live, or which commercial establishment, business, or service is distinguished or characterized by an emphasis on matter depicting, describing, or relating to sex."

[3] Ordinance No. 04-20 states in pertinent part as follows: "A commercial establishment, business, or service shall be deemed to 'offer, as a principal stock or trade, sexually oriented material, devices, or paraphernalia or specified sexual activities or any combination or form thereof' or to be 'distinguished or characterized by an emphasis on matter depicting, describing, or relating to sex' if at any time:

> (a) The commercial establishment, business, or service (i) designates all or a portion of its premises as for adults only, or has a policy of excluding minors from its premises or from a portion of its premises, and (ii) offers for sale or rent sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof; or
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> (b) The commercial establishment, business, or service devotes greater than 15 % of its wall, counter, shelf, or other display space in actual use and which is open to its customers to sexually oriented material, devices, paraphernalia, or specified sexual activities or any combination thereof; or
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> (c) The commercial establishment, business, or service derives greater than 15% of its gross revenue from the sale or rental of sexually oriented material, devices, paraphernalia, or specified sexual activities or any combination thereof; or

William T. Jennings presided over the bench trial. Prior to judgment, Judge Jennings retired. Senior Judge Gary D. Payne was assigned to the case and, after reviewing the record, issued findings of fact, conclusions of law, and judgment enjoining Curry from operating his business in violation of Ordinance No. 01-30. Curry filed a motion to alter, amend or vacate the judgment arguing that the amendment of the ordinance in 2004 rendered the case moot. The trial court denied the motion. This appeal followed.

Curry first argues he was denied due process and the judgment was not supported by substantial evidence because the judgment was entered three years after trial by a judge other than the judge who presided over the trial. We disagree.

As stated in the judgment, Judge Payne had the benefit of reviewing the entire record including the videotapes of the testimony presented at trial. We note that Curry presented no testimony at trial although he did offer three exhibits.

> (d) The commercial establishment, business, or service advertises (i) in a manner visible from the outside of the business premises, or (ii) in the media, including the internet, or (iii) in the "Yellow Pages" or a similar format, the availability of sexually oriented material, devices, or paraphernalia or specified sexual activities or any combination thereof; or
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> (e) The commercial establishment, business, or service devotes more than 150 square feet or more than 15% of its floor space, excluding hallways, walkways between display areas, restrooms, storage area, check-out area, and areas not open to its patrons or customers, to the sale or display of sexually oriented material, devices, or paraphernalia or specified sexual activities or any combination thereof; or
>
> (f) The commercial establishment, business, or service devotes more than 150 square feet of display space to sexually oriented material, devices, or paraphernalia or specified sexual activities or any combination thereof.

On appeal, Curry simply presents the bare assertion that Judge Payne was unable to make critical credibility assessments by watching the recorded testimony. However, from the judgment and the record before us, we find no merit in this contention. Curry cites no authority in support of his argument—only cases standing for the general proposition that the trial court is in the best position to determine the credibility of witnesses. While we agree with the general rule stated by Curry, witness credibility is not the issue before us. Furthermore, Curry has produced no authority in support of his argument regarding the passage of time between trial and the entry of judgment or that the judgment was entered by a judge other than the judge who presided at trial. As a result of the foregoing, we are unconvinced that Judge Jennings' retirement required a new trial. Thus, reversal is unwarranted.

Curry next argues the amendment of the ordinance in 2004 rendered the proceedings against him moot. We disagree. KRS 100.253[4] permits the

[4] KRS 100.253 states:

> (1) The lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.
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> (2) The board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted, nor shall the board permit a change from one (1) nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification, provided, however, the board of adjustment may grant approval, effective to maintain nonconforming-use status, for enlargements or extensions, made or to be made, of the facilities of a nonconforming use, where the use consists of the presenting of a major public attraction or attractions, such as a sports event or

continuance of a non-conforming use which existed prior to the adoption of zoning regulations affecting it. This statute prevents a board of adjustment from zoning out existing businesses. *See generally, Legrand v. Ewbank,* 284 S.W.3d 142, 144-45 (Ky. App. 2008).

Curry was issued a business license in 2002. In 2004, the ordinance was amended to include a more restrictive definition of an adult establishment. KRS 100.253 provides the law governing a lawful use of a business remains in effect in the face of a subsequent zoning regulation affecting the business. Stated differently, KRS 100.253 prevents the retroactive application of a more restrictive ordinance to an existing business. The practical effect of Curry's argument would be that no ordinance governs his business because the ordinance in effect at the inception of his business was amended, yet the amended ordinance could not

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> events, which has been presented at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status of a public tradition, contributing substantially to the economy of the community and state, of which prestige and status the site is an essential element, and where the enlargement or extension was or is designed to maintain the prestige and status by meeting the increasing demands of participants and patrons.
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> (3) Any use which has existed illegally and does not conform to the provisions of the zoning regulations, and has been in continuous existence for a period of ten (10) years, and which has not been the subject of any adverse order or other adverse action by the administrative official during said period, shall be deemed a nonconforming use. Thereafter, such use shall be governed by the provisions of subsection (2) of this section.
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> (4) The provisions of subsection (3) of this section shall not apply to counties containing a city of the first class, a city of the second class, a consolidated local government, or an urban-county government.

govern him by virtue of KRS 100.253. Obviously, this would lead to an absurd result and contradict the plain language of KRS 100.253. KRS 100.253 contemplates and governs the situation at hand. Therefore, the trial court properly applied the ordinance as it existed when Curry received his business license. The issue was not moot.

Accordingly, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Michael Hatzell
Louisville, Kentucky

H. Louis Sirkin (*pro hac vice*)
Jennifer M. Kinsley
Scott R. Nazzarine
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Garrett T. Fowles
Richmond, Kentucky