STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT,

Plaintiff-Appellant,

v

MARIE SHANNON BERNAL, MEGAN MARIE LUMPKIN, JEAN ELLEN BOND and CHRISTINE DOMANSKI,

Defendants-Appellees.

UNPUBLISHED
August 4, 1998

No. 196994
Recorder's Court
LC No. 95-900016

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Plaintiff City of Detroit appeals from an order of the Detroit Recorder's Court affirming the 36th District Court order dismissing charges against defendants for violating plaintiff's disorderly conduct ordinance, § 38-5-1 of the Detroit City Code. The Recorder's Court found that the ordinance was unconstitutionally vague. We reverse.

In December 1994, undercover City of Detroit police officers investigated the Silk Stockings lounge, an "adult entertainment" facility. The officers observed defendants, who were employees of the Silk Stockings lounge, offer to perform "lap dances" for individual customers for a price between $30 and $60. A lap dancer, wearing only a "g-string" bikini bottom, would straddle the legs of a seated, clothed customer and moved her genital area against the customer's genital area. The officers stated that the lap dancers appeared to simulate intercourse with their movements and moaning in an attempt to masturbate the customer. The officers observed customers licking and sucking defendants' breasts and feeling their buttocks and vaginal areas during the lap dances. Defendants were arrested and charged with violating City of Detroit Code §38-5-1, which provides as follows:

> Any person who shall make or assist in making any noise, disturbance, or improper diversion or any rout or riot, by which the peace and good order of the neighborhood is disturbed, or any person who shall consume alcoholic beverages on any street or

> sidewalk, *or who shall engage in any indecent or obscene conduct in any public place,* or who shall engage in an illegal occupation, or who shall loiter in a place of illegal occupation, shall be guilty of a misdemeanor. [Emphasis added.]

Defendants moved to dismiss the charges on the ground that the ordinance's reference to "indecent or obscene conduct" rendered the ordinance unconstitutionally vague because it failed to provide fair notice of the conduct proscribed and it was overbroad. The district court judge granted defendants' motion to dismiss because the ordinance failed to provide adequate notice of the proscribed conduct. Plaintiff appealed to the Recorder's Court, which affirmed the district court's decision.

Plaintiff argues on appeal that the Recorder's Court erred in affirming the district court's determination that the ordinance was unconstitutional and dismissing the charges. This Court reviews de novo a trial court's decision regarding the constitutionality of a city ordinance. *Jott, Inc v Clinton Charter Township,* 224 Mich 513, 525; 569 NW2d 841 (1997). We apply the rules of statutory construction when construing a city ordinance. *Folands Jewelry Brokers, Inc v City of Warren,* 210 Mich App 304, 307; 532 NW2d 920 (1995). City ordinances are presumed to be constitutional and the party challenging the ordinance has the burden of proving its invalidity. *Kopietz v Clarkston Zoning Board of Appeals,* 211 Mich App 666, 670; 535 NW2d 910 (1995). Though constitutional questions are raised, "a court does not grapple with a constitutional issue except as a last resort." *People v Mell,* 227 Mich App 508, 509; 576 NW2d 428 (1998), quoting *Taylor v Auditor General,* 360 Mich 146, 154; 103 NW2d 769 (1960). Further, courts have a duty to construe a statute as constitutional, unless the unconstitutionality is clearly apparent. *People v Hubbard (After Remand),* 217 Mich App 459, 483-484; 552 NW2d 493 (1996). "Accordingly, 'if the record presents some other ground upon which the case may be disposed of' in a more narrow fashion, a broad constitutional challenge should not be considered." *Mell, supra* at 510, quoting *Rescue Army v Municipal Court of Los Angeles,* 331 US 549, 569; 67 S Ct 1409; 91 L Ed 1666 (1947). A statute may be challenged for vagueness on three grounds: 1) that the statute does not provide fair notice of the conduct proscribed; 2) that the statute is overbroad and impinges on First Amendment freedoms; or 3) that the statute is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law as been violated. *People v Lino,* 447 Mich 567, 575-576; 527 NW2d 434 (1994).

First, we address plaintiff's argument that the trial court improperly determined that the ordinance did not provide fair notice of the proscribed conduct. To give fair notice, a statute must simply define the crime "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Lino, supra* at 575, citing *Kolender v Lawson,* 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983). The statute cannot use terms that require persons of ordinary intelligence to guess at the statute's meaning and differ regarding its application. *Sanchez v Lagoudakis (On Remand),* 217 Mich App 535, 555; 552 NW2d 472 (1996). However, a statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of the words. *Lino, supra* at 575.

Here, the language at issue is "indecent or obscene conduct." Detroit Ordinances, § 38-5-1. In *Miller v California,* 413 US 15; 93 S Ct 2607; 37 L Ed2d 419 (1973), the leading case on state regulation of obscene materials, the United States Supreme Court held that a state statute designed to regulate obscene materials must be confined in its scope to works that depict or describe sexual conduct, and that conduct must be defined specifically by the state law, as written or authoritatively construed. In defining the terms "obscene, lewd, lascivious, filthy, indecent or disgusting" from the Michigan civil obscenity statute in *Wayne County Prosecutor v General Video of Michigan, Inc,* 203 Mich App 49, 53-4; 512 NW2d 36 (1993); and in defining the terms "obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic" from Michigan's criminal obscenity statute in *People v Neumayer*, 405 Mich 341, 367-368; 275 NW2d 230 (1979), the Michigan Courts incorporated the following *Miller* descriptions:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. [*Miller, supra* at 25.]

Although *Miller, General Video* and *Neumayer* considered printed materials rather than physical conduct as at issue here, "the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Miller, supra* at 26 n 8. Thus, in our judgment, the meaning of the terms indecent and obscene can fairly be ascertained by reference to judicial interpretations, so defendants were on notice that the terms indecent and obscene had been construed in accordance with the standards set forth in *Miller* and were therefore not unconstitutionally vague.

Further, at the time of the conduct at issue, defendants were on notice that this Court had held lap dancing to be lewd conduct when done for the purpose of masturbation. *Michigan ex rel Wayne County Prosecutor v Dizzy Duck,* 203 Mich App 250, 260; 511 NW2d 907 (1994), vacated on other grounds 449 Mich 353; 535 NW2d 178 (1995).[1] Lewd conduct was defined in the state nuisance statute at issue in that case[2] as "those sexual acts of a nature similar to sexual intercourse: anal intercourse, fellatio, cunnilingus, and masturbation performed on another where done for hire." *Id.* This Court has held that this nuisance statute was "designed to eliminate the use of property for or in connection with prostitution . . . not to eliminate obscenity." *Michigan ex rel Prosecuting Attorney for the County of Oakland v Alray Northcrest Plaza,* 146 Mich App 595, 602-603; 381 NW2d 731 (1986). Thus, although lewd conduct is generally viewed as similar to indecent or obscene conduct,[3] the definition of lewdness is narrower than that of obscenity or indecency since lewdness requires the act to be related to prostitution and "done for hire." Unlike in the case of *Mell, supra* at 512, the prosecutor and police witnesses in the case at hand did allege that the lap dancing was done specifically for the purpose of masturbation. Therefore, in our opinion defendants did have "fair warning" that lap dancing was criminally prohibited, at least where done for the purpose of masturbation, as alleged here. *Id*. Indeed, because defendants' behavior rose to the higher standard of lewdness, defendants should have also been on notice that their conduct was obscene and indecent. Accordingly, we find that the terms indecent and obscene have been given sufficiently definite meanings

through judicial construction so that the Detroit ordinance provides fair notice of the proscribed conduct.

Next, we address plaintiff's second argument that the ordinance is not overbroad. Although defendants raised an overbreadth challenge below, the lower courts did not address it. However, because the issue is one of law and the facts necessary for its resolution have been presented, we will review the issue in order to enable the charges against defendants to be fully resolved on their merits upon remand. *Brown v Drake-Willock International*, 209 Mich App 136, 146; 530 NW2d 510 (1995).

An overbroad statute is one that is likely to chill constitutionally protected behavior. *People v Hicks*, 149 Mich App 737, 742; 386 NW2d 657 (1986). The doctrine of overbreadth is primarily applied to First Amendment cases where a statute inadvertently prohibits constitutionally protected behavior. *People v Cavaiani*, 172 Mich App 706, 711; 432 NW2d 409 (1988). However, a person cannot bring an overbreadth challenge where his own conduct is clearly within the contemplation of the statute, "even where there is some marginal application which might infringe on First Amendment activities." *Cavaiani*, *supra* at 713. Thus, since defendants' conduct here was clearly within the contemplation of the ordinance, as discussed above, defendants did not have standing to bring an overbreadth challenge.

For these reasons, we reverse the Recorder's Court determination that the City of Detroit disorderly conduct ordinance is unconstitutional, and remand for reinstatement of the charges against defendants.

Reversed.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] In an opinion issued after the conduct at issue in the instant case, the Michigan Supreme Court held that all lap dancing was lewd. *State of Michigan ex rel Wayne County Prosecutor v Dizzy Duck*, 449 Mich 353, 364-365; 353 NW2d 178 (1995) (*Dizzy Duck II)*.

[2] MCL 600.3801; MSA 27A.3801.

[3] "Lewd. *Obscene*, lustful, *indecent*, lascivious, lecherous. . . . [Black's Law Dictionary (5th ed.) (citations omitted).]" *Dizzy Duck II*, *supra* at 363 n 11 (emphasis added).