Affirmed and Opinion filed April 26, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00482-CR

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STEVE LYNN COLLINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 15
Harris County, Texas
Trial Court Cause No. 99-40302

O P I N I O N

Steve Lynn Collins appeals a misdemeanor conviction for acting as the manager of a sexually oriented business without a permit on the grounds that: (1) the evidence is insufficient to prove that (a) All Star News & Video ("All Star") is an "adult bookstore" as defined by the City of Houston Ordinance regulating sexually oriented businesses (the "ordinance") or (b) appellant was a "manager" of All Star; and (2) the terms "enterprise," "adult bookstore," and "primary business" as defined in the ordinance are unconstitutionally vague and overbroad as applied to appellant. We affirm.

Background

The Houston Police Department's vice division began investigating All Star in the summer of 1998 to ensure compliance with chapter 28 of the ordinance, which regulates adult bookstores. In September of 1999, several officers entered All Star and arrested appellant for acting as a manager of a sexually oriented business without a permit. Appellant was found guilty by the trial court and assessed punishment at one year confinement, probated for two years.

Sufficiency of the Evidence

Appellant's first point of error argues that the evidence is legally insufficient to prove that All Star was an adult bookstore (for which a permit to act as a manager was required) because the evidence was insufficient to prove that All Star's "primary business" was to deal in material intended to provide sexual stimulation or sexual gratification to customers. Appellant further argues that the evidence is legally insufficient to prove that he was a "manager" of All Star because it did not show that he: (1) "conducted business" as defined in the ordinance; (2) received compensation; or (3) intended to violate any section of the ordinance.[1]

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[1] Appellant also states that the definition of "manager" under the ordinance is overbroad and over-inclusive, in requiring that any individual performing a service on the premises be licensed. This is, according to appellant, a prior restraint on the exercise of First Amendment rights. However, other than making this generalization, appellant fails to offer any argument as to how the definition acts as a prior restraint. Additionally, none of the cases appellant cites in support of his contention overturn a similar statutory definition for overbreadth. *See, e.g., SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1272 (5th Cir. 1988) (upholding Houston's 1986 sexually oriented business ordinance against the following challenges: (1) First Amendment claim that the city failed to prove that it had a substantial interest in regulating topless bars; (2) claims that the ordinance delegated too much discretion to administrative officers and that signage provisions were impermissibly intrusive; (3) Fifth and Fourteenth Amendment claims that the ordinance was an unconstitutional taking of property and was overbroad and vague, violating owner's due process rights; (4) equal protection claims that the ordinance regulated only certain forms of sexually oriented businesses, was not gender neutral, and did not apply to the rest of the business community; (5) claims that the ordinance conflicted with preemptive Texas statutes regulating businesses that sell alcoholic beverages and exceeding the authority of the state enabling act); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990) (concluding that the Dallas licensing requirement for sexually oriented businesses was unconstitutional insofar as it did not provide for an effective limitation on the time within which

Standard of Review

In evaluating legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

The ordinance prohibits any person from acting as a "manager" of an "enterprise" without holding a permit. HOUSTON, TEX., REV. ORDINANCES ch. 28, art. VIII, § 253(a) (1997). "Manager" includes any person who "supervises, directs or manages any employee of an enterprise" or "conducts any business in an enterprise with respect to any activity conducted on the premises of the enterprise."[2] *Id.* § 251. "Conduct any business in an enterprise" includes, among other things, operating a cash register, cash drawer, or other depository on the premises of the enterprise and supervising or managing other persons in the performance of any of the foregoing activities on the premises of the enterprise. *Id.* "Enterprise" is defined as:

> An adult bookstore . . . or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

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the licensor's decision must be made and failed to provide an avenue for prompt judicial review, minimizing suppression of speech in the event of a license denial); *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 494-97 (5th Cir. 1994) (rejecting a vagueness and overbreadth challenge to the definition of "simulated nudity" in Dallas's sexually oriented business ordinance, but finding that the imposition of zoning requirements on businesses that used certain words in their advertising was unconstitutional); *MD II Entertainment, Inc. v. City of Dallas*, 935 F. Supp. 1394, 1396-99 (N.D. Tex. 1995) (striking down the city's sexually oriented business ordinance because there was no evidence that the amendments were necessary or effective to curb secondary deleterious effects of those businesses).

[2] Contrary to appellant's assertion, the ordinance does not require a manager to receive compensation or have the intent to violate the ordinance. *See* HOUSTON, TEX., REV. ORDINANCES, ch. 28, art. VIII, § 251 (1997).

Id. at § 251. "Adult bookstore" is similarly defined as:

> An establishment whose primary business is the offering to customers of books, magazines, films or videotapes (whether for viewing off-premises or on-premises . . .), periodicals, or other printed or pictorial materials which are intended to provide sexual stimulation or sexual gratification to such customers, and which are distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities, or specified anatomical areas.

Id. at art. III, § 121.

Primary Business

Because "primary business" is not specifically defined in the ordinance, it must be read in the context in which it is used and construed according to the rules of grammar and common usage. *Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App. 1989). Before using "primary business," the prior version of the ordinance used the term "major business." HOUSTON, TEX., REV. ORDINANCES ch. 28, art. III, § 121 (1986); *N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp.2d 754, 789 n.79 (S.D. Tex. 1998); *Mayo v. State*, 877 S.W.2d 385, 388-89 (Tex. App.–Houston [1st Dist.] 1994, no pet.). In construing "major business," courts excluded businesses whose activities might only incidentally cause sexual stimulation. *Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5th Cir. 1980); *Mayo*, 877 S.W.2d at 388-89. This reasoning is also applied to the term "primary business" in the current ordinance. *Mayo*, 877 S.W.2d at 388-89. Therefore, we conclude that the term "primary business" is used in the ordinance to distinguish enterprises in which sexual stimulation is the main business from those in which it is only an incidental business. *See 4330 Richmond Ave. v. City of Houston*, 1997 WL 1403893, *14 (S.D. Tex.); *Mayo*, 877 S.W.2d at 389; *Schope v. State*, 647 S.W.2d 675, 679 (Tex. App.–Houston [14th Dist.] 1982, pet. ref'd).

In this case, the defense offered as an exhibit the reporter's record from the trial of David Michael Griswold, who was arrested at All Star with appellant. In the Griswold trial, vice officers Lovett and Williams testified that an undercover surveillance was made of All Star over a period of several months to ascertain if it was, in fact, an adult bookstore.

During the surveillance, officers observed whether the merchandise purchased was pornographic or non-pornographic. According to Lovett, the store contained an assortment of adult pornography tapes, videos, magazines, vibrators, sex "lubes" and jells, as well as approximately less than five percent nonpornographic material. In addition, Officer Shipley, who video taped an investigation of All Star on September 6, 1999, testified that the video tapes for sale were approximately seventy to eighty percent pornographic. Lovett and Williams both testified that they had concluded from their surveillance that this was a sexually oriented enterprise.

This evidence is legally sufficient to establish that All Star's primary business was to offer customers printed or pictorial materials which were intended to provide sexual stimulation or gratification rather than a business whose activities only incidentally pertained to sexual stimulation. Because All Star was thus an adult bookstore, any manager of it was required to hold a permit under the ordinance.

Manager

With regard to the evidence that appellant was such a "manager," Williams and Lovett testified at appellant's trial that upon entering the premises, they witnessed appellant standing behind the sales counter discussing business with Griswold and holding a bucket filled with coins. Immediately thereafter, Williams closed the arcade section by removing all the patrons. However, the bookstore section remained open. Lovett then advised appellant of his warnings and asked him to remove everything from his pockets. Williams and Lovett testified that appellant removed approximately $1900 from his pants pocket, which he stated was business money, and deposited it in the floor safe. Additionally, appellant removed the money from the cash register and placed it in the safe. Thereafter, Lovett spoke to appellant and Griswold regarding locking the business. According to the officers, whenever questions were addressed to Griswold, he referred back to appellant for an answer or some instruction. Williams and Lovett concluded from

these circumstances that appellant was acting as a manager.[3] Although appellant contends that the above activities did not constitute conducting business because All Star had been closed by the officers before these things occurred, the ordinance does not require the enterprise to be open, it only requires appellant to conduct these activities *on the premises of the enterprise*. *See* HOUSTON, TEX., REV. ORDINANCES ch. 28, art. VIII, § 251 (1997). Therefore, the officers' testimony was legally sufficient to prove that appellant was a manager of All Star because it showed that he was conducting business in an enterprise by operating a cash register, cash drawer, or other depository on the premises of the enterprise and by supervising or managing other persons in the performance of the specified activities at the enterprise. Accordingly, appellant's first point of error is overruled.

Constitutional Challenges

Appellant's second point of error argues that the terms "enterprise," and "adult bookstore," including the term "primary business," are unconstitutionally overbroad and vague as applied to appellant and thus provide no ascertainable objective standards for determining an establishment's "primary business," thereby placing unfettered discretion in the hands of the police.

In analyzing a challenged statute, a court begins with a presumption of validity. *Fox v. State*, 801 S.W.2d 173, 175 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). The burden is on the individual who challenges the act to establish its unconstitutionality. *Kaczmarek v. State*, 986 S.W.2d 287, 292 (Tex. App.–Waco 1999, no pet.). A statute or ordinance is overbroad if in its reach it prohibits constitutionally protected conduct.[4] *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972); *Martinez v. State*, 744 S.W.2d 224, 227 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd, untimely filed). Similarly, a

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[3] Additionally, Williams testified that he recognized appellant's name from All Star's prior sexually oriented business application on which appellant's title was "intended operator." The evidence also showed that appellant was the president and secretary of the corporation that owned All Star.

[4] Sexually oriented materials are due less protection than other forms of expression. *Smith v. State*, 866 S.W.2d 760, 765 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd).

statute is void for vagueness if it does not provide an ordinary citizen sufficient notice that his conduct is prohibited and fails to provide sufficient standards for enforcement. *Bynum*, 767 S.W.2d at 773.

In this case, appellant contends that because All Star is a "50-50" store, the phrase "primary business" is unconstitutionally overbroad and vague because it sweeps within its coverage an establishment whose content of non-pornographic material is more than fifty-percent and thereby criminalizes innocent behavior.[5] However, as previously stated, there was sufficient evidence to establish that All Star's primary business was clearly selling, renting, or exhibiting items intended to provide sexual gratification to its customers. Therefore, as applied to appellant, there is no showing that the ordinance operated in this case in an overbroad manner by criminalizing innocent behavior.

Further, as appellant acknowledges, the term "primary business" has been upheld against constitutional challenges. *See generally N.W. Enterprises*, 27 F. Supp.2d at 787-790 (rejecting the claim that "primary business" was overbroad and vague because it failed to define what businesses were covered and could sweep within its ambit "main-stream" stores); *Kaczmarek*, 986 S.W.2d at 292 (noting that "primary business" is sufficient to provide a person of common intelligence with notice of the forbidden conduct); *Mayo*, 877 S.W.2d at 388-89 (rejecting a vagueness challenge against the ordinance, finding that "enterprise" and "primary business" were sufficiently clear). Accordingly, we overrule appellant's second point of error and affirm the judgment of the trial court.

Richard H. Edelman
Justice

[5] The "50-50" rule, which appellant alleges is used by the Houston Police Department, is not set forth in the ordinance or used in case law for determining primary business.

Judgment rendered and Opinion filed April 26, 2001.
Panel consists of Acting Chief Justice Fowler and Justices Anderson and Edelman.
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