

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONCHATTA, INC, GAIL BAKER, : CIVIL ACTION
and SABRINA BARRAR :
 :
v. :
 :
COL. PAUL J. EVANKO, in his :
Official Capacity as :
Commissioner, Pennsylvania :
State Police : NO. 01-01207-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

February , 2005

Plaintiffs challenge the constitutional validity of that portion of the Pennsylvania Liquor Code which prohibits "lewd, immoral or improper entertainment" in licensed premises, 47 P.S. § 4-493(10), and a related regulation of the Liquor Control Board enacted pursuant to the statute which prohibits contact with patrons on such premises for a "lewd, immoral, improper or illegal purpose." 40 Pa. Code §5.32(c).

At an earlier stage of this litigation, plaintiffs sought a preliminary injunction against enforcement of the statute and regulation. After hearing, I denied the application for preliminary injunction, on the ground that plaintiffs' likelihood of success on the merits was somewhat doubtful, and that plaintiffs had not established that they would suffer irreparable harm in the absence of preliminary relief. I also noted that the same constitutional issues were about to be

addressed by the Pennsylvania Supreme Court, (in the appeal which later produced Purple Orchid, Inc. v. Pennsylvania State Police, 572 Pa. 171, 813 A.2d 801 (2002)). I therefore entered an order staying all further proceedings in this case until the Pennsylvania Supreme Court acted on the appeal.

Plaintiffs appealed the denial of preliminary relief to the Third Circuit Court of Appeals which, by a two-to-one vote, affirmed. Although both the majority and dissenting opinions expressed the view that plaintiffs' likelihood of success on the merits was much stronger than my opinion had suggested, the majority affirmed my decision on the alternate ground, namely, absence of irreparable harm.

Following remand, the litigation proceeded in this court, and has eventuated in cross-motions for summary judgment, now before the court for decision.

At the preliminary injunction stage, plaintiffs had asserted only a facial challenge to the statute and regulation, and neither this court nor the Court of Appeals expressed any view as to the possible validity of an "as applied" challenge. This is not surprising, since neither the statute nor the regulation has ever been applied to these plaintiffs, and their desired course of conduct was not specified. Their concern is that, because of the alleged over-breadth and vagueness of the statutory and regulatory provisions, they are unable to ascertain

just what is and what is not forbidden, hence their freedom of expression is being curtailed, in violation of the First Amendment of the United States Constitution.

The Third Circuit decision was rendered after the Pennsylvania Supreme Court had decided the appeal which was pending when this case was initially before this court. In a comprehensive opinion by Mr. Justice Castille, which exhaustively reviewed United States Supreme Court precedent in this area, the Court upheld the statute and regulation involved here, as applied to proscribe totally nude dancing in licensed establishments -- i.e., that requiring minimal covering of genitalia (pasties and G-strings) was constitutionally permissible. The Court carefully avoided deciding whether the statute and regulation were unconstitutionally vague, since that issue had not been raised by the appellant.

There can be no doubt that the terms "immoral or improper" are vague; their meaning may vary with the views of the beholder. But, as noted by the defendants, the term "lewd" has, over time, acquired a well-understood meaning. At common law, a lewd act was "an act of open indecency which tends to corrupt the morals of the community." Commonwealth v. Heinbaugh, 467 Pa. 1, 8, 354 A.2d 244, 247 (1976). The Model Penal Code has included "open lewdness" as a crime, defined as "any lewd act" which is likely to be observed by others who would be affronted or

alarmed. Model Penal Code § 251.1. The same definition of "open lewdness" is set forth in Pennsylvania's Criminal Code, 18 Pa. C.S. § 5901. In Osborne v. Ohio, 495 U.S. 103, 113, 114 (1990), the Court upheld a state statute outlawing possession of images of nude children where the nudity constituted "lewd exhibitions." The majority specifically held that the term "lewd" by itself sufficiently defined what was prohibited. In Winters v. New York, 337 U.S. 507, 518 (1948), the Court held that the words "lewd" and "lascivious" were well understood through long use and were sufficiently clear so as not to constitute unconstitutional vagueness. See also Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 572 (1942)(prohibition on "lewd" speech).

A statute is unconstitutionally vague if it does not provide reasonably clear notice of what is and what is not prohibited. But the statute must be considered in conjunction with the interpretation uniformly applied by the appellate courts. In light of those decisions, I believe plaintiffs are adequately apprised of what they may or may not do in order to avoid "lewd" performances or activities.

Thus, if the statute prohibited "lewd, immoral and improper" conduct, - i.e., if the words "immoral" and "improper" were qualified by a requirement of lewdness, the statute would, in my view, pass constitutional muster.

But, on its face, the statute can be read as prohibiting "immoral" or "improper" conduct. I believe it appropriate, therefore, to accept the suggestion made in the defendants' brief, namely, that the words "immoral or improper" be, in effect, excised from the statute.

For the reasons so carefully explained by Mr. Justice Castille in the Purple Orchid decision, I am persuaded that the statute is primarily directed at conduct, not speech, and that it meets all four of the requirements of United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). I further conclude that the statute's prohibition of "lewd" entertainment is not unconstitutionally vague. An Order will be entered granting in part plaintiffs' application for injunctive relief, precluding the defendants from enforcing the statute and regulation to the extent they prohibit "immoral or improper" conduct, but denying injunctive relief with respect to "lewd" conduct.

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ORDER

AND NOW, this day of February 2005, upon
consideration of the pending cross-motions for summary judgment,
IT IS ORDERED:

1. Plaintiffs' motion for summary judgment is GRANTED
IN PART. The defendants are enjoined from enforcing so much of
the challenged statute and regulation as proscribe "immoral or
improper" entertainment or related conduct. The statute and
regulation may continue to be enforced with respect to "lewd"
entertainment or conduct.

2. Defendants' cross-motion for summary judgment is
DENIED.

BY THE COURT:

John P. Fullam, Sr. J.