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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236.

THE STATE OF OHIO,

Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,

Defendant-Appellant.

APPEAL FROM THE SUPREME COURT OF OHIO.

SUPPLEMENTAL BRIEF OF APPELLEE ON THE MERITS.

The appellee has refiled the brief heretofore filed with the Motion to Dismiss or Affirm, for the hearing on the merits.

STATEMENT OF THE CASE.

There are several unsupported and inaccurate statements made in the Statement of the Case (App. Br. pp. 5-6) in the brief of the appellant on the merits.

To say, as they do in their brief on the merits, that "It was for possession of the roomer's documents (???) that the defendant was convicted of violation of Sec. 2905.34 O. R. C." (App. Br. p. 6), is an assumption unsupported by any such finding by the jury. Further, to refer to this obscene matter as "documents" is, to say the least, also inaccurate. There was never any issue raised either on the trial or on review in the State courts as to the "obscenity" of the material offered in evidence.

It should be borne in mind that this case was tried to a jury. It was, therefore, solely within the province of the jury to weigh the evidence and, as triers of the facts, to determine wherein the truth lay. The appellant was charged with unlawfully and knowingly having in her possession and under her control certain obscene books and photographs. This charge required along with proof of scienter, proof of a voluntary personal possession and control by the appellant; "the present right and power to do with it as one will," as stated by the trial court to the jury (R. 66).

The appellant was not charged in the indictment with involuntary possession of this obscene material for some alleged roomer. That was the defense offered in this case on the trial. She claimed she had possession for someone else. Whether or not there was any truth to that defense became a jury question, since the evidence offered by the State was in direct conflict with that offered by the defense as to where the obscene matter was found.

The jury found her guilty "as charged in the indictment" (R. D.). In finding her guilty of the charge contained in the indictment, the jury necessarily had to reject the defense evidence that she had involuntary possession for someone else; that these books and photographs were possessions of an alleged roomer which had been stored by the appellant in the basement.

Not only did the State's evidence contradict her story on the element of "possession" as to the location in which this obscene material was found by the police, but the personal element of scienter was proven beyond a reasonable doubt (R. 5).

Under the circumstances, the assumption by the defense that the appellant was convicted under this statute in question, for obscene material possessed by a roomer,

is not based upon any such finding by the jury. Nor could the jury have made any such finding on the charge contained in the indictment, or the instructions given by the court. Neither the language of the statute, the charge contained in the indictment, nor the instructions of the court contemplates a conviction by the establishment of proof by the evidence of an involuntary, constructive possession and control of obscene matter by a defendant for a third person. And, for the latter reason, Syllabus 1 of the decision of the Supreme Court of Ohio in this case, based as it is upon the defense evidence only, is subject to criticism. Further, there was no evidence produced by the defense to show that there were any roomer's possessions in that basement.

There was no request by the defense during the trial for the production of the search warrant or that it be tendered, and their statement to that effect at page 5 of their brief on the merits is unsupported by the record.

The police officers who made the search and who were the witnesses in this case, testified that they did not obtain the search warrant. Their testimony shows that they awaited the arrival of Lt. White with a search warrant and upon his arrival, the appellant resisted execution of the warrant (R. 16, 18). No question was raised on the trial that no search warrant had been obtained and Lt. White was as available to the defense on subpoena as to the State. It was not incumbent upon the State to offer a search warrant into the evidence as an element of the offense to be proven on this trial. The only issue raised on the motion to suppress the evidence was that a proper search warrant was not secured setting forth the confiscated evidence on which the appellant was charged by indictment (R. 2). And it is admitted that such a search warrant was not secured.

Further, in their Statement of the Case at page 5 of their brief, it is said that twelve police officers had surrounded the private residence of the defendant, and forced their way into it. This is predicated upon the unsupported testimony of one of the attorneys for the defendant, Walter L. Greene, who "estimated" that there were that number (R. 30), and whose testimony shows that he went to the scene in an effort to discredit the police. He testified that he attempted to take pictures of the police (R. 33). His claim that he was denied entrance to the premises (App. Br. p. 5) is uncorroborated.

ARGUMENT.

I. THE PROVISION IN THE OHIO "OBSCENITY" STATUTE, REVISED CODE SECTION 2905.34, THAT "NO PERSON SHALL KNOWINGLY HAVE IN HIS POSSESSION OR UNDER HIS CONTROL" ANY OBSCENE BOOKS OR PICTURES, IS NOT UNCONSTITUTIONAL.

In view of this Court's decision in the *Roth* case, discussed more fully in the brief of the appellee on the Motion to Dismiss or Affirm, it seems to us that there is very little room for argument against the constitutionality of the legislation under which the appellant was charged and convicted.

State and federal statutes regulating obscenity, under which convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct, are not, for that reason, unconstitutional; obscenity not being constitutionally protected speech, consideration of matters as to "clear and present danger" are unnecessary. *Roth v. U. S., supra.*

Various reasons are given by the appellant to have this legislation declared unconstitutional. It is argued

that under the "old" law in Ohio, no one could possibly be accused under circumstances such as those in the case at bar. (App. Br. p. 7.) It is recognized that the legislature may create new offenses, in harmony with the power of the legislature to define criminal offenses and fix the penalty. 11 *Am. Jur.*, Sec. 195, p. 898.

Whether or not the prohibition in such legislation is a valid exercise of the police powers of the State of Ohio to conserve public morality must be tested by the Constitution alone and how can it be logically argued that legislation having for its purpose the regulation of "obscenity" is incompatible with the provisions of the Constitution?

It is no answer to this question to argue that the legislation is unconstitutional because the appellant is innocent; that the obscene books and photographs were the possessions of a roomer and had been stored in the basement. The truth of that defense was a jury question on the charge contained in the indictment and is not the criterion for determining constitutionality.

The prohibition in the statute requiring as it does proof of scienter before a conviction can be had, contemplates proof of unlawful voluntary possession and control. Under the circumstances, the argument that anyone can be convicted, "no matter how innocent of purpose" (App. Br. p. 7) carries no weight. Further, the law recognizes a lawful possession as distinguished from an unlawful possession and the claim that police officers, court attaches or judges could be found guilty by reason of taking possession of such obscene matter for prosecution purposes has no merit.

It is begging the question too, on the issue of constitutionality, to argue that this obscene material belonged to a roomer and that the appellant could not destroy such property without being subject to prosecution for mali-

ciously destroying the property of another (App. Br. pp. 6, 8). There are no constitutional property rights involved in obscene matter, and no such prosecution could be had under the circumstances.

It is argued that in Section 2905.34 "we have such indefinite terms, with the cruelest and most unusual of punishments" (App. Br. p. 7). There is nothing indefinite in the language of the statute under which this appellant was indicted. That portion of the statute provides in clear and unmistakable language:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book" etc.

The statute provides for a fine or imprisonment, or both, but punishment by fine and imprisonment is not per se cruel and unusual; 15 *Am. Jur.*, Sec. 530, p. 176. The appellant was not given a seven year sentence as claimed, nor could any convicted defendant be given a seven year sentence under this statute. Under the laws of Ohio, more particularly R. C. Sec. 5143.05, the sentence of the court has to be a general one, not fixed or limited in duration. The term of such imprisonment is terminated by the Ohio Pardon and Parole Commission. Under such sentence, the punishment could be no more than one year with time off for good behavior.

For the first time in this Court, the appellant raises the issue that Sec. 2905.34 must be construed along with Sec. 3767.01 and infers that a class exemption is "brought into being" (App. Br. p. 8) by the second-class mail privilege exception in Sec. 3767.01. Since the Legislature could conclude that the Federal Obscenity Laws offer sufficient regulation for publications entered as second class matter by the Post Office Department, the separate classification of such publications is reasonable and valid. It is the law

of this State that the constitutional provision as to uniformity of operation does not preclude reasonable classification; *State ex rel. v. Thrasher,* 130 O. S. 434.

The claim is made that, at the discretion of the prosecutor, the appellant could have been prosecuted on a misdemeanor charge under R. C. Sections 2905.36, 2905.38 or 2905.39, and that such a power of discrimination makes R. C. Sec. 2905.34, which is a felony statute, unconstitutional. (App. Br. pp. 14-15.) None of the statutes cited cover the same acts for which the appellant was indicted in the instant case. The appellant cites *State v. Pirkey,* 281 P. 2d 698. The *Pirkey* case is based upon a statute delegating the arbitrary power of charging a felony or a misdemeanor on the same set of facts without setting a standard for making a distinction. The *Pirkey* case is not in point, under the circumstances.

The *Winters* case (333 U. S. 507) is discussed in the brief of the defense and it is argued that they cannot distinguish the Ohio statute from that held invalid in the *Winters* case (App. Br. p. 13). The portion of the New York statute under consideration by this Court and struck down in the *Winters* case, made it an offense to publish or distribute publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." This Court held, three justices dissenting, that such provision did not set up a sufficiently definite standard of conduct. That portion of the statute is not in issue in the instant case.

> "It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected." 11 *Am. Jur.* 834, Sec. 152.

II. THE SENTENCE WAS NOT UNCONSTITUTIONAL.

It is argued that the appellant's sentence violated Article I, Section 9 of the Constitution of the State of Ohio, and Amendment VIII of the United States Constitution as constituting cruel and unusual punishment. She was, as heretofore stated in this brief not given a seven year sentence. The sentence of the trial court was within the limit fixed by the statute, is not cruel and unusual and is therefore valid.

In 15 *Am. Jur.*, pp. 155-156, Sec. 507, it is stated:

> "Subject only to constitutional limitations, such as those prohibiting cruel and unusual punishment, excessive fines, the enactment of ex post facto laws, the imposition of double jeopardy, and those guaranteeing equal protection of the laws, due process of law, etc., the legislature may fix the punishment for crime as it sees fit. * * *"

Further, in 15 *Am. Jur.*, p. 157, Sec. 508, it is stated:

> "The general principle that a state has full control over matters of procedure in its courts has received liberal interpretation in its application to statutes regulating the punishment of persons convicted of crime. While the legislatures are frequently restrained by provisions in state constitutions in this respect, so far as the limitations as to due process of law are concerned, the states have the general power to fix and determine penalties and punishments for crime. For example, a state may provide that in the case of a certain specified crime, punishment by death by electrocution shall be inflicted."

The appellant continues to argue on this issue that had she destroyed this obscene matter she would have been subject to prosecution for malicious destruction of property. There being no constitutional guaranty of a

property right in obscene material, there would be no private property right upon which to base a prosecution for malicious destruction of property of another.

III. THE CONDUCT OF THE POLICE IN OBTAINING THE EVIDENCE WAS NOT UNCONSTITUTIONAL.

The defense claim that the appellant's constitutional rights were disregarded by the police in obtaining the evidence in this case, and cite *Rochin vs. California,* 342 U. S. 165, in support of that contention. No physical examination of the appellant was made to secure the evidence which was the basis for this prosecution, as was done in the *Rochin* case. It is therefore inapplicable, and the Supreme Court of Ohio so held in its opinion.

The Record establishes that there was no misconduct on the part of the police in securing the evidence. The incident which took place between the appellant and the police prior to the search was brought about through no fault of the police. By her conduct, the appellant provoked the situation which made it necessary for the police to handcuff her if a peaceable search was to be conducted.

Under the judicial rules of evidence prevailing in the courts of the State of Ohio, the trial court in this case and the appellate courts on review had every right to rely upon the authority of the *Lindway* case, *State v. Lindway,* 131 Ohio St. 166, 2 N. E. (2d) 490 (appeal dismissed and certiorari denied, 299 U. S. 506, 81 L. Ed. 375, 57 S. Ct. 36) in holding that the criminal evidence obtained in this search was competent and admissible on the trial.

In *Irvine v. People of State of California,* 347 U. S. 128, 74 S. Ct. 381, 98 L. Ed. 561, the main opinion states, 347 U. S., p. 134, 74 S. Ct., p. 384, 98 L. Ed., p. 570:

"The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions."

Again, in 347 U. S., pp. 136, 137, 74 S. Ct., p. 385, 98 L. Ed. p. 571, it is said in the main *Irvine* opinion:

"Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innoncent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. Some discretion is still left to the states in criminal cases, for which they are largely responsible, and we think it is for them to determine which rule best serves them."

And in *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359, this Court held:

"4. In a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

Rules of evidence apply alike to all criminal cases regardless of the facts and circumstances in a particular case. To argue then that a different rule of evidence or a modification of the non-exclusionary rule of evidence adopted by the Courts of the State of Ohio should apply

to the instant case is an attempt to open the door to an arbitrary application of a judicially created rule of evidence in Ohio.

IV. THE SENTENCE OF THE COMMON PLEAS COURT PRESENTED NO BASIS FOR REDUCTION BY THE COURT OF APPEALS ON REVIEW.

It is argued that the Court of Appeals of Cuyahoga County, Ohio held that it could not review the sentence of the trial court in this case (App. Br. p. 22). There was no such holding.

The statute under which the appellant was convicted and sentenced calls for imprisonment or a fine, or both. The trial court sentenced the appellant to the Ohio Reformatory for Women. The fact that the trial court had discretion under the statute to impose imprisonment or a fine does not render the punishment cruel and unusual so as to present a basis for a reduction by the Court of Appeals. The Court of Appeals properly held under the circumstances, that the question of punishment is within the exclusive jurisdiction of the trial court.

As stated heretofore, the sentence of the trial court was within the limit fixed by the statute, is not cruel and unusual and is therefore valid. This was not the exercise of any arbitrary power on the part of the trial court and under the circumstances, there was no reason for the Court of Appeals to reverse the sentence.

V. THE CHARGE OF THE TRIAL COURT DID NOT VIOLATE ANY OF THE CONSTITUTIONAL RIGHTS OF THE APPELLANT.

It is contended that the trial court violated the due process clause and the appellant's right to trial by jury, by instructing the jury that:

"The law presumes that a sane person intends the ordinary consequences of his own voluntary acts." (R. 65.)

This instruction was a part of the following instruction given to the jury:

"In order to find the defendant, Dollree Mapp, guilty as charged in the indictment, the State must prove beyond a reasonable doubt each and all of the following elements, which I shall enumerate:

"(1) * * *

"(2) That the act was done unlawfully, that is, in violation of a statute of Ohio; and that it was done knowingly, that is, voluntarily, of one's own choice, not accidentally. This signifies an act of the will, an intention to possess and have under one's control the things alleged in the indictment, which knowledge and intention must have been present at the time when the act complained of was done. The law presumes that a sane person intends the ordinary consequences of his own voluntary acts." (R. 65).

The defense state that this was not a case admitting of any charge as to presumption, for both sides had given evidence (App. Br., p. 23). It is a general presumption of law that a sane person intends the natural and probable consequences of his voluntary acts. This is a presumption of law, not a presumption of fact, and the trial court was not, by such instruction, telling the jury that they could presume any facts in the absence of evidence.

The cases cited by the appellant deal with the place and position of a presumption of fact in the absence of evidence, and are inapplicable to the instruction of the court in the instant case.

Complaint is made that the trial court unfairly instructed the jury that one who deposits articles in a place

of concealment may still be deemed to have them in his possession. (App. Br. p. 25). It is further contended that the trial court misled the jury in using such words as "detaining" and "holding" (App. Br. p. 25).

None of the obscene material in this case was found on the appellant's person. The State's evidence established that all of it was found in the appellant's bedroom. The defense was that it was found in the basement and belonged to a roomer. The trial court was required to define to the jury what possession and control meant, and in that connection said:

> "* * * 'Possession' means the act or state of detaining a thing; it is the act of holding or keeping it. Now, such detention does not mean that it is necessary always to have in one's sight the thing possessed. For example, one who deposits articles in a place of concealment may still be deemed to have them in his possession. To have something under one's control is to have the present right and power to do with it as one will.
>
> Neither possession or control necessarily means ownership. If a person possesses something it does not necessarily mean that he owns it. The test is whether or not the defendant had some degree of possession and control over the material as alleged in the indictment." (R. 65-66).

There is no showing in the brief of the defense that the appellant was prejudiced by these instructions or that the court's charge was in any way unfair, misleading or incorrect. It may be pointed out too, that not only was there no general exception to the charge taken, but upon completion of the instructions, the defense was asked if there was anything further and stated: "Nothing on behalf of the defense, your honor." (R. 68.)

CONCLUSION.

The Supreme Court of Ohio affirmed the judgment of the trial and appellate courts in the case. The fact that under the Ohio Constitution a simple majority of the State Supreme Court cannot hold a statute to be unconstitutional and void, without the concurrence of the Court of Appeals, is a lawful limitation on the power of the State Judiciary and is not in violation of the Fourteenth Amendment. *Toth v. Silbert, et al.,* Civil Action No. 36089, U. S. District Court, Northern District of Ohio, Eastern Division, per Circuit Judge Weick and District Judges Kalbfleish and Jones; decided May 16, 1960.

A state constitutional provision that no law shall be held unconstitutional by the supreme court of the state without a concurrence of at least all but one of the judges does not violate the due process clause of the 14th Amendment to the Federal Constitution, nor does it deny the equal protection of the laws. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park District for Summit County,* 281 U. S. 74, decided March 12, 1930.

In view of all of the foregoing and what has been said on the issues raised in this case, in our Brief filed with the Motion to Dismiss or Affirm, we respectfully submit that the Motion to Affirm should be granted.

Respectfully submitted,

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