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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.

MOTION TO DISMISS OR AFFIRM.

Now comes the Appellee, the State of Ohio, and respectfully moves this Court for an order dismissing or affirming the appeal filed by the Appellant, for the reason that the appeal does not present a substantial federal question, and for the further reason that the judgment of the State court of Ohio rests on an adequate non-federal basis; and finally, for the reasons set forth in the Brief filed by the Appellee.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorney,
Attorneys for Plaintiff-Appellee.

Notice.

The Defendant-Appellant herein will take notice that the Plaintiff-Appellee is filing a Motion to Dismiss or Affirm, together with Brief, a copy of which is hereto attached.

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County, Ohio,

GERTRUDE BAUER MAHON,

Assistant Prosecuting Attorney,

Attorneys for Plaintiff-Appellee.

BRIEF.

STATEMENT.

The defendant-appellant, hereinafter referred to as the Appellant, was charged by indictment with unlawfully and knowingly having in her possession and under her control certain lewd and lascivious books, pictures and photographs, said books, pictures and photographs being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed upon the records thereof.

On September 3d, 1958 the Appellant was tried on this charge to a jury in the Court of Common Pleas of Cuyahoga County, Ohio, and was found guilty. Execution of sentence to the Ohio Reformatory for Women was suspended pending the appeal and the Appellant is at large on bond.

The Court of Appeals of Cuyahoga County, Ohio affirmed the judgment of conviction and the Supreme Court of Ohio affirmed. The opinion of the Supreme Court of Ohio in this case is reported in 170 O. S. 427. In setting forth this opinion in the Jurisdictional Statement, it is noted that the Appellant failed to include the syllabi as reported.

THE EVIDENCE.

On May 23rd, 1957, at about 1:30 P. M., Cleveland Police Officers Michael Haney, Carl Delau and Thomas Dever went to the home of the Appellant, located at 14705 Milverton Road, Cleveland, Ohio. It is a two-family brick dwelling and the Appellant lived on the second floor. The police had received information that there was a person hiding out in this home who was wanted for questioning in

connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home (R. 10).

Three police officers from the Fourth District, the district in which the Appellant's home was located, also arrived on the scene. However, these officers did not participate in the search of the Appellant's upstairs' rooms (R. 20, 28, 29, 44, 47, 48).

Officers Haney and Delau testified that the Appellant refused to admit them to her home on the advice of her attorney, Walter Greene (R. 11). Thereafter, Lieutenant White arrived on the scene with a search warrant (R. 31, 34, 44). The Appellant then admitted the police, tore the search warrant out of the officer's hands and placed it down her bosom (R. 30, 34). She got into a tussle with the police officer who was trying to retrieve the search warrant, as a result of which she was handcuffed to one of the officers and taken upstairs. (R. 30, 34, 80). A search of her bedroom was made, in her presence and while she was seated on the bed (R. 35).

In the Appellant's bedroom in a dresser located beside the bed, Officer Haney came upon four obscene books (State's Exhibits 1, 2, 3, 4) carrying the following titles:

The Affairs of the Troubadour
Little Darlings
London Stage Affairs
Memories of a Hotel Man.

While the police officer was removing these books from the dresser in the presence of the Appellant, she said to the officer, "Better not look at those; they might excite you" (R. 11). This officer then searched the Appellant's suitcase located beside the bed in the Appellant's bedroom and found among her personal papers (State's Exhibits 6, 7,

8, 9) a hand-drawn penciled picture (State's Exhibit 5) of a very obscene nature (R. 12).

Sergeant Delau participated in the search of the Appellant's bedroom along with Patrolman Haney. He found four separate groups of obscene photographs (State's Exhibits 10, 11, 12, 13) and tape recorders in a chest of drawers in the same bedroom, as well as a 25 Caliber Colt automatic gun (R. 35).

Sergeant Delau testified that the bedroom where he found the obscene pictures contained nothing but feminine wearing apparel and that there were no men's clothing in that bedroom. The second bedroom contained only children's clothing (R. 38-39).

A trunk of policy paraphernalia was found in the basement by Patrolman Dever (R. 25-29).

The Appellant testified at the trial and claimed that the books and pictures had been packed and put in her basement, and that they belonged to one Morris Jones. She also testified that Officers Haney and Delau did not find these books and pictures in her bedroom, but that Officer Haney walked into the bedroom with a brown bag containing the books and pictures (R. 41, 43). The jury evidently believed otherwise. She admitted that the hand-drawn penciled drawing (State's Exhibit 5) was in her suitcase, but claimed that she had also packed some of Morris Jones' belongings in her suitcase. She said that Morris Jones had been a roomer in her home. There was no evidence produced at the trial by the defense that any belongings of one Morris Jones were in the home at the time, other than a cosmetology book purportedly belonging to Jones and claimed to have been in the suitcase.

ARGUMENT.

Introductory Statement.

Several statements are made in the Jurisdictional Statement of the Appellant that are not supported by the record. There was no evidence that twelve police officers surrounded and forced their way into the residence of the Appellant. The testimony established that seven police officers arrived on the scene, but other than the Sergeant who testified at the trial, and his two men, the other officers did not play any part in the search of the Appellant's premises (R. 20, 40, 44, 47).

Nor was there any evidence that the Appellant was handcuffed to the banister of the stairway while a search of her private residence was made. Further, there was no evidence that any of the incriminating evidence in the instant case was taken from the home of the Appellant by the use of any brutal or offensive physical force against the Appellant.

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.

It is established beyond doubt that no constitutional defect is inherent in federal or state regulations of obscene literature—that is, that such regulations are not ipso facto unconstitutional; 1 L. Ed. (2d) 2211; *Kingsley Books, Inc. v. Brown,* 354 U. S. 436, 1 L. Ed. (2d) 1469, 77 S. Ct. 1325 (involving state regulations); *Roth v. U. S.,* 354 U. S. 476, 1 L. Ed. (2d) 1498, 77 S. Ct. 1304 (involving both state and federal regulations).

In the *Roth* case, this Court held:

> "4. Obscenity is not within the area of constitutionally protected speech or press."

And the test to be applied in judging obscenity was laid down in the *Roth* case, in the following language:

> "12. * * * the proper test is whether, to the average person, applying contemporary community standards, the dominant theme of the material in question, when taken as a whole, appeals to prurient interest."

The trial court in the instant case instructed the jury in accordance with the foregoing definition.

The appeal this Court refers to in the *Roth* case necessarily is to the prurient interest of an individual who may come into possession of the obscene material as a user. The obvious intent and specific purpose of legislation prohibiting distribution, advertising or sale of obscene material is to safeguard and conserve public morality by preventing the use of obscene matter. Of what value is such legislation if, once such material gets past the book-seller or distributor into the hands of an individual to whose prurient interest it may appeal, the police powers of a state constitutionally cease to operate?

To effectively eradicate obscenity, the police powers of a state should be broad enough to ban every step in the progress of "obscenity," not only prohibiting the manufacture, advertising, sale and distribution but the ultimate scienter retained possession by an individual. Why prohibit distribution and sale of obscene books and pictures if the end result, namely, possession by an individual for private consumption and further circulation is constitutionally protected? Further, how can it be consistently argued that an individual acquires a property right under the constitution, in obscene material? That would seem to

be the reasoning of Judge Herbert of the Supreme Court of Ohio in his dissenting opinion, wherein he says (p. 437):

> "The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual."

The argument against the constitutionality of the legislation under which this appellant was convicted, which appears in the majority opinion of the Supreme Court of Ohio, is based upon the false premise that such legislation is analogous in its effect to that in the *Smith* case (p. 433). The two cases are dissimilar in every respect. There is no tendency in the Ohio legislation under which this appellant was charged to restrict the dissemination of books which are not obscene or to impose a restriction upon the distribution of constitutionally protected as well as obscene literature. Nor is there any tendency in the Ohio legislation to require self-censorship on the part of a book seller or dealer in literature and make a book seller criminally liable without knowledge of the contents of the books and periodicals he has for sale. Further, there is no question in the instant case, as in the *Smith* case, of the effect upon freedom of speech and press.

In the *Smith* case, 361 U. S. 147, 4 L. Ed. (2d) 205, 80 S. Ct. 215, this Court had under consideration a California ordinance making it unlawful, without regard to scienter, for a book-seller to have obscene books in his possession. Five members of the Court held that the ordinance, though aimed at obscene matter, had, *because not requiring scienter on the part of the book seller,* such a tendency to inhibit constitutionally protected expression that it could not stand under the Federal constitution.

The Ohio legislation makes "scienter" an element of the crime to be proven before a defendant can be convicted for possession. The evidence on the trial clearly established that the appellant had possession and control of the obscene books and pictures with knowledge of their obscenity. Judge Taft in the majority opinion of the Supreme Court of Ohio, said:

> "The books and pictures in evidence in the instant case clearly represent, and the undisputed evidence in the record indicates, that defendant knew at the time she is charged with having possessed them that they represented lewd and lascivious books and pictures."

Such legislation as provided for in Ohio properly takes into account that in order to effectively prevent circulation of obscene material, not only a book seller, or distributor of obscenity must be held liable, but the individual who acquires scienter possession and control and to whose prurient interest the material may appeal for further use by way of exhibition or circulation. It cannot be denied that efforts to eradicate the circulation of obscenity in a community would be greatly hampered if possession with scienter by an individual, as distinguished from possession by a book seller or distributor, would be constitutionally protected.

In *State v. Michael Kowan,* 7 O. O. (2d) 81, 156 N. E. (2d) 170, a trial court in Cuyahoga County, in upholding the constitutionality of that portion of Revised Code Section 2905.34 involved in the instant case, said:

> "The danger to the community as a whole is just as great whether the possessor holds the obscene literature solely for his own purposes, as it is when he exhibits or sells it to others."

Further, it was not incumbent upon the State to prove any specific intent upon the part of the appellant with re-

gard to the obscene matter which she had in her possession and under her control. Intent is not an essential element of the offense of obscenity. In 33 *Am. Jur.*, Sec. 5, p. 18, it is stated:

> "The general rule that a guilty intent is not an essential element of a crime that is positively prohibited by statute applies to the offense of obscenity. To constitute the crime of obscenity, there is no necessity for the existence of any specific intent or motive; in fact, although the motive and intent are of the best, this is no defense. * * *"

Whether the intent of a person who retains obscene matter in his possession and under his control is solely because it appeals to his prurient interest or for the purpose of exhibiting or circulating it is immaterial, for the legislation is aimed at the existence of the material itself and the potential possibilities by reason thereof. Legislation regulating obscenity can be likened to legislation prohibiting the possession of narcotics. It is the use to which either may be put that endangers the morals and the health of the people.

It is mentioned in the instant case in the majority opinion, that four members of the Supreme Court of Ohio were of the opinion that this portion of the Ohio obscenity statute is unconstitutional. The same provisions of the statute were considered in *State v. Gevaras,* 170 O. S. 404 (February, 1960) and the Supreme Court held in that case that there was no debatable constitutional question involved.

In the *Gevaras* case, the constitutionality of the obscenity provision under which this appellant has been convicted, was raised. The *Gevaras* case was before the Ohio Supreme Court concurrently with the instant case. The defendant Gevaras was charged in one count with know-

ingly having in her possession and under her control certain lewd and lascivious motion picture films, and in a second count with knowingly exhibiting the films. She was found guilty on both counts as charged.

The decision in the instant case was rendered by the Supreme Court of Ohio on March 23, 1960. The Mapp case (the case at bar) is distinguishable from the *Gevaras* case only upon the facts, and not upon the law. The point is, Gevaras was charged with two separate offenses under separate counts, namely, one for knowingly possessing and the other for knowingly exhibiting, and she could have been found guilty under either count, without regard to the other. The provision of the statute under which the appellant was charged and convicted is the same provision under which Gevaras was charged. If there was no debatable constitutional question in so far as this legislation was concerned in the *Gevaras* case, how can there be in the instant case? As heretofore pointed out, the two cases are distinguishable upon the facts, but not upon the law.

The Ohio legislation authorizes the confiscation of obscene matter and its destruction (R. C. 2905.35). Accordingly, such property is contraband and there are no property rights involved under the Constitution. Further, in Cuyahoga County, Ohio the right of the police to seize obscene material possessed in one's home has been upheld by our Court of Appeals in *State v. Pomeranz,* 134 O. S. 509.

II. The Rule of Evidence Prevailing in the Courts of the State of Ohio that Confiscated Criminal Evidence, Even Though Obtained Without A Search Warrant Therefor, is Admissible in a Criminal Prosecution, is Not in Conflict With Any Constitutional Provision.

The search warrant about which there is testimony in the record (R. 34) did not cover the incriminating evidence subsequently found in the home of the appellant and upon which she was convicted. However, there is nothing about this case that distinguishes it from any other criminal prosecution in so far as the application of the same rules of evidence is concerned.

The Ohio courts justifiably relied upon the decision in *State v. Lindway,* 131 O. S. 166, 2 N. E. (2d) 490 (appeal dismissed and certiorari denied, 299 U. S. 506, 81 L. Ed. 375, 57 S. Ct. 36) for guidance at the trial and on the appeal, and held that the incriminating evidence found in the home of the appellant was competent and admissible, though obtained without lawful process. And this Court has consistently held, except where the illegal search involves an assault upon the person (*Rochin v. California,* 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A. L. R. (2d) 1396) that in a prosecution in a state court for a state crime, the 14th Amendment does not forbid the admission of evidence obtained by illegal search and seizure. *Irvine v. California,* 347 U. S. 128, 98 L. Ed. 561, 74 S. Ct. 381; *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359; *Breithaupt v. Abram,* 352 U. S. 432, 1 L. Ed. (2d) 448, 77 S. Ct. 408.

There is no sound reason for departing from the *Lindway* decision, or modifying it in its application to this case, as suggested by Judge Herbert in his dissenting opinion. As ground for modifying the Lindway rule, Judge Herbert

points out that the evidence did not disclose a commercial purpose in the possession of these books; that no printing presses were found, nor a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise.

There is no requirement in that portion of the statute under discussion, that the State establish by the evidence that the appellant was engaged in manufacturing or distributing quantities of obscene books. It is the nature of the material, not the quantity, that the obscenity legislation is aimed at eradicating. The morals of a community can be endangered as well by one book or one picture, as by a volume. And, supposing she had possessed this obscene matter on her person, and scienter was established, it could not be claimed that the State was required to prove, in addition, that she was carrying a printing press around with her, or was manufacturing such obscene matter.

The gist of the offense was possession and control of obscene books and pictures, with knowledge of their obscenity. The police, obviously, did not know that the appellant had this obscene material in her possession until they found it, but having found it without lawful process, did they violate some constitutional right of the appellant in so doing? The constitutional guaranty against unreasonable searches and seizures was never meant to prevent the administration of criminal justice. It speaks of the right of the people to be secure in their persons, houses, papers, and effects. Nothing is said in that provision guaranteeing security and immunity in the commission of crimes.

If we are to interpret the constitutional guaranty against unreasonable searches and seizures as a prohibition of the use of relevant confiscated evidence establishing the commission of a crime, then we have the Constitution

granting immunity from prosecution for a crime, for that would be the end result if criminal evidence such as uncovered in the instant case is not competent and admissible. Without it, the case could not be proven.

We submit that neither the Federal exclusionary rule, nor decisions of the courts of other States have any application in view of the Lindway rule decided by the Ohio courts, which has been properly applied to the facts and circumstances of this case.

III. The Penalty Section of the Ohio "Obscenity" Statute, Is Not Unconstitutional.

In the Jurisdictional Statement, it is claimed in paragraph (b), page 4, that the appellant was given a seven year sentence by the trial court. That is not a fact. In accordance with the laws of Ohio, more particularly Revised Code Section 5143.05, the sentence of the trial court was a general one, and not fixed in duration. The term of such imprisonment is terminated by the Ohio Pardon and Parole Commission and under the penalty section of 2905.34, the Parole Commission could release the appellant on parole at any time after she started serving her sentence, there being no minimum provided for in the statute.

This was not the exercise of any arbitrary power on the part of the trial court and under the circumstances, there was no basis for review by the Court of Appeals of Cuyahoga County of the sentence of the appellant.

IV. Paragraph (e), page 4 of the Jurisdictional Statement is not sufficiently explicit relative to the charge of the trial court, to enable the appellee to answer.

CONCLUSION.

This case was decided on an adequate non-federal basis. The police powers of a State cannot be effectively exercised to eradicate obscenity without legislation such as provided for in the Ohio obscenity statute. The limits of the power of the state to enact laws to promote the health, safety, morals, and general welfare of its people must always be determined with appropriate regard to the particular subject of its exercise; *Near v. Minnesota,* 283 U. S. Supreme Court Reports, p. 707, 75 L. Ed. p. 1363 (1931). Obviously, the opportunity for further dissemination and circulation of obscene matter does not cease when it reaches the possession and comes under the control of a private individual. The opportunity for dissemination and circulation of such material is ever present so long as the material remains in existence, whether it is in the scienter possession of a manufacturer, an advertiser, a book seller or distributor, or, as in the instant case, in the possession and under the control of an individual, who, having acquired knowledge of the contents of the obscene matter, continues to retain possession and control.

We submit that the Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

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