IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 293

ROBERT ELI STANLEY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS THE APPEAL AND AFFIRM THE JUDGMENT

AUTHORITY TO FILE BRIEF

This brief in opposition to Appellee's Motion to Dismiss and to Affirm is being filed in accordance with and pursuant to Rule 16 (4) of the Rules of the Supreme Court of the United States.

GROUNDS OF APPELLEE'S MOTION TO DISMISS

The motion to dismiss the appeal is totally without merit. The judgment from which the appeal was taken does not rest upon an adequate non-federal basis as contended by the appellee, and the jurisdiction of this court has not been divested by the Supreme Court of Georgia.

The statute, (Ga. Code Ann. 26-6301), which is under attack by this appeal, authorizes a conviction for knowingly *having possession* of any obscene matter "if such person has knowledge or reasonably should know of the obscene nature of such matter." Thus, while actual knowledge of the obscene nature of the matter is made one of the elements of the crime it is not an indispensable requirement to authorize a conviction. If the possessor "reasonably should know of the obscene nature of such matter" this will supply the necessary ingredient to attach criminality to the possessor.

The Georgia Supreme Court summed up the contentions of the parties, and made their ruling thereon as to this question in division 4 of its opinon. The Court stated that the defendant contended that the law "under which he was indicted is unconstitutional, null and void as in conflict with the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law," etc., but held that the language of the statute therein complained of "merely amounts to a statutory expression of a rule of evidence which has been extant in this state over many years."

The Georgia Supreme Court then decided the federal

question without any regard to a non-federal basis by holding as follows:

> "The statute is therefor not unconstitutional for any reasons urged and the trial court did not err in overruling the general and special demurrers of the defendant in which sought to raise this issue."

Whether the controversial phrase of the statute was held by the state court to be "a statutory expression of a rule of evidence" or a substantive "escape hatch" to be used by the state to secure a conviction on evidence less than actual knowledge is not relevant to the issue of whether the state judgment rests on a non-federal, as distinguished from a federal basis. Thus, the jurisdictional question of whether the State of Georgia may authorize a conviction for the *mere possession* of obscene matter on evidence less than, or a finding short of, actual knowledge by the possessor that the article is obscene, has been squarely decided by the Georgia Supreme Court and is now directly before this Court.

The appellee has clearly misinterpreted Rule 16 (1) (b) of this Court by contending that the judgment of the state court "rests on an adequate non-federal basis." The absence of citation of authority for its novel position illustrates the very weakness of its position.

Examples of the application of this rule exist where the federal question is not properly raised under state procedural requirements and the state court refuses to rule on the federal question, declining to do so on *adequate* non-federal grounds.

***Stembridge v. State of Georgia*, 343 U.S. 541 (72 S.Ct. 834); *Hedgebeth v. State of North Carolina*, 334 U.S. 806 (68 S.Ct. 1185); *Holley v. Lawrence*, Warden, 317 U.S. 518 (63 S.Ct. 394).**

Even in these instances, however, the jurisdiction of the United States Supreme Court is not defeated if the non-federal ground of the state court's decision is without any fair or substantial support.

***National Association For The Advancement Of Colored People v. State of Alabama*, 357 U.S. 449 (78 S.Ct. 1163); *Ward v. Board of County Commissioners*, 253 U.S. 17 (40 S.Ct. 419); *Abie State Bank v. Bryan*, 282 U.S. 765 (51 S.Ct. 252); *N.A.A.C.P. v. Flowers*, 377 U.S. 288 (84 S.Ct. 1302); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (64 S.Ct. 384).**

On page 2 of the appellee's motion to dismiss, the following statement appears:

> "Said decision interpreting the statute held that the statute did not withdraw the element of scienter."

We wish to challenge this statement as not being borne out by the record in the case. Nowhere in the opinion of the Georgia Supreme Court was it held "that the statute did not withdraw the element of scienter." We invite the Court to inspect the opinion itself.

As we view the opinion, it authorized a conviction on less evidence than it would take to prove actual knowledge, or *scienter*. The opinion assumed that even though a possessor was not shown to have actually known that an article was obscene, if a jury found from circumstances that the possessor "reasonably should" have known of its obscene nature, they should convict. This is in effect what the Georgia Supreme Court ruled when they held that the statute did not offend the First and Fourteenth Amendments. This is the constitutional issue presented to this court on appeal.

GROUNDS OF APPELLEE'S MOTION TO AFFIRM

Appellee makes the statement in its motion to affirm that the questions "are so unsubstantial as not to need further argument." Appellee then argues that: "If this Court were presented with an Obscene Matter Statute which did in fact withdraw the element of scienter, an entirely different question would be presented." (P. 3)

Appellant replies by saying that this Court is now presented with a statute which does "in fact withdraw the element of scienter."

Furthermore, in division 2 of the judgment appealed from the Georgia court held that the charge of having "possession of obscene matter"** "sufficiently charged the defendant with an offense." The Georgia Supreme Court held that it was not essential that it be alleged that it was "with intent to sell, expose or circulate the same."

Thus, the very serious and substantial question arises as to whether such *mere possession* of an article alleged to be obscene can be constitutionally punished. How can one know that an article is obscene without having first possessed it? After one possesses a book, a picture or a film, and reads, looks at it and views it, is it then that he learns that it is or is not obscene? If so, has he violated the Georgia law because he possessed it and discovered that it was obscene under contemporary community standards?

Counsel for the State of Georgia has invited the Court to view the films in order to ascertain they are "hard-core pornography." (P. 7) This illustrates that counsel for appellee concedes that he cannot make a determination of obscenity until he has viewed the film, and sug-

gests the Court do the same in order to ascertain that they are obscene.

The force of this argument suggests that *until they are viewed* no one can *know* that they are obscene. But the State of Georgia makes the *mere possession* a crime.

We suggest that any statute that makes *mere possession* of such material a crime places every person who buys a book in jeopardy of being prosecuted for committing a crime, if, after reading it he finds it to be obscene. This is so notwithstanding the element of scienter is present or not.

The substantiality of the question here involved is apparent on its face. It strikes at the very root and foundation of First Amendment freedom. To decide for oneself what one will read, what one will see and what one will hear must not be taken away. We are fully cognizant that films or books that might be offensive to others should not be forced upon them, but this is not involved in this appeal.

PENALIZING MERE POSSESSION

Beginning on page 7 of Appellee's motion is a list of various offenses that may constitutionally punish possession of certain prohibited items. These deal with stolen goods, burglary tools, liquor, weapons, forged checks, gambling devices and counterfeit money. Appellee contends that the States have the right to punish the *mere possession*. With this position we agree.

Appellee then contends that if the States can constitutionally punish the *mere possession* of these items, that it must necessarily follow that they can also constitu-

tionally punish the *mere possession* of obscenity. With this position we do not agree.

The items heretofore dealt with are not within the realm of the First Amendment's protection, and so the answer is that the *mere possession* of obscenity cannot be prohibited for the same reason that scienter cannot be constitutionally eliminated from obscenity prosecutions, even though it may be eliminated in the elements of other type offenses.

***Smith v. People of California*, 361 U.S. 147 (80 S.Ct. 215).**

Although *Roth v. United States,* 354 U.S. 476 holds that obscenity does not come within the protection of the First Amendment, it is to be noted that *Roth* was dealing with the *distribution* or *sale* of obscene books, and not with their *mere possession.* More recent decisions of this Court would indicate that the *Roth* rule might be inapplicable when applied to *mere possession.*

***Redrup v. New York; Austin v. Kentucky; Gent v. Arkansas*, 386 U.S. 767 (87 S.Ct. 1414).**

For example, *Roth* involved *distribution* of obscene material. The decision assumed that *Roth* was aware of the contents, and by the distribution of the material could not claim the protection of the First Amendment. This rule could very well be applied to the seller or distributor, for once ascertaining for himself that the matter is obscene he is on notice not to furnish it to others who might become offended. But *Roth* does not hold that the mere possessor of such material can be constitutionally punished. Nor does it hold that the mere possessor may not claim the First Amendment's

protection as to *his right to decide for himself* whether it offends him.

Thus, to extend the rule of *Roth* to a mere possessor would curtail the exchange of books, photographs and films because every man and woman would be in fear of buying such items because they would be in peril of being faced with a prosecution by the State if it should develop that the book or magazine they have bought turns out to be obscene, or the film they are viewing does not meet the standards of morality of their community.

If such article offends the possessor after he has determined for himself that it is offensive, he has two choices. First, he may destroy it, and second, he may keep it. But in either case the appellant contends the possessor comes within the protection of the First Amendment, and the rule of *Roth* is inapplicable to him.

INVALID SEARCH WARRANT

Beginning on page 12 of appellee's motion, appellee contends that *Marchetti v. U.S.,* 390 U.S. 39, says nothing with respect to search warrants issued for violation of the Wagering Tax Act. Appellee also cites several other cases dealing with retroactivity, and contends Marchetti is not applicable because it was decided 16 months later. Counsel has apparently not familiarized himself with the companion case of *Grosso v. United States,* 88 S.Ct. 709 (_____ U.S. _____) holding as follows:

> "Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the allegation that he conspired to evade payment of the occupational tax. Given the decisions of this

> Court in *Kahriger* and *Lewis,* supra, which were on the books at the time of petitioner's trial, and left untouched by *Albertson v. S.A.C.B.,* supra, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."

The judgment of the Circuit Court was then reversed in its entirety.

In the case at bar, we raised the question of *Grosso* in the Supreme Court of Georgia prior to its judgment and raised the question of the invalidity of the search warrant before trial in Superior Court and again in the Georgia Supreme Court and on motion for rehearing.

Respectfully submitted,

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