SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1970
No. .....

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Appeal From the Appellate Department of the Superior Court of the County of Orange State of California.

MOTION TO DISMISS APPEAL.

Respondent moves the Court to dismiss the Appeal herein on the grounds that no substantial Federal Question is presented by the appeal. It moves the Court to deny the petition for certiorari for lack of jurisdiction on the following grounds:

1. Petitioner's contention that California Penal Code Section 311.2 requires the use of a "state-wide" standard in all instances is incorrect. Where materials are intended for wider distribution the standard to be applied under California Law is the national standard.
2. The determination of the "Customary limits of candor" of the community made by the court and the jury was based upon properly admitted evidence of community standards.

3. The prosecution of Petitioner was based upon Petitioner's distribution of obscene matter within the county of Orange, California and presents no preemption issue.
4. Petitioner-Appellant has never entered a double jeopardy plea in this case. Moreover, no double jeopardy issue is involved.
5. The amended California Statute was never invoked against Appellant-Petitioner.
6. The materials involved are not protected by the First Amendment as a matter of law.

ARGUMENT.

I.

The California Obscenity Law Does Not Require the Application of "State-Wide" Standards to Materials Intended for Nation Wide Publication.

In *In re Giannini,* 69 Cal. 2d 563, the California Supreme Court set forth the necessity for proof of state wide community standards in cases involving stage performances by dancers. That court, however, was careful to caution:

> The strongest argument in support of a national community, that a non-national standard would produce the "intolerable consequence of denying some sections of the county access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency" (*Manual Enterprises v. Day, supra,* 370 U.S. 478, 488 [9 L. Ed. 2d 639, 647]), does not apply with any force to the instant fact situation. Evaluation of "speech" that is designed for nationwide dissemination, such as books or films, according to a non-national community standard might well unduly deter expression in the first instance and thus run afoul of First Amendment guarantees. But we need not, in the instant case, reconcile this contention with the practical problems of producing evidence of national standards. Iser's dancing is purely local in nature, a subject matter obviously not intended for nationwide dissemination. Since the decision as to whether to stage a "topless" dance rests solely on local considerations, the problem that unduly restrictive local standards may interfere with dissemination of and "access to [such] material" as books or film does not arise in the instant case.

II.

The Court and Jury Had Before Them Evidence From Which They Could Properly Determine That the Materials Went Beyond the "Standard" Limits of Candor of the Community.

Later cases in the appellate courts have held that the *Giannini* standards and requirements are applicable in non-live performance cases. They have never, however, determined whether the standard in those cases is state-wide or nation-wide. *People v. Rosakos,* 268 Cal. App. 2d 497 (1968) reversed a conviction for exhibiting obscene *photographs* because no expert had testified to community standards as required by *In re Giannini. People v. Cimber,* 271 Cal. App. 2d Supp. 869 (1969) reversed a conviction for exhibiting obscene *films* because the community testified about *by* the expert was local. *People v. Bonanza Printing Co.,* 271 Cal. App. 2d Supp. 871 at 874, (1969) merely suggests that *magazines* are to be tested by the rules set down in *In re Giannini.*

In the case at hand Appellant never showed that the advertising brochures which were the basis for the prosecution were intended for nation-wide distribution rather than local distribution. Moreover, the People introduced as their expert Doctor Donald Albert Sears, Professor of English, California State College at Fullerton, Fullerton, California 92631, and the record shows his qualifications to be as follows: B.A. *magna cum laude,* Bowdoin College, 1944; A.M., Harvard University, 1947; Ph.D., *ibid.,* 1952. Instructor, Dartmouth College, 1948-52; Assistant to Professor, Upsala College, 1952-62; Director of Freshman English, *ibid.,* 1953-60; Associate Director of Development, *ibid.,*

1961-62; Professor and Chairman of English, Skidmore College, 1962-64; Staff. Assoc., American Council on Education, Washington, D.C. 1964-65; Professor of English, Howard University, 1965-66; Chair of English, Ahmadu Bello University, Kano and Zaria, Northern Nigeria, 1966-67; Professor of English, California State College at Fullerton, 1967; Hon. Pos.: Visiting Professor, University of Massachusetts, 1957. Mem.: College English Association; Modern Language Association; Executive Director, College English Association, 1962-; Editor, The CEA Critic, 1960-; Director, Book-of-the-Month Club Writing Fellowship Program; 1965-; Milton Soc.; Malone Soc.; Shakespeare Soc.; Phi Beta Kappa; Contbr. to: New England Quarterly; Proc. of Modern Language Association; The CEA Critic; Good Reading; Western Review. Author: The Harbrace Guide to the Library and Research Paper, 1956, 1960; The Discipline of English, 1963; The Undergraduate and Graduate School, Part 1 of A Guide to Graduate Study, 1965. Co-Author: The Sentence in Context, 1960. U.S. Army, Air Corps, 1943-46, 1950. Gen. Int.: Rec., Lindback Fdn. Award for Distinguished Tchng., 1961; Hon. Life Mem., Me. Hist. Soc., 1963; Hon. Life Mem., College English Association of Indiana. Listed in Directory of American Scholars; Contemporary Authors; Who's Who in the South; Who's Who in American Education.

Professor Sears over a two day period was questioned at length not only as to the value of the material but as to the existence of other similar depictions in art and in Literature. From his testimony and his background the jury could well and properly conclude that the materials went beyond what was being and had been published on a nation-wide basis as well as that the material had no social redeeming value.

Additionally the Respondent presented the expert evidence of Sargeant Shaidell of the Los Angeles Police Department.

Appellant attacks the testimony of Officer Shaidell by assuming an invalid premise, *i.e.*, that Officer Shaidell's qualifications set only from a survey. Officer Shaidell testified as follows:

1. In the last six years he had reviewed approximately 100,000 communications from members of the public dealing with materials involving sex and nudity. The bulk of those communications involved materials sent through the mail. [R.T. Vol. III, Section I, p. 115, lines 3-24, p. 116, lines 3-9.]

2. He is in constant contact with law enforcement personnel who tell him the complaints they have received. [R.T. Vol. III, Section I, p. 124, lines 9-26; p. 125, line 1; p. 126, lines 5-8.]

3. He is a participant in the League of Cities. [R.T. Vol. III, Section I, p. 127, lines 3-16.]

4. He has traveled throughout the state and observed what was being offered to the public. [R.T. Vol. III, Section 1, p. 129, lines 15-23.]

5. He is familiar with the Gallup Poll's survey concerning the same subject matter. [R.T. Vol. III, Section I, p. 128, lines 4-11 and 18-26; p. 129, lines 1-3.]

It should be further noted that he has qualified as an expert on 26 prior occasions. [R.T. Vol. III, Section I, p. 130, lines 4-26; p. 131, lines 1-3.]

In addition to the above, Officer Shaidell and others conducted a survey throughout the state. The questionaire used was prepared by Shaidell and members of the

Department of Justice; reviewed by 15 deputy District Attorneys; submitted to a committee of the Attorney General; and also reviewed by two marketing professors at U.C.L.A. [R.T. Vol. III, Section 2, p. 15, lines 6-18; p. 8, lines 1-4.] It was taken to 18 of the State's 58 counties. Those counties represent 90% of the State's population. [R.T. Vol. III, Section 2, p. 20, lines 15, 16.] There were 1,902 people surveyed; 105 different occupations.

In light of the above qualifications, can there be any doubt that Officer Shaidell had some special knowledge that could aid the jury?

III.

Federal Law Has Not Pre-empted the Field of Distributing Obscene Matter.

Many cases have recognized the validity of state statutes controlling the circulation of obscenity. *Mishkin v. New York,* 383 U.S. 502, 86 S. Ct. 958; *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215; *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304; and *Marvin Miller v. Reddin,* 293 F. Supp. 216.

California law does not infringe upon federal statutes prohibiting the mailing of obscene matter. It does not even mention mailing; it does, however, prohibit the transfer or distribution of obscene matter. And, in the present case, the fact the matter was sent through the mails is incidental to the case. The fact that Mr. Miller made the U.S. Post Office his agent for distribution does not exempt him from responsibility under California law, and no case cited by appellant even remotely suggests such exemption.

IV.

There Was No Violation of Appellant's Right to Be Free From Double Jeopardy.

Appellant's plea was "not guilty." If his contention was former jeopardy, his plea was not in accordance with California Penal Code Section 1017. However, when the plea of former jeopardy is not made before the trial court, it cannot be raised for the first time on appeal. *People v. Martinson,* 179 Cal. App. 2d 164; *People v. Fairchild,* 254 Cal. App. 2d 831.

Finally, the case which appellant cites apparently did not go to *trial,* and did not involve the brochures mailed to the Orange County victim.

V.

The Amended California Statute Was Never Invoked Against Appellant.

In the instant case, the trial court instructed the jury according to the law as it existed at the time of the offense. The court did not use Penal Code Section 311(e) as it presently exists; rather, it instructed the jury as follows:

> "Knowingly means having knowledge that the matter is obscene." The word "knowingly" as used in these instructions, imports a knowledge of the contents of the material, and being aware of its obscene character or nature. (*People v. Campise,* 242 A.C.A. 713.)

There was a lengthy, in chambers discussion, prior to instructions being given that shows the reasons for the instruction. [R.T. Vol. VI, pp. 78-81, lines 1-18.]

In addition, it should be noted that the trial court gave an instruction that benefited the appellant more than the alleged instruction could have prejudiced him. It read as follows:

> In order to find the defendant guilty you must find beyond a reasonable doubt and to a moral certainty that said defendant knew not only the contents of the brochures, but that he also knew they appealed to a prurient interest in sex, that they went substantially beyond contemporary standards of candor in sexual matters and that they were utterly without redeeming social value. (Defendant's proposed jury instruction No. K—given as modified.)

VI.

The Materials Involved Are Not Protected As a Matter of Law.

The materials involved are a collection of depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more. Doctor Wagner, a psychiatrist, testified that the material appealed to the prurient interest. Doctor Sears testified that the material had no literary or artistic value and to the standard of the materials as compared to other books and paintings. Sergeant Shaidell testified that the materials went far beyond the limits of candor of the community of the State of California. The jury was, therefore, entitled to accept their testimony rather than the testimony of appellant's two witnesses whose qualifications the jury obviously did not find as comprehensive. This the jury did and found the appellant guilty.

For all the above reasons, respondent urges this Honorable Court to deny review under 28 U.S.C. 1257 and if treating the appeal as a petition for certiorari to deny the writ.

Dated this 24th day of February, 1971.

Respectfully submitted,

CECIL HICKS,
District Attorney,
County of Orange,
State of California,

MICHAEL R. CAPIZZI,
Deputy District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,

Attorneys for Respondent.

Verification.

State of California, County of Orange—ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that my business address is Post Office Box 808, Santa Ana, California, 92701; that on February 24, 1971, I served the within Motion to Dismiss Appeal on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Santa Ana, California, addressed to said parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 1971, at Santa Ana, California.

HORTENSIA J. ROBERSON