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Soundgarden v. Eikenberry,

123 WASH. 2D 750, 871 P.2D 1050 (WASH. 1994).

INTRODUCTION

The musical group Soundgarden, joined by an extensive list of recording artists, record companies, music retailers, and consumers challenged the State of Washington's "Erotic Music Statute." Plaintiffs sought declaratory judgment of the statute's unconstitutionality for violation, and prior restraint, of free speech under both the state and federal constitutions. On appeal by the State, the Supreme Court of Washington held that although the statute's definition of "erotic material" was not void for vagueness, the statute: (1) did constitute a prior restraint on protected speech as applied to adults; (2) was overbroad in its regulation of constitutionally protected conduct; and (3) violated constitutional due process principles.

FACTS

Washington State's "Erotic Music Statute"¹ became law on June 11, 1992. In that enactment, the Legislature amended the existing obscenity statute so as to add sound recordings to the list of "erotic materials" which included printed material, photographs, motion pictures, and other material specifically appealing to the prurient interest of minors in sex.² On June 23, 1992, the recording group Soundgarden, joined by more than 65 other parties including prominent recording artists such as Pearl Jam, several record companies, retailers and individual citizens including minors, filed a complaint for declaratory judgment that the statute was unconstitutional as a violation of, and prior restraint upon, free speech and due process under both the state and federal constitutions. Affidavits and declarations filed by plaintiffs and their supporters made unchallenged claims that the statute interfered with their ability to express themselves and conduct their business affairs as well as society's notion of a free marketplace of ideas. Defendants disagreed and both parties recognized the action as a facial challenge to the statute.

On October 29, 1992, the lower court declared the statute unconstitutional and granted an order permanently enjoining enforcement of the statute. The statute has never been enforced. As there were no findings of fact related to the trial court's declaration of unconstitutionality, the Supreme Court of Washington reviewed the constitutionality of the "Erotic Music Statute" de novo.

1. WASH. REV. CODE §§ 9.68.050, 9.68.060, 9.68.070 and 9.68.090 (1992) (also known as the "Erotic Sound Recording(s) Statute").

2. WASH. REV. CODE § 9.68.050(2) (1992).

LEGAL ANALYSIS

The Supreme Court of Washington began its analysis with an examination of obscenity regulation in general. The United States Supreme Court had earlier held that obscene material is not within the area of speech or press protected by the First Amendment and has approved the concept of “variable obscenity” whereby the definition of obscenity announced in earlier decisions can be adjusted in its application to minors.³ In *Ginsburg v. New York*,⁴ the Supreme Court upheld a statutory test of obscenity with respect to minors which was substantially similar to the definition of “erotic material” in the statute sub judice. The Washington Supreme Court had already decided, in an earlier decision, on a policy of following the federal obscenity test rather than adhering to a particularized state formulation.⁵ While Plaintiffs proposed that music enjoys absolute constitutional protection, making obscenity analysis moot, the court took notice that federal courts had considered the potential obscenity of sound recordings in the past and merely failed to find obscenity present in those particular circumstances.⁶ Thus, the court found nothing objectionable in the Legislature’s formulation of an obscenity test regarding materials reaching minors and the application of that test to musical recordings.

The court next analyzed the procedural mechanisms found in the statute at issue. Agreeing with *McKinney v. Alabama*,⁷ the court declared that a multi-stage procedure imposing legal determinations from a preliminary non-jury civil proceeding upon a defendant at a subsequent criminal proceeding, when that defendant was not a party in the civil proceeding, violates constitutional due process for depriving the defendant of his right to litigate the earlier established legal determinations. Section 9.68.060 of the statute provides, at state request, for a hearing to determine whether material in question satisfies the statutory definition of “erotic material” at which the court may order “adults only” labeling of the material and enjoin the sale or display of the material in question to minors throughout the state of Washington. Violation of court orders issued at the hearing subjects all dealers and distributors to criminal proceedings for sale, distribution, or exhibition to minors of the “erotic material” as well as civil contempt proceedings.

The court found that the statute in question constituted a prior restraint upon protected speech when applied to adults. Prior restraints of speech prospectively forbid communication rather than punish past occurrences of speech.⁸ Such restrictions are presumptively unconstitutional, although not all prior restraints are invalid. The Washington Supreme Court has “expressly rejected an absolute bar

3. *Ginsburg v. New York*, 390 U.S. 629, 635 (1968).

4. 390 U.S. 629 (1968).

5. *State v. Reece*, 110 Wash. 2d 766, 766 (1988), *cert. denied*, 493 U.S. 812 (1989).

6. *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 659, (1992).

7. 424 U.S. 669 (1976).

8. *Alexander v. United States*, 113 S. Ct. 2766, 2768 (1993).

against prior restraints on speech which is not constitutionally protected," a category which includes obscenity.⁹ The court agreed with Plaintiffs' argument that the "erotic music" statute effectively censored recordings prior to actual publication by allowing prosecution for the mere distribution of erotic materials to wholesalers or retailers. The court noted that such prior restraint may be permissible as applied to minors, accepting the unusual validity of prior restraints in the area of obscenity when minors are affected,¹⁰ but remains impermissible as applied to adults.

Furthermore, the court declared section 9.68.060 overbroad in its reach of conduct which is constitutionally protected. Overbreadth, in the free speech context, refers to potential danger that the exercise of protected speech may be inhibited due to fear of criminal sanctions imposed by a statute which might be interpreted as prohibiting the protected speech.¹¹ The court found that the terms of the statute proscribed lawful conduct of music retailers in displaying the content of materials which are not legally obscene with respect to the adult public. The court's finding of overbreadth in the "Erotic Music Statute" was dependent upon its conclusion that both a "real and substantial" level of protected conduct had been prohibited and that there was no alternative, non-overbroad, construction reasonably found within the statutory language.¹²

Finally, the court found several procedural aspects of the "Erotic Music Statute" unconstitutional for violating the due process principles. The statute, which gives the dealer or distributor only 5 days' notice, failed to provide sufficient time for the preparation of an adequate defense. The subjugation of dealers and distributors to contempt prosecution for violation of injunctions imposed at a hearing to which they may not have been parties, violated due process. Furthermore, due process violations were found in the statute's imposition of criminal penalties without sufficient notice and without requiring actual "knowledge" of the erotic nature of particular materials on the part of defendants.

CONCLUSION

An extensive list of well-known recording artists, record companies, music retailers, and several individuals challenged the constitutionality of the State of Washington's "Erotic Music Statute." The Supreme Court of Washington held that, although the statute's definition of "erotic material" with regard to minors was neither constitutionally unsound nor void for vagueness, the implementation measures specified within the statute constituted a prior restraint on protected

9. *State v. Coe*, 101 Wash. 2d 364, 375 (1984).

10. *Id.*

11. *New York v. Ferber*, 458 U.S. 747, 768 (1982) (*quoting* *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)).

12. *State v. Halstein*, 122 Wash. 2d 109, 122-23 (1993).

speech as applied to adults. The statute was declared to be overbroad in that it attempted to regulate constitutionally protected conduct and several of its provisions violated constitutional principles of procedural due process.

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