Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00671-CR
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TERENCE JEROME HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 99-18374, 99-18373, 99-18372

O P I N I O N

Terence Jerome Hernandez appeals three misdemeanor convictions for violations of the City of Houston Ordinance 97-75, regulating sexually oriented businesses, on the grounds that: (1) the evidence is insufficient to prove that (a) All Star News & Video ("All Star"), appellant's employer, is an "adult bookstore" or "adult arcade" governed by the ordinance, or (b) appellant was acting as a "manager" or "operator" of the establishment; (2) the terms "enterprise," "primary business," and "adult arcade" as defined in the ordinance are unconstitutionally vague and overbroad as applied to appellant; and (3) the

statutory right of entry under the ordinance is unconstitutional as applied to appellant, and, therefore, items seized from All Star should have been excluded from evidence as fruits of an unreasonable search and seizure in violation of the Fourth Amendment. We affirm.

Background

All Star was formerly licensed as an adult bookstore under Houston's previous sexually oriented business ordinance, 91-87. That ordinance was amended in 1997, and when All Star reapplied under the amended ordinance, its application was denied because of "residential density."[1] In June of 1998, All Star notified the city that it was converting to a "50/50"store.[2] The Houston Police Department's Vice Division began investigating All Star in August of 1998 to ensure compliance with ordinance 97-75. The officers involved made a number of surveillance visits to All Star and, in January of 1999, an officer advised appellant that there existed three violations of the ordinance: (1) no permit to operate a sexually oriented business; (2) obstructed view from the manager's area of the arcade; and (3) wall penetrations. The officer did not arrest appellant at that time, but did provide him with a copy of the ordinance.

In March of 1999, several vice officers and an assistant district attorney entered All Star and noted that these violations continued. Appellant was arrested and separately charged in three informations with failing to: (1) ensure that wall penetrations did not exist; (2) ensure that the view from the manager's station into the arcade was not obstructed; and (3) have a permit as required under the ordinance. Appellant was found guilty of the three offenses by a jury, and the trial court assessed punishment at 180 days confinement for each offense.

Sufficiency of the Evidence

Appellant's first and second points of error argue that the evidence is legally insufficient to prove that All Star was an adult bookstore or an adult arcade as defined in ordinance 97-75. Appellant reasons

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[1] Residential density involves counting the number of residences within a 1500 foot radius of the store's location. Less than 75% residential tracts within that radius is required for such a business to obtain a permit. The record does not indicate why, if a sexually oriented business could not legally operate in this location due to residential density, citations were issued in this case for noncompliance with the statute applicable to such a business, *i.e.*, as if one could legally be operated there.

[2] According to Officer Foulis, one of the vice officers testifying, a 50-50 store is one which carries 50% pornographic material and 50% non-pornographic material.

that if All Star was not such an adult bookstore or adult arcade, it was not covered by the ordinance and appellant had no duty to obtain a permit, maintain unobstructed views, or prevent wall penetrations. Appellant argues that All Star was not an adult bookstore or arcade because there was insufficient evidence to prove that All Star's "primary business" was to deal in printed or pictorial material intended to provide sexual stimulation or sexual gratification to customers. Appellant further contends that because vice officers have no guidelines as to how to determine an entity's "primary business," the determination is left to each individual officer. Appellant also argues that the evidence is legally insufficient to prove that he was the operator and had a duty to prevent any of the alleged violations because there was no evidence that he performed any management functions, had any control over the inventory or configuration of the store, or had access to the arcade.[3]

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[3] Appellant also states that the definition of "manager" under the ordinance is overbroad and over-inclusive, requiring that any individual performing a service on the premises be licensed. This is, according to appellant, a prior restraint on the exercise of First Amendment rights. Other than making this generalization, appellant fails to offer any argument as to how the definition acts as a prior restraint. Additionally, none of the cases appellant cites in support of his contention overturn a similar statutory definition for overbreadth. *See, e.g., SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1272 (5th Cir. 1988) (upholding Houston's 1986 sexually oriented business ordinance against the following challenges: (1) First Amendment claim that the city failed to prove that it had a substantial interest in regulating topless bars; (2) claims that the ordinance delegated too much discretion to administrative officers and that signage provisions were impermissibly intrusive; (3) Fifth and Fourteenth Amendment claims that the ordinance was an unconstitutional taking of property and was overbroad and vague, violating owner's due process rights; (4) equal protection claims that the ordinance regulated only certain forms of sexually oriented businesses, was not gender neutral, and did not apply to the rest of the business community; (5) claims that the ordinance conflicted with preemptive Texas statutes regulating businesses that sell alcoholic beverages and exceeding the authority of the state enabling act); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990) (concluding that the Dallas licensing requirement for sexually oriented businesses was unconstitutional insofar as it did not provide for an effective limitation on the time within which the licensor's decision must be made and failed to provide an avenue for prompt judicial review, minimizing suppression of speech in the event of a license denial); *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 494-97 (5th Cir. 1994) (rejecting a vagueness and overbreadth challenge to the definition of "simulated nudity" in Dallas's sexually oriented business ordinance, but finding that the imposition of zoning requirements on businesses that used certain words in their advertising was unconstitutional); *MD II Entertainment, Inc. v. City of Dallas*, 935 F. Supp. 1394, 1396-99 (N.D. Tex. 1995) (striking down the city's sexually oriented business ordinance because there was no evidence that the amendments were necessary or effective to curb secondary deleterious effects of those businesses).

In evaluating legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999).

In this case, the information alleging appellant's permit violation stated that he had acted as a manager at All Star, an adult bookstore, without holding a valid permit as required under Section 28-253(a) of the Code of Ordinances. Section 28-253(a) prohibits any person from acting as a manager of an "enterprise" without holding a permit. *See* HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-253(a). "Manager" includes any person who "conducts any business in an enterprise with respect to any activity conducted on the premises of the enterprise." *See id*. § 28-251. "Conduct any business in an enterprise" includes operating a cash register, displaying or taking orders from customers, or delivering or providing any services to customers. *See id*. "Enterprise" is defined as:

> An adult bookstore . . . adult movie theatre or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

See id. § 28-121. "Adult bookstore" is defined as:

> An establishment whose primary business is the offering to customers of books, magazines, films or videotapes (whether for viewing off-premises or on-premises . . .), periodicals, or other printed or pictorial materials which are intended to provide sexual stimulation or sexual gratification to such customers, and which are distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities, or specified anatomical areas.

See id.

The informations alleging appellant's arcade violations stated that appellant had:

[W]hile the operator of an adult arcade . . . in violation of Section 28-102 [4] . . . fail[ed] . . . to monitor the premises of [All Star] to ensure that no patron was permitted access to an area of . . . [All Star] by allowing openings to exist . . . in a wall that separated viewing areas for the adult arcade devices from other viewing areas for the adult arcade devices;

and

[W]hile the operator of an adult arcade . . . fail[ed] to ensure that the view area specified in Section 28-101(a) [5] . . . remained unobstructed by a wall at all times that J. Shipley, a patron was present in the adult arcade.

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[4] Section 28-102 of the ordinance provides:

> (a) In addition to any other requirements of this article, no adult arcade or adult mini-theatre shall be configured in such a manner as to have any opening in any partition, screen, wall or other barrier that separates viewing areas for arcade devices or adult mini-theatre devices from other viewing areas for arcade devices or adult mini-theatre devices.
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> (b) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in an adult arcade or adult mini-theatre to ensure that the premises is monitored to assure that no openings are allowed to exist in violation of subsection (a), above, and to ensure that no patron is allowed access to any portion of the premises where any opening exists in violation of subsection (a), above, until the opening has been repaired.

HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-102.

[5] Section 28-101provides:

> (a) If an adult arcade or adult mini-theatre has one (1) manager's station . . . then the interior of the adult arcade or adult mini-theatre shall be configured in such a manner that there is an unobstructed view of every area of the adult arcade or adult mini-theatre to which any patron is permitted access for any purpose from that manager's station. . . . The view required in this subsection must be by direct line of sight from the manager's station.
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> (b) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in an adult arcade . . . to ensure that the view area specified in subsection (a) remains unobstructed . . . at all times that any patron is present in the adult arcade . . . .

See id. § 28-101.

An "adult arcade" is defined as "any premises"[6] that are subject to regulation under Chapter 243 of the Local Government Code[7] "to which members of the public . . . are admitted and permitted to use one or more arcade devices." *See id.* § 28-81. An "arcade device" includes any "device that dispenses . . . entertainment, that is intended for the viewing of five (5) or fewer persons in exchange for any payment of any consideration." *See id.* The individual who is "principally in charge of the management of the adult arcade" is the operator for purposes of the ordinance. *See id.*

Because "primary business" is not specifically defined in the ordinance, it must be read in the context in which it is used and construed according to the rules of grammar and common usage. *See Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App. 1989). Prior to using "primary business," the ordinance used the term "major business." *See N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp.2d 754, 789 n.79 (S.D. Tex. 1998); *Mayo v. State*, 877 S.W.2d 385, 388-89 (Tex. App.–Houston [1st Dist.] 1994, no pet.). In construing "major business," courts excluded businesses whose activities might only incidentally cause sexual stimulation. *See Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5th Cir. 1980); *Mayo*, 877 S.W.2d at 388-89. This reasoning is also applied to the term "primary business" in the current ordinance. *See Mayo*, 877 S.W.2d at 388-89. Therefore, we conclude that the term "primary business" is used in the ordinance to distinguish enterprises in which sexual stimulation is the main business from those in which it is only an incidental business. *Accord 4330 Richmond Ave. v. City of Houston*, 1997 WL 1403893, *14 (S.D. Tex.); *Mayo*, 877 S.W.2d at 389; *Schope v. State*, 647 S.W.2d 675, 679 (Tex. App.–Houston [14th Dist.] 1982, pet. ref'd).

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[6] The "premises" is defined as the building. *See id.* § 28-81.

[7] Chapter 243 permits municipalities to regulate "sexually oriented businesses." *See* TEX. LOC. GOV'T. CODE ANN. § 243.001 (Vernon 1999). A sexually oriented business is described as:

> [A] sex parlor, nude studio, modeling studio, love parlor, adult bookstore, adult movie theatre, adult video arcade, adult movie arcade, adult video store, adult motel, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer.

See id. § 243.002.

In this case, vice officer Shipley testified that an undercover surveillance was made of All Star over a period of several months to ascertain if it was in fact a sexually oriented business as defined under the ordinance. During the surveillance, officers would observe whether the merchandise purchased was pornographic or non-pornographic, what customers were doing, and the arcade usage. Shipley testified that All Star's materials were "overwhelmingly" more pornographic than non-pornographic. In addition, he testified that video and magazine racks[8] were counted and there were approximately twenty to twenty-two racks of pornographic videos, and only four racks of non-pornographic videos. Each of these racks contained approximately the same number of videos. He also testified that the non-pornographic magazines were five to ten years out of date but were selling for list price or more, and that "adult toys" were also sold on the premises. Also, Assistant District Attorney Kaplan, who had accompanied the officers on the night appellant was arrested, testified that the materials contained in the store were "well over" fifty-percent pornographic, stating "it was very clear that it was a pornographic bookstore."

Regarding the arcade, Shipley testified that after purchasing his tokens from appellant and entering the arcade area, he was not visible from the manager's station. In describing the videos available on the monitors, Shipley stated, "they range from homosexual conduct, male on male, female on male, female on female. . . . some bondage sometimes that is showing." He also testified that the marquee listing the movies available in the arcade reflected only adult movies. Shipley admitted, however, that he had not counted the number of pornographic movies available versus non-pornographic movies.[9] Shipley described the arcade booth as approximately four feet by five feet and as holding about three people comfortably. Shipley testified that the wall penetrations found in the booths were about three to four inches in diameter and were belt height. He stated that these holes were stained with fecal discharge and semen, apparent remnants of patrons engaging in anonymous sex in the booths. He further testified that during his surveillance, customers in adjoining booths would put their penis through the holes or press their buttocks

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[8] However, the officer admitted that a count had not been made of the individual magazine and video titles.

[9] Michael Foster, another employee of All Star, testified that there are two video systems in the arcade booths, one containing sixteen channels, nine non-adult movies versus seven adult movies, while the second system has thirty-two channels, and is "18/14."

up against the hole and tap on the wall, attempting to engage him in sex. A photograph depicted a used condom laying on the floor of the booth. Kaplan also testified that while they were in the arcade booth on the evening of appellant's arrest, a man inserted his penis through the wall penetration and began masturbating; he was subsequently arrested.

This evidence is legally sufficient to establish that All Star's primary business was sexually oriented and that it was not a business whose activities only incidentally pertained to sexual stimulation. Therefore, it was an adult bookstore and arcade that was subject to the sexually oriented business ordinance.

Shipley also testified that after entering the premises, he approached appellant and purchased $6 in tokens to use in the arcade. Shipley also stated that appellant was the manager at the time he entered the premises, that appellant was standing behind the cash register stacking tokens to be sold, there were no other employees present in the store at that time, and that appellant was in charge of selling materials from the bookstore. Officer Williams similarly testified that, during his surveillance of the premises, he had observed appellant behind the cash register, acting as the operator, making change and selling tokens to customers. Williams also testified that appellant was "running" the bookstore by providing tokens to customers, selling magazines, and selling videos.[10] The officers' testimony was legally sufficient to show that appellant was acting as manager of the bookstore and as operator of the arcade at the time the vice officers arrested him. Therefore, appellant's first and second points of error are overruled.

Constitutional Challenges

Appellant's third and fourth points of error argue that the terms "enterprise," and "adult arcade," including the term "primary business," are unconstitutionally overbroad and vague as applied to appellant.[11]

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[10] However, Foster testified that appellant was merely a clerk and had no access to the arcade or any control over the store's configuration. Other than the officers' characterizations of appellant as "manager" and "operator," all but one of which were made without objection, there is no evidence that appellant possessed or exercised any managerial decision making authority at All Star. Appellant has not challenged the probative value of the officers' characterizations of him as a manager and operator of All Star. Nor has he challenged the factual sufficiency of the evidence to prove that he was a manager or operator.

[11] Again, appellant asserts that there are no ascertainable objective standards in determining an establishment's "primary business," thereby placing unfettered discretion in the hands of the police.

In analyzing a challenged statute, a court begins with a presumption of validity. *See Fox v. State*, 801 S.W.2d 173, 175 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). The burden is on the individual who challenges the act to establish its unconstitutionality. *See Kaczmarek v. State*, 986 S.W.2d 287, 292 (Tex. App.–Waco 1999, no pet.). A statute or ordinance is overbroad if in its reach it prohibits constitutionally protected conduct.[12] *See Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972); *Martinez v. State*, 744 S.W.2d 224, 227 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd, untimely filed). Similarly, a statute is void for vagueness if it does not provide an ordinary citizen sufficient notice that his conduct is prohibited and fails to provide sufficient standards for enforcement. *See Bynum*, 767 S.W.2d at 773.

In this case, appellant contends that because All Star is a 50-50 store, the phrase "primary business" is unconstitutionally overbroad and vague because it sweeps within its coverage an establishment whose content of non-pornographic material is more than fifty-percent and thereby criminalizes innocent behavior. However, as previously stated, there was sufficient evidence to establish that All Star was not a 50-50 store and that its materials were overwhelmingly pornographic. Therefore, as applied to appellant, there is no showing that the ordinance operated in an overbroad manner.

Further, as appellant acknowledges, the terms "enterprise" and "primary business" have been upheld against constitutional challenges. *See generally N.W. Enterprises*, 27 F. Supp.2d at 787-790 (rejecting the claim that "primary business" was overbroad and vague because it failed to define what businesses were covered and could sweep within its ambit "main-stream" stores); *Kaczmarek*, 986 S.W.2d at 292 (noting that "primary business" is sufficient to provide a person of common intelligence with notice of the forbidden conduct); *Mayo*, 877 S.W.2d at 388-89 (rejecting a vagueness challenge against the ordinance, finding that "enterprise" and "primary business" were sufficiently clear). Accordingly, we overrule appellant's fourth point of error.

Fourth Amendment

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[12] Sexually oriented materials are due less protection than other forms of expression. *See Smith v. State*, 866 S.W.2d 760, 765 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd).

Appellant's fifth point of error argues that the statutory right of entry in the ordinance is unconstitutional as applied to him. He reasons that because he and All Star do not consider themselves an "enterprise," or a manager or operator of an enterprise, the statutory right of entry in section 28-136(c)[13] does not apply and the photographs and video tape taken of the premises by the vice officers were therefore fruits of an illegal search and seizure, violating the Fourth Amendment, and should have been excluded by the trial judge. Further, appellant argues that the arcade area was "private" and the customers in that area were entitled to a reasonable expectation of privacy.

Because we have concluded that All Star was a sexually oriented business as defined in the ordinance, appellant's contention, that the statutory right of entry does not apply to him, is not valid.[14] Rather, because All Star was a sexually oriented business, police or other city officials were allowed access to the premises for purposes of inspection. *See* HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-136(c); *see also Santikos v. State*, 836 S.W.2d 631, 632-34 (Tex. Crim. App. 1992) (noting that warrantless inspections of commercial premises in certain highly regulated industries may be valid exceptions to Fourth Amendment warrant requirement).

Regarding appellant's argument that the arcade area was "private" and the customers had a reasonable expectation of privacy, appellant lacks standing to assert any privacy rights of third parties. *See Rakas v. Illinois*, 439 U.S. 128, 134 (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted"); *see also Santikos*, 836 S.W.2d at 633. Similarly, where an employee does not enjoy exclusive use of property, the employee does not have

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[13] Section 28-136(c) provides:

> It shall be the duty of any owner, operator or manager of an enterprise to allow immediate access by any police officer, city fire department official or health officer to any portion of the premises of the enterprise upon request for purpose of inspection of such premises for compliance with this article, or any other applicable law.

HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-136(c).

[14] Appellant does not argue that the officers violated the right-of-entry provision in the ordinance, but only that All Star was not a sexually oriented business subject to the ordinance.

a reasonable expectation of privacy in the property. *See United States v. Blok*, 188 F.2d 1019, 1020-21 (D.C. Cir. 1951); *Dawson v. State*, 868 S.W.2d 363, 367 (Tex. App.–Dallas 1993, pet. ref'd).

Finally, appellant states that the videotape was made on December 2, 1998, several months prior to his arrest, in connection with an "extraneous offense and arrest" and was admitted into evidence without properly connecting it to appellant. He argues that the tape was made without a warrant and admitted without any evidence connecting it to appellant or showing that he had any knowledge of it.[15] However, the record indicates that a proper predicate for its admission[16] was laid, showing that the tape was relevant

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[15] At trial, appellant objected to admission of the tape based on "the previous motion that related to the photographs, the basis for it is exactly the same . . . . I suggest that we have the memorandum of law that I relied upon and the Court looked at simply marked as an exhibit." Appellant's memorandum of law asserted that, because All Star was not subject to the ordinance and because the arcade was a private area, the police had no authority to enter the premises. We have determined that All Star was a sexually oriented business subject to the ordinance. Moreover, inasmuch as the arcade was open to the public, it was not a private area within the premises.

[16] The prosecution offered the tape into evidence through the testimony of Officer Shipley. After initially questioning Shipley as to when the tape was made, the following questions were asked to lay the predicate for admission of the tape:

> PROSECUTOR: I am handing you what has been marked as State's Exhibit 8. Do you recognize that?
> SHIPLEY: It is our – it is the video tape of the location . . . .
> * * * *
> PROSECUTOR: Have you had the opportunity to watch it?
> SHIPLEY: Yes, I have.
> PROSECUTOR: And was this tape made on a recording device capable of making an accurate video recording?
> SHIPLEY: Yes, it was.
> PROSECUTOR: Was the operator competent?
> SHIPLEY: Yes, he was.
> PROSECUTOR: And do the pictures in this video tape fairly and accurately reflect the location shown on the tape?
> SHIPLEY: Yes, it does.
> PROSECUTOR: Has that tape been altered in anyway?
> SHIPLEY: No, it has not.
> PROSECUTOR: And does the location on that particular tape, is that the same – substantially the same as it appeared on March 1, 1999?
> SHIPLEY: Yes, it does.

to establish the contents of the premises. In addition, Shipley testified that the premises as depicted in the tape were substantially similar to the premises on the date of appellant's arrest. Therefore, we overrule appellant's fifth issue and affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Fowler, Edelman, and Baird.[17]

Do not publish — TEX. R. APP. P. 47.3(b).

[17] Former Judge Charles F. Baird sitting by assignment.