

Special Lib

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Supreme Court of the United States

October Term, 1968

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FILED

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JOHN F. DAVIS, CLERK

In the Matter of:

ROBERT ELI STANLEY,

Appellant

VS.

THE STATE OF GEORGIA

Appellee

Docket No. 293

Pt. 1

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Place Washington, D. C.

Date January 14, 1969

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Robert Sparks, Esq. on behalf of Appellee

20

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -x
4 ROBERT ELI STANLEY, :

5 Appellant, :

6 v. :

No. 293

7 THE STATE OF GEORGIA, :

8 Appellee. :

9 - - - - -x
10 Washington, D. C.

Tuesday, January 14, 1969

11 The above-entitled matter came on for argument at

12 1:45 p.m.

13 BEFORE:

14 EARL WARREN, Chief Justice

15 HUGO L. BLACK, Associate Justice

16 WILLIAM O. DOUGLAS, Associate Justice

17 JOHN M. HARLAN, Associate Justice

WILLIAM J. BRENNAN, JR., Associate Justice

POTTER STEWART, Associate Justice

BYRON R. WHITE, Associate Justice

3 ABE FORTAS, Associate Justice

THURGOOD MARSHALL, Associate Justice

19 APPEARANCES:

20 WESLEY R. ASINOF, ESQ.

21 3424 First National Bank Bldg.

22 Atlanta, Georgia

23 Counsel for Appellant
24
25

1 APPEARANCES (continued):

2 J. ROBERT SPARKS, ESQ.
3 Assistant District Attorney
4 Atlanta Judicial Circuit
5 Fulton County Courthouse
6 Atlanta, Georgia
7 Counsel for Appellee
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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 293, Robert Eli
3 Stanley versus Georgia.

4 ORAL ARGUMENT OF WESLEY R. ASINOF, ESQ.

5 ON BEHALF OF APPELLANT

6 MR. ASINOF: May it please the Court, I would like to
7 request the martial to notify me when 25 minutes is up. I
8 would like to save five minutes for rebuttal, if I may.

9 Q You will find a white light come up before you.
10 That will be the five-minute warning.

11 A Thank you.

12 Mr. Chief Justice and members of the Court: This
13 case involves the constitutionality of the Georgia obscenity
14 statute. The questions raised by this appeal insofar as the
15 constitutionality of the statute concerned are twofold.

16 First, we raise the question that the statute
17 violates the First Amendment because it punishes the mere
18 possession of obscene material without requiring any further
19 overt act on the part of the possessor or intent to do anything
20 with it.

21 This was a possession, if Your Honor please, where
22 Robert Eli Stanley had possession of three reels of motion
23 picture film in a desk drawer of his upstairs bedroom of his
24 home. There was no allegation in the indictment of any
25 showing or attempt to exhibit or show these films or pander

1 them or show them to minors.

2 The only question involved insofar as the indictment
3 was concerned was that he possess them knowing them to be
4 obscene or that he should reasonably have known them to have
5 been obscene.

6 The second question of our constitutional attack
7 on this statute is the use of the language in the statute and
8 in the indictment to the effect that he reasonably should have
9 known of the obscene nature of the film removes the element
10 of scienter from the definition of the offense and, thus, permits
11 the State to secure a conviction for possessing these
12 films on a showing less than actual knowledge on his part that
13 they were obscene.

14 Q Do you concede them to be obscene?

15 A We do not concede them to be obscene and if
16 we took that position with the trial court then under the
17 First Amendment insofar as possession itself is concerned
18 that there is no such thing as obscenity.

19 The reason that we took that position and now take
20 that position is this: It would be a violation of the freedom
21 of press clause of the First Amendment to restrict a person
22 or to prohibit a person to possessing anything they want
23 insofar as its claim of obscenity is concerned.

24 We take the position that where a person merely
25 possesses an article alleged to be obscene and does not attempt

1 to distribute it or to show it to any other person as was
2 the case in this case and as was the indictment in this case,
3 and as to the holding by the Supreme Court that the mere holding
4 isn't an offense under the definition of Georgia law, that any
5 evidence in the case on the part of the State or any contention
6 on the part of the State to the effect that the evidence might
7 have circumstantially shown that he was about to have a party
8 and about to show these films to other persons would be
9 completely irrelevant for this Court to consider has no relevancy
10 here because of the fact that he was only charged with the
11 mere possession.

12 Now, to my knowledge this exact question has never
13 been passed upon by this Court. The question of whether or not
14 a person can be prohibited by the State from merely possessing
15 obscene material or obscene writings or pictures clearly would
16 seem to me that the mere possession -- that anyone would have
17 the right to say "Draw a picture" which might obviously be
18 obscene to some other person and put it in his pocket or put it
19 in his desk drawer or if he wanted to take a picture of
20 himself or take a picture of himself and his wife in a sexual
21 act, that this would be a matter that he could determine as
22 long as he did not attempt to pander this material, attempt to
23 sell it, distribute it or distribute it to minors.

24 Q Where were these films?

25 A These films were in the desk drawer. This,

1 of course ---

2 Q Well, you couldn't tell what they were.

3 A Could not.

4 Q What did the officers do?

5 A The officers -- I might as well mention this
6 at the outset right here -- the second part of our contention
7 is the officers were on with a Federal search warrant issued
8 by United States Commissioner on a claim that the defendant
9 was violating the Wagering and Tax Act.

10 Since then, of course, this Court has held that the
11 provisions of that law are constitutionally ---

12 Q Excuse me, what I am trying to get to is, did
13 the officers use the projector to see the films?

14 A Yes.

15 Q Then and there?

16 A Yes, sir. They went in on with the search
17 warrant issued by United States Commissioner which did not
18 call for the seizure for any obscene film but called for the
19 seizure of gambling paraphernalia.

20 No gambling paraphernalia was seized except some
21 negligible things that I think the State concedes were not
22 sufficient.

23 But, during their search, they searched through
24 this drawer and found three cans of film, eight-millimeter
25 film, which they testified they could not discern or know from

1 their own knowledge that it was what it was.

2 So they found, in the closet, a projector and they
3 found a screen and they showed these films and looked at them ---

4 Q Then they set up the screen and ---

5 A They set up the screen and they showed them.

6 Q Is there any conceivable circumstance in which
7 if you saw film that -- could it possibly be connected with
8 gambling paraphernalia?

9 A I would think not. I would think not. I
10 wouldn't know that there was any connection between them, but
11 what happened, after they showed these films, not having a
12 warrant to seize the films, the evidence shows in the case and
13 in the record that the officer, the State Officer, called the
14 Solicitor General who is the prosecuting officer for that
15 circuit and told him they didn't find gambling paraphernalia
16 but they did find some films and it is in the record that the
17 Solicitor General then stated to him after you view the films
18 if, in your opinion, they are obscene, seize the films and book
19 the case and I will set a bond.

20 Q Well, tell me, suppose, instead of these films,
21 they had found counterfeit bills, couldn't this fellow have
22 been prosecuted for possession of counterfeit bills?

23 A I think so.

24 Q Yes; how do you distinguish that?

25 A I distinguish that, and I concede, that where

1 evidence is seized or where contraband is seized, where it is
2 not such as would be subject to a claim of the First Amendment,
3 freedom of press or freedom of speech, that the States do have
4 the right to prohibit the possession.

5 Q I take it that Harrison would require that that
6 be counterfeit money.

7 A I think that any case -- and we concede that
8 in our brief and make that distinction -- that in this particu-
9 lar case, these were films alleged to be obscene from the very
10 start. They weren't seized as gambling paraphernalia, but they
11 were seized under a warrant issued by United States Commissioner
12 under the Wagering Tax Act, under a contention that the
13 defendant had not registered as a gambler.

14 Q Was this man a merchant, a distributor or
15 anything like that?

16 A No, sir. There was no claim of any distributor-
17 ship. He was an individual in his own home. The State, of
18 course, alleged and contended that he had a record for gambling
19 in the past and that the Federal agents and the State agents
20 were going in for that purpose, that they had probably cause,
21 one of the contentions in the affidavit being that he had not
22 registered as a gambler and paid his tax, which, of course
23 since then ---

24 A Well, in the prosecution and the actual trial
25 for possession of these films was there any effort to produce

1 proof that possession of these films was for the purpose of
2 sale?

3 A No, sir.

4 Q It was just naked possession of the films?

5 A This is not a ---

6 Q There was one other point. There were biscuits
7 in the kitchen.

8 A This was brought up in the brief to this Court,
9 that there were biscuits being ready to put in the stove, that
10 there were well-dressed people who came to the house, that
11 this man was a bachelor and his girlfriend had come there
12 and that the officers had turned them away.

13 They said that the table was set for eight people
14 looking like they were fixing to have supper, getting ready to
15 have supper, and, for this reason, they said that apparently
16 he was going to have a party.

17 This is now the contention raised by the State, but
18 I want to call the Court's attention to this, that ---

19 Q Where was this in Georgia?

20 A Sir?

21 Q Where was this in Georgia?

22 A In Atlanta.

23 Q Was there any claim that this party was going
24 to include the showing of these films?

25 A That is what they claim. They claim

1 circumstantially -- there is no evidence of that at all. The
2 defendent denied knowing anything about ---

3 Q Well, as I understood you to say, neither
4 screen nor projector was set up?

5 A That is right.

6 Q And the films were in cans in the desk drawer.

7 A Upstairs in the bedroom of the defendent in a
8 desk drawer.

9 Q Was there any effort at the trial to show that
10 he was going to have a party, including showing these films?

11 A No, sir, none whatsoever. No testimony of
12 that at all.

13 Q What do you do with films nowmally?

14 A Well, I would imagine that you would show them?

15 Q Do you keep them as a souvenir, or show them?

16 A Well, I think that an individual could do as
17 he pleases. But the point is in this case, and this is the
18 paramount thing in here, that the State did not contend, by its
19 indictment that he had any intention to show them and this was
20 one of our grounds of demurrer in the trial court in the State
21 court.

22 Q And he didn't show them to somebody else.

23 A Whether there was any intent to do anything
24 with them.

25 Q Or even to show them to himself? There was

1 nothing, as I understand you, there is nothing to indicate --
2 except that he had them in a drawer and in the closet had
3 a projector and a screen?

4 A That is right, they were for his own use.

5 Q Or maybe he wasn't going to show them at all.

6 A Maybe he wasn't going to show them at all. He
7 contended by his ---

8 Q He was going to keep them as a keepsake.

9 A He could. In his statement he said that I
10 have never seen these films before, that a man brought them
11 to my house on Labor Day which was about four or five days
12 before this.

13 The point was, that the State at no time in its
14 indictment charged this. We demur, on the grounds the vague-
15 ness of the Georgia statute, the Georgia statute did not
16 specifically make the mere possession an offense.

17 We asked for interpretation by the State Court and
18 got it. The Supreme Court construed the language to be
19 sufficient to make the mere possession an offense and that
20 is why we are in this Court, because of the fact that we are
21 reinforced by the State Court decision holding that the mere
22 possession is an offense and we say that isn't a constitutional
23 interpretation.

24 Q The nub of this case, as appears on Page 69
25 of the appendix, doesn't it, right at the top of the page, that

1 one sentence.

2 A I believe so, yes.

3 Q "It is not essential to an indictment charging
4 one with possession of obscene matter, that it be alleged that
5 such possession was with intent to sell, expose or circulate
6 the set."

7 A That is correct.

8 Q And that is a clear holding by the highest
9 court of your State that mere possession or, as my brother says,
10 "naked possession" is sufficient to constitute a criminal
11 offense.

12 A That is correct. That is the holding of the
13 Supreme Court, so the question is squarely before this Court,
14 as to whether or not under that interpretation given to it
15 by the Supreme Court of Georgia, whether or not that can be
16 squared with the First Amendment, whether mere possession of
17 material alleged to be obscene, pictures or writings, can be
18 constitutionally made a criminal offense.

19 Q Does it say that naked possession, pictures
20 of naked persons, cannot be kept in a person's house without
21 his committing a crime?

22 A Under Georgia law. Under the interpretation
23 given by the Supreme Court of Georgia, that is correct.

24 Q What did this fellow get -- a year?

25 A Yes, sir; he received a year's punishment. That

1 was fixed by the jury, and it was under the charge of the
2 Court -- of course, under Georgia law, peculiarly, the jury
3 fixes the punishment -- the Court charged the mere possession
4 as being -- that that is all they had to consider, together
5 with either that he had knowledge that they were obscene, or
6 that he should reasonably have known of its obscene nature.

7 Now, this gets to the scienter question. Whether or
8 not a State can withdraw the element of scienter by permitting
9 a conviction to rest upon less evidence than actual knowledge
10 that it is obscene.

11 Q Has your client been out on bail?

12 A Yes, sir, he has been out on bail.

13 The second question involved in his case, as I
14 stated, is that this Court has held in Grosso and Marchetti
15 since this case was tried that the Wagering Tax Act is
16 constitutionally unenforceable.

17 This holding by the Court we say renders the
18 search warrant, that was issued in this case, invalid. We filed
19 a motion to suppress in the trial court. In our motion to
20 suppress ---

21 Q When was the search warrant issued?

22 A The search warrant was issued before Grosso or
23 Marchetti decisions. It was issued in 1967 but it was about --
24 it was some months before Grosso or Marchetti. But we filed a
25 motion to suppress the evidence and in our motion the

1 allegation was made that the films were seized without a
2 valid search warrant, particularly describing the articles to
3 be seized.

4 That language, we say, is sufficient to now reach
5 back as of that time and say that that was a sufficient attack
6 upon the warrant itself.

7 Q Do you argue at all that even the warrant was
8 valid and even Marchetti and Grosso weren't retroactive, that,
9 nevertheless, the search was invalid because the warrant
10 described gambling paraphernalia and they, nevertheless, seized
11 the film which -- it isn't like just running across contraband
12 that is lying out in plain sight, you have to actually look into
13 the film to see what is in it?

14 A Not only look into the film ---

15 Q Do you make that argument?

16 A Yes, sir. Not only look at the film but there
17 had been no -- this requires on the question of obscenity --
18 it would require at least the finding of a magistrate to
19 determine that these films were obscene.

20 In this particular case the evidence is clear that
21 this officer called the Solicitor General and asked the
22 Solicitor General what to do and he told him: "If, in your
23 opinion, they are obscene, seize the films and make a case and
24 I will set the bond."

25 Now, we say that this would require, before a film

1 or picture or photograph or anything else can be considered
2 to be obscene, there must be some judicial finding, some
3 notice, some knowledge that these films have been declared
4 to be obscene, at least that much.

5 We say that, for that reason, that even though
6 officers would be authorized, under search warrant, to seize
7 contrabands not named in the article, they would not be authorized
8 to seize films alleged to be obscene.

9 If the Solicitor General, himself, had no judicial
10 powers under the laws of Georgia, had no right to, himself,
11 have seized the films, but in this case he delegated some
12 sort of judicial power to the officer making the finding and
13 told him: "If, in your opinion, they are obscene" ---

14 Q I take it you are relying on Marcus, are you?
15 You are relying on Marcus?

16 A Yes, sir.

17 Q Marcus involves, as I recall it, didn't it,
18 a warehouse full of books of which there were six or seven
19 that the police had purchased and there, on the basis of police
20 examination of the books, they issued the warrant.

21 A That was under the Missouri statute.

22 Q We said that they had to have a determination
23 advance, but isn't this a little different? Here you have
24 just a single item. Just how would you get the film to have
25 a determination of obscenity before a search warrant is issued?

1 How would you get it?

2 A If the Solicitor General had instructed the
3 officer, submit your facts to a magistrate and if he ---

4 Q What facts? He would have to take the films,
5 wouldn't he?

6 A No, he could, by affidavit, submit to a
7 magistrate who was authorized to issue a warrant, he could
8 submit what these films revealed to him.

9 Q According to another argument, he wasn't even
10 entitled to look at them.

11 A That is right. He was not even entitled to
12 look at them, which, of course, is, again, the question. We
13 say under either one of those theories, the seizure of the
14 films was illegal.

15 Q Well, it wouldn't be obscene unless it lacked
16 some social and redeeming value, as I understand it, and you
17 couldn't tell that unless you saw it.

18 A Well, of course, Your Honor, that is true. But,
19 I think that is something that has been the subject of discussion
20 for many, many years, as to whether or not an item does have
21 redeeming social value or whether or not it could be classified
22 as obscene.

23 Q Were these movies shown at the trial?

24 A Yes, sir; the movies were shown at the trial.

25 Q Did the jury see them?

1 A Yes, sir.

2 Q Are they here?

3 A Yes, sir; I think this Court has them and I
4 would say this, that, of course, I think and I would concede
5 to this Court that the pictures, the films, insofar as films
6 are concerned, I think disgusting, but I don't know that
7 disgusting makes them obscene.

8 I don't know that they would appeal. They wouldn't
9 appeal to my prurient interests. I don't know whose prurient
10 interests they would appeal to because I think that they are
11 sickening. But I don't think that they would be any more
12 sickening than to show a man being tortured to death and having
13 his guts torn out of him. That wouldn't be obscene.

14 It is really hard to say what obscenity is but getting
15 right to the point in this case, we say, that if they are
16 the vilest, the filthiest pictures that could ever be seen,
17 that a person has the right to possess them as long as he has
18 not -- and this is what this Court held last year in Redrup
19 and the other cases along with Redrup -- that as long as there
20 is no pandering, as long as there is no exhibition to minors,
21 and as long as there is no intrusion upon the privacy of other
22 persons who are unwilling to see them, then, of course, we
23 have nothing, and this is all we have in this case, unless you
24 want to accept the State's theory that because there were some
25 biscuits being prepared to put into the stove, because of the

1 fact that the table was set for eight where they were going to
2 have dinner and against the statement of the defendant in the
3 trial of the case, nothing to refute that, that a man had
4 brought these films to him several days before and told him:
5 "I have some films that I would like you to see."

6 Now, we say this, if the Court please, that wherever
7 we find that a question of obscenity is concerned or whether
8 or not we know that something is obscene, if A tells B: "I
9 have some pictures I want to give you and these pictures are
10 obscene."

11 Does that say that B cannot determine or ascertain
12 for himself whether they are obscene to him or does that mean
13 that he would have the right to himself inspect those films
14 and say: "I have a right under the First Amendment to determine
15 whether"---

16 Q Well, you don't have that case here. Why argue
17 that case?

18 A Well, that is what it would actually ---

19 Q All you have here, as I understand it, assuming
20 any obscenity of these films, a question of whether the
21 possession, and nothing more, not for sale or otherwise, but
22 just the possession of itself constitutionally can be made a
23 crime under the First Amendment; isn't that what it is?

24 A That is right. And that is why I say, if Your
25 Honor please, that because of that a man has the right to

1 determine for himself if it offends him, if, to him, it is
2 obscene, because it would violate the First Amendment to
3 say that if a man handed me some film ---

4 Q Incidentally, is there anything in this record
5 to show that he had any knowledge as to what these films were?

6 A None whatsoever, except the fact that they
7 said -- an expert testified that the films had been scratched,
8 one of them was wound backwards, to show that someone had
9 seen them at some time in the past, but nothing to show that
10 he had seen them or he had viewed them.

11 There is nothing to refute or rebutt his statement
12 that he had never seen them before.

13 Q Well, were they in his bureau drawer?

14 A They were in his desk drawer of his bedroom
15 upstairs. And there was no setup, nothing set up, no screen
16 set up to show or view these films.

17 Q The difference between this and the Wilkes
18 case, which was tried a long time ago, is that there they
19 found the paper in the bottom of his trunk. Here they found
20 it in the desk drawer, and they turned him loose.

21 A I think that would be analogous.

22 So, I would like to reserve what time I have left,
23 I know the white light hasn't come on, I would like to reserve,
24 if I may, the time that is left for rebuttal.

25 MR. CHIEF JUSTICE WARREN: Mr. Sparks.

1 ORAL ARGUMENT OF J. ROBERT SPARKS, ESQ.

2 ON BEHALF OF APPELLEE

3 MR. SPARKS: May it please the Court: I am the
4 trial counsel who prosecuted this case in the court below,
5 Superior Court of Fulton County so the Court has the original
6 trial counsel, Mr. Asinof was the defense counsel.

7 Now, I want to point out several things to the Court,
8 which I think Mr. Asinof neglected to point out because he
9 was so wrapped up in his own argument.

10 One is this: On the question of whether or not this
11 Georgia statute contains the element of scienter, I want to
12 point out to the Court that the Supreme Court of Georgia
13 ruled on that in this very case.

14 The Court said, I am just reading in part, just a
15 line, "It is contended that being contended that the require-
16 ment of reasonable knowledge would withdraw the element of
17 scienter from the definition of the offense and would render
18 a person guilty without actual knowledge of the obscene
19 nature of the matter."

20 This contention is without merit. Now, as we have
21 pointed out in our brief the Court has consistently held that
22 where a State statute is interpreted by the highest court of
23 its State, that this Court is bound by the construction placed
24 on it by that court.

25 That happened in the Mishkin case, another obscenity.

1 case, which the Court, of course, is familiar with, and also
2 in the last Ginsberg case. Now, in the last Ginsberg case,
3 the New York statute, which you find knowledge is this, "the
4 word knowingly possess obscene matter". The New York statute
5 defined "knowingly" as "Having general knowledge of or reason
6 to know," the exact same words that are in the Georgia statute
7 "or reasonably should know, or a belief or ground for belief
8 which warrants further inspection or inquiry."

9 In other words, in the Ginsberg case, and that is
10 a G-i-n-s-b-e-r-g case, there being two Ginsberg cases in the
11 obscenity field, this Court accepted the construction placed
12 on the scienter feature of the New York statute and said, as
13 we are bound to do.

14 Now, the Georgia Supreme Court said, in response to
15 Mr. Asinof's contention that the language of the Georgia
16 statute, "If such person has knowledge or reasonably should
17 know of the obscene nature of the matter," does not remove
18 scienter from the offense, but is merely a statutory expression
19 of the rule of evidence which has been in Georgia courts for
20 many years.

21 That is the only way you can prove intent or know-
22 ledge of a person as to anything, as to whether goods are
23 stolen, or any element involving intent or knowledge, unless
24 he confesses by the circumstances as to whether a reasonable
25 man in the same position would know or would have knowledge

1 of the obscene nature.

2 So, we submit, respectfully, that by a long series
3 of this Court's own decisions, that you cannot go beyond or
4 reverse the judgment of the Georgia Supreme Court on this
5 question of scienter because that is a State Court interpreting
6 its own statute.

7 I have cited a number of cases where this Court has
8 said that "We are bound by such expresstion". This Court
9 also said it in the Mishkin case, you said it in the Kingsley
10 International Pictures Corporation case, in about eight cases,
11 Aero Transit, all of which are listed in our brief.

12 So that moves us onto the second facet of the
13 attack on the constitutionality of the statute. I submit,
14 most earnestly, to the Court that scienter is an element of
15 this offense as interpreted by the Georgia Court, by the judges
16 of the Supreme Court, and that this Court cannot, unless you
17 reverse your prior rulings, which are set out in our brief and
18 which I have cited to you, unless you reverse that long line
19 of cases, I don't believe the Court could, in keeping with
20 its precedence, it said, "We think the Georgia Court was wrong
21 when they said that this statute does not contain the element
22 of scienter."

23 Q What was the State's evidence on scienter -- the
24 State's evidence to prove scienter?

25 A It was circumstantial, Your Honor, but we think

1 it was sufficient.

2 These officers went in with a Federal Search Warrant
3 to seize wagering paraphernalia. This man was alleged to have
4 been a notorious bookmaker, having a prior record of arrest and
5 a conviction ---

6 Q What connection would that have?

7 A That wouldn't have any connection with this
8 case, but I point out the probable cause that we had.

9 Q No, I am interested in how you brought evidence
10 and what evidence there was on which the jury could find that
11 he knew the contents of these motion pictures?

12 A One of the cans bears the label "Young Blood"
13 on it, which is certainly a suggestive title. It is a home-
14 made label. I gather from what the Court has said that the
15 Court hasn't viewed these films. They are here, and I have
16 asked the Court ---

17 Q I would still like to know, if you don't mind,
18 what the evidence was that brought home to him the knowledge of
19 the contents of those movies?

20 A Well, the evidence showed, Your Honor, that in
21 the upstairs living room there was a projector set up and a
22 bunch of innocuous films, slides, travel logs, things like that.

23 These films were not found with the other films,
24 the innocuous, though innocent type films, but they were found
25 in a desk drawer underneath some papers in his private bedroom.

1 The officers ran them, threw them against the wall,
2 and then went downstairs and told him, "We are arresting you
3 for the obscene films which are found upstairs."

4 Q Well, why did they show them? They were looking
5 for what? The search warrant was limited to what?

6 A I think that they wanted to look at the films
7 for the reason that the films might have been record. They
8 were authorized to look for book-making records. It is not
9 inconceivable that ---

10 Q Would he have them in a tin can marked "Young
11 Blood"?

12 A He could do that just like the old story by
13 Edgar Allen Poe, the story about putting something in the most
14 conspicuous place ---

15 Q I am sure that the policeman read Edgar Allen
16 Poe.

17 As soon as you saw the first frame you thought you
18 were still looking for records?

19 A No, sir, but there were three cans ---

20 Q They ran through all three, I take it.

21 A They didn't show all three of them. Your Honor,
22 the record shows that they only showed a few feet of the second
23 and third one. In fact, one of the films had been rewound
24 backward which shows recent viewing, and the pictures were
25 shown upside down.

1 Q Now, you were going to tell us that he went
2 downstairs and, I gathered, you were going to tell us that he
3 met the defendant -- the officer did?

4 A He went downstairs and met the defendant and
5 told the defendant that "I am arresting you for those obscene
6 films upstairs." The defendant said nothing. Of course, I
7 don't claim that you can't use his right to remain silent
8 against him. That is a constitutional right.

9 But it would still seem more logical to say "What
10 films" if he didn't know he had any obscene films.

11 Q But so far you have got that he said nothing.

12 A Yes, sir.

13 Q Now, what else have you got? The officer
14 said "I am going to arrest you for those obscene films". The
15 defendant said nothing.

16 A He said, "Let me call Mr. Asinof", and he did
17 call Mr. Asinof.

18 Q Now, does the fact that he called his lawyer
19 indicate that he knew what those films were?

20 A No, sir, but there is his own statement -- he
21 made a statement on the trial. Georgia has the unsworn state-
22 ment law where a defendant can either be sworn or make an
23 unsworn statement.

24 This is what he said, and while it is not in
25 admission, it still is significant, I think; it is very brief.

1 He said: "I am a bachelor. I live by myself and
2 I have a girlfriend. We planned a party for Labor Day. I
3 invited several couples out. Later on in the evening a friend
4 of mine came by and said, 'I brought you something I want you
5 to see'. He handed it to me. It was three rolls of film.
6 I took the film upstairs and put it in a desk draw, closed the
7 desk drawer and came back downstairs."

8 Then he goes on to say he never looked at it. However,
9 there were two people in the backyard when the officers made
10 the execution of the search warrant, two men; three women came
11 over later that evening, well-dressed women. There was Justice
12 Marshall's three dozen biscuits sitting on the stove.

13 All the indications were that there was going to be
14 a party. In fact, he told the jury that he was going to have
15 a party and in the connection, the context of his statement
16 telling about the party first and a friend by and saying, "I
17 want you to see them", I think it is a reasonable deduction
18 that the jury could have drawn that the films were to be shown
19 at the party.

20 Q Well, is there anything in what you have told
21 us that support an inference that he had looked at the films
22 and knew what they were?

23 A Only one of the Federal agents was a former
24 professional photographer, Your Honor, and he testified that
25 the films were badly scratched, that they were dirty, that one

1 of the films had been wound backwards which caused the figures
2 to project upside down on the wall when they showed it and he
3 said that they had, obviously, been used before, been shown
4 before, many times.

5 Q Many times, did you say?

6 A I am not certain whether he used the word "many"
7 or not. I know that he said that they had, obviously, been shown
8 before, at least that they had seen extensive use.

9 I could find that for you.

10 MR. CHIEF JUSTICE WARREN: We will adjourn now.

11 (Whereupon, at 2:30 p.m. the hearing in the above-
12 entitled matter was recessed to reconvene on January 15, 1969.)
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